EXHIBIT A

REPORT OF THE SUBCOMMITTEE ON RESTYLING
DECEMBER 7, 2018

The Subcommittee on Restyling submits proposed restyling changes to the Rules of Evidence for consideration by the Supreme Court. This project was commissioned by the Supreme Court following a similar decade-long effort by a committee of the Supreme Court of the United States to restyle the Federal Rules of Evidence, as well as other federal rules.

Several of our present Rules of Evidence contain the same wording as, or are substantially patterned after, the Federal Rules of Evidence as they existed in 1992 when our Rules were revised and recodified. In December 2011, the sourced federal rules were restyled. The New Jersey restyling project has been of shorter duration but, like the Federal project, it has proven to be challenging both in scope and substance.

The restyled Rules are intended to be restated, plain-language versions of the present Rules. The intent of the project was to make the Rules simpler, easier to read, and easier to understand without changing their substance. In fact, one of the most challenging aspects of the restyling project was to restyle the Rules without altering substance. To ensure that no substantive changes would be made, 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 "dog-eared rule" or "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. One example of this is the basic definition of hearsay stated in Rule 801, which we recommend should remain unaltered despite its revision in the Federal Rule. However, when we found terms that provided an opportunity for revision without a change in substance, we proposed a revision that reflected a simpler phrase. An example of this can be found in Rule 611(a)(2), where the language in the original Rule used the term "avoid needless consumption of time." We substituted the phrase "avoid wasting time." We concluded that the substituted phrase presented a stylistic change rather than a substantive one.

These are some of the "ground rules" that we applied during our consideration of the various Rules.

First, the restyled Rules attempt to use an effective format to achieve clearer presentations. Although Rule numbers and citations are preserved to minimize the effects on research, subdivisions are 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. There are also more vertical lists with hanging indents. 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.

Second, the restyled Rules reduce the use of inconsistent terms that say the same thing in different ways and create possible confusion. For example, consistent expression is achieved by not switching between "accused" and "defendant" or between "party opponent" and "opposing party" or between the various formulations of civil and criminal action, case, or proceeding.

Third, the restyled Rules minimize the use of inherently ambiguous words. We rejected the Federal restyling practice of substituting the words "shall" and "may" with "must" or "should." We concluded that our jurisprudence has ascribed meanings to our present terminology, and the change would not advance a clearer understanding of the meaning or application of the Rule.

Fourth, the restyled Rules attempt 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.

Fifth, in many instances, the restyled Rules remove words and concepts that are outdated or redundant.

Sixth, we rejected the Federal approach that all Rules required change. In fact, as our project progressed, we found less cause to change Rules that had been changed in the Federal effort because we determined that our Rule was clear, understandable and did not warrant a change for change's sake. We also recognized that in the last substantive revision of the New Jersey Rules, changes were adopted that caused us 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, we generally left the language in place. We operated under the premise that such changes might cause a substantive change and understanding of the Rule, and we left the language in place.

Finally, we recognize that our work is subjective and each time we revisited a Rule, we realized that we could "tweak" it. Ultimately, our touchstone, as previously noted, was to assess whether the Rule was clear and understandable.

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 Subcommittee adopted the following processes and procedures in the restyling effort. Each Rule was submitted to the Subcommittee for review and revision. After discussion and consensus as to the changes, the proposed

Rule was submitted to a drafting working group[1] for actual drafting of the restyled Rule. It was then submitted to the Subcommittee for further discussion and approval and then to the entire Committee.

To assist the Court in its deliberative process, the Subcommittee has presented its report in a five-column chart. The first column displays the original Federal Rule; the second column is the newly restyled Federal rule; the third column is the original New Jersey Rule; the fourth column is the recommended restyled New Jersey Rule; and the fifth column is the mark-up and proposed finalized restyled New Jersey Rule.

As was previously stated, in a number of instances the proposed New Jersey Rule does not change the third-column New Jersey Rule. The reasons for this have been previously stated but the dominant reason for no change has been a consensus decision that the Rule is too embedded in New Jersey court decisions and usage to justify a change.

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

[1] The members of the drafting working group were Judge Jack M. Sabatino, Judge Harvey Weissbard, Judge Philip S. Carchman and Seton Hall Law Professor Denis F. McLaughlin.

"tender years" hearsay exception) because that provision is under active substantive review by the Evidence Committee for a future Rules cycle pursuant to a Supreme Court referral.

The Subcommittee also submits 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 necessary to also reflect issues that the Subcommittee were able to identify, which would benefit from commentary for those applying the Rules. These Comments appear below each Rule. In addition, the Subcommittee has included prior comments that were included in earlier Rule revisions.

In addition, in its deliberative process, the Subcommittee and working group identified various substantive issues that warrant further review by the Evidence Committee. The Subcommittee concluded that such substantive changes were beyond its charge but felt that the Committee would benefit from identification of these issues. The Committee will consider these recommendations during the next cycle.

We thank you for consideration of this report and the attached proposed restyled Rules.

Respectfully submitted,

SUBCOMMITTEE ON RESTYLING

Hon. Philip S. Carchman, Chair
Daniel Bornstein, Esq.
Hon. Robert Kirsch
Hon. Roy F. McGeady
Prof. Denis F. McLaughlin
Hon. Patricia B. Roe
Hon. Jack M. Sabatino
John D. Rosero, Esq.
Hon. Harvey Weissbard

Subcommittee Staff:
Bridget Dorney Chater, Esq.
Carol Johnston, Esq.
Carol Ann Welsch, Esq. (former staff)
Kya Saunders, Esq. (former staff)

EXHIBIT A-1

New Jersey Rules of Evidence – Proposed Restyled 2019

ARTICLE I. GENERAL PROVISIONS

NJRE 101. Applicability; Exceptions; Definitions

(a) Applicability; Exceptions.

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

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

(5) Undisputed Facts. If there is no bona fide dispute between the parties as to a relevant fact, the court may permit that fact to be established by stipulation or binding admission. In civil proceedings the 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) 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 by a preponderance of the evidence, by clear and convincing evidence, beyond a reasonable doubt, or such other standard as required by law.

(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.

2019 NJ Supreme Court Committee Comment

The language of Rule 101 has been amended, and definitions have been added, as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Unless otherwise indicated, all Rules governing civil cases also govern family cases.

Rule 102. Purpose and Construction

These rules shall be construed to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

2019 NJ Supreme Court Committee Comment

The language of Rule 102 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

[Rule 103. Not Adopted.]

Rule 104. Preliminary Questions

(a) In General.

(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.

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

(b) Relevance That Depends on a Fact.

(1) When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

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

(c) Preliminary Hearing on Admissibility of Defendant's Statements.

(1) If the hearing involves the admissibility of a confession, the court shall conduct such hearing 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 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 subsequently determines from all of the evidence that the statement is not admissible, the court shall take appropriate action.

(d) Cross-Examining a Defendant in a Criminal Proceeding.

By testifying on a preliminary matter, a defendant in a criminal proceeding does not become subject to cross-examination on other issues in the case.

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

2019 NJ Supreme Court Committee Comment

The language of Rule 104 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 104(e) states the rule "does not limit the right of a party to introduce *before the jury* evidence relevant to weight or credibility." (Emphasis added). Unlike portions of Rule 104 that logically refer only to situations arising in a jury trial (such as those concerning jury instructions and the court's obligation to hear preliminary matters outside of a jury's presence), subparagraph (e) concerns a broader subject, i.e., a party's right to present additional evidence that affects the credibility or weight of the admitted proof. That right logically extends to both jury and non-jury trials. See, e.g., State v. Campbell, 436 N.J. Super. 264, 271-72 (App. Div. 2014) (applying the principles of Rule 104(e) in a non-jury setting). Consistent with this logic and published case law, the broader term "trier of fact" has been substituted for "the jury" in subsection (e) to make clear the provision equally applies in non-jury trials as well as jury trials.

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 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.

2019 NJ Supreme Court Committee Comment

The language of Rule 105 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 106. Remainder of or Related Writings or Recorded Statements

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part, or any other writing or recorded statement, that in fairness ought to be considered at the same time.

2019 NJ Supreme Court Committee Comment

The language of Rule 106 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ARTICLE II. JUDICIAL NOTICE

NJRE 201. Judicial Notice of Law and Adjudicative Facts

(a) Notice of 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. 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. The court may take judicial notice on its own; or

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

(e) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) How Taken. In determining the propriety of taking judicial notice and the nature of the fact 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. In a civil proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal proceeding, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

2019 NJ Supreme Court Committee Comment

The language of Rule 201 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

NJRE 202. Judicial Notice in Proceedings Subsequent to Trial

(a) Subsequent Proceedings. The failure or refusal of the 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 trial court from taking judicial notice of the matter in subsequent proceedings in the action.

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

(c) Opportunity to be Heard. A trial or 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 the nature of the fact to be noticed.

2019 NJ Supreme Court Committee Comment

The language of Rule 202 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ARTICLE III. PRESUMPTIONS

Rule 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 court from commenting on inferences that may be drawn from the evidence.

2019 NJ Supreme Court Committee Comment

The language of Rule 301 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

NJRE 302. Choice of Law

In a civil proceeding, 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.

2019 NJ Supreme Court Committee Comment

The language of Rule 302 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 303. Presumptions Against a Defendant in Criminal Proceedings

(a) Scope. Except as otherwise provided by law, in a criminal proceeding presumptions against a defendant, 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. The court may not direct the jury to find a presumed fact against the defendant. If a presumed fact establishes an element of the offense, the 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 court 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 defendant is submitted to the jury, the 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 court shall instruct the jury that its existence, on all of the evidence, must be proved beyond a reasonable doubt. The court shall not use the word "presumed" or "presumption" in instructions to the jury.

2019 NJ Supreme Court Committee Comment

The language of Rule 303 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ARTICLE IV. RELEVANCY AND ITS LIMITS

NJRE 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action.

2019 NJ Supreme Court Committee Comment

No restyling changes were made to this Rule.

NJRE 402. Relevant Evidence Generally Admissible

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

2019 Supreme Court Committee Comment

The language of Rule 402 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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

Except as otherwise provided by these rules or other law, the court may exclude relevant evidence if its probative value is substantially outweighed by the risk of:

(a) Undue prejudice, confusing the issues, or misleading the jury; or

(b) Undue delay, wasting time, or needlessly presenting cumulative evidence.

2019 Supreme Court Committee Comment

The language of Rule 403 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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

(a) Character Evidence.

Evidence of a person's character or character trait, including a trait of care or skill or lack thereof, is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait except:

(1) Character of 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 defendant's character offered by the defendant shall not be excluded under Rule 403;

(2) Character ~~of~~ Victim. Evidence of a pertinent trait of character of the victim of the crime offered by a defendant in a criminal proceeding or by the prosecution to rebut 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. Evidence of the character of a witness as provided in Rule 608.

(b) Other 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 a person's disposition in order to show that on a particular occasion the person acted in accordance with such disposition.

(2) Permitted Uses. 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.

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

2019 NJ Supreme Court Committee Comment

The language of Rule 404 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 405. Methods of Proving Character

(a) Reputation, Opinion, or Conviction of Crime. When evidence of 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 character or trait. Specific instances of conduct not the subject of a conviction of a crime shall be inadmissible under this paragraph.

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

2019 NJ Supreme Court Committee Comment

The language of Rule 405 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

NJRE 406. Habit, Routine Practice

(a) Evidence, whether corroborated or not, of habit or routine practice is admissible to prove that on a specific occasion a person or organization acted in conformity with the habit or routine practice.

(b) Evidence of specific instances of conduct is admissible to prove habit or routine practice if evidence of a sufficient number of such instances is offered to support a finding of such habit or routine practice.

2019 NJ Supreme Court Committee Comment

No restyling changes were made to this Rule.

Rule 407. Subsequent Remedial Measures

Evidence of remedial measures taken after an event is not admissible to prove that the event was caused by negligence or culpable conduct. However, evidence of such subsequent remedial conduct may be admitted as to other issues.

2019 NJ Supreme Court Committee Comment

No restyling changes were made to this Rule.

Rule 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, is not admissible either to prove or disprove the validity 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.

2019 NJ Supreme Court Committee Comment

The language of Rule 408 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Committee adopted the more compact language recommended by the 2011 Federal Restyling Committee, replacing the phrase "admissible to prove liability for, or invalidity of, or amount of the disputed claim" with the shorter phrase "admissible either to prove or disprove the validity or amount of the disputed claim." This change is not intended to have any substantive impact on the interpretation or application of Rule 408. In this regard, the Committee endorses and adopts the following Note to Rule 408 from the Federal revision: "The [Federal] Committee deleted the reference to 'liability' on the ground that the deletion makes the Rule flow better and easier to read, and because 'liability' is covered by the broader term 'validity.' Courts have not made substantive decisions on the basis of any distinction between validity and liability. No change in current practice or in the coverage of the Rule is intended."

Rule 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.

2019 NJ Supreme Court Committee Comment

The language of Rule 409 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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

(a) Prohibited Uses. Except as otherwise provided in this rule, evidence of:

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

(2) any statement made in the course of that plea proceeding; or

(3) 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.

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

(1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or

(2) in a criminal proceeding for perjury or false statement if the defendant made the defendant made the statement under oath, on the record, and with counsel present.

2019 NJ Supreme Court Committee Comment

The language of Rule 410 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 411. Liability Insurance

Evidence that a person was or was not insured against liability is not admissible on the issue of that person's negligence or other wrongful conduct. Subject to Rule 403, this rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, control, bias, or prejudice of a witness.

2019 NJ Supreme Court Committee Comment

No restyling changes were made to this Rule.

ARTICLE VI. WITNESSES

NJRE 601. General Rule of Competency

Every person is competent to be a witness unless (a) the court finds that the proposed witness is incapable of expression so as to be understood by the 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) as otherwise provided by these rules or by law.

2019 NJ Supreme Court Committee Comment

The language of Rule 601 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

NJRE 602. Lack Of Personal Knowledge

A witness may testify to a matter 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 consist of the witness' own testimony. This rule does not apply to expert testimony under Rule 703.

2019 NJ Supreme Court Committee Comment

The language of Rule 602 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

NJRE 603. Oath or Affirmation

Before testifying a witness shall be required to take an oath or make an affirmation or declaration to tell the truth under the penalty provided by law. No witness may be barred from testifying because of religious belief or lack of such belief.

2019 NJ Supreme Court Committee Comment

The language of Rule 603 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Note that Rule 101(b)(5) has also been amended to provide a definition for a "statement under oath."

NJRE 604. Interpreters

The court shall determine the qualifications of a person testifying as an interpreter. An interpreter 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.

2019 NJ Supreme Court Committee Comment

The language of Rule 604 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

NJRE 605. Restriction on Judge As a Witness

The judge presiding at the trial may not testify as a witness in that trial. A party need not object to preserve the issue.

2019 NJ Supreme Court Committee Comment

The language of Rule 605 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

NJRE 606. Restriction on Juror As a Witness

A member of the jury may not testify as a witness before the jury on which the juror is serving.

2019 NJ Supreme Court Committee Comment

No restyling changes have been made to this Rule.

NJRE 607. Witness Impeachment, Support, and Neutralization

(a) For the purpose of 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) The party calling a witness may not neutralize the witness' testimony by a prior contradictory statement unless (i) the statement is in a form admissible under Rule 803(a)(1), or (ii) the 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 (2) as otherwise provided by the law of evidence.

2019 NJ Supreme Court Committee Comment

The language of Rule 607 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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

a) The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, 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 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) The credibility of a witness in a criminal case 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.

2019 NJ Supreme Court Committee Comment

No restyling changes have been made to this Rule.

NJRE 609. Impeachment by Evidence of Conviction of Crime

(a) In General.

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

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

(B) In a criminal 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 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 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.

2019 NJ Supreme Court Committee Comment

The language of Rule 609 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

NJRE 610. Religious Beliefs or Opinions

Evidence of a witness' religious beliefs or opinions is not admissible to attack or support the witness' credibility.

2019 NJ Supreme Court Committee Comment

The language of Rule 610 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

NJRE 611. Mode and Order of Interrogation and Presentation

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

(1) make those procedures effective for determining the truth;

(2) avoid wasting time; and

(3) protect witnesses from harassment or undue embarrassment.

(b) Scope of Cross-examination. Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness' credibility. The court may allow inquiry into additional matters as if on direct examination.

(c) Leading Questions. Leading questions should not be used on direct examination except as 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.

2019 NJ Supreme Court Committee Comment

The language of Rule 611 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The change of the phrase in Rule 611(b) from "in the exercise of discretion" to "may" does not eliminate the court's discretion but encompasses the concept of discretion, consistent with the use of "may" in other rules.

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 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.

2019 NJ Supreme Court Committee Comment

The language of Rule 612 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

NJRE 613. Prior Statements of Witnesses

(a) Examining Witness Concerning Prior Statement. ~~When~~ examining a witness about the witness' prior statement, whether written or not, a party need not show it or disclose its contents to the witness. But the party must, upon request, 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. Extrinsic evidence of a witness' prior inconsistent statement may 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).

2019 NJ Supreme Court Committee Comment

The language of Rule 613 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

NJRE 614. Calling and Interrogation of Witnesses by Court

(a) Calling. The court may call a 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.

2019 NJ Supreme Court Committee Comment

The language of Rule 614 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

NJRE 615. Sequestration of Witnesses

At the request of a party or on the court's own motion, the court may, in accordance with law, enter an order sequestering witnesses.

2019 NJ Supreme Court Committee Comment

No restyling changes have been made to this Rule.

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 witness' perception and

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

2019 NJ Supreme Court Committee Comment

No restyling changes were made to this Rule.

NJRE 702. Testimony by Expert Witnesses

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

2019 NJ Supreme Court Committee Comment

No restyling changes were made to this Rule.

NJRE 703. Bases of Opinion Testimony 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 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.

2019 NJ Supreme Court Committee Comment

The language of Rule 703 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Committee notes that it rejected the concluding substantive language in the present version of Federal Rule of Evidence 703, added after 1993 – "But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect."

NJRE 704. Opinion on Ultimate Issue

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

2019 NJ Supreme Court Committee Comment

No restyling changes were made to this Rule. This Rule applies to lay witnesses as well. Jacober v. St. Peter's Medical Center, 128 N.J. 475, 497 (1992).

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

Unless the court orders otherwise, an expert may testify in the form of an opinion or inference, state an opinion, and give reasons for it, without first testifying to the underlying facts or data. The expert may be required to disclose those facts or data on cross-examination.

Questions calling for the opinion of an expert witness need not be hypothetical in form unless in the court's discretion a hypothetical is required.

2019 NJ Supreme Court Committee Comment

The language of Rule 705 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ARTICLE VIII. HEARSAY

NJRE 801. Definitions

(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a statement that:

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

(2) a party offers 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, drawing, 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.

2019 NJ Supreme Court Committee Comment

The language of Rule 801 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

NJRE 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other law.

2019 NJ Supreme Court Committee Comment

No changes were made to this Rule.

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. The declarant-witness testifies and is subject to cross-examination about a prior otherwise admissible statement, 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 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. The statement is offered against a party-opponent 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 case, 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. The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) Present Sense Impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it 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. A statement that:

(A) is made in good faith for purposes of, and is reasonably pertinent to, medical diagnosis or treatment; and

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

(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 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 when it was made; and

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

This exception does not apply if unless the circumstances indicate that the statement is not trustworthy. 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 a 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 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. 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) the evidence is admitted to prove that the matter did not occur or exist; and

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

This exception does not apply if 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.

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

(9) Public Records of Vital Statistics. Subject to Rule 807, a record of a birth, fetal death, death, or marriage or civil union, if reported to a public office in accordance with a legal duty.

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

(A) the record or statement does not exist; or

(B) the matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.

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

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

(12) Certificates of Marriage, Civil Union, Baptism, and Similar Ceremonies. Subject to Rule 807, a statement 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) attesting that the person performed a marriage or civil union or similar ceremony or administered a sacrament; and

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

(13) Family Records. Subject to Rule 807, a statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a family portrait, engraving on an urn, crypt, tombstone, or other burial marker.

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

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

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

(16) Statements in Ancient Documents. A statement in a document at least 30 years old and whose authenticity is established.

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

(18) Statements in Learned Treatises, Periodicals, or Pamphlets. A statement contained in a published treatise, periodical, or pamphlet, 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 on cross-examination; and

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

If admitted, the statement may not be received as an exhibit 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 a person's family by blood, adoption, or marriage or civil union, or among 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 a person's personal or family history.

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

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

(22) Judgment 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 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 Involving Personal, Family, or General History, or a Boundary. A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; and

(B) could be proved by evidence of reputation.

(24) Not adopted.

(25) Statement against Interest. A statement that a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary, pecuniary or social interest, or had so great a tendency to invalidate the declarant's claim against another or to expose the declarant to civil or criminal liability. Such a statement is admissible against a defendant in a criminal proceeding only if the defendant was the declarant.

(26) Judgments against Persons Entitled to Indemnity. Subject to Rule 807 and except in a case brought under the Joint Tortfeasors Contribution Law, N.J.S.A. 2A:53A-1 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. 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 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.

2019 NJ Supreme Court Committee Comment

The language of Rule 803 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The use of the term "thereof" has been retained throughout the Rule for the purpose of clarity.

The change from the term "regularly made and kept" to "regularly kept" in Rule 803(c)(7) does not reflect a substantive change and was made for restyling purposes only.

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 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 the trial, hearing, or proceeding; and

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

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

(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.

(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 same or another proceeding; and (ii) is now offered against a party who had an opportunity and similar motive in the prior trial, hearing or deposition to develop the testimony by examination or cross-examination.

(B) In a civil proceeding, or when offered by the defendant in a criminal proceeding, testimony given in a prior trial, hearing or deposition taken 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 if the 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. 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 in 1993 as Rule 803(c)(25)]

(4) Statement of Personal or Family History. A statement about:

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

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

(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 death if the statement was made in good faith upon declarant's personal knowledge in circumstances indicating that it is trustworthy.

(7) Voters' 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. 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.

2019 NJ Supreme Court Committee Comment

The language of Rule 804 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 805. Hearsay Within Hearsay

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.

2019 NJ Supreme Court Committee Comment

The language of Rule 805 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 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 evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny 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.

2019 NJ Supreme Court Committee Comment

The language of Rule 806 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 807. Discretion of Court to Exclude Evidence Under Certain Exceptions

Except if offered by a defendant in a criminal proceeding, when any statement is admissible 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 court may exclude 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 challenge the statement.

2019 NJ Supreme Court Committee Comment

The language of Rule 807 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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

Expert opinion that is included in an admissible hearsay statement shall be excluded if the declarant has not been produced as a witness unless the court finds that the circumstances involved in rendering 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.

2019 NJ Supreme Court Committee Comment

The language of Rule 808 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

NJRE 901. Requirement of Authentication or Identification

To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must present evidence sufficient to support a finding that the item is what its proponent claims.

2019 NJ Supreme Court Committee Comment

The language of Rule 901 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

"Present" is used because the Rule is not referencing the production of documents during discovery but is referring to the presentation of evidence to the court.

NJRE 902. Self-Authentication

The following items of evidence are self-authenticating and they require no extrinsic evidence of authenticity in order to be admitted:

(a) New Jersey 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.

(b) Other 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. 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. 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. A book, pamphlet, or other publication purporting to be issued by public authority.

(f) Newspapers and Periodicals. Printed material purporting to be a newspaper or periodical.

(g) Trade Inscriptions and the Like. An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(h) Acknowledged Documents. A document 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. Commercial paper, a signature on it, and documents relating thereto related to the extent provided by applicable commercial law.

(j) Presumption 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. 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.

2019 NJ Supreme Court Committee Comment

The language of Rule 902 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

NJRE 903. Testimony of Subscribing Witness Unnecessary

A subscribing witness' testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

2019 NJ Supreme Court Committee Comment

The language of Rule 903 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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, 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. 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.

2019 NJ Supreme Court Committee Comment

The language of Rule 1001 has been amended as part of general the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

NJRE 1002. Requirement of Original

To prove the content of a writing or photograph, the original writing or photograph is required except as otherwise provided in these rules or by statute.

2019 NJ Supreme Court Committee Comment

The language of Rule 1002 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

NJRE 1003. Admissibility of Duplicates

A duplicate as defined by Rule 1001(d) is admissible to the same extent as an original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

2019 NJ Supreme Court Committee Comment

The language of Rule 1003 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

NJRE 1004. Admissibility of Other Evidence of Contents

The original is not required and other evidence of the contents of a writing or photograph is admissible if:

(a) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(b) Original not obtainable. No original can be obtained by any available judicial process or procedure or by other available means; or

(c) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice by the pleadings or otherwise that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(d) Collateral matters. The writing or photograph is not closely related to a controlling issue and it would not be expedient to require its production.

2019 NJ Supreme Court Committee Comment

The language of Rule 1004 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

NJRE 1005. Public Records

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

(a) the record or writing is otherwise admissible;

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

If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the contents.

2019 NJ Supreme Court Committee Comment

The language of Rule 1005 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

NJRE 1006. Summaries

The proponent may use a summary, chart, or calculation presented by a qualified witness to prove the content of voluminous writings or photographs that cannot conveniently be examined in court. The proponent shall make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place or mode. The court may order that the proponent to produce them in court.

2019 NJ Supreme Court Committee Comment

The language of Rule 1006 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

NJRE 1007. Testimony or Written Statement of Party

The proponent may prove the content of a writing or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.

2019 NJ Supreme Court Committee Comment

The language of Rule 1007 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

NJRE 1008. Functions of Court and Jury

Ordinarily the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing or photograph under Rule 1004 or 1005. However, in a jury trial, the jury determines, in accordance with Rule 104, any factual issue about whether:

(a) an asserted writing or photograph ever existed,

(b) another writing or photograph produced at the trial or hearing is the original, or

(c) the evidence correctly reflects the content of the original writing or photograph.

2019 NJ Supreme Court Committee Comment

The language of Rule 1008 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

EXHIBIT A-2

Rule 101

Old FRE	New FRE	NJRE	Restyled NJRE	Markup NJRE
ARTICLE I. GENERAL PROVISIONS **Rule 101. Scope**	**ARTICLE I. GENERAL PROVISIONS** **Rule 101. Scope; Definitions**	**ARTICLE I. GENERAL PROVISIONS** **NJRE 101. Scope; Definitions**	**ARTICLE I. GENERAL PROVISIONS** **NJRE 101. Applicability; Exceptions; Definitions**	**ARTICLE I. GENERAL PROVISIONS** **NJRE 101. [Scope; Definitions] <u>Applicability; Exceptions; Definitions</u>**
These rules govern proceedings in the courts of the United States and before the United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions stated in rule 1101.	**(a) Scope.** These rules apply to proceedings in United States courts. The specific courts and proceedings to which the rules apply, along with exceptions, are set out in Rule 1101. **(b) Definitions.** In these rules:	(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	(a) Applicability; Exceptions. (1) Applicability. Except as provided by paragraph (a)(3), these rules of evidence shall apply in all proceedings, whether criminal, civil, family, municipal, tax, or any other proceeding conducted by or under the supervision of a court. (2) Privileges. The provisions of Rule 500 (privileges) shall apply, without relaxation, to all proceedings and inquiries,	(a) Applicability; E[e]xceptions. <u>(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.</u> <u>(2)</u> [(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.

	(1) "civil case" means a civil action or proceeding; **(2)** "criminal case" includes a criminal proceeding; **(3)** "public office" includes a public agency; **(4)** "record" includes a memorandum, report, or data compilation; **(5)** a "rule prescribed by the Supreme Court" means a rule adopted by the Supreme Court under statutory authority; and **(6)** a reference to any kind of written material or any other medium includes electronically stored information.	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,	whether formal, informal, public or private, and to all branches and agencies of government. (3) Relaxation. Except as provided by subparagraph (a)(2) 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	(3) [(2) Court proceedings;] [r]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

		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	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) Administrative Proceedings. Except as otherwise provided by subparagraph (a)(2) of this rule, proceedings before administrative agencies shall not be governed by these rules. (5) Undisputed Facts. If there	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 P[p]roceedings. 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 F[f]acts. If there is no bona fide dispute between the parties as to a relevant fact, the [judge] court may permit

		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	is no bona fide dispute between the parties as to a relevant fact, the court may permit that fact to be established by stipulation or binding admission. In civil proceedings the 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) 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	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 L[l]ieu of T[t]estimony. 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

		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 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	rule of law that the fact be proved by a preponderance of the evidence, by clear and convincing evidence, beyond a reasonable doubt, or such other standard as required by law. (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.	<u>such other standard as required by law</u> [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). <u>(4) "Public Official" has the meaning given in the definition contained in Rule 801(f).</u> <u>(5) "Statement Under Oath" means a statement made under penalty of perjury whether by oath, affirmation, or declaration.</u> (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

		have no further force or effect.	(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.	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.

2019 NJ Supreme Court Committee Comment

The language of Rule 101 has been amended, and definitions have been added, as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Unless otherwise indicated, all Rules governing civil cases also govern family cases.

2011 FRE Committee Note

The language of Rule 101 has been amended, and definitions have been added, as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The reference to electronically stored information is intended to track the language of Fed. R. Civ. P. 34.

1991 NJ Supreme Court Committee Comment

Rule 101 is based on N.J.Evid.R. 1, 2, and 3 of the 1967 Rules of Evidence [The 1967 Rules of Evidence, as amended, are referred to in these Comments as either the 1967 rule or rules or N.J.Evid.R. These rules are referred to as N.J.R.E. or Rule(s). See Rule 1103. The Report of the New Jersey Supreme Court Committee on Evidence (1963) is referred to in these comments as The 1963 Report]; Fed.R.Evid. 101 and 1101 deal with the scope and applicability of the federal rules.

Paragraph (a) of Rule 101 prescribes the scope of application of the evidence rules and organizes this material somewhat differently from both the 1967 New Jersey scope rule, N.J.Evid.R. 2, and Fed.R.Evid. 101 and 1101. The 1967 New Jersey scope rule is a four-part rule addressing both the general application of the rules of evidence and exceptions to their general application. The scheme of the federal rules is a general application provision, Fed.R.Evid. 101, and an additional rule, Fed.R.Evid. 1101, which addresses both applicability and exceptions to applicability. The scheme of the Rule 101(a) is to state in one rule the principles of application, relaxation and exception, although the rule incorporates by reference other rules which include exceptions to applicability, such as Rule 104(a) and Rule 201(f). Accordingly, there is no analogue to Fed.R.Evid. 1101 in these rules since its subject matter is covered by Rule 101.

With respect to the structure and specific provisions of paragraph (a) of this rule, subparagraph (1) provides that privileges shall apply without relaxation to all proceedings and inquiries, formal, informal, public or private, and to all branches and agencies of government. This provision follows both N.J.Evid.R. 2(1) and Fed.R.Evid. 1101(c) without substantive change.

Paragraph (a)(2) provides generally that the rules of evidence shall apply to all civil and criminal proceedings conducted by or under the supervision of a court. This provision corresponds to N.J.Evid.R. 2(2) and is the analogue of Fed.R.Evid. 101 and 1101(d). The second sentence of subsection (2), unlike N.J.Evid.R. 2(2), undertakes to enumerate those proceedings in which the rules of evidence, other than those relating to privileges, may be relaxed. These exceptions are limited to:

(A) Actions within the cognizance of the Small Claims Section of the Special Civil Part of the Law Division, the successor to the Small Claims Division of the County District Court. This exception reflects the amendment of N.J.Evid.R. 2(2), effective July 1, 1983. However, this rule clarifies that amendment by providing that the evidence rules may be relaxed in all cases within the small claims jurisdiction whether or not they are actually brought in a small claims section. This is consistent with the Rules of Court. This section also excepts the Small Claims Division of the Tax Court, whose procedure is also more informal. See R. 8:11 and N.J.S.A. 2A:3A-5.

(B) In accordance with a statutory provision. There is no analogue to this provision in the 1967 New Jersey rules. Under N.J.Evid.R. 2(3), provision for relaxation pursuant to statute applied only to administrative proceedings. See Comment on Rule 101(a)(3), replacing N.J.Evid.R. 2(3). While there is no direct analogue in the federal rules, the principle is reflected in Fed.R.Evid. 1101(e), which defers to specified federal statutes having particular evidential provisions for certain proceedings. Unlike the federal rule, this rule is drawn in general terms without enumeration of specific statutes.

(C) Sentencing and dispositional proceedings. The federal rule analogue to this provision is Fed.R.Evid. 1101(d)(3). It enumerates various miscellaneous proceedings to which the rules do not apply, including extradition or rendition proceedings, preliminary examination in criminal cases, sentencing, probation

proceedings, issuance of warrants and summonses, and proceedings with respect to bail release. While there is no 1967 analogue to this rule, it is accepted practice in New Jersey not to apply the rules of evidence to these proceedings. See, e.g., State v. Stewart, 96 N.J. 596, 606 (1984); State v. Kunz, 55 N.J. 128 (1969).

Paragraph (a)(2)(C) of this rule generally follows the intent of the federal rule but is limited to those proceedings in which information is produced which forms the basis for the court's exercise of sentencing or dispositional discretion in criminal and juvenile delinquency actions. Such proceedings include final juvenile dispositions, pre-disposition detention determinations in juvenile delinquency actions, bail proceedings, pretrial intervention and other diversionary proceedings, and any other proceedings in which the exercise of judicial discretion determines the custodial status of or other restraints upon an accused or juvenile charged with delinquency.

Proceedings for the issuance of warrants or summonses are not covered by paragraph (a)(2)(C) but rather by paragraphs (a)(2)(D) and (a)(5) of this rule.

(D) Proceedings to establish probable cause. This paragraph of the rule covers proceedings in which the determination to be made is probable cause for taking an official action which constitutes a step in the criminal process. This rule includes grand jury proceedings, probable cause hearings conducted pursuant to R. 3:4-3, applications for search and arrest warrants, applications for wiretap orders, and proceedings under R. 3:5-7 challenging warrantless searches and seizures. In each of these proceedings substantive law governs both the extent to which the rules of evidence may be relaxed and the quantum of competent evidence that is required. This rule addresses only the character of the proof, not the form in which it is presented. The question of form is addressed by paragraph (a)(5) of this rule, which allows the use of affidavits to the extent permitted by substantive law.

The federal analogues of this rule are found in Fed.R.Evid. 1101(d)(2) (grand jury) and 1101(d)(3) (preliminary examinations and warrants). While there is no 1967 New Jersey analogue, these provisions do not modify New Jersey practice but merely codify it. See, e.g., State v. Kasabucki, 52 N.J. 110, 116-117 (1968) (search warrant); State v. Fary, 19 N.J. 431, 437 (1955) (grand jury proceedings).

Note that this rule does not refer to preliminary examination as does the federal rule, since the New Jersey court rules provide for a preliminary hearing (prior to the probable cause hearing) at which no factual findings are made. Compare R. 3:4-2 with R. 3:4-3.

(E) Admissibility hearings. Paragraph (a)(2)(E) is similar to Fed.R.Evid. 1101(d)(1). While the federal rule refers only to Fed.R.Evid. 104, this rule uses the phrase "under these rules or other law" in order to make clear that proceedings under Rule 104 are not the only proceedings to determine admissibility in which the rules of evidence may be relaxed. A relaxation provision is expressly included in Rule 201(f) dealing with judicial notice. Conditions for the admissibility of evidence are also imposed by other evidence rules, such as the qualifications to establish a business record under Rule 803(c)(6). See Gunter v. Fischer Scientific American, 193 N.J.Super. 688, 692 (App.Div.1984). As to conditions for admissibility imposed by case law, see State v. Johnson, 42 N.J. 146, 170-171 (1964) (criteria for admissibility of breathalyzer test results). State v. Cardone, 146 N.J.Super. 23 (App.Div.1976), certif. denied, 75 N.J. 3 (1977), dealing with admissibility of K-55 radar readings, illustrates this rule's application. See also Comment on Rule 104(a).

The rules of evidence have never been strictly applied in arbitration proceedings, although the parties might otherwise agree or stipulate. See Local Union 560 v. Eazor Express, Inc., 95 N.J.Super. 219, 227 (App.Div.1967); Livingston v. Combs & wife, Adm'rs, 1 N.J.L. 50 (Sup.Ct.1790). N.J.S.A. 39:6A-24 to 35 and

N.J.S.A. 2A:23A-20 to -30, respectively, provide for arbitration under court supervision of motor vehicle and personal injury claims of $15,000 or less. See also R. 4:21A. The provision for court supervision does not compel a change in this principle.

Paragraph (a)(3) of Rule 101 replaces N.J.Evid.R. 2(3), for which there is no federal analogue. While it changes the language of N.J.Evid.R. 2(3), it merely conforms the rule to established practice. N.J.Evid.R. 2(3) addressed only so-called formal hearings before administrative agencies and tribunals and provided that the rules of evidence were applicable to such hearings except as otherwise provided by statute. Since so-called informal hearings were not addressed, it appears that the 1967 rules of evidence were not intended to apply to those proceedings. The Administrative Procedure Act (APA), N.J.S.A. 52:14B-1, et seq., enacted subsequent to the adoption of N.J.Evid.R. 2(3), replaced the former undefined formal and informal hearing dichotomy by creating the category of contested cases to which a variety of procedural consequences attach. N.J.S.A. 52:14B-2(b). The APA expressly provides that the rules of evidence do not apply to contested cases. N.J.S.A. 52:14B-10(a). This comports with pre-APA case law. See, e.g., In re Plainfield-Union Water Co., 11 N.J. 382, 392 (1953). The requirement of N.J.Evid.R. 2(3) that the rules of evidence apply to formal hearings unless relaxed by statute was contrary to established case law and was not complied with in practice. Rule 101(a)(3) recognizes current practice and the codification of the common-law principle by the APA by making the rules of evidence inapplicable to all administrative proceedings. However, the law of privileges applies to all proceedings. That had been expressly provided for by N.J.Evid.R. 2(3) and is now repeated in Rule 101(a)(1) as well as in this paragraph. It is noted that neither this rule nor its predecessor addresses the question of the need for some residuum of competent evidence. That is a matter of substantive administrative law which these rules do not affect. See, e.g., Weston v. State, 60 N.J. 36, 50-52 (1972); In re Cowan, 224 N.J.Super. 737, 748-751 (App.Div.1988).

Paragraph (a)(4) of Rule 101 replaces N.J.Evid.R. 3, for which there is no federal analogue. N.J.Evid.R. 3 applied to civil proceedings only and permitted undisputed facts to be proved by any relevant evidence without reference to exclusionary rules. The provision is retained, nearly verbatim, by the second sentence of this rule. The first sentence is a new provision, applicable to both civil and criminal proceedings, which conforms with actual practice by permitting an undisputed fact to be established by stipulation or binding admission. See State v. Mack, 131 N.J.Super. 542 (App.Div.1974). This rule does not affect the scope of the jury function constitutionally required in criminal trials. It is intended only to relieve parties of the need for formal proof of specific facts. See Horning v. District of Columbia, 254 U.S. 135, 65 L.Ed.2d 185 (1920).

Paragraph (a)(5) has no analogue in the 1967 New Jersey rules or the federal rules. This paragraph codifies by reference the practice by which proofs are submitted by affidavit in lieu of oral testimony in ex parte matters, on motions, and in other proceedings. See Gunter v. Fischer Scientific American, supra, 193 N.J.Super. at 692; State v. Cardone, supra, 146 N.J.Super. at 28-29. The rule refers only to the mode of presenting proof and not to its character or quality. It does not authorize relaxation of the rules of evidence but merely allows affidavits to be used as a vehicle for proof where permitted by law. Cf. R. 1:6-6, requiring the contents of affidavits to comply with the rules of evidence as to the competence of both the affiant and the evidence submitted. See Patrolman's Benevolent Ass'n v. Montclair, 70 N.J. 130, 134 n. 1 (1976).

Paragraph (b) of Rule 101 replaces N.J.Evid.R. 1, which contained the definition of 14 terms: evidence, relevant evidence, proof, burden of proof, burden of producing evidence, conduct, the hearing, finding of fact, guardian, judge, trier of fact, verbal, writing, and perceive. Paragraph (b) retains only three of these definitions, burden of proof (N.J.Evid.R. 1(4)), burden of producing evidence (N.J.Evid.R. 1(5)), and writing (N.J.Evid.R. 1(13)). Paragraph (b)(2) of this rule follows N.J.Evid.R. 1(5) almost verbatim. As to N.J.Evid.R. 1(4), the term "burden of proof" has been replaced in paragraph (b)(1) by the more accurate term

"burden of persuasion." This obviates the need for the last sentence of N.J.Evid.R. 1(4) which provides that burden of proof is synonymous with burden of persuasion. The definition of writing, now contained in Rule 801(e) under the hearsay rules, is made applicable to all evidence rules by incorporation.

As to the remaining 11 terms defined in the 1967 rules, relevance is now defined in Rule 401, and the other 10 of the original 14 definitions of terms have been omitted because they are self-evident and have not proved useful. Note that definitions relating to the hearsay rule are included in Rule 801, and definitions relating to contents of writings and photographs are included in Rule 1001.

The first sentence of paragraph (c) of Rule 101 follows N.J.Evid.R. 2(4), making clear that the adoption of these rules should not be construed as an implied repeal of any presently existing statute. There is no federal analogue. The second sentence is a new provision intended to call attention to the supersession provision of N.J.S.A. 2A:84A-40, pursuant to which official footnotes were appended to specific 1967 rules to supersede existing statutes and pursuant to which footnotes may be appended to future rule amendments.

The Official Footnote to this rule catalogs all of the statutory provisions superseded by the 1962 rules and adds as well the statutory provisions superseded by these rules, namely, N.J.S.A. 2A:84A-1 to -15 inclusive (Definitions) and N.J.S.A. 2A:84A-16 (Scope). This constitutes a format change from the 1967 rules which appended the Official Footnote to each superseding rule rather than collecting them, as here, in a single catalog.

Rule 102

Old FRE	New FRE	NJRE	Restyled NJRE	Mark up NJRE
Rule 102. Purpose and Construction	**Rule 102. Purpose**	**NJRE 102. Purpose and Construction**	**Rule 102. Purpose and Construction**	**NJRE 102. Purpose and Construction**
These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.	These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.	These rules shall be construed to secure fairness in administration and elimination of unjustified expense and delay. 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.	These rules shall be construed to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.	These rules shall be construed to [secure fairness in] <u>administer every proceeding fairly, eliminate unjustifiable</u> [administration and elimination of unjustified] expense and delay, <u>and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination</u>. [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.]

2019 NJ Supreme Court Committee Comment

The language of Rule 102 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

1991 NJ Supreme Court Committee Comment

This rule follows both N.J.Evid.R. 5 and Fed.R.Evid. 102, retaining the 1967 New Jersey formulation that the adoption of the evidence rules "shall not bar the growth and development of the law of evidence."

It should be noted that this rule is not intended as a rule authorizing the trial judge to relax the rules of evidence in a particular case. A proposed relaxation provision, N.J.Evid.R. 2(4), applicable to civil cases, was not adopted as part of the 1967 rules and has not been incorporated in these rules. See The 1963 Report at 9. Cf. Fed.R.Evid. 803(24) and 804(b)(5), not adopted in this revision, which allow for other exceptions to the hearsay rule if certain standards are satisfied. See State v. D.R. 109 N.J. 348, 371-377 (1988). Cf. In re Baby M., 109 N.J. 396, 467 n. 20 (1988); State v. Tirone, 64 N.J. 222, 226-227 (1974); State v. Kennedy, 135 N.J.Super. 513, 521-525 (App.Div.1975).

Rule 104

Old FRE	New FRE	NJRE	Restyled NJRE	Mark up NJRE
Rule 104. Preliminary Questions	**Rule 104. Preliminary Questions**	**NJRE 104 Preliminary Questions**	**Rule 104. Preliminary Questions**	**NJRE 104. Preliminary Questions**
(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision	**(a) In General.** The court must 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.	(a) Questions of admissibility generally. 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. The judge may hear and determine such matters	(a) In General. (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. (2) The court may hear and determine such matters out of the presence or hearing of the jury.	(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.]

(b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.		out of the presence or hearing of the jury.		(2) The [judge] court may hear and determine such matters out of the presence or hearing of the jury.
(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a	**(b) Relevance That Depends on a Fact.** When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.	(b) Relevance conditioned on fact. 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. In such cases the judge shall instruct the jury to consider the issue of the fulfillment of the condition and to disregard the evidence if it finds that the condition	(b) Relevance That Depends on a Fact. (1) When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later. (2) In such cases the court shall instruct the jury to consider the issue of the existence of the fact and to disregard the evidence if it finds that the fact does not exist. The jury shall be instructed to disregard the	(b) Relevance [conditioned] That Depends on a [f]Fact. (1) When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact 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

finding of the fulfillment of the condition.		was not fulfilled. The jury shall be instructed to disregard the evidence if the judge subsequently determines that a jury could not reasonably find that the condition was fulfilled.	evidence if the court subsequently determines that a jury could not reasonably find the existence of the fact.	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) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the	**(c) Conducting a Hearing So That the Jury Cannot Hear It.** The court must conduct any hearing on a preliminary question so that the jury cannot hear it if: **(1)** the hearing involves the admissibility of a confession; **(2)** a defendant in a criminal case is a witness and so requests; or	(c) Preliminary hearing on admissibility of defendant's statements. 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. In such a hearing the rules of evidence shall apply and the burden of	(c) Preliminary Hearing on Admissibility of Defendant's Statements. (1) If the hearing involves the admissibility of a confession, the court shall conduct such hearing 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.	(c) Preliminary H[h]earing on A[a]dmissibility of D[d]efendant's S[s]tatements. (1) If the hearing involves the admissibility of a confession, 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

interests of justice require, or when an accused is a witness and so requests.	(3) justice so requires.	persuasion as to the admissibility of the statement is on the prosecution. If the 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 judge subsequently determines from all of the evidence that the statement is not admissible, the judge shall take appropriate action.	If the court 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 subsequently determines from all of the evidence that the statement is not admissible, the court shall take appropriate action.	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. The accused does not, by testifying upon a preliminary matter, become	**(d) Cross-Examining a Defendant in a Criminal Case.** By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination	(d) Testimony by accused. By testifying upon a preliminary matter, the accused does not become subject to cross-examination as to other issues in the case.	(d) Cross-Examining a Defendant in a Criminal Proceeding. By testifying on a preliminary matter, a defendant in a criminal proceeding does not become subject to cross-	(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.

subject to cross-examination as to other issues in the case.	on other issues in the case.		examination on other issues in the case.	
(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.	**(e) Evidence Relevant to Weight and Credibility.** This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.	(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.	(e) Evidence Relevant to Weight and Credibility. This rule does not limit a party's right to introduce, before the trier of fact, evidence that is relevant to the weight or credibility of other evidence.	(e) Evidence Relevant to Weight and [c]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.

2019 NJ Supreme Court Committee Comment

The language of Rule 104 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 104(e) states the rule "does not limit the right of a party to introduce *before the jury* evidence relevant to weight or credibility." (Emphasis added). Unlike portions of Rule 104 that logically refer only to situations arising in a jury trial (such as those concerning jury instructions and the court's obligation to

hear preliminary matters outside of a jury's presence), subparagraph (e) concerns a broader subject, i.e., a party's right to present additional evidence that affects the credibility or weight of the admitted proof. That right logically extends to both jury and non-jury trials. See, e.g., State v. Campbell, 436 N.J. Super. 264, 271-72 (App. Div. 2014) (applying the principles of Rule 104(e) in a non-jury setting). Consistent with this logic and published case law, the broader term "trier of fact" has been substituted for "the jury" in subsection (e) to make clear the provision equally applies in non-jury trials as well as jury trials.

1991 NJ Supreme Court Committee Comment

The subject matter covered by paragraph (a) of Fed.R.Evid. 104 is substantially the same as that covered by N.J.Evid.R. 8(1). Rule 104 uses the New Jersey formulation with some modifications. The phrase "stated in these rules" has been omitted, since the rules of evidence are not the only source of a condition imposed for the admissibility of evidence. See Comment on Rule 101(a)(2)(E). The last sentence of paragraph (1) of N.J.Evid.R. 8 is encompassed by paragraph (e) of the federal rule. Therefore, for purposes of consistency and uniformity, that sentence was moved from its location in the 1967 New Jersey rule to paragraph (e) of this rule. The provision requiring the judge to indicate to the parties which one has the burden of persuasion and the burden of producing evidence has been omitted. The next to the last sentence of paragraph (1) of N.J.Evid.R. 8(1), which provides that the admissibility hearing may be conducted outside the presence or hearing of the jury, is encompassed by paragraph (c) of the federal rule. That provision is retained in paragraph (a) of this rule. It should also be noted that the content of the second sentence of paragraph (a), making the rules of evidence inapplicable to hearings conducted thereunder, is also contained in Rule 101(a)(2)(E). Paragraph (c), discussed below, is reserved exclusively for hearings on the admissibility of confessions of a criminal defendant.

Paragraph (b) of Fed.R.Evid. 104 encompasses the same material as is contained in N.J.Evid.R. 8(2). See also N.J.Evid.R. 19. The 1967 New Jersey formulation has been retained, adding the phrase "subject to" which is in the federal rule and is implicit in the 1967 New Jersey rule. Cf. N.J.Evid.R. 19.

In lieu of paragraph (c) of Fed.R.Evid. 104, this rule retains virtually verbatim paragraph (3) of N.J.Evid.R. 8 as paragraph (c) of this rule dealing with conditions for the admissibility of a criminal defendant's statements, such as their voluntary nature. The 1967 New Jersey rule had been amended in 1976 in response to the holding of State v. Hampton, 61 N.J. 250 (1972), and continues to constitute an accurate and useful guide. Its application is limited to defendant's statements alone, and it does not purport to deal with the admissibility of other evidence such as identification evidence. Unlike paragraph (a), paragraph (c) provides that the rules of evidence do apply to hearings on the admissibility of defendant's statements. This follows N.J.Evid.R. 8(3). Note should also be taken of the 1979 adoption of R. 3:13-1(b), which permits pretrial hearings to determine admissibility of statements, identification evidence, and other evidence as well.

N.J.Evid.R. 8 does not have an analogue to paragraph (d) of the federal rule, which provides that by testifying upon a preliminary matter the accused does not subject himself to cross-examination as to other issues in the case. Fed.R.Evid. 104(d) is consistent with New Jersey practice and is, therefore, included as paragraph (d) of this rule.

As noted above, paragraph (e) of this rule is taken from the last sentence of N.J.Evid.R. 8(1). That sentence is placed in Rule 104(e) to correspond with its location in the federal rules.

Rule 105

Old FRE	New FRE	NJRE	Restyled NJRE	Mark up NJRE
Rule 105. Limited Admissibility	**Rule 105. Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes**	**NJRE 105. Limited Admissibility**	**NJRE 105. Limited Admissibility**	**NJRE 105. Limited Admissibility**
When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.	If the court admits evidence that is admissible against a party or for a purpose — but not against another party or for another purpose — the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.	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, 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.	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 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.	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.

2019 NJ Supreme Court Committee Comment

The language of Rule 105 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

1991 NJ Supreme Court Committee Comment

Rule 105, which replaces N.J.Evid.R. 6, follows Fed.R.Evid. 105, adding, however, the final proviso respecting waiver of the limiting instruction. This proviso has no analogue either in the 1967 New Jersey rules or the federal rules.

The only other difference between N.J.Evid.R. 6 and Rule 105 is that this rule requires that a request be made for a limiting instruction. Although the 1967 New Jersey rule appears to require the instruction whether or not a request is made, a number of cases have held that the failure to give a limiting instruction is not plain error unless the failure had the capacity to produce an unjust result. See, e.g., State v. Lair, 62 N.J. 388, 391-393 (1973); Millison v. E.I. duPont de Nemours & Co., 226 N.J.Super. 572, 597-598 (App.Div.1988), aff'd o.b., 115 N.J. 252 (1989); State v. Rajnai, 132 N.J.Super. 530, 537-539 (App.Div.1975). The trial judge should give a limiting instruction sua sponte where it appears necessary to avoid the potential for prejudice. See State v. Cofield, 127 N.J. 328 (1992), so holding in respect of other-crime evidence. Without a request, the failure to give a limiting instruction will be reviewed as plain error.

The second sentence of the rule was included in recognition of the practice that a party for whose benefit a limiting instruction may be given should have the right to expressly waive the instruction. This is often done for tactical reasons as, for example, to avoid emphasizing particular evidence.

Rule 106

Old FRE	New FRE	NJRE	Restyled NJRE	Mark up NJRE
Rule 106. Remainder of or Related Writings or Recorded Statements	**Rule 106.** **Remainder of or Related Writings or Recorded Statements**	**NJRE 106. Remainder of or Related Writings or Recorded Statements**	**Rule 106. Remainder of or Related Writings or Recorded Statements**	**NJRE 106. Remainder of or Related Writings or Recorded Statements**
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 ought in fairness to be considered contemporaneously with it.	If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time.	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 in fairness ought to be considered contemporaneously.	If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part, or any other writing or recorded statement, that in fairness ought to be considered at the same time.	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.

2019 NJ Supreme Court Committee Comment

The language of Rule 106 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

1991 NJ Supreme Court Committee Comment

This rule follows Fed.R.Evid. 106 almost verbatim. While there is no 1967 New Jersey analogue to this rule, the Rules of Court have similar provisions governing the use at trial of depositions and interrogatories. See R. 4:16-1(d); R. 4:17-8(a). The federal rule is adopted because it incorporates the prevailing practice in this state.

Rule 201

Old FRE	New FRE	NJRE	Restyled NJRE	Mark up NJRE
ARTICLE II. JUDICIAL NOTICE **Rule 201. Judicial Notice of Adjudicative Facts**	**ARTICLE II. JUDICIAL NOTICE** **Rule 201. Judicial Notice of Adjudicati ve Facts**	**ARTICLE II. JUDICIAL NOTICE** **NJRE 201. Judicial Notice of Law and Adjudicative Facts**	**ARTICLE II. JUDICIAL NOTICE** **NJRE 201. Judicial Notice of Law and Adjudicative Facts**	**ARTICLE II. JUDICIAL NOTICE** **NJRE 201. Judicial Notice of Law and Adjudicative Facts**
(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.	**(a) Scope.** This rule governs judicial notice of an adjudicative fact only, not a legislative fact.	(a) Notice of 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	(a) Notice of 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	(a) Notice of L[l]aw. 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.

		determinations of all governmental subdivisions and agencies thereof. Judicial notice may also be taken of the law of foreign countries.	governmental subdivisions and agencies thereof. Judicial notice may also be taken of the law of foreign countries.	Judicial notice may also be taken of the law of foreign countries.
(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.	**(b) Kinds of Facts That May Be Judicially Noticed.** The court may judicially notice a fact that is not subject to reasonable dispute because it: **(1)** is generally known within the trial court's territorial jurisdiction; or	(b) Notice of facts. Facts which may be judicially noticed include: (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	(b) Notice of Facts. 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	(b) Notice of F[f]acts. [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

	(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.	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.	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.	of this state or federal court sitting for this state.
(c) When discretionary. A court may take judicial notice, whether requested or not. **(d) When mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.	**(c) Taking Notice.** The court: **(1)** may take judicial notice on its own; or **(2)** must take judicial notice if a party requests it and the court is supplied with the necessary information.	(c) When discretionary. A court may take judicial notice whether requested or not. (d) When mandatory. A court shall take judicial notice if requested by a party on notice to all other parties and if supplied with the necessary information.	(c) When Discretionary. The court may take judicial notice on its own; or (d) When Mandatory. The court shall take judicial notice if a party requests it on notice to all other parties and the court is supplied with the necessary information.	(c) When D[d]iscretionary. [A] The court may take judicial notice on its own [whether requested or not.]; or (d) When M[m]andatory. [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. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.	**(d)Timing.** The court may take judicial notice at any stage of the proceeding.	(e) Opportunity to be heard. Each party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.	(e) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.	(e) Opportunity to [b]Be [h]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) Time of taking notice. Judicial notice	**(e) Opportunity to Be Heard.** On timely	(f) How taken. --In determining the propriety of taking judicial notice of a matter or the tenor thereof,	(f) How Taken. In determining the propriety of taking judicial notice and the	(f) How T[t]aken. In determining the propriety of taking judicial notice [of a matter or the tenor

may be taken at any stage of the proceeding.	request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.	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.	nature of the fact 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.	thereof] and the nature of the fact 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 jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive	**(f) Instructing the Jury.** In a civil case, the court must instruct the jury to accept the noticed fact	(g) Instructing the jury. In a civil action or proceeding, the judge shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the judge shall instruct the jury that it may, but is not required to, accept	(g) Instructing the Jury. In a civil proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal proceeding, the court shall instruct the jury that it may, but is not required to, accept as	(g) Instructing the J[j]ury. 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

any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.	as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.	as established any fact which has been judicially noticed.	conclusive any fact judicially noticed.	has been] judicially noticed.

2019 NJ Supreme Court Committee Comment

The language of Rule 201 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

1991 NJ Supreme Court Committee Comment

Rule 201 generally follows the format of Fed.R.Evid. 201 and replaces N.J.Evid.R. 9, 10, and 11.

The scheme of the federal analogue is to provide for a single rule addressing judicial notice of adjudicative facts. The 1967 New Jersey rules had four separate rules dealing with judicial notice of law and adjudicative facts. N.J.Evid.R. 9 to 12, inclusive. The structure of the federal analogue has been largely followed by these rules except that the first paragraph of this rule deals with judicial notice of law, and the content of Fed.R.Evid. 201(f) (time of taking notice) is addressed by Rule 202. Rules 201 and 202 embrace all of the material covered by N.J.Evid.R. 9 through 12.

Paragraph (a) of this rule deals with judicial notice of law. There is no analogue in the federal evidence rules because notice of law is addressed by the federal practice rules. See Fed.R.Civ.P. 44.1 and Fed.R.Crim.P. 26.1. This paragraph of Rule 201 collects the provisions N.J.Evid.R. 9(1) and (2) as to judicial notice of

law. New Jersey Rules of Court do not address this subject.

Paragraph (b) of this rule contains a more detailed definition of judicially noticeable fact than Fed.R.Evid. 201(b), embodying the notice of fact provisions N.J.Evid.R. 9(1) and (2). It also provides for judicial notice of the records of the courts of New Jersey and of federal courts sitting in or for this state. While the federal rules of evidence contain no comparable provision, 28 U.S.C.A. § 1738 facilitates proof of the records and proceedings of any court of a state, territory or possession of the United States. See also Fed.R.Evid. 902 and 1005 dealing with authentication and admission of public records.

Paragraphs (c) and (d) of this rule follow Fed.R.Evid. 201(c) and (d), respectively, and replace the mandatory/discretionary provisions N.J.Evid.R. 9(1), (2), and (3).

Paragraph (d) does not contain a limitation as to the time when a request to take judicial notice must be made, as did N.J.Evid.R. 9(3). N.J.Evid.R. 10(3) provided that judicial notice need not be taken if the information available or supplied is insufficient or unconvincing. N.J.Evid.R. 10(4) provided that all matters pertaining to judicial notice are for the judge rather than the jury. Neither of these two provisions is expressly contained in Fed.R.Evid. 201, but they are implied by the language of this rule and the federal rule, particularly subsection (d).

Paragraph (e) of this rule follows Fed.R.Evid. 201(e), the only change being the substitution of the words "each party" for the words "a party" at the beginning of the sentence. With this change the paragraph incorporates the substance N.J.Evid.R. 10(1) by permitting both the proponent and the adversary of the noticeable material to be heard.

Paragraph (f) of the rule follows N.J.Evid.R. 10(2). The substance of Fed.R.Evid. 201(f) is included in Rule 202.

Paragraph (g) of this rule is identical to Fed.R.Evid. 201(g) and replaces N.J.Evid.R. 11. It omits as unnecessary the provision of the New Jersey rule which required the judge to indicate to the jury the source of his information. The 1967 rule failed to distinguish between instructions to the jury in civil and criminal cases. This distinction is made in Rule 201(g). While the need to make this distinction has been debated, the rule takes the safer course in view of a defendant's sixth amendment right to trial by jury. However, the court retains the power to charge the jury on the legal significance of adjudicative facts which have been judicially noticed. See A.B.A. Section of Litigation, Emerging Problems Under the Federal Rules of Evidence 35--38 (1983).

Rule 202

Old FRE	New FRE	NJRE	Restyled NJRE	Mark up NJRE
No FRE 202		**NJRE 202. Judicial Notice in Proceedings Subsequent to Trial**	**NJRE 202. Judicial Notice in Proceedings Subsequent to Trial**	**NJRE 202. Judicial Notice in Proceedings Subsequent to Trial**
		(a) Subsequent proceedings. The failure or refusal of the judge to take judicial notice of a matter or to instruct the trier of the fact with respect to it shall not preclude the judge from taking judicial notice of the matter in subsequent proceedings in the action.	(a) Subsequent Proceedings. The failure or refusal of the 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 trial court from taking judicial notice of the matter in subsequent proceedings in the action.	(a) Subsequent P[p]roceedings. 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. 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.	(b) On Appeal. The reviewing court may take judicial notice of any matter specified in Rule 201, whether or not judicially noticed by the trial court.	(b) On A[a]ppeal. 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. A judge 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	(c) Opportunity to be Heard. A trial or 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	(c) Opportunity to be H[h]eard. 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 tenor of the matter to be noticed.	information relevant to the propriety of taking such judicial notice and the nature of the fact to be noticed.	information relevant to the propriety of taking such judicial notice and [to] <u>the nature of the fact</u> [tenor of the matter] to be noticed.

2019 NJ Supreme Court Committee Comment

The language of Rule 202 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

1991 NJ Supreme Court Committee Comment

Rule 202 follows almost verbatim N.J.Evid.R. 12, whose federal analogue is Fed.R.Evid. 201(f). The federal rule provides merely that judicial notice may be taken at any stage of the proceeding. The 1967 New Jersey rule was preferred because its greater detail and specificity afford useful guidance in interpreting the scope and application of this rule, especially as to judicial notice on appeal.

Rule 301

Old FRE	New FRE	NJRE	Restyled NJRE	Mark up NJRE
ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS **Rule 301. Presumptions in General in Civil Actions and Proceedings**	**ARTICLE III. PRESUMPTIONS IN CIVIL CASES** **Rule 301. Presumptions in Civil Cases Generally**	**ARTICLE III. PRESUMPTIONS** **Rule 301. Effect of Presumption**	**ARTICLE III. PRESUMPTIONS** **Rule 301. Effect of Presumption**	**ARTICLE III. PRESUMPTIONS** **Rule 301. Effect of Presumption**
In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but	In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does	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. If evidence is introduced tending to disprove the presumed fact, the issue shall be submitted to the	(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	(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

does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.	not shift the burden of persuasion, which remains on the party who had it originally.	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. 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. 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. Nothing in this rule shall preclude the judge from commenting on inferences that may be drawn from the evidence.	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 court from commenting on inferences that may be drawn from the evidence.	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.

2019 NJ Supreme Court Committee Comment

The language of Rule 301 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

1991 NJ Supreme Court Committee Comment

Rule 301 generally follows Fed.R.Evid. 301 as well as the principles of N.J.Evid.R. 13 and 14, which it replaces. The principle adopted reflects established New Jersey law. Dwyer v. Ford Motor Co., 36 N.J. 487, 507 (1962); Kirschbaum v. Metropolitan Life Ins. Co., 133 N.J.L. 5, 9-10 (E. & A. 1945); Silver Lining Inc. v. Shein, 37 N.J.Super. 206, 216-218 (App.Div.1955). The principle is that a valid presumption can be used to establish a prima facie case, but the presumption normally disappears in the face of conflicting evidence. Nevertheless, any logical inference which can be drawn from the basic fact remains. Thus, the rule provides that the trial judge is not precluded from commenting on inferences that may be drawn from the evidence, even when conflicting evidence is presented. Note also that under Rule 301 the burden of persuasion is not shifted to a party against whom the presumption operates.

This rule does not concern conclusive presumptions, which are actually rules of substantive law. See Comment on Rule 13, The 1963 Report at 45-46.

Rule 302

Old FRE	New FRE	NJRE	Restyled NJRE	Mark up
Rule 302. Applicability of State Law in Civil Actions and Proceedings	**Rule 302. Applying State Law to Presumptions in Civil Cases**	**NJRE 302. Choice of Law**	**NJRE 302. Choice of Law**	**NJRE 302. Choice of Law**
In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.	In a civil case, state law governs the effect of a presumption regarding a claim or defense for which state law supplies the rule of decision.	In civil actions or proceedings, 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 supplies the rule of decision shall be determined in accordance with that federal or other law.	In a civil proceeding, 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.	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].

2019 NJ Supreme Court Committee Comment

The language of Rule 302 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

1991 NJ Supreme Court Committee Comment

Rule 302 is based on Fed.R.Evid. 302, which provides a choice of law rule for the effect of presumptions. There is no 1967 New Jersey rule analogue. This rule, like the federal rule, provides that when the law of another state or federal law supplies the rule of decision as to a fact which is an element of a claim or defense, the law of the same jurisdiction shall determine the effect of a presumption respecting that fact.

Rule 303

Old FRE	New FRE	NJRE	Subcommittee Suggestions NJRE	Mark up NJRE
No FRE 303		**Rule 303. Presumptions Against the Accused in Criminal Cases**	**Rule 303. Presumptions Against a Defendant in Criminal Proceedings**	**Rule 303. Presumptions Against [the Accused] <u>a Defendant</u> in Criminal [Cases] <u>Proceedings</u>**
		(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.	(a) Scope. Except as otherwise provided by law, in a criminal proceeding presumptions against a defendant, 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.	(a) Scope. Except as otherwise provided by law, in <u>a</u> criminal [cases] <u>proceeding</u> presumptions against <u>a defendant</u> [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	(b) Submission to the Jury. The court may not direct the jury to find a presumed fact against the defendant. If a presumed fact establishes an element of the	(b) Submission to <u>the</u> J[j]ury. The [judge] <u>court</u> may not direct the jury to find a presumed fact against the [accused] <u>defendant</u>. If a presumed fact establishes an element of the offense, the [judge] <u>court</u>

		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.	offense, the 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 court determines that reasonable jurors on the evidence as a whole could not find the existence of the presumed fact.	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. 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	(c) Instructing the Jury. Whenever the existence of a presumed fact against the defendant is submitted to the jury, the 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	(c) Instructing the J[j]ury. 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

		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 instructions to the jury.	the offense, the court shall instruct the jury that its existence, on all of the evidence, must be proved beyond a reasonable doubt. The court shall not use the word "presumed" or "presumption" in instructions to the jury.	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.

2019 NJ Supreme Court Committee Comment

The language of Rule 303 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

1991 NJ Supreme Court Committee Comment

Rule 303 states the effect of presumptions in criminal cases and embodies principles of constitutional law developed by both federal and New Jersey cases. See County Court of Ulster County, New York v. Allen, 442 U.S. 140, 60 L.Ed.2d 777 (1979); State v. DiRienzo, 53 N.J. 360, 369-382 (1969). Cf. Tot v. United States, 319 U.S. 463, 87 L.Ed. 1519 (1943). The provisions for instructing the jury are derived from State v. DiRienzo, supra, 53 N.J. at 381-382, and State v. Humphreys, 54 N.J. 406, 415-416 (1969). See also State v. Ingram, 98 N.J. 489 (1985), and State v. Stasio, 78 N.J. 467, 485 (1979).

A federal presumption rule for criminal cases, proposed as federal rule 303, was not adopted. However, that proposal was incorporated into rule 303 of the 1974 Uniform Rules of Evidence, which is the basis of this rule.

The 1967 New Jersey Rules of Evidence did not include a separate provision for presumptions against the accused in criminal cases. To distinguish between the effect of presumptions in civil cases and criminal cases, an interim rule, N.J.Evid.R. 15, was adopted effective July 1, 1982, to make clear that N.J.Evid.R. 13 and 14 did not apply against the accused in criminal cases. See the commentary published in 108 N.J.L.J. 301-302 (1981).

The 1979 New Jersey Code of Criminal Justice provided that presumptions established by statute with respect to any fact which is an element of an offense shall have the meaning accorded by the law of evidence. N.J.S.A. 2C:1-13(e).

Rule 401

Old FRE	New FRE	NJRE	Proposed NJRE	Markup NJRE
ARTICLE IV. RELEVANCY AND ITS LIMITS **Rule 401. Definition of "Relevant Evidence"**	**ARTICLE IV. RELEVANCE AND ITS LIMITS** **Rule 401. Test for Relevant Evidence**	**ARTICLE IV. RELEVANCY AND ITS LIMITS** **NJRE 401. Definition of "Relevant Evidence"**	**ARTICLE IV. RELEVANCY AND ITS LIMITS** **NJRE 401. Definition of "Relevant Evidence"**	**ARTICLE IV. RELEVANCY AND ITS LIMITS** **NJRE 401. Definition of "Relevant Evidence"**
"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.	Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.	"Relevant evidence" means evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action.	"Relevant evidence" means evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action.	"Relevant evidence" means evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action.

2019 NJ Supreme Court Committee Comment

No restyling changes were made to this Rule.

1991 NJ Supreme Court Committee Comment

Rule 401 is similar to N.J.Evid.R. 1(2) in that it incorporates the phrase "evidence having a tendency in reason to prove," but it substitutes for the phrase, "any material fact," the phrase, "any fact of consequence to the determination of the action" which follows Fed.R.Evid. 401. Relevant evidence is evidence tending to prove or disprove a proposition about a matter of fact, or, as in the federal rule, evidence which has a tendency to make "more probable or less probable" a fact of consequence to the action.

Rule 402

Old FRE	New FRE	NJRE	Proposed NJRE	Markup NJRE
Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible	**Rule 402. General Admissibility of Relevant Evidence**	**NJRE 402. Relevant Evidence Generally Admissible**	**NJRE 402. Relevant Evidence Generally Admissible**	**NJRE 402. Relevant Evidence Generally Admissible**
All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.	Relevant evidence is admissible unless any of the following provides otherwise: • the United States Constitution; • a federal statute; • these rules; or • other rules prescribed by the Supreme Court. Irrelevant evidence is not admissible.	Except as otherwise provided in these rules or by law, all relevant evidence is admissible.	All relevant evidence is admissible, except as otherwise provided in these rules or by law.	[Except as otherwise provided in these rules or by law,] <u>All relevant evidence is admissible, except as otherwise provided in these rules or by law.</u>

2019 Supreme Court Committee Comment

The language of Rule 402 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

1991 NJ Supreme Court Committee Comment

Rule 402 is essentially the same as both N.J.Evid.R. 7(f) and Fed.R.Evid. 402. The subject of N.J.Evid.R. 7(a) and (c) (qualification of witnesses) is covered by Rule 601. N.J.Evid.R. 7(b), (d), and (e), which deal with witness privilege, were deleted as superfluous. However, this deletion should not be construed as a return to the common-law rules of witness disabilities. The provision in the federal rule that irrelevant evidence is inadmissible was omitted as self-evident.

Rule 403

Old FRE	New FRE	NJRE	Proposed NJRE	Markup NJRE
Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time	**Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons**	**NJRE 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time**	**NJRE 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time**	**NJRE 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time**
Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.	The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.	Except as otherwise provided by these rules or other law, relevant evidence may be excluded if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence.	Except as otherwise provided by these rules or other law, the court may exclude relevant evidence if its probative value is substantially outweighed by the risk of: (a) Undue prejudice, confusing the issues, or misleading the jury; or (b) Undue delay, wasting time, or needlessly presenting cumulative evidence.	Except as otherwise provided by these rules or other law, [relevant evidence may be excluded] <u>the court may exclude relevant evidence</u> if its probative value is substantially outweighed by the risk of: (a) <u>U</u>ndue prejudice, confusion of issues, or misleading the jury; or (b) <u>U</u>ndue delay, [waste of] <u>wasting</u> time, or needlessly [presentation] <u>presenting</u> [of] cumulative evidence.

2019 Supreme Court Committee Comment

The language of Rule 403 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

1991 NJ Supreme Court Committee Comment

Rule 403 contains the principles established by both N.J.Evid.R. 4 and Fed.R.Evid. 403. Although the formulation is closer to the federal rule than the 1967 New Jersey rule, the intention was to retain the principles of N.J.Evid.R. 4 as construed by New Jersey courts. See State v. Carter, 91 N.J. 86, 105--107 (1982); State v. Garfole, 76 N.J. 445, 455--457 (1978); State v. Reldan, 185 N.J.Super. 494, 505 (App.Div.1982), certif. denied, 91 N.J. 543 (1982); State v. Jackson, 182 N.J.Super. 98 (App.Div.1981).

The opening phrase of this rule was added to accommodate certain exceptions to a trial judge's discretion. For example, Rule 404, like its predecessor, N.J.Evid.R. 47, provides that evidence of good character offered by the defendant in a criminal proceeding cannot be excluded under this rule. See also Chambers v. Mississippi, 410 U.S. 284 (1972), holding that it is a denial of due process to exclude, under local evidence rules, the confession of another person to the crime charged against defendant.

Rule 404

Old FRE	New FRE	NJRE	Proposed NJRE	Markup NJRE
Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes*	**Rule 404. Character Evidence; Crimes or Other Acts**	**NJRE 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes Evidence****	**Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes Evidence****	**NJRE 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 character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: **(1) Character of accused.** In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;	**(a) Character Evidence.** (1) ***Prohibited Uses.*** Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait. (2) ***Exceptions for a Defendant or Victim in a Criminal Case.*** The following exceptions apply in a criminal case: **(A)** a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it; **(B)** subject to the limitations in Rule 412, a defendant may offer evidence of an alleged	(a) Character 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 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	(a) Character Evidence. Evidence of a person's character or character trait, including a trait of care or skill or lack thereof, is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait except: (1) Character of 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 defendant's character	(a) Character E[e]vidence [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] accordance [therewith] 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

(2) Character of alleged victim. In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged 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 alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor; **(3) Character of witness.** Evidence of the character of a witness, as provided in Rules 607, 608, and 609. **(b) Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that	victim's pertinent trait, and if the evidence is admitted, the prosecutor may: **(i)** offer evidence to rebut it; and **(ii)** offer evidence of the defendant's same trait; and **(C)**in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor. ***Exceptions for a Witness.*** Evidence of a witness's character may be admitted under Rules 607, 608, and 609. **(b) Crimes, Wrongs, or Other Acts.** **(1)** ***Prohibited Uses.*** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character. **(2)** ***Permitted Uses; Notice in a Criminal Case.*** This	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. 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 in order to show that such person	offered by the defendant shall not be excluded under Rule 403; (2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by a defendant in a criminal proceeding or by the prosecution to rebut 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. Evidence of the character of a witness as provided in Rule 608. (b) Other 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 a	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 V[v]ictim. 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 W[w]itness. Evidence of the character of a witness as provided in Rule 608. (b) Other C[c]rimes, W[w]rongs, or A[a]cts. (1) Prohibited Uses. Except as otherwise provided by Rule 608(b) evidence of other crimes, wrongs, or acts is not admissible to prove [the

upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.	evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must: **(A)** provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and **(B)** do so before trial – or during trial if the court, for good cause, excuses lack of pretrial notice.	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. 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.	person's disposition in order to show that on a particular occasion the person acted in accordance with such disposition. (2) Permitted Uses. 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. (3) Character and Character Trait in Issue. Evidence of a person's character or character trait is admissible when that character or trait is an element of a claim or defense.	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 accordance with such disposition. (2) 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. (3) Character and C[c]haracter T[t]rait in I[i]ssue. 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.

2019 NJ Supreme Court Committee Comment

The language of Rule 404 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rules 404 and 405 refer at times to evidence of "character," at times to evidence of a "character trait," and at other times to "character or a character trait," along with other related formulations. The varying terminology derives from Rules 404 and 405 in the Federal Rules of Evidence, much of which our Rules substantially incorporated in 1992. Neither the Federal Rules nor our current Rules define the terms "character" or "character trait." Since their adoption, a considerable body of New Jersey case law under Rules 404 and 405 has developed using these terms. See, e.g., State v. Jenewicz, 193 N.J. 440 (2006); Johnson v. Dobrosky, 187 N.J. 594 (2006). In light of this history, the Restyling Committee chose to leave intact the linguistic variations within Rules 404 and 405. The Committee decided not to attempt to define or distinguish the terms "character" and "character trait." Nor did the Committee deem it appropriate to make the wording uniform within these Rules, and possibly affect established case law in doing so.

1991 NJ Supreme Court Committee Comment

Rule 404 generally follows Fed.R.Evid. 404 and replaces N.J.Evid.R. 46, 48, and 55. It also incorporates a portion of N.J.Evid.R. 47.

Paragraph (a) of Rule 404 is almost identical to Fed.R.Evid. 404(a). The introductory sentence of paragraph (a) adds to the federal formulation the phrase "including a trait of care or skill or lack thereof." This addition repeats the principle expressed by N.J.Evid.R. 48. Paragraph (a)(3) of this rule omits the cross references to Rule 607 and 609 appearing in the federal analogue. These references were deleted because only Rule 608 deals with character evidence offered to affect the credibility of a witness.

The formulation of paragraph (b) of this rule follows Fed.R.Evid. 404(b) rather than the New Jersey analogue, N.J.Evid.R. 55, except that it uses the word "disposition" contained in the New Jersey rule and it adds the final phrase "when such matters are relevant to a material issue in dispute." This addition was made to emphasize the provision of N.J.Evid.R. 55 that ordinarily other crimes evidence is admissible only to prove "some other fact in issue," and not a general disposition to commit crimes or other wrongs. In conformity with the federal rule, "opportunity" and "preparation" have been added to the N.J.Evid.R. 55 list of examples of other purposes for which other crimes evidence may be admitted.

This formulation is intended to encompass relevant New Jersey case law. See e.g. State v. Cofield, 127 N.J.Super. 328 (1992); State v. Stevens, 115 N.J. 289 (1989).

Paragraph (c) of this rule has no federal analogue although its principle is implicit in the federal practice. This paragraph is based on the general principle formerly expressed by N.J.Evid.R. 46, that evidence of character or a trait of character is admissible when that character or trait is an element of a claim or defense which is in issue.

As a result of adoption of Rule 404, evidence of a trait of character offered for the purpose of drawing inferences as to the conduct of a person on a specified occasion is no longer admissible in civil cases except as provided in Rule 404(c) (character and character trait in issue) and Rule 608 (trait of character for truthfulness/untruthfulness offered to affect the credibility of a witness).

Rule 405

OLD FRE	NEW FRE	NJRE	Proposed NJRE	Mark-Up
Rule 405. Methods of Proving Character	**Rule 405. Methods of Proving Character**	**Rule 405. Methods of Proving Character**	**Rule 405. Methods of Proving Character**	**Rule 405. Methods of Proving Character**
(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.	**(a) By Reputation or Opinion.** When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.	(a) Reputation, opinion or conviction of crime. When evidence of character or a trait of character of a person is admissible, it may be proved by evidence of 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.	(a) Reputation, Opinion, or Conviction of Crime. When evidence of 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 character or trait. Specific instances of conduct not the subject of a conviction of a crime shall be inadmissible under this paragraph.	(a) Reputation, O[o]pinion, or C[c]onviction of C[c]rime. 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 under this paragraph.
(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or	**(b) By Specific Instances of Conduct.** When a person's character or character trait is an essential element of a charge, claim, or defense, the	(b) Specific instances of conduct. When character or a trait of character of a person is an essential element of a charge,	(b) Specific Instances of Conduct. When a person's character or character trait is an essential element of a charge, claim, or defense,	(b) Specific I[i]nstances of C[c]onduct. When [character or a trait of character of a person] a person's character or character trait is an essential element of a charge,

defense, proof may also be made of specific instances of that person's conduct.	character or trait may also be proved by relevant specific instances of the person's conduct.	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.	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.

2019 NJ Supreme Court Committee Comment

The language of Rule 405 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

1991 NJ Supreme Court Committee Comment

Rule 405(a) adopts the substance of N.J.Evid.R. 46 and 47 with changes in language and structure only. Fed.R.Evid. 405(a) does not provide for proof of character or a character trait by evidence of conviction of a crime and does not provide that specific instances of conduct not the subject of a crime are inadmissible. Rule 405(a), following N.J.Evid.R. 47, rejects the provision of the federal rule which permits inquiry on cross-examination into specific instances of conduct. This provision of N.J.Evid.R. 47 was originally designed to respond to the criticism of the common-law rule pursuant to which the prosecutor was permitted to impeach a defendant's character witness by inquiring of him on cross-examination whether he had heard rumors of "bad acts" by or charges against the accused not evidenced by a judgment of conviction. See, e.g., State v. La Porte, 62 N.J. 312, 319-320 (1973); cf. State v. Steensen, 35 N.J.Super. 103, 108 (App.Div.1955). The Committee regards this principle of N.J.Evid.R. 47 as still valid. Note also the same prohibition imposed on "bad act" impeachment by N.J.Evid.R. 22(d), followed by Rule 608.

Rule 405(b) follows Fed.R.Evid. 405(b) with language changes, incorporating the principle of N.J.Evid.R. 46.

Old FRE 406	New FRE	NJRE	Proposed NJRE	Mark up NJRE
Rule 406. Habit; Routine Practice	**Rule 406. Habit; Routine Practice**	**NJRE 406. Habit, Routine Practice**	**NJRE 406. Habit, Routine Practice**	**NJRE 406. Habit, Routine Practice**
Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.	Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.	(a) Evidence, whether corroborated or not, of habit or routine practice is admissible to prove that on a specific occasion a person or organization acted in conformity with the habit or routine practice. (b) Evidence of specific instances of conduct is admissible to prove habit or routine practice if evidence of a sufficient number of such instances is offered to support a finding of such habit or routine practice.	(a) Evidence, whether corroborated or not, of habit or routine practice is admissible to prove that on a specific occasion a person or organization acted in conformity with the habit or routine practice. (b) Evidence of specific instances of conduct is admissible to prove habit or routine practice if evidence of a sufficient number of such instances is offered to support a finding of such habit or routine practice.	(a) Evidence, whether corroborated or not, of habit or routine practice is admissible to prove that on a specific occasion a person or organization acted in conformity with the habit or routine practice. (b) Evidence of specific instances of conduct is admissible to prove habit or routine practice if evidence of a sufficient number of such instances is offered to support a finding of such habit or routine practice.

2019 NJ Supreme Court Committee Comment

No restyling changes were made to this Rule.

1991 NJ Supreme Court Committee Comment

Paragraph (a) of Rule 406 follows Fed.R.Evid. 406 and replaces N.J.Evid.R. 49 without any change in substance. The term "routine practice" is taken from the federal rule and replaces the term "custom" contained in N.J.Evid.R. 49 and 50. The phrase, "regardless of the presence of eyewitnesses," contained in the federal analogue, was omitted from paragraph (a) as superfluous.

Paragraph (b), which follows N.J.Evid.R. 50 and is not contained in the federal rule, deals with one method of proving habit or routine practice, namely by proof of a sufficient number of specific instances of conduct. Habit or routine practice may also be proved by other competent evidence.

Rule 407

Old FRE 407	New FRE	NJRE	Proposed NJRE	Mark up NJRE
Rule 407. Subsequent Remedial Measures	**Rule 407. Subsequent Remedial Measures**	**Rule 407. Subsequent Remedial Measures**	**Rule 407. Subsequent Remedial Measures**	**Rule 407. Subsequent Remedial Measures**
When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.	When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove: • negligence; • culpable conduct; • a defect in a product or its design; or • a need for a warning or instruction. But the court may admit this evidence for another purpose, such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures.	Evidence of remedial measures taken after an event is not admissible to prove that the event was caused by negligence or culpable conduct. However, evidence of such subsequent remedial conduct may be admitted as to other issues.	Evidence of remedial measures taken after an event is not admissible to prove that the event was caused by negligence or culpable conduct. However, evidence of such subsequent remedial conduct may be admitted as to other issues.	Evidence of remedial measures taken after an event is not admissible to prove that the event was caused by negligence or culpable conduct. However, evidence of such subsequent remedial conduct may be admitted as to other issues.

2019 NJ Supreme Court Committee Comment

No restyling changes were made to this Rule.

2011 FRE Committee Note

The language of Rule 407 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 407 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

1991 NJ Supreme Court Committee Comment

Rule 407 follows the principle stated by N.J.Evid.R. 51 and Fed.R.Evid. 407. The 1967 New Jersey rule did not have an express provision making evidence of subsequent remedial measures admissible for purposes other than proof of negligence. Nevertheless, the admissibility of such evidence for other purposes has been recognized by case law. See, e.g., Brown v. Brown, 86 N.J. 565, 580-582 (1981) (routine maintenance); Shatz v. TEC Technical Adhesives, 174 N.J.Super. 135, 141-142 (App.Div.1980) (change in warning on product before injury); Lavin v. Fauci, 170 N.J.Super. 403 (App.Div.1979) (feasibility and credibility); Manieri v. Volkswagenwerk, 151 N.J.Super. 422 (App.Div.1977), certif. denied, 75 N.J. 594 (1978) (control).

Rule 408

Old FRE 408	New FRE	NJRE	Proposed NJRE	Mark up NJRE
Rule 408. Compromise and Offers to Compromise *	**Rule 408. Compromise and Offers to Compromise ***	**Rule 408. Settlement Offers and Negotiations ****	**Rule 408. Settlement Offers and Negotiations ****	**Rule 408. Settlement Offers and Negotiations ****
(a) Prohibited uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction: **(1)** furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and **(2)** conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.	**(a) Prohibited Uses.** Evidence of the following is not admissible – on behalf of any party – either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction: (1) furnishing, promising, or offering – or accepting, promising to accept, or offering to accept – a valuable consideration in compromising or attempting to compromise the claim; and (2) conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.	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 not be admissible to prove 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	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, is not admissible either to prove or disprove the validity 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	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 validity [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.	disclosed during settlement negotiations.	admissible shall not be excluded merely because it was disclosed during settlement negotiations.
(b) Permitted uses. This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.	**(b) Exceptions.** The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.			

2019 NJ Supreme Court Committee Comment

The language of Rule 408 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Committee adopted the more compact language recommended by the 2011 Federal Restyling Committee, replacing the phrase "admissible to prove liability for, or invalidity of, or amount of the disputed claim" with the shorter phrase "admissible either to prove or disprove the validity or amount of the disputed claim." This change is not intended to have any substantive impact on the interpretation or application of Rule 408. In this regard, the Committee endorses and adopts the following Note to Rule 408 from the Federal revision: "The [Federal] Committee deleted the reference to 'liability' on the ground that the deletion makes the Rule flow better and easier to read, and because 'liability' is covered by the broader term 'validity.' Courts have not made substantive decisions on the basis of any distinction between validity and liability. No change in current practice or in the coverage of the Rule is intended."

2011 FRE Committee Note

The language of Rule 408 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 408 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

The Committee deleted the reference to "liability" on the ground that the deletion makes the Rule flow better and easier to read, and because "liability" is covered by the broader term "validity." Courts have not made substantive decisions on the basis of any distinction between validity and liability. No change in current practice or in the coverage of the Rule is intended.

1991 NJ Supreme Court Committee Comment

Rule 408 generally follows Fed.R.Evid. 408 and replaces N.J.Evid.R. 52(1) and 53. The general principles of these rules have been retained, but the formulation has been simplified.

The reference to parties' attorneys was added to make it clear that the rule applies to their statements and conduct as well. The rule also follows the federal provision that evidence otherwise obtained is not rendered inadmissible because it was also the subject of settlement negotiations. For example, admissions of liability made at the scene of an accident may be admitted.

The rule permits the use of evidence arising out of settlement negotiations for purposes other than proving liability or the amount of damages. Such other purposes include, for example, proof of an accord and satisfaction (N.J.Evid.R. 53), proof of a debtor's promise to pay all or a portion of a preexisting debt (N.J.Evid.R. 52(1)(b)) and proof of bias or prejudice of a witness (Fed.R.Evid. 607). Evidence that a criminal defendant offered consideration for dropping or reducing a charge may also be admitted in appropriate circumstances. See State v. Romero, 95 N.J.Super. 482, 489-490 (App.Div.1967).

To the extent that statements of fact made during settlement negotiations are not expressly excluded by N.J.Evid.R. 52(1) or 53, Rule 408 follows the broader principle embodied in Fed.R.Evid. 408 which excludes such statements unless made outside of settlement negotiations.

Rule 409

Old FRE 409	New FRE	NJRE	Proposed NJRE	Mark up NJRE
Rule 409. Payment of Medical and Similar Expenses	**Rule 409. Offers to Pay Medical and Similar Expenses**	**Rule 409. Payment of Medical and Similar Expenses**	**Rule 409. Payment of Medical and Similar Expenses**	**Rule 409. Payment of Medical and Similar Expenses**
Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.	Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.	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.	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.	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.

2019 NJ Supreme Court Committee Comment

The language of Rule 409 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

1991 NJ Supreme Court Committee Comment

Rule 409 follows Fed.R.Evid. 409 verbatim. Although there is no precise New Jersey analogue to this rule, it is partly encompassed by reference in N.J.Evid.R. 52(1) to furnishing consideration to a claimant "from humanitarian motives."

Rule 410

Old FRE 410	New FRE	NJRE	Proposed NJRE	Mark up NJRE
Rule 410. Inadmissibility of Pleas, Plea Discussions and Related Statements	**Rule 410. Pleas, Plea Discussions and Related Statements**	**Rule 410. Inadmissibility of Pleas, Plea Discussions and Related Statements**	**Rule 410. Inadmissibility of Pleas, Plea Discussions and Related Statements**	**Rule 410. Inadmissibility of Pleas, Plea Discussions and Related Statements**
Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions: **(1)** a plea of guilty which was later withdrawn; **(2)** a plea of nolo contendere; **(3)** any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or **(4)** any statement made in the course of plea discussions with an attorney for the prosecuting authority	**(a) Prohibited Uses.** In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions: **(1)**a guilty plea that was later withdrawn; **(2)**a nolo contendere plea; **(3)**a statement made during a proceeding on either of those pleas under Federal Rule of Criminal Procedure 11 or a comparable state procedure; or **(4)**a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.	Except as otherwise provided in this rule, evidence of a plea of guilty which was later withdrawn, of any statement made in the course of that plea proceeding, 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 (1) in any proceeding in which another statement made in the course of the same plea or plea	(a) Prohibited Uses. Except as otherwise provided in this rule, evidence of: (1) a guilty plea, which was later withdrawn; or (2) any statement made in the course of that plea proceeding; or (3) 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. (b) Exceptions.	(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):

which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.	**(b) Exceptions.** The court may admit a statement described in Rule 410(a)(3) or (4): **(1)**in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or **(2)**in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present.	discussions has been introduced and the statement should in fairness be considered 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 under oath, on the record, and in the presence of counsel.	The court may admit a statement described in Rule 410(a): (1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or (2) in a criminal proceeding for perjury or false statement if the defendant made the defendant made the statement under oath, on the record, and with counsel present.	(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 or [,] 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].

2019 NJ Supreme Court Committee Comment

The language of Rule 410 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

1991 NJ Supreme Court Committee Comment

Rule 410 generally follows Fed.R.Evid. 410. Deleted, however, are those provisions of the federal rule which are unique to the federal practice. In replacing the abbreviated statement of N.J.Evid.R. 52(2), this rule expands the exclusion to include not only an accused's offer to plead guilty but also any statements made during plea negotiations. The expanded scope of the exclusion is a change in current New Jersey practice. See State v. Boyle, 198 N.J.Super. 64, 69-73 (App.Div.1984), whose holding this rule effectively supersedes. Even under current practice, however, if a court refuses to accept a plea of guilty or permits the accused to withdraw his plea, no admission made by the accused in the plea proceedings may be admitted against him at his criminal trial. State v. Boone, 66 N.J. 38 (1974). See R. 3:9-2 and R. 5:22-2(d).

This rule does not preclude the admissibility of statements made during plea negotiations when an issue is later raised as to the terms of the plea offer or agreement. See, e.g., State v. Kovack, 91 N.J. 476, 479-484 (1982).

Old FRE 411	New FRE	NJRE	Proposed NJRE	Mark up NJRE
Rule 411. Liability Insurance	**Rule 411. Liability Insurance**	**Rule 411. Liability Insurance**	**Rule 411. Liability Insurance**	**Rule 411. Liability Insurance**
Evidenec that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.	Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control.	Evidence that a person was or was not insured against liability is not admissible on the issue of that person's negligence or other wrongful conduct. Subject to Rule 403, this rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, control, bias, or prejudice of a witness.	Evidence that a person was or was not insured against liability is not admissible on the issue of that person's negligence or other wrongful conduct. Subject to Rule 403, this rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, control, bias, or prejudice of a witness.	Evidence that a person was or was not insured against liability is not admissible on the issue of that person's negligence or other wrongful conduct. Subject to Rule 403, this rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, control, bias, or prejudice of a witness.

2019 NJ Supreme Court Committee Comment

No restyling changes were made to this Rule.

2011 FRE Committee Note

The language of Rule 411 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 411 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

1991 NJ Supreme Court Committee Comment

Rule 411 follows Fed.R.Evid. 411 with minor modification. It replaces N.J.Evid.R. 54, which was essentially the same as the first sentence of this rule. While the 1967 New Jersey rule did not include the content of the second sentence of this rule, its import is consistent with current practice. The reference to Rule 403 has been added to the second sentence to emphasize the potential for prejudice of such evidence.

Rule 601

Old FRE 601	New FRE	NJRE	Proposed NJRE	Markup NJRE
ARTICLE VI. WITNESSES (Old) FRE 601. General Rule of Competency	**ARTICLE VI. WITNESSES (Restyled) FRE 601. Competency to Testify in General**	**ARTICLE VI. WITNESSES NJRE 601. General Rule of Competency**	**ARTICLE VI. WITNESSES NJRE 601. General Rule of Competency**	**ARTICLE VI. WITNESSES NJRE 601. General Rule of Competency**
Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.	Every person is competent to be a witness unless these rules provide otherwise. But in a civil case, state law governs the witness's competency regarding a claim or defense for which state law supplies the rule of decision.	Every person is competent to be a witness unless (a) the judge finds that the proposed witness is incapable of expression concerning the matter so as to be understood by the judge and 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.	Every person is competent to be a witness unless (a) the court finds that the proposed witness is incapable of expression so as to be understood by the 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) as otherwise provided by these rules or by law.	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.

2019 NJ Supreme Court Committee Comment

The language of Rule 601 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

1991 NJ Supreme Court Committee Comment

Rule 601 incorporates the substantive provisions of N.J.Evid.R. 7(a) and (c) and 17(a) and (b). The federal analogue, Fed.R.Evid. 601, is inapposite to the extent that it states a choice of law rule in federal proceedings. While the substantive provision of the federal rule is less specific than this rule, the federal rule is not inconsistent with this rule in principle. Subsection (c) was added to accommodate provisions of Rules 804(a)(5) and 805(b)(8)(B) regarding admissibility of a child's statements concerning sexual activity notwithstanding the child is not deemed competent as a witness under Rule 601.

Rule 602

Old FRE 602	New FRE	NJRE	Proposed NJRE	Markup NJRE
ARTICLE VI. WITNESSES [Old] FRE 602 Lack of Personal Knowledge	**ARTICLE VI. WITNESSES [Restyled] FRE 602 Need for Personal Knowledge**	**ARTICLE VI. WITNESSES** **NJRE 602. Lack Of Personal Knowledge****	**ARTICLE VI. WITNESSES** **NJRE 602. Lack Of Personal Knowledge****	**ARTICLE VI. WITNESSES** **NJRE 602. Lack Of Personal Knowledge****
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 witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.	A witness may testify to a matter 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 consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.	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 that witness.	A witness may testify to a matter 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 consist of the witness' own testimony. This rule does not apply to expert testimony under Rule 703.	[Except as otherwise provided by Rule 703 (bases of opinion testimony by experts), a] <u>A</u> witness may [not] testify to a matter [unless] <u>only if</u> 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] <u>witness' own testimony. This rule does not apply to expert testimony under Rule 703.</u>

2019 NJ Supreme Court Committee Comment

The language of Rule 602 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

1991 NJ Supreme Court Committee Comment

Rule 602 follows Fed.R.Evid. 602 and part of N.J.Evid.R. 19. The provision contained in N.J.Evid.R. 19 which allowed evidence to be introduced conditionally is encompassed by Rule 104 and is therefore not repeated in this rule.

