

NOTICE TO THE BAR

JUDICIAL CONFERENCE ON PROPOSED AMENDMENTS TO THE RULES OF EVIDENCE – WED., SEPTEMBER 4, 2019 AT THE NEW JERSEY LAW CENTER –

TO DISCUSS (1) NJRE 530 (“WAIVER OF PRIVILEGE BY CONTRACT OR PREVIOUS DISCLOSURE; LIMITATIONS”); (2) NJRE 608 (“EVIDENCE OF CHARACTER FOR TRUTHFULNESS OR UNTRUTHFULNESS AND EVIDENCE OF A PRIOR FALSE ACCUSATION”); (3) PROPOSED RESTYLING AMENDMENTS

Pursuant to N.J.S.A. 2A:84A-34, the New Jersey Judiciary is convening a Judicial Conference on Wednesday, September 4, 2019, to discuss proposed amendments to the Rules of Evidence. The specific rule proposals that will be considered at this public session will be:

1. New Jersey Rule of Evidence 530, “Waiver of Privilege by Contract or Previous Disclosure; Limitations”;
2. New Jersey Rule of Evidence 608, “Evidence of Character for Truthfulness or Untruthfulness and Evidence of a Prior False Accusation”; and
3. Restyling amendments to the following New Jersey Rules of Evidence: N.J.R.E. 101, 102, 104, 105, 106, 201, 202, 301, 302, 303, 402, 404, 405, 408, 409, 410, 601, 602, 604, 605, 607, 609, 610, 611, 612, 613, 614, 701, 703, 705, 801, 803, 804, 805, 806, 807, 808, 901, 902, 903, 1001, 1003, 1005, 1006, 1007, 1008.

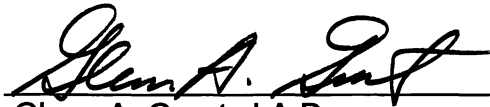
The proposed amended Rules and summaries of the proposed amendments are appended to this Notice.

The September 4, 2019 Judicial Conference session will be at 6:00 p.m. at the New Jersey Law Center, One Constitution Square, New Brunswick, New Jersey. Anyone wishing to speak at this session should notify the Acting Administrative Director of the Courts in advance by Tuesday, August 27, 2019, at the following address:

Hon. Glenn A. Grant, Acting Administrative Director
Attention: 2019 Judicial Conference on Evidence Rules
Hughes Justice Complex; P.O. Box 037
Trenton, NJ 08625-0037

Requests to speak at the Judicial Conference also may be made by e-mail to Comments.mailbox@njcourts.gov.

Requests to speak must identify the individual seeking to speak and whether the speaker will be representing an organization. Please note that the limit on each speaker's presentation will be five minutes. Written comments will also be accepted.

A handwritten signature in black ink, appearing to read "Glenn A. Grant", is written over a horizontal line.

Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts

Dated: August 5, 2019

1. Summary of Proposed Amendments to N.J.R.E. 530

The proposed amendments to N.J.R.E. 530 address inadvertent disclosures of privileged material. The proposal is specific to the attorney-client privilege and work product doctrine and responds to the increasing use of electronic discovery in litigation; the attendant high risk of inadvertent disclosures of privileged materials; and the unsettled nature of the case law governing inadvertent disclosures of privileged material. The proposed amendments accord with the Complex Business Litigation Program Electronic Discovery Stipulation and Order form, governing production, spoliation, and disclosure issues. That form provides that disclosure of privileged discovery materials will not constitute a waiver of attorney-client or work product privilege.

The language of the proposal tracks Federal Rule of Evidence 502 in large part but also contains significant differences. Paragraph (c)(1) follows Federal Rule of Evidence 502(a) to make clear that blanket waivers are not recognized by, for example, disclosure of a single privileged document. A waiver to a single document will not constitute a waiver in other documents unless it is shown that the waiver is intentional, the subject matter is the same, and, as a matter of fairness, the separate sources of the privileged information ought to be considered together.

As to inadvertent disclosures, proposed N.J.R.E. 530(c)(2) tracks Federal Rule of Evidence 502(b) and imposes the “balancing approach.”

Proposed N.J.R.E. 530(c)(3) addresses whether the impact of a disclosure in another jurisdiction operates as a disclosure in the New Jersey litigation. Proposed paragraph (c)(3) states that in such a case, no waiver will be recognized in the New Jersey litigation if the outside-jurisdiction disclosure would not be considered a waiver under New Jersey law, or if it would not be considered a waiver under the law of the outside jurisdiction.

Proposed N.J.R.E. 530(c)(4) follows Federal Rule of Evidence 502(d) on the execution of anti-waiver orders, a critical component of federal e-discovery practice recognized in the Complex Business Litigation Program amendments. The first sentence of proposed paragraph (c)(4) follows Federal Rule of Evidence 502(d) and is consistent with the language of the evidence rules of other states. The second sentence was included to resolve a practice issue raised under Federal Rule of Evidence 502(d) after its adoption, namely, whether a party waives any rights under a Federal Rule of Evidence 502(d) order by conducting a privilege review. Privilege reviews may serve useful purposes even where an anti-waiver provision exists, and the application of an anti-waiver order should not inhibit such a review if a party deems one necessary.

Proposed N.J.R.E. 530(c)(5) tracks Federal Rule of Evidence 502(e), providing that parties cannot bind non-parties by an agreement. In order for the anti-waiver agreement to have broader effect, it must be subject to a court order. The issue of whether the court has jurisdiction to extend the reach of the agreement beyond the parties can be addressed through normal motion practice, as Federal Rule of Evidence 502(e) foresees.

Finally, the proposed amendments incorporate, as does Federal Rule of Evidence 502, a definition section to make clear that the provisions of N.J.R.E. 530(c) are specific to the attorney-client privilege and work-product doctrine. This language deviates from Federal Rule of Evidence 502(g) with respect to the definition of the attorney-client privilege by cross-referencing N.J.R.E. 504, which defines this privilege.

Proposed Revised New Jersey Rule of Evidence 530

N.J.R.E. 530. Waiver of Privilege by Contract or Previous Disclosure: Limitations

- (a) Except as provided herein with respect to the attorney-client privilege or work-product doctrine, a [A] person waives his right or privilege to refuse to disclose or to prevent another from disclosing a specified matter if he or any other person while the holder thereof has [(a)] (1) contracted with anyone not to claim the right or privilege or, [(b)] (2) without coercion and with knowledge of his right or privilege, made disclosure of any part of the privileged matter or consented to such a disclosure made by anyone.
- (b) Except as provided herein with respect to the attorney-client privilege or work-product doctrine, a [A] disclosure which is itself privileged or otherwise protected by the common law, statutes or rules of court of this State, or by lawful contract, shall not constitute a waiver under this section. The failure of a witness to claim a right or privilege with respect to one question shall not operate as a waiver with respect to any other question.
- (c) Attorney-Client Privilege and Work Product; Limitations on Waiver. The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.
 - (1) Disclosure Made in a State Proceeding or to a State Office or Agency; Scope of a Waiver. When the disclosure is made in a state proceeding or to a state office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication in a state proceeding only if:
 - A. the waiver is intentional;
 - B. the disclosed and undisclosed communications or information concern the same subject matter; and
 - C. they ought in fairness to be considered together.
 - (2) Inadvertent Disclosure. When made in a state proceeding or to a state office or agency, the disclosure does not operate as a waiver in a state proceeding if:
 - A. the disclosure is inadvertent;

- B. the holder of the privilege or protection took reasonable steps to prevent disclosure; and
 - C. the holder promptly took reasonable steps to rectify the error.
- (3) Disclosure Made in Another Forum. When the disclosure is made in another state or in a federal proceeding, the disclosure does not operate as a waiver in the New Jersey proceeding if the disclosure:

 - A. Would not be a waiver under this rule if it had been made in a New Jersey proceeding; or
 - B. Is not a waiver under the law of the forum where the disclosure occurred.
- (4) Controlling Effect of a Court Order. A court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court, in which event the disclosure is also not a waiver in any other federal or state proceeding. The existence of such an agreement between the parties shall not limit a party's right to conduct a review of documents, electronically stored information or other information for relevance, responsiveness or segregation of privileged or protected information before production.
- (5) Controlling Effect of a Party Agreement. An agreement on the effect of a disclosure in a state proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.
- (6) Definitions. In this rule:

 - A. "Attorney-client privilege" means the protection afforded under New Jersey Rule of Evidence 504; and
 - B. "Work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

2. Summary of Proposed Amendments to N.J.R.E. 608

The proposed amendments would permit, in limited circumstances and in criminal cases only, inquiry into specific-act evidence on cross-examination when probative of a witness' character for truthfulness. The amendments represent an expansion from the current rule where specific act evidence is permitted in only two scenarios: prior criminal convictions admissible under N.J.R.E. 609; and false accusations of a crime similar to that with which the defendant is charged.

