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# Evidence

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## I. INTRODUCTION

The Illinois Supreme Court addressed several evidentiary issues during the *Survey* year. Of particular significance were cases relating to evidence presented by treating physician witnesses.[1] In the relevance area, the court considered the admissibility of other crimes evidence,[2] gruesome photographs,[3] subsequent remedial repairs made by defendants in tort negligence cases,[4] and breathalyzer test results.[5] The court also decided that videotaped testimony of a minor in a sexual abuse case is hearsay.[6] Finally,

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1. *See infra* notes 9-46 and accompanying text.
2. *See infra* notes 83-105 and accompanying text.
3. *See infra* notes 116-21 and accompanying text.
4. *See infra* notes 122-35 and accompanying text.
5. *See infra* notes 136-49 and accompanying text.
6. *See infra* notes 170-85 and accompanying text.

the court considered the scope of the attorney-client privilege,[7] as well as the accountant-client privilege.[8]

## II. WITNESSES

During this *Survey* period, the Illinois Supreme Court clarified the definition of expert witness for purpose of disclosure under the discovery rules. Although the court also reasserted the principle that the admission of expert testimony is within the discretion of the trial court, the court held that the trial court no longer has discretion to disallow testimony from defendant's psychiatric expert. Also, the court held that out-of-court statements made by nontestifying codefendants are prejudicial to defendant and should not be allowed.

### *A. Experts*

In *Tzystuck v. Chicago Transit Authority*,[9] the Illinois Supreme Court held that a treating physician who offers medical opinion testimony at trial is not an expert witness within the meaning of Illinois Supreme Court Rule 220(b)(1).[10] The court also held that the plaintiff is not obligated to pay the deposition fees of plaintiff's treating physician when the deposition is taken at the defendant's

7. *See infra* notes 186-201 and accompanying text.

8. *See infra* notes 202-18 and accompanying text.

9. 124 Ill. 2d 226, 529 N.E.2d 525 (1988). For purposes of this appeal, the court consolidated *Tzystuck* with Diminskis v. Chicago Transit Authority, 155 Ill. App. 3d 585, 508 N.E.2d 215 (1st Dist. 1987). In *Diminskis*, the plaintiff brought suit individually and as plenary guardian of her husband who was struck and injured by a CTA bus. *Tzystuck*, 124 Ill. 2d at 230, 529 N.E.2d at 527. Before the trial, the CTA requested that plaintiff identify all expert witnesses who would testify at trial. *Id.* at 231, 529 N.E.2d at 527. Plaintiff responded that treating physicians would testify at trial but did not specifically name Dr. Kelvin Von Roenn, the neurosurgeon who treated plaintiff following the injury. *Id.* The plaintiff previously disclosed Von Roenn's name in response to an interrogatory and provided his medical treatment records. *Id.* After the case was set for trial, plaintiff told defendant that he intended to call Von Roenn, and the trial court granted defendant leave to depose the physician. *Id.* At trial, Von Roenn testified over defendant's objections. *Id.* His opinion testimony included the extent of plaintiff's injuries and the prospect for recovery. *Id.* After the trial court ruled in plaintiff's favor, the defendant appealed, arguing that Von Roenn's testimony should have been barred because plaintiff failed to disclose that the physician witness would testify as an expert pursuant to Rule 220(b)(1). *Id.* The appellate court affirmed, and the Illinois Supreme Court granted defendant's petition for leave to appeal. *Id.* at 232, 529 N.E.2d at 527. For further discussion of the facts of *Tzystuck* and *Diminskis*, see *infra* Bingle and Meyer, *Torts*, 21 LOY. U. CHI. L.J. 661 (1990); Troy and Fehringer, *State and Local Government*, 21 LOY. U. CHI. L.J. 601 (1990).

10. 124 Ill. 2d at 235, 529 N.E.2d at 529. Rule 220(b)(1) provides that litigants must disclose the identity of an expert who is retained to render an opinion at trial. *Id.* at 233, 529 N.E.2d at 528 (citing ILL. REV. STAT. ch. 110A, para. 220(b)(1) (1987)).

insistence.[11]

In *Tzystuck*, plaintiff brought an action for injuries she sustained while attempting to board a Chicago Transit Authority ("CTA") bus.[12] After the trial court granted defendant's motion to take the discovery deposition of Tzystuck's treating physician and ordered Tzystuck to pay the deposition fees pursuant to Illinois Supreme Court Rule 220, plaintiff filed an objection.[13]

The defendants argued that a "treating physician" who offers a medical opinion at trial is an expert witness under the definition of expert in Rule 220(a)(1).[14] According to the rule, an expert witness is "a person who . . . 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 at trial."[15] The court agreed with defendant that this definition appears to include all witnesses with specialized knowledge superior to that of the average person; whether their opinion is formed as a treating physician or as a hired expert is irrelevant.[16] The court pointed out, however, that subsection 220(a)(1) simply defines expert qualifications; Rule 220(b)(1) addresses the more germane issue, *disclosure* of expert witnesses.[17]

The court concluded that the disclosure requirement only applies to witnesses who are retained for litigation purposes.[18] Reasoning that treating physicians' opinions are developed in the course of treatment and not in anticipation of litigation, the court held that a treating physician is not an expert witness within the meaning of Rule 220(b)(1).[19]

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11. *Id.* at 239, 529 N.E.2d at 531 (1988) (citing ILL. REV. STAT. ch. 110A, para. 220(c)(6) (1987)).

12. *Id.* at 232, 529 N.E.2d at 527.

13. *Id.* The trial court certified the question to the appellate court pursuant to Illinois Supreme Court Rule 308. The appellate court denied Tzystuck's petition to appeal; the supreme court, however, granted her petition for leave to appeal. *Id.*

14. *Id.* at 233, 529 N.E.2d at 528.

15. *Id.* (citing ILL. REV. STAT. ch. 110A, para. 220(a)(1) (1987)).

16. *Id.*

17. *Id.* at 234, 529 N.E.2d at 528. Rule 220(b)(1) provides: "In order to insure fair and equitable preparation for trial by all parties the identity of an expert who is *retained* to render an opinion at trial on behalf of a party must be disclosed by that party . . . ." *Id.* (citing ILL. REV STAT. ch. 110A, para. 220(b)(1) (1987) (emphasis added)).

18. 124 Ill. 2d at 234, 529 N.E.2d at 528. The court rejected the defendant's argument that "retained" has a broad meaning and refers to all witnesses rendering an opinion at trial. *Id.*

19. *Id.* at 234-35, 529 N.E.2d at 528-29. The court cited the committee comments to Rule 220(b)(1), which note that in drafting the Illinois rule, the Illinois General Assembly relied heavily on Rule 26(b)(4) of the Federal Rules of Civil Procedure. *Id.* at 235,

Additionally, the court did not require the plaintiff to pay his own treating physician's deposition fees.[20] Rule 204(c) provides that the deposition fees of a physician or surgeon shall be paid by the party who insists on the deposition, unless the physician or surgeon is retained as an expert, or unless the court orders otherwise.[21] Rule 220(c)(6) provides that each party shall pay all fees charged by his experts unless injustice would result.[22] The court reasoned that because treating physicians are not expert witnesses under Rule 220, Rule 204(c) rather than Rule 220(c)(6) must govern.[23] Therefore, because the defendant insisted upon taking the deposition of plaintiff's treating physician, the defendant had to pay the deposition fees.[24]

Three months after the *Tzystuck* decision, the court again addressed treating physicians and Rule 220. In *Wilson v. Chicago Transit Authority*,[25] a Dr. Treister treated the injured plaintiff from January through April of 1982.[26] At trial, the circuit court accepted Dr. Treister as plaintiff's expert witness.[27] When the physician gave his opinion as to the permanency of plaintiff's injuries, the defendant objected.[28] Defendant argued that Dr. Treister should not be allowed to give an opinion as to the injuries' permanency because the opinion would be based on an examination per-

529 N.E.2d at 529. Rule 26(b)(4) involves discovery of experts' identity and opinions and is the federal counterpart to Illinois Rule 220. *Id.* The federal advisory committee notes to Rule 26(b)(4) caution that it does not apply to the witness who gathered information as an actor in the transactions; rather, the rule applies to the witness who gathered information in preparation for trial. *Id.* (citing FED. R. CIV. P. 26(b)(4) Advisory Committee Notes (1970 amendment)). Federal decisions interpreting Rule 26(b)(4) hold that treating physicians are not within the rule's scope. *Id.*

20. *Id.* at 239, 529 N.E.2d at 531.