This rule should not be construed to deprive the judge of the inherent power to reject the testimony of a witness if he finds that no trier of fact could reasonably believe that the witness actually perceived the matter. The express provision to this effect contained in N.J.Evid.R. 19 was not included in this rule because it merely reflects a principle generally applicable to proof of all conditions for the admissibility of evidence which is embraced by Rule 104.

Rule 603

Old FRE 603	New FRE	NJRE	Proposed NJRE	Markup NJRE
ARTICLE VI. WITNESSES [Old] FRE 603. Oath or Affirmation	**ARTICLE VI. WITNESSES [Restyled] FRE 603. Oath or Affirmation to Testify Truthfully**	**ARTICLE VI. WITNESSES NJRE 603. Oath or Affirmation**	**ARTICLE VI. WITNESSES NJRE 603. Oath or Affirmation**	**ARTICLE VI. WITNESSES NJRE 603. Oath or Affirmation**
Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.	Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.	Before testifying a witness shall be required to take an oath or make an affirmation or declaration to tell the truth under the penalty provided by law. No witness may be barred from testifying because of religious belief or lack of such belief.	Before testifying a witness shall be required to take an oath or make an affirmation or declaration to tell the truth under the penalty provided by law. No witness may be barred from testifying because of religious belief or lack of such belief.	Before testifying a witness shall be required to take an oath or make an affirmation or declaration to tell the truth under the penalty provided by law. No witness may be barred from testifying because of religious belief or lack of such belief.

2019 NJ Supreme Court Committee Comment

The language of Rule 603 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Note that Rule 101(b)(5) has also been amended to provide a definition for a "statement under oath."

1991 NJ Supreme Court Committee Comment

Rule 603 follows both Fed.R.Evid. 603 and N.J.Evid.R. 18 with minor language changes. As to the use of evidence respecting the religious belief of a witness, see Rule 610.

Although N.J.S.A. 41:1-6 prescribes a form of affirmation and declaration and R. 1:4-4(b) prescribes the form of certification in lieu of oath, no statute or rule of evidence or practice prescribes the form of witness oath. Consequently, although the so-called traditional form of oath is commonly used, it is not mandated and, especially in the case of children, any form will be acceptable if it satisfies the judge that it constitutes a commitment to speak the truth "on pain of future punishment of any kind." State in Interest of R.R., 79 N.J. 97, 111 (1979).

See also Rule 610, which prohibits admissibility of a witness' beliefs or opinions to affect credibility.

Rule 604

Old FRE 604	New FRE	NJRE	Proposed NJRE	Markup NJRE
ARTICLE VI. WITNESSES [Old] FRE 604. Interpreters	**ARTICLE VI. WITNESSES [Restyled] FRE 604. Interpreter**	**ARTICLE VI. WITNESSES** **NJRE 604. Interpreters**	**ARTICLE VI. WITNESSES** **NJRE 604. Interpreters**	**ARTICLE VI. WITNESSES** **NJRE 604. Interpreters**
An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.	An interpreter must be qualified and must give an oath or affirmation to make a true translation.	The judge 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.	The court shall determine the qualifications of a person testifying as an interpreter. An interpreter 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.	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.

2019 NJ Supreme Court Committee Comment

The language of Rule 604 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

1991 NJ Supreme Court Committee Comment

Rule 604 follows the current but presently uncodified practice of requiring an interpreter to take an oath or make an affirmation to interpret accurately and adopts the last sentence of N.J.Evid.R. 17 making the interpreter subject to rules relating to witnesses. While not inconsistent with Fed.R.Evid. 604, this rule avoids the potential for confusion in the federal rule's stipulation that an interpreter is subject to "qualification as an expert." Instead, this rule, filling a gap in the current New Jersey rules, simply leaves the qualification of a person to act as an interpreter to determination by the trial judge.

Because the use of an interpreter always presents some risk of distortion of the "message communicated by the primary witness," the use of an interpreter should be limited to those situations in which the trial judge is satisfied that the "witness' natural mode of expression is not intelligible to the tribunal." State in Interest of R.R., 79 N.J. 97, 116 (1979).

To insure the integrity of the interpretation, the interpretation must be wholly impersonal, that is, an exact rendering of the witness' communication, neither paraphrased, summarized, expanded or otherwise modified. Id. at 117-118. More significantly, the interpreter must have no interest in the matter before the court; an interested interpreter may be allowed to act, if at all, only when there is no reasonable possibility of obtaining the services of a disinterested interpreter. Ibid. See State v. Lee, 211 N.J.Super. 590, 594-596 (App.Div.1986). In no circumstances may a primary witness act as interpreter for another primary witness. State in the Interest of R.R., supra, 79 N.J. at 119-120.

Rule 605

Old FRE 605	New FRE	NJRE	Proposed NJRE	Markup NJRE
ARTICLE VI. WITNESSES [Old] FRE 605. Competency of Judge as Witness	**ARTICLE VI. WITNESSES [Restyled] FRE 605. Judge's Competency As a Witness**	**ARTICLE VI. WITNESSES NJRE 605. Restriction on Judge As a Witness**	**ARTICLE VI. WITNESSES NJRE 605. Restriction on Judge As a Witness**	**ARTICLE VI. WITNESSES NJRE 605. Restriction on Judge As a Witness**
The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.	The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue.	The judge presiding at the trial may not testify as a witness in that trial. No objection need be made to preserve the point.	The judge presiding at the trial may not testify as a witness in that trial. A party need not object to preserve the issue.	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.

2019 NJ Supreme Court Committee Comment

The language of Rule 605 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

1991 NJ Supreme Court Committee Comment

Rule 605 follows Fed.R.Evid. 605 except that "in that trial" was moved to the end of the sentence. In principle the rule is the same as N.J.Evid.R. 42.

Note that a New Jersey judge may not testify as an expert witness on New Jersey law in a trial over which he is not presiding. State v. Grimes, 235 N.J.Super. 75, 79-81 (App.Div.1989), certif. denied, 118 N.J. 222 (1989).

Rule 606

Old FRE 606	New FRE	NJRE	Proposed NJRE	Markup NJRE
ARTICLE VI. WITNESSES **[Old]** **FRE 606. Competency of Juror as Witness**	**ARTICLE VI. WITNESSES** **[Restyled]** **FRE 606.** **Juror's Competency As a Witness**	**ARTICLE VI. WITNESSES** **NJRE 606.** **Restriction on Juror As Witness**	**ARTICLE VI. WITNESSES** **NJRE 606.** **Restriction on Juror As a Witness**	**ARTICLE VI. WITNESSES** **NJRE 606.** **Restriction on Juror As Witness**
(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.	**(a) At the Trial.** A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give a party an opportunity to object outside the jury's presence.	A member of the jury may not testify as a witness before the jury on which the juror is serving.	A member of the jury may not testify as a witness before the jury on which the juror is serving.	A member of the jury may not testify as a witness before the jury on which the juror is serving.
(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly	**b) During an Inquiry into the Validity of a Verdict or Indictment.** **(1)** ***Prohibited Testimony or Other Evidence.*** During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.			

brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.	(2) ***Exceptions.*** A juror may testify about whether: **(A)** extraneous prejudicial information was improperly brought to the jury's attention; **(B)** an outside influence was improperly brought to bear on any juror; or **(C)** a mistake was made in entering the verdict on the verdict form.			

2019 NJ Supreme Court Committee Comment

No restyling changes have been made to this Rule.

1991 NJ Supreme Court Committee Comment

Rule 606 follows the analogous provisions of both Fed.R.Evid. 606(a) and N.J.Evid.R. 43 with minor language changes only. The provision of the federal rule requiring objections to the testimony of a juror to be made outside the presence of the jury was deleted as self-evident.

Fed.R.Evid. 606(b) and N.J.Evid.R. 41 address the extent to which a juror may testify after the verdict with respect to factors influencing his vote. In general terms both prohibit such testimony unless it relates to improper outside influences. New Jersey case law on the subject is generally consistent with both rules. See, e.g., State v. Athorn, 46 N.J. 247 (1966), cert. denied, 384 U.S. 962 (1966); State v. LaFera, 42 N.J. 97, 105-111 (1964); State v. Young, 181 N.J.Super. 463, 466-472 (App.Div.1981); R. 1:16-1. See also State v. Bey (I), 112 N.J. 45, 86--92 (1988), prescribing standards for post-impanelment, pre-verdict interrogation of jurors respecting possible taint. The prohibition against testimony by jurors in the New Jersey analogue, N.J.Evid.R. 43, was intended only to prohibit a juror from testifying as a fact witness in the trial itself and does not address the question of testimony by a juror in a collateral hearing to determine whether improper influences upon him or the jury may have been exerted. See Comment on Rule 43, The 1963 Report at 83-84. Because New Jersey case law is comprehensive and the issue overlaps procedural concerns, it was deemed unnecessary to adopt an evidence rule dealing with juror misconduct, improper influence of jurors, and related matters. Consequently, no analogue to N.J.Evid.R. 41, or Fed.R.Evid. 606(b) was incorporated in this rule.

Rule 607

Old FRE 607	New FRE	NJRE	Proposed NJRE	Markup NJRE
ARTICLE VI. WITNESSES [Old] FRE 607. Who May Impeach	**ARTICLE VI. WITNESSES [Restyled] FRE 607. Who May Impeach a Witness**	**ARTICLE VI. WITNESSES** **NJRE 607. Credibility and Neutralization**	**ARTICLE VI. WITNESSES** **NJRE 607 Witness Impeachment, Support, and Neutralization**	**ARTICLE VI. WITNESSES** **NJRE 607. [Credibility] Witness Impeachment, Support, and Neutralization**
The credibility of a witness may be attacked by any party, including the party calling the witness.	Any party, including the party that called the witness, may attack the witness's credibility.	Except as otherwise provided by Rules 405 and 608, for the purpose of impairing 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, except that 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 finds that the party calling the witness was surprised. A prior	(a) For the purpose of 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) The party calling a witness may not neutralize the witness' testimony by a prior contradictory statement unless (i) the statement is in a form admissible under Rule 803(a)(1), or (ii) the court	[Except as otherwise provided by Rules 405 and 608,] (a) F[f]or 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 t] 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]

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

2019 NJ Supreme Court Committee Comment

The language of Rule 607 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

1991 NJ Supreme Court Committee Comment

Rule 607 follows almost verbatim N.J.Evid.R. 20 as amended effective July 1, 1982. That amendment, together with the contemporaneous amendment of N.J.Evid.R. 63(1)(a), substantially modified the so-called voucher rule as previously embraced in N.J.Evid.R. 20. Fed.R.Evid. 607, which abolished the voucher rule entirely, was rejected. Rule 607 also continues the neutralization provision embodied in N.J.Evid.R. 20, which is not contained in the federal analogue.

Fed.R.Evid. 607 was coupled in the original draft of the Federal Rules of Evidence with a hearsay exception providing for the substantive admissibility of all prior statements of a witness. See Notes of Committee on the Judiciary, House Report No. 93-650, Note to Fed.R.Evid. 801(d)(1), 28 U.S.C.A. (1984). When all prior statements of a witness are thus admissible, there is no longer the danger that a witness will be called solely to obtain forbidden hearsay benefits under the guise of impeachment, since the benefits are no longer forbidden. See Notes of Advisory Committee on Proposed Rules, Note to Fed.R.Evid. 607, 28 U.S.C.A.

(1984). However, if some prior statements of a witness remain subject to hearsay restrictions on substantive use, restrictions on "impeaching" one's own witness should be retained, at least to some extent. This point was apparently overlooked by Congress when the wide open prior witness statement hearsay exception was narrowed, but a corresponding change was not made in the impeachment rule. Rule 607 reflects the properly tailored restrictions on impeachment of one's own witness contained in N.J.Evid.R. 20.

Prior to the adoption of the 1967 Rules of Evidence, it was recommended that Rule 20 take a form that "sweeps the decks clean as to impeachment." The 1963 Report at 59. It was argued that there should be no limitation on the right to impair the credibility of one's "own witness." Ibid. However, the proposed version of Rule 20, which mirrored the principle later embodied in Rule 607 of the Uniform Rules of Evidence, was rejected.

Instead a version incorporating the restrictive voucher rule was adopted.

The 1982 amendments to N.J.Evid.R. 20 broadened the right of a party to impeach a witness called by him by allowing him to use a prior inconsistent statement if in a form complying with N.J.Evid.R. 63(1)(a), as amended. Such a statement can also be used to neutralize the current testimony of the witness, whether or not the party calling the witness has been surprised by that testimony. A fuller statement of the purposes of the 1982 amendments to N.J.Evid.R. 20 and N.J.Evid.R. 63(1)(a) was given in the commentary to the proposed amendments to these rules published in 108 N.J.L.J. 301, 302 (1981).

Rule 607 permits the use of a prior consistent statement to rebut an express or implied charge of recent fabrication or of improper influence or motive. The phrase "improper influence or motive" has been added to the formulation in N.J.Evid.R. 20. It was taken from Fed.R.Evid. 801(d)(1)(B) and is repeated in Rule 803(a)(2). With respect to the provision dealing with the admissibility of prior consistent statements, the phrase "and except as otherwise provided by the law of evidence" refers to situations recognized by case law, such as the fresh complaint rule, which permits fresh complaint evidence to be offered to support the credibility of a witness. State v. Balles, 47 N.J. 331, 338 (1966), cert. denied and appeal dismissed, 388 U.S. 461 (1967); State v. Bethune, 232 N.J.Super. 532 (App.Div.1989), aff'd, 121 N.J. 137 (1990).

As to the use of extrinsic evidence other than prior statements to affect credibility, see generally State v. Johnson, 216 N.J.Super. 588, 603 (App.Div.1987). See also Rule 608 as to the use of character evidence of truthfulness to support the credibility of a witness.

Old FRE 608	New FRE	NJRE	Proposed NJRE	Markup NJRE
ARTICLE VI. WITNESSES [Old] **FRE 608. Evidence of Character and Conduct of Witness**	**ARTICLE VI. WITNESSES [Restyled]** **FRE 608. A Witness's Character for Truthfulness or Untruthfulness**	**ARTICLE VI. WITNESSES** **NJRE 608. Evidence of Character for Truthfulness or Untruthfulness and Evidence of Prior False Accusation**	**ARTICLE VI. WITNESSES** **NJRE 608. Evidence of Character for Truthfulness or Untruthfulness and Evidence of Prior False Accusation**	**ARTICLE VI. WITNESSES** **NJRE 608. Evidence of Character for Truthfulness or Untruthfulness and Evidence of Prior False Accusation**
(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.	**(a) Reputation or Opinion Evidence.** A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.	a) The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, 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 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	a) The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, 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 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	a) The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, 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 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.

		cannot be proved by specific instances of conduct. (b) The credibility of a witness in a criminal case 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.	cannot be proved by specific instances of conduct. (b) The credibility of a witness in a criminal case 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.	(b) The credibility of a witness in a criminal case 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.

2019 NJ Supreme Court Committee Comment

No restyling changes have been made to this Rule.

Rule 609

Old FRE 609	New FRE	NJRE	Proposed NJRE	Markup NJRE
ARTICLE VI. WITNESSES [Old] FRE 609. Religious Beliefs or Opinions	**ARTICLE VI. WITNESSES [Restyled] FRE 609. Religious Beliefs or Opinions**	**ARTICLE VI. WITNESSES** **NJRE 609. Impeachment by Evidence of Conviction of Crime ****	**ARTICLE VI. WITNESSES** **NJRE 609. Impeachment by Evidence of Conviction of Crime ****	**ARTICLE VI. WITNESSES** **NJRE 609. Impeachment by Evidence of Conviction of Crime ****
		(a) In General (1) For the purpose of affecting the credibility of any witness, the witness's conviction of a crime, subject to Rule 403, must be admitted unless excluded by the judge pursuant to Section (b) of this rule. (2) Such conviction may be proved by examination, production of the record thereof, or by other competent evidence, except in a criminal case, 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	(a) In General (1) For the purpose of attacking the credibility of any witness, the witness' conviction of a crime, subject to Rule 403, shall be admitted unless excluded by the court pursuant to paragraph (b) of this rule. (2) (A) Except as provided in subparagraph (a)(2)(B) of this Rule, such conviction may be proved by examination, production of the record thereof, or by other competent evidence. (B) In a criminal proceeding when the defendant is the witness, and	(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

		admitting the nature of the offense poses a risk of undue prejudice to a defendant, the State 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's 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	(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 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	(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] <u>prosecution</u> 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,

		is admissible under Section (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.	evidence having the burden of proof. (2) In determining whether the evidence of a conviction is admissible under 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.	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.

2019 NJ Supreme Court Committee Comment

The language of Rule 609 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 610

Old FRE 610	New FRE	NJRE	Proposed NJRE	Markup NJRE
ARTICLE VI. WITNESSES [Old] FRE 610. Religious Beliefs or Opinions	**ARTICLE VI. WITNESSES [Restyled] FRE 610. Religious Beliefs or Opinions**	**ARTICLE VI. WITNESSES** **NJRE 610. Religious Beliefs or Opinions ****	**ARTICLE VI. WITNESSES** **NJRE 610. Religious Beliefs or Opinions****	**ARTICLE VI. WITNESSES** **NJRE 610. Religious Beliefs or Opinions ****
Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.	Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.	Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.	Evidence of a witness' religious beliefs or opinions is not admissible to attack or support the witness' credibility.	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.

2019 NJ Supreme Court Committee Comment

The language of Rule 610 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

1991 NJ Supreme Court Committee Comment

Rule 610 follows Fed.R.Evid. 610 verbatim. It is not inconsistent with N.J.Evid.R. 30, which cited the statutory privilege contained in N.J.S.A. 2A:84A-24. By virtue of that privilege a witness may "refuse to disclose his theological opinion or religious belief unless his adherence or nonadherence to such an opinion or belief is material to an issue in the action other than that of his credibility as a witness." Rule 610 makes inadmissible proof of the religious beliefs or opinions of a witness when offered through the testimony of that witness or by other evidence if the sole purpose is to affect the credibility of that witness by reason of the nature of those beliefs. Consistent with N.J.S.A. 2A:84A-24, this rule does not exclude proof of religious beliefs or opinions when offered for another purpose

that is material to an issue in the action. See, e.g., In re Conroy, 98 N.J. 321, 361--362 (1985) (religious beliefs of an incompetent patient are admissible to determine the patient's prior intent to have life-sustaining medical intervention).

See also Rule 603 (oath or affirmation), which expressly permits a witness to testify irrespective of his religious belief or lack thereof.

Old FRE 611	New FRE	NJRE	Proposed NJRE	Markup NJRE
ARTICLE VI. WITNESSES [Old] FRE 611. Mode and Order of Interrogation and Presentation	**ARTICLE VI. WITNESSES [Restyled] FRE 611. Mode and Order of Examining Witnesses and Presenting Evidence**	**ARTICLE VI. WITNESSES** **NJRE 611. Mode and Order of Interrogation and Presentation**	**ARTICLE VI. WITNESSES** **NJRE 611. Mode and Order of Interrogation and Presentation**	**ARTICLE VI. WITNESSES** **NJRE 611. Mode and Order of Interrogation and Presentation**
(a) Control by court. 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 effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.	**(a) Control by the Court; Purposes.** The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: **(1)** make those procedures effective for determining the truth; **(2)** avoid wasting time; and **(3)** protect witnesses from harassment or undue embarrassment.	(a) Control by court. 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 effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.	(a) Control by Court; Purposes. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment.	(a) Control by C[c]ourt; 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 should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.	**(b) Scope of Cross-Examination.** Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination.	(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.	(b) Scope of Cross-examination. Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness' credibility. The court may allow inquiry into additional matters as if on direct examination.	(b) Scope of C[c]ross-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 questions. 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 a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.	**(c) Leading Questions.** Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions: **(1)** on cross-examination; and **(2)** when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.	(c) Leading questions. 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.	(c) Leading Questions. Leading questions should not be used on direct examination except as 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.	(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.

2019 NJ Supreme Court Committee Comment

The language of Rule 611 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The change of the phrase in Rule 611(b) from "in the exercise of discretion" to "may" does not eliminate the court's discretion but encompasses the concept of discretion, consistent with the use of "may" in other rules.

1991 NJ Supreme Court Committee Comment

Rule 611 follows Fed.R.Evid. 611 almost verbatim. Paragraph (c) was changed to add to the federal formulation "unresponsiveness" as a basis for permitting leading questions and to substitute "when a witness demonstrates hostility" for the term "hostile witness." While there is no 1967 New Jersey analogue, N.J.S.A. 2A:81-11 provides: "Except as otherwise provided by law, when any party is called as a witness by the adverse party he shall be subject to the same rules as to examination and cross-examination as other witnesses." See Becker v. Eisenstodt, 60 N.J.Super. 240, 248-249 (App.Div.1960).

Although the principles stated by Rule 611 have not heretofore been codified in this jurisdiction, they are nevertheless consistent with New Jersey practice. As to paragraph (a) of the Rule, see Cestero v. Ferrara, 110 N.J.Super. 264, 273 (App.Div.1970), aff'd, 57 N.J. 497 (1971), holding that "[t]he control of examination, both direct and cross, resides in [the trial judge], to the end that the proofs may be kept within reasonable bounds. His discretion in this respect is a broad one, and we will not interfere with its exercise absent a clear abuse of that discretion."

As to cross-examination, New Jersey courts have repeatedly held that while the scope of cross-examination is a matter within the trial judge's discretion and should ordinarily be restricted to the scope of the direct testimony, nevertheless, reasonable latitude should be permitted to assure its inclusion of relevant material, including matters relevant to showing the improbability of the direct evidence. See, e.g., State v. Petillo, 61 N.J. 165, 169 (1972), cert. denied, 410 U.S. 945 (1973); State v. Pollack, 43 N.J. 34, 39 (1964); Singer Shop-Rite, Inc. v. Rangel, 174 N.J.Super. 442, 448 (App.Div.1980), certif. denied, 85 N.J. 148 (1980); State v. Mustacchio, 109 N.J.Super. 257, 264 (App.Div.1970), aff'd, 57 N.J. 265 (1970).

As to leading questions, see Nobero Co. v. Ferro Trucking Inc., 107 N.J.Super. 394, 404 (App.Div.1969), noting that "[w]hile leading questions are generally not permitted on the direct examination of one's own witness, there is an area of permissible leading, within the discretion of the trial judge, to avoid confusion, to clarify testimony, or otherwise to bring out the truth in serving the cause of justice." See also State v. Riley, 28 N.J. 188, 204-205 (1958), cert. denied, 359 U.S. 313 (1959) and cert. denied, 361 U.S. 879 (1959), as to the propriety of a judge posing leading questions to a witness.

Rule 612

Old FRE 612	New FRE	NJRE	Proposed NJRE	Markup NJRE
ARTICLE VI. WITNESSES [Old] FRE 612. Writing Used To Refresh Memory	**ARTICLE VI. WITNESSES [Restyled] FRE 612. Writing Used to Refresh a Witness's Memory**	**ARTICLE VI. WITNESSES** **NJRE 612 Writing Used to Refresh Memory**	**ARTICLE VI. WITNESSES** **NJRE 612 Writing Used to Refresh Memory**	**ARTICLE VI. WITNESSES** **NJRE 612 Writing Used to Refresh Memory**
Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either— (1) while testifying, or (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the	**(a)Scope.** This rule gives an adverse party certain options when a witness uses a writing to refresh memory: (1) while testifying; or (2) before testifying, if the court decides that justice requires the party to have those options. **(b) Adverse Party's Options; Deleting Unrelated Matter.** Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the	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	(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	(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

testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.	writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record. **(c) Failure to Produce or Deliver the Writing.** If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or — if justice so requires — declare a mistrial.	of the testimony, the court shall examine the writing in camera and excise any unrelated portions. 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.	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 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.	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.

2019 NJ Supreme Court Committee Comment

The language of Rule 612 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

1991 NJ Supreme Court Committee Comment

Rule 612 generally follows the first two sentences of Fed.R.Evid. 612 with some language and technical changes. Although there is no 1967 New Jersey rule analogue, the provisions of this rule are consistent with accepted practice in this jurisdiction. See State v. Carter, 91 N.J. 86, 122-123 (1982); State v. Bindhammer, 44 N.J. 372, 385 (1965); State v. Williams, 226 N.J.Super. 94, 103 (App.Div.1988); State v. Rajnai, 132 N.J.Super. 530, 539-540 (App.Div.1975).

First, this rule makes clear that when a writing used by a witness to refresh his memory is offered in evidence by the adverse party, the purpose of the offer is limited to impeaching credibility. The writing itself does not constitute substantive evidence of the facts stated therein. While the federal rule is not explicit as to this limited purpose of the offer, that limitation is nevertheless implicit. See State v. Carter, supra, 91 N.J. at 123, explaining that "[t]he admissible evidence is the recollection of the witness, and not the extrinsic paper."

Second, the introductory phrase of the federal rule specifically excepts the provisions of 18 U.S.C.A. § 3500 (the Jencks Act), which accord defendants in criminal proceedings rights to discovery of any prior statement made by a prosecution witness. The evident purpose of this exception in the federal rule is to avoid the interpretation that it intends any curtailment of the discovery rights afforded by the Jencks Act. While New Jersey does not have a statutory analogue to the Jencks Act, its principles are embodied by rules of court. See R. 3:17-1 to 4. See also Comment on R. 3:17. Thus, the exception provision in the introductory phrase of Rule 612 is primarily intended as a reference to R. 3:17 and to the pertinent provisions of R. 3:13-3, which provide for pretrial discovery. Note that pretrial discovery in New Jersey, substantially broader than that available in the federal practice, has effectively eliminated the need of defendants to rely on R. 3:17, which is little used.

This rule retains the distinction made by the federal rule between statements used to refresh collection while the witness is testifying and statements used for that purpose before the testimony is given. When the statement is used during testimony, the adverse party is absolutely entitled to its production, inspection, use in cross-examination and introduction into evidence. Where, however, the writing is used by the witness to refresh his recollection before he testifies, the according of these rights to the adverse party is within the discretion of the court.

This rule omits the provisions of the last two sentences of the federal rule which require preservation of excised portions for appellate purposes and prescribe sanctions for violation of an order entered by the court pursuant to the rule. The first of these provisions is not necessary since it is a matter of well-established practice that any deleted portion of proffered evidence must be made available to the appellate court in the event of an appeal. Cf. R. 1:7-3, so providing in respect of excluded evidence. The sanction provision was omitted since sanctions generally are a matter within the sound discretion of the court.

The distinctions between a writing used to refresh memory offered under this rule and a statement of recorded recollection admissible as an exception to the hearsay rule under R. 803(c)(5) must be kept in mind. Under Rule 612 the offer may be made only by the adverse party, and when offered, the writing may be made only to impeach credibility. The substantive evidence is the testimony of the witness whose memory has been refreshed by recourse to the writing. The hearsay exception of R. 803(c)(5) is applicable when a witness is unable to recall even after recourse to the statement and, therefore, cannot give substantive testimony. Since the statement of recorded recollection can be offered by the proponent of the witness, it is subject to the further limitation that it may only be read to the jury and may not be introduced into evidence as an exhibit. This qualification is not made in the case of a writing used to refresh memory since that writing may be introduced only by an adverse party.

Note that a document used to refresh recollection under this rule need not have been authorized by the witness and may also be used pursuant to this rule even if obtained as the result of an unlawful search and seizure. See State v. Carter, supra, 91 N.J. at 122-123. The only relevant criteria governing the judge's exercise of discretion in allowing use of a document to refresh recollection are whether the witness' memory is actually impaired, whether the document does in fact fairly refresh recollection, and whether the value of the evidence outweighs any danger of undue suggestion. Ibid; State v. Williams, supra, 226 N.J.Super. at 103.

As to the related problem of admitting testimony of recollection refreshed by hypnosis, see State v. Hurd, 86 N.J. 525 (1981), prescribing standards for the admission of such evidence.

Rule 613

Old FRE 613	New FRE	NJRE	Proposed NJRE	Markup NJRE
ARTICLE VI. WITNESSES [Old] FRE 613. Prior Statements of Witnesses	**ARTICLE VI. WITNESSES [Restyled] FRE 613. Witness's Prior Statement**	**ARTICLE VI. WITNESSES** **NJRE 613. Prior Statements of Witnesses**	**ARTICLE VI. WITNESSES** **NJRE 613. Prior Statements of Witnesses**	**ARTICLE VI. WITNESSES** **NJRE 613. Prior Statements of Witnesses**
(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.	**(a) Showing or Disclosing the Statement During Examination.** When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.	(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown or its contents disclosed to the witness at that time. Upon request the statement shall be shown or disclosed to opposing counsel.	(a) Examining Witness Concerning Prior Statement. When examining a witness about the witness' prior statement, whether written or not, a party need not show it or disclose its contents to the witness. But the party must, upon request, 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.	(a) Examining W[w]itness C[c]oncerning P[p]rior S[s]tatement. 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 [U] 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. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).	**(b) Extrinsic Evidence of a Prior Inconsistent Statement.** Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).	(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a 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).	(b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a witness' prior inconsistent statement may 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).	(b) Extrinsic E[e]vidence of P[p]rior I[i]nconsistent S[s]tatement of W[w]itness. 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).

2019 NJ Supreme Court Committee Comment

The language of Rule 613 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

1991 NJ Supreme Court Committee Comment

Rule 613 generally follows Fed.R.Evid. 613 with minor language changes only and is consistent with N.J.Evid.R. 22(a) and (b).

Note that while N.J.Evid.R. 22(b) is phrased in terms of the judge's discretion to exclude extrinsic evidence of the witness' prior inconsistent statement unless the preconditions for admissibility are met, this rule, following the federal formulation, provides that unless the preconditions are met, the evidence is not admissible except if "the interests of justice otherwise require." While the import of the two rules is thus essentially the same, this formulation was deemed preferable because of its emphasis on the general principle that absent some special reason, the evidence should not be admitted if the required explanatory opportunities were not afforded. See generally State v. Conyers, 58 N.J. 123, 132 (1971); State v. Coruzzi, 189 N.J.Super. 273, 305 (App.Div.1983), certif. denied, 94 N.J. 531 (1983).

Rule 614

Old FRE 614	New FRE	NJRE	Proposed NJRE	Markup NJRE
ARTICLE VI. WITNESSES **[Old]** **FRE 614. Calling and Interrogation of Witnesses by Court**	**ARTICLE VI. WITNESSES** **[Restyled]** **FRE 614. Court's Calling or Examining a Witness**	**ARTICLE VI. WITNESSES** **NJRE 614. Calling and Interrogation of Witnesses by Judge**	**ARTICLE VI. WITNESSES** **NJRE 614. Calling and Interrogation of Witnesses by Court**	**ARTICLE VI. WITNESSES** **NJRE 614. Calling and Interrogation of Witnesses by Court [Judge]**
(a) Calling by court. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.	(a) **Calling.** The court may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness.	The 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.	(a) Calling. The court may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness.	(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) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party.	(b) **Examining.** The court may examine a witness regardless of who calls the witness.		(b) Examining. The court may examine a witness regardless of who calls the witness.	(b) Examining. The court may examine a witness regardless of who calls the witness.
(c) Objections. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.	(c) **Objections.** A party may object to the court's calling or examining a witness either at that time or at the next opportunity when the jury is not present.		(c) Objections. A party may object to the court's calling or examining a witness.	(c) Objections. A party may object to the court's calling or examining a witness.

2019 NJ Supreme Court Committee Comment

The language of Rule 614 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

1991 NJ Supreme Court Committee Comment

Rule 614 generally follows Fed.R.Evid. 614. While there is no New Jersey rule analogue, this rule is consistent with current New Jersey practice. See State v. Ross, 80 N.J. 239, 248-249 (1979); State v. Guido, 40 N.J. 191, 207-208 (1963); State v. Riley, 28 N.J. 188, 200-201 (1958), cert. denied and appeal dismissed, 359 U.S. 313 (1959) and cert. denied, 361 U.S. 879 (1959). This case law establishes standards and limitations on the exercise of this authority. The phrase "in accordance with law" refers to such standards and limitations.

Rule 615

Old FRE 615	New FRE	NJRE	Proposed NJRE	Markup NJRE
ARTICLE VI. WITNESSES [Old] **FRE 615. Exclusion of Witnesses***	**ARTICLE VI. WITNESSES [Restyled]** **FRE 615. Excluding Witnesses**	**ARTICLE VI. WITNESSES** **NJRE 615. Sequestration of Witnesses**	**ARTICLE VI. WITNESSES** **NJRE 615. Sequestration of Witnesses**	**ARTICLE VI. WITNESSES** **NJRE 615. Sequestration of Witnesses**
At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.	At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding: **(a)** a party who is a natural person; **(b)** an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney; **(c)** a person whose presence a party shows to be essential to presenting the party's claim or defense; or **(d)** a person authorized by statute to be present.	At the request of a party or on the court's own motion, the court may, in accordance with law, enter an order sequestering witnesses.	At the request of a party or on the court's own motion, the court may, in accordance with law, enter an order sequestering witnesses.	At the request of a party or on the court's own motion, the court may, in accordance with law, enter an order sequestering witnesses.

2019 NJ Supreme Court Committee Comment

No restyling changes have been made to this Rule.

1991 NJ Supreme Court Committee Comment

Rule 615 is a general statement incorporating by reference the body of New Jersey case law on witness sequestration. The formulation of Fed.R.Evid. 615 was therefore not adopted. There is no New Jersey rule analogue. Exercise of the inherent power to sequester witnesses is subject to the limitations and standards developed by judicial decision. See, e.g., State v. Smith, 55 N.J. 476, 484-485 (1970), cert. denied, 400 U.S. 949 (1970); State v. DiModica, 40 N.J. 404, 413-414 (1963); State v. Williams, 29 N.J. 27, 45-47 (1959). Note that the sequestration of juries during deliberations is dealt with by rule of court, R. 1:8-6. And see further as to witness sequestration, S. Pressler, Current N.J. Court Rules, R. 1:8-6 Comment 2 (1991).

Rule 701

Old FRE 701	New FRE	NJRE	Proposed NJRE	Markup NJRE
ARTICLE VII. OPINIONS AND EXPERT TESTIMONY **(Old)** **FRE 701.** **Opinion Testimony by Lay Witnesses**	**ARTICLE VII. OPINIONS AND EXPERT TESTIMONY** **(Restyled)** **FRE 701** **Opinion Testimony by Lay Witnesses**	**ARTICLE VII. OPINIONS AND EXPERT TESTIMONY** **NJRE 701** **Opinion Testimony of Lay Witnesses**	**ARTICLE VII. OPINIONS AND EXPERT TESTIMONY** **NJRE 701** **Opinion Testimony of Lay Witnesses**	**ARTICLE VII. OPINIONS AND EXPERT TESTIMONY** **NJRE 701** **Opinion Testimony of Lay Witnesses**
If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.	If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: **(a)** rationally based on the witness's perception; **(b)** helpful to clearly understanding the witness's testimony or to determining a fact in issue; and **(c)** not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.	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 and (b) will assist in understanding the witness' testimony or in determining a fact in issue.	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 witness' perception and (b) will assist in understanding the witness' testimony or determining a fact in issue.	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.

2019 NJ Supreme Court Committee Comment

No restyling changes were made to this Rule.

2011 FRE Committee Note

The language of Rule 701 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Committee deleted all reference to an "inference" on the grounds that the deletion made the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

1991 NJ Supreme Court Committee Comment

This rule follows both Fed.R.Evid. 701 and N.J.Evid.R. 56(1) in substance. Minor language changes have been made for clarity. The term "perception" is used in this rule in the sense as defined by N.J.Evid.R. 1(14), which has not been incorporated in these rules, namely, the acquisition of knowledge through one's own senses.

Rule 702

Old FRE 702	New FRE	NJRE	Proposed NJRE	Markup NJRE
ARTICLE VII. OPINIONS AND EXPERT TESTIMONY **(Old)** **FRE 702** **Testimony by Expert Witnesses**	**ARTICLE VII. OPINIONS AND EXPERT TESTIMONY** **(Restyled)** **FRE 702** **Testimony by Expert Witnesses**	**ARTICLE VII. OPINIONS AND EXPERT TESTIMONY** **NJRE 702** **Testimony by Expert Witnesses**	**ARTICLE VII. OPINIONS AND EXPERT TESTIMONY** **NJRE 702** **Testimony by Expert Witnesses**	**ARTICLE VII. OPINIONS AND EXPERT TESTIMONY** **NJRE 702** **Testimony by Expert Witnesses**
If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.	A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.	If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.	If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.	If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify [thereto] in the form of an opinion or otherwise.

2019 NJ Supreme Court Committee Comment

No restyling changes were made to this Rule.

1991 NJ Supreme Court Committee Comment

Rule 702 follows Fed.R.Evid. 702 verbatim and makes only minor language changes in the first sentence of N.J.Evid.R. 56(2). The foundation requirement set forth in N.J.Evid.R. 19 has been omitted as necessarily implied by the use in this rule of the generic word "witness" rather than the more limited word "expert" used in the 1967 New Jersey analogue. Note further for that reason, the applicability of the general conditional acceptance provision of Rule 104(b) to the proferred testimony of an expert witness. Consequently the similar provision of N.J.Evid.R. 19 is redundant.

This rule intends to incorporate New Jersey case law establishing the general criteria for admissibility of expert testimony articulated by State v. Kelly, 97 N.J. 178, 208 (1984). As restated by Landrigan v. The Celotex Corporation, -- N.J. --, -- (1992), these criteria include the requirements that "(1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the act such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony."

Rule 703

Old FRE 703	New FRE	NJRE	Proposed NJRE	Markup NJRE
ARTICLE VII. OPINIONS AND EXPERT TESTIMONY **(Old) FRE 703 Bases of Opinion Testimony By Experts**	**ARTICLE VII. OPINIONS AND EXPERT TESTIMONY** **(Restyled) FRE 703 Bases of an Expert's Opinion Testimony**	**ARTICLE VII. OPINIONS AND EXPERT TESTIMONY** **NJRE 703 Bases of Opinion Testimony By Experts**	**ARTICLE VII. OPINIONS AND EXPERT TESTIMONY** **NJRE 703 Bases of Opinion Testimony By Experts**	**ARTICLE VII. OPINIONS AND EXPERT TESTIMONY** **NJRE 703 Bases of Opinion Testimony 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. 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 in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.	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. 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.	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 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.	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] <u>proceeding</u>. 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.

2019 NJ Supreme Court Committee Comment

The language of Rule 703 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Committee notes that it rejected the concluding substantive language in the present version of Federal Rule of Evidence 703, added after 1993 – "But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect."

2011 FRE Committee Note

The language of Rule 703 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Committee deleted all reference to an "inference" on the grounds that the deletion made the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

1991 NJ Supreme Court Committee Comment

Rule 703 follows Fed.R.Evid. 703 verbatim and the last two sentences of N.J.Evid.R. 56(2). The New Jersey rule had been amended effective July 1, 1982, to conform to the federal rule. As to the purpose of that amendment, see the commentary published in 108 N.J.L.J. 301, 302 (1981). The term "perceived" as used in this rule means to have acquired knowledge through one's own senses. See Comment to Rule 701 above.

Rule 704

Old FRE 704	New FRE	NJRE	Proposed NJRE	Markup NJRE
ARTICLE VII. OPINIONS AND EXPERT TESTIMONY **(Old) FRE 704 Opinion on Ultimate Issue**	**ARTICLE VII. OPINIONS AND EXPERT TESTIMONY** **(Restyled) FRE 704 Opinion on Ultimate Issue**	**ARTICLE VII. OPINIONS AND EXPERT TESTIMONY** **NJRE 704 Opinion on Ultimate Issue**	**ARTICLE VII. OPINIONS AND EXPERT TESTIMONY** **NJRE 704 Opinion on Ultimate Issue**	**ARTICLE VII. OPINIONS AND EXPERT TESTIMONY** **NJRE 704 Opinion on Ultimate Issue**
(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. (b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.	(a) In General--Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue. (b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.	Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.	Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.	Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

2019 NJ Supreme Court Committee Comment

No restyling changes were made to this Rule. This Rule applies to lay witnesses as well. Jacober v. St. Peter's Medical Center, 128 N.J. 475, 497 (1992).

2011 FRE Committee Note

The language of Rule 704 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Committee deleted all reference to an "inference" on the grounds that the deletion made the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

1991 NJ Supreme Court Committee Comment

Rule 704 follows Fed.R.Evid. 704(a) and makes only minor language changes in N.J.Evid.R. 56(3). State v. Odom, 116 N.J. 65, 79 (1989).

Fed.R.Evid. 704 was amended by the Comprehensive Crime Control Act of 1984 (Pub.L. No. 98-473), to add subsection (b) to the rule, prohibiting expert witnesses testifying about the mental state of the defendant in a criminal case from giving an opinion as to whether or not defendant had the mental state or condition which constituted an element of the crime charged or a defense to the crime. The federal rule leaves that "ultimate issue" for the jury. This rule was not adopted; it is contrary to New Jersey law. See Aponte v. State, 30 N.J. 441, 446 (1959).

Rule 705

Old FRE 705	New FRE	NJRE	Proposed NJRE	Markup NJRE
ARTICLE VII. OPINIONS AND EXPERT TESTIMONY **(Old) FRE 705** **Disclosing the Facts or Data Underlying an Expert's Opinion**	**ARTICLE VII. OPINIONS AND EXPERT TESTIMONY** **(Restyled) FRE 705** **Disclosing the Facts or Data Underlying an Expert's Opinion**	**ARTICLE VII. OPINIONS AND EXPERT TESTIMONY** **NJRE 705** **Disclosure of Facts or Data Underlying Expert Opinion; Hypotheses Not Necessary**	**ARTICLE VII. OPINIONS AND EXPERT TESTIMONY** **NJRE 705** **Disclosure of Facts or Data Underlying Expert Opinion; Hypotheses Not Necessary**	**ARTICLE VII. OPINIONS AND EXPERT TESTIMONY** **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 his reasons therefor without first testifying to 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.	Unless the court orders otherwise, an expert may state an opinion--and give the reasons for it--without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.	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 discretion it is so required.	Unless the court orders otherwise, an expert may testify in the form of an opinion or inference, state an opinion, and give reasons for it, without first testifying to the underlying facts or data. The expert may be required to disclose those facts or data on cross-examination. Questions calling for the opinion of an expert witness need not be hypothetical in form unless in the court's discretion a hypothetical is required.	Unless the court orders otherwise, [The] an expert may testify in [terms of] the form of an opinion or inference, and give reasons [therefor] for it, without [prior disclosure of] first testifying to the underlying facts or data[, unless the court requires otherwise]. The expert may [in any event] be required to disclose [the underlying] those 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] a hypothetical is required.

2019 NJ Supreme Court Committee Comment

The language of Rule 705 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

2011 FRE Committee Note

The language of Rule 705 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Committee deleted all reference to an "inference" on the grounds that the deletion made the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

1991 NJ Supreme Court Committee Comment

The first sentence of Rule 705 follows Fed.R.Evid. 705 verbatim and makes only minor language changes in N.J.Evid.R. 57, which had been amended effective July 1, 1982, to conform to the federal rule. As to the purpose of that amendment, see the commentary published in 108 N.J.L.J. 301, 302 (1981).

The third sentence of Rule 705 follows N.J.Evid.R. 58 verbatim. There is no federal analogue.

ARTICLE VIII. HEARSAY FRE 801. Definitions*	ARTICLE VIII. HEARSAY (Restyled) FRE 801. Definitions That Apply to This Article; Exclusions from Hearsay	ARTICLE VIII. HEARSAY NJRE 801. Definitions**	ARTICLE VIII. HEARSAY NJRE 801. Definitions	ARTICLE VIII. HEARSAY NJRE 801. Definitions
The following definitions apply under this article: **(a) Statement.** A ''statement'' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.	**(a) Statement.** "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.	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 the person intends it as an assertion.	(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.	[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 intended[s]s it as an assertion.
(b) Declarant. A ''declarant'' is a person who makes a statement.	**(b) Declarant.** "Declarant" means the person who made the statement.	(b) Declarant. A "declarant" is a person who makes a statement.	(b) Declarant. "Declarant" means the person who made the statement.	(b) Declarant. [A] "D[d]eclarant" means the [is a] person who made the [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.	**(c) Hearsay.** "Hearsay" means a statement that: **(1)** the declarant does not make while testifying at the current trial or hearing; and **(2)** a party offers in evidence to prove the truth of the matter asserted in the 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.	(c) Hearsay. "Hearsay" means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the 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.	(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.	(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,	(e) Writing. A "writing" consists of letters, words, numbers, data compilations, pictures, drawing, photographs, symbols, sounds, or combinations thereof or their equivalent, set down or recorded by handwriting, typewriting, printing,	(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,

		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).	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).	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.	(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.	(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.

(d) Statements which are not hearsay. A statement is not hearsay if— **(1) Prior statement by witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or	**(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay: **(1)** ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement: **(A)** is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition; **(B)** is consistent with the declarant's testimony and is offered: (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or (ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or **(C)** identifies a person as someone the declarant perceived earlier.	**See NJRE 803(a) for comparable rule**

Rule 801(d)

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) 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 (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).	(2) ***An Opposing Party's Statement.*** The statement is offered against an opposing party and: **(A)** was made by the party in an individual or representative capacity; **(B)** is one the party manifested that it adopted or believed to be true; **(C)** was made by a person whom the party authorized to make a statement on the subject; **(D)** was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or **(E)** was made by the party's coconspirator during and in furtherance of the conspiracy. The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).	

2019 NJ Supreme Court Committee Comment

The language of Rule 801 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

2011 FRE Committee Note

The language of Rule 801 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Statements falling under the hearsay exclusion provided by Rule 801(d)(2) are no longer referred to as "admissions" in the title to the subdivision. The term "admissions" is confusing because not all statements covered by the exclusion are admissions in the colloquial sense — a statement can be within the exclusion even if it "admitted" nothing and was not against the party's interest when made. The term "admissions" also raises confusion in comparison with the Rule 804(b)(3) exception for declarations against interest. No change in application of the exclusion is intended.

1991 NJ Supreme Court Committee Comment

OFFICIAL COMMENTS

The definitions of statement, declarant, and hearsay contained in Rule 801(a), (b), and (c), respectively, are identical to those of Fed.R.Evid. 801(a), (b), and (c), respectively. They replace without substantial change N.J.Evid.R. 62(1), 62(2), and 63, respectively.

The definition of business contained in Rule 801(d) follows N.J.Evid.R. 62(5). The federal analogue is the last sentence of Fed.R.Evid. 803(6), which, unlike this rule, does not include governmental activity within the definition of business. See Comment on Rules 803(c)(6) and 803(c)(8). However, Rule 803(8), dealing with records of governmental activities, covers much of the material that would be admissible under the business record exception in Rule 803(c)(6) and the exception for public records, reports and findings in Rule 803(c)(8).

The definition of writing contained in Rule 801(e) follows Fed.R.Evid. 1001(1) and N.J.Evid.R. 1(13) in substance. The definition broadly includes records of all kinds. Nevertheless, some rules such as Rule 803(c)(5), (6) and (7) use both of the terms "writing" and "record" despite the redundancy.

Rule 801(e) includes provisions contained in both the federal and state analogues but is more comprehensive than N.J.Evid.R. 1(13) in enumerating forms of recording. It also includes duplicates as defined by Rule 1001(d), which follows the federal rule. N.J.Evid.R. 1(13) contains a number of specific forms of recorded expression requiring that the recording be reasonably permanent and readable by sight, a requirement incompatible with recordings of sound and electronic impulses. The requirement of permanency has been retained by this rule but the requirement of readability has been broadened to include all forms of perception. Thus, this rule includes recordings of writings, sounds, photographic images, x-rays, other images, data stored in computers, and electronic or other impulses in all forms of preservation that may be perceived by sight, sound or other senses directly or after retrieval. Photographs are not separately defined as in Fed.R.Evid. 1001(2) because photographs are included in the definition of a writing.

The definition of public official contained in Rule 801(f) follows N.J.Evid.R. 62(3) and 62(4), but broadens the definition to include officials of the United States and agencies of the United States and its territories. There is no federal analogue. However, federal agencies are included in the business record rule, Rule 803(c)(6) and N.J.Evid.R. 63(13), since "business" is defined by Rule 801(d) to include "activities of governmental agencies" as in N.J.Evid.R. 62(5). The definition of a public official is used primarily when applying Rule 803(c)(8), which refers to written records and reports of a public official. The federal version, Fed.R.Evid. 803(8), does not speak in terms of "public officials" but rather refers to records of public offices or agencies, as does Fed.R.Evid. 803(10) (absence of public record).

N.J.Evid.R. 62(4), which defined "State," was deleted as self-evident.

Rule 801 differs from Fed.R.Evid. 801 by omitting paragraph (d) of the federal rule. That paragraph excludes from the definition of hearsay prior statements of witnesses and party-opponents. The Advisory Committee's Note to Fed.R.Evid. 801(d) recognizes that these statements would "otherwise literally fall within the definition" of hearsay. Notes of Advisory Committee on Proposed Rules, Note to Fed.R.Evid. 801(d), 28 U.S.C.A. (1984). One reason for admitting certain extra-judicial statements of witnesses is that, because the declarant is a witness, he is subject to cross-examination and can normally affirm, deny, explain or otherwise qualify the statement. This special category of hearsay applies only to declarants who are witnesses. Like N.J.Evid.R. 63(1), these rules continue to treat prior extra-judicial statements of witnesses as hearsay statements which are admissible as exceptions to the hearsay rule in accordance with the provisions of Rule 803(a). The net effect is the same, that is to say, certain prior extra-judicial statements of witnesses are admitted either because they are deemed not hearsay under the federal formula or because they are an exception under the New Jersey formula. The same treatment is accorded to statements of a party-opponent. Fed.R.Evid. 801(d)(2) defines such extra-judicial statements as non-hearsay, whereas Rule 803(b) admits such statements as an exception to the hearsay rule, as in N.J.Evid.R. 63(7).

Because of this conceptual difference, the numbering of hearsay exceptions in these rules is somewhat different from the federal rules. The exceptions to the hearsay rule that do not depend on the declarant's unavailability as a witness are contained in Fed.R.Evid. 803(1) to (24). Fed.R.Evid. 804 contains hearsay exceptions that require proof of unavailability of the declarant. Similarly, in these rules all hearsay exceptions are contained in Rules 803 and 804. Rule 803(a) and (b) contain the exceptions for prior extra-judicial statements of witnesses and party-opponents, respectively, and Rule 803(c)(1) to (26) contain other specific exceptions not dependent upon the declarant's unavailability as a witness. Thus, Rules 803(c)(1) to (23) contain the parallel exceptions that are designated Fed.R.Evid. 803(1) to (23). No analogue to Fed.R.Evid. 803(24) (residual exceptions) was adopted. Rule 803(c)(25), which deals with statements against interest, corresponds to Fed.R.Evid. 804(b)(3), but unavailability of the declarant as a witness is not required under Rule 803(c)(25). There is no federal analogue for Rule 803(c)(26), which deals with judgments against persons entitled to indemnity, derived from N.J.Evid.R. 63(21). Rule 804, like Fed.R.Evid. 804, provides certain additional hearsay exceptions conditioned on the unavailability of the declarant as a witness.

As noted in the comment to Rule 802, neither the hearsay rule nor its exceptions address issues concerning a criminal defendant's right of confrontation under the sixth amendment. The right of confrontation was not the basis for the distinction between hearsay exceptions under Rules 803(c)(1) to (26), which do not depend on the unavailability of a witness, and hearsay exceptions under Rule 804(b), which do require proof of unavailability. See discussion of the confrontation clause, which normally requires a showing of witness unavailability, Ohio v. Roberts, 448 U.S. 56, 66, 65 L.Ed.2d 597, 608 (1980), under Comment, Rule 804(b)-Hearsay Exceptions, Introduction, infra.

Rule 802

FRE 802. Hearsay Rule	FRE 802.The Rule Against Hearsay (Restyled)	NJRE 802. Hearsay Rule	NJRE 802. Hearsay Rule	NJRE 802. Hearsay Rule
Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.	Hearsay is not admissible unless any of the following provides otherwise: • a federal statute; • these rules; or • other rules prescribed by the Supreme Court.	Hearsay is not admissible except as provided by these rules or by other law.	Hearsay is not admissible except as provided by these rules or by other law.	Hearsay is not admissible except as provided by these rules or by other law.

2019 NJ Supreme Court Committee Comment

No changes were made to this Rule.

1991 NJ Supreme Court Committee Comment

Rule 802 follows Fed.R.Evid. 802 in excluding hearsay subject to express exceptions provided by these rules or by law. The New Jersey analogue, N.J.Evid.R. 63, excluded hearsay subject to specific exceptions provided in N.J.Evid.R. 63(1) through 63(33). This rule allows for exceptions provided by law as well as specific exceptions contained in these rules. Rule 101(a)(2)(B) recognizes that hearsay evidence may be admitted in proceedings to which the rules of evidence are made inapplicable by statute. See Rule 101(a) and comments thereto. There is also the rare case in which statements which may be excluded as hearsay in some jurisdictions must be admitted as a matter of constitutional right. See Chambers v. Mississippi, 410 U.S. 284, 291-298, 35 L.Ed.2d 306-310 (1973).

As stated in the Advisory Committee's Note to Fed.R.Evid. 803, the exceptions "are phrased in terms of nonapplication of the hearsay rule, rather than in positive terms of admissibility, in order to repel any implication that other possible grounds for exclusion are eliminated from consideration." Notes of Advisory Committee on Proposed Rules, Note to Fed.R.Evid. 803, 28 U.S.C.A. (1984). To illustrate this point, lay opinion evidence that would not be admissible if the declarant were testifying in person does not become admissible because it is contained in business records that may be introduced as an exception to the hearsay rule. See Brown v. Mortimer, 100 N.J.Super. 395, 405-406 (App.Div.1968). Moreover, no attempt has been made to determine the extent to which hearsay exceptions may conflict with a criminal defendant's right of confrontation under the sixth amendment. See Ohio v. Roberts, 448 U.S. 56, 65-66, 65 L.Ed.2d 597, 607-608 (1980); Dutton v. Evans, 400 U.S. 74, 27 L.Ed.2d 213 (1970); California v. Green, 399 U.S. 149, 26 L.Ed.2d 489 (1970); State v. Burgos, N.J.Super. 6, 12 (App.Div.1985), certif. denied, 101 N.J. 304 (1985).

FRE 803. Hearsay Exceptions; Availability of Declarant Immaterial*	**FRE 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness (Restyled)**	**NJRE 803.** **Hearsay Exceptions Not Dependent on Declarant's Unavailability****	**NJRE 803.** **Hearsay Exceptions Not Dependent on Declarant's Unavailability**	**N.J.R.E. 803** **Hearsay Exceptions Not Dependent on Declarant's Unavailability**
See FRE 801(d)(1) below for comparable rule: **801. Definitions that Apply to This Article; Exclusions from Hearsay** **(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay: **(1)** *A Declarant-Witness's Prior Statement.* The		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 following statements are not excluded by the hearsay rule: (a) A Declarant-Witness' Prior Statement. The declarant-witness testifies and is subject to cross-examination about a prior otherwise admissible statement, and the statement: (1) is inconsistent with the declarant-witness' testimony at the trial or hearing and is offered in compliance with Rule 613.	The following statements are not excluded by the hearsay rule: (a) A Declarant-Witness' Prior [s]Statement[s 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

declarant testifies and is subject to cross-examination about a prior statement, and the statement: **(A)** is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition; **(B)** is consistent with the declarant's testimony and is offered: **(i)** to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or **(ii)** to rehabilitate the declarant's credibility as a witness when attacked on another ground; or **(C)** identifies a		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	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 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	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.

person as someone the declarant perceived earlier. the party's coconspirator during and in furtherance of the conspiracy. The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).		(3) is a prior identification of a person made after perceiving that person if made in circumstances precluding unfairness or unreliability.	precluding unfairness or unreliability.	
See FRE 801(d)(2) below for comparable rule: **(2)** *An Opposing Party's Statement.* The statement is offered against an opposing party and: **(A)** was made by the party in an individual or representative capacity; **(B)** is one the		(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	(b) Statement by Party-Opponent. The statement is offered against a party-opponent 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	(b) Statement by [p]Party-[o]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;[,]

party manifested that it adopted or believed to be true; **(C)** was made by a person whom the party authorized to make a statement on the subject; **(D)** was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or **(E)** was made by the party's coconspirator during and in furtherance of the conspiracy. The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).		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).	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 case, the admissibility of a defendant's statement, which is offered against the defendant, is subject to Rule 104(c).	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] case, the admissibility of a defendant's statement which is offered against the defendant is subject to Rule 104(c).

The following are not excluded by the hearsay rule, even though the declarant is available as a witness: **(1) Present sense impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.	The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness: **(1) *Present Sense Impression.*** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.	(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.	(c) Statements Not Dependent on Declarant's Availability. The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness: (1) Present Sense Impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it and without opportunity to deliberate or fabricate.	(c) Statements [n]Not [d]Dependent on [d]Declarant's [a]Availability. The following are not excluded by the rule against hearsay, regardless of [W]whether [or not] the declarant is available as a witness: (1) Present [s]Sense [i]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. 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.	**(2) *Excited Utterance.*** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.	(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.	(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.	(2) Excited [u]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.

FRE 803. Hearsay Exceptions; Availability of Declarant Immaterial*	FRE 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness (Restyled)	NJRE 803. Hearsay Exceptions Not Dependent on Declarant's Unavailability**	NJRE 803. Hearsay Exceptions Not Dependent on Declarant's Unavailability	NJRE 803. Hearsay Exceptions Not Dependent on Declarant's Unavailability Mark up
(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and 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.	**(3)** ***Then-Existing Mental, Emotional, or Physical Condition.*** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as 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 validity or terms of the declarant's will.	(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.	(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.	(3) Then-[e]Existing [m]Mental, [e]Emotional, or [p]Physical [c]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 for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.	**(4)** ***Statement Made for Medical Diagnosis or Treatment.*** A statement that: **(A)** is made for — and is reasonably pertinent to — medical diagnosis or treatment; and **(B)** describes medical history; past or present symptoms or sensations; their inception; or their general cause.	(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.	(4) Statements for Purposes of Medical Diagnosis or Treatment. A statement that: (A) is made in good faith for purposes of, and is reasonably pertinent to, medical diagnosis or treatment; and (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.	(4) A [S]statement[s] for [p]Purposes of [m]Medical [d]Diagnosis or [t]Treatment. A [S]statement[s] 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. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory	**(5)** ***Recorded Recollection.*** A record that: **(A)** is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately; **(B)** was made or adopted by the witness when the matter was fresh in	(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	(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 that; (A) was made at a time when the fact recorded actually occurred or was fresh in the memory of the witness; and	(5) Recorded [r]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

and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.	the witness's memory; and **(C)** accurately reflects the witness's knowledge. If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.	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 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.	(B) was made by the witness or under the witness' direction or by some other person for the purpose of recording the statement when it was made; and (C) the statement concerns a matter of which the witness had knowledge when it was made. This exception does not apply if unless the circumstances indicate that the statement is not trustworthy. 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.	(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.[,] This exception does not apply if [unless] the circumstances indicate that the statement is not trustworthy. [; provided that w]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 memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate	**(6) *Records of a Regularly Conducted Activity.*** A record of an act, event, condition, opinion, or diagnosis if: **(A)** the record was made at or near the time by — or from information transmitted by — someone with knowledge; **(B)** the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit; **(C)** making the record was a regular practice of that activity; **(D)** all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute	(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.	(6) Records of a 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 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.	(6) Records of [r]Regularly [c]Conducted [a]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.

lack of trustworthiness. The term ''business'' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.	permitting certification; and **(E)** the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.			

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation	**(7)** ***Absence of a Record of a Regularly Conducted Activity.*** Evidence that a matter is not included in a record described in paragraph (6) if: **(A)** the evidence is admitted to prove that the matter did not occur or exist; **(B)** a record was regularly kept for a matter of that kind; and **(C)** the opponent does not show that ~~neither~~ the possible source of the information or ~~nor~~ other circumstances	(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	(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), if: (A) the evidence is admitted to prove that the matter did not occur or exist; and (B) a record was regularly kept for a matter of that kind. This exception does not apply if the sources of information or other circumstances indicate that	(7) Absence of an [e]Entry in [r]Records of [r]Regularly [c]Conducted [a]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]

was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.	indicate a lack of trustworthiness.	nonexistence is not trustworthy.	the inference of nonoccurrence or nonexistence is not trustworthy.	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 and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases,	**(8) *Public Records.*** A record or statement of a public office if: **(A)** it sets out: **(i)** the office's activities; **(ii)** a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or **(iii)** in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and	(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	(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.	(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

factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.	**(B)** the opponent does not show that ~~neither~~ the source of information or ~~nor~~ other circumstances indicate a lack of trustworthiness.	such statistical findings, unless the sources of information or other circumstances indicate that such statistical findings are not trustworthy.	This exception does not apply if the sources of information or other circumstances indicate that such statistical findings are not trustworthy.	such statistical findings are not trustworthy.
(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.	**(9)** ***Public Records of Vital Statistics.*** A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.	(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.	(9) Public Records of Vital Statistics. Subject to Rule 807, a record of a birth, fetal death, death, or marriage or civil union, if reported to a public office in accordance with a legal duty.	(9) Records of [v]Vital [s]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 or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any	**(10)** ***Absence of a Public Record.*** Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that:	(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)	(10) Absence of Public Record or Entry. Subject to Rule 807, a certification in accordance with Rule 902 stating that a diligent search failed to disclose a public record, report, writing, or entry when offered to prove:	(10) Absence of [p]Public [r]Record or [e]Entry. Subject to Rule 807, a certification in accordance with Rule 902 stating that a diligent search failed to disclose a public record, report, writing, or entry when offered to prove:

form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.	**(A)** the record or statement does not exist; or **(B)** a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.	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.	(A) the record or statement does not exist; or (B) the matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind. This exception does not apply if the sources of information or other circumstances indicate that the inference of nonoccurrence or nonexistence is not trustworthy.	(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. 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.	**(11)** ***Records of Religious Organizations Concerning Personal or Family History.*** A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.	(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.	(11) Records of Religious Organizations Concerning Personal or Family History. Subject to Rule 807, a statement of birth, legitimacy, ancestry, marriage or civil union, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.	(11) Records of [r]Religious [o]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) Marriage, baptismal, and similar certificates. 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.	**(12)** ***Certificates of Marriage, Baptism, and Similar Ceremonies.*** A statement 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)** attesting that the person performed a marriage or similar ceremony or administered a sacrament; and **(C)** purporting to have been issued at the time of the act or within a reasonable time after it.	(12) Marriage, [civil union], 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.	(12) Certificates of Marriage, Civil Union, Baptism, and Similar Ceremonies. Subject to Rule 807, a statement 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) attesting that the person performed a marriage or civil union or similar ceremony or administered a sacrament; and (C) purporting to have been issued at the time of the act or within a reasonable time after it.	(12) Certificates of Marriage, [c]Civil [u]Union], [b]Baptism[al], and [s]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. Statements of fact concerning personal or family history	**(13)** ***Family Records.*** A statement of fact about personal or family history contained in a family	(13) Family records. Subject to Rule 807, statements of fact concerning a personal or	(13) Family Records. Subject to Rule 807, a statement of fact about personal or family history	(13) Family [r]Records. Subject to Rule 807, statements of fact [concerning a] about personal or family history contained in a family

contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.	record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.	family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.	contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a family portrait, engraving on an urn, crypt, tombstone, or other burial marker.	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 affecting an interest in property. 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 authorizes the recording of documents of that kind in that office.	**(14) *Records of Documents That Affect an Interest in Property.*** The record of a document that purports to establish or affect an interest in property if: **(A)** the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it; **(B)** the record is kept in a public office; and **(C)** a statute authorizes recording documents of that kind in that office.	(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.	(14) Records of Documents that Affect an Interest in Property. Subject to Rule 807, the record of a document that purports to establish or affect an interest in property if: (A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it; (B) the record is kept in a public office; and (C) a statute authorizes recording documents of that kind in that office.	(14) Records of [d]Documents that [a]Affect[ing] an [i]Interest in [p]Property. Subject to Rule 807, the record of a document that purports[ing] 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[d the] recording [of] documents of that kind in that office.

(15) Statements in documents affecting an interest in property. 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.	**(15)** ***Statements in Documents That Affect an Interest in Property.*** A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose — unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.	(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.	(15) Statements in Documents that Affect an Interest in Property. Subject to Rule 807, a statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose, unless dealings with the property are inconsistent with the truth of the statement or the purport of the document.	(15) Statements in [d]Documents that [a]Affect[ing] an [i]Interest in [p]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. Statements in a document in existence twenty years or more the authenticity of which is established.	**(16)** ***Statements in Ancient Documents.*** A statement in a document that is at least 20 years old and whose authenticity is established.	(16) Statements in ancient documents. Statements in a document in existence 30 years or more whose authenticity is established.	(16) Statements in Ancient Documents. A statement in a document at least 30 years old and whose authenticity is established.	(16) Statements in [a]Ancient [d]Documents. A [S]statement[s] in a document [in existence] at least 30 years old and [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.	**(17) *Market Reports and Similar Commercial Publications.*** Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.	(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.	(17) Market Reports and Similar Commercial Publications. Market quotations, tabulations, lists, directories, or other published compilations that are generally relied on by the public or by persons in particular occupations.	(17) Market [r]Reports, and Similar [c]Commercial [p]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) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness 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 the testimony or admission of the witness or by other expert testimony or	**(18) *Statements in Learned Treatises, Periodicals, or Pamphlets.*** A statement contained in a treatise, periodical, or pamphlet if: **(A)** the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and **(B)** the publication is established as a reliable authority by the expert's admission or testimony, by another	(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	(18) Statements in Learned Treatises, Periodicals, or Pamphlets. A statement contained in a published treatise, periodical, or pamphlet, 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 on cross-examination; and (B) the publication is established as a reliable authority by testimony or by judicial notice.	(18) Statements in Learned [t]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

by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.	expert's testimony, or by judicial notice. If admitted, the statement may be read into evidence but not received as an exhibit.	or, if graphics, shown to the jury.	If admitted, the statement may not be received as an exhibit but may be read into evidence or, if graphics, shown to the jury.	(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. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.	**(19) *Reputation Concerning Personal or Family History.*** A reputation among a person's family by blood, adoption, or marriage — or among a person's associates or in the community — concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.	(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.	(19) Reputation Concerning Personal or Family History. Evidence of a person's reputation among members of a person's family by blood, adoption, or marriage or civil union, or among 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 a person's personal or family history.	(19) Reputation [c] Concerning [p]Personal or [f]Family [h]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. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.	**(20) *Reputation Concerning Boundaries or General History.*** A reputation in a community — arising before the controversy — concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.	(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.	(20) Reputation Concerning Boundaries or General History. Evidence of reputation in a community, arising before the controversy, concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation in which the community is located.	(20) Reputation [c]Concerning [b]Boundaries or [g]General [h]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[history] events important to [the] that community, [or] state, or nation in which the community is located.
(21) Reputation as to character. Reputation of a person's character among associates or in the community.	**(21) *Reputation Concerning Character.*** A reputation among a person's associates or in the community concerning the person's character.	(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.	(21) Reputation Concerning Character. Evidence of reputation of a person's character at a relevant time among the person's associates or in the community.	(21) Reputation Concerning [as to] [c]Character. Evidence of reputation of a person's character at a relevant time among the person's associates or in the community.

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.	**(22) *Judgment of a Previous Conviction.*** Evidence of a final judgment of conviction if: **(A)** the judgment was entered after a trial or guilty plea, but not a nolo contendere plea; **(B)** the conviction was for a crime punishable by death or by imprisonment for more than a year; **(C)** the evidence is admitted to prove any fact essential to the judgment; and **(D)** when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.	(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 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.	(22) Judgment 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 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.	(22) Judgment[s] of [p]Previous [c]Conviction of [c]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.

	The pendency of an appeal may be shown but does not affect admissibility.			
(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 the same would be provable by evidence of reputation.	**(23) *Judgments Involving Personal, Family, or General History, or a Boundary.*** A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter: **(A)** was essential to the judgment; and **(B)** could be proved by evidence of reputation.	(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.	(23) Judgment Involving Personal, Family, or General History, or a Boundary. A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter: (A) was essential to the judgment; and (B) could be proved by evidence of reputation.	(23) Judgment [as to] Involving [p]Personal, [f]Family, or [g]General [h]History, or [b]Boundary[ies]. A [J]judgment[s] 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[able] by evidence of reputation.
(24) [Other exceptions.] [Transferred to Rule 807]	**(24) [*Other Exceptions.*]** [Transferred to Rule 807.]	(24) Not adopted.	(24) Not adopted.	(24) 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.	(25) Statement against Interest. [Adopted in 1993 as Rule 803(c)(25)] A statement that a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary, pecuniary or social interest, or had so great a tendency to invalidate the declarant's claim against another or to expose the declarant to civil or criminal liability. Such a statement is admissible against a defendant in a criminal proceeding only if the defendant was the declarant.	(25) Statement [a]Against [i]Interest. [Adopted in 1993 as Rule 803(c)(25)] 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 only if [the statement unless] the person believed it to be true because, when made, it was so contrary to the declarant's proprietary, pecuniary or social interest, or had so great a tendency to invalidate the declarant's claim against another or to expose the declarant to civil or criminal liability. Such a statement is admissible against a[n accused] defendant in a criminal [action] proceeding only if the [accused] defendant was the declarant.
		(26) Judgments against persons entitled to indemnity. Subject to	(26) Judgments against Persons Entitled to Indemnity. Subject to Rule 807 and except in a case	(26) Judgments against [p]Persons [e]Entitled to [i]Indemnity. Subject to Rule 807 and except in a

		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 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.	brought under the Joint Tortfeasors Contribution Law, N.J.S.A. 2A:53A-1 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.	[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. A statement made by a child under the age of 12 relating to sexual	***Revisions to paragraph (27) are currently under review by the Rules of Evidence Committee, as directed by the Court in State in the Interest of A.R.*** (27) Statements by a Child Relating to a Sexual Offense.	***Revisions to paragraph (27) are currently under review by the Rules of Evidence Committee, as directed by the Court in State in the Interest of A.R.*** (27) Statements by a [c]Child [r]Relating to a [s]Sexual [o]Offense.

		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 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	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 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.	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] <u>case</u> 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.

		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.		

2019 NJ Supreme Court Committee Comment

The language of Rule 803 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The use of the term "thereof" has been retained throughout the Rule for the purpose of clarity.

The change from the term "regularly made and kept" to "regularly kept" in Rule 803(c)(7) does not reflect a substantive change and was made for restyling purposes only.

1991 NJ Supreme Court Committee Comment

Rule 803 Generally

Rule 803 states the hearsay exceptions whose application does not depend on the unavailability of the declarant. Rule 804 states the hearsay exceptions that apply only if the declarant is unavailable.

As noted in the Comment to Rule 801, Rule 803(a) treats certain prior extrajudicial statements of witnesses as an exception to the hearsay rule, and Rule 803(b) treats extrajudicial statements of party-opponents (admissions) as an exception to the hearsay rule. The result is consistent with that of Fed.R.Evid. 801(d)(1) and (2) which provide that such prior statements of witnesses and admissions of party-opponents are, by definition, not hearsay. Rules 803(c)(1) to (c)(26) collect the other general hearsay exceptions as to which the unavailability of the declarant is not a criterion for admissibility.

Rule 803(a)--Prior Statements

Rule 803(a)(1) follows almost verbatim N.J.Evid.R. 63(1)(a), as amended effective July 1, 1982. The words "sound recording" are omitted because they are contained in the definition of writing in Rule 801(e). The New Jersey formulation as to the substantive use of prior inconsistent statements of witnesses is less restrictive than the federal formulation in Fed.R.Evid. 801(d)(1)(A). The New Jersey rule permits the use of a prior inconsistent statement as substantive evidence when offered by a party other than the proponent of the witness, State v. Provet, 133 N.J.Super. 432, 435-439 (App.Div.1975), certif. denied, 68 N.J. 174 (1975),

and also allows such use when offered by the party calling the witness if the inconsistent statement is in written or recorded form in circumstances bespeaking reliability, or was made under oath as specified by the rule. State v. Mancine, 124 N.J. 232, 236-256 (1991); State v. Gross, 121 N.J. 1, 7-15 (1990); State v. Gross, 121 N.J. 18 (1990). By contrast, Fed.R.Evid. 801(d)(1)(A) makes no distinction based upon which party called the witness and admits inconsistent statements as substantive evidence only if made under oath. Thus, the federal rule is much narrower than the New Jersey rule. For the history and application of the New Jersey rule and its relationship to Rule 607, see State v. Hacker, 177 N.J.Super. 533, 537 n. 2 (App.Div.), certif. denied, 87 N.J. 364 (1981), and commentary on the 1982 amendment published in 108 N.J.L.J. 302 (1981). See also State v. Gross, 121 N.J. 1 (1990), defining circumstantial reliability with regard to a prior inconsistent statement of an accomplice called by the prosecution as a witness.

Unlike Rule 803(a)(1), Fed.R.Evid. 801(d)(1) expressly requires that the declarant be a person who testifies at the trial or hearing "and is subject to cross-examination." While the "cross-examination" requirement is not explicitly stated in Rule 803(a)(1), it is implicit. The Rule requires that the statement be "inconsistent with [the witness'] testimony." The requirements that the statement be one which was previously made by "a witness at a trial or hearing" which is "inconsistent with his testimony" insure that the declarant is a witness who testifies, and is, therefore, subject to cross-examination. If the declarant is called as a witness and refuses to testify, his prior statement cannot be admitted as an inconsistent statement. State v. Williams, 182 N.J.Super. 427, 431-437 (App.Div.1982), holding that a prior signed statement by a witness who was charged with the same crimes could not be admitted as a prior inconsistent statement, since the witness refused to testify despite being granted immunity. The court reasoned that the statement was not inconsistent with the witness' testimony since he did not testify and he could not be cross-examined. The court held that admission of the statement would violate defendant's sixth amendment confrontation rights, citing Douglas v. Alabama, 380 U.S. 415, 419-420, 13 L.Ed.2d 934, 937-938 (1965).

A more difficult issue arises when the statement was made by a witness who testifies that he cannot remember making the statement, or cannot remember the subject matter of the statement. Courts have admitted the prior statement as inconsistent with the witness' testimony where the trial judge finds that the witness' forgetfulness was feigned. State v. Bryant, 217 N.J.Super. 72, 75-79 (App.Div.1987), certif. denied, 108 N.J. 202 (1987), cert. denied, 484 U.S. 978 (1987); State v. Burgos, 200 N.J.Super. 6, 10-12 (App.Div.1985), certif. denied, 101 N.J. 304 (1985); see California v. Green, 399 U.S. 149, 168--169, 26 L.Ed.2d 489, 502-503 (1970), on remand, People v. Green, 3 Cal.3d 98, 92 Cal.Rptr. 494, 479 P.2d 998, 1000--1004 (1971); but see United States v. Palumbo, 639 F.2d 123, 128 n. 6 (3d Cir.1981), cert. denied, 454 U.S. 819 (1981), noting that a lack of memory as to the substance of the prior statement may not be inconsistent with the statement in various circumstances; 4 J. Weinstein & M. Berger, Weinstein's Evidence R 801(d)(1)(A)[04] at 801-120 (1988), stating that the prior statement should not be admitted "if the judge finds that the witness genuinely cannot remember and the period of amnesia or forgetfulness is crucial as regards the facts in issue."

Rule 803(a)(2), dealing with prior consistent statements offered to rebut a charge of recent fabrication, has no direct New Jersey analogue located in the hearsay exception rules, but, rather, it repeats a portion of N.J.Evid.R. 20 which has been incorporated in Rule 607. The provision is included in this rule to allow such evidence to be used substantively. See also Comment on Rule 607. This rule follows Fed.R.Evid. 801(d)(1)(B) verbatim.

Rule 803(a)(3), dealing with evidence of prior identification, follows without substantial change the formulation of N.J.Evid.R. 63(1)(c). See State v. Matlack, 49 N.J. 491, 497-500 (1967), cert. denied, 389 U.S. 1009 (1967). It is consistent with Fed.R.Evid. 801(d)(1)(c), but adds criteria relating to reliability.

N.J.Evid.R. 63(1)(b), dealing with past recollection recorded, is now covered by Rule 803(c)(5).

Rule 803(b)--Party Admissions

Rule 803(b) follows the structure as well as the substantive content of Fed.R.Evid. 801(d)(2), while retaining some of the language of the 1967 New Jersey rule analogues.

The last sentence of this rule was added to emphasize that the admissibility of statements by an accused is subject to Rule 104(c), formerly N.J.Evid.R. 8(3).

While Rule 803(b) changes some of the language of the 1967 New Jersey rule analogues, it makes no substantive change in current New Jersey practice. Paragraph (b)(1) replaces N.J.Evid.R. 63(7); paragraphs (b)(2) and (b)(3) replace N.J.Evid.R. 63(8); paragraph (b)(4) replaces N.J.Evid.R. 63(9)(a); and paragraph (b)(5) replaces N.J.Evid.R. 63(9)(b). As to paragraph (b)(5) (Statements of co-conspirators), See Bourjaily v. United States, 483 U.S. 171, 107 S.Ct. 22-15, 97 L.Ed. 144 (1987), construing the federal analogue broadly in favor of admissibility. The Committee takes no position on what are essentially policy issues and does not necessarily endorse Bourjaily by recommending the federal formulation. See as to the more restrictive New Jersey position, State v. Phelps, 96 N.J. 500 (1984).

Rule 803(c)--Other Statements

As stated above, Rule 803(c), following the federal format and the enumeration of Fed.R.Evid. 803, collects other hearsay exceptions which are not dependent upon the unavailability of the declarant as a witness. Unless excluded on other grounds, the hearsay exceptions contained in Rule 803(c) permit the admission of certain extra-judicial statements of a declarant as substantive evidence whether the declarant is available or unavailable as a witness. Unavailability as a witness is defined in Rule 804(a).

(1) Present sense impression. Rule 803(c)(1) is an amalgam of the content of Fed.R.Evid. 803(1) and N.J.Evid.R. 63(4)(a). It adds to the federal rule a provision found in N.J.Evid.R. 63(4)(a), making admissible statements of "observation" as well as statements "describing or explaining" an event or condition. It also incorporates a provision in the federal rule, which is not in the New Jersey rule, making admissible statements made immediately after declarant perceived an event or condition. As in the case of excited utterances, statements made immediately after the event must be so close to the event as to exclude the likelihood of fabrication or deliberation. This requirement is expressed by the phrase "without opportunity to deliberate or fabricate," which is not contained in the federal analogue.

(2) Excited utterance. Rule 803(c)(2) is identical to Fed.R.Evid. 803(2) except that it adds the phrase "without opportunity to deliberate or fabricate," taken from N.J.Evid.R. 63(4)(b), which this rule replaces without substantial change.

(3) Then existing mental, emotional, or physical condition. Rule 803(c)(3) follows Fed.R.Evid. 803(3) almost verbatim, adding the good faith requirement contained in N.J.Evid.R. 63(12). This rule replaces paragraph (a) of N.J.Evid.R. 63(12), first adding the term "physical condition" and, consistent with New Jersey law, the provision respecting declarant's will. See Engle v. Siegel, 74 N.J. 287, 293-294 (1977); Wilson v. Flowers, 58 N.J. 250, 261-264 (1971); Fidelity Union Trust Co. v. Robert, 36 N.J. 561 (1962). See also N.J.S.A. 3B:3-33, permitting proof of the testator's intent by way of extrinsic "relevant circumstances." The phrase "relevant circumstances" had been construed by Engle v. Siegel, supra, 74 N.J. at 291, as including testator's statements of intent.

With respect to conduct inferred from a declarant's statement of intent, there is some conflict among federal cases as to the viability of the Hillmon doctrine under Fed.R.Evid. 803(1). The United States Supreme Court held in Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 295-300, 36 L.Ed. 706, 709-712 (1892), that letters of the declarant, Walters, to his family and his fiancee stating that he was leaving on a trip to Colorado with a man named Hillmon were admissible to prove from declarant's intention not only the likelihood that declarant went on the trip but also the likelihood that Hillmon went with declarant. Walters was never heard from again. The Advisory Committee on the Proposed [Federal] Rules stated that Rule 803(3) was intended to leave the Hillmon doctrine undisturbed. Notes of Advisory Committee on Proposed Rules, Note to Fed.R.Evid. 803(3), 28 U.S.C.A. (1984). However the House Committee on the Judiciary preferred to limit the Hillmon doctrine to permit statements of intent to show declarant's own future conduct, not the future conduct of another person. Notes of Committee on the

Judiciary, House Report No. 93-650, Note to Fed.R.Evid. 803(3), 28 U.S.C.A. (1984).

With this background in mind, the court in United States v. Pheaster, 544 F.2d 353, 376-380 (9th Cir.1976), cert. denied, 429 U.S. 1099 (1977), applied the Hillmon doctrine; see also United States v. Mangan, 575 F.2d 32, 43 n. 12 (2d Cir.1978), cert. denied, 439 U.S. 931 (1978); but the limitation expressed by the House Committee was adopted in Gual Morales v. Hernandez Vega, 579 F.2d 677, 680 n. 2 (1st Cir.1978); see also United States v. Jenkins, 579 F.2d 840, 843 (4th Cir.1978), cert. denied, 439 U.S. 967 (1979).

The New Jersey law, as pronounced in Hunter v. State, 40 N.J.L. 495, 534-540 (E & A 1878), is the same as the Hillmon doctrine; in fact, the United States Supreme Court relied upon Hunter in the Hillmon decision. Hillmon, supra, 145 U.S. at 299--300, 36 L.Ed. at 712. See also Brown v. Tard, 552 F.Supp. 1341, 1351-1352 (D.N.J.1982). The "good faith" requirement carried over from N.J.Evid.R. 63(12) into this rule gives the trial judge discretion and responsibility in admitting statements of intent and other states of mind which would be particularly appropriate to apply in dealing with the problem posed by the Hillmon and Hunter cases.

(4) Statements for purposes of medical diagnosis or treatment. Rule 803(c)(4) follows Fed.R.Evid. 803(4) almost verbatim, adding the good faith requirement of N.J.Evid.R. 63(12). This rule replaces N.J.Evid.R. 63(12)(b) and (c) without substantive change except that the requirement of the New Jersey rule that the statement be made to a physician was omitted as too narrow since statements made for the purpose of diagnosis or treatment may be made to other health care professionals and paraprofessionals. For example, many psychotherapists are not MDs; they may be psychologists, social workers or practitioners of other disciplines.

(5) Recorded recollection. Rule 803(c)(5) generally follows both Fed.R.Evid. 803(5) and N.J.Evid.R. 63(1)(b), but it differs to some extent from both rules. The rule permits the exclusion of the recorded statement if the circumstances indicate that the statement is untrustworthy. This provision is not contained in the federal or New Jersey analogues. It is substituted for the requirement in Fed.R.Evid. 803(5) that the statement be shown to reflect declarant's knowledge "correctly" and for the provision in N.J.Evid.R. 63(1)(b)(iii) that the witness must testify that his statement was true. These conditions cannot be realistically satisfied since the witness must also testify that he has insufficient recollection of the matter. See State v. Wood, 130 N.J.Super. 401, 408-410 (App.Div.1973), aff'd, 66 N.J. 8 (1974). Frequently a witness will say that the statement must have been true when made, but the trial judge should be permitted to exclude the statement if circumstances suggest that it was not trustworthy because of declarant's intention to lie or other reasons.

As to the distinction between a statement admissible under this rule and a writing used to refresh memory offered under Rule 612, see Comment on Rule 612.

(6) Records of regularly conducted activity. While Rule 803(c)(6) generally follows Fed.R.Evid. 803(6), its formulation is closer in some respects to N.J.Evid.R. 63(13). Rule 803(c)(6) follows the federal formulation by clearly requiring both that the records be made in the regular course of business and that it was the regular practice of that business to make those records. Although the "regular practice" condition was not expressly included in the 1967 New Jersey rule, its import is consistent with its judicial interpretation. See Sas v. Strelecki, 110 N.J.Super. 14, 19-22 (App.Div.1970).

Like the federal rule, Rule 803(c)(6) expressly permits the admission of opinions and diagnoses contained in business records. This provision was not contained in N.J.Evid.R. 63(13), but it is consistent with present practice. Falcone v. New Jersey Bell Tel. Co., 98 N.J.Super. 138, 146-150 (App.Div.1967), certif. denied, 51 N.J. 190 (1968). The extent of admissibility of opinions contained in business records is qualified by Rule 808, a provision new to New Jersey practice and not included in the federal rules. As to the scope and intent of Rule 808, see the Comment on that rule.

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); see The 1963 Report at 186-187; see also Comment on Rule 101(a)(2)(E) and Rule 104(a).

This rule, like the federal rule and the 1967 New Jersey rule, contains a proviso that permits exclusion of the record if the sources of information or the method or circumstances of its preparation indicate that it is untrustworthy. This rule adds "purpose" of preparation as a factor of untrustworthiness to be considered. If the purpose for which the record was prepared was the anticipation of or the use in litigation, it should be subjected to special scrutiny for trustworthiness. See Palmer v. Hoffman, 318 U.S. 109, 111-116, 87 L.Ed. 645, 648-651 (1943); but cf. Lewis v. Baker, 526 F.2d 470, 472-473 (2d Cir.1975).

The admission of police reports as business records in criminal proceedings has been considered in a number of cases. Annotation, Admissibility of Police Reports Under Federal Business Records Act (Federal Rules of Evidence, Rule 803, and Predecessor Amendments), 31 A.L.R.Fed. 457 (1977); Annotation, Admissibility in State Court Proceedings of Police Reports as Business Records, 77 A.L.R.3d 115 (1977). See United States v. Smith, 521 F.2d 957, 962-969 (D.C.Cir.1975). State v. McGeary, 129 N.J.Super. 219, 223-229 (App.Div.1974), held that an inspection certificate as to the operating condition of a breathalyzer made in the regular course of a State Police employee's duties was sufficiently trustworthy to qualify as a business record admissible under N.J.Evid.R. 63(13). Test reports of unlawful drugs performed by State Police laboratory technicians may also be admitted. See State v. Matulewicz, 101 N.J. 27 (1985), and Comment to Rule 808. However, a report summarizing the observations of police officers in the course of a surveillance of an accused's activities may be excluded when offered against the accused on the ground that the purpose in preparing the report was to use it in litigation. Cf. United States v. Smith, supra, 521 F.2d at 965-966. Such a report would be admissible, however, as a business record if offered by the accused against the prosecution. Id. at 965.

Police reports in civil cases in which the police officer making the report has no interest in the anticipated litigation are generally admissible under established law. See Sas v. Strelecki, supra, 110 N.J.Super. at 19-22; Schneiderman v. Strelecki, 107 N.J.Super. 113, 118-119 (App.Div.1969), certif. denied, 55 N.J. 163 (1969); Brown v. Mortimer, 100 N.J.Super. 395, 402-406 (App.Div.1968). The admissibility of a business record, however, does not mean that all parts of the record are necessarily admissible. For example, in Sas the court held inadmissible portions of a police report which contained statements given to a police officer because the statements were made by persons not under a "business duty" to render a truthful account of the automobile accident involved in the case. 110 N.J.Super. at 22. See also State v. Lungsford, 167 N.J.Super. 296, 309-310 (App.Div.1979). Nevertheless, the rule does not condition admissibility of business records on proof that all information which they contain came from persons with a business duty to report the information accurately. The duty to report accurately may enhance the reliability of the business record. See State v. Matulewicz, supra, 101 N.J. at 30--31. But many business organizations regularly keep, use and rely upon information derived from sources without such a duty. Thus, to the extent that the holding in Phoenix Associates, Inc. v. Edgewater Park Sewerage Auth., 178 N.J.Super. 109, 116 (App.Div.1981), aff'd on other grounds sub nom. Phoenix Apartments, Inc. v. Edgewater Park Sewerage Auth., 89 N.J. 2 (1982), was based on the lack of a duty on the informant to report truthfully and accurately, it is not followed here. See Matter of Ollag Constr. Equip. Corp., 665 F.2d 43, 46 (2d Cir.1981), which upheld the admissibility of financial statements prepared on a bank's form by the debtor, although the debtor was not under a business duty to supply the information.

As noted in the Comment on Rule 801(d), the definition of "business" under Fed.R.Evid. 803(6) does not expressly include activities of governmental agencies, in contrast to the definition in Rule 801(d) and N.J.Evid.R. 62(5). See also Comment on Rule 803(c)(8). The admissibility of reports of government agencies may also be governed by Rule 803(c)(8). See State v. Matulewicz, supra, 101 N.J. at 32; State v. McGeary, supra, 129 N.J.Super. at 227-228; State v. Connors, 129 N.J.Super. 476, 485 (App.Div.1974).

(7) Absence of an entry in records of regularly conducted activity. Rule 803(c)(7) follows both Fed.R.Evid. 803(7) and N.J.Evid.R. 63(14), with language

changes that do not alter the basic principle of the rule. The "unless" clause at the end of the rule derives from the federal rule; it is not contained in N.J.Evid.R. 63(14).

As noted in the comment to Rule 803(c)(6), because governmental activity is included in the definition of business, Rule 803(c)(6) overlaps with 803(c)(8). Rule 803(c)(7) (absence of business record) is the converse of Rule 803(c)(6), and Rule 803(c)(10) (absence of public record) is the converse of Rule 803(c)(8). Thus, there is a corresponding overlap of Rules 803(c)(7) and 803(c)(10).

(8) Public records, reports, and findings. Rule 803(c)(8) follows N.J.Evid.R. 63(15) with minor language changes. The first portion of the rule deals with acts performed by or acts, conditions or events observed by, public officials within their duty to report upon. This portion of the rule corresponds to Fed.R.Evid. 803(8)(A) and (B) which make admissible records of "activities" of a public office or agency and of "matters observed" as to which there was a duty to report. However, the federal counterpart excludes from criminal cases matters observed by law enforcement personnel.

The second portion of the rule admits "statistical findings" of public officials. This is narrower than the term used in Fed.R.Evid. 803(8)(C), namely, "factual findings resulting from an investigation" authorized by law, except that such findings under the federal rule cannot be used against an accused in a criminal case.

The federal rule embodies the business record rule. Unlike the federal rules, these rules, like the New Jersey 1967 evidence rules, define the term "business" to include activities of governmental agencies. Thus, many records of governmental agencies can be admitted either under this rule or the traditional business record rule, Rule 803(c)(6). See State v. Matulewicz, 101 N.J. 27 (1985).

The extent to which opinions may be admitted as part of investigative records or evaluative reports of governmental agencies has caused difficulty under the federal rule. Compare Baker v. Elcona Homes Corp., 588 F.2d 551, 556-559 (6th Cir.1978), cert. denied, 441 U.S. 933 (1979) (admitting a police report with the officer's conclusion from his investigation that plaintiff's vehicle entered the intersection against a red light, as a factual finding under federal Rule 803(8)) with Smith v. Ithaca Corp., 612 F.2d 215, 220-223 (5th Cir.1980) (distinguishing "factual findings" in federal Rule 803(8)(C) from "opinions" and "diagnoses" in federal Rule 803(6) as to exclude "evaluative conclusions and opinions" of a Coast Guard agency investigation regarding liability and the cause of an accident, while admitting factual findings apparently based on objective data). See Phillips v. Erie Lackawanna R.R. Co., 107 N.J.Super. 590 (App.Div.1969), certif. denied, 55 N.J. 444 (1970) (holding inadmissible the Board of Public Utility examiner's report of factual conclusions as to the hazardous condition of a railroad crossing, as well as the agency's order for corrective action); but see State v. Matulewicz, supra, 101 N.J. at 31-32.

Adjudicatory findings of the Division of Workers' Compensation, which can be judicially noticed under Rule 201(a), were held admissible as evidence in a "third party" Law Division negligence action in Wunschel v. Jersey City, 96 N.J. 651, 666-667 (1984), in pursuit of the policy of avoiding inconsistent adjudications. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 60 n. 21, 39 L.Ed.2d 147, 165 n. 21 (1974) (arbitral decision under collective bargaining agreement may be admitted as evidence in a District Court action for discrimination brought under Title VII of the 1964 Civil Rights Act, in furtherance of the dual federal policies favoring arbitration of labor disputes and preventing discrimination in employment). In other situations, however, arbitrators' decisions may be inadmissible in related litigation where policy reasons dictate that result. See N.J.S.A. 2A:23A-28 and N.J.S.A. 39:6A-33 making inadmissible arbitration decisions in non-automobile and automobile personal injury actions.

(9) Records of vital statistics. Rule 803(c)(9) follows Fed.R.Evid. 803(9) almost verbatim. N.J.Evid.R. 63(16), which is replaced by this rule, provided for the admissibility of "vital statistics," although not so designated in the rule, contained in a written "record, report or finding of fact" made and filed pursuant to statute if the maker of such record, report or finding was exclusively authorized by statute to perform the functions reflected in the writing and was required by statute to file in a designated public office a written report relating to the performance of such functions. As described in The 1963 Report at 193, the purpose of

N.J.Evid.R. 63(16) was to admit "reports made by ad hoc public officials: physicians, undertakers, ministers, and the like, who are under a duty to file reports from time to time." Admissibility pursuant to N.J.Evid.R. 63(16) was subject to N.J.Evid.R. 64. This rule follows that scheme by making admissibility subject to R. 807, which replaces N.J.Evid.R. 64.

The first sentence of N.J.Evid.R. 63(17) provided for the admissibility of authenticated copies of official records or entries therein. This provision has been omitted since such a copy is normally a duplicate as defined by Rule 1001(d), and Rules 803(c)(8) and (9) provide for the admissibility of public records, reports and findings as well as records of reports of vital statistics to a public office.

(10) Absence of public record or entry. Rule 803(c)(10) generally follows Fed.R.Evid. 803(10) with changes in language and structure but not in substance. Section (A) of this rule replaces the second sentence of N.J.Evid.R. 63(17) without substantive change. There is no specific New Jersey rule analogue to section (B), the effect of which is to permit an inference of the nonoccurrence or nonexistence of a matter normally recorded to be drawn from proof of absence of the recording. Drawing such an inference is ordinarily the very purpose for which proof of the absence of a record would be made pursuant to N.J.Evid.R. 63(17). Thus, the federal formulation, which this rule follows, does not constitute a change in current New Jersey practice. See N.J.Evid.R. 63(14), now Rule 803(c)(7).

Testimony by a public official that his diligent search failed to disclose a particular record is not hearsay since that testimony is not offered to prove the contents of an extrajudicial statement. It is offered to prove the absence of any such report, from which an inference may be drawn that this act or event never occurred. Therefore, the use of the term "testimony" by the federal rule in this context was not followed, but such testimony is admissible.