The amendments were crafted in response to the Chief Justice's referral to the Committee on the Rules of Evidence in State v. Scott, 229 N.J. 469 (2017), where, writing for the Court, he noted that the "topic relates directly to the jury's search for the truth, which a system of justice should foster." The concurring opinion by Justice Albin in Scott raised concerns that admission of specific-act evidence had the potential to: (1) divert jurors from the central issue in the case; (2) discourage witnesses and victims from testifying; and (3) create unfairness in requiring a witness to answer for any falsehood made in the witness's life. The proposed amendments include safeguards intended to protect against undue delay, abuse, or unfairness.

The proposed amendments would bring New Jersey in line with both the federal courts and the majority of state courts by permitting specific-act evidence with procedural safeguards. Under the proposed amendments, the trial court serves as a gatekeeper for specific-act evidence by holding a Rule 104 hearing to balance the probative value and prejudicial effect of the evidence. The standard to be applied involves consideration of the identity of the witness, the remoteness of the act, whether the act was committed by a juvenile, and whether the proceeding is in a criminal case. The proposed amendments provide enhanced protections for criminal defendants as compared to the federal rule by requiring the proponent to establish a reasonable basis that the conduct occurred, and the conduct to be probative of the witness' character for truthfulness. When the act occurred more than ten years before the trial, the court must find that the probative value of the conduct outweighs any prejudicial effect. Acts committed as a juvenile are permissible only if committed by a witness other than a defendant in a criminal case, are otherwise admissible under Rule 609, and are necessary for the fair determination of the issues.

Proposed Amended New Jersey Rule of Evidence 608

N.J.R.E. 608. Evidence of a Witness' Character for Truthfulness or Untruthfulness [and Evidence of Prior False Accusation]

- (a) [The credibility of a] A witness' credibility may be attacked or supported by evidence in the form of opinion or reputation that relates to the witness' character for truthfulness or untruthfulness, provided[, however, that the evidence relates only to the witness' character for truthfulness or untruthfulness, and provided further] that evidence of truthful character is admissible only after the [character of the witness] witness' character for truthfulness has been attacked by opinion or reputation evidence or otherwise. [Except as otherwise provided by Rule 609 and by paragraph (b) of this rule, a trait of character cannot be proved by specific instances of conduct.]

- (b) (1) [The credibility of a witness in] In a criminal case, a witness' character for truthfulness may be attacked by evidence that the witness made a prior false accusation against any person of a crime similar to the crime with which defendant is charged if the judge preliminarily determines, by a hearing pursuant to Rule 104(a), that the witness knowingly made the prior false accusation.
- (2) In a criminal case, a witness' character for truthfulness may be attacked by evidence that the witness made a prior false statement tending to exonerate the defendant if the judge preliminarily determines, by a hearing pursuant to Rule 104(a), that the witness knowingly made the prior false statement of exoneration.
- (c) Except as otherwise provided by Rule 609 and paragraph (b) of this Rule, extrinsic evidence is not admissible to prove specific instances of a witness' conduct in order to attack or support the witness' character for truthfulness. In a criminal case, subject to the requirements in paragraphs (d), (e), and (f) of this Rule, the court may, on cross-examination, permit inquiry into specific instances of conduct that are probative of the character for truthfulness or untruthfulness of:
- (1) the witness; or
- (2) another witness whose character the witness being cross-examined has testified about pursuant to paragraph (a) of this Rule.
- (d) The proponent of the specific conduct inquiry pursuant to paragraph (c) of this Rule must show that
- (1) a reasonable factual basis exists that the specific instance of conduct occurred, and
- (2) the specific instance of conduct has probative value in assessing the witness' character for truthfulness.
- (3) If the witness is a criminal defendant, the proponent of the specific conduct inquiry pursuant to paragraph (c) of this Rule must give the defendant reasonable notice of the intent to cross-examine on the specific instance of conduct and the court must determine, by a hearing pursuant to Rule 104(a), that a reasonable factual basis exists that the specific instance of conduct occurred and that the specific instance of conduct has probative value in assessing the defendant's character for truthfulness.
- (e) Except as provided below, the court's determination to allow inquiry under paragraph (c) of this Rule is subject to the balancing standard of Rule 403. If, however, the specific instance of conduct occurred more than ten years before the commencement of

the trial, the court must find that the probative value of the specific instance of conduct in assessing the witness' character for truthfulness outweighs any prejudicial effect.

- (f) Inquiry into specific instances of conduct of a witness committed while the witness was a juvenile is generally not permissible under paragraph (c) of this Rule. The court may, however, permit inquiry into such conduct by a witness, other than the defendant in a criminal case, if the inquiry would otherwise be permitted under paragraph (c) of this Rule if the conduct had been committed by an adult and the court determines that the inquiry is necessary for a fair determination of the issues in the action.
- (g) By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness' character for truthfulness.

3. Summary of Proposed Restyling Amendments to the New Jersey Rules of Evidence

The proposed restyling amendments to the New Jersey Rules of Evidence are the result of a seven-year project that was initiated at the Chief Justice's request after the Federal Rules were restyled in 2011. The goal of this project was to make the New Jersey Rules of Evidence clearer, plainer, and easier to understand, but without changing their meaning. The proposed restyled Rules eliminate ambiguous words, minimize the use of redundant intensifiers, use consistent terminology and punctuation, and preserve “sacred phrases” (phrases that have become so familiar and have been interpreted so frequently in the case law that to alter them would be disruptive to existing jurisprudence).

The proposed restyled rules also contain a revised format where Rule numbers and citations were preserved to minimize the effects on research, and subdivisions were rearranged in some Rules to improve the organization. The Rules are broken down into more subparts with indents and headings to guide readers.

Article V (Privileges) was not restyled since this Article largely consists of privileges that were enacted by statute and incorporated into the Evidence Rules for convenience of reference.

The Rules were restyled to reduce the use of inconsistent terms that say the same thing in different ways and create possible confusion. For example, Rules that used the words “accused” and “defendant” interchangeably were revised to refer just to “defendant.” The proposed restyled rules also minimize the use of redundant “intensifiers.” These are expressions that attempt to add emphasis but instead state the obvious and create negative implications for other Rules. The proposed restyled rules also have eliminated words and concepts that are outdated or redundant.

Restyling amendments are proposed for the following Rules: N.J.R.E. 101, 102, 104, 105, 106, 201, 202, 301, 302, 303, 402, 404, 405, 408, 409, 410, 601, 602, 604, 605, 607, 609, 610, 611, 612, 613, 614, 701, 703, 705, 801, 803, 804, 805, 806, 807, 808, 901, 902, 903, 1001, 1003, 1005, 1006, 1007, 1008.

Proposed Restyling Amendments to the New Jersey Rules of Evidence

ARTICLE I. GENERAL PROVISIONS

NJRE 101. [Scope; Definitions] Applicability; Exceptions; Definitions

(a) Applicability; Exceptions [exceptions].

(1) Applicability. Except as provided by paragraph (a)(3), these rules of evidence shall apply in all proceedings, whether civil, criminal, family, municipal, tax, or any other proceeding conducted by or under the supervision of a court.

(2) [(1)] Privileges. The provisions of Rule 500 (privileges) shall apply, without relaxation, to all proceedings and inquiries, whether formal, informal, public or private, and to all branches and agencies of government.

