2017 - 2019 REPORT OF THE

SUPREME COURT COMMITTEE ON

THE RULES OF EVIDENCE

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I. RULE AMENDMENTS RECOMMENDED FOR ADOPTION

A. RESTYLING THE NEW JERSEY RULES OF EVIDENCE

In 2007, the federal court system undertook a major rewriting of the Federal Rules of Evidence with a goal "to make the [Federal Evidence] Rules simpler, easier to read, and easier to understand without changing their substance."[1] The restyling of the Federal Rules of Evidence was part of a larger effort to revise all the national rules of procedure so that they were presented in plain language with clear, consistent style conventions. On December 1, 2011, the restyled Federal Rules of Evidence took effect.

The New Jersey Rules of Evidence were extensively revised in 1992 after the Supreme Court asked this Committee to consider whether New Jersey should adopt the Federal Rules of Evidence. At that time, the Committee recommended against adopting the Federal Rules as a whole but, rather, suggested adopting "the substance and language of the federal rules when we considered them equal to or better than our present rules. However, in a number of instances we preferred the prevailing New Jersey law . . . ."[2] Consequently, the 1992 New Jersey Evidence Rules are largely patterned after the Federal Rules of Evidence but are not identical to them.

[1] Davidson M. Douglas et al., The Restyled Federal Rules of Evidence, 53 Wm. & Mary L. Rev. 1435, 1440 (2012).
[2] 1991 Report of the New Jersey Supreme Court Committee on the Rules of Evidence.

Because of the similarities between the current New Jersey Rules of Evidence and the Federal Rules of Evidence that were in effect before restyling, Chief Justice Stuart Rabner, in late 2011, asked this Committee to study the restyled Federal Rules of Evidence to determine whether our Rules of Evidence would benefit from a similar revision. Chief Justice Rabner charged the Committee with recommending stylistic changes to the New Jersey Evidence Rules that would make the rules simpler and easier to understand, but would not change their substantive meaning.

In January 2012, the Restyling Subcommittee, led by Judge Philip S. Carchman, embarked on an in-depth study of the restyled Federal Evidence Rules. The Subcommittee's membership was carefully chosen to include judges, practitioners and an academic, all with expertise in both the Evidence Rules and substantive areas of the law, including civil and criminal practice, appellate practice, personal injury law, family law, and municipal court practice.

The Restyling Subcommittee subsequently undertook a systematic, rule-by-rule, word-by-word review of the New Jersey Rules of Evidence. Consistent with Chief Justice Rabner's charge, the Subcommittee recognized that its recommendations should be limited to making the New Jersey Evidence Rules clearer, plainer, and easier to understand, but without changing

their meaning. The Subcommittee decided that initially it would be guided by the style rules and guidelines used by the federal Advisory Committee on Evidence Rules. See Federal Rule of Evidence 101, Note. These style rules include eliminating ambiguous words, minimizing the use of redundant intensifiers, and preserving "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).

In its review, the Subcommittee used a meticulous method of analysis. For each Evidence Rule it considered, it compared the Federal Rule of Evidence before the restyling, the Federal Rule after restyling, the current New Jersey Rule of Evidence, the notes of the Federal Advisory Committee, and the notes of the 1991 New Jersey Evidence Committee. The Subcommittee also considered revisions to the Federal Rules of Evidence adopted since 1991. The Restyling Subcommittee worked on this project during 2011-2013 term, 2013-2015 term, 2015-2017 term, and finished in the current term.

The Subcommittee did not restyle Article V, Privileges, since this Article largely consists of privileges that were enacted by statute and incorporated into the Evidence Rules for convenience of reference. See N.J.R.E. 500. The Subcommittee also did not restyle Rule 803(c)(27) (the "tender years" hearsay exception) because that provision is under active

substantive review by the Committee for a future cycle pursuant to a Supreme Court referral. It restyled Rule 608 but is aware that the Committee is recommending, in this Report, that the Rule be substantively amended.

As noted above, the restyled Rules are intended to be restated, plain-language versions of the present Rules, without altering substance. When recommending revisions, the Subcommittee considered whether a change could lead to a different result on a question of admissibility; whether it changes how judges and lawyers have addressed and interpreted the Rule in the past; and whether it changes what has been referred to as a "sacred phrase" – a Rule or various components of a Rule that has become so embedded in the practice of law and litigation that even if its terms would warrant change, to do so would create uncertainty about the meaning and application of the Rule.

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 merely refer to "defendant." The Subcommittee also attempted to 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 Subcommittee removed words and concepts that are outdated or redundant.