Rule 804(a)

Rule 804. Hearsay Exceptions; Declarant Unavailable	**Rule 804. Exceptions to the Rule Against Hearsay — When the Declarant Is Unavailable as a Witness**	**Rule 804. Hearsay Exceptions: Declarant Unavailable**	**Rule 804. Hearsay Exceptions: Declarant Unavailable**	**Rule 804. Hearsay Exceptions: Declarant Unavailable**

(a) Definition of unavailability. ''Unavailability as a witness'' includes situations in which the declarant— **(1)** is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or **(2)** persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or **(3)** testifies to a lack of memory of the subject matter of the declarant's statement; or **(4)** is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or	**(a) Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant: **(1)** is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies; **(2)** refuses to testify about the subject matter despite a court order to do so; **(3)** testifies to not remembering the subject matter; **(4)** cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or **(5)** is absent from the trial or hearing	(a) Definition of 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 hearing because of physical or mental illness	(a) Definition of 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) Definition of [u]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

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means. A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.	and the statement's proponent has not been able, by process or other reasonable means, to procure: **(A)** the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or **(B)** the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4). But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.	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 declarant's deposition for use in lieu of testimony at trial; or (5) [Deleted – see N.J.R.E. 803(c)(27)].	(A) the proponent of the statement is unable by process or other reasonable means to procure the declarant's attendance at the trial, hearing, or proceeding; and (B) with respect to statements proffered under Rules 804(b)(4) and (7), the proponent must be unable, without undue hardship or expense, to obtain declarant's deposition for use in lieu of testimony at the trial, hearing, or proceeding; or (5) [Deleted – see N.J.R.E. 803(c)(27)].	declarant's attendance at trial, <u>hearing, or proceeding;</u> and[.] <u>(B)</u> 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[;], <u>hearing, or proceeding;</u> or (5) [Deleted – see N.J.R.E. 803(c)(27)].

Rule 804(b)

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: **(1) Former testimony.** Testimony given as a witness at another hearing of the same or a different proceeding, or in a 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, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.	**(b) The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness: **(1) *Former Testimony.*** Testimony that: **(A)** was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and **(B)** is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive to develop it by direct, cross-, or redirect examination.	(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. (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	(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. (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 same or another proceeding; and (ii) is now offered against a party who had an opportunity and similar motive in the prior trial, hearing or deposition to develop the testimony by examination or cross-examination. (B) In a civil proceeding, or when offered by the defendant in a criminal proceeding, testimony given in a prior trial, hearing or	(b) Hearsay [e]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 [p]Prior [p]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

		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.	deposition taken 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 if the 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.	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 impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.	**(2) *Statement Under the Belief of Imminent Death.*** In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.	(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.	(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.	(2) Statement [u]Under[b]Belief of [i]Imminent [d]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. A statement that: **(A)** a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and	**(3) *Statement Against Interest.*** A statement that: **(A)** a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone	(3) Statement against interest. --[Adopted in 1993 as Rule 803(c)(25)]	(3) Statement Against Interest. [Adopted in 1993 as Rule 803(c)(25)]	(3) Statement [a]Against [i]Interest. [Adopted in 1993 as Rule 803(c)(25)]

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.	else or to expose the declarant to civil or criminal liability; and **(B)** is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.			

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, 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) a statement concerning the	**(4)** ***Statement of Personal or Family History.*** A statement about: **(A)** the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or	(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)	(4) Statement of Personal or Family History. A statement about: (A) the declarant's own birth, adoption, legitimacy, ancestry, marriage or civil union, divorce, relationship by blood, adoption, or marriage or civil union, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or of the matter stated; or	(4) Statement of [p]Personal or [f]Family [h]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

foregoing matters, and 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 matter declared.	**(B)** another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.	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.	(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or civil union, or was so intimately associated with the person's family that the declarant's information is likely to be accurate.	(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.] [Transferred to Rule 807]	**(5) [*Other Exceptions.*]** [Transferred to Rule 807.]	(5) Other exceptions. [Not Adopted]	(5) Other Exceptions. [Not Adopted]	(5) Other [e]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 death if the statement was made in good faith upon declarant's personal knowledge in circumstances indicating that it is trustworthy.	(6) Trustworthy 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.	(6) Trustworthy [s]Statements by [d]Deceased [d]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. A statement by a voter concerning the voter's qualifications to vote or the fact or content of the vote.	(7) Voters' Statements. A statement by a voter concerning the voter's qualifications to vote or the fact or content of the vote.	(7) Voters' [s]Statements. A statement by a voter concerning the voter's qualifications to vote or the fact or content of the vote.
		(8) [Deleted]	(8) [Deleted]	(8) [Deleted]
(6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.	**(6) *Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.*** A statement offered against a party that wrongfully caused — or acquiesced in wrongfully causing — the declarant's unavailability as a witness, and did so intending that result.	(9) Forfeiture by 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.	(9) Forfeiture by 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.	(9) Forfeiture by [w]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.

2019 NJ Supreme Court Committee Comment

The language of Rule 804 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 805. Hearsay Within Hearsay	Rule 805. Hearsay Within Hearsay	Rule 805. Hearsay Within Hearsay	Rule 805. Hearsay Within Hearsay	Rule 805. Hearsay Within Hearsay
Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.	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.	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.	[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.

2019 NJ Supreme Court Committee Comment

The language of Rule 805 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 806. Attacking and Supporting Credibility of Declarant	Rule 806. Attacking and Supporting the Declarant's Credibility	Rule 806. Attacking and Supporting Credibility of Declarant	Rule 806. Attacking and Supporting Credibility of Declarant	Rule 806. Attacking and Supporting Credibility of Declarant
When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), 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 declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the	When a hearsay statement — or a statement described in Rule 801(d)(2)(C), (D), or (E) — has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine	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. Evidence of a statement or other conduct by a declarant, inconsistent with the declarant's hearsay statement received in evidence, is admissible although declarant had no opportunity to deny or explain it. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, that	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 evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny 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	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]evidence 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.

party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.	the declarant on the statement as if on cross-examination.	party is entitled to examine the declarant on the statement as if under cross-examination.	as if under cross-examination.	

2019 NJ Supreme Court Committee Comment

The language of Rule 806 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 807. Residual Exception	Rule 807. Residual Exception	Rule 807. Discretion of Judge to Exclude Evidence Under Certain Exceptions	Rule 807. Discretion of Court to Exclude Evidence Under Certain Exceptions	Rule 807. Discretion of [Judge] Court to Exclude Evidence Under Certain Exceptions
A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into	**(a) In General.** Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804: **(1)** the statement has equivalent circumstantial guarantees of trustworthiness; **(2)** it is offered as evidence of a material fact; **(3)** it is more probative on the point for which it is offered than any other evidence	Except if offered by an accused in a criminal proceeding, when any statement is admissible by reason of 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 may exclude it 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.	Except if offered by a defendant in a criminal proceeding, when any statement is admissible 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 court may exclude 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 challenge the statement.	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.

evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.	that the proponent can obtain through reasonable efforts; and **(4)** admitting it will best serve the purposes of these rules and the interests of justice. **(b) Notice.** The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.			

2019 NJ Supreme Court Committee Comment

The language of Rule 807 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

		Rule 808. Expert Opinion Included in a Hearsay Statement Admissible Under an Exception	**Rule 808. Expert Opinion Included in a Hearsay Statement Admissible Under an Exception**	**Rule 808. Expert Opinion Included in a Hearsay Statement Admissible Under an Exception**
		Expert opinion which is included in an admissible hearsay statement shall be excluded if the declarant has not been produced as a witness unless the trial judge 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.	**Hold – Hayes v. Delamotte** Expert opinion that is included in an admissible hearsay statement shall be excluded if the declarant has not been produced as a witness unless the court finds that the circumstances involved in rendering 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.	**Hold – Hayes v. Delamotte** Expert opinion [which] <u>that</u> is included in an admissible hearsay statement shall be excluded if the declarant has not been produced as a witness unless the [trial judge] <u>court</u> 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. <u>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.</u>

2019 NJ Supreme Court Committee Comment

Rule 901

Old FRE	New FRE	NJRE	Proposed NJRE	Markup NJRE
ARTICLE IX. AUTHENTICATION AND IDENTIFICATION **FRE 901. Requirement of Authentication or Identification**	**ARTICLE IX. AUTHENTICATION AND IDENTIFICATION (restyled)** **FRE 901. Authenticating or Identifying Evidence**	**ARTICLE IX. AUTHENTICATION AND IDENTIFICATION** **NJRE 901. Requirement of Authentication or Identification**	**ARTICLE IX. AUTHENTICATION AND IDENTIFICATION** **NJRE 901. Requirement of Authentication or Identification**	**ARTICLE IX. AUTHENTICATION AND IDENTIFICATION** **NJRE 901. Requirement of Authentication or Identification**
(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.	**(a) In General.** To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.	The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter is what its proponent claims.	To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must present evidence sufficient to support a finding that the item is what its proponent claims.	[The] <u>To satisfy the</u> requirement of [authentication or identification as a condition precedent to admissibility is satisfied by] <u>authenticating or identifying an item of evidence, the proponent must present</u> evidence sufficient to support a finding that the [matter] <u>item</u> is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:	(b) **Examples.** The following are examples only — not a complete list — of evidence that satisfies the requirement:			
(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.	(1) ***Testimony of a Witness with Knowledge.*** Testimony that an item is what it is claimed to be.			
(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.	(2) ***Nonexpert Opinion About Handwriting.*** A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.			

(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.	(3) ***Comparison by an Expert Witness or the Trier of Fact.*** A comparison with an authenticated specimen by an expert witness or the trier of fact.			
(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.	(4) ***Distinctive Characteristics and the Like.*** The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.			
(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.	(5) ***Opinion About a Voice.*** An opinion identifying a person's voice — whether heard firsthand or through mechanical or electronic transmission or recording — based on hearing the voice at any time under circumstances that connect it with the alleged speaker.			

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.	(6) ***Evidence About a Telephone Conversation.*** For a telephone conversation, evidence that a call was made to the number assigned at the time to: **(A)** a particular person, if circumstances, including self-identification, show that the person answering was the one called; or **(B)** a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.			
(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.	(7) ***Evidence About Public Records.*** Evidence that: **(A)** a document was recorded or filed in a public office as authorized by law; or **(B)** a purported public record or statement is from the office where items of this kind are kept.			

(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.	(8) ***Evidence About Ancient Documents or Data Compilations.*** For a document or data compilation, evidence that it: **(A)** is in a condition that creates no suspicion about its authenticity; **(B)** was in a place where, if authentic, it would likely be; and **(C)** is at least 20 years old when offered.			
(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.	(9) ***Evidence About a Process or System.*** Evidence describing a process or system and showing that it produces an accurate result.			
(10) Methods provided by statute or rule. Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.	(10) ***Methods Provided by a Statute or Rule.*** Any method of authentication or identification allowed by a federal statute or a rule prescribed by the Supreme Court.			

2019 NJ Supreme Court Committee Comment

The language of Rule 901 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

"Present" is used because the Rule is not referencing the production of documents during discovery but is referring to the presentation of evidence to the court.

1991 NJ Supreme Court Committee Comment

Rule 901 generally follows Fed.R.Evid. 901 and replaces N.J.Evid.R. 67. The federal rule includes ten examples of authentication. These examples were not adopted because they are not exclusive nor is the proof set out in them necessarily sufficient in all cases. Rule 901 does not include the provision "or by any other means provided by law" found in the New Jersey rule analogue, N.J.Evid.R. 67, since that provision is clearly encompassed by the more inclusive "sufficient evidence" standard. The "law" incorporated by the source rule and still incorporated by this rule refers primarily to statutes which provide for authentication of various documents, such as recorded deeds or other instruments, and for their admission in evidence. See, e.g., N.J.S.A. 2A:82-17 and 18. The federal rule, which is followed by this rule, does not preclude proof of authenticity being furnished by operation of law; in fact, the illustration in Fed.R.Evid. 901(b)(10) expressly includes "authentication or identification" by any method provided by Act of Congress or Supreme Court rule. Rule 902(h), (i), and (j) provide that evidence of authenticity is satisfied by acknowledgment certificates on documents executed as provided by law, commercial paper and signatures thereon as provided by applicable law, and documents, signatures and the like as declared by state or federal law.

Rule 902

Old FRE 902	New FRE	NJRE	Proposed NJRE	Markup NJRE
ARTICLE IX. AUTHENTICATION AND IDENTIFICATION **FRE 902. Self-authentication**	**ARTICLE IX. AUTHENTICATION AND IDENTIFICATION (restyled)** **FRE 902. Evidence That Is Self-Authenticating**	**ARTICLE IX. AUTHENTICATION AND IDENTIFICATION** **NJRE 902. Self-Authentication**	**ARTICLE IX. AUTHENTICATION AND IDENTIFICATION** **NJRE 902. Self-Authentication**	**ARTICLE IX. AUTHENTICATION AND IDENTIFICATION** **NJRE 902. Self-Authentication**
Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: **(1) Domestic public documents under seal.** A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.	The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted: **(1)** ***Domestic Public Documents That Are Sealed and Signed.*** A document that bears: **(A)** a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and	Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: (a) New Jersey 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. (b) Other domestic public documents. A document (1) bearing a seal purporting to be that	The following items of evidence are self-authenticating and they require no extrinsic evidence of authenticity in order to be admitted: (a) New Jersey 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. (b) Other Domestic Public Documents. A document (1) bearing a seal	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 [p]Public [d]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) a signature purporting to be an execution or attestation.	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.	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.	(b) Other [d]Domestic [p]Public [d]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.

(2) Domestic public documents not under seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, 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 has the official capacity and that the signature is genuine.	(2) ***Domestic Public Documents That Are Not Sealed but Are Signed and Certified.*** A document that bears no seal if: **(A)** it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and **(B)** another public officer who has a seal and official duties within that same entity certifies under seal — or its equivalent — that the signer has the official capacity and that the signature is genuine.			
(3) Foreign 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, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official	(3) ***Foreign Public Documents.*** A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester — or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the	(c) Foreign 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	(c) Foreign 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	(c) Foreign [p]Public [d]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

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 an 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.	signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either: **(A)** order that it be treated as presumptively authentic without final certification; or **(B)** allow it to be evidenced by an attested summary with or without final certification.	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	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,	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

		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.	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.	by an attested summary with or without final certification.
(4) Certified 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 (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.	**(4)** ***Certified Copies of Public Records.*** A copy of an official record — or a copy of a document that was recorded or filed in a public office as authorized by law — if the copy is certified as correct by: **(A)** the custodian or another person authorized to make the certification; or **(B)** a certificate that complies with Rule 902(1), (2), or (3), a federal statute, or a rule prescribed by the Supreme Court.	(d) Certified 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.	(d) Certified 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.	(d) Certified [c]Copies of [p]Public [r]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.

(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.	**(5)** ***Official Publications.*** A book, pamphlet, or other publication purporting to be issued by a public authority.	(e) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.	(e) Official Publications. A book, pamphlet, or other publication purporting to be issued by public authority.	(e) Official [p]Publications. A [B]book[s], pamphlet[s], or other publication[s] purporting to be issued by public authority.
(6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.	**(6)** ***Newspapers and Periodicals.*** Printed material purporting to be a newspaper or periodical.	(f) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.	(f) Newspapers and Periodicals. Printed material purporting to be a newspaper or periodical.	(f) Newspapers and [p]Periodicals. Printed material[s] purporting to be newspaper[s] or periodical[s].
(7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.	**(7)** ***Trade Inscriptions and the Like.*** An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.	(g) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.	(g) Trade Inscriptions and the Like. An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating ownership, control, or origin.	(g) Trade [i]Inscriptions and the [l]Like. An [I]inscription[s], sign[s], tag[s], or label[s] purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) Acknowledged documents. 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.	**(8) *Acknowledged Documents.*** A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.	(h) Acknowledged documents. 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.	(h) Acknowledged Documents. A document 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.	(h) Acknowledged [d]Documents. A [D]document[s] 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.
(9) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.	**(9) *Commercial Paper and Related Documents.*** Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.	(i) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by applicable commercial law.	(i) Commercial Paper and Related Documents. Commercial paper, a signature on it, and documents relating thereto related to the extent provided by applicable commercial law.	(i) Commercial [p]Paper and [r]Related [d]Documents. Commercial paper, signature[s thereon] on it, and documents [relating thereto] related to the extent provided by applicable commercial law.
(10) Presumptions under Acts of Congress. Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.	**(10) *Presumptions Under a Federal Statute.*** A signature, document, or anything else that a federal statute declares to be presumptively or prima facie genuine or authentic.	(j) Presumption under statute. Any signature, document, or other matter declared by state or federal law to be presumptively or prima facie genuine or authentic.	(j) Presumption Under Statute. Any signature, document, or other matter declared by state or federal law to be presumptively or prima facie genuine or authentic.	(j) Presumption [u]Under [s]Statute. Any signature, document, or other matter declared by state or federal law to be presumptively or prima facie genuine or authentic.

(11) Certified domestic records of regularly conducted activity. The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record— **(A)** was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; **(B)** was kept in the course of the regularly conducted activity; and **(C)** was made by the regularly conducted activity as a regular practice. A party intending to offer a record into evidence under this paragraph must provide written notice of that	**(11)** ***Certified Domestic Records of a Regularly Conducted Activity.*** The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record — and must make the record and certification available for inspection — so that the party has a fair opportunity to challenge them.	(k) Certificate of 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.	(k) Certificate of 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.	(k) Certificate of [l]Lack of [r]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.

intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.				
(12) Certified foreign records of regularly conducted activity. In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record— **(A)** was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; **(B)** was kept in the course of the regularly conducted activity; and **(C)** was made by the regularly conducted	**(12)** ***Certified Foreign Records of a Regularly Conducted Activity.*** In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).			

activity as a regular practice. The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.				

2019 NJ Supreme Court Committee Comment

The language of Rule 902 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

1991 NJ Supreme Court Committee Comment

Rules 902(a) and (b) generally follow Fed.R.Evid. 902(1) and (2) and replace N.J.Evid.R. 68(1). These rules retain the distinction in N.J.Evid.R. 68(1) between New Jersey public documents and out-of-state public documents. Rule 902(a), which covers New Jersey documents, contains the former New Jersey provision that no seal be required. Rule 902(b), which covers out-of-state documents, does require a seal. The seal requirement for out-of-state documents is consistent with both the federal rule and the New Jersey analogue. Rule 902(b) is substantially the same as Fed.R.Evid. 902(1) and (2).

Rule 902(c) follows Fed.R.Evid. 902(3) and replaces N.J.Evid.R. 68(3). The only change from the federal rule is for the purpose of conforming this rule with the

Hague Convention on Authentication of Foreign Documents. That convention allows authentication by apostille as an alternative to final certification by a consular official.

Rule 902(d) is substantially the same as Fed.R.Evid. 902(4) and is consistent with present New Jersey practice as generally expressed by N.J.Evid.R. 68.

Rule 902(e) follows Fed.R.Evid. 902(5) verbatim and makes no change in the substance of N.J.Evid.R. 68(1) which it replaces.

Rules 902(f) and (g) follow verbatim Fed.R.Evid. 902(6) and (7), respectively. There are no specific 1967 New Jersey rule analogues.

Rules 902(h), (i), and (j) generally follow Fed.R.Evid. 902(8), (9), and (10). The only change made in the federal rule is the substitution of the phrase "applicable commercial law" for "general commercial law" in Fed.R.Evid. 902(9). This substitution is intended to make it clear that the law referred to is the law applicable to the specific document in question.

There are no express 1967 New Jersey rule analogues, but these sections would be covered by the provision in N.J.Evid.R. 67 for authentication "by any other means provided by law." See Comment to Rule 901 above.

Rule 902(k) follows N.J.Evid.R. 69. There is no specific federal analogue although the content of this rule is consistent with Fed.R.Evid. 902(4). See Rule 803(e)(10).
N.J.Evid.R. 68(4), providing prima facie indicia of genuineness, was not adopted since its substance is comprehended by the concept of self-authentication under this rule. Despite authentication under this rule, the genuineness of a document may always be challenged.

Rule 903

Old FRE 903	New FRE	NJRE	Proposed NJRE	Markup NJRE
ARTICLE IX. AUTHENTICATION AND IDENTIFICATION (old) **FRE 903. Subscribing Witness' Testimony Unnecessary**	**ARTICLE IX. AUTHENTICATION AND IDENTIFICATION (restyled)** **FRE 903. Subscribing Witness's Testimony**	**ARTICLE IX. AUTHENTICATION AND IDENTIFICATION** **NJRE 903. Testimony of Subscribing Witness Unnecessary**	**ARTICLE IX. AUTHENTICATION AND IDENTIFICATION** **NJRE 903. Testimony of Subscribing Witness Unnecessary**	**ARTICLE IX. AUTHENTICATION AND IDENTIFICATION** **NJRE 903. Testimony of Subscribing Witness Unnecessary**
The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.	A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.	The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the law of the jurisdiction whose law governs the validity of the writing.	A subscribing witness' testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.	[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].

2019 NJ Supreme Court Committee Comment

The language of Rule 903 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

1991 NJ Supreme Court Committee Comment

Rule 903 follows Fed.R.Evid. 903 almost verbatim. It replaces N.J.Evid.R. 71 without any change in substance.

Rule 1001

Old FRE 1001	New FRE	NJRE	Proposed NJRE	Markup NJRE
ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS **FRE 1001. Definitions [Old]**	**ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS** **FRE 1001. Definitions That Apply to This Article [Restyled]**	**ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS** **NJRE 1001. Definitions**	**ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS** **NJRE 1001. Definitions**	**ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS** **NJRE 1001. Definitions**
For purposes of this article the following definitions are applicable: **(1) Writings and recordings.** ''Writings'' and ''recordings'' consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation. **(2) Photographs.** ''Photographs'' include still photographs, X-ray films, video tapes, and motion pictures.	In this article: **(a)** A "writing" consists of letters, words, numbers, or their equivalent set down in any form. **(b)** A "recording" consists of letters, words, numbers, or their equivalent recorded in any manner. **(c)** A "photograph" means a photographic image or its equivalent stored in any form. **(d)** An "original" of a writing or recording	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, video tapes, motion pictures and similar forms of reproduced likenesses. (c) Original. An "original" of a writing is the writing itself or any counterpart	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, motion pictures and similar forms of reproduced likenesses. (c) Original. An "original" of a writing is	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

(3) Original. An ''original'' of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An ''original'' of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an ''original''. **(4) Duplicate.** A ''duplicate'' is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.	means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, "original" means any printout — or other output readable by sight — if it accurately reflects the information. An "original" of a photograph includes the negative or a print from it. **(e)** A "duplicate" means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.	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, any printout or other output readable by sight, shown to reflect the data accurately, is an "original." (d) Duplicate. A "duplicate" is a counterpart 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.	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. 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.	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] <u>With respect to electronically created documents</u>, any printout or other output readable by sight, shown to reflect the data accurately, is an "original." (d) Duplicate. A "duplicate" is a counterpart<u>, other than an original,</u> 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.

2019 NJ Supreme Court Committee Comment

The language of Rule 1001 has been amended as part of general the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

1991 NJ Supreme Court Committee Comment

Rule 1001 generally follows Fed.R.Evid. 1001. The only New Jersey rule analogue, N.J.Evid.R. 1(13), which is replaced by Rule 801(e), contained a definition of writings and included in that definition reproductions of information and data which is recorded.

Rule 1001(a) merely incorporates the definition of writings in Rule 801(e). That definition was expanded expressly to include recordings.

Rule 1001(b) generally follows Fed.R.Evid. 1001(2) but adds the phrase "and similar forms of reproduced likenesses" in an attempt to include and anticipate technological developments.

Rule 1001(c) generally follows Fed.R.Evid. 1001(3), but it omits the word "recording" since Rule 1001(a) includes recordings within the definition of a writing. For the same reason the word "recording" has been omitted from Rules 1002, 1004, 1006, 1007, and 1008.

Rule 1001(d) follows Fed.R.Evid. 1001(4) almost verbatim. There is no 1967 New Jersey rule analogue. Rule 1003 provides for the admissibility of a duplicate as the equivalent of the original, subject to exceptions contained in that rule.

Old FRE 1002	New FRE	NJRE	Proposed NJRE	Markup NJRE
FRE 1002. Requirement of Original	**FRE 1002. Requirement of Original**	**NJRE 1002. Requirement of Original**	**NJRE 1002. Requirement of Original**	**NJRE 1002. Requirement of Original**
To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.	An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.	To prove the content of a writing or photograph, the original writing or photograph is required except as otherwise provided in these rules or by statute.	To prove the content of a writing or photograph, the original writing or photograph is required except as otherwise provided in these rules or by statute.	To prove the content of a writing or photograph, the original writing or photograph is required except as otherwise provided in these rules or by statute.

2019 NJ Supreme Court Committee Comment

The language of Rule 1002 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

1991 NJ Supreme Court Committee Comment

Rule 1002 follows Fed.R.Evid. 1002. It is consistent with the preference for the original of a writing expressed by N.J.Evid.R. 70. However, the use of duplicates as authorized by Rule 1002 significantly diminishes the preference previously accorded originals under New Jersey law.

Rule 1003

Old FRE 1003	New FRE	NJRE	Proposed NJRE	Markup NJRE
FRE 1003. Admissibility of Duplicates [Old]	**FRE 1003. Admissibility of Duplicates [Restyled]**	**NJRE 1003. Admissibility of Duplicates**	**NJRE 1003. Admissibility of Duplicates**	**NJRE 1003. Admissibility of Duplicates**
A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.	A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.	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 the authenticity of the original, or (b) in the circumstances it would be unfair to admit the duplicate in lieu of the original.	A duplicate as defined by Rule 1001(d) is admissible to the same extent as an original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.	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] <u>about</u> the <u>original's</u> authenticity [of the original,] or [(b) in] the circumstances [it would be] <u>make it</u> unfair to admit the duplicate [in lieu of the original].

2019 NJ Supreme Court Committee Comment

The language of Rule 1003 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

1991 NJ Supreme Court Committee Comment

Rule 1003 follows Fed.R.Evid. 1003 almost verbatim. The concept of admitting a duplicate, defined by Rule 1001(d) as the equivalent of an original, is new to New Jersey practice. Rule 1003 provides that a duplicate is generally the equivalent of the original of a document for purposes of admissibility, subject to exceptions provided for in the rule. By contrast, N.J.Evid.R. 70 provides generally that no writing other than the "original writing itself is admissible" unless certain conditions are met, such as proof that the original is lost or cannot reasonably be procured.

Old FRE 1004	New FRE	NJRE	Proposed NJRE	Markup NJRE
FRE 1004. Admissibility of Other Evidence of Contents [Old]	**FRE 1004. Admissibility of Other Evidence of Content [Restyled]**	**NJRE 1004. Admissibility of Other Evidence of Contents**	**NJRE 1004. Admissibility of Other Evidence of Contents**	**NJRE 1004. Admissibility of Other Evidence of Contents**
The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if— **(1) Originals lost or destroyed.** All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or **(2) Original not obtainable.** No original can be obtained by any available judicial process or procedure; or **(3) Original in possession of opponent.** At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does	An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if: **(a)** all the originals are lost or destroyed, and not by the proponent acting in bad faith; **(b)** an original cannot be obtained by any available judicial process; **(c)** the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or **(d)** the writing, recording, or photograph is not	The original is not required and other evidence of the contents of a writing or photograph is admissible if: (a) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or (b) Original not obtainable. No original can be obtained by any available judicial process or procedure or by other available means; or (c) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that	The original is not required and other evidence of the contents of a writing or photograph is admissible if: (a) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or (b) Original not obtainable. No original can be obtained by any available judicial process or procedure or by other available means; or (c) Original in possession of opponent. At a time when an original was under the control of the	The original is not required and other evidence of the contents of a writing or photograph is admissible if: (a) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or (b) Original not obtainable. No original can be obtained by any available judicial process or procedure or by other available means; or (c) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice by the pleadings or otherwise that the contents would be a subject of proof at

not produce the original at the hearing; or **(4) Collateral matters.** The writing, recording, or photograph is not closely related to a controlling issue.	closely related to a controlling issue.	party was put on notice by the pleadings or otherwise that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or (d) Collateral matters. The writing or photograph is not closely related to a controlling issue and it would not be expedient to require its production.	party against whom offered, that party was put on notice by the pleadings or otherwise that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or (d) Collateral matters. The writing or photograph is not closely related to a controlling issue and it would not be expedient to require its production.	the hearing, and that party does not produce the original at the hearing; or (d) Collateral matters. The writing or photograph is not closely related to a controlling issue and it would not be expedient to require its production.

2019 NJ Supreme Court Committee Comment

The language of Rule 1004 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

1991 NJ Supreme Court Committee Comment

Rule 1004 replaces N.J.Evid.R. 70(1)(a), (b), (c), and (d) without substantive change and follows Fed.R.Evid. 1004 almost verbatim.

Paragraphs (a) and (c) are identical to Fed.R.Evid. 1004(1) and (3), respectively.

The only change which paragraph (b) of this rule makes in Fed.R.Evid. 1004(2) is the retention of the provision contained in N.J.Evid.R. 70(1)(b) which makes clear that an original is not unavailable if a party can obtain it by other reasonable means in addition to judicial process or procedure.

The only change which paragraph (d) of this rule makes in Fed.R.Evid. 1004(4) is the addition of the final clause, taken from N.J.Evid.R. 70(1)(d), which requires the use of an original even for collateral matters unless it is not expedient to produce it.

This rule differs from N.J.Evid.R. 70 by eliminating the order of preference for secondary evidence provided for by N.J.Evid.R. 70(2). That rule placed "oral testimony of the content of the writing" after all "conveniently available written secondary evidence."

Rule 1005

Old FRE 1005	New FRE	NJRE	Proposed NJRE	Markup NJRE
FRE 1005. Public Records [Old]	**FRE 1005. Copies of Public Records to Prove Content [Restyled]**	**NJRE 1005. Public Records**	**NJRE 1005. Public Records**	**NJRE 1005. Public Records**
The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, 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 copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.	The proponent may use a copy to prove the content of an official record — or of a document that was recorded or filed in a public office as authorized by law — if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.	The contents of an official record or of a writing authorized to be recorded or filed and actually recorded or filed, if otherwise admissible, may be proved by a copy, 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 copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, other evidence of the contents may be admitted.	The proponent may use a copy to prove the contents of an official record, or of a writing that was recorded or filed in a public office as authorized by law, if these conditions are met: (a) the record or writing is otherwise admissible; (b) and the copy is certified as correct in accordance with Rule 902, or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the contents.	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].

2019 NJ Supreme Court Committee Comment

The language of Rule 1005 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

1991 NJ Supreme Court Committee Comment

Rule 1005 follows Fed.R.Evid. 1005 almost verbatim and replaces N.J.Evid.R. 70(1)(e) without substantial change in current New Jersey practice.

Old FRE 1006	New FRE	NJRE	Proposed NJRE	Markup NJRE
FRE 1006. Summaries [Old]	**FRE 1006. Summaries to Prove Content [Restyled]**	**NJRE 1006. Summaries**	**NJRE 1006. Summaries**	**NJRE 1006. Summaries**
The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.	The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.	The contents of voluminous writings or photographs which cannot conveniently be examined in court may be presented by a qualified witness in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The judge may order that they be produced in court.	The proponent may use a summary, chart, or calculation presented by a qualified witness to prove the content of voluminous writings or photographs that cannot conveniently be examined in court. The proponent shall make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place or mode. The court may order that the proponent to produce them in court.	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.

2019 NJ Supreme Court Committee Comment

The language of Rule 1006 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The term "mode" was inserted to the portion of the Rule that addresses how to provide an opposing party with access to the source documents that underlie evidential summaries. As revised, the provision now requires the proponent of a summary to make the originals or duplicates of the underlying documents available to other parties "at a reasonable time and place *or mode*." The word "mode" is intended to encompass broadly other methods of access, apart from the physical inspection or copying of documents, such as electronic or digital transmissions. This change is not intended to be substantive. Rather, the change simply aims to update the Rule, in recognition of the increasing use of technology in litigation and trial practice for producing and inspecting written materials.

1991 NJ Supreme Court Committee Comment

Rule 1006 generally follows Fed.R.Evid. 1006 and replaces N.J.Evid.R. 70(1)(g). The one change which this rule makes in the 1967 New Jersey rule analogue is the elimination of the general requirement that the writings be produced in court. Adopting the principles of the federal rules, this rule requires that the original or duplicates be made available to the other parties at a reasonable time and place. However, the judge may order their production in court.

This rule retains the requirement of N.J.Evid.R. 70(1)(g) that the summary be presented by a witness qualified to testify as to its contents. This provision is not contained in the federal rule.

Rule 1007

Old FRE 1007	New FRE	NJRE	Proposed NJRE	Markup NJRE
FRE 1007. Testimony or Written Admission of Party [Old]	**FRE 1007. Testimony or Statement of a Party to Prove Content [Restyled]**	**NJRE 1007. Testimony or Written Admission of Party**	**NJRE 1007. Testimony or Written Statement of Party**	**NJRE 1007. Testimony or Written [Admission] <u>Statement</u> of Party**
Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.	The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.	The contents of writings or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.	The proponent may prove the content of a writing or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.	The <u>proponent may prove the</u> content[s] of <u>a</u> writing[s] or photograph[s may be proved] by the testimony<u>,</u> [or] deposition<u>, or written statement</u> of the party against whom <u>the evidence is</u> offered<u>.</u> [or by that party's written admission, without accounting for the nonproduction of] <u>The proponent need not account for</u> the original.

2019 NJ Supreme Court Committee Comment

The language of Rule 1007 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

1991 NJ Supreme Court Committee Comment

Rule 1007 follows Fed.R.Evid. 1007 almost verbatim and replaces N.J.Evid.R. 70(1)(h) with no change in substance.

Rule 1008 Old FRE 1008	New FRE	NJRE	Proposed NJRE	Markup NJRE
FRE 1008. Functions of Court and Jury [Old]	**FRE 1008. Functions of the Court and Jury [Restyled]**	**NJRE 1008. Functions of Judge and Jury**	**NJRE 1008. Functions of Court and Jury**	**NJRE 1008. Functions of [Judge] Court and Jury**
When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.	Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005. But in a jury trial, the jury determines — in accordance with Rule 104(b) — any issue about whether: **(a)** an asserted writing, recording, or photograph ever existed; **(b)** another one produced at the trial or hearing is the original; or **(c)** other evidence of content accurately reflects the content.	Ordinarily the judge shall determine the sufficiency of proof of a condition for the admission of evidence of the contents of a writing or photograph other than the original in accordance with Rule 104. However, when a party raises an issue as to (a) whether the 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.	Ordinarily the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing or photograph under Rule 1004 or 1005. However, in a jury trial, the jury determines, in accordance with Rule 104, any factual issue about whether: (a) an asserted writing or photograph ever existed, (b) another writing or photograph produced at the trial or hearing is the original, or (c) the evidence correctly reflects the content of the original writing or photograph.	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, in accordance with Rule 104, 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.]

2019 NJ Supreme Court Committee Comment

The language of Rule 1008 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the Rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

1991 NJ Supreme Court Committee Comment

Rule 1008 follows Fed.R.Evid. 1008 with language changes only and replaces N.J. Evid.R. 70(3) without change in substance.

EXHIBIT B-1

Memorandum

To: New Jersey Supreme Court Committee on the Rules of Evidence

From: Rule 608 Subcommittee

Honorable Lisa Rose, J.A.D.
Daniel Bornstein, Esquire
Professor Dennis McLaughlin, Seton Hall Law School
Kristen B. Miller, Esquire
Dean Andrew L. Rossner, Rutgers Law School, Chairman
Kevin Walker, Esquire

Re: Proposed Revision to New Jersey Rule of Evidence 608

Date: November 27, 2018

The Rule 608 Subcommittee recommends an amendment to Rule 608 as set forth in the attached report. The seven member subcommittee considered the current New Jersey Rule 608, current practice, the history of New Jersey Rule 608, the Supreme Court opinions in State v Scott, 229 N.J 469 (2017), and State v. Guenther, 181 N.J. 129 (2004), the Federal practice under Federal Rule of Evidence 608 and the practice in the 49 other states. Based upon that review, a majority of the subcommittee proposes an amended Rule 608 as set forth in the attached memorandum. Three members of the subcommittee oppose the recommendation for the reasons set forth in the attached Minority report.

To assist in evaluating the proposed Rule, attached are:

1. The Subcommittee Report and Proposed Rule
2. The Subcommittee Minority Report
3. A Summary of the Approaches taken by the 50 States
4. An Appendix setting forth the rule in each of the 50 states
5. State v. Scott, 229 N.J 469 (2017).
6. State v. Guenther, 181 N.J. 129 (2004)

Memorandum

To: New Jersey Supreme Court Committee on the Rules of Evidence
From: Rule 608 Subcommittee
Re: Proposed Revision to New Jersey Rule of Evidence 608
Date: November 21, 2018

A majority of the Rule 608 subcommittee members recommend that New Jersey's Rule of Evidence 608 be amended to join the vast majority of states and the Federal Rules of Evidence in permitting, when an appropriate showing can be made, inquiry on cross examination of a witness about specific instances of conduct that are probative of the witness' character for truthfulness. The current rule categorically excludes in all civil and criminal cases specific conduct evidence, either through cross-examination inquiry or through extrinsic evidence, no matter how probative on the issue of credibility and without any consideration of the strength of its probative value when weighed against any potential for delay, confusion or unfairness, except when the witness is an accuser in a criminal case. In circumstances in which the specific instance of conduct is clear, simple and highly probative of truthfulness parties should have the opportunity, in the court's discretion, to inquire about such matters on cross- examination because it enhances the jurors' ability to assess the credibility of a witness. As the trial courts in the vast majority of states and the federal district courts, New Jersey trial courts are similarly equipped to make determinations as to when cross-examination inquiry into specific instances of conduct is appropriate and to weigh carefully the probative value of the evidence against any potential for abuse or unfairness.

Although most jurisdictions in the United States have adopted rules nearly identical to Federal Rule of Evidence 608, some have adopted more restrictive versions of the Federal Rule with various procedural safeguards and other limitations. Only six other states, (Florida, Illinois, Kansas, Massachusetts, Oregon, and Texas), reject the federal approach entirely and do not permit any evidence of specific instances of conduct that are probative only of a witness'

character for truthfulness. This Report recommends the adoption of the federal approach but with a more restrictive rule that includes safeguards that recognize and build upon New Jersey's evidence jurisprudence and tradition.

Background

In State v Scott, 229 N.J 469 (2017), a majority of the Court joined Chief Justice Rabner's concurring opinion calling for consideration as to whether New Jersey Rule 608 should be revised "to allow cross-examination, in a controlled fashion, into specific instances of conduct that are probative of the witness' character for truthfulness." Id. at 494. Recognizing that such a revision "would amount to a substantial change in practice," a majority of the Court nevertheless noted that "the Judiciary has not shied away from reassessing its approach when there is cause to do so." Id.

The majority of the Court specifically referred to this Committee the task of "evaluating the current state of the law and consider appropriate safeguards that might accompany a change." Significantly, the Court directed the Committee to "consider the question once again today for a simple reason; the topic relates directly to the jury's search for the truth, which a system of justice should foster." Id. After a careful review and evaluation of the Federal rule, the rules adopted in other states, and the history and practice in New Jersey, we recommend a change in Rule 608 to enhance a jury's ability, in both civil and criminal cases, "to decide whether a witness can be believed," Id., by permitting inquiry on cross-examination in certain circumstances, while ensuring that the inquiry remains upon the credibility of the witness and neither distracts from the issues in the case nor becomes unfair.

Current New Jersey Rule 608 provides:

> (a) The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, 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 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) The credibility of a witness in a criminal case 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.

The issue that prompted the Supreme Court's referral is the issue of the use of evidence of specific instances of conduct of a witness offered to attack the witness' credibility by attacking the witness' character for truthfulness. While the current Rule 608(a) permits the attacking of a witness' credibility with opinion or reputation evidence as to truthfulness, it forbids the use of specific conduct evidence except where (1) the conduct resulted in a conviction and N.J. Rule 609 permits it or (2) in a criminal case, where an accuser is attacked with evidence that the witness made a prior false accusation of a similar crime against any person.[1] The second exception is a codification of the Supreme Court's opinion in State v. Guenther, 181 N.J. 129 (2004) discussed below.[2]

Importantly, N.J. Rule 608's prohibition applies only when the sole purpose for which the prior specific conduct evidence is offered is to attack the witness' credibility by attacking the witness' character for truthfulness, and not when offered to attack the credibility on some other impeaching basis. If the prior specific conduct is offered to show bias, contradiction, prior inconsistent statement, or lack of sensory or mental capacity, such evidence would be admissible under N.J. Rule 607, which permits extrinsic evidence of specific acts of conduct for those purposes.

The factual circumstances in Scott provide the context for the issue that prompted a majority of the Court to consider a change in this longstanding practice. In Scott, a prosecution for possession of heroin, the defense argued that Scott did not knowingly possess the heroin, and

---

[1] Thus, the current rule would not permit a witness to be asked on cross examination about testifying falsely under oath, even if the witness admitted doing so in a deposition under oath, but would permit impeachment by offering a witness who testifies that the witness has a poor reputation for truthfulness.

[2] It carved out an exception to the previous Rule 608 for instances involving certain prior false accusations in criminal cases. The Rule was subsequently amended to reflect the exception. It is important to note here, that the Guenther decision did not rest on constitutional grounds for its decision. See infra at pages 5 -7.

that unbeknownst to him, someone had placed the drugs in his pants before he put them on. The defense intended to offer the defendant's mother as witness at trial to testify that it was she who put the drugs in his pants believing that the pants belonged to someone else. At a hearing to determine admissibility of the mother's testimony, the State sought to question her, on cross-examination, about two previous instances in which she had been untruthful in an attempt to exculpate the defendant. When the trial court ruled that the prosecution could ask questions about those incidents because they were "highly relevant" on the issue of the mother's character for truthfulness, the defendant chose not to call his mother at trial and offered other evidence on this defense.

Except for a prior false accusation under Rule 608(b) or a prior conviction under Rule 609, current N.J. Rule 608(a) expressly excludes evidence of specific conduct of a witness for the purpose of attacking the witness' character for truthfulness. In the Scott case, neither exception applied as the mother's prior conduct was uncharged criminally and she had not made a prior false statement of accusation, but rather a prior false statement of exoneration. As such, Rule 608(a) forbids even asking the witness whether the events occurred. Of course, had the witness been an accuser, 608(b) would permit not only asking the witness whether the events occur, but would empower the trial court to permit the introduction of extrinsic evidence.[3] The Appellate Division recognized the trial court's error as to the applicability of Rule 608(a), but upheld the conviction because the mother's prior false statement of exoneration was relevant in showing the strength of the mother's bias for her son. .

Justice Timpone, writing for four members of the Court, reversed the conviction. Justice Timpone recognized that Rule 608, as written, does not permit the use of specific acts not subject to a conviction unless it involves a false accusation of a similar crime. Here, the prior specific act was a false exoneration, not a false accusation. The Court also rejected the Appellate Division's bias analysis, noting that although the fact that a mother might lie to exonerate a son is admissible to show bias, actual specific acts are not evidence of bias.

---

[3] Indeed, in the Guenther case, there were several witnesses who were prepared to testify about the unrelated prior incident.

It is in this context that Chief Justice Rabner authored his concurring opinion, joined by Justices Timpone, Patterson, Fernandez-Vina, and Solomon, referring the issue to this Committee. The thrust of the concurring opinion is that although the current Rule dictates the result in Scott, the truth seeking functions of trials seem to suggest that, with appropriate safeguards, there are circumstances in which the jury should hear some inquiry about prior dishonest conduct in assessing the credibility of the witness. For example, the current rule would prohibit even asking a witness whether the witness had lied under oath at a different proceeding, even if the witness had admitted the dishonest conduct.

In Scott, evidence of a prior false exoneration is highly probative of truthfulness for the same reason that evidence of a prior false accusation is highly probative of truthfulness and ought to be similarly considered by a jury on the issue of credibility. Indeed, N.J. Rule 608(b) would have permitted in Scott, extrinsic evidence of a prior false accusation by a prosecution witness, while at the same time denying even inquiry on cross-examination into prior false exonerations by a defense witness.

Justice Albin, concurring in the result in Scott, questioned the need for a Rule change and set forth the concerns that underpin New Jersey's longstanding prohibition against such specific conduct act evidence including: (1) that the probative value of such evidence is outweighed by the potential for diverting jurors from the central issues in the case,[4] (2) the potential that such evidence may discourage victims and witnesses from coming forward and deter defendants from taking the stand, and (3) the unfairness of exposing a witness to answer for any falsehood in the witness' life. These concerns should inform the discussion in considering whether and how to align the New Jersey Rule more towards the Federal one.

Context of New Jersey Rule of Evidence 608

New Jersey has long recognized the jury's important role in making credibility

[4] Justice Albin seems to have been concerned about the waste of time and confusion that would ensue if the prosecution in that case were permitted to bring extrinsic evidence in to prove the prior falsehood. Surely, merely asking a question and being bound by the answer does not raise issues of confusion or waste of time.

assessments and the need to provide evidence relevant to that role. For example, New Jersey Evidence Rule 609 permits the introduction of evidence of a witness' prior criminal conviction for crimes other than crimes of dishonesty because criminal convictions bear on credibility.[5] In addition, Rule 608(a) permits evidence in the form of opinion and reputation that relates to the witness' character for truthfulness. Indeed, specific prior conduct evidence clearly may be more probative than these types of evidence.[6] Justice Albin, writing for the Court's majority in Guenther recognized that specific conduct evidence may be highly probative in assessing credibility of a key witness, - even more probative than other forms of credibility attack permitted by the New Jersey Rules, i.e., opinion and reputation truthful character evidence and evidence of a prior criminal conviction. As Justice Albin stated:

> That a victim-witness uttered a prior false accusation may be no less relevant, or powerful as an impeachment tool, than opinion testimony that a witness has a reputation for lying. Moreover, a prior criminal conviction for criminal mischief or aggravated assault probably has far less bearing on the trustworthiness of a victim's testimony than a prior false accusation, but there is no question concerning the admissibility of the prior conviction.

Id. at 155.

In addition, New Jersey has a tradition of recognizing the important role that trial judges play in making determinations that balance the probative value of evidence against potential harms, including unfair prejudice, waste of time and confusing or distracting the jury. See for example, N.J. Rules 403, 404, 609.

Indeed, Justin Albin recognized in Guenther:

> Trial courts are well qualified to determine when such evidence will create the prospect of a mini-trial and when the probative value of that evidence is outweighed by the risk of undue prejudice, confusion of the issues, or waste of time. See N.J.R.E. 403.

Id.

Under the current New Jersey rule, a trial court may permit a false accuser's credibility

---

[5] Significantly, Rule 609 requires that the court admit evidence of a prior conviction less than 10 years old, subject to a Rule 403 analysis.

[6] Evidence that a witness lied under oath in a prior proceeding is clearly more probative of the witness' credibility in the current trial than a prior conviction for a drug offense. Currently, the former would be excluded under Rule 608, the latter permitted under Rule 609.

to be attacked by evidence of a prior false accusation by the accuser. In that same criminal case, however, the court may not permit even the inquiry into an exculpatory witness' prior false exculpatory statements - no matter how probative, no matter how compelling. In addition, the credibility of any witness in a civil case cannot be tested by inquiry into false prior statements of accusation or exoneration, even if the statements were under oath in a court proceeding and the witness has admitted the statements in a pre-trial deposition. Thus, the jury in those contexts is categorically prohibited from considering evidence highly probative on the issue of credibility, no matter how probative that evidence may be in assessing the credibility of the witness in the particular case.

New Jersey also has a tradition of looking to practices in other state jurisdictions, while also honoring New Jersey's own jurisprudence. Justin Albin, in announcing an expansion of Rule 608 in Guenther noted "the weight of authority from other jurisdictions generally favors that approach, although we chart a path consistent with our own jurisprudence."

Before turning to the proposed rule, it is valuable to look at the Federal Rule and the practice in other states.

The History and Context of the Federal Rule 608(b)

It is worth noting that the issue surrounding the particular type of character evidence that may admitted to show a witness' character for truthfulness or untruthfulness, which is at the heart of the 608 policy debate, is not one of relevance. All jurisdictions permit the use of reputation evidence as evidence of character for truthfulness, and nearly all permit the use of opinion evidence. The rationale for limiting or excluding specific conduct evidence is not that it is inferior or less probative of the character for truthfulness, but that it may be too powerful.

A review of the history and context of the adoption of Federal Rule 608, which was adopted as part of the original rules in 1975, is important as the drafters were aware of and grappled with the same issues that are now before us. As an initial matter, the Advisory Committee on the Federal Rules of Evidence recognized the relevance of specific conduct evidence as it relates to character, but also the risk such evidence posed in a variety of contexts. As in New Jersey, the Federal Rules recognize that character evidence of relevant traits of a

party or person is relevant under the broad notions set forth in Rule 401, but carries the risk that the jurors will erroneously give such evidence too much weight in determining the particular facts of the instant case.

As such, both the Federal and New Jersey Rules prohibit generally the use of character evidence to prove that a person acted in conformity with that character, F.R.E. 404(a) and N.J. Rule Evid. 404(a), except in limited circumstances where it is highly relevant. Importantly, both the Federal and N.J. Rules recognize that one important exception to that prohibition is the credibility of witnesses. F.R.E. 404(A)(3) and N.J. Rule Evid. 404(a)(3). This is a recognition of the central role of the jury in all cases is to assess the credibility of the witnesses in finding the facts and that when the evidence bears on credibility there is higher probative value to character evidence.

Yet, even when character evidence is admissible, such as with regard to truthfulness of a witness, both the Federal and New Jersey Rules place a limitation on *how* it can be proven. F.R.E. 405 & 608, N.J. Rule Evid. 405 & 608. Both rules severely limit the use of evidence of specific instances of conduct to prove character.[7] Significantly, the prohibition against use of specific conduct evidence is not that it is not probative or relevant; it is because the evidence may be too compelling given its legal significance. As the Advisory Committee for the Federal Rules of Evidence noted in the comments to Federal Rule 405:

> Of the three methods of proving character provided by the rule [opinion, reputation, specific instances of conduct], evidence of specific instances of conduct is the most convincing. At the same time it possesses the greatest capacity to arouse prejudice, to confuse, to surprise and to consume time.

The Federal Rule excludes extrinsic evidence of specific instances of conduct, but allows the court to permit inquiry on cross-examination of a witness or character witness as to specific

---

[7] The Federal Rule 405 provides that character may be proven only by reputation or opinion, unless the character is an essential element of a charge, defense or claim. New Jersey Rule 405 mirrors this preference for opinion and reputation evidence. The Rules differ only as to whether specific instances of conduct can be inquired about on cross-examination to challenge a character witness' claim as to opinion or reputation.

instances of conduct.[8] With regard to the reputation or opinion character witness, the theory is that the opinion or reputation testimony rests on what the witness has experienced or heard and the "inquiry tends to shed light on the accuracy of the hearing and reporting." Ad. Comm. Notes to F.R.E. 405. This notion is carried into the Federal Rule 608.

In recommending Federal Rule of Evidence 608, the Advisory Committee recognized the competing interests involved: on the one hand, providing the jury with relevant information that bears upon the important credibility assessments they will make and, on the other hand, the possibilities for abuse, waste of time, and unfair prejudice. As such, the Advisory Committee ultimately recommended a rule that provided a balance of those interests when placed in the context of the other Federal Rules. The Advisory Committee Notes to F.R.E. 608 explained the balance as follows:

> Effective cross-examination demands that some allowance be made for going into matters of this kind [specific instances of conduct], but the possibilities of abuse are substantial. Consequently, safeguards are erected in the form of specific requirements that the instances inquired into be probative of truthfulness or its opposite and not remote in time. Also, the overriding protection of Rule 403 requires that the probative value not be outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, and that of Rule 611 bars harassment and undue embarrassment.

When Congress considered the Rule, it eliminated the express requirement that the conduct inquired about not be too remote in time and added language to make clear that a determination as to whether the inquiry should happen was within the discretion of the court and that those factors should play a role in the determination.[9] The change eliminating the reference as to remoteness in time was made, according to the Report of the House of Representatives Committee on the Judiciary, "as being unnecessary and confusing." That is, it is presumed in

---

[8] Of course, New Jersey's current Rule 608 permits the use of extrinsic evidence of false accusations that would not be permitted under the Federal Rules. In that sense, New Jersey Rule 608 is more permissive than Federal Rule 608.

[9] Thus, the Federal rule places significant responsibility on the trial court to balance the factors in assessing whether it is appropriate to permit inquiry under Rule 608(b). Among the factors will be the probative value, potential for waste of time, unfairness, etc. as set forth in Rule 403.

assessing the probative value of the evidence as to truthfulness, factors as to remoteness in time will be considered.

The history and text of Federal Rule 608 makes clear that the ban on the use of extrinsic evidence of specific instances of conduct to prove character only applies when the sole purpose of offering the evidence is to prove character for truthfulness. If the impeaching extrinsic evidence is otherwise permissible under the Rules to impeach a witness, such as for bias, contradiction, prior inconsistent statement, or lack of sensory or mental capacity, Rule 608 does not bar such evidence.[10]

There was extensive debate as to whether the adoption of Federal 608(b) would be subject to substantial abuse and would open up a witness to answer for unproven allegations remote in time.[11] The Rule as adopted was deemed to strike an appropriate balance by requiring that any inquiry be by permission from the court. It was contemplated that abuse would be curtailed, when the inquiry was objected to, by the court's assessment of probative value, waste of time, confusing the issues, or potential for unfair prejudice. Rule 403.

With respect to application of Federal Rule 608(b) to criminal defendants, the drafters were keenly aware that the impact on criminal defendants ought to be assessed differently than other witnesses. See generally 5 Weinstein's Federal Evidence §608 App. 100. To accommodate that concern, the last section of Rule 608 was added to ensure that by taking the stand the defendant does not thereby waive any privilege against self-incrimination. This was to reduce the risk that the rule would discourage criminal defendants from taking the stand.

Under the Federal Rule, the issue raised by Justice Albin as to unfairness, potential for confusing of issues, potential of having to answer for remote events that are not truly probative of truthfulness and the potential for undue delay would be assessed by the court under both Rule 608 and Rule 403.

For example, Justice Albin, concurring in Scott, expressed concern that criminal defendants should not be forced to confront certain prior acts of false statements when the

---

[10] Of course, in New Jersey, this principle is memorialized in Rule 607.

[11] The Rule has remained essentially unchanged since its adoption and there does not appear to be an issue of abuse and delay.

"probative value of such questioning is outweighed by the potential prejudice of diverting jurors from the central issues in the case — and because we do not assume that a person who lied in the past under wholly different circumstances will lie under oath a trial." Under the Federal Rule, when a proponent seeks to inquire of any witness on cross-examination as to a prior act bearing on dishonesty, the court must make an assessment of the probative value and the potential for diverting the jury from the central issues before permitting it. When the witness is a criminal defendant, the court must make an assessment of potential for unfair prejudice as well. In circumstances in which the prior act does have probative value on assessing the veracity of the witness in court today, the court may permit it unless the probative value is outweighed by unfair prejudice, possibility of delay and the like.

As to Justice Albin's concern that we ought not to assume that a person who has lied under wholly different circumstances would lie under oath at trial, the Federal Rule does not make that assumption. Nor does it assume that all other prior circumstances are *not* probative of whether someone would now lie under oath at trial. Rather than assume that the evidence is *not* probative and prohibit such inquiry in all cases, the Federal Rule gives the trial court the responsibility to assess how probative the prior instance of conduct is and to grant permission to inquire when the probative value as to credibility at trial justifies it.[12]

The issue, then, is whether New Jersey should continue to ban *all* instances of inquiry on cross-examination or permit trial courts to assess the probative value and permit inquiry when appropriate. It is instructive to see what other states have done when confronted with the same issues.

Other States

Federal experience, though instructive, is not the only approach to balancing the competing values of effective cross-examination and limiting abuse and waste of time. As noted

---

[12] Indeed, to the degree there is evidence as to how courts carry out the responsibility to be the gatekeepers, the evidence suggests trial courts do a very good job. A great many of the cases in which courts permit inquiry appear to be ones in which there is a writing by the witness that evidences a false statement in circumstances that involve some degree of solemnity or seriousness.

in the state rule summary appended to this report, majority of the states have adopted either the identical language of Federal Rule 608, whether the 1975, 2003, or 2011 versions, or follow the federal approach in their own self-styled rules with various procedural safeguards and limitations.[13] Only six states, Florida, Illinois, Kansas, Massachusetts, Oregon, and Texas, reject the federal approach entirely and do not permit evidence of specific instances of conduct that are probative only of a witness's character for truthfulness.[14] New Jersey's rule also has a blanket prohibition on such evidence, but includes an exception for false accusations in criminal cases.[15]

Significantly, the practice in these states and the Federal Courts shows that the parade of horribles suggested by our subcommittee members who oppose the change will not occur. The rules have been operating in these jurisdictions without change for decades and there is no evidence that courts have been unable to serve as appropriate gatekeepers in order to prevent abuse, jury confusion, or unfairness. Indeed, the very instances that Justice Albin and the subcommittee members who seek no change cite as examples for why the rule should not be changed are the very instances in which Courts have not permitted inquiry. To the degree New Jersey has charted its own path with regard to character evidence, those principles are expressed in the proposed rule and in our jurisprudence and would inform decisions made by trial courts under the proposed rule.

Proposed New Jersey Rule 608

We recommend that New Jersey join the vast majority of jurisdictions that empower trial courts to permit inquiry when the probative value of such inquiry, when measured against the potential harms, warrant doing so. In doing so, New Jersey would not be permitting mini-trials

---

[13] See Appendix A.

[14] See FL ST §90.609; IL R. EVID. Rule 608; KAN. STAT. ANN. §60-422(d); MASS. GUIDE EVID. 608(b); OR. R. REV. Rule 608; TEX. R. EVID. 608(b).

[15] New Jersey's rule is not limited to false accusations in sex crime cases, as is the case in three other states. As Justice Albin noted in Guenther, "We see no reason why prior false accusation evidence should be limited to cases in which the witness is a victim of a sexual crime. We, therefore, part from those jurisdictions that have modified their evidence rules...only in sexual crime cases." Id., 181. N.J. at 155-156.

that pose a distraction to the jury or creating unfair situations in which a witness is asked to answer for his or her own life. Indeed, under the proposed rule and the practice in the vast majority of jurisdictions, the very instances that Justin Albin and the subcommittee members who seek no change cite as examples for why the rule should not be changed are the very instances in which courts have not permitted inquiry.[16]

It is clear that New Jersey's current rule accepts the principle that there are prior false statements of a witness that are highly probative of credibility and that trial courts are well equipped to sort out when they ought to be admitted. In our view, this suggests that a modification of Rule 608 to allow a trial court to permit limited inquiry into prior false statements in appropriate cases is wholly consistent with the New Jersey's evidence jurisprudence and tradition. Nevertheless, that tradition also suggests, as Justice Albin pointed out in Guenther, that we provide guidance to trial courts.

The rule we propose does just that. The rule gives trial courts the ability to permit inquiry when an appropriate showing is made, but also provides guidance to the courts as to when such inquiry may be appropriate and safeguards against misuse.

Justice Albin's concerns with respect to a change to Rule 608(b) include the potential for abuse and delay, unfairness to a witness or a criminal defendant, and whether certain prior specific instances of conduct are actually probative of truthfulness on the stand at a trial. The rule we propose ensures that inquiry will be permitted only when there is probative value that is not outweighed by the potential for harms.

1. *Potential for Abuse and Delay*:

The proposed rule limits specific conduct impeachment to an inquiry on cross-examination and limits inquiry about acts that are remote in time. The Rule also provides a criminal defendant with additional protection. The proposed rule requires a more demanding showing by the proponent than the federal rule. See Section (d). In addition, specific instances of conduct that are remote in time typically would be excluded unless they have high probative

---

[16] A review of instances in which courts have permitted inquiry suggests that courts typically permit inquiry into material misrepresentations that are evidenced in writing and are made in circumstances that are highly probative of truthfulness under oath.

value. See Section (e). The proposed rule also limits cross-examination of a criminal defendant with regard to specific acts committed while a juvenile. See Section (f). In addition, Rule 403 would apply. As such, trial courts would be permitting inquiry only when the probative value warrants it and the inquiry does not cause delay, waste of time or confusion.

2. *Unfairness*:

Justice Albin, in Scott, expressed the concern that permitting broad inquiry into any specific conduct was tantamount to asking a "witness to answer for his whole life and respond to instances of untruthful conduct." Id. at 498. Justice Albin expressed a concern that permitting such evidence might deter witnesses from testifying and this may be particularly acute and unfair when the witness is a criminal defendant. [17]

Under the proposed Rule, trial courts must determine that the evidence is probative of truthfulness and that the acts indeed did occur. Section (d). Further, the proposed Rule limits the scope of potential inquiry in time and type. See Section (e) and (f). The Rule specifically excludes cross-examination of a criminal defendant by inquiry into specific acts committed while a juvenile. See Section (f). As is traditionally the practice in New Jersey, it is anticipated that trial courts will require pre-trial notice and hearings, when necessary, to assess whether the proponent has met the burden under the proposed Rule. When the witness is a criminal defendant, the proposed Rule requires notice and a Rule 104 hearing. See Section (c).

3. *Probative Value*:

Two concerns arise concerning probative value. First, Justice Albin, in Scott, questioned the probative value of certain specific acts that were too remote in time or in a context that would not provide insight into the witness' character for truthfulness on the stand at a trial. Of course, when a witness has admitted that he or she lied under oath at an earlier trial, probative value is high. In addition, as Justice Albin noted in Guenther, some specific conduct evidence is more probative than the opinion or reputation evidence admitted under current Rule 608(a).

---

[17] During our subcommittee discussions, it was clear that defendants will benefit from the rule change in that they will have the opportunity to challenge the veracity of the prosecution's witnesses. Of course, the prosecution, unlike the defendant, has the obligation to provide such impeachment evidence to the defense.

It will be the trial courts who will assess the probative value of the inquiry under the proposed Rule, as the federal courts and the courts in the vast majority of other jurisdictions do and as New Jersey courts do now in assessing the admissibility of false accusations under current Rule 608(b). The proposed Rule provides additional guidance. It requires a threshold of evidence to ensure that the acts indeed did occur, limits the scope of potential inquiry in time and type, and limits the use of conduct committed as a juvenile. The Rule does not permit inquiry of a criminal defendant about acts committed while a juvenile. See Section (f).

Second, the question arises as to whether mere inquiry is probative, since the inquirer is bound the witness' answer. This would be especially so if the witness denies the conduct occurred.[18] Of course, litigants would not likely seek to inquire about acts that are easily denied and trial courts would not likely let the inquiry occur. In cases in which there is clear evidence of the conduct, such as a prior deposition or a compelling statement of the witness, the witness is not likely deny the conduct. By the time the testimony takes place, the court would have already found that a reasonable basis exists that the specific conduct occurred and the attorney putting the witness on the stand would be aware of it and would advise the witness. If there is a truthful denial in such circumstances, the jury can assess the demeanor, etc. of the witness and decide what weight to give it. Furthermore, if the witness gave an untruthful denial, the attorney who put the witness on the stand would have to consider whether the Rules of Professional Conduct require some corrective action.[19]

---

[18] We found no empirical studies evaluating how often the witness denies such an inquiry. Nevertheless, if the inquiry is of no value, litigants will not likely engage in it. It does appear that, when appropriate, litigants in the federal and majority of state systems choose to ask questions when permitted by the court. Notably, there are a significant number of cases involving prior written statements or testimony of the witness.

[19] Rule of Professional Conduct 3.3 provides:

(a) A lawyer shall not knowingly:
(1) make a false statement of material fact or law to a tribunal; ....
(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures...

Response To The Subcommittee Minority Report

Several issues raised in the subcommittee minority report require discussion. As an initial matter, in rejecting the subcommittee's proposed rule, the minority report claims on the one hand that permitting mere inquiry about prior false conduct will be a distraction to the jury and divert jurors from the true issues in the case. Minority report at page 7. As such, the minority report argues that even the mere limited inquiry into such conduct should not be permitted. On the other hand, several pages later, the report argues that the proposed rule should be rejected because it does not permit extrinsic evidence of the prior false conduct. Minority report at fn. 1, page 10. The proposed rule, rather, strikes the appropriate balance by permitting only a limited inquiry on cross-examination and only after the proponent has made a proper showing that the conduct occurred and is probative of truthfulness. It is precisely this balance that is working in the vast majority of state jurisdictions and in the federal courts.

Further, the minority report contends that the proposed rule is inconsistent with the jurisprudence of Rule 404(b) in that the proposed rule does not require the same higher threshold for admissibility when the witness is a criminal defendant. It is worth noting that this concern does not militate against the proposed rule in civil cases. Nor does it militate against the rule when applied to other witnesses in criminal cases whether offered by the prosecution or by the defendant. Even with its limited effect, the argument misses the critical distinctions between Rule 404(b) extrinsic evidence and Rule 608(c) cross-examination inquiry.

First, Rule 404(b) specific conduct evidence is admitted because it is relevant to the substantive issues in the case, and not simply witness credibility. Second, Rule 404(b) specific conduct evidence can be offered by the prosecution as part of the prosecution's case-in-chief, irrespective of whether the defendant has "opened the door" by voluntarily taking the stand and thus placing his or her character for truthfulness at issue. In contrast, proposed Rule 608(c) only permits specific conduct cross-examination inquiry solely on the issue of credibility and only when the criminal defendant's character for truthfulness is at issue because the defendant has voluntarily chosen to testify in the case. Just as with Rule 609 evidence concerning prior

convictions, evidence that bears on the defendant's character for truthfulness becomes relevant only when the defendant takes the stand and the jury must then assess the defendant's credibility.

Third, under Rule 404(b), the prosecution can offer extrinsic evidence of specific instances of conduct against the defendant, whereas under proposed Rule 608(c) the introduction of extrinsic evidence is prohibited. Under the proposed rule, the inquiry is limited solely to cross-examination and no extrinsic evidence of the specific instance of conduct is permitted.

Fourth, in addition to the above arguments, there is a further policy reason why the proposed rule should not impose a higher burden, similar to that imposed under Rule 404(b), for cross-examination inquiry into specific conduct evidence pertaining to the character for truthfulness of testifying criminal defendants. Different impeachment burdens can create unfairness in the application of the rule.

When the criminal defendant testifies in the case, the jury's determination of guilt or innocence may ultimately rest on whether the jury finds the victim and the prosecution's witnesses to be credible or, in the alternative, finds the defendant to be credible. If there are different burdens for impeaching criminal defendants as opposed to all other witnesses, the defendant may be allowed to question the prosecution's witnesses about specific instances of prior conduct bearing on the witness's character for truthfulness, but the prosecution may be unable to question a criminal defendant about a similar specific instance of conduct bearing on the defendant's character for truthfulness. Because the jury would be completely unaware of the different impeachment burdens, the jury may then assume, incorrectly, that only the prosecution's witnesses have credibility issues, whereas the criminal defendant does not. Ultimately, the jury might resolve the credibility dispute in favor of the defendant, but the credibility determination will be skewed by the jury's incorrect assumptions about the comparative backgrounds of the various witnesses.

Under Rule 403, the court may always consider undue prejudice to a criminal defendant in determining whether to allow inquiry into the defendant's prior conduct under the proposed rule. If there is concern that the jury may use such evidence for an improper purpose the court

can exclude it under Rule 403 or the court can issue an appropriate limiting instruction as it does when evidence of a prior conviction is introduced under Rule 609 to attack credibility only and when evidence of prior conduct is introduced under Rule 404(b) for a limited purpose other than proving a person's character.

Finally, the minority report projects that the proposed rule will lead to rampant abuse and unfairness. Quite to the contrary, as is evidenced by the practice in the vast majority of state jurisdictions and the federal courts, the proposed rule is a balanced approach which permits trial courts, using measured discretion, to allow limited inquiry into prior dishonest conduct when there is appropriate proof that prior dishonest conduct occurred, that the conduct is relevant to the jury's assessment of the witness' credibility, and that the probative value of the inquiry in assessing the witness' character for truthfulness is not outweighed by the risk of undue prejudice, confusion or delay.

Conclusion

The current New Jersey Rule 608 and evidence jurisprudence clearly recognizes that certain prior specific acts of dishonesty are highly probative as to the credibility of witnesses. Nevertheless, the current rule departs from the vast majority of state jurisdictions and the federal courts in that it categorically excludes such evidence, even by inquiry on cross- examination, no matter how probative the evidence is, no matter how simple and clear the evidence is, and without any assessment of the probative value against the potential for delay, confusion, or unfairness. The current rule would not even permit inquiry into a witness' perjury under oath at a prior proceeding that has been admitted by the witness.

The proposed Rule would permit trial courts to permit inquiry on cross- examination in limited circumstances that are probative of the witness' character for truthfulness and would not pose an overriding danger of delay, abuse or unfairness. Trial courts are well equipped to deny permission to inquire when the probative value is low or when the mere inquiry would pose a threat of confusion or delay. Mere inquiry does not pose a threat of delay. The experience in the vast majority of jurisdictions over a long period of time shows that this will increase the truth-seeking function of trials and not lead to the kinds of issues that the members of the

subcommittee who oppose the rule suggest would occur. For these reasons, we propose the following rule change.

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.

Proposed Rule 608

N.J.R.E. 608. Evidence of a Witness' Character for Truthfulness or Untruthfulness

(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 that evidence of truthful character is admissible only after the witness' character for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) (1) 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.

EXHIBIT B-2

MEMORANDUM

TO: Rules of Evidence Committee

FROM: Rule 608 Subcommittee - Minority Report

DATE: November 26, 2018

Re: Proposed Revision of N.J.R.E. 608

I. Introduction

Following the Supreme Court's decision in State v. Scott, 229 N.J. 469 (2017), this Subcommittee was asked to consider whether N.J.R.E. 608 should be amended to allow cross-examination into specific instances of conduct probative of a witness's character for truthfulness. For the reasons that appear below, this report recommends that no change be made to the current rule.

II. Current State of the Law

N.J.R.E. 608 currently includes a general prohibition against using specific instances of conduct to attack or support a witness's character for truthfulness, subject to two limited exceptions. Specifically, the Rule provides:

> **Rule 608. Evidence of Character for Truthfulness or Untruthfulness and Evidence of Prior False Accusation.**
>
> **(a)** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, 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 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)** The credibility of a witness in a criminal case 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.

Subsection (b), which permits, under limited circumstances, use of evidence of a prior false accusation, was created in response to the Supreme Court's decision in State v. Guenther, 181 N.J. 129, 160 (2004); the N.J.R.E. 609 exception referenced in Subsection (a) relates to evidence of a prior criminal conviction. In all other instances, N.J.R.E. 608 prohibits the use of specific acts to attack or support a witness's credibility.

In contrast, the Federal Rules of Evidence permit the introduction and use of such testimony. Fed. R. Evid. 608 provides:

> **Rule 608. A Witness's Character for Truthfulness or Untruthfulness**
>
> **(a) Reputation or Opinion Evidence.** A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.
>
> **(b) Specific Instances of Conduct.** Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they 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.
>
> By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

Most states have adopted a variation of this rule, allowing parties to attack or support a

witness's character for truthfulness with specific instances of conduct, while barring the introduction of extrinsic evidence. Scott, 229 N.J. at 489-91.

In contrast, New Jersey's rule, like the common law before it, Guenther, 181 N.J. at 143 (citation omitted), has prohibited the use of specific acts for that purpose since its inception. Scott, 229 N.J. at 491 (citing Supreme Court Committee Comment on N.J.R.E. 608 (1991), reprinted in Biunno, Weissbard, & Zegas, New Jersey Rules of Evidence 612 (2016) and Supreme Court Adopts Evidence Rules, 90 N.J.L.J. 393 (June 15, 1967)); see also State v. De Paola, 5 N.J. 1, 9-13 (1950) (reversing conviction based on State's questioning about alleged fraudulent liquor license applications).

III. The Creation of this Subcommittee

This Subcommittee was created in response to Chief Justice Rabner's concurring opinion in State v. Scott, 229 N.J. 469. In Scott, the Court found reversible error in the trial court's decision to allow the State to attack the credibility of defendant's mother by asking her about earlier instances when she allegedly lied to the police for him. Id. at 474. (Because of that ruling, defendant declined to call his mother as a witness. Ibid.)

In reversing defendant's conviction, Justice Timpone, writing for the Court, noted that N.J.R.E. 608 "explicitly excludes specific instances of conduct as a means of proving a character for untruthfulness . . . ." Id. at 483. Justice Timpone also stated that, even if N.J.R.E. 608 did not include such a prohibition, the evidence would have been inadmissible because its "slight probative value" would have been "substantially outweighed by its prejudicial nature." Ibid. Those comments and findings were unanimously endorsed by the Court, with the dissenting opinion focusing solely on whether the error required reversal. Id. at 502 (Patterson, J., concurring in part and dissenting in part).

In a concurring opinion, Chief Justice Rabner compared N.J.R.E. 608 to its state and federal counterparts and suggested that the Rule be amended to allow the use of prior acts to attack or support a witness's character for truthfulness. Id. at 486-94 (Rabner, C.J., concurring). To that end, the Chief Justice recommended that the Rules of Evidence Committee "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" and, if so, what "appropriate safeguards . . . might accompany a change." Id. at 494. Justices Patterson, Fernandez-Vina, Solomon and Timpone joined in Chief Justice Rabner's concurring opinion.

Justice Albin filed his own concurring opinion, which Justice LaVecchia joined, contending that consideration of such a change was not warranted. Id. at 494-502 (Albin, J., concurring).

Significantly, unlike in other cases, the Court did not instruct the Rules of Evidence Committee to amend N.J.R.E. 608. Cf. Guenther, 181 N.J. at 159-60 (instructing Committee to adopt specific exception to N.J.R.E. 608). Rather, the Committee was tasked with: (1) considering whether N.J.R.E. 608 should be amended; and (2) identifying safeguards that should be implemented if a change were made. Scott, 229 N.J. at 494 (Rabner, C.J., concurring); see also id. at 506 (Patterson, J., concurring in part and dissenting in part) ("I agree with the view expressed by Chief Justice Rabner . . . that a revision to N.J.R.E. 608, authorizing limited cross-examination regarding specific conduct by a witness if that conduct is probative of the witness' character for truthfulness, should be considered."). This Subcommittee was formed in the fall of 2017 to accomplish those objectives.

IV. The Subcommittee's Work and Recommendations

Since this Subcommittee was constituted more than a year ago, we have struggled with the

Court's referral. No consensus has emerged from our deliberations. A rewrite of N.J.R.E. 608 would effect a substantial shift in our practice. On that, we agree. Yet, as Justice Albin observed in his concurrence in Scott, no one -- practitioners, the trial bench, the general public -- is clamoring for change; there is no groundswell of support for the proposition that New Jersey needs to bring itself into alignment with federal practice. Scott, 229 N.J. at 500 (Albin, J., concurring). Besides, as Justice Albin also noted, N.J.R.E. 608 has been the subject of two reevaluations -- first in 1991, when the Supreme Court specifically declined to adopt the federal approach, Supreme Court Committee Comment on N.J.R.E. 608 (1991), reprinted in Biunno, Weissbard, & Zegas, New Jersey Rules of Evidence 632-33 (2018), and again in 2004, when, in Guenther, 181 N.J. at 139-55, the Court engaged in a protracted analysis of N.J.R.E. 608 and suggested only a modest change, motivated as much by our Confrontation Clause jurisprudence as anything else.

Some of our members believe New Jersey should align itself with Fed. R. Evid. 608, variations of which have been adopted by most of the states, and allow the expansive cross-examination contemplated by the federal rule. But in our considered opinion, informed by many years of trial practice, the current rule -- particularly when read in conjunction with the other rules -- achieves the right balance. We continue to hew to the views expressed by Justice Albin in his concurrence in Scott, 229 N.J. at 494-502 (Albin, J., concurring): that N.J.R.E. 608, while perhaps peculiar to those who principally practice in the federal courts, is deeply rooted in the common law of this state, and that the "auxiliary policies" that underlie it -- fairness to the witness, particularly when he or she is a criminal defendant, and avoidance of jury confusion or distraction from "the true issues in the case" -- are just as viable today as they were centuries ago, when the prohibition on the use of prior acts of misconduct found its way into our common law. Guenther, 181 N.J. at 141-42 (citations omitted).

New Jersey has never hesitated to elevate its own "unique interests, values, [and] customs" over the alternatives favored by other jurisdictions. Scott, 229 N.J. at 500 (Albin, J., concurring) (alteration in original) (quoting Lewis v. Harris, 188 N.J. 415, 456 (2006)). Thus, that only a minority of other states have joined us in barring the use of specific acts does not alone counsel change. In fact, N.J.R.E. 608 is based on "arguably the fairest and most expedient" approach to the issue, 1 McCormick on Evidence § 41, at 180 (Broun ed., 6th ed. 2006); any change to the rule is likely, in the words of the 2013 edition of McCormick, to pose "dangers of prejudice (particularly if the witness is a party), of distraction and confusion, of abuse of asking unfounded questions" and, perhaps most fundamentally, difficulties in determining what should be admitted in the first instance. 1 McCormick on Evidence § 41, at 250 (Broun ed., 7th ed. 2013).

Those of us who practice criminal law are particularly unsettled by the proposed change to N.J.R.E. 608. The use of prior bad acts has long been disfavored in New Jersey. See, e.g., N.J.R.E. 404(b); State v. Willis, 225 N.J. 85, 100 (2016) (quoting State v. Marrero, 148 N.J. 469, 483 (1997)) (describing "N.J.R.E. 404(b) 'as a rule of exclusion rather than a rule of inclusion'"). Under our jurisprudence, prior bad acts can only be admitted if the proponent complies with the exacting four-part test outlined in State v. Cofield, 127 N.J. 328, 338 (1992). Even then, many trial courts get it wrong; a cursory search on Lexis Advanced discloses nearly 30 reversals in the last five years based on the improper admission of N.J.R.E. 404(b) evidence at criminal trials and at least another four reversals on that basis in civil cases.

If N.J.R.E. 608 were amended as our colleagues propose, the amendment would open for the enterprising lawyer a new line of attack. As Justice Albin suggested in Scott, the cross-examiner would be encouraged to sift through a prospective witness's life for any miscue -- a lie on a job application, a misstatement on a loan application or a public document -- with which to

confront the witness. Scott, 229 N.J. at 495 (Albin, J., concurring); see also Guenther, 181 N.J. at 141 (stating bar on use of specific acts was "designed to prevent unfair foraging into the witness's past, as well as unfair surprise"). Such wide-ranging inquiries, in turn, would set the stage for the type of broad discovery requests condemned in State v. Hernandez, 225 N.J. 451, 465-67 (2016), by encouraging parties to "undertake a speculative venture, hoping to snare some morsel of information" that may be used to impeach a witness's character for truthfulness.

This could prove devastating for any witness, but no more so than when the witness is a defendant in a criminal proceeding. Under our colleagues' formulation, that witness could be confronted with a withering version of "This is Your Life" -- with few of the safeguards that attend our N.J.R.E. 404(b) practice. How is the witness to defend himself under the circumstances? The proposal offered by our colleagues does not contemplate the admission of extrinsic evidence to explain or rebut the allegation. So, the witness would be forced to endure a string of damaging questions, rendered even more so by the theatricality with which his interrogator may pose them, and then what? Mutter a curt denial? Either the jury will be left to conclude the witness is a serial liar or it will be hopelessly confused, given the lack of extrinsic evidence with which the fact-finder could more fairly assess the situation.[1]

Faced with that prospect, it is likely, as noted by Justice Albin in Scott, that amending N.J.R.E. 608 will "keep crime victims from coming forward[,]" deter "injury victims from

[1] Our colleagues' general bar on extrinsic evidence stands in contrast to the approach taken by the Supreme Court for prior false accusations under N.J.R.E. 608(b). Under that rule, the Court held that a cross-examiner may prove the prior false report through extrinsic evidence and that both parties could introduce evidence and witnesses to litigate the matter at trial. Guenther, 181 N.J. at 157-59. If N.J.R.E. 608 is amended, we see no reason to not similarly permit the use of extrinsic evidence to prove and rebut other instances of untruthfulness. Likewise, although our colleagues propose admitting extrinsic evidence of claims of prior false exculpatory statements, we do not believe an exception for only that class of allegations, and no others, is warranted, particularly given the "slight probative value" such allegations were deemed to have in Scott, 229 N.J. at 483.

bringing their claims[,]" and "keep defendants off the stand, thus depriving the jury of their testimony." Scott, 229 N.J. at 495 (Albin, J., concurring).

It can be frightening, embarrassing, even traumatic, for individuals to testify in public, particularly when their testimony concerns highly sensitive subjects, such as sexual assault. See State v. Basil, 202 N.J. 570, 603 (2010) ("One of the great challenges facing the law enforcement community is to persuade reluctant or frightened witnesses to testify."); see also H. Hunter Bruton, Cross-Examination, College Sexual-Assault Adjudications, and the Opportunity for Tuning up the "Greatest Legal Engine Ever Invented", 27 Cornell J. L. & Pub. Pol'y 145, 175 (2017) (noting that "the traumatic experience of cross-examination falls hardest on testifying victims" of sexual assault). It can be equally daunting when a witness -- particularly a defendant in a criminal proceeding -- is confronted with the admission of a prior criminal conviction. See State v. Hamilton, 193 N.J. 255, 266 (2008) (citation omitted) (noting that "prior-conviction evidence ha[s] been shown to deter defendants from testifying because of the fear that the jury will misuse the evidence"). The possibility of being cross-examined on uncharged acts of alleged dishonesty would only compound the problem, creating yet one more reason for individuals to remain silent, preventing juries from hearing their testimony and undermining the fact-finding process.

Given the risks of jury confusion, distraction and undue prejudice, the proposed changes to N.J.R.E. 608 are likely to create fertile ground for reversible error. As with our N.J.R.E. 404(b) practice, we can envision the birth of a new "cottage industry" of legal arguments and litigation, both at trial and on appeal. See Guenther, 181 N.J. at 141-42 (citation omitted) (stating bar on specific acts was meant to avoid "minitrials" and protracted litigation "on collateral matters"). And toward what end? Our rules already offer the cross-examiner an array of impeachment tools: a cross-examiner may present opinion or reputation evidence regarding the witness's character for

truthfulness, N.J.R.E. 608; and the witness's credibility may be attacked with evidence of bias, State v. Bass, 224 N.J. 285, 302 (2016) (citation omitted), prior inconsistent statements, N.J.R.E. 613, 803(a), and criminal convictions, N.J.R.E. 609. The "payoff" from amending N.J.R.E. 608, particularly when extrinsic evidence is barred, will yield "relatively little profit" in comparison. Guenther, 181 N.J. at 142 (quoting 3A Wigmore on Evidence § 979, at 823 (Chadbourn rev. 1970)).

An analysis of State v. Scott -- the very vehicle the Supreme Court used to make the referral to this Subcommittee -- is particularly instructive on that point.

As noted, in Scott, 229 N.J. at 483, the Justices found that the trial court violated N.J.R.E. 608 by ruling that the State could question defendant's mother about two prior occasions on which she had lied to protect her son. But the Court also recognized that there was an alternative basis for the evidence's inadmissibility: that its "slight probative value" was "substantially outweighed by its prejudicial nature." Ibid.

In so ruling, the Court acknowledged the limited worth of such evidence, even when it involves a witness twice lying to law enforcement. If that type of evidence has only "slight probative value," as the Court noted and we agree, one would be hard-pressed to think of a specific act (other than one memorialized in a judgment of conviction admissible under N.J.R.E. 609) that would be sufficiently probative to overcome an N.J.R.E. 403 challenge, let alone the heightened standard for admissibility under N.J.R.E. 404(b).

Thus, it is our view that amending N.J.R.E. 608 to permit cross-examination on specific acts would not meaningfully advance "the jury's search for the truth," Scott, 229 N.J. at 494 (Rabner, C.J., concurring), and that any revision to the rule -- which has stood us in good stead for many years -- would succumb to the law of unintended consequences by creating additional

opportunities for juror speculation and confusion, prejudice, trial error and prolonged litigation. The avoidance of those outcomes has long animated our state's rules on this issue, Guenther, 181 N.J. at 141-42, and we see no reason to invite those consequences now.

It seems obvious to us, moreover, that those risks will be even more pronounced if the standard for using evidence of specific acts is less demanding than that required for prior bad-act evidence and criminal convictions. The chance of confusion, prejudice and gamesmanship will only be enhanced if a reworked N.J.R.E. 608 does not require at the very least: (1) proof by "clear and convincing" evidence at an N.J.R.E. 104 hearing; (2) a showing that the evidence's probative value is not outweighed by its apparent prejudice if it involves the alleged acts of a defendant in a criminal proceeding, Cofield, 127 N.J. at 338;[2] (3) a presumption against admission that is weighed more heavily as time passes between the act and the start of trial, N.J.R.E. 609(b); and (4) appropriate limiting instructions at the time of the inquiry and again in the final jury charge. State v. Rose, 206 N.J. 141, 161 (2011) (citation omitted).

Such limitations are also needed to avoid serious inconsistencies in our jurisprudence. As implicitly recognized in Scott, 229 N.J. at 476-77, 483, evidence of prior instances of untruthfulness, if not barred by N.J.R.E. 608, would constitute bad-act evidence governed by N.J.R.E. 404(b). Under that rule, the proponent of the evidence needs to show, among other things,

---

[2] Consistent with our N.J.R.E. 404(b) jurisprudence, evidence of a defendant's uncharged conduct should only be admitted if its probative value outweighs its risk of prejudice, while "reverse" bad-act evidence presented by a defendant should be admitted if its probative value is not substantially outweighed by its risk of prejudice, pursuant to N.J.R.E. 403. State v. Weaver, 219 N.J. 131, 150-51 (2014) (citations omitted). Those divergent standards are needed to protect a defendant from undue prejudice while ensuring his right "to advance in his defense any evidence which may rationally tend to refute his guilt or buttress his innocence of the charge made." Id. at 150 (quoting State v. Garfole, 76 N.J. 445, 453 (1978)). We believe our colleagues' proposed amendment, which would only apply N.J.R.E. 403, unless the allegation is over ten years old, while appropriate for non-defendant witnesses, would too easily permit inquiry into alleged acts of defendants in criminal proceedings.

that the evidence of the prior act is "clear and convincing" and, in the case of a criminal defendant, that its probative value is "not outweighed by its apparent prejudice." Cofield, 127 N.J. at 338. The use of less-demanding standards under N.J.R.E. 608, including those proposed by our colleagues,[3] would thus not only permit the introduction of more prejudicial bad-act evidence, with less proof, but would also directly conflict with the standards our courts have long applied to bad-act evidence. We see no basis for creating such a "back door" to admit more of the "highly prejudicial" bad-act evidence that our courts have so consistently sought to limit. State v. Barden, 195 N.J. 375, 396 (2008).

Incorporation of the N.J.R.E. 404(b) standards is therefore needed to ensure both consistency with our jurisprudence and fundamental fairness, given the well-established risks of bad-act evidence identified in Cofield and its progeny. In our view, however, the foregoing measures would lessen, but not sufficiently ameliorate, the significant risks that would attend the dramatic revision of N.J.R.E. 608 proposed by our colleagues. Accordingly, we are unable to recommend a change to the rule at this time.

V. Conclusion

We respectfully recommend that N.J.R.E. 608 not be amended to permit the use of specific acts to attack or support a witness's character for truthfulness.

As Chief Justice Rabner observed in Scott, 229 N.J. at 494 (Rabner, C.J., concurring), such an amendment would mark a dramatic departure from our current practice. While that alone does not counsel rejection of Fed. R. Evid. 608, we see little to be gained by altering the New Jersey rule. Among those who regularly use N.J.R.E. 608, there is no agitation for change. Indeed, the

[3] We are also concerned that the "reasonable factual basis" standard proposed by our colleagues would create additional confusion given the uncertain meaning of that term and its apparent absence from our evidentiary jurisprudence.

prevailing sentiment appears to be that N.J.R.E. 608 "ain't broke." So why "fix" it, particularly when the current rules offer ample avenues for vigorous cross-examination and the evidential "payoff," when balanced against the potential for jury confusion and prejudice, is so "slight"?

Under the circumstances, we see no imperative to embrace the federal practice. In our view, the risks associated with a revised N.J.R.E. 608 outweigh any benefit to the jury's truth-seeking function. Accordingly, we respectfully recommend that the proposed amendments be rejected.

APPENDICES TO EXHIBIT B

Appendix

to Memorandum to 608 Subcommittee

1. State Statutes - Full Text

2. State Statute Summary Chart

3. Model Rules For Discussion

4. State v. Guenther, 181 N.J. 129 (2004)

5. 1991 Report of the New Jersey Supreme Court Committee on the Rules of Evidence

6. Rule 609 Amendments 2013

50 State Survey – State Equivalent to Fed. R. Evid. 608

1. Alabama

Rule 608. Evidence of character and conduct of witness.

(a) **Opinion and reputation evidence of character.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:
(1) the evidence may refer only to character for truthfulness or untruthfulness, and
(2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) **Specific Instances of Conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than conviction of crime as provided in Rule 609, may not be inquired into on cross-examination of the witness nor proved by extrinsic evidence. They may, however, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

2. Alaska

Rule 608. Evidence of Character and Conduct of Witness.

(a) Opinion and Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness; and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific Instances of Conduct. If a witness testifies concerning the character for truthfulness or ~~untruth~~fulness of a previous witness, the specific instances of conduct probative of the truthfulness or untruthfulness of the previous witness, may be inquired into on cross-examination. Evidence of other specific instances of the conduct of a witness offered for the purpose of attacking or supporting that witness' credibility is inadmissible unless such evidence is explicitly made admissible by these rules, by other rules promulgated by the Alaska Supreme Court or by enactment of the Alaska Legislature.

(c) Admissibility. Before a witness may be impeached by inquiry into specific instances of conduct pursuant to subdivision (b), the court shall be advised of the specific instances of conduct upon which inquiry is sought and shall rule if the witness may be impeached by such inquiry by weighing its probative value against its prejudicial effect. (Added by SCO 364 effective August 1, 1979)

3. Arizona – Models FRE Verbatim (Ariz. R. Evid. R. 608)

Rule 608. A witness's character for truthfulness or untruthfulness

- (a) Reputation or opinion evidence. -- A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.
- (b) Specific instances of conduct. -- Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they 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.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

4. Arkansas

Rule 608. Evidence of Character and Conduct of Witness

(a) Opinion and Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:

(1) the evidence may refer only to character for truthfulness or untruthfulness, and

(2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness

(1) concerning his character for truthfulness or untruthfulness, or

(2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

California - CA Ev Code § 787

787. Subject to Section 788, evidence of specific instances of his conduct relevant only as tending to prove a trait of his character is inadmissible to attack or support the credibility of a witness.

5. Colorado - Colo. R. Evid. 608(b)

(a) ~~Opinion~~ and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:

(1) the evidence may refer only to character for truthfulness or untruthfulness, and

(2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in 13-90-101, C.R.S. 1973, may not be proved by extrinsic evidence. They may, however, **in the discretion of the court**, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness

(1) concerning his character for truthfulness or untruthfulness, or

(2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

6. Connecticut

Sec. 6-6. Evidence of Character and Conduct of Witness

(a) Opinion and reputation evidence of character. The credibility of a witness may be impeached or supported by evidence of character for truthfulness or untruthfulness in the form of opinion or reputation. Evidence of truthful character is admissible only after the character of the witness for truthfulness has been impeached.

(b) Specific instances of conduct.

(1) General rule. A witness may be asked, in good faith, about specific instances of conduct of the witness, if probative of the witness' character for untruthfulness.

(2) Extrinsic evidence. Specific instances of the conduct of a witness, for the purpose of impeaching the witness' credibility under subdivision (1), may not be proved by extrinsic evidence.

(c) Inquiry of character witness. A witness who has testified about the character of another witness for truthfulness or untruthfulness may be asked on cross-examination, in good faith, about specific instances of conduct of the other witness if probative of the other witness' character for truthfulness or untruthfulness.

8. Delaware - Del. R. Evid. 608(b)

Rule 608. Evidence of character and conduct of witness.

(a) **Opinion and reputation evidence of character.** -- Except as provided in 11 Del. C. 3508 and 3509, the credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:

(1) The evidence may refer only to character for truthfulness or untruthfulness, and

(2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked.

(b) **Specific instances of conduct.** -- Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, **in the discretion of the court**, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness

(1) concerning the witness' character for truthfulness or untruthfulness, or

(2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

9. Florida

90.609 Character of witness as impeachment.—A party may attack or support the credibility of a witness, including an accused, by evidence in the form of reputation, except that:

(1) The evidence may refer only to character relating to truthfulness.

(2) Evidence of a truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence.

10. Georgia - Ga. Code Ann. § 24-6-608(b)

(a) The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, subject to the following limitations:

(1) The evidence may refer only to character for truthfulness or untruthfulness; and

(2) Evidence of truthful character shall be admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than a conviction of a crime as provided in Code Section 24-6-609, or conduct indicative of the witness's bias toward a party may not be proved by extrinsic evidence. Such instances may however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness:

(1) Concerning the witness's character for truthfulness or untruthfulness; or

(2) Concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

(c) The giving of testimony, whether by an accused or by any other witness, shall not operate as a waiver of the accused's or the witness's privilege against self-incrimination when examined with respect to matters which relate only to character for truthfulness.

11. Hawaii

Rule 608 Evidence of character and conduct of witness.

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:

(1) The evidence may refer only to character for truthfulness or untruthfulness, and

(2) Evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking the witness' credibility, if probative of untruthfulness, may be inquired into on cross-examination of the witness and, in the discretion of the court, may be proved by extrinsic evidence. When a witness testifies to the character of another witness under subsection (a), relevant specific instances of the other witness' conduct may be inquired into on cross-examination but may not be proved by extrinsic evidence.

12. Idaho - Idaho R. Evid. 608(b)

Idaho Rules of Evidence Rule 608.
Evidence of Character and Conduct of Witness.

(a) **Opinion and reputation evidence of character.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:

(1) the evidence may refer only to character for truthfulness or untruthfulness, and

(2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) **Specific instances of conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the credibility, of the witness, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness concerning

(1) the character of the witness for truthfulness or untruthfulness, or

(2) the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

(c) Effect of giving testimony. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the privilege of the witness against self-incrimination when examined with respect to matters which relate only to credibility.

13. Illinois

Rule 608: The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:

(1) the evidence may refer only to character for truthfulness or untruthfulness, and

(2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

14. Indiana

Rule 608. A Witness's Character for Truthfulness or Untruthfulness

(a) **Reputation or Opinion Evidence.** A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) **Specific Instances of Conduct.** Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of another witness whose character the witness being cross-examined has testified about.

15. Iowa - Iowa R. Evid. 5.608(b)

Rule 5.608 Witness's character for truthfulness or untruthfulness.

a. Reputation or opinion evidence

.A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

b. Specific instances of conduct

.Except for a criminal conviction under rule 5.609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they 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. By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

16. Kansas - K.S.A. § 60-422

60-422. Further limitations on admissibility of evidence affecting credibility. As affecting the credibility of a witness (a) in examining the witness as to a statement made by him or her in writing inconsistent with any part of his or her testimony it shall not be necessary to show or read to the witness any part of the writing provided that if the judge deems it feasible the time and place of the writing and the name of the person addressed, if any, shall be indicated to the witness; (b) extrinsic evidence of prior contradictory statements, whether oral or written, made by the witness, may in the discretion of the judge be excluded unless the witness was so examined while testifying as to give him or her an opportunity to identify, explain or deny the statement; (c) evidence of traits of his or her character other than honesty or veracity or their opposites, shall be inadmissible; (d) evidence of specific instances of his or her conduct relevant only as tending to prove a trait of his or her character, shall be inadmissible.

17. Kentucky - Ky. R. Evid. 608(b)

a) **Opinion and reputation evidence of character.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) **Specific instances of conduct**. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness: (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. **No specific instance of conduct of a witness may be the subject of inquiry under this provision unless the cross-examiner has a factual basis for the subject matter of his inquiry.**

18. Louisiana

Art. 608. Attacking or supporting credibility by character evidence

A. **Reputation evidence of character**. The credibility of a witness may be attacked or supported by evidence in the form of general reputation only, but subject to these limitations:

(1) The evidence may refer only to character for truthfulness or untruthfulness.

