

# SURVEY OF ILLINOIS LAW: THE INS AND OUTS OF THE NEW ILLINOIS EVIDENCE RULES

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## I. INTRODUCTION

The new Illinois Rules of Evidence (IRE), which took effect January 1, 2011, primarily reaffirm earlier laws dispersed throughout cases, statutes and rules.<sup>1</sup> They modernize many evidence guidelines by incorporating “uncontroversial developments” found in the Federal Rules of Evidence (FRE) and in the laws of forty-four other surveyed jurisdictions.<sup>2</sup> The new rules are said to change Illinois evidence laws in only two areas: they add opinion testimony as a method of proving character and they eliminate certain requirements within the hearsay exceptions on statements of then existing mental, emotional or physical condition.<sup>3</sup>

The new rules reference some, but far from all, preexisting statutes whose validity “are not affected by” the IRE.<sup>4</sup> The rules contemplate future General Assembly laws on evidence as long as there is no conflict with the IRE.<sup>5</sup> Finally, when there is redundancy between IRE and another Illinois Supreme Court Rule, “reference should be made solely to the appropriate Illinois rule of evidence.”<sup>6</sup>

Other American states have also codified their evidence laws on the FRE model and, accordingly, both federal and other state experiences should be helpful to Illinois lawyers and judges.

There are a few pitfalls, however. First, the legislative history behind the FRE is dispersed so that its persuasive use in Illinois courts will be challenging. Second, the role of the General Assembly in promulgating new evidence laws is uncertain. Uncertainty arises, in part, because

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1. ILL. R. EVID. committee commentary.

2. *Id.*

3. *Id.*

4. *Id.* (“It is important to note that the Illinois Rules of Evidence are not intended to abrogate or supercede any current statutory rules of evidence.”)

5. ILL. R. EVID. 101 (“A statutory rule of evidence is effective unless in conflict with a rule or a decision of the Illinois Supreme Court.”).

6. ILL. R. EVID. committee commentary.

evidence guidelines often implicate substantive law policies, thus prompting General Assembly responsibilities. Perhaps at least some evidence lawmaking in Illinois should be undertaken jointly by legislators and judges. Third, not all IRE provisions are modeled on FRE provisions so that care is required when utilizing federal precedents. IRE diversions from the FRE are sometimes expressly referenced in the notes accompanying the IRE. At other times, open issues of Illinois evidence law are recognized; here there may be diversions from the FRE. Fourth, even when the IRE and FRE appear similar, at times they will (and should) be read differently. Fifth, there may be more choice of law issues when applying the IRE rather than the FRE. Finally, there are some major questions left unaddressed in the IRE and little guidance from the rule makers and others on who will answer, when answers will come and what the answers will likely be.

## II. LEGISLATIVE HISTORY

The relevant legislative history underlying the FRE varies depending upon the ultimate lawmaker. The initial FRE took effect only upon Congressional enactment. The U.S. Supreme Court's first proposed evidence rules, with their extensive Advisory Committee Notes, were not fully enacted by Congress. Much evidence codification, as with FRE 501 and the rejection by Congress of the U.S. Supreme Court's explicit proposals on privileges, arose initially from extensive Senate and House debates rich with Congressional reports that continue to be used today by those deciphering the FRE.<sup>7</sup> Since the FRE enactment, further codified evidence rules, like the rules on similar crimes and conduct in sexual assault and child molestation cases,<sup>8</sup> were developed primarily in Congress. Yet, many of the initial FRE proposals (as on "relevant evidence"),<sup>9</sup> as well as some later FRE rulemaking initiatives (as on subsequent remedial measures),<sup>10</sup> were chiefly drafted by the U.S. Supreme Court's Advisory

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7. A history of the enactment of the original FRE is found in 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE & PROCEDURE* § 5006 (2d ed. 2005) [hereinafter WRIGHT & GRAHAM] and James Wm. Moore & Helen L. Bendix, *Congress, Evidence and Rulemaking*, 84 YALE L.J. 9 (1974) [hereinafter Moore & Bendix]. A history of more recent FRE lawmaking is found in WRIGHT & GRAHAM, at § 5007.

8. FED. R. EVID. 413-415 (effective September 13, 1994 via Violent Crime Control & Law Enforcement Act, Pub. L. 103-322, § 320935, 108 Stat. 2137).

9. FED. R. EVID. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.")

10. FED. R. EVID. 407 ("When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a

Committee. The Advisory Committee Notes, instead of the Congressional reports, guide these rules.

