LAYING FOUNDATIONS FOR
INTRODUCING EVIDENCE

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This QuickGuide is written from the point of view of the plaintiff’s lawyer and outlines the progression of foundations of evidence from the first days of the attorney-client relationship through the actual events of the trial. The author discusses the basis for identifying and organizing the evidence, deciding what to present at trial, evaluating the evidence and anticipating objections, dealing with witnesses, anticipating miscellaneous problems, and dealing with admissibility issues. He discusses exhibits and parol evidence as well as physical evidence and includes forms and samples in the extensive appendix. This QuickGuide is fully indexed by subject matter and authority.
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INTRODUCTION

The introduction of evidence in every case contains certain mechanical as well as stylistic elements. These elements are not easily separated. However, the mechanical elements of evidence presentation must be addressed as a threshold consideration. Stylistic concerns are secondary. Each and every piece of evidence requires a foundation to establish its admissibility. Without such a foundation, the evidence will not be admitted.

This QuickGuide addresses the necessary steps to establish a foundation for the introduction of evidence. Some style considerations are addressed, but style is largely dependent on the individual attorney and the facts, circumstances, and witnesses in each case. Attention is also given as to how to gather evidence and testimony before trial in order to establish the necessary foundational requirements once you are at trial.

There are a number of other reference sources that are considered authoritative with regard to Illinois evidentiary law. These sources include the following (not listed in any particular order — any omissions are not intentional):

ILLINOIS CIVIL TRIAL EVIDENCE (IICLE, 2009).

Michael H. Graham, CLEARY AND GRAHAM’S HANDBOOK OF ILLINOIS EVIDENCE (9th ed. 2009).


CHAPTER I. PREPARE EVIDENCE BEFORE TRIAL

SECTION 1.1. STRUCTURE A TRIAL PREPARATION SYSTEM FOR THE CASE

OUTLINE YOUR CASE:

a. Define the legal and factual issues of the case. You must know what facts you need to prove to establish a prima facie case and what evidence is necessary.

b. List each element of your case.

c. List what evidence is still necessary.

d. List all the evidence you have available.

e. List what evidence you need to obtain.

f. Detail how each piece of evidence will be admitted.

g. List the foundational elements for each piece of evidence.

NOTE: An excellent place to start is the Illinois Pattern Jury Instructions (I.P.I.) published by Thomson/West. Updates of recent instructions not yet contained in the I.P.I. bound volumes are available at the Supreme Court’s website, www.state.il.us/court, under “Documents.”

b. Consult experienced trial lawyers.

c. For sample trial preparation systems, see §8.1 below.

CONSIDER PREPARATION NEEDED:

a. Analyze the factors that will affect the organization and preparation of your case for trial, including

   (1) Nature of the case, e.g., product liability, medical malpractice;

   (2) Complexity of the case;

   (3) Your burden of proof;

   (4) Number of anticipated witnesses;

   (5) Opinion testimony;

   (6) Nature and scope of demonstrative evidence; and

   (7) Time necessary.

b. Consult experienced trial lawyers.

c. For sample trial preparation systems, see §8.1 below.
As soon as you open your file, start putting together your trial preparation system. The goal is to resolve the case with the maximum result in the shortest period of time. If you are not prepared early, it won’t happen. The Illinois discovery rules emphatically reemphasize the truth of this old maxim. The focus of discovery is now full disclosure at the earliest stage possible.

CONSIDER VALUE OF CASE:

a. Balance the need for good trial preparation, begun sufficiently before trial, with the value and likely outcome of the case.

b. If value and likely outcome are negative factors, consider increasing your settlement efforts.

CONSIDER EFFECT OF SMALL CLAIMS CASE:

a. No depositions, interrogatories, or other discovery proceedings or requests to admit permitted without leave of court. S.Ct. Rule 287.

b. No motions without leave of court except for motions under §2-619 (involuntary dismissal) or §2-1001 (substitution of judge) of the Code of Civil Procedure, 735 ILCS 5/1-101, et seq.

c. Dispute may be adjudicated informally with “all relevant evidence” admissible. S.Ct. Rule 286(b).

CONSIDER EFFECT OF SUPREME COURT RULE 222:

S.Ct. Rule 222 applies to all civil actions in tort or contract not in excess of $50,000, all cases subject to mandatory arbitration, and cases for the collection of taxes not in excess of $50,000.

a. Affidavit regarding amount of damages required. S.Ct. Rule 222(b).

b. Mandatory disclosure of defense legal theory, witness identity, documents, and damage computation required “in accordance with the time lines set by local rule” or, if no local rule has been established, within 120 days of responsive pleading to the complaint. S.Ct. Rule 222(c).

c. Limited and simplified discovery provisions limit interrogatories to 30 and depositions to three hours and restrict depositions of physicians and expert witnesses. S.Ct. Rule 222(f).

CONSIDER EFFECT OF MANDATORY ARBITRATION:

S.Ct. Rules 86 – 95 govern actions subject to mandatory arbitration. If your venue has a mandatory arbitration program, determine whether it applies to your case. Structure your preparation system to accommodate the effects of the program, e.g.:

a. All civil actions subject to mandatory arbitration are valued at less than an amount to be determined by local rule. (Originally, the amount set by most circuits participating in the arbitration program was $15,000. Now, most programs are at the $50,000 level.)

b. Local rules for the conduct of arbitration apply.

c. Discovery is generally governed by S.Ct. Rule 222. See above.

d. No foundation is required for certain documents “presumptively admissible.” S.Ct. Rule 90(c).

NOTE: This is the single most significant rule relative to the introduction of evidence in arbitration cases. It effectively allows for the admission of almost any document, “otherwise admissible under the rules of evidence,” without providing any additional foundation. Id.

e. You must provide notice and copies of the following to the opposing party 30 days prior to the hearing:

(1) Healthcare provider medical reports and medical bills;

(2) Property repair bills or estimates (must be itemized and identified);

(3) Lost earnings report from an employer;

(4) Written statements of expert witnesses;

(5) Depositions of witnesses;

(6) Affidavits of witnesses; and

(7) Any other unspecified document otherwise admissible under the rules of evidence.

f. A sample S.Ct. Rule 90(c) disclosure cover sheet is provided in the body of the rule.
**AVOID FAILING TO SECURE EVIDENCE:** Certain evidence must be gathered as soon as possible following an event giving rise to a claim. You should structure your trial preparation system to allow you to calendar and check off time-related evidence. The most obvious example is photographs of an accident scene. Any physical evidence that is subject to change must be photographed immediately. It does not matter who takes the photographs as far as their later admissibility is concerned. See §7.1 below regarding the admission of photographs. It matters only that the photographs fairly, accurately, and completely portray the intended subject (FAC rule).

Other issues to consider include:

a. The X-Ray Retention Act, 210 ILCS 90/0.01, et seq. This Illinois act requires “hospitals” that produce “photographs” of the human body to retain the films for a period of 5 years unless notified by an attorney, in writing, to retain such films. Upon such notification, the period of retention shall be 12 years from creation absent prior notification by the attorney that the case involving the “photograph” has been concluded. 210 ILCS 90/1. See sample request for retention in §8.16 below.

b. Spoliation of Evidence. Spoliation of evidence is negligent or intentional destruction, mutilation, alteration, or concealment of evidence. Spoliation can result in sanctions being levied against the responsible parties, including but not limited to the dismissal of a complaint, the entry of judgment, the barring of testimony, and the awarding of fees. For a thorough discussion of spoliation claims, see Todd P. Stelter, Ch. 25, *Spoliation of Evidence, ILLINOIS CAUSES OF ACTION — ELEMENTS, FORMS & WINNING TIPS: TORT ACTIONS* (IICLE, 2008).

Be certain to retain all physical evidence, actual or potential, that comes into your or your client’s control and to make every effort to take possession of all potential evidence. Also, put all other holders of evidence on written notice of the need to retain and preserve physical evidence.

**SECTION 1.2. IDENTIFY POTENTIAL TRIAL EVIDENCE**

**OBJECTIVES:**

a. Identify evidence you have already gathered.

b. Recognize any need for additional evidence.

**USE:**

a. Prove or disprove a factual issue.

b. Refresh recollection.

c. Impeach a witness.
d. Rehabilitate a witness.

e. Aid with judicial notice.

f. Illustrate a concept with charts, graphs, and blowups (demonstrative evidence).

**SOURCES AND TYPES:**

**Investigation:** Physical evidence created by the underlying occurrence, *e.g.*, aircraft wreckage, defective components, photographs, letters, data entries, X-rays, medical records, etc.

**Discovery:**


b. Parties’ responses to discovery requests, *e.g.*, answers to interrogatories, responses to requests for admissions of fact or genuineness of documents.

c. Deposition or other prior testimony of the parties or witnesses.

**Custom-Prepared Exhibits:**

In considering custom-prepared exhibits, whether prepared by witnesses, experts, or professional services, evaluate

a. The purpose of the exhibit;

b. The manner in which the exhibit will be put into evidence;

c. Whether the exhibit is economically justified;

d. Whether the exhibit is evidence or demonstrative;

e. Whether and how the exhibit might be used against your client by opposing counsel; and

f. How to preserve the exhibit for the appellate record.

**Photographs:**

Photographs can convey information to the trier of fact in a versatile and inexpensive way.

Take photos as soon as possible after the event before circumstances change and continue to photograph changes in the evidence, such as physical scarring, etc. See §7.1 below.

**Videography:**

Videography is especially effective and has only the same foundational requirements as a photograph. See §§7.1, 7.3 below.
Litigation-Generated:

a. Pleadings. See §5.9 below.

b. Admissions of fact or genuineness of documents. See §§5.13, 5.14 below.

c. Formal stipulations of parties. See §§5.10, 8.6 below.

d. Judicial notice (mandatory or discretionary). See §7.16 below.

e. Live testimony at trial of parties or representatives.

f. Live testimony at trial of nonparty witnesses.

g. Live testimony at trial of witnesses.

h. Prior testimony of parties or witnesses. See §5.1 below.

SECTION 1.3. ORGANIZE YOUR EVIDENCE FOR TRIAL

OBJECTIVE: To sort the evidence by issues and witnesses for easy access and analysis.

WHAT TO DO: Use the trial preparation system you have developed (for sample trial preparation systems, see §8.1 below) to

a. Review all the evidence and sort it by issues and witnesses;

b. Classify the evidence according to

   (1) How you plan to use it;

   (2) When you plan to introduce it; and

   (3) Procedural and foundational requirements;

c. Streamline the evidence to the greatest extent possible; and

d. Prepare a “Plan B” or backup plan to introduce your evidence (For example, if a witness you planned to use to establish the foundation for a photograph becomes unavailable, be prepared to have an alternative witness available; or if you had utilized a request to admit documents prior to trial, you can use the admission to establish your foundational requirements. Also, do not overlook a simple stipulation with the other party either prior to or during the course of trial as an alternative. Most courts will conduct a detailed final pretrial prior to most jury trials to organize and to streamline the admission of evidence. This is an excellent time to obtain stipulations for the admission of evidence, allowing your witness to utilize the evidence during testimony without the need to fumble through foundational elements.).
SECTION 1.4. DECIDE HOW AND WHEN YOU WILL PRESENT THE EVIDENCE AT TRIAL

OBJECTIVE: To determine how and when to present each witness, exhibit, and other item of evidence most persuasively during trial.

WHAT TO DO: 

a. Use your trial preparation system and outline your case step by step, including

   (1) Points you plan to establish through each witness (see §1.7 below);
   (2) Exhibits you intend to offer;
   (3) Demonstrative evidence you plan to offer;
   (4) Whether you plan to offer deposition excerpts and, if so,
      (a) Consider when to offer them (indicate in your outline);
      (b) Include volume, page, and line number of the transcript for quick reference; and
      (c) Recognize that your decision to introduce portions of the deposition may stimulate opposing counsel to seek to introduce other excerpts (see S.Ct. Rule 212(c)) and analyze how that will affect your case; and
   (5) Whether you should ask the court to take judicial notice of certain evidence (see §7.16 below).

b. Decide the sequence in which you want to present the evidence and arrange it to fit the order of presentation by analyzing

   (1) The most persuasive sequence;
   (2) The sequence allowing clearest presentation of information;
   (3) The sequence avoiding undue repetition;
   (4) When you will present your strong witnesses; and
   (5) When you should present your weak witnesses.

HOW TO DO IT: Consider how to present such evidence, including

   (1) Blowups of originals (photos, documents, etc.);
   (2) Use of overhead transparencies;
(3) Use of juror handouts;

(4) Jury view of physical items, including
   (a) small passable items; and
   (b) large bulky items

(5) Outside of the courtroom viewings;

(6) Video presentations; and

(7) Audio presentations (use readable transcripts or video subtitling for juror convenience and for purposes of the record).

SECTION 1.5. REVIEW GENERAL RULES ON OBJECTIONS AND CLAIMS OF PRIVILEGE

OBJECTIVE: To be able to readily anticipate and respond to an objection or claim of privilege for all evidence you plan to introduce.


   b. Many experienced trial lawyers and judges maintain a checklist of objections and claims of privilege for handy reference. See §§6.1, 6.2 below.

SECTION 1.6. EVALUATE YOUR EVIDENCE AND ANTICIPATE OBJECTIONS

ANALYZE YOUR EVIDENCE:

a. Determine why it is relevant. See §3.1 below.

b. Determine whether it is subject to other common objections. See §6.1 below.

c. Decide how you are going to authenticate documents or demonstrative evidence. See Chapters V and VII of this QuickGuide.

d. Prepare for any logistical problems (e.g., will you need to bring equipment into the courtroom to display demonstrative evidence?).

e. Consider whether the evidence potentially offends a procedure, evidentiary rule, or public policy (e.g., nonuse of seat belts; evidence of drinking without proof of intoxication).

f. Decide whether, and if so how, you will use visual aids as part of your evidentiary package.
ANALYZE KEY STRATEGY CONCERNS: As you outline your case, make sure that it reflects your review of the rules of prima facie admissibility (see §3.1 below) and decisions about timing and manner of using all evidence you plan to introduce, e.g.:

   a. Whether you should disclose the evidence during opening statement or voir dire;

   b. Which witnesses you should interrogate about the evidence;

   c. Whether there are witnesses you should not question about the evidence, even though they have knowledge of it;

   d. Whether it is possible to gain an advantage by surprise use of the evidence;

   e. In a jury trial, whether the evidence should be disclosed to the court before any reference to it is made before the jury;

   f. Whether it is procedurally necessary to produce the evidence of certain witnesses before asking others about it (e.g., impeachment issues);

   g. What is the best way to reveal the substance of an exhibit to the jury;

   h. Whether you should specifically discuss the evidence during closing argument; and

   i. What you will do if the evidence is excluded (i.e., “Plan B”).

DECIDE HOW TO OVERCOME OBJECTIONS: If you believe you will encounter objections when introducing certain evidence, decide

   a. How to overcome the objection; and

   b. What to do if evidence is excluded. If possible, always have an alternative method to prove a fact other than by potentially excludable evidence.

PREPARE EVIDENCE MEMOS: For exhibits, attach an “evidence memo” (see §8.2 below) to remind yourself at trial of the way in which to respond to expected objections, including, e.g.:

   (1) Explanation of relevancy;

   (2) Written checklist of questions to ask witness in order to authenticate exhibit; and

   (3) Legal citations, summaries, briefs, or copies of legal authorities supporting admission.
b. For oral testimony, adapt your “evidence memo” to set out the way in which you expect to overcome objections. Keep the memo in your witness file.

c. Keep the “evidence memo” brief. You need cite no more than one or two controlling cases.

PREPARE TRIAL MEMOS:

a. For issues of admissibility, prepare in advance simple “trial memoranda” on specific issues that may cause the opposing party to raise an objection. For example, while a police report is generally not admissible in evidence, a drawing prepared by the officer and included within the report may be admissible. This issue often comes up before the court, and having a trial memorandum prepared and ready to be filed on the issue can not only quickly resolve the issue but also demonstrate your competence and preparedness to the court, the opposing party, and, notably, the jury. See sample memorandum in §8.3 below.

b. The “evidence memo” described above is for your own use, while the “trial memorandum” should be prepared for filing with the court, so you will need an original and the appropriate number of copies for the other parties.

SECTION 1.7. PREPARE A WITNESS EXAMINATION PLAN FOR EACH WITNESS

OBJECTIVE: To be able to

a. Present your evidence clearly and logically through each witness that you use; and

b. Anticipate and rebut any potential objection to that testimony.

WHAT TO DO: a. Develop questions, in whole or by keywords, to carry out your goal with the particular witness.

b. List the points you will cover in the order you plan to present them. See §1.4 above.

c. Arrange the points so that the witness can naturally, comfortably, and clearly “tell the story.”

d. Note, next to the pertinent point,

(1) Documents or other demonstrative evidence you plan to introduce through the witness; and

(2) Any visual aids you plan to use to help explain the testimony or documentary or demonstrative evidence.
e. Note, next to the pertinent point,
   (1) Anticipated objections; and
   (2) Legal support for your position.

f. Indicate any specific terminology you plan to use in this case, e.g.:
   (1) How you expect to address the witness (Doctor, Sergeant, Trooper, etc.); and
   (2) Specific expressions or terminology that relate to the case.

g. Develop a cross-examination strategy:
   (1) Consider alternative answers the witness may give on key points on direct examination, and develop a line of questions to follow those answers.
   (2) Annotate the examination outline with sources of impeachment, e.g., a deposition transcript (by page and line number or exhibit), so that you can easily locate the portion you want to use for impeachment.
   (3) For a friendly witness called by the other party as an adverse witness, formulate questions or areas of questioning that will rehabilitate the witness.

h. Prepare anticipated rebuttal and note deposition testimony or other documents that may help rehabilitate a witness or refute evidence introduced by the other side.

