2015 - 2017 REPORT OF THE

SUPREME COURT COMMITTEE ON

THE RULES OF EVIDENCE

January 24, 2017
(Corrected April 12, 2017)

TABLE OF CONTENTS

I. RULE AMENDMENTS RECOMMENDED FOR ADOPTION

A. Oath or Affirmation: Proposed amendments to N.J.R.E. 603, N.J.R.E. 604, and N.J.R.E. 803(a)(1)(B).

The Committee considered the issue of whether religious oaths for witnesses should continue to be used in New Jersey state courts or whether a uniform witness affirmation to testify truthfully should be adopted for all witnesses without use or reference to any religious text or artifact and without reference to any deity. The issue arose after several letters from individuals and organizations were directed to the Committee following the Supreme Court's decision in Davis v. Husain, 220 N.J. 270 (2014). In Davis, the witness was sworn in before testifying but did not place his hand directly on the Bible. Later, in an *ex parte* conversation with the trial judge, a juror commented that "she was surprised that the witness did not actually touch the Bible before he testified." Id. at 276. The Committee formed a Subcommittee to fully explore the issues related to N.J.R.E. 603 and make recommendations as to whether a uniform affirmation should be used for all witnesses. A copy of the Subcommittee's report entitled, "Report of the N.J.R.E. 603 Oath and Affirmation Subcommittee" ("Subcommittee Report") is annexed hereto as Appendix A.

Ultimately, the Subcommittee recommended the adoption of a uniform non-religious witness affirmation in the following form: "Do you solemnly declare and affirm, under penalty of perjury, that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth?" See "Subcommittee Report" at page 2. The Subcommittee recommended amending N.J.R.E. 603 to include the language proposed above and the following revision to the caption: "Affirmation to Testify Truthfully." Id. at

12. The Subcommittee also recommended amendments to N.J.R.E. 604 regarding interpreters and N.J.R.E. 803(a)(1)(B) regarding prior inconsistent statements.

Members gave in-depth consideration to the following topics included in the Subcommittee Report: the use or non-use of religious texts and artifacts; the use or non-use of specific terms such as “oath” and “swear” which have religious connotations as well as “affirm/affirmation” and “solemnly declare,” which are neutral terms without religious association; jury instructions by the court; the invocation of N.J.S.A. 2A:84A-40- “Effect of Rules on Conflicting Laws”; and the impact of changing to an affirmation on other participants in the courtroom process and non-trial events such as depositions.

Members acknowledged that there is a long tradition of ritual and a large public expectation that people will have the option to swear an oath on a religious text. In this regard, while several members found it significant that the Subcommittee’s research revealed apparently no other state or federal court has completely eliminated an oath option in its statutes or court rules, the appended compilation reflects only the governing law/court rules from other jurisdictions but is not definitive as to the actual practices employed in those jurisdictions. The use of a jury instruction was discussed as an alternative to address concerns with giving the witness an option to “swear or affirm.” The jury instruction would provide that an inference should not be drawn, favorable or unfavorable, regarding the witness’s choice to swear or affirm that they will testify truthfully. A member expressed concern that the continuation of the tradition, even with a jury instruction, could have serious implications insofar as the disclosure of a witness’s religious or non-religious beliefs and how the jury would perceive that information.

There was also concern that it would be difficult to reconcile N.J.R.E. 512, Religious Belief, and N.J.R.E. 610, Religious Beliefs or Opinions, with the religious associations of the current oath and swearing-in process. N.J.R.E. 512 provides the privilege that a person has to refuse to disclose his or her religious or theological beliefs unless the belief or religious opinion is material to an issue in the action other than witness credibility. N.J.R.E. 610 expressly prohibits evidence of a witness's religious beliefs or opinions to enhance or impair credibility.