### III. THE ROLE OF LEGISLATION

The Illinois Supreme Court recognized as appropriate both past and future evidence lawmaking by the Illinois General Assembly. Yet the roles of legislators clearly differ in Washington, D.C., Springfield, Illinois, and other American states. In Washington, Congress chiefly has the last word. New or amended evidence rules proposed by the U.S. Supreme Court are transmitted to Congress for review.<sup>11</sup> “Such rules shall not abridge, enlarge or modify any substantive right.”<sup>12</sup> Transmissions “take effect . . . unless otherwise provided by law.”<sup>13</sup> As to evidentiary privileges, transmissions “shall have no force or effect unless approved by Act of Congress.”<sup>14</sup>

In Springfield, there are no comparable transmissions of rule proposals and no express constraints involving substantive rights. While the Illinois Code of Civil Procedure limits Illinois Supreme Court rulemaking to matters “supplementary to, but not inconsistent with” the Code,<sup>15</sup> the Illinois Supreme Court Rules seemingly make a rule supplementary only to a non-Code statute regulating “the procedure in particular kind of action,”<sup>16</sup> as with probate,<sup>17</sup> parentage,<sup>18</sup> and marriage

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product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.”). As noted later, *infra* note 34, some Illinois General Assembly input into any new subsequent remedial measures rule in Illinois (there is now no IRE 407) seems appropriate given prior General Assembly interests, as found in 735 ILL. COMP. STAT. 5/2-2105 (product liability claims).

11. 28 U.S.C. § 2074(a) (2006).

12. 28 U.S.C. § 2072(b).

13. 28 U.S.C. § 2074 (a).

14. 28 U.S.C. § 2074(b). On ultimate Congressional authority, *see, e.g.*, Benjamin H. Barton, An Article I Theory of the Inherent Powers of the Federal Courts (March 15, 2011), <http://ssrn.com/abstract=1787400>.

15. 735 ILL. COMP. STAT. 5/1-104(a) (2010).

16. ILL. SUP. CT. R. 1. In the federal district courts, comparably, there are or have been special statutory evidence laws beyond the FRE and the preceding general common law principles. Special laws, at times, guide admiralty, bankruptcy and copyright proceedings. WRIGHT & GRAHAM, *supra* note 7, § 5004.

17. “The Civil Practice Law and all existing and future amendments and modifications thereof and the Supreme Court Rules now or hereafter adopted in relation to that Law shall apply to all proceedings under this Act, except as otherwise provided in this Act.” 755 ILL. COMP. STAT. 5/1-6 (2010).

18. *See, e.g.*, *People ex. rel. Sheppard v. Money*, 124 Ill.2d 265, 284-85, 529 N.E.2d 542, 551 (1988) (“Establishment of paternity, determination of child support obligations, and enforcement of those obligations are indeed regulated by a statute other than the Civil Practice Law or our rules”; the “procedural requirements” of the Parentage Act “are not an unconstitutional legislative encroachment upon the judiciary,” as long as “they do not conflict with a rule of this court.”).

dissolution.<sup>19</sup> As for judicial review of Illinois administrative agency actions, the General Assembly usually dictates procedures.<sup>20</sup>

In other American states, the roles of legislators differ from the approaches taken by Washington, D.C. and Springfield. For example, in Kentucky, the evidence rules were a “joint effort” by the legislature and high court when first adopted in the early 1990s.<sup>21</sup> The rules were passed by the legislature and then adopted by the court “to the extent that they may have constituted a rule of practice or procedure.”<sup>22</sup> Under the Kentucky constitution, the high court has had for some time exclusive authority to enact “rules of practice and procedure for the Court of Justice.”<sup>23</sup> Since initial enactment of the evidence rules, further changes in Kentucky evidence laws have been guided by a rule requiring the high court to report possible rule amendments to the legislature, which may disapprove;<sup>24</sup> a rule recognizing the legislature “may amend any proposal reported by the Supreme Court”;<sup>25</sup> and, a rule noting that the legislature “may adopt amendments or additions to the Kentucky Rules of Evidence not reported.”<sup>26</sup> Legislative changes, however, are limited by the exclusive judicial authority over rules of practice and procedure.<sup>27</sup>

In contrast to Kentucky, practice and procedure rules are explicitly distinguished constitutionally from evidence rules in Missouri. The Missouri Supreme Court may establish rules of practice, procedure and pleading for all courts.<sup>28</sup> But, these rules “shall not change substantive

19. 750 ILL. COMP. STAT. 5/802 (2010) (“The Supreme Court . . . and the respective circuit courts, may adopt such rules as they deem necessary and expedient” to carry out the provisions of the Illinois Marriage and Dissolution of Marriage Act). See also *Strukoff v. Strukoff*, 76 Ill.2d 53, 389 N.E.2d 1170 (1979); *People ex rel. Daley v. Fitzgerald*, 123 Ill.2d 175, 526 N.E.2d 131 (1988).