NOTE: There is no set form or method for preparing your notes for a witness examination. Some attorneys carefully write out each question in advance, others outline the areas of inquiry, while others do little more than draw a vertical line down a sheet of paper, write the witness’ name on the top, and then cryptically list the main points needed to be established by the witness on the left side of the sheet, using the right side for notes as the witness testifies. The method used by each attorney is usually dependant on experience and the attorney’s knowledge of the content of the expected testimony.

SECTION 1.8. PREPARE WITNESSES TO TESTIFY

OBJECTIVE: To ensure that favorable witnesses are as confident, predictable, knowledgeable, and persuasive as possible.

WHAT TO DO: Make sure that you allow adequate time to prepare the witness.
**NOTE:** This is the most important step in the preparation process. An error by a key witness may destroy your case. No matter how long it takes, make certain your witnesses are thoroughly prepared, especially as far as exhibits are concerned.

**Plan Preparation Session:**

a. Use the session to thoroughly review

1. The nature of the lawsuit (review the pleadings, complaint, admissions, and discovery responses);

2. The parties’ contentions;

3. The status of the evidence; and

4. The substance and meaning of the witness’ expected testimony (direct and cross).

b. If a witness has been deposed or has given a statement, provide that witness with a copy of the transcript and insist he or she read it and highlight all key testimony.

c. Provide the witness with a copy of the deposition transcripts of other witnesses, discovery responses, and documents.

d. Discuss trial exhibits about which the witness has knowledge and may be examined.

e. Admonish the witness not to speculate beyond the limitations of the witness’ knowledge.

**Organize Structure of Practice Session:**

Decide whether it is best for this case to meet with all witnesses separately or jointly. Joint meetings

a. Give witnesses a better overall view of the case; and

b. Allow for more consistent witness testimony; but

c. May result in testimony that sounds rehearsed or “too consistent.”

**NOTE:** Discussing testimony with witnesses in the presence of your client may waive the attorney-client privilege, so you may consider leaving your client out of any such conversations.

**Hold Practice Session:**

a. Consider beginning the session by educating the witness about the lawsuit so that the witness understands where his or her testimony fits into the case.
b. “Walk through” the direct testimony with the witness by stating at least the substance of what you will ask and requesting the witness to provide a response.

   (1) Do not give the witness a script.

   (2) Discourage the witness from memorizing specific answers.

   (3) Discuss the significance of each question and answer so that the witness understands the reason the question will be asked.

c. Review with all authenticating witnesses the exhibit(s) you will introduce through them. Show them the exhibit(s) and go through each question with them.

   **NOTE:**

   Do not overlook the importance of this aspect of trial preparation. Your witness must be familiarized not only with the contents of the exhibit but with the procedure used in the courtroom for introducing and handling the exhibit.

d. Review areas of anticipated cross-examination, especially any vulnerable areas, *e.g.*, a prior inconsistent statement, so that the witness will be ready for the most penetrating questions by opposing counsel.

   (1) Remind the witness to remain calm and to not show undue hostility toward opposing counsel.

   (2) Remind the witness of his or her obligation to tell the truth, and explain that it is acceptable to respond with “I don’t know” or “I don’t remember” if those are the truthful answers.

   (3) Some attorneys caution witnesses to pause slightly before answering to allow the interposition of any objection or claim of privilege.

   (4) Discuss with the witness that he or she should not be defensive when questioned; many questions are best answered with non-grudging agreement.

e. Advise the witness that opposing counsel may ask about the preparation session.

   **NOTE:**

   Illinois Pattern Jury Instructions — Civil No. 3.02 (2006) (I.P.I. — Civil) provides:

   An attorney is allowed, if the witness agrees, to talk to a witness to learn what testimony will be given. Such an interview, by itself, does not affect the credibility of the witness.
(1) Instruct the witness to tell the truth.

(2) Remember that if you review documents with the witness to refresh recollection as to any matter about which the witness testifies, opposing counsel may request to see those documents at trial. See Tenenbaum v. City of Chicago, 60 Ill.2d 363, 325 N.E.2d 607 (1975).

(a) If the writing is subject to lawyer-client privilege, be prepared to argue immediately that privilege precludes disclosure. See Consolidation Coal Co. v. Bucyrus-Erie Co., 89 Ill.2d 103, 432 N.E.2d 250, 59 Ill.Dec. 666 (1982). See also Waste Management, Inc. v. International Surplus Lines Insurance Co., 144 Ill.2d 178, 579 N.E.2d. 322, 161 Ill.Dec. 774 (1991) (privilege ought to be strictly confined within its narrowest possible limits and is limited solely to those communications that claimant either expressly made confidential or that claimant could reasonably believe under circumstances would be understood by attorney as such).

(b) If the writing is subject to the attorney work-product exception, make the same argument. S.Ct. Rule 201(b)(2) provides in part: “Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party’s attorney.” See also Monier v. Chamberlain, 35 Ill.2d 351, 221 N.E.2d 410 (1966).

f. Review with the witness courtroom procedures, decorum, and demeanor, including

(1) The oath;

(2) Whether and when the witness will stand or sit and whether the witness will be asked to leave the box, e.g., be asked to point something out on a diagram;

(3) The role of the court reporter and the benefits of speaking slowly and clearly; and

(4) What to do if there is an objection, i.e., stop talking and wait for the court’s instruction.

SECTION 1.9. SATISFY PRETRIAL PROCEDURAL REQUIREMENTS

WHAT TO DO: Verify that all applicable pretrial procedures have been satisfied for each type and item of evidence.
WITNESSES

LAY WITNESSES:

a. Satisfy any discovery obligation to disclose witnesses’ identities or knowledge. See S.Ct. Rule 213(f) requiring, upon interrogatory, disclosure of all testifying witnesses along with the subject matter of their testimony. Disclosure is mandatory in cases governed by S.Ct. Rule 222 (i.e., cases not in excess of $50,000).

b. Issue and serve appropriate subpoenas to nonparty witnesses. Service of subpoenas is governed by S.Ct. Rule 237(a). See §8.12 below. Also note that effective June 1, 2009, pursuant to 735 ILCS 5/2-1101, an attorney may issue subpoenas on behalf of the court for witnesses.

c. Serve notice pursuant to S.Ct. Rule 237(b) to party witnesses. See §8.8 below. This rule also applies to an “officer, director, or employee” of a party. S.Ct. 237(b).

d. Satisfy any local court rule or order requiring pretrial disclosure of witnesses.

NOTE:

Prior to January 1, 1996, there was no duty to supplement discovery responses absent a request from the opposing party to do so. Presently, S.Ct. Rule 213(i) requires each party to supplement previous responses whenever new information is obtained. See also S.Ct. Rules 214, 222(c).

OPINION WITNESSES:

The disclosure of all “opinion” witnesses, both lay and independent and controlled expert, is governed by S.Ct. Rule 213(f).

S.Ct. Rule 213(f) and its three subparts govern the disclosure of witness and identifies them in one of three categories:

(1) Lay witnesses;

(2) Independent expert witnesses; and

(3) Controlled expert witnesses.

The disclosure of the witnesses and the subject matter of their testimony is not mandatory (as opposed to cases worth not in excess of $50,000 (S.Ct. Rule 222)) but subject to interrogatory request and subjects the disclosure to the duty to “seasonably supplement” (S.Ct. Rule 213(i)).

NOTE:

Federal Rule of Civil Procedure 26(a)(2) provides for mandatory disclosure of all retained expert witnesses, the witnesses’ qualifications, opinions, etc., even absent a request for disclosure from the opposing party.
EXHIBITS AND DOCUMENTS

**DISCOVERY OBLIGATIONS:** Satisfy discovery disclosure and production obligations, pursuant to both discovery requests and mandatory disclosure requirements. S.Ct. Rules 214, 222(c).

**LOCAL RULE REQUIREMENTS:** Satisfy any local court rule or pretrial order on

a. Exchange and/or disclosure of exhibits;

b. Pretrial resolution of issues of admissibility (e.g., stipulations, motions in limine, etc.); and

c. Pretrial marking of exhibits (most courts appreciate but do not require that exhibits be pre-marked).

**NOTE:** Most local rules are available online from the ISBA website, www.isba.org, or contact the individual circuit courts directly or visit their websites.

**REQUIREMENTS TO authenticate evidence:**

a. Use request for admission procedures to eliminate issues of authenticity or admissibility. See S.Ct. Rule 216. See also Chapter III, §8.11 below.

b. Use subpoena duces tecum procedures (735 ILCS 5/2-1101) to secure production at trial of original business records of a nonparty and S.Ct. Rule 237(b) to require production of documents by a party. See §8.13 below.

**DEPOSITION TRANSCRIPT REQUIREMENTS:**

a. Verify that the original evidence transcript is available to be filed with the court by the reporter or custodial attorney when needed. See S.Ct. Rule 207(b).

b. Verify that review, correction, and signing procedures have been completed. See S.Ct. Rule 207(a).

**NOTE:** S.Ct. Rule 212 governs the use of depositions at trial. Only the evidence depositions of physicians and surgeons may be used at trial without regard to the deponent’s availability. As to all other witnesses, there must be a showing that they are unavailable. (NOTE: This rule is widely ignored, and evidence depositions are commonly used at trial without any showing of unavailability. Check your local practice.) It is suggested that the party taking an evidence deposition of a witness who is not a physician or surgeon stipulate on the record that the transcript of the deposition may be used at trial without any showing of the requirements of S.Ct. Rule 212(b).
VIDEO- OR AUDIO-RECORDING REQUIREMENTS:

If you plan to use video- or audio-recorded depositions, satisfy the disclosure requirements of S.Ct. Rule 206(a)(2) prior to the deposition.

INTERROGATORIES AND REQUESTS FOR ADMISSION REQUIREMENTS:

Confirm that original interrogatories and requests for admission, with corresponding answers and responses, are verified and available for use at trial. See Chapter V below.

SECTION 1.10. ANTICIPATE AND RESOLVE LOGISTICAL DIFFICULTIES

a. Be sure that witnesses are going to be available when they are needed.

(1) Always issue subpoenas to witnesses, even your “friendly” witnesses. If a witness does not appear at trial and you request any type of relief from the court, the first question you will be asked by the court is, “Is the witness under subpoena?” If your answer is “no,” you may well be out of luck, and you’ll have to proceed without him or her. If a subpoena has been served, the court can and probably will afford you relief including but not limited to a continuance and/or the sheriff’s assistance in transporting your witness to trial.

Effective June 1, 2009, 735 ILCS 5/2-1101 permits attorneys to personally issue subpoenas.

(2) S.Ct. Rule 237(b) notices should be utilized requiring the presence of parties and officers, directors, or employees of a party.

b. If equipment is necessary for demonstrations, be sure that

(1) It is available and operating; and

(2) You know how to use it.

c. Be sure that the courtroom contains materials you may need, e.g.,

(1) Chalkboards;

(2) Easels;

(3) Chalk, markers;

(4) Electrical outlets;
(5) VCR or DVD player and television;

(6) Overhead projector;

(7) Projection screen;

(8) Computer equipment; and

(9) Extension cords.

**NOTE:** The court is under no obligation to provide to you any of the items on this list. However, most courts will have some if not all of the items available, but a call to the clerk in advance of trial will save unneeded stress.

d. Consider space problems that may be created by displaying exhibits at trial.

e. Consider possible problems getting exhibits to and into the courtroom.

f. Ascertain whether bulky exhibits will create storage problems for the court.

g. Consider where exhibits will be placed while witnesses are being interrogated about them. The witness, judge, and jury must all be able to view the evidence.

h. Consider whether the light or acoustical characteristics of the courtroom may impair any planned demonstrations. In some older courthouses, the windows are large and the room cannot be darkened.

i. Ascertain whether anticipated exhibits or demonstrations will create difficulties with courthouse or courtroom security (e.g., weapons).

j. Consider the need for equipment necessary to preserve for appeal a record of evidence demonstrated during the trial.

**NOTE:** Bring a digital camera to preserve drawings made on a chalkboard or a model too bulky to be included in the record. Print the photo and have it marked as an exhibit itself and have it admitted into evidence.
CHAPTER II. OBTAIN EVIDENCE

SECTION 2.1. INVESTIGATION

Investigation helps an attorney gather all the relevant facts of a case. Until you have all the facts, you will not be able to determine liability issues or decide whether to take a case with great monetary damages versus no or very little liability. Investigation will allow you to consider taking a case with poor liability in the hopes that it can be settled. Your investigation for evidence is critical. In order for evidence to be admissible, it must have first been obtained properly. It is important to keep this in mind during your investigation of evidence. You must do more than briefly talk to your client, obtain a police report or some medical records, and then file a complaint. You must determine whether you want to take on the case, whether your case has economic value, and whether you truly believe in your client. The investigatory stage is not meant to be cursory. It is the time to thoroughly gather information and evidence in order to form an informal opinion as to the prospects of the case.

ECONOMIC VALUE:
Investigation helps the attorney understand the economic value of the case. Some cases simply have such limited economic value that it makes no sense for the attorney or client to pursue the claim, regardless of the potential liability.

DISCOVERY:
Discovery comes after investigation, but the direction of your discovery is guided by what was found in your investigation. Discovery that is not based on solid investigation is commonly not useful and will likely cost you unnecessary expenses.

AVOID SANCTION:
Conducting a solid investigation prior to filing suit will prevent potential sanctions being imposed on you for filing a frivolous suit. Sanctions are covered under S.Ct. Rule 137, which provides in relevant part:

The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

CONDUCTING THE INVESTIGATION:
The attorney may do much of the investigating himself or herself, pass it onto another attorney in the same firm, such as an associate or partner, or hire a trained investigator. Be sure to check with whoever is assisting you in the investigation constantly. This will help control costs and make your overall investigation more efficient.
SECTION 2.2. COLLECTING AND PRESERVING EVIDENCE

Evidence obtainable by statute and rule of court means evidence that is received through interrogatories, discovery depositions, requests to produce, requests to admit facts, and requests to admit genuineness of documents.


SECTION 2.3. SOURCES OF EVIDENCE

CLIENT INTERVIEWS: Always thoroughly interview your own client. Many sources of information and evidence will be available through your own client. Clients often have in their possession evidence that will be needed. Interviewing your client will also lead you to other witnesses who can be interviewed.

WITNESS INTERVIEWS: You want to be the first person to interview a witness, so you must act quickly. One reason you want to interview a witness as soon as possible is that you want the witness to have as fresh a recall as possible. There are several methods of obtaining a statement from a witness:

a. Handwritten statement;

b. Court reporter’s statement; and

c. Audio- or video-recorded statement.

Recorded statements should always begin, e.g.:

“Ms. Poole, you understand I am recording this statement on my recorder, that we are taking it on December 1, 2004, and that it is taken, of course, with your permission. Is that correct?”

NOTE: Statements are discoverable. However, keep in mind that an attorney’s notes memorializing the substance of what was said and the attorney’s impressions of the witness and the facts are all work product that is generally not discoverable. S.Ct. Rule 201(b)(2).
COURT DOCUMENTS: A good source of potential evidence or information that may lead to admissible evidence is contained in the circuit clerk’s files. Following is a list of potential, but certainly not exhaustive, court sources:

a. Records of charges for traffic or criminal offenses;

b. Records of traffic or criminal convictions;

c. Prior or subsequent civil actions involving some or all of the parties and or witnesses, including sworn allegations and/or responses, sworn admissions, and deposition transcripts and/or court reported testimony;

d. The identity of attorneys who may have discovery responses from the same parties in other cases; and

e. Exhibits from other actions.

COUNTY CLERKS: County clerks collect and maintain a wide range of documents that may serve as useful evidence in your cause, including but not limited to

a. Birth, death, and marriage certificates;

b. Deeds to real property;

c. Titles to personal property;

d. Identities of owners of businesses filed pursuant to the Assumed Business Name Act, 805 ILCS 405/0.01, et seq.; and

e. Local building permit filings.

COUNTY ASSESSOR: The county assessor may have detailed ownership or appraisal information as to real property within the county.

ILLINOIS SECRETARY OF STATE: The Secretary of State maintains driving records for all licensed drivers and automobile title information, as well as information as to various business entities such as corporations.

ILLINOIS STATE POLICE: The state police maintain copies of all of their accident reports, including reconstruction reports. They also maintain copies of aerial photographs of the entire state of Illinois depicting the configuration of all roadway systems.

OTHER GOVERNMENT SOURCES: For certified weather reports, see www.nws.noaa.gov.

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ILLINOIS INSTITUTE FOR CONTINUING LEGAL EDUCATION
CHAPTER III. DEAL WITH ADMISSIBILITY ISSUES BEFORE TRIAL

SECTION 3.1. REVIEW GENERAL RULES GOVERNING ADMISSIBILITY

RELEVANCY

GENERAL RULE: Only relevant evidence is admissible and, unless otherwise excluded, all relevant evidence is admissible.