(3) [(2) Court proceedings;] Relaxation [relaxation]. [These rules of evidence shall apply in all proceedings, civil or criminal, conducted by or under the supervision of a court.] Except as provided by subparagraph (a)(2)[(1)] of this rule, these rules may be relaxed in the following instances to admit relevant and trustworthy evidence in the interest of justice:

(A) actions within the cognizance of the Small Claims Section of the Special Civil Part of the Superior Court, Law Division, and the Small Claims Division of the Tax Court whether or not the action was instituted in a Small Claims Section or Division;

(B) in accordance with a statutory provision;

(C) proceedings in a criminal or juvenile delinquency action in which information is presented for the court's use in exercising a sentencing or other dispositional discretion, including bail and pretrial intervention and other diversionary proceedings;

(D) to the extent permitted by law, proceedings to establish probable cause, including grand jury proceedings, probable cause hearings, and ex parte applications;

(E) proceedings to determine the admissibility of evidence under these rules or other law.

(4) [(3)] Administrative Proceedings [proceedings]. Except as otherwise provided by subparagraph (a)(2)[(1)] of this rule, proceedings before administrative agencies shall not be governed by these rules.

(5) [(4)] Undisputed Facts [facts]. If there is no bona fide dispute between the parties as to a relevant fact, the [judge] court may permit that fact to be established by stipulation or binding admission. In civil proceedings the [judge] court may also permit that fact to be proved by any relevant evidence, and exclusionary rules shall not apply, except Rule 403 or a valid claim of privilege.

(6) [(5)] Affidavit in Lieu [lieu] of Testimony [testimony]. These rules shall not be construed to prohibit the use of an affidavit in lieu of oral testimony to the extent permitted by law.

(b) Definitions. As used in these rules, the following terms shall have the meaning hereafter set forth unless the context otherwise indicates:

(1) "Burden of persuasion" means the obligation of a party to meet the requirements of a rule of law that the fact be proved [either] by a preponderance of the evidence, [or] by clear and convincing evidence, [or] beyond a reasonable doubt, or such other standard as required by law [as the case may be].

(2) "Burden of producing evidence" means the obligation of a party to introduce evidence when necessary to avoid the risk of a judgment or peremptory finding against that party on an issue of fact.

(3) "Writing" has the meaning given in the definition contained in Rule 801(e).

(4) "Public Official" has the meaning given in the definition contained in Rule 801(f).

(5) "Statement Under Oath" means a statement made under penalty of perjury whether by oath, affirmation, or declaration.

(c) Repeal. The adoption of these rules of evidence shall not operate to repeal any existing statute by implication. However, where an existing statute has been expressly superseded pursuant to N.J.S.A. 2A:84A-40 by an official note heretofore or hereafter appended to a rule of evidence, such statute shall have no further force or effect.

NJRE 102. Purpose and Construction

These rules shall be construed to [secure fairness in] administer every proceeding fairly, eliminate unjustifiable [administration and elimination of unjustified] expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination. [The adoption of these rules shall not bar the growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.]

[NJRE 103. Not Adopted.]

NJRE 104. Preliminary Questions

(a) In General. [Questions of admissibility generally–]

(1) The court shall decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege and Rule 403. [When the qualification of a person to be a witness, or the admissibility of evidence, or the existence of a privilege is subject to a condition, and the fulfillment of the condition is in issue, that issue is to be determined by the judge. In making that determination the judge shall not apply the rules of evidence except for Rule 403 or a valid claim of privilege.]

(2) The [judge] court may hear and determine such matters out of the presence or hearing of the jury.

(b) Relevance [conditioned] That Depends on a Fact [fact].

(1) When the relevance of evidence depends on whether a fact or condition exists, proof must be introduced sufficient to support a finding that the fact or condition does exist. The court may admit the proposed evidence on the condition that the proof be introduced later. [Where evidence is otherwise admissible if relevant and its relevance is subject to a condition, the judge shall admit it upon or subject to the introduction of sufficient evidence to support a finding of the condition.]

(2) In such cases the court [judge] shall instruct the jury to consider the issue of the existence of the fact [fulfillment of the condition] and to disregard the evidence if it finds that [the condition was not fulfilled] fact does not exist. The jury shall be instructed to disregard the evidence if the court [judge] subsequently determines that a jury could not reasonably find [that] the existence of the fact [condition was fulfilled].

(c) Preliminary Hearing [hearing] on Admissibility [admissibility] of Defendant's Statements [defendant's statements].

(1) If the hearing involves the admissibility of defendant's statements, the court shall conduct such hearing out of the presence of the jury; [Where by virtue of any rule of law a judge is required in a criminal action to make a preliminary determination as to the admissibility of a statement by the defendant, the judge shall hear and determine the question of its admissibility out of the presence of the jury.]

(2) In such a hearing the rules of evidence shall apply and the burden of persuasion as to the admissibility of the statement is on the prosecution.

If the court [judge] admits the statement the jury shall not be informed of the finding that the statement is admissible but shall be instructed to disregard the statement if it finds that it is not credible.

If the court [judge] subsequently determines from all of the evidence that the statement is not admissible, the court [judge] shall take appropriate action.

(d) [Testimony by accused] Cross-Examining a Defendant in a Criminal Proceeding. By testifying [upon] on a preliminary matter, a defendant in a criminal proceeding [the accused] does not become subject to cross-examination on [as to] other issues in the case.

(e) Evidence Relevant to Weight and Credibility [credibility]. This rule does not limit a party's [the] right [of a party] to introduce, before the trier of fact, evidence relevant to the weight or credibility of other evidence.

NJRE 105. Limited Admissibility

When evidence is admitted as to one party or for one purpose but is not admissible as to another party or for another purpose, the [judge] court, upon request, shall restrict the evidence to its

proper scope and shall instruct the jury accordingly, but may permit a party to waive a limiting instruction.

NJRE 106. Remainder of or Related Writings or Recorded Statements

If a party introduces all or part of a writing or recorded statement [When a writing or recorded statement or part thereof is introduced by a party], an adverse party may require the introduction, at that time, of any other part, or any other writing or recorded statement, [which] that in fairness ought to be considered [contemporaneously] at the same time.

ARTICLE II. JUDICIAL NOTICE

NJRE 201. Judicial Notice of Law and Adjudicative Facts

(a) Notice of Law [law]. Law which may be judicially noticed includes the decisional, constitutional and public statutory law, rules of court, and private legislative acts and resolutions of the United States, this state, and every other state, territory and jurisdiction of the United States as well as ordinances, regulations and determinations of all governmental subdivisions and agencies thereof. Judicial notice may also be taken of the law of foreign countries.

(b) Notice of Facts [facts]. [Facts which may be judicially noticed include] The court may judicially notice a fact, including:

(1) such specific facts and propositions of generalized knowledge as are so universally known that they cannot reasonably be the subject of dispute;

(2) such facts as are so generally known or are of such common notoriety within the area pertinent to the event that they cannot reasonably be the subject of dispute;

(3) specific facts and propositions of generalized knowledge which are capable of immediate determination by resort to sources whose accuracy cannot reasonably be questioned; and

(4) records of the court in which the action is pending and of any other court of this state or federal court sitting for this state.

(c) When Discretionary [discretionary]. [A] The court may take judicial notice on its own [whether requested or not.]; or

(d) When Mandatory [mandatory]. [A] The court shall take judicial notice if [requested by] a party requests it on notice to all other parties and [if] the court is supplied with the necessary information.

(e) Opportunity to Be Heard [be heard]. On timely request, a [Each] party is entitled [upon timely request to an opportunity] to be heard on [as to] the propriety of taking judicial notice and the nature [tenor] of the fact to be [matter] noticed. [In the absence of prior notification, the request may be made after judicial notice has been taken.] If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) How Taken [taken].

In determining the propriety of taking judicial notice [of a matter or the tenor thereof] and the nature of the matter to be noticed, any source of relevant information may be consulted or used, whether or not furnished by a party, and the rules of evidence shall not apply except Rule 403 or a valid claim of privilege.

(g) Instructing the Jury [jury]. In a civil [action or] proceeding, the [judge] court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal [case] proceeding, the [judge] court shall instruct the jury that it may, but is not required to, accept as [established] conclusive any fact [which has been] judicially noticed.