21. *Id.* at 239, 529 N.E.2d at 530 (citing ILL. REV. STAT. ch. 110A, para. 204(c) (1987)).

22. *Id.* (citing ILL. REV. STAT. ch. 110A, para. 220(c)(6) (1987). Rule 220(c)(6) provides: "Unless manifest injustice would result, each party shall bear the expense of all fees charged by his expert witness or witnesses." *Id.*

23. *Id.* at 239, 529 N.E.2d at 530-31.

24. *Id.* at 239-40, 529 N.E.2d at 531.

25. 126 Ill. 2d 171, 533 N.E.2d 894 (1988). The plaintiff in this case brought suit for personal injuries sustained while disembarking from a CTA bus. *Id.* at 172, 533 N.E.2d at 895.

26. *Id.* at 173, 533 N.E.2d at 895.

27. *Id.* The plaintiff initially listed Dr. Treister as an attending physician in her "notice of Personal Injury," which defendant received on March 22, 1982. *Id.* The plaintiff later listed Treister as a consulting physician in her answer to defendant's interrogatories in February 1982. *Id.*

28. *Id.* The defendant did not object to Dr. Treister's testimony concerning his treatment, care, diagnosis and opinion as to the cause of the plaintiff's injury. *Id.*

formed three years and seven months before trial.[29] The court sustained the defendant's objection.[30]

Plaintiff's counsel then posited a hypothetical question to the physician witness, who apparently of his own initiative, offered that he had briefly reexamined plaintiff the day of the trial.[31] Based on this revelation, the trial judge allowed him to render an opinion regarding the permanency of plaintiff's injuries.[32] Defendant objected, contending that, because three years had elapsed between Dr. Treister's last treatment of the plaintiff and the courtroom examination, the doctor had based his testimony upon his courtroom examination. He was no longer the treating physician, but had become an expert "retained for litigation."[33] Thus, defendant argued, because plaintiff did not comply with Rule 220, and this surprise testimony prevented defendant from adequately preparing for trial, the doctor's opinion as to permanency of the injuries should have been barred.[34]

The trial court disagreed and concluded that Dr. Treister was a treating physician, not an expert witness pursuant to Rule 220.[35] Defendant appealed, and the appellate court affirmed.[36] The Illinois Supreme Court granted defendant's petition for leave to appeal.[37] Before the supreme court, defendant argued that because plaintiff's March 1985 amended answers to interrogatories indicated that plaintiff was last seen by Dr. Treister in April 1982, defendant reasonably prepared its defense on the notion that without an expert witness and a recent examination, an opinion on perma-

29. *Id.* at 173, 533 N.E.2d at 896. The defendant relied on Henricks v. Nyberg, Inc., 41 Ill. App. 3d 25, 353 N.E.2d 273 (1st Dist. 1976), which held that "an opinion held by an expert at the time of trial is the only opinion evidence which may be considered by the trier of fact." *Wilson*, 126 Ill. 2d at 173, 533 N.E.2d at 896 (citing *Henricks*, 41 Ill. App. 3d at 28, 353 N.E.2d at 276).

30. *Id.* at 174, 533 N.E.2d at 896. The circuit court granted defendant's objection to this testimony based on the rule of *Henricks*. *Id.*

31. *Id.* Defendant argued that the record demonstrated a conceived plan of nondisclosure. *Id.* The Illinois Supreme Court, however, found that from the partial record submitted, it appeared that plaintiff's counsel seemed equally surprised by Dr. Treister's volunteered information regarding the recent examination, and counsel appeared to be operating on the assumption that no recent examination had taken place. *Id.* at 176, 533 N.E.2d at 897. This testimony occurred at a hearing outside the jury's presence. *Id.* at 174, 533 N.E.2d at 896.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 172, 533 N.E.2d at 895.

37. *Id.*

nency of injuries could not be allowed.[38]

In a four to three decision, the Illinois Supreme Court affirmed.[39] The majority concluded that the passage of three years did not transform Dr. Treister from a treating physician into an expert retained for litigation.[40] Further, the court emphasized that the defendant's claim of surprise was unfounded.[41] Even though defendant had learned through discovery that Dr. Treister was plaintiff's treating physician and was entitled to the facts and data underlying his opinion, defendant's counsel never sought to depose Dr. Treister or subpoena his medical records.[42]

In dissent, Justices Ryan, Moran and Miller argued that the majority ignored the real issue in the case, namely whether the defendant was "bushwhacked" by Dr. Treister's testimony.[43] The dissenters argued that there was no way the defense could have been prepared to respond.[44] Defendant reasonably had relied on the principle that an opinion on an injury's permanency is inadmissible when the opinion has been formed long before trial.[45]

As a result of the court's decisions in *Tzystuck* and *Wilson*, defendants will have to prepare their cases with increased vigilance in order to avoid the element of surprise. Thus, the discovery process may take on an increased importance in the litigation process.[46]

During the *Survey* period, the Illinois Supreme Court also addressed the content of expert witness opinion testimony. In *People v. Salazar*,[47] the court admitted a pathologist's opinion testimony as to the probable sequence of five gun shot wounds in the murder of a police officer.[48] The defendant objected to the sequencing tes-

38. *Id.*
39. *Id.* at 177, 533 N.E.2d at 897.
40. *Id.* at 176-77, 533 N.E.2d at 897.
41. *Id.* at 176, 533 N.E.2d at 897.
42. *Id.*
43. *Id.* at 177, 533 N.E.2d at 897 (Ryan, J., dissenting).
44. *Id.*
45. *Id.* at 178, 533 N.E.2d at 897. Justice Ryan stated that according to Henricks v. Nyberg, Inc., 41 Ill. App. 3d 25, 353 N.E.2d 273 (1st Dist. 1976), "an opinion as to the permanency of an injury formulated long before trial is not admissible." *Wilson*, 126 Ill. 2d at 177, 533 N.E.2d at 897 (Ryan, J., dissenting). Thus, Dr. Treister should not have been permitted to express an opinion as the injury's permanency. *Id.* The dissent indicated that, in denying the right to rely on the inadmissibility of evidence regarding the injury's permanency, the trial court was "just not playing by the rules." *Id.* at 178, 533 N.E.2d at 897.
46. Parenthetically, the Illinois Supreme Court curiously continues to classify a non-treating physician's statements as hearsay and thus inadmissible, even when they are properly the basis of the expert's opinion.
47. 126 Ill. 2d 424, 535 N.E.2d 766 (1988).
48. *Id.* at 458-60, 535 N.E.2d at 780-81.

timony, arguing that this testimony was speculative.[49] The trial court, however, admitted the evidence.[50] The defendant never argued that the pathologist was not qualified to answer the question.[51] Rather, the defense argued that the question called for speculation and that the answer would not be based upon a reasonable degree of medical certainty.[52]