DEFINED: “Relevant evidence” is evidence having any tendency or reason to prove or disprove any disputed fact that is of consequence to the determination of the action, including:

a. Evidence bearing on the credibility of a witness or hearsay declarant; and

b. Evidence created solely for the trial or to aid jurors in understanding a witness’ testimony.

BURDEN OF PROOF: The proponent of the evidence bears the burden of proof.

STANDARD: The test of relevancy of the evidence is whether it fairly tends to make a proposition at issue either more or less probable. People v. Galloway, 28 Ill.2d 355, 192 N.E.2d 370 (1963).

NOTE: Because of the infinite number of issues and sub-issues in any trial, the relevancy of an item of evidence may not be immediately obvious to the court even when it is pointed out by proffering counsel. Counsel must be prepared to explain in clear terms both the issue to which the item relates and the relevancy of the item to that issue.

MATERIALITY

GENERAL RULE: Testimony or evidence must have some logical bearing on an issue of the case, i.e., it must be material evidence.

NOTE: Although distinguishable, the terms “relevancy” and “materiality” are often used interchangeably. The Federal Rules of Evidence have abandoned the term “materiality” and incorporated it within the definition of “relevancy.” Fed.R.Evid. 401. Illinois, however, still clings to the distinction, although more in a technical than in a practical sense. Materiality generally relates to the facts in issue, while relevancy goes to the probative weight of the proffered evidence. Materiality looks to the relationship between the propositions for which the evidence is offered and the issues in the case. People v. Mason, 60 Ill.App.3d 463, 376 N.E.2d 1059, 17 Ill.Dec. 730 (4th Dist. 1978). The standard to determine the relevancy of evidence is that it will be admissible if it renders a matter in issue more or less probable. People v. Bouska, 118 Ill.App.3d 595, 455 N.E.2d 257, 74 Ill.Dec. 227 (1st Dist. 1983).
**EXEMPLARY SPARRPH**: Testimony as to an admitted fact would be immaterial as no longer an issue in the case. Background information as to a witness would be relevant evidence.

**COMPETENCY OF WITNESS**

**GENERAL RULE**: A witness is presumed to be competent unless proven otherwise. To qualify as a witness, a person must be able to

a. Express himself or herself on the matter in an understandable way, either directly or through an interpreter; and

b. Understand a witness’ duty to tell the truth.

The test of competence to testify as a witness is the capacity to observe, recollect, and communicate. *People v. Cox*, 87 Ill.App.2d 243, 230 N.E.2d 900 (4th Dist. 1967).

**CHILD WITNESS**: Competency of a child is within the discretion of the court. Every person above the age of 14 is presumed competent. Below 14, the court must make a preliminary determination that the child is mature enough to

a. Receive correct sense impressions;

b. Recollect the impressions;

c. Understand and answer questions; and


**Criminal Cases**: According to Hon. Hollis L. Webster in the DuPage County Bar Association Brief Online, available at www.dcba.org/brief/judpractice/0798.htm, “The historic presumptions that a child under age six is not competent to testify, and that a child of fourteen years is a competent witness, have been abandoned by the Illinois courts. *People v. Rocha*, 191 Ill.App.3d 529 (2nd Dist. 1989).” Judge Webster goes on to state that all persons are presumed competent regardless of age. For criminal cases, 725 ILCS 5/115-14 provides

(a) Every person, irrespective of age, is qualified to be a witness and no person is disqualified to testify to any matter, except as provided in subsection (b).

(b) A person is disqualified to be a witness if he or she is:

(1) Incapable of expressing himself or herself concerning the matter so as to be understood . . . or

(2) Incapable of understanding the duty of a witness to tell the truth.
(c) A party may move the court prior to a witness’ testimony being received in evidence, requesting that the court make a determination if a witness is competent to testify. The hearing shall be conducted outside the presence of the jury and the burden of proof shall be on the moving party.

Civil Cases: Judge Hollis goes on to state that “[c]ivil law follows the same general competency rules and foundation requirements as criminal law. Swanigan v. Chicago Board of Education, 173 Ill.App.3d 784 (1st Dist. 1988). Although the burden to prove incompetency is on the opponent of the witness, the proponent generally lays the foundation with a child witness to pre-empt the challenge and add weight to the testimony. The elements of foundation proof are that the witness has sufficient capacity to: 1) Gather correct impressions by his or her senses. 2) Remember events he or she has experienced. 3) Understand questions and narrate answers intelligently. 4) Appreciate the moral duty to tell the truth. People v. Edwards, 224 Ill.App.3d 1017 (Dist. 1992).”

ISSUE OF FACT: An objection to competency raises an issue of fact that the judge decides by voir dire examination outside the presence of the jury. Jefferson Park District v. Sowinski, 336 Ill. 390, 168 N.E. 370 (1929).

BURDEN OF PROOF: The objecting party has the burden of proving a prospective witness’ lack of capacity. Boyd v. McConnell, 209 Ill. 396, 70 N.E. 649 (1904).

AUTHENTICITY

GENERAL RULE: Documentary evidence must be authenticated before it can be admitted into evidence. It must be material to the issues and must be relevant in that it has some probative weight in proving or disproving some issue.

HOW TO AUTHENTICATE:

a. By testimonial evidence; or

b. By other means, including

   (1) Presumptions;

   (2) Judicial notice;

   (3) Stipulations; and

   (4) Responses to requests for admissions or interrogatories.

BURDEN OF PROOF: Proponent has burden of proof.
SCIENTIFICALLY ACCEPTED TECHNIQUE

GENERAL RULE: Admission of evidence obtained through scientific technique depends on whether it is reliable enough to have gained general acceptance in the scientific community or field in which it belongs. *Frye v. United States*, 293 F. 1013 (D.C.Cir. 1923).

WHAT IT REQUIRES: Proponent must show that
   a. The technique is reliable enough to have gained general acceptance in the scientific community or field; and
   b. The correct scientific procedures were used in this case. See §5.4 below; *Frye, supra*, 293 F. at 1014.

WHAT TO SHOW:
   a. To satisfy these foundational requirements, the proponent frequently will need the testimony of a properly qualified expert.
   b. To admit specific test results, the proponent frequently will have to show substantial similarity of underlying conditions.

BEST-EVIDENCE RULE, AKA ORIGINAL-WRITING RULE

GENERAL RULE: In order to prove the contents of a writing, the original writing must be introduced or its absence must be explained. *Lam v. Northern Illinois Gas Co.*, 114 Ill.App.3d 325, 449 N.E.2d 1007, 70 Ill.Dec. 660 (1st Dist. 1983).

DEFINED: In its truest sense, this rule requires that, if a document is introduced when the contents of that document are sought to be proven, the original is required unless its unavailability can be explained and a duplicate can be authenticated. *It does not require that only originals are admissible.*

NOTE: See Fed.R.Evid. 1003 and 1001(4) for the modern view that a duplicate is admissible to the same extent as an original unless (a) a genuine question is raised as to authenticity or (b) under the circumstances it would be unfair to admit the duplicate.

OPINION EVIDENCE

GENERAL RULE: Witnesses may testify only as to statements of fact rather than inferences or conclusions. *People v. Rosenbaum*, 299 Ill. 93, 132 N.E. 433 (1921).

EXCEPTIONS:
   a. Expert witnesses.
   b. A lay witness may express an opinion if it is (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the testimony or determination of a fact in issue. *Freeding-Skokie Roll-Off Service, Inc. v.*
EXAMPLES: Lay opinions have been admitted as to

a. A person’s attitude;
b. Speed of a vehicle;
c. Automobile stopping distance;
d. Intoxication;
e. Age;
f. Health;
g. Sanity;
h. Competency;
i. Weight;
j. Reputation;
l. Ultimate issue in a case (*Freeding-Skokie Roll-Off Service, supra*).

SECTION 3.2. RESOLVE ADMISSIBILITY QUESTIONS

ASCERTAIN LOCAL PRETRIAL REQUIREMENTS: a. Before trial begins, the court may require you to

(1) File and argue motions in limine to make objections to potential evidence; and

(2) Meet and confer to resolve evidentiary issues.

b. Check local circuit or federal court rules.

MOTIONS IN LIMINE: Motions in limine are motions to exclude evidence before the evidence is introduced. They may be oral or written and may be raised at any point in the proceeding, including during the middle of your direct examination of the authenticating witness. Most courts prefer they be written and raised before trial. For a sample motion, see §8.7 below.
a. Expect that opposing counsel will make a motion in limine to prevent you from referring during voir dire or opening statement to evidence that opposing counsel claims is improper or inadmissible.

b. Be prepared to produce the exhibit and explain its relevance and how you plan to have it introduced. Have your authority with the exhibit. See §1.6 above, §§8.2, 8.3 below.

ELEMENTS OF MOTION:

Typical elements:

a. Opposing counsel’s intention to move in limine to exclude specified evidence;

b. Opposing counsel’s reason for believing that you have the evidence and will offer it at trial;

c. The specific ground for excluding the evidence, e.g., that it violates lawyer-client privilege or will unduly prejudice the trier of fact, etc.;

d. Why it is not sufficient to object at trial, e.g., the jury should not hear the question; and

e. Legal argument supporting the motion.

IF COURT GRANTS ORDER:

a. Expect the order to prohibit you from mentioning or referring to the excluded evidence at any time during trial, including

(1) Voir dire;

(2) Opening statement;

(3) Examination of witnesses; and

(4) Closing argument.

b. Expect that the order will require you to instruct witnesses not to refer to this evidence during testimony.


d. If a motion in limine is granted against your client’s interest, make an offer of proof to preserve the record. For an example, see §7.15 below.
e. For every motion in limine, granted or denied, the practice is to have an explicit written order spelling out specifically the court’s ruling. Ask the court to require all counsel to initial the order. This should be done no more than one day following the ruling. The purpose of the written order is to make it clear to all parties what will be allowed and/or disallowed and to preserve your record on appeal.

**IF COURT DEFERS RULING ON MOTION:**

If the court takes a motion in limine under submission or indicates an inability to decide the issue until hearing further evidence, expect opposing counsel to request an interim order prohibiting you from referring to the challenged evidence until the court has ruled on its admissibility.

**STRATEGY:**

Should you have an issue that you believe will raise an objection at trial, you might consider raising it yourself in a pretrial memo and thus obtain a pretrial ruling from the court as to the admissibility of the evidence. If the ruling goes against you, you will then have an opportunity to make whatever adjustments are necessary to assure the evidence will be admitted.
CHAPTER IV. INTRODUCE EXHIBITS AT TRIAL

SECTION 4.1. MARK THE EXHIBIT FOR IDENTIFICATION

MARK EXHIBIT:  

a. Before trial: If you already marked the exhibit to comply with local rule or practice, remember to present the exhibit to the court reporter for logging into the record.

b. At trial: The court reporter typically marks the exhibit and logs the exhibit into the court’s record. The exhibit is then within the court’s custody and control.

DESCRIBE ON RECORD:  

When the exhibit is first handled during the trial, provide a brief description of it on the record.

a. Do this when you ask that the exhibit be marked for identification.

b. If you are describing a document, tailor the description so that it does not disclose the document’s substance. You will make that disclosure after the court receives the document into evidence.

EXAMPLE:  

“Your Honor, I ask this document be marked as Plaintiff’s Exhibit 1 for identification. It is a letter dated July 26, 2010, and is addressed to Mr. Thomas Smith.”

NOTE:  

Some judges will not permit you to describe the exhibit in any fashion until it is marked and handed to the witness. This is within the court’s discretion.

KEEP EXHIBIT RECORD:  

a. When the exhibit is being logged, record that fact in an exhibit log that you maintain during the trial. For a sample log, see §8.5 below.

b. Update the log to reflect the exhibit’s status after offering it into evidence.

MARK COPY OF DOCUMENTS:  

If the exhibit is a document, mark a copy for your own use (see Sample System #1, Exhibit List, in §8.1 below) with the court’s identifying number or letter for later easy reference.

NOTE:  

Once an exhibit is marked and logged in the court’s record, the clerk retains custody until the exhibit is formally released by the court, even after trial.

For purposes of the record, the clerk will retain even those exhibits not admitted into evidence. Generally, the clerk collects all exhibits at the close of trial each day.
SECTION 4.2. SHOW THE EXHIBIT TO OPPOSING COUNSEL

a. Unless you have shown the exhibit to opposing counsel as part of a pretrial marking/disclosure requirement, disclose it when you ask that the exhibit be marked. Simply hand opposing counsel a copy of the exhibit. Typically, a courtesy copy of the exhibit is provided unless there has been a previous exchange of exhibits.

b. Ask that the record reflect that you are showing the exhibit to opposing counsel.

c. If opposing counsel has an objection to the exhibit, it should be made at this stage, at a sidebar or in chambers, before the exhibit is described in detail by the witness.

SECTION 4.3. PROVIDE A COURTESY COPY TO THE JUDGE

Provide a copy of the exhibit to the court so the court can follow along with the foundational questions (unless copies of all exhibits have previously been provided during the final pretrial).

SECTION 4.4. LAY THE FOUNDATION

WHAT TO DO: Develop a factual basis for admission in order to

a. Show relevancy;

b. Establish authenticity; and

c. Overcome potential evidentiary objections.

HOW TO DO IT: Use methods developed during pretrial preparation to show required factual basis, e.g.:

a. Ask a witness questions to lay the foundation.

b. If appropriate, ask the court to take judicial notice (see §7.16 below), and be prepared with supporting authority if opposing counsel objects.

c. If you and opposing counsel have stipulated to the admission of the exhibit, read the stipulation of opposing counsel to the factual basis or to admissibility. (Stipulations may be oral and recited into the record or written and entered into evidence. For a sample, see §8.6 below.)
d. Inform the court and opposing counsel of presumptions providing the factual basis (e.g., those items that are presumptively admissible, such as certified records; see §7.13 below).

e. Read responses to interrogatories, requests for admission, or pleadings if they provide the factual basis.

WITNESS AUTHENTICATION:

a. If you are using a witness to authenticate the exhibit, be prepared to

(1) Ask questions that establish the witness’ knowledge of the exhibit; and

(2) Ask the witness to explain what the exhibit is.

b. Remember that some courts require counsel to ask permission to approach a witness. This is seldom required in state court but is a strict requirement in some federal courts. Nevertheless, it is good practice to request permission of the court.

SAMPLE COUNSEL. Your Honor, I would ask that this document be marked as Plaintiff’s Exhibit 1 for purposes of identification. It is a letter addressed to Mr. Poole and dated April 27, 2010. It has previously been disclosed to opposing counsel.

[The document is then marked as Exhibit 1. It is shown to opposing counsel, and copies are provided to the court and counsel.]

Q. May I approach the witness with the exhibit, Your Honor?

COURT. You may. [Counsel then approaches the witness.]

Q. Mr. Poole, I am handing you a document that now has been marked for purposes of identification as Plaintiff’s Exhibit 1. Would you please examine this document and tell us whether you recognize it?

A. Yes, I do.

Q. What is it?

A. It’s a letter I received from Mr. Wilson on April 28, 2010, shortly after I was at his office.

SAMPLE FOUNDATION: For sample typical foundations and objections for specific types of evidence, see Chapter VII of this QuickGuide.
SECTION 4.5. PROVIDE THE EXHIBIT TO THE JUDGE

**IF EXHIBIT WAS COPIED:**
Hand the clerk the original exhibit to be marked.

**IF PROBLEM EXISTS WITH EXHIBIT:**
Ascertain from local rules or from the judge whether early disclosure is required outside the jury’s presence if the exhibit is
a. Sensitive (*e.g.*, a picture of the injuries);

b. Bulky; or

c. Otherwise likely to bring an objection.

**NOTE:**
If there is a high probability your exhibit will not be admitted, it is normally preferable to have that determination made before you are in front of a jury.

SECTION 4.6. OFFER THE EXHIBIT INTO EVIDENCE

**WHEN TO OFFER:**
*Immediately* after laying the foundation, introduce the exhibit into evidence.

**HOW TO OFFER:**
a. Use a

(1) Motion;

(2) Request; or

(3) Offer.

b. If there is any uncertainty about which exhibit you are offering into evidence, *e.g.*, two documents were handled at the same time or you obtained foundational testimony from more than one witness, briefly describe the exhibit again.

**SAMPLE RECORD:**
a. “Your Honor, I request that Plaintiff’s Exhibit 1 be received in evidence.”

b. “Your Honor, we move that Plaintiff’s Exhibit 1, a letter to Mr. Poole dated April 27, 2010, be admitted into evidence.”

**NOTE:**
Until the court grants your motion, request, or offer to receive the exhibit in evidence, you cannot disclose the exhibit’s content to the jury or argue the content or meaning of the exhibit.
SECTION 4.7. OBTAIN A RULING ON ADMISSIBILITY

OBJECTIVE: To obtain a favorable ruling so that the exhibit may be used as evidence or to make a clear record of any refusal to admit so that you can preserve your client’s rights on appeal.

COURT’S POSSIBLE RULING:

a. Admit the exhibit for all purposes and against all parties;

b. Admit the exhibit, but only for limited purposes or against certain parties;

c. Admit the exhibit, but with portions excluded or excised;

d. Conditionally admit the exhibit subject to additional foundational testimony;

e. Conditionally admit the exhibit subject to cross-examination;

f. Exclude the exhibit;

g. Request further foundation; or

h. Take the matter under advisement.