NJRE 202. Judicial Notice in Proceedings Subsequent to Trial

(a) Subsequent Proceedings [proceedings]. The failure or refusal of the [judge] trial court to take judicial notice of a matter or to instruct the trier of the fact with respect to it shall not preclude the [judge] trial court from taking judicial notice of the matter in subsequent proceedings in the action.

(b) On Appeal [appeal]. The reviewing court [in its discretion] may take judicial notice of any matter specified in Rule 201, whether or not judicially noticed by the [judge] trial court.

(c) Opportunity to Be Heard [be heard]. A [judge] trial or [a] reviewing court taking judicial notice under paragraph (a) or (b) of this rule of a matter not previously noticed in the action may afford the parties the opportunity to present information relevant to the propriety of taking such judicial notice and [to] the nature [tenor of] the matter to be noticed.

ARTICLE III. PRESUMPTIONS

NJRE 301. Effect of Presumption

(a) Except as otherwise provided in Rule 303 or by other law, a presumption discharges the burden of producing evidence as to a fact (the presumed fact) when another fact (the basic fact) has been established.

(b) If evidence is introduced tending to disprove the presumed fact, the issue shall be submitted to the trier of fact for determination unless the evidence is such that reasonable persons would not differ as to the existence or nonexistence of the presumed fact.

(c) If no evidence tending to disprove the presumed fact is presented, the presumed fact shall be deemed established if the basic fact is found or otherwise established.

(d) The burden of persuasion as to the proof or disproof of the presumed fact does not shift to the party against whom the presumption is directed unless otherwise required by law.

(e) Nothing in this rule shall preclude the [judge] court from commenting on inferences that may be drawn from the evidence.

NJRE 302. Choice of Law

In a civil [actions or] proceeding[s], [the existence and effect of a presumption respecting a fact which is an element of a claim or defense as to which] federal law or the law of another jurisdiction governs the effect of a presumption regarding a claim or defense for which such law supplies the rule of decision [supplies the rule of decision shall be determined in accordance with that federal or other law].

Rule 303. Presumptions Against a Defendant in Criminal Proceedings

(a) Scope. Except as otherwise provided by law, in a criminal [cases] proceeding presumptions against a defendant [an accused], recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt, are governed by this rule. As used in this rule, the term "element of the offense" shall include any issue on which the prosecution bears the burden of persuasion beyond a reasonable doubt.

(b) Submission to the Jury [jury]. The [judge] court may not direct the jury to find a presumed fact against the [accused] defendant. If a presumed fact establishes an element of the offense, the [judge] court may submit the question of the existence of the presumed fact to the jury upon proof of the basic fact but only if a reasonable juror on the evidence as a whole, including the evidence of the basic fact, could find the presumed fact beyond a reasonable doubt. If the presumed fact has a lesser effect, the question of its existence may be submitted to the jury provided the basic facts are supported by sufficient evidence or are otherwise established, unless the [judge] court determines that reasonable jurors on the evidence as a whole could not find the existence of the presumed fact.

(c) Instructing the Jury [jury]. Whenever the existence of a presumed fact against the [accused] defendant is submitted to the jury, the [judge] court may instruct the jury that it may regard the basic fact as sufficient evidence of the presumed fact but that it is not required to do so. In addition, if the presumed fact establishes guilt or is an element of the offense, the [judge] court shall instruct the jury that its existence, on all of the evidence, must be proved beyond a reasonable doubt. The [judge] court shall not use the word "presumed" or "presumption" in instructions to the jury.

ARTICLE IV. RELEVANCY AND ITS LIMITS

NJRE 401. Definition of "Relevant Evidence"

[No change.]

NJRE 402. Relevant Evidence Generally Admissible

[Except as otherwise provided in these rules or by law,] All relevant evidence is admissible, except as otherwise provided in these rules or by law.

NJRE 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

[No change.]

NJRE 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes Evidence

(a) Character Evidence [evidence] [generally]. Evidence of a person's character or character trait, including a trait of care or skill or lack thereof, is not admissible [for the purpose of proving] to prove that on a particular occasion the person acted in conformity with [on a particular occasion] the character or trait except:

(1) Character of [accused] Defendant in a Criminal Proceeding. Evidence of a pertinent trait of the defendant's character offered by the defendant or by the prosecution to rebut it. Evidence of a pertinent trait of the [accused's] defendant's character offered by the [accused] defendant [, which] shall not be excluded under Rule 403[, or by the prosecution to rebut the same];

(2) Character of Victim [victim]. Evidence of a pertinent trait of character of the victim of the crime offered by [an accused] a defendant in a criminal proceeding or by the prosecution to rebut [the same] it, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of Witness [witness]. Evidence of the character of a witness as provided in Rule 608.

(b) Other Crimes, Wrongs, or Acts [crimes, wrongs, or acts].

(1) Prohibited Uses. Except as otherwise provided by Rule 608(b) evidence of other crimes, wrongs, or acts is not admissible to prove [the disposition of a person] a person's disposition in order to show that [such person acted in conformity therewith] on a particular occasion the person acted in conformity with such disposition.

(1) Permitted Uses. [Such] This evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident when such matters are relevant to a material issue in dispute.

(2) Character and Character Trait in Issue [character trait in issue]. Evidence of a person's character or [trait of character] character trait is admissible when that character or trait is an element of a claim or defense.

NJRE 405. Methods of Proving Character

(a) Reputation, Opinion, or Conviction of [opinion or conviction of crime]. When evidence of [character or a trait of character of a person] a person's character or character trait is admissible, it may be proved by evidence of the person's reputation, evidence in the form of opinion, or evidence of conviction of a crime which tends to prove the trait. Specific instances of conduct not the subject of a conviction of a crime shall be inadmissible except as otherwise provided.

(b) Specific Instances of Conduct [instances of conduct]. When [character or a trait of character of a person] a person's character or character trait is an essential element of a charge, claim, or defense, [evidence of specific instances of conduct may also be admitted] the character or trait may also be proved by specific instances of the person's conduct.

NJRE 406. Habit, Routine Practice

[No change.]

NJRE 407. Subsequent Remedial Measures

[No change.]

NJRE 408. Settlement Offers and Negotiations

When a claim is disputed as to validity or amount, evidence of statements or conduct by parties or their attorneys in settlement negotiations, with or without a mediator present, including offers of compromise or any payment in settlement of a related claim, [shall] is not [be] admissible either to prove or disprove the liability for, or invalidity of, or amount of the disputed claim. Such evidence shall not be excluded when offered for another purpose; and evidence otherwise admissible shall not be excluded merely because it was disclosed during settlement negotiations.

NJRE 409. Payment of Medical and Similar Expenses

Evidence of furnishing or offering or promising to pay medical, hospital, property damage, or similar expenses occasioned by an injury or other claim is not admissible to prove liability for the injury or claim.

NJRE 410. Inadmissibility of Pleas, Plea Discussions and Related Statements

(a) Prohibited Uses.

Except as otherwise provided in this rule, evidence of:

(1) a [plea of] guilty plea which was later withdrawn[,]; or

(2) [of] any statement made in the course of that plea proceeding[, and of]; or

(3) [and of] any statement made during plea negotiations when either no guilty plea resulted or a guilty plea was later withdrawn, is not admissible in any civil or criminal proceeding against the person who made the plea or statement or who was the subject of the plea negotiations.

[However, such a statement is admissible]

(b) Exceptions.

The court may admit a statement described in Rule 410(a):

(1) in any proceeding in which another statement made during [in the course of] the same plea or plea discussions has been introduced, if [and the statement should] in fairness the statements ought to be considered together [contemporaneously with it,]; or

(2) in a criminal proceeding for perjury, false statement, or other similar offense, if the [statement was made by] the defendant made the statement under oath, on the record, and with counsel present [in the presence of counsel].

NJRE 411. Liability Insurance

[No change.]

ARTICLE VI. WITNESSES

NJRE 601. General Rule of Competency

Every person is competent to be a witness unless (a) the [judge] court finds that the proposed witness is incapable of expression [concerning the matter] so as to be understood by the [judge] court and any jury either directly or through interpretation, or (b) the proposed witness is incapable of understanding the duty of a witness to tell the truth, or (c) [except] as otherwise provided by these rules or by law.