The Subcommittee rejected the Federal approach that all Rules required change. In many cases, the New Jersey Rule was clear, understandable and did not warrant a change for change's sake. It also recognized that in the last substantive revision of the New Jersey Rules, changes were adopted that caused members to pause as to fully understand the thought process behind the change, but absent some reference in the comments or other verification as to meaning, it generally left the language in place. The Subcommittee operated under the premise that such changes might cause a substantive change and understanding of the Rule.

The Subcommittee also revised the format of the Rules. 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, using progressive (or cascading) indents and more headings to guide readers. These formatting changes are designed to make the structure of the Rules graphic and make the restyled Rules easier to navigate, read, and understand even when the words are not changed.

The Subcommittee submitted proposed comments. All Rules that have been changed are accompanied by a Comment that the purpose of the change is for restyling only and there is no intent to change any of the substantive

provisions of the Rule. Additional comments are proposed to reflect issues that would benefit from explanation for those applying the Rules.

The full Committee considered the Subcommittee's restyling language and comments and adopted the recommendation. The Rules are used by judges, practicing lawyers, litigants, academics, and the public countless times each day. In the courtroom — where their impact is most direct — they must be easily understood and applied.

The Report of the Subcommittee on Restyling is attached as Appendix A; the full text of the restyled Rules is attached as Appendix A-1; and a 5-column chart showing the former Federal Rules; Restyled Federal Rules; current New Jersey Rules; proposed restyled New Jersey Rules; and marked-up proposed restyled Rules, is attached as Appendix A-2.

B. N.J.R.E. 608 EVIDENCE OF CHARACTER FOR TRUTHFULNESS OR UNTRUTHFULNESS AND EVIDENCE OF A PRIOR FALSE ACCUSATION

In his concurring opinion in State v. Scott, Chief Justice Rabner requested the Committee to "consider whether Rule 608 should be revised to allow cross-examination, in a controlled fashion, into specific instances of conduct that are probative of the witness's character for truthfulness." 229 N.J. 469, 494 (2017). The Chief Justice stated that the Committee's

"thoughtful judges, practitioners, and academics can evaluate the current state of the law and consider appropriate safeguards that might accompany a change." Ibid. Federal courts and a majority of state courts allow cross-examination into specific instances of conduct that are probative of a witness's character for truthfulness. New Jersey, however, is one of a few states that follow the minority approach barring the use of specific instances of conduct to attack or support a witness's credibility. The Chief Justice stated that the topic "relates directly to the jury's search for the truth, which our system of justice should foster." Ibid.

Justice Albin authored a concurring opinion arguing against an amendment to the current Rule. He noted that neither the parties to the case nor the members of the Judiciary, bar, or public have complained about the Rule or requested such change. Id. at 496. Moreover, the present version of Rule 608 is "consistent with [New Jersey's] jurisprudence and values." Id. at 500. In addition, specific-conduct evidence could lead to prejudice, distraction, and confusion, discouraging victims from bringing claims and deterring defendants from testifying.

A seven-member Subcommittee was formed to explore the proposal, consider the opinions authored in Scott, and make a recommendation to the full Committee based on its findings. After exhaustive consideration, the

Subcommittee was unable to form a consensus. The Committee chairperson directed the Subcommittee to convene once again to determine whether a consensus could be attained and, if not, to issue majority and minority reports outlining the competing positions. Ultimately, a 4-member majority of the Subcommittee recommended an amendment to Rule 608 permitting inquiry into specific-act evidence along with limitations to safeguard against abuse. A copy of the Report recommending an amendment to Rule 608 (the "Majority Report") is annexed hereto as Appendix B-1. A 3-member minority of the Subcommittee issued a separate Report recommending no change to Rule 608. A copy of the Report recommending no amendment to Rule 608 (the "Minority Report") is annexed hereto as Appendix B-2.

The Majority Report proposed an amendment to Rule 608 to permit inquiry into a witness's specific instances of conduct on cross-examination in limited circumstances. Majority Report at 13. The proposal is designed to balance the admission of relevant evidence that is probative of the witness's character for truthfulness against unfair delay, abuse, or unfairness. Majority Report at p. 16.

Under the current Rule, the use of specific instances of conduct is precluded to attack the credibility of a witness except for: (1) prior criminal convictions in accordance with Rule 405(a); and (2) false accusations of a

crime similar to the crime for which the defendant is charged in accordance with Rule 608. The Subcommittee noted that under the current Rule, an instance of a prior falsehood made under oath in a deposition, while highly probative and highly relevant to a witness's character for truthfulness, would be inadmissible at trial, while potentially less relevant or less probative evidence may be admissible. Majority Report at 1. Thus, the current Rule 608 may impede the truth-seeking function of trials by excluding relevant and probative evidence when, as Chief Justice Rabner stated in Scott, "[t]he justice system's focus belongs on enabling juries to decide whether a witness can be believed . . . ." 229 N.J. at 494. At the same time, however, an expansion of the Rule to allow inquiry into other-acts evidence raises the concerns expressed by Justice Albin in Scott: creating a distraction to the jury on issues not central to the case, discouraging witnesses and defendants from testifying, and delaying trials.