NOTE: When counsel has promised to connect evidence to make it admissible and thereafter fails to do so, the opposing counsel must move to strike the unconnected and, therefore, inadmissible evidence or the point is waived. Greig v. Griffel, 49 Ill.App.3d 829, 364 N.E.2d 660, 7 Ill.Dec. 499 (2d Dist. 1977); Balestri v. Highway & City Transportation, Inc., 57 Ill.App.3d 669, 373 N.E.2d 689, 693, 15 Ill.Dec. 343 (1st Dist. 1978).

NOTE: In any case in which evidence has been admitted for a limited purpose or only as to specific parties, an instruction is to be given that such evidence should not be considered by the jury for any other purpose. I.P.I. — Civil No. 2.02. See Dallas v. Granite City Steel Co., 64 Ill.App.2d 409, 211 N.E.2d 907, 914 (5th Dist. 1965).

WHAT TO DO:

Preserve the Record: Put any court ruling on the record. Avoid unreported sidebar conferences and discussions in chambers when either side is asking for a ruling.

Make a record of what happened at a sidebar conference by having it reported or by specifically referring to it in the courtroom on the record immediately after the conference.

Do not hesitate to ask that conferences be reported.
Request an in-chambers conference with the reporter present (or ask that the jury be excused) if

a. You believe it will be inappropriate to refer to the ruling in the jury’s presence; or

b. You anticipate that the discussion will be significant or too long to summarize later.

If the judge does not allow the reporter to be present at the chambers conference, put on the record what occurred in chambers as well as the court’s refusal to have a reporter present when you return to the courtroom. Absent a record of the court’s refusal, you will have no basis for appeal.

Follow Up:

a. Monitor the status of the record by referring to your exhibit log and fulfill your obligations to

   (1) Offer further evidence;

   (2) Make needed motions; or

   (3) Provide a legal brief on the issue.

b. If you do not make a follow-up offer or obtain a definite ruling by the court stating for the record why the exhibit was not admitted, you risk waiving any error on appeal.

Maintain Exhibit Log:

Maintain a log of the status of every proffered trial exhibit. For a sample log, see §8.5 below.

a. Keep this log for both your own exhibits and opposing counsel’s exhibits.

b. Include the following information about the exhibit:

   (1) Its number or letter;

   (2) A description;

   (3) The date offered into evidence; and

   (4) Its status in the record, including the date of the ruling on admissibility.

c. Periodically compare your log during the trial with the clerk’s formal record to verify the accuracy of both. Never assume the clerk’s record is correct. Make a habit of confirming its accuracy at the start of each trial date and prior to the close of evidence.
d. Use the log to remind you to

(1) Provide additional authenticating testimony;

(2) Make subsequent motions to strike opposing counsel’s evidence; and

(3) Obtain definitive rulings on admissibility.

Verify Status: Before you close your case-in-chief, verify the status of your exhibits with the judge. Ask him or her on the record what exhibits have been admitted. If you close without offering your exhibits for admission, it is within the discretion of the trial court to allow you to reopen your case. People v. Franceschini, 20 Ill.2d 126, 169 N.E.2d 244 (1960); People v. Johnson, 151 Ill.App.3d 1049, 504 N.E.2d 178, 181, 105 Ill.Dec. 309 (3d Dist. 1987).

SECTION 4.8. PUBLISH TO THE JURY

OBJECTIVE: To make jurors aware of the exhibit’s meaning and importance.

HOW TO DISCLOSE: Your specific method of disclosure will vary, depending on

a. Type of exhibit;

b. Importance of exhibit;

c. Authenticating witness’ qualities;

d. Court’s practices; and

e. Time and expense considerations.

OPTIONS: a. Have the witness read the exhibit to the jury. Fultz v. Peart, 144 Ill.App.3d 364, 494 N.E.2d 212, 98 Ill.Dec. 285 (5th Dist. 1986) (trial court properly allowed counsel to refer to those parts of records in closing arguments and did not abuse its discretion in refusing to allow Exhibits 1, 2, and 3 to go to jury room).

b. Read the exhibit to the jury yourself.

c. Read the exhibit in its entirety.

d. Read the exhibit only in part and in response to questions.

e. Display the exhibit on an overhead projector or by computer display.

f. Display the exhibit by enlargement. See People v. Lawson, 163 Ill.2d 187, 644 N.E.2d 1172, 206 Ill.Dec. 119 (1994) (jury was presented with photographic enlargements of shoeprint impressions that were used as exhibits).
g. Distribute copies of the exhibit to individual jurors for review.

h. Circulate the original exhibit among the jurors for review.

ADVANTAGES
AND
DISADVANTAGES
OF OPTIONS:

Read Exhibit in Part:

a. Advantage: Highlights a portion of the exhibit.

b. Disadvantages:

(1) If you only partially disclose the exhibit, you risk that the jury will suspect unfair editing or concealment.

(2) If you do not read an entire document, opposing counsel may have the undisclosed material portions read and admitted into evidence pursuant to the common-law “rule of completeness.” Lawson v. G.D. Searle & Co., 64 Ill.2d 543, 356 N.E.2d 779, 1 Ill.Dec. 497 (1976). See also People v. Patterson, 154 Ill.2d 414, 610 N.E.2d 16, 33 – 34, 182 Ill.Dec. 592 (1992), in which the court compares and contrasts the rule of completeness to the “curative admissibility doctrine.”

Display Exhibit:

a. Advantage: Most persuasive option.

b. Disadvantages:

(1) Overhead projectors are cumbersome.

(2) Computer displays require preparation and/or assistance.

(3) Enlargements are expensive and cumbersome.

Distribute Copies of Exhibit to Jurors:

a. Advantage: Allows the jurors to study the exhibit.

b. Disadvantages:

(1) You must obtain prior court permission.

(2) Jurors may be distracted from the witness’ testimony while they examine the exhibit.
Circulate Original Exhibit Among Jurors:

- Advantage: Allows close juror inspection of the item and reinforces the testimony.
- Disadvantages:
  1. You must obtain prior court permission.
  2. Least preferred because it is time-consuming and the court may prevent the jurors from examining the exhibit while the witness is testifying.
  3. If the exhibit is large or cumbersome, circulating it is a physically difficult procedure.

WHEN WITNESS MAKES MARKS ON EXHIBIT:

If you plan to have a witness mark on an enlargement, treat that document as a separate exhibit.

SECTION 4.9. ELICIT THE TESTIMONY OF THE WITNESS

Whether you question the witness concerning the exhibit is a matter of personal preference. The standard practice was to do so before publishing the exhibit to the jury. However, in most cases the witness’ testimony will have more impact if the jury has seen the exhibit or is holding a copy of the exhibit during testimony.

NOTE: If the court has denied the admission of your exhibit and you were not then permitted to elicit testimony concerning the exhibit, you must make an offer of proof outside the presence of the jury to preserve your record. You have an absolute right to make an offer of proof on the record. In re Estate of Undziakiewicz, 54 Ill.App.2d 382, 203 N.E.2d 434 (1st Dist. 1964). For a sample offer of proof, see §7.15 below.
CHAPTER V. INTRODUCE OTHER EVIDENCE NOT OFFERED AS EXHIBITS

SECTION 5.1. PRIOR DEPOSITION TESTIMONY USED TO IMPEACH

GENERAL RULE:
The use of discovery depositions at trial is governed by S.Ct. Rule 212.

USES:


b. As an admission by a party or by an officer or agent of a party. S.Ct. Rule 212(a)(2).

c. If otherwise admissible, as a hearsay exception. S.Ct. Rule 212(a)(3).

d. Any other purpose for which an affidavit may be used. S.Ct. Rule 212(a)(4).

e. As evidence at trial or hearing against a party who appeared at the deposition or was given proper notice thereof, if the court finds that the deponent is neither a controlled expert witness nor a party, the deponent’s evidence deposition has not been taken, and the deponent is unable to attend or testify because of death or infirmity, and if the court, based on its sound discretion, further finds such evidence at trial or hearing will do substantial justice between or among the parties. S.Ct. Rule 212(a)(5).

AUTHORITY FOR IMPEACHMENT:
Though the purpose of impeachment is to destroy the credibility of the witness, it is not substantive evidence. Hence the foundational requirements differ from those of specific substantive evidence.

Before proof of a prior inconsistent statement for the purpose of impeachment is admitted, a proper foundation must be made. The witness must be directed to the time, place, and circumstance of the making of the statement and also to its substance. People v. Bradford, 106 Ill.2d 492, 478 N.E.2d 1341, 88 Ill.Dec. 615 (1985).

WHAT TO DO:

Elicit Testimony: Obtain a definite statement from the witness that is contradictory to his or her prior testimony. People v. Washington, 104 Ill.App.3d 386, 432 N.E.2d 1020, 60 Ill.Dec. 121 (1st Dist. 1982).

Ask Foundational Questions: Have the transcript available and ask the witness about the date, place, and time of the deposition.
NOTE: Developing these foundational questions is extremely useful in underlining the importance of the testimony to be read.

Most jurors have not had a deposition taken and do not realize the circumstances under which the testimony was given, i.e., that the witness was under oath and that the deponent was probably represented at the deposition by counsel.

Show Transcript to Opposing Counsel:

Read Transcript:

a. Pause long enough for the court and opposing counsel to review designated portions for possible objections.

b. If opposing counsel has any objection to any specific portion, expect it to be made and resolved before that portion of the transcript is read.

c. Read the designated portion carefully into the record, prefacing each question with the word “Question” and each answer with the word “Answer.”

d. After finishing, you do not need to ask the witness to explain discrepancies or to comment on the testimony or whether his or her recollection has been refreshed. You have just shown that the witness has made contradictory statements. Do not let the witness explain it away during your examination. Seek instead to reinforce the contradiction by asking controlled questions such as “Which of your two answers was wrong?” or “Both of those responses are not correct, are they?”

Example:

The witness testifies in a personal injury case that the color of his light before he entered the intersection was green. At his deposition he testified it was yellow.

Q. Mr. Smith, you saw the color of your light before you entered the intersection?

A. Yes, I did.

Q. And you testified here the color of your light was green before you entered the intersection.

A. Yes, that’s true.

Q. There’s no doubt in your mind that is correct.

A. Yes.
Q. Mr. Smith, you gave a deposition in this case last year, didn’t you?
A. Yes.

Q. And you remember you were in my offices on April 27, 2009, don’t you?
A. Yes, that sounds right.

Q. And at that time, Ms. Sherr, your lawyer, a court reporter, you, and I were all present. Isn’t that right?
A. Yes.

Q. Both Ms. Sherr and I asked you questions about the accident, didn’t we?
A. Yes.

Q. Before you answered those questions you were sworn by the court reporter to tell the truth, weren’t you?
A. Yes.

Q. You did tell the truth, didn’t you?
A. Yes.

Q. After you finished testifying you had a chance to read your testimony to make sure it was accurate, didn’t you?
A. Yes.

Q. After reading it to make sure it was correct, you signed it, didn’t you?
A. Yes. [Optional: Show him the signature page.]

Q. You gave that deposition just six months after the accident, right?
A. Yes.

Q. So what you saw that day was still pretty fresh in your mind, wasn’t it?
A. Yes.

Q. Mr. Smith, during that deposition, page 10, line 6, you were asked the following questions and you gave the following answers, didn’t you? [reading transcript]:
Question: What color was your traffic light as you first entered the intersection?

Answer: It was yellow.

Question: Are you certain?

Answer: Yes.

Question: How can you be sure?

Answer: Because I remember thinking I knew this was a long yellow so I could get through the intersection before it turned red.

A. If that’s what it says.

Q. You did give those answers to those questions, didn’t you?

A. I guess so.

Q. Your answer is yes?

A. Yes.

Admission Into Evidence:

a. It is unnecessary to offer the deposition transcript into evidence if the witness admits making the prior statement. Kyowski v. Burns, 70 Ill.App.3d 1009, 388 N.E.2d 770, 26 Ill.Dec. 769 (1st Dist. 1979).

b. If the witness denies the statement, you must offer the transcript into evidence. People v. Hood, 229 Ill.App.3d 202, 593 N.E.2d 805, 170 Ill.Dec. 916 (1st Dist. 1992). In doing so, lay the foundation:

(1) Ask the witness if he or she read and signed the transcript.

(2) If the witness waived signature, bring in the court reporter to testify as to the authenticity and accuracy of the transcript.

(3) If stenographic stipulations were entered into between the parties at the time of taking the deposition, move it into evidence by those stipulations. For a sample stipulation, see §8.15 below.

NOTE: Testimony used to impeach is not evidence. People v. McKee, 39 Ill.2d 265, 235 N.E.2d 625 (1968). In the present example, the testimony is that the witness said the light was green. All you have proved is that he has given contradictory testimony, and therefore his credibility is bad. You do not now have testimony that the light was yellow unless he denies making the statement and the transcript is offered into evidence.
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NOTE: Proper impeachment with a prior inconsistent statement requires that the two statements be contradictory. People v. Ellis, 41 Ill.App.3d 377, 354 N.E.2d 369 (1st Dist. 1976).

During Closing Argument: It is effective during closing argument to highlight impeaching testimony, but be aware that it is within the discretion of the court to allow counsel to read or display previously read deposition testimony during closing argument. People v. Morgan, 28 Ill.2d 55, 190 N.E.2d 755 (1963); People v. Davies, 50 Ill.App.3d 506, 365 N.E.2d 628, 634, 8 Ill.Dec. 390 (1st Dist. 1977).

During Jury Deliberations: Be aware that jurors generally will not be allowed to take deposition transcripts into deliberations.

SECTION 5.2. EVIDENCE DEPOSITIONS (NON-VIDEO)

GENERAL RULE: The introduction into evidence of an evidence deposition and a discovery deposition follow similar procedures, but an evidence deposition can be used at trial as evidence. Unless noticed as an evidence deposition, a deposition is for discovery purposes only. See S.Ct. Rule 202. However, note the exception in S.Ct. Rule 212(a)(5).

S.Ct. Rule 212(b) governs the use of evidence depositions at trial. Evidence depositions may be used for any purpose for which a discovery deposition may be used and, if at the time of trial certain conditions are met, may be used by any party for any purpose. S.Ct. Rule 212(b) requires that, before an evidence deposition may be used at trial, the court must give consideration to both the “interest of justice” and the importance of presenting the testimony of witnesses orally in open court. Vicencio v. Lincoln-Way Builders, Inc., 204 Ill.2d 295, 789 N.E.2d 290, 273 Ill.Dec. 390 (2003).

Evidence depositions by physicians do not need to meet the conditions imposed on depositions by others to be admissible. The evidence deposition of a physician or surgeon may be introduced in evidence at trial on the motion of either party, regardless of the availability of the deponent, without prejudice to the right of either party to subpoena or otherwise call the physician or surgeon for attendance at trial. S.Ct. Rule 212(b). In effect, depositions of physicians or surgeons are different. (Note that the rule speaks of a “physician or surgeon” and not a “medical care provider.”) The rules permit physicians to give evidence depositions for their own convenience and the convenience of parties, notwithstanding the strong preference for live testimony. Vicencio, supra.

FILING WITH COURT: S.Ct. Rule 207 provides for the certification and filing of evidence depositions. Generally, the court reporter will seal and provide the party who noticed the deposition with the original transcript. That party may then file the original with the court or retain it until needed.
PROCEDURE: At trial a reader takes the stand in place of the deponent and is sworn as a witness. Counsel read their respective questions, and the reader reads the responses. The transcript is retained by the court as part of the court file and is generally marked as an exhibit as that testimony is often not taken by the court reporter.

OBJECTIONS: Objections are reviewed by the court and counsel outside the presence of the jury before the reading of the deposition. Questions and answers to which objections have been sustained are stricken and not read.

NOTE: Have sufficient copies for yourself and the reader. You must provide your own reader. Court personnel generally are not permitted to act as readers. Make certain your reader is familiar with the terminology used in the deposition and has read through the transcript prior to trial. Clearly mark those questions that have been stricken to avoid their being inadvertently read to the jury. Anyone, including professional actors, can be used to read the transcript.

SECTION 5.3. VIDEO DEPOSITIONS

GENERAL

Video depositions are evidence depositions shown to the jury by video.

RULE: Follow similar procedures as evidence depositions. See S.Ct. Rule 206(g).

CONDUCT: A transcript of the video deposition must be entered into evidence and becomes a part of the court file. The video itself may be admitted with the transcript, but this step is unnecessary unless there was some conduct or action by the witness that you wish to preserve for the record.

OBJECTIONS: Objections are reviewed by the court and counsel prior to viewing the video. However, this review must be done in sufficient time prior to the viewing to allow for the stricken portions to be edited from the video. (Certain software programs now allow for the instantaneous editing of transcripts.)

SECTION 5.4. EXPERT TESTIMONY

NOTE: Expert testimony was previously governed by S.Ct. Rule 220. The rule was abolished as of January 1, 1996. However, the foundational requirements for the admission of expert testimony at trial were not affected.

GENERAL

The disclosure of witnesses, both lay and expert, is governed by S.Ct. Rule 213(f).

DEFINITION: An expert is a person who, because of education, training, or experience, possesses knowledge of a specialized nature beyond that of the average person on a factual matter material to a claim or defense in pending litigation and who may be expected to render an opinion within his or her expertise at trial. An expert may be an employee of a party, a party, or an independent contractor. Former S.Ct. 220(a)(1).