NJRE 602. Lack of [Of] Personal Knowledge

[Except as otherwise provided by Rule 703 (bases of opinion testimony by experts), a] A witness may [not] testify to a matter [unless] only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the [testimony of that witness] witness' own testimony. This rule does not apply to expert testimony under Rule 703.

NJRE 603. Oath or Affirmation

[No change.]

NJRE 604. Interpreters

The [judge] court shall determine the qualifications of a person testifying as an interpreter. An interpreter [shall be subject to all provisions of these rules relating to witnesses and] shall take an oath or make an affirmation or declaration to interpret accurately and shall be subject to all provisions of these rules relating to witnesses.

NJRE 605. Restriction on Judge as a Witness

The judge presiding at the trial may not testify as a witness in that trial. [No objection need be made] A party need not object to preserve the [point] issue.

NJRE 606. Restriction on Juror as a Witness

[No change.]

NJRE 607. [Credibility] Witness Impeachment, Support, and Neutralization

[Except as otherwise provided by Rules 405 and 608,]

(a) For [for] the purpose of [impairing] attacking or supporting the credibility of a witness, any party including the party calling the witness may examine the witness and introduce extrinsic evidence relevant to the issue of credibility, subject to the exceptions in (a)(1) and (2).

(1) This provision is subject to Rules 405 and 608.

(2) [except that the] The party calling a witness may not neutralize the witness' testimony by a prior contradictory statement unless the statement is in a form admissible under Rule 803(a)(1) or the [judge] court finds that the party calling the witness was surprised.

(b) A prior consistent statement shall not be admitted to support the credibility of a witness except: (1) to rebut an express or implied charge against the witness of recent fabrication or of improper influence or motive, and [except] (2) as otherwise provided by the law of evidence.

NJRE 608. Evidence of Character for Truthfulness or Untruthfulness and Evidence of Prior False Accusation

[Proposed Amendments to Rule 608 Presented Separately.]

NJRE 609. Impeachment by Evidence of Conviction of Crime

(a) In General.

(1) For the purpose of [affecting] attacking the credibility of any witness, the witness' conviction of a crime, subject to Rule 403, [must] shall be admitted unless excluded by the [judge] court pursuant to [Section] paragraph (b) of this rule.

(2) (A) Except as provided in subparagraph (a)(2)(B) of this Rule, [S]such conviction may be proved by examination, production of the record thereof, or by other competent evidence[.], [except]

(B) In a criminal [case,] proceeding when the defendant is the witness, and

(i) the prior conviction is the same or similar to one of the offenses charged, or

(ii) the court determines that admitting the nature of the offense poses a risk of undue prejudice to a defendant, the [State] prosecution may only introduce evidence of the defendant's prior convictions limited to the degree of the crimes, the dates of the convictions, and the sentences imposed, excluding any evidence of the specific crimes of which defendant was convicted, unless the defendant waives any objection to the non-sanitized form of the evidence.

(b) Use of Prior Conviction Evidence After Ten Years.

(1) If, on the date the trial begins, more than ten years have passed since the witness' conviction for a crime or release from confinement for it, whichever is later, then evidence of the conviction is admissible only if the court determines that its probative value outweighs its prejudicial effect, with the proponent of that evidence having the burden of proof.

(2) In determining whether the evidence of a conviction is admissible under [Section] subparagraph (b)(1) of this rule, the court may consider:

(i) whether there are intervening convictions for crimes or offenses, and if so, the number, nature, and seriousness of those crimes or offenses,

(ii) whether the conviction involved a crime of dishonesty, lack of veracity or fraud,

(iii) how remote the conviction is in time,

(iv) the seriousness of the crime.

NJRE 610. Religious Beliefs or Opinions

Evidence of [the beliefs or opinions of a witness on matters of religion] a witness' religious beliefs or opinions is not admissible [for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced] to attack or support the witness' credibility.

NJRE 611. Mode and Order of Interrogation and Presentation

(a) Control by Court [court]; Purposes. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence [so as] to:

(1) make [the interrogation and presentation] those procedures effective for [the ascertainment of] determining the truth;

(2) avoid [needless consumption of] wasting time; and

(3) protect witnesses from harassment or undue embarrassment.

(b) Scope of Cross-examination [cross-examination]. Cross-examination should [be limited to] not go beyond the subject matter of the direct examination and matters affecting the [credibility of the witness] witness' credibility. The court may [, in the exercise of discretion, permit] allow inquiry into additional matters as if on direct examination.

(c) Leading Q[q]uestions. Leading questions should not be used on [the] direct examination [of a witness] except as [may be] necessary to develop the witness' testimony. Ordinarily, leading questions should be permitted on cross-examination. When a party calls an adverse party or a witness identified with an adverse party, or when a witness demonstrates hostility or unresponsiveness, interrogation may be by leading questions, subject to the discretion of the court.

NJRE 612. Writing Used to Refresh Memory

(a) Except as otherwise provided by law in criminal proceedings, if a witness while testifying uses a writing to refresh the witness' memory for the purpose of testifying, an adverse party is entitled to have the writing produced at the hearing for inspection and use in cross-examining the witness. The adverse party shall also be entitled to introduce in evidence those portions which relate to the testimony of the witness but only for the purpose of impeaching the witness. If it is claimed that the writing contains material not related to the subject of the testimony, the court shall examine the writing in camera and excise any unrelated portions.

(b) If the witness has used a writing to refresh the witness' memory before testifying, the court [in its discretion and] in the interest of justice may accord the adverse party the same right to the writing as that party would have if the writing had been used by the witness while testifying.

NJRE 613. Prior Statements of Witnesses

(a) Examining Witness Concerning Prior Statement [witness concerning prior statement]. When [In] examining a witness [concerning a] about the witness' prior statement, [made by the witness,] whether written or not, [the statement need not be shown or its] a party need not show it or disclose [the] its contents [disclosed] to the witness [at that time]. But the party must upon [Upon] request, [the statement shall be shown or disclosed to opposing counsel] show it or disclose its contents to an adverse party's attorney or a self-represented litigant, unless the self-represented litigant is the witness.

(b) Extrinsic Evidence of Prior Inconsistent Statement of Witness [evidence of prior inconsistent statement of witness]. Extrinsic evidence of a witness' prior inconsistent statement [made by a witness] may [in the judge's discretion] be excluded unless the witness is afforded an opportunity to explain or deny the statement and the opposing party is afforded an opportunity to interrogate on the statement, or the interests of justice otherwise require. This rule does not apply to admissions of a party opponent as defined in Rule 803(b).

NJRE 614. Calling and Interrogation of Witnesses by Court [Judge]

(a) Calling. The court [judge, in accordance with law and subject to the right of a party to make timely objection,] may call a witness [and may interrogate any witness] on its own or at a party's request. Each party is entitled to cross-examine the witness.

(b) Examining. The court may examine a witness regardless of who calls the witness.

(c) Objections. A party may object to the court's calling or examining a witness.

NJRE 615. Sequestration of Witnesses

[No change.]

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

NJRE 701. Opinion Testimony of Lay Witnesses

If a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences may be admitted if it:

(a) is rationally based on the [perception of the] witness' perception; and

(b) will assist in understanding the witness' testimony or [in] determining a fact in issue.

NJRE 702. Testimony by Experts

[No change.]

NJRE 703. Bases of Opinion Testimony by [By] Experts

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

NJRE 704. Opinion on Ultimate Issue

[No change.]

NJRE 705. Disclosure of Facts or Data Underlying Expert Opinion; Hypotheses Not Necessary

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

Questions calling for the opinion of an expert witness need not be hypothetical in form unless in the [judge's] court's discretion it is so required.

ARTICLE VIII. HEARSAY

NJRE 801. Definitions

[For purposes of this article, the following definitions apply:]

(a) Statement. "Statement" means a person's [A "statement" is (1) an] oral assertion, [or] written assertion, or [(2)] nonverbal conduct, [of a person] if the person intendeded[s] it as an assertion.

(b) Declarant. [A "Declarant"] "Declarant" means the [is a] person who made the [makes a] statement.

(c) Hearsay. "Hearsay" means [is] a statement[, other than one made by the declarant] that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers[, offered] in evidence to prove the truth of the matter asserted [in the statement].