20. ILL. CONST. art. VI, § 6 (appellate court review); ILL. CONST. art. VI, § 9 (circuit court review). Compare *Chambers v. Indus. Comm.*, 132 Ill. App. 3d 891, 893, 478 N.E.2d 498, 499 (1st Dist. 1985) (Civil Procedure Code and Illinois Supreme Court Rules inapplicable to judicial reviews of Workmen’s Compensation Act proceedings) with *People v. ICC*, 407 Ill. App. 3d 207, 220, 941 N.E.2d 947, 958-59 (1st Dist. 2010) (some role for supreme court in regulating direct appellate court review of administrative decisions).

21. *Mullins v. Commonwealth*, 956 S.W.2d 210, 211 (Ky. 1997). This joint effort was “a polite fiction” recognizing “some parts of the rules fell within the sole purview of the legislature (substantive law), whereas others fell within the sole purview” of the high court (practice and procedure). *Commonwealth v. Chauvin*, 316 S.W.3d 279, 285 (Ky. 2010). The fiction avoided a fight “over which was which.” *Chauvin*, 316 S.W.3d at 285.

22. *Chauvin*, 316 S.W.3d at 285.

23. KY. CONST. pt. 1, § 116.

24. KY. R. EVID. 1102(a).

25. KY. R. EVID. 1102(b).

26. *Id.*

27. *Chauvin*, 316 S.W.3d at 284.

28. MO. CONST. art. V, § 5.

rights, or the law relating to evidence.”<sup>29</sup> And, in contrast to Kentucky, high court “rules governing practice and procedure in civil and criminal cases in all courts” in Alaska may be changed by legislators in the General Assembly by two-thirds vote of the members elected to each house.<sup>30</sup>

In Illinois, the ultimate responsibility for new evidence laws applicable in the Illinois circuit courts lies with the Illinois Supreme Court.<sup>31</sup> For most new evidence rules (and certainly for common law developments), General Assembly input should be limited, at best, with an even more limited role for legislators in evidence issues involving attorney regulation<sup>32</sup> and jury trial procedures.<sup>33</sup> Yet when evidence laws will, or may, significantly impact substantive rights, or civil or criminal procedure laws now and traditionally addressed by the General Assembly,<sup>34</sup> perhaps

29. *Id.* (no changes as well to laws relating to the oral exam of witnesses, juries, jury trials or appeals). Evidence laws in Missouri primarily are located in the Revised Statutes, Chapter 490.
30. ALASKA CONST. art. IV, § 15 (also includes “rules governing the administration of all courts”). In Alaska, evidence laws primarily appear in Alaska Statutes § 09.25.
31. The Advisor to the Illinois Supreme Court Special Committee on Illinois Evidence (Committee) says little about this authority in his latest treatise, which follows his earlier treatise that was significantly used by the Committee. MICHAEL H. GRAHAM, GRAHAM’S HANDBOOK OF ILLINOIS EVIDENCE, at xiii, § 101 (Wolters Kluwer, 10th ed. 2010) [hereinafter GRAHAM’S HANDBOOK]. *See, e.g.*, ILL. R. EVID. 101 (“A statutory rule of evidence is effective unless in conflict with a rule or decision of the Illinois Supreme Court.”). *See also* Jeffrey A. Parness & Bruce Elliot Keller, *Increased and Accessible Judicial Rulemaking*, 8 N. ILL. U. L. REV. 817 (1988) (discussing the history of increased, and at times exclusive, Illinois Supreme Court authority for procedural laws governing Illinois circuit court actions).
32. *See, e.g.*, *People ex rel. Brazen v. Finley*, 119 Ill.2d 485, 492, 519 N.E.2d 898, 901 (1988) (“This court’s sole authority to regulate and discipline attorney conduct arises from our inherent power to govern admission to the practice of law in Illinois.”). *But see* Eli Wald, *Should Judges Regulate Lawyers?*, 42 MCGEORGE L. REV. 149, 174–75 (2010) (“[T]he simplistic assumption that judges should regulate lawyers” must be abandoned, with “a contextual comparative institutional analysis scrutinizing the promulgation and enforcement abilities of the judiciary broken into various elements . . . and to contrast them with those of alternative regulatory bodies.”).
33. *See, e.g.*, *Lebron v. Gottlieb Mem’l Hosp.*, 237 Ill.2d 217, 238, 930 N.E.2d 895, 908 (2010) (statutory caps on noneconomic damages in medical malpractice cases invalidated as they constituted a “legislative remittitur” that “unduly” encroached upon “the fundamental judicial prerogative of determining whether a jury’s assessment of damages is excessive within the meaning of law”); *People v. Jackson*, 69 Ill.2d 252, 260, 371 N.E.2d 602, 606 (1977) (invalidating Code of Criminal Procedure provision granting to attorneys the right to examine potential jurors personally).
34. Substantive rights possibly impacted by evidence laws include trade secret protections. Procedural laws now and traditionally addressed by the General Assembly include subsequent remedial measure evidence in product liability cases, 735 ILL. COMP. STAT. 5/2-2105, which may be preempted if a new IRE 407 is adopted. Such an adoption would likely speak to subsequent remedial measures; such a new rule was contemplated by the Special Evidence Committee. GINO L. DIVITO, THE ILLINOIS RULES OF EVIDENCE; A COLOR-CODED GUIDE CONTAINING THE NEW RULES, THE COMMITTEE’S GENERAL AND SPECIFIC COMMENTS, A COMPARISON WITH THE FEDERAL RULES OF EVIDENCE, AND ADDITIONAL COMMENTARY 30–31 (2010), available at [http://www.tdrllawfirm.com/downloads/Illinois\\_Rules\\_of\\_Evidence\\_Color-Coded\\_Guide.pdf](http://www.tdrllawfirm.com/downloads/Illinois_Rules_of_Evidence_Color-Coded_Guide.pdf). [hereinafter DIVITO]. Procedural laws now and traditionally addressed by the General Assembly also include evidentiary presentations in Illinois circuit courts when final administrative agency