S.Ct. Rule 213, revised in 2002, split expert witnesses into two categories. Those categories differentiate between independent expert witnesses and controlled expert witnesses.

**Independent Expert Testimony.** An “independent expert witness” is a person giving expert testimony who is not the party, the party’s current employee, or the party’s retained expert. Examples of independent expert witnesses include a person’s treating physician or an investigating police officer. S.Ct. Rule 213(f)(2).

**Controlled Expert Testimony.** A “controlled expert witness” is a person giving expert testimony who is the party, the party’s current employee, or the party’s retained expert. Examples of controlled experts are a retained engineer in a products liability case or a specialized physician in a medical malpractice case. S.Ct. Rule 213(f)(3).

**FOUNDATION:** Make a factual showing through the expert’s own testimony that the witness has special knowledge, skill, experience, training, or education relating to the issue in dispute. The sufficiency of the qualifications of an expert witness is largely within the sound discretion of the trial court. *Schaffner v. Chicago & North Western Transportation Co.*, 129 Ill.2d 1, 541 N.E.2d 643, 133 Ill.Dec. 432 (1989).

“Individuals are permitted to testify as experts when their experience and qualifications provide them with knowledge beyond that of lay persons and where their testimony aids the jury in reaching a conclusion” *Dominguez v. St. John’s Hospital*, 260 Ill.App.3d 591, 632 N.E.2d 16, 19 (1st Dist. 1993). An expert’s testimony must be to a reasonable degree of certainty within the field of his or her expertise to be admissible. *Aguilera v. Mount Sinai Hospital Medical Center*, 293 Ill.App.3d 967, 691 N.E.2d 1, 229 Ill.Dec. 65 (1st Dist. 1997).

**QUALIFY THE EXPERT:** It is not required that the court make an explicit ruling as to whether the witness qualifies as an expert absent an objection by opposing counsel to the witness’ qualifications. It is not uncommon to see attorneys establish the credentials of an “expert” and then turn to the court and seek a ruling that the individual qualifies as an “expert.” Such a step is unnecessary. A court does not “certify” a witness as an expert but will instead rule on any objections opposing counsel may make as to the witness’ qualifications. Absent an objection, the witness normally will be allowed to state his or her opinion.
OBJECTING TO AN EXPERT’S QUALIFICATIONS:

If your opponent has presented a witness to offer opinion testimony, you should wait until the witness has concluded testifying as to his or her credentials and then request permission to cross-examine the witness as to qualifications only. Any objections as to the witness’ qualifications should be made at that point prior to the opinion testimony.

Expert testimony was properly stricken when a witness testified he could not base his opinion on architectural or scientific certainty. Torres v. Midwest Development Co., 383 Ill.App.3d 20, 889 N.E. 2d 654, 321 Ill.Dec. 389 (1st Dist. 2008).

DEVELOP OPINIONS:

a. Establish the expert’s personal knowledge of facts or assumptions constituting a basis for opinions and show the manner in which that knowledge was acquired.

b. Have the expert give opinions and then explain the reasons for them.

SAMPLE QUESTION:  

Q: Mr. Becker, based on your training and experience in the field of accident reconstruction, your investigation into the facts of this occurrence, your examination of the scene of the occurrence, and your review of the police reports, the witness statements, and the deposition transcripts of the parties, all of which you just testified to today, have you formed an opinion as to the speed of the defendant’s vehicle immediately prior to impact?

SECTION 5.5. LAY TESTIMONY

DEFINITION:

A “lay witness” is a person giving only fact or lay opinion testimony. A party or an eyewitness of an automobile accident is a good example of a lay witness. Lay testimony in an automobile case may concern (a) the path of travel and speed of the vehicles before impact, (b) a description of the impact, and (c) the lighting and weather conditions at the time of the accident.

Although the decision whether a witness is competent to testify is a matter within the court’s discretion, lay witnesses are permitted to give their opinion as to the value of property if they have sufficient personal knowledge of the property and its value. There must be an adequate showing of the basis for such testimony before it will be allowed. Razor v. Hyundai Motor America, 222 Ill.2d 75, 854 N.E.2d 607, 305 Ill.Dec. 15 (2006).

To establish an appropriate foundation, a lay witness should be able to testify, at a minimum, as to his or her

a. Familiarity with the property;

b. Actual knowledge of the value; and

c. Basis of the knowledge (how, when, and where).
WHAT TO DO:

a. Have the witness give sufficient personal identifying information so that the jury can assess the witness’ credibility and ability to recount.

b. Establish the witness’ personal knowledge about the matter before asking questions about it through

   (1) The witness’ own testimony; or

   (2) Other admissible evidence.

c. Have the witness recount actual knowledge regarding disputed matters.

d. Ask the witness if he or she has formed any opinions (such as speed, etc.) and what those opinions are.

SAMPLE FOUNDATIONS:

For sample testimonial foundations, see §8.14 below.

SECTION 5.6. PRESENT RECOLLECTION REFRESHED

GENERAL RULE:

A witness’ memory may be refreshed if his or her memory is shown to be exhausted and the witness states there is something that will refresh his or her memory so that he or she can then state, independently of that thing, his or her present, actual recollection. People v. Griswold, 405 Ill. 533, 92 N.E.2d 91 (1950).

WHAT YOU CAN USE:

a. You can use almost any item to refresh recollection.

b. It is not necessary that the witness has prepared the item.

c. If you use a writing to refresh a witness’ recollection, opposing counsel is entitled to inspect and to cross-examine the witness about the document and to introduce into evidence pertinent portions of it. Diamond Glue Co. v. Wietzychowski, 227 Ill. 338, 81 N.E. 392 (1907).

WHAT TO DO:

Ask the witness if his or her recollection is exhausted; if so, ask if there is any document or item that, if viewed, would refresh his or her recollection. If he or she says “yes,” have the exhibit marked for identification.

Show “Refreshing” Document:

a. Show the exhibit to opposing counsel.

b. Provide a courtesy copy to the court.

Refresh Witness’ Recollection:

a. Hand the document to the witness, asking him or her silently to review it or some portion of it that you specify.

b. Ask the witness whether his or her recollection has now been refreshed:
(1) If recollection is not refreshed, consider whether the document can be authenticated as past recollection recorded.

(2) If recollection is refreshed, go back and re-ask the same question that earlier prompted the need to refresh, asking the witness to give present recollection. For a sample record, see §8.14(3) below.

**NOTE:** The document is not at this point received into evidence and is not evidence!

Consider Authenticating Document:

Consider separately authenticating the exhibit and offering it into evidence.

**SECTION 5.7. PAST RECOLLECTION RECORDED**

**GENERAL**

**RULE:** A record or memorandum may be admissible in evidence as an exception to the hearsay rule if the following criteria are met:

a. The exhibit is relevant.

b. The witness has no full or accurate recollection of the facts.

c. The witness had firsthand knowledge of the facts when they occurred.

d. The witness made a record of the events at or near the time the facts occurred, or the record was made at the witness’ direction.

e. The record was accurate and complete when made.


**NOTE:** Although not specifically adopted, Fed.R.Evid. 803(5) is generally followed by Illinois courts:

**Hearsay Exceptions; Availability of Declarant Immaterial**

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

* * *
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.

WHAT TO DO: 

a. Elicit testimony that the witness has insufficient present recollection to testify fully and accurately.

b. Show the prior recorded recollection to opposing counsel.

c. Have a copy marked as an exhibit for purposes of identification.

d. Show the exhibit to the witness and ask the witness to review the document and to verify recognizing it.

e. Elicit the witness’ testimony that the writing is authentic.

f. Develop the witness’ testimony that

(1) The writing was made at the time when the facts recorded actually occurred or were fresh in the witness’ mind;

(2) The writing was made by the witness or under the witness’ direction and was made for the purpose of recording the witness’ knowledge; and

(3) Any statement made by the witness and recorded in the writing was a true statement and was accurately reported.

If the statement was made by someone other than the witness and was not made under the witness’ direction, you may need the actual maker to testify that the writing was made for the purpose of recording the witness’ statement and that it accurately did so.

g. After satisfying the foundational requirements (a – f, above), ask permission to read the contents of the writing into the record and for the jury as past recollection recorded. The court may read the contents to the jury or allow you to do so.

ADMISSION OF DOCUMENT: The writing may be admitted into evidence if the above criteria have been met. Olson, supra.

NOTE: Under Fed.R.Evid. 803(5), the document may be admitted but not be received as an exhibit unless offered by an adverse party.
SECTION 5.8. ANSWERS TO INTERROGATORIES OR REQUESTS FOR ADMISSIONS

GENERAL RULE: Answers to interrogatories may be used in evidence to the same extent as a discovery deposition. S.Ct. Rule 213(h). See S.Ct. Rule 212:

a. Impeachment;

b. Admission by a party;

c. If otherwise admissible, as a hearsay exception; and

d. Any other purpose for which an affidavit may be used.

WHAT TO DO: Follow the same procedure as with discovery depositions above. See §5.1 above.

NOTE: Ensure that responses to your discovery requests have been signed under oath by your party opponent prior to trial. (See S.Ct. Rule 213(d) as to the requirement that the responding party do so under oath.)

SECTION 5.9. PLEADINGS

GENERAL RULE: Admissions may be either judicial or evidentiary.

DEFINITIONS: Judicial admissions are formal admissions in the pleadings that have the effect of withdrawing a fact from issue and dispensing wholly the need for proof of the fact. Robins v. Lasky, 123 Ill.App.3d 194, 462 N.E.2d 774, 78 Ill.Dec. 655 (1st Dist. 1984).


Evidentiary admissions may be controverted or explained by a party. Pryor, supra.

JUDICIAL ADMISSIONS

TYPES OF JUDICIAL ADMISSIONS:

b. Admissions pursuant to a request to admit. See S.Ct. Rule 216; §5.8 above.


**EFFECT OF JUDICIAL ADMISSION:**

It conclusively establishes a fact.

**EVIDENTIARY ADMISSIONS**

**TYPES OF EVIDENTIARY ADMISSIONS:**

a. Pleadings in other cases;

b. Withdrawn pleadings in the same case;

c. Answers to interrogatories; and

d. Stipulation as to admissibility.

**EFFECT OF EVIDENTIARY ADMISSION:**

It is only “evidence” of a fact. It is not conclusive proof as is a judicial admission.

**USE OF EVIDENTIARY ADMISSION:**

Treat evidentiary admissions like any other prior statement of a party:

a. Authenticate by testimony or judicial notice; and

b. You may want to offer all of it, or part of it, as an exhibit.
SECTION 5.10. STIPULATIONS

DEFINITION: A stipulation is an agreement between parties. It may be written or oral. It may consist of an agreement as to facts, evidence, admissions, or procedure. See §8.6 below. Note that a court may refuse to accept a stipulation of the parties under certain circumstances, such as a waiver of due-process rights. Smith v. Freeman, 232 Ill.2d 218, 902 N.E.2d 1069, 327 Ill.Dec. 683 (2009).

WHAT TO DO:

a. If you or opposing counsel offers to stipulate, make sure that the offer is made outside the jury’s hearing.

b. Commit the stipulation to writing whenever possible, with each party signing the document, and file it with the court.

c. Read the stipulation to the jury and into the record in its exact terms.

d. Have the court advise the jury, both at the time that the stipulation is first read and later during final instructions, that any stipulated fact is conclusively presumed to be true as to the stipulating parties.

e. Prepare a specific instruction regarding the stipulation to be read by the court during final instructions.

WHEN YOU MAY DISCLOSE STIPULATIONS:

You may disclose stipulations during

a. Your opening statement;

b. Presentation of evidence;

c. Your closing argument; and

d. Jury instructions.

SECTION 5.11. DEMONSTRATIVE OR EXPERIMENTAL EVIDENCE

GENERAL RULE: Demonstrations in court are generally permissible for explanatory purposes. See §7.4 below. Admissibility rests within the discretion of the court.

ANTICIPATE PROBLEMS: If the procedure will impose logistical problems, create any sensitivity, or entail courtroom delay or disruption, notify the court early in the trial of your intent to conduct the procedure.

If opposing counsel objects, consider seeking early resolution of the issue to assist in trial planning and to give time to correct deficiencies.
**BEFORE CONDUCTING DEMONSTRATION:**

a. On the day before or the morning of the planned demonstration, remind the court of your intent to conduct.

b. Raise logistical problems and explain proposed solutions.

**WHEN TO SET UP DEMONSTRATION:**

Set up equipment for the demonstration before the court session begins or during recess immediately before the procedure is to be performed.

**NOTE:**

If you will be handling physical objects at trial, get organized and set up in advance. Moving items around the courtroom, setting up charts or equipment, and trying to get equipment to work can be very time consuming. If these things are done while the judge and jury are impatiently watching, they can be irritating to the court, distracting and possibly annoying to the jury, unnerving to you, and ultimately detrimental to the client.

**WHAT TO DO:**

Introduce and explain the demonstration or experiment through an authenticating witness. For a sample, see §7.4 below.

a. Show through testimony that the procedure involves conditions substantially similar to those of the underlying occurrence.

b. If scientific testing is involved, establish the general acceptance of the particular techniques in the scientific community.

c. Ask the court’s permission to conduct the demonstration or to display its results.

d. If the display includes photographs, motion pictures, or other tangible evidence, treat such items as exhibits and offer them into evidence.

e. Resolve any objections regarding admissibility. If opposing counsel objects, authenticate the evidence outside the jury’s presence.

f. Present the demonstrative or experimental evidence professionally, competently, and with as little disruption as possible.

g. Make a record by testimonial description or physical recording of both the substance and the result of the demonstrative evidence.

**SECTION 5.12. JURY VIEWS**

**GENERAL RULE:**

A trial court has absolute discretion to permit the view of property, the scene of an occurrence, or any other tangible item that the court believes will aid will aid the jury in their determination of the facts in dispute. *People v. Durso*, 40 Ill.2d 242, 239 N.E.2d 842 (1968). However, a judge is not required to do so. *People v. Poole*, 123 Ill.App.3d 375, 462 N.E.2d 810, 78 Ill.Dec. 691 (4th Dist. 1984).
OBJECTIVE: If appropriate, to have the jurors view the disputed property, the scene of disputed occurrences, objects, and demonstrations outside the courtroom.

WHAT TO DO: a. Because of logistical concerns, notify the trial court of a request for a jury view as soon as possible.

b. Include in your request or motion

   (1) A description of specific items to be viewed;
   (2) A showing of relevance and admissibility of the proffered evidence; and
   (3) Discussion of how and when the viewing will be accomplished.

c. Show that the evidence to be viewed is in substantially similar condition to that which existed at the time of the disputed occurrence.

d. Make arrangements to transport the entire court (including the judge, jury, court reporter, counsel, and necessary officers) to the viewing location.

e. Seek court approval for final arrangements.

f. Consider whether testimony is to be taken or demonstrations are to be conducted at the viewing site:

   (1) Obtain advance permission from the court; and
   (2) Arrange with the court for both reporting and possibly video recording.

SECTION 5.13. REQUESTS TO ADMIT FACTS

GENERAL RULE: S.Ct. Rule 216 allows you to serve on an opposing party a request to admit facts that, if not denied or objected to within 28 days, are deemed admitted. See §8.10 below for a sample request.


OBJECTIVE: Make sure each paragraph in your request to admit facts constitutes an admission of a single fact that can stand on its own without the aid of any other paragraphs of the request. The purpose is to obtain simple, pointed admissions of fact unencumbered by other allegations that may be denied.
SECTION 5.14. REQUESTS TO ADMIT GENUINENESS OF DOCUMENTS

GENERAL RULE: A request to admit the genuineness of a document operates on the same basis as a request for admission of facts. See §§8.10, 8.11 below.

WHEN TO USE: Anytime you want to determine what objections will be made to your evidence or anytime you want to dispense with bringing in a witness only for the purpose of providing a foundation for the evidence.

NOTE: Requests for admission should be utilized in all bench trials to streamline the presentation of evidence. In jury trials, there may be occasions when you wish to bring in the foundation witness because of the impression he or she would make on the jury.

SECTION 5.15. PUBLIC RECORDS

GENERAL RULE: A public record may be admitted in evidence as an exception to the hearsay rule if the record was made in the ordinary course of business and was authorized by statute or agency regulation or was required due to the nature of the public office. *Topps v. Unicorn Insurance Co.*, 271 Ill.App.3d 111, 648 N.E.2d 214, 207 Ill.Dec. 758 (1st Dist. 1995) (concerning admission of letter from Illinois Department of Transportation).

S.Ct. Rule 216(d) allows you to serve on the opposing party copies of any public records you intend to use at trial. The documents are then admissible without further foundation except to the extent of an inaccuracy identified by the opponent by affidavit within 14 days of receipt.

TYPES OF PUBLIC RECORDS:

a. Any document a public agency is under a duty to maintain.

b. Birth certificates.

c. Death certificates.

d. Tax returns.

e. Weather Bureau reports.

f. Deeds.

g. Court records.

h. Public agency reports.
SECTION 5.16. HABIT EVIDENCE

GENERAL RULE: Subject to the discretion of the trial court, habit testimony may be admitted provided that a proper foundation has been established. Alvarado v. Goepp, 278 Ill.App.3d 494, 663 N.E.2d 63, 215 Ill.Dec. 313 (1st Dist. 1996).


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.