(2) A foundation must first be established that the character witness is familiar with the reputation of the witness whose credibility is in issue. The character witness shall not express his personal opinion as to the character of the witness whose credibility is in issue.

(3) **Inquiry into specific acts on direct examination while qualifying the character witness or otherwise is prohibited.**

B. Particular acts, vices, or courses of conduct. Particular acts, vices, or courses of conduct of a witness may not be inquired into or proved by extrinsic evidence for the purpose of attacking his character for truthfulness, other than conviction of crime as provided in Articles 609 and 609.1 or as constitutionally required.

C. Cross-examination of **character witnesses**. A witness who has testified to the character for truthfulness or untruthfulness of another witness may be cross-examined as to whether he has heard about particular acts of that witness bearing upon his credibility.

19. Maine - Me. R. Evid. 608(b)& (C)(2)

Rule 608. Evidence of character and conduct of witness.

- (a) *Opinion and Reputation Evidence of Character.* The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
- (b) *Specific Instances of Conduct.* Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, or, in the discretion of the trial judge, evidence of prior similar false accusations, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his or her privilege against self-incrimination when examined with respect to matters which relate only to credibility.

20. Maryland - Md. Rule 5-608

Rule 5-608. Evidence of character of witness for truthfulness or untruthfulness

- (a) Impeachment and rehabilitation by character witnesses.
    - (1) Impeachment by a character witness. In order to attack the credibility of a witness, a character witness may testify (A) that the witness has a reputation for untruthfulness, or (B) that, in the character witness's opinion, the witness is an untruthful person.

- (2) Rehabilitation by a character witness. After the character for truthfulness of a witness has been attacked, a character witness may testify (A) that the witness has a good reputation for truthfulness or (B) that, in the character witness's opinion, the witness is a truthful person.
- (3) Limitations on character witness's testimony.
  - (A) A character witness may not testify to an opinion as to whether a witness testified truthfully in the action.
  - (B) On direct examination, a character witness may give a reasonable basis for testimony as to reputation or an opinion as to the character of the witness for truthfulness or untruthfulness, but may not testify to specific instances of truthfulness or untruthfulness by the witness.
- (4) Impeachment of a character witness. The court may permit a character witness to be cross-examined about specific instances in which a witness has been truthful or untruthful or about prior convictions of the witness as permitted by Rule 5-609. Upon objection, however, the court may permit the inquiry only if (A) the questioner, outside the hearing of the jury, establishes a reasonable factual basis for asserting that the prior instances occurred or that the convictions exist, and (B) the prior instances or convictions are relevant to the witness's reputation or to the character witness's opinion, as appropriate.

- (b) Impeachment by examination regarding witness's own prior conduct not resulting in convictions. The court may permit any witness to be examined regarding the witness's own prior conduct that did not result in a conviction but that the court finds probative of a character trait of untruthfulness. Upon objection, however, the court may permit the inquiry only if the questioner, outside the hearing of the jury, establishes a reasonable factual basis for asserting that the conduct of the witness occurred. The conduct may not be proved by extrinsic evidence.
- (c) Effect on privilege against self-incrimination. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the witness's privilege against self-incrimination when examined with respect to matters which relate only to credibility.

21. Massachusetts - ALM G. Evid. § 608

Section 608. A Witness's Character for Truthfulness or Untruthfulness

- (a) Reputation Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.
- (b) Specific Instances of Conduct. In general, specific instances of misconduct showing the witness to be untruthful are not admissible for the purpose of attacking or supporting the witness's credibility.

Notes: -No specific acts even on cross-examination unless witness is victim in sexual assault.

Special Exception: In Commonwealth v. Bohannon, 376 Mass. 90, 94–96, 378 N.E.2d 987, 990–992 (1978), the special circumstances warranting evidence of the prior accusations were that (1) the witness was the victim in the case on trial; (2) the victim/witness's consent was the central issue at trial; (3) the victim/witness was the only Commonwealth witness on the issue of consent; (4) the victim/witness's testimony was inconsistent and confused; and (5) there was a basis in independent third-party records for concluding that the victim/witness's prior accusation of the same type of crime had been made and was false. Not all of the Bohannon circumstances must be present for the exception to apply.

22. Michigan - MRE 608

Rule 608. Evidence of Character and Conduct of Witness.

- **(a)** Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:
  - **(1)** the evidence may refer only to character for truthfulness or untruthfulness, and
  - **(2)** evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
- **(b)** Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

- The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

23. Minnesota - Minn. R. Evid. 608(b)

Rule 608. Evidence of Character and Conduct of Witness

- **(a)** ***Opinion and reputation evidence of character.*** --The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:
    - **(1)** the evidence may refer only to character for truthfulness or untruthfulness, and
    - **(2)** evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
- **(b)** ***Specific instances of conduct.*** --Specific instances of the conduct of the witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
- **(c)** ***Criminal cases.*** --The prosecutor in a criminal case may not cross-examine the accused or defense witness under subdivision (b) unless (1) the prosecutor has given the defense notice of intent to cross-examine pursuant to the rule; (2) the prosecutor is able to provide the trial court with sufficient evidentiary support justifying the cross-examination; and (3) the prosecutor establishes that the probative value of the cross-examination outweighs its potential for creating unfair prejudice to the accused.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

24. Mississippi - Miss. R. Evid. 608(b)

Rule 608. A witness's character for truthfulness or untruthfulness.

- **(a) Reputation or opinion evidence.** -- A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or

untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

- **(b) Specific instances of conduct. --** Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they 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.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

25. Missouri

Missouri law allows a party to attack the credibility of witness by demonstrating the witnesses' bad character for truth and veracity. John C. O'Brien, MISSOURI LAW OF EVIDENCE, section 5-7 (3d ed. 1996). While a party may cross-examine the witness regarding specific acts of misconduct relating to credibility, these prior acts may not be proven by extrinsic evidence.

- Rousan v. State, 48 S.W.3d 576, 590 (Mo. ban 2001).

Thus, when a defendant cross-examines a witness about prior misconduct, the defendant is "bound by the witness' answer" and "cannot offer evidence to the contrary, unless, of course, the character of the witness has been put in issue on direct examination." State v. Williams, 492 S.W.2d 1, 4 (Mo. App. 1973).

a criminal defendant in Missouri may, in some cases, introduce extrinsic evidence of prior false allegations. This rule is not limited to sexual assault or rape cases.

- State v. Long, 140 S.W.3d 27, 30 (Mo. 2004)

26. Montana- Title 26, Ch. 10, Rule 608, MCA

Rule 608 Evidence of Character and Conduct of Witness.

- (a)Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of

truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

- (b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

- The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

27. Nebraska - R.R.S. Neb. § 27-608

§ 27-608. Rule 608. Evidence of character and conduct of witness; opinion and reputation evidence of character; specific instances of conduct; privilege against self-incrimination.

(1) The credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion, but subject to these limitations: (a) The evidence may refer only to character for truthfulness or untruthfulness, and (b) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(2) Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in section 27-609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness be inquired into on cross-examination of the witness (a) concerning his character for truthfulness or untruthfulness, or (b) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

28. Nevada - Nev. Rev. Stat. Ann. § 50.085

50.085. Evidence of character and conduct of witness.

1. Opinion evidence as to the character of a witness is admissible to attack or support the witness's credibility but subject to these limitations:

(a) Opinions are limited to truthfulness or untruthfulness; and

(b) Opinions of truthful character are admissible only after the introduction of opinion evidence of untruthfulness or other evidence impugning the witness's character for truthfulness.

2. Evidence of the reputation of a witness for truthfulness or untruthfulness is inadmissible.

3. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crime, may not be proved by extrinsic evidence. They may, however, if relevant to truthfulness, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to an opinion of his or her character for truthfulness or untruthfulness, subject to the general limitations upon relevant evidence and the limitations upon interrogation and subject to the provisions of NRS 50.090.

29. New Hampshire - N.H. Evid. Rule 608

Rule 608. A Witness's Character for Truthfulness or Untruthfulness [Effective January 1, 2018]

(a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross examination, allow them to be inquired into if they 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.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

30. New Jersey – N.J. R. Evid. 608

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

- (a) The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, 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 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) The credibility of a witness in a criminal case 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.

31. New Mexico – 11-608 NMRA

11-608 A witness's character for truthfulness or untruthfulness

A. Reputation or opinion evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for untruthfulness has been attacked by opinion or reputation evidence or otherwise.

B. Specific instances of conduct. Except for a criminal conviction under Rule 11-609 NMRA, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness of

(1) the witness; or

(2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

32. New York – Case Law.

Given these central principles, prosecution witnesses—and indeed, even a testifying defendant—may be cross-examined on "prior specific criminal, vicious or immoral conduct," provided that "the nature of such conduct or the circumstances in which it occurred bear logically and reasonably on the issue of credibility" (People v Sandoval, 34 NY2d 371, 376, 314 NE2d 413, 357 NYS2d 849 [1974]).

Of course, where a witness other than the defendant testifies, the court, in considering the parameters of permissible cross-examination, is not focused on protecting the rights of the accused, and on the concern that permitting evidence of bad conduct will serve merely to demonstrate a propensity to commit the crime charged (see People v Ocasio, 47 NY2d 55, 58, 389 NE2d 1101, 416 NYS2d 581 [1979]).

After all, for a nondefendant witness, "neither conviction nor vindication, imprisonment nor freedom, hangs in the balance" (id. at 59). However, in all cases the trial court retains broad discretion to weigh the probative value of evidence of prior bad acts against the possibility that it "would confuse the main issue and mislead the jury . . . or create substantial danger of undue prejudice to one of the parties" (People v Corby, 6 NY3d 231, 234-235, 844 NE2d 1135, 811 NYS2d 613 [2005] [internal quotation marks and citation omitted]; see also People v Harrell, 209 AD2d 160, 160, 618 NYS2d 631 [1st Dept 1994], affd 86 NY2d 806, 656 NE2d 591, 632 NYS2d 493 [1995]; see generally People v Dawson, 50 NY2d 311, 322, 406 NE2d 771, 428 NYS2d 914 [1980]; People v Gissendanner, 48 NY2d at 548 [1979]; Sandoval, 34 NY2d at 374 ["(t)he nature and extent of cross-examination have always been subject to the sound discretion of the Trial Judge"]).

33. North Carolina - N.C. Gen. Stat. § 8C-1, Rule 608

Rule 608. Evidence of character and conduct of witness

- (a) *Opinion and reputation evidence of character.* -- The credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion as provided in Rule 405(a), but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
- (b) *Specific instances of conduct.* -- Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

34. North Dakota - N.D.R. Ev. Rule 608

Rule 608. Evidence of character and conduct of witness

(a) ***Opinion and reputation evidence of character.*** -- The credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion as provided in Rule 405(a), but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) ***Specific instances of conduct.*** -- Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

35. Ohio - Ohio R. Evid. 608(B)

Rule 608. Evidence of character and conduct of witness

(A) **Opinion and reputation evidence of character**. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(B) **Specific instances of conduct**. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than conviction of crime as provided in **Evid.R.** 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if *clearly probative* of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness

or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony by any witness, including an accused, does not operate as a waiver of the witness's privilege against self-incrimination when examined with respect to matters that relate only to the witness's character for truthfulness.

36. Oklahoma

Substantially similar to the Uniform Rules of Evidence.

§ 2608. Evidence of Character and Conduct of Witness

A. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, subject to these limitations:

1. The evidence may refer only to character for truthfulness or untruthfulness; and

2. Evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked.

B. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crime as provided in Section 2609 of this title, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness if they:

1. Concern the witness's character for truthfulness or untruthfulness;

2. Concern the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

C. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness's privilege against self-incrimination when examined with respect to matters which relate only to credibility.

37. Oregon - ORS § 40.350

40.350 Rule 608. Evidence of Character and Conduct of Witness.

(1) The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but:

(a) The evidence may refer only to character for truthfulness or untruthfulness; and

(b) Evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(2) Specific instances of the conduct of a witness, for the purpose of attacking or supporting the credibility of the witness, other than conviction of crime as provided in ORS 40.355, may not be proved by extrinsic evidence. Further, such specific instances of conduct may not, even if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness.

38. Pennsylvania - Pa.R.E. 608

Rule 608. A Witness's Character for Truthfulness or Untruthfulness

(a) **Reputation Evidence.** A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked. Opinion testimony about the witness's character for truthfulness or untruthfulness is not admissible.

(b) **Specific Instances of Conduct.** Except as provided in Rule 609 (relating to evidence of conviction of crime),

(1) the character of a witness for truthfulness may not be attacked or supported by cross-examination or extrinsic evidence concerning specific instances of the witness' conduct; however,

(2) in the discretion of the court, the credibility of a witness who testifies as to the reputation of another witness for truthfulness or untruthfulness may be attacked by cross-examination concerning specific instances of conduct (not including arrests) of the other witness, if they are probative of truthfulness or untruthfulness; but extrinsic evidence thereof is not admissible.

39. Rhode Island – RI R. Evid. Art. VI, Rule 608

Rule 608. Evidence of character and conduct of witness.

- **(a)** ***Opinion and Reputation Evidence of Character.*** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence

of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

- **(b)** ***Specific Instances of Conduct.*** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, or, in the discretion of the trial judge, evidence of prior similar false accusations, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his or her privilege against self-incrimination when examined with respect to matters which relate only to credibility.

40. South Carolina - Rule 608, SCRE

RULE 608. EVIDENCE OF CHARACTER, CONDUCT AND BIAS OF WITNESS

(a) Opinion and Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

(c) Evidence of Bias. Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.

41. South Dakota – S.D. Codified Laws § 19-19-608

S.D. Codified Laws § 19-19-608 is identical to the Federal Rules of Evidence 608.

19-19-608. A witness's character for truthfulness or untruthfulness.

(a) Reputation or opinion evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) Specific instances of conduct. Except for a criminal conviction under § 19-19-609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they 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.

(c) Privilege against self-incrimination not waived by testimony on credibility. By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

42. Tennessee - Tenn. R. Evid. Rule 608

Rule 608. Evidence of character and conduct of witness.

(a) Opinion and Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) the evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked.

(b) Specific Instances of Conduct. Specific instances of conduct of a witness for the purpose of attacking or supporting the witness's character for truthfulness, other than convictions of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, if probative of truthfulness or untruthfulness and under the following conditions, be inquired into on cross-examination of the witness concerning the witness's character for truthfulness or untruthfulness or concerning the character for truthfulness or untruthfulness of another witness as to which the character witness being cross-examined has testified. The conditions which must

be satisfied before allowing inquiry on cross-examination about such conduct probative solely of truthfulness or untruthfulness are:

(1) The court upon request must hold a hearing outside the jury's presence and must determine that the alleged conduct has probative value and that a reasonable factual basis exists for the inquiry;

(2) The conduct must have occurred no more than ten years before commencement of the action or prosecution, but evidence of a specific instance of conduct not qualifying under this paragraph (2) is admissible if the proponent gives to the adverse party sufficient advance notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence and the court determines in the interests of justice that the probative value of that evidence, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(3) If the witness to be impeached is the accused in a criminal prosecution, the State must give the accused reasonable written notice of the impeaching conduct before trial, and the court upon request must determine that the conduct's probative value on credibility outweighs its unfair prejudicial effect on the substantive issues. The court may rule on the admissibility of such proof prior to the trial but in any event shall rule prior to the testimony of the accused. If the court makes a final determination that such proof is admissible for impeachment purposes, the accused need not actually testify at the trial to later challenge the propriety of the determination.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the witness's privilege against self-incrimination when examined with respect to matters which relate only to character for truthfulness.

(c) Juvenile Conduct. Evidence of specific instances of conduct of a witness committed while the witness was a juvenile is generally not admissible under this rule. The court may, however, allow evidence of such conduct of a witness other than the accused in a criminal case if the conduct would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination in a civil action or criminal proceeding.

43. Texas - Tex. R. Evid. 608(b).

Rule 608 A Witness's Character for Truthfulness or Untruthfulness

(a) *Reputation or Opinion Evidence.* --A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) *Specific Instances of Conduct.* --Except for a criminal conviction under Rule 609, a party may not inquire into or offer extrinsic evidence to prove specific instances of the witness's conduct in order to attack or support the witness's character for truthfulness.

44. Utah - Utah R. Evid. Rule 608

Rule 608. A witness's character for truthfulness or untruthfulness

(a) *Reputation or opinion evidence.* -- A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) *Specific instances of conduct.* -- Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they 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.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

(c) *Evidence of bias.* -- Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by other evidence.

45. Vermont - V.R.E. Rule 608

Rule 608. Evidence of Character and Conduct of Witness

(a) Opinion and reputation evidence of character. -- The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. -- Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

46. Virginia - Va. Sup. Ct. R. 2:608

Rule 2:608. Impeachment by Evidence of Reputation for Truthtelling and Conduct of Witness

(a) **Reputation evidence of the character trait for truthfulness or untruthfulness.** --The credibility of a witness may be attacked or supported by evidence in the form of reputation, subject to these limitations: (1) the evidence may relate only to character trait for truthfulness or untruthfulness; (2) evidence of truthful character is admissible only after the character trait of the witness for truthfulness has been attacked by reputation evidence or otherwise; and (3) evidence is introduced that the person testifying has sufficient familiarity with the reputation to make the testimony probative.

(b) **Specific instances of conduct; extrinsic proof.** --Except as otherwise provided in this Rule, by other principles of evidence, or by statute, (1) specific instances of the conduct of a witness may not be used to attack or support credibility; and (2) specific instances of the conduct of a witness may not be proved by extrinsic evidence.

(c) **Cross-examination of character witness.** --Specific instances of conduct may, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of a character witness *concerning the character trait for truthfulness or untruthfulness* of another witness as to whose character trait the witness being cross-examined has testified.

d) **Unadjudicated perjury.** --If the trial judge makes a threshold determination that a reasonable probability of falsity exists, any witness may be questioned about prior specific instances of unadjudicated perjury. Extrinsic proof of the unadjudicated perjury may not be shown.

(e) **Prior false accusations in sexual assault cases.** -- Except as otherwise provided by other evidentiary principles, statutes or Rules of Court, a complaining witness in a sexual assault case may be cross-examined about prior false accusations of sexual misconduct.

47. Washington - Wash. R. Evid. 608(b)

Rule 608. Evidence of character and conduct of witness

(a) *Reputation evidence of character.* The credibility of a witness may be attacked or supported by evidence in the form of reputation, but subject to the limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence or otherwise.

(b) *Specific instances of conduct.* Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

48. West Virginia

Rule 608. A witness's character for truthfulness or untruthfulness.

(a) Reputation or opinion evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) Specific instances of conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination of a witness other than the accused, allow them to be inquired into if they 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.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

49. Wisconsin - Wis. Stat. § 906.08

Evidence of character and conduct of witness

(1) **Opinion and reputation evidence of character.** Except as provided in s. 972.11 (2), the credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion, but subject to the following limitations:

(a) The evidence may refer only to character for truthfulness or untruthfulness.

(b) Except with respect to an accused who testifies in his or her own behalf, evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(2) **Specific instances of conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than a conviction of a crime or an adjudication of delinquency as provided in s. 906.09, may not be proved by extrinsic evidence. They may, however, subject to s. 972.11 (2), if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to his or her character for truthfulness or untruthfulness.

(3) **Testimony by accused or other witnesses.** The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the privilege against self-incrimination when examined with respect to matters which relate only to credibility.

50. Wyoming - W.R.E. Rule 608

W.R.E. Rule 608 - **Evidence of character and conduct of witness.**

(a) **Opinion and reputation evidence of character.** -- The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) **Specific instances of conduct.** -- Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Slight Modification to the Federal Rules These states adopted the version of Rule 608 in the Uniform Rules of Evidence which track the essence of the FRE with slightly different langauge. Unif. R. Evid. § 608(b) (Nat'l Conf. of Comm'rs on Unif. State Laws 2005)	**Additional Information**
Arkansas, Ark. R. Evid. 608(b)	
Colorado, Colo. R. Evid. 608(b)	Adds the language "in the discretion of the court" under 608(b). The additional language is merely to emphasize that the judge has discretion. Substantively, the Colorado rule follows the Federal Rule.
Delaware, Del. R. Evid. 608(b);	Adds the language "in the discretion of the court"
Georgia, Ga. Code Ann. § 24-6-608(b)	
Idaho, Idaho R. Evid. 608(b)	Adds the language "In the discretion of the court" is added
Kentucky, Ky. R. Evid. 608(b);	Adds language to include the required good faith basis.
Maine, Me. R. Evid. 608(b)+C2	
Michigan, Mich. R. Evid. 608(b)	Prohibits opinion as a means of proving character. Otherwise, Mich. R. Evid. 608(b) is identical to the FRE.
Montana, Mont. Code Ann. § 26-10-608(b)	
Nebraska, Neb. Rev. Stat. § 27-608(2)	
Nevada, Nev. Rev. Stat. § 50.085(3)	
New Hampshire, N.C6H. R. Evid. 608(b)	
North Carolina, N.C. Gen. Stat. § 8C-1, Rule 608(b)	

Ohio, Ohio R. Evid. 608(B)	Unlike Federal Evidence Rule 608(b), the rule contains the word "clearly" in the second sentence. The rule requires a high degree of probative value of instances of prior conduct as to truthfulness or untruthfulness
Oklahoma, Okla. Stat. tit. 12, § 2608(B)	
Rhode Island, R.I. R. Evid. 608(b)	
South Carolina, S.C. R. Evid. 608(b)	Except for the addition of subsection (c), this rule is identical to the federal rule.
Vermont, Vt. R. Evid. 608(b)	
Washington, ~~Wash. R.~~ Evid. 608(b)	
Wisconsin, ~~Wis. Stat.~~ § 906.08(2)	
Wyoming, Wyo. R. Evid. 608(b)	

Modify or Reject the Federal Rules	Additional Information
Maryland	need a "reasonable factual basis" for asserting specific instance.
Massachusetts	no specific conduct even on cross unless the witness is victim in sexual assault. o Commonwealth v. Bohannon Exception
Minnesota	FRE + criminal defendant protection – notice, sufficient evidentiary support, probative value outweighs potential for unfair prejudice to the accused.
Missouri	FRE + a criminal Defendant in some cases may introduce extrinsic evidence of prior false allegations, this is not limited to sexual assault cases.
Oregon	Reject the FRE, no evidence of specific acts of conduct to attack or support a witness's credibility.
Pennsylvania	Opinion testimony inadmissible (608(a)), only can inquire about credibility of character witness.
Tennessee	More narrow than the FRE, requires notice, preliminary hearing, 10 year rule, and a juvenile restriction.
Texas	No cross examination of a witness's specific prior instances of untruthfulness, can cross on bias or motive, however.
Virginia	can cross-examine about specific instances of a character witness only to the truthfulness or untruthfulness of the witness as to whose character trait the witness being cress-examined has testified. There is a specific section on the permissibility of asking the witness about unadjudicated perjury if there is a reasonable probability of the falsity. Additionally a complaining witness in a sexual assault case may be cross-examined about prior false accusations of sexual misconduct.
Alabama	can cross-examine about specific instances of a character witness only to the truthfulness or untruthfulness of the witness as to whose character trait the witness being cress-examined has testified.
Alaska	can cross-examine about specific instances of a character witness only to the truthfulness or untruthfulness of the witness as to whose character trait the witness being cress-examined has testified. Also, requires a judicial determination of whether the inquiry is appropriate by weighing probative and prejudicial effect
California	permits use of specific instances of conduct only in criminal - not civil - cases

Connecticut	On cross examination of the principle witness, can only inquire about specific instances that are probative of *untruthfulness* . Cross-examination of a character witness allows inquiry into specific instances of conduct probative of both untruthfulness and truthfulness.
Florida	no inquiry into specific conduct is admissible for truthfulness/untruthfulness
Hawaii	allows use of extrinsic evidence with judge's discretion; adds in more specificity that bias, interest, and motive is not considered character evidence
Illinois	no inquiry into specific conduct is admissible for truthfulness/untruthfulness
Indiana	only allows cross examination into specific instances of conduct if it is probative of the truthfulness/untruthfulness of another witness whose character the witness being cross-examined has testified about
Kansas	are allowed to use extrinsic evidence
Louisiana	prohibits inquiry into specific acts on DIRECT examination while qualifying the character witness or otherwise. Specific acts may not be inquired into on cross-examination of the principle witness. A character witness can be cross-examined to ask 'whether he has heard about particular acts' that bears upon his credibility.

Model 1[1]

"Rule 608. Evidence of Character and Conduct of Witness

- (a) ***Opinion and reputation evidence of character.*** --The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:
    - **(1)** the evidence may refer only to character for truthfulness or untruthfulness, and
    - **(2)** evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
- (b) ***Specific instances of conduct.*** --Specific instances of the conduct of the witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
- (c) ***Criminal cases.*** --The prosecutor in a criminal case may not cross-examine the accused or defense witness under subdivision (b) unless (1) the prosecutor has given the defense notice of intent to cross-examine pursuant to the rule; (2) the prosecutor is able to provide the trial court with sufficient evidentiary support justifying the cross-examination; and (3) the prosecutor establishes that the probative value of the cross-examination outweighs its potential for creating unfair prejudice to the accused.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility."

[1] Model Rule 1 is based on Minnesota's rule, Minn. R. Evid. 608(b). It closely mirrors Fed. R. Evid. 608, with the addition of Section (c). Section (c) is an additional safeguard for criminal defendants. In a 2006 Committee Note, Minnesota's legislature stated that "Under this test the court should not allow the cross-examination if probative value and unfair prejudice are closely balanced." Citing State v. Fallin, 540 N.W.2d 518, 522 (Minn. 1995). These additional safeguards for criminal defendants may address the concerns of concurring opinions in State v. Scott, 229 N.J. 469, 495, 163 A.3d 325, 340 (2017)(J. Albin, Concurring).

Model 2[2]

- (A) **Opinion and reputation evidence of character.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

- (B) **Specific instances of conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than conviction of crime as provided in Evid.R. 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if *clearly probative* of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. The conditions which must be satisfied before allowing inquiry on cross-examination about such conduct probative solely of truthfulness or untruthfulness are:

    - (1) The court upon request must hold a hearing outside the jury's presence and must determine that the alleged conduct has probative value and that a reasonable factual basis exists for the inquiry;

    - (2) The conduct must have occurred no more than ten years before commencement of the action or prosecution, but evidence of a specific instance of conduct not qualifying under this paragraph (2) is admissible if the proponent gives to the adverse party sufficient advance notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence and the court determines in the interests of justice that the probative value of that evidence, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

    - (3) If the witness to be impeached is the accused in a criminal prosecution, the State must give the accused reasonable written notice of the impeaching conduct before trial, and the court upon request must determine that the conduct's probative value on credibility outweighs its unfair prejudicial effect on the substantive issues. The court may rule on the admissibility of such proof prior to the trial but in any event shall rule prior to the testimony of the accused. If the court makes a final determination that such proof is admissible for impeachment purposes, the accused need not actually testify at the trial to later challenge the propriety of the determination.

---

[2] Model Rule 2 is based on Ohio's (Ohio R. Evid. 608(B)) and Tennessee's (Tenn. R. Evid. Rule 608) counterpart rules to Fed. R. Evid. 608. Mode Rule 2 requires a higher degree of probative value as to truthfulness or untruthfulness than the Federal counterpart ("clearly probative standard"). Additionally, there are three prerequisites that must be satisfied before inquiry on cross-examination about specific conduct is allowed. The first is a pre-trial hearing to establish a factual basis exists for the inquiry. Additionally, there is a ten year limitation on the conduct, however the judge has discretion to waive this limitation if justice so requires. Last, for a criminal defendant witness, there are additional safeguards. The court must determine that the probative value outweighs the unfair prejudice.

Model 3[3]

- (a) Opinion and Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) the evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked.

- (b) Specific Instances of Conduct. Specific instances of conduct of a witness for the purpose of attacking or supporting the witness's character for truthfulness, other than convictions of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, if probative of truthfulness or untruthfulness and under the following conditions, be inquired into on cross-examination of the witness concerning the witness's character for truthfulness or untruthfulness or concerning the character for truthfulness or untruthfulness of another witness as to which the character witness being cross-examined has testified. The conditions which must be satisfied before allowing inquiry on cross-examination about such conduct probative solely of truthfulness or untruthfulness are:

    - (1) The court upon request must hold a hearing outside the jury's presence and must determine that the alleged conduct has probative value and that a reasonable factual basis exists for the inquiry;

    - (2) The conduct must have occurred no more than ten years before commencement of the action or prosecution, but evidence of a specific instance of conduct not qualifying under this paragraph (2) is admissible if the proponent gives to the adverse party sufficient advance notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence and the court determines in the interests of justice that the probative value of that evidence, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

    - (3) If the witness to be impeached is the accused in a criminal prosecution, the State must give the accused reasonable written notice of the impeaching conduct before trial, and the court upon request must determine that the conduct's probative value on credibility outweighs its unfair prejudicial effect on the substantive issues. The court may rule on the admissibility of such proof prior to the trial but in any event shall rule prior to the testimony of the accused. If the court makes a final determination that such proof is admissible for impeachment purposes, the accused need not actually testify at the trial to later challenge the propriety of the determination.

- (c) Juvenile Conduct. Evidence of specific instances of conduct of a witness committed while the witness was a juvenile is generally not admissible under this rule. The court may, however, allow evidence of such conduct of a witness other than the accused in a criminal case if the conduct would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination in a civil action or criminal proceeding.

---

[3] Model Rule 3 is also based on Ohio's (Ohio R. Evid. 608(B)) and Tennessee's (Tenn. R. Evid. Rule 608) counterpart rules to Fed. R. Evid. 608. However, it also additionally has Section (c), which limits juvenile conduct from being inquired about. However, if the witness is not the accused, the court has the discretion to allow inquiry about the conduct if it is necessary for a fair determination in a civil action or criminal proceeding.

State v. Guenther

Supreme Court of New Jersey

December 1, 2003, Argued ; August 9, 2004, Decided

A-102 September Term 2002

Reporter
181 N.J. 129 *; 854 A.2d 308 **; 2004 N.J. LEXIS 941 ***

STATE OF NEW JERSEY, PLAINTIFF-APPELLANT, v. KENNETH GUENTHER, DEFENDANT-RESPONDENT.

Prior History: [***1] On certification to the Superior Court, Appellate Division.

State v. Guenther, 177 N.J. 489, 828 A.2d 917, 2003 N.J. LEXIS 893 (2003)

Syllabus

(This syllabus is not part of the opinion of the Court. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Supreme Court. Please note that, in the interests of brevity, portions of any opinion may not have been summarized).

***State of New Jersey v. Kenneth Guenther* (A-102-02)**

Argued December 1, 2003 -- Decided August 9, 2004

ALBIN, J., writing for a unanimous Court.

The issue presented here is whether a witness who has accused a defendant of sexual abuse may be impeached by evidence that she made a prior false accusation of sexual abuse.

An Ocean County grand jury charged defendant Kenneth Guenther with committing various sexual offenses against D.F. when she was between the ages of ten and fourteen. Guenther lived in the same household and acted as D.F.'s stepfather at the time of the alleged offenses. On the first day of trial, the prosecutor provided defense counsel with documents detailing that six months before D.F. accused Guenther of sexual abuse, she had admitted to falsely accusing her neighbor [***2] of sexually abusing her. D.F. allegedly told two classmates at her middle school, J.O. and D.D., that a neighbor had sexually abused her. J.O. and D.D. reported what they had learned to a school counselor. The counselor then met with D.F. D.F. at first denied telling J.O. and D.D. that she had been sexually abused by her neighbor, then finally admitted that she told the story and that it was a lie. That same day, the vice principal also questioned D.F. At that meeting, D.F. also confessed that what she told her classmates concerning the sexual abuse by her neighbor was a lie. The prosecutor's investigation was completed on July 1, 1999, with no charges filed against the neighbor. Defense counsel requested time to investigate the new information and permission to cross-examine D.F. about the prior false allegation. He stated his intent to impeach D.F. if she denied making the accusation. The court rejected the request, ruling that the accusation was irrelevant.

The jury found Guenther guilty on all of the charges presented to them. The trial court sentenced Guenther to state prison terms aggregating twenty-five years.

On appeal, the Appellate Division remanded for a hearing [***3] to determine whether D.F.

made the allegation that her neighbor had sexually abused her, and if so, whether the allegation was false. The panel stated that if the trial court determined that D.F. did not falsely accuse her neighbor or if it determined that she did and that the evidence nevertheless was inadmissible, then the verdict would stand. If the court found that D.F. made a false accusation and that it was admissible, a new trial would be necessary. We granted certification.

HELD: Creating a limited exception to N.J.R.E. 608 to allow a prior false accusation to be used to impeach a victim-witness's credibility will promote fairness in the trial process and is not inconsistent with the rationale underpinning the rule. Because we decide the issue on state grounds, we need not address the constitutional question arising under the *Confrontation Clause*.

1. Our rules permit evidence in the form of opinion, reputation, or a prior criminal conviction to attack a witness's credibility by establishing the witness's character for untruthfulness. However, evidence of specific instances of conduct - other than a prior conviction - to prove the character trait of untruthfulness [***4] is prohibited. Specific instances of conduct are admissible, however, when a character trait is an essential element of a charge, claim, or defense, as in a defamation case. In this case, character is not directly at issue, and, therefore, the general prohibition on specific conduct evidence applies. (Pp. 14-15)

2. The general principle embodied in N.J.R.E. 608 originated in the common law. Several centuries ago, courts began to prohibit the use of prior instances of conduct to attack the credibility of a witness for two essential reasons: to prevent unfairness to the witness and to avoid confusion of the issues before the jury. Those reasons remain the present justification for the exclusion of specific conduct evidence. It was not a lack of relevance that gave rise to the rule prohibiting evidence of prior instances of untruthful conduct to impeach the witness's credibility, but the auxiliary policies regarding unfairness to the witness, confusion of issues, and undue consumption of time. When those auxiliary policies do not apply, the rationale for the exclusion of such evidence no longer exists. (Pp. 15-17)

3. The United States Supreme Court decision in *Davis v.* [***5] *Alaska*, provides the paradigm by which to examine the tension between a state's evidentiary rule and a defendant's confrontation rights. *Davis* held that the *Sixth Amendment* right to confrontation trumped a state statute and procedural rule protecting the privacy of a juvenile's delinquency record. The Court recognized that the exposure of a witness' motivation [such as bias] in testifying is a proper and important function of the constitutionally protected right of cross-examination. We conclude that creating a limited exception to N.J.R.E. 608 to allow a prior false accusation to be used to impeach a victim-witness's credibility will promote fairness in the trial process and is not inconsistent with the rationale underpinning the rule. Because we decide the issue on state grounds, we need not address the constitutional question arising under the federal *Confrontation Clause*. (Pp. 26-30)

4. N.J.R.E. 608 does not allow the use of a prior false accusation, to impeach a witness's character for truthfulness. Various courts across the nation have addressed the issue whether a defendant may impeach the credibility of a witness-accuser by showing that the witness made [***6] a prior false criminal accusation. Many courts have permitted cross-examination of a witness-accuser who has falsely alleged a sexual crime on a previous

occasion. A number of courts also permit the introduction of extrinsic evidence to prove the point. Some courts have carved out an exception to their rules of evidence; others have found justification in the federal *Confrontation Clause* or in their own state's analogous clause. We conclude that in limited circumstances and under very strict controls a defendant has the right to show that a victim-witness has made a prior false criminal accusation for the purpose of challenging that witness's credibility. Although our *Confrontation Clause* jurisprudence informs our decision, we do not decide this issue on constitutional grounds, but rather by making a narrow exception to *N.J.R.E. 608* consistent with the rationale of that rule. In certain cases, we believe that the interests of justice require that we relax the strictures against specific conduct evidence in *N.J.R.E. 608*. The weight of authority from other jurisdictions generally favors that approach, though we chart a path consistent with our own jurisprudence and values. We [***7] see no reason why prior false accusation evidence should be limited to cases in which the witness is the victim of a sexual crime. (Pp. 30-37)

5. We limit our holding to a criminal case that involves the impeachment of a victim-witness whose credibility was the central issue in the case. The trial in this case essentially was reduced to a credibility contest between the victim and defendant. (P. 38)

6. In deciding whether to permit the impeachment of a victim-witness who allegedly made a prior false accusation, trial courts must first conduct an admissibility hearing. The court must determine by a preponderance of the evidence whether the defendant has proven that a prior accusation charging criminal conduct was made by the victim and whether that accusation was false. The admission of this type of evidence is an exception to *N.J.R.E. 608* and should be limited circumstances in which the prior accusation has been shown to be false. The factors to be considered in deciding the issue of admissibility are: a) whether the credibility of the victim-witness is the central issue in the case; b) the similarity of the prior false criminal accusation to the crime charged; c) the [***8] proximity of the prior false accusation to the allegation that is the basis of the crime charged; d) the number of witnesses, the items of extrinsic evidence, and the amount of time required for presentation of the issue at trial; and e) whether the probative value of the false accusation evidence will be outweighed by undue prejudice, confusion of the issues, and waste of time. If the court determines that evidence of the prior false accusation is admissible, the court may limit the number of witnesses who will testify concerning the matter at trial. The court must ensure that testimony on the subject does not eclipse the trial of the crimes charged. (Pp. 39-40)

7. Whether the defense may introduce evidence of D.F.'s previous accusation is a matter for the sound discretion of the trial court on remand. The State has argued that any presentation of the false accusation issue at trial will require at least nine witnesses. We disagree. Assuming that the school counselor and vice-principal testify consistently with the letters they forwarded to the prosecutor's office, their testimony alone, if believed, would be sufficient to establish that D.F. made an accusation of a criminal [***9] nature that she knew to be false. If D.F. admits to making the false accusation, there would be no need for the defense to call any witnesses to prove the point. Of course, D.F. would have the opportunity to give an explanation for making the false report. On the other hand, if D.F. denies ever making the allegation to J.O. and D.D., as she did when questioned by members of the prosecutor's office, then defendant could rebut that testimony by calling the two school officials. We give this guidance for the purpose

of suggesting that it is possible to present this issue economically. (Pp. 40-42)

8. We are not creating a new rule of evidence, but merely carving out a narrow exception to *N.J.R.E. 608* for the purpose of permitting the jury to consider relevant evidence - in clearly defined circumstances - that may affect its estimation of the credibility of a key witness. The exception to *N.J.R.E. 608* that we recognize is limited to the impeachment of a victim-witness whose credibility is the central issue in a criminal case. We submit the question of whether the use of a prior false criminal allegation to impeach credibility should have wider application in other circumstances [***10] to this Court's standing Committee on the Rules of Evidence for any recommendations to this Court not inconsistent with this opinion. (Pp. 42-45)

The judgment of the Appellate Division is **AFFIRMED.** This matter is remanded to the trial court for proceedings consistent with this opinion.

CHIEF JUSTICE PORITZ and JUSTICES VERNIERO, LaVECCHIA, ZAZZALI and WALLACE join in JUSTICE ALBIN's opinion. JUSTICE LONG did not participate.

Counsel: *Steven A. Yomtov,* Deputy Attorney General, argued the cause for appellant (*Peter C. Harvey,* Attorney General of New Jersey, attorney).

Steven M. Gilson, Designated Counsel, argued the cause for respondent (*Yvonne Smith Segars,* Public Defender, attorney).

Judges: Justice ALBIN delivered the opinion of the Court. Chief Justice PORITZ and Justices VERNIERO, LaVECCHIA, ZAZZALI, ALBIN and WALLACE.

Opinion by: Albin

Opinion

[*131] Justice ALBIN delivered the opinion of the [**309] Court.

Defendant Kenneth Guenther was convicted of sexual assault and other crimes related to the abuse of his stepdaughter. At trial, he was denied the opportunity to present evidence of a prior false accusation of sexual abuse that his stepdaughter made against a neighbor. *N.J.R.E. 608* [***11] embodies the common law rule [*132] that generally forbids admission of specific instances of conduct to attack a witness's character for truthfulness. We must decide, pursuant to *N.J.R.E. 608*, whether the credibility of a witness who has accused a defendant of sexual abuse may be impeached by evidence that she made a prior false criminal accusation. We also must decide whether that issue implicates a defendant's state and federal constitutional right of confrontation.

I.

A.

On May 9, 2000, an Ocean County Grand Jury charged defendant Kenneth Guenther in a seven-count indictment with committing various sexual offenses against D.F. when she was between the ages of ten and fourteen. Guenther, the "common-law" husband of D.F.'s mother, lived in the same household as D.F. and acted in the role of her "stepfather" at the time of the alleged acts of sexual abuse. Guenther was charged with first-degree aggravated sexual assault, contrary to *N.J.S.A. 2C:14-2a* (counts one and two); second-degree endangering the welfare of a child, contrary to *N.J.S.A. 2C:24-4a* (count [**310] three); second-degree sexual assault, contrary to *N.J.S.A. 2C:14-2* [***12] *b*, *c* (counts four and five); third-degree aggravated criminal sexual contact, contrary to

N.J.S.A. 2C:14-3a (count six); and fourth-degree criminal sexual contact, contrary to N.J.S.A. 2C:14-3b (count seven).

B.

On the first day of trial, the prosecutor provided defense counsel with documents detailing that a little more than six months before D.F. accused Guenther of committing various sexual crimes, she admitted to falsely accusing her neighbor of sexually abusing her. The documents consisted of two investigation reports from the Ocean County Prosecutor's Office and two letters addressed to the prosecutor's office, one from Johan E. de Brigard, [*133] the Vice Principal of the middle school attended by D.F., and the other from Mary Ellen Cordisco, a counselor at that school.

The letters from the school officials related that D.F. told two of her classmates, D.D. and J.O., that she had been sexually abused by a neighbor named Tony. D.F. informed the two girls that Tony "had exposed himself to her and that he had forced her to have sex with him." D.F. was distraught when she made that claim to her classmates. One day while walking [***13] home from school with D.D., D.F. "pointed to the neighbor and said, 'That's the guy I told you about.'" On April 23, 1999, D.D. and J.O. reported what they had learned to Ms. Cordisco, including the man's name and that he was a convicted child molester.

Ms. Cordisco questioned D.F. in the presence of her two classmates concerning her claim of abuse. D.F., at first, "became very defensive, and then hostile and adamantly denied everything." D.F., however, "finally admitted to telling the girls the story about [the neighbor]" and admitted that "she was lying at the time."

Later, D.F. was interviewed by Ms. de Brigard, the Vice Principal, also in the presence of the two girls and Ms. Cordisco. When Ms. de Brigard repeated to D.F. the account she had purportedly given to D.D. and J.O., D.F. "became upset" that her classmates had betrayed her confidence. D.F. admitted telling the "story" to D.D. and J.O. and confessed "that it was a lie." D.F. explained that she had babysat for Tony and his wife and was "angry" at him because she "had heard stories about him" of a "sexual nature." D.F. did not elaborate on those stories, but told Ms. de Brigard that she "was sorry she had made-up the[] [***14] charges."

That same day, Ms. de Brigard provided the information gathered during her interview to the Ocean County Prosecutor's Office. On May 3, 1999, D.F. was questioned by an investigator from the prosecutor's office. D.F. denied making the claims to her classmates and denied that her neighbor had abused her. She maintained that J.O. "made up the story to Ms. Cordisco" and that [*134] D.D. went along with it. The investigator's reports did not explain why D.F. admitted to both Ms. Cordisco and Ms. de Brigard that she had made false sexual accusations. The investigation was completed on July 1, 1999, without the filing of any charges against the neighbor.

Based on those facts, defense counsel requested time to interview the people involved in the investigation and permission to cross-examine D.F. about the prior false allegation. Counsel stated his intent to impeach D.F. with extrinsic evidence in the event she denied making the false accusation. The court rejected defendant's request for a hearing and ruled that the purported false accusation was "irrelevant" and "extremely collateral" and, [**311] therefore, inappropriate for consideration by the jury.

A trial before a jury proceeded on [***15] March 20-22, 2001. The trial testimony presented two conflicting versions of events.

C.

In January 2000, then fourteen-year-old D.F. accused her "stepfather," defendant Kenneth Guenther, of sexual abuse. D.F.'s mother, Lorraine, and Guenther had lived together as "common law" husband and wife for more than ten years before marrying in the fall of 2000. D.F. had lived with her mother and Guenther since she was four years old when her mother divorced her biological father. D.F. testified that she and her older brother, P.F., considered Guenther their "stepfather" because he had acted in the role of their father since they were children.

According to D.F., Guenther began abusing her when she was nine years old. At first, Guenther exposed himself to D.F. in the bathroom and forced her to "masturbate" him. That abuse occurred monthly when the two were home alone while her mother was at work. D.F. remained silent about the abuse because Guenther told her that if she complained her mother would get in trouble.

[*135] On direct examination, D.F. testified that when she was around twelve years old, Guenther started forcing her to perform oral sex on him. Initially, that abuse occurred once [***16] a week and then progressed to every other day. On cross-examination she admitted telling the grand jury that the abuse occurred three to four times a day. D.F. stated that when she was around thirteen years old, Guenther started performing oral sex on her. D.F. began to consider sexual acts with Guenther as "just like one of [her] chores." As she got older, D.F. kept the abuse a secret because she feared that she would "pay for" her disclosure by being "hit" or "smacked" by Guenther.

Sometime in 1998 or 1999, D.F. told her brother, P.F., that Guenther was sexually abusing her, although she did not provide many details. On Thanksgiving Day 1999, D.F., her mother, and P.F. visited a relative's house without Guenther. On the drive home, P.F. told his mother that Guenther was molesting D.F. Upon arriving home, Lorraine spoke with Guenther, and for the next week kept a close eye on her daughter. According to D.F., after a week, "it just went back to normal" and the abuse continued. D.F. was resigned that if her mother did not believe her, no one would.

D.F. viewed Guenther as a strict parent, but also recognized that he "favored" her over her brother. On the one hand, Guenther and Lorraine [***17] kept a tight rein on their daughter. D.F. had to stay at home to complete her chores, could only visit a friend who lived one house away, and was not allowed to venture further than the end of her street. On the other hand, Guenther, a bail enforcement agent, took D.F. everywhere with him, including on his "bounty hunter" assignments, during which they were together sometimes until the early morning hours.

In 1999, D.F. "skipped" school one day with one of her brother's friends, John Cowie, who was several years older than D.F. Guenther and Lorraine strongly disapproved of their daughter's relationship with Cowie. Guenther accused D.F. of smoking marijuana with Cowie. At first D.F. denied the accusation, but [*136] confessed after Guenther struck her and her brother with a cutting board. After Guenther went to visit Cowie's parents, D.F. professed to be neither concerned nor embarrassed.

[**312] In January 2000, D.F.'s brother ran away and made his way to the home of their natural father. After P.F. arrived at his father's house, the police were called to arrange for his transport home. During that process, P.F. spoke with the police and revealed that his sister had been molested by Guenther. [***18] That same day, a Division of Youth

and Family Services (DYFS) worker was dispatched to interview D.F. at her home.

In the interview, D.F. denied she had been abused by Guenther. At trial, D.F. said that she lied to the DYFS worker because Guenther was within hearing distance during the interview, and she feared that if she disclosed the truth she would later be beaten. D .F. also believed that no one would believe her because Guenther had friends on the local police force and was involved with the court system.

The next day, in response to a court order, D.F. appeared in the Ocean County Courthouse because her natural father had taken legal steps to gain custody of both her and her brother. While in the courthouse complex, D.F. was interviewed by members of the prosecutor's office and revealed the history of Guenther's sexual abuse of her. Since that day, D.F. and P.F. have lived with their natural father and stepmother.

P.F., who was seventeen at the time of trial, testified that on four to six separate occasions in 1998 and 1999, D.F. and Guenther appeared "surprised" and even "shocked" when he returned home while they were alone in the master bedroom. However, when he gave his [***19] statement to the prosecutor, P.F. could recall only one or two such occasions. Those were the only times that P.F. witnessed anything suspicious between his sister and Guenther, although he felt that they were closer "than father and daughter should be."

[*137] Sometime in 1998 or 1999, his sister told him that Guenther had touched her improperly. According to P.F., he told his mother about D.F.'s allegations on at least two occasions over the course of the next year and a half, but his mother suggested that she would take the allegations seriously only if they came from D.F. Nevertheless, his mother instructed him to make sure that D.F. and Guenther were not left alone together in the house.

In January 2000, P.F. ran away because "there was too much stuff" going on at home and his "mom was not doing anything" about it. At about that time, P.F.'s mother told him that unless his grades improved he would not be allowed to get his driver's license until he turned eighteen. After P.F.'s revelations about the abuse of his sister, he moved in with his natural father, did not return to school, and obtained his license--at age seventeen.

D.F.'s mother, Lorraine, testified for the defense and described [***20] Guenther as a "wonderful" father. She stated that she and Guenther disapproved of their thirteen-year-old daughter's interest in seventeen-year-old John Cowie. After D.F. admitted to "skipping" school and smoking marijuana with Cowie, they "grounded" her, restricting her to their property and barring her use of the telephone. In addition, she and Guenther went to Cowie's house to speak with his parents. As a result, D.F. became "very, very angry," went into a "temper tantrum," started "slamming things," and told them that it was "none of [their] business."

Lorraine also explained that when P.F., then sixteen years old, dropped out of school, she gave him an ultimatum that he either return to school or find a job--otherwise he would not be permitted to get a driver's license. P.F., instead, ran away from home. Lorraine denied that her children [**313] ever informed her that Guenther had abused D.F., and claimed that she first learned of the allegations when the DYFS worker came to her house in January 2000. Although she had never spoken with D.F. about the abuse allegations, she did not believe her daughter.

[*138] In his testimony, Guenther denied the charges and described himself as a

caring [***21] and fair parent. He stated that he had been a father to D.F. since she was a young child and that he loved D.F. and P.F. with "all [his] heart" and would never harm them in any way. He also denied that D.F. was restricted to the house or that she frequently accompanied him alone on errands and work-related trips.

Before summations, the trial court dismissed counts six (third-degree aggravated criminal sexual contact) and seven (fourth-degree criminal sexual contact) because they were duplicative of the remaining counts in the indictment. The jury found Guenther guilty of counts one through five. The court sentenced Guenther to concurrent eighteen-year terms of imprisonment on his two convictions of first-degree aggravated sexual assault (counts one and two) and to a consecutive seven-year term of imprisonment on his conviction of second-degree endangering the welfare of a child (count three). In all, Guenther received an aggregate twenty-five year state prison term. The court merged the second-degree sexual assault convictions (counts four and five) into counts one and two.

On appeal, the Appellate Division in a *per curiam* opinion remanded for a *N.J.R.E. 104* hearing to determine [***22] whether D.F. made an allegation that her neighbor had sexually abused her, and if so, whether the allegation was false. The panel directed that if the trial court were to find that D.F. made a false accusation, evidence relating to the accusation would still be subject to the *Rules of Evidence*. The panel concluded that if the court on remand determined that D.F. did not falsely accuse her neighbor or if it determined that she did and that the evidence nevertheless was inadmissible, then the verdict would stand. If, however, the court found that D.F. did make the false accusation and that it was admissible, a new trial would be necessary.

The State petitioned for certification arguing that the Appellate Division's decision and an earlier opinion, *State v. Bray, 356 N.J. Super. 485, 813 A.2d 571 (App.Div.2003)*, were contrary to [*139] New Jersey evidence law that prohibits evidence of specific instances of conduct, not the subject of a prior conviction, to impeach a witness's character for truthfulness. We granted certification. *177 N.J. 489, 828 A.2d 917 (2003)*.

II.

A.

We must decide whether the Appellate Division correctly ruled that an alleged victim of [***23] a sexual assault may be impeached by evidence that, on a previous occasion, she falsely accused a person of sexually abusing her. Relying on *State v. Bray, 356 N.J. Super. 485, 496, 813 A.2d 571 (App.Div.2003)*, the appellate panel ordered a remand to the trial court to determine whether the alleged victim falsely accused her neighbor of committing a sexual offense and, if so, whether such evidence is admissible. The State contends that our evidentiary rules forbid the introduction of specific conduct evidence relating to character to undermine the credibility of a victim-witness. The State asks this Court to reverse the panel's holding and to repudiate *Bray*.

Defendant asks us to make an exception to the general prohibition on the use of [**314] specific conduct evidence to allow him to establish D.F.'s character for lack of truthfulness. Defendant argues for the admission of D.F.'s prior false criminal accusation for the purpose of drawing the inference that a witness who has falsely accused once will do so again. Defendant claims that even if our evidentiary rules prohibit the use of a prior false accusation to undermine the credibility of his accuser, his federal [***24] and state constitutional right to

confrontation would override those rules and compel the admission of the evidence.

B.

New Jersey's *Rules of Evidence* generally prohibit evidence of "a person's character or a trait of his character" offered to prove that the person acted in conformity with that trait on a particular [*140] occasion. N.J.R.E. 404(a). The general prohibition on the use of character evidence, however, is subject to a number of exceptions. See N.J.R.E. 404(a)(1) to (3) . We address one such exception in this case, the use of evidence of a witness's character for untruthfulness to attack that witness's credibility at trial. N.J.R.E. 404(a)(3), 608.

N.J.R.E. 608 provides that

> [t]he credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, 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 for truthfulness has been attacked by opinion or reputation evidence or otherwise. Except as otherwise provided by Rule 609 [prior conviction], a trait of character [***25] cannot be proved by specific instances of conduct.

Thus, our rules permit evidence in the form of opinion, reputation, or a prior criminal conviction to attack a witness's credibility by establishing the witness's character for untruthfulness. N.J.R.E. 608, 609. A party may introduce such evidence for the purpose of asking a jury to draw an inference that a witness with a reputation for untruthfulness is capable of lying on the stand. However, evidence of specific instances of conduct--other than a prior conviction--to prove the character trait of untruthfulness is prohibited. N.J.R.E. 608. For example, we do not allow a party to attack a witness's general credibility through the introduction of specific evidence that the witness falsely completed a licensing application. *See, e.g.*, State v. De Paola, 5 N.J. 1, 9-10, 13, 73 A.2d 564 (1950) (finding reversible error to permit cross-examination testimony of defendant about false answers he provided in application for liquor license for purpose of showing defendant was unworthy of belief).

N.J.R.E. 404(a)(2) provides for the broader use of character evidence against a victim by allowing the introduction of [***26] "[e]vidence of a pertinent trait of character of the victim of the crime." The character trait of untruthfulness is but one of a number of traits that might apply to a victim-witness. We note that veracity is a pertinent character trait whenever a victim gives testimony. The proof requirements when using character evidence against a [*141] victim are the same as under N.J.R.E. 608. Proof of that character trait must be by "evidence of reputation, evidence in the form of opinion, or evidence of conviction of a crime which tends to prove the trait," and not by "[s]pecific instances of conduct not the subject of a conviction." N.J.R.E. 405(a). Specific instances of conduct are admissible, however, when a character trait is an "essential element of a charge, claim, or defense," as in a defamation case. N.J.R.E. 405(b), 404(c). In this case, character is not directly at issue, and, therefore, [**315] the general prohibition on specific conduct evidence applies.

C.

The general principle embodied in N.J.R.E. 608 and 405(a) originated in the common law. Accordingly, we must examine the rationale for the common law rule barring the use of specific conduct evidence to challenge a witness's credibility [***27] for truthfulness. We must determine whether that rule has continuing vitality when applied to evidence of

a victim-witness's prior false accusation.

Several centuries ago, courts began to prohibit the use of prior instances of conduct to attack the credibility of a witness for two essential reasons: to prevent unfairness to the witness and to avoid confusion of the issues before the jury. 3A *Wigmore on Evidence* § 979, at 823, 827 (Chadbourn rev.1970). Those reasons remain the present justification for the exclusion of specific conduct evidence. *Id.* at 823, . The use of prior instances of misconduct to impeach credibility was considered to be unfair to the witness because "it would be practically impossible for the witness to have ready at the trial competent persons who would demonstrate the falsity of allegations that might range over the whole scope of his life." *Id.* at 826,. Thus, the rule was designed to prevent unfair foraging into the witness's past, as well as unfair surprise.

The second rationale for the bar on specific conduct evidence was the concern that such wide-ranging collateral attacks on the [*142] general credibility of a witness would cause confusion of the [***28] true issues in the case. *Ibid.* Courts were reluctant to permit testimony on minor points that would invite more tangential testimony relating to the witness's character for truthfulness, needlessly protracting the trial "with relatively little profit." *Ibid.* Modern courts continue to cite that rationale--the avoidance of "minitrials" on collateral matters that "tend to distract and confuse the jury"--as the primary justification for the exclusion of prior acts evidence. *Carter v. Hewitt, 617 F.2d 961, 971 (3rd Cir.1980).* It was not a lack of relevance that gave rise to the rule prohibiting evidence of prior instances of untruthful conduct to impeach the witness's credibility, but the "auxiliary policies" regarding unfairness to the witness, confusion of issues, and undue consumption of time. *Wigmore, supra,* § 979, at 827.

When those "auxiliary policies" do not apply, the rationale for the exclusion of such evidence no longer exists. *Ibid.* An example is the long-standing rule allowing the admission of a prior criminal conviction as a method of undermining the general credibility of a witness. *Id.* § 980, at 828. The use of a prior criminal conviction [***29] does not require the calling of witnesses because "the judgment cannot be reopened and no new issues" are raised. *Ibid.* In addition, there is no danger of unfair surprise because the witness presumably is aware of his own record of conviction. *Ibid.* Similarly, our rules permit testimony in the form of an opinion regarding a witness's reputation for lack of truthfulness in the community because the scope of inquiry is limited and the witness is protected against a prolonged excursion on a collateral matter. *See State v. Polhamus, 65 N.J.L. 387, 388, 47 A. 470 (1900)* (stating that law supposes that impeached witness is "capable of supporting his reputation for truthfulness whenever it is attacked"). In short, our rules recognize the power and relevance of evidence relating to a witness's character for truthfulness. However, we prohibit the use of specific instances of conduct to prove a character trait for pragmatic reasons associated with [**316] the efficient and orderly presentation of a trial.

[*143] D.

Long before New Jersey codified its *Rules of Evidence,* our courts recognized the common law rule that "proof of particular independent facts, though bearing upon [***30] the question of veracity" may not be employed for the purpose of discrediting the character of a witness. *State v. Hendrick, 70 N.J.L. 41, 45, 56 A. 247 (1903).* Although earlier cases decided under the codified *Rules of Evidence* followed the common law and disallowed evidence of a prior false charge to impeach the credibility of the accuser, more recent cases have parted

from that strict formula. [1]

In *State v. Mondrosch, 108 N.J. Super. 1, 2-5, 259 A.2d 725 (App.Div.1969),* [***31] *certif. denied, 55 N.J. 600, 264 A.2d 71 (1970)*, a burglary case, the Appellate Division interpreted former *Evidence Rules* 22 and 47, predecessors to *N.J.R.E. 608*, consistent with the common law tradition. The court ruled that the defendant could not impeach the prosecution's primary witness, a police officer, by eliciting evidence that the officer "had previously falsely accused certain persons of committing criminal acts." *Id. at 4, 259 A.2d 725*. The court concluded that the "evidence of specific instances of [the officer's] past misconduct" proffered to impugn his credibility was inadmissible because such evidence was "explicitly limited" by former *Evidence Rules* 22 and 47. *Id. at 4, 5, 259 A.2d 725*.

In *State v. Hummel, 132 N.J. Super. 412, 418, 334 A.2d 52 (App.Div.), certif. denied, 67 N.J. 102, 335 A.2d 54 (1975)*, the defendant-foster father was charged with sexually abusing two minor children in his care. The defendant attempted to impeach the credibility of his two young female wards by presenting evidence that they had previously fabricated "a serious matter" [*144] and that one had made an accusation against her uncle similar to the one made against [***32] the defendant. *Id. at 427, 334 A.2d 52*. Construing former *Evidence Rule* 22, the Appellate Division upheld the trial court's exclusion of that impeachment evidence, reasoning that the "defendant's approach was improper both in the character traits it sought to establish and in the use of specific instances of conduct to establish these traits." *Ibid.* The court found that the evidence of prior accusations did not "show bias against this defendant or a motive to fabricate." *Id. at 428, 334 A.2d 52*. Instead, the court found that the evidence was offered to show an "instability of character" on the part of both girls, and that one possessed an "accusatory trait." *Id. at 427, 334 A.2d 52*. The court concluded that the evidence was inadmissible under our evidence rules and its exclusion did not violate the defendant's confrontation rights. *Id. at 427-28, 334 A.2d 52*.

A different approach was taken in evaluating the use of a prior false accusation under the current version of the *Rules of Evidence* in *State v. Ross, 249 N.J. Super. 246, 592 A.2d 291 (App.Div.1991)*. In that case, the defendant was convicted of criminal charges related to the sexual [***33] abuse of a ten-year-old child based on the child's uncorroborated testimony. *Id. at 247, 592 A.2d 291*. In reversing, the Appellate Division concluded that the prosecutor acted [**317] improperly by suggesting in summation that the alleged victim's youth and inexperience precluded her from fabricating the allegations when the prosecutor knew that the child had claimed to have been abused twice before. *Id. at 248-50, 592 A.2d 291*. The court ordered that on remand a hearing should be held to address the admissibility of the evidence relating to the prior accusations. *Id. at 252, 592 A.2d 291*. In directing that the defendant should be "accorded a full opportunity to explore the issue of the truth or falsity of the victim's allegations of prior abuse," the court noted:

> If there were a judicial determination that these allegations were probably false, the incidents could no longer be characterized as sexual conduct, proof of which is barred

---

[1] *N.J.R.E. 608*'s general bar on the use of specific conduct evidence to prove or disprove a trait of character, such as truthfulness, remains, in substance, unchanged from its earlier version, former *Evidence Rule* 22, which states "evidence of specific instances of his conduct, relevant only as tending to prove a trait of his character, shall be inadmissible." *See State v. Hummel, 132 N.J. Super. 412, 427, 334 A.2d 52 (App.Div.), certif. denied,* ***67 N.J. 102, 335 A.2d 54 (1975)***.

by the Rape Shield Law. Rather, proof of the probably false allegations themselves would be admissible to impeach the victim's credibility. See, e.g., State v. Barber, 13 Kan. App. 2d 224, 766 P.2d 1288 (Kan.App.1989). If [***34] on the other hand, the allegations were deemed to be probably true, they might be held to be admissible [*145] either, as in [State v. Budis, 125 N.J. 519, 593 A.2d 784 (1991)], to offer an alternative source of sexual knowledge, or, depending on the circumstances surrounding the reporting of these incidents by the victim to her mother, to offer a motive for the child to have made a false accusation.

[*Ibid.* (emphasis added).]

The Appellate Division in *Ross* did not analyze how "probably false allegations" could be admitted to impeach the credibility of the accuser-witness consistent with the language of N.J.R.E. 608. The court did, however, intimate by its reference to a Kansas case, *State v. Barber,* that barring such evidence would violate the defendant's right of confrontation. In Barber, supra the Kansas Court of Appeals stated that its evidentiary rule (similar to our N.J.R.E. 608), prohibiting evidence of a witness's specific conduct to prove a trait of character, "must bend," under certain circumstances, to the defendant's constitutional right of confrontation. 766 P.2d at 1290. Finding that the defendant's confrontation [***35] rights trumped the evidentiary rule barring specific conduct evidence, the Kansas Court of Appeals concluded that "in a sex crime case, the victim/complaining witness may be cross-examined about prior false accusations, and if she denies making those accusations, defendant may put on evidence of those accusations." *Ibid.* The Kansas court, however, conditioned admissibility of the evidence on a judicial finding of a "reasonable probability" that the accusation is false. *Ibid.*

In State v. Bray, supra the Appellate Division reaffirmed the holding in *Ross* and allowed the admission of evidence of a prior false criminal allegation, provided that the evidence met "applicable evidentiary requirements." 356 N.J. Super. at 496, 813 A.2d 571. In *Bray,* the defendant was convicted of various crimes related to his sexual assault of K.P. when she was less than thirteen years old. Id. at 488-89, 813 A.2d 571. In the process of responding to police questioning concerning her allegations against the defendant, K.P., then nearly fourteen years old, stated that she had been sexually abused at the age of three or four by a person named Detrick. Id. at 488, 813 A.2d 571 [***36] . At his trial, the defendant was precluded from examining K.P. about the sexual [*146] abuse allegation against Detrick--who had denied the allegation--or to call witnesses to prove its falsity for the purpose of attacking K.P.'s credibility. Id. at 488-89, 813 A.2d 571.

In reviewing the defendant's petition for post-conviction relief, the Appellate Division reasoned that the Rape Shield Law, which generally prohibits the disclosure of [**318] a victim's prior sexual conduct, did not apply because false allegations do not constitute previous sexual conduct as defined in N.J.S.A. 2C:14- 7f. Id. at 494-95, 813 A.2d 571. The appellate panel found that the trial court, at a minimum, should have taken testimony from K.P., K.P.'s mother, and Detrick, and ordered a remand for the trial court to conduct an evidentiary hearing to determine whether K.P.'s allegations "were probably false." Id. at 495-97, 813 A.2d 571. The admission of the prior false accusation was made subject to the requirements of various evidence rules, including N.J.R.E. 401, 403, and 608. Id. at 496, 813 A.2d 571. The panel did not decide whether a prior false allegation introduced to establish a victim-witness's character [***37]

for lack of truthfulness passed muster under those evidence rules. Instead, the trial court was instructed to consider a non-exclusive set of factors in deciding the admissibility of the evidence:

> [the] defendants right of confrontation; whether the evidence was relevant to the defense; whether its probative value outweighs its prejudicial effect; whether or not the prior allegations closely resemble the acts alleged in the indictment; the difference in the age and maturity of the child at the time of the prior allegations as compared with the age and maturity of the child at the time of the incidents complained in the indictment; and whether such evidence would create confusion of the issues or unwarranted invasion of the privacy of the victim.
>
> [*Id. at 497, 813 A.2d 571* (internal citations omitted).]

In the present case, the appellate panel, quoting *Bray*, remanded for a hearing to determine whether D.F.'s prior allegations are probably false and, if so, whether the evidence in support of those allegations is admissible under *N.J.R.E. 401, 403, 607*, and *608*. The panel directed the trial court on remand to consider the same factors enunciated in *Bray*.

[*147] The appellate [***38] panels in *Ross*, *Bray*, and this case never analyzed whether a prior false accusation was admissible under *N.J.R.E. 608*. That rule simply states that a "trait of character cannot be proved by specific instances of conduct." *N.J.R.E. 608*. We conclude that a prior false allegation is not admissible to impeach the general credibility of a witness under a plain reading of *N.J.R.E. 608*. The next issue is whether an exception to *N.J.R.E. 608* is warranted under limited circumstances and, if not, whether the Federal and State *Confrontation Clauses* compel the admission of that evidence.

E.

The *Sixth Amendment to the United States Constitution* and *Article I, Paragraph 10 of the New Jersey Constitution* guarantee a criminal defendant the right to confront "the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." *U.S. Const. amend. VI*; *N.J. Const. art. I, P 10*. We have observed that both rights are essential to a "'fair opportunity to defend against the State's accusations,'" and are, therefore, essential for a fair trial. *State v. Garron, 177 N.J. 147, 169, 827 A.2d 243 (2003)* (quoting *Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 1045, 35 L. Ed. 2d 297, 308 (1973)*), [***39] *cert. denied, 540 U.S. 1160, 124 S. Ct. 1169, 157 L. Ed. 2d 1204 (2004)*. A defendant's right to confrontation is exercised through cross-examination, which is recognized as the most effective means of testing the State's evidence and ensuring its reliability. *Lilly v. Virginia, 527 U.S. 116, 124, 119 S. Ct. 1887, 1894, 144 L. Ed. 2d 117, 126 (1999)*; [**319] *California v. Green, 399 U.S. 149, 158, 90 S. Ct. 1930, 1935, 26 L. Ed. 2d 489, 497 (1970)* (stating that cross-examination is "'greatest legal engine ever invented for the discovery of truth'") (quoting 5 *Wigmore* § 1367); *Pointer v. Texas, 380 U.S. 400, 404, 85 S. Ct. 1065, 1068, 13 L. Ed. 2d 923, 926 (1965)*.

The right to confrontation and compulsory process are intended to accommodate "legitimate interests in the criminal trial process, such as established rules of evidence and procedure [*148] designed to ensure the fairness and reliability of criminal trials." *Garron, supra, 177 N.J. at 169, 827 A.2d 243* (quoting *Chambers, supra, 410 U.S. at 295, 302, 93 S. Ct. at 1046, 1049, 35 L. Ed. 2d at 309, 313*); *see also State v. Budis, supra, 125 N.J. at 531-32, 593 A.2d 784*. [***40] Those

rights, however, do not bow to "the mechanistic application of a state's rules of evidence or procedure [that] would undermine the truth-finding function by excluding relevant evidence necessary to a defendant's ability to defend against charged offenses." *Garron, supra, 177 N.J. at 169, 827 A.2d 243* (citing *Chambers, supra, 410 U.S. at 302, 93 S. Ct. at 1049, 35 L. Ed. 2d at 313*; *Budis, supra, 125 N.J. at 532, 593 A.2d 784*).

The United States Supreme Court decision in *Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974)*, provides the paradigm by which to examine the tension between a states evidentiary rule and a defendants confrontation rights. *Davis* held that the *Sixth Amendment* right to confrontation trumped a state statute and procedural rule protecting the privacy of a juvenile's delinquency record. *Id. at 319, 94 S. Ct. at 1111-12, 39 L. Ed. 2d at 355*. While serving a probationary term for a juvenile delinquency adjudication, the State's key witness in *Davis* cooperated with the prosecution and gave testimony implicating the defendant in a burglary. *Id. at 310-11, 94 S. Ct. at 1107, 39 L. Ed. 2d at 350.* [***41] The defendant sought to show that the juvenile witness, due to his vulnerable probationary status, had an incentive to cooperate and curry favor with the State. *Id. at 311, 94 S. Ct. at 1108, 39 L. Ed. 2d at 351*. The defendant intended to impeach the juveniles credibility by revealing his bias toward the prosecution. *Ibid.* Because Alaska's statutory and procedural provisions placed a cloak of confidentiality over the juveniles records, the trial court barred any cross-examination on the juveniles adjudication or his probationary status. *Ibid.* The Supreme Court recognized the privacy interests at stake, but concluded that "[t]he State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for [*149] bias of an adverse witness." *Id. at 320, 94 S. Ct. at 1112, 39 L. Ed. 2d at 356*.

In reversing the defendants conviction in *Davis,* the Supreme Court distinguished between a general attack on credibility and a more particular attack on credibility. *Id. at 316, 94 S. Ct. at 1110, 39 L. Ed. 2d at 353-54*. As the [***42] Court noted, the use of a prior conviction for the purpose of having a jury "infer that the witness character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony" is a general attack on credibility. *Ibid.* The examination of a witness "directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case" is a particular attack on credibility. *Ibid.* The Court suggested that a particular attack on credibility is entitled to special protection under the *Confrontation Clause*. *Id. at 316-17, 94 S. Ct. at 1110-11, 39 L. Ed. 2d at 353-54*. The Court "recognized that the exposure of a witness motivation [such as bias] in testifying is a proper and important function of the constitutionally protected right [**320] of cross-examination." *Ibid.* On the other hand, there was no suggestion in *Davis* that the use of the prior juvenile record to impeach the witness's character for truthfulness--a general attack on credibility--in violation of Alaska's rules would have been compelled under the *Confrontation Clause.* Justice Stewart, in [***43] his concurring opinion, drove home the point by stating, "I would emphasize that the Court neither holds nor suggests that the Constitution confers a right in every case to impeach the general credibility of a witness through cross-examination about his past delinquency adjudications or criminal convictions." *Davis, supra, 415 U.S. at 321, 94 S. Ct. at 1112-13, 39 L. Ed. 2d at 356* (Stewart, J., concurring).

Since *Davis*, the United States Supreme Court has not decided a case in which the *Confrontation Clause* has overridden a states rule barring evidence introduced for the sole purpose of attacking general credibility. *Quinn v. Haynes, 234 F.3d 837, 846 (4th Cir.2000), cert. denied, 532 U.S. 1024, 121 S. Ct. 1968, 149 L. Ed. 2d 762 (2001)*. The Supreme Court has shown considerable deference to evidence rules that are deeply rooted in the common law and that promote the efficient and orderly presentation of reliable [*150] evidence. *See, e.g., White v. Illinois, 502 U.S. 346, 356, 112 S. Ct. 736, 743, 116 L. Ed. 2d 848, 859 (1992)* (stating that *Confrontation Clause* is not violated when hearsay is of sufficient [***44] reliability to come within firmly rooted exception to hearsay rule); *Idaho v. Wright, 497 U.S. 805, 816-17, 110 S. Ct. 3139, 3147, 111 L. Ed. 2d 638, 653 (1990)* (same).

In this case, defendant argues that the *Confrontation Clause* takes precedence over the common law rule embodied in *N.J.R.E. 608* to the extent that that rule bars impeachment of a witness with a prior false criminal accusation. In *Davis, supra* the *Confrontation Clause* was the means for upholding the long-standing common law rule that bias is never collateral. *415 U.S. at 316-17, 94 S. Ct. at 1110, 39 L. Ed. 2d at 354*; *see also Greene v. McElroy, 360 U.S. 474, 496, 79 S. Ct. 1400, 1413, 3 L. Ed. 2d 1377, 1390-91 (1959)* (noting that ability of accused to challenge witness's motivation by showing "malice, vindictiveness, intolerance, prejudice, or jealousy" has "ancient roots" that have "remained relatively immutable in our jurisprudence"). Here, unlike *Davis* defendant contends that the common law rule embodied in *N.J.R.E. 608* must give way to the superior claim of the *Confrontation Clause*. Undoubtedly, the *Confrontation Clause* was not intended to [***45] sweep aside all evidence rules regulating the manner in which a witness is impeached with regard to general credibility. *See Davis, supra, 415 U.S. at 321, 94 S. Ct. at 1112, 39 L. Ed. 2d at 356* (Stewart, J., concurring). Today, we conclude that creating a limited exception to *N.J.R.E. 608* to allow a prior false accusation to be used to impeach a victim-witness's credibility will promote fairness in the trial process and is not inconsistent with the rationale underpinning the rule. Because we decide the issue on state grounds, we need not address the constitutional question arising under the Federal *Confrontation Clause*. *See In Re New Jersey Am. Water Co., 169 N.J. 181, 197, 777 A.2d 46 (2001)* (stating that "courts should not reach constitutional questions [*151] unless necessary to the disposition of the litigation") (citation omitted).

F.

As noted, *N.J.R.E. 608* follows the common law rule and does not allow the use of specific instances of conduct, such as a prior false accusation, to impeach a witness's character for truthfulness. Various courts across the nation have addressed the issue whether a defendant may impeach [**321] the credibility of a witness-accuser [***46] by showing that the witness made a prior false criminal accusation. Notwithstanding the common law bar, in sexual crime cases many courts have permitted cross-examination of a witness-accuser who has falsely alleged a sexual crime on a previous occasion. A number of courts also permit the introduction of extrinsic evidence to prove the point. Some courts have carved out an exception to their rules of evidence; others have found justification in the Federal *Confrontation Clause* or in their own states *Confrontation Clause*.

Unlike New Jersey, many states have codified a rule similar to *Fed. R. Evid. 608(b)*, which provides:

> Specific instances of the conduct of a

> witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. *They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another [***47] witness as to which character the witness being cross-examined has testified.*
> [(Emphasis added.)]

Under that rule, with the permission of the court, a defendant is allowed to cross-examine his accuser about a prior false criminal accusation that is probative of the witness's character for truthfulness. *Ibid.* The caveat is that under the federal rule the defendant is bound by the witness's response and may not introduce extrinsic evidence to disprove the witness's denial. *Ibid.*

Maine, Maryland, Missouri, New Mexico, Ohio, Tennessee, Vermont, and Wisconsin follow the federal rule and allow cross-examination concerning a prior false accusation that is probative of the witness's character for truthfulness, but do not allow the [*152] use of extrinsic evidence to contradict the witness's answer or to prove the character trait. *See, e.g., State v. Almurshidy, 1999 ME 97, 732 A.2d 280, 287 n.4 (Me.1999); State v. Cox, 298 Md. 173, 468 A.2d 319, 323-24 (Md.1983); State v. Raines, 118 S.W.3d 205, 211-14 (Mo.Ct.App.2003); State v. Scott, 113 N.M. 525, 828 P.2d 958, 962-63 (N.M.Ct.App.1984); State v. Boggs, 63 Ohio St. 3d 418, 588 N.E.2d 813, 816-17 (Ohio 1992);* [***48] *State v. Wyrick, 62 S.W.3d 751, 780-82 (Tenn.Crim.App.2001); State v. Leggett, 164 Vt. 599, 664 A.2d 271, 272 (Vt.1995); State v. Olson, 179 Wis. 2d 715, 508 N.W.2d 616, 619-20 (Wisc.Ct.App.1993), reh'g denied, 515 N.W.2d 715 (Wis.1994).*

Alaska, Arizona, Arkansas, Idaho, New Hampshire, and Nevada also have evidence rules similar to the federal rule, but have relaxed those rules in sexual crime cases to allow the admission of extrinsic evidence of an accuser's prior false sexual crime allegation. *See, e.g., Morgan v. State, 54 P.3d 332, 336 (Alaska Ct.App.2002); State v. Hutchinson, 141 Ariz. 583, 688 P.2d 209, 212-13 (Ariz.Ct.App.1984)* (interpreting *State ex rel Pope v. Superior Court, 113 Ariz. 22, 545 P.2d 946, 953 (Ariz.1976)*); *West v. State, 290 Ark. 329, 719 S.W.2d 684, 686-87 (Ark.1986)*, reh'g *denied,290 Ark. 340A, 290 Ark. 329, 722 S.W.2d 284 (1987); State v. Schwartzmiller, 107 Idaho 89, 685 P.2d 830, 833 (Idaho 1984); State v. Gordon, 146 N.H. 258, 770 A.2d 702, 704-05 (N.H.2001);* [***49] *Miller v. State, 105 Nev. 497, 779 P.2d 87, 89-90 (Nev.1989).*

Massachusetts and Oregon, which like New Jersey follow the common law rule, have recognized a limited exception to allow cross-examination of an accuser who has made a prior false sexual crime allegation when the case involves a similar [**322] crime, but disallow extrinsic evidence. *See, e.g., Commonwealth v. Bohannon, 376 Mass. 90, 378 N.E.2d 987, 991 (Mass.1978); State v. Driver, 192 Ore. App. 395, 86 P.3d 53, 55-58 (Or.Ct.App.2004).* Kansas, Georgia, Indiana, Louisiana, and Virginia, which also follow the common law rule prohibiting specific conduct evidence relating to character, have suggested that the defendant's right to confrontation in a sexual crime case allows cross-examination of the accuser-witness and the admission of extrinsic evidence to prove the witness's [*153] prior false sexual crime accusation. *See, e.g., State v. Barber, supra, 766 P.2d at 1290 (Kan.); Smith v. State, 259 Ga. 135, 377 S.E.2d 158, 160 (Ga.), cert. denied, 493 U.S. 825, 110 S. Ct. 88, 107 L. Ed. 2d 53 (1989);*

Little v. State, 413 N.E.2d 639, 643-44 (Ind.Ct.App.1980); [***50] *State v. Smith, 743 So. 2d 199, 202 (La.1999)*; *Clinebell v. Commonwealth, 235 Va. 319, 368 S.E.2d 263, 266, 4 Va. Law Rep. 2497 (Va.1988)*.

Texas, which has an evidence rule similar to New Jersey's, has embraced a case-by-case analysis to determine whether a defendant's right to confrontation requires relaxation of the bar on specific conduct evidence in all cases in which an accuser has made a prior false criminal allegation--not just sexual crime cases. *See Lopez v. State, 18 S.W.3d 220, 225 (Tex.Crim.App.2000)* (declining "to create a *per se* exception to the *Rule 608(b)* for sexual offenses" because "[i]t makes no sense to say that certain factors will always be present in a case involving a sexual offense").

Some Federal Courts of Appeals that have addressed the use of a prior false accusation to undermine the credibility of an accuser-witness have determined that restrictions on the admissibility of extrinsic evidence do not violate the *Sixth Amendment* right to confrontation. *See, e.g., Boggs v. Collins, 226 F.3d 728, 736-40 (6th Cir.2000), cert. denied, 532 U.S. 913, 121 S. Ct. 1245, 149 L. Ed. 2d 152 (2001)*; [***51] *Hogan v. Hanks, 97 F.3d 189, 191 (7th Cir.1996), cert. denied, 520 U.S. 1171, 117 S. Ct. 1439, 137 L. Ed. 2d 546 (1997)*; *United States v. Bartlett, 856 F.2d 1071, 1088-89 (8th Cir.1988)*.

Several jurisdictions have recognized that prior false accusations of sexual crimes by the accuser may be admissible for reasons unrelated to impeachment of general credibility--to prove the accuser's habit, state of mind, motive, or common scheme. *See, e.g., Peeples v. State, 681 So. 2d 236, 237-39 (Ala.1995)* (habit); *People v. Hurlburt, 166 Cal. App. 2d 334, 333 P.2d 82, 87 (Cal.Dist.Ct.App.1958)* (state of mind); *State v. Anderson, 211 Mont. 272, 686 P.2d 193, 199, 201 (Mont.1984)* (state of mind, motive, and bias). There is no evidential bar to such an approach in New Jersey, *see N.J.R.E. 404(b), 608*, but defendant in this case has presented no proof that [*154] would remotely place the prior accusation within the realm of habit, intent, or common scheme.

Those jurisdictions that permit evidence of prior false criminal accusations in sexual crime cases condition the admissibility of such [***52] evidence on a preliminary judicial finding. Some jurisdictions require that the prior accusation be shown to be "demonstrably false." *See, e.g., Little, supra, 413 N.E.2d at 643 (Ind.Ct.App.); State v. Sieler, 397 N.W.2d 89, 92 (S.D.1986)*; *Berry v. Commonwealth, 84 S.W.3d 82, 91 (Ky.Ct.App.2001)*. Others have articulated varying standards of proof for determining whether the witness made the accusation and whether it was false: clear and convincing evidence, *Gordon, supra, 770 A.2d at 704, 705 (N.H.)*; preponderance of the evidence, *Morgan v. State, 54 P.3d 332, 339 (Alaska Ct.App.2002)*; or "a reasonable probability of falsity," *Smith, supra, 377 S.E.2d at 160 (Ga.)*; *Barber, supra, 766 P.2d at 1290 (Kan.Ct.App)*; [**323] *Clinebell, supra, 368 S.E.2d at 266 (Va.)*. *See also Smith, supra, 743 So. 2d at 203 (La.)* (stating judge must determine "whether reasonable jurors could find, based on the evidence presented by defendant, that the victim had made prior false accusations").

III.

A.

We conclude that in limited circumstances and under very strict controls a defendant has the [***53] right to show that a victim-witness has made a prior false criminal accusation for the purpose of challenging that witness's credibility. Although our *Confrontation Clause* jurisprudence informs our decision, we do not decide this issue on constitutional grounds, but

rather by making a narrow exception to N.J.R.E. 608 consistent with the rationale of that rule.

A witness's propensity for making false criminal allegations is admissible if presented in the proper form. For instance, under our evidence rules, a witness may testify in the form of an opinion [*155] that the victim has a reputation for lying, and the defendant may argue from such testimony that the victim is, therefore, not worthy of belief. N.J.R.E. 608. Moreover, a criminal conviction may be used to impeach the witness for the purpose of drawing an inference that the witness's testimony is not as trustworthy as that of a person with a blameless past. *See* N.J.R.E. 608, 609. Both examples are permissible attacks on the general credibility of a witness; neither imposes the burden of a mini-trial.

That a victim-witness uttered a prior false accusation may be no less relevant, or powerful as an impeachment tool, than opinion testimony [***54] that the witness has a reputation for lying. Moreover, a prior criminal conviction for criminal mischief or aggravated assault probably has far less bearing on the trustworthiness of a victims testimony than a prior false accusation, but there is no question concerning the admissibility of the prior conviction. Yet, proving a prior false accusation--unlike presenting reputation testimony or evidence of a prior conviction--if not strictly regulated, could cause the very type of sideshow trial that N.J.R.E. 608 was intended to prevent. We are confident, however, that trial courts, with proper guidance and limitations, can decide appropriately when the admission of prior false accusation evidence is central to deciding a case that hinges on the credibility of a victim-witness. Trial courts are well qualified to determine when such evidence will create the prospect of a mini-trial and when the probative value of that evidence is outweighed by the risk of undue prejudice, confusion of the issues, or waste of time. *See* N.J.R.E. 403. In certain cases, we believe that the interests of justice require that we relax the strictures against specific conduct evidence in N.J.R.E. 608. The weight [***55] of authority from other jurisdictions generally favors that approach, though we chart a path consistent with our own jurisprudence and values.

We see no reason why prior false accusation evidence should be limited to cases in which the witness is the victim of a sexual crime. We, therefore, part from those jurisdictions that have modified their evidence rules, whether on constitutional or non-constitutional [*156] grounds, only in sexual crime cases. We are not aware of any empirically-based evidence that sexual crime victim-witnesses are more likely to have made prior false criminal allegations than other crime victims. Limiting such evidence to sexual crime cases would only appeal to stereotypes that we have long since banished from our jurisprudence. *See* Denise R. Johnson, [**324] *Prior False Allegations of Rape: Falsus in Uno, Falsus in Ominibus, 7 Yale J.L. & Feminism 243, 247-64 (1995)* (criticizing courts nationwide that distinguish between sexual crime cases and other cases when permitting use of prior false criminal accusations as character evidence).

B.

We now must determine the circumstances that will justify the admission of prior false accusation evidence. [***56] First, we limit our holding to a criminal case that involves the impeachment of a victim-witness whose credibility was the central issue in the case. The trial in this case essentially was reduced to a credibility contest between the victim and defendant. Second, the introduction of the prior false accusation evidence cannot become the tail wagging the dog; that is, proof of the false accusation cannot become such a

diversion that it overshadows the trial of the charges itself. On the one extreme, we will have the witness who admits the false accusation on cross-examination, averting the need for extrinsic evidence. *See Carter v. Hewitt, 617 F.2d 961, 971 (3rd Cir.1980)* (noting that "reasons for barring extrinsic evidence lose their force when the witness whose credibility is challenged concedes the alleged acts" because "no trial is needed since the matter is conceded"). At the other extreme, we will have the witness who claims that the prior accusation is true, in which case only a complete trial of that issue will determine the truth or falsity of the accusation. In keeping with the historical rationale for the common law rule now codified in *N.J.R.E. 608*, we disfavor [***57] using the trial of charged offenses as the forum for an [*157] extended mini-trial for the collateral determination of a prior criminal accusation.

C.

In deciding whether to permit the impeachment of a victim-witness who allegedly made a prior false accusation, trial courts must first conduct an admissibility hearing pursuant to *N.J.R.E. 104*. At that hearing, the court must determine by a preponderance of the evidence whether the defendant has proven that a prior accusation charging criminal conduct was made by the victim and whether that accusation was false. That standard strikes the right balance, placing an initial burden on the defendant to justify the use of such evidence while not setting an exceedingly high threshold for its admission. We note that the admission of this type of specific conduct evidence is an exception to *N.J.R.E. 608* and should be limited only to those circumstances in which the prior accusation has been shown to be false. Among the factors to be considered in deciding the issue of admissibility are:

1. whether the credibility of the victim-witness is the central issue in the case;
2. the similarity of the prior false criminal accusation to the crime [***58] charged;
3. the proximity of the prior false accusation to the allegation that is the basis of the crime charged;
4. the number of witnesses, the items of extrinsic evidence, and the amount of time required for presentation of the issue at trial; and
5. whether the probative value of the false accusation evidence will be outweighed by undue prejudice, confusion of the issues, and waste of time.

If the court, pursuant to its gate-keeping role, determines that evidence of the prior false accusation is admissible, the court has the discretion to limit the number of witnesses who will testify concerning the matter at trial. The court must ensure that testimony on the subject does not become a second trial, eclipsing the trial of the crimes charged.

[*158] [**325] D.

Whether defendant in this case may introduce evidence of D.F.s previous false criminal accusation is a matter for the sound discretion of the trial court on remand at a *N.J.R.E. 104* hearing. We do make these observations, however, regarding the issues that will face the trial court. The State has argued that any presentation of the false accusation issue at trial will require no less than nine witnesses. We disagree based [***59] on our review of the letters from the two school officials. D.F. allegedly told two classmates at her middle school, J.O. and D.D., that a neighbor had sexually abused her. J.O. and D.D. reported what they had learned from D.F. to a counselor, Mary Ellen Cordisco. Ms. Cordisco then met with D.F. in the presence of J.O. and D.D. At that meeting, although D.F. at first denied ever telling J.O. and D.D. that she had been sexually abused by her neighbor, she finally admitted that she told the story and that it was a lie. That same day, Vice Principal

Johan E. de Brigard questioned D.F. in the presence of Ms. Cordisco and her two classmates. Ms. de Brigard disclosed to D.F. what she had learned. At that time, D.F. became upset that J.O and D.D. had revealed such intimate information to others. D.F. confessed that what she told her classmates concerning the sexual abuse by her neighbor "was a lie."

Assuming that Ms. Cordisco and Ms. de Brigard testify consistently with the letters they forwarded to the Ocean County Prosecutors Office, their testimony alone, if believed, would be sufficient to establish that D.F. made an accusation of a criminal nature that she knew to be false. If D. [***60] F. admits to making the false accusation, then there would be no need for the defense to call any witnesses to prove the point. Of course, D.F. would have the opportunity to give an explanation for making the false report. On the other hand, if D.F. denies ever making the allegation to J.O and D.D., as she did when questioned by members of the prosecutors office, then defendant could rebut that testimony by calling the two school officials. We give this guidance for the [*159] purpose of suggesting that it is possible to present this issue economically, without calling redundant witnesses, confusing the issues and causing a sideshow. Of course, we have before us only a documentary record, and the trial court on remand, in determining admissibility, must take testimony and make the appropriate findings from that testimony.

E.

In this case, we are not creating a new rule of evidence, but merely carving out a narrow exception to the common law rule embodied in N.J.R.E. 608 for the purpose of permitting the jury to consider relevant evidence--in clearly defined circumstances--that may affect its estimation of the credibility of a key witness. As noted, many jurisdictions already allow the [***61] impeachment of a witness who has made a prior false criminal accusation. N.J.R.E. 102 tells us that our codified rules of evidence "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." We have recognized that our constitutional authority over the practice and procedure in the courts empowers us to make adjustments to the evidence rules "on a unilateral basis" when the fairness and truth-seeking function of a trial will be enhanced. *Jacober v. St. Peter's Med. Ctr.*, 128 N.J. 475, 494, 608 A.2d 304 (1992).

In *Jacober,* we adopted the federal formulation of the learned treatise rule, allowing the admission into evidence of an authoritative treatise or text that has been established as a reliable authority "by expert [**326] testimony or by judicial notice." *Id. at 478, 498, 608 A.2d 304.* Before *Jacober,* learned treatises were used to impeach an expert witness's credibility on cross-examination only when that witness cited to the treatise in his report or testimony or conceded on cross-examination that the treatise was an authority in the field. *See Ruth v. Fenchel*, 21 N.J. 171, 175-76, 179, 121 A.2d 373 (1956). [***62] In *Jacober,* we stated that "[a]lthough the *Evidence Act* provides the usual mechanism for adopting new [*160] rules, certain areas of evidence law 'will continue to develop on a case-by-case decisional basis.'" *Id. at 493, 608 A.2d 304* (quoting V. Biunno, *Current N.J. Rules of Evidence,* Preliminary Comments at xvii (1991)). We cited former *Evidence Rule* 5 (now N.J.R.E. 102) for the proposition that "[t]he adoption of [the *Rules of Evidence*] shall not bar the growth and development of the law of evidence in accordance with fundamental principles to the end that the truth may be fairly ascertained." *Ibid.* We also drew a distinction between creating a new rule of evidence and "modifying a pre-existing common-law rule." *Id. at 494, 608 A.2d 304.* The limited exception to

N.J.R.E. 608 that we now recognize will enhance the truth-seeking function of the trial and is a proper subject of this Court's jurisdiction because of our constitutional responsibility to ensure that trials achieve reliable and just outcomes. *See* N.J. Const. art. 6, § 2, P 3 ("The Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such [***63] courts.").

We have held that significant changes to the *Rules of Evidence* "should be adopted in accordance with the prescribed statutory procedure." State v. D.R., 109 N.J. 348, 352, 375-76, 537 A.2d 667 (1988) (holding Appellate Division's unilateral adoption of new evidence rule inappropriate given "serious and far-reaching nature of the rule"). The exception to N.J.R.E. 608 that we recognize in this opinion is limited to the impeachment of a victim-witness whose credibility is the central issue in a criminal case. Whether the use of a prior false criminal allegation to impeach credibility should have wider application in other circumstances is a matter that "would benefit from more deliberate study." Id. at 376, 537 A.2d 667. Accordingly, we refer that issue for review to this Court's standing Committee on the Rules of Evidence for any recommendations to this Court not inconsistent with this opinion.

IV.

We, therefore, affirm the judgment of the Appellate Division and remand for a hearing to determine the admissibility of the [*161] prior false criminal accusation alleged to have been made by D.F. If the trial court finds that evidence of the prior accusation should have [***64] been admitted pursuant to the standards set forth in this opinion, then a new trial shall be granted. If the evidence of the prior accusation is deemed inadmissible, then the conviction shall stand. This matter is remanded to the trial court for proceedings consistent with this opinion.

End of Document

Report of the Supreme Court Committee on the Rules of Evidence

REPORT OF THE NEW JERSEY SUPREME COURT
COMMITTEE ON THE RULES OF EVIDENCE

To the Honorable Chief Justice Robert N. Wilentz
and the Associate Justices of the
Supreme Court of New Jersey

The task which you assigned to the Committee was to consider whether or to what extent New Jersey should adopt the Federal Rules of Evidence which are now followed by many states. You perceived that the bench and bar might benefit by this uniformity. New Jersey attorneys who appear in federal courts, and in the courts of sister states which have adopted the federal rules, would be conversant with a common body of law. In addition, judges and attorneys would gain insight and understanding in using the rules of evidence by the availability of a wider body of precedent. In considering the adoption of the federal rules, we were authorized to review their substance and to recommend appropriate changes.

The rules presented in this Report reflect what our Committee perceived as the best of the 1967 New Jersey Rules of Evidence and the 1975 Federal Rules of Evidence as amended. Both sets of rules have much in common; they both derived from the 1953 Uniform Rules of Evidence.

In working on this project the Committee examined in detail the New Jersey rules and the federal rules as a whole, the substance and wording of each individual rule, and issues in cases spawned by the rules. We considered the interplay between the rules of evidence and the Rules of Court, because the admissibility of evidence is affected occasionally by both sets of rules. For example, R. 4:16-1(c) provides for the use of testimony given in depositions. In general, these proposed rules of evidence do not address matters of practice and procedure, although some rules may be said to fall into that category, such as Rule 615 dealing with sequestration of witnesses.

The Committee represented all segments of the profession. It was composed of practicing attorneys, prosecuting attorneys, public and private defense counsel, judges, and academics who teach evidence at law schools in this state. Many of the published opinions on our law of evidence were written by judges serving on the Committee. Several of our members had the advantage of having participated in the judicial conference which considered the 1963 report of the committee whose invaluable work, Report of the Supreme Court Committee on Evidence, was the foundation for the 1967 rules. Many members of the Committee had worked on the ad hoc committee whose recommendations for amending several evidence rules were previously adopted. See, for example, the amendments to N.J. Evid. R. 13 to 15, 20, 56, and 63(1)(a) and the commentary published in 108 N.J.L.J. 293, 301-302 (1981).