Pursuant to the Chief Justice's direction to "consider appropriate safeguards that might accompany a change" to Rule 608, the Subcommittee borrowed restrictions from other jurisdictions. Majority Report at 2. Namely, the proposed amended Rule 608 limits specific-conduct impeachment to an inquiry on cross-examination and limits inquiry about acts that are remote in time. Majority Report at p. 13. The proposal also provides a criminal

defendant with additional protection by prohibiting inquiry regarding acts committed while a juvenile. Id. at 14. Such inquiry is permitted of other witnesses provided the court determines that the inquiry is necessary for a fair determination of the issues in the case. Ibid. Additionally, trial courts may require pre-trial notice and a hearing for specific-conduct inquiries and must hold a Rule 104 hearing when the witness is a criminal defendant. Ibid. Finally, the majority contends that other jurisdictions have not experienced the problems that the members of the subcommittee who oppose the rule suggest would occur. Id. at 18.

The Minority Report recommended no change to the current Rule, arguing that the proposed amendment raised risks of jury confusion, distraction, and undue prejudice creating "fertile ground for reversible error." Minority Report at 8. The Minority Report cites the long-standing history in New Jersey disfavoring the use of prior bad acts, as well as the lack of any groundswell from the bench and bar for a change. Minority Report at 6-7. The Minority Report argues the proposed amendment will deter witnesses from testifying, encourage attorneys to engage in wide-ranging inquiries of witnesses, and broadly expand pre-trial discovery without "meaningfully advancing" the jury's search for truth. Minority Report at 9. If any change is to be considered, the Minority argues, it must be accompanied by: (1) proof by

"clear and convincing" evidence at a Rule 104 hearing; (2) a showing that the evidence's probative value is not outweighed by the apparent prejudice if it involved the alleged acts of a defendant in a criminal proceeding; (3) a presumption against admission that is weighed more heavily as time passes between the act and the start of trial; and (4) appropriate limiting instructions at the time of the inquiry and at the final jury charge. Minority Report at 10.

The full Committee considered the competing proposals and engaged in a robust debate. Members expressed concern regarding the impact on civil discovery. Unlike the federal system, where specific-act evidence is permitted, there are no magistrate judges in New Jersey to oversee and manage the discovery process. Permitting inquiry into past dishonest conduct, as the proposed Rule provides, combined with advances in technology and the ability to engage in "data mining," may have a deleterious impact on discovery and unduly protract its scope and expense. While trial judges are equipped to enforce the rules fairly and apply Rule 403, practitioners and litigants are not similarly equipped in the discovery process, thus creating a potential for abuse.

Other members raised concerns related to the effect of the proposed change on witnesses. Specifically, data mining gives parties a greater ability to pursue inquiries into a witness's past that may humiliate or demean the witness causing witnesses to be reluctant to testify. A party may easily harvest

extraneous or de minimis information with which to confront and embarrass a witness. A witness will not be permitted to explain the evidence on cross-examination and the attempts on re-direct to rehabilitate the witness may cause confusion for the jury, create delay in the trial, and possibly result in inconsistency across the trial courts. Some members believed, however, that data mining is taking place already and the safeguards of the proposed Rule as well as Rules 403 and 404 are capable of preventing any such abuse.

Members also considered the impact of the proposed change on testimony by police officers in both criminal and civil cases. In the scenario where an officer received minor discipline for filing a false police report, and the false statement is a minor issue such as leaving the patrol sector, the officer typically has no opportunity to appeal the discipline. Similarly, the officer has no ability to explain the situation during cross-examination when confronted with the evidence. Some members contended that the proposed rule would affect current precedent restricting the discoverability of police officer disciplinary files. See e.g. State v. Harris 316 N.J. Super. 384 (App. Div. 1998) (holding that disclosure of police personnel records are admissible only where they may reveal prior bad acts that bear "peculiar relevance" to the issues at trial). If the rule were amended, such files would likely be routinely produced on request to defense counsel to determine whether Rule 608

impeaching material exists. Other members believed the proposed change was fair in this regard, as police officers currently face numerous grounds for impeachment including bias and prior inconsistent statements.

