2002 - 2004 REPORT OF THE

SUPREME COURT COMMITTEE ON

THE RULES OF EVIDENCE

January 30, 2004

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I. RULE AMENDMENTS RECOMMENDED FOR ADOPTION

A. Proposed Amendments to Eliminate Gender-Biased Language

In 1984, the New Jersey Supreme Court Task Force on Women recommended that all court rules be revised to use gender-neutral language. A similar recommendation was made by the Supreme Court Committee on Women in the Courts in its 1990-92 rules report. In a letter dated October 17, 1994, Chief Justice Robert Wilentz reported to the Committee on Women in the Courts that many rules committees had proposed rule changes to eliminate gender-biased language. He asked that if committee members came across any remaining problems, Marilyn Slivka, Court Executive, Administrative Office of the Courts ("AOC"), call them to the attention of staff of the appropriate rules committees.

In 2002, Ms. Slivka brought to the attention of the Supreme Court Committee on the Rules of Evidence ("the Committee") that many evidence rules still contain gender-biased language. At the request of the Committee, Ms. Slivka proposed changes to the evidence rules that substituted gender-neutral language for the biased language. The Committee recommends that the Court adopt these proposed changes to the evidence rules, which eliminate gender-biased language, without changing the substantive meaning of the rules. Changes are proposed to the following rules: N.J.R.E. 101(b)(2); N.J.R.E. 303(c); N.J.R.E. 404(a) and (b); N.J.R.E. 602; N.J.R.E. 705; N.J.R.E. 801(a)(2); N.J.R.E. 803(c)(5)(B), (22), (26), (27)(a); 804(a), (a)(2), (a)(3), (a)(4), (b)(6), and (b)(7).

The Committee is not recommending any revisions to the evidence rules found in Article V, Privileges, because these rules merely restate New Jersey statutes that create privileges.

Rule 101. Scope; definitions

(a) Applicability; exceptions.

(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.

(2) Court proceedings; 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 Paragraph (a)(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.

(3) Administrative proceedings. Except as otherwise provided by Paragraph (a)(1) of this rule, proceedings before administrative agencies shall not be governed by these rules.

(4) Undisputed facts. If there is no bona fide dispute between the parties as to a relevant fact, the judge may permit that fact to be established by stipulation or binding admission. In civil proceedings the judge 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.

(5) Affidavit in lieu of 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, 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 [him] that party on an issue of fact.

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

(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.

Rule 303.   Presumptions against the accused in criminal cases

(a) Scope. Except as otherwise provided by law, in criminal cases presumptions against 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 jury. The judge may not direct the jury to find a presumed fact against the accused. If a presumed fact establishes an element of the offense, the judge 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 determines that reasonable jurors on the evidence as a whole could not find the existence of the presumed fact.

(c) Instructing the jury. Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge 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 shall instruct the jury that its existence, on all of the evidence, must be proved beyond a reasonable doubt. The judge shall not use the word “presumed" or “presumption" in [his] instructions to the jury.

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes; evidence

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

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

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused or by the prosecution to rebut the same, 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. Evidence of the character of a witness as provided in Rule 608.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that [he] such person acted in conformity therewith. Such 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.

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

Rule 602. Lack of personal knowledge

Except as otherwise provided by Rule 703 (bases of opinion testimony by experts), a witness may not testify to a matter unless 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 [the] that witness [himself].

Rule 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 therefore 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 [the judge in his discretion so requires] in the judge's discretion it is so required.

Rule 801. Definitions

For purposes of this article, the following definitions apply:

(a) Statement. A “statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person if [it is intended by him] the person intends it as an assertion.

(b) Declarant. A “declarant" is a person who makes a statement.

(c) Hearsay. “Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(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.

Rule 803. Hearsay exceptions not dependent on declarant's unavailability

The following statements are not excluded by the hearsay rule:

(a) Prior statements of witnesses. 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 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 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 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 witness' testimony and is offered to rebut an express or implied charge against the witness of recent fabrication or 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. A statement offered against a party which is:

(1) the party's own statement, made either in an individual or in a representative capacity, or

(2) a statement whose content the party 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 to make a statement concerning the subject, or

(4) a statement by the party'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 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. Whether or not the declarant is available as a witness:

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

(2) Excited 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. 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) Statements for purposes of medical diagnosis or treatment. Statements made in good faith for purposes of medical diagnosis or treatment which describe medical history, or past or present symptoms, pain, or sensations, or the inception or 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. 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 (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 [himself] 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 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.