FOUNDATION REQUIREMENTS: A party seeking to admit habit testimony must show the conduct to have become semiautomatic or invariably regular, and not merely a tendency to act in a given manner. Knecht v. Radiac Abrasives, Inc., 219 Ill.App.3d 979, 579 N.E.2d 1248, 1252, 162 Ill.Dec. 434 (5th Dist. 1991).

SECTION 5.17. TELEPHONE CONVERSATION — VOICE OF PERSON

GENERAL RULE: For a witness to testify as to a “voice only” conversation with another individual, a foundation must be established as to the identity of the other party without visual means to identify the party.

FOUNDATION REQUIREMENT: a. For a person making a call: A witness can establish the proper foundation for the admission as to the identity of a caller by circumstantial evidence through the personal identification by the caller combined with the witness’ familiarity with the voice of the caller. People v. Poe, 121 Ill.App.3d 457, 459 N.E.2d 667, 669, 76 Ill.Dec. 752 (2d Dist. 1984).
b. *For a person being called:* By evidence that a call was made to a specific number assigned to a particular person or business, if circumstances, including personal identification, demonstrate the one being called answered the call. See Fed.R.Evid. 901(b)(6).

c. *Telephone “Caller ID”:* “Caller ID” is a method to corroborate the identity of a caller. In a case of first impression, the Illinois Supreme Court in *People v. Caffey*, 205 Ill.2d 52, 792 N.E.2d 1163, 275 Ill.Dec. 390 (2001), held that information displayed on a caller ID device is not hearsay because there is no out-of-court asserter. The caller ID display is based on computer-generated information and not simply the repetition of prior recorded human input or observation.

The only requirement necessary for the admission of caller ID evidence is that the caller ID device be proven reliable. *Id.*
CHAPTER VI. RESPOND TO CHALLENGES TO ADMISSIBILITY
OF YOUR EVIDENCE AT TRIAL

SECTION 6.1. REVIEW COMMON EVIDENTIARY OBJECTIONS AND CLAIMS OF PRIVILEGE

IRRELEVANT

GROUNDS: Evidence does not have any probative value, i.e., it does not tend to prove or disprove any fact in controversy. Relevant evidence is that which has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Wojcik v. City of Chicago, 299 Ill.App.3d 964, 702 N.E.2d 303, 234 Ill.Dec. 137 (1st Dist. 1998). See also §3.1 above; Fed.R.Evid. 401.

IMMATERIAL

GROUNDS: Evidence offered is at variance with the issues created by the pleadings. Materiality looks to the relationship between the propositions for which the evidence is offered and the issues in the case. People v. Mason, 60 Ill.App.3d 463, 376 N.E.2d 1059, 17 Ill.Dec. 730 (4th Dist. 1978). See also §3.1 above; Fed.R.Evid. 401.

PRIVILEGED

GROUNDS: Evidence discloses confidential information between persons protected by statute or common law.

COMMON FORMS OF PRIVILEGE IN ILLINOIS:


e. Mental health therapist-patient. 740 ILCS 110/10.


g. Self-incrimination. ILL.CONST. art. I, §10.

h. Social worker-client. 225 ILCS 20/16.

i. Accountant-client. 225 ILCS 450/27.
j. Medical studies. 735 ILCS 5/8-2101.

k. Unemployment compensation records. 820 ILCS 405/1900.


m. Voter. 735 ILCS 5/8-910.

n. Interpreter. 735 ILCS 5/8-911, et seq.

o. Informants. 735 ILCS 5/8-802.3.

p. Union agent-union member. 735 ILCS 5/8-803.5.

q. Rape crisis personnel. 735 ILCS 5/8-802.1.

r. Violent crime counselors. 735 ILCS 5/8-802.2.

NOTE: Fed.R.Evid. 501 adopts the state rules of privilege in civil actions.

INSUFFICIENT FOUNDATION

GROUNDS: Proponent of evidence has failed to establish the preliminary facts required for admissibility.

NOTE: Objection must be specific as to why the foundation is insufficient.

HEARSAY

GROUNDS: An out-of-court statement is being used to prove the truth of the matter asserted in the statement.

COMMON EXCEPTIONS:

a. Age.

b. Ancient documents.

c. Business records.

d. Careful habits.

e. Computerized records.

f. Declaration against interest.

g. Dying declaration.
h. Excited utterance.
i. Family Bible.
j. Family relationships and history.
k. Historical works.
l. Learned treatises.
m. Mortality tables.
n. Pain and suffering.
o. Past recollection recorded.
p. Present sense impression.
q. Prior convictions.
r. Public records.
s. Reputation as to truthfulness.
t. Statements of party-opponent.
u. Statements to treating physician.
v. Testimony at prior proceeding.
w. Vital statistics.
x. Weather reports.

**BEST EVIDENCE, AKA ORIGINAL WRITING**

** Grounds:** A copy of a writing is offered to prove its content without explanation as to unavailability of original. See also §3.1 above.

**Rule:** The best-evidence rule requires that when a party attempts to establish the terms of a writing, the original writing must be produced at trial unless it is unavailable. *Lam v. Northern Illinois Gas Co.*, 114 Ill.App.3d 325, 449 N.E.2d 1007, 70 Ill.Dec. 660 (1st Dist. 1983).
OPINION

GROUNDS:  
a. Witness offers testimony that is not an assertion of fact and/or does not provide a proper foundation that would demonstrate that the witness had the ability to form an opinion.

b. Witness’ identity and opinion were not disclosed pursuant to S.Ct. Rule 213(f).

PREJUDICE OUTWEIGHS PROBATIVE VALUE

GROUNDS:  
Although the evidence is otherwise admissible, its probative value is substantially outweighed by the probability that its admission would create a substantial danger of (a) prejudice, (b) confusing the issues, or (c) misleading the jury.

SECTION 6.2. MEET OBJECTIONS TO ADMITTING YOUR EVIDENCE

USE CONCISE EVIDENCE MEMO:  
Have a short “evidence memo” prepared on any anticipated objections to evidence you wish to present. For a sample “evidence memo,” see §8.2 below.

MAKE OFFER OF EVIDENCE FOR A LIMITED PURPOSE:

a. Recognize that evidence is frequently admissible for some purposes while inadmissible for others (e.g., prior inconsistent statements may be admitted solely for impeachment purposes and not as substantive evidence).

b. If you want to use evidence that may be subject to objection, 

   (1) Try to find alternative reasons to make it admissible (e.g., impeachment or as to one party as opposed to another); and

   (2) Be prepared to develop and explain those reasons at trial.

c. If you succeed, the evidence will be admitted for the jury to consider along with a limiting instruction from the court restricting its use. See I.P.I. — Civil No. 2.02.

d. You risk committing misconduct if evidence is received for a limited purpose and you use it in argument for an improper purpose.

MAKE CONDITIONAL OFFER OF EVIDENCE:
When there are logistical problems in admitting some evidence because its foundation involves more than one witness, ask the court to admit the evidence conditioned on your later introducing foundational testimony.

Procedure:  
Request a conditional admission by

a. Explaining the logistical problem to the court;

b. Outlining the theory of admissibility;
c. Stating the nature and source of additional facts; and

d. Assuring the court of your intent and ability to develop those facts at a later
time.

**Expect Motion**

**To Strike:**

a. You have to develop the additional foundation after evidence has been
conditionally received.

b. The burden is on your opponent to move to strike the evidence if you fail to
develop the additional foundation. *Gillespie v. Chrysler Motors Corp.*, 135

**If Court Grants Motion:**

If the court has previously received evidence conditionally and then grants
the motion to strike, opposing counsel may be able to successfully move
for a mistrial or for a new trial. *Kloster v. Markiewicz*, 94 Ill.App.3d 392, 418

**EXCISE OBJECTIONABLE ENTRIES:**

When an otherwise admissible writing contains objectionable material, be
prepared to offer the exhibit with the objectionable portion excised (e.g.,
medical bills that show insurance payments).

**When Entire Document May Be Admissible:**

If you believe that the entire document may be admissible, offer it into
evidence before raising any possibility of excising the challenged portion.

**When Portion Is Objectionable:**

If the questioned portion is clearly objectionable or is unimportant to you,
discuss using an excised copy with the court, outside the jury’s presence,
before offering the original exhibit into evidence.

**How To Excise:**

Before coming to court, you should prepare an excised copy of the exhibit:

a. Excise objectionable portions by scanning the exhibit and preparing a copy
with the objectionable material deleted.

b. Make and bring enough copies for all counsel and the court.

c. When the objectionable portion of the exhibit can be excised only by physically
covering a portion of the original exhibit, do so before bringing the exhibit to
court.

**IF COURT ADMITS EXCISED EXHIBIT:**

If the court rules that a copy of the excised exhibit is admissible,

a. The edited copy will be received in evidence; and

b. The original unaltered exhibit remains part of the record, marked for purposes
of identification only.
MINIMIZE
PREJUDICIAL
IMPACT:

Consider the risk of jury speculation about what might have been deleted from an obviously altered exhibit, speculation that could be prejudicial to either side.

a. Avoid potential prejudice:

   (1) Ask for an admonition to the jury stating that such speculation is inappropriate.

   (2) Ask the court to allow the exhibit to be read to the jury (rather than inspected by it).

   (3) Request that the exhibit not go with the jury when the jury is deliberating.

b. Prepare a summary of medical bills and admit the summary rather than the original bills. See §7.11 below.
CHAPTER VII. ESTABLISH FOUNDATIONS FOR SPECIFIC TYPES OF PHYSICAL EVIDENCE

SECTION 7.1. PHOTOGRAPHS

STANDARD FOR AUTHENTICATION:

DISCRETIONARY:

COMMON WAYS OF AUTHENTICATION:
a. Stipulation. Oral stipulation on the record can be made in open court with a simple statement that the parties have stipulated to the admission into evidence of Plaintiff’s Exhibit 1. This can be done in or out of the presence of the jury. Ask the court’s preference of procedure. You may also submit a written stipulation. See §5.10 above, §8.6 below.

b. Request for admission of genuineness of documents. See §4.7 above, §8.11 below.

c. “Presumptive admissibility” in arbitration cases under S.Ct. Rule 90(c).

d. Witness testimony.

FOUNDATION WITNESS:
a. A typical foundation witness is a person having personal knowledge of the facts in dispute who then testifies that the photograph fairly depicts those facts. People v. Donaldson, 24 Ill.2d 315, 181 N.E.2d 131 (1962).

b. In order to have a photograph admitted in evidence, it is necessary that the photograph be identified by a witness as a portrayal of certain facts relevant to the issue and verified by the witness on personal knowledge as a correct representation of the facts. The witness need not be the photographer nor know anything of the time or condition of the taking, but the witness must have personal knowledge of the scene or object in question and testify that it is correctly portrayed by the photograph. People v. Thomas, 88 Ill.App.2d 71, 232 N.E.2d 259, 264 (1st Dist. 1967).

c. Generally, the witness is not the actual photographer unless a special photographic technique is used or the fairness or content of the photograph is seriously contested.

d. If the scene changed before the photo was taken, the photograph may still be admissible if the witness can explain the changes. Warner v. City of Chicago, 72 Ill.2d 100, 378 N.E.2d 502, 19 Ill.Dec. 1 (1978).
e. If the FAC rule applies (i.e., the picture fairly, accurately, and completely portrays the scene), the picture will normally be admitted and any question as to the photo will go to its weight, not its admissibility.

**SAMPLE FOUNDATION:**

**Q.** Let me hand you a document, marked as Plaintiff’s Exhibit 10 for purposes of identification. Do you recognize this document?

**A.** Yes.

**Q.** Would you tell us what it is?

**A.** It's a picture I took of my car several days before the accident.

**Q.** When was this picture taken, if you recall?

**A.** April 18, 2010. It was on my birthday.

**Q.** Could you tell us whether Exhibit 10 accurately and fairly depicts the physical condition of your car just before the collision on April 20, 2010?

**A.** Yes, it does.

**Q.** Was there any change in the condition of the car between the time that this photograph was taken and the time of the collision on April 20?

**A.** No.

**Q.** Your Honor, I move for the admission of Plaintiff’s Exhibit 10 into evidence.

**TYPICAL OBJECTIONS:**


b. The evidence is cumulative.

c. The photo is gruesome and would unduly prejudice the jury.

d. Prejudicial effect outweighs probative value.

e. The photo was altered.
SECTION 7.2. MODELS, MAPS, AND DIAGRAMS

REAL VS. DEMONSTRATIVE EVIDENCE:
Models, maps, and diagrams may be used either as real evidence, in which case they must be authenticated for admission into evidence, or for demonstrative purposes to aid a witness in conveying testimony to the court. Demonstrative evidence generally is not admitted into evidence. Examples of demonstrative evidence include skeletons, models, plats, maps, or any other item used to illustrate the testimony of a witness.

STANDARD FOR AUTHENTICATION:
Maps, drawings, sketches, and diagrams that illustrate the scene of a transaction and the relative location of objects may be admissible if material and relevant. Department of Public Works & Buildings v. Chicago Title & Trust Co., 408 Ill. 41, 95 N.E.2d 903 (1950).

COMMON WAYS OF AUTHENTICATING:

a. Judicial notice (e.g., maps, surveys, etc.). See §7.16 below.

b. Stipulation. See §5.10 above, §8.6 below.

c. Witness testimony. See sample foundation for photographs in §7.1 above.

TYPICAL WITNESS:

Expert Witness:
A witness who uses the visual aid to illustrate testimony (demonstrative), e.g., a doctor who uses a skeleton to aid the jury in understanding testimony.

Lay Witness:
A witness who is familiar with the matter depicted (real), e.g., a witness who identifies a picture of an automobile involved in an accident.

SAMPLE FOUNDATION:

Q. Were you present at the intersection of Market and Hyde Streets on July 4, 2010, when a car hit a child?

A. Yes, I was.

Q. While you were at the scene, did you observe whether there were painted crosswalks for people walking across Market Street?

A. Yes, I did.

Q. And did you also observe whether there were traffic lights governing the flow of pedestrian traffic on Hyde Street crossing Market Street at that location?

A. Yes, I did.
COUNSEL. Your Honor, may I approach the witness with an exhibit?

COURT. You may.

Q. Mr. Jones, I’m handing you an exhibit marked as Defendant’s Exhibit C for purposes of identification. For the record, the exhibit is a map bearing the heading “Market Street.” Would you please take the time to review this exhibit and then tell us whether it fairly and accurately shows the location of the sidewalk and traffic lights at the intersection of Market and Hyde Streets at the time of the accident there on July 4?

A. Yes, it does.

Q. Your honor, Plaintiff moves for the admission of Plaintiff’s Exhibit C into evidence.

[At this point, the exhibit can be offered into evidence.]

SECTION 7.3. MOTION PICTURES/VIDEOS/DAY-IN-THE-LIFE FILMS

GENERAL RULE: Motion pictures are admissible into evidence under the same standards that apply to photographs.

FOUNDATION: A foundation must be laid by someone having personal knowledge of the filmed object that the film is an accurate portrayal of what it purports to show. Cisarik v. Palos Community Hospital, 144 Ill.2d 339, 579 N.E.2d 873, 162 Ill.Dec. 59 (1991).

STANDARD FOR AUTHENTICATION: Same standard as for photographs. See §7.1 above.

COMMON WAY TO AUTHENTICATE: a. Stipulations. See §5.10 above, §8.6 below.

b. Witness testimony:

(1) Lay;

(2) Independent Expert; and/or

(3) Controlled Expert.

Typical Witness: a. A person having personal knowledge of the facts in dispute who testifies that the film fairly depicts those facts or facts substantially similar to them.

b. Generally, the witness is not the actual photographer. See §7.1 above.
Typical Foundation for a “Day-in-the-Life” Film:

a. Utilize the testimony of someone who is familiar with the individual on a frequent basis, e.g., family member, nurse, or doctor, and qualify that person as such.

Q. Are you familiar, as the nurse for John Doe, with his daily treatment and care?

Q. Did you see the movie or video presentation that has been marked for identification as Exhibit 1?

Q. Were you in the movie or video?

Q. Were you present during the filming of that video or movie?

Q. What you did and said and what others did and said in the video or movie — was this the way in which you customarily deal with John each day?

Q. The way in which John acted and the way he behaved during this movie or video — was this the way you see him at any point you might see him during a typical day?

Q. Is there anything unusual about the way he acted throughout this movie?

Q. Was the activity in this film a true and accurate representation of what you saw during the taking of the movie or video?

Q. Is the color a true and accurate representation of the color when you observed the movie or video being taken?

Q. Is the sound a true and accurate representation of the sound that you heard during the taking of the movie or video?

Q. Is Plaintiff’s Exhibit 1 a true and accurate representation of what was photographed during the taking of the movie or video of John Doe in every respect?

b. Offer film and display.

SECTION 7.4. DEMONSTRATIONS AND EXPERIMENTS

RELEVANCE: To illustrate and clarify a witness’ testimony.
STANDARDS FOR AUTHENTICATION:

a. The demonstration must help clarify the witness’ testimony.

b. Facts incorporated into the demonstration must fairly depict material facts in dispute or facts substantially similar to those facts.

c. The demonstration may not be for dramatic or emotional appeal.


e. Conditions of the demonstration or experiment must be “substantially similar” to those it attempts to duplicate. Galindo v. Riddell, Inc., 107 Ill.App.3d 139, 437 N.E.2d 376, 62 Ill.Dec. 849 (3d Dist. 1982).