(d) Business. A "business" includes every kind of business, institution, association, profession, occupation, and calling, whether or not conducted for profit, and also includes activities of governmental agencies.

(e) Writing. A "writing" consists of letters, words, numbers, data compilations, pictures, drawings, photographs, symbols, sounds, or combinations thereof or their equivalent, set down

or recorded by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or by any other means, and preserved in a perceptible form, and their duplicates as defined by Rule 1001(d).

(f) Public Official. A "public official" includes an official of the United States, its territories, the District of Columbia and states, as well as political subdivisions, regional and other governmental agencies thereof.

NJRE 802. Hearsay Rule

[No change.]

NJRE 803. Hearsay Exceptions Not Dependent on Declarant's Unavailability

The following statements are not excluded by the hearsay rule:

(a) A Declarant-Witness' Prior Statement [statements of witnesses]. The declarant-witness testifies and is subject to cross-examination about a prior otherwise admissible statement, and the statement [A statement previously made by a person who is a witness at a trial or hearing, provided it would have been admissible if made by the declarant while testifying and the statement]:

(1) is inconsistent with the declarant-witness' testimony at the trial or hearing and is offered in compliance with Rule 613.

However, when the statement is offered by the party calling the declarant-witness, it is admissible only if, in addition to the foregoing requirements, it (A) is contained in a sound recording or in a writing made or signed by the declarant-witness in circumstances establishing its reliability; or (B) was given under oath [subject to the penalty of perjury] at a trial or other judicial, quasi-judicial, legislative, administrative or grand jury proceeding, or in a deposition; or

(2) is consistent with the declarant-witness' testimony and is offered to rebut an express or implied charge against the declarant-witness of (A) recent fabrication or (B) improper influence or motive; or

(3) is a prior identification of a person made after perceiving that person if made in circumstances precluding unfairness or unreliability.

(b) Statement by Party-Opponent [party-opponent]. [A] The statement is offered against a party-opponent [which is] and is:

(1) the party-opponent's own statement, made either in an individual or in a representative capacity;[,] or

(2) a statement whose content the party-opponent has adopted by word or conduct or in whose truth the party has manifested belief;[,] or

(3) a statement by a person authorized by the party-opponent to make a statement concerning the subject;[,] or

(4) a statement by the party-opponent's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship;[,] or

(5) a statement made at the time the party-opponent and the declarant were participating in a plan to commit a crime or civil wrong and the statement was made in furtherance of that plan.

In a criminal proceeding, the admissibility of a defendant's statement which is offered against the defendant is subject to Rule 104(c).

(c) Statements Not Dependent on Declarant's Availability [not dependent on declarant's availability]. The following are not excluded by the rule against hearsay, regardless of whether [Whether or not] the declarant is available as a witness:

(1) Present Sense Impression [sense impression]. A statement describing or explaining [of observation, description or explanation of] an event or condition, made while or immediately after the declarant [was perceiving the event or condition] perceived it and without opportunity to deliberate or fabricate.

(2) Excited Utterance [utterance]. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition and without opportunity to deliberate or fabricate.

(3) Then-Existing Mental, Emotional, or Physical Condition [existing mental, emotional, or physical condition]. A statement made in good faith of the declarant's then-existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) A Statement for Purposes of Medical Diagnosis or Treatment [Statements for purposes of medical diagnosis or treatment]. A statement [Statements] that: (A) is made in good faith for purposes of, and is reasonably pertinent to, medical diagnosis or treatment; and [which] describes medical history;[, or] past or present symptoms[, pain,] or sensations;[, or the] their inception; or their general [character of the] cause [or external source thereof to the extent that the statements are reasonably pertinent to diagnosis or treatment].

(5) Recorded Recollection [recollection]. A statement concerning a matter about which the witness is unable to testify fully and accurately because of insufficient present recollection if the statement is contained in a writing or other record [which] that:

(A) was made at a time when the fact recorded actually occurred or was fresh in the memory of the witness;[,] and

(B) was made by the witness or under the witness' direction or by some other person for the purpose of recording the statement at the time it was made;[,] and

(C) the statement concerns a matter of which the witness had knowledge when it was made.[,]

[unless the circumstances indicate that the statement is not trustworthy; provided that when] When the witness does not remember part or all of the contents of a writing, the portion the witness does not remember may be read into evidence but shall not be introduced as an exhibit over objection. This exception does not apply if the circumstances indicate that the statement is not trustworthy.

(6) Records of Regularly Conducted Activity [regularly conducted activity]. A statement contained in a writing or other record of acts, events, conditions, and, subject to Rule 808, opinions or diagnoses, made at or near the time of observation by a person with actual knowledge or from information supplied by such a person, if the writing or other record was made in the regular course of business and it was the regular practice of that business to make [it, unless] such writing or other record.

This exception does not apply if the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy.

(7) Absence of an Entry in Records of Regularly Conducted Activity [entry in records of regularly conducted activity]. Evidence that a matter is not included in a writing or other record kept in accordance with the provisions of Rule 803(c)(6), if:

(A)[when offered] the evidence is admitted to prove that [the nonoccurrence or nonexistence of] the matter did not occur or exist; and

(B) a record was regularly kept for a matter of that kind.

[if the matter was of a kind of which a writing or other record was regularly made and preserved, unless]

The exception does not apply if [unless] the sources of information or other circumstances indicate that the inference of nonoccurrence or nonexistence is not trustworthy.

(8) Public records, reports, and findings. Subject to Rule 807,

(A) a statement contained in a writing or other record made by a public official of an act done by the official or an act, condition, or event observed by the official if it was within the scope of the official's duty either to perform the act reported or to observe the act, condition, or event reported and to make the written statement[.]; or

(B) statistical findings of a public official based upon a report of or an investigation of acts, conditions, or events, if it was within the scope of the official's duty to make such statistical findings.[,]

This exception does not apply if [unless] the sources of information or other circumstances indicate that such statistical findings are not trustworthy.

(9) Records of Vital Statistics [vital statistics]. Subject to Rule 807, a statement contained in any form such as a record[s] of a birth[s], fetal death[s], death[s], or marriage[s] or civil union, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of Public Record [public record] or [entry]Statement. Subject to Rule 807, a certification in accordance with Rule 902 stating that a diligent search failed to disclose a public record or statement [, report, writing, or entry] when offered to prove:

(A) the [absence of a public record, report, writing, or entry] record or statement does not exist: or

(B) the [nonoccurrence or nonexistence of a] matter [of which a record, report, writing, or entry is regularly made and preserved by] did not occur or exist if a public office or agency [,] regularly kept a record or statement for a matter of that kind.

The exception does not apply if [unless] the sources of information or other circumstances indicate that the inference of nonoccurrence or nonexistence is not trustworthy.

(11) Records of [religious organizations] Religious Organizations Concerning Personal or Family History. Subject to Rule 807, a statement[s] of birth[s], legitimacy, ancestry marriage[s] or civil union, divorce[s], death[s], [legitimacy,] [ancestry,] relationship by blood or marriage or civil union, or [other] similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Certificates of Marriage, Civil Union, Baptism [civil union, baptismal], and Similar [similar certificates] Ceremonies. Subject to Rule 807, statements of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) [that the maker] attesting that the person performed a marriage or civil union, or [other] similar ceremony, or administered a sacrament;[, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified,] and

(C) purporting to have been issued at the time of the act or within a reasonable time [there] after it.

(13) Family Records [records]. Subject to Rule 807, statements of fact [concerning a] about personal or family history contained in a family record, such as a Bible[s], genealogy[ies], chart[s], engraving[s] on a ring[s], inscription[s] on a family portrait[s], engraving[s] on an urn[s], crypt[s], [or] tombstone[s], or other [the like] burial marker.

(14) Records of Documents [documents] that Affect an Interest in Property [affecting an interest in property]. Subject to Rule 807, the record of a document that purports [purporting] to establish or affect an interest in property if[:],]

(A) the record is admitted [as proof of] to prove the content of the original recorded document, along with its signing and its [execution and] delivery by each person by who[m it] purports to have signed it [been executed,];

(B) [if] the record is kept in a [record of] public office; and

(C) [an applicable] a statute authorizes [authorized the] recording [of] documents of that kind in that office.