joint lawmaking by Illinois legislators and judges (as in Kentucky or as with General Assembly representation on judicial rulemaking bodies) is advisable, because later thorny separation of powers issues will be avoided,<sup>35</sup> though Supreme Court expertise should merit significant deference.<sup>36</sup>

#### IV. IRE DIVERSIONS FROM THE FRE

As the IRE chiefly codify existing evidence laws, many of which differ from the FRE, there are explicit references in the IRE to the continuing diversions. For example, as to expert testimony, IRE 702 confirms Illinois as a Frye state while FRE 702 operates under the Daubert standard.<sup>37</sup> And, as to former testimony and hearsay exceptions, IRE 804(b)(1) speaks to “an evidence deposition” while FRE 804(b)(1) covers “a deposition” because the Federal Civil Procedure Rules (FRCP) do not distinguish between discovery and evidence depositions.

There are also notable absences from the IRE of provisions in the FRE. Diversions here are not inevitable. Illinois evidence law simply remains uncertain. For example, there is no IRE 502. FRE 502, added in 2008 and coordinated with FRCP 26,<sup>38</sup> addresses waivers of some

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decisions are reviewed. *See, e.g.*, 735 ILL. COMP. STAT. 5/3-110 (2010) (no new or additional evidence is allowed during judicial review); ILL. CONST. art. VI, § 9 (“Circuit courts shall have such power to review administrative action as provided by law.”).

35. Recently, similar advice was given to the Connecticut high court. Thomas A. Bishop, *Evidence Rulemaking: Balancing the Separation of Powers*, 43 CONN. L. REV. 265, 267 (2010). On Congressional actions in adopting the FRE, Professors Wright and Graham say, “we can say that by intervening in the making of the Evidence Rules Congress gave them a broader claim to legitimacy than they might have otherwise had” (meaning there could be no Rules Enabling Act challenges). WRIGHT & GRAHAM, *supra* note 7, at § 5006.
36. *See, e.g.*, Moore & Bendix, *supra* note 7, at 38 (“There has thus been a policy of Congressional deferral to Court rulemaking. This policy is wise . . . As demonstrated by the Rules of Evidence, the House effort at statutory rulemaking, though undertaken in a serious, objective and scholarly spirit, has shown the value of the previous congressional policy of according Court-promulgated rules a substantial presumption of wisdom. In the future, rulemaking should be left in the hands of the judiciary.”). Too much exclusive judicial rulemaking could prompt backlash, as with reforms like the 2011 proposed Arizona constitutional amendment. S.J. Res. 1041, 49th Leg., 1st Reg. Sess. (Ariz. 2009) (provides rules adopted by supreme court may be amended or repealed by the legislature or by the public via initiative and declares the authority to enact substantive, procedural, and evidentiary laws is not a power inherent in the judiciary but is a legislative power inherent in the legislature and the people). One example of legislative/judicial tensions in evidence lawmaking is found in *Leads v. Fields*, 245 P.3d 911 (Ariz. Ct. App. 2011).
37. The Comment to IRE 702 “confirms that Illinois is a Frye state . . . as set forth in *Donaldson v. Central Illinois Public Service Co.*, 199 Ill.2d 63 (2002).” ILL. R. EVID. 702 committee’s cmt.
38. Federal Rule of Evidence 26(b)(5)(B) provides:  
 Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose

disclosed, and some related and undisclosed, information arguably subject to attorney-client privilege or work-product protection. In the federal courts under FRE 502, certain inadvertent disclosures of some information operate as waivers of the disclosed information and related but undisclosed information. Other inadvertent disclosures only waive the protections for the disclosed information.<sup>39</sup> Outside of the materials guided by FRE 502, the federal courts are split on waiver standards.<sup>40</sup>