The supreme court concluded that the circuit court did not abuse its discretion in allowing the pathologist's opinion about the sequence of chest and head wounds.[53] The pathologist's opinion turned on the amount of internal bleeding at the site of the chest wounds; if the victim had been shot first in the head, death would have been immediate and the bleeding much less in the chest wounds.[54] Thus, the pathologist's opinion was not based upon mere speculation, as the defendant claimed; instead, it required special expertise and knowledge outside the lay person's realm.[55]

The supreme court addressed a different aspect of expert testimony in *People v. Gacy*.[56] In *Gacy*, the defendant was convicted of murdering 33 young men.[57] On direct appeal to the Illinois Supreme Court, defendant contended, among other things, that the trial court erred in barring as hearsay, testimony by a defense psychiatrist as to verbatim statements made to him by defendant.[58] The trial court had relied upon *People v. Hester*[59] for the propositions that such statements should be barred as "self-serving hearsay declarations" and that defense experts should not be permitted to become conduits for defendants.[60]

Although the Illinois Supreme Court questioned the continuing vitality of *Hester*,[61] it sidestepped the issue as it was presented in

49. *Id.*

50. *Id.*

51. Defendant did not dispute the expert's qualifications or the testimony regarding the angle, distance or direction of the gunshots. *Id.* at 459, 535 N.E.2d at 780. The defendant argued that the pathologist's testimony did not rest on any well-recognized scientific principle or technique. *Id.*

52. *Id.* at 458-59, 535 N.E.2d at 780.

53. *Id.* at 461, 535 N.E.2d at 781.

54. *Id.*

55. *Id.*

56. 125 Ill. 2d 117, 530 N.E.2d 1340 (1988), *cert. denied*, 109 S. Ct. 2111 (1989).

57. *Id.* at 122, 530 N.E.2d at 1341. For twelve of these murders, the defendant received the death penalty. *Id.*

58. *Id.* at 123, 530 N.E.2d at 1341.

59. 39 Ill. 2d 489, 237 N.E.2d 466 (1968).

60. *Gacy*, 125 Ill. 2d at 130, 530 N.E.2d at 1345. The rationale is to prevent hearsay declarations from the defendant that he might want conveyed to the jury. *Id.*

61. *Id.*

*Gacy*. Although the psychiatrist was not allowed to quote Gacy verbatim, he could paraphrase Gacy's remarks, and respond to hypothetical questions. Thus, the essence of the psychiatric testimony was admitted in other ways.[62] Accordingly, because the substance of the defendant's statements was before the jury, if there was error, it was harmless.

Gacy presented similar arguments in his petition for post-conviction relief which was denied without an evidentiary hearing. In the interim between Gacy's direct appeal and his petition for post-conviction relief, the court had overruled *Hester* in *People v. Anderson*.[63] Nevertheless, relying upon the same rationale it used in deciding Gacy's direct appeal, the supreme court affirmed the trial court's denial of Gacy's petition for post-conviction relief.

*Salazar* and *Gacy* both follow the Illinois Supreme Court trend toward liberalization of the rules governing testimony by expert witnesses. The former reiterates that the admissibility of expert opinions is a matter of discretion; the latter reemphasizes that an expert may base an opinion upon statements made by the party and may repeat those statements in explaining the basis of the opinion to the jury.

### *B. Nontestifying Codefendants*

In *People v. Duncan*,[64] the Illinois Supreme Court held that when a nontestifying codefendant's statements might prejudice the jury against the other defendant, fairness dictates the severance of trials.[65] In *Duncan*, a jury found codefendants Duncan and Olinger guilty of murder, armed robbery, armed violence and conspiracy.[66] The jury sentenced Duncan to life imprisonment and Olinger was sentenced to death.[67] In its case in chief, the prosecution offered certain out-of-court statements made by Olinger to

62. *Id.* The defendant's statements were admitted insofar as they formed the basis of the expert's opinion. *Id.* at 130-31, 520 N.E.2d at 1345.

63. 113 Ill. 2d 1, 495 N.E.2d at 485 (1986), *cert. denied*, 479 U.S. 1012 (1986). In *Anderson*, the court held that a psychiatric expert may not be precluded from relating statements made to him by the defendant that figure in the diagnosis. *Id.*

64. 124 Ill. 2d 400, 530 N.E.2d 423 (1988).

65. *Id.* at 412, 530 N.E.2d at 429. The court acknowledged the importance of judicial economy but found that considerations of fairness normally outweigh this and other concerns. *Id.* The Illinois courts long have held that a choice must be made between severance, non-use of a nontestifying codefendant's admissions, or redaction to eliminate all reference to the implicated defendant. *Id.*

66. *Id.* at 403, 530 N.E.2d at 425. Duncan and Olinger apparently worked together in a scheme to take over local drug traffic. *Id.*

67. *Id.*

which Duncan objected.[68] The judge overruled defense counsel's objection to the testimony and instructed the jury to consider the statements only with regard to Olinger.[69]

On appeal, the Illinois Supreme Court reversed Duncan's convictions and remanded for a new trial.[70] Relying on *Bruton v. United States*,[71] the court analyzed the statements at issue to determine whether they implicated Duncan[72] and found that they did.[73] Subsequently, the United States Supreme Court decided *Richardson v. Marsh*[74] in which it held that redacting the defendant's name from the codefendant's statement could be sufficient to protect the defendant even if other evidence in the case could enable the jury to use the codefendant's statement to infer defendant's guilt.[75] In light of *Richardson*, the United Supreme Court vacated the Illinois Supreme Court's judgment in *Duncan* and remanded the case for reconsideration.[76]

Thus, the state court was called upon to decide whether references to Duncan clearly implicated him. Two statements were at issue in *Duncan*. In the first statement, a witness said that Olinger had referred to "Bill" in connection with the takeover of a local drug ring; Duncan's first name is William.[77] The court concluded that this reference was not tantamount to a redaction.[78] *Richardson* does not permit a codefendant's confession that refers to the other defendant by a symbol or neutral pronoun.[79]

In a second statement attributed to Olinger, he referred to "a drug courier from Kansas City";[80] other testimony linked Duncan with a drug dealer from Kansas City. Here too, the court stated that the evidence differed in kind from that found acceptable in *Richardson*. The court reasoned that in order to be effective, a re-

68. *Id.* Duncan contended that the testimony of two witnesses regarding alleged out-of-court statements by Olinger, though properly inculpatory of Olinger, also inculpated Duncan, thus improperly prejudicing the jury against him. *Id.*

69. *Id.* at 405, 503 N.E.2d at 426.

70. *Id.* at 402, 530 N.E.2d at 424.

71. 391 U.S. 123 (1968).

72. *Duncan*, 124 Ill. 2d at 405, 530 N.E.2d at 426 (citing Bruton v. United States, 391 U.S. 123 (1968) (a limiting instruction regarding out-of court statements is an inadequate substitute for the right to confrontation)). *Id.*

73. *Id.*

74. 481 U.S. 200 (1987).

75. *Duncan*, 124 Ill. 2d at 409, 530 N.E.2d at 428.

76. *Id.* at 402, 530 N.E.2d at 424.

77. *Id.* at 402, 530 N.E.2d at 425.

78. *Id.* at 408-09, 530 N.E.2d at 428.

79. *Id.* at 409, 530 N.E.2d at 428.

80. *Id.* at 404, 530 N.E.2d at 427.

daction must remove reference not only to the name, but to the defendant's very existence.[81] Thus, the second statement fell short of the *Richardson* standard in that it linked Duncan to a drug trafficker from Kansas City in the context of the other testimony. The substantial prejudice of the statement could not easily be tempered by limiting instructions to the jury.