We did not have the services of an official reporter. As a result, this product represents the work of the Committee members themselves. The Committee took a practical approach based on the experience of its members in living with the 1967 rules. Nevertheless, our debates often returned to first principles.

The rules contained in this Report may be characterized broadly as follows. The organization essentially follows the format of the federal rules. Thus, the rules are divided into eleven articles. The number of each rule corresponds to the number of the federal rule with occasional deviations necessitated by some differences in approach, most noticeable in the organization of the hearsay exceptions in Article VIII. Those changes in organization, however, do not affect precepts of admissibility.

In general, we have adopted 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, especially when it reflected a resolution of previous controversy over important principles. For example, Rule 609 embodies the holding of State v. Sands, 76 N.J. 127 (1978), as to the use of prior convictions for impeachment purposes, and Rule 607 retains vestiges of the voucher rule found in N.J. Evid. R. 20. Frequently, language changes were made without intending any change in substance. The wording of some 1967 rules was retained when we considered it superior to the corresponding federal rules. The purpose was to improve the clarity of expression of numerous rules so that they could be better understood and applied.

These rules differ in many respects from the federal and 1967 New Jersey rules. We broadened some rules, tightened others, omitted some federal rules entirely, corrected aspects of the 1967 Rules to the extent that they conflicted with established practice (for example, N.J. Evid. R. 2 as to scope of application), and filled in gaps in the law not covered by the 1967 Rules. The overall effect, however, is neither startling nor radical and will not substantially alter prevailing practice, although there are some important changes which are noted in the Comments. The similarities between the federal rules and the 1967 New Jersey rules are far greater than their differences, and the perception of the Committee is that the New Jersey rules have worked well for the most part. Nevertheless, we endeavored to improve the substance and language of the rules. In the main,

basic principles which served the interests of justice well in the past have been retained. We relied heavily on the valuable work of our colleagues and predecessors. With the adoption of this revision of the rules of evidence, New Jersey should continue to move forward in modernizing the law of evidence as was done in this state in 1967 and by the United States in 1975.

The law of evidence is not static. This is not the last word. But we hope to have contributed logic and good sense to this body of law and something to its beauty.

Respectfully submitted,

NEW JERSEY SUPREME COURT COMMITTEE ON RULES OF EVIDENCE

Hon. Theodore I. Botter, Chair

Jeffrey Blitz
Hon. Warren Brody
John Cannel
Hon. Philip Carchman
Marina Corodemus
Richard Carley
Robert Carter
Alfred C. Clapp*
Hon. Erminie L. Conley
Hon. William Dreier
Zulima V. Farber
Hon. E. Stevenson Fluharty
Hon. Myron Gottlieb
*Deceased

Francis Hartman
Hon. Michael P. King
Hon. Sylvia B. Pressler
Michael Risinger
Robert E. Rochford
Hon. Edwin H. Stern
Harvey Weissbard

Joyce Usiskin, Staff Representatives of the Administrative Office of the Courts

Charles Hollenbeck, NJSBA Former Staff of the Administrative Office of the Courts

June 1991

Summary Analysis of Evidence Rule Changes

ARTICLE I - GENERAL PROVISIONS

101 - Scope, Applicability

(a)(1) - privileges (no substantial change)

(a)(2) - relaxation: the proposed rule collects all the various proceedings and circumstances in which the rules of evidence may be relaxed, including small claims proceedings, statutory stipulations, sentencing and disposition proceedings, probable cause hearings and hearings to determine admissibility (present Rule 8, proposed Rule 104. While this rule accords with present practice, the only relaxation provision in the present rules is small claims, which this rule amends by making clear that the relaxation provision applies to all matters within small claims jurisdiction, whether or not brought there initially.

(a)(3) - administrative proceedings: the proposed rule clarifies and expands the present rule to include all administrative hearings: contested, uncontested, formal or informal.

(a)(4) - undisputed facts: the proposed rule extends the binding stipulation of fact provision of the present rule to criminal actions.

(b) definitions: the proposed rule preserves only three of the present fourteen definitions: burden of proof, burden of producing evidence, and writing. Relevance is defined by proposed 401 and some other definitions are provided by the hearsay rules. The omitted definitions were considered too obvious or unhelpful for inclusion.

102 - Purpose and Construction. Essentially unchanged

103 - Federal Rule 103 (rulings on evidence). Not adopted since this material is covered by rules of procedure.

104 - Preliminary Questions. Substantially unchanged, except for the addition of (d), taken from the federal rule and consistent with N.J. practice, providing that testimony by an accused on preliminary hearing does not subject him to cross-examination on other issues.

105 - Limited Admissibility. Changes present rule by requiring the party to request a limiting instruction and by expressly authorizing the judge to permit a party to waive the limiting instruction.

106 - Remainder of or Related Writings or Recorded Statements. The proposed rule follows the federal rule by permitting the adverse party to require the proferring party to introduce any other relevant portion of the statement or other writing bearing on the issue. There is no such present evidence rule although the rules of procedure to some extent so provide. This accords with present practice.

ARTICLE II - JUDICIAL NOTICE

201 - Judicial Notice of Law and Adjudicative Facts. By and large the substance of the proposed rule follows the present rules more closely than the federal rule but the material has been reorganized consistently with the federal rule, replacing present Rules 9, 10, and 11. The main change is in 201(g) which provides, for sixth amendment confrontation purposes, that the judge's instruction as to the conclusiveness of judicially noticed fact is limited to civil cases. In criminal cases, the jury cannot be compelled to accept a judicially noticed fact.

202 - Judicial Notice in Proceedings Subsequent to Trial. The proposed rule follows the present N.J. rule in both substance and format rather than the analogous federal rule.

ARTICLE III - PRESUMPTIONS

301 - Effect of Presumption. Substantially unchanged.

302 - Choice of Law. - The proposed rule follows the federal rule; there is no New Jersey analogue. It provides that the law of existence and effect of presumption follows the law governing the claim or defense to which it relates. The rule expressly applies only to civil actions.

303 - Presumptions Against the Accused in Criminal Cases. There is no analogous state or federal rule. The proposed rule follows well-established New Jersey case law on the effect of statutory presumptions and instructions to juries where presumed facts are involved. The proposed rule follows, generally, the 1974 Uniform Rules of Evidence. The rule replaces N.J. Evid. R. 15, which was adopted as a stop-gap measure.

ARTICLE IV - RELEVANCY AND ITS LIMITS

401 - Definition of Relevant Evidence. The proposed rule is substantially the same as the present rule, substituting however for the phrase "material fact", the phrase "fact of consequence to the determination of the action."

402 - Relevant Evidence Generally Admissible. Substantially unchanged.

403 - Exclusion of Relevant Evidence. Substantially the same as present rule with new introductory phrase cross-referencing to other rules and statutes.

404 - Character Evidence Not Admissible to Prove Conduct. The proposed rule replaces present Rules 46,48, 55 and part of 47, generally following the federal formulation without substantial change in New Jersey practice except to render clearly inadmissible proof of a trait of character for the purposes of drawing inferences as to conduct on a specific occasion. Trait of character is consequently only admissible where it itself is in issue or to affect credibility in accordance with proposed Rule 608.

405 - Methods of Proving Character. Proposed paragraph (a)(reputation, opinion, or conviction of crime) is substantially unchanged, rejecting the federal provision permitting general inquiry on cross-examination into specific instances of conduct. Proposed paragraph (b)(specific instances of conduct when an essential element of a charge, claim or defense) follows the federal formulation without change in New Jersey practice.

406 - Habit, Routine Practice. The proposed rule generally follows present Rules 49 and 50. There is no federal analogue to paragraph (b).

407 - Subsequent Remedial Measures - The proposed rule, in addition to streamlining and clarifying the verbiage of present Rule 51, also makes clear that proof of subsequent remedial measures is admissible for purposes other than proof of negligence such as control, routine maintenance, feasibility and credibility. This comports not only with the federal analogue but with New Jersey case law.

408 - Settlement Offers and Negotiations - The proposed rule follows the formulation of the federal analogue which is more felicitously phrased than the New Jersey rule, also making clear its applicability to statements and conduct of the parties' attorneys as well as those of the parties themselves. It also expands the issues as to which such proof may be introduced from "accord and satisfaction" only, as at present, to a purpose other than validity or amount of the claim. It expressly provides that otherwise relevant evidence to be admitted despite its disclosure during settlement negotiations.

409 - Payment of Medical and Similar Expenses - The proposed rule follows the federal rule which is consistent with the principles of N.J. Evid. R. 52(1), although expressed in different terms.

410 - Inadmissibility of Pleas, Plea Discussions and Related Statements - The proposed rule expands the formulation of the present New Jersey rule, also overruling case law which permitted admissibility of statements made by defendant during unconsummated plea negotiations. The verbiage generally follows the federal analogue.

411 - Liability Insurance -- The proposed rule follows the federal formulation and changes the N.J. Evid. R. 54 by making clear that while evidence of insurance is not admissible to prove negligence or wrongdoing, it may be admitted for other purposes such as proof of ownership, agency, control or bias.

412 - Federal Rule 412 (rape-shield law). Not adopted. This subject is covered by N.J.S.A. 2A:2C: 14-7, which is not proposed to be changed at this time. Note, however, that recent decision (see State v. Budis) challenge a literal interpretation of 2C:14-7(c), suggesting that a future change may be necessary depending on the substantive nature of Supreme Court review.

ARTICLE V - PRIVILEGES

No change is suggested in any of the statutory formulations constituting the rules of privilege. The statutes are merely restated in this draft.

ARTICLE VI - WITNESSES

601 - General Rule of Competency - The proposed rule reflects current practice, collecting the cognate provisions of present Rules 7(a) and (b) and 17 (a) and (b). It adds a sentence to accommodate questioning of a child of tender years as to sexual activity pursuant to proposed Rule 804(b)(8) notwithstanding the child may be incompetent to testify as a witness. See present Rule 63(33).

602 - Lack of Personal Knowledge - The proposed rule follows the federal formulation, making no substantial change in New Jersey practice.

603 - Oath or Affirmation - The proposed rule makes no substantial change in the present rule.

604 - Interpreters - The proposed rule codifies the practice of requiring the interpreter to take an oath or affirmation that he will interpret accurately. It rejects, as confueing, the federal stipulation that the interpreter is subject to "qualification as an expert," leaving the qualifications of the interpreter to be determined by the judge.

605 - Restriction on Judge as Witness - The proposed rule follows the federal formulation which is not substantially different from the present New Jersey rule.

606 - Restrictions on Juror as Witness - The proposed rule is substantially the same as both the analogous federal and present state rule.

607 - Credibility and Neutralization - The proposed rule follows, almost verbatim, present Rule 20, whose formulation was deemed preferable to the federal rule.

608 - Evidence of Character for Truthfulness or Untruthfulness - The proposed rule generally follows the federal formulation, remaining consistent with N.J.Evid. R. 47.

609 - Impeachment by Evidence of Crime - There is no present New Jersey rule, but rather a statute N.J.S.A. 2A:81-12, which was interpreted by State v. Sands. For completeness, the substance of that statute is followed by this rule and the federal formulation is rejected in favor of Sands, which is intended to be incorporated into the rule by its reference to the judge's discretion. The proposed rule, by its silence on the subject, follows New Jersey case law and rejects the contrary provision of the federal rule respecting the inadmissibility for impeachment purposes of a conviction pending appeal.

610 - Religious Beliefs or Opinions - There is no present New Jersey rule other than the privilege of N.J.S.A. 2A:84A-24 (reiterated by present Rule 30 and proposed Rule 512). The proposed ruie follows the federal rule and is not inconsistent with the privilege.

611 - Mode and Order of Interrogation and Presentation - The proposed rule follows the federal rule almost verbatim. While there is no New Jersey analogue, the provisions of the proposed rule follow accepted New Jersey practice.

612 - Writing Used to Refresh Recollection - While there is no present New Jersey rule, the proposed rule is consistent with New Jersey practice. It generally follows the federal rule but omits the Jencks Act reference (whose substance is covered by R.3:17), makes clear that the writing used to refresh recollection has no substantive evidential import, omits the reference to preservation of excised portions (covered by R. 1:7-3), and omits the reference to sanctions (covered by various rules of practice).

613 - Prior Statements of Witnesses - The proposed rule generally follows both the federal and state analogues.

614 - Calling and Interrogation of Witnesses by Judge - The proposed rule generally follows the federal rule. While there is no New Jersey analogue, the rule comports with present New Jersey practice.

615 - Sequestration of Witnesses - While there is no present New Jersey evidence rule, there is a body of New Jersey case law on the subject. For purposes of completeness, the proposed rule merely cross-references to that body of law, thus rejecting the federal formulation.

ARTICLE VII --OPINIONS AND EXPERT TESTIMONY

701 - Opinion Testimony of Law Witness
702 - Testimony by Experts
703 - Bases of Opinion by Experts
704 - Opinion on Ultimate Issue
705 - Disclosure of Facts or Data Underlying Expert Opinion

The text of these proposed rules is substantially the same as both their New Jersey and federal analogues. Only clarifying language changes have been made as well as those format changes necessary to conform to the federal rules. Note that proposed 704 rejects the recent amendment of federal analogue barring an expert from testifying on the mental state of defendant in a criminal case.

706 - Court Appointed Experts - Federal rule 706 was not adopted since the subject is well-covered both by New Jersey case law and rules of practice. There is no New Jersey evidence rule analogue.

ARTICLE VIII --HEARSAY

801 - Definitions - The proposed rule defines six terms: statement, declarant, hearsay, business, writing and public official. The definitions of the first three make no change in the present New Jersey analogues. The definition of "business" follows the New Jersey analogue which, unlike the federal rule, includes governmental agencies. The definition of "writing" substantially broadens the form of expression included thereby. The definition of "public official" has been broadened to include federal officials. The omission of officials of the federal government from the definition in Rule 62(3) appears to have been an oversight since Rule 63(15) as initially proposed included public officials of the United States as well as state officials.

802 - Hearsay Rule - The formulation of the proposed rule follows the federal rule, broadening the New Jersey analogue by excepting not only hearsay exceptions provided for by rules of evidence but also those provided for by law generally.

803 - Hearsay Exceptions Not Dependent on Declarant's Unavailability. As a general matter, the proposed rule, together with proposed Rule 804, represents a significant format change in the rules and something of a format change from the federal rules as well. First, these rules separate exceptions which are not dependent on unavailability (Rule 803) and those which are (Rule 804), a formal distinction not made by present Rule 63, which collects all exceptions. Secondly, 803(a) and 803(b)(prior statements of witnesses and statement by party-opponents) are treated differently from the federal rules. The federal rules do not consider these statements as hearsay, but rather expressly excludes them from the hearsay definition (Federal rule 801(d)). The New Jersey rules continue to regard such statements as exceptions to the hearsay rule rather than as exclusions from it. In order to maintain parallelism with federal enumeration, these two types of statements were designated as 803(a) and (b), respectively. All other hearsay exceptions not dependent on unavailability are grouped together in Rule 803(c) in the same order as in the federal rule 803.

803(a) - Prior Statements - The proposed rule makes no substantial change in the analogous New Jersey source rules, which are here reorganized. Subsection (1), dealing with the substantive use of prior inconsistent statements, is broader than the federal rule, which admits such statement sonly if they were made under oath.

803(b) - Party Statements - The proposed rule makes no substantial change in the analogous New Jersey source rules which are here reorganized.

803(c) - Hearsay Exceptions Not Dependent on Unavailability

(c)(1) - Present Sense Impression - The proposed rule includes elements of both the analogous federal and state rule, adding to the latter the provision for admissibility of a statement made immediately after the observation if the declarant had no opportunity to deliberate or fabricate. This is the standard employed by the excited utterance rule as well.

(c)(2) - Excited Utterances - The proposed rule follows the federal formulation with no substantial change in the New Jersey rule.

(c)(3) - Then Existing Mental, Emotional or Physical Condition - The proposed rule follows the federal formulation with little substantial change in but considerable streamlining of the present New Jersey Rule. This rules, however, does add the provision respecting a declarant's will for the purpose of proving probable intent.

(c)(4) - Statements for Purposes of Medical Diagnosis or Treatment. The proposed rule follows the federal formulation, substantially streamlining the present New Jersey rule with one change in substance. The present rule requires the statement to be made to a physician. In light of present-day medical practice, that restriction was deemed too narrow and was consequently deleted. Statements made in good faith to anyone for purposes of diagnosis and treatment are included in the exception.

(c)(5) - Recorded Recollection - The proposed rule is substantially the same as both the state and federal analogues, but adds to the state rule the provision permitting exclusion of the statement if made in circumstances indicating that it is not reliable.

(c)(6) - Records of Regularly Conducted Activity - The proposed rule combines provisions of both the federal and present New Jersey rule. Added to the present New Jersey rule is the provision that the record not only be made in the regular course of business but that it also be the regular practice of the business to make the record. Also added is the provision permitting admission of opinions and diagnoses contained in business records subject to Rule 808, a new provision hereafter referred to. Records prepared in anticipation of litigation are not expressly excluded as a class; that fact of preparation goes to the issue of trustworthiness. Unlike the federal rule, the rule continues to include government records. It also rejects the federal requirement that the record must be introduced by its custodian or other qualified purpose. Thus the present New Jersey practice of a general trustworthy criterion is continued.

(c)(7) - Absence of an entry in records of regularly conducted activity - The only change the proposed rule makes in the present New Jersey rule is the addition of the express provision permitting exclusion of the evidence if the source of information or other circumstances indicate that the inference of nonoccurrence is not trustworthy.

(c)(8) - Public Records, Reports , and Findings - The proposed rule follows the present New Jersey rule, rejecting two key provisions of the federal rule. First, the federal rule excludes from criminal cases statements of observations by law enforcement personnel. The proposed rule does not. Second, the federal rule includes, except against the accused in criminal cases, "factual findings resulting from an investigation." The proposed rule permits only "statistical findings" but in both civil and criminal cases.

(c)(9) - Records of Vital Statistics - The proposed rule follows the federal formulation, replacing present New Jersey Rule 63(16), which was intended, although not expressly so stated, as a "vital statistic" rule. No change in practice is intended.

(c)(10) - Absence of Public Record or Entry - The proposed rule follows the federal formulation, adding to the present New Jersey rule the express provision that the failure to discover an official record is admissible to prove not only the non-existence of the record itself but also the nonoccurrence or nonexistence of the fact not recorded.

(c)(11) - Records of Religious Organizations - The proposed rule follows the federal rule. There is no New Jersey analogue. Thus religious records may be admissible, if otherwise reliable, even if the information was not provided by a person in the regular course of that person's business.

(c)(12) - Marriage, Baptismal and Other Records - The proposed rule follows the federal rule, enlarging the present New Jersey rule, which includes only marriage certificates.

(c)(13) - Family Records - The proposed rule, admitting family records contained in Bible, genealogies, inscriptions and the like, follows the federal rule. There is no New Jersey analogue

(c)(14) - Records of Documents Affecting an Interest in Property - The proposed rule follows the federal formulation, making no substantial change in the New Jersey rule.

(c)(15) - Statements in Documents Affecting an Interest in Property - The proposed rule follows the federal formulation, making no substantial change in the New Jersey rule.

(c)(16) - Statements in Ancient Documents - The proposed rule follows the federal formulation, substituting a 30-year period for the federal rule's 20-year period. Although there is no New Jersey analogue, New Jersey has followed the 30-year common-law rule on ancient documents. Hence no practice change is made.

(c)(17) - Market Reports, Commercial Publications - The proposed rule follows the federal formulation, broadening the present New Jersey rule by including commercial publications relied on by the general public, not just by persons engaged in a particular field.

(c)(18) - Learned Treatises - The proposed rule follows the federal rule, adding the proviso respecting the display of graphics to the jury. There is no New Jersey analogue. Hence this rule changes New Jersey practice by admitting learned treatises established as authoritative even if not so acknowledged by an expert witness on cross-examination.

(c)(19) - Reputation of Personal or Family History - The proposed rule follows the federal formulation, modifying the present New Jersey rule by eliminating the requirement of Rule 63(27)(c) that the person whose history is being proved be "resident in the community at the time of the reputation."

(c)(20) - Reputation of Boundaries or General History - The proposed rule follows the federal formulation, making no substantial change in the present New Jersey rule.

(c)(21) - Reputation as to Character - The proposed rule follows the federal rule with no substantial change in the present New Jersey rule.

(c)(22) - Judgment of Previous Conviction of Crime - The proposed rule follows the present New Jersey rule, rejecting the federal provision which permits substantive use of prior convictions in criminal cases as well as civil cases to prove facts essential to the judgment.

(c)(23) - Judgments as to Personal, Family or General History - The proposed rule follows the federal formulation. Although there is no New Jersey analogue, the rule follows the common-law exception recognized by case law in this jurisdiction.

(c)(24) - Other Exceptions - The federal rule is not proposed.

(c)(25) - Statement Against Interest - The proposed rule generally follows the present New Jersey rule but deletes, as imprecise, the phrase "social interest," which is not included in the federal rule. The proposed rule rejects the federal provision which conditions admissibility on unavailability and also rejects the federal requirement of corroborating circumstances indicating trustworthiness of statements against penal interest made by another which exculpate the accused in a criminal case.

(c)(26) - Judgments Against Persons Entitled to Indemnity - The proposed rule makes no substantial change in the present New Jersey rule. There is no federal analogue.

804 - Hearsay Exceptions: Declarant Unavailable

(a) - Definition of Unavailable - The proposed rule is an amalgam of the federal and present New Jersey rules. Paragraphs (1), (2), and (3) generally follow the formulation of the federal rule without substantial change in New Jersey practice. Paragraph (4) modifies both federal and state practice by limiting the requirement that depositions first be taken or be attempted to be taken to 804(b)(4) and (7) only (personal and family history and voter statements). Paragraph (5) is included to implement the requirements respecting the admissibility of a statement by a child of sexual conduct under 804(b)(8) (present 63(33)).

(b)(1) - Testimony in Prior Proceedings - The proposed rule follows the federal formulation, differing, however, in some respects both from that rule and the present New Jersey rule in format and substance. Subsection (A) applies to testimony against a party who was a party to the prior proceeding. Such testimony is admissible if the party had the same motive and opportunity to develop the testimony in the prior case as in the instant case. Subsection (B) applies to testimony against a party who was not a party to the prior action. Such evidence is limited to civil actions and, in criminal actions, only if offered by the defendant. The criterion of similarity of motive and opportunity to develop is the same even though they may be motive and opportunity of different persons. The requirement of "predecessor in interest" of both the federal and state rule is not retained. The rule applies to depositions as well as trial testimony but excludes prior testimony of expert witnesses if similar experts are available, subject to exceptions.

(b)(2) - Statement Under Belief of Impending Death - The proposed rule, applicable to all criminal cases, follows the present New Jersey rule, rejecting the federal rule, which applies only to homicide cases but also to civil cases and also applies if the declarant survives. Statements by deceased declarants are admissible in civil cases under 804(b)(6), which follows N.J. Evid. R. 63(32).

(b)(3) - Statement against Interest - Adopted in these proposed rules as 803(c)(25)(unavailability not required).

(b)(4) - Statement of Personal or Family History - The proposed rule follows the formulation of the federal rule, making no substantial change in present Rule 63(24). It modifies present Rule 63(25), however, by eliminating the requirement of unavailability of both declarants.

(b)(5) - Other exceptions - The federal rule is not proposed.

(b)(6) - Trustworthy Statement by Deceased Declarants - The proposed rule, applicable to civil cases only, follows the present New Jersey rule. There is no direct federal analogue. See note to proposed 804(b)(2), supra.

(b)(7) - Voters' Statements - The proposed rule follows the present New Jersey rule adding the notice requirement of Rule 807. There is no federal analogue.

(b)(8) - Statements by a Child Concerning Sexual Activity - There is no federal analogue. The proposed rule makes several important changes in present Rule 63(33). It makes its provisions applicable to all types of proceedings. It substitutes the phrase "tender years" for the strict 12-year old stipulation. It does permit the hearsay admission if the declarant is able to testify fully and cogently. It permits the statement of other declarants who are physically available only if an adverse party who so requests has the opportunity to question the child. It clarifies the general standards of admissibility. Finally, it permits the adverse party to introduce other parts of the statement and other relevant statements made by the child.

805 - Hearsay Within Hearsay - The proposed rule follows the present New Jersey rule, which is consistent with the federal rule.

806 - Attacking and Supporting Credibility of Declarant - The proposed rule follows the formulation of the federal rue adding to the present state rule the provision, consistent with current state practice, that if the party against whom a hearsay statement has been admitted calls the declarant as a witness, he may examine the declarant as if under cross-examination.

807 - Discretion of the Judge to Exclude Evidence under Certain Exceptions - The proposed rule follows the present New Jersey rule which requires advance notice of an intention to offer hearsay admissible under certain designated exceptions. There is no direct federal analogue.

808 - Included Expert Opinion - The proposed provision appears in neither the federal nor the New Jersey rulesss. It permits the admission of included expert hearsay under designated indicia of trustworthiness.

ARTICLE IX - AUTHENTICATION AND IDENTIFICATION

901 - Requirement of Authentication or Identification - The proposed rule makes no substantial change in the present New Jersey rule, rejecting the detailed formulation of the federal rule.

902 - Self-Authentication - While the proposed rule follows federal formulation and format, it makes little substantial change in the New Jersey rules. Note, however, that following the federal rule, the categories of newspapers and periodicals, trade inscriptions and the like, acknowledged documents, commercial paper and statutorily presumed authenticity have been added.

903 - Testimony of Subscribing Witness Unnecessary - The proposed rule follows the federal formulation, making no substantial change in the present New Jersey rule.

ARTICLE X- CONTENTS OF WRITINGS AND PHOTOGRAPHS

1001 - Definitions - The proposed rule follows the federal format and formulation with no substantial change in New Jersey sources.

1002 - Requirement of Original - The proposed rule follows the federal format with no substantial change in the present New Jersey rule.

1003 - Admissibility of Duplicates - The proposed rule follows the federal rule. There is no New Jersey analogue, and the provision that a duplicate is admissible as an original under the circumstances specified in the rule.

1004 - Admissibility of Other Evidence of Contents - The proposed rule follows the federal formulation with no substantial change in the present New Jersey rule other than eliminating the preference for written secondary sources over oral testimony.

1005 - Public Records - The proposed rule follows the federal formulation with no substantial change in the present New Jersey rule.

1006 - Summaries - The proposed rule follows the federal rule, eliminating from the present New Jersey rule the requirement that the underlying data be routinely produced in court. This rule requires only that they be made available and produced in court only when ordered.

1007 - Testimony of Written Admission of Party - The proposed rule follows the federal rule with no substantial change in the New Jersey rule.

1008 - Functions of Judge and Jury - The proposed rule follows the federal formulation with no substantial change in the present New Jersey rule.

ARTICLE XI- MISCELLANEOUS RULES

1101 - Applicability of Rules - The federal rule is not proposed for adoption as it overlaps proposed Rule 101.

1102 - Amendment of Rules - The federal rule is not proposed for adoption. See N.J.S.A. 2A:84A-33, et seq.

1103 - Citation of Rules - The proposed rule is based on the federal rule, providing an approved citation form.

ANALYSIS OF SIGNIFICANT RULE CHANGES

This analysis summarizes the principal changes in the Rules of Evidence proposed in the June 1991 Report of the New Jersey Supreme Court Committee on the Rules of Evidence. I will also discuss significant comparisons with the Federal Rules of Evidence.

In many respects the proposed rules closely reflect the present state of New Jersey evidence law, but they have been organized and numbered according to the federal format. Overall, where differences exist substantively, the proposed rules are more akin to our present law than to the Federal Rules of Evidence. Previous amendments to the 1967 New Jersey evidence rules, such as to Rule 63(1)(a) (prior inconsistent statements) and Rule 56(2) (expert opinion), incorporated some concepts taken from the federal rules, and to a large extent the similarities in the present New Jersey rules and the federal rules are far more pervasive than their differences. It should be remembered that the New Jersey evidence rules, adopted in 1967, and the federal rules, adopted in 1975, derived, in different degrees, from the 1953 Uniform Rules of Evidence.

The following comments deal with significant differences from the federal rules and changes and additions to the 1967 New Jersey Rules of Evidence as amended to date, which are contained in the rules proposed in the Committee's June 1991 Report.

1. Prior inconsistent statements of a non-party witness.

In proposed Rule 803(a)(1) and Rule 607, we retain existing provisions of N.J.Evid.R. 63(1)(a) and N.J.Evid.R. 20. These rules had been amended in 1982, with 63(1)(a) borrowing a small part of the concept contained in federal Rule 801 (d)(1)(A). However, we then adopted a much broader rule than the federal rule, retaining the original form of the 1967 version of 63(1)(a) to admit for substantive use a prior inconsistent statement of a non-party witness made in any form so long as the witness was not called by the party offering the extra-judicial statement. The federal rule limits the substantive use of prior inconsistent statements to those made under oath at a trial, hearing, deposition or other proceeding, no matter which party offers the prior statement. Under our proposed Rule 803(a)(1), a prior inconsistent statement made by a party's own witness can be used substantively only if it was made under oath or in writing made or signed by the declarant, or is contained in a sound recording.

In amending Rule 63(1)(a) in 1982 it was felt that the requirement that the prior inconsistent statement be made under oath was too narrow and limiting. A sound recording or written record made or signed by the declarant was deemed of sufficient reliability for the purpose, and a statement in any form, even an informal verbal statement, made in circumstances indicating reliability, should suffice as to another party's witness, since the witness can, in testimony, deny or explain the extra-judicial statement.

Thus, the Committee felt that our rule is and has been a better rule than its federal counterpart.

2. Attacking the credibility of a witness by a prior inconsistent statement.

Under N.J.Evid.R. 20, a party calling a witness may not neutralize his testimony by a prior inconsistent statement unless the statement is in a form admissible under Rule 63(1)(a) or the judge finds that the party calling the witness was surprised by his testimony. This reflects to some extent the common law "voucher" principle. This rule is continued in proposed Rule 607. It is narrower than federal rule 607 which permits the credibility of a witness to be attacked by any party, including the party who called the witness, without limitation on the use of prior inconsistent statements for the purpose. Whether the narrower New Jersey rule is better may be debated. A broader rule was proposed in the 1963 Report of the New Jersey Supreme Court Committee on Evidence ("The 1963 Report") but was rejected. See also a proposed amendment to Fed. R. Evid. 607 that would impose stricter conditions for admission of a prior inconsistent statement offered by the party calling the witness. A.B.A. Section of Litigation, Proposed Amendments to the Federal Rules of Evidence (1985) at p. 75.

Our Committee adhered to the present form of Rule 20, as it was broadened somewhat in 1982 to admit statements under oath, sound recordings or writings as in 63(1)(a) for this purpose. This modification of Rule 20 produced a comfortable compromise.

3. Supporting the credibility of a witness by character evidence.

N.J.Evid. 20, as adopted in 1967, provided that "[n]o evidence to support the credibility of a witness shall be admitted except to meet a charge of recent fabrication of testimony." Evidence of a witness' trait of character for truthfulness could not be offered generally unless the credibility of the witness had first been attacked. See The 1963 Report at 64.

The provision of N. J. Evid. R. 20 referred to above was literally too restrictive since corroborating evidence is frequently introduced which has the incidental effect of supporting the credibility of a witness. Thus, when N. J. Evid. R. 20 was amended in 1982, that sentence was revised to provide that "a prior consistent statement" of the witness could not be admitted to support his credibility except to meet an express or implied charge of recent fabrication (and except as otherwise provided by law, e.g., the fresh complaint rule and prior identification testimony under N. J. Evid. R. 63(1)(c)). Unfortunately, this amendment was given a broader reading than intended. See State v. Frost, 242 N. J. Super. 601, 613 (App. Div. 1990); Cogdell v. Brown, 220 N. J. Super. 330, 336 (Law Div. 1987). Relevant evidence which incidentally supports the credibility of a witness is always admissible, but evidence of the witness' truthful character could not be offered unless the witness' credibility was first attacked. State v. Johnson, 216 N.J.Super. 588, 605-607 (App. Div. 1987).

While the provisions of N. J. Evid. R. 20 have been incorporated into proposed Rule 607, as discussed above, the prior history of N. J. Evid. R. 20 requires a change in proposed Rule 608 to provide that evidence of truthful character of a witness cannot be offered unless the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise. This is not intended to alter the right of an accused in a criminal case to offer character evidence tending to rebut the likelihood that he would commit a crime. This amendment will clarify the confusion in interpreting N.J Evid. R. 20 and is consistent with Fed. Evid. R. 608(a) as well as the intent of N. J. Evid. R. 20 as adopted in 1967 and New Jersey practice prior to the 1982 amendment of that rule.

4. Public records, reports, and findings.

Proposed Rule 803(c)(8) retains the provisions of N.J.Evid.R. 63(15)(b) and rejects the provisions of federal Rule 803(8)(C) which are broader in scope (except as to evidence offered against an accused in criminal cases). The Committee also retained the present design of the 1967 New Jersey rules by including regularly conducted activities of governmental agencies in the business record rule, 803(c)(6), defining business in Rule 801(d) to include "activities of governmental agencies," as in

N.J.Evid.R. 62(5). Thus, in Rules 803(c)(6) and 803(c)(8) we have retained the pattern of our present rules, 63(13) and 63(15), maintaining two rules through which governmental records may be introduced in evidence. See State v. Matulewicz, 101 N.J. 27 (1985). The federal rules do not expressly include governmental activity within the definition of business contained in federal Rule 803(6). However, business records of government agencies are generally admissible under federal Rule 803(8).

The principal difference between our proposed Rule 803(c)(8) and federal Rule 803(8) is that we continue N.J.Evid.R. 63(15)'s limitation on the admissibility of findings in governmental investigations to "factual"-findings. Under the federal counterpart, Rule 803(8)(C), records, reports, statements or data compilations of public offices or agencies containing "factual findings resulting from an investigation made pursuant to authority granted by law," derived from trustworthy sources and circumstances, are admissible in civil cases and against the government in criminal cases. Thus, proposed Rule 803(c)(8), like N.J.Evid.R. 63(15), is narrower than the business record rule, and may serve no separate purpose unless broadened in the direction of the federal rule. This was not proposed by the Committee but is a matter for the Supreme Court's consideration. See Matulewicz, supra, in which the Court referred to the provisions of N.J.Evid.R. 63(15) which seem to exclude conclusions and opinions rather than observations or statistical findings as a "problematic exclusionary limitation." 101 N.J. at 32. Sculpting a rule that secures the benefits of governmental agencies' investigations while rejecting the impurities and disadvantages of such evidence is a difficult task. See Comment on Rule 803(c)(8) in the Committee's Report, referring to conflicts in federal decisions on the admissibility of opinions and conclusions in investigative records and evaluative reports.

5. Exclusion of expert opinion in otherwise admissible hearsay.

Proposed Rule 808 is a new rule not found in the current New Jersey or the Federal Rules of Evidence. It requires that expert opinion of a declarant who is not produced as a witness at trial be excluded from hearsay, such as business records, unless the circumstances in which the opinion was rendered, including motive, interest, contemplation of litigation, complexity of the subject matter, and likelihood of accuracy, tend to establish the trustworthiness of the opinion.

As an example, this rule would allow the exclusion of an opinion contained in a hospital record of a patient admitted for the treatment of cancer that the cause of cancer was a traumatic injury suffered in an auto accident, then in litigation, unless the medical expert is produced as a witness subject to cross-examination. The rule incorporates principles expressed in State v. Matulewicz, 101 N.J. 27, 30 (1985), holding that the admissibility of a State chemist's laboratory report identifying a substance as marijuana would depend on the method and circumstances involved in the report's preparation, the complexity or routine nature of the analysis, the degree of objectivity or subjectivity involved, the motive for untrustworthiness, and the duty of the declarant to be accurate and reliable.

This rule has been developing over time. See State v. Martorelli, 136 N.J.Super. 449 (App. Div. 1975), certif. denied, 69 N.J. 445 (1976) (blood alcohol report in hospital record) and dicta in Gunter v. Fischer Scientific American, 193 N.J.Super. 688, 694 (App. Div. 1984) and Lazorick v. Brown, 195 N.J.Super. 444, 451 (App. Div. 1984). Notwithstanding the complexity of the condition which is the subject of the expert opinion, many records containing such opinions, particularly hospital records, are routinely admitted without objection. However, where the conclusion expressed is a matter of dispute, and may be critical to the outcome of the case, judges should be aware of their discretion to exclude opinions of questionable trustworthiness unless the expert is produced as a witness. The rule is intended to embody principles found in case law and recognized by other authorities. See McCormick on Evidence (Cleary 2d ed. 1972), §313 at 732; 4 Weinstein's Evidence, par. 803(6)[06], 803-199 to 201 (1988).

6. Presumptions in civil cases.

The presumption provisions of proposed Rule 301 generally follow its federal counterpart and existing New Jersey law. The Committee considered adopting the "Morgan view" which was incorporated in Rule 301 of the Uniform Rules of Evidence (1974), and was proposed to the United States Supreme Court by its Advisory Committee on Rules of Evidence, namely, that a presumption should not disappear in the face of evidence on the subject as in the classical "Thayer view," but should serve to shift the burden of persuasion to the party against whom the presumption operates. E.M. Morgan, "Instructing the Jury Upon Presumptions and Burden of Proof," 47 Harv. L. Rev. 59, 83 (1933). That position was rejected by our Committee and is expressly rejected by federal Rule 301 as adopted by Congress. By contrast, the California Evidence Code, successfully or not divides all presumptions into those which affect the burden of producing evidence (§603) and those which affect the burden of proof, i.e., persuasion (§605), and undertakes the task of allocating a number of existing presumptions to one or the other of these categories. The New York State Law Revision Commission, in its 1982 Proposed Code of Evidence, recommended adoption of the "Morgan" view, shifting the burden of persuasion to the party against whom the presumption operated. §302, at 24 (West. Pub. Co.). But the Committee recognized that no one rule can ideally give the appropriate effect to all presumptions. Id. at 26.

The large number and variety of presumptions, their different purposes, and the differing probative force of the factual inferences on which they are based make it difficult to provide comfortably in one rule for all eventualities. For example, the presumption that a driver is the agent of a motor vehicle's owner may serve a purpose in the absence of any evidence on the subject, but in many circumstances it may be a highly unlikely inference. Should the presumption do more than shift the burden of producing evidence on the issue? It may be sufficient to provide, as in Rule 301, that the inferences that may be drawn from the evidence remain in the case, and to consider the presumed fact established from proof of the basic fact in the absence of contradictory evidence.

7. Presumptions against the accused in criminal cases.

Rule 303 is new. It deals with the effect of presumptions in criminal cases and incorporates principles of constitutional law enunciated in both federal and New Jersey cases. A proposed federal rule for presumptions in criminal cases was not adopted. The 1967 New Jersey rules did not contain a separate rule on the subject. As a result, N.J.Evid.R. 15 was adopted in 1982 as a stop-gap measure to assure that Rules 13 and 14 were not used against an accused in criminal cases by virtue of N.J.S. 2C:1-13(e). The Committee considers Rule 303 a useful addition to New Jersey law.

8. The residual hearsay exception in federal rules 803(24) and 804(b)(5).

A significant difference between the Committee's Report and the federal rules is the rejection of residual exceptions to the hearsay rules contained in the federal enactment that permit "other" unspecified exceptions to the hearsay rules in limited instances. A general rule permitting any evidence rule to be "relaxed" in civil cases in the interest of justice was proposed as Rule 2(4) in The 1963 Report, but it was not adopted.

Federal Rules 803(24) and 804(b)(5) are identical and are carefully crafted to meet rare exceptional needs. Ironically, a residual exception was made part of Rule 803 (which applies whether or not the extra-judicial declarant is available as a witness) as well as Rule 804, which conditions the admission of hearsay statements of declarants only when they are unavailable as witnesses. There should be no need for a residual exception in Rule 803 if the declarant is available as a witness.

The federal residual exception rules contain strict criteria for admissibility in addition to advance notice to an adversary of an intention to introduce such hearsay evidence. The conjoined criteria for admissibility are:

a. the statement is offered as evidence of a material fact;

b. the statement is more probative on the issue that any other evidence reasonably available;

c. the interests of justice and the general purposes of the evidence rules will best be served by admission of the hearsay statement; and,

d. The statement is not covered by an express hearsay exception but has equivalent circumstantial guarantees of trustworthiness.

The federal courts have not been consistent in the application of these criteria, some being less strict than others. One general problem is whether the rule can be applied to admit a type of hearsay which is governed by an express exception if the conditions of that exception have not been satisfied. The terms of the rules suggest otherwise. Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd., 500 F.Supp. 1190, 1262-1263 (E.D. Pa. 1980); but cf. Lloyd v. American Export Lines, Inc., 580 F.2d 1179 (3d Cir. 1978), cert. denied., 439 U.S. 969 (1979) (concurring opinion).

In the search for truth there is often a gnawing temptation to use some seemingly reliable evidence of a material fact in the absence of other probative evidence or which appears superior to other available evidence on the issue. The case often used to prove the need for such a rule is Dallas County v. Commercial Union Assurance Co., Ltd., 286 F.2d 388 (5th Cir. 1961). The case was cited in The 1963 Report to support its relaxation proposal, and by the Report of Senate Committee on the Judiciary, in support of its amendment to add a residual exception rule to the proposed federal rules.

The issue in the Dallas County case was whether the county courthouse tower collapsed because it was struck by lightning, for which there was insurance coverage, or because of structural weakness and deterioration. There was evidence of charcoal and charred timbers present. However, the insurer offered in evidence an article published 56 years earlier in a local newspaper describing a fire in the courthouse while it was under construction. The court held that the article was admissible out of necessity as trustworthy hearsay, consistent with the rationale of the ancient document exception, but not admitted as such nor as a business record.

The federal rule is not as broad as Rule 2(4) proposed in The 1953 Report, and does require warning to an adversary in

advance of trial, a condition not contained in proposed Rule 2(4). Advance notice to an adversary tends to reduce the fear of uncertainty that unspecified exceptions engender.The Supreme Court may wish to consider the possibility that within a state system greater discipline may be exercised to appiy the criteria of the rule more strictly than in the far-flung federal court system.

9. Statements of a child concerning sexual activity.

Rule 804(b)(8) makes significant changes in N.J.Evid.R. 63(33) which was adopted in 1989 pursuant to authority of Joint Resolution No. 4, 1989, following principles announced in State v. D.R., 109 N.J. 348 (1988). The Committee's proposed rule is consistent with D.R.'s holding, but it contains important differences: (a) it limits the rule to statements of a child who is unavailable as a witness or cannot give full and cogent testimony; (b) the child must be of "tender years" rather than under 12 years of age; (c) the rule is not limited to criminal actions but may be applied in all actions and proceedings; and (d) it contains more detailed criteria for admissibility of the out-of-court statement.

Thus, the rule narrows N.J.Evid.R. 63(33) by excluding hearsay statements of an available witness who is able to give full and cogent testimony concerning the substance of the statement (see Rule 804(5)), since there is no need for such hearsay to be used substantively in such cases, as distinguished from its use as a fresh complaint when appropriate. But it broadens N.J.Evid.R. 63(33) to make it applicable to all proceedings, civil as well as criminal.

There is no Federal Rule of Evidence on this subject.

10. Inadmissibility of plea discussions and withdrawn guilty pleas, and related statements.

Rule 410 generally follows Fed.R.Evid. 410 and contains provisions not present in our current rules of evidence. It protects against the use of guilty pleas that have been withdrawn and statements made in the course of the plea proceeding as well as during plea negotiations if a guilty plea was not effectively consummated. If adopted, it would supersede the holding in State v. Boyle, 198 N.J.Super. 64, 69-73 (App. Div. 1984). The rule is consistent with N.J.Evid.R. 52(2) (evidence that defendant offered to plead guilty to a lesser offense or upon terms is inadmissible against him in that criminal proceeding) and State v. Boone, 66 N.J. 30 (1974), but it covers more ground. This is a protective rule similar to but broader than Rule 52(2) as originally proposed in The 1963 Report. N.J.Evid. R. 52(2) was narrowed when adopted in 1967, and the Boyle case was faithful to that rule in the form in which it was adopted. Rule 310 would add broader protections in both civil and criminal actions for withdrawn guilty pleas and statements made during plea negotiations that were not consummated by effective guilty pleas, subject to exceptions, including use in a criminal proceeding for perjury. The federal rule was seen as a needed improvement to current New Jersey law.

11 Learned treatises.

Proposed Rule 803(c)(18) follows Fed. R. Evid. 803(18) and changes New Jersey practice. A similar rule was proposed in The 1963 Report as Rule 63(31) but was not adopted. As a result we have no rule governing learned treatises in our present rules of evidence, and our practice is more restrictive than the proposed rule.

Rule 803(c)(18) would allow the use of learned treatises as evidence, although not accepted as authoritative by a witness cross-examined on the subject, providing it is established as authoritative by other testimony or by judicial notice. The work may be read into evidence as substantive evidence although not received as an exhibit. Its use is not limited to the function of impeaching an expert on cross-examination who acknowledges the text as a recognized authority, as in Ruth v. Fenchel, 21 N.J. 171, 176-179 (1956).

The proposed rule has long had the widespread approval of scholars of the law of evidence. The 1963 Report, at 213. Adoption of this rule is overdue.

12. Declarations against interest.

The federal rules assign declarations against interest (extra-judicial statements against declarant's pecuniary or proprietary interest or which expose declarant to civil or criminal liability) to the category of hearsay which requires proof that declarant is unavailable as a witness. Fed. Evid. R. 804 (b)(3). Consistent with N.J.Evid.R. 63(10), the Committee rejected this principle and, in proposed Rule 803(c)(25), continued this hearsay exception whether declarant is available or not.

13. Testimony in Prior Proceedings.

Proposed Rule 804(b)(1) is similar both to its federal counterpart and N.J.Evid. R. 63(3) in a number of respects but differs from both rules. Unavailability of the declarant as a witness is a condition of admissibility of prior testimony, as in the present rule.

Proposed Rule 804(b)(1) is divided into two parts, respectively applicable to cases (A) in which the former testimony is offered against a party who was a party to the earlier proceeding and to cases (B) in which it is offered against a party who was not in the prior proceeding. In both instances the rule requires that the opportunity and motive to develop the earlier testimony by examination or cross-examination be the same or similar to that which the party against whom the evidence is offered has in the present proceeding. If the party against whom the evidence is offered was not a party to the earlier proceeding, it is admissible in civil cases and when offered by the defendant in criminal cases, provided the party who offered it or against whom it was offered in the prior proceeding had an interest as well as the opportunity and motive to develop the testimony identical or similar to that of the party against whom it is later offered.

The federal rule admits the testimony in a civil case if the party against whom it is offered was a party to the earlier action or proceeding or was a "predecessor in interest." This language is narrower than the proposed rule, tempting federal courts to read "predecessor in interest" broadly and not literally. Lloyd v. American Export Lines, Inc. 580 F.2d 1179 (3d. Cir.), cert. denied 439 U.S. 969 (1978); but cf. In re Screws Antitrust Litigation, 526 F. Supp. 1316, 1319 (D. Mass. 1981). The proposed rule would include predecessors in interest in category (B), but that provision is not limited to such parties. Note that Rule 63(3) used the successor-in-interest criterion with respect to testimony offered by a party in the earlier proceeding. The proposed rule is also broader than N.J. Evid.R. 63(3)(a) with respect to the use of prior depositions in that the present rule applies only to de bene esse depositions. While the proposed rule is slightly more flexible than N.J.Evid. R. 63(3), the criteria must be carefully applied to assure a just result.

The proposed rule contains a limitation with respect to the admissibility of expert testimony given in a prior proceeding, namely, the requirement of a finding that experts of "like kind" are not readily available and that the interests of justice require admission of the prior testimony. See Thompson v. Merrell Dow Pharmaceuticals, Inc., 229 N.J.Super. 230, 252 (App. Div. 1988); cf. Sacawa v. Polikoff, 150 N.J.Super. 172, 177-179 (App. Div. 1977). This limitation is not contained in the federal or state analogues. But see Carter-Wallace, Inc. v. Otte, 474 F.2d. 529, 535-537 (2d Cir. 1972), cert. denied 412 U.S. 929 (1973), to the same effect.

14. Dying Declarations.

Proposed rule 804 (b)(2) follows N.J.Evid. R. 63(5) but requires prior notice to an adversary of an intention to offer such hearsay, a condition not presently required. Cf. N.J.Evid. R. 64, making prior notice a condition for admitting hearsay under certain rules if the statement is in writing. Rule 804 (b)(2) differs in a number of respects from its federal counterpart. The present and proposed New Jersey rules are limited to criminal proceedings and to statements of victims who are dead. Cf. N.J. Evid. R. 63(32) and proposed Rule 804(b)(6) for admission in civil proceedings of trustworthy statements of declarants generally who are dead. The federal rule is limited to statements "concerning the cause or circumstances of what the declarant believed to be impending death"; and the only type of criminal case in which the evidence is admissible is a homicide case. The New Jersey rule is not so limited.

The federal rule stays close to the common-law origin of the rule, that the declarant be a victim of homicide, but it recognizes also that the declarant's psychological or religious impulse for veracity justifies admission in civil cases. It continues the limitation to homicide in criminal cases and the limitation on the subject matter of the declaration, namely, the cause or circumstances of declarant's impending death. The New Jersey rule, which requires the death of the declarant, does not limit the statement to the cause or circumstances of his impending death, which he believed was imminent. The statement may be on another subject, provided it was made voluntarily and in good faith. As noted above, there is no need to apply the rule to civil cases in view of the broader state rule admitting trustworthy statements of persons who are unavailable as witnesses because of their death. N.J.Evid. R. 63(32) and proposed Rule 804(b)(6). But the proposed rule leaves one gap in criminal cases which is covered by the federal rule: dying declarations of declarants who survive the impending death but are, nevertheless, unavailable as witnesses. The Committee chose not to close this small gap.

15. Admissibility of Duplicates.

Proposed Rule 1003 alters our present "best evidence" rule by admitting duplicate writings without proof of the unavailability of the original, subject to an exception if the authenticity of the original is questioned or other circumstances make it "unfair" to admit the duplicate rather than the original. This is consistent with provisions found currently in many contracts making a duplicate the equivalent of an original.

CONCLUSION

In addition to substantive changes, some of which are discussed above, numerous language and organizational changes in the rules of evidence were made in an effort to improve the rules and their interpretation. A brief rule by rule summary has been prepared by Sylvia B. Pressler, P.J.A.D. and is attached as a "Summary Analysis of Evidence Rule Changes."

My references to positions taken by the Committee should not suggest that its members agreed unanimously with the Report as a whole or with all the individual rules contained in the Report. The rules of evidence will never be static or beyond debate; they will always be subject to varying judgments as to logic, need and fairness.

Almost 25 years have passed since this body of law was reviewed as a whole in New Jersey. We have our own experience to consider as well as the federal rules which followed, and the interpretation and controversy their adoption and application engendered. See, for example, A.B.A. Section of Litigation, Emerging Problems Under the Federal Rules of Evidence (1983). The Committee's Report will serve to stimulate discussion and improvement of the rules proposed here. Some will argue against change. Some attorneys, skilled in advocating their cause and partisan by habit, will argue against narrowing some rules or loosening others. At the very least, merging the New Jersey rules with the federal rules, selecting the best portions of each, with one set of numbers, should benefit New Jersey trial attorneys in state and federal courts and will expose the bench and bar to a larger field of decisional law and academic comment. More than one-half of our sister states have adopted the federal rules.

More importantly, we hope this process will improve our body of evidence law and that not only logic but the quest for truth and justice will be better served.

Theodore I. Botter,
Chairman, New Jersey Supreme
Court Committee on Evidence

ARTICLE I GENERAL PROVISIONS

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, whether or not the action was instituted in a Small Claims Section;

(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 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.

COMMENT

Rule 101 is based on N.J. Evid. R. 1, 2, and 3 of the 1967 Rules of Evidence[1]; Fed. R. Evid. 101 and 1101 deal with the scope and applicability of the federal rules.

Paragraph (a) of Rule 101 prescribes the scope of application of the evidence rules and organizes this material somewhat differently from both the 1967 New Jersey scope rule, N.J. Evid. R. 2, and Fed. R. Evid. 101 and 1101. The 1967 New Jersey scope rule is a four-part rule addressing both the general application of the rules of evidence and exceptions to their general application. The scheme of the federal rules is a general application provision, Fed. R. Evid. 101, and an additional rule, Fed. R. Evid. 1101, which addresses both applicability and exceptions to applicability. The scheme of the Rule 101(a) is to state in one rule the principles of application, relaxation and exception, although the rule incorporates by reference other rules which include exceptions to applicability, such as Rule 104(a) and Rule 201(f). Accordingly, there is no analogue to Fed. R. Evid. 1101 in these rules since its subject matter is covered by Rule 101.

With respect to the structure and specific provisions of paragraph (a) of this rule, subparagraph (1) provides that

[1]The 1967 Rules of Evidence, as amended, are referred to in these Comments either as the 1967 rule or rules or N.J. Evid. R. These rules are referred to as N.J.R.E. or Rule(s). See Rule 1103. The Report of the New Jersey Supreme Court Committee on Evidence (1963) is referred to in these comments as The 1963 Report.

privileges shall apply without relaxation to all proceedings and inquiries, formal, informal, public or private, and to all branches and agencies of government. This provision follows both N.J. Evid. R. 2(1) and Fed. R. Evid. 1101(c) without substantive change.

Paragraph (a)(2) provides generally that the rules of evidence shall apply to all civil and criminal proceedings conducted by or under the supervision of a court. This provision corresponds to N.J. Evid. R. 2(2) and is the analogue of Fed. R. Evid. 101 and 1101(d). The second sentence of subsection (2), unlike N.J. Evid. R. 2(2), undertakes to enumerate those proceedings in which the rules of evidence, other than those relating to privileges, may be relaxed. These exceptions are limited to:

(A) Actions within the cognizance of the Small Claims Section of the Special Civil Part of the Law Division, the successor to the Small Claims Division of the County District Court. This exception reflects the amendment of N.J. Evid. R. 2(2), effective July 1, 1983. However, this rule clarifies that amendment by providing that the evidence rules may be relaxed in all cases within the small claims jurisdiction whether or not they are actually brought in a small claims section. This is consistent with the Rules of Court.

(B) In accordance with a statutory provision. There is no analogue to this provision in the 1967 New Jersey rules. Under N.J. Evid. R. 2(3), provision for relaxation pursuant to statute applied only to administrative proceedings. See Comment on Rule 101(a)(3), replacing N.J. Evid. R. 2(3). While there is no direct analogue in the federal rules, the principle is reflected in Fed. R. Evid. 1101(e), which defers to specified federal statutes having particular evidential provisions for certain proceedings. Unlike the federal rule, this rule is drawn in general terms without enumeration of specific statutes.

(C) Sentencing and dispositional proceedings. The federal rule analogue to this provision is Fed. R. Evid. 1101(d)(3). It enumerates various miscellaneous proceedings to which the rules do not apply, including extradition or rendition proceedings, preliminary examination in criminal cases, sentencing, probation proceedings, issuance of warrants and summonses, and proceedings with respect to bail release. While there is no 1967 analogue to this rule, it is accepted practice in New Jersey not to apply the rules of evidence to these proceedings. See, e.g., State v. Stewart, 96 N.J. 596, 606 (1984); State v. Kunz, 55 N.J. 128 (1969).

Paragraph (a)(2)(C) of this rule generally follows the intent of the federal rule but is limited to those proceedings in which information is produced which forms the basis for the court's exercise of sentencing or dispositional discretion in criminal and juvenile delinquency actions. Such proceedings include final juvenile dispositions, pre-disposition detention determinations in juvenile delinquency actions, bail proceedings, pretrial intervention and other diversionary proceedings, and any other proceedings in which the exercise of judicial discretion determines the custodial status of or other restraints upon an accused or juvenile charged with delinquency.

Proceedings for the issuance of warrants or summonses are not covered by paragraph (a)(2)(C) but rather by paragraphs (a)(2)(D) and (a)(5) of this rule.

(D) Proceedings to establish probable cause. This paragraph of the rule covers proceedings in which the determination to be made is probable cause for taking an official action which constitutes a step in the criminal process. This rule includes grand jury proceedings, probable cause hearings conducted pursuant to R. 3:4-3, applications for search and arrest warrants, applications for wiretap orders, and proceedings under R. 3:5-7 challenging warrantless searches and seizures. In each of these proceedings substantive law governs both the extent to which the rules of evidence may be relaxed and the quantum of competent evidence that is required. This rule addresses only the character of the proof, not the form in which it is presented. The question of form is addressed by paragraph (a)(5) of this rule, which allows the use of affidavits to the extent permitted by substantive law.

The federal analogues of this rule are found in Fed. R. Evid. 1101(d)(2) (grand jury) and 1101(d)(3) (preliminary examinations and warrants). While there is no 1967 New Jersey analogue, these provisions do not modify New Jersey practice but merely codify it. See, e.g., State v. Kasabucki, 52 N.J. 110, 116-117 (1968) (search warrant); Hintz v. Fary, 19 N.J. 431, 437 (1955) (grand jury proceedings).

Note that this rule does not refer to preliminary examination as does the federal rule, since the New Jersey court rules provide for a preliminary hearing (prior to the probable cause hearing) at which no factual findings are made. Compare R. 3:4-2 with R. 3:4-3.

(E) Admissibility hearings. Paragraph (a)(2)(E) is similar to Fed. R. Evid. 1101(d)(1). While the federal rule refers only to Fed. R. Evid. 104, this rule uses the phrase "under these rules or other law" in order to make clear that proceedings under Rule 104 are not the only proceedings to determine admissibility in which the rules of evidence may be relaxed. A relaxation provision is expressly included in Rule 201(f) dealing with judicial notice. Conditions for the admissibility of evidence are also imposed by other evidence rules, such as the qualifications to establish a business record under Rule 803(c)(6). See Gunter v. Fischer Scientific American, 193 N.J. Super. 688, 692 (App. Div. 1984). As to conditions for admissibility imposed by case law, see State v. Johnson, 42 N.J. 146, 170-171 (1964) (criteria for admissibility of breathalyzer test results). State v. Cardone, 146 N.J. Super. 23 (App. Div. 1976), certif. denied, 75 N.J. 3 (1977), dealing with admissibility

of K-55 radar readings, illustrates this rule's application. See also Comment on Rule 104(a).

The rules of evidence have never been strictly applied in arbitration proceedings, although the parties might otherwise agree or stipulate. See Local Union 560 v. Eazor Express, Inc., 95 N.J. Super. 219, 227 (App. Div. 1967); Livingston v. Combs & wife, Adm'rs, 1 N.J.L. 50 (Sup. Ct. 1790). N.J.S.A. 39:6A-24 to 35 and N.J.S.A. 2A:23A-20 to - 30, respectively, provide for arbitration under court supervision of motor vehicle and personal injury claims of $15,000 or less. See also R. 4:21A. The provision for court supervision does not compel a change in this principle.

Paragraph (a)(3) of Rule 101 replaces N.J. Evid. R. 2(3), for which there is no federal analogue. While it changes the language of N.J. Evid. R. 2(3), it merely conforms the rule to established practice. N.J. Evid. R. 2(3) addressed only so-called formal hearings before administrative agencies and tribunals and provided that the rules of evidence were applicable to such hearings except as otherwise provided by statute. Since so-called informal hearings were not addressed, it appears that the 1967 rules of evidence were not intended to apply to those proceedings. The Administrative Procedure Act (APA), N.J.S.A. 52:14B-1, et seq., enacted subsequent to the adoption of N.J. Evid. R. 2(3), replaced the former undefined formal and informal hearing dichotomy by creating the category of contested cases to which a variety of procedural consequences attach. N.J.S.A. 52:14B-2(b). The APA expressly provides that the rules of evidence do not apply to contested cases. N.J.S.A. 52:14B-10(a). This comports with pre-APA case law. See, e.g., In re Plainfield-Union Water Co., 11 N.J. 382, 392 (1953). The requirement of N.J. Evid. R. 2(3) that the rules of evidence apply to formal hearings unless relaxed by statute was contrary to established case law and was not complied with in practice. Rule 101(a)(3) recognizes current practice and the codification of the common-law principle by the APA by making the rules of evidence inapplicable to all administrative proceedings. However, the law of privileges applies to all proceedings. That had been expressly provided for by N.J. Evid. R. 2(3) and is now repeated in Rule 101(a)(1) as well as in this paragraph. It is noted that neither this rule nor its predecessor addresses the question of the need for some residuum of competent evidence. That is a matter of substantive administrative law which these rules do not affect. See, e.g., Weston v. State, 60 N.J. 36, 50-52 (1972); In re Cowan, 224 N.J. Super. 737, 748-751 (App. Div. 1988).

Paragraph (a)(4) of Rule 101 replaces N.J. Evid. R. 3, for which there is no federal analogue. N.J. Evid. R. 3 applied to civil proceedings only and permitted undisputed facts to be proved by any relevant evidence without reference to exclusionary rules. The provision is retained, nearly verbatim, by the second sentence of this rule. The first sentence is a new provision, applicable to both civil and criminal proceedings, which conforms with actual practice by permitting an undisputed fact to be established by stipulation or binding admission. See State v. Mack, 131 N.J. Super. 542 (App. Div. 1974). This rule does not affect the scope of the jury function constitutionally required in criminal trials. It is intended only to relieve parties of the need for formal proof of specific facts. See Horning v. District of Columbia, 254 U.S. 135, 65 L. Ed. 2d 185 (1920).

Paragraph (a)(5) has no analogue in the 1967 New Jersey rules or the federal rules. This paragraph codifies by reference the practice by which proofs are submitted by affidavit in lieu of oral testimony in ex parte matters, on motions, and in other proceedings. See Gunter v. Fischer Scientific American, supra, 193 N.J. Super. at 692; State v. Cardone, supra, 146 N.J. Super. at 28-29. The rule refers only to the mode of presenting proof and not to its character or quality. It does not authorize relaxation of the rules of evidence but merely allows affidavits to be used as a vehicle for proof where permitted by law. Cf. R. 1:6-6, requiring the contents of affidavits to comply with the rules of evidence as to the competence of both the affiant and the evidence submitted. See Patrolman's Benevolent Ass'n v. Montclair, 70 N.J. 130, 134 n.1 (1976).

Paragraph (b) of Rule 101 replaces N.J. Evid. R. 1, which contained the definition of 14 terms: evidence, relevant evidence, proof, burden of proof, burden of producing evidence, conduct, the hearing, finding of fact, guardian, judge, trier of fact, verbal, writing, and perceive. Paragraph (b) retains only three of these definitions, burden of proof (N.J. Evid. R. 1(4)), burden of producing evidence (N.J. Evid. R. 1(5)), and writing (N.J. Evid. R. 1(13)). Paragraph (b)(2) of this rule follows N.J. producing evidence (N.J. Evid. R. 1(5)), and writing (N.J. Evid. R. 1(13)). Paragraph (b)(2) of this rule follows N.J. Evid. R. 1(5) almost verbatim. As to N.J. Evid. R. 1(4), the term "burden of proof" has been replaced in paragraph (b)(1) by the more accurate term "burden of persuasion." This obviates the need for the last sentence of N.J. Evid. R. 1(4) which provides that burden of proof is synonymous with burden of persuasion. The definition of writing, now contained in Rule 801(e) under the hearsay rules, is made applicable to all evidence rules by incorporation.

As to the remaining 11 terms defined in the 1967 rules, relevance is now defined in Rule 401, and the other 10 of the original 14 definitions of terms have been omitted because they are self-evident and have not proved useful. Note that definitions relating to the hearsay rule are included in Rule 801, and definitions relating to contents of writings and photographs are included in Rule 1001.

The first sentence of paragraph (c) of Rule 101 follows N.J. Evid. R. 2(4), making clear that the adoption of these rules should not be construed as an implied repeal of any presently existing statute. There is no federal analogue.

The second sentence is a new provision intended to call attention to the supersession provision of N.J.S.A. 2A:84A-40, pursuant to which official footnotes were appended to specific 1967 rules to supersede existing statutes and pursuant to which footnotes may be appended to future rule

By way of catalog, the 1967 official footnotes are as follows:

N.J. Evid. R.	N.J.R.E.	Superseded Statute
7(a) (witness competency)	601	2A:81-1 and 8 19:34-26
9, 10, 11, 12 (judicial notice)	201, 202	2A:87-27 to 33
62(5) (business defined)	801(d)	2A:82-34 to 37
63(3) (depositions, prior testimony)	804(b)(1)	2A:81-13 and 14
63(13) (Business records exception)	803(c)(6) and (7)	2A:82-34 to 37
63(17) (official records)	803(c)(8),(9), and (10)	2A:11-55 2A:82-8 to 12 2A:82-14 to 16 2A:82-20 to 22 4:20-20
63(19) (documents concerning property interests)	803(c)(14) and (15)	2A:82-22
63(20) (previous conviction)	803(c)(22)	2A:81-12, in part
68 (authentication)	902	2A:11-55 2A:82-8 to 12 2A:82-14 to 16 2A:82-25 45:6-30 and 31 45:9-20 45:14-28
70 (best evidence)	1002, 1004, 1005	2A:11-55 2A:82-8 to 12
70 (best evidence)	1002, 1004, 1005	2A:11-55 2A:82-8 to 12 2A:82-14 to 16 2A:82-20 to 23 4:20-20
71 (attested writings)	903	2A:82-2

RULE 102

PURPOSE AND CONSTRUCTION

These rules shall be construed to secure fairness in administration and elimination of unjustified expense and delay. 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.

COMMENT

This rule follows both N.J. Evid. R. 5 and Fed. R. Evid. 102, retaining the 1967 New Jersey formulation that the adoption of the evidence rules "shall not bar the growth and development of the law of evidence."

It should be noted that this rule is not intended as a rule authorizing the trial judge to relax the rules of evidence in a particular case. A proposed relaxation provision, N.J. Evid. R. 2(4), applicable to civil cases, was not adopted as part of the 1967 rules and has not been incorporated in these rules. See The 1963 Report at 9. Cf. Fed. R. Evid. 803(24) and 804(b)(5), not adopted in this revision, which allow for other exceptions to the hearsay rule if certain standards are satisfied. See State v. D.R. 109 N.J. 348, 371-377 (1988). Cf. In re Baby M., 109 N.J. 396, 467 n.20 (1988); State v. Tirone, 64 N.J. 222, 226-227 (1974); State v. Kennedy, 135 N.J. Super. 513, 521-525 (App. Div. 1975).

RULE 103

RULINGS ON EVIDENCE

[Not Adopted]

COMMENT

Fed. R. Evid. 103 was not adopted. It provides for (1) the effect of erroneous rulings; (2) making a record of offers of proof and rulings thereon; (3) requiring that proceedings on evidential questions be held out of the hearing of the jury; and (4) notice of plain error. These matters are covered in the New Jersey Rules of Court and established case law and need not be repeated in the rules of evidence. See R. 1:7-2, R. 1:7-3 and R. 2:10-2.

RULE 104

PRELIMINARY QUESTIONS

(a) Questions of admissibility generally. 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. The judge may hear and determine such matters out of the presence or hearing of the jury.

(b) Relevance conditioned on fact. 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. In such cases the judge shall instruct the jury to consider the issue of the fulfillment of the condition and to disregard the evidence if it finds that the condition was not fulfilled. The jury shall be instructed to disregard the evidence if the judge subsequently determines that a jury could not reasonably find that the condition was fulfilled.

(c) Preliminary hearing on admissibility of defendant's statements. 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. 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 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 judge subsequently determines from all of the evidence

that the statement is not admissible, the judge shall take appropriate action.

(d) Testimony by accused. By testifying upon a preliminary matter, the accused does not become subject to cross-examination as to other issues in the case.

(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility

COMMENT

The subject matter covered by paragraph (a) of Fed. R. Evid. 104 is substantially the same as that covered by N.J. Evid. R. 8(1). Rule 104 uses the New Jersey formulation with some modifications. The phrase "stated in these rules" has been omitted, since the rules of evidence are not the only source of a condition imposed for the admissibility of evidence. See Comment on Rule 101(a)(2)(E). The last sentence of paragraph (1) of N.J. Evid. R. 8 is encompassed by paragraph (e) of the federal rule. Therefore, for purposes of consistency and uniformity, that sentence was moved from its location in the 1967 New Jersey rule to paragraph (e) of this rule. The provision requiring the judge to indicate to the parties which one has the burden of persuasion and the burden of producing evidence has been omitted. The next to the last sentence of paragraph (1) of N.J. Evid. R. 8(1), which provides that the admissibility hearing may be conducted outside the presence or hearing of the jury, is encompassed by paragraph (c) of the federal rule. That provision is retained in paragraph (a) of this rule. It should also be noted that the content of the second sentence of paragraph (a), making the rules of evidence inapplicable to hearings conducted thereunder, is also contained in Rule 101(a)(2)(E). Paragraph (c), discussed below, is reserved exclusively for hearings on the admissibility of confessions of a criminal defendant.

Paragraph (b) of Fed. R. Evid. 104 encompasses the same material as is contained in N.J. Evid. R. 8(2). The 1967 New Jersey formulation has been retained, adding the phrase "subject to" which is in the federal rule and is implicit in the 1967 New Jersey rule. Cf. N.J. Evid. R. 19.

In lieu of paragraph (c) of Fed. R. Evid. 104, this rule retains virtually verbatim paragraph (3) of N.J. Evid. R. 8 as paragraph (c) of this rule dealing with conditions for the admissibility of a criminal defendant's statements, such as their voluntary nature. The 1967 New Jersey rule had been amended in 1976 in response to the holding of State v. Hampton, 61 N.J. 250 (1972), and continues to constitute an accurate and useful guide. Its application is limited to defendant's statements alone, and it does not purport to deal with the admissibility of other evidence such as identification evidence. Unlike paragraph (a), paragraph (c) provides that the rules of evidence do apply to hearings on the admissibility of defendant's statements. This follows N.J. Evid. R. 8(3). Note should also be taken of the 1979 adoption of R. 3:13-1(b), which permits pretrial hearings to determine admissibility of statements, identification evidence, and other evidence as well.

N.J. Evid. R. 8 does not have an analogue to paragraph (d) of the federal rule, which provides that by testifying upon a preliminary matter the accused does not subject himself to cross-examination as to other issues in the case. Fed. R. Evid. 104(d) is consistent with New Jersey practice and is, therefore, included as paragraph (d) of this rule.

As noted above, paragraph (e) of this rule is taken from the last sentence of N.J. Evid. R. 8(1). That sentence is placed in Rule 104(e) to correspond with its location in the federal rules.

RULE 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, 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.

COMMENT

The first sentence of Rule 105, which replaces N.J. Evid. R. 6, is identical to Fed. R. Evid. 105. The second sentence has no analogue either in the 1967 New Jersey rules or the federal rules.

The only difference between the first sentence of N.J. Evid. R. 6 and Rule 105 is that this rule requires that a request be made for a limiting instruction. Although the 1967 New Jersey rule appears to require the instruction whether or not a request is made, a number of cases have held that the failure to give a limiting instruction is not plain error unless the failure had the capacity to produce an unjust result. See, e.g., State v. Lair, 62 N.J. 388, 391-393 (1973); Millison v. E. I. duPont de Nemours & Co., 226 N.J. Super. 572, 597-598 (App. Div. 1988), aff'd o.b., 115 N.J. 252 (1989); State v. Rajnai, 132 N.J. Super. 530, 537-539 (App. Div. 1975). The trial judge should give a limiting instruction sua sponte where it appears necessary to avoid the potential for prejudice. Without a request, the failure to give a limiting instruction will be reviewed only as plain error.

The second sentence of the rule was included in recognition of the practice that a party for whose benefit a limiting instruction may be given should have the right to expressly waive the instruction. This is often done for tactical reasons as, for example, to avoid emphasizing particular evidence.

RULE 106

REMAINDER OF OR RELATED WRITINGS OR RECORDED STATEMENTS

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 in fairness ought to be considered contemporaneously.

COMMENT

This rule follows Fed. R. Evid. 106 almost verbatim. While there is no 1967 New Jersey analogue to this rule, the Rules of Court have similar provisions governing the use at trial of depositions and interrogatories. See R. 4:16-1(d); R. 4:17-8(a).

The federal rule is adopted because it incorporates the prevailing practice in this state.

ARTICLE II JUDICIAL NOTICE

RULE 201

JUDICIAL NOTICE OF LAW AND ADJUDICATIVE FACTS

(a) Notice of 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 which may be judicially noticed include (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. A court may take judicial notice whether requested or not.

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

(e) Opportunity to be heard. Each party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) How taken. In determining the propriety of taking judicial notice of a matter or the tenor thereof, 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. In a civil action or proceeding, the judge shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the judge shall instruct the jury that it may, but is not required to, accept as established any fact which has been judicially noticed.

COMMENT

Rule 201 generally follows the format of Fed. R. Evid. 201 and replaces N.J. Evid. R. 9, 10, and 11.

The scheme of the federal analogue is to provide for a single rule addressing judicial notice of adjudicative facts. The 1967 New Jersey rules had four separate rules dealing with judicial notice of law and adjudicative facts. N.J. Evid. R. 9 to 12, inclusive. The structure of the federal analogue has been largely followed by these rules except that the first paragraph of this rule deals with judicial notice of law, and the content of Fed. R. Evid. 201(f) (time of taking notice) is addressed by Rule 202. Rules 201 and 202 embrace all of the material covered by N.J. Evid. R. 9 through 12.

Paragraph (a) of this rule deals with judicial notice of law. There is no analogue in the federal evidence rules because notice of law is addressed by the federal practice rules. See Fed. R. Civ. P. 44.1 and Fed. R. Crim. P. 26.1. This paragraph of Rule 201 collects the provisions of N.J. Evid. R. 9(1) and (2) as to judicial notice of law. New Jersey Rules of Court do not address this subject.

Paragraph (b) of this rule contains a more detailed definition of judicially noticeable fact than Fed. R. Evid. 201(b), embodying the notice of fact provisions of N.J. Evid. R. 9(1) and (2). It also provides for judicial notice of the records of the courts of New Jersey and of federal courts sitting in or for this state. While the federal rules of evidence contain no comparable provision, 28 U.S.C.A. §1738 facilitates proof of the records and proceedings of any court of a state, territory or possession of the United States. See also Fed. R. Evid. 902 and 1005 dealing with authentication and admission of public records.

Paragraphs (c) and (d) of this rule follow Fed. R. Evid. 201(c) and (d), respectively, and replace the mandatory/discretionary provisions of N.J. Evid. R. 9(1), (2), and (3). Paragraph (d) does not contain a limitation as to the time when a request to take judicial notice must be made, as did N.J. Evid. R. 9(3). N.J. Evid. R. 10(3) provided that judicial notice need not be taken if the information available or supplied is insufficient or unconvincing. N.J. Evid. R. 10(4) provided that all matters pertaining to judicial notice are for the judge rather than the jury. Neither of these two provisions is expressly contained in Fed. R. Evid. 201, but they are implied by the language of this rule and the federal rule, particularly subsection (d).

Paragraph (e) of this rule follows Fed. R. Evid. 201(e), the only change being the substitution of the words "each party" for the words "a party" at the beginning of the sentence. With this change the paragraph incorporates the substance of N.J. Evid. R. 10(1) by permitting both the proponent and the adversary of the noticeable material to be heard.

Paragraph (f) of the rule follows N.J. Evid. R. 10(2). The substance of Fed. R. Evid. 201(f) is included in Rule 202.

Paragraph (g) of this rule is identical to Fed. R. Evid. 201(g) and replaces N.J. Evid. R. 11. It omits as unnecessary the provision of the New Jersey rule which required the judge to indicate to the jury the source of his information. The 1967 rule failed to distinguish between instructions to the jury in civil and criminal cases. This distinction is made in Rule 201(g). While the need to make this distinction has been

debated, the rule takes the safer course in view of a defendant's sixth amendment right to trial by jury. However, the court retains the power to charge the jury on the legal significance of adjudicative facts which have been judicially noticed. See A.B.A. Section of Litigation, Emerging Problems Under the Federal Rules of Evidence 35-38 (1983).

RULE 202

JUDICIAL NOTICE IN PROCEEDINGS SUBSEQUENT TO TRIAL

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

(b) On 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.

(c) Opportunity to be heard. A judge 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 tenor of the matter to be noticed.

COMMENT

Rule 202 follows almost verbatim N.J. Evid. R. 12, whose federal analogue is Fed. R. Evid. 201(f). The federal rule provides merely that judicial notice may be taken at any stage of the proceeding. The 1967 New Jersey rule was preferred because its greater detail and specificity afford useful guidance in interpreting the scope and application of this rule, especially as to judicial notice on appeal.

ARTICLE III. PRESUMPTIONS

RULE 301

EFFECT OF PRESUMPTION

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.

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. 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. 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. Nothing in this rule shall preclude the judge from commenting on inferences that may be drawn from the evidence.

COMMENT

Rule 301 generally follows Fed. R. Evid. 301 as well as the principles of N.J. Evid. R. 13 and 14, which it replaces. The principle adopted reflects established New Jersey law. Dwyer v. Ford Motor Co., 36 N.J. 487, 507 (1962); Kirschbaum v. Metropolitan Life Ins. Co., 133 N.J.L. 5, 9-10 (E. & A. 1945); Silver Lining Inc. v. Shein, 37 N.J. Super. 206, 216-218 (App. Div. 1955). The principle is that a valid presumption can be used to establish a prima facie case, but the presumption normally disappears in the face of conflicting evidence. Nevertheless, any logical inference which can be drawn from the basic fact remains. Thus, the rule provides that the trial judge is not precluded from commenting on inferences that may be drawn from the evidence, even when conflicting evidence is presented. Note also that under Rule 301 the burden of persuasion is not shifted to a party against whom the presumption operates.

This rule does not concern conclusive presumptions, which are actually rules of substantive law. See Comment on Rule 13, The 1963 Report at 45-46.

RULE 302

CHOICE OF LAW

In civil actions or proceedings, 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 supplies the rule of decision shall be determined in accordance with that federal or other law.

COMMENT

Rule 302 is based on Fed. R. Evid. 302, which provides a choice of law rule for the effect of presumptions. There is no 1967 New Jersey rule analogue. This rule, like the federal rule, provides that when the law of another state or federal law supplies the rule of decision as to a fact which is an element of a claim or defense, the law of the same jurisdiction shall determine the effect of a presumption respecting that fact.

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.

COMMENT

Rule 303 states the effect of presumptions in criminal cases and embodies principles of constitutional law developed by both federal and New Jersey cases. See County Court of Ulster County, New York v. Allen, 442 U.S. 140, 60 L. Ed. 2d 777 (1979); State v. DiRienzo, 53 N.J. 360, 369-382 (1969). Cf. Tot v. United States, 319 U.S. 463, 87 L. Ed. 1519 (1943). The provisions for instructing the jury are derived from State v. DiRienzo, supra, 53 N.J. at 381-382, and State v. Humphreys, 54 N.J. 406, 415-416 (1969). See also State v. Ingram, 98 N.J. 489 (1985), and State v. Stasio, 78 N.J. 467, 485 (1979).

A federal presumption rule for criminal cases, proposed as federal rule 303, was not adopted. However, that proposal was incorporated into rule 303 of the 1974 Uniform Rules of Evidence, which is the basis of this rule.

The 1967 New Jersey Rules of Evidence did not include a separate provision for presumptions against the accused in criminal cases. To distinguish between the effect of presumptions in civil cases and criminal cases, an interim rule, N.J. Evid. R. 15, was adopted effective July 1, 1982, to make clear that N.J. Evid. R. 13 and 14 did not apply against the accused in criminal cases. See the commentary published in 108 N.J.L.J. 301-302 (1981).

The 1979 New Jersey Code of Criminal Justice provided that presumptions established by statute with respect to any fact which is an element of an offense shall have the meaning accorded by the law of evidence. N.J.S.A. 2C:1-13(e).

ARTICLE IV. RELEVANCY AND ITS LIMITS

RULE 401

DEFINITION OF "RELEVANT EVIDENCE"

"Relevant evidence" means evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action.

COMMENT

Rule 401 is similar to N.J. Evid. R. 1(2) in that it incorporates the phrase "evidence having a tendency in reason to prove," but it substitutes for the phrase, "any material fact," the phrase, "any fact of consequence to the determination of the action" which follows Fed. R. Evid. 401. Relevant evidence is evidence tending to prove or disprove a proposition about a matter of fact, or, as in the federal rule, evidence which has a tendency to make "more probable or less probable" a fact of consequence to the action.

RULE 402

RELEVANT EVIDENCE GENERALLY ADMISSIBLE

Except as otherwise provided in these rules or by law, all relevant evidence is admissible.

COMMENT

Rule 402 is essentially the same as both N.J. Evid. R. 7(f) and Fed. R. Evid. 402. The subject of N.J. Evid. R. 7(a) and (c) (qualification of witnesses) is covered by Rule 601. N.J. Evid. R. 7(b), (d), and (e), which deal with witness privilege, were deleted as superfluous. However, this deletion should not be construed as a return to the common-law rules of witness disabilities. The provision in the federal rule that irrelevant evidence is inadmissible was omitted as self-evident.

RULE 403

EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE CONFUSION, OR WASTE OF TIME

Except as otherwise provided by these rules or other law, relevant evidence may be excluded if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence.

COMMENT

Rule 403 contains the principles established by both N.J. Evid. R. 4 and Fed. R. Evid. 403. Although the formulation is closer to the federal rule than the 1967 New Jersey rule, the intention was to retain the principles of N.J. Evid. R. 4 as construed by New Jersey courts. See State v. Carter, 91 N.J. 86, 105-107 (1982); State v. Garfole, 76 N.J. 445, 455-457 (1978); State v. Reldan, 185 N.J. Super. 494, 505 (App. Div. 1982), certif. denied, 91 N.J. 543 (1982); State v. Jackson, 182 N.J. Super. 98 (App. Div. 1981).

The opening phrase of this rule was added to accommodate certain exceptions to a trial judge's discretion. For example, Rule 404, like its predecessor, N.J. Evid. R. 47, provides that evidence of good character offered by the defendant in a criminal proceeding cannot be excluded under this rule. See also Chambers v. Mississippi, 410 U.S. 284 (1972), holding that it is a denial of due process to exclude, under local evidence rules, the confession of another person to the crime charged against defendant.

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, 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 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.

COMMENT

Rule 404 generally follows Fed. R. Evid. 404 and replaces N.J. Evid. R. 46, 48, and 55. It also incorporates a portion of N.J. Evid. R. 47.

Paragraph (a) of Rule 404 is almost identical to Fed. R. Evid. 404(a). The introductory sentence of paragraph (a) adds to the federal formulation the phrase "including a trait of care or skill or lack thereof." This addition repeats the principle expressed by N.J. Evid. R. 48. Paragraph (a)(3) of this rule omits the cross references to Rule 607 and 609 appearing in the federal analogue. These references were deleted because only Rule 608 deals with character evidence offered to affect the credibility of a witness.

The formulation of paragraph (b) of this rule follows Fed. R. Evid. 404(b) rather than the New Jersey analogue, N.J. Evid. R. 55, except that it uses the word "disposition" contained in the New Jersey rule and it adds the final phrase "when such matters are relevant to a material issue in dispute." This addition was made to emphasize the provision of N.J. Evid. R. 55 that ordinarily other crimes evidence is admissible only to prove "some other fact in issue," and not a general disposition to commit crimes or other wrongs. In conformity with the federal rule, "opportunity" and "preparation" have been added to the N.J. Evid. R. 55 list of examples of other purposes for which other crimes evidence may be admitted.

Paragraph (c) of this rule has no federal analogue although its principle is implicit in the federal practice. This paragraph is based on the general principle formerly expressed by N.J. Evid. R. 46, that evidence of character or a trait of character is admissible when that character or trait is an element of a claim or defense which is in issue.

As a result of adoption of Rule 404, evidence of a trait of character offered for the purpose of drawing inferences as to the conduct of a person on a specified occasion is no longer admissible in civil cases except as provided in Rule 404(c) (character and character trait in issue) and Rule 608 (trait of character for truthfulness/untruthfulness offered to affect the credibility of a witness).

RULE 405

METHODS OF PROVING CHARACTER

(a) Reputation, opinion, or conviction of crime. When evidence of character or a trait of character of a person is admissible, it may be proved by evidence of 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.

(b) Specific instances of conduct. When character or a trait of character of a person is an essential element of a charge, claim, or defense, evidence of specific instances of conduct may also be admitted.

COMMENT

Rule 405(a) adopts the substance of N.J. Evid. R. 46 and 47 with changes in language and structure only. Fed. R. Evid. 405(a) does not provide for proof of character or a character trait by evidence of conviction of a crime and does not provide that specific instances of conduct not the subject of a crime are inadmissible. Rule 405(a), following N.J. Evid. R. 47, rejects the provision of the federal rule which permits inquiry on cross-examination into specific instances of conduct. This provision of N.J. Evid. R. 47 was originally designed to respond to the criticism of the common-law rule pursuant to which the prosecutor was permitted to impeach a defendant's character witness by inquiring of him on cross-examination whether he had heard rumors of "bad acts" by or charges against the accused not evidenced by a judgment of conviction. See, e.g., State v. La Porte, 62 N.J. 312, 319-320 (1973); cf. State v. Steensen, 35 N.J. Super. 103, 108 (App. Div. 1955). The Committee regards this principle of N.J. Evid. R. 47 as still valid. Note also the same prohibition imposed on "bad act" impeachment by N.J. Evid. R. 22(d), followed by Rule 608.

Rule 405(b) follows Fed. R. Evid. 405(b) with language changes, incorporating the principle of N.J. Evid. R. 46.

RULE 406

HABIT, ROUTINE PRACTICE

(a) Evidence, whether corroborated or not, of habit or routine practice is admissible to prove that on a specific occasion a person or organization acted in conformity with the habit or routine practice.

(b) Evidence of specific instances of conduct is admissible

to prove habit or routine practice if evidence of a sufficient number of such instances is offered to support a finding of such habit or routine practice.

COMMENT

Paragraph (a) of Rule 406 follows Fed. R. Evid. 406 and replaces N.J. Evid. R. 49 without any change in substance. The term "routine practice" is taken from the federal rule and replaces the term "custom" contained in N.J. Evid. R. 49 and 50. The phrase, "regardless of the presence of eyewitnesses," contained in the federal analogue, was omitted from paragraph (a) as superfluous.

Paragraph (b), which follows N.J. Evid. R. 50 and is not contained in the federal rule, deals with one method of proving habit or routine practice, namely by proof of a sufficient number of specific instances of conduct. Habit or routine practice may also be proved by other competent evidence.

RULE 407

SUBSEQUENT REMEDIAL MEASURES

Evidence of remedial measures taken after an event is not admissible to prove that the event was caused by negligence or culpable conduct. However, evidence of such subsequent remedial conduct may be admitted as to other issues.

COMMENT

Rule 407 follows the principle stated by N.J. Evid. R. 51 and Fed. R. Evid. 407. The 1967 New Jersey rule did not have an express provision making evidence of subsequent remedial measures admissible for purposes other than proof of negligence. Nevertheless, the admissibility of such evidence for other purposes has been recognized by case law. See, e.g., Brown v. Brown, 86 N.J. 565, 580-582 (1981) (routine maintenance); Shatz v. TEC Technical Adhesives, 174 N.J. Super. 135, 141-142 (App. Div. 1980) (change in warning on product before injury); Lavin v. Fauci, 170 N.J. Super. 403 (App. Div. 1979) (feasibility and credibility); Manieri v. Volkswagenwerk, 151 N.J. Super. 422 (App. Div. 1977), certif. denied, 75 N.J. 594 (1978) (control).

RULE 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, including offers of compromise, shall not be admissible to prove liability for, or invalidity of, or amount of the 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.

COMMENT

Rule 408 generally follows Fed. R. Evid. 408 and replaces N.J. Evid. R. 52(1) and 53. The general principles of these rules have been retained, but the formulation has been simplified.

The reference to parties' attorneys was added to make it clear that the rule applies to their statements and conduct as well. The rule also follows the federal provision that evidence otherwise obtained is not rendered inadmissible because it was also the subject of settlement negotiations. For example, admissions of liability made at the scene of an accident may be admitted.

The rule permits the use of evidence arising out of settlement negotiations for purposes other than proving liability or the amount of damages. Such other purposes include, for example, proof of an accord and satisfaction (N.J. Evid. R. 53), proof of a debtor's promise to pay all or a portion of a preexisting debt (N.J. Evid. R. 52(1)(b)) and proof of bias or prejudice of a witness (Fed. R. Evid. 607). Evidence that a criminal defendant offered consideration for dropping or reducing a charge may also be admitted in appropriate circumstances. See State v. Romero, 95 N.J. Super. 482, 489-490 (App. Div. 1967).

To the extent that statements of fact made during settlement negotiations are not expressly excluded by N.J. Evid. R. 52(1) or 53, Rule 408 follows the broader principle embodied in Fed. R. Evid. 408 which excludes such statements unless made outside of settlement negotiations.

RULE 409

PAYMENT OF MEDICAL AND SIMILAR EXPENSES

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

COMMENT

Rule 409 follows Fed. R. Evid. 409 verbatim. Although there is no precise New Jersey analogue to this rule, it is partly encompassed by reference in N.J. Evid. R. 52(1) to furnishing consideration to a claimant "from humanitarian motives."

RULE 410

INADMISSIBILITY OF PLEAS, PLEA DISCUSSIONS AND RELATED STATEMENTS

Except as otherwise provided in this rule, evidence of a plea of guilty which was later withdrawn, of any statement made in the course of that plea proceeding, 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 (1) in any proceeding in which another statement made in the course of the same plea or plea discussions has been introduced and the statement should in fairness be considered 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 under oath, on the record, and in the presence of counsel.

COMMENT

Rule 410 generally follows Fed. R. Evid. 410. Deleted, however, are those provisions of the federal rule which are unique to the federal practice. In replacing the abbreviated

statement of N.J. Evid. R. 52(2), this rule expands the exclusion to include not only an accused's offer to plead guilty but also any statements made during plea negotiations. The expanded scope of the exclusion is a change in current New Jersey practice. See State v. Boyle, 198 N.J. Super. 64, 69-73 (App. Div. 1984), whose holding this rule effectively supersedes. Even under current practice, however, if a court refuses to accept a plea of guilty or permits the accused to withdraw his plea, no admission made by the accused in the plea proceedings may be admitted against him at his criminal trial. State v. Boone, 66 N.J. 38 (1974). See R. 3:9-2 and R. 5:22-2(d).

This rule does not preclude the admissibility of statements made during plea negotiations when an issue is later raised as to the terms of the plea offer or agreement. See, e.g., State v. Kovack, 91 N.J. 476, 479-484 (1982).

See also R. 3:9-2 which provides that in accepting a guilty plea, the judge, for good cause shown, may order that it not be admissible in a civil proceeding.

RULE 411

LIABILITY INSURANCE

Evidence that a person was or was not insured against liability is not admissible on the issue of that person's negligence or other wrongful conduct. Subject to Rule 403, this rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, control, bias, or prejudice of a witness.

COMMENT

Rule 411 follows Fed. R. Evid. 411 with minor modification. It replaces N.J. Evid. R. 54, which was essentially the same as the first sentence of this rule. While the 1967 New Jersey rule did not include the content of the second sentence of this rule, its import is consistent with current practice. The reference to Rule 403 has been added to the second sentence to emphasize the potential for prejudice of such evidence.

RULE 412

PROSECUTIONS FOR RAPE AND RELATED OFFENSES

[NOT ADOPTED]

COMMENT

Fed. R. Evid. 412 was not adopted since this subject is covered by N.J.S.A. 2C:14-7, the Rape-Shield Law, which provides:

> a. In prosecutions for aggravated sexual assault, sexual assault, aggravated criminal sexual contact, criminal sexual contact, or endangering the welfare of a child in violation of N.J.S. 2C:24-4, evidence of the victim's previous sexual conduct shall not be admitted nor reference made to it in the presence of the jury except as provided in this section. When the defendant seeks to admit such evidence for any purpose, he must apply for an order of the court before the trial or preliminary hearing, except that the court may allow the motion to be made during trial if the court determines that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence. After the application is made, the court shall conduct a hearing in camera to determine the admissibility of the evidence. If the court finds that evidence offered by the defendant regarding the sexual conduct of the victim is relevant and that the probative value of the evidence offered is not outweighed by its collateral nature or by the probability that its admission will create undue prejudice, confusion of the issue, or unwarranted invasion of the privacy of the victim, the court shall enter an order setting forth with specificity what evidence may be introduced and the nature of the questions which shall be permitted, and the reasons why the court finds that such evidence satisfies the standards contained in this section. The defendant may then offer evidence under the order of the court.
>
> b. In the absence of clear and convincing proof to the contrary, evidence of the victim's sexual conduct occurring more than one year before the date of the offense charged is presumed to be inadmissible under this section.
>
> c. Evidence of previous sexual conduct shall not be considered relevant unless it is material to negating the element of force or coercion or to proving that the source of semen, pregnancy or disease is a person other than the defendant. For the purpose of this section, "sexual conduct" shall mean any conduct or behavior relating to sexual activities of the victim, including but not limited to previous or subsequent experience of sexual penetration or sexual contact, use of contraceptives, living arrangement and life style.

Note that the two categories of admissible prior sexual conduct prescribed by N.J.S.A. 2C:14-7(c) have been held on sixth amendment confrontation grounds, to be illustrative rather than exclusive. See State v. Budis, 243 N.J. Super. 498 (App. Div. 1990), aff'd, ___ N.J. ___ (1991), permitting evidence of the prior sexual abuse of the child victim by another in order to rebut her assumed naivete.

ARTICLE V. PRIVILEGES

RULE 500

GENERAL RULE

Privileges as they now exist or may be modified by law shall be unaffected by the adoption of these rules. For convenience in reference certain existing provisions of law relating to privileges are enumerated in Article V.

COMMENT

This rule leaves undisturbed the law of privileges in its present form or as it may be developed.

RULE 501

PRIVILEGE OF ACCUSED

N.J.S.A. 2A:84A-17 provides:

> (1) Every person has in any criminal action in which he is an accused a right not to be called as a witness and not to testify.
>
> (2) The spouse of the accused in a criminal action shall not testify in such action except to prove the fact of marriage unless (a) such spouse and the accused shall both consent, or (b) the accused is charged with an offense against the spouse, a child of the accused or of the spouse, or a child to whom the accused or the spouse stands in the place of a parent, or (c) such spouse is the complainant.
>
> (3) An accused in a criminal action has no privilege to refuse when ordered by the judge, to submit his body to examination or to do any act in the presence of the judge or the trier of the fact, except to refuse to testify.

NOTE: N.J.S.A. 2A:84A-17(4) which, as adopted in 1960, permitted adverse comment and inferences from a criminal defendant's failure to testify, in certain circumstances, was declared unconstitutional in State v. Lanzo, 44 N.J. 560, 562-564 (1965), citing Griffin v. California, 380 U.S. 609, 14 L. Ed. 2d 106 (1965). Accordingly, N.J. Evid. R. 23(4) was deleted by amendment adopted by the New Jersey Supreme Court, effective July 1, 1980.

RULE 502

DEFINITION OF INCRIMINATION

N.J.S.A. 2A:84A-18 provides:

Within the meaning of this article, a matter will incriminate (a) if it constitutes an element of a crime against this State, or another State or the United States, or (b) is a circumstance which with other circumstances would be a basis for a reasonable inference of the commission of such a crime, or (c) is a clue to the discovery of a matter which is within clauses (a) or (b) above; provided, a matter will not be held to incriminate if it clearly appears that the witness has no reasonable cause to apprehend a criminal prosecution. In determining whether a matter is incriminating under clauses (a), (b) or (c) and whether a criminal prosecution is to be apprehended, other matters in evidence, or disclosed in argument, the implications of the question, the setting in which it is asked, the applicable statute of limitations and all other factors, shall be taken into consideration.