(15) Statements in Documents [documents] that Affect an Interest in Property [affecting an interest in property]. Subject to Rule 807, a statement contained in a document that purports[ing] to establish or affect an interest in property if the matter stated was relevant to the [purpose of the] document's purpose, unless dealings with the property [since the document was made have been] are inconsistent with the truth of the statement or the purport of the document.

(16) Statements in Ancient Documents [ancient documents]. A statement [Statements] in a document [in existence] at least 30 years old and [or more] whose authenticity is established.

(17) Market Reports [reports], and Similar Commercial Publications [commercial publications]. Market quotations, tabulations, lists, directories, or other published compilations[,] that are generally used and relied [up]on by the public or by persons in particular occupations.

(18) Statements in Learned Treatises [treatises], Periodicals, or Pamphlets. [To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert in direct examination,] A statement[s] contained in a published treatise[s], periodical[s], or pamphlet[s] on a subject of history, medicine, or other science or art, if:

(A) the statement is relied on by an expert witness on direct examination or called to the attention of the expert of cross-examination; and

(B) the publication is established as a reliable authority by testimony or by judicial notice.

If admitted, the statement[s] may not be received as an exhibit[s] but may be read into evidence or, if graphics, shown to the jury.

(19) Reputation Concerning Personal or Family History [concerning personal or family history]. Evidence of a person's reputation[,] among members of [the] a person's family by blood, adoption, or marriage, or civil union, or among [that] a person's associates, or in the community, concerning a person's birth, adoption, marriage or civil union, divorce, death, legitimacy, ancestry, relationship by blood, adoption, or marriage or civil union, or other similar facts of [the] a person's personal or family history.

(20) Reputation Concerning Boundaries or General History [concerning boundaries or general history]. Evidence of reputation in a community, arising before the controversy, [as to] concerning boundaries of [or customs affecting] land[s] in the community or customs that affect the land, or concerning [and as to events of] general historical[historical] events important to [the] that community, [or] state, or nation in which the community is located.

(21) Reputation Concerning [as to] Character [character]. Evidence of reputation of a person's character at a relevant time among the person's associates or in the community.

(22) Judgment[s] of Previous Conviction of Crime [previous conviction of crime]. In a civil [proceeding] case, except as otherwise provided by court order on acceptance of a plea, evidence of a final judgment against a party adjudging the party guilty of an indictable offense in New Jersey or of an offense which would constitute an indictable offense if committed in this state, as against that party, to prove any fact essential to sustain the judgment.

(23) Judgment [as to] Involving Personal, Family, or General History, or Boundaries [personal, family, or general history, or boundary]. A judgment [Judgments] that is admitted to prove [as proof of] a matter[s] of personal, family, or general history, or boundaries, [essential to the judgment,] if [those] the matter[s]:

(A) was essential to the judgment; and

(B) [would] could be proved [proveable] by evidence of reputation.

(24) Not adopted.

(25) Statement Against Interest [against interest]. A statement which was at the time of its making so far contrary to the declarant's pecuniary, proprietary, or social interest, or so far tended to subject declarant to civil or criminal liability, or to render invalid declarant's claim against another, that a reasonable person in declarant's position would not have made the statement unless the person believed it to be true. Such a statement is admissible against [an accused] a defendant in a criminal [action] proceeding only if the [accused] defendant was the declarant.

(26) Judgments against Persons Entitled to Indemnity [persons entitled to indemnity]. Subject to Rule 807 and except in a [proceeding] case brought under the Joint Tortfeasors Contribution Law, N.J.S.A. 2A:53A-1 [et seq.] to -5, the record of a final judgment is admissible if offered by the judgment debtor in an action in which the debtor seeks to recover partial or total indemnity or exoneration for money paid or a liability incurred because of the judgment, as evidence:

(A) of the liability of the judgment debtor[,];

(B) of the facts on which the judgment is based[,]; and

(C) of the reasonableness of the damages recovered.

If the defendant in the second action had notice of and opportunity to defend the first action, the judgment is conclusive evidence.

(27) Statements by a Child Relating to a Sexual Offense [child relating to a sexual offense]. A statement made by a child under the age of 12 relating to sexual misconduct committed with or against that child is admissible in a criminal, juvenile, or civil [proceeding] case if (a) the proponent of the statement makes known to the adverse party an intention to offer the statement and the particulars of the statement at such time as to provide the adverse party with a fair opportunity to prepare to meet it; (b) the court finds, in a hearing conducted pursuant to Rule

104(a), that on the basis of the time, content and circumstances of the statement there is a probability that the statement is trustworthy; and (c) either (i) the child testifies at the proceeding, or (ii) the child is unavailable as a witness and there is offered admissible evidence corroborating the act of sexual abuse; provided that no child whose statement is to be offered in evidence pursuant to this rule shall be disqualified to be a witness in such proceeding by virtue of the requirements of Rule 601.

NJRE 804. Hearsay Exceptions: Declarant Unavailable

(a) Definition of Unavailable [unavailable]. Except when the declarant's unavailability has been procured or wrongfully caused by the proponent of declarant's statement for the purpose of preventing declarant from attending or testifying, a declarant is "unavailable" as a witness if declarant:

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the statement; or

(2) persists in refusing to testify concerning the subject matter of the statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the statement; or

(4) is absent from the trial, hearing, or proceeding because of physical or mental illness or infirmity, or other cause;[,] and

(A) the proponent of the statement is unable by process or other reasonable means to procure the declarant's attendance at trial, hearing, or proceeding; and[,]

(B) with respect to statements proffered under Rules 804(b)(4) and (7), the proponent [is] must be unable, without undue hardship or expense, to obtain declarant's deposition for use in lieu of testimony at trial[;], hearing, or proceeding; or

(5) [Deleted – see N.J.R.E. 803(c)(27)].

(b) Hearsay Exceptions [exceptions]. Subject to Rule 807, the following are not excluded by the hearsay rule if the declarant is unavailable as a witness.

(1) Testimony in Prior Proceedings [prior proceedings].

(A) Testimony that: (i) was given by a witness at a prior trial of the same or a different matter, or in a hearing or deposition taken in compliance with law in the [course of the] same or another proceeding[, if the party against whom the testimony]; and (ii) is now offered against a party who had an opportunity and similar motive in the prior trial, hearing or deposition [proceeding] to develop the testimony by examination or cross-examination.

(B) In a civil [action or] proceeding, [and only] or when offered by the defendant in a criminal [action or] proceeding, testimony given in a prior trial, hearing or deposition taken [pursuant to] in compliance with law to which the party against whom the testimony is now offered was not a party, if the party who offered the prior testimony or against whom it was offered had an opportunity to develop the testimony on examination or cross-examination and had an interest and motive to do so, which is the same or similar to that of the party against whom it is now offered.

(C) Expert opinion testimony given in a prior trial, hearing, or deposition otherwise admissible under (A) or (B) may be excluded[, however,] if the [judge] court finds that there are experts of a like kind generally available within a reasonable distance from the place in which the action is pending and the interests of justice so require.

(2) Statement Under Belief of Imminent Death [under belief of imminent death]. In a criminal proceeding, a statement made by a victim unavailable as a witness is admissible if it was made voluntarily and in good faith and while the declarant believed in the imminence of declarant's impending death.

(3) Statement Against Interest [against interest]. [Adopted in 1993 as Rule 803(c)(25)]

(4) Statement of Personal or Family History [personal or family history]. A statement about:

(A) [concerning] the declarant's own birth, adoption, [marriage, divorce,] legitimacy, ancestry, marriage or civil union, divorce, relationship by blood, adoption, or marriage or civil union, or [other] similar facts of personal or family history, even though declarant had no way [means] of acquiring personal knowledge about the fact; or of the matter stated; or

(B) another person concerning any of these facts, as well as, [the foregoing matters, and the] death [also, of another person], if the declarant was related to the other by blood, adoption, or marriage or civil union, or was so intimately associated with the [other's] person's family [as to be likely to have accurate information concerning the matters declared] that the declarant's information is likely to be accurate.