With no explicit rule in Illinois, case law governs waivers. Precedents have been described as unclear. One federal district judge found the Illinois appellate courts split on whether an inadvertent disclosure of attorney-client communication can constitute a waiver, with no Illinois Supreme Court authority.<sup>41</sup> Work product protections are narrower in Illinois courts than in federal courts, with a privilege for only opinion work product.<sup>42</sup> Illinois precedents on waiving opinion work product protections are also unclear.<sup>43</sup>

Waivers outside of attorney-client privilege and work-product protections will be difficult in Illinois as they are guided by a greater mix of rules and statutes than operate in the federal courts. In the federal courts, the FRE direct that in the absence of statute, nonconstitutional privilege laws are “governed by the principles of common law” developed “in the light of reason and experience.”<sup>44</sup> Congress has not said much about longstanding, or new, privileges.<sup>45</sup> By contrast, the Illinois General

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the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

FED. R. EVID. 26(b)(5)(B).

39. *Id.*

40. WRIGHT & GRAHAM, *supra* note 7, at Evidence Rule 502 (outside FRE 502 (i.e., disclosures outside a federal proceeding or federal office), the lower federal courts have reached differing conclusions on the standards for waiver, with few courts finding intent to disclose is necessary, with a majority finding careless disclosure is necessary, and with some courts recognizing waivers for any inadvertent disclosures). *See also* Gray v. Bicknell, 86 F.3d 1472, 1482–84 (8th Cir. 1996) (describing similar differences amongst state courts).

41. Howell v. Joffe, 483 F. Supp. 2d 659 (N.D. Ill. 2007). *See also* Dalen v. Ozite Corp., 230 Ill. App. 3d 18, 26–30, 594 N.E.2d 1365, 1370–72 (2d Dist. 1992) (both parties invoked federal case law “since Illinois courts have been silent”).

42. ILL. SUP. CT. R. 201(b)(2).

43. *See, e.g., Dalen*, 230 Ill. App. 3d at 26–30, 594 N.E.2d at 1370–72 (finding Illinois courts “silent” while opining that any law on “waiver of attorney-client privilege . . . applies to waiver of the work product doctrine.”). *See also* W. States Ins. Co. v. O’Hara, 357 Ill. App. 3d 509, 518, 828 N.E.2d 842, 849 (4th Dist. 2005) (citing Waste Mgmt., Inc. v. Int’l Surplus Lines Ins. Co., 144 Ill.2d 178, 196, 579 N.E.2d 322, 330 (1991)) (opinion work product is discoverable, without waiver, “upon a showing of impossibility of securing similar information from other sources.”).

44. FED. R. EVID. 501.

45. *But see* 26 U.S.C. § 7525(a) which says, in part:

(1) **General rule.**—With respect to tax advice, the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also apply to a communication between a taxpayer and any

Assembly, in the Civil Procedure Code,<sup>46</sup> often has spoken on privileges, including husband and wife (both testimonial<sup>47</sup> and communications)<sup>48</sup>; physician and patient;<sup>49</sup> informant's;<sup>50</sup> clergy;<sup>51</sup> reporter's;<sup>52</sup> and voter's.<sup>53</sup>

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federally authorized tax practitioner to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney.

(2) **Limitations.**—Paragraph (1) may only be asserted in—

(A) any noncriminal tax matter before the Internal Revenue Service; and

(B) any noncriminal tax proceeding in Federal court brought by or against the United States.

26 U.S.C. § 7525(a) (2006) (emphasis in original). *See also* 11 U.S.C. § 542(e) (2006) (“applicable privilege” in matters involving turnover of property to estates during bankruptcy). At times there are federal agency regulations. *See, e.g.*, 20 C.F.R. 402.95 (2010) (deliberative process, attorney work product and attorney-client communication privileges); 45 C.F.R. 5.66 (2010) (similar).

46. 735 ILL. COMP. STAT. 5/101 (2010).

47. An Illinois statute provides:

Husband and wife. In all actions, husband and wife may testify for or against each other, provided that neither may testify as to any communication or admission made by either of them to the other or as to any conversation between them during marriage, except in actions between such husband and wife, and in actions where the custody, support, health or welfare of their children or children in either spouse's care, custody or control is directly in issue, and as to matters in which either has acted as agent for the other.

735 ILL. COMP. STAT. 5/8-801 (2010).

48. *Id.*

49. An Illinois statute provides:

Physician and patient. No physician or surgeon shall be permitted to disclose any information he or she may have acquired in attending any patient in a professional character, necessary to enable him or her professionally to serve the patient, except only (1) in trials for homicide when the disclosure relates directly to the fact or immediate circumstances of the homicide, (2) in actions, civil or criminal, against the physician for malpractice, (3) with the expressed consent of the patient . . . (4) in all actions brought by or against the patient, his or her personal representative, a beneficiary under a policy of insurance, or the executor or administrator of his or her estate wherein the patient's physical or mental condition is an issue, (5) upon an issue as to the validity of a document as a will of the patient . . . (7) in actions, civil or criminal, arising from the filing of a report in compliance with the Abused and Neglected Child Reporting Act . . . (9) in prosecutions where written results of blood alcohol tests are admissible pursuant to . . . the Illinois Vehicle Code . . . In the event of a conflict between the application of this Section and the Mental Health and Developmental Disabilities Confidentiality Act to a specific situation, the provisions of the Mental Health and Developmental Disabilities Confidentiality Act shall control.