Some members stated that the safeguards built into the proposal will be fair to witnesses and protect against abuse. In addition, some members noted that these issues have not arisen in the majority of jurisdictions with rules similar or more permissive than the proposed rule over the decades that the rules have been in place.

The recommendation of the Majority Report of the Subcommittee for an amendment to Rule 608 was approved narrowly by the Committee with 13 members in favor and 11 opposed. The proposed amended Rule 608 as well as explanations for the specific provisions are set forth below.

Rule 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. 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.

Specific Provisions – Proposed Rule 608

Proposed Rule 608(a) makes no substantive change with respect to the admission of opinion or reputation evidence to show a witness' character for truthfulness or untruthfulness as is currently provided in existing Rule 608(a).

Proposed Rule 608(b)(1) makes no language or substantive change with respect to the admission of a witness' prior false statement of accusation as is currently provided in existing Rule 608(b).

Proposed Rule 608(b)(2) is new and provides for the admission of a witness' prior false statement of exoneration under the same procedural standard as provided in existing Rule 608(b) and Proposed Rule 608(b)(1).

Proposed Rule 608(c) is new. The first sentence makes no substantive change in the existing prohibition on the introduction of extrinsic evidence to prove specific instances of conduct in order to attack or support a witness' character for truthfulness. This prohibition is currently stated in the second sentence of existing Rule 608(a).

The second sentence contains the new provision by which a court may permit inquiry into specific instances of conduct on cross-examination of a witness or a Rule 608(a) character witness subject to the limitations of paragraphs (d), (e), and (f).

Proposed Rule 608(d) is new and requires that the proponent of an inquiry into specific instances of conduct must show a reasonable factual basis that the specific instance of conduct occurred and that the specific instance of conduct is probative of the witness' character for truthfulness.

Proposed Rule 608(e) is new and provides that the standard Rule 403 balance applies to the court's determination to allow or disallow cross-examination inquiry, except when the specific instance of conduct is more than

ten years old. In that case, the court must find that the probative value outweighs any prejudicial effect.

Proposed Rule 608(f) is new and prohibits inquiry into specific instances of conduct committed while a criminal defendant-witness was a juvenile. With regard to other witnesses, inquiry into acts committed while a juvenile are generally not permitted, but the court may permit inquiry if the conduct would be permitted under paragraph (c) if the witness had been an adult and inquiry is necessary for a fair determination of the issues in the action.

Proposed Rule 608(g) is new and provides that 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.

C. N.J.R.E. 530 WAIVER OF PRIVILEGE BY CONTRACT OR PREVIOUS DISCLOSURE; LIMITATIONS

The Committee proposes an amendment to New Jersey Rule of Evidence 530 (Waiver of Privilege by Contract or Previous Disclosure; Limitations). The amendment's genesis is multifold: the increasing use of electronic discovery in litigation; the attendant high risk of inadvertent disclosures of privileged materials; the unsettled nature of the case law governing inadvertent disclosures of privileged material; and the recent adoption of new Court Rules governing the Complex Business Litigation Program. The forms pertaining to the new Rules on complex business litigation include a discovery stipulation and order allowing for the return of inadvertently produced documents. The

proposed amendments to Rule 530 should achieve a unified approach on the issue of waiver of the attorney-client privilege or the work product doctrine.

This recommendation has a long history. During the 2009-2011 cycle, the Committee considered whether to adopt a New Jersey Rule of Evidence equivalent to Federal Rule of Evidence 502, Attorney-Client Privilege and Work Product; Limitations on Waiver. Federal Rule of Evidence 502 was enacted in 2008 to address concerns about the proliferation of electronic discovery and to resolve a conflict that had developed in the federal circuits on the consequences of an inadvertent disclosure of documents in discovery. After referring the issue to a Subcommittee, the consensus of the Committee was not to adopt the Federal Rule whole cloth, but rather, to wait to see what developments may occur through case law to clarify which approach should be used. [3]

Last cycle, a Subcommittee was formed to assess the status of case law developments and reconsider whether Rule 530 should be updated. The Subcommittee concluded that case law had not resolved the question of which

[3] There are three approaches to privilege waiver in New Jersey: a "strict approach" (any disclosure results in waiver); a "subjective approach" (waiver depends on whether the producing party intended to waive the privilege); and a "balancing approach" (the disclosure of privileged information may result in a waiver depending on the circumstances of the case, including whether the party who disclosed privileged information took reasonable steps to prevent disclosure). See Kinsella v. NYT Television, 370 N.J. Super. 311 (App. Div. 2004).

of New Jersey's three competing approaches applies to the issue of waiver of the attorney-client privilege or work product doctrine. It proposed a limited amendment to Rule 530 that would allow a court to enter a case management order specifying whether the attorney-client privilege or work product doctrine would be waived by inadvertent disclosure. The Supreme Court returned the issue to the Committee to review whether Rule 530 should also be amended to incorporate a uniform waiver rule as it applies to the attorney-client privilege or work product doctrine.