(5) Other Exceptions [exceptions]. [Not Adopted]

(6) Trustworthy Statements by Deceased Declarants [statements by deceased declarants]. In a civil proceeding, a statement made by a person unavailable as a witness because of death if the statement was made in good faith upon declarant's personal knowledge in circumstances indicating that it is trustworthy.

(7) Voters' Statements [statements]. A statement by a voter concerning the voter's qualifications to vote or the fact or content of the vote.

(8) [Deleted]

(9) Forfeiture by Wrongdoing [wrongdoing]. A statement offered against a party who has engaged, directly or indirectly, in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

NJRE 805. Hearsay Within Hearsay

[A statement within the scope of an exception to Rule 802 shall not be inadmissible on the ground that it includes a statement made by another declarant which is offered to prove the truth of its contents if the included statement itself meets the requirements of an exception to Rule 802.]

Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

NJRE 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness. The court may admit [E]vidence of the declarant's inconsistent [a] statement or [other] conduct [by a declarant], [inconsistent with the declarant's hearsay statement received in evidence, is admissible although] regardless of when it occurred or whether the declarant had [no] an opportunity to explain or deny [or explain] it. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, that party is entitled to examine the declarant on the statement as if under cross-examination.

NJRE 807. Discretion of [Judge] Court to Exclude Evidence Under Certain Exceptions

Except if offered by a[n] [accused] defendant in a criminal proceeding, when any statement is admissible [by reason of] under Rules 803(c)(8), 803(c)(9), 803(c)(10), 803(c)(11), 803(c)(12), 803(c)(13), 803(c)(14), 803(c)(15), 803(c)(26) or 804(b), the [judge] court may exclude [it] the statement at the trial if it appears that the proponent's intention to offer the statement in evidence was not made known to the adverse party at such time as to provide that party with a fair opportunity to [meet it] challenge the statement.

NJRE 808. Expert Opinion Included in a Hearsay Statement Admissible Under an Exception

Expert opinion [which] that is included in an admissible hearsay statement shall be excluded if the declarant has not been produced as a witness unless the [trial judge] court finds that the circumstances involved in rendering the opinion [, including the motive, duty, and interest of the declarant, whether litigation was contemplated by the declarant, the complexity of the subject matter, and the likelihood of accuracy of the opinion,] tend to establish its trustworthiness. Factors to consider include the motive, duty, and interest of the declarant, whether litigation was contemplated by the declarant, the complexity of the subject matter, and the likelihood of accuracy of the opinion.

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

NJRE 901. Requirement of Authentication or Identification

[The] To satisfy the requirement of [authentication or identification as a condition precedent to admissibility is satisfied by] authenticating or identifying an item of evidence, the proponent must present evidence sufficient to support a finding that the [matter] item is what its proponent claims.

NJRE 902. Self-Authentication

The following items of evidence are self-authenticating and they require no [E] extrinsic evidence of authenticity [as a condition precedent to admissibility is not required with respect to the following:] in order to be admitted:

- (a) New Jersey Public Documents [public documents]. A document purporting to bear a signature affixed in an official capacity by an officer or employee of the State of New Jersey or of a political subdivision, department, office, or agency [thereof] within it.
- (b) Other Domestic Public Documents [domestic public documents]. A document (1) bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or possession thereof, or of a political subdivision, department, office, or agency thereof, and a signature purporting to be an attestation or execution, or (2) purporting to bear a signature affixed in an official capacity by an officer or employee of such an entity, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer had the official capacity and that the signature is genuine.
- (c) Foreign Public Documents [public documents]. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, provided that either an apostille is affixed to the document certifying its genuineness pursuant to international agreement to which the United States is a party or the document is accompanied by a final certification as to the genuineness of the signature and official position (1) of the executing or attesting person, or (2) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

- (d) Certified Copies of Public Records [copies of public records]. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (a), (b), or (c) of this rule or complying with any law or rule of court.
- (e) Official Publications [publications]. A book [Books], pamphlet[s], or other publication[s] purporting to be issued by public authority.
- (f) Newspapers and Periodicals [periodicals]. Printed material[s] purporting to be newspaper[s] or periodical[s].
- (g) Trade Inscriptions and the Like [inscriptions and the like]. An inscription [Inscriptions], sign[s], tag[s], or label[s] purporting to have been affixed in the course of business and indicating ownership, control, or origin.
- (h) Acknowledged Documents [documents]. A document [Documents] accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.
- (i) Commercial Paper and Related Documents [paper and related documents]. Commercial paper, signature[s thereon] on it, and documents [relating thereto] related to the extent provided by applicable commercial law.
- (j) Presumption Under Statute [under statute]. Any signature, document, or other matter declared by state or federal law to be presumptively or prima facie genuine or authentic.
- (k) Certificate of Lack of Record [lack of record]. A writing asserting the absence of an official record authenticated in the manner prescribed for public documents in paragraph (a), (b), or (c) of this rule.

NJRE 903. Testimony of Subscribing Witness Unnecessary

[The testimony of a] A subscribing witness' testimony is [not] necessary to authenticate a writing [unless] only if required by the law of the jurisdiction [whose law] that governs [the] its validity [of the writing].

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

NJRE 1001. Definitions

For purposes of this article the following definitions are applicable:

- (a) Writings. "Writings," which include recordings, are defined in Rule 801(e).
- (b) Photographs. "Photographs" include still photographs, X-ray films, videos [tapes], motion pictures and similar forms of reproduced likenesses.

(c) Original. An "original" of a writing is the writing itself or any counterpart intended by the person or persons executing or issuing it to have the same effect. An "original" of a photograph includes the negative or any print therefrom. [If data are stored by means of a computer or similar device] With respect to electronically created documents, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

(d) Duplicate. A "duplicate" is a counterpart, other than an original, produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and reductions, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent technique which accurately reproduces the original.

NJRE 1002. Requirement of Original

[No change.]

NJRE 1003. Admissibility of Duplicates

A duplicate as defined by Rule 1001(d) is admissible to the same extent as an original unless [(a)] a genuine question is raised [as to] about the original's authenticity [of the original,] or [(b) in] the circumstances [it would be] make it unfair to admit the duplicate [in lieu of the original].

NJRE 1004. Admissibility of Other Evidence of Contents

[No change.]

NJRE 1005. Public Records

The proponent may use a copy to prove the contents of an official record, or of a writing [authorized to be] that was recorded or filed [and actually recorded or filed,] in a public office as authorized by law, if these conditions are met:

(a) the record or writing [if] is otherwise admissible;

(b) and the copy [may be proved by a copy,] is certified as correct in accordance with Rule 902, or testified to be correct by a witness who has compared it with the original.

If [a] no such copy [which complies with the foregoing cannot] can be obtained by [the exercise of] reasonable diligence, then the proponent may use other evidence to prove of the contents [may be admitted].

NJRE 1006. Summaries

The proponent may use a summary, chart, or calculation presented by a qualified witness to prove the content[s] of voluminous writings or photographs [which] that cannot conveniently be

examined in court. [may be presented by a qualified witness in the form of a chart, summary, or calculation.] The proponent shall make the originals[,] or duplicates[, shall be made] available for examination or copying, or both, by other parties at a reasonable time and place or mode. The [judge] court may order that [they be produced] the proponent to produce them in court.

NJRE 1007. Testimony or Written Statement of Party

The proponent may prove the content[s] of a writing[s] or photograph [photographs may be proved] by the testimony, [or] deposition, or written statement of the party against whom the evidence is offered. [or by that party's written admission, without accounting for the nonproduction of] The proponent need not account for the original.

NJRE 1008. Functions of [Judge] Court and Jury

Ordinarily the [judge shall] court determines whether the proponent has fulfilled the factual conditions for admitting other [the sufficiency of proof of a condition for the admission of] evidence of the content[s] of a writing or photograph [other than the original in accordance with Rule 104] other than Rule 1004 and 1005. However, [when a party raises an issue as to (a)] in a jury trial, the jury determines any factual issue about whether:

- (a) [the] an asserted writing or photograph ever existed, or
- (b) [whether] another writing or photograph produced at the trial is the original, or
- (c) [whether] the evidence correctly reflects the content of the original writing or photograph, [the issue shall be determined by the trier of fact as in the case of other issues of fact.]