

# The new code

The newly codified Illinois Rules of Evidence could affect your business litigation

**P**reviously, the Illinois Rules of Evidence were scattered across several sources, making it difficult and inefficient to deal with them.

The Illinois Supreme Court began to change that in November 2008 when it created a Special Supreme Court Committee on Evidence to address the fact that most Illinois rules of evidence were “dispersed throughout case law, statutes and Illinois Supreme Court rules, requiring that they be researched and ascertained from a number of sources.”

“The new codification of the Illinois Rules of Evidence is significant for three reasons: efficiency, certainty and uniformity,” says P. Andrew Fleming, a partner with the business litigation specialty firm Novack and Macey LLP. “The new rule provides efficiency because there is now primarily one easy-to-find source for all rules of evidence in Illinois. A single, codified rule provides more certainty than the common law, which often required litigants to piece together the rules from a collection of case law. And, the new rules provide uniformity because, for example, they should help to eliminate any disagreements between trial court judges or first-tier appellate courts in Illinois over the rules of evidence.”

As a result of the committee’s work, the new codification went into effect on Jan. 1, 2011, so companies would be wise to take the time to fully understand its impact.

*Smart Business* spoke with Fleming about the new codification of the Illinois Rules of Evidence, and how it could affect you and your company.

## Have there been any changes since the new codification went into effect?

Yes, but for the most part, the committee attempted to incorporate Illinois rules that already had been clearly adopted in cases or statutes. So, pre-existing Illinois law — at least when it was clear and well developed — remains largely the same.

For example, when it comes to the admission of expert testimony, the Illinois Supreme Court adopted in 2002 what is known as the Frye test for admissibility, which means an expert’s opinion must be based on generally accepted scientific principles or techniques.

Incidentally, Illinois evidentiary law — even after codification — is different in this respect than a number of other jurisdictions on this point. Indeed, many other jurisdictions (including the federal courts) follow the rule set forth by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S.



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579 (1993) and its progeny.

Under *Daubert*, courts may allow experts to base their opinions on reliable and sound theories, even if those theories are new or cutting edge and have not had sufficient time to become generally accepted.

## What are some of the changes?

The committee intended that the codified rules incorporate generally accepted rules from other states and the federal courts when they did not conflict with settled Illinois evidentiary law. The rules also eliminate a few things that the committee believed were unsound or relics of the past.

For example, under prior Illinois law, statements made during settlement negotiations might have been admissible unless they were stated ‘hypothetically,’ but the new rules do away with that. Generally, under the codified rules, statements made during settlement talks are now inadmissible with or without any such qualifications.

Of course, you still have to be careful about what is said during settlement negotiations for a variety of reasons because statements made during settlement talks can be admitted for certain purposes and can often come back to haunt a client. For example, if Party A represents that a particular fact is true during settlement negotiations, but later it turns out

that that representation was untrue, Party B can seek to set aside and rescind the settlement agreement. In addition, Party A could be held liable for fraud.

There are other changes. For instance, when parts of writings or recordings are used by an opponent, the codified rules now allow the other party to require other parts of that writing, recording or *other* writings/recordings that ‘ought in fairness’ to be considered at the same time. The committee recommended this change even though prior Illinois law was thought to have limited admission to parts of the same writing or recording.

Further, as noted by the committee, the codified rules now make it clear that attorneys no longer need to show witnesses prior inconsistent statements before they are cross-examined on those statements and, with respect to statements of then-existing mental/physical conditions, the codified rules eliminate the requirement that declarants must be unavailable to testify before such statements can be admitted.

## The federal courts have long had codified rules of evidence. Are the Illinois rules the same?

Not always. In fact, it would be a mistake to assume that the Illinois rules are the same as the federal rules. For example, Illinois and the federal rules differ when it comes to expert opinions. Moreover, according to the committee, Illinois common law did not recognize the present-sense impression or learned treatise exceptions to the hearsay rule even though they are recognized as hearsay exceptions under the federal rules. Thus, the codified Illinois rules do not expressly recognize these hearsay exceptions. There are also a number of other instances where the rules differ.

## Are there any unresolved issues?

Yes. For example, there is a case pending in the Illinois Supreme Court that might resolve a conflict in the lower courts concerning whether actions taken to make a product less dangerous (before the product caused any harm) could be admitted into evidence.

Some lower Illinois courts have said yes; others have said no. The question is scheduled to be resolved by the Illinois Supreme Court. If it is, then the Illinois Supreme Court’s pronouncement on this issue likely will be codified into the Illinois Rules of Evidence. <<

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