NOTE: Do everything possible to make conditions identical and anticipate objections to conditions that are only similar.

COMMON WAY TO AUTHENTICATE:

Testimony of witness.

Typical Witness:

a. Expert.

b. Participant.

SAMPLE TESTIMONY:

Q. Dr. Jones, relative to a fracture site of a bone, what is displacement?

A. In general terms, it’s the bones moving apart from each other at the fracture site.

Q. Can that be measured from an X-ray?

A. Certainly.

Q. Could that have been done in this case?

A. Of course.

Q. Can you demonstrate for the jury how that would be done?

A. You would place the X-ray against the shadow box like this [indicating] and simply measure with a ruler Point A of the bone to Point B as I am doing here.
Q. Is this the same manner in which Dr. Smith could have measured the displacement?

A. Why, yes. In fact, I’m using here one of his X-rays.

SECTION 7.5. X-RAYS

RELEVANCY:

a. To show present and past physical conditions.

b. To provide comparison between normal body and injured body.

STANDARD FOR AUTHENTICATION:

The standards applicable to X-rays are the same as those applicable to authenticating normal photographs:

a. The X-ray was taken of the person and condition that is the subject of the dispute.

b. The X-ray portrays conditions that are substantially similar to those conditions.

c. The manner in which the films were taken indicates reliability. Stevens v. Illinois Cent. R. Co., 306 Ill. 370, 137 N.E. 859 (1922).

COMMON WAYS TO AUTHENTICATE:

a. Stipulation.

b. Testimony of the witness.


Typical Witness:

a. Treating doctor.

b. Radiologist.

c. X-ray technician.

d. Medical expert witness.

e. Custodian of medical records.

Typical Foundation Questions:

a. Is the witness familiar with X-ray procedure?

b. Was the X-ray taken of the patient, and what date was it taken?

c. Is the X-ray a true and correct representation of the person photographed?

d. Was the X-ray taken on standard X-ray equipment?
e. Was the equipment in good working order?

f. Was the X-ray taken under the witness’ direction or supervision or at the witness’ request?

g. Was the X-ray used by the witness in diagnosis and treatment of the patient?

h. Does the X-ray accurately show the body parts it purports to show?

SAMPLE FOUNDATION:

Q. Dr. Smith, did you conduct a physical examination of Mr. Jones in your office on April 11, 2010?

A. Yes, I did. He came in complaining of injuries to his arm.

Q. As part of your examination, did you order that an X-ray be taken of his arm?

A. Yes, I did.

Q. And was an X-ray film actually prepared on the same day?

A. Yes, it was.

Q. Who prepared it?

A. It was prepared by the radiologist who works in the clinic where my office is located.

Q. And when was it that you first saw the X-ray film that was prepared by the radiologist?

A. The same day. I called the radiologist and told him what I needed. I then sent Mr. Jones next door to the X-ray facility with instructions to bring the completed X-ray film immediately back for me to review. He was back in about 30 minutes, and I then reviewed the film.

Q. Did you bring that X-ray film with you to court today?

A. Yes, sir.

Q. How do you know that the film you brought with you is the same film?

A. Several reasons. First, the film, at the time it was prepared, had a small insert in the corner, which recorded Mr. Jones’ name and the date. That information is actually part of the photograph itself. When I looked at the film when I received it back from the X-ray facility, I looked at this
insert to make certain that they had sent me the right film. This film has Mr. Jones’ name on it, with the date of April 11, 2010. In addition, when I finished examining the film on April 11, I placed it in the office chart for Mr. Jones, as is my normal practice. It is my office procedure to have all X-rays stay with the file so that they are always available for review. When I went to get Mr. Jones’ file this morning so that I could produce it in response to the subpoena I received to be here, the X-ray was located in the file. Finally, I’ve looked at the film, and I remember it as being what I reviewed when Mr. Jones was in my office.

SECTION 7.6. EXHIBITION OF PERSON AT TRIAL

GENERAL


RULE:

WHAT TO DO:

a. Notify and obtain the court’s approval in advance.

b. Be sure that the court reporter’s record reports that the demonstration or exhibition was conducted.

c. Consider taking a photograph of the demonstrated condition and making it part of the record.

If Exhibition Is Embarrassing:

Ask the court to have each juror inspect the condition of the exhibited person in chambers rather than having a mass viewing in the open courtroom.

a. Take care that the process is monitored by all counsel and reported by a reporter; and

b. Ask the court to instruct jurors not to ask questions during the session.

RELEVANCY:

Typically, to show the person’s injuries or appearance.

STANDARD FOR AUTHENTICATION:

Exhibition is normally permitted as of right. The court may limit the display if its purpose is simply to arouse or inflame the jury. The injuries may be displayed even if there is no controversy as to their existence, nature, and extent. Minnis v. Friend, 360 Ill. 328, 196 N.E. 191 (1935).

COMMON WAYS TO AUTHENTICATE:

Testimony of witness.

Typical Witness:

a. Person to be exhibited.

b. Medical provider.
Q. Did you suffer any injuries as a result of being thrown off the horse?

A. Yes, I did.

Q. Would you describe for the jury what those injuries were?

A. When I came off the horse, I slammed up against the corral fence. I hit it so hard that it broke my right arm in two right about here.

[The witness should indicate the location of the injury so that the court and jury can see it.]

Q. You're indicating a location about four inches down from the shoulder?

A. Yes, I am.

Q. Has the arm now fully recovered?

A. No, it hasn’t. I don’t have nearly the strength in the arm that I used to have, the muscles in my right arm are a lot smaller than those in my left arm, and I can’t seem to lift the arm up as high in certain directions like I used to.

Q. How high can you lift the arm now?

A. No higher than this.

[The witness should demonstrate so that the court and jury can see.]

Q. Up to about the level of your shoulder, is that it?

A. That’s right.

Q. You mentioned that your right arm is smaller?

A. Yeah.

Q. Have you done any exercise or work to increase the size of your left arm since being thrown off the horse?

A. No, I haven’t.

Q. Is your left arm, your healthy one, in substantially the same condition as it was before the accident?

A. Yes.
Q. Before this incident, was there any difference between the size of your left arm and your right one?

A. No, they were pretty much the same.

COUNSEL. Your Honor, I would ask that Mr. Gray be allowed to step down in front of the jury box and remove his shirt in order to show the jury the difference between his left arm and his right.

COURT. Any objection, counsel?

OPPOSING COUNSEL. None, your Honor.

COURT. You may proceed.

Q. At this point, let me ask you to come down and show the jury the condition of your two arms.

SAMPLE TESTIMONY:

Q. Your Honor, may the witness step down from the stand?

COURT. She may.

Q. Ms. Wohlers, would you please step down and stand before the jury? The scars on your leg that you have previously described, would you please point them out to the jury?

A. The scar on my left leg is right here. [The witness points, while facing the jury.]. The scar on my right leg is here [pointing].

Q. Your Honor, may the record show that Ms. Wohlers has pointed to a white scar approximately six inches long, running horizontally about one inch above her knee on her left leg, and another scar approximately eight inches long and one-half inch wide, which runs vertically starting about two inches below her right knee.

COURT. That appears accurate. Any objection, counsel?

COUNSEL. No, your Honor.

Q. Thank you, Ms. Wohlers. Please return to the witness stand.
SECTION 7.7. LETTERS/WRITINGS

LETTER FROM ANOTHER PARTY

WHAT TO DO:  

a. Show receipt of the letter. 

b. Establish that the letter is in the same condition as when received. 

c. Demonstrate knowledge of the other party’s handwriting and or signature.

SAMPLE FOUNDATION: 

a. Show the marked exhibit to the witness:

Q. Mr. Bill, I show you Plaintiff's Exhibit 1. Do you recognize it? 
A. Yes.

Q. Have you seen it before? 
A. Yes, I received this on April 27, 2010.

Q. Do you recognize the signature at the bottom? 
A. Yes, I do.

Q. Have you seen that signature before? 
A. Many times.

Q. Under what circumstances? 
A. [The witness explains how he has acquired personal knowledge.]

Q. Whose signature is it? 
A. It is Susan Thomas’ signature.

Q. Is this letter in the same condition today as when you received it on April 27, 2010? 
A. Yes, sir. It looks the same.

b. Move for admission of the exhibit into evidence.

c. Publish the exhibit to the jury.
LETTER FROM WITNESS

WHAT TO DO: Show that

a. The witness prepared the letter;

b. The letter is in the same condition as when it was mailed;

c. The witness signed the letter; and

d. The witness addressed and mailed the letter.

SAMPLE FOUNDATION:

Q. Let me hand you a document, which has been marked as Plaintiff’s Exhibit 2 for purposes of identification. Would you tell us whether you recognize this document?

A. Yes, I do.

Q. What is it?

A. It is the letter I mailed to Mr. Rue immediately after our telephone conversation on September 1.

Q. Whose signature is that on the bottom?

A. It’s mine.

SECTION 7.8. CONTRACTS

GENERAL The terms and conditions of a contract are admissible in the same fashion RULE: as the contents of any other writing.

SAMPLE FOUNDATION:

Q. During the course of this meeting you attended, was any sort of document prepared?

A. Yes, there was.

Q. Who prepared the document?

A. Mr. Thomas.

Q. Did Mr. Thomas say anything with respect to what the document was at the time he prepared it?

A. Yes.
**Q.** What did he say?

**A.** He said he was putting together a short memorandum of understanding, which both he and Mr. Bill could sign to confirm their agreement.

**Q.** When you were at this meeting, did you see the document that Mr. Thomas prepared?

**A.** Yes, I did.

[At this point, the attorney hands a copy of the document to opposing counsel.]

**Q.** With the court’s permission, I would ask that this document be marked as Plaintiff’s Exhibit 1 for purposes of identification.

**COUNSEL.** Your Honor, may I approach the witness with the exhibit?

**COURT.** Go ahead.

**Q.** I am handing you a document that has now been marked Plaintiff’s Exhibit 1 for purposes of identification. Will you please read this document and tell us whether you recognize it?

**A.** Yes. It is the memo that Mr. Thomas prepared at the meeting.

**Q.** Did you see Mr. Bill sign his name to this memorandum?

**A.** Yes, I did.

**Q.** Is that his signature at the bottom of the exhibit?

**A.** Yes, it is.

**Q.** Did Mr. Thomas also sign this document, Exhibit 1, in your presence during that meeting?

**A.** Yes, he did. That is his signature at the bottom of the document.

**SECTION 7.9. BUSINESS RECORDS**

**GENERAL RULE:** Records kept by a business are generally admissible as an exception to the hearsay rule.
AUTHORITY: S.Ct. Rule 236, “Admission of Business Records in Evidence,” states:

(a) Any writing or record, whether in the form of any entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of the act, transaction, occurrence, or event, if made in the regular course of any business, and if it was the regular course of the business to make such a memorandum or record at the time of such an act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but shall not affect its admissibility. The term “business,” as used in this rule, includes business, profession, occupation, and calling of every kind.

NOTE: Police records: S.Ct. Rule 236 continues to specifically exclude police records from the scope of this rule.

Medical records: Before August 1, 1992, medical records were specifically excluded from the provisions of this rule. The amended rule was contemplated to include such records. However, S.Ct. Rule 236 applies to civil cases only. 725 ILCS 5/115-5(c)(1) prohibits the use of the business-records exception as a method to introduce medical records in a criminal case.

NOTE: The business-records rule for criminal cases continues to exclude from its scope police and investigative reports and, unlike S.Ct. Rule 236, excludes hospital and medical records. 725 ILCS 5/115-5(c).


b. Establish that the witness is familiar with the business, its method of operation, and the manner in which the record was prepared. Smith v. Williams, 34 Ill.App.3d 677, 339 N.E.2d 10 (5th Dist. 1975).

c. Establish that the business requires accurate records and that the records were made in a timely fashion or within a reasonable time following the event. Kern v. Rafferty, 131 Ill.App.3d 728, 476 N.E.2d 52, 86 Ill.Dec. 876 (5th Dist. 1985).

I am handing you a document now marked as Defendant’s Exhibit E for purposes of identification. Would you please read the document and tell us whether or not you recognize it?

A. Yes, I do.

Q. Could you tell us what it is?

A. It’s the accident report I prepared as a result of this accident.

Q. Why did you prepare this?

A. It is the procedure at our company that an accident report will be prepared anytime an employee is injured on the job.

Q. Who has the responsibility for preparing those reports?

A. I do.

Q. Was that also true at the time of the accident involving Mr. Gray?

A. Yes.

Q. Is there a procedure you follow in preparing a report such as Exhibit E?

A. Yes.

Q. Could you describe for us what that procedure is?

A. As soon as I learn of an accident, I immediately go to the accident site to talk to the injured employee, if that is possible, and to any witnesses to the accident. What each of these people tells me is then recorded by me in my report. I also take a camera with me to photograph anything that might be helpful in recording what happened.

Q. Did you follow that procedure in preparing this Exhibit E?

A. Yes, I did.

Q. How long was it after the accident that you arrived at the accident site?

A. Within the hour.

Q. How much later was it that you had prepared this report?

A. I did the entire report on the same day.
Q. How accurate is this record with respect to recording what you observed and heard at the accident site?

A. Very accurate.

Q. After this accident report, Exhibit E, was prepared, what did you do with it?

A. The original goes into the file that I maintain on all accident reports. A copy of it goes to my boss.

Q. Has this report, Exhibit E, been altered or modified in any way since the day that you prepared it?

A. No.

SECTION 7.10. MEDICAL RECORDS

GENERAL

Prior to August 1, 1992, medical records were specifically excluded from the scope of S.Ct. Rule 236 (“Admission of Business Records in Evidence”) and a foundation had to be laid for their admissibility through the testimony of each individual who performed the charting. Illinois courts had generally adopted a restrictive view of the foundation that was required. See Martin v. Zucker, 133 Ill.App.3d 982, 479 N.E.2d 1000, 88 Ill.Dec. 980 (1st Dist. 1985). Effective August 1, 1992, S.Ct. Rule 236 was amended to eliminate the exclusion of medical records from the purview of the rule.

A foundation for the introduction of medical records may now be accomplished by following the requirements of the rule. No longer are you required to introduce the testimony of each individual who made an entry on the record.

SAMPLE FOUNDATION: For a sample foundation, see the sample in §7.9 above. See also Lecroy v. Miller, 272 Ill.App.3d 925, 651 N.E.2d 617, 209 Ill.Dec. 439 (1st Dist. 1995), holding that a plaintiff’s hospital discharge summary was properly admitted into evidence as a business record even though the testifying physician did not personally prepare the document; it was made in the regular course of business, he was familiar with it, and he was acquainted with the business and procedures at issue.
PERSONS WHO MAY TESTIFY:

a. The custodian of the records.

b. Any physician or nurse familiar with the chart.

NOTE:

Hospitals use different titles for persons who are the custodians of the records and bills. Below are some of the titles employed:

**Medical Records:**
- Service Leader — Medical Records Department
- Director of Health Information Services
- Medical Records Custodian

**Medical Bills:**
- Service Leader — Patient Accounts
- Director of Patient Accounts
- Manager — Patient Accounts

STIPULATION:

Following the amendment of S.Ct. Rule 236, most medical records are admitted into evidence by stipulation of the parties, either orally and or in writing. See §5.10 above, §§8.6, 8.16 below.

If a stipulation cannot be reached, attempt to lay the foundation through S.Ct. Rule 236 by calling a physician familiar with the records and the manner by which they are kept or issue a subpoena for the records custodian. If the hospital is a defendant, require the appearance of the records custodian through S.Ct. Rule 237(b). See §8.6 below.

SECTION 7.11. MEDICAL BILLS

GENERAL RULE:

Medical bills may be introduced into evidence if they were for services that were reasonable and necessary to the recipient and if the amount of the bills was reasonable. *Wills v. Foster*, 229 Ill.2d 393, 892 N.E.2d 1018, 323 Ill.Dec. 26 (2008).

AUTHENTICATION:


b. Testimony of the recipient that the bill was paid. (In Illinois, a paid bill constitutes prima facie evidence of reasonableness. *Arthur*, 833 N.E.2d at 853 – 854.)

TESTIMONY OF CARE PROVIDER:

Unpaid medical bills require testimony that

a. The plaintiff has become liable to pay the amount claimed; and

**SAMPLE FOUNDATION:**

**Q.** Doctor, is this your bill for medical services for the treatment of injuries growing out of this accident?

**Q.** How much is that charge?

**Q.** Is that the usual, reasonable, and customary charge made by the medical profession for such services in this area?

**TESTIMONY OF RECIPIENT:**  

**SAMPLE FOUNDATION:**

**Q.** Would you identify Plaintiff’s Exhibit 1, please?

**A.** It is a bill from Dr. Allen for $720.

**Q.** Was that bill for medical services provided as a result of the injuries you received on June 12, 2010?

**A.** Yes.

**Q.** Is that bill paid?

**A.** Yes.

[Move for the admission of Exhibit 1.]

**SECTION 7.12. SUMMARY CHARTS**

**STANDARD FOR AUTHENTICATION:**  

**EXAMPLES:**

a. Medical records.

b. Medical bills.

c. Company invoices.

d. Payroll expenses.
FOUNDATION:  
   a. Present testimony of the witness who prepared the summary.  
   b. Describe the underlying data.  
   c. Establish that the summary is accurate and correct.  