*Duncan* is noteworthy in that, as stated in the concurring opinions of Justices Miller and Moran, its analysis goes beyond *Bruton* and *Richardson* and attempts to find a State law basis.[82]

## III. RELEVANCE

As in previous *Survey* years, the question of relevance constantly appeared in Illinois Supreme Court cases. The court considered cases involving the admission of other crimes evidence to show *modus operandi* and propensity to commit crimes. The court also reiterated two traditional rules: first, weapons are admissible if proof connects them to the defendant and the crime; second, the admissibility of gruesome photographs is within the trial court's discretion. The court set forth the proper foundation for the admission of breathalyzer test results in drunk driving cases and also held that arresting officers' certification statements are equivalent to the swearing of an oath required by the Vehicle Code. Finally, in a civil matter, the court cited policy reasons for disallowing evidence of subsequent remedial repairs by the defendant to prove tort negligence.

### *A. Other Crimes*

Evidence of other crimes may be received to show, among other factors, intent or plan. This type of evidence, however, is potentially highly prejudicial because it might mislead the jury to believe that the defendant had a disposition or propensity to commit such crime. In *People v. Evans*,[83] the Illinois Supreme Court held that evidence of other crimes was properly admitted when these crimes were substantially similar to the crime at bar.[84]

The defendant in *Evans* was charged with the murder and rape of a sixteen year-old woman in a public housing building.[85] During the trial, the court allowed testimony concerning two very similar

81. *Id.*
82. *Id.* at 416-17, 530 N.E.2d at 430-31 (Miller, J. and Moran, J., concurring).
83. 125 Ill. 2d 50, 530 N.E.2d 1360 (1988), *cert. denied*, 109 S. Ct. 3175 (1989).
84. *Id.* at 83, 530 N.E.2d at 1374.
85. *Id.* The murder took place in an elevator that was stopped between floors. *Id.*

crimes in the same complex.[86] On appeal, the defendant argued that the other crimes evidence was irrelevant because the other crimes were not substantially similar to the instant case and the prejudicial effect of the evidence outweighed its probative value.[87] The court found, to the contrary, that the evidence was highly probative of the defendant's criminal intent and design, particularly with regard to the sexual assault counts.[88] Because all of the attacks occurred in an almost-identical manner, the evidence was properly admitted.[89]

Reiterating the long-accepted principle that evidence of previous offenses is admissible if it shows motive, intent, identity, or *modus operandi*, the court in *People v. Phillips*[90] allowed evidence of a previous crime committed by defendant.[91] In *Phillips*, the defendant was convicted of murder and sentenced to death.[92] The victim was raped and strangled while her hands were tied behind her back.[93] At trial, the court allowed testimony by another woman who suffered an assault similar to the one involved in *Phillips*.

The court noted the striking similarities between the two crimes. Both victims were abducted from downtown Carbondale just three blocks away from each other. The crimes were only forty-six days apart. At some point during the abduction, each victim was placed in the trunk of a car with her hands tied. Both were taken to the

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The victim was found with her sweater and skirt pulled up and her underwear around her ankles. She had been stabbed twenty-two times. *Id.*

86. *Id.* at 83, 530 N.E.2d at 1374. One woman testified that the perpetrator entered the elevator behind her. *Id.* at 81, 530 N.E.2d at 1373. He hit a button, stopping the elevator. *Id.* He pulled on a ski mask and proceeded to fondle her. *Id.* She refused to disrobe and lie down and he beat her on the head. *Id.* The man restarted the elevator and grabbed the woman's purse, which contained a white-handled knife with a lion on it. *Id.* This incident occurred in an elevator in the same housing project as in *Evans*. *Id.* Other testimony concerned a different woman in the same building. A man got on an elevator after her and once the elevator started, he stopped it and pulled on a ski mask. He then pulled out a white-handled knife with a lion on it. He began to fondle the woman, told her to lie down and had intercourse with her. *Id.* at 81-82, 530 N.E.2d at 1373.

87. *Id.* at 80, 530 N.E.2d at 1373.

88. *Id.* The court ruled defendant's argument conclusory, stating that the evidence was highly probative of defendant's intent, particularly with regard to the rape charge. *Id.*

89. *Id.* The jury was instructed that the other crimes evidence was received solely for the limited purpose of the defendant's identification, intent and design. This was to remove any potential prejudicial effect. *Id.*

90. 127 Ill. 2d 499, 538 N.E.2d 500 (1989).

91. *Id.* at 520, 538 N.E.2d at 508 (citing People v. McKibbins, 96 Ill. 2d 176, 182, 449 N.E.2d 821, 824 (1983); People v. McDonald, 62 Ill. 2d 448, 455, 343 N.E.2d 489, 492-93 (1975); People v. Lehman, 5 Ill. 2d 337, 343, 125 N.E.2d 506, 509 (1955)).

92. *Id.* at 506, 538 N.E.2d at 501.

93. *Id.* at 507, 538 N.E.2d at 502.

industrial park where defendant's father maintained his business. Each woman was sexually assaulted.[94]

On appeal, defendant argued that the two crimes were totally dissimilar and the previous victim's testimony served only to prejudice the jury by showing that the defendant had a propensity to commit crimes.[95] Specifically, defendant asserted that one victim was violently and brutally killed and the other was treated "in a totally non-violent manner."[96] The court rejected defendant's argument that the crimes were substantially different, stating that there will always be some dissimilarity between independent crimes.[97] The test is not one of exact identity.[98]

The defendant also argued that the court's holding in *People v. Tate*[99] dictates that to demonstrate *modus operandi*, the other crime must have some distinctive feature not usually identified with a certain type of offense,[100] and such a distinctive feature was not present in this particular crime.[101] The court distinguished *Tate*, stating that the defendant in that case was attempting to admit evidence of another person's commission of a crime to support the argument that he did not commit the crime.[102] Moreover, *Tate* involved a series of events that the court characterized as "nondistinctive and capable of being found in many shoplifting and struggle cases. . . ."[103] In *Phillips*, on the other hand, the distinctive similarities between the two crimes were striking and unmistakable.[104] Accordingly, the trial court did not err in admitting evidence of defendant's *modus operandi*.[105]

The meaning of *Phillips* is clear: a trial court cannot be said to have abused its discretion in admitting evidence of other crimes if there is marked similarity, although not perfect identity, among the crimes. In *Phillips*, the court noted ten similar facts. Left unclear is how much dissimilarity there must be for the court to bar the evidence. So strong is the trend toward admissibility of other

94. *Id.* at 519, 538 N.E.2d at 507.
95. *Id.*
96. *Id.* The court hastened to point out that the crime of rape is hardly a "non-violent" activity. *Id.*
97. *Id.* at 519-520, 538 N.E.2d at 507.
98. *Id.* at 520-21, 538 N.E.2d at 508.
99. 87 Ill. 2d 134, 429 N.E.2d 470 (1981).
100. *Phillips*, 127 Ill. 2d at 521, 538 N.E.2d at 508.
101. *Id.*
102. *Id.*
103. *Id.* at 522, 538 N.E.2d at 509.
104. *Id.* at 519, 538 N.E.2d at 507.
105. *Id.*

crimes in criminal cases, the rule now is one of inclusion (evidence of other crimes is admissible for any relevant purpose), rather than one of exclusion (in the absence of good reasons, evidence of other crimes is inadmissible). *Evans* and *Phillips* are thus representative cases.