The Subcommittee then reexamined New Jersey case law developments and the actions of other states in the 10 years since adoption of Federal Rule of Evidence 502. The Subcommittee also considered the effect of Federal Rule of Evidence 502 on federal civil practice and noted the absence of a definitive New Jersey rule governing the issue in civil practice. Most significantly, the Subcommittee reviewed the September 2018 adoption of new Court Rules in Part IV governing the New Jersey Superior Court Complex Business Litigation Program, which borrow liberally from the Federal Rules of Civil Procedure and Federal Rule of Evidence 502. The new Rules provide a model Electronic Discovery Stipulation and Order, similar to a Federal Rule of Evidence 502 Order, to allow for the return of inadvertently produced documents.

While the issue of which standard governs the waiver of privilege has not been resolved through New Jersey case law, the creation of the Complex Business Litigation Program supports this recommendation to amend Rule 530. Under the Complex Business Litigation Program, each vicinage appoints a special judge who manages all aspects of qualifying complex commercial and construction cases. In order to qualify, a litigant must designate in its Civil Case Information Statement that the case is a complex commercial or construction case with at least $200,000 in controversy.

The Complex Business Litigation Program Court Rules pertain to case management, discovery, and motion practice. See R. 4:102-1 to 103-3. Rule 4:103-1 governs mandatory initial disclosures, requiring parties to disclose, at the outset of the case, all individuals with knowledge or who may be used to support claims of defenses, as well as a description of documents and data that may be used to support such claims or defenses and a computation of damages. Rules 4:103-2 and 4:104-2 include mandatory meet-and-confer obligations early in discovery and the development of a written discovery plan. The judge must conduct an initial case management conference, and all cases are to be pre-tried.

On July 24, 2018, the Administrative Office of the Courts issued proposed forms for purposes of the updated Complex Business Litigation

Program Rules. The proposed Electronic Discovery Stipulation and Order form governs production, spoliation, and disclosure issues. On the issue of waiver, the proposed form states:

> Although New Jersey has not adopted a rule of evidence similar to Federal Rule of Evidence 502 (Attorney-Client Privilege and Work Product; Limitations on Waiver), the Parties understand and stipulate that disclosure of Privileged Discovery Materials pursuant to this Stipulation and Order as well as any Clawback or other Order will not prejudice or otherwise constitute a waiver of, or estoppel as to, any claim of attorney-client, work product or other applicable privilege or immunity, under New Jersey law.
>
> For example, the mere production of privileged or work-product-protected documents in this case as part of a mass production is not itself a waiver in this case, or in any other Federal or State proceeding.
>
> Communications involving trial counsel that post-date the filing of the Complaint need not be placed on a privilege log. Communications may be identified on a privilege log by category, rather than individually, if appropriate.
>
> [Proposed Electronic Discovery Stipulation and Order, August 20, 2018 Notice to the Bar, ¶ 9.]

As of the date of this report, the proposed forms have not yet been implemented and approved by the Supreme Court.

The proposed amendments to Rule 530 will apply a unified approach to the issue of waiver of the attorney-client privilege or work-product doctrine. Rule 530 currently provides:

> 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) contracted with anyone not to claim the right or privilege or, (b) 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.
>
> A disclosure that 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.

Unlike Federal Rule of Evidence 502, New Jersey Rule of Evidence 530 is not limited to the attorney-client privilege and work-product doctrine. The Subcommittee recognized that a broad waiver rule that goes beyond the attorney-client privilege or work-product doctrine may affect other types of cases, such as family or juvenile proceedings. For this reason, the proposed amendment is limited to waiver only of the attorney-client privilege and work-product doctrine.

As an initial matter, the Subcommittee recommends additional language in the first paragraph of the Rule to make clear that waiver of the attorney-client privilege or work-product doctrine are addressed in a new paragraph (c). It further recommends that the first paragraph of the Rule be identified by letter, with a change in internal references. The amended Rule would provide:

(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.

The Subcommittee recommended similar revisions to the current second paragraph of Rule 530, redesignated as paragraph (b):

(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.

The Subcommittee proposed the following new paragraph (c):

(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.