SECTION 7.13. CERTIFIED RECORDS

STANDARDS FOR AUTHENTICATION:

Common Law:  

Statutory Citations:  
   a. Court records. 735 ILCS 5/8-1202.  
   b. Municipal records. 735 ILCS 5/8-1203.  
   c. Corporate records. 735 ILCS 5/8-1204.  
   e. State land patents. 735 ILCS 5/8-1210.  
   g. Public aid records. 305 ILCS 5/10-13.4.  
   h. Secretary of State driving records, registration information, etc. 625 ILCS 5/2-108.

SECTION 7.14. SELF-AUTHENTICATING DOCUMENTS

STANDARD FOR AUTHENTICATION:  
   Certain documents need no authentication.

EXAMPLES:  


e. Newspapers and periodicals. See id.

SECTION 7.15. OFFER OF PROOF

GENERAL RULE: An offer of proof is a statement or testimony on the record detailing what evidence would have been presented had the movant been allowed to proceed.

AUTHORITY: The court has no authority to refuse an offer of proof. In re Estate of Undziakiewicz, 54 Ill.App.2d 382, 203 N.E.2d 434 (1st Dist. 1964).

SAMPLE QUESTIONS RESULTING IN OBJECTION:

Q. Now, Dr. Marston, based on your examination of Mr. Gray, the X-ray results you brought with you, and the nature and severity of his injuries, did you form a medical conclusion as to whether Mr. Gray would be permanently disabled from his occupation as a carpenter as a result of those injuries?

A. Yes, I did.

Q. Would you tell the jury what that conclusion was?

SAMPLE OBJECTION ON GROUND OF INSUFFICIENT FOUNDATION:

OPPOSING COUNSEL. Objection, your Honor. There’s been no showing that Dr. Marston has seen or examined the plaintiff in over two years, and Mr. Gray himself has testified that his condition has improved significantly during that time period. For this witness to offer an opinion about the plaintiff’s current or future physical condition or his ability to do his job adequately would be sheer speculation.

COURT. Mr. Dunne?

PROFFERING COUNSEL. Your Honor, the doctor has testified that he personally examined and treated Mr. Gray for his various injuries. He, therefore, has personal knowledge of the plaintiff’s condition at that time and should be allowed
to testify as to the opinion he formed at that time. That opinion is certainly relevant to showing the severity of the injuries for which Mr. Gray is now seeking damages.

Dr. Marston should also be allowed to express his opinion regarding the prognosis of Mr. Gray’s condition in the future based on the nature and permanency of the injuries that Mr. Gray sustained. That is something doctors are called on to do every day, both in practice and in the courtroom. As a medical doctor, he knows certain injuries are only going to heal so much. That’s the case here, as Dr. Marston will explain if allowed.

COURT. I’m going to sustain the objection.

PROFFERING COUNSEL. May I make an offer of proof, your Honor?

COURT. Yes.

SAMPLE OFFER OF PROOF:

COUNSEL. Thank you, your Honor. I’ll be brief. Dr. Marston was asked what medical conclusion he had reached with respect to whether Mr. Gray would be permanently disabled as a result of his injuries.

Had Dr. Marston been allowed to answer that question, he would have testified that it was his medical conclusion that Mr. Gray was disabled as a result of the injuries caused by being thrown by the defendant’s horse; that, because of the manner in which Mr. Gray’s arm and shoulder bones were crushed, Mr. Gray would never regain more than 60 percent of his original flexibility or strength in that arm and shoulder; and, therefore, in the doctor’s medical opinion, that Mr. Gray’s disability would be permanent. Thank you, your Honor.

NOTE: The alternative is to elicit the witness’ testimony during your offer of proof. This is done outside the presence of the jury. The examination of the witness is conducted in the normal fashion. You must be certain to elicit all testimony necessary to preserve your issue on appeal. It is also not unusual for a trial judge to change his or her opinion concerning the admissibility of the testimony once the court has had the opportunity to hear the witness testify. Be certain to again move for the admission of the proffered testimony once the offer of proof is concluded.
SECTION 7.16. JUDICIAL NOTICE

DEFINITION: Judicial notice is the acceptance by a court of a fact, thus dispensing with the necessity of proof thereof.

PRINCIPLE: Perhaps the primary principle of judicial notice is that “judges ought not to be more ignorant than the rest of mankind” or, stated otherwise, that “courts should at least know what everyone else knows.” Wheeler v. Aetna Casualty Surety Co., 11 Ill.App.3d 841, 298 N.E.2d 329, 334 (1st Dist. 1973), vacated as moot, 57 Ill.2d 184 (1974).


   (1) General ordinances of Illinois municipal organizations.

   (2) All Illinois county ordinances.

   (3) All laws of any state (statutory or common law).

   (4) Rules of practice of the court from which a case has been transferred.

b. Discretionary judicial notice. The court may take notice of facts generally known or readily verifiable from sources of indisputable accuracy (People v. Davis, 65 Ill.2d 157, 357 N.E.2d 792, 2 Ill.Dec. 572 (1976)), such as

   (1) Geographical facts;

   (2) General populations;

   (3) Navigability of streams;

   (4) Distance between cities;

   (5) Seasonal weather conditions;

   (6) Fair earning rate of money;

   (7) General economic conditions;

   (8) Liquor as an intoxicant;

   (9) Natural phenomena;

   (10) General value of objects;

   (11) Weights or measures;
(12) Historical events; and

(13) Calendars and dates.

**FOUNDATION:** No proof of a judicially noticed fact is required.

**NOTE:** Ensure that a proper record is made of any fact of which the court takes judicial notice by having the fact and the action of the court recited into the record, e.g., “I would ask the court to indicate for the record that judicial notice was taken of the fact that May 20, 1996, was a Monday.”

**SECTION 7.17. HABIT/ROUTINE PRACTICE**


**RULE:** 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.

**NOTE:** Foundation testimony for habit and routine practice must be specific as to date, time, and frequency. Vague, general, and ambiguous testimony will not suffice. *Grewe v. West Washington County Unit District #10*, 303 Ill.App.3d 299, 707 N.E.2d 739, 236 Ill.Dec. 612 (5th Dist. 1999).

**SECTION 7.18. COMPUTER PRINTOUTS**


**RULE:** Such printouts are admissible when it is shown that

a. The electronic computing equipment is recognized as standard equipment;

b. The entries were made in the regular course of business at or reasonably near the time of the occurrence of the event recorded; and

c. The sources of information, the method, and the time of preparation indicate its trustworthiness and justify its admission. *Grand Liquor, supra.*
SECTION 7.19. COMPUTER-GENERATED DOCUMENTS

STANDARD FOR AUTHENTICATION:

Computer-generated documents that do not require human input are not hearsay and are admissible.

EXAMPLE:

A computerized record of all incoming phone numbers compiled automatically by the computer as calls came in was admissible, as the record was not the statement of a person. *People v. Holowko*, 109 Ill.2d 187, 486 N.E.2d 877, 93 Ill.Dec. 344 (1985).

GENERAL RULE:

The printout of results of computerized or electronic data that represent self-generated records of the operation of a mechanical or electronic device are not hearsay and their admission into evidence requires only foundation proof of the method of the recording of the information and the proper functioning of the device by which it was effected. *Id.*

TYPES OF COMPUTER-GENERATED DATA:

a. Cell phone records.

b. GPS receiver records.

c. Seismograph readings.

d. Data recorder readings (black boxes).

e. Flight recorder data.

FOUNDATION:

Introducing the exhibit through a witness who is familiar with how the records were kept and who is familiar with the method, sources, and time of preparation so as to indicate the trustworthiness of the document is necessary. *Grand Liquor Co. v. Department of Revenue*, 67 Ill.2d 195, 367 N.E.2d 1238, 10 Ill.Dec. 472 (1977).

NOTE:

Records not admissible under this rule may be admissible as business records or public records.

SECTION 7.20. FAXED DOCUMENTS

GENERAL RULE:

A proper foundation for a “faxed” document is presented when testimony is elicited that the sources of the information, the method, and the time of preparation indicate the trustworthiness of the document. “Evidence which can establish the foundation requirement, by establishing the trustworthiness of such a document, includes testimony by a person who can explain a business’ procedures for compiling information and methods for checking for mechanical and human error; explain the operation of the machine and testify that the machine properly did what it was supposed to do; and testify as to the mechanical reliability of the machine.” *People v. Hagan*, 145 Ill.2d 287, 583 N.E.2d 494, 504, 164 Ill.Dec. 578 (1991).
A facsimile also may be introduced into evidence under the business-records exception to the hearsay rule. *People v. Mormon*, 97 Ill.App.3d 556, 422 N.E.2d 1065, 52 Ill.Dec. 856 (1st Dist. 1981).

**AUTHORITY:** S.Ct. Rule 236, “Admission of Business Records in Evidence,” states:

(a) Any writing or record, whether in the form of any entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of the act, transaction, occurrence, or event, if made in the regular course of any business, and if it was the regular course of the business to make such a memorandum or record at the time of such an act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but shall not affect its admissibility. The term “business,” as used in this rule, includes business, profession, occupation, and calling of every kind.

For a sample foundation, see §7.9 above.

**SECTION 7.21. POLICE REPORTS**

**GENERAL**


**RULE:**

**EXCEPTIONS:**

a. Refresh recollection. A police report can be used to refresh recollection (see §5.6 above regarding refreshing recollection) or to impeach the witness. *People v. Williams*, 159 Ill.App.3d 527, 512 N.E.2d 35, 111 Ill.Dec. 131 (1st Dist. 1987).

**NOTE:** A police report used to refresh recollection is not then admissible. *People v. Morris*, 65 Ill.App.3d 155, 382 N.E.2d 383, 22 Ill.Dec. 63 (1st Dist. 1978).


**SECTION 7.22. MORTALITY TABLES**

**GENERAL**

Mortality and annuity tables are admissible as exceptions to the hearsay rule. *Allendorf v. Elgin, Joliet & Eastern Ry.*, 8 Ill.2d 164, 133 N.E.2d 288 (1956).
Mortality and annuity tables are admissible in evidence to show the expectancy of human life. When such tables are shown to be of standard authority, they may be received without any further proof of their authenticity and correctness, as under such circumstances the court will, it is said, take judicial notice of their genuineness and authoritativeness. *Hann v. Brooks*, 331 Ill.App. 535, 73 N.E.2d 624 (2d Dist. 1947).


**SECTION 7.23. PRIOR OCCURRENCES**

**PURPOSE:** A prior occurrence may be relevant to show

a. The existence of a particular danger or hazard; or

b. Notice of the danger on the part of the defendant.

**FOUNDATION:** A plaintiff is required to lay a foundation of substantive similarity between the prior and present accidents. *Mikus v. Norfolk & Western Ry.*, 312 Ill.App.3d 11, 726 N.E.2d 95, 244 Ill.Dec. 499 (1st Dist. 2000).

**SECTION 7.24. ABSENCE OF SIMILAR ACCIDENTS**

**PURPOSE:** To establish the lack of negligence for a particular injury through evidence of a lack of prior injuries.

**FOUNDATION:** To lay a proper foundation for testimony concerning the absence of similar prior accidents, the offering party must show that the absence occurred during the use of equipment similar to the injury-producing equipment. *Darrough v. White Motor Co.*, 74 Ill.App.3d 560, 393 N.E.2d 122, 30 Ill.Dec. 467 (4th Dist. 1979). The offering party must also show that the absence occurred under conditions substantially similar to those surrounding the accident that gave rise to the suit. *Smith v. Verson Allsteel Press Co.*, 74 Ill.App.3d 818, 393 N.E.2d 598, 30 Ill.Dec. 562 (1st Dist. 1979). See also *Parson v. City of Chicago*, 117 Ill.App.3d 383, 453 N.E.2d 770, 72 Ill.Dec. 895 (1st Dist. 1983).
CHAPTER VIII. APPENDICES

SECTION 8.1. SAMPLE TRIAL PREPARATION SYSTEMS

The following are sample trial preparation systems. No one system is preferred by all attorneys or suited to all cases. You may want to adapt elements of each in developing your own system, depending on the case and your preferences.

SAMPLE SYSTEM #1: A system commonly used in cases of varying complexity when preparing for trial in earnest.


    b. May include (using tab divisions)

        (1) Things to do;
        (2) Thoughts;
        (3) Pleadings;
        (4) Exhibit list/log;
        (5) Witness list;
        (6) Voir dire;
        (7) Opening statement;
        (8) Closing argument;
        (9) Jury instructions;
        (10) Research;
        (11) Chronology;
        (12) Key exhibits; and
        (13) Miscellaneous.

EXHIBIT BOX:  a. Centralized location for documents and other exhibits you expect to use at trial.

    b. Index it for ready access.

    c. Should include
(1) Original exhibits (pre-marked when necessary);

(2) Accompanying evidence memos or other research briefs or materials on admissibility; and

(3) Sufficient copies of exhibits for you, the court, and all other counsel.

d. If planning to read multiple interrogatories or requests for admission, determine whether local rule or practice will require you to prepare in advance cut-and-paste extracts of the designated portions and, if so, include them in exhibit box.

**WITNESS BINDER:**

a. Prepare for *each* expected witness.

b. Should include

   (1) Witness’ personal data sheet, including

      (a) Home address;

      (b) Work address;

      (c) Home telephone number; and

      (d) Work telephone number;

   (2) Copy of deposition transcript and summary;

   (3) Copy of prior witness statements;

   (4) Copy of expected trial exhibits about which witness may testify;

   (5) Interrogation outline;

   (6) Copy of notice to attend trial or return on subpoena; and

   (7) Thoughts.

**WITNESS LIST:**

a. List *all* expected witnesses.

b. Use this list to

   (1) Decide the order of calling witnesses; and

   (2) Verify that witness’ trial attendance has been ensured through
(a) Proper notice;

(b) Subpoena; or

(c) Agreement.

EXHIBIT LIST:  

a. List all exhibits expected to be used at trial.

b. Should indicate

   (1) Whether there has been an accounting yet for the original exhibit;

   (2) Identity of witnesses to be questioned about the exhibit; and

   (3) How and when the exhibit will be put into evidence.

c. Make copy of each document to bring to trial.

SAMPLE SYSTEM #2: Begins with setting up files when case is accepted.

SET UP FILES: Use a method of setting up and organizing your files from the outset to meet your trial objectives, *e.g.*, by establishing as many files as you need for

a. Correspondence;

b. Pleadings;

c. Motions;

d. Discovery documents, including a chronological index sheet;

e. Witness materials, *e.g*.,

   (1) Statements and declarations; and

   (2) Deposition transcripts and summaries;

f. Documents, including

   (1) An index of document files on which the source of all documents is noted so that you can quickly refer to this information if you need it to lay a foundation to introduce a document; and

   (2) Summaries of any voluminous documents;

g. Your attorney notes;
h. Legal research; and

i. Strategy ideas, e.g.,

   (1) Voir dire;

   (2) Opening and closing statements; and

   (3) Other trial tactics.

Consider using a computer program to organize your case materials.

ORGANIZE PHYSICAL EVIDENCE:

Consider the kinds of demonstrative and physical evidence you will want to introduce at trial.

REVIEW YOUR CASE FILE:

As you review the file, analyze the uses and sources of potential evidence in light of elements of each side’s case that you have to prove and disprove.

Outline Your Case:

a. Consider preparing an issue outline covering

   (1) Every element you must establish to prevail, e.g.,

       (a) If you represent the plaintiff, review the elements of the causes of action you pleaded;

       (b) If you represent the defendant, review the elements of your answer, affirmative defenses, and cross or counterclaims;

       (c) Determine any changes since the complaint and answer were filed, e.g., because of court orders or new law;

   (2) All facts you need to prove for each element of your claim or defense; and

   (3) All evidence you need to offer to prove the facts.

b. Divide the outline into categories that allow you to quickly identify evidence needed at trial to prove or disprove an issue, e.g., by

   (1) Issues and sub-issues;

   (2) Participant witnesses;

   (3) Foundational witnesses (if needed to authenticate evidence and these witnesses are different from participant witnesses);
c. Under each category, list

(1) Specific issue and evidentiary and legal sub-issues supporting it;

(2) Various items of proof for each issue or sub-issue, e.g.,

   (a) Names of participant witnesses;

   (b) Names of foundational witnesses;

   (c) Documents; and

   (d) Demonstrative evidence; and

(3) Law applying to each issue or sub-issue.

d. For sample issue, outline format.

Outline Opposing Side’s Case:

Use the outline you developed to prove your case and fill in with elements, facts, and evidence you believe the other side will use to try to prevail.

Outline Your Rebuttal:

Use the outline you developed to prove the other side’s case and note how you would rebut each point and with what evidence.

REVIEW YOUR EVIDENCE:

Use the issue outline and sort through all available evidence to

a. Select what you will use; and

b. Identify any need for additional evidence.

ARRANGE EVIDENCE:

Arrange the evidence in the order in which you intend to present it.
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SECTION 8.17. PETITION

This form was written by Paul T. Manion and is included in Ch. 22, *Discovery Before Suit To Identify Parties, ILLINOIS CAUSES OF ACTION — ELEMENTS, FORMS & WINNING TIPS: ESTATE, BUSINESS & NON-PERSONAL INJURY ACTIONS* (IICLE, 2008). The author thanks Mr. Manion for allowing it to be used in this QuickGuide.

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