(6) Records of 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 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. Evidence that a matter is not included in a writing or other record kept in accordance with the provisions of Rule 803(c)(6), when offered to prove the nonoccurrence or

nonexistence of the matter, if the matter was of a kind of which a writing or other record was regularly made and preserved, 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 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, unless the sources of information or other circumstances indicate that such statistical findings are not trustworthy.

(9) Records of vital statistics. Subject to Rule 807, a statement contained in any form such as records of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry. Subject to Rule 807, a certification in accordance with Rule 902 stating that diligent search failed to disclose a public record, report, writing, or entry when offered to prove (A) the absence of a public record, report, writing, or entry, or (B) the nonoccurrence or nonexistence of a matter of which a record, report, writing, or entry is regularly made and preserved by a public office or agency, unless the sources of information or other circumstances indicate that the inference of nonoccurrence or nonexistence is not trustworthy.

(11) Records of religious organizations. Subject to Rule 807, statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Subject to Rule 807, statements of fact contained in a certificate that the maker performed a marriage or other 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 purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Subject to Rule 807, statements of fact concerning a personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. Subject to Rule 807, the record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorized the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. Subject to Rule 807, a statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence 30 years or more whose authenticity is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by testimony or by judicial notice. If admitted, the statements may not be received as exhibits but may be read into evidence or, if graphics, shown to the jury.

(19) Reputation concerning personal or family history. Evidence of a person's reputation, among members of the person's family by blood, adoption, or marriage, or among that person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, ancestry, relationship by blood, adoption, or marriage, or other similar fact of the person's personal or family history.

(20) Reputation concerning boundaries or general history. Evidence of reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and as to events of general history important to the community or state or nation in which the community is located.

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

(22) Judgments of previous conviction of crime. In a civil proceeding, except as otherwise provided by court order on acceptance of a plea, evidence of a final judgment against a party adjudging [him] 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 personal, family, or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if those matters would be provable by evidence of reputation.

(24) Other exceptions. [Not Adopted]

(25) Statement 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 in a criminal action only if the accused was the declarant.

(26) Judgments against persons entitled to indemnity. Subject to Rule 807 and except in a proceeding brought under the Joint Tortfeasors Contribution Law, N.J.S.A. 2A:53A-1 et seq., the record of a final judgment is admissible if offered by the judgment debtor in an action in which [he] the debtor seeks to recover partial or total indemnity or exoneration for money paid or a liability incurred because of the judgment, as evidence of the liability of the judgment debtor, of the facts on which the judgment is based, and 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. A statement 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 if (a) the proponent of the statement makes known to the adverse party [his] an intention to offer the statement and the particulars of the statement at such time as to provide [him] 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.

Rule 804. Hearsay exceptions: declarant unavailable

(a) Definition of unavailable. Except when the declarant's unavailability has been procured or wrongfully caused by the proponent of [his] declarant's statement for the purpose of preventing [him] declarant from attending or testifying, a declarant is "unavailable" as a witness if [he] 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 [his] the statement despite an order of the court to do so; or
>
> (3) testifies to a lack of memory of the subject matter of [his] the statement; or
>
> (4) is absent from the hearing because of death, physical or mental illness or infirmity, or other cause, and the proponent of the statement is unable by process or other reasonable means to procure the declarant's attendance at trial, and, with respect to statements proffered under Rules 804(b)(4) and (7), the proponent is unable, without undue hardship or expense, to obtain [his]declarant's deposition for use in lieu of testimony at trial.

(b) Hearsay 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.
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> (A) Testimony 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 is now offered had an opportunity and similar motive in the prior trial, hearing or proceeding to develop the testimony by examination or cross-examination.
>
> (B) In a civil action or proceeding, and only when offered by the defendant in a criminal action or proceeding, testimony given in a prior trial, hearing or deposition taken pursuant to 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. Expert opinion testimony given in a prior trial, hearing, or deposition may be excluded, however, if the judge 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.
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> (2) Statement 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 -- adopted as Rule 803(c)(25)]

(4) Statement of personal or family history. A statement: (A) concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, ancestry, relationship by blood, adoption, or marriage, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated or (B) concerning the foregoing matters, and the death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matters declared.

(5) [Other exceptions--not adopted]

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

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

II. RULE AMENDMENTS CONSIDERED AND REJECTED

A. Proposed Amendment to N.J.R.E. 604 and Creation of a New Rule Governing Use of Approved Interpreters for Certain Depositions

The Committee considered a request from the AOC to amend N.J.R.E. 604, "Interpreters," and to create a new rule requiring the use of approved interpreters for certain depositions.