Paragraph (c) reflects the central components of Federal Rule of Evidence 502. Paragraph (c)(1) follows Federal Rule of Evidence 502(a) to make clear that blanket waivers are not caused by, for example, disclosure of a single privileged document. A waiver to a single document will not effect a waiver in other documents unless it is shown that the waiver is intentional, that the subject matter is the same, and that, as a matter of fairness, the separate sources of the privileged information are considered together.

As to inadvertent disclosures, paragraph (c)(2) tracks Federal Rule of Evidence 502(b) and imposes the "balancing approach." This is designed to settle the ongoing issue of which of the three separate approaches under New Jersey case law applies in the context of the attorney-client privilege or work-

product doctrine. A common approach with the Federal Rule will facilitate and inform case law development on this issue. Further, this language is consistent with the proposed Electronic Discovery Stipulation and Order language for the Complex Business Litigation Program discussed above.

Proposed Rule 530(c)(3) addresses the concerns of Federal Rule of Evidence 502(c), on whether a disclosure in another forum operates as a disclosure in the New Jersey litigation. Proposed Rule 530(c)(3) states that in such a case, no waiver will be recognized in the New Jersey litigation if the matter had been disclosed in the New Jersey litigation, or if no waiver exists under the law of the outside jurisdiction. The Subcommittee finds that a companion rule is appropriate since New Jersey courts, just as federal courts, commonly address cases that may involve companion proceedings in other jurisdictions. No supremacy or comity issues are raised since this aspect of the Rule solely concerns the impact of a disclosure in outside, non-New Jersey litigation on the New Jersey litigation.

Proposed Rule 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 Rule amendments. The first sentence of proposed Rule 530(c)(4) follows Federal Rule of Evidence 502(d). The Subcommittee saw no reason to deviate from

such language, and its adoption is consistent with the action of other states. The Subcommittee further proposes a second sentence 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. The Subcommittee finds that privilege reviews may serve useful purposes even where an anti-waiver provision exists, and thus the application of an anti-waiver order should not inhibit such a review if a party deems one necessary.

Proposed Rule 530(c)(5) follows Federal Rule of Evidence 502(e) concerning the binding effect of an anti-waiver agreement on non-parties to the agreement. There is no reason to deviate from the basic premise that parties cannot bind non-parties by virtue of an agreement. In order for the anti-waiver agreement to have broader effect, it must be subject to a court order. The Subcommittee anticipates that the issue of whether the court has jurisdiction to extend the reach of the agreement beyond the parties would be addressed through normal motion practice, just as Federal Rule of Evidence 502(e) foresees.

The Subcommittee declines to recommend incorporation of Federal Rule of Evidence 502(f), which concerns the enforceability of a New Jersey anti-waiver order in other jurisdictions. If the enforceability question is raised in a

federal proceeding, Federal Rule of Evidence 502 applies, and there will be no impact since New Jersey Rule of Evidence 530(c) will be recognized by Federal Rule of Evidence 502(c). The same result holds if the enforceability question is raised in a proceeding in another state that has adopted Federal Rule of Evidence 502(c). If the jurisdiction has not adopted Federal Rule of Evidence 502(c), the enforceability question would be left to a determination by that jurisdiction under principles of comity and full faith and credit. The Subcommittee would expect that in this narrow circumstance, where there is both the New Jersey litigation and litigation in another state that has not adopted Federal Rule of Evidence 502(c), the parties will be sufficiently informed to meet-and-confer concerning the unique waiver issues presented.

Finally, the proposed amendment incorporates, as does Federal Rule of Evidence 502, a definitional section to make clear that the provisions of Rule 530(c) are specific to the attorney-client privilege and work-product doctrine. The Subcommittee deviates from Federal Rule of Evidence 502(g) with respect to the definition of the attorney-client privilege by cross-referencing New Jersey Rule of Evidence 504, which defines this privilege. With respect to the work-product doctrine, the Subcommittee finds that the definition in Federal Rule of Evidence 502(g) is sufficient for these purposes.

These proposed amendments are specific to the attorney-client privilege and work-product doctrine. Consistent with its charge, the Subcommittee does not address issues of privilege waiver that go beyond the circumstances identified in Federal Rule of Evidence 502.

The full Committee considered the Subcommittee's proposed language as set forth in the Subcommittee's report and adopted the recommendation. See Subcommittee Report attached as Appendix C. In its discussion, the Committee noted that the substance of the amendments accords with Rule of Professional Conduct 4.4(b), which states that inadvertently disclosed information should not be reviewed by the receiving lawyer, and the receiving lawyer is obliged to delete the information and notify the sending lawyer of the breach. The Committee found that the proposed amendments are necessary, given the lack of case law resolution and the recent enactment of the Complex Business Litigation Program Rules.