### *B. Exhibits*

#### 1. Weapons

In *People v. Fierer*,[106] the Illinois Supreme Court addressed whether, in order to show defendant's premeditation, weapons not used in the underlying murder should have been admitted.[107] Defendant was charged with murder in the stabbing death of his wife.[108] At trial, the State offered into evidence several bottles of poison that were found in defendant's car on the day of the murder.[109] Defendant argued that such evidence was highly prejudicial; the State claimed that the poison, even though not used in the murder, was relevant to show defendant's premeditation.[110]

The admissibility of weapons rests on the ability to connect them to the defendant and the crime.[111] Thus, when a weapon found is similar to that allegedly used by the defendant, the jury can infer that the particular weapon was the one used by the defendant to commit the crime.[112] In *Fierer*, the State sought to admit a weapon completely different from that allegedly used by defendant.[113] The supreme court ruled that although there was some probative value in defendant's possession of the poison, the poison was in no way connected with the murder; hence, any probative value was out-

106. 124 Ill. 2d 176, 529 N.E.2d 972 (1988). In a later appeal, defendant argued that because he previously had been found guilty but mentally ill, the jury implicitly acquitted him of murder. *See infra* note 108 and accompanying text. Accordingly, his retrial violated the constitutional prohibition against double jeopardy. The court disagreed and further found that the jury was properly instructed as to the burden of proof with regard to sanity. 124 Ill. 2d 176, 529 N.E.2d 972.

107. *Id.* at 194, 529 N.E.2d at 979.

108. *Id.* at 180, 529 N.E.2d at 973. The murder occurred in the Fierer's home, where the couple was dividing up their property pursuant to a divorce. Mrs. Fierer was stabbed twenty-seven times, and there was no dispute that this was the cause of death. *Id.* at 183, 529 N.E.2d at 974. At trial, the jury found defendant guilty but mentally ill. *Id.* at 191, 529 N.E.2d at 978.

109. *Id.* at 193-94, 529 N.E.2d at 979. The poisons found were potassium cyanide and secobarbital; neither are generally available to the public. *Id.*

110. *Id.*

111. *Id.* at 194, 529 N.E.2d at 979 (citing People v. Tribbett, 41 Ill. 2d 267, 242 N.E.2d 249 (1968)).

112. *Id.*

113. *Id.*

weighed by the evidence's prejudicial effect.[114] The trial court had improperly admitted evidence of defendant's possession of the poison.[115]

*Fierer* illustrates "circumstances of arrest" cases, which are a subspecies of other crimes cases. The defendant's possession of a weapon or weapons other than the actual instrumentality of the crime suggests criminal propensity and would be barred ordinarily. The "circumstances of arrest" rationale permits the prosecution to evade this rule and introduce such weapons so long as they are suitable for the commission of the crime charged. This evasion is pernicious in its impact on the defendant. In holding that the trial court erred in admitting evidence as to poisons found in defendant's car and under his control to show premeditation in a stabbing death, the supreme court appropriately closed the door on an impermissible line of attack.

### 2. Photographs

*People v. Fierer*,[116] also involved the admissibility into evidence of pre-autopsy photographs of the murder victim. Generally, photographs will be admitted into evidence if they are relevant to the case in any way, despite their possibly gruesome nature.[117] The photographs in question depicted the victim and her wounds.[118] The Illinois Supreme Court held that the admission of the photographs was not an abuse of the trial court's discretion.[119] The photographs were relevant to show the number and nature of the wounds, which in turn were relevant to the issues of self-defense and the defendant's mental state.[120] The photographs, therefore, were admissible.[121]

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114. *Id.* The supreme court also noted that the possession of the poison was not relevant to prove premeditation because the murder was committed in such a sudden and spontaneous manner. *Id.* Further, the court called this evidence "uniquely prejudicial," because the poison had no medical use and was unavailable to the public. *Id.*

115. *Id.*

116. 124 Ill. 2d 176, 529 N.E.2d 972 (1988). *See supra* notes 106-115 and accompanying text (additional discussion of *Fierer*).

117. *Id.* at 193, 529 N.E.2d at 979 (citing People v. Foster, 76 Ill. 2d 365, 392 N.E.2d 6 (1979)). The trial judge has great discretion in determining the admissibility of such photographs. *Id.*

118. *Id.* The body of the victim had been cleaned of all blood. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

### C. *Subsequent Remedial Measures*

In *Schaffner v. Chicago & North Western Transportation Co.*,[122] the Illinois Supreme Court held that although it did not approve of the admission of evidence regarding subsequent remedial repairs made by defendant railroad, the evidence was not prejudicial. Therefore, its admission constituted harmless error.[123]

In *Schaffner*, a fifteen-year-old boy was severely injured when he rode his bicycle over an extremely rough railroad crossing that was owned and maintained by the defendant ("North Western" or "railroad").[124] At trial, the jury found in plaintiff's favor against North Western.[125]

On appeal, North Western argued that the trial judge erred in allowing evidence of the railroad's subsequent repair of the crossing shortly after plaintiff's accident.[126] Evidence of subsequent remedial measures is generally not allowed to show the negligence of the repairing party.[127] In upholding the admission of the evidence, the appellate court relied on *Collins v. Interroyal Corp.*,[128] for the proposition that evidence of subsequent remedial repairs may be admitted to show a defendant's willful and wanton misconduct when the plaintiff is seeking punitive damages.[129]

The Illinois Supreme Court construed *Collins* differently.[130] Specifically, the court did not interpret *Collins* as establishing a rule allowing admission of evidence of post-occurrence remedial measures to show willful and wanton misconduct.[131] Rather, *Collins* simply demonstrates that punitive damages may be awarded based on the amount of evidence that shows the defendant's notice of the allegedly dangerous condition prior to the accident.[132]

The court stressed that evidence of subsequent remedial repairs

122. 129 Ill. 2d 1, 541 N.E.2d 643 (1989).

123. *Id.* at 18, 541 N.E.2d at 649.

124. *Id.* at 8, 541 N.E.2d at 645. Plaintiff's front bicycle tire disengaged when he hit the railroad crossing, throwing him several feet past the tracks. *Id.* As a result, he suffered brain damage and was rendered disabled. *Id.* Plaintiff sued the railroad under a common law negligence theory; plaintiff sued the manufacturer, Schwinn Bicycle Co. ("Schwinn") under a theory of strict liability in tort. *Id.*

125. *Id.* at 13, 541 N.E.2d at 647. The court also found in Schwinn's favor against the plaintiff. *Id.*

126. *Id.* at 14, 541 N.E.2d at 647. North Western repaired the crossing less than a year after the underlying incident. *Id.*

127. *Id.*

128. 126 Ill. App. 3d 244, 466 N.E.2d 1191 (1st Dist. 1984).

129. *Schaffner*, 129 Ill. 2d at 15, 541 N.E.2d at 649.

130. *Id.* at 16, 541 N.E.2d at 649.

131. *Id.*

132. *Id.* at 17, 541 N.E.2d at 649.

should not be admitted for *any* purpose.[133] Thus, admission of North Western's repairs was improper, however, any resulting error was harmless.[134] The other evidence establishing the crossing's faulty condition was so overwhelming that the disputed point could not have prejudiced defendant.[135]

The plaintiff in *Schaffner* tried to evade the rule against admission of evidence of subsequent remedial measures by arguing that the evidence was not offered merely to show liability, but to show wilful and wanton misconduct. The court disagreed, falling back on the policy reasons behind this special rule of exclusion. Evidence of subsequent remedial repairs may be admitted only for narrow purposes such as demonstrating prior notice of a dangerous condition when the plaintiff is seeking punitive damages.