735 ILL. COMP. STAT. 5/8-802 (2010).

50. An Illinois statute provides:

Informant's privilege. (a) Except as provided in subsection (b), if an individual (i) submits information concerning a criminal act to a law enforcement agency or to a community organization that acts as an intermediary in reporting to law enforcement and (ii) requests anonymity, then the identity of that individual is privileged and confidential and is not subject to discovery or admissible in evidence in a proceeding.

735 ILL. COMP. STAT. 5/8-802.3 (2010).



It has also spoken elsewhere, as in the Mental Health and Developmental Disabilities Confidentiality Act<sup>54</sup> and the Hospital Licensing Act.<sup>55</sup>

When addressing waivers, the Illinois General Assembly has at times not spoken (as with clergy).<sup>56</sup> At other times it has spoken on waivers in differing ways, as with “written consent” as to rape crisis personnel,<sup>57</sup> “written or oral consent” as to union agent and member,<sup>58</sup> and “express consent” as to interpreters.<sup>59</sup> In the absence of statutes on waivers, one distinguished observer suggests similar common law principles will govern all waivers, that is, uniformity regardless of the underlying privilege or protection.<sup>60</sup>

When addressing waivers, the Illinois General Assembly has given no indication that privileges may be waived by those who do not hold the privilege, even those in privity with or agents of the privilege holders.

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51. An Illinois statute provides:

Clergy. A clergyman or practitioner of any religious denomination accredited by the religious body to which he or she belongs, shall not be compelled to disclose in any court, or to any administrative board or agency, or to any public officer, a confession or admission made to him or her in his or her professional character or as a spiritual advisor in the course of the discipline enjoined by the rules or practices of such religious body or of the religion which he or she professes, nor be compelled to divulge any information which has been obtained by him or her in such professional character or as such spiritual advisor.

735 ILL. COMP. STAT. 5/8-803 (2010).

52. 735 ILL. COMP. STAT. 5/8-901 (2010) (“Reporter’s Privilege. Source of information. No court may compel any person to disclose the source of any information obtained by a reporter except as provided in Part 9.”).

53. 735 ILL. COMP. STAT. 5/8-910 (2010) (“No person shall be compelled to disclose, in any proceeding conducted by a court, commission, administrative agency or other tribunal in the State, the name of any candidate for whose nomination, election or retention in office the person voted, or whether the person voted for or against any question of public policy, as defined in Section 1-3 of The Election Code, at any election held within this State.”).

54. 740 ILL. COMP. STAT. 110/1 (2010).

55. 210 ILL. COMP. STAT. 85/1 (2010).

56. 735 ILL. COMP. STAT. 5/8-803.

57. 735 ILL. COMP. STAT. 5/8-802.1(d) (2010) (“[N]o rape crisis counselor shall disclose any confidential communication . . . without the written consent of the victim . . .”).

58. An Illinois statute provides:

Union agent and union member . . . (b) A union agent may use or reveal information obtained during the course of fulfilling his or her professional representative duties: . . . (4) when, after full disclosure has been provided, the written or oral consent of the bargaining unit member has been obtained or, if the bargaining unit member is deceased or has been adjudged incompetent by a court of competent jurisdiction, the written oral consent of the bargaining unit member’s estate.

735 ILL. COMP. STAT. 5/8-803.5(b)(4) (2010).

59. 735 ILL. COMP. STAT. 5/8-911 (2010) (“Language interpreter’s privilege . . . (c) The language interpreter shall not disclose the communication without the express consent of the person who has the right to claim the underlying privilege.”).

60. GRAHAM’S HANDBOOK, *supra* note 31, at § 506.1 (on waivers of privilege by voluntary disclosure, Professor Graham combines cases involving varying privileges and suggests no distinctions).