RULE 503

SELF-INCRIMINATION

N.J.S.A. 2A:84A-19 provides:

Subject to Rule 37 [Rule 530], every natural person has a right to refuse to disclose in an action or to a police officer or other official any matter that will incriminate him or expose him to a penalty or a forfeiture of his estate, except that under this rule:

(a) no person has the privilege to refuse to submit to examination for the purpose of discovering or recording his corporal features and other identifying characteristics or his physical or mental condition;

(b) no person has the privilege to refuse to obey an order made by a court to produce for use as evidence or otherwise a document, chattel or other thing under his control if some other person or a corporation or other association has a superior right to the possession of the thing ordered to be produced;

(c) no person has a privilege to refuse to disclose any matter which the statutes or regulations governing his office, activity, occupation, profession or calling, or governing the corporation or association of which he is an officer, agent or employee, require him to record or report or disclose except to the extent that such statutes or regulations provide that the matter to be recorded, reported or disclosed shall be privileged or confidential;

(d) subject to the same limitations on evidence affecting credibility as apply to any other witness, the accused in a criminal action or a party in a civil action who voluntarily testifies in the action upon the merits does not have the privilege to refuse to disclose in that action, any matter relevant to any issue therein.

RULE 504

LAWYER-CLIENT PRIVILEGE

N.J.S.A. 2A:84A-20 provides:

(1) General rule. Subject to Rule 37 [Rule 530] and except as otherwise provided by paragraph 2 of this rule communications between lawyer and his client in the course of that relationship and in professional confidence, are privileged, and a client has a privilege (a) to refuse to disclose any such communication, and (b) to prevent his lawyer from disclosing it, and (c) to prevent any other witness from disclosing such communication if it came to the knowledge of such witness (i) in the course of its transmittal between the client and the lawyer, or (ii) in a manner not reasonably to be anticipated, or (iii) as a result of a breach of the lawyer-client relationship, or (iv) in the course of a recognized confidential or privileged communication between the client and such witness. The privilege shall be claimed by the lawyer unless otherwise instructed by the client or his representative; the privilege may be claimed by the client in person, or if incompetent or deceased, by his guardian or personal representative. Where a corporation or association is the client having the privilege and it has been dissolved, the privilege may be claimed by its successors, assigns or trustees in dissolution.

(2) Exceptions. Such privilege shall not extend (a) to a communication in the course of legal service sought or obtained in aid of the commission of a crime or a fraud, or (b) to a communication relevant to an issue between parties all of whom claim through the client, regardless of whether the respective claims are by testate or intestate succession or by inter vivos transaction, or (c) to a communication relevant to an issue of breach of duty by the lawyer to his client, or by the client to his lawyer. Where 2 or more persons have employed a lawyer to act for them in common, none of them can assert such privilege as against the others as to communications with respect to that matter.

(3) Definitions. As used in this rule (a) "client" means a person or corporation or other association that, directly or through an authorized representative, consults a lawyer or the lawyer's representative for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity; and includes an incompetent whose guardian so consults the lawyer or the lawyer's representative in behalf of the incompetent, (b) "lawyer" means a person authorized, or reasonably believed by the client to be authorized to practice law in any State or nation the law of which recognizes a privilege against disclosure of confidential communications between client and lawyer. A communication made in the course of relationship between lawyer and client shall be presumed to have been made in professional confidence unless knowingly made within the hearing of some person whose presence nullified the privilege.

RULE 505

PSYCHOLOGIST PRIVILEGE

N.J.S.A. 45:14B-28 provides:

The confidential relations and communications between and among a licensed practicing psychologist and individuals, couples, families or groups in the course of the practice of psychology are placed on the same basis as those provided between attorney and client, and nothing in this act shall be construed to require any such privileged communications to be disclosed by any such person.

RULE 506

PATIENT AND PHYSICIAN PRIVILEGE

(a) N.J.S.A. 2A:84A-22.1 provides:

As used in this act, (a) "patient" means a person who, for the sole purpose of securing preventive, palliative, or curative treatment, or a diagnosis preliminary to such treatment, of his physical or mental condition, consults a physician, or submits to an examination by a physician; (b) "physician" means a person authorized or reasonably believed by the patient to be authorized, to practice medicine in the State or jurisdiction in which the consultation or examination takes place; (c) "holder of the privilege" means the patient while alive and not under the guardianship of the guardian of the person of an incompetent patient, or the personal representative of a deceased patient; (d) "confidential communication between physician and patient" means such information transmitted between physician and patient, including information obtained by an examination of the patient, as is transmitted in confidence and by a means which, so far as the patient is aware, discloses the information to no third persons other than those reasonably necessary for the transmission of the information or the accomplishment of the purpose for which it is transmitted.

(b) N.J.S.A. 2A:84A-22.2 provides:

Except as otherwise provided in this act, a person, whether or not a party, has a privilege in a civil action or in a prosecution for a crime or violation of the disorderly persons law or for an act of juvenile delinquency to refuse to disclose, and to prevent a witness from disclosing, a communication, if he claims the privilege and the judge finds that (a) the communication was a confidential communication between patient and physician, and (b) the patient or the physician reasonably believed the communication to be necessary or helpful to enable the physician to make a diagnosis of the condition of the patient or to prescribe or render treatment therefor, and (c) the witness (i) is the holder of the privilege or (ii) at the time of the communication was the physician or a person to whom disclosure was made because reasonably necessary for the transmission of the communication or for the accomplishment of the purpose for which it was transmitted or (iii) is any other person who obtained knowledge or possession of the communication as the result of an intentional breach of the physician's duty of nondisclosure by the physician or his agent or servant and (d) the claimant is the holder of the privilege or a person authorized to claim the privilege for him.

(c) N.J.S.A. 2A:84A-22.3 provides:

There is no privilege under this act as to any relevant communication between the patient and his physician (a) upon an issue of the patient's condition in an action to commit him or otherwise place him under the control of another or others because of alleged mental incompetence, or in an action in which the patient seeks to establish his competence or in an action to recover damages on account of conduct of the patient which constitutes a criminal offense other than a misdemeanor, or (b) upon an issue as to the validity of a document as a will of the patient, or (c) upon an issue between parties claiming by testate or intestate succession from a deceased patient.

(d) N.J.S.A. 2A:84A-22.4 provides:

There is no privilege under this act in an action in which the condition of the patient is an element or factor of the claim or defense of the patient or of any party claiming through or under the patient or claiming as a beneficiary of the patient through a contract to which the patient is or was a party or under which the patient is or was insured.

(e) N.J.S.A. 2A:84A-22.5 provides:

There is no privilege under this act as to information which the physician or the patient is required to report to a public official or as to information required to be recorded in a public office, unless the statute requiring the report or record specifically provides that the information shall not be disclosed.

(f) N.J.S.A. 2A:84A-22.6 provides:

No person has a privilege under this act if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the services of the physician were sought or obtained to enable or aid anyone to commit or to plan to commit a crime or a tort, or to escape detection or apprehension after the commission of a crime or a tort.

(g) N.J.S.A. 2A:84A-22.7 provides:

A privilege under this act as to a communication is terminated if the judge finds that any person while a holder of the privilege has caused the physician or any agent or servant of the physician to testify in any action to any matter of which the physician or his agent or servant gained knowledge through the communication.

RULE 507

UTILIZATION REVIEW COMMITTEES OF CERTIFIED HOSPITAL OR EXTENDED CARE FACILITY; EXCEPTIONS

(a) N.J.S.A. 2A:84A-22.8 provides:

Information and data secured by and in the possession of utilization review committees established by any certified hospital or extended care facility in the performance of their duties shall not be revealed or disclosed in any manner or under any circumstances by any member of such committee except to: (a) a patient's attending physician, (b) the chief administrative officer of the hospital or extended care facility which it serves, (c) the medical executive committee, or comparable enforcement unit, of such hospital or extended care facility, (d) representatives of, including intermediaries or carriers for, government agencies in the performance of their duties, under the provisions of Federal and State law, or (e) any hospital service corporation, medical service corporation or insurance company with which said patient has pertinent coverage under a contract, policy or certificate, the terms of which authorize the carrier to request and be given such information and data.

(b) N.J.S.A. 2A:84A-22.9 provides:

No member of a utilization review committee may be held liable for damages or otherwise prejudiced in any manner by reason of recommendations or findings made by said committee or for furnishing information or data obtained in the course of his duties as a member of a committee to the persons and officials mentioned in section 1 [2A:84A-22.8] hereof.

RULE 508

NEWSPERSON'S PRIVILEGE

(a) N.J.S.A. 2A:84A-21 provides:

Subject to Rule 37 [Rule 530], a person engaged on, engaged in, connected with, or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated has a privilege to refuse to disclose, in any legal or quasilegal proceeding or before any investigative body, including, but not limited to, any court, grand jury, petit jury, administrative agency, the Legislature or legislative committee, or elsewhere:

a. The source, author, means, agency or person from or through whom any information was procured, obtained, supplied, furnished, gathered, transmitted, compiled, edited, disseminated, or delivered; and

b. Any news or information obtained in the course of pursuing his professional activities whether or not it is disseminated.

The provisions of this rule insofar as it relates to radio or television stations shall not apply unless the radio or television station maintains and keeps open for inspection, for a period of at least 1 year from the date of an actual broadcast or telecast, an exact recording, transcription, kinescopic film or certified written transcript of the actual broadcast or telecast.

(b) N.J.S.A. 2A:84A-21a provides:

Unless a different meaning clearly appears from the context of this act, as used in this act:

a. "News media" means newspapers, magazines, press associations, news agencies, wire services, radio, television or other similar printed, photographic, mechanical or electronic means of disseminating news to the general public.

b. "News" means any written, oral or pictorial information gathered, procured, transmitted, compiled, edited or disseminated by, or on behalf of any person engaged in, engaged on, connected with or employed by a news media and so procured or obtained while such required relationship is in effect.

c. "Newspaper" means a paper that is printed and distributed ordinarily not less frequently than once a week and that contains news, articles of opinion, editorials, features, advertising, or other matter regarded as of current interest, has a paid circulation and has been entered at a United States post office as second class matter.

d. "Magazine" means a publication containing news which is published and distributed periodically, has a paid circulation and has been entered at a United States post office as second class matter.

e. "News agency" means a commercial organization that collects and supplies news to subscribing newspapers, magazines, periodicals and news broadcasters.

f. "Press association" means an association of newspapers or magazines formed to gather and distribute news to its members.

g. "Wire service" means a news agency that sends out syndicated news copy by wire to subscribing newspapers, magazines, periodicals or news broadcasters.

h. "In the course of pursuing his professional activities" means any situation, including a social gathering, in which a reporter obtains information for the purpose of disseminating it to the public, but does not include any situation in which a reporter intentionally conceals from the source the fact that he is a reporter, and does not include any situation in which a reporter is an eyewitness to, or participant in, any act involving physical violence or property damage.

(c) N.J.S.A. 2A:84A-21.1 provides:

Where a newsperson is required to disclose information pursuant to a subpoena issued by or on behalf of a defendant in a criminal proceeding, not including proceedings before administrative or investigative bodies, grand juries, or legislative committees or commissions, the provisions and procedures in this act are applicable to the claim and exercise of the newsperson's privilege under Rule 27 (C.2A:84A-21).

(d) N.J.S.A. 2A:84A-21.2 provides:

Proceedings pursuant to this act shall take place before the trial, except that the court may allow a motion to institute proceedings pursuant to this act to be made during trial if the court determines that the evidence sought is newly discovered and could not have been discovered earlier through the exercise of due diligence.

(e) N.J.S.A. 2A:84A-21.3 provides:

a. To sustain a claim of the newsperson's privilege under Rule 27 [Rule 508(a)] the claimant shall make a prima facie showing that he is engaged in, connected with or employed by a news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated, and that the subpoenaed materials were obtained in the course of pursuing his professional activities.

b. To overcome a finding by the court that the claimant has made a prima facie showing under a. above, the party seeking enforcement of the subpoena shall show by clear and convincing evidence that the privilege has been waived under Rule 37 [Rule 530] (C. 2A:84A-29) or by a preponderance of the evidence that there is a reasonable probability that the subpoenaed materials are relevant, material and necessary to the defense, that they could not be secured from any less intrusive source, that the value of the material sought as it bears upon the issue of guilt or innocence outweighs the privilege against disclosure, and that the request is not overbroad, oppressive, or unreasonably burdensome which may be overcome by evidence that all or part of the information sought is irrelevant, immaterial, unnecessary to the defense, or that it can be secured from another source. Publication shall constitute a waiver only as to the specific material published.

c. The determinations to be made by the court pursuant to this section shall be made only after a hearing in which the party claiming the privilege and the party seeking enforcement of the subpoena shall have a full opportunity to present evidence and argument with respect to each of the materials or items sought to be subpoenaed.

(f) N.J.S.A. 2A:84A-21.4 provides:

Upon a finding by the court that there has been a waiver as to any of the materials sought or that any of the materials sought meet the criteria set forth in subsection 3.b., the court shall order the production of such materials, and such materials only, for in camera inspection and determination as to its probable admissibility in the trial. The party claiming the privilege and the party seeking enforcement of the subpoena shall be entitled to a hearing in connection with the in camera inspection of such materials by the court, during which hearing each party shall have a full opportunity to be heard. If the court, after its in camera review of the materials, determines that such materials are admissible according to the standards set forth in subsection 3.6., the court shall direct production of such materials, and such materials only.

(g) N.J.S.A. 2A:84A-21.5 provides:

After any hearing conducted by the court pursuant to section 3 or 4 hereof, the court shall make specific findings of fact and conclusions of law with respect to its rulings, which findings shall be in writing or set forth on the record.

(h) N.J.S.A. 2A:84A-21.6 provides:

An interlocutory appeal taken from a decision to uphold or quash a subpoena shall act as a stay of all penalties which may have been imposed for failure to comply with the court's order. The record on appeal shall be kept under seal until such time as appeals are exhausted. In the event that all material or any part thereof is found to be privileged, the record as to that privileged material shall remain permanently sealed. Any subpoenaed materials which shall, upon exhaustion and determination of such appeals, be found to be privileged, shall be returned to the party claiming the privilege.

(i) N.J.S.A. 2A:84A-21.7 provides:

Where proceedings are instituted hereunder by one of several co-defendants in a criminal trial, notice shall be provided to all of the co-defendants. Any co-defendant shall have the right to intervene if the co-defendant can demonstrate, pursuant to section 3, that the materials sought by the issuance of the subpoena bear upon his guilt or innocence. Where such intervention is sought by a co-defendant, that co-defendant shall be required, prior to being permitted to participate in any in camera proceeding, to make that showing required of a defendant in section 3.

(j) N.J.S.A. 2A:84A-21.8 provides:

If the court finds no reasonable basis for requesting the information has been shown, costs, including counsel fee, may be assessed against the party seeking enforcement of the subpoena. Where an application for costs or counsel fee is made, the judge shall set forth his reasons for awarding or denying same.

RULE 509

MARITAL PRIVILEGE--CONFIDENTIAL COMMUNICATIONS

N.J.S.A. 2A:84A-22 provides:

No person shall disclose any communication made in confidence between such person and his or her spouse unless both shall consent to the disclosure or unless the communication is relevant to an issue in an action between them or in a criminal action or proceeding coming within Rule 23(2) [Rule 501(2)]. When a spouse is incompetent or deceased, consent to the disclosure may be given for such a spouse by the guardian, executor or administrator. The requirement for consent shall not terminate with divorce or separation. A communication between spouses while living separate and apart under a divorce from bed and board shall not be a privileged communication.

RULE 510

MARRIAGE COUNSELOR PRIVILEGE

N.J.S.A. 45:8B-29 provides:

Any communication between a marriage counselor and the person or persons counseled shall be confidential and its secrecy preserved. This privilege shall not be subject to waiver, except where the marriage counselor is a party defendant to a civil, criminal or disciplinary action arising from such counseling, in which case, the waiver shall be limited to that action.

RULE 511

PRIEST-PENITENT PRIVILEGE

N.J.S.A. 2A:84A-23 provides:

Subject to Rule 37 [Rule 530], a clergyman, minister or other person or practitioner authorized to perform similar functions, of any religion shall not be allowed or compelled to disclose a confession or other confidential communication made to him in his professional character, or as a spiritual advisor in the course of the discipline or practice of the religious body to which he belongs or of the religion which he professes, nor shall he be compelled to disclose the confidential relations and communications between and among him and individuals, couples, families or groups with respect to the exercise of his professional counselling role.

RULE 512

RELIGIOUS BELIEF

N.J.S.A. 2A:84A-24 provides:

Every person has a privilege to refuse to disclose his theological opinion or religious belief unless his adherence or nonadherence to such an opinion or belief is material to an issue in the action other than that of his credibility as a witness.

RULE 513

POLITICAL VOTE

N.J.S.A. 2A:84A-25 provides:

Every person has a privilege to refuse to disclose the tenor of his vote at a political election unless the judge finds that the vote was cast illegally.

RULE 514

TRADE SECRET

N.J.S.A. 2A:84A-26 provides:

The owner of a trade secret has a privilege, which may be claimed by him or his agent or employee, to refuse to disclose the secret and to prevent other persons from disclosing it if the judge finds that the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.

RULE 515

OFFICIAL INFORMATION

N.J.S.A. 2A:84A-27 provides:

No person shall disclose official information of this State or of the United States (a) if disclosure is forbidden by or pursuant to any Act of Congress or of this State, or (b) if the judge finds that disclosure of the information in the action will be harmful to the interests of the public.

RULE 516

IDENTITY OF INFORMER

N.J.S.A. 2A:84A-28 provides:

A witness has a privilege to refuse to disclose the identity of a person who has furnished information purporting to disclose a violation of a provision of the laws of this State or of the United States to a representative of the State or the United States or a governmental division thereof, charged with the duty of enforcing that provision, and evidence thereof is inadmissible, unless the judge finds that (a) the identity of the person furnishing the information has already been otherwise disclosed or (b) disclosure of his identity is essential to assure a fair determination of the issues.

RULE 517

VICTIM COUNSELOR PRIVILEGE

(a) N.J.S.A. 2A:84A-22.13 provides:

The Legislature finds and declares that:

a. The emotional and psychological injuries that are inflicted on victims of violence are often more serious than the physical injuries suffered;

b. Counseling is often a successful treatment to ease the real and profound psychological trauma experienced by these victims and their families;

c. In the counseling process, victims of violence openly discuss their emotional reactions to the crime. These reactions are often highly intertwined with their personal histories and psychological profile;

d. Counseling of violence and victims is most successful when the victims are assured their thoughts and feelings will remain confidential and will not be disclosed without their permission; and

e. Confidentiality should be accorded all victims of violence who require counseling whether or not they are able to afford the services of private psychiatrists or psychologists.

Therefore, it is the public policy of this State to extend a testimonial privilege encompassing the contents of communications with a victim counselor and to render immune from discovery or legal process the records of these communications maintained by the counselor.

(b) N.J.S.A. 2A:84A-22.14 provides:

As used in this act:

a. "Act of violence" means the commission or attempt to commit any of the offenses set forth in subsection b. of section 11 of P.L. 1971, c. 317 (C.52:4B-11).

b. "Confidential communication" means any information exchanged between a victim and a victim counselor in private or in the presence of a third party who is necessary to facilitate communication or further the counseling process and which is disclosed in the course of the counselor's treatment of the victim for any emotional or psychological condition resulting from an act of violence. It includes any advice, report or working paper given or made in the course of the consultation and all information received by the victim counselor in the course of that relationship.

c. "Victim" means a person who consults a counselor for the purpose of securing advice, counseling or assistance concerning a mental, physical or emotional condition caused by an act of violence.

d. "Victim counseling center" means any office, institution, or center offering assistance to victims and their families through crisis intervention, medical and legal accompaniment and follow-up counseling.

e. "Victim counselor" means a person engaged in any office, institution or center defined as a victim counseling center by this act, who has undergone 40 hours of training and is under the control of a direct services supervisor of the center and who has a primary function of rendering advice, counseling or assisting victims of acts of violence.

(c) N.J.S.A. 2A:84A-22.15 provides:

Subject to Rule 37 [Rule 530] of the Rules of Evidence, a victim counselor has a privilege not to be examined as a witness in any civil or criminal proceeding with regard to any confidential communication. The privilege shall be claimed by the counselor unless otherwise instructed by prior written consent of the victim. When a victim is incompetent or deceased consent to disclosure may be given by the guardian, executor or administrator except when the guardian, executor or administrator is the defendant or has a relationship with the victim such that he has an interest in the outcome of the proceeding. The privilege may be knowingly waived by a juvenile. In any instance where the juvenile is, in the opinion of the judge, incapable of knowing consent, the parent or guardian of the juvenile may waive the privilege on behalf of the juvenile, provided that the parent or guardian is not the defendant and does not have a relationship with the defendant such that he has an interest in the outcome of the proceeding. A victim counselor or a victim cannot be compelled to provide testimony in any civil or criminal proceeding that would identify the name, address, location, or telephone number of a domestic violence shelter or any other facility that provided temporary emergency shelter to the victim of the offense or transaction that is the subject of the proceeding unless the facility is a party to the proceeding.

(d) N.J.S.A. 2A:84A-22.16 provides:

Nothing in this act shall be deemed to prevent the disclosure to a defendant in a criminal action of statements or information given by a victim to a county victim-witness coordinator, where the disclosure of the statements or information is required by the constitution of this State or of the United States.

RULE 518 TO RULE 529

[Reserved]

RULE 530

WAIVER OF PRIVILEGE BY CONTRACT OR PREVIOUS DISCLOSURE; LIMITATIONS

N.J.S.A. 2A:84A-29 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 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.

RULE 531

ADMISSIBILITY OF DISCLOSURE WRONGFULLY COMPELLED

N.J.S.A. 2A:84A-30 provides:

Evidence of a statement or other disclosure is inadmissible against the holder of the privilege if the disclosure was wrongfully made or erroneously required.

RULE 532

REFERENCE TO EXERCISE OF PRIVILEGES

N.J.S.A. 2A:84A-31 provides:

If a privilege is exercised not to testify or to prevent another from testifying, either in the action or with respect to particular matters, or to refuse to disclose or to prevent another from disclosing any matter, the judge and counsel may not comment thereon, no presumption shall arise with respect to the exercise of the privilege, and the trier of fact may not draw any adverse inference therefrom. In those jury cases wherein the right to exercise a privilege, as herein provided, may be misunderstood and unfavorable inferences drawn by the trier of the fact, or be impaired in the particular case, the court, at the request of the party exercising the privilege, may instruct the jury in support of such privilege.

RULE 533

EFFECT OF ERROR IN OVERRULING CLAIM OF PRIVILEGE

N.J.S.A. 2A:84A-32 provides:

(1) A party may predicate error on a ruling disallowing a claim of privilege only if he is the holder of the privilege.

(2) If a witness refuses to answer a question, under color of a privilege claimed pursuant to Rules 23 through 38 [Rules 501 through 531], after the judge has ordered the witness to answer, and a contempt proceeding is brought against the witness, the court hearing the same shall order it dismissed if it appears that the order directing the witness to answer was erroneous.

ARTICLE VI. WITNESSES

RULE 601

GENERAL RULE OF COMPETENCY

Every person is competent to be a witness unless (a) the judge finds that the proposed witness is incapable of expression concerning the matter so as to be understood by the judge and 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.

COMMENT

Rule 601 incorporates the substantive provisions of N.J. Evid. R. 7(a) and (c) and 17(a) and (b). The federal analogue, Fed. R. Evid. 601, is inapposite to the extent that it states a choice of law rule in federal proceedings. While the substantive provision of the federal rule is less specific than this rule, the federal rule is not inconsistent with this rule in principle. Subsection (c) was added to accommodate provisions of Rules 804(a)(5) and 805(b)(8)(B) regarding admissibility of a child's statements concerning sexual activity notwithstanding the child is not deemed competent as a witness under Rule 601.

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 witness himself.

COMMENT

Rule 602 follows Fed. R. Evid. 602 and part of N.J. Evid. R. 19. The provision contained in N.J. Evid. R. 19 which allowed evidence to be introduced conditionally is encompassed by Rule 104 and is therefore not repeated in this rule.

This rule should not be construed to deprive the judge of the inherent power to reject the testimony of a witness if he finds that no trier of fact could reasonably believe that the witness actually perceived the matter. The express provision to this effect contained in N.J. Evid. R. 19 was not included in this rule because it merely reflects a principle generally applicable to proof of all conditions for the admissibility of evidence which is embraced by Rule 104.

RULE 603

OATH OR AFFIRMATION

Before testifying a witness shall be required to take an oath or make an affirmation or declaration to tell the truth under the penalty provided by law. No witness may be barred from testifying because of religious belief or lack of such belief.

COMMENT

Rule 603 follows both Fed. R. Evid. 603 and N.J. Evid. R. 18 with minor language changes. As to the use of evidence respecting the religious belief of a witness, see Rule 610.

Although N.J.S.A. 41:1-6 prescribes a form of affirmation and declaration and R. 1:4-4(b) prescribes the form of certification in lieu of oath, no statute or rule of evidence or practice prescribes the form of witness oath. Consequently, although the so-called traditional form of oath is commonly used, it is not mandated and, especially in the case of children, any form will be acceptable if it satisfies the judge that it constitutes a commitment to speak the truth "on pain of future punishment of any kind." State in Interest of R.R., 79 N.J. 97, 111 (1979).

See also Rule 610, which prohibits admissibility of a witness' beliefs or opinions to affect credibility.

RULE 604

INTERPRETERS

The judge 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.

COMMENT

Rule 604 follows the current but presently uncodified practice of requiring an interpreter to take an oath or make an affirmation to interpret accurately and adopts the last sentence of N.J. Evid. R. 17 making the interpreter subject to rules relating to witnesses. While not inconsistent with Fed. R. Evid. 604, this rule avoids the potential for confusion in the federal rule's stipulation that an interpreter is subject to "qualification as an expert." Instead, this rule, filling a gap in the current New Jersey rules, simply leaves the qualification of a person to act as an interpreter to determination by the trial judge.

Because the use of an interpreter always presents some risk of distortion of the "message communicated by the primary witness," the use of an interpreter should be limited to those situations in which the trial judge is satisfied that the "witness' natural mode of expression is not intelligible to the tribunal." State in Interest of R.R., 79 N.J. 97, 116 (1979). To insure the integrity of the interpretation, the interpretation must be wholly impersonal, that is, an exact rendering of the witness' communication, neither paraphrased, summarized, expanded or otherwise modified. Id. at 117-118. More significantly, the interpreter must have no interest in the matter before the court; an interested interpreter may be allowed to act, if at all, only when there is no reasonable possibility of obtaining the services of a disinterested interpreter. Ibid. See State v. Lee, 211 N.J. Super. 590, 594-596 (App. Div. 1986). In no circumstances may a primary witness act as interpreter for another primary witness. State in the Interest of R.R., supra, 79 N.J. at 119-120.

RULE 605

RESTRICTION ON JUDGE AS WITNESS

The judge presiding at the trial may not testify as a witness in that trial. No objection need be made to preserve the point.

COMMENT

Rule 605 follows Fed. R. Evid. 605 verbatim except that "in that trial" was moved to the end of the sentence. In principle the rule is the same as N.J. Evid. R. 42.

Note that a New Jersey judge may not testify as an expert witness on New Jersey law in a trial over which he is not presiding. State v. Grimes, 235 N.J. Super. 75, 79-81 (App. Div. 1989), certif. denied, 118 N.J. 222 (1989).

RULE 606

RESTRICTION ON JUROR AS WITNESS

A member of the jury may not testify as a witness before the jury on which the juror is serving.

COMMENT

Rule 606 follows the analogous provisions of both Fed. R. Evid. 606(a) and N.J. Evid. R. 43 with minor language changes only. The provision of the federal rule requiring objections to the testimony of a juror to be made outside the presence of the jury was deleted as self-evident.

Fed. R. Evid. 606(b) and N.J. Evid. R. 41 address the extent to which a juror may testify after the verdict with respect to factors influencing his vote. In general terms both prohibit such testimony unless it relates to improper outside influences. New Jersey case law on the subject is generally consistent with both rules. See, e.g., State v. Athorn, 46 N.J. 247 (1966), cert. denied, 384 U.S. 962 (1966); State v. LaFera, 42 N.J. 97, 105-111 (1964); State v. Young, 181 N.J. Super. 463, 466-472 (App. Div. 1981); R. 1:16-1. See also State v. Bey (I), 112 N.J. 45, 86-92 (1988), prescribing standards for post-impanelment, pre-verdict interrogation of jurors respecting possible taint. The prohibition against testimony by jurors in the New Jersey analogue, N.J. Evid. R. 43, was intended only to prohibit a juror from testifying as a fact witness in the trial itself and does not address the question of testimony by a juror in a collateral hearing to determine whether improper influences upon him or the jury may have been exerted. See Comment on Rule 43, The 1963 Report at 83-84. Because New Jersey case law is comprehensive and the issue overlaps procedural concerns, it was deemed unnecessary to adopt an evidence rule dealing with juror misconduct, improper influence of jurors, and related matters. Consequently, no analogue to N.J. Evid. R. 41, or Fed. R. Evid. 606(b) was incorporated in this rule.

RULE 607

CREDIBILITY AND NEUTRALIZATION

Except as otherwise provided by Rules 405 and 608, for the purpose of impairing 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, except that 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 finds that the party calling the witness was surprised. A prior consistent statement shall not be admitted to support the credibility of a witness except to rebut an express or implied charge against the witness of recent fabrication or of improper influence or motive and except as otherwise provided by the law of evidence.

COMMENT

Rule 607 follows almost verbatim N.J. Evid. R. 20 as amended effective July 1, 1982. That amendment, together with the contemporaneous amendment of N.J. Evid. R. 63(1)(a), substantially modified the so-called voucher rule as previously embraced in N.J. Evid. R. 20. Fed. R. Evid. 607, which abolished the voucher rule entirely, was rejected. Rule 607 also continues the neutralization provision embodied in N.J. Evid. R. 20, which is not contained in the federal analogue.

Fed. R. Evid. 607 was coupled in the original draft of the Federal Rules of Evidence with a hearsay exception providing for the substantive admissibility of all prior statements of a witness. See Notes of Committee on the Judiciary, House Report No. 93-650, Note to Fed. R. Evid. 801(d)(1), 28 U.S.C.A. (1984). When all prior statements of a witness are thus admissible, there is no longer the danger that a witness will be called solely to obtain forbidden hearsay benefits under the guise of impeachment, since the benefits are no longer forbidden. See Notes of Advisory Committee on Proposed Rules, Note to Fed. R. Evid. 607, 28 U.S.C.A. (1984). However, if some prior statements of a witness remain subject to hearsay restrictions on substantive use, restrictions on "impeaching" one's own witness should be retained, at least to some extent. This point was apparently overlooked by Congress when the wide open prior witness statement hearsay exception was narrowed, but a corresponding change was not made in the impeachment rule. Rule 607 reflects the properly tailored restrictions on impeachment of one's own witness contained in N.J. Evid. R. 20.

Prior to the adoption of the 1967 Rules of Evidence, it was recommended that Rule 20 take a form that "sweeps the decks clean as to impeachment." The 1963 Report at 59. It was argued that there should be no limitation on the right to impair the credibility of one's "own witness." Ibid. However, the proposed version of Rule 20, which mirrored the principle later embodied in Rule 607 of the Uniform Rules of Evidence, was rejected. Instead a version incorporating the restrictive voucher rule was adopted.

The 1982 amendments to N.J. Evid. R. 20 broadened the right of a party to impeach a witness called by him by allowing him to use a prior inconsistent statement if in a form complying with N.J. Evid. R. 63(1)(a), as amended. Such a statement can also be used to neutralize the current testimony of the witness, whether or not the party calling the witness has been surprised by that testimony. A fuller statement of the purposes of the 1982

amendments to N.J. Evid. R. 20 and N.J. Evid. R. 63(1)(a) was given in the commentary to the proposed amendments to these rules published in 108 N.J.L.J. 301, 302 (1981).

Rule 607 permits the use of a prior consistent statement to rebut an express or implied charge of recent fabrication or of improper influence or motive. The phrase "improper influence or motive" has been added to the formulation in N.J. Evid. R. 20. It was taken from Fed. R. Evid. 801 (d)(1)(B) and is repeated in Rule 803 (a)(2). With respect to the provision dealing with the admissibility of prior consistent statements, the phrase "and except as otherwise provided by the law of evidence" refers to situations recognized by case law, such as the fresh complaint rule, which permits fresh complaint evidence to be offered to support the credibility of a witness. State v. Balles, 47 N.J. 331, 338 (1966), cert. denied and appeal dismissed, 388 U.S. 461 (1967); State v. Bethune, 232 N.J. Super. 532 (App. Div. 1989), aff'd, 121 N.J. 137 (1990).

As to the use of extrinsic evidence other than prior statements to affect credibility, see generally State v. Johnson, 216 N.J. Super. 588, 603 (App. Div. 1987). See also Rule 608 as to the use of character evidence of truthfulness to support the credibility of a witness.

RULE 608

EVIDENCE OF CHARACTER FOR TRUTHFULNESS OR UNTRUTHFULNESS

The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, 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 for truthfulness has been attacked by opinion or reputation evidence or otherwise. Except as otherwise provided by Rule 609, a trait of character cannot be proved by specific instances of conduct.

COMMENT

Rule 608 incorporates the limiting principles of N.J. Evid. R. 22(c) and (d) with respect to admission of evidence of a trait of character for truthfulness or untruthfulness when offered under N.J. Evid. R. 20 to affect the credibility of a witness. The form of language follows the federal analogue, Fed. R. Evid. 608, rather than the current New Jersey rule. The federal rule has the advantage of explicitly stating the mode of proof of character for veracity in its reference to "opinion or reputation" evidence. Although the current New Jersey rule does not specify the mode of proof, both opinion and reputation evidence were contemplated by The 1963 Report at 71. Rule 608 also incorporates expressly the provision found in the federal rule that evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise. This is consistent with established New Jersey law. State v. Johnson, 216 N.J. Super. 588, 605-607 (App. Div. 1987); The 1963 Report at 64.

However, the 1982 amendment of N.J. Evid. R. 20 which amended the provision that "[n]o evidence to support the credibility of a witness shall be admitted except to meet a charge of recent fabrication of testimony" has been broadly interpreted to suggest that evidence of good character to support the credibility of a witness can be introduced without prior impeachment by character evidence. See State v. Frost, 242 N.J. Super. 601, 613 (App. Div. 1990); Coddeli v. Brown, 220 N.J. Super. 330, 336 (Law Div. 1987). This was not the intent of the 1982 amendment of N.J. Evid. R. 20. The provision which was changed was literally too restrictive; corroborating evidence the credibility of a witness. What was intended by the 1967 version of rule 20 was that, generally, credibility could not be supported by a prior consistent statement except to meet an express or implied charge of recent fabrication. The 1982 amendment revised the last sentence of this rule to express this principle more accurately. The revision was not intended to open the door to supporting character evidence of truthfulness when the character of the witness for truthfulness had not first been attacked. Rule 608 is intended to ratify the long-standing New Jersey rule in this respect.

Another change in the New Jersey rule is the express provision in the second sentence of the rule that the prohibition against proof of trait of character for truthfulness or untruthfulness does not apply to evidence of prior conviction admissible pursuant to Rule 609, which incorporates N.J.S.A. 2A:81-12 as interpreted by State v. Sands, 76 N.J. 127 (1978). Note further that the subject matter of N.J. Evid. R. 22(a) and (b) is dealt with in Rule 613.

Although this rule follows the formulation of Fed. R. Evid. 608, it retains present New Jersey practice by rejecting the provision of paragraph (b) of the federal rule which permits limited admissibility of specific instances of conduct on cross-examination. N.J. Evid. R. 22(d), followed by this rule, prohibited "specific instances of conduct" proof in any form if introduced to prove a trait of character. Thus, this rule is consistent in philosophy and effect with the choice made in respect of Rule 405(a), namely adopting the state rather than the federal analogue. It is the Committee's view that Rule 607 affords sufficient scope for the effective impeachment of credibility.

As to other rules dealing with proof of character traits for purposes other than impeaching credibility, see Rules 404 and 405 incorporating former N.J. Evid. R. 46, 47, 48 and 55.

RULE 609

IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

For the purpose of affecting the credibility of any witness, the witness' conviction of a crime shall be admitted unless excluded by the judge as remote or for other causes. Such conviction may be proved by examination, production of the record thereof, or by other competent evidence.

COMMENT

Rule 609 is adopted in place of Fed. R. Evid. 609. The rule follows provisions contained in N.J.S.A. 2A:81-12 as interpreted by State v. Sands, 76 N.J. 127 (1978). There is no comparable 1967 rule, since the then proposed Rule 21, which contained restrictive provisions on the use of criminal convictions to impair credibility, was not adopted, the intention then being to leave N.J.S.A. 2A:81-12 in effect, except for the portion concerning the use in civil actions of judgments of conviction as substantive evidence of facts, which was superseded by virtue of the official note to N.J. Evid. R. 63(20). See R. 3:9-2 and R. 7:4-2(b).

The general rule stated by Fed. R. Evid. 609(a) limits the use of convictions to impeach the credibility of a witness to (1) crimes punishable by death or imprisonment in excess of a year and (2) all crimes involving dishonesty or false statement regardless of punishment. A further qualification in respect of the first category only is the determination by the judge that the probative value of admitting the evidence outweighs its prejudicial effect to the defendant. This rule makes no admissibility distinction in terms of the crime of which the witness has been convicted. Evidence of any conviction of crime is subject to exclusion if its probative value is outweighed by its prejudicial effect, but it is the defendant who bears the burden of proving the exclusion. See State v. Kelly, 97 N.J. 178, 217 n.21 (1984); State v. Balthrop, 92 N.J. 542, 544-547 (1983). Paragraph (b) of the federal rule deals with the admissibility of convictions which are more than ten years old. This rule does not refer explicitly to the ten-year limitation and exceptions thereto. These are matters dealt with by State v. Sands, supra, whose principles, similar to those embodied by Fed. R. Evid. 609(b), should be deemed to have been incorporated in this rule.

While this rule draws no distinction between crimes of dishonesty or false statement and other crimes, it is clear that it applies only to indictable offenses which are the subject of valid convictions. Neither evidence of arrests for or charges of crime are admissible under this rule. See, e.g., State v. McBride, 213 N.J. Super. 255, 267 (App. Div. 1986). Neither are convictions of disorderly persons offenses or traffic violations. See, e.g., State v. Rowe, 52 N.J. 293, 302 (1970). Nor are adjudications of juvenile delinquency. See State in Interest of K.P., 167 N.J. Super. 290, 293-294 (App. Div. 1979), certif. denied, 87 N.J. 394 (1981). And, it has been held, uncounselled convictions are inadmissible. State v. Rios, 155 N.J. Super. 11, 15 (Law Div. 1978). See also State v. Koch, 119 N.J. Super. 184 (App. Div. 1972).

As to the impeachment use of a prior conviction against a witness in a criminal trial rather than against the defendant himself and particularly against a prosecution witness, see State v. Balthrop, supra, 92 N.J. at 544-547, where the Court explained that while the same balancing test of probative value versus prejudicial effect applies to determine exclusion, nevertheless the prejudice to the defendant, not merely to the witness, must be a significant factor in the equation. In this regard, the federal rule is explicit, paragraph (a)(1) specifically defining prejudice as prejudice to the defendant.

As to the use of prior convictions for impeachment of witnesses in civil causes, see, e.g., Tonsberg v. VIP Coach Lines, Inc., 216 N.J. Super. 522, 529 (App. Div. 1987); Vartenissian v. Food Haulers, Inc., 193 N.J. Super. 603, 610-611 (App. Div. 1984).

With respect to the mode of proof of prior convictions, Fed. R. Evid. 609(a) expressly requires proof by way of public record or admission by the witness. This rule incorporates both modes, which have been held to be acceptable. See State v. H.G.G., 202 N.J. Super. 267 (App. Div. 1985); State v. Mazur, 158 N.J. Super. 89, 106 (App. Div. 1978), certif. denied, 75 N.J. 399 (1978). In addition, the rule also permits, without definition, proof by "other competent evidence." This provision may be deemed to incorporate N.J.S.A. 2C:44-4(d), which provides: "Any prior conviction may be proved by any evidence, including fingerprint records, made in connection with arrest, conviction or imprisonment, that reasonably satisfies the court that the defendant was convicted." Cf. State v. Carey, 232 N.J. Super. 553, 555-558 (App. Div. 1989) (holding a computer printout of defendant's driving record admissible to prove a prior driving-while-intoxicated conviction).

This rule contains no provisions comparable to Fed. R. Evid. 609(c), (d) and (e). Paragraph (c) of the federal rule deals with the effect of a pardon, annulment or other procedure upon the viability of the conviction. This subject is left for development by case law and the judicial interpretation of applicable statutes or other pertinent laws both of the jurisdiction in which the conviction was entered and in this jurisdiction. See, for example, N.J.S.A. 2C:52-27 which provides that, if an order of expungement is entered, the conviction "shall be deemed not to have occurred."

Paragraph (d) of the federal rule addresses juvenile adjudications. Since adjudications of juvenile delinquency are not convictions of crime in New Jersey, such adjudications do not come within this rule. State in Interest of K.P., supra, 167 N.J. Super. at 293-294. However, if a juvenile has been tried and convicted of a crime as an adult on a waiver of jurisdiction by the Chancery Division, Family Part, that conviction may be shown to impeach his credibility. State v. Steffanelli, 133 N.J. Super. 512 (App. Div. 1975).

Paragraph (e) of Fed. R. Evid. 609 deals with effect of a pending appeal on the use of a conviction to impeach credibility and provides that such pendency does not render evidence of the conviction inadmissible. New Jersey case law holds to the contrary. See State v. Biegenwald, 96 N.J. 630, 638 (1984), citing with approval State v. Biue, 129 N.J. Super. 8, 12 (App. Div. 1974), certif. denied, 66 N.J. 328 (1974). See also State v. Eddy, 189 N.J. Super. 22 (Law Div. 1982). The conviction is, however, admissible pending appeal if the appeal challenges only the sentence and not the validity or integrity of the guilt adjudication. See State v. Anderson, 177 N.J. Super. 334 (App.

Div. 1981); State v. Eddy, supra, 189 N.J. Super. at 23. Cf. State v. Rodriquez, 202 N.J. Super. 543 (Law Div. 1985).

This rule is not limited to convictions of crimes obtained in New Jersey. See State v. Koch, 118 N.J. Super. 421, 424-425 (App. Div. 1972). Cf. State v. Lueder, 74 N.J. 62 (1977).

Note that New Jersey law permits a defendant who does not testify to appeal a trial court determination that a prior conviction could be used to impeach him if he were to testify at the trial. See State v. Whitehead, 104 N.J. 353 (1986). This is contrary to the federal rule which requires the defendant to testify in order to preserve for appeal the claim that a prior conviction was improperly admitted for impeachment purposes. See Luce v. United States, 469 U.S. 38, 83 L. Ed. 2d 443 (1984).

RULE 610

RELIGIOUS BELIEFS OR OPINIONS

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

COMMENT

Rule 610 follows Fed. R. Evid. 610 verbatim. It is not inconsistent with N.J. Evid. R. 30, which cited the statutory privilege contained in N.J.S.A. 2A:84A-24. By virtue of that privilege a witness may "refuse to disclose his theological opinion or religious belief unless his adherence or nonadherence to such an opinion or belief is material to an issue in the action other than that of his credibility as a witness." Rule 610 makes inadmissible proof of the religious beliefs or opinions of a witness when offered through the testimony of that witness or by other evidence if the sole purpose is to affect the credibility of that witness by reason of the nature of those beliefs. Consistent with N.J.S.A. 2A:84A-24, this rule does not exclude proof of religious beliefs or opinions when offered for another purpose that is material to an issue in the action. See, e.g., In re Conroy, 98 N.J. 321, 361-362 (1985) (religious beliefs of an incompetent patient are admissible to determine the patient's prior intent to have life-sustaining medical intervention).

See also Rule 603 (oath or affirmation), which expressly permits a witness to testify irrespective of his religious belief or lack thereof.

RULE 611

MODE AND ORDER OF INTERROGATION AND PRESENTATION

(a) Control by court. 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 effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading questions. 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.

COMMENT

Rule 611 follows Fed. R. Evid. 611 almost verbatim. Paragraph (c) was changed to add to the federal formulation "unresponsiveness" as a basis for permitting leading questions and to substitute "when a witness demonstrates hostility" for the term "hostile witness." While there is no 1967 New Jersey analogue, N.J.S.A. 2A:81-11 provides: "Except as otherwise provided by law, when any party is called as a witness by the adverse party he shall be subject to the same rules as to examination and cross-examination as other witnesses." See Becker v. Eisenstodt, 60 N.J. Super. 240, 248-249 (App. Div. 1960).

Although the principles stated by Rule 611 have not heretofore been codified in this jurisdiction, they are nevertheless consistent with New Jersey practice. As to paragraph (a) of the Rule, see Cestero v. Ferrara, 110 N.J. Super. 264, 273 (App. Div. 1970), aff'd, 57 N.J. 497 (1971), holding that "[t]he control of examination, both direct and cross, resides in [the trial judge], to the end that the proofs may be kept within reasonable bounds. His discretion in this respect is a broad one, and we will not interfere with its exercise absent a clear abuse of that discretion."

As to cross-examination, New Jersey courts have repeatedly held that while the scope of cross-examination is a matter within the trial judge's discretion and should ordinarily be restricted to the scope of the direct testimony, nevertheless, reasonable latitude should be permitted to assure its inclusion of relevant material, including matters relevant to showing the improbability of the direct evidence. See, e.g., State v. Petillo, 61 N.J. 165, 169 (1972), cert. denied, 410 U.S. 945 (1973); State v. Pollack, 43 N.J. 34, 39 (1964); Singer Shop-Rite, Inc. v. Rangel, 174 N.J. Super. 442, 448 (App. Div. 1980), certif. denied, 85 N.J. 148 (1980); State v. Mustacchio, 109 N.J. Super. 257, 264 (App. Div. 1970), aff'd, 57 N.J. 265 (1970).

As to leading questions, see Nobero Co. v. Ferro Trucking Inc., 107 N.J. Super. 394, 404 (App. Div. 1969), noting that "[w]hile leading questions are generally not permitted on the direct examination of one's own witness, there is an area of permissible leading, within the discretion of the trial judge, to avoid confusion, to clarify testimony, or otherwise to bring out the truth in serving the cause of justice." See also State v. Riley, 28 N.J. 188, 204-205 (1958), cert. denied, 359 U.S. 313 (1959) and cert. denied, 361 U.S. 879 (1959), as to the propriety of a judge posing leading questions to a witness.

RULE 612

WRITING USED TO REFRESH MEMORY

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. 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.

COMMENT

Rule 612 generally follows the first two sentences of Fed. R. Evid. 612 with some language and technical changes. Although there is no 1967 New Jersey rule analogue, the provisions of this rule are consistent with accepted practice in this jurisdiction. See State v. Carter, 91 N.J. 86, 122-123 (1982); State v. Bindhammer, 44 N.J. 372, 385 (1965); State v. Williams, 226 N.J. Super. 94, 103 (App. Div. 1988); State v. Rajnai, 132 N.J. Super. 530, 539-540 (App. Div. 1975).

First, this rule makes clear that when a writing used by a witness to refresh his memory is offered in evidence by the adverse party, the purpose of the offer is limited to impeaching credibility. The writing itself does not constitute substantive evidence of the facts stated therein. While the federal rule is not explicit as to this limited purpose of the offer, that limitation is nevertheless implicit. See State v. Carter, supra, 91 N.J. at 123, explaining that "[t]he admissible evidence is the recollection of the witness, and not the extrinsic paper."

Second, the introductory phrase of the federal rule specifically excepts the provisions of 18 U.S.C.A. §3500 (the Jencks Act), which accord defendants in criminal proceedings rights to discovery of any prior statement made by a prosecution witness. The evident purpose of this exception in the federal rule is to avoid the interpretation that it intends any curtailment of the discovery rights afforded by the Jencks Act. While New Jersey does not have a statutory analogue to the Jencks Act, its principles are embodied by rules of court. See R. 3:17-1 to 4. See also Comment on R. 3:17. Thus, the exception provision in the introductory phrase of Rule 612 is primarily intended as a reference to R. 3:17 and to the pertinent provisions of R. 3:13-3, which provide for pretrial discovery. Note that pretrial discovery in New Jersey, substantially broader than that available in the federal practice, has effectively eliminated the need of defendants to rely on R. 3:17, which is little used.

This rule retains the distinction made by the federal rule between statements used to refresh collection while the witness is testifying and statements used for that purpose before the testimony is given. When the statement is used during testimony, the adverse party is absolutely entitled to its production, inspection, use in cross-examination and introduction into evidence. Where, however, the writing is used by the witness to refresh his recollection before he testifies, the according of these rights to the adverse party is within the discretion of the court.

This rule omits the provisions of the last two sentences of the federal rule which require preservation of excised portions for appellate purposes and prescribe sanctions for violation of an order entered by the court pursuant to the rule. The first of these provisions is not necessary since it is a matter of well-established practice that any deleted portion of proffered evidence must be made available to the appellate court in the event of an appeal. Cf. R. 1:7-3, so providing in respect of excluded evidence. The sanction provision was omitted since sanctions generally are a matter within the sound discretion of the court.

The distinctions between a writing used to refresh memory offered under this rule and a statement of recorded recollection admissible as an exception to the hearsay rule under R. 803(c)(5) must be kept in mind. Under Rule 612 the offer may be made only by the adverse party, and when offered, the writing may be made only to impeach credibility. The substantive evidence is the testimony of the witness whose memory has been refreshed by recourse to the writing. The hearsay exception of R. 803(c)(5) is applicable when a witness is unable to recall even after recourse to the statement and, therefore, cannot give substantive testimony. Since the statement of recorded recollection can be offered by the proponent of the witness, it is subject to the further limitation that it may only be read to the jury and may not be introduced into evidence as an exhibit. This qualification is not made in the case of a writing used to refresh memory since that writing may be introduced only by an adverse party.

Note that a document used to refresh recollection under this rule need not have been authorized by the witness and may also be used pursuant to this rule even if obtained as the result of an unlawful search and seizure. See State v. Carter, supra, 91 N.J. at 122-123. The only relevant criteria governing the judge's exercise of discretion in allowing use of a document to refresh recollection are whether the witness' memory is actually impaired, whether the document does in fact fairly refresh recollection, and whether the value of the evidence outweighs any danger of undue suggestion. Ibid.; State v. Williams, supra, 226 N.J. Super. at 103.

As to the related problem of admitting testimony of recollection refreshed by hypnosis, see State v. Hurd, 86 N.J. 525 (1981), prescribing standards for the admission of such evidence.

RULE 613

PRIOR STATEMENTS OF WITNESSES

(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown or its contents disclosed to the witness at that time. Upon request the statement shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a 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).

COMMENT

Rule 613 generally follows Fed. R. Evid. 613 with minor language changes only and is consistent with N.J. Evid. R. 22(a) and (b).

Note that while N.J. Evid. R. 22(b) is phrased in terms of the judge's discretion to exclude extrinsic evidence of the witness' prior inconsistent statement unless the preconditions for admissibility are met, this rule, following the federal formulation, provides that unless the preconditions are met, the evidence is not admissible except if "the interests of justice otherwise require." While the import of the two rules is thus essentially the same, this formulation was deemed preferable because of its emphasis on the general principle that absent some special reason, the evidence should not be admitted if the required explanatory opportunities were not afforded. See generally State v. Conyers, 58 N.J. 123, 132 (1971); State v. Coruzzi, 189 N.J. Super. 273, 305 (App. Div. 1983), certif. denied, 94 N.J. 531 (1983).

RULE 614

CALLING AND INTERROGATION OF WITNESSES BY JUDGE

The 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.

COMMENT

Rule 614 generally follows Fed. R. Evid. 614. While there is no New Jersey rule analogue, this rule is consistent with current New Jersey practice. See State v. Ross, 80 N.J. 239, 248-249 (1979); State v. Guido, 40 N.J. 191, 207-208 (1963); State v. Riley, 28 N.J. 188, 200-201 (1958), cert. denied and appeal dismissed, 359 U.S. 313 (1959) and cert. denied, 361 U.S. 879 (1959). This case law establishes standards and limitations on the exercise of this authority. The phrase "in accordance with law" refers to such standards and limitations.

RULE 615

SEQUESTRATION OF WITNESSES

At the request of a party or on the court's own motion, the court may, in accordance with law, enter an order sequestering witnesses.

COMMENT

Rule 615 is a general statement incorporating by reference the body of New Jersey case law on witness sequestration. The formulation of Fed. R. Evid. 615 was therefore not adopted. There is no New Jersey rule analogue. Exercise of the inherent power to sequester witnesses is subject to the limitations and standards developed by judicial decision. See, e.g., State v. Smith, 55 N.J. 476, 484-485 (1970), cert. denied, 400 U.S. 949 (1970); State v. DiModica, 40 N.J. 404, 413-414 (1963); State v. Williams, 29 N.J. 27, 45-47 (1959). Note that the sequestration of juries during deliberations is dealt with by rule of court, R. 1:8-6. And see further as to witness sequestration, S. Pressler, Current N.J. Court Rules, R. 1:8-6 Comment 2 (1991).

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

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

COMMENT

This rule follows both Fed. R. Evid. 701 and N.J. Evid. R. 56(1) in substance. Minor language changes have been made for clarity. The term "perception" is used in this rule in the sense as defined by N.J. Evid. R. 1(14), which has not been incorporated in these rules, namely, the acquisition of knowledge through one's own senses.

RULE 702

TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

COMMENT

Rule 702 follows Fed. R. Evid. 702 verbatim and makes only minor language changes in the first sentence of N.J. Evid. R. 56(2). The foundation requirement set forth in N.J. Evid. R. 19 has been omitted as necessarily implied by the use in this rule of the word "expert" rather than the word "witness" used in the 1967 New Jersey analogue.

RULE 703

BASES OF OPINION TESTIMONY 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. 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.

COMMENT

Rule 703 follows Fed. R. Evid. 703 verbatim and the last two sentences of N.J. Evid. R. 56(2). The New Jersey rule had been amended effective July 1, 1982, to conform to the federal rule. As to the purpose of that amendment, see the commentary published in 108 N.J.L.J. 301, 302 (1981). The term "perceived" as used in this rule means to have acquired knowledge through one's own senses. See Comment to Rule 701 above.

RULE 704

OPINION ON ULTIMATE ISSUE

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

COMMENT

Rule 704 follows Fed. R. Evid. 704(a) and makes only minor language changes in N.J. Evid. R. 56(3). State v. Odom, 116 N.J. 65, 79 (1989).

Fed. R. Evid. 704 was amended by the Comprehensive Crime Control Act of 1984 (Pub. L. No. 98-473), to add subsection (b) to the rule, prohibiting expert witnesses testifying about the mental state of the defendant in a criminal case from giving an opinion as to whether or not defendant had the mental state or condition which constituted an element of the crime charged or a defense to the crime. The federal rule leaves that "ultimate issue" for the jury. This rule was not adopted; it is contrary to New Jersey law. See Aponte v. State, 30 N.J. 441, 446 (1959).

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 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 the judge in his discretion so requires.

COMMENT

The first sentence of Rule 705 follows Fed. R. Evid. 705 verbatim and makes only minor language changes in N.J. Evid. R. 57, which had been amended effective July 1, 1982, to conform to the federal rule. As to the purpose of that amendment, see the commentary published in 108 N.J.L.J. 301, 302 (1981).

The third sentence of Rule 705 follows N.J. Evid. R. 58 verbatim. There is no federal analogue.

RULE 706

COURT APPOINTED EXPERTS

[NOT ADOPTED]

COMMENT

Contrary to the recommendation of The 1963 Report at 115-121 (proposed N.J. Evid. R. 59, 60 and 61), the 1967 New Jersey rules did not include provisions for the court appointment of experts. The power of a court to appoint expert witnesses and to deal with related procedural matters may be viewed primarily as a matter of practice and procedure rather than as a part of the law of evidence. The court rules provide in detail for the appointment by the court of an impartial medical expert in personal injury and wrongful death actions. R. 4:20-1 et seq. The rules provide the method of appointment, disclosure to the jury of court appointment, and compensation. R. 4:20-3, 10 and 11. Court appointment of experts is also provided for in family actions. R. 5:3-3.

The power of the court to appoint experts is also established by the case law. See Wayne Tp. v. Kosoff, 73 N.J. 8, 13-15 (1977); Handleman v. Marwen Stores Corp., 53 N.J. 404, 408-414 (1969). For related procedures, see Kosoff, 73 N.J. at 15.

ARTICLE VIII. HEARSAY

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 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.

COMMENT

The definitions of statement, declarant, and hearsay contained in Rule 801(a), (b), and (c), respectively, are identical to those of Fed. R. Evid. 801(a), (b), and (c), respectively. They replace without substantial change N.J. Evid. R. 62(1), 62(2), and 63, respectively.

The definition of business contained in Rule 801(d) follows N.J. Evid. R. 62(5). The federal analogue is the last sentence of Fed. R. Evid. 803(6), which, unlike this rule, does not include governmental activity within the definition of business. See Comment on Rules 803(c)(6) and 803(c)(8). However, Fed. R. Evid. 803(8), dealing with records of governmental activities, covers much of the material that would be admissible under the business record exception in Rule 803(c)(6) and the exception for public records, reports and findings in Rule 803(c)(8).

The definition of writing contained in Rule 801(a) follows Fed. R. Evid. 1001(1) and N.J. Evid. R. 1(13) in substance. The definition broadly includes records of all kinds. Nevertheless, some rules such as Rule 803(c)(5), (6) and (7) use both of the terms "writing" and "record" despite the redundancy.

Rule 801(e) includes provisions contained in both the federal and state analogues but is more comprehensive than N.J. Evid. R. 1(13) in enumerating forms of recording. It also includes duplicates as defined by Rule 1001(d), which follows the federal rule. N.J. Evid. R. 1(13) contains a number of specific forms of recorded expression requiring that the recording be reasonably permanent and readable by sight, a requirement incompatible with recordings of sound and electronic impulses. The requirement of permanency has been retained by this rule but the requirement of readability has been broadened to include all forms of perception. Thus, this rule includes recordings of writings, sounds, photographic images, x-rays, other images, data stored in computers, and electronic or other impulses in all forms of preservation that may be perceived by sight, sound or other senses directly or after retrieval. Photographs are not separately defined as in Fed. R. Evid. 1001(2) because photographs are included in the definition of a writing.

The definition of public official contained in Rule 801(f) follows N.J. Evid. R. 62(3) and 62(4), but broadens the definition to include officials of the United States and agencies of the United States and its territories. There is no federal analogue. However, federal agencies are included in the business record rule, Rule 803(c)(6) and N.J. Evid. R. 63(13), since "business" is defined by Rule 801(d) to include "activities of governmental agencies" as in N.J. Evid. R. 62(5). The definition of a public official is used primarily when applying Rule 803(c)(8), which refers to written records and reports of a public official. The federal version, Fed. R. Evid. 803(8), does not speak in terms of "public officials" but rather refers to records of public offices or agencies, as does Fed. R. Evid. 803(10) (absence of public record).

N.J. Evid. R. 62(4), which defined "State," was deleted as self-evident.

Rule 801 differs from Fed. R. Evid. 801 by omitting paragraph (d) of the federal rule. That paragraph excludes from the definition of hearsay prior statements of witnesses and party-opponents. The Advisory Committee's Note to Fed. R. Evid. 801(d) recognizes that these statements would "otherwise literally fall within the definition" of hearsay. Notes of Advisory Committee on Proposed Rules, Note to Fed. R. Evid. 801(d), 28 U.S.C.A. (1984). One reason for admitting certain extra-judicial statements of witnesses is that, because the declarant is a witness, he is subject to cross-examination and can normally affirm, deny, explain or otherwise qualify the statement. This special category of hearsay applies only to declarants who are witnesses. Like N.J. Evid. R. 63(1), these rules continue to treat prior extra-judicial statements of witnesses as hearsay statements which are admissible as exceptions to the hearsay rule in accordance with the provisions of Rule 803(a). The net effect is the same, that is to say, certain prior extra-judicial statements of witnesses are admitted either because they are deemed not hearsay under the federal formula or because they are an exception under the New Jersey formula. The same treatment is accorded to statements of a party-opponent. Fed. R. Evid. 801(d)(2) defines such extra-judicial statements as non-hearsay, whereas Rule 803(b) admits such statements as an exception to the hearsay rule, as in N.J. Evid. R. 63(7).

Because of this conceptual difference, the numbering of hearsay exceptions in these rules is somewhat different from the federal rules. The exceptions to the hearsay rule that do not depend on the declarant's unavailability as a witness are contained in Fed. R. Evid. 803(1) to (24). Fed. R. Evid. 804 contains hearsay exceptions that require proof of unavailability of the declarant. Similarly, in these rules all hearsay exceptions are contained in Rules 803 and 804. Rule 803 (a) and (b) contain the exceptions for prior extra-judicial statements of witnesses and party-opponents, respectively, and Rule 803 (c)(1) to (26) contain other specific exceptions not dependent upon the declarant's unavailability as a witness. Thus, Rules 803(c)(1) to (23) contain the parallel exceptions that are designated Fed. R. Evid. 803(1) to (23). No analogue to Fed. R. Evid. 803(24) (residual exceptions) was adopted. Rule 803(c)(25), which deals with statements against interest, corresponds to Fed. R. Evid. 804(b)(3), but unavailability of the declarant as a witness is not required under Rule 803(c)(25). There is no federal analogue for Rule 803(c)(26), which deals with judgments against persons entitled to indemnity, derived from N.J. Evid. R. 63(21). Rule 804, like Fed. R. Evid. 804, provides certain additional hearsay exceptions conditioned on the unavailability of the declarant as a witness.

As noted in the comment to Rule 802, neither the hearsay rule nor its exceptions address issues concerning a criminal defendant's right of confrontation under the sixth amendment. The right of confrontation was not the basis for the distinction between hearsay exceptions under Rules 803(c)(1) to (26), which do not depend on the unavailability of a witness, and hearsay exceptions under Rule 804(b), which do require proof of

unavailability. See discussion of the confrontation clause, which normally requires a showing of witness unavailability, Ohio v. Roberts, 448 U.S. 56, 66, 65 L. Ed. 2d 597, 608 (1980), under Comment, Rule 804(b)-Hearsay Exceptions, Introduction, infra.

RULE 802

HEARSAY RULE

Hearsay is not admissible except as provided by these rules or by other law.

COMMENT

Rule 802 follows Fed. R. Evid. 802 in excluding hearsay subject to express exceptions provided by these rules or by law. The New Jersey analogue, N.J. Evid. R. 63, excluded hearsay subject to specific exceptions provided in N.J. Evid. R. 63(1) through 63(33). This rule allows for exceptions provided by law as well as specific exceptions contained in these rules. Rule 101(a)(2)(B) recognizes that hearsay evidence may be admitted in proceedings to which the rules of evidence are made inapplicable by statute. See Rule 101(a) and comments thereto. There is also the rare case in which statements which may be excluded as hearsay in some jurisdictions must be admitted as a matter of constitutional right. See Chambers v. Mississippi, 410 U.S. 284, 291-298, 35 L. Ed. 2d 306-310 (1973).

As stated in the Advisory Committee's Note to Fed. R. Evid. 803, the exceptions "are phrased in terms of nonapplication of the hearsay rule, rather than in positive terms of admissibility, in order to repel any implication that other possible grounds for exclusion are eliminated from consideration." Notes of Advisory Committee on Proposed Rules, Note to Fed. R. Evid. 803, 28 U.S.C.A. (1984). To illustrate this point, lay opinion evidence that would not be admissible if the declarant were testifying in person does not become admissible because it is contained in business records that may be introduced as an exception to the hearsay rule. See Brown v. Mortimer, 100 N.J. Super. 395, 405-406 (App. Div. 1968). Moreover, no attempt has been made to determine the extent to which hearsay exceptions may conflict with a criminal defendant's right of confrontation under the sixth amendment. See Ohio v. Roberts, 448 U.S. 56, 65-66, 65 L. Ed. 2d 597, 607-608 (1980); Dutton v. Evans, 400 U.S. 74, 27 L. Ed. 2d 213 (1970); California v. Green, 399 U.S. 149, 26 L. Ed. 2d 489 (1970); State v. Burgos, 200 N.J. Super. 6, 12 (App. Div. 1985), certif. denied, 101 N.J. 304 (1985).

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 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 or proprietary 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 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.

COMMENT

Rule 803 Generally

Rule 803 states the hearsay exceptions whose application does not depend on the unavailability of the declarant. Rule 804 states the hearsay exceptions that apply only if the declarant is unavailable.

As noted in the Comment to Rule 801, Rule 803(a) treats certain prior extrajudicial statements of witnesses as an exception to the hearsay rule, and Rule 803(b) treats extrajudicial statements of party-opponents (admissions) as an exception to the hearsay rule. The result is consistent with that of Fed. R. Evid. 801(d)(1) and (2) which provide that such prior statements of witnesses and admissions of party-opponents are, by definition, not hearsay. Rules 803 (c)(1) to (c)(26) collect the other general hearsay exceptions as to which the unavailability of the declarant is not a criterion for admissibility.

Rule 803(a) - Prior Statements

Rule 803(a)(1) follows almost verbatim N.J. Evid. R. 63(1)(a), as amended effective July 1, 1982. The words "sound recording" are omitted because they are contained in the definition of writing in Rule 801(e). The New Jersey formulation as to the substantive use of prior inconsistent statements of witnesses is less restrictive than the federal formulation in Fed. R. Evid. 801(d)(1)(A). The New Jersey rule permits the use of a prior inconsistent statement as substantive evidence when offered by a party other than the proponent of the witness, State v. Provet, 133 N.J. Super. 432, 435-439 (App. Div. 1975), certif. denied, 68 N.J. 174 (1975), and also allows such use when offered by the party calling the witness if the inconsistent statement is in written or recorded form in circumstances bespeaking reliability, or was made under oath as specified by the rule. State v. Mancine, 124 N.J. 232, 236-256 (1991); State v. Gross, 121 N.J. 1, 7-15 (1990); State v. Gross, 121 N.J. 18 (1990). By contrast, Fed. R. Evid. 801(d)(1)(A) makes no distinction based upon which party called the witness and admits inconsistent statements as substantive evidence only if made under oath. Thus, the federal rule is much narrower than the New Jersey rule. For the history and application of the New Jersey rule and its relationship to Rule 607, see State v. Hacker, 177 N.J. Super. 533, 537 n.2 (App. Div.), certif. denied, 87 N.J. 364 (1981), and commentary on the 1982 amendment published in 108 N.J.L.J. 302

(1981). See also State v. Gross, 121 N.J. 1 (1990), defining circumstantial reliability with regard to a prior inconsistent statement of an accomplice called by the prosecution as a witness.

Unlike Rule 803(a)(1), Fed. R. Evid. 801(d)(1) expressly requires that the declarant be a person who testifies at the trial or hearing "and is subject to cross-examination." While the "cross-examination" requirement is not explicitly stated in Rule 803(a)(1), it is implicit. The Rule requires that the statement be "inconsistent with [the witness'] testimony." The requirements that the statement be one which was previously made by "a witness at a trial or hearing" which is "inconsistent with his testimony" insure that the declarant is a witness who testifies, and is, therefore, subject to cross-examination. If the declarant is called as a witness and refuses to testify, his prior statement cannot be admitted as an inconsistent statement. State v. Williams, 182 N.J. Super. 427, 431-437 (App. Div. 1982), holding that a prior signed statement by a witness who was charged with the same crimes could not be admitted as a prior inconsistent statement, since the witness refused to testify despite being granted immunity. The court reasoned that the statement was not inconsistent with the witness' testimony since he did not testify and he could not be cross-examined. The court held that admission of the statement would violate defendant's sixth amendment confrontation rights, citing Douglas v. Alabama, 380 U.S. 415, 419-420, 13 L. Ed. 2d 934, 937-938 (1965).

A more difficult issue arises when the statement was made by a witness who testifies that he cannot remember making the statement, or cannot remember the subject matter of the statement. Courts have admitted the prior statement as inconsistent with the witness' testimony where the trial judge finds that the witness' forgetfulness was feigned. State v. Bryant, 217 N.J. Super. 72, 75-79 (App. Div. 1987), certif. denied, 108 N.J. 202 (1987), cert. denied, 484 U.S. 978 (1987); State v. Burgos, 200 N.J. Super. 6, 10-12 (App. Div. 1985), certif. denied, 101 N.J. 304 (1985); see California v. Green, 399 U.S. 149, 168-169, 26 L. Ed. 2d 489, 502-503 (1970), on remand, People v. Green, 3 Cal.3d 98, 92 Cal. Rptr. 494, 479 P.2d 998, 1000-1004 (1971); but see United States v. Palumbo, 639 F.2d 123, 128 n.6 (3d Cir. 1981), cert. denied, 454 U.S. 819 (1981), noting that a lack of memory as to the substance of the prior statement may not be inconsistent with the statement in various circumstances; 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶801(d)(1)(A)[04] at 801-120 (1988), stating that the prior statement should not be admitted "if the judge finds that the witness genuinely cannot remember and the period of amnesia or forgetfulness is crucial as regards the facts in issue."

Rule 803(a)(2), dealing with prior consistent statements offered to rebut a charge of recent fabrication, has no direct New Jersey analogue located in the hearsay exception rules, but, rather, it repeats a portion of N.J. Evid. R. 20 which has been incorporated in Rule 607. The provision is included in this rule to allow such evidence to be used substantively. See also Comment on Rule 607. This rule follows Fed. R. Evid. 801(d)(1)(B) verbatim.

Rule 803(a)(3), dealing with evidence of prior identification, follows without substantial change the formulation of N.J. Evid. R. 63(1)(c). See State v. Matlack, 49 N.J. 491, 497-500 (1967), cert. denied, 389 U.S. 1009 (1967). It is consistent with Fed. R. Evid. 801(d)(1)(C), but adds criteria relating to reliability.

N.J. Evid. R. 63(1)(b), dealing with past recollection recorded, is now covered by Rule 803(c)(5).

Rule 803(b) - Party Admissions

Rule 803(b) follows the structure as well as the substantive content of Fed. R. Evid. 801(d)(2), while retaining some of the language of the 1967 New Jersey rule analogues. The last sentence of this rule was added to emphasize that the admissibility of statements by an accused is subject to Rule 104(c), formerly N.J. Evid. R. 8(3).

While Rule 803(b) changes some of the language of the 1967 New Jersey rule analogues, it makes no substantive change in current New Jersey practice. Paragraph (b)(1) replaces N.J. Evid. R. 63(7); paragraphs (b)(2) and (b)(3) replace N.J. Evid. R. 63(8); paragraph (b)(4) replaces N.J. Evid. R. 63(9)(a); and paragraph (b)(5) replaces N.J. Evid. R. 63(9)(b).

Rule 803(c) - Other Statements

As stated above, Rule 803(c), following the federal format and the enumeration of Fed. R. Evid. 803, collects other hearsay exceptions which are not dependent upon the unavailability of the declarant as a witness. Unless excluded on other grounds, the hearsay exceptions contained in Rule 803(c) permit the admission of certain extra-judicial statements of a declarant as substantive evidence whether the declarant is available or unavailable as a witness. Unavailability as a witness is defined in Rule 804(a).

(1) Present sense impression. Rule 803(c)(1) is an amalgam of the content of Fed. R. Evid. 803(1) and N.J. Evid. R. 63(4)(a). It adds to the federal rule a provision found in N.J. Evid. R. 63(4)(a), making admissible statements of "observation" as well as statements "describing or explaining" an event or condition. It also incorporates a provision in the federal rule, which is not in the New Jersey rule, making admissible statements made immediately after declarant perceived an event or condition. As in the case of excited utterances, statements made immediately after the event must be so close to the event as to exclude the likelihood of fabrication or deliberation. This requirement is expressed by the phrase "without opportunity to deliberate or fabricate," which is not contained in the federal analogue.

(2) Excited utterance. Rule 803(c)(2) is identical to Fed. R. Evid. 803(2) except that it adds the phrase "without opportunity to deliberate or fabricate," taken from N.J. Evid. R. 63(4)(b), which this rule replaces without substantial change.

(3) Then existing mental, emotional, or physical condition. Rule 803(c)(3) follows Fed. R. Evid. 803(3) almost verbatim, adding the good faith requirement contained in N.J. Evid. R. 63(12). This rule replaces paragraph (a) of N.J. Evid. R.

63(12), first adding the term "physical condition" and, consistent with New Jersey law, the provision respecting declarant's will. See Engle v. Siegel, 74 N.J. 287, 293-294 (1977); Wilson v. Flowers, 58 N.J. 250, 261-264 (1971); Fidelity Union Trust Co. v. Robert, 36 N.J. 561 (1962). See also N.J.S.A. 3B:3-33, permitting proof of the testator's intent by way of extrinsic "relevant circumstances." The phrase "relevant circumstances" had been construed by Engle v. Siegel, supra, 74 N.J. at 291, as including testator's statements of intent.

With respect to conduct inferred from a declarant's statement of intent, there is some conflict among federal cases as to the viability of the Hillmon doctrine under Fed. R. Evid. 803(1). The United States Supreme Court held in Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 295-300, 36 L. Ed. 706, 709-712 (1892), that letters of the declarant, Walters, to his family and his fiancee stating that he was leaving on a trip to Colorado with a man named Hillmon were admissible to prove from declarant's intention not only the likelihood that declarant went on the trip but also the likelihood that Hillmon went with declarant. Walters was never heard from again. The Advisory Committee on the Proposed [Federal] Rules stated that Rule 803(3) was intended to leave the Hillmon doctrine undisturbed. Notes of Advisory Committee on Proposed Rules, Note to Fed. R. Evid. 803(3), 28 U.S.C.A. (1984). However the House Committee on the Judiciary preferred to limit the Hillmon doctrine to permit statements of intent to show declarant's own future conduct, not the future conduct of another person. Notes of Committee on the Judiciary, House Report No. 93-650, Note to Fed. R. Evid. 803(3), 28 U.S.C.A. (1984).

With this background in mind, the court in United States v. Pheaster, 544 F.2d 353, 376-380 (9th Cir. 1976), cert. denied, 429 U.S. 1099 (1977), applied the Hillmon doctrine; see also United States v. Mangan, 575 F.2d 32, 43 n.12 (2d Cir. 1978), cert. denied, 439 U.S. 931 (1978); but the limitation expressed by the House Committee was adopted in Gual Morales v. Hernandez Vega, 579 F.2d 677, 680 n.2 (1st Cir. 1978); see also United States v. Jenkins, 579 F.2d 840, 843 (4th Cir. 1978), cert. denied, 439 U.S. 967 (1979).

The New Jersey law, as pronounced in Hunter v. State, 40 N.J.L. 495, 534-540 (E&A 1878), is the same as the Hillmon doctrine; in fact, the United States Supreme Court relied upon Hunter in the Hillmon decision. Hillmon, supra, 145 U.S. at 299-300, 36 L. Ed. at 712. See also Brown v. Yard, 552 F. Supp. 1341, 1351-1352 (D.N.J. 1982). The "good faith" requirement carried over from N.J. Evid. R. 63(12) into this rule gives the trial judge discretion and responsibility in admitting statements of intent and other states of mind which would be particularly appropriate to apply in dealing with the problem posed by the Hillmon and Hunter cases.

(4) Statements for purposes of medical diagnosis or treatment. Rule 803(c)(4) follows Fed. R. Evid. 803(4) almost verbatim, adding the good faith requirement of N.J. Evid. R. 63(12). This rule replaces N.J. Evid. R. 63(12)(b) and (c) without substantive change except that the requirement of the New Jersey rule that the statement be made to a physician was omitted as too narrow since statements made for the purpose of diagnosis or treatment may be made to other health care professionals and paraprofessionals. For example, many psychotherapists are not MDs; they may be psychologists, social workers or practitioners of other disciplines.

(5) Recorded recollection. Rule 803(c)(5) generally follows both Fed. R. Evid. 803(5) and N.J. Evid. R. 63(1)(b), but it differs to some extent from both rules. The rule permits the exclusion of the recorded statement if the circumstances indicate that the statement is untrustworthy. This provision is not contained in the federal or New Jersey analogues. It is substituted for the requirement in Fed. R. Evid. 803(5) that the statement be shown to reflect declarant's knowledge "correctly" and for the provision in N.J. Evid. R. 63(1)(b)(iii) that the witness must testify that his statement was true. These conditions cannot be realistically satisfied since the witness must also testify that he has insufficient recollection of the matter. See State v. Wood, 130 N.J. Super. 401, 408-410 (App. Div. 1973), aff'd, 66 N.J. 8 (1974). Frequently a witness will say that the statement must have been true when made, but the trial judge should be permitted to exclude the statement if circumstances suggest that it was not trustworthy because of declarant's intention to lie or other reasons.

As to the distinction between a statement admissible under this rule and a writing used to refresh memory offered under Rule 612, see Comment on Rule 612.

(6) Records of regularly conducted activity. While Rule 803(c)(6) generally follows Fed. R. Evid. 803(6), its formulation is closer in some respects to N.J. Evid. R. 63(13). Rule 803(c)(6) follows the federal formulation by clearly requiring both that the records be made in the regular course of business and that it was the regular practice of that business to make those records. Although the "regular practice" condition was not expressly included in the 1967 New Jersey rule, its import is consistent with its judicial interpretation. See Sas v. Strelecki, 110 N.J. Super. 14, 19-22 (App. Div. 1970).

Like the federal rule, Rule 803(c)(6) expressly permits the admission of opinions and diagnoses contained in business records. This provision was not contained in N.J. Evid. R. 63(13), but it is consistent with present practice. Falcone v. New Jersey Bell Tel. Co., 98 N.J. Super. 138, 146-150 (App. Div. 1967), certif. denied, 51 N.J. 190 (1968). The extent of admissibility of opinions contained in business records is qualified by Rule 808, a provision new to New Jersey practice and not included in the federal rules. As to the scope and intent of Rule 808, see the Comment on that rule.

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); see The 1963 Report at 186-187; see also Comment on Rule 101(a)(2)(E) and Rule 104(a).

This rule, like the federal rule and the 1967 New Jersey rule, contains a proviso that permits exclusion of the record if the sources of information or the method or circumstances of its preparation indicate that it is untrustworthy. This rule adds "purpose" of preparation as a factor of untrustworthiness to be considered. If the purpose for which the record was prepared was the anticipation of or the use in litigation, it should be subjected to special scrutiny for trustworthiness. See Palmer v. Hoffman, 318 U.S. 109, 111-116, 87 L. Ed. 645, 648-651 (1943); but cf. Lewis v. Baker, 526 F.2d 470, 472-473 (2d Cir. 1975).

The admission of police reports as business records in criminal proceedings has been considered in a number of cases. Annotation, Admissibility of Police Reports Under Federal Business Records Act (Federal Rules of Evidence, Rule 803, and Predecessor Amendments), 31 A.L.R. Fed. 457 (1977); Annotation, Admissibility in State Court Proceedings of Police Reports as Business Records, 77 A.L.R.3d 115 (1977). See United States v. Smith, 521 F.2d 957, 962-969 (D.C. Cir. 1975). State v. McGeary, 129 N.J. Super. 219, 223-229 (App. Div. 1974), held that an inspection certificate as to the operating condition of a breathalyzer made in the regular course of a State Police employee's duties was sufficiently trustworthy to qualify as a business record admissible under N.J. Evid. R. 63(13). Test reports of unlawful drugs performed by State Police laboratory technicians may also be admitted. See State v. Matulewicz, 101 N.J. 27 (1985), and Comment to Rule 808. However, a report summarizing the observations of police officers in the course of a surveillance of an accused's activities may be excluded when offered against the accused on the ground that the purpose in preparing the report was to use it in litigation. Cf. United States v. Smith, supra, 521 F.2d at 965-966. Such a report would be admissible, however, as a business record if offered by the accused against the prosecution. Id. at 965.

Police reports in civil cases in which the police officer making the report has no interest in the anticipated litigation are generally admissible under established law. See Sas v. Strelecki, supra, 110 N.J. Super. at 19-22; Schneiderman v. Strelecki, 107 N.J. Super. 113, 118-119 (App. Div. 1969), certif. denied, 55 N.J. 163 (1969); Brown v. Mortimer, 100 N.J. Super. 395, 402-406 (App. Div. 1968). The admissibility of a business record, however, does not mean that all parts of the record are necessarily admissible. For example, in Sas the court held inadmissible portions of a police report which contained statements given to a police officer because the statements were made by persons not under a "business duty" to render a truthful account of the automobile accident involved in the case. 110 N.J. Super. at 22. See also State v. Lungsford, 167 N.J. Super. 296, 309-310 (App. Div. 1979). Nevertheless, the rule does not condition admissibility of business records on proof that all information which they contain came from persons with a business duty to report the information accurately. The duty to report accurately may enhance the reliability of the business record. See State v. Matulewicz, supra, 101 N.J. at 30-31. But many business organizations regularly keep, use and rely upon information derived from sources without such a duty. Thus, to the extent that the holding in Phoenix Associates, Inc. v. Edgewater Park Sewerage Auth., 178 N.J. Super. 109, 116 (App. Div. 1981), aff'd on other grounds sub nom. Phoenix apartments, Inc. v. Edgewater Park Sewerage Auth., 89 N.J. 2(1982), was based on the lack of a duty on the informant to report truthfully and accurately, it is not followed here. See Matter of Ollag Constr. Equip. Corp., 665 F.2d 43, 46 (2d Cir. 1981), which upheld the admissibility of financial statements prepared on a bank's form by the debtor, although the debtor was not under a business duty to supply the information.

As noted in the Comment on Rule 801(d), the definition of "business" under Fed. R. Evid. 803(6) does not expressly include activities of governmental agencies, in contrast to the definition in Rule 801(d) and N.J. Evid. R. 62(5). See also Comment on Rule 803(c)(8). The admissibility of reports of government agencies may also be governed by Rule 803(c)(8). See State v. Matulewicz, supra 101 N.J. at 32; State v. McGeary, supra, 129 N.J. Super. at 227-228; State v. Connors, 129 N.J. Super. 476, 485 (App. Div. 1974).

(7) Absence of an entry in records of regularly conducted activity. Rule 803(c)(7) follows both Fed. R. Evid. 803(7) and N.J. Evid. R. 63(14), with language changes that do not alter the basic principle of the rule. The "unless" clause at the end of the rule derives from the federal rule; it is not contained in N.J. Evid. R. 63(14).

As noted in the comment to Rule 803(c)(6), because governmental activity is included in the definition of business, Rule 803(c)(6) overlaps with 803(c)(8). Rule 803(c)(7) (absence of business record) is the converse of Rule 803(c)(6), and Rule 803(c)(10) (absence of public record) is the converse of Rule 803(c)(8). Thus, there is a corresponding overlap of Rules 803(c)(7) and 803(c)(10).

(8) Public records, reports, and findings. Rule 803(c)(8) follows N.J. Evid. R. 63(15) with minor language changes. The first portion of the rule deals with acts performed by or acts, conditions or events observed by, public officials within their duty to report upon. This portion of the rule corresponds to Fed. R. Evid. 803(8)(A) and (B) which make admissible records of "activities" of a public office or agency and of "matters observed" as to which there was a duty to report. However, the federal counterpart excludes from criminal cases matters observed by law enforcement personnel.

The second portion of the rule admits "statistical findings" of public officials. This is narrower than the term used in Fed. R. Evid. 803(8)(C), namely, "factual findings resulting from an investigation" authorized by law, except that such findings under the federal rule cannot be used against an accused in a criminal case.

The federal rule embodies the business record rule. Unlike the federal rules, these rules, like the New Jersey 1967 evidence rules, define the term "business" to include activities of

governmental agencies. Thus, many records of governmental agencies can be admitted either under this rule or the traditional business record rule, Rule 803(c)(6). See State v. Matulewicz, 101 N.J. 27 (1985).

The extent to which opinions may be admitted as part of investigative records or evaluative reports of governmental agencies has caused difficulty under the federal rule. Compare Baker v. Elcona Homes Corp., 588 F.2d 551, 556-559 (6th Cir. 1978), cert. denied, 441 U.S. 933 (1979) (admitting a police report with the officer's conclusion from his investigation that plaintiff's vehicle entered the intersection against a red light, as a factual finding under federal Rule 803(8)) with Smith v. Ithaca Corp., 612 F.2d 215, 220-223 (5th Cir. 1980) (distinguishing "factual findings" in federal Rule 803(8)(C) from "opinions" and "diagnoses" in federal Rule 803(6) as to exclude "evaluative conclusions and opinions" of a Coast Guard agency investigation regarding liability and the cause of an accident, while admitting factual findings apparently based on objective data). See Phillips v. Erie Lackawanna R.R. Co., 107 N.J. Super. 590 (App. Div. 1969), certif. denied, 55 N.J. 444 (1970) (holding inadmissible the Board of Public Utility examiner's report of factual conclusions as to the hazardous condition of a railroad crossing, as well as the agency's order for corrective action); but see State v. Matulewicz, supra, 101 N.J. at 31-32.

Adjudicatory findings of the Division of Workers' Compensation, which can be judicially noticed under Rule 201(a), were held admissible as evidence in a "third party" Law Division negligence action in Wunschel v. Jersey City, 96 N.J. 651, 666-667 (1984), in pursuit of the policy of avoiding inconsistent adjudications. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 60 n.21, 39 L. Ed. 2d 147, 165 n.21 (1974) (arbitral decision under collective bargaining agreement may be admitted as evidence in a District Court action for discrimination brought under Title VII of the 1964 Civil Rights Act, in furtherance of the dual federal policies favoring arbitration of labor disputes and preventing discrimination in employment). In other situations, however, arbitrators' decisions may be inadmissible in related litigation where policy reasons dictate that result. See N.J.S.A. 2A:23A-28 and N.J.S.A. 39:6A-33 making inadmissible arbitration decisions in non-automobile and automobile personal injury actions.

(9) Records of vital statistics. Rule 803(c)(9) follows Fed. R. Evid. 803(9) almost verbatim. N.J. Evid. R. 63(16), which is replaced by this rule, provided for the admissibility of "vital statistics," although not so designated in the rule, contained in a written "record, report or finding of fact" made and filed pursuant to statute if the maker of such record, report or finding was exclusively authorized by statute to perform the functions reflected in the writing and was required by statute to file in a designated public office a written report relating to the performance of such functions. As described in The 1963 Report at 193, the purpose of N.J. Evid. R. 63(16) was to admit "reports made by ad hoc public officials: physicians, undertakers, ministers, and the like, who are under a duty to file reports from time to time." Admissibility pursuant to N.J. Evid. R. 63(16) was subject to N.J. Evid. R. 64. This rule follows that scheme by making admissibility subject to R. 807, which replaces N.J. Evid. R. 64.

The first sentence of N.J. Evid. R. 63(17) provided for the admissibility of authenticated copies of official records or entries therein. This provision has been omitted since such a copy is normally a duplicate as defined by Rule 1001(d), and Rules 803(c)(8) and (9) provide for the admissibility of public records, reports and findings as well as records of reports of vital statistics to a public office.

(10) Absence of public record or entry. Rule 803(c)(10) generally follows Fed. R. Evid. 803(10) with changes in language and structure but not in substance. Section (A) of this rule replaces the second sentence of N.J. Evid. R. 63(17) without substantive change. There is no specific New Jersey rule analogue to section (B), the effect of which is to permit an inference of the nonoccurrence or nonexistence of a matter normally recorded to be drawn from proof of absence of the recording. Drawing such an inference is ordinarily the very purpose for which proof of the absence of a record would be made pursuant to N.J. Evid. R. 63(17). Thus, the federal formulation, which this rule follows, does not constitute a change in current New Jersey practice. See N.J. Evid. R. 63(14), now Rule 803(c)(7).

Testimony by a public official that his diligent search failed to disclose a particular record is not hearsay since that testimony is not offered to prove the contents of an extrajudicial statement. It is offered to prove the absence of any such report, from which an inference may be drawn that this act or event never occurred. Therefore, the use of the term "testimony" by the federal rule in this context was not followed, but such testimony is admissible.

(11) Records of religious organizations. Rule 803(c)(11) follows Fed. R. Evid. 803(11) almost verbatim. There is no 1967 New Jersey rule analogue. Religious records may be admitted as business records under Rule 803(c)(6) if made by an official of the religious organization who had a duty to make the record. Such records are also admissible under this rule even if the information contained in the record of the religious organization came from a person who had no duty to make the report, as is typically the case.

(12) Marriage, baptismal and similar certificates. Rule 803(c)(12) follows verbatim Fed. R. Evid. 803(12) except for the reference to Rule 807. The 1967 New Jersey analogue, N.J. Evid. R. 63(18), covered only certificates of marriage made by persons authorized by law to perform the marriage ceremony. The federal rule was adopted because of the high degree of reliability of the certificates it includes.

(13) Family records. Rule 803(c)(13) follows Fed. R. Evid. 803(13) almost verbatim, adding the reference to Rule 807. There is no 1967 New Jersey rule analogue. Frequently, authorities referred to in 5 J. Wigmore, Evidence §§1495-1496 (1974), are cited in support of the federal rule; see Notes of Advisory Committee on Proposed Rules, Note to Fed. R. Evid. 803(13) 28

U.S.C.A. (1984). The federal rule has some support in New Jersey law. See In re Blau, 4 N.J. Super. 343, 350-351 (App. Div. 1949); but cf. Supreme Council v. Conklin, 60 N.J.L. 565, 569-571 (E. & A. 1897). As to the application of the rule, see 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶803(13)[01] at 803-299 to 300 (1990). The cases usually look for some evidence of reliability of the source of the statement. Unavailability of the declarant is not required as under the common law rule.

(14) Records of documents affecting an interest in property. Rule 803(c)(14) follows Fed. R. Evid. 803(14) almost verbatim except for the reference to Rule 807. It makes no substantive change in N.J. Evid. R. 63(19), which it replaces.

(15) Statements in documents affecting an interest in property. Rule 803(c)(15) follows Fed. R. Evid. 803(15) almost verbatim except for the reference to Rule 807. It makes no substantive change in N.J. Evid. R. 63(29), which it replaces.

(16) Statements in ancient documents. Rule 803(c)(16) follows Fed. R. Evid. 803(16) but substitutes a 30-year period for the 20-year period used by the federal rule. This is consistent with New Jersey law on the admissibility of ancient documents of apparent authenticity. See Havens v. Sea Shore Land Co., 47 N.J. Eq. 365, 373-379 (Ch. 1890). There is no New Jersey rule analogue. For criteria used to authenticate ancient documents, see Fed. R. Evid. 901(b)(8). See also Comment to Rule 901. These rules do not establish particular criteria to satisfy the required proof of authenticity.

(17) Market reports, commercial publications. Rule 803(c)(17) follows Fed. R. Evid. 803(17) verbatim. While it changes the language of N.J. Evid. R. 63(30), it makes no substantial change in practice. The 1967 New Jersey rule analogue did not include documents relied on by the public but only those published for and used by persons in particular occupations. However, the same principle supports the admissibility of both categories of publications.

Although the formulation of this rule is somewhat broader than its predecessor, it is not intended to affect the holdings of State v. McGee, 131 N.J. Super. 292, 296-298 (App. Div. 1974) (compilations of the National Crime Information Center not admissible) and State v. Lungsford, supra, 167 N.J. Super. at 301-306 (compilations of the National Automobile Theft Bureau not admissible), for reasons stated in these opinions.

(18) Learned treatises. Rule 803(c)(18) follows Fed. R. Evid. 803(18) almost verbatim, adding the proviso respecting the display of graphics to the jury. Although a rule similar to this was proposed as N.J. Evid. R. 63(31) in The 1963 Report at 212, it was not adopted, and there is no 1967 New Jersey rule analogue. The adoption of this rule represents a change in practice by allowing the use of learned treatise evidence even if an expert witness fails to acknowledge that it is authoritative, so long as the reliability of the authority is established by other testimony or by judicial notice.

(19) Reputation concerning personal or family history. Rule 803(c)(19) follows Fed. R. Evid. 803(19) almost verbatim. It combines N.J. Evid. R. 63(26) and 63(27)(c) with language changes but with no change in substance except for the omission of the phrase "resident in the community at the time of the reputation," a factor which would affect the weight of the evidence but not its admissibility.

(20) Reputation concerning boundaries or general history. Rule 803(c)(20) follows Fed. R. Evid. 803(20) almost verbatim and makes language changes but no substantive changes in N.J. Evid. R. 63(27)(a) and (b), which it replaces, except for broadening the condition that the event be "of importance to the community" to include "or state or nation" as well.

(21) Reputation as to character. Rule 803(c)(21) follows Fed. R. Evid. 803(21) almost verbatim. It incorporates the concept of "relevant time" included in N.J. Evid. R. 63(28), which this rule replaces with language changes but no substantive changes.

(22) Judgments of previous conviction of crime. Rule 803(c)(22) follows almost verbatim N.J. Evid. R. 63(20), which limits to civil proceedings the substantive use of judgments of convictions against a party. By contrast, the federal rule, Fed. R. Evid. 803(22), permits substantive use of prior convictions against the accused in criminal prosecutions. As to the difference between the 1967 New Jersey analogue, followed by this rule, and the federal rule, see State v. Ingenito, 87 N.J. 204, 222-224 (1981) (Schreiber, J., concurring), which notes that a prior conviction may be admitted in a criminal case if the fact of conviction constitutes an essential element of the subsequent offense. A prior conviction of a witness, whether or not a party, can also be used in both civil and criminal proceedings for impeachment purposes. See id. at 224, and N.J.S.A. 2A:81-12, to the extent that that statute was not superseded by the official footnote accompanying the 1967 adoption of N.J. Evid. R. 63(20). See also Rule 609 and Comment thereon. The provision in the federal rule allowing proof of convictions on appeal was not adopted as contrary to New Jersey law. State v. Biegenwald, 96 N.J. 630, 638 (1984) (citing with approval State v. Blue, 129 N.J. Super. 8, 11-12 (App. Div. 1974), certif. denied, 66 N.J. 328 (1974)).

(23) Judgments as to personal, family, or general history, or boundaries. Rule 803(c)(23) follows Fed. R. Evid. 803(23). While there is neither a 1967 New Jersey rule analogue nor New Jersey case law on the subject, this exception has long been recognized by the general common law. See City of London v. Clerke, 90 Eng. Rep. 710 (K.B. 1691); Patterson v. Gaines, 47 U.S. 550, 599, 12 L. Ed. 553, 573 (1848). The federal rule embodying the common law was adopted because judgments are ordinarily more reliable than the evidence of reputation concerning those matters admissible under Rules 803(c)(19) and (20).

(24) Other exceptions -- not adopted. Fed. R. Evid. 803(24), which creates a general hearsay exception for statements not covered by a specific hearsay rule, provided they are attended by "equivalent circumstantial guarantees of trustworthiness" and are the most probative evidence reasonably available, and provided further that other stated criteria are met, was not adopted. The adoption of the federal rule was

attended by substantial controversy and its application since its adoption has been disparate among the federal courts. See A.B.A. Section of Litigation, Emerging Problems Under the Federal Rules of Evidence 279-281 (1983). The adoption of Fed. R. Evid. 803(24), construable as a general relaxation rule, would represent a radical departure from New Jersey practice. The advantages and disadvantages of this departure are debatable. For the same reason, Fed. R. Evid. 804(b)(5) was not adopted. It should be noted that a broad relaxation rule proposed as Rule 2(4) in The 1963 Report at 9 was rejected.