### *D. Alcohol Tests*

In *People v. Orth*,[136] the Illinois Supreme Court held that a motorist, whose license has been summarily suspended based on a drunk driving charge, has the burden of proof in attempting to rescind the suspension.[137] In this case, defendant was arrested for driving under the influence of alcohol and registered a blood-alcohol concentration of 0.12 on the breathalyzer.[138] Defendant's driver's license was then summarily suspended.[139] Defendant petitioned to have the summary suspension rescinded, arguing that the results of the breathalyzer were inadmissible based on a lack of evidence as to the test's accuracy or the the breathalyzer operator's qualifications.[140] At the rescission hearing, the State attempted to introduce the arresting officer's sworn report, which included the breathalyzer test results into evidence.[141] The circuit court ruled that this report did not provide the proper foundation for admission of the breathalyzer test results into evidence. The test results

133. *Id.*
134. *Id.*
135. *Id.* The court also noted that the repairs were not made until six months after the accident, and the jury could therefore reasonably infer that the further passage of time ultimately could result in a condition requiring repair. *Id.*
136. 124 Ill. 2d 326, 530 N.E.2d 210 (1988).
137. *Id.* at 328-29, 530 N.E.2d at 211.
138. *Id.* at 330, 530 N.E.2d at 212.
139. *Id.*
140. *Id.*
141. *Id.* The circuit court held that when the petition to rescind is filed, the burden of proof shifts to the State, and the State cannot rely solely on the arresting officer's reports. *Id.* The prosecution must show the test's accuracy and the administrator's qualifications. *Id.*

were hearsay and therefore inadmissible.[142] The appellate court affirmed.[143]

The supreme court initially determined that placing the burden of proof upon the motorist in a rescission hearing does not violate due process.[144] Once the motorist has made a prima facie showing that rescission is warranted, however, the burden of proving reliability of the breathalyzer test shifts to the State.[145] This in turn means that the State must lay a proper foundation before introducing the test results into evidence.[146]

The State argued that a foundation need not be established for admission of the test results in an administrative hearing.[147] The court held otherwise, relying on the Illinois Motor Vehicle Code section governing admissibility of breathalyzer test results.[148] Thus, the State is required to lay a proper foundation for the admission of breathalyzer test results in any civil or criminal proceeding, including rescission hearings.[149]

In *People v. McClain*,[150] the court held that a certification statement by an arresting officer is equivalent to the swearing of an oath and sufficiently satisfies section 11-501.1(d) of the Illinois Motor

142. *Id.* at 331, 530 N.E.2d at 212.

143. *Id.* The appellate court held that a conviction for driving under the influence may be based entirely on the arresting officer's testimony. *Id.* Once the results of a breathalyzer test are introduced in such a hearing, however, the rules of evidence must govern. *Id.* (citing *Orth*, 154 Ill. App. 3d at 148, 506 N.E.2d at 960).

144. *Id.* at 337, 530 N.E.2d at 214-15. The court held that the motorist's private interest in his driver's license and the risk of erroneous deprivation of a license did not outweigh the State's extremely important interest in public highway safety. *Id.*

145. *Id.* at 340, 530 N.E.2d at 216. The court noted that this shifting of the burden of proof will further reduce the risk of erroneous deprivation of drivers' licenses. *Id.* at 337, 530 N.E.2d at 215. The motorist may make a prima facie case based on his own credible testimony that he was not driving under the influence of alcohol. *Id.* at 340, 530 N.E.2d at 217.

146. *Id.* at 340, 530 N.E.2d at 216. The court explicitly set forth factors that will constitute this foundation: (1) evidence that the tests were performed in accordance with Illinois Department of Health ("Department") standards; (2) certification of the operator by the Department; (3) evidence of the particular machine's accuracy; (4) evidence that the motorist was observed during the twenty minutes before the arrest without smoking or drinking; (5) evidence that the printout actually is the test result for the defendant. *Id.* at 340, 530 N.E.2d at 216-17.

147. *Id.* at 338, 530 N.E.2d at 216. The State conceded that such a foundation would be proper in a criminal prosecution. *Id.*

148. *Id.* (citing ILL. REV. STAT. ch. 95 1/2, para. 11-501.2(a) (1985)). The statute basically states that breathalyzer tests will be admissible if performed in accordance with Illinois Department of Public Health standards and by a qualified operator. *Id.* (citing ILL. REV. STAT. ch. 95 1/2, para. 11-501.2(a)(1) (1985)).

149. *Id.* at 340, 530 N.E.2d at 216.

150. 128 Ill. 2d 500, 539 N.E.2d 1247 (1989).

Vehicle Code.[151] In *McClain*, defendant was arrested for driving under the influence of alcohol, and his breathalyzer test revealed a blood-alcohol concentration of 0.14.[152] Subsequently, defendant's driver's license was suspended summarily.[153] Defendant petitioned for a rescission hearing, arguing that the arresting officer failed to swear under oath to the truth of his report as required under Section 11-501.1(d).[154] He further argued that the officer's report was defective because the officer failed to list the time and place of the breathalyzer test.[155]

The circuit court rescinded the summary suspension based upon these defects in the arresting officer's documentation.[156] The appellate court reversed the circuit court's judgment, holding that the validity of the officer's oath as well as the question of correct form completion, were outside the scope of a rescission hearing.[157]

In holding that the circuit court could consider alleged deficiencies in the sworn report at the rescission hearing, the supreme court relied on *People v. Badoud*.[158] In *Badoud*, the court stated that Section 2-118.1 provides that a hearing "may be conducted upon a review of the law enforcement officer's own official reports."[159] Thus, an inquiry into whether such reports were sworn properly may be necessary to establish the report's accuracy.[160]

Also in *Badoud*, the court noted that in a summary suspension hearing, the sworn report serves the same function as a complaint

151. *Id.* at 504-05, 539 N.E.2d at 1250-51. The Code requires an officer to submit a sworn report after a drunk driving arrest, certifying that the motorist either refused or failed a breathalyzer test. ILL. REV. STAT. ch. 95 1/2, para. 11-501.1(d) (1985). The sworn report serves as a type of complaint in the event a motorist requests a rescission hearing. 128 Ill. 2d at 502-03, 539 N.E.2d at 1250.

152. *Id.* at 502, 539 N.E.2d at 1248.

153. *Id.*

154. *Id.* at 503, 539 N.E.2d at 1249.

155. *Id.* at 504, 539 N.E.2d at 1249. The arresting officer mistakenly thought that these sections in the report did not apply to this particular arrest. *Id.* at 508, 339 N.E.2d at 1251.

156. *Id.*

157. *Id.* at 503, 539 N.E.2d at 1248-49. Section 2-118.1 of the Illinois Motor Vehicle Code provides in pertinent part that the scope of the hearing shall be limited to whether the person was arrested for an offense defined in Section 11-501; whether the arresting officer had reasonable grounds to arrest, and whether the motorist was advised regarding the refusal to take the test, yet still refused the test; or whether the motorist submitted to the test and the results revealed an alcohol concentration of 0.10 or more. ILL. REV. STAT. ch. 95 1/2, para. 2-118.1(b)(1-4) (1985).

158. *Id.* at 505, 539 N.E.2d at 1249-50 (citing 122 Ill. 2d 50, 521 N.E.2d 884 (1988)). *Badoud* was not decided until 1988, after the appellate court in *McClain* issued its ruling.

159. *Id.* (citing ILL. REV. STAT. ch. 95 1/2, para. 2-118.1(b) (1985)).