The proposed amended Rule 530 as approved by the Committee is set forth below (additions underlined [deletions bracketed]):

> (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.

II. MATTERS HELD FOR FUTURE CONSIDERATION

A. N.J.R.E. 803(C)(27) STATEMENTS BY A CHILD RELATING TO A SEXUAL OFFENSE

In State in the Interest of A.R., 234 N.J. 82 (2018), the Court asked the Committee to consider whether Rule 803(c)(27) should be amended to conform to the evidence ruling adopted in State v. D.R., 109 N.J. 348 (1988), the source of the current "tender years" exception and its incompetency proviso, and whether any other amendment is advisable. In A.R., the child victim's out-of-court, video-recorded statement was admitted into evidence. 234 N.J. at 85. In addition, the child, who was unable to distinguish between fantasy and reality, was permitted to testify after being declared incompetent as a witness by the court pursuant to the "incompetency proviso" contained in Rule 803(c)(27). Though a child witness may be deemed incompetent as a witness under the requirements of Rule 601, the incompetency proviso states that "no child whose statement is offered into evidence pursuant to this rule shall be disqualified" to testify "by virtue of the requirements of Rule 601." A.R., supra, 234 N.J. at 85 (quoting Rule 803(c)(27)).

The Court noted that the proviso reflected in D.R., and later embodied in former Evidence Rule 63(33), differs from the current language of Rule 802(c)(27). The D.R. proviso states that no child should be disqualified as a witness by virtue of his or her being "incapable of understanding the duty to tell the truth." as set forth in former Evidence Rule 17(b). As adopted and codified in Rule 803(c)(27), however, the proviso permits the child to testify, notwithstanding Rule 601, not only where the child does not understand the duty to tell the truth, but also where the child does not have the capacity to tell the truth, or the capability of expression so as to be understood. Thus, the version adopted by the Legislature in 1993 and codified in the current Rule is an expansion of that adopted by the Court in D.R. The current Rule permits the child to testify in both scenarios: unable to comprehend the duty to tell the truth as well as without the capacity to do so. The Court in A.R. examined the historical record on the evolution of the Rule including Committee meeting minutes and the Committee's 1993 Report, which suggested that this expansion may not have been intended. As a result, the Court asked the Committee to reexamine the issue.

Notably, during the last cycle, the Committee considered whether to amend Rule 803(c)(27) in light of State v. P.S., 202 N.J. 232 (2010), where the Court found the second portion of the rule invalid in criminal or juvenile cases

pursuant to the Confrontation Clause. At that time, however, the Committee declined to recommend any proposed changes to the Rule in anticipation of the Court's decision in A.R.

A Subcommittee was formed to address the Court's request in A.R. Due to the timing of the Court's opinion near the close of the Committee's cycle as well as the significance of the task, this item was held over to the next cycle. In the next term, the Committee will consider the issues involved and draft a rule proposal for the Court's consideration.

B. STATE V. BUESO, 225 N.J. 189 (2016) COMPETENCY OF CHILD WITNESSES

In State v. Bueso, the Court requested that the Criminal Practice Committee draft model questions to be used by trial courts to determine the competency of child witnesses. In carrying out their task, the Criminal Practice Committee requested input from this Committee to assist with evidentiary issues and a joint subcommittee was formed. At the conclusion of the last cycle, the joint subcommittee had concerns with regard to the cognitive abilities of child witnesses and requested the assistance of experts in the field to develop the questions. Recently, toward the close of the Committee's current cycle, the Court approved the use of experts and the joint

subcommittee will develop the questions as requested by the Court during the next cycle.

III. RULES CONSIDERED AND REJECTED

A. PROPOSAL TO ADMIT STATEMENTS IN A TREATING PHYSICIAN'S RECORDS

Last cycle, the Committee received a letter from an attorney proposing that a new evidence rule be drafted to permit the admission of statements in a treating physician's records relied upon or intended to be relied upon by any other treating physician. The proposal was made in light of the Appellate Division's decision in James v. Ruiz, 440 N.J. Super. 45 (App. Div. 2015), where the court clarified that a party may not question a testifying expert about whether his or her views are consistent with those of a non-testifying expert. The Committee also reviewed Hayes v. Delamotte, No. A-3387-14T2 (App. Div. May 10, 2016), which involved the admissibility of a non-testifying expert's complex and disputed opinions under Rule 808. The Supreme Court granted certification in Hayes but its opinion did not address the concerns raised by the attorney who made the proposal. 231 N.J. 373 (2018). After discussion, the Committee decided that a rule adoption was not advisable and notified the attorney of the decision.