(25) Statement against interest. Rule 803(c)(25) follows almost verbatim the first sentence of Fed. R. Evid. 804(b)(3) and replaces N.J. Evid. R. 63(10) without substantive change. The placement of this rule as a section of Rule 803 preserves the present New Jersey practice of permitting the use of declarations against interest irrespective of the declarant's availability as a witness. See State v. Barry, 86 N.J. 80, 91-92 (1981), cert. denied, 454 U.S. 1017 (1981); Portner v. Portner, 186 N.J. Super. 410, 416-418 (App. Div. 1982), rev'd on other grounds, 93 N.J. 215 (1983). The federal rule, by placing this provision in Rule 804, conditions the use of such statements on the declarant's unavailability.

This rule follows the federal formulation by excluding statements against "social interest." That term is vague, and some declarations which are against social interest may also be against penal or other specified interest. See, e.g., State v. West, 145 N.J. Super. 226, 232-233 (App. Div. 1976), certif. denied, 73 N.J. 67 (1977).

This rule also rejects the second sentence of the federal analogue which requires corroborating circumstances indicating trustworthiness as a condition for the admission of declarations against penal interest by another person exculpating an accused. See Chambers v. Mississippi, 410 U.S. 284, 299-302, 35 L. Ed. 2d 297, 311-313 (1973).

(26) Judgments against persons entitled to indemnity. Rule 803(c)(26) follows N.J. Evid. R. 63(21) almost verbatim. The reference in the rule to the Joint Tortfeasors Contribution Law is intended to incorporate the modifying provision of the Comparative Negligence Law, N.J.S.A. 2A:15-5.3. While the rule does not so state in terms, it is clear that a judgment obtained by fraud is not admissible for the purposes stated by the rule. Cf. Scaglione v. St. Paul-Mercury Indem. Co., 20 N.J. 88 (1958). There is no federal analogue.

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 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 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 declarant's deposition for use in lieu of testimony at trial; or

(5) for the purpose of Rule 804(b)(8), is unable to give full and cogent testimony concerning the substance of the statement because of lack of memory or other cause, including disqualification as a witness pursuant to Rule 601.

(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.

(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.

(2) Statement under belief of impending death.

In a criminal proceeding, a statement made by a victim unavailable as a witness because of death is admissible if it was made voluntarily and in good faith and while the declarant was conscious 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 death if the statement was made in good faith upon declarant's personal knowledge in circumstances indicating that it is trustworthy.

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

(8) Statements by a child concerning sexual activity. A statement made by a child of tender years concerning sexual activity involving the child if

(A) after a hearing pursuant to Rule 104(a), the judge finds that

(i) the statement was not the product of fabrication or suggestion, after considering the content of the statement in light of the child's youth and lack of knowledge and experience and the circumstances surrounding the statement, including when and to whom it was made, and the nature of any questions leading to it, and

(ii) the statement is otherwise reliable; and

(iii) the statement is corroborated by other reliable evidence of the occurrence of the sexual activity described in the statement; and

(B) the child is produced for questioning on request of the person against whom the statement is used when the child has not testified as a witness at the hearing but is physically available.

If a statement has been admitted under this rule the party against whom it was admitted may introduce other statements of the child on the same subject.

COMMENT

Rule 804(a) - Definition of "Unavailable"

Rule 804(a) specifies the circumstances in which a declarant will be deemed "unavailable" as a witness in order to satisfy this condition for admitting his prior statement in evidence under hearsay exceptions contained in Rule 804(b). In general, Rule 804(a) follows the provisions of the federal rule and incorporates some of the provisions of N.J. Evid. R. 62(6), which defines the terms "unavailable as a witness" for the purpose of certain hearsay exceptions.

Paragraphs (1), (2) and (3) of Rule 804(a) are identical to the federal rule. These provisions define unavailability to include (1) a declarant whose privilege not to testify has been upheld, (2) a declarant who refuses to testify despite a court order to do so, and (3) a declarant who testifies that he cannot recall the subject of his prior statement. These circumstances were not expressly included in N.J. Evid. R. 62(6). The issue raised in State v. Wilson, 57 N.J. 39, 47-48 (1970), that a declarant who can assert a privilege is not "unavailable" within the meaning of the hearsay exception for former testimony, will no longer present a problem under the expanded definition of "unavailable" contained in Rule 804(a). These new provisions are consistent with the principles underlying N.J. Evid. R. 62(6).

The contents of paragraphs (4) and (5) of Fed. R. Evid. 804(a) have been combined in paragraph (a)(4) of this rule, to which have been added principles embodied in N.J. Evid. R. 62(6) concerning the taking of a declarant's deposition with respect to only two Rule 804(b) exceptions, (b)(4) and (b)(7), applicable to statements of personal and family history and to voters' statements respectively. But see comment on Rule 804(b)(7).

Paragraph (4) of this rule does not specifically enumerate all possible causes for the inability to compel the appearance of the person whose prior statement will be offered. The rule expressly includes death of the declarant as well as mental or physical illness or infirmity. These terms are found in the federal rule and the 1967 New Jersey rule as well as in R. 4:16-1(c), dealing with use of depositions. The court rule also includes the terms "age" and "imprisonment". The provision for "other cause" in paragraph (4) would include imprisonment as well as all other circumstances resulting in the inability to produce the declarant as a witness at trial. Absence from the jurisdiction may be another cause. It was expressly included in N.J. Evid. R. 62(6) and R. 4:16-1(c). However, it was omitted

from paragraph (4) because a person may be deemed available in certain circumstances despite absence from the jurisdiction if he or she is within the control of the proponent of the hearsay statement. As to the sufficiency of efforts to procure the witness' attendance at trial, see generally Annotation, "Sufficiency of Efforts to Procure Missing Witness' Attendance to Justify Admission of his Former Testimony -- State Cases," 3 A.L.R.4th 87 (1981).

Federal Rule 804(a)(5) requires the attempt to depose an absent declarant whose hearsay statement is proferred under 804(b)(2) (statement under belief of impending death), (b)(3) (statement against interest) and (b)(4) (statement of personal or family history). As noted above this rule requires an attempt to depose a declarant only with respect to statements of personal or family history and voters' statements offered under Rules 804(b)(4) and (b)(7), respectively. This rule does not require an attempt to depose declarant in order to admit statements made under belief of impending death because the New Jersey rule, unlike the federal rule, permits admission of such statements only if the declarant is dead. Rule 804(b)(2), following N.J. Evid. R. 63(5). Nor does this rule require the deposition attempt for admission of statements against interest. Under New Jersey practice, the admissibility of declarations against interest is not dependent on the unavailability of the declarant. Rule 803(c)(25), following N.J. Evid. R. 63(10). In addition, this rule, like the federal rule, does not require the deposition attempt with respect to prior testimony. There is no reason to depose a declarant who has previously testified subject to cross-examination.

The federal rule has no counterpart to Rule 804(b)(7) (voter statements). Since the validity of an election may depend upon the content of the statement, the better practice is to require the deposition attempt, and this rule so provides. However, for self-evident reasons, the rule does not require deposition attempts for the two remaining "unavailability" exceptions, statements of deceased declarants and statements of children regarding sexual abuse, Rules 804(b)(6) and (b)(8), respectively.

Even where the deposition attempt is required, the failure to have made that attempt will not always preclude admissibility. The importance of the declarant's statement to the proceeding, the expectation that he would ordinarily be available at trial, the extent of the hardship and expense in taking the deposition, and other factors, may be considered in determining whether a declarant's deposition is required. Note that the additional provision in N.J. Evid. R. 62(6), "and the probable importance of the [declarant's] testimony is such as to justify the expense of taking such deposition" was omitted as embraced in the concept "without undue hardship or expense." Of course, if unavailability is disputed, the trial judge will be required to determine the issue pursuant to Rule 104(a). There are many factors that can be considered, and Rule 804(a) establishes general principles to guide the discretion of the court.

Paragraph (5) was added to enlarge the definition of unavailability with respect to statements concerning sexual activity of a child of tender years, made admissible under Rule 804(b)(8), in keeping with the principles of State v. D.R., 109 N.J. 348, 351-377 (1988). See N.J. Evid. R. 63 (33). There is no federal analogue.

RULE 804(b) - Hearsay Exceptions

Introduction. Rule 804(b), like Fed. R. Evid. 804(b), provides certain hearsay exceptions if the declarant is unavailable as a witness. Under the 1967 New Jersey rules, the exceptions to the hearsay rule contained in N.J. Evid. R. 63 were not divided into categories according on the availability of the declarant as a witness. However, several exceptions were individually conditioned on the declarant's unavailability, namely, New Jersey Evidence Rules 63(3) (depositions and prior testimony), 63(5) (dying declarations), 63(23) and (24) (statements concerning one's own or another's family history), 63(32) (statements of declarants who have died), 63(11) (voters' statements), and to some extent, 63(33) (statements by a child relating to a sexual offense). These New Jersey evidence rules are the antecedents of Rules 804(b)(1), (2), (4), (6), (7) and (8), respectively. There are no federal counterparts to Rules 804(b)(6), (7), and (8). Fed. R. Evid. 804(b)(5), which contains a general exception for other trustworthy statements of unavailable declarants, was not adopted.

Like Rule 803, Rule 804(b) is phrased in the negative. It provides that certain statements are not excluded by the hearsay rule if the declarant is unavailable as a witness. However, statements of unavailable witnesses otherwise admissible under Rule 804(b) may be excluded under another rule of evidence, for example, in most instances when the statement is not based on the personal knowledge of the declarant or when the statement contains an opinion which the declarant is not qualified to give. On the other hand, statements of unavailable witnesses may also be admitted under any of the other hearsay exceptions contained in Rule 803(c).

Note that the admissibility of all hearsay offered pursuant to Rule 804(b) is subject to the notice requirements contained in Rule 807.

As a general caution, it must be noted that in criminal cases, "when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable." Ohio v. Roberts, 448 U.S. 56, 66, 65 L. Ed. 2d 597, 608 (1980). Unavailability in the constitutional sense requires proof that the prosecutor has made a "good-faith effort" to produce the declarant at trial. 448 U.S. at 74, 65 L. Ed. 2d at 613; Barber v. Page, 390 U.S. 719, 724-724, 20 L. Ed. 2d 255, 260 (1968). When unavailability has been established, the Roberts court said: "Even then, [the] statement is admissible only if it bears adequate 'indicia of reliability'. Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." Roberts, supra, 448 U.S. at 66, 65 L. Ed. 2d at 608.

(1) Testimony in prior proceedings. Rule 804(b)(1), dealing with the admissibility of former testimony given at an earlier trial, hearing or proceeding or in a deposition in the same case or in another case, is similar to the federal rule and N.J. Evid. R. 63(3) in a number of respects, but differs in some respects from both rules. As for the use of depositions taken in the pending case, see generally R. 4:16 and, in particular, R. 4:16-1(c) with respect to unavailable witnesses and absent but not unavailable witnesses.

Rule 804(b)(1)(A) applies to testimony offered against a party who was a party to an earlier trial, hearing or proceeding involving the same or a different matter. Rule 804(b)(1)(B) applies to prior testimony which is offered against a party who was not a party to the prior action or proceeding in which the testimony was given.

Under Rule 804(b)(1)(A), testimony of a declarant who is unavailable as a witness is admissible against a party to the present civil or criminal case who was a party to the prior proceeding in which the testimony was given and had a similar motive and opportunity to develop the testimony as in the present case. See State v. Wooters, 228 N.J. Super. 171, 179 (App. Div. 1988). The term "develop the testimony by examination or cross-examination" is intended to include direct and redirect examination as well as cross-examination as in Fed. R. Evid. 804(b)(1). In some cases a party may not have had an opportunity or motive to develop the testimony on the earlier occasion, particularly if the issues were dissimilar. Examples in criminal cases include proceedings before a grand jury, where defendant does not have a right to appear and examine a witness, and in probable cause hearings where the motive to examine the witness extensively may be lacking or the opportunity curtailed. See State v. Moody, 169 N.J. Super. 177 (Law Div. 1978); but see State v. Ewings, 154 N.J. Super. 472 (Law Div. 1977); cf. California v. Green, 399 U.S. 149, 26 L.Ed.2d 489 (1970).

When testimony has been given in another proceeding in which the party against whom it is later offered was not a party, stricter rules apply. Rule 804(b)(1)(B). In criminal cases, such evidence cannot be admitted against a defendant because of his constitutional right to confront the declarant. In civil cases, or when offered by a defendant in a criminal proceeding, the former testimony may be admitted under this rule against a party who was not a party in the prior proceeding if a party in the prior proceeding had an interest substantially similar to that of the party against whom it is now being offered and also had a similar motive and an opportunity to develop the testimony. By virtue of this rule, testimony given in a prior proceeding would be admissible against a present party if a party in the prior proceeding was a predecessor in interest or privy of the present party or one with a common interest, provided the issues in both proceedings are such that the party in the prior proceeding had an interest substantially similar to that of the present party and had a similar motive and opportunity to develop the testimony on direct, cross, or redirect examination.

Rule 804(b)(1)(B) is broader than a literal reading of its federal analogue with respect to testimony given in an earlier proceeding which is offered against a party who was not a party to that proceeding. Under the federal rule such former testimony is not admissible unless offered against a party whose "predecessor in interest" was a party to the proceeding in which the testimony was given. Rule 804(b)(1)(B) would admit such testimony in a civil case or in a criminal proceeding when offered by an accused if a party to the earlier proceeding had an interest similar to that of the party to the present proceeding against whom the testimony is offered and had a similar motive and an opportunity to develop the testimony.

The term "predecessor in interest" has caused difficulty in applying Fed. R. Evid. 804(b)(1). Some federal courts have given it an expansive reading comparable to the term "community of interest." See Lloyd v. American Export Lines, Inc., 580 F.2d 1179, 1184-1187 (3d Cir. 1978), cert. denied, 439 U.S. 969 (1978); Clay v. Johns-Manville Sales Corp., 722 F.2d 1289, 1293-1295 (6th Cir. 1983), cert. denied, 467 U.S. 1253 (1984); Carpenter v. Dizio, 506 F.Supp. 1117, 1123-1124 (E.D.Pa. 1981), aff'd mem., 673 F.2d 1298 (3d Cir. 1981). This interpretation is akin to the intent of Rule 804(b)(1)(B). But see cases cited in A.B.A. Section of Litigation, Emerging Problems Under the Federal Rules of Evidence 287 et seq. (1983).

Rule 804(b)(1) follows the substance of N.J. Evid. R. 63(3)(a) except that former deposition testimony under N.J. Evid. R. 63(3)(a) was limited to de bene esse depositions "for use as testimony in the trial" as distinguished from depositions taken for discovery purposes only. Rule 804(b)(1) makes admissible testimony of an unavailable witness, including a discovery deposition as well as a de bene esse deposition, if the other conditions of the rule are satisfied. The important safeguard is the inquiry into the motive, interest, and opportunity to examine the witness in the prior proceedings. For tactical reasons a party may not avail himself of the opportunity to fully examine or cross-examine a witness during a discovery deposition, preferring to retain an element of surprise for the actual trial. For this reason extra care should be taken in admitting deposition testimony taken for discovery purposes whether or not the present party against whom the testimony is offered was a party to the prior proceeding.

Rule 804 (b)(1) contains a limitation on the admissibility of expert testimony given in a prior trial not found in either its federal or state analogues. See Secaws v. Polikoff, 150 N.J. Super. 172, 177-179 (App. Div. 1977).

(2) Statement under belief of impending death. Rule 804(b)(2) incorporates N.J. Evid. R. 63(5) verbatim, but like the other rules respecting statements of unavailable witnesses, it is made subject to the notice requirements of Rule 807 by virtue of the preamble in Rule 804(b).

Like its 1967 New Jersey Rule analogue, this rule is limited to criminal proceedings and covers all statements made by a declarant voluntarily and in good faith while believing his death is imminent, provided both that declarant is unavailable because of his death and was a victim of the crime. The federal rule analogue, Rule 804(b)(2), limits admissible dying declarations to

statements concerning the cause or circumstances of declarant's perceived imminent death offered in all civil actions but restricts admission in criminal cases to prosecutions for homicide only. The New Jersey rule, applicable only to criminal actions, is not, however, limited to homicide cases. While the New Jersey rule is limited to criminal proceedings, any relevant statements made by a declarant who is dead may be admitted under Rule 804(b)(6) in civil actions if "made in good faith upon his personal knowledge in circumstances indicating that it is trustworthy." Thus, dying declarations may be admitted in civil actions if these conditions are met. Note, also, that unlike the New Jersey rule, the federal rule applies if the declaration was made while declarant believed his death was imminent, even if the declarant survived but is otherwise unavailable as a witness.

A dying declaration may include a conclusion or opinion, but before admitting such a statement the trial judge should determine in a preliminary hearing whether the inferences and conclusions were drawn from facts known or observed by the declarant, and whether, considering all the circumstances, the statement can be received without undue prejudice to the defendant. State v. Hegel, 113 N.J. Super. 193 (App. Div. 1971), certif. denied, 58 N.J. 596 (1971).

(3) Statement against interest -- adopted as Rule 803(c)(25). Fed. R. Evid. 804(b)(3), dealing with statements against interest, was not adopted as part of Rule 804(b) because such statements are made admissible under Rule 803(c)(25) regardless of declarant's availability. The inherent reliability of such statements was deemed sufficient to justify their admission even if the declarant is available as a witness. See Comment on Rule 63(10), The 1963 Report at 169. For other comment on Fed. R. Evid. 804(b)(3), see Rule 803(c)(25).

(4) Statement of personal or family history. Rule 804(b)(4) follows Fed. R. Evid. 804(4) almost verbatim. Section A replaces N.J. Evid. R. 63(23), and Section B replaces N.J. Evid. R. 63(24) with language changes only. N.J. Evid. R. 63(25) (statements concerning family history based on statement of another declarant) has not been separately adopted as its substance is comprehended by the formulation of Section A of this rule. However, this rule, unlike N.J. Evid. R. 63(25), does not require the unavailability of both declarants and is subject to the notice requirements of Rule 807.

(5) Other exceptions -- not adopted. Fed. R. Evid. 804(b)(5), which provides for unspecified "other exceptions," has not been adopted. See Comment of Rule 803(c)(24) above explaining the failure to adopt a counterpart to Fed. R. Evid. 803(24) (other exceptions).

(6) Trustworthy statements by deceased declarants. Rule 804(b)(6) follows N.J. Evid. R. 63(32). While it makes some language changes, it does not change the substance of the New Jersey rule. There is no direct federal rule analogue to this rule, but such evidence may be admitted under the residual exception provisions of Fed. R. Evid. 804(b)(5) if the conditions of that rule are satisfied. The hearsay exception for dying declarations in civil proceedings, provided for by Fed. R. Evid. 804(b)(2), is encompassed by the broader terms of this rule.

Note that this rule is expressly limited to civil proceedings. However, statements of declarants who are dead may meet the requirements of other exceptions to the hearsay rule, such as Rules 803(c)(1) (present sense impression) and 803(c)(2) (excited utterances) and may be admitted in criminal as well as civil proceedings without violating a defendant's right of confrontation so long as adequate indicia of reliability inhere in the exception or are otherwise established. Ohio v. Roberts, supra, 448 U.S. at 66, 65 L. Ed. 2d at 608.

(7) Voters' statements. Rule 804(b)(7) follows N.J. Evid. R. 63(11) verbatim, to which were added the notice requirements of Rule 807, which were not included in the 1967 New Jersey rule. There is no federal rule analogue. This rule is not inconsistent with N.J.S.A. 2A:84A-25 (N.J. Evid. R. 31) which accords a voter the privilege to refuse to disclose the tenor of his vote at a political election unless the judge finds that the vote was cast illegally. Clearly, the illegality of the vote must be determined before the hearsay statements provided for by this rule could be admitted. See N.J.S.A. 19:29-7, authorizing a judge to compel a voter, found to be unqualified, to disclose for whom he voted. See also In re Mallon, 232 N.J. Super. 249, 273 (App. Div. 1989), certif. denied, 117 N.J. 166 (1989), where the court encouraged the "resourceful" procedure used by the trial judge and the attorneys in questioning unavailable voters by telephone conference. However, in a case where the illegal vote of a voter who is not available as a witness is critical to the

outcome of the election, a judge may require the parties to take the deposition of the voter, if reasonable in the light of all circumstances, pursuant to the requirements of Rule 804(a)(4).

(8) Statements by a child concerning sexual activity. Rule 804(b)(8), like N.J. Evid. R. 63(33), derives from principles announced in State v. D.R., 109 N.J. 348, 351-377 (1988), but there are significant differences between the two rules. There is no federal analogue. N.J. Evid. R. 63(33) was adopted on June 13, 1989, pursuant to authority of Joint Resolution No. 4, 1989. See N.J.S.A. 2A:84A-38.

The main differences between this rule and N.J. Evid. R. 63(33) are discussed below. Unlike N.J. Evid. R. 63(33), Rule 804(b)(8) does not admit hearsay statements of declarants who can give full and cogent testimony at trial concerning the substance of the extra-judicial statement; but if the child is physically available, although unavailable as a witness as defined by Rule 804(a), the child must be produced for questioning upon request of the party against whom the child's statement has been admitted. In addition, this rule applies to civil and other actions and is not limited to criminal proceedings against a defendant charged with a sexual offense against the child. This rule applies to statements of children of tender age only, not all children under 12 years of age; and this rule expressly permits a party against whom the extra-judicial statements are admitted to introduce other relevant statements of the child.

Availability of the Child. N.J. Evid. R. 63(33) does not exclude the child's hearsay statement if the child is able to competently testify as a witness at trial. This rule rejects that position. Most out-of-court statements admitted as hearsay exceptions are admitted despite the availability of the declarant because various circumstances are deemed to give the hearsay as much reliability as, or, in the case of business records, possibly more reliability than, the frail memory of a witness permits. As noted below, however, statements of sexual abuse by a child of tender years may be reliable or may be the product of suggestion or even fantasy. For this reason, and also because of the dictates of the Confrontation Clause discussed in the introductory comment on Rule 804(b), such statements ordinarily should not be admitted as substantive evidence in place of or in addition to the child's testimony if the child is available and able to testify fully and cogently about the subject matter contained in the proffered statements.

Rule 804(b)(8), in conjunction with the unavailability definition in Rule 804(a)(5), applies an "unavailability" condition that is more broadly defined than is customary. This requirement is consistent with the spirit and principles of D.R. that the hearsay statement should be admitted whenever the child is not able to give full and cogent testimony respecting the subject matter of the statement, not only because of unavailability in the usual sense or because of lack of testimonial capacity, but also because of fear, trauma, lack of memory, or other cause. If the child does testify and has recall and articulation ability, the hearsay is not admissible under this rule, although it may come in under some other exception such as Rule 803(a)(2) (prior consistent statements) or 803(c)(3) (statements of sensation or physical condition) or otherwise. To some extent, a child's statement complaining of sexual abuse may also be admissible under the fresh complaint doctrine. See, e.g., State v. Tirone, 124 N.J. Super. 530 (App. Div. 1973), rev'd on other grounds, 64 N.J. 222 (1974); State v. Ramos, 203 N.J. Super. 197, 202-203 (Law Div. 1985).

This rule attempts to meet these special considerations by conditioning the substantive use of the child's statements on unavailability, testimonial incapacity, or other testimonial inability.

Age of child. Rule 804(b)(8) applies to children "of tender years." The intent was to use a phrase that focuses on young children but to give a court discretion to apply the rule for older children when the circumstances make its application appropriate. The phrase "of tender years" is one frequently used in the common law. Its most common use was in connection with the custom of giving custody of a child "of tender years" to its mother. See, e.g., Esposito v. Esposito, 41 N.J. 143, 145 (1963); Grove v. Grove, 21 N.J. Super. 447, 454 (App. Div. 1952). However, the phrase is used in other contexts, such as in regard to children who may be competent to testify but of whom inquiry must be made before being sworn. See, e.g., Hare v. Pennell, 37 N.J. 558, 565 (App. Div. 1955); State v. Walton, 72 N.J. Super. 527, 534 (Cty. Ct. 1962). In this latter context especially, the phrase seems appropriate for this rule as it refers to those children who cannot be held to an adult standard of testimony. Although many of the cases use "children of tender years" in referring to very young children, Seitz v. Seitz, 1 N.J. Super. 234, 237, 240 (App. Div. 1949) (6-year-old), there is a substantial range in the phrase. See Wojnarowicz v. Wojnarowicz, 48 N.J. Super. 349, 352-353 (Ch. Div. 1958) (3-, 5-, and 7-year-olds); State v. Walton, supra, 72 N.J. Super. at 530, 534 (10-year-old); Mayer v. Mayer, 150 N.J. Super. 556 (Ch. Div. 1977) (11- and 13-year-olds treated as borderline: "not of such tender years"). The flexibility of the phrase is more appropriate for use in this rule than a prestipulated age. The focus of the rule on the child's lack of knowledge and experience should assure that statements made by younger children are more frequently admitted than statements of older children.

Proceedings in which Rule 804(b)(8) applies. N.J. Evid. R. 63(33) is limited to statements relating to "a sexual offense under the Code of Criminal Justice ... in a criminal proceeding brought against a defendant for the commission of such offense...." The rule does not apply to civil cases, although some civil cases involve proof of sexual activity with a child. Rule 804(b)(8) is not limited to criminal cases. N.J.S.A. 9:6-8.46 allows the use of out-of-court statements alleging child abuse, but it applies only in certain child-protection proceedings. Taken literally, N.J. Evid. R. 63(33) would not apply in juvenile delinquency proceedings or in prosecutions related to, but not for, sexual offenses (e.g., prosecutions for burglary with intent to commit sexual assault, under N.J.S.A. 2C:18-2, or murder while attempting to commit sexual assault,

under N.J.S.A. 2C:11-3a(3)). This limitation seems artificial. If evidence of this nature is trustworthy, there seems no reason not to admit it in all criminal cases when it is material to the crime charged. See State v. D.R., supra, 109 N.J. at 359-360. While this evidence may be the result of fabrication or suggestion in custody disputes, the same can be said for criminal cases as well. Thus, the hearsay exception in Rule 804(b)(8) applies to civil and juvenile delinquency proceedings as to all criminal proceedings in which the fact of sexual activity involving a child is relevant.

Criteria for admissibility. Rule 804(b)(8) is more detailed than N.J. Evid. R. (63)(33). Because the rule embodies a new exception to the hearsay rule, it is important to give considerable guidance in its application. D.R. states that this sort of statement by a child is very seldom the product of conscious lying. 109 N.J. at 360. See also Skoler, "New Hearsay Exceptions for a Child's Statement of Sexual Abuse," 18 J. Marshall L. Rev., 1, 44-45 (1984) (hereafter Skoler). That does not mean that all such statements are reliable. Note, "A Comprehensive approach to Child Hearsay Statements in Sex Abuse Cases," 83 Colum. L. Rev. 1745, 1751 (1983) (hereafter Colum. Note). The problem generally concerns statements that are the product of suggestion or fantasy, or occasionally the intentional falsehood or fabrication by persons other than the child. Colum. Note, supra, at 1751; and Note, "The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations," 98 Harv. L. Rev. 806, 820 (1985) (hereafter Harvard Note). The proposed rule focuses on those problems. The content of the statement is to be judged against other factors. Colum. Note, supra, at 1761-62. Thus, if there are facts in the statement that could not have been known by the child unless the event in question had taken place, that would tend to rule out fantasy as the source of the statement and would supports its admission. Skoler, supra, at 44. But care must be used in deciding what might be within the child's knowledge and experience. Harvard Note, supra, at 820. The statement must also be judged against the circumstances in which it was made. The nature of the questioning that led to the statement may be important in determining whether the statement was really that of the child rather than the product of suggestion. Questioning either by the person to whom the statement was made or by previous questioners of the child may produce a statement that is not descriptive of the experience of the child, but rather what the child thinks adults wish to hear. The time of the statement is also important, inasmuch as a child's memory may fade with time, and time may allow other factors to affect the statement. For these reasons, special care should be taken in applying this rule.

Other statements. Rule 804(b)(8) allows the party against whom a hearsay statement is admitted under this rule to use any other statements of the child in his or her defense. This provision is not contained in N.J. Evid. R. 63(33), although other statements may come in under that rule. This provision is consistent with the holding in D.R. that a person against whom this kind of statement is used should be given the full opportunity to rebut it. 109 N.J. at 369-371. Other statements of the child should be admissible when proffered by the adverse party even though they do not meet all the standards of the rule for the same reason that the child's testimony may be introduced even though the child does not meet the ordinary criteria for witness competency.

RULE 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.

COMMENT

Rule 805 follows N.J. Evid. R. 66 almost verbatim. Fed. R. Evid. 805 expresses the same principle in different language, providing that included hearsay is not excluded from an admissible hearsay statement if both hearsay statements conform with an exception to the hearsay rule.

RULE 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. Evidence of a statement or other conduct by a declarant, inconsistent with the declarant's hearsay statement received in evidence, is admissible although declarant had no opportunity to 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.

COMMENT

Rule 806 generally follows Fed. R. Evid. 806. Its first two sentences replace N.J. Evid. R. 65 without substantial change. The last sentence of this rule, which is taken from the federal rule, has no direct New Jersey analogue but was included here because it is consistent with current New Jersey practice.

RULE 807

DISCRETION OF JUDGE TO EXCLUDE EVIDENCE UNDER CERTAIN EXCEPTIONS

Except if offered by an accused in a criminal proceeding, when any statement is admissible by reason of 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 may exclude it 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.

COMMENT

Rule 807 follows N.J. Evid. R. 64 almost verbatim, with appropriate changes in the cross-references. There is no direct

federal analogue. Although notice provisions are included in the residual exception rules, Fed. R. Evid. 803(24) and 804(b)(5), neither of these rules has been adopted. Rule 807 is not intended to affect the notice requirements in the Rules of Court applicable to civil or criminal cases. See, e.g., R. 3:11-1; 3:13-3; 4:10 to 4:25, particularly 4:17-7, 4:23-2(b)(2), 4:23-4 and 4:23-5(b).

RULE 808

EXPERT OPINION INCLUDED IN A

HEARSAY STATEMENT ADMISSIBLE UNDER AN EXCEPTION

Expert opinion which is included in an admissible hearsay statement shall be excluded if the declarant has not been produced as a witness unless the trial judge 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.

RULE 808

COMMENT

Rule 808 deals with the admissibility of extra-judicial statements of expert opinion included in business records or other forms of admissible hearsay when the declarant of the expert opinion is not produced as a witness. There is no express counterpart in the federal or present New Jersey rules. However, N.J. Evid. R. 63(13) conditions the admission of a business record on proof that the "sources of information" and "the method and circumstances of its preparation were such to justify its admission." Relying on this language the Supreme Court in State v. Matulewicz, 101 N.J. 27, 30 (1985), held that the admissibility of a State Police chemist's laboratory report identifying a substance as marijuana would depend on the "method and circumstances" involved in preparing the report, such as the complexity or routine nature of the procedures used in making the analysis, the degree of objectivity and subjectivity involved, the existence of motive for untrustworthiness, and the responsibility of the declarant to be accurate and reliable.

The Matulewicz holding is consistent with the comment on proposed rule 63(13) contained in The 1963 Report at 185-186. The 1963 Report contemplated that opinions derived from a "relatively well-established" test, such as a "blood-grouping test, an alcoholism test, or the taking of an x-ray," and other "relatively simple" diagnostic tests contained in hospital records would be admitted in evidence. This approach has been followed. State v. Martorelli, 136 N.J. Super. 449 (App. Div. 1975), certif. denied, 69 N.J. 445 (1976) (blood alcohol report in hospital record). See also McCormick on Evidence §313 at 732 (Cleary 2d ed. 1972), §313 at 732: "The admissibility of ordinary diagnostic findings customarily based on objective data and not usually presenting more than average difficulty of interpretation is usually conceded," but "diagnostic opinions which on their face are speculative are reasonably excluded." However, "under the Uniform Act, it would not be unreasonable ... to permit introduction of the record only if the declarant were produced for cross-examination," in those "borderline cases" of records with opinions "involving difficulty of interpretation," although "most courts favor admissibility." Ibid. See also State in Interest of J.H., 244 N.J. Super. 207 (App. Div. 1990), holding that, to satisfy the confrontation clause requirement of particularized trustworthiness, a laboratory drug analysis certificate offered in evidence pursuant to N.J.S.A. 2C:35-19 must satisfy the Matulewicz criteria.

In dealing with the admissibility of diagnoses found in hospital records before adoption of Fed. R. Evid. 803(6), federal courts tended to admit entries relating to physical conditions and diagnoses as to which competent physicians would not differ and to exclude opinions based on conjecture or on an evaluation of subjective factors, such as psychiatric diagnoses. 4 J. Weinstein & M. Berger, Weinstein's Evidence, ¶803(6)[06], 803-199 to 200 (1990). Federal Rule 803(6) makes opinions and diagnoses contained in business records admissible without distinction but subject to exclusion by the trial judge where indicia of trustworthiness are lacking. Id. at 803-200 to 201. If the expert can be produced, the trial judge may require him to testify "to ensure trustworthiness through cross-examination," particularly when the issue is crucial and competent experts could disagree. Ibid.

The formulation of Rule 808 is intended to include in general terms all of the specific criteria discussed in Matulewicz.

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

RULE 901

REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter is what its proponent claims.

COMMENT

Rule 901 generally follows Fed. R. Evid. 901 and replaces N.J. Evid. R. 67. The federal rule includes ten examples of authentication. These examples were not adopted because they are not exclusive nor is the proof set out in them necessarily sufficient in all cases. Rule 901 does not include the provision "or by any other means provided by law" found in the New Jersey rule analogue, N.J. Evid. R. 67. That provision refers primarily to statutes which provide for authentication of various documents, such as recorded deeds or other instruments, and for their admission in evidence. See, e.g., N.J.S.A. 2A:82-17 and 18. The federal rule, which is followed by this rule, does not preclude proof of authenticity being furnished by operation of law; in fact, the illustration in Fed. R. Evid. 901(b)(10) expressly includes "authentication or identification" by any method provided by Act of Congress or Supreme Court rule. Rule 902(h), (i), and (j) provide that evidence of authenticity is satisfied by acknowledgment certificates on documents executed as

provided by law, commercial paper and signatures thereon as provided by applicable law, and documents, signatures and the like as declared by state or federal law.

RULE 902

SELF-AUTHENTICATION

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(a) New Jersey 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.

(b) Other 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. 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. 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. Books, pamphlets, or other publications purporting to be issued by public authority.

(f) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.

(g) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(h) Acknowledged documents. 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. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by applicable commercial law.

(j) Presumption 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. 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.

COMMENT

Rules 902(a) and (b) generally follow Fed. R. Evid. 902(1) and (2) and replace N.J. Evid. R. 68(1). These rules retain the distinction in N.J. Evid. R. 68(1) between New Jersey public documents and out-of-state public documents. Rule 902(a), which covers New Jersey documents, contains the former New Jersey provision that no seal be required. Rule 902(b), which covers out-of-state documents, does require a seal. The seal requirement for out-of-state documents is consistent with both the federal rule and the New Jersey analogue. Rule 902(b) is substantially the same as Fed. R. Evid. 902(1) and (2).

Rule 902(c) follows Fed. R. Evid. 902(3) and replaces N.J. Evid. R. 68(3). The only change from the federal rule is for the purpose of conforming this rule with the Hague Convention on Authentication of Foreign Documents. That convention allows authentication by apostille as an alternative to final certification by a consular official.

Rule 902(d) is substantially the same as Fed. R. Evid. 902(4) and is consistent with present New Jersey practice as generally expressed by N.J. Evid. R. 68.

Rule 902(e) follows Fed. R. Evid. 902(5) verbatim and makes no change in the substance of N.J. Evid. R. 68(1) which it replaces.

Rules 902(f) and (g) follow verbatim Fed. R. Evid. 902(6) and (7), respectively. There are no specific 1967 New Jersey rule analogues.

Rules 902(h), (i), and (j) generally follow Fed. R. Evid. 902(8) (9), and (10). The only change made in the federal rule is the substitution of the phrase "applicable commercial law" for "general commercial law" in Fed. R. Evid. 902(9). This substitution is intended to make it clear that the law referred to is the law applicable to the specific document in question.

There are no express 1967 New Jersey rule analogues, but these sections would be covered by the provision in N.J. Evid. R. 67 for authentication "by any other means provided by law." See Comment to Rule 901 above.

Rule 902(k) follows N.J. Evid. R. 69. There is no specific federal analogue although the content of this rule is consistent with Fed. R. Evid. 902(4). See Rule 803(e)(10).

N.J. Evid. R. 68(4), providing prima facie indicia of genuineness, was not adopted since its substance is comprehended by the concept of self-authentication under this rule. Despite authentication under this rule, the genuineness of a document may always be challenged.

RULE 903

TESTIMONY OF SUBSCRIBING WITNESS UNNECESSARY

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the law of the jurisdiction whose law governs the validity of the writing.

COMMENT

Rule 903 follows Fed. R. Evid. 903 almost verbatim. It replaces N.J. Evid. R. 71 without any change in substance.

ARTICLE X. CONTENTS OF WRITINGS AND PHOTOGRAPHS

RULE 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, video 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, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

(d) Duplicate. A "duplicate" is a counterpart 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.

COMMENT

Rule 1001 generally follows Fed. R. Evid. 1001. The only New Jersey rule analogue, N.J. Evid. R. 1(13), which is replaced by Rule 801(e), contained a definition of writings and included in that definition reproductions of information and data which is recorded.

Rule 1001(a) merely incorporates the definition of writings in Rule 801(e). That definition was expanded expressly to include recordings.

Rule 1001(b) generally follows Fed. R. Evid. 1001(2) but adds the phrase "and similar forms of reproduced likenesses" in an attempt to include and anticipate technological developments.

Rule 1001(c) generally follows Fed. R. Evid. 1001(3), but it omits the word "recording" since Rule 1001(a) includes recordings within the definition of a writing. For the same reason the word "recording" has been omitted from Rules 1002, 1004, 1006, 1007, and 1008.

Rule 1001(d) follows Fed. R. Evid. 1001(4) almost verbatim. There is no 1967 New Jersey rule analogue. Rule 1003 provides for the admissibility of a duplicate as the equivalent of the original, subject to exceptions contained in that rule.

RULE 1002

REQUIREMENT OF ORIGINAL

To prove the content of a writing or photograph, the original writing or photograph is required except as otherwise provided in these rules or by statute.

COMMENT

Rule 1002 follows Fed. R. Evid. 1002. It is consistent with the preference for the original of a writing expressed by N.J. Evid. R. 70. However, the use of duplicates as authorized by Rule 1002 significantly diminishes the preference previously accorded originals under New Jersey law.

RULE 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 the authenticity of the original, or (b) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

COMMENT

Rule 1003 follows Fed. R. Evid. 1003 almost verbatim. The concept of admitting a duplicate, defined by Rule 1001(d) as the equivalent of an original, is new to New Jersey practice. Rule 1003 provides that a duplicate is generally the equivalent of the original of a document for purposes of admissibility, subject to exceptions provided for in the rule. By contrast, N.J. Evid. R. 70 provides generally that no writing other than the "original writing itself is admissible" unless certain conditions are met, such as proof that the original is lost or cannot reasonably be procured.

RULE 1004

ADMISSIBILITY OF OTHER EVIDENCE OF CONTENTS

The original is not required and other evidence of the contents of a writing or photograph is admissible if:

(a) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(b) Original not obtainable. No original can be obtained by any available judicial process or procedure or by other available means; or

(c) Original in possession of opponent. At a time when an original was under the control of the party against whom offered,

that party was put on notice by the pleadings or otherwise that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(d) Collateral matters. The writing or photograph is not closely related to a controlling issue and it would not be expedient to require its production.

COMMENT

Rule 1004 replaces N.J. Evid. R. 70(1)(a), (b), (c), and (d) without substantive change and follows Fed. R. Evid. 1004 almost verbatim.

Paragraphs (a) and (c) are identical to Fed. R. Evid. 1004(1) and (3), respectively.

The only change which paragraph (b) of this rule makes in Fed. R. Evid. 1004(2) is the retention of the provision contained in N.J. Evid. R. 70(1)(b) which makes clear that an original is not unavailable if a party can obtain it by other reasonable means in addition to judicial process or procedure.

The only change which paragraph (d) of this rule makes in Fed. R. Evid. 1004(4) is the addition of the final clause, taken from N.J. Evid. R. 70(1)(d), which requires the use of an original even for collateral matters unless it is not expedient to produce it.

This rule differs from N.J. Evid. R. 70 by eliminating the order of preference for secondary evidence provided for by N.J. Evid. R. 70(2). That rule placed "oral testimony of the content of the writing" after all "conveniently available written secondary evidence."

RULE 1005

PUBLIC RECORDS

The contents of an official record or of a writing authorized to be recorded or filed and actually recorded or filed, if otherwise admissible, may be proved by a copy, 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 copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, other evidence of the contents may be admitted.

COMMENT

Rule 1005 follows Fed. R. Evid. 1005 almost verbatim and replaces N.J. Evid. R. 70(1)(e) without substantial change in current New Jersey practice.

RULE 1006

SUMMARIES

The contents of voluminous writings or photographs which cannot conveniently be examined in court may be presented by a qualified witness in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The judge may order that they be produced in court.

COMMENT

Rule 1006 generally follows Fed. R. Evid. 1006 and replaces N.J. Evid. R. 70(1)(g). The one change which this rule makes in the 1967 New Jersey rule analogue is the elimination of the general requirement that the writings be produced in court. Adopting the principles of the federal rules, this rule requires that the original or duplicates be made available to the other parties at a reasonable time and place. However, the judge may order their production in court.

This rule retains the requirement of N.J. Evid. R. 70(1)(g) that the summary be presented by a witness qualified to testify as to its contents. This provision is not contained in the federal rule.

RULE 1007

TESTIMONY OR WRITTEN ADMISSION OF PARTY

The contents of writings or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.

COMMENT

Rule 1007 follows Fed. R. Evid. 1007 almost verbatim and replaces N.J. Evid. R. 70(1)(h) with no change in substance.

RULE 1008

FUNCTIONS OF JUDGE AND JURY

Ordinarily the judge shall determine the sufficiency of proof of a condition for the admission of evidence of the contents of a writing or photograph other than the original in accordance with Rule 104. However, when a party raises an issue as to (a) whether the 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.

COMMENT

Rule 1008 follows Fed. R. Evid. 1008 with language changes only and replaces N.J. Evid. R. 70(3) without change in substance.

ARTICLE XI. MISCELLANEOUS RULES

RULE 1101

APPLICABILITY OF RULES

[NOT ADOPTED]

COMMENT

Fed. R. Evid. 1101 was not adopted since the provisions relating to the applicability of these rules of evidence, including privileges, are covered by Rule 101.

RULE 1102

AMENDMENT OF RULES

[NOT ADOPTED]

COMMENT

Fed. R. Evid. 1102, which deals with the procedure for amending the Federal Rules of Evidence, was not adopted. Amendment of the rules of evidence is governed by New Jersey law. See, e.g., N.J.S.A. 2A:84A-33 et. seq.

RULE 1103

TITLE

The title of these rules is the New Jersey Rules of Evidence and they may be cited as N.J.R.E.

COMMENT

Rule 1103 is based on Fed. R. Evid. 1103 with the addition of an approved citation form. There is no 1967 New Jersey rule analogue.

TABLE OF DISPOSITIONS

Present N.J. Rule	Proposed N.J. Rule
1(1)	Deleted. See Comment on Rule 101(b).
1(2)	401
1(3)	Deleted. See Comment on Rule 101(b).
1(4)	101(b)(1)
1(5)	101(b)(2)
1(6)	Deleted. See Comment on Rule 101(b).
1(7)	Deleted. See Comment on Rule 101(b).
1(8)	Deleted. See Comment on Rule 101(b).
1(9)	Deleted. See Comment on Rule 101(b).
1(10)	Deleted. See Comment on Rule 101(b).
1(11)	Deleted. See Comment on Rule 101(b).
1(12)	Deleted. See Comment on Rule 101(b).
1(13)	1001
1(14)	1001
2(1)	101(a)(1)
2(2)	101(a)(2) (first sentence) and 101(a)(2)(A)
2(3)	101(a)(3)
2(4) (first sentence)	101(c)
2(4) (second sentence)	no analogue
3	101(a)(4)

Table of Dispositions (cont.)

Present N.J. Rule	Proposed N.J. Rule
4	403
5	102
6	105
7(a)	601
7(b)	Deleted. See Comment on Rule 402.
7(c)	601
7(d)	Deleted. See Comment on Rule 402.
7(e)	Deleted. See Comment on Rule 402.
7(f)	402
8(1) (first sentence)	104(a)
8(1) (second sentence)	101(a)(2)(E), 104(a)
8(1) (third sentence)	104(a)
8(1) (fourth sentence)	104(e)
9(2)	104(b)
8(3)	104(c)
9(1)	201(a)(b)
9(2)	201(a)(b)
9(3)	201(c)(d)(e)
10(1)	201(e)
10(2)	201(f)
10(3)	Deleted. See Comment on Rule 201.
10(4)	Deleted. See Comment on Rule 201.

Table of Dispositions (cont.)

Present N.J. Rule	Proposed N.J. Rule
11	201(g)
12(1)	202
12(2)	202
12(3)	202
13	301
14	301
15	303
16 (not adopted)	
17 (first sentence) (a)	601(a)
17 (first sentence) (b)	601(b)
17 (second sentence)	604
18	603
19	602
20	607, 803(a)(2)
21 (not adopted)	609
22(a)	613(a)
22(b)	613(b)
22(c)	608
22(d)	608
23	501
24	502
25	503
26	504
26A-1	505

Table of Dispositions (cont.)

Present N.J. Rule	Proposed N.J. Rule
26A-2	506
26A-3	507
26A-4 (repealed L. 1987, c. 169, §6)	
26A-5	517
27	508
28	509
28A-1	510
29	511
30	512, 610
31	513
32	514
33 (not enacted) (secret of state)	
34	515
35 (not enacted) (communication to grand jury)	
36	516
37	530
38	531
39	532
40	533
40A-1	See 412
41	Deleted. See Comment on Rule 606
42	605
43	606

Table of Dispositions (cont.)

Present N.J. Rule	Proposed N.J. Rule
44 (not adopted)	
45 (not adopted)	
46	405(a)
47	404(a)(1), 405
48	404(a)
49	406(a)
50	406(b)
51	407
52(1)	408
52(2)	410
53	408
54	411
55	404(b)
56(1)	701
56(2) (first sentence)	702
56(2) (second & third sentences)	703
56(3)	704
57	705
58	705
59 (not adopted)	
60 (not adopted)	
61 (not adopted)	
62(1)	801(a)
62(2)	801(b)

Table of Dispositions (cont.)

Present N.J. Rule	Proposed N.J. Rule
62(3)	801(f)
62(4)	Deleted as self-evident. See Comment on Rule 801.
62(5)	801(d)
62(6)	804(a)
63	801(c), 802
63(1)(a)	803(a)
63(1)(b)	803(c)(5)
63(1)(c)	803(c)
63(2) (not adopted)	
63(3)	804(b)(1)
63(4)(a)	803(c)(1)
63(4)(b)	803(c)(2)
63(5)	804(b)(2)
63(6) (not adopted)	
63(7)	803(b)(1)
63(8)	803(b) (2) & (3)
63(9)(a)	803(b)(4)
63(9)(b)	803(b)(5)
63(10)	803(c)(25)
63(11)	804(b)(7)
63(12)(a)	803(c)(3)
63(12)(b)	803(c)(4)
63(12)(c)	803(c)(4)
63(13)	803(c)(6)

Table of Dispositions (cont.)

Present N.J. Rule	Proposed N.J. Rule
63(14)	803(c)(7)
63(15)	803(c)(8)
63(16)	803(c)(9)
63(17)	803(c)(10)
63(18)	803(c)(12)
63(19)	803(c)(14)
63(20)	803(c)(22)
63(21)	803(c)(26)
63(22) (not adopted)	
63(23)	804(b)(4)
63(24)	804(b)(4)
63(25)	804(b)(4)
63(26)	804(b)(4)
63(27)(a)	803(c)(20)
63(27)(b)	803(c)(20)
63(27)(c)	803(c)(19)
63(28)	803(c)(21)
63(29)	803(c)(15)
63(30)	803(c)(17)
63(31) (not adopted)	See Rule 803(c)(18)
63(32)	804(b)(6)
63(33)	804(b)(8)
64	807
65	806

Table of Dispositions (cont.)

Present N.J. Rule	Proposed N.J. Rule
66	805
67	901
68(1)	902(a)(b)(e)
68(2)	902(b)
68(3)	902(c)
68(4)	Deleted. See Comment on Rule 902.
69	902(k)
70(1) (Introductory Clause)	1002
70(1)(a)	1004(a)
70(1)(b)	1004(b)
70(1)(c)	1004(c)
70(1)(d)	1004(d)
70(1)(e)	1005
70(1)(f)	1002
70(1)(g)	1006
70(1)(h)	1007
70(2)	Deleted. See Comment on Rule 1004.
70(3)	1008
71	903
72 (not adopted)	

NOTICE TO THE BAR

AMENDMENTS TO THE NEW JERSEY EVIDENCE RULE 609– IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME (TO BE EFFECTIVE JULY 1, 2014)

Pursuant to N.J.S.A. 2A:84A-35, attached is the Supreme Court's Order of September 16, 2013 adopting amendments to N.J.R.E. 609 of the New Jersey Rules of Evidence as recommended by the Supreme Court Committee on the Rules of Evidence. The amendments relate to impeachment by evidence of conviction of crime. In addition to amending the current text of the rule, the amendments also adopt a new paragraph regarding use of evidence of prior convictions ten or more years old. The Committee addressed this topic as requested by the Supreme Court in State v. Harris, 209 N.J. 431, 445 (2012).

The amendment proposal was presented and discussed at a Judicial Conference on September 3, 2013 in accordance with the requirements of N.J.S.A. 2A:84A-34. The proposal, as recommended by the Supreme Court Committee on the Rules of Evidence, was previously announced by public notice dated July 26, 2013.

The Court's Order notes that the effective date of the amendments is July 1, 2014. The action of the Court is subject to the terms of N.J.S.A. 2A:84A-36.

Mark Neary, Supreme Court Clerk

Dated: September 16, 2013

SUPREME COURT OF NEW JERSEY

It is ORDERED that, pursuant to N.J.S.A. 2A:84-33 through 2A:84A-36, the attached amendments to **N.J.R.E. 609** of the New Jersey Rules of Evidence are adopted to be effective July 1, 2014.

For the Court,

Chief Justice

Dated: September 16, 2013

N.J.R.E. 609. Impeachment by Evidence of Conviction of Crime

(a) In General

(1) For the purpose of affecting the credibility of any witness, the witness's conviction of a crime, subject to Rule 403, must [shall] be admitted unless excluded by the judge pursuant to Section (b) of this rule [as remote or for other causes].

(2) Such conviction may be proved by examination, production of the record thereof, or by other competent evidence [.] , except in a criminal case, 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 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's 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 (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.

Note: Adopted September 15, 1992 to be effective July 1, 1993; text amended and designated as paragraph (a), paragraph (a) caption added, new paragraph (b) caption and text added September 16, 2013 to be effective July 1, 2014.

EXHIBIT C

MEMORANDUM

TO: **Rules of Evidence Committee**

FROM: **Inadvertent Disclosure Subcommittee**

Hon. Mitchel E. Ostrer, J.A.D.
William F. Cook, Esquire
Jeffrey S. Mandel, Esquire
Prof. Denis F. McLaughlin, Seton Hall University School of Law
Fernando M. Pinguelo, Esquire
Jeffrey M. Pollock, Esquire

DATE: **December 11, 2018**

RE: **Report on Proposed Rule Amendments to N.J.R.E. 530 Regarding Waiver of Attorney-Client Privilege or Attorney Work Product Protection**

TABLE OF CONTENTS

I. Introduction

In 2010, the Privileges Subcommittee was formed to examine the impact of the 2008 adoption of F.R.E. 502. F.R.E. 502 addresses the circumstances in which the attorney-client

privilege or work product doctrine may be waived in federal court. Congress adopted F.R.E. 502 to accommodate growing issues with electronic discovery.

After an extensive analysis of New Jersey law governing privilege waiver, the subcommittee declined to amend our corresponding rule, N.J.R.E. 530. The subcommittee determined that further case law should be developed on the issue before any formal amendatory action is taken.[1]

Last term, this subcommittee was formed to assess the status of case law developments and reconsider whether N.J.R.E. 530 should be updated. The subcommittee concluded that case law had not resolved the question of which of New Jersey's three competing approaches applies to the issue of waiver of the attorney-client privilege or work product doctrine. The subcommittee proposed a limited amendment to N.J.R.E. 530 which would allow a court to enter a case management order defining when the attorney-client privilege or work product doctrine is waived in the context of a specific case. The Supreme Court returned the issue for a review of whether N.J.R.E. 530 should also be amended to incorporate a uniform waiver rule as it applies to the attorney-client privilege or work product doctrine, not merely the incorporation of an anti-waiver enforcement vehicle as the subcommittee had proposed.

The subcommittee has now examined New Jersey case law developments, as well as the actions of other states, in the 10 years since adoption of F.R.E. 502. The subcommittee has also considered the impact of F.R.E. 502 on federal civil practice and the absence of a definitive New Jersey rule for state civil practice. Of importance, the subcommittee reviewed the September 2018

[1] The subcommittee identified three approaches in New Jersey to privilege waiver: a strict approach (in which any disclosure results in waiver); a subjective approach (in which waiver depends on whether the producing party intended to waive the privilege); and the "balancing approach," which 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.

adoption of new 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 F.R.E. 502. The new rules provide a model Electronic Discovery Stipulation and Order, similar to a F.R.E. 502 Order, to allow for the return of inadvertently produced documents, even though neither the New Jersey Rules of Evidence nor New Jersey case law adopts that approach.

Based these developments, the subcommittee concludes that the time has come for an amendment to N.J.R.E. 530 which reflects a unified approach on the issue of waiver of the attorney-client privilege or the work product doctrine. The subcommittee recommends adoption of the amendments below.

II. Background on Federal Rule of Evidence 502

F.R.E. 502, which concerns the waiver of privilege, was adopted by Congress in 2008.[2] The Rule was in response to limitations in prior case law to address the massive proliferation of electronic discovery. Under the prior case law, a party could have been deemed to waive the attorney-client privilege or work product doctrine due to, for instance, the accidental disclosure of a single privileged email in a massive document production involving thousands of documents.

F.R.E. 502 provides:

> **Rule 502. 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.

[2] F.R.E. 502 followed an unusual path to adoption. At the same time that Congress rejected the original privilege rules proposed in 1975 by the Rules Advisory Committee and the Supreme Court, Congress amended the Rules Enabling Act to provide that "any . . . amendment creating, abolishing, or modifying a privilege shall have no force or effect unless it shall have been approved by Act of Congress." 28 U.S.C. § 2076. In accordance with § 2076, the Rules Advisory Committee drafted F.R.E. 502 and the Standing Committee on Rules of Practice and Procedure of the Judicial Conference submitted the Rule directly to Congress in 2007. Congress adopted and enacted F.R.E. 502 in its current substantive form in 2008.

(a) Disclosure made in a Federal proceeding or to a Federal office or agency; scope of a waiver.--When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(b) Inadvertent disclosure.--When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:

(1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

(c) Disclosure made in a State proceeding.--When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in a Federal proceeding; or

(2) is not a waiver under the law of the State where the disclosure occurred.

(d) Controlling effect of a court order.--A Federal 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.

(e) Controlling effect of a party agreement.--An agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Controlling effect of this rule.--Notwithstanding Rules 101 and 1101, this rule applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision.

(g) Definitions.--In this rule:

(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

(2) "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.

In addressing the new rule, the Senate Judiciary Committee stated that an "efficient and cost-effective discovery process is important to preserving the integrity of our legal system." See Report of Senate Committee on the Judiciary, S.Rep. No. 264 (2008). The Senate Judiciary Committee further stated that the "costs of discovery have increased dramatically in recent years as the proliferation of email and other forms of electronic record-keeping have multiplied the number of documents litigants must review to protect privileged material." Id. As a result, the Senate Judiciary Committee explained:

> Outdated law affecting inadvertent disclosure coupled with the stark increase in discovery materials has led to dramatic litigation cost increases.
>
> Currently, the inadvertent production of even a single privileged document puts the producing party at significant risk. If a privileged document is disclosed, a court may find that the waiver applies not only to that specific document and case but to all other documents and cases concerning the same subject matter. Furthermore, the privilege can be waived even if the party took reasonable steps to avoid disclosing it.
>
> The increased use of email and other electronic media in today's business environment have exacerbated the problems with the current doctrine on waiver. Electronic information is even more voluminous and dispersed than traditional record-keeping methods, greatly increasing the time needed to review and separate privileged from non-privileged material. As the time spent reviewing documents has increased, so too has the amount of money litigants on all sides must spend to

protect against the potential waiver of privilege.

Judiciary Committee Report, S.Rep. No. 264 (2008).

III. The 2010 Review of Federal Rule of Evidence 502 by the Privileges Subcommittee

In 2010, a subcommittee was formed to evaluate whether a provision similar to F.R.E. 502 should be added to the New Jersey Rules of Evidence. After extensive consideration of F.R.E. 502 and New Jersey law, the subcommittee did not recommend the adoption of a companion provision.

As explained in the 2010 report, New Jersey law regarding privilege waiver at that time was unclear. The report referenced Kinsella v. NYT Television, 370 N.J. Super. 311 (App. Div. 2004), which included a comprehensive overview of the law governing waiver. Three approaches were identified:

- The ***"strict"*** or ***"traditional"*** approach, under which the disclosure of privileged information results in a waiver of privilege, regardless of whether the disclosure was inadvertent. Under this approach, disclosure of privileged information will result in a waiver, even if reasonable steps were taken to prevent disclosure.

- The ***"subjective intent"*** approach, under which a disclosure of privileged information will never result in a waiver unless the party protected by the privilege intended to waive it.

- The ***"middle"*** or ***"balancing of factors"*** approach, under which the disclosure of privileged information may result in a waiver depending on the specific circumstances of the case, including whether the party who disclosed privileged information took reasonable steps to prevent disclosure. This is the approach taken under Fed. R. Evid. 502.

In Stengart v. Loving Care Agency, Inc., 201 N.J. 300 (2010), the Court addressed these issues but did not adopt a singular waiver rule. In Stengart, the issue was whether pre-suit emails that plaintiff sent to her attorney while using plaintiff's personal, password-protected web-based email account on a company-issued laptop were protected from disclosure. The Supreme Court held that the attorney-client privilege applied to the documents, and the privilege was not waived. The Court noted:

> A person waives the privilege if she, "without coercion and with knowledge of [her] right or privilege, made disclosure of any part of the privileged matter or consented to such a disclosure made by anyone." N.J.R.E. 530 (codifying N.J.S.A. 2A:84A-29). Because consent is not applicable here, we look to whether Stengart either knowingly disclosed the information contained in the e-mails or failed to "take reasonable steps to insure and maintain their confidentiality." Trilogy Commc'ns, supra, 279 N.J. Super. at 445-48, 652 A.2d 1273.
>
> As discussed previously, Stengart took reasonable steps to keep discussions with her attorney confidential: she elected not to use the company e-mail system and relied on a personal, password-protected, web-based account instead. She also did not save the password on her laptop or share it in some other way with Loving Care.
>
> As to whether Stengart knowingly disclosed the e-mails, she certified that she is unsophisticated in the use of computers and did not know that Loving Care could read communications sent on her Yahoo account. Use of a company laptop alone does not establish that knowledge. Nor does the Policy fill in that gap. Under the circumstances, we do not find either a knowing or reckless waiver.[3]

In a footnote, the Court observed that it did not need to determine which standard applied to the issue of a waiver of privilege, i.e. whether the test was whether Stengart "knowingly disclosed the information contained in the e-mails" or failed to "take reasonable steps to insure and maintain their confidentiality." Id. at 324, n. 5 (citing, Kinsella and Trilogy). The Court remanded for a determination as to appropriate sanctions.

Given the above, the Privileges Subcommittee concluded that the adoption of a companion provision to F.R.E. 502 was premature. The subcommittee recommended that the issue of privilege waiver be left to further case law development. Based on the case law at that time, it was unclear whether New Jersey courts would adopt a waiver standard similar to F.R.E. 502.

IV. The 2016 Report of the Inadvertent Disclosure Subcommittee New Jersey Law Concerning Privilege Waiver Since 2010

In 2016, the Inadvertent Disclosure Subcommittee was formed to evaluate whether case law provided further guidance on which approach would govern a waiver of the attorney-client

---

[3] Stengart, 201 N.J. at 323-324.

privilege or work product doctrine in New Jersey. In the intervening time frame, the reported decisions on this issue included the following:

- In re January 11, 2013 Subpoena by Grand Jury of Union County, 432 N.J. Super. 570 (Law Div. 2013) involved a potential waiver of the newsperson's privilege in the context of a blog post. The case involves the specialized context of New Jersey's Shield Law. The opinion does not address which of the above waiver approaches would be adopted as a general matter.

- In Hedden v. Kean Univ., 434 N.J. Super. 1 (App. Div. 2013), the issue was whether a university waived the attorney-client privilege upon a coach's disclosure of an email to the NCAA. The email had originally been sent by the coach to the university's general counsel. Over a dissent, the Appellate Division held that the coach did not have the authority to waive the privilege on behalf of the university. The majority decision quoted N.J.R.E. 530 concerning waiver, and noted that once privileged material is disclosed, the privilege of non-disclosure is waived as to that matter. Hedden, 434 N.J. Super. at 14-15 (citing In re Grand Jury Subpoena Issued, 389 N.J. Super. 281, 298 (App. Div. 2006)). Hedden further notes that "[n]ot all disclosures, however, amount to waivers. For example, an unauthorized disclosure by someone who is not the holder of the privilege does not generally constitute a waiver." Hedden, 434 N.J. Super. at 14-15 (citing In re Grand Jury Subpoenas Duces Tecum, 241 N.J. Super. 18, 31 (App. Div. 1989); In re Nackson, 221 N.J. Super. 187, 191 (App. Div. 1987), aff'd, 114 N.J. 527 (1989)). Hedden does not address the standard which applies to determine whether a privilege has been waived, but rather the issue of who has the authority to waive a privilege.

- In Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C., 215 N.J. 242 (2013), the issue concerned whether the mediation privilege was waived. The Supreme Court's decision involves specific provisions relating to mediation, and does not involve a discussion of the approaches above.

- In O'Boyle v. Borough of Longport, 218 N.J. 168 (2014), the issue concerned the application of the common interest rule to OPRA requests. The Court adopted the common interest exception to waiver as articulated in LaPorta v. Gloucester County Board of Chosen Freeholders, 340 N.J. Super. 254 (App.Div. 2001). The O'Boyle decision concerns a specific issue in the context of waiver, namely whether the disclosure of privileged information to advance the representation is a waiver. The decision does not involve the general circumstances of when a waiver will be deemed to exist.

Other decisions addressed issues concerning the waiver of privilege, but these decisions were unreported. In Friedman Route 10, LLC v. Certain Underwriters At Lloyd's, London, 2014 WL 340087 (App. Div. 2014), the issue was the attorney-client privilege in the context of disclosures to a claims adjuster. The Appellate Division found that there was no such waiver under

the common interest rule. In Bayliss v. New Jersey State Police, 2015 WL 3755111 (App. Div. 2015), a case involving inadvertently released documents by the Office of the Attorney General, the Appellate Division cited Kinsella for the proposition that the waiver of privilege must be intended. However, there was no extended discussion on the issue.

Given the above, the issue of which standard governs the waiver of privilege remained unresolved. The subcommittee therefore suggested a narrow proposal: an amendment of N.J.R.E. 530 to expressly authorize a court to enforce the terms of an anti-waiver agreement reached by parties for purposes of litigation.

In recommending this narrow approach, the subcommittee observed that F.R.E. 502(d) has been highly praised as an essential tool in reducing e-discovery costs.[4] The utility of the rule is that it allows parties to stipulate as to the consequences of an unintentional disclosure, regardless of what "default" law would apply in the absence of such an agreement. In this way, parties can "contract around" the law governing waiver for purposes of the litigation. This allows, for example, so-called "make available" productions in cases involving thousands upon thousands of emails from multiple custodians.

The Sedona Conference, a leading authority on issues relating to e-discovery and related issues, specifically espoused the benefits of F.R.E. 502 (d). See Sedona Conference, "Commentary on Protection of Privileged ESI," (November 2014). As explained by that organization:

> Notably, Rule 502(d) permits courts to enter orders that provide that a disclosure does not constitute a waiver—regardless of the actions taken by the producing party. In sum, courts may enter orders which provide greater protection than provided in subsections (a) and (b) of Rule 502. By reducing the risk of waiver, such an order provides parties and their counsel a blank canvass to design and

[4] See, e.g. The Sedona Conference, "Commentary on Protection of Privileged ESI," (November 2014); John A. Rosans, "6 Years In, Why Haven't FRE 502(d) Orders Caught On?" Law360, New York (July 24, 2014); John M. Barkett, Evidence Rule 502: The Solution to the Privilege-Protection Puzzle in the Digital Era, 81 Fordham L. Rev. 1589 (2013); Ryan J. Cooper, "Oops! I Did It Again: Unintentional Waivers of Privilege Under FRE 502," New Jersey Law Journal (April 30, 2015).

implement creative mechanisms to limit the risk of the disclosure of privileged information resulting in a waiver and, equally important, reduce the tremendous cost of a system that is largely broken—the process of identifying and logging privileged documents. Thus, a federal court could enter a Rule 502(d) non-waiver order regardless of whether the producing party used reasonable procedures to identify privileged documents before production. Rule 502(d) also permits the parties to agree that there will be no waiver even if there is no privilege review thereby permitting the parties to agree to use a quick peek or make available production, without waiving privilege or protection.

Given the potential to eliminate the possibility of waiver and reduce the cost of privilege review, some commentators have stated that the failure to at least ask for the entry of a Rule 502(d) order is tantamount to malpractice. Despite such statements, the bench and the bar have largely ignored the rule and have failed to take advantage of its protections. As Judge Paul Grimm has noted with respect to Rule 502: "to date it has not lived up to its promise ... because parties have overlooked it and courts have not construed it consistently with its purpose. ..." Hon. P. Grimm, Lisa Yurwit Bergstrom & Matthew P. Kraeuter, Federal Rule of Evidence 502: Has it Lived Up to its Potential?, Richmond Journal of Law and Technology, Vol. XVII, Issue 3, Spring 2011; see also Smith v. Allstate Ins. Co., - F.Supp.2d--, 2012 WL 5463099 (W.D.Pa. Nov. 8, 2012) ("Curiously, neither [defendant] in its motion nor Plaintiff in her response reference Fed R. Evid. 502(b) or discuss its factors as they relate to the instant case [involving inadvertent production]. Accordingly, some information that would be helpful in resolving this issue is not before the Court."); Swift Spindrift, LTD v. Alvada Insurance, Inc., 09 Civ. 9242, 2013 WL 3815970, at *4 (S.D.N.Y. 2013) ("Perhaps this omission [to mention Rule 502] should not be a surprise since remarkably few lawyers seem to be aware of the Rule's existence despite its enactment nearly five years ago."); Hon. L. Rosenthal, The Phillip D. Reed Lecture Series, Evidence Rules Committee Symposium on Rule 502, Panel Discussion, Reinvigorating Rule 502 (Oct. 5, 2012) ("Rule 502 is underutilized"); R. Marcus, The Rulemakers' Laments, 81 Fordham L. Rev. 1639, 1644 (2013) ("The reality is that not very many lawyers have used these very flexible tools"); id. at 1645 ("The much larger problem, however, is that lawyers simply have not noticed the rule").[5]

Meanwhile, in response to F.R.E. 502, several states took action to incorporate some or all of its provisions.[6] The following states have taken some form of action in response to F.R.E. 502[7]:

[5] Sedona Conference, "Commentary on Protection of Privileged ESI," (November 2014), at 3 (footnotes omitted).

[6] Sedona Conference, "Commentary on Protection of Privileged ESI," (November 2014), Appendix B.

[7] For a detailed discussion of the actions taken by these states, see See Sedona Conference, "Commentary on Protection of Privileged ESI," (November 2014), Appendix B.

- Ariz. R. Evid. 502 (contains analogues to F.R.E. 502(a), (b), (d), (e) and (g) with respect to disclosures in an Arizona proceeding, and subsection (c) of the Arizona rule addresses disclosures in federal proceedings and another state's proceedings);

- DRE 510 (Delaware Uniform Rule of Evidence 510 contains analogues to F.R.E. 502(a) – (e) with respect to disclosures made to law enforcement agencies and in state proceedings);

- Ill. R. Evid. 502 (contains analogues to F.R.E. 502(a), (b), (d), (e) and (g) with respect to disclosures in an Illinois proceeding or to an Illinois office or agency, and subsection (c) of the Illinois rule addresses disclosures in federal proceedings and another state's proceedings, and disclosures to federal, or another state's, offices or agencies);

- Ind. R. Evid. 502 (contains analogues to F.R.E. 502(a), (b), (d) and (e) with respect to disclosures in court proceedings);

- Iowa R. Evid. 5.502 (contains analogues to F.R.E. 502(a), (b), (d), (e) and (g) with respect to disclosures in court or agency proceedings);

- Kan. Stat. Ann. § 60-426a (West 2012) (contains analogues to F.R.E. 502(a), (b), (d), (e) and (g) with respect to disclosures in court or agency proceedings, and subsection (c) of the Kansas rule addresses non-Kansas proceedings);

- Vt. R. Evid. 510 (b) (1-6) (contains analogues to F.R.E. 502(a), (b), (d), (e) and (g) with respect to disclosures in Vermont proceedings or to a Vermont office or agency, and subsection (3) of the Vermont rule addresses non-Vermont proceedings);

- Va. Code Ann. § 8.01-420.7 (West 2012) (contains analogues to F.R.E. 502(a), (b), (d), and (e) with respect to disclosures in a proceeding or to any public body);

- Wash. R. Evid. 502 (contains analogues to F.R.E. 502(a), (b), (d), (e) and (g) with respect to disclosures in Washington proceedings or to Washington offices or agencies, and subsection (c) of the Washington rule addresses non-Washington proceedings).

The action taken by most of these states includes the incorporation of a standard rule as to when a waiver occurs, regardless of whether the parties entered into an anti-waiver agreement. As noted, the proposed 2016 change to N.J.R.E. 530 did not go so far as to implement a uniform standard for waiver, leaving development of that issue to further case law. The proposed change to N.J.R.E. 530 was limited to situations in which the parties stipulate as to when waiver occurs in the course of the litigation process.

It was the position of the 2016 subcommittee that the proposed amendment would be of enormous consequence to current cases involving massive amounts of e-discovery in the New Jersey state courts. Under New Jersey case law at the time, no clear standard existed governing waiver, and no provision existed in the New Jersey Rules of Evidence for the ***enforcement*** of anti-waiver agreements. The subcommittee observed that, in the absence of clarity on the issue, trial attorneys must operate on the assumption that the strict approach could still be applied, *i.e.* that the disclosure of a single privileged document, in a stack of thousands, may waive a privilege. The net result is that much time and resources are spent in reviewing documents in the off-chance that a privileged document may be discovered.

The subcommittee further observed that N.J.R.E. 530 has not been amended since 1993, nor did it appear that the rule had ever been interpreted in the context of an e-discovery anti-waiver agreement. Additionally, at that time, there appeared to be no reported cases in New Jersey involving the enforcement of an anti-waiver agreement in litigation. The only reference to such an agreement is R. 4:5B-2 (Case Management Conferences), which provided:

> In cases assigned to Tracks I, II, and III, the designated pretrial judge may *sua sponte* or on a party's request conduct a case management conference if it appears that such a conference will assist discovery, narrow or define the issues to be tried, address issues relating to discovery of electronically stored information, or otherwise promote the orderly and expeditious progress of the case. A case management conference shall not, however, ordinarily be conducted after the case is ready for trial. In Track IV cases, except for actions in lieu of prerogative writs and probate and general equity actions, an initial case management conference shall be conducted as soon as practicable after joinder and, absent exceptional circumstances, within 60 days thereafter. In actions in lieu of prerogative writs, case management conferences shall be held pursuant to R. 4:69-4. In probate actions, case management conferences may be scheduled at the discretion of the judge. In all actions in general equity, except summary actions pursuant to R. 4:67 and foreclosure actions, an initial case management conference shall be held within 30 days following the filing of the answers of all defendants initially joined, and the court may hold such additional case management conferences as it deems appropriate. All decisions and directives issued at a case management conference shall be memorialized by order as required by R. 1:2-6. ***The order may include provisions for disclosure of discovery of electronically stored information and***

any agreements the parties reach for asserting claims of privilege or protection as trial preparation material after production.

While R. 4:5B-2 contemplates the existence of anti-waiver agreements, there is no clear authorization in the New Jersey Rules of Evidence (or New Jersey law governing waiver) for the enforcement of such orders, particularly where the terms chosen by the parties may diverge from New Jersey law governing waiver of privilege. As of 2016, a court that was tasked with the implementation of such an order had nothing in the New Jersey Rules of Evidence to determine whether the proposed terms and conditions can, in fact, be imposed, particularly where the terms may adopt one of the three approaches above. For example, if parties contracted to incorporate the "subjective intent" approach to their litigation, there is nothing in N.J.R.E. 530 which gives the court the ability to enforce that order if it finds that that the "modified/balancing" approach or the "strict" approach is prevailing law.[8]

The subcommittee's 2016 proposal was designed to enable the use of anti-waiver agreements for litigation-related disclosures, and court enforcement of same. The heart of the proposed rule was that the parties may agree about the effect of the disclosure of privileged or protected information in the course of litigation or agency proceedings, even if the disclosure is unintentional or inadvertent.

After presentation of the 2016 proposal, the full Committee concluded that a recommendation on a narrow rule amendment should be proposed to the Supreme Court. On

[8] R. 4:5B-2 is a generic procedural vehicle, but it does not address the specific issue of waiver. Other types of agreements exist in this context which do not necessarily deal with waiver, including so-called "claw-back" agreements and "quick-peek" agreements. Moreover, not all such agreements are created equal. Under a claw-back agreement, a party may demand the return of a document which has been unintentionally disclosed. However, the party who received the document may still be able to argue that a privilege has been waived. In a "quick-peek" agreement, the parties stipulate that certain search protocols will satisfy a party's obligation to make reasonable efforts to avoid an inadvertent disclosure. However, this assumes that the "modified" or "balancing" approach applies, and in New Jersey, this test has not been expressly adopted. Thus, under the current state of New Jersey law, "quick peek" agreements are of limited usefulness.

further review by the Supreme Court, the Supreme Court recommended that the subcommittee examine whether a broader amendment on the issue of privilege waiver should be considered. This subcommittee was thus reconstituted to examine these issues.

V. The 2018 Rule Updates to the New Jersey Complex Business Litigation Business Program

In the meantime, various updates to the Part IV Rules governing the New Jersey Complex Business Litigation Program ("CBLP") took effect in September 2018. These changes followed multi-year pilot programs in Bergen and Essex counties, later expanded statewide, on recommendation of the Supreme Court's Working Group on Business Litigation.

Under the CBLP, each vicinage appoints a special CBLP 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 2018 Rule amendments relate to CBLP case management, discovery, and motion practice. See R. 4:102-1 to 103-3. R. 4:103-1 follows the Fed. R. Civ. P. 26 model governing 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. R. 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 CBLP must conduct an initial case management conference, and all CBLP cases are to be pre-tried. Limitations are imposed on the number of interrogatories and the length of depositions.

On August 20, 2018, the Administrative Office of the Courts issued proposed forms for purposes of the updated CBLP rules.[9] Under the new forms, an Electronic Discovery Stipulation and Order ("EDSO") is proposed governing production, spoliation, and disclosure issues. On the issue of waiver, the proposed EDSO states as follows:

> 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.
>
> See Proposed Form EDSO, August 20, 2018 Notice to the Bar, ¶ 9.

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

VI. Recommendations for Amendments to N.J.R.E. 530

The subcommittee has examined New Jersey case law developments, as well as the actions of other states, in the 10 years since adoption of F.R.E. 502. The subcommittee has also examined the impact of F.R.E. 502 on federal civil practice, the absence of a definitive New Jersey rule for state civil practice, the September 2018 adoption of new rules in Part IV governing the CBLP, and the proposed CBLP forms under review. Based on this review, the subcommittee concludes that Rule 530 should be amended, consistent with F.R.E. 502, to apply a unified approach to the issue of waiver of the attorney-client privilege or work-product doctrine.

[9] These proposals are attached hereto as Exhibit A.

N.J.R.E. 530 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 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.

N.J.R.E. 530.

Unlike F.R.E. 502, N.J.R.E. 530 is not limited to the attorney-client privilege and work-product doctrine. The subcommittee recognizes that F.R.E. 502 does not address other privileges that exist at law, and that a broad waiver rule that goes beyond the attorney-client privilege or work-product doctrine may impact other types of cases, such as family or juvenile proceedings. For this reason, the subcommittee, like Congress with F.R.E. 502, focuses on specific issues of privilege waiver as they pertain to the attorney-client privilege and work-product doctrine.

As an initial matter, the subcommittee recommends that the first paragraph of N.J.R.E. be identified by letter, with a change in internal references. The subcommittee also recommends the new underlined language. The underlined language is designed to make clear that all waiver issues dealing with the attorney-client privilege or work-product doctrine are addressed in new paragraph (c).

> *(a)* Except as provided herein with respect to the attorney-client privilege or work-product doctrine, 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 recommends the following revision to the current second paragraph of N.J.R.E. 530. The second paragraph is designated as paragraph (b) with the new underlined language.

> *(b)* Except as provided herein with respect to the attorney-client privilege or work-product doctrine, 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 proposes 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.[10]
>
> **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.

[10] Language tracks introductory language of F.R.E. 502 *verbatim*.

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 order 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 N.J.R.E. 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) accomplishes the central components of F.R.E. 502 as applied to state proceedings. Paragraph (c)(1) follows F.R.E. 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 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 should be considered together.

As to inadvertent disclosures, Paragraph (c)(2) tracks F.R.E. 502(b) and imposes the balancing approach previously identified. 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. The subcommittee further finds that a common approach with the federal rule will facilitate and inform case law development on this issue. The subcommittee also finds that such language is consistent with the proposed EDSO language for the CBLP discussed above.

Proposed N.J.R.E. 530(c)(3) addresses the concerns of F.R.E. 502(c), namely the impact of a disclosure in another forum operates as a disclosure in the New Jersey litigation. Proposed N.J.R.E. 530(c)(3) holds 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 which 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 N.J.R.E. 530(c)(4) follows federal F.R.E. 502(d) concerning the execution of anti-waiver orders, a critical component of federal e-discovery practice recognized in the CBLP amendments. The first sentence of proposed N.J.R.E. 530(c)(4) follows F.R.E. 502(d). The subcommittee sees no reason to deviate from such language, and such adoption is consistent with the action of other states. The subcommittee further proposes a second sentence to resolve a practice issue raised under F.R.E. 502(d) after its adoption, namely whether a party waives any rights under an F.R.E. 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 N.J.R.E. 530(c)(5) follows F.R.E. 502(e) concerning the binding effect of an anti-waiver agreement on non-parties to the agreement. The subcommittee sees 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 F.R.E. 502(e) foresees.

The subcommittee declines to recommend incorporation of F.R.E. 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, F.R.E. 502 applies, and there will be no impact since N.J.R.E. 530(c) will be recognized by F.R.E. 502(c). The same result holds if the enforceability question is raised in a proceeding in another state that has adopted F.R.E. 502(c). If the jurisdiction has not adopted F.R.E. 502(c), the enforceability question would be left to a determination by that jurisdiction under principles of comity and full faith and credit. Unlike Congress, New Jersey does not have supremacy powers to impose its privilege waiver rules on proceedings in other jurisdictions. The subcommittee would expect that in this narrow circumstance, where there is both the New Jersey litigation and litigation in another state which has not adopted F.R.E. 502(c), the parties will be sufficiently informed to meet-and-confer concerning the unique waiver issues presented.

Finally, the subcommittee sees fit to incorporate, as does F.R.E. 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 F.R.E. 502(g) with respect to the definition of the attorney-client privilege by cross-referencing N.J.R.E. 504, which defines this

privilege. With respect to the work-product doctrine, the subcommittee finds that the definition in F.R.E. 502(g) is sufficient for these purposes.

The subcommittee incorporates its discussion above concerning the utility of these amendments, emphasizing that these 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 which go beyond the circumstances identified in F.R.E. 502. The subcommittee further finds that these amendments are necessary given the lack of case law resolution and the recent CBLP rule amendments.

VII. Conclusion

For these reasons, the Subcommittee respectfully recommends adoption of the above additions to N.J.R.E. 530. The members of the subcommittee thank the full Committee and the Supreme Court for the opportunity to review these critically important issues.

Respectfully submitted,

Hon. Mitchel E. Ostrer, J.A.D.
William F. Cook, Esquire
Jeffrey S. Mandel, Esquire
Prof. Denis F. McLaughlin
Fernando M. Pinguelo, Esquire
Jeffrey M. Pollock, Esquire

Attachments:

Exhibit A	Notice the Bar Regarding CBLP Forms, August 20, 2018
Exhibit B	Shook, Hardy & Bacon, Links to State Court and Local Federal eDiscovery Rules, August 2018
Exhibit C	The Sedona Conference, Commentary on Protection of Privileged ESI, November 2014, Exhibit F
Exhibit D	Comparison Chart – F.R.E. 502 and Proposed N.J.R.E. 530(c)

NOTICE TO THE BAR

EXTENSION OF COMMENT PERIODS ON THREE ITEMS – (1) AMENDMENTS TO RULE 1:4-9; (2) COMPLEX BUSINESS LITIGATION PROGRAM GUIDELINES, FORMS, AND ORDERS; (3) REPORT OF THE COMMITTEE ON MUNICIPAL COURT OPERATIONS, FINES, AND FEES

This notice announces the extension of the comment periods for three previously published items as set forth below; the new end date of the comment period for each of the three items will now be Monday, September 24, 2018:

(1) "Proposed Amendment to Rule 1:4-9 Regarding Electronic Filing of Papers," notice dated August 3, 2018 (comment period extended from September 10, 2018);

(2) "Complex Business Litigation Program – Proposed Overview and Case Management Guidelines; Model Forms and Orders," notice dated July 24, 2018 (comment period extended from September 1, 2018); and

(3) "Municipal Courts – Report of the Supreme Court Committee on Municipal Court Operations, Fines, and Fees," notice dated July 17, 2018 (comment period extended from September 17, 2018).

Comments on these three items during the extended comment periods should be submitted as directed in the respective previously published notices.

Hon. Glenn A. Grant, J.A.D.
Acting Administrative Director

Dated: August 20, 2018

NOTICE TO THE BAR

COMPLEX BUSINESS LITIGATION PROGRAM – PROPOSED OVERVIEW AND CASE MANAGEMENT GUIDELINES; MODEL FORMS AND ORDERS – PUBLICATION FOR COMMENT

The Supreme Court established the Complex Business Litigation Program (CBLP) in November 2014 for the handling of complex business, commercial, and construction cases. As part of the current rules cycle, the Court will be including in its upcoming Omnibus Rule Amendment Order a series of Court Rules on CBLP. In addition to those rules, the following proposed documents, which are appended to this notice, have been developed to provide for better case management and efficiencies in CBLP cases:

1. Proposed CBLP Overview and Case Management Guidelines
2. Joint Proposed Discovery Plan (Model Plan)
3. Scheduling Order (Model Order)
4. Electronic Discovery Stipulation and Order (Model Order)
5. Clawback Stipulation and Order (Model Order)

The Supreme Court invites written comments on the proposed CBLP Overview and Case Management Guidelines and the proposed CBLP model forms/orders published with this Notice. Comments should be submitted in writing by September 1, 2018 to the following address:

Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Attn: Comments on CBLP Guidelines and Forms/Orders
Hughes Justice Complex; P.O. Box 037
Trenton, New Jersey 08625-0037

Comments may also be submitted by email to: Comments.Mailbox@njcourts.gov.

The Supreme Court will not consider comments submitted anonymously. Thus, those submitting comments by mail should include their name and address and those submitting comments by email should include their name and email address. Comments submitted in response to this notice are subject to public disclosure.

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

Dated: July 24, 2018

PROPOSED
COMPLEX BUSINESS LITIGATION PROGRAM (CBLP)
OVERVIEW AND CASE MANAGEMENT GUIDELINES

PROGRAM OVERVIEW

The Complex Business Litigation Program ("CBLP" or "the Program") is focused on business, commercial and construction cases with significant amounts in dispute or business or commercial cases involving complex factual or legal issues; a large number of separately represented parties; potential numerous pre-trial motions raising difficult or novel legal issues; case management of a large number of lay and expert witnesses or a substantial amount of documentary evidence (including electronically stored information); substantial time required to complete the trial; significant interpretation of a business, commercial or construction statute; or involves other contentions of a complex business, commercial or construction nature.

Eligibility

A case is assigned to the vicinage CBLP judge in the following situations:

Threshold Damages

The CBLP involves disputes with and between business entities where the claims, counterclaims, or third-party claims allege business, commercial or construction claims and an amount in controversy of at least $200,000.00, unless the court determines a lesser amount is acceptable.

Self Designation

Attorneys or parties completing the Civil Case Information Statement will self-designate actions as Complex Commercial (Case Type 508) or Complex Construction (Case Type 513). These case types will presumptively be assigned to the vicinage's CBLP judge for case management.

Complex Commercial (508) actions involve claims by, against, and among parties that arise out of business or commercial transactions and involve parties' exposure to potentially significant damage awards; or where the business or commercial claim involves complex factual or legal issues; a large number of separately represented parties; potential numerous pre-trial motions raising difficult or novel legal issues; case management of a large number of lay and expert witnesses or a substantial amount of documentary evidence (including electronically stored information); substantial time required to complete the trial; significant interpretation of a business or commercial statute; or involves other contentions of a complex business – commercial nature.

Complex Construction (513) actions involve claims by, against, and among owners, contractors, subcontractors, fabricators and installers, architects, engineers, design and construction consultants, and other similar parties associated with a construction project that

involves parties' exposure to potentially significant damage awards because of claimed design and construction defects, delay claims, or where the construction claim involves complex factual or legal issues; a large number of separately represented parties; potential numerous pre-trial motions raising difficult or novel legal issues; case management of a large number of lay and expert witnesses or a substantial amount of documentary evidence (including electronically stored information); substantial time required to complete the trial. Complex construction does not include construction and professional payment and billing claims, change order claims, wrongful termination, quantum merit, construction lien or mechanics lien claims, unless associated with a complex construction claim as herein described.

Actions to establish a constructive trust or impose an equitable lien to satisfy damages are also cognizable in the CBLP, as are cases primarily seeking legal relief in which ancillary injunctive relief is sought. The CBLP encompasses both jury and non-jury matters.

CBLP judges handle cases arising from the following non-exclusive list of circumstances:

- non-consumer Uniform Commercial Code transactions;
- the purchase and sale of assets of businesses or assets of a business, including contract disputes and commercial landlord/tenant claims;
- non-consumer sales of goods or services by or to a business;
- non-consumer bank or brokerage accounts including loan, deposit, cash management, and investment accounts;
- purchase, sale, or lease of commercial personal property, or security interests therein;
- arising out of state securities laws;
- intellectual property disputes;
- business licensing agreement disputes;
- unfair competition disputes;
- sale, purchase of a business or purchase or sale of stock, assets or liabilities of a business;
- mergers and acquisitions disputes;
- franchisee/ franchisor relationship and liabilities;
- business torts, including interference with prospective economic advantage, interference with contractual relations, tortious interference with business relationships, breach of implied covenant of good faith and fair dealing, fraud, fraud in the inducement, misrepresentation, and breach of fiduciary duty;
- liability or indemnity of managers (officers, directors, managers, trustees or members or partners functioning as managers) of corporations, partnerships, limited partnerships, limited liability companies or partnerships, professional associations, business trusts, joint ventures or other business enterprises;
- Racketeer Influenced and Corrupt Organizations Act (RICO) claims;
- complex commercial construction disputes;
- other complex disputes of a business or commercial nature.

The CBLP retains the law and equity separation that was recognized in the 1947 Constitution. It does not encroach on the cases traditionally heard in General Equity. The CBLP does not include matters involving:

- internal affairs or governance disputes over management and/or control of business entities;
- dissolution or liquidation rights or obligation between or among owners (shareholders, partner, members);
- statutory and custodial receivership or actions seeking the appointment of special fiscal agents;
- restructuring of a business entity;
- shareholder derivative suits;
- actions to protect the interests of a business, such as non-compete agreements, trade secrets or restrictive covenant agreements.

Also excluded from CBLP are actions primarily involving consumers, labor organizations, personal, physical or mental injury; mechanics' lien actions, and condemnation proceedings. Following is a non-inclusive list of actions that generally are not handled by CBLP judges and are handled by judges regularly assigned to the Law Division, Civil Part:

- class action consumer claims;
- products liability actions;
- personal injury and wrongful death actions;
- commercial landlord verses consumer tenant actions;
- noncommercial real estate matters actions;
- actions by consumers against a business and businesses against consumers;
- enforcement of arbitration awards;
- condemnation actions;
- landlord-tenant matters involving summary dispossession;
- employment Law Against Discrimination actions;
- civil rights actions;
- professional malpractice actions;
- medical device litigation and pharmaceutical litigation;
- Multicounty Litigation (mass tort);
- environmental litigation including environmental insurance coverage actions;
- Conscientious Employee Protection Act actions;
- agreements relating to an individual or collective contract of employment;
- wrongful discharge actions;
- slander of title or product disparagement actions;
- fraudulent transfers under the Uniform Fraudulent Transfers Act;
- consumer residential construction actions.

Opt-In Motion

Parties may formally move before the CBLP judge for inclusion in the Program where a case is not presumptively assigned to the CBLP but involves complex business related issues and/or the amount in controversy is less than $200,000. Business or commercial disputes that involve complex factual or legal issues; a large number of parties; discovery issues such as managing large numbers of documents, multiple experts; is likely to have implications for business beyond the decision in the particular case; is likely to result in a significant interpretation of a business or commercial statute; or involves other contentions that the CBLP judge finds compelling may be assigned to the Complex Business Litigation Program. Such motions shall be granted for good cause shown.

Complex Business Litigation Assignment Recommendation

If, upon review, the Assignment Judge or the CBLP judge determines a case is appropriate for the CBLP, the judge may, *sua sponte,* assign it to the CBLP.

Exclusion from CBLP

Initial Case Review

The CBLP judge will review actions presumptively assigned to the CBLP to determine if the case is appropriate for the CBLP. If, after review, the CBLP judge determines that the complex nature of the action or the threshold damages claim amount is not established, the CBLP judge shall remove the case from the Program. The Assignment Judge may also conduct initial CBLP eligibility reviews. Cases removed from the CBLP by the Assignment Judge or the CBLP judge will be reassigned to the appropriate track for case management.

Motion for Removal from the Program

Any party may move for removal from the CBLP on the grounds that the action does not meet the eligibility criteria.

GUIDELINES

Assignment of Judges

CBLP cases are assigned to a single judge that handles all aspects of the case, including discovery disputes, summary judgment and other motions, and trial.

Court Rules

Cases assigned to the CBLP are governed by Part IV, Chapter XI ("Complex Commercial & Complex Construction Matters") of the New Jersey Rules of Court. Absent an express contradictory rule contained in Chapter XI, Parts I and IV of the Court Rules shall otherwise apply to any case in the CBLP.

Pre-Case Management Conference Activity

Initial conference preparation is required pursuant to *Rules* 4:103-2 and 4:103-3, comparable to Federal Rule of Civil Procedure 26, to require attorneys to both meet with their clients as well as each other before a meeting with a judge.

The initial meetings between counsel and their clients will provide an understanding of the potential data and information at issue and the time required to accomplish full discovery. In conferring with counsel, attorneys ~~should~~ prepare a Joint Discovery Plan for all discovery as well as an Electronic Discovery Plan, both of which are to be provided to the Court in advance of the Initial Conference. Counsel should also advise the Court of any unresolved discovery issues.

Electronic discovery (e-discovery): the attorneys should meet and confer to discuss form, scope preservation/destruction, and expense of production; method for asserting or preserving claims of privilege or of protection; confidentiality; and any other electronic discovery issues. The Electronic Discovery Plan should set forth the parties' agreements as to all e-discovery.

Initial Conferences

The case will be scheduled for an Initial Conference with the CLBP Judge.[1] At that Conference, counsel will meet with the Judge/other court representative to discuss assignment and scheduling of the case. If it is determined that it should not be in the CBLP, the case may be removed at that time. If the case remains in the CBLP, a comprehensive Scheduling Order, setting forth all discovery deadlines, will be entered at that time.

Model Stipulations/Orders

The CBLP Internet website has the following model case management, discovery and protective orders:

Joint Proposed Discovery Plan;
Discovery Confidentiality Order (Appendix 30 (XXX) to the Rules of Court);
Clawback Stipulation and Order;
Electronic Discovery Stipulation and Order; and
Scheduling Order.

Contacting Chambers

At the time of the Initial Conference, the CBLP Judge should advise the parties the appropriate method(s) (phone, letter, email) and bases for contacting chambers. The CBLP Judge should also advise whether joint submissions will be required.

---

[1] Should the need arise, the utilization of other judicial staff such as law clerks and/or a designated statewide case manager should be considered for overseeing/conducting certain conferences for CBLP cases.

Case Management/Status Conferences

As needed/requested by the parties (within reason). There, the parties will report their discovery progress and address any issues. Prior to such a conference a joint letter should be sent to the Court advising of the status of the case and the issues to be discussed at the Conference.

Discovery and Motions

The Supreme Court has approved Court Rules to govern cases in the Program. Some aspects of discovery and motions in CBLP cases will be handled differently than other civil matters.

Discovery

See *Rules* 4:104-1 through 4:104-9, which provide the timing, limits and confidentiality of discovery in CBLP matters. The Rules also address discovery disputes (*R.* 4:105-4). The parties should first "meet and confer" to try to resolve the issues. If an agreement cannot be reached, counsel should submit a letter to the court explaining the basis for the motion and requesting a telephone or in-court conference before the motion is made. The Rule provides a process to resolve the dispute if not resolved by the court conference.

Motions

See *Rules* 4:105-1 through 4:105-9. These Rules seek to streamline and facilitate the motion practice while also addressing the complexity and need for ease and flexibility of litigants to seek and to obtain extensions. Discovery disputes should be handled as noted above and the Dispositive Motion schedule should be set forth in Joint Proposed Discovery Plan.

Settlement and CDR

Any settlement conferences will be held at the CBLP judge's discretion. The CBLP judge will also advise whether a settlement conference memorandum is necessary as well as any content and formatting requirements.

CBLP cases are not part of the court's mandatory civil mediation and arbitration programs. However, the CBLP judge in each vicinage, as part of case management, should encourage the parties to engage in mediation or some type of dispute resolution to facilitate settlement.

Pre-trial and Trial

All CBLP actions shall be pretried and the requirements of *Rule* 4:25 shall apply to the final pretrial conference, which should lead to the formulation of a trial plan, including a plan to facilitate the admission of evidence. With regard to trial exhibits, parties should prepare and submit Joint Exhibits to eliminate redundancy (it does not mean the parties are stipulating to its admissibility).

Plaintiff(s)	:	Superior Court of New Jersey Law Division - Civil Part _____ County
	:	Docket No: L - _____ - _____
v.	:	**JOINT PROPOSED DISCOVERY PLAN**
Defendant(s)	:	

1. Set forth the name of each attorney appearing, the firm name, address and telephone number and email address of each, designating the party represented.