160. *Id.* at 505, 539 N.E.2d at 1250 (citing *Badoud*, 122 Ill. 2d at 54, 521 N.E.2d at 884).

in a civil proceeding.[161] The Illinois Vehicle Code states that a rescission hearing should proceed as any other civil proceeding.[162] Because a complaint may be examined in a civil proceeding, it follows that the arresting officer's report may be examined in a rescission hearing.[163]

The court next considered whether the "verification of certification" document, which the arresting officer filed, constituted a sworn report as required by Section 11-501.1(d).[164] Section 1-109 of the Illinois Code of Civil Procedure governs the swearing of complaints in civil matters and expressly provides that any certification of pleadings is the equivalent of a certification under oath.[165] Because a sworn report at a rescission hearing is similar to a complaint in a civil matter, analogous rules of law ought to apply.[166] The arresting officer's report was verified pursuant to Section 1-109 of the Illinois Code of Civil Procedure; therefore, it was adequate to satisfy the oath requirement of Illinois Motor Vehicle Code Section 11-501.1.[167] Thus, rescission of the summary suspension of the motorist's license was unwarranted.[168]

*McClain* is noteworthy because its holding, that the deficiencies in an arresting officer's report may be insufficient to rescind the revocation of a driver's license, demonstrates the court's unwillingness to be bound by strict technical requirements.[169]

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161. *Id.* at 507, 539 N.E.2d at 1250 (citing *Badoud*, 122 Ill. 2d at 54, 521 N.E.2d at 884).

162. *Id.* at 507, 539 N.E.2d at 1251 (citing ILL. REV. STAT. ch. 95 1/2, para. 2-118.1 (1985)).

163. *Id.* (citing *Badoud*, 122 Ill. 2d at 54, 521 N.E.2d at 884)).

164. *Id.* at 506, 539 N.E.2d at 1250. The "verification of certification" certified as true the content of other documents filed by the arresting officer. *Id.* The document reads in pertinent part:

> [T]he undersigned certifies that the statements set forth in the warning to motorists and law enforcement sworn report . . . are true and correct except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies that he verily believes the same to be true.

*Id.*

165. ILL REV. STAT. ch. 110, para. 1-109 (1985).

166. *McClain*, 128 Ill. 2d at 506-07, 539 N.E.2d at 1251.

167. *Id.* The court also found that the officer's inadvertent omission of the breathalyzer test's date and place was not cause for rescission.

168. *Id.*

169. In 1970, the Supreme Court decided Goldberg v. Kelly, in which it held that procedural due process requires an evidentiary hearing before the state can terminate payments of welfare benefits. 397 U.S. 254 (1970). *Goldberg*'s principle has been extended to other types of proceedings, including driver's license and auto registration revocation hearings. *See* Bell v. Burson, 402 U.S. 535 (1971). Thus, in cases in which there are serious departures from technical requirements, the court may be unwilling to look askance.

## IV. HEARSAY

In *People v. Bastien*,[170] the court held that the admission of a child victim's videotaped testimony in a sexual abuse case violated defendant's constitutional right to confrontation.[171] In the underlying case, defendant was charged with aggravated criminal sexual assault.[172] The State sought to record the minor victim's testimony on videotape pursuant to Section 106A-2 of the Illinois Code of Criminal Procedure and filed the appropriate motion.[173] Such a procedure is allowed if both defense and State's attorneys are present, as well as the defendant and the judge.[174] The prosecutor or the judge may ask the child non-leading questions.[175] The child must be available to testify at trial where the defense will have an opportunity to cross-examine.[176] The defense may not cross-examine the witness during the videotaping.[177]

The defendant argued that the statute violated his right to confrontation under the United States and Illinois constitutions by prohibiting any cross-examination during the videotaping.[178] The State argued that contemporaneous cross-examination is not a constitutional requirement.[179]

The Illinois Supreme Court held that the statute violated the defendant's right to contemporaneous cross-examination, and therefore was unconstitutional.[180] Videotaped testimony of a child victim is constitutionally acceptable to protect the child from ex-

170. 129 Ill. 2d 64, 541 N.E.2d at 670 (1989). For further discussion of *Bastien*, see *infra* Appell and Wessel, *Juvenile Law*, 21 LOY. U. CHI. L.J. 481, 482 (1990).

171. *Id.* at 80, 541 N.E.2d at 677. In reaching its conclusion, the court held unconstitutional Code of Criminal Procedure section 106A-2, ILL. REV. STAT. ch. 38, para. 106A-2 (1985).

172. *Bastien*, 129 Ill. 2d at 66, 541 N.E.2d at 671.

173. *Id.* at 66, 541 N.E.2d at 671 (citing ILL. REV. STAT. ch. 38, para. 106A-2 (1987). The trial court denied the motion, stating that the statute denied defendant's right to confrontation by not allowing the defendant to cross-examine the witness contemporaneously with the witness' direct testimony. *Id.* The State then filed a motion with the supreme court for leave to file a motion for supervisory order, naming as respondents the defendant and the trial judge, the Honorable Robert Bastien. *Id.* The court entered an order staying the proceedings pending disposition of the supervisory order motion. *Id.*

174. *Id.* at 68, 541 N.E.2d at 672 (citing ILL REV. STAT. ch. 38, para. 106A-2 (1985)).

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 80, 541 N.E.2d at 677.

periencing the trauma of live courtroom testimony.[181] The Illinois statute, however, requires the child witness to be present at trial subject to live cross-examination in order for the videotaped testimony to be admissable.[182]

The court recognized the danger posed by such delayed cross-examination, noting that the child witness was likely to be influenced either consciously or unconsciously by the presence of the prosecutor and relatives.[183] The court found that the delayed cross-examination provision thus unnecessarily violated the accused's right to confrontation.[184] Further, delayed questioning frustrates the truth-seeking process of cross-examination because the witness is able to consult with an attorney and regain his poise.[185] Based on these considerations, the court struck down the statute.

An apparent increase in sex offenses generally, and sex offenses against children in particular, has prompted many state legislatures to change the substantive and procedural rules for the prosecution of sex offenses. The Illinois General Assembly has made several such alterations, including changes in the laws of hearsay. These changes are designed to facilitate prosecution of those crimes by making certain out-of-court statements by victims admissible over a hearsay objection. The *Bastien* opinion is noteworthy in curbing this trend.

## V. PRIVILEGE

In *In re Himmel*,[186] the Illinois Supreme Court suspended an attorney from the practice of law for one year for failure to report another attorney's misconduct pursuant to Rule 1-103(a) of the Illinois Code of Professional Responsibility ("Code").[187] Rule 1-103(a) requires an attorney to report certain misconduct by another attorney to the Administrator of the Attorney Registration

181. *Id.* at 73, 541 N.E.2d at 574 (citing Coy v. Iowa, 487 U.S. 1012 (1988)).

182. ILL. REV. STAT. ch. 38, para. 106A-2 (1985).

183. *Bastien*, 129 Ill. 2d at 77, 541 N.E.2d at 676.

184. *Id.* The court noted that because the child had to be present to testify at trial, there was no reason to rely on the "weaker" videotaped testimony. *Id.* The *Bastien* court analogized this case to People v. Inadi, 475 U.S. 387, 394 (1986), in which the Supreme Court concluded that the unavailability of a witness is not a prerequisite to admission of a co-conspirator's statements.

185. *Bastien*, 129 Ill. 2d at 79, 541 N.E.2d at 676.

186. 125 Ill. 2d 531, 533 N.E.2d 790 (1988). For extensive discussion of *Himmel*, see *infra* Howlett and Spratt, *Professional Responsibility*, 21 LOY. U. CHI. L.J. 535, 537 (1990).