Thus, in the rape crisis context, the “written consent of the victim” is needed under statute before a “rape crisis counselor shall disclose any confidential communication.”<sup>61</sup> But with opinion work product and attorney-client communication materials outside of Illinois, lawyers are, at times, deemed capable of waiving the protections and privileges held by their clients.<sup>62</sup>

## V. CASE LAW DIVERSIONS FOR COMPARABLE PROVISIONS

Even where the IRE and FRE have identical or similar provisions, federal and Illinois cases can still vary. Certainly, as with common law privileges, preexisting case diversions should continue. Therefore, as to privileged communications between attorneys and corporate clients, in Illinois there is the control group test even with the new IRE 501.<sup>63</sup> In the federal courts, the comparable test under FRE 501 is more protective of confidential communications.<sup>64</sup>

Further, even when there are no preexisting case diversions and the IRE follows the FRE, future case diversions are possible. While FRE cases may be “instructive,” they need not be “persuasive.”<sup>65</sup> The FRE cases have not been persuasive, for example, in some American states where a heightened standard of proof is needed for preliminary findings that prior misconduct has occurred, where such misconduct will be used to prove matters other than propensity (like proof of common plan or design).<sup>66</sup>

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61. 735 ILL. COMP. STAT. 5/8-802.1(d). *See also* 735 ILL. COMP. STAT. 5/8-803.5(b)(4) (“bargaining unit member” consents); 735 ILL. COMP. STAT. 5/8-911 (“person who has the right to claim the underlying privilege” consents).
  62. *See, e.g.,* *Mendenhall v. Barber-Greene Co.*, 531 F. Supp. 951, 955 (N.D. Ill. 1982) (assuming lawyer’s acts could waive client’s privilege); *Georgetown Manor, Inc. v. Ethan Allen, Inc.*, 753 F. Supp. 936, 938–39 (S.D. Fla. 1991) (similar). *But see* *Cities Serv. Helex, Inc. v. United States*, 618 F.2d 121 (Ct. Cl. 1977) (no case where attorney held able to waive client privilege). As originally proposed by the U.S. Supreme Court, Federal Rule of Evidence 511 would have said: “A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication.” The accompanying Advisory Committee’s Note indicates the same waiver rule applies to all privileges and is silent on whether and how a privilege holder can act through an agent. FED. R. EVID. 511 advisory committee’s note. *See also* *United States v. Gulf Oil Corp.*, 760 F.2d 292, 295 (Temp. Emer. Ct. App. 1985) (differing waiver standards for attorney-client privilege and work product protection).
  63. *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill.2d 103, 432 N.E.2d 250 (1982) (control group).
  64. *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (rejecting control group).
  65. *State v. Terrazas*, 944 P.2d 1194 (Ariz. 1997) (differing standard of proof for prior bad acts though the Arizona and federal evidence rules are similar).
  66. *State v. Aaron L.*, 865 A.2d 1135, 1152–53 (Conn. 2005) (rejecting heightened standard while recognizing other states have differed).

## VI. CHOICE OF LAW ISSUES

There will likely be far more choice of law issues when applying the IRE than the FRE. Law choices are often necessary when Illinois courts hear non-Illinois substantive law claims. Where competing laws conflict, Illinois courts must decide whether a matter implicating admissibility is substantive or procedural. If substantive, non-Illinois law usually applies; if procedural, Illinois law typically applies.

Matters implicating admissibility that are often substantive will include, if the FRE model is followed, privilege and privilege waivers,<sup>67</sup> witness competency<sup>68</sup> and the effects of presumptions.<sup>69</sup> On these matters the FRE expressly choose nonfederal laws when nonfederal claims are heard in the federal courts. As to privilege, competency and presumptions, the IRE are silent on choice of law when non-Illinois claims are heard in Illinois state courts.<sup>70</sup>

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67. FRE 501 says that “in civil actions and proceedings, with respect to an element of a claim or defense as to which state law supplies the rule of decision, the privilege of a witness, person government, state or political subdivision thereof shall be determined in accordance with state law.” FED. R. EVID. 501. Yet FRE 502 also says that “even if state law provides that rule of decision,” disclosure of “communication or information covered by the attorney-client privilege or work product protection” made “in a federal proceeding or to a federal office or agency” is governed by the Rule 502 waiver standards (distinguishing between inadvertent disclosures and intentional waivers). FED. R. EVID. 502(a), (b) & (f). The Uniform Rules of Evidence, as amended in 2005, say nothing in their privilege provisions, Rules 501–511, about choice of law. *See* FED. R. EVID. 501–511. The history of the Uniform Rules of Evidence, and their influence on the FRE lawmakers, is found in WRIGHT & GRAHAM, *supra* note 7, at § 5005.

68. FRE 601 says that generally every person is competent to be a witness, but goes on: “However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.” FED. R. EVID. 601. By contrast, the Uniform Rules of Evidence, as amended in 2005, say nothing (in Rule 601) about choice of law. *Id.*

69. FRE 302 provides: “In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State Law supplies the rule of decision is determined in accordance with State law.” By contrast the Uniform Rules of Evidence, as amended in 2005, Rule 302(c) only says: “The effect of presumption respecting a fact that is an element of a claim or defense as to which federal law provides the rule of decision is determined in accordance with federal law.” The Illinois Evidence Committee Advisor, in his treatise, does say:

Illinois courts give effect to the federal law of presumptions under the same circumstances and to the same extent to which federal courts are required to give effect to state law of presumptions. Thus a presumption representing a fact relating to a cause of action or defense as to which federal law supplies the rule of decision is to be given effect in accordance with federal law.