The AOC requested that N.J.R.E. 604 be amended to eliminate the requirement that interpreters take an oath before each proceeding. The primary purpose of the proposed change was to increase efficiency in the courtroom by saving time. The AOC proposed the following language: [additions to the current rule are underscored and deletions are placed in [brackets]]:

> The judge shall determine the qualifications of a person [testifying as an interpreter] interpreting on the record. A[n] person interpreting the testimony of a witness [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] except that an interpreter employed by the Administrative Office of the Courts, listed in the Judiciary's Registry of Free-lance Interpreters and Interpretation/ translation Agencies, or contracted through an approved interpreting agency need not take an oath or make an affirmation or declaration at the beginning of a proceeding.

The Committee decided to reject the proposed change. It noted that the interpreter's oath takes up little courtroom time and that the oath emphasizes to all participants the seriousness and importance of the interpreter's role in the proceeding.

The AOC also proposed the following text for a new evidence rule mandating that approved interpreters be used, whenever reasonably possible, for de bene esse depositions:

> Use of Interpreters at Deposition:
>
> A party taking a deposition that is intended to be used as substantive evidence at trial shall, whenever reasonably possible, use only interpreters or agencies included in the Judiciary's Registry of Free-lance Interpreters and Interpretation/translation Agencies. When such a deposition is offered into evidence its proponent should place on the record (1) that the interpreter or agency was included in the registry at the time of the deposition, or (2) that despite reasonable efforts to obtain one, no interpreter from the registry or an approved agency was available, or (3) that the circumstances of the deposition made it infeasible to use an interpreter from the registry or an approved agency. This rule should not be read to interfere with the requirement that a judge shall determine the qualifications of an interpreter set forth in Rule 604.

The Committee rejected this proposal. After discussion, it decided that the AOC's goals could more appropriately be accomplished through amending the court rules on depositions or through a directive from the Director of the AOC.

B. Proposed Amendment to N.J.R.E. 803(c)(6) – Business Records Exception to the Hearsay Rule

The Committee considered whether it should amend N.J.R.E. 803(c)(6) to explicitly allow the admission of business records by certification. The Committee decided such an amendment was unnecessary, because the current rule allows for such admission. The 1991 comments of the Committee on the business exception rule make clear that live testimony is not always necessary:

> In contrast to its federal counterpart, Rule 803(c)(6) follows the 1967 New Jersey rule in not requiring testimony of the custodian or other qualified witness as a condition for admission of business records. The requirement that a foundation be laid establishing the criteria for admissibility may be met by the kind of proof that would satisfy a trial judge in a hearing under Rule 104(a), including proof presented in affidavit form, such as in the case of hospital records. Gunter v. Fischer Scientific American, 193 N.J. Super. 688, 691-692 (App. Div. 1984).
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> [Biunno, Current N.J. Rules of Evidence, 1991 Supreme Court Committee Comment on N.J.R.E. 803(c)(6).]

C. Proposed Hearsay Exception for Domestic Violence Cases

At the request of a citizen, the Committee considered whether it should recommend the creation of an exception to the hearsay rule for use solely in domestic violence cases. Many cases of domestic violence are never prosecuted because the victim refuses to testify against the batterer in court. Proponents of such an exception argue that if a victim's out-of-court statements could be introduced as evidence, more domestic violence cases could be successfully prosecuted. On the other hand, opponents of the exception fear that it would dangerously impinge on the rights of defendants. In order to address this complex issue, a subcommittee was formed, chaired by Committee member, Professor Sherry Colb.

The consensus of the subcommittee was that the current evidence rules, if properly applied, are adequate to permit the successful prosecution of domestic violence cases, even in the absence of the victim's testimony. The Committee agrees with its subcommittee and recommends against the adoption of such an exception.

III. MATTERS HELD FOR CONSIDERATION

A. Uniform Mediation Act

The New Jersey Law Revision Commission ("Commission") asked the Committee for comment on the Uniform Mediation Act ("the Act"), which creates a mediation communication privilege. The Committee, though it generally favored the privilege, asked that it be modified slightly so that mediators will be required to testify if all parties to an agreement waive the privilege. John Cannel, Executive Director of the Commission and member of the Committee, agreed to draft an appropriate modification to the Act. The Committee recently received the proposed modification and will consider it in the next term.

IV. CONCLUSION

The members of the Supreme Court Committee on the Rules of Evidence appreciate the opportunity to serve the Supreme Court in this capacity.

Respectfully submitted,

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