187. 125 Ill. 2d at 546, 533 N.E.2d at 796.

and Disciplinary Commission ("ARDC").[188]

Himmel's client, Fosberg, previously had retained John Casey to represent her in a personal injury suit.[189] After negotiating a settlement with the defendant, Casey received a settlement check, which he converted.[190] Fosberg hired Himmel to collect her money from Casey.[191]

In negotiating with Casey on Fosberg's behalf, Himmel learned about Casey's misconduct.[192] When he failed to report Casey to the ARDC, the Administrator of the ARDC brought a complaint against Himmel.[193] A hearing board found that Himmel had in fact violated Rule 1-103(a) of the Code.[194] Because of mitigating factors, however, the Board recommended a private reprimand.[195] The ARDC Administrator took exception to the Board's recommended decision and the matter was brought to the Review Board, which recommended that the complaint be dismissed.[196]

Before the Illinois Supreme Court, Himmel argued that he had been unable to disclose the misconduct to the ARDC because the information was privileged.[197] The court, however, ruled that the communications regarding the misconduct were not made by Fosberg in confidence.[198] Himmel and Fosberg discussed the matter in the presence of Fosberg's mother and fiancé.[199] With Fosberg's consent, Himmel also discussed the conversion of funds with the insurance company and the insurance company's lawyer, as well as with Casey himself.[200] Thus, Himmel was not justified in his fail-

188. *Id.* at 540, 533 N.E.2d at 793 (citing ILL. REV. STAT. ch. 110A, para. 1-103(a) (1987)). The Illinois Code of Professional Responsibility generally requires that an attorney report another attorney's illegal conduct involving moral turpitude, or conduct involving dishonesty, fraud, deceit or misrepresentation. ILL. REV. STAT. ch. 110A, paras. 1-103(a), 1-102(a)(3) -(4) (1987).

189. *Id.* at 535, 533 N.E.2d at 791.

190. *Id.*

191. *Id.* at 535-36, 533 N.E.2d at 791.

192. *Id.*

193. *Id.* at 536, 533 N.E.2d at 791. Casey was disbarred on consent.

194. *Id.* at 537, 533 N.E.2d at 792.

195. *Id.* The Board observed that Himmel had practiced law for eleven years, had no prior complaints, requested no fee in the case and obtained a good result for his client. *Id.*

196. *Id.* The Review Board found that the ARDC did have knowledge of the alleged misconduct as the client had contacted the ARDC prior to retaining Himmel. *Id.* Further, the Review Board stated that Himmel was merely respecting his client's wishes in not reporting Casey. *Id.*

197. *Id.* at 539, 533 N.E.2d at 793.

198. *Id.* at 542, 533 N.E.2d at 794.

199. *Id.*

200. *Id.*

ure to report the misconduct to the ARDC and subsequently was suspended for from the practice of law for one year.[201]

In another case, the Illinois Supreme Court considered the issue of privilege as it pertains to a certified public accountant and his clients. In *In re October 1985 Grand Jury*,[202] the court held that information and papers that a tax client gives to his accountant for preparation of income tax returns are not confidential; therefore, this information is not protected by privilege.[203]

In 1985, the Illinois Attorney General began a grand jury investigation of Jack and Wanda Bernstein for underpayment of taxes from 1982-1984.[204] Drebin, a certified public accountant, had prepared the Bernsteins' tax returns for these years.[205] The grand jury served a *subpoena duces tecum* upon Drebin to compel production of written materials used in preparing the tax returns, as well as retained copies of state and federal income tax returns for the applicable years.[206] Drebin appeared before the grand jury but claimed that he was not required to divulge information that had been obtained in his confidential capacity as a certified public accountant pursuant to the Illinois Public Accounting Act ("IPAA").[207] The Assistant Attorney General later sought a rule to show cause why Drebin should not be held in contempt.[208] Instead, the court quashed the subpoena, ruling that the accountant properly asserted the privilege.[209]

The State appealed. The appellate court held that Drebin must comply with the subpoena because the information requested was not confidential.[210] In the Illinois Supreme Court, Drebin argued that the information and paperwork requested by the subpoena were privileged.[211] The court replied that the statute protected

201. *Id.* ar 546, 533 N.E.2d at 796. Himmel had also argued that he was simply respecting his client's wishes by not reporting Casey to the ARDC. Not only was the court unable to find any legal support for this defense, it also refused to accept it as a justification for circumvention of the Code. *Id.* at 538-39, 533 N.E.2d at 792-93.

202. 124 Ill. 2d 466, 530 N.E.2d 453 (1988).

203. *Id.* at 477, 530 N.E.2d at 458.

204. *Id.* at 468, 530 N.E.2d at 454.

205. *Id.* at 468-69, 530 N.E.2d at 454.

206. *Id.* at 469, 530 N.E.2d 454.

207. *Id.* The pertinent provision states that "[a] public accountant shall not be required by any court to divulge information or evidence which has been obtained by him in his confidential capacity as a public accountant." ILL. REV. STAT. ch. 111, para. 5533 (1987).

208. *October*, 124 Ill. 2d at 469, 530 N.E.2d at 454.

209. *Id.* at 470, 530 N.E.2d at 454.

210. *Id.*

211. *Id.* at 474, 530 N.E.2d at 456.

only information received by an accountant in confidence from his client.[212] An accountant has discretion to disclose certain information received from a tax client to a third party, such as a taxing authority.[213] It is generally understood that such communications by clients are not confidential.[214] Thus, the information sought through the subpoena was outside the scope of material protected by the IPAA.[215]

In dissent, Justice Clark argued that the majority's conclusion did not do justice to the accountant-client relationship.[216] He argued that, in certain cases, disclosure of tax information to a professional accountant should be privileged.[217] He agreed that some of the information disclosed to the accountant in this case was not privileged, but he asserted that such a conclusion did not render every document containing that information unprivileged.[218]

## VI. CONCLUSION

The *Survey* year decisions addressing principles of evidence do not break new ground. Rather, they carry forth established trends in the Illinois common law of evidence. The court continued to liberalize the admissibility of expert witnesses testimony. At the same time, the court maintained the anachronistic, unsound distinction between treating and non-treating physicians for purposes of hearsay. The other crimes and other occurrence decisions fit neatly into established patterns. The court wisely curbed the "circumstance of arrest" rationale under which the prosecution can introduce prejudicial evidence that a defendant possessed certain weapons tangentially related to the question of guilt.

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212. *Id.* at 474, 530 N.E.2d at 456-57.

213. *Id.* at 477, 530 N.E.2d at 458.

214. *Id.* Similarly, information given to an attorney for preparation of a client's tax return also is not privileged. Fisher v. United States, 425 U.S. 391 (1976).

215. *October*, 124 Ill. 2d at 477, 530 N.E.2d at 458. Following the appellate court's decision, the Illinois General Assembly proposed a bill to amend the IPAA specifically to include as privileged documents, information or evidence obtained by the public accountant in connection with any tax services. *Id.* at 478, 530 N.E.2d at 458. Fearing that such protection would hinder the prosecution of tax evaders, the Governor exercised an amendatory veto. A motion to override the Governor's veto was defeated. *Id.* The court found that this history supported the conclusion reached in the case. *Id.*

216. *Id.* at 481, 530 N.E.2d at 460 (Clark J., dissenting).

217. *Id.*

218. *Id.* at 480, 530 N.E.2d at 460 (Clark, J., dissenting). Justice Clark also argued that subsequent legislative action or inaction should not be used as a guide to the intent of an earlier legislature. *Id.*

One possible exception to this picture of consistency is *Bastien*[219] in which the court struck down a statute that authorized the admission into evidence of a videotaped statement by a child victim of a sex offense. The decision is noteworthy in opposing several trends, including the generation of statutes designed to facilitate prosecution of sex offenses. In addition, the United State Supreme Court generally has been restricting the rights of the accused in criminal cases (although their recent record with the confrontation clause does not run so clearly in the prosecution's favor). *Bastien* stands as a somewhat solitary beacon in the midst of these powerful trends.

219. 129 Ill. 2d 64, 541 N.E.2d at 670 (1989). *See supra* notes 170-85 and accompanying text.