GRAHAM’S HANDBOOK, *supra* note 31, at § 301.11. He gives no citations and does not mention a cause of action or defense as to which some other state law, or foreign law, supplies the rule of decision. *Id.*

70. IRE 601 on witness competency contains no provision on non-Illinois claims heard in Illinois courts. One member of the special Illinois Supreme Court Committee on Illinois Evidence opined this was because such a provision rule was “unnecessary in Illinois state proceedings.” DiVITO,

Generally, in choice of evidence law settings, Illinois state courts employ the standards recognized by the American Law Institute (ALI) on conflict of laws.<sup>71</sup> At times, the ALI standards dictate whether local evidence law is always employed. For example, one standard demands the “local law of the forum determines how the content of foreign law is to be shown and the effect of a failure to show such content.”<sup>72</sup> At other times, the ALI standards envision varying balancing tests involving forum law and the law of another state. Such tests all involve which state has “the most significant relationship” with the evidentiary issue.<sup>73</sup>

As noted, privilege laws are often substantive so that such Illinois laws may not apply when a non-Illinois claim is heard in an Illinois circuit court. Thus, there can be choice of law issues regarding the scope of the attorney-client privilege. For example, in Illinois the privilege covers communications by both attorneys and clients.<sup>74</sup> Elsewhere, the attorney-client privilege extends only to communications from the client to the attorney, and thus not to communications from the attorney to the client.<sup>75</sup>

## VII. CONCLUSION

The IRE are modeled on the FRE. But the evidence lawmakers differ in Washington, D.C. and in Springfield, Illinois. Further, because most preexisting differences between Illinois and federal evidence laws continue, FRE precedents will not always guide IRE applications. Where

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*supra* note 34, at 55. The same member says IRE 302 is blank regarding presumptions “because the Erie doctrine does not apply in Illinois state courts,” the FRE 302 principle “is not required.” *Id.* at 30. The member goes on to say choice of law issues will be decided by the *Restatement Second of Conflict of Law*. *Id.* Seemingly, IRE 502 on privilege waiver was not adopted in Illinois in some form because the case law was “relatively undeveloped.” *Id.* at 52.

71. *See, e.g., Allianz Ins. Co. v. Guidant Corp.*, 373 Ill. App. 3d 652, 667, 869 N.E.2d 1042, 1056 (2d Dist. 2007) (“When faced with a claim of privilege in which there are factual connections to more than one state . . . (citation omitted) Illinois follows the Restatement (Second) of Conflict of Laws . . .”). The ALI standards frequently shun procedure/substance classifications that are often used in other choice of law settings. *Id.* at 668, 869 N.E.2d at 1056–57. *See also* Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 841 (2010) (doctrines founded on false substance/procedure dichotomy “are flawed and vulnerable”).
72. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 136(2) (1996).
73. *Compare, e.g., id.* at § 139(1) (if “contrary to the strong public policy of the forum,” local law rather than law of state with most significant relationship governs privilege) *and id.* at § 139(2) (privilege law of state with most significant relationship governs unless there exists “special reason” why forum policy should be used).
74. *See, e.g., Dickerson v. Dickerson*, 322 Ill. 492, 500, 153 N.E. 740, 743 (1926) (“It is essential to the ends of justice that clients should be safe in confiding to their counsel the most secret facts and to receive advice in the light thereof, without peril of publicity.”). *See also* *Newton v. Meissner*, 76 Ill. App. 3d 479, 394 N.E.2d 1241 (1st Dist. 1979).
75. *Harrisburg Auth. v. CIT Capital USA, Inc.*, 716 F. Supp. 2d 380 (M.D. Pa. 2010) (as New York law was like Illinois law and unlike Pennsylvania law, and as both New York and Pennsylvania governmental interests were at play in a state law claim, federal court had to choose which state privilege law to apply).

the FRE precedents are more likely persuasive, federal public policies can emanate chiefly from an array of sources including the FRE's advisory committee notes, Congressional debates and reports, and federal case precedents. Other state court policies may also persuade, however, even where the FRE model is followed, as when better policies have been implemented elsewhere. Finally, there will be more litigation on choice of evidence laws in Illinois state courts since the IRE, unlike the FRE, do not dictate many of the choices to be made when Illinois courts hear non-Illinois claims.

As before the IRE, Illinois evidence statutes—in and outside of the Civil and Criminal Procedure Codes—will often guide Illinois judges and lawyers. So too will many new and old case precedents. Yet now the IRE will also guide, operating only at times like their FRE counterparts. On occasion, as with certain privilege waivers, uncertainty over Illinois evidence laws will continue, albeit with the new set of written rules.