IV. MATTERS DISCUSSED FOR INFORMATIONAL PURPOSES – NO ACTION TAKEN

Throughout the Committee's term, the members discussed various items related to the New Jersey Rules of Evidence as well as procedural changes to the New Jersey Court Rules that may affect evidentiary issues. These items were brought before the Committee to keep the members abreast of developments in the law or procedure and not necessarily as proposals for change. With each item, the Committee was provided with background information and opportunity for discussion and comment. The items were informational but the Committee was afforded the opportunity to make suggestions or proposals for Rule changes. The items noted below were considered by the Committee, which decided not to take action.

A. N.J.R.E. 803(a)(2) Recent Fabrication and State v. Moorer

The Committee discussed State v. Moorer, 448 N.J. Super. 94 (App. Div. 2016), which contained an extended discussion of Rule 803(a)(2), the prior consistent statement hearsay exception. In State v. Moorer, the court upheld the prosecutor's use of a prior consistent statement to rebut the defense counsel's implication that the detective's trial testimony was recently fabricated because he testified about information that had not been included in his initial police report. During a prior term, the Committee considered the

issue of recent fabrication in the context of Federal Rule of Evidence 801(d)(1)(b) and its recent addition of subsection (ii). The Committee decided not to take action on this matter.

B. RULE 4:25-8 AND CHO V. TRINITAS REGIONAL MEDICAL CENTER

The Committee was referred an item by the Civil Practice Committee regarding that Committee's proposed new Rule 4:25-8 concerning motions in limine. The proposal was prompted by Cho v. Trinitas Regional Medical Center, 443 N.J. Super. 461 (App. Div. 2015), certif. denied 224 N.J. 529 (2016), where the Appellate Division expressed concern over the last-minute filing of motions that were dispositive in nature but labeled as motions in limine. The Civil Practice Committee requested the Committee's input on the proposed Rule because, while it is essentially procedural in nature, it may have an impact on evidentiary rulings. The Committee discussed the proposed Rule and the definition of "dispositive impact." For example, the stated intention for the new Rule was to eliminate motions for summary judgment filed as motions in limine but motions to bar expert reports may also have a "dispositive impact" on the case if they result in a party being unable to produce required expert testimony. A summary of the discussions by the Committee was relayed to the Civil Practice Committee for its consideration.

C. N.J.R.E. 804(a) (Definition of "Unavailable") and Rule 4:16-1 (Use of Depositions)

At the beginning of the cycle, the Civil Practice Committee referred an item to the Committee for consideration regarding Rule 804(a). The Civil Practice Committee noted that Court Rule 4:16-1(c) allows the court to permit the testimony of an absent but not "unavailable" witness if the court finds exceptional circumstances exist to warrant such use in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court. Evidence Rule 804(a), however, in its definition of an "unavailable" witness, does not refer to testimony of an absent witness whose deposition testimony may be presented when there are exceptional circumstances in the interest of justice. The Committee noted the inconsistency between the Court Rule on civil proceedings and the Evidence Rule but decided not to take action on this matter.

D. F.R.E. 803 Ancient Document

Federal Rule of Evidence 803(16) was recently amended. Previously, an "ancient document" was defined as a document that is at least 20 years old; the amendment defines an "ancient document" as an authenticated document that predates January 1, 1998 (the time when documents started being widely stored electronically). The amendment to the Federal Rule acknowledges that

modern technology facilitates modification and alteration of documents. The Committee noted the change in the Federal Rule but decided not to take action on this matter.

E. F.R.E. 902(13) AND (14) AUTHENTICATING DIGITAL EVIDENCE

The Committee noted that, in Federal Rule of Evidence 902, the list of self-authenticating documents now includes "certified records generated by an electronic process or system" (13), and "certified data copied from an electronic device, storage medium, or file" (14). These amendments permit parties to authenticate certain electronic evidence through means other than the testimony of a foundation witness. The Committee decided not to take action to modify the New Jersey Rule to accord with the Federal Rule.

F. N.J.R.E. 803(C)(8) AND STATE V. WILSON

The Committee considered the Supreme Court opinion State v. Wilson, 227 N.J. 534 (2017), regarding the admissibility of a map in a criminal prosecution and whether its entry violates the defendant's rights under the Confrontation Clause. The Court held that the map was improperly admitted under Rule 803(c)(8) because it was not authenticated, and reversed for a new trial. The Court authorized a "notice and demand" procedure to bypass the requirement of an authenticating witness and directed the Committee on

Criminal Practice to craft a conforming rule. The Committee took note of the case and will await the recommendation of the Criminal Practice Committee.

V. CONCLUSION

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

Respectfully submitted,

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