2. Set forth a brief description of the case, including the causes of action and defenses asserted.

3. Have settlement discussions taken place? Yes_____No _____

   (a) What was each plaintiff's last demand?

      (1) Monetary demand: $ _____
      (2) Non-monetary demand: _____

   (b) What was defendant's last offer?

      (1) Monetary offer: $ _____
      (2) Non-monetary offer: _____

4. The Parties [have_____have not_____] met pursuant to *R.* 4:103-3.

5. The Parties [have_____have not_____] exchanged the information required by *R.* 4:103-2(a)(1). If not, state the reason therefor.

6. Explain any problems in connection with completing the disclosures required by *R.* 4:103-2(a)(1).

7. The Parties [have_____have not_____] conducted discovery other than the above disclosures. If so, describe.

8. Proposed joint discovery plan:

(a) Discovery is needed on the following subjects:

(b) Discovery [should_____should not_____] be conducted in phases or be limited to particular issues. Explain.

(c) Proposed schedule:

(1) *R.* 4:103-2 Disclosures_____.

(2) Service of initial written discovery_____.

(3) Maximum of_____Interrogatories and _____ document requests by each party to each other party. NOTE: Parties are to provide rolling privilege logs within ten (10) days after each production.

(4) Maximum of_____depositions to be taken by each party.

(5) Motions to amend pleadings or to add Parties to be filed by____.

(6) Motions to resolve any privilege log disputes to be filed by _____.

(7) Factual discovery to be completed by_____.

(8) Plaintiff's expert report(s) due on_____.

(9) Defendant's expert report(s) due on_____.

(10) Any rebuttal reports due on _____.

(11) Expert depositions to be completed by_____.

(12) Discovery end date: _____.

(13) Dispositive motions to be served within_____days of discovery end date.

(d) Set forth any special discovery mechanism or procedure requested.

(e) A pretrial conference may take place on_____.

(f) Trial date:_____
(_____Jury Trial_____Non-Jury Trial).

9. Do you anticipate any special discovery needs (i.e., videotape/telephone depositions, problems with out-of-state witnesses or documents, etc.)? Yes_____No_____. If so, please explain.

10. Do you anticipate any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced? Yes_____No_____.

If so, how will electronic discovery or data be disclosed or produced? Describe any agreements reached by the Parties regarding same, including costs of discovery, production, related software, licensing agreements, etc.

11. Do you anticipate entry of a Discovery Confidentiality Order? *See R.* 4:104-6 and Appendix XXX.

12. Do you anticipate any discovery problem(s) not listed above? Describe. Yes_____No_____.

13. Is this case appropriate for bifurcation? Yes_____No _____

14. Is the case appropriate for mediation? Yes_____No _____

15. Do the parties consent to binding arbitration? Yes_____No _____

16. An interim status/settlement conference (with client representatives having settlement authority in attendance), shall be held on _____.

17. Identify any other issues to address at the Scheduling Conference.

_____
Attorney(s) for Plaintiff(s) / Date

_____
Attorney(s) for Defendant(s)/Name of client / Date

Plaintiff(s)	:	Superior Court of New Jersey Law Division - Civil Part _____ County
	:	Docket No: L - _____ - _____
v.	:	**SCHEDULING ORDER**
Defendant(s)	:	

This matter having come before the Court for an Initial Conference, and for good cause shown,

It is, on this _____ day of _____, 20 ___, ORDERED as follows:

(1) *R.* 4:103-2 Disclosures of the parties must be served on all parties no later than fourteen (14) days from the date of the Initial Conference.

(2) Service of initial written discovery to be completed by _____.

(3) Maximum of _____ Interrogatories and document requests by each party to each other party (if other than the limits set forth in *R.* 4:104-4).

(4) Maximum of_____depositions to be taken by each party (if other than the limits set forth in *R.* 4:104-3).

(5) Motions to amend pleadings or to add parties to be filed by _____.

(6) Motions to resolve any privilege log disputes to be filed by _____.

(7) Factual discovery to be completed by _____.

(8) Plaintiff's expert report(s) due on _____.

(9) Defendant's(s') expert report(s) due on _____.

(10) Any rebuttal reports due on _____.

(11) Expert depositions to be completed by _____.

(12) Discovery end date: _____.

(13) Dispositive motions to be served within_____days of discovery end date.

(14) Tentative Status Conference Date (if necessary): _____.

(15) Tentative Pre-Trial Conference Date: _____.

(16) Tentative Trial Date: _____.

_____

J.S.C.

NOTE: The parties may agree to set and/or modify interim deadlines without court approval, provided that any such change will not have any impact on the discovery end date.

NOTE: The setting of the Tentative Trial Date, above, does not implicate the "exceptional circumstances" standard of *R.* 4:24-1(c), and discovery extensions may be considered for good cause shown.

Plaintiff(s)	:	Superior Court of New Jersey Law Division - Civil Part _____ County Docket No: L - _____ - _____
v.	:	**ELECTRONIC DISCOVERY STIPULATION AND ORDER**
Defendant(s)	:	

1. PURPOSE

This Order (the "eDiscovery Order") will govern discovery of Electronically Stored Information ("ESI") and any electronically stored or maintained information in this case as a supplement to the Rules of Court, the Complex Business Litigation Program's Guidelines, and any other applicable Orders and Rules.

2. COOPERATION

The Parties are aware of the importance the Court places on cooperation and commit to cooperate in good faith throughout the matter consistent with this Court's Guidelines for the discovery and production of ESI and any electronically stored or maintained documents.

3. LIAISON

The Parties have designated liaisons who are and will be knowledgeable about and responsible for discussing their respective ESI and/or electronic documents ("eDiscovery Liaison"). Each eDiscovery Liaison will be, or have access to those who are, knowledgeable about the technical aspects of e-discovery, including the location, nature, accessibility, format, collection, search methodologies, and production of ESI and/or electronic documents in this matter. The Parties will rely on the eDiscovery Liaison, as needed, to confer about ESI and/or electronic documents and to help resolve disputes without court intervention. The following individuals are the designated as the eDiscovery Liaison for this litigation:

Plaintiff(s) [with contact information]:

Defendant(s)[with contact information]:

4. PRESERVATION

By signing this eDiscovery Order, the Parties certify that they have taken reasonable steps to preserve all ESI and electronically stored documents. Additionally, the Parties have discussed their preservation obligations and needs as litigation progresses and agree that preservation of potentially relevant ESI and electronically stored documents will be reasonable and proportionate. To reduce the costs and burdens of preservation, and to ensure proper ESI and/or electronically stored information is preserved, the Parties agree that:

a) They have exchanged a list of custodians, the types of ESI and/or electronically stored information they believe should be preserved, or general job titles or descriptions of custodians, for whom they believe ESI and/or electronically stored information should be preserved, e.g., "HR head," "scientist," "marketing manager," etc...;

b) In addition to the previously preserved ESI and/or electronically stored information, the Parties agree that any ESI created or received between _____ and _____ will be preserved for the custodians and/or for those individuals who meet the general job titles or descriptions of custodians provided by the opposing party;

c) They have agreed/will agree on the number of custodians per party for whom ESI and/or electronically stored information will be preserved;

d) Data sources that are not reasonably accessible because of undue burden or cost and ESI from these sources will be preserved but not searched, reviewed, or produced: [e.g., backup media of [named] system, systems no longer in use that cannot be accessed];

e) Among the sources of data the Parties agree are not reasonably accessible, the Parties agree not to preserve the following: [e.g., backup media created before _____, digital voicemail, instant messaging, automatically saved versions of documents];

f) Any data sources, ESI and/or electronically stored information that has or potentially could have been destroyed is listed below and has been divulged to the opposing party;

Plaintiff(s)' Preservation Issues (if any):

Defendant(s)' Preservation Issues (if any):

g) In addition to the agreements above, the Parties agree data from these sources (a) could contain relevant information but (b) under the proportionality factors, should not be preserved: _____.

5. CUSTODIANS

The Parties agree that in providing *R.* 4:103-2 Initial Disclosures, or earlier if appropriate, they have met and conferred about methods to search ESI in order to identify data sources that are likely to contain relevant documents. The Parties have agreed to ____ custodians and/or data sources each for the purposes of this litigation. Those custodians and/or data sources are listed below. The Parties shall add or remove custodians as reasonably necessary.

a) Plaintiff(s)'Custodians and/or Data Sources:

b) Defendant(s)' Custodians and/or Data Sources:

6. SEARCH TERMS

The Parties have agreed upon the following search terms:

a) Plaintiff(s)' Search Terms:

b) Defendant(s)' Search Terms:

In the event that any of the search terms return ____ number of documents or more, the Parties agree that the search term is per se overly broad and will work to create a more tailored search term.

7. PRODUCTION

The Parties agree to run the appropriate de-duplication program prior to any production to reduce the number of duplicate documents. The Parties further agree to the Production Format set forth in Exhibit "A", which is attached hereto and incorporated as part of the eDiscovery Order, for all ESI and/or electronically stored information exchanged in this litigation:

The Parties agree to electronically Bates label documents as follows:

a) Plaintiff(s)' Bates Designation:

b) Defendant(s)' Bates Designation:

8. PHASING (Rolling) PRODUCTION

When a party propounds discovery requests pursuant to proposed *R.* 4:104-5, the Parties agree to phase the production of ESI (i.e. produce the documents on a rolling basis), and the initial production will be from the above-agreed upon custodians and data sources.

Following the initial production, the Parties will continue to prioritize the order of subsequent productions.

9. DOCUMENTS PROTECTED FROM DISCOVERY

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.

10. MODIFICATION

This Stipulated Order may be modified by a Stipulated Order of the Parties or by the Court for good cause shown.

IT IS SO STIPULATED, through Counsel of Record.

Dated: _____

Counsel for Plaintiff

Dated: _____

Counsel for Defendant

IT IS ORDERED that the foregoing Agreement is approved.

Dated: _____

J.S.C.

Plaintiff(s)	:	Superior Court of New Jersey Law Division - Civil Part _____ County
	:	Docket No: L - _____ - _____
v.	:	**CLAWBACK STIPULATION AND ORDER**
Defendant(s)	:	

WHEREAS, the Parties[1] believe that it will promote the efficient, just, and economical resolution of this Litigation to supplement the existing Discovery Confidentiality Order by entering into this stipulation and Order (the "Clawback Order") regarding the exchange of certain electronically stored information ("ESI"), any electronically stored or maintained information, documents, or things, or portion of any documents or things ("Discovery Materials"); and

WHEREAS, based upon a good faith belief that the procedures set forth in the Electronic Discovery Stipulation and Order (the "eDiscovery Order") are likely to generate a large volume of Discovery Materials;

WHEREAS, based on the anticipated number of relevant and/or responsive Discovery Materials that will be identified in this Litigation, the Parties have previously agreed upon certain delimiters, procedures and processes set forth in the eDiscovery Order which include, *inter alia,* agreeing to utilize agreed upon search terms, date ranges and custodians to more accurately identify potentially relevant Discovery Materials; and

[1] Unless otherwise defined, capitalized terms herein have the meanings assigned in the "Discovery Confidentiality Order").

WHEREAS, despite these methods used to cull-down the number of documents identified as potentially relevant, the Parties recognize that the volume of Discovery Materials that will be exchanged in this Litigation is of a magnitude that the inadvertent disclosure of Discovery Materials that are subject to a claim of attorney-client, work product and/or other applicable privilege or immunity, and/or protected pursuant to applicable state and/or federal privacy laws (collectively, "Privileged Discovery Materials"), as well as the disclosure of other materials irrelevant to this Litigation ("Irrelevant Materials") is possible; and

WHEREAS, the Parties believe that permitting the production of Discovery Materials pursuant to this Clawback Order will materially reduce the cost and duration of discovery, the attendant burdens on the Parties, and the need for judicial intervention; and

WHEREAS, although New Jersey has not adopted a rule of evidence similar to Federal Rule of Evidence 502,[2] the Parties understand and stipulate that disclosure of Privileged Discovery Materials pursuant to this Clawback 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.

IT IS HEREBY STIPULATED, AGREED AND ORDERED:

1. Discovery Materials exchanged by the Parties in this Litigation is subject to and under the terms of this Clawback Order provided that the Party producing the Discovery Materials has made a good faith effort to prevent the inadvertent production of any Privileged Discovery Materials or Irrelevant Materials.
2. A Producing Party shall not be obligated to conduct a document-by-document review of

[2] Entitled "Attorney-Client Privilege and Work Product; Limitations on Waiver."

the Discovery Material prior to its production in order to meet the good faith standard mentioned above; provided however, that a Producing Party utilized, at a minimum, the following best practices to avoid the inadvertent production of documents ("Best Practices"):

a. Keyword search terms (*e.g.*, the names of counsel and law firms for the Producing Party);

b. Domain names; and

c. Analytical software tools and/or other reasonable means to locate and exclude potentially Privileged Discovery Materials prior to the production of the Discovery Materials;

3. Any document that is not identified by using the above Best Practices is considered presumptively responsive/non-privileged and may be produced without performing a document-by-document review.

4. Any documents that are identified as being potentially privileged by using the above Best Practices shall be reviewed by the Producing Party and, if such material is responsive and non-objectionable, shall either be (i) produced (if such material is not deemed Privileged Discovery Material), or (ii) identified as privileged and placed onto the Producing Party's privilege log (if such material is deemed as Privileged Discovery Material), in the normal course of discovery, consistent with the Rules of this Court. If a Producing Party complies with Paragraphs 2 and 3 herein, such Producing Party shall be deemed to have implemented adequate precautions to prevent inadvertent disclosure of any Privileged Discovery Materials.

5. Disclosure of Privileged Discovery Materials in this Litigation, pursuant to this Clawback

Order, shall in no way prejudice or otherwise constitute a waiver of, or estoppel as to, any attorney-client, work product or other applicable privilege or immunity. Any Privileged Discovery Materials or Irrelevant Materials shall be deemed to have been inadvertently produced.

a. A Party who receives any Discovery Materials that, upon review by such Party, appears on their face to be Privileged Discovery Materials shall: (i) refrain from any further examination or disclosure of such document pending confirmation by the Producing Party that such document is not Privileged Discovery Material; and (ii) provide reasonably prompt written notice to counsel for the Producing Party that such document appears to be Privileged Discovery Material. Upon receiving a written notice contemplated by the preceding sentence, the Producing Party shall provide reasonably prompt written notice to the requesting Party indicating whether the document in question constitutes Inadvertent Production Material.

b. A Producing Party shall be obligated to make a reasonably prompt claim of inadvertent production upon the earlier of: (i) receiving notice under the preceding paragraph concerning such document, or (ii) otherwise becoming aware of the inadvertent production of such document. If a Producing Party complies with this paragraph, such Party shall be deemed to have acted timely and adequately to rectify any inadvertent disclosure of Privileged Discovery Materials.

c. The procedures set forth in Paragraph 9 of the Discovery Confidentiality Order shall apply to any Discovery Material which is claimed to be Inadvertent Production Material.

d. The Producing Party shall timely log any Discovery Material that is claimed to be

Inadvertent Production Material, consistent with the Rules of Court.

6. Each Party shall have the right to demand the immediate return of any Irrelevant Material produced by such Party. After the documents are returned, the Parties agree to meet and confer in good faith to resolve any disputes that arise regarding the alleged Irrelevant Materials. The Party that is challenging the designation of potentially Irrelevant Material and is subject to destroy and/or return the documents at issue must also destroy and/or obtain from any Party or third party that was provided with the potentially Irrelevant Material until the issues are resolved through the meet and confer or by motion to the Court.

7. Nothing in this Clawback Order shall:

   a. Require any Party to produce or disclose any Privileged Discovery Materials;

   b. Require any Party to produce documents or data as Clawback Discovery Material;

   c. Waive any Party's right to conduct limited pre-production review of Discovery Material prior to production of such materials;

   d. Modify the Discovery Confidentiality Order, unless expressly stated herein;

   e. Except as expressly stated herein, modify any prior agreements among the Parties concerning the conduct of discovery in this Litigation, including but not limited to agreements regarding the collection of Discovery Material from certain custodians or the use of search terms to identify potentially responsive documents; or

   f. Prevent any Party from arguing that a waiver of an attorney-client, work product, or other applicable privilege or immunity has occurred from circumstances other than disclosure of Discovery Material pursuant to this Clawback Order.

8. The Parties agree that any violation of this Clawback Order shall result in irreparable harm

for which there is no adequate remedy at law. The Parties further agree that any Party shall be entitled to injunctive relief to enforce the terms hereof. In addition, the Parties expressly acknowledge that the Court may, in its discretion, award such other and further relief as the Court may deem appropriate.

9. This Clawback Order applies only to Discovery Material produced by the Parties, and does not apply to Discovery Material produced by non-parties. In the event additional parties join or are joined in the Litigation, they shall not have access to Discovery Material until the newly-joined party, by its counsel, has executed and, at the request of any Party, filed with the Court its agreement to be fully bound by this Clawback Order.

10. The Parties agree to be bound by the terms of this Clawback Order pending the entry of this Clawback Order by the Court, and any violation of its terms shall be subject to the same sanctions and penalties as if this Clawback Order has been entered by the Court. Notwithstanding the foregoing, the Parties shall not be obligated to provide any Discovery Material prior to entry of this Clawback Order by the Court, unless the production of such Discovery Material is expressly required by another Order of the Court.

11. Subject to any applicable Rule of Court, the provisions of this Clawback Order shall, absent written permission of the Producing Party or further Order of the Court, continue to be binding throughout and after the conclusion of the Litigation, including without limitation any appeals therefrom.

12. Nothing in this Clawback Stipulation and Order shall preclude any Party from seeking judicial relief, upon notice to the Parties, with regard to any provision hereof.

13. This Clawback Stipulation and Order may be executed by PDF or conformed signature and may be executed in one or more counterparts, each of which shall be deemed to

constitute an original, but all of which together shall constitute but one agreement.

[COUNSEL]

Attorneys for Plaintiff

[COUNSEL]

Attorneys for Defendant

IT IS SO ORDERED.

Dated: _____

_____

J.S.C.

SHOOK
HARDY & BACON

Links to State Court and Local Federal eDiscovery Rules

Data and Discovery Strategies

August 2018

STATES ADOPTING EDISCOVERY RULES AMENDMENTS PATTERNED AFTER THE FEDERAL RULES.....7

STATES ADOPTING EDISCOVERY RULES AMENDMENTS PATTERNED AFTER THE FEDERAL RULES

1. Alabama (effective Nov. 18, 2009; Feb. 1, 2010; July 1, 2016)

Alabama Rules of Civil Procedure 16, 26, 33(c), 37 (effective Feb. 1, 2010), 34 (effective Nov. 18, 2009), and 45 (effective July 1, 2016) are patterned after the pre-Dec. 2015 federal rules, with the following exception:

- Rule 26(f) does not mandate a meeting of the parties to confer and consider ESI or other issues.

2. Alaska (effective Apr. 15, 2009)

Alaska Rules of Civil Procedure 16, 26, 33, 34, 37, and 45 are patterned after the pre- Dec. 2015 federal rules, with the following exceptions:

- Rule 16 does not specifically address privilege protection;
- Rule 26 does not specifically address privilege protection; and
- Rule 45 is less specific regarding objections to a subpoena for the production of ESI.

3. Arizona (effective Jan. 1, 2017)

Arizona Rules of Civil Procedure 16, 26, 26.1, 26.2, 33, 34, 37, 45 and 45.2 (effective July 1, 2018) incorporate the concepts of the post-Dec. 2015 federal rules, but they also include several provisions for which there are no federal equivalents, including:

- Rule 16 specifically incorporates the concept of proportionality (which is also included in Rule 26);
- Under Rules 16 and 26.1, the parties are required to address the preservation and discovery of ESI at early conferences;
- Rule 26 provides:
  - Specific limits relating to discovery of ESI "sought for purposes unrelated to the case";
  - An expedited procedure for resolving discovery and disclosure disputes;
  - Factors for determining whether ESI is reasonably accessible; and
  - That no discovery may be had before initial disclosures.
- Rule 26.2 imposes presumptive limits on the number of depositions and written discovery requests, as well as a presumptive timeframe in which discovery should be completed. A party moving for discovery beyond the presumptive limits must show the additional discovery to be "necessary and proportional.";

- Rules 26 and 45 specifically contemplate protective orders relating to a request to preserve ESI;
- Under Rules 26.1, 34 and 45, if the format of ESI is not specified by the requesting party, it must be produced "in native form or in another reasonably usable form that will enable the receiving party to have the same ability to access, search, and display the information as the producing party"; and
- Rule 37 identifies "[f]actors that a court should consider in determining whether a party took reasonable steps to preserve relevant" ESI.
- Rule 37(h) expressly permits the court to "make any order to require or prohibit disclosure or discovery to achieve proportionality"; and
- Rule 45.2 sets forth a dispute resolution procedure "concerning the scope of a party's or nonparty's duty to preserve" ESI. And allows a party or non-party to seek an ESI preservation order from the Court, the compliance with which precludes subsequent spoliation claims.

4. Arkansas (effective Oct. 1, 2009)

Arkansas Rules of Civil Procedure include optional Rule 26.1 (page 5 of 9). The rule is optional because the parties must agree to its application or the court must order that it will apply for good cause shown. Rule 26.1 is patterned after the pre-Dec. 2015 federal rules, with the following exceptions:

- The rule does not require preliminary disclosure of ESI;
- The rule requires—rather than merely permits—that ESI be addressed in a planning conference and that the parties submit a resulting plan to the court;
- The rule does not specifically address the production of ESI in records that are responsive to interrogatories; and
- The subsection regarding subpoenas mirrors the procedure to be used by the parties.

5. California (various effective dates)

Amendments (effective June 29, 2009) to the California Code of Civil Procedure revised sections 2016.020, 2031.010, 2031.030, 2031.050, 2031.060, 2031.210, 2031.240, 2031.280, 2031.300, and 2031.310. They also added sections 1985.8 and 2031.285.

Amendments (effective Jan. 1, 2013) to the California Code of Civil Procedure revised sections 1985, 1985.3, 1985.8, 1987, 1987.1, 1987.2, 2017.010, 2017.020, 2020.020, 2020.220, 2020.410, 2020.510, 2023.030, 2025.220, 2025.280, 2025.410, 2025.420, 2025.450, 2025.460, 2025.480, 2026.010, 2027.010, and 2029.200. They also added section 2019.040.

These Code sections are patterned after the pre- Dec. 2015 federal rules, with the following exceptions:

- The amendments do not specifically address the production of ESI in records that are responsive to interrogatories;

- Sections 1985.8(g) and 2031.280(e) place the cost of translating data into reasonably usable form on the demanding party;
- Section 2031.060 (f) explicitly allows a court to limit discovery "even from a source that is reasonably accessible"; and
- Section 1985.6 incorporates ESI into a particular procedure to request employment records.

California Rule of Court 3.724 (page 75 of 257) (effective Aug. 14, 2009) also addresses discovery procedures involving ESI. Rule 3.724(8) requires parties to discuss ESI in the initial meet-and-confer session.

California Rule of Procedure 5.65 (page 51 of 205) (formally Rule 180) (effective Jan. 1, 2011) adds "electronically stored information" to information required to be provided to another party within the Scope of Discovery.

6. District of Columbia (current as of Nov. 2017)

The District of Columbia Superior Court's Rules of Civil Procedure 16, 26, 33, 34, 37 and 45 are patterned after the post-Dec. 2015 federal rules, with the following exception:

- The rules do not require preliminary disclosure of ESI;
- The rules do not require the parties to develop a discovery plan or hold a 26(f) conference); and
- There is option for early Rule 34 requests because there is no discovery moratorium in the Superior Court.

7. Florida (effective Sep. 1, 2012)

Florida Rules of Civil Procedure 1.200, 1.201, 1.280, 1.340, 1.350, 1.380, and 1.410 are patterned after the pre-Dec. 2015 federal rules, with several exceptions, including:

- Discovery of ESI is expressly authorized;
- There is no requirement that meet-and-confers take place under all circumstances, rather only within complex litigation do the rules "require the parties in a complex civil case to address the possibility of an agreement between them addressing the extent to which electronic information should be preserved";
- A party objecting to discovery requests must prove "the information sought or the format requested is not reasonably accessible because of undue burden or cost," and courts have the right to shift costs between parties; and
- Absent exceptional circumstances, a court may not impose sanctions on a party for failing to provide electronically stored information that was lost as a result of the routine, good-faith operation of an electronic information system.

8. Hawaii (effective January 1, 2015)

Hawaii Rules of Civil Procedure 26, 30, 33, 34, 37 and 45 are patterned after the pre-Dec. 2015 federal rules, with the following exceptions:

- The rules do not require preliminary disclosure of ESI or an informal meet-and-confer session about ESI;
- The rules do not explicitly address ESI-related scheduling order provisions; and
- Rule 34 provides that a party need not produce ESI in more than one form "absent a showing of good cause."

9. Idaho (effective July 1, 2016)

Idaho Rules of Civil Procedure 26, 30, 33, 34, 37 and 45 are patterned after the pre- Dec. 2015 federal rules, with the following exceptions:

- The rules do not require preliminary disclosure of ESI; a meeting of the parties to confer and consider ESI; or a discovery plan;
- Rule 34 permits the court to order the requesting party to pay "the reasonable expenses of any extraordinary steps required to retrieve and produce" ESI;
- Rule 45 requires the party serving the subpoena to pay the reasonable cost of producing ESI;
- Rule 45 specifically allows the court, upon motion, to condition compliance with a subpoena for ESI upon the advancement of reasonable costs; and
- Rule 45 includes provisions adopting the Uniform Interstate Depositions and Discovery Act.

10. Indiana (effective Jan. 1, 2008; Jan. 1, 2013)

Indiana Rules of Trial Procedure 26, 34 and 37 are patterned after the pre- Dec. 2015 federal rules, with the following exceptions:

- Rule 26 does not require preliminary disclosure of ESI;
- There is no specific requirement that ESI be addressed in an informal meet-and-confer session;
- Rule 26 does not provide specific limitations on ESI; and
- No other Indiana Rules have been amended to address the remaining issues regarding discovery of ESI that are addressed in the respective federal rules amendments.

11. Iowa (effective May 1, 2008; Oct. 9, 2009; Jan. 1, 2015)

Iowa Rules of Civil Procedure 1.602 (effective May 1, 2008), 1.500, 1.503, 1.504, 1.507, 1.509, 1.512, 1.517, (effective Jan. 1, 2015) and 1.1701 (effective Oct. 9, 2009) are patterned after the pre-Dec. 2015 federal rules, with the following exception:

- Rule 1.500 requires the parties to disclose ESI without an option to provide instead a description of the ESI by category and location unless good cause exists for nondisclosure.

Iowa has the following standard forms:

- Iowa Court Rule 23.5 Forms:
  - Form 2: Trial Scheduling Order and Discovery Plan
  - Form 3: Trial Scheduling and Discovery Plan for Expedited Civil Action
- Iowa Rule of Civil Procedure 1.1901 Forms
  - Form 13: Subpoena Form to Testify at Deposition or Produce Documents (page 118 of 132)
  - Form 14: Subpoena Form to Testify at Hearing or Trial (page 120 of 132)

- Form 15: Subpoena Form to Produce Documents or Permit Inspection (page 122 of 132)

12. Kansas (effective July 1, 2010; July 1, 2011; July 1, 2012)

Kansas Rules of Civil Procedure §§ 60-216, 60-233, 60-234, 60-237, 60-245, 60-245a (effective July 1, 2010), 60-228a (effective July 1, 2011), and 60-226 (effective July 1, 2012) are patterned after the pre-Dec. 2015 federal rules, with the following exceptions:

- § 60-216 requires – rather than permits – that privilege issues and ESI issues, including the form of production, be addressed at a case management conference;
- § 60-226 does not require the parties to initially disclose a description of ESI within their possession, custody, or control;
- § 60-226 does not require the parties to meet and confer about ESI issues;
- § 60-228a (adopting the Uniform Interstate Depositions and Discovery Act) and § 60-245a (providing a separate procedure for subpoenas for nonparty business records) address similar issues but do not closely mirror Federal Rule 45.

13. Louisiana (effective Aug. 15, 2007; Jan. 1, 2009; Aug. 1, 2016)

Louisiana Code of Civil Procedure Articles 1424, 1460, 1461 (effective Aug. 15, 2007), 1354, 1425, 1471, 1551 (effective Jan. 1, 2009), and 1462 (effective Aug. 1, 2016) are patterned after the pre-Dec. 2015 federal rules, with the following exceptions:

- There is no specific requirement that ESI be addressed in initial disclosures or an informal meet-and-confer session;
- Article 1462, Louisiana's analog to Federal Rule 34, specifically incorporates Federal Rule 26's limit on the production of ESI because of undue burden or cost;
- Article 1462 expressly permits the court to order access to computers and other devices used for the storage of ESI for inspection, copying, testing, and sampling.

14. Maine (effective Aug. 1, 2008)

Maine Rules of Civil Procedure 16, 33, 34, and 37 (effective July 2008) and 26 (effective June 2014) are patterned after the pre-Dec. 2015 federal rules, with the following exceptions:

- There is no specific requirement that ESI be addressed in initial disclosures or at an informal meet-and-confer session; and
- Rule 26 requires the court to impose the reasonable expense of producing ESI on the requesting party if the court orders production of ESI.

According to the Advisory Committee Note to Rule 16, "Guidance in the interpretation of the Maine rules may be obtained from the federal amendments, their Advisory Committee's Notes, and cases applying the federal rules."

15. Maryland (various effective dates)

Maryland Rules of Civil Procedure 2-402, 2-421, 2-422, 2-424 (effective Jan. 1, 2008), 2-433 (effective Jan. 1, 2014), 2-504, 2-504.1 (effective July 1, 2016) and 2-510 (effective Jan. 1, 2016) are patterned after the pre-Dec. 2015 federal rules, with the following exceptions:

- Rule 2-401 explicitly permits courts to assess costs when ruling on a motion to compel discovery of ESI;
- Rule 2-424 specifically authorizes parties to seek an admission of the genuineness of ESI;
- There is no specific requirement that ESI be addressed in initial disclosures;
- Rule 2-504.1 permits – rather than requires – a meet-andoconfer before the scheduling conference with the court; and
- Rule 2-510 specifically allows the court, upon motion, to condition compliance with a subpoena for ESI on the advancement of reasonable costs.

16. Massachusetts (effective various dates)

Massachusetts Rules of Civil Procedure 16 (effective Jan. 1, 2014), 26 (effective July 1, 2016), 34 (effective Aug. 1, 2016), 37 (effective Jan. 1, 2014) and 45 (effective April 15, 2015) are patterned after the pre-Dec. 2015 federal rules, with the following exceptions:

- Rule 26 does not require the initial disclosure of ESI;
- Rule 26 provides special procedures for discovery of ESI, including ESI conferences and ESI court orders;
- Rule 26 expressly permits courts to limit the discovery of ESI, "even from an accessible source, in the interests of justice"; and
- Rule 26(c) specifically identifies "factors bearing on the decision whether discovery imposes an undue burden or expense," including factors mirroring the proportionality factors from post-Dec. 2015 Federal Rule 26(b)(1).

17. Michigan (current as of Sep. 1, 2016)

Michigan Civil Procedure Court Rules 2.302, 2.310, 2.313, 2.401, and 2.506 are patterned after the pre-Dec. 2015 federal rules, with the following exceptions:

- There is no specific requirement that ESI be addressed in initial disclosures or in an informal meet-and-confer session; and
- Rule 2.310 provides that document requests must specify the form of ESI production.

18. Minnesota (effective July 1, 2007; July 1, 2013; July 1, 2015)

Minnesota Rules of Civil Procedure 34 (effective July 1, 2007), 1, 37, (effective July 1, 2013), 16, 26 and 45 (effective July 1, 2015) are patterned after the pre-Dec. 2015 federal rules, with the following exceptions:

- Rule 1 incorporates a proportionality principle that applies to all discovery processes;
- Rule 26.02 resembles the post-Dec. 2015 Federal Rule 26(b)(1) in that the scope of discovery is defined by what is relevant to the claims and defenses and by factors of proportionality; and
- There is no specific requirement that ESI be addressed in an informal meet-and-confer session.

General Rule of Practice 146 (effective July 1, 2015) also states that, in complex cases, the court shall enter a scheduling order outlining provisions for the disclosure of ESI and setting deadlines for a meet-and-confer session about ESI.

19. Montana (effective Oct. 1, 2011; July 31, 2012; Dec. 16, 2014)

Montana Rules of Civil Procedure 16, 34, 37 (effective Oct. 1, 2011), 45 (July 31, 2012) and 26 (effective Dec. 16, 2014) are patterned after the pre-Dec. 2015 federal rules, with the following exception:

- There is no specific requirement that ESI be addressed in initial disclosures or in an informal meet-and-confer session.

20. Nebraska (effective June 18, 2008)

Nebraska Court Rules of Discovery §§ 6-333, 6-334, and 6-334A are patterned after the pre-Dec. 2015 Federal Rules 33, 34, and 45.

21. Nevada (effective Mar. 1, 2014)

Nevada Rule of Civil Procedure 34 is patterned after the pre-Dec. 2015 Federal Rule 34.

22. New Jersey (effective Sep. 1, 2006; Sep. 1, 2016)

New Jersey Court Rules 1:9-2, 4:5B-2, 4:17-4, 4:23-6 (effective Sep 1, 2006), 4:18-1, and 4:10-2 (effective Sep. 1, 2016), are patterned after the pre-Dec. 2015 federal rules, with the following exceptions:

- There is no specific requirement that ESI be addressed in initial disclosures or in an informal meet-and-confer session;
- Rule 1:9-2 specifically allows the court, upon motion, to condition compliance with a subpoena for ESI upon the advancement of reasonable costs; and
- Rule 4:10-2 and the notes to Rule 4:18-1 specifically permit discovery of metadata.

23. New Mexico (effective May 15, 2009; Aug. 7, 2009)

New Mexico Rules of Civil Procedure for the District Courts (*see* New Mexico Rules) 1-016, 1-026, 1-033, 1-034, 1-037 (effective May 15, 2009) and 1-045 (effective Aug. 7, 2009) are patterned after the pre-Dec. 2015 federal rules, with the following exceptions:

- Rule 1-016 requires – rather than merely permits – a scheduling order include provisions for discovery of ESI;
- There is no requirement that the parties initially disclose ESI or discuss ESI at an informal meet-and-confer session;
- There is no specific limitation in Rule 1-026 for the production of ESI that is not reasonably accessible; and

- Rule 1-037 does not provide a safe harbor for destruction of ESI as a result of the routine, good-faith operation of an electronic information system.

24. North Carolina (effective Oct. 1, 2011; July 16, 2015)

North Carolina Rules of Civil Procedure 26 (effective July 16, 2015), 33, 34, 37 and 45 (effective Oct. 1, 2011) are patterned after the pre-Dec. 2015 federal rules, with the following exceptions:

- There is no requirement for initial disclosures of ESI;
- Rule 26 defines ESI to include "reasonably accessible metadata that will enable the discovering party to have the ability to access such information as the date sent, date received, author, and recipients";
- Rule 26 explicitly allows the court to allocate costs for the production of ESI that is not reasonably accessible; and
- Rule 26(f) establishes procedures for permissive "discovery meetings" between the parties and/or "discovery conferences" held before the court.

North Carolina Business Court Local Rules (revised July 31, 2006) also address e-discovery but do not closely track the federal rules:

- Under Rule 17.1 (beginning at page 29 of 56), parties are to discuss in a case management meeting discovery of ESI, including its preservation, the possibility of cost-shifting and its production format.
- Rule 18.6(b) (page 26 of 56) requires that "[p]rior to filing motions and objections relating to discovery of information stored electronically, the parties shall discuss the possibility of shifting costs for electronic discovery, the use of Rule 30(b)(6) depositions of information technology personnel, and informal means of resolving disputes regarding technology and electronically stored information."

Rule 6 of the Rules for Civil Superior Court, Judicial District 15B (Chatham County) (effective July 1, 2008) supplements the state-wide rules:

- Rule 6.6 addresses the form of production of ESI and is patterned after its federal rule counterpart; and
- Rule 6.8 addresses objections relating to ESI and is patterned after Rule 18.6(b) of the Business Court Local Rules.

25. North Dakota (various effective dates)

North Dakota Rules of Civil Procedure 16 (effective Dec. 1, 2011), 26 (effective Mar. 1, 2015), 33 (effective Mar. 1, 2016), 34, 37 (effective Mar. 1, 2011), and 45 (effective Mar. 1, 2014) are patterned after the pre-Dec. 2015 federal rules, with the following exceptions:

- Rule 16 does not require a scheduling order in all circumstances;
- Rule 16 does not address discussion of privilege protection in a pretrial conference; and
- Rules 26 and 45 explicitly define ESI to include reasonably accessible metadata that will enable the discovering party to have the ability to access information like the date sent, date received, author, and recipients (and other metadata is not discoverable absent agreement or court order).

26. Ohio (various effective dates)

Ohio Rules of Civil Procedure 16, 34 (effective July 1, 2008), 26 (effective July 1, 2012), 33, 45 (effective July 1, 2014) and 37 (effective July 1, 2016) are patterned after the pre-Dec. 2015 federal rules, with the following exceptions:

- There is no specific requirement that ESI be addressed in initial disclosures or in an informal meet-and-confer session;
- Rules 26 and 45 explicitly provide that a court ordering the production of ESI that is not reasonably accessible may specify the format, extent, timing and allocation of expenses;
- Rules 34 and 45 provides that, if a requesting party does not specify the forms for producing ESI, a party may produce ESI in the form in which the ESI is ordinarily maintained if that form is reasonably useable; and
- Rule 34 provides a procedure for obtaining discovery prior to filing an action;
- Rule 37 explicitly outlines five factors that a court may consider when deciding whether to impose sanctions for ESI lost as a result of the routine, good-faith operation of an electronic information system.

27. Oklahoma (various effective dates)

Oklahoma Code of Civil Procedure Discovery Code Chapter's 12 O.S. §§ 3226 (effective Nov. 1, 2014), 3233 (effective Nov. 1, 2015), 3234, 3237 and 2004.1 (effective Nov. 1, 2010) and Rule 5 for District Courts of Oklahoma (effective Aug. 1, 2013) are patterned after the pre-Dec. 2015 federal rules, with the following exception:

- There is no specific requirement that the parties initially disclose ESI or discuss ESI at an informal meet-and-confer session.

28. South Carolina (effective 2011; 2015)

South Carolina Rules of Civil Procedure 16, 26, 33, 34, 37 (effective 2011) and 45 (effective 2015) are patterned after the pre-Dec. 2015 federal rules, with the following exceptions:

- There is no requirement that the parties initially disclose ESI or address ESI at an informal meet-and-confer session;
- Instead of requiring an informal meet-and-confer session, Rule 26 permits the parties to move for a discovery conference in front of the court if the motion includes any statement of issues related to ESI; and
- Rule 26 specifically allows the court to allocate the expenses associated with discovery of ESI.

29. Tennessee

Tennessee Rules of Civil Procedure 16.01, 26.02, 26.06, 33.03, 34.01, 34.02, 37.06 and 45 are patterned after the pre-Dec. 2015 federal rules, with the following exceptions:

- There is no specific requirement that ESI be addressed in initial disclosures;
- Under Rule 26.02, if the requesting party shows good cause for the discovery of ESI that is not reasonably accessible, the court must (rather than may) specify conditions of discovery;

- Rule 26.06 states that the judge should "encourage" counsel to meet and confer about ESI and may order a conference, if necessary;
- Rule 26.06 contains cost-shifting provisions for when ESI is not reasonably accessible and when sampling of ESI is insufficient;
- In addition to providing a safe harbor for ESI lost as the result of the routine, good faith, operation of an electronic information system, Rule 37.06 outlines multiple factors the court should consider when ordering production of ESI; and
- Rule 45.07 specifically provides for the right to seek reasonable costs of production (even absent a timely objection).

30. Texas (effective Sep. 1, 2016)

In May 2017, the Supreme Court of Texas issued a decision clarifying that the proportionality standard of Texas Rule of Civil Procedure 192.4 (page 133 of 323) "expressly constrains the scope of discovery as to otherwise discoverable matters" in a manner that "aligns electronic-discovery practice" with the Federal Rules of Civil Procedure. *In re State Farm Lloyds*, 520 S.W.3d 595, 604-605, 612 (Tex. 2017).

Texas' rules are not otherwise patterned after the federal rules. Texas Rule of Civil Procedure 192.3(b) (page 132 of 323) includes "electronic or videotape recordings, data, and data compilations" within its definition of "documents or tangible things" that are subject to discovery. Rule 196.4 (page 137 of 306) provides that, if desired, a party must specifically request production of "electronic or magnetic data" and specify the form of production. The responding party must produce responsive data that is reasonably available in its ordinary course of business. "If the responding party cannot - through reasonable efforts - retrieve the data or information requested or produce it in the form requested," the court can nonetheless order its production but "must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information."

31. Utah (effective Nov. 1, 2011; May 1, 2015)

Utah Rule of Civil Procedure 26(b) (effective May 1, 2015) resembles the current (i.e., post-Dec. 2015) Federal Rule 26(b) in that the scope of discovery is defined by what is relevant to the claims and defenses and by factors of proportionality. However, unlike it's federal counterpart, Utah Rule of Civil Procedure 26(b):

- Specifically provides that a party seeking discovery has the burden of showing proportionality; and
- Requires that a party claiming that ESI is not reasonably accessible to "describe the source of the electronically stored information, the nature and extent of the burden, the nature of the information not provided, and any other information that will enable other parties to evaluate the claim."

Utah Rules of Civil Procedure 16, 33, 34 (effective Nov. 1, 2011), 26(a) and (e), 37 and 45 (effective May 1, 2015) are patterned after the current (i.e., post-Dec. 2015) federal rules, with the following exceptions:

- Rule 16 provides that the court may, in its discretion or upon motion, direct the parties to appear to discuss the preservation, disclosure, or discovery of ESI;
- The rules do not allow for "early delivery" of requests for production;
- Rule 37 establishes a procedure whereby discovery disputes – other than requests for sanctions – are resolved by "statement of discovery issues" rather than motions practice;
- Rule 45 provides that the party issuing a subpoena must pay the reasonable cost of producing ESI;
- Rule 45 provides that an entity responding to a subpoena may object if a subpoena requests ESI in an objectionable form or ESI that is not reasonably accessible; and
- Rule 45 does not expressly provide that ESI need not be produced in more than one form.

32. Vermont (various effective dates)

Vermont Rules of Civil Procedure (*see* Vermont Statutes and Court Rules) 16.2 (effective July 6, 2009), 26, 33, 34 (effective Jan. 1, 2018), 37 (effective Sep. 18, 2017) and 45 (effective Feb. 13, 2015) are patterned after the post-Dec. 2015 federal rules, with the following exceptions:

- There is option for early Rule 34 requests; and
- Rule 37 applies to ESI and "other evidence" that should have been preserved. Sanctions are appropriate only upon a finding of prejudice; the Rule makes no mention of an "intent to deprive."

33. Virginia

Virginia Rules of Civil Procedure (starting at page 302 of 611) 4:1, 4:4, 4:8, 4:9, 4:9A and 4:13 are patterned after the pre-Dec. 2015 federal rules, with the following exceptions:

- There is no specific requirement that ESI be addressed in initial disclosures or in an informal meet-and-confer session; and
- Rule 4:1 expressly provides that the court may order the allocation of costs for the production of ESI that is not reasonably accessible.

34. Virgin Islands

Rule 39 of the Rules of the Superior Court of the Virgin Islands expressly adopts and follows "Rules 26 to 37" of the federal rules.

35. Washington (effective Sep. 1, 2013; Dec. 8, 2015)

Washington Superior Court Civil Rules 33 (effective Dec. 8, 2015) and 34 (effective Sep. 1, 2013) are patterned after the pre-Dec. 2015 federal rules.

36. Wisconsin (effective Apr. 5, 2018)

- Wisconsin Statutes §§ 802.10, 804.08, 804.09, 804.12, 804.01, 805.07 (effective Apr. 5, 2018) incorporate aspects of the post-Dec. 2015 federal rules on electronic discovery. For example, § 804.01(2)(a) on the scope of discovery incorporates the proportionality concept contained in the current federal rules, including the identical proportionality factors enunciated in FRCP 26(b). Wisconsin's rules, however, do vary from the current federal rules:

- § 804.01(2)(e) requires the parties to confer about the following before seeking discovery of ESI: subjects on which the discovery of ESI may be needed, preservation of ESI, forms of production, methods for asserting privilege, costs of ESI discovery and the need for a referee to supervise discovery of ESI; and
- There is no requirement for the initial disclosure of ESI.
- § 804.01(2)(e)1g, like FRCP 26(b)(2)(B), proscribes discovery of ESI that is not easily retrievable due to "undue burden or cost" absent a showing of "substantial need and good cause," but, unlike the federal rule, it identifies specific categories of ESI subject to this proscription, including backup data and legacy data on obsolete systems.
- § 804.09(2)(a)3 establishes 5 years before the cause of action's accrual as the reasonable look back period for RFPs.

37. Wyoming (various effective dates)

Wyoming Rules of Civil Procedure 16 (effective July 1, 2010), 26 (effective Oct. 1, 2014), 33, 34, 37 (effective July 1, 2008) and 45 (effective Oct. 1, 2009) and are patterned after the pre-Dec. 2015 federal rules, with the following exception:

- There is no specific requirement that ESI be addressed in an informal meet-and-confer session.

Wyoming Rules of Civil Procedure for Circuit Courts contain additional rules aimed at "enhance[ing] the provision of just, speedy, and inexpensive determination of civil actions; . . . provid[ing] expedited trial dates; and . . . focus[ing] discovery towards resolution of the issues." Rule 1 applies a "proportionality rule . . . to every aspect of these Rules."

STATES ADOPTING INDEPENDENT EDISCOVERY RULES

1. Colorado (effective Jan. 1, 2012; July 1, 2015)

The Colorado Civil Access Pilot Project (CAPP) applies to cases filed in participating jurisdictions between January 1, 2012 and June 30, 2015. The goal of the pilot program was to "address the growing concern that the civil pretrial process is unnecessarily complex, lengthy, and expensive." Among other changes, the CAPP rules (mandatory in participating jurisdictions) establish that:

- "Within 14 days after the filing of an answer, the parties shall meet and confer concerning reasonable preservation of all relevant documents and things, including any electronically stored information" (PPR 6.1)
- "The court may shift any or all costs associated with the preservation, collection and production of electronically stored information as the interests of justice and proportionality so require." (PPR 6.2)

Applying learnings from CAPP, Colorado Rules of Civil Procedure were amended (effective July 1, 2015 – *see* redlined changes).[1] Notably, the scope of discovery under Colorado's Rule 26(b)(1) incorporates proportionality in a manner nearly identical to post-Dec 2015 Federal Rule 26(b)(1). The key provisions of Rule 16 include:

- Parties must file a Proposed Case Management Order addressing "information relevant to the evaluation of proportionality as well as how the case should be handled."
- If the parties anticipate needing to discover a "significant amount" ESI, the parties must discuss and include in their Proposed Case Management Order agreements concerning ESI search terms to be used, if any, and the production, continued preservation and restoration of ESI, including forms of production and cost estimates.
- Lead counsel for each counsel must attend in person an initial case management conference with the judge.
- The court is permitted to dispense with the initial case management conference only if "there appear to be no unusual issues, that counsel appear to be working together collegially, and that the information on the proposed order appears to be consistent with the best interests of all parties and is proportionate to the needs of the case."

2. Connecticut (effective Jan. 1 2012; Jan. 1, 2014)

Connecticut's Rules for the Superior Court include several provisions relating to eDiscovery that do not directly parallel the federal rules:

- Rule 13-1 (page 217 of 645) (effective Jan. 1, 2014) specifies that a request for production of "documents" includes ESI and the responding party should act accordingly "unless otherwise specified by the requesting party";
- Rule 13-5 (page 222 of 645) (effective Jan. 1, 2012) acknowledges that a protective order may be used to specify "terms and conditions" – including cost allocation – relating to the discovery of ESI;
- Rule 13-9 (page 223 of 645) (effective Jan. 1, 2014) provides that ESI need not be produced in more than one form and that, if a request for ESI does not specify the form of production, the responding party must produce the data "in a form in which it is ordinarily maintained or in a form that is reasonably usable";
- Rule 13-14(d) (page 227 of 645) (effective Jan. 1, 2012) forecloses sanctions when information – including ESI – is "lost as the result of the routine, good-faith operation of a system or process in the absence of a showing of intentional actions designed to avoid known preservation obligations."

3. Illinois (effective July 1, 2014)

Illinois Rules of Civil Procedure 201, 214, and 218 address matters relating to e-discovery.

- Rule 210 defines ESI as "any writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations in any medium from which

[1] Colorado Rules of Civil Procedure do not appear to be available free of charge on the state court's website. A free version of the rules (current as of May 1, 2016) is provided by a local law firm. Otherwise, Lexis subscribers can access the rules here.

electronically stored information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form."

- Rule 214 allows parties to serve written requests for materials, including ESI. The rule borrows several concepts from Federal Rule 34, including that "if a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms." Moreover, Rule 214 incorporates the post-Dec. 2015 federal rules' proportionality concept by allowing a responding party to object to a request "on the basis that the burden or expense of producing the requested materials would be disproportionate to the likely benefit."
- Rule 218 requires consideration at a case management conference of "any other matters which may aid in the disposition of the action including but not limited to issues involving electronically stored information and preservation."

4. Delaware

Delaware Court of Chancery[2] Rules 26, 30, 34, and 45 include ESI within their scope. In January 2011, the Delaware Court of Chancery issued guidelines for preservation of ESI.

The Superior Court of Delaware's Complex Commercial Litigation Division (CCLD) has E-Discovery Plan Guidelines, which require the parties to meet and confer to discuss issues related to ESI, including preservation, form and scope of production ("including the custodians, time period, file types and search protocol to be used to identify which ESI will be produced"), the methods for asserting and preserving privilege and confidentiality and "whether allocation among the parties of the expense of preservation and production is appropriate." The parties then must develop an e-discovery plan for submission to the court, which will enter an order governing discovery of ESI.

The Delaware Supreme Court has created the Delaware Commission on Law & Technology (DECLT) "to develop and publish guidelines and best practices regarding the use of technology and the practice of law." The DECLT offers various materials relating to eDiscovery, including a collection of "Leading Practice" publications and a CLE presentation titled Best Practices in Electronic Discovery.

5. Georgia (effective June 4, 2015)

Georgia Superior Court Uniform Rule 5.4 (page 23 of 117) establishes a process whereby parties may submit to the court a discovery plan. Included among the topics that such a plan might

[2] Delaware's Court of Chancery has exclusive jurisdiction to hear and determine all matters and causes in equity. Delaware's Superior Court has jurisdiction over all criminal and non-equity civil cases except domestic relation matters (in which jurisdiction is vested with Delaware's Family Court). The Superior Court's CCDL handles large and complex business or commercial cases.

address are: the schedule for discovery, including ESI; the format in which ESI will be produced; and any sources of information that are "not reasonably accessible."[3]

6. Mississippi (effective May 29, 2003; July 1, 2013)

Mississippi Rules of Civil Procedure 34 and 45 (effective July 1, 2013) address the production of ESI and mirror the pre-Dec. 2015 federal rules.

Mississippi's other Rules of Civil Procedure predate the 2006 federal rules amendments. Rule 26 (effective May 29, 2003) includes "electronic or magnetic data" in the scope of discovery and as to such data, requires that a requesting party specify a form of production, allows the producing party to object if the data is not reasonably available, and includes a cost-shifting provision for any extraordinary steps required to produce the data.

Mississippi's Supreme Court's Rules Committee on Civil Practice and Procedure is conducting a comprehensive review of the Mississippi Rules of Civil Procedure. The Committee invited attorneys and judges to submit proposed revisions through August 31, 2016. Some of the proposed revisions relate to Mississippi's discovery-related rules. *See generally* Mississippi Rules of Civil Procedure Revision Project.

7. New Hampshire

New Hampshire Superior Court[4] Rules 21, 22, 23 and 24 include ESI within the scope of discovery, require the initial disclosure of ESI and allow for requests for production of ESI.

Rule 25 addresses solely the discovery of ESI and includes the following provisions:

- Parties must meet and confer about the preservation of ESI;
- A duty to preserve "all potentially relevant ESI" is triggered "once the party is aware that the information may be relevant to a potential claim;
- "Requests for ESI shall be made in proportion to the significance of the issues in dispute" and cost-shifting may be appropriate for any disproportionate requests;

---

[3] In July 2015, Georgia's Council of Superior Court Judges approved a proposed amendment to the state's Uniform Superior Court Rules that would add a provision governing spoliation of ESI closely tracking amended FRCP 37(e). *See* Proposed Amendments to the Uniform Rules of Superior Court (Aug. 3, 2015); Proposed Amendments to the Uniform Rules For Superior Court, Approved For First Reading, July 29, 2015, at 3. This proposed rule change is not part of the current Georgia Rules, but it is unclear whether the proposal has been considered and rejected or remains pending. *See generally* Georgia Uniform Superior Court Rules (updated Sep. 22, 2016).

[4] New Hampshire's Superior Court is the only forum in the court for jury trials and has jurisdiction over certain criminal, domestic relations and civil cases. In comparison, New Hampshire's District Courts have jurisdiction over cases involving families, juveniles, small claims, landlord-tenant matters, minor crimes and violations, and civil cases in which the amount in dispute does not exceed $25,000. New Hampshire also has a Family Division and Probate Court.

- A party may request ESI "stored in any medium from which information could be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form," including "back-up and archived copies of ESI";
- The party requesting ESI must state the form in which it is to be produced, but the same ESI need not be produced in more than one form; and
- "A party may also serve on another party a request to permit the requesting party and or its representatives to inspect, copy, test or sample the ESI in the responding party's possession or control."

8. New York

New York has no e-discovery rules that apply to all trial courts, but certain courts within the New York State Unified Court System address e-discovery:

- Section 202.12 of the Uniform Civil Rules for the Supreme Court and the County Court requires parties who attend a preliminary conference to be prepared to discuss electronic discovery. After the conference, the court may establish the method and scope of discovery of ESI.
- Appendix A to the Uniform Rules sets forth guidelines for the discovery of ESI from nonparties in Commercial Division cases.
- Section 202.70, which applies to the Commercial Division of the Supreme Court, requires the parties to meet and confer about ESI before the preliminary conference.
- The Commercial Division in Nassau County has adopted guidelines for the discovery of ESI.
- Rule 5(b) of the Commercial Division in Queens County requires the parties to confer about anticipated e-discovery issues prior to the preliminary conference held with the court.

9. Oregon (effective January 1, 2012)

Oregon Rule of Civil Procedure 43 defines "documents" to include ESI and provides that, if a requesting party does not specify a form of production for ESI, the responding party may produce ESI in the form in which it is ordinarily maintained or in a reasonably useful form.

10. Pennsylvania (effective August 1, 2012)

Pennsylvania Rules of Civil Procedure 4009.1, 4009.11, 4009.12, 4009.21, 4009.23 and 4011 address the discovery of ESI. But as stated in the Explanatory Comment: "[t]hough the term 'electronically stored information' is used in these rules, there is no intent to incorporate the federal jurisprudence surrounding the discovery of electronically stored information. The treatment of such issues is to be determined by traditional principles of proportionality under Pennsylvania law . . . ."

11. Rhode Island (effective November 5, 2014)

Rhode Island Superior Court[5] Rule of Civil Procedure 34 (page 47 of 115) provides for requests for production of "documents or electronically stored information . . . stored in any medium from which information can be obtained either directly or, if necessary, after translation by the

[5] Rhode Island's Superior Court has jurisdiction in all felony proceedings, in civil cases where the amount in controversy exceeds $10,000, and in equity matters. The District Court has exclusive jurisdiction of all civil actions at law wherein the amount in controversy is less than $5,000. The Superior and District Courts have concurrent jurisdiction of all civil actions at law in which the amount in controversy exceeds $5,000 and does not exceed $10,000. The Family court has jurisdiction over matters involving domestic relations and juveniles.

responding party into a reasonably usable form." Similar rules apply in Family Court (page 45 of 90) and in District Court (page 49 of 109).

STATES NOT ADOPTING EDISCOVERY RULES AMENDMENTS

1. **Kentucky**
2. **Missouri**
3. **South Dakota**
4. **West Virginia**
5. **Guam**

STATES ADOPTING RULES AFFECTING WAIVER OF PRIVILEGE AND WORK PRODUCT PROTECTION

1. Alabama (effective Oct. 1, 2013)

Rule 510 of the Alabama Rules of Evidence largely mirrors Federal Rule of Evidence 502.

2. Alaska (effective July 15, 1994)

Rule 510 of the Alaska Rules of Evidence (page 15 of 26) defines waiver of privilege as voluntary disclosure or consent for disclosure of any significant part of the matter or communication.

3. Arizona (effective Jan. 1, 2012)

Rule 502 of the Arizona Rules of Evidence mirrors Federal Rule of Evidence 502.

4. Arkansas

Arkansas Rule of Evidence 502 addresses the effect of inadvertent disclosure on claims of privilege as well as selective waiver for information produced to government agencies.

5. California (effective Jan. 1, 2015)

Section 912 of the California Evidence Code defines waiver of privilege as disclosure or consent to disclosure, without coercion, of a significant part of the communication.

California Code of Civil Procedure Section 2031.285, sets forth a process by which a party can claw back privileged or protected ESI that has been inadvertently disclosure. The code implicitly recognizes that such inadvertent production does not, by itself, constitute waiver.

6. Delaware

Delaware Rule of Evidence 510 (page 8 of 22) mirrors federal Rule of Evidence 502.

The CCDL's Protocol for the Inadvertent Production of Documents establishes a claw-back procedure and states that "[i]nadvertent production of privileged material, the return of which is requested in accordance with this [protocol], shall not be considered a waiver of any claim of privilege."

7. Florida (effective July 10, 1995)

Section 90.507 of the Florida Statutes defines waiver of privilege as consent to disclosure or voluntary disclosure without the expectation of privacy.

8. Hawaii

Hawaii Rule of Evidence 511 (page 17 of 32) defines waiver of privilege as voluntary disclosure or consent to disclosure of any significant part of the privileged matter.

9. Illinois (effective Jan. 1, 2013)

Illinois Rule of Evidence 502 mirrors Federal Rule of Evidence 502 in addressing the inadvertent disclosure of privileged materials.

10. Indiana (current as of Jan. 1, 2014)

Indiana Rule of Evidence 502 mirrors Federal Rule of Evidence 502 in addressing the inadvertent disclosure of privileged materials.

11. Iowa (effective June 1, 2009)

Iowa Rule of Evidence 5.502 (page 7 of 19) mirrors Federal Rule of Evidence 502.

12. Kansas (effective Jan. 1, 1964)

Kansas Statutes Annotated § 60-437 defines waiver of privilege as disclosure of information with knowledge of the privilege and without coercion, trickery, deception, or fraud.

13. Kentucky (effective 1990)

Kentucky Rule of Evidence 509 defines waiver of privilege as voluntary disclosure or consent to disclosure of any significant part of the privileged matter.

14. Louisiana (effective Jan. 1, 1993; Aug. 15, 2007)

Louisiana Code of Evidence Article 502 (effective Jan. 1, 1993) defines waiver of privilege as voluntary disclosure or consent for disclosure. Louisiana Code of Civil Procedure Article 1424(D) (effective Aug. 15, 2007) provides that inadvertent disclosure of privileged materials does not operate as a waiver if "reasonably prompt measures" were taken to assert privilege "once the holder knew of the disclosure."

15. Maine (effective Jan. 1, 2015)

Maine's Rule of Evidence 510 (page 91 of 186) defines waiver of privilege as voluntary disclosure or consent to disclosure.

16. Maryland (effective Jan. 1, 2008)

Maryland Rules of Procedure 2-402(e)(3) and (4) mirror Federal Rule of Evidence 502(b) and (e).

17. Massachusetts

The Massachusetts Guide to Evidence (2016 Ed.)[6] Section 523 (page 126 of 408) defines waiver of privilege as voluntary disclosure, consent for disclosure, or introduction of privileged communications as part of a claim or defense. The Note to this Section includes a thorough explanation of FRE 502 and its effect on state law. Section 524 (page 128 of 408) states simply that "[a] claim of privilege is not defeated by a disclosure erroneously made without an opportunity to claim the privilege."

18. Montana (effective June 7, 1990)

Montana Rule of Evidence 503 defines waiver of privilege as voluntary disclosure or consent to disclosure.

19. Nebraska (effective 1975)

Nebraska Revised Statute 27-511 defines waiver of privilege as voluntary disclosure or consent to disclosure of any significant part of the matter or communication.

20. Nevada (effective 1995)

---

[6] An online supplement to this Guide, offering "summaries of important opinions of the Supreme Judicial Court and Appeals Court relating to the development and evolution of Massachusetts evidence law," is available at http://www.mass.gov/courts/case-legal-res/guidelines/mass-guide-to-evidence/supplement.html.

Nevada's Revised Statute 49.385 defines waiver of privilege as voluntary disclosure or consent to disclosure of a significant part of the matter.

21. New Hampshire

Under New Hampshire Superior Court Rule 25(i) the inadvertent disclosure of ESI does not waive privilege.

22. New Jersey (effective July 1, 1993)

New Jersey Rule of Evidence 530 defines waiver of privilege as (a) contracting to not claim the privilege, or (b) disclosing or consenting to disclosure without coercion and with knowledge of the privilege.

23. New Mexico (effective Dec. 31, 2013)

New Mexico Rule of Evidence 11-511 (effective Dec. 31, 2013) defines waiver of privilege as voluntary disclosure or consent to disclosure of any significant part of the matter or communication. (*See* New Mexico Rules.)

24. North Dakota (effective Mar. 1, 2014)

North Dakota Rule of Evidence 510 (effective Mar. 1, 2014) defines waiver of privilege as voluntary disclosure of or consent to disclose any significant part of the privileged matter.

25. Oklahoma (effective Nov. 1, 2002)

Oklahoma Evidence Code 12 O.S. § 2511 (effective Nov. 1, 2002) defines waiver of privilege as voluntary disclosure or consent to disclose any significant part of the privileged matter.

26. Oregon (enacted 2003)

Oregon Rule of Evidence 511 defines waiver of privilege as voluntary disclosure or consent to disclose any significant part of the matter or communication.

27. South Dakota

South Dakota Rule of Evidence 510 defines waiver of privilege as voluntary disclosure or consent to disclosure of any significant part of the privileged matter.

28. Tennessee (effective July 1, 2010)

Tennessee Rule of Evidence 502 (effective July 1, 2010) addresses waiver and mirrors Federal Rule of Evidence 502(b).

29. Texas

Texas Rule of Civil Procedure 193.3(d) (page 137 of 323) states that inadvertent disclosure of privileged materials does not waive privilege "if - within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made - the producing party amends the response, identifying the material or information produced and stating the privilege asserted."

Texas Rule of Evidence 511(a) (page 31 of 58) defines waiver of privilege as (1) voluntary disclosure or consent to disclose any significant part of the privileged matter or (2) the calling of a character witness to whom privileged communications have been made to testify as to a person's character insofar as the privileged communications are relevant to character. Rule 511(b) largely mirrors Federal Rule of Evidence 502.

30. Utah

Utah Rule of Evidence 510 defines waiver of privilege as (1) the voluntary disclosure or consent to disclosure of any significant part of the matter, or (2) failure to take reasonable precautions against inadvertent disclosure.

31. Vermont (effective Jan. 23, 2012)

Vermont Rule of Evidence 510 (*see* Vermont Statutes and Court Rules) mirrors Federal Rule of Evidence 502.

32. Washington (Sep. 1, 2010)

Washington Rule of Evidence 502 mirrors Federal Rule of Evidence 502.

33. West Virginia

West Virginia Rule of Evidence 502 largely mirrors Federal Rule 502.

34. Wisconsin (effective 1993; Jan. 1, 2013)

Under Wisconsin Statute § 804.01 (effective Jan. 1, 2013), work product protection is waived "if the disclosure was not inadvertent." § 905.03(5)(a) (effective Jan. 1, 2013) mirrors Federal Rule of Evidence 502(b) as it pertains to attorney-client privilege. § 905.11 (effective 1993) defines waiver of privilege as voluntary disclosure or consent to disclose any significant part of the matter or communication.

FEDERAL DISTRICT COURT LOCAL EDISCOVERY RULES, ORDERS, AND FORMS[7]

1. M.D. Ala.

Guidelines to Civil Discovery Practice (*see* Section III.D – Electronically Stored Information, page 18 of 27; Appendix II – Ask the Right Questions, page 25 of 27) (effective Feb. 9, 2015)

2. S.D. Ala.

Local Rules (effective Aug. 1, 2015)

- Civil L.R. 16(a) – Preliminary Pretrial Conferences (page 40 of 155)
- Civil L.R. 26(a) – Conference of the Parties; Planning for Discovery (page 44 of 155)
- Local Form for Report of Parties' Planning Meeting (page 88 of 155) (*see* ¶ 12, page 89 of 155)

3. D. Alaska

Local Rule 16.1(b) – Pre-Trial Scheduling and Planning Conference (page 28 of 70) (effective Dec. 1, 2011)
Local Civil Form 26(f) – Scheduling and Planning Conference Report (*see* ¶ 4(C), page 2 of 4)

4. Ariz.

General Order 17-08 – regarding the MIDP (see below)

5. E.D. and W.D. Ark.

Local Rule 26.1 – Outline for Fed.R.Civ.P.26(f) Report (effective May 1, 2002)

6. N.D. Cal.

Standing Order for All Judges of the Northern District of California (revised Nov. 1, 2014)
Guidelines for the Discovery of Electronically Stored Information (revised Dec. 1, 2015)
ESI checklist for use during the Rule 26(f) meet and confer process (revised Dec. 1, 2015)
[Model] Stipulated Order Re: Discovery of Electronically Stored Information for Standard Litigation
[Model] Stipulation & Order Re: Discovery of Electronically Stored Information for Patent Litigation

---

[7] This section identifies only court-wide rules, orders and forms. To the extent that individual judges have additional or different standing orders governing discovery, these are not compiled here.

7. S.D. Cal.

Local Rules (current as of Feb. 9, 2016)
- Patent Local Rule 2.1.a – Early Neutral Evaluation Conference (page 81 of 130)
- Patent Local Rule 2.6 – Model Order for Electronically Stored Information (page 84 of 130)
- Model Order Governing Discovery of Electronically Stored Information in Patent Cases (page 106 of 130)

8. D. Colo.

Guidelines Addressing the Discovery of Electronically Stored Information (effective Sep. 1, 2014)
Checklist for Rule 26(f) Meet-and-Confer Regarding Electronically Stored Information (effective Apr. 24, 2015)
LCivR 16.2 – Scheduling Order (page 19 of 82) (effective Dec. 1, 2015)
Proposed Scheduling Order and Instructions (revised Dec. 1, 2011)

9. D. Conn.

Local Rules (revised Apr. 1, 2016)
- Rule of Civil Procedure 16(b) – Scheduling Orders (page 32 of 159)
- Civil Appendix, Form 26(F) Report of Parties' Planning Meeting (page 105 of 159) (*see* ¶ V.E.j., page 108 of 159)

10. D. Del.

Default Standard for Discovery, Including Discovery of Electronically Stored Information ("ESI")
Default Standard for Access to Source Code
Local Bankruptcy Rule 7026-3 – Discovery of Electronic Documents (page 109 of 170) (Effective Feb. 1, 2016)

11. M.D. Fla.

Handbook on Civil Discovery Practice (*see* ¶ VII – E-Discovery, page 24 of 28) (revised Jun. 5, 2015)

12. N.D. Fla.

Local Rules (effective Nov. 24, 2015)
- 2.1 – Definitions (page 8 of 82)
- 26.2(E) – Discovery in Criminal Cases (page 26 of 82)

13. S.D. Fla.

Local Rules (revised Dec. 1, 2017)
- 16.1(b)(2)(K) – Scheduling Conference Report (page 31 of 124)
- 16.1(b)(3)(C) – Joint Proposed Scheduling Order (page 31 of 124)
- 26.1(e) – Interrogatories and Production Requests (page 43 of 124)

ESI Checklist

14. N.D. Ga.

LR 16.2 – Joint Preliminary Report and Discovery Plan (page 26 of 80) (updated Mar. 31, 2016)
Appendix B, II. Joint Preliminary Report and Discovery Plan (page 9 of 31) (*see* ¶ 11(b), page 15 of 31) (revised Mar. 11, 2011)

15. S.D. Ga.

Local Rule 26.1(b)
Form – Rule 26(f) Report (page 17 of 22) (*see* ¶ 9, page 20 of 22)

16. D. Guam

RN Civil Attachment 5 – Scheduling and Planning Conference Report [8](page 42 of 50 *see* ¶ V.C.) (revised Dec. 12, 2014)

17. D. Haw.

General and Civil Rule LR16.3 – Scheduling Conference Order (page 28 of 100) (updated June 29, 2016)

18. D. Idaho

Local District Civil Rule 16.1 – Scheduling Conference, Litigation Plan, Voluntary Case Management Conference and Electronically Stored Information (page 30 of 82) (revised Jan. 1, 2016)

19. N.D. Ill.

General Order 17-0005 – implementing the MDIP program (see below)
Standing Order Regarding MIDP

---

[8] The link provided will take you to the "Draft of Proposed Civil Local Rules." This is offered because the final (i.e., adopted), online version of the rules do not include the attachments. The referenced form should be available on the Court's Civil Forms page (http://www.gud.uscourts.gov/civil_forms?page=1), but the link to the zipped attachments is ineffective.

20. S.D. Ill.

Local Rules (effective Dec. 1, 2009)
- 16.2(a) – Initial Conferences of the Parties; Submission of Report (page 18 of 63)
- 23.1 – Class Actions / Scheduling and Discovery Conference (page 20 of 63)

Joint Report of Parties and Proposed Scheduling and Discovery Order (*see* ¶ 7, page 2 of 3) (revised Mar. 2016)
Joint Report of Parties and Proposed Scheduling and Discovery Order (Class Action) (*see* ¶ 8, page 2 of 4) (revised Mar. 2016)

21. N.D. Ind.

Local Rules (effective Jan. 19, 2016)
- L.R. 16.1(d) – Planning-Meeting Report (page 24 of 130)
- L.P.R. 2-1(b) – Discovery Plan (page 99 of 130)

Report of Parties' Planning (*see* ¶ 4, page 2 of 3)

22. S.D. Ind.

Local Rule 16.1(b) – Case Management Plan (effective Sep. 1, 2016)
Uniform Case Management Plan (*see* ¶ III(K), page 5 of 11) (revised Dec. 10, 2013)
Uniform Patent Case Management Plan (*see* ¶ IV(G), page 4 of 10)
ESI Supplement to Case Management Plan

23. N.D. Iowa

Instructions and Worksheet for Preparation of Scheduling Order and Discovery Plan (effective Jan. 1, 2007)

24. S.D. Iowa

Order for Status Report on ESI (revised Mar. 2, 2015)
Instructions and Worksheet for Preparation of Scheduling Order and Discovery Plan (revised May 1, 2013)

25. D. Kan.

Guidelines for Cases Involving Electronically Stored Information (ESI)
Report of Parties' Planning Conference (*see* page 2 and ¶5.e., page 5 of 10) (revised Dec. 3, 2015)
Initial Order Regarding Planning and Scheduling (*see* page 5 and ¶5.e., page 8 of 13) (revised Dec. 1, 2015)
Scheduling Order (*see* ¶2.f, page 6 of 13) (revised Dec. 1, 2015)

26. D. Md.

Local Rules (effective July 1, 2016)
- Section VIII. Patents; Rule 802 – Scheduling Conference (page 96 of 162)
- Appendix D; Standard Requests for Production of Documents (page 148 of 162)

Discovery Guidelines

Principles for the Discovery of Electronically Stored Information in Civil Cases

Suggested Protocol for Discovery of Electronically Stored Information

Local Bankruptcy Rules
- 2004-1(d) – Examination Guidelines (page 21 of 189)
- 7026-1(j) – Discovery Guidelines (page 70 of 189)
- Appendix C – Discovery Guidelines (page 156 of 189)

27. D. Mass.

Local Rule 16.6 – Scheduling and Procedures in Patent Infringement Cases (*see* ¶ (A)(7), page 37 of 173) (updated May 6, 2016)

28. E.D. Mich.

Model Order Relating to the Discovery of ESI (effective Sep. 20, 2013)

Local Bankruptcy Rule 7026-4 – Discovery of Electronically Stored Information (page 62 of 101) (effective Feb. 1, 2016)

Bankruptcy Court Report of Parties' Rule 26(f) Conference (revised Apr. 19, 2016)

29. D. Minn.

Local Rule 37.1(e) – form of discovery motion concerning failure to preserve ESI (page 77 of 167) (effective May 16, 2016)

Form 3 – 26(f) Report and Proposed Scheduling Order (*see* ¶ (e)(2), page 3 of 5)

Form 4 – 26(f) Report and Proposed Scheduling Order (Patent Cases) (*see* ¶ (h)(4), page 8 of 10)

Discussion of Electronic Discovery at Rule 26(f) Conferences: A Guide for Practitioners

30. N.D. and S.D. Miss.

Local Uniform Civil Rules (effective Dec. 1, 2015)
- 26(f) – Fed. R. Civ. P. 26(f) Conference of the Parties (page 34 of 122)
- 45(d) – Non-Party ESI (page 39 of 122)

Form 1 – Case Management Order (*see* ¶ 6.E., page 3 of 5) (updated Feb. 2016)

31. E.D. Mo.

Local Rule 26 - 3.01(A) – Disclosure Pursuant to Rule 26(a)(1) and (2) (page 39 of 141) (effective Dec. 1, 2009)

32. D.N.H.

Local Rules (amended June 6, 2016)

- 26.1 – Discovery Plan (page 47 of 159)
- Civil Form 2 – Discovery Plan (page 88 of 159)
- Supplemental Patent Rule 3.1 – Scheduling Conference, Discovery Plan and Discovery Order (page 151 of 159)

33. D.N.J.

Local Civil Rules (updated Apr. 20, 2014)

- 26.1(b) – Meeting of Parties, Discovery Plans, and Initial Disclosures (page 60 of 143)
- 26.1(d) – Discovery of Digital Information Including Computer-Based Information (page 61 of 143)

Joint Proposed Discovery Plan

Proposed Discovery Plan (CAMDEN only)

Local Bankruptcy Rule 7016-1 – Pretrial Procedure (page 62 of 95) (current as of August 1, 2016)

34. E.D.N.Y

Local Civil Rules (updated Sep. 3, 2015)

- 26.2 – Assertion of Claim of Privilege (*see* Committee Note, page 31 of 127)
- 26.3(c)(2) – Uniform Definitions in Discovery Requests / Document (page 33 of 127)
- 54.1 – Taxable Costs (*see* Committee Note, page 44 of 127)

Local Bankruptcy Rule 7033-1(f) – Reference to Records (revised Jan. 10, 2013)

35. N.D.N.Y.

Civil Case Management Plan (*see* ¶ 12.G., page 5 of 7) (effective Nov. 4, 2013)

36. S.D.N.Y

Local Civil Rules (updated Sep. 3, 2015)

- 26.2 – Assertion of Claim of Privilege (*see* Committee Note, page 31 of 127)
- 26.3(c)(2) – Uniform Definitions in Discovery Requests / Document (page 33 of 127)
- 54.1 – Taxable Costs (*see* Committee Note, page 44 of 127)

Standing Order –Pilot Program to Improve the Quality of Judicial Case Management Techniques for Complex Civil Cases (effective Nov. 14, 2014)

Discovery Guide for Pro Se Litigants

Local Bankruptcy Rule 7033-1(f) – Reference to Records (page 65 of 92) (effective Dec. 1, 2015)

37. W.D.N.Y.

Local Rules of Civil Procedure (effective Jan. 1, 2016)
- 16(b) – Initial Pretrial Conference (page 24 of 65)
- 26(e) – Electronically Stored Information (page 32 of 65)

38. M.D.N.C.

Local Rule of Practice and Procedure 16.1(f) – Meeting on the Scope of Retention of Potentially Relevant Documents (page 26 of 76) (effective Mar. 1, 2014)

39. W.D.N.C.

Local Rule of Civil Procedure 16.1(G) – Initial Pretrial Conference (page 20 of 83) (effective Jan. 1, 2012)

40. N.D. Ohio

Local Civil Rules
- 16.3(b) – Case Management Conference (effective Feb. 2, 2009)
- Appendix K – Default Standards for Discovery of Electronically Stored Information

41. S.D. Ohio

Rule 26(f) Report of Parties (Western Division, Dayton only) (*see* ¶ 6.h., page 4 of 6)
Rule 26(f) Report of Parties (Eastern Division only) (*see* ¶ 6.c., page 2 of 4)

42. E.D. Okla.

Recommendations for Electronically Stored Information Discovery Production in Federal Criminal Cases (effective Feb. 2012)

43. W.D. Okla.

Local Court Rules (revised May 10, 2016)
- Civil Rule 16.1(a)(1) – Parties' Initial Conference (page 27 of 106)
- Civil Rule 26.1 – Discovery Plan (page 33 of 106)
- Appendix II – Joint Status Report and Discovery Plan (page 74 of 106) (*see* ¶ 8.D., page 75 of 106)
- Criminal Rule 16.1(a) (page 61 of 106)

General Order Regarding Best Practices for Electronic Discovery of Documentary Materials in Criminal Cases (effective Aug. 20, 2009)

44. D. Or.

Local Rule of Civil Procedure 26
- LR 26-1(2) – Electronically Stored Information (effective Mar 1, 2016)

- LR 26-6 – E-Discovery in Patent Cases (effective Mar. 1, 2014)
- LR 26-7 – Initial Discovery Protocols for Employment Cases Alleging Adverse Action (effective Mar. 1, 2014)

45. M.D. Penn.

Local Rules of Court (effective Dec. 1, 2014)
- LR 26.1 – Duty to Investigate and Disclose (page 30 of 107)
- Appendix A – Joint Case Management Plan (page 83 of 107)

46. W.D. Penn.

Local Rules (effective Feb. 1, 2013)
- LCvR 26.2 – Discovery of Electronically Stored Information (page 35 of 130)
- Appendix LCvR 16.1A – Fed. R. Civ. Pr. 26(f) Report of the Parties (page 104 of 130)

Electronic Discovery Information

Administrative Orders
- Establishment of a Panel of Special Masters for Electronic Discovery (amended Feb 26, 2016)
- Establishment of a Panel of Mediators for Electronic Discovery (filed Dec. 16, 2015)
- Use of Special Masters for Electronic Discovery By United States Bankruptcy Judges (filed Mar. 30, 2011)

Local Bankruptcy Rules (effective Apr. 1, 2016)
- 7026-1 – Discover of Electronic Documents (page 110 of 158)
- 7026-2 – Electronic Discovery Special master (page 113 of 158)

47. P.R.

Local Civil Rule 16(a) – Scheduling Conference (page 22 of 141) (current as of Sep. 2, 2010)

48. M.D. Tenn.

Administrative Order No. 174 – Default Standard E-Discovery (effective July 9, 2007)

49. W.D. Tenn.

Local Rule 26.1(e) – E-Discovery (page 24 of 173) (revised Nov. 13, 2015)
Standard Track Scheduling Order
Expedited Track Scheduling Order
Complex Track Scheduling Order
Local Patent Rules (effective Jan. 1, 2014), Appendix B – Joint Planning Report and Proposed Schedule (page 30 of 38) (*see* ¶ 5(b), page 31 of 38)

50. E.D. Tex.

[Model] Order Regarding E-Discovery in Patent Cases

51. N.D. Tex.

Miscellaneous Order No. 62 (Dallas Division, Patent Cases) (filed Nov. 17, 2009) (*see* ¶ 2-1(a) – Initial Case Management Conference, page 2 of 23)

52. S.D. Tex.

Local Rule of Practice for Patent Cases 2-1(a) – Parties' Preparation for Initial Case Management Conference (page 2 of 14) (effective Jan. 1, 2008)

53. D. Utah

Bankruptcy Court Form 35: Report of Parties' Planning Meeting Pursuant to Local Rule 7016-1(b)

54. D. Vt.

Local Rule of Procedure 26(a) – Discovery Schedule (page 28 of 60) (effective Mar. 1, 2017)

55. W.D. Wash.

Local Civil Rules (updated Jan. 21, 2016 to conform to post Dec.-2015 federal rules; redlined version available here)
Model Agreement re: Discovery of Electronically Stored Information (updated Mar. 12, 2015)
Best Practices for Electronic Discovery in Criminal Cases (adopted Mar. 21, 2013)

56. S.D. W. Va.

Report of Parties' Planning Meeting (required by Local Rule 16.1 (page 25 of 92) (current as of Nov. 18, 2013))

In June 2016, an Advisory Committee for the Study of Local Rules of Civil Procedure was appointed "to propose new rules where appropriate." (*See* Order.)

57. E.D. Wis.

Civil Local Rules (current as of Sep. 9, 2015)

- 16(a) – Preliminary Pretrial Conferences (page 29 of 64)
- 26(a) – Conference of the Parties; Planning for Discovery (page 33 of 64)

58. D. Wyo.

Local Civil Rules (current as of Mar. 4, 2015)

- 26.1(c) – Discovery of Electronically Stored Information (page 32 of 105)
- Appendix A – Rule 26(f) Conference Checklist9 (page 101 of 105)

59. U.S. Court of Federal Claims

Rules of the United States Court of Federal Claims (effective Aug. 1, 2016), Title V (page 48 of 229)

FEDERAL COURT EDISCOVERY AND RELATED INITIATIVES

1. Seventh Circuit

The Seventh Circuit Electronic Discovery Pilot Program is a multi-year, multi-phase project begun in 2009 to develop, implement, evaluate, and improve pretrial litigation procedures. The program committee has published Principles Relating to the Discovery of Electronically Stored Information (rev. 08/01/2010), which are designed to "provide incentives for the early and informal information exchange on commonly encountered issues relating to evidence preservation and discovery," and a Model Standing Order for use by courts participating in the program. Phase One was completed in May 2010 (Report on Phase One). Phase Two was completed in May 2012 (Report on Phase Two). Phase Three began in May 2012 (Interim Report on Phase Three).

2. Federal Circuit

The Federal Circuit Advisory Council has drafted and adopted a Model Order governing e-discovery. As stated on the Federal Circuit's website: "This Model Order is offered to aid trial courts in the exercise of their discretion in crafting orders tailored to the facts and circumstances of each case. The Court of Appeals for the Federal Circuit has not approved the specific language of the posted Model Order."

---

[9] Appendix A's reference to Local Rule 26.1(d)(3) appears to be an outdated reference that was not amended to reflect the most recent (Mar. 2014) changes to the rules.

3. S.D.N.Y.

The Pilot Program to Improve the Quality of Judicial Case Management was implemented in response to the federal bar's concern over the high costs of litigating complex cases and was designed to reduce costs and delay by improving judicial case management of such matters. The program was in effect Nov. 1, 2011 through Oct. 31, 2014. Since then, "the Bench and the Bar are urged to consider the provisions of the Pilot Project as best practices and to use them in particular cases as they see fit."

4. Federal Criminal Cases

The Department of Justice / Administrative Office Joint Electronic Technology Working Group published Recommendations for ESI Discovery Production in Federal Criminal Cases in Feb. 2012.

5. Federal Employment Cases Alleging Adverse Action

In Nov. 2011, the Federal Judicial Center launched the Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action. United States District Court judges across the country were invited to participate in the project, which seeks to encourage the exchange of "the most relevant information and documents" – specifically defined to include ESI – "early in the case, to assist in framing the issues to be resolved and to plan for more efficient and targeted discovery."

6. Mandatory Initial Discovery Pilot Project – Ariz. & N.D. Ill.

In May 2017, some district courts began participating in the Mandatory Initial Discovery Pilot Project ("MIDP"), a 3-year project to study "whether requiring parties in civil cases to respond to a series of standard discovery requests before undertaking other discovery will reduce the cost and delay of civil litigation." Except in exempted cases, the mandatory initial discovery replaces the initial disclosures otherwise required by Rule 26(a)(1) and require, *inter alia*, that the parties:

- make initial disclosures of "both favorable and unfavorable information that is relevant to their claims or defenses regardless of whether they intend to use the information in their cases"; and
- "address certain issues relating to [ESI] and produce ESI by the deadline set in the Standing Order."

Currently two district courts – Ariz. and N.D. Ill.– are participating in the program.

MODEL UNIFORM LAWS

1. Conference of Chief Justices

In Aug. 2006, the Conference approved the Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information "as a reference tool" and urged "the highest appellate court of each jurisdiction to distribute the Guidelines to the trial judges in its state as appropriate."

2. National Conference of Commissioners of Uniform State Laws (approved Aug. 2007)

In Aug. 2007, the Uniform Law Commission (ULC, also known as National Conference of Commissioners on Uniform State Laws) approved the Uniform Rules Relating to the Discovery of Electronically-Stored Information.

The Sedona Conference Working Group Series

wgs

The Sedona Conference

Commentary on Protection of Privileged ESI

A Project of The Sedona Conference
Working Group on Electronic Document Retention
& Production (WG1)

November 2014
PUBLIC COMMENT VERSION

APPENDIX F

Federal Rule 502—State Law Analogues

Federal Rule 502 applies to disclosures in federal proceedings and to federal offices and agencies. The Rule addresses waiver in connection with such disclosures in the initial federal proceeding and in subsequent federal and state proceedings. Rule 502 also contains a provision concerning waiver in a federal court with respect to a production in a prior state proceeding.

However, the applicable state's privilege, work product and waiver law govern disclosures made solely in a state proceeding and may govern disclosures made initially in a state proceeding, if the applicable state law affords more protection than federal law. Traditionally, different states have employed different tests to determine whether the attorney-client privilege or the work product doctrine has been waived.

Since Federal Rule 502 was enacted in September 2008, a number of states have adopted versions of Federal Rule 502. For example, Arizona, Illinois, Indiana, Iowa, Kansas, Vermont, Virginia, and Washington have enacted rules or statutes that contain most of the provisions of Federal Rule 502, namely 502 (a), (b), (d), (e) and (g).[18] The Arizona, Illinois, Kansas, Vermont, and Washington enactments also contain provisions concerning disclosures made in federal proceedings or another state's proceedings, which are analogues to Federal Rule 502(c).[19] Wisconsin's statute contains analogues to Rule 502(a) and (b).[20] Maryland's Rule predated Federal Rule 502 but has provisions that are analogous to Rule 502 (b), (d) and (e).[21]

---

[18] ARIZ. R. EVID. 502 (contains analogues to FED. R. EVID. 502 (a), (b), (d), (e) and (g) with respect to disclosures in an Arizona proceeding, and subsection (c) of the Arizona rule addresses disclosures in federal proceedings and another state's proceedings);

DRE 510 (Delaware Uniform Rule of Evidence 510 contains analogs to FED. R. EVID. 502(a) – (e) with respect to disclosures made to law enforcement agencies and in state proceedings.

ILL. R. EVID. 502 (contains analogues to FED. R. EVID. 502 (a), (b), (d), (e) and (g) with respect to disclosures in an Illinois proceeding or to an Illinois office or agency, and subsection (c) of the Illinois rule addresses disclosures in federal proceedings and another state's proceedings, and disclosures to federal, or another state's, offices or agencies);

IND. R. EVID. 502 (contains analogues to FED. R. EVID. 502 (a), (b), (d) and (e) with respect to disclosures in court proceedings);

IOWA R. EVID. 5.502 (contains analogues to FED. R. EVID. 502 (a), (b), (d), (e) and (g) with respect to disclosures in court or agency proceedings);

KAN. STAT. ANN. § 60-426a (West 2012) (contains analogues to FED. R. EVID. 502 (a), (b), (d), (e) and (g) with respect to disclosures in court or agency proceedings, and subsection (c) of the Kansas rule addresses non-Kansas proceedings);

VT. R. EVID. 510 (b) (1-6) (contains analogues to FED. R. EVID. 502 (a), (b), (d), (e) and (g) with respect to disclosures in Vermont proceedings or to a Vermont office or agency, and subsection (3) of the Vermont rule addresses non-Vermont proceedings);

VA. CODE ANN. § 8.01-420.7 (West 2012) (contains analogues to FED. R. EVID. 502 (a), (b), (d), and (e) with respect to disclosures in a proceeding or to any public body);

WASH. R. EVID. 502 (contains analogues to FED. R. EVID. 502 (a), (b), (d), (e) and (g) with respect to disclosures in Washington proceedings or to Washington offices or agencies, and subsection (c) of the Washington rule addresses non-Washington proceedings).

[19] ARIZ. R. EVID. 502 (c);
ILL. R. EVID. 502 (C);
KAN. STAT. ANN. § 60-426a (c) (West 2012);
VT. R. EVID. 510 (b) (3);
WASH. R. EVID. 502 (c).

[20] WIS. STAT. § 905.03 (5) (a) and (b) (2013) (contain analogues to FED. R. EVID. 502 (a), (b), although the Wisconsin statute uses the term "inadvertent" instead of "intentional" in its Rule 502 (a) counterpart).

[21] MD. CODE ANN., MD. RULES § 2-402(e) (3), and (4) (West 2012) (contains analogues to FED. R. EVID. 502 (b), (d) and (e)).

The Rules of several states only contain Rule 502(b) equivalents.[22] Most of those Rules provide, in substance, that an inadvertent disclosure does not operate as a waiver if the privilege holder took reasonable steps to prevent the inadvertent disclosure and promptly took reasonable steps to rectify the inadvertent disclosure after it was discovered.

It is also worth noting that the Louisiana rule requires the receiving party to return or promptly safeguard the inadvertently produced privileged material -- without notification from the producing party -- if it is clear that the material received is privileged.[23] That provision is more akin to the ethical requirements of certain jurisdictions under those circumstances.

Some states, such as Arkansas, Massachusetts, New Hampshire, and Texas, have Rules that address waiver in connection with inadvertent productions.[24] Those statutes do not, however, mirror the language of Federal Rule 502 (b) and do not contain other subsections of Rule 502.

During the initial stages of the rulemaking process, proposed Federal Rule 502 contained a provision addressing non-waiver for the production of privileged or protected materials to a governmental entity in connection with its investigation, regardless of whether the production was inadvertent. That provision proved to be controversial and was not included in the final version of Rule 502 that was submitted to Congress. Nevertheless, the Arkansas rule extends non-waiver protection to disclosures made to government entities,

---

22 TENN. R. EVID. 502 (generally similar to FED. R. EVID. 502(b));

LA. CODE CIV. PROC. ANN. art. 1:1424(D) (2012) (generally similar to FED. R. EVID. 502 (b) in that an inadvertent disclosure made in connection with litigation or administrative proceedings "does not operate as a waiver" if [the privilege holder] took reasonably prompt measures" after learning of "the disclosure, to notify the receiving party of the inadvertence of the disclosure and the privilege asserted." After receiving such notice, "the receiving party shall either return or promptly safeguard the [inadvertently disclosed] material," but may assert waiver.);

OKLA. STAT. tit. 12, § 2502 (E) and (F) (2012) (Subsection E is similar to FED. R. EVID. 502(b). Subsection F addresses waiver in connection with productions to a "governmental office, agency or political subdivision in the exercise of its regulatory, investigative, or enforcement authority.").

23 LA. CODE CIV. PROC. ANN. art. 1:1424(D) (2012) (Without receiving notice from the producing party, "if it is clear that the material received is privileged and inadvertently produced, the receiving party shall either return or promptly safeguard the material, and shall notify the sending party . . . with the option of asserting a waiver.").

24 ARK. R. EVID. 502(e) and (f) (Under subjection (e) of the Arkansas rule, an "[i]nadvertent disclosure does not operate as a waiver if the disclosing party follows the procedure specified in" the Arkansas analogue to FED. R. CIV. P. 26(b)(5) and, if challenged, "the circuit court finds in accordance with [the Arkansas analogue to FED. R. CIV. P. 26(b)(5)(D)] that there was no waiver." Subsection (f) of the Arkansas rule provides that a disclosure "to a governmental office or agency in the exercise of its regulatory, investigative, or enforcement authority does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities.");

MASS. GUIDE EVID. § 523 (c)(2) (2012) ("disclosure does not waive the privilege if . . . (2) there is an unintentional disclosure of a privileged communication and reasonable precautions were taken to prevent the disclosure.");
N.H. R. EVID. 511 ("A claim of privilege is not defeated by . . . a disclosure that was made inadvertently during the course of discovery.");

TEX. R. CIV. PROC. § 193.3(d) (West 2012) ("Privilege Not Waived by Production. A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these Rules of Evidence if--within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made--the producing party amends the response, identifying the material or information produced and stating the privilege asserted.").

regardless of whether the disclosure was inadvertent.[25] In that respect, Arkansas' rule is broader than Federal Rule 502. The Oklahoma rule similarly provides that a production to a governmental entity will not result in a waiver to non-governmental entities or persons but further provides for the possible waiver of undisclosed communications on the same subject matter.[26]

States that have not adopted versions of Federal Rule 502 may nevertheless have Rules similar to Federal Rule of Civil Procedure 26 or otherwise permit parties to include non-waiver or clawback provisions in protective orders. Accordingly, clawback orders may still be a valuable tool in states that have not adopted a Rule 502 analogue, even if those orders do not provide all of the protections afforded by a Federal Rule 502(d) order.

---

25 ARK. R. EVID. 502(f) (a disclosure "to a governmental office or agency in the exercise of its regulatory, investigative, or enforcement authority does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities.").

26 OKLA. STAT. tit. 12, § 2502 (F) (2012) (Under subsection F, the disclosure of attorney-client privileged or work product information "to a governmental office, agency or political subdivision in the exercise of its regulatory, investigative, or enforcement authority does not operate as a waiver . . . in favor of nongovernmental persons or entities." Further, "[d]isclosure of such information does not waive the privilege or protection of undisclosed communications on the same subject matter unless: 1. The waiver is intentional; 2. The disclosed and undisclosed communications or information concern the same subject matter; and 3. Due to principles of fairness, the disclosed and undisclosed communications or information should be considered together.").

COMPARISON OF F.R.E. 502 TO PROPOSED N.J.R.E. 530(c)
(SUBSTANTIVE DEVIATIONS FROM F.R.E. 502 UNDERLINED)

F.R.E. 502	N.J.R.E. 530(c)
Rule 502. 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.	**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.
(a) Disclosure made in a Federal proceeding or to a Federal office or agency; scope of a waiver.--When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if: (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together.	**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.
(b) Inadvertent disclosure.--When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil	**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.

COMPARISON OF F.R.E. 502 TO PROPOSED N.J.R.E. 530(c)
(SUBSTANTIVE DEVIATIONS FROM F.R.E. 502 UNDERLINED)

F.R.E. 502	N.J.R.E. 530(c)
Procedure 26(b)(5)(B).	
(c) Disclosure made in a State proceeding.--When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure: (1) would not be a waiver under this rule if it had been made in a Federal proceeding; or (2) is not a waiver under the law of the State where the disclosure occurred.	**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.
(d) Controlling effect of a court order.--A Federal 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.	**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.
(e) Controlling effect of a party agreement.--An agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.	**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.
(f) Controlling effect of this rule.--Notwithstanding Rules 101 and 1101, this rule applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this	Not adopted in proposal.

COMPARISON OF F.R.E. 502 TO PROPOSED N.J.R.E. 530(c)
(SUBSTANTIVE DEVIATIONS FROM F.R.E. 502 UNDERLINED)

F.R.E. 502	N.J.R.E. 530(c)
rule applies even if State law provides the rule of decision.	
(g) Definitions.--In this rule: (1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and (2) "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.	**6. Definitions.** In this rule: A. "attorney-client privilege" means the protection afforded under N.J.R.E. 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.