If the Court approves the non-religious affirmation, there are statutes that would be in conflict with the changes to the proposed Rule amendments. The Evidence Act's implicit repealer, N.J.S.A. 2A:84A-40, would render the conflicting laws or parts of laws obsolete with no force or effect. The following text is proposed to be included in a footnote to N.J.R.E. 603:

> The adoption of amended N.J.R.E. 603, effective_____, will hereinafter govern the administration of the witness attestation ceremony for all witnesses in the state courts of New Jersey. To the extent that N.J.S.A. 41:1-4, -5 and -6 apply to the administration of the witness attestation ceremony for witnesses in the state courts of New Jersey, these statutes shall be of no further force or effect after_____, the effective date of amended N.J.R.E. 603.

The Committee considered that a shift to a non-religious based uniform affirmation could have an impact on non-trial events such as depositions and the swearing in of jurors. A member stated that oaths administered during depositions are not done with a religious text. It was stated, however, that jurors place their hand on the Bible when their

oath is being administered. The difference is that oaths for jurors and officers appointed to attend the jury are governed by statute, not the Rules of Evidence. The Subcommittee recommended legislative outreach and coordination regarding these statutes and with other decision making entities such as the Office of Administrative Law if the non-religious affirmation is approved.

The proposed affirmation includes “solemnly declare” and “affirm” which are neutral terms that do not reference religious association. The proposal also includes “under penalty of perjury” so witnesses understand that there is a legal consequence for untruthful testimony as opposed to “so help me God” which invokes religious consequences. The idea is to have uniformity in the language so the court is not asking people to disclose their religious or non-religious beliefs.

The Committee’s discussion of the Subcommittee’s recommendation centered on the concerns raised about the disclosure of a witness’s religious or non-religious beliefs. During the discussion, some members raised the question of whether these concerns could be addressed without the need for a formal Rule amendment. It was suggested that perhaps the Court as an internal supervisory matter could simply direct that Bibles and other holy books no longer be used in conjunction with the oath ceremony in New Jersey courtrooms. It was suggested that this would resolve the specific problem presented in Davis.

Also, several members stated that the attestation language is often administered in an undifferentiated manner to all witnesses as a combined, “do you swear or affirm that the testimony you are about to give …” phrase. When administered in this combined way to all witnesses, there is no disclosure of any witness’s religious or non-religious

beliefs. It was noted that the parenthetical phrase "(or affirm)" was not intended to be read jointly to all witnesses, but only substituted for witnesses choosing to affirm. Nevertheless, it was suggested that the Court could perhaps direct as an internal matter that the attestation language be administered in this combined way to all witnesses in New Jersey courtrooms. This anecdotally seems to be how the attestation is presently stated orally by some individual judges and court personnel who administer it. Such a "combined" approach was favored by some members as providing a modest alternative to the proposed elimination of the oath option, possibly being more consonant with the practices in other jurisdictions and less likely to generate difficulties of implementation and public acceptance. Attachment C to the Subcommittee Report includes a state-by-state compilation of oath and affirmation Rules and Statutes, but it is not definitive as to the actual practices employed in those jurisdictions.

These suggested alternatives to a formal Rule amendment, although raised as part of the Committee discussion, were not specifically voted on by the Committee. Only the Subcommittee recommendation was presented for a Committee vote. The Subcommittee recommendation for a non-religious affirmation and the amendments to N.J.R.E. 603, N.J.R.E. 604, and N.J.R.E. 803(a)(1)(B) was narrowly approved by the full Committee.

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

603. [OATH OR] AFFIRMATION TO TESTIFY TRUTHFULLY[1]

Before testifying a witness shall be required to [take an oath or] make an affirmation to testify truthfully under the penalty provided by law [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.] The affirmation shall be administered and made without use of or reference to any religious text or other artifact and without reference to any deity.

Except as provided below, the affirmation shall be administered to all witnesses in the following form:

"Do you solemnly declare and affirm, under penalty of perjury, that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth?"

The court may alter the form of the affirmation as appropriate when dealing with a minor child or in other exceptional circumstances when alternative language is required for the court to impress upon the witness the legal duty to testify truthfully.

[1] The adoption of amended N.J.R.E. 603, effective_____, will hereinafter govern the administration of the witness attestation ceremony for all witnesses in the state courts of New Jersey. To the extent that N.J.S.A. 41:1-4, -5 and -6 apply to the administration of the witness attestation ceremony for witnesses in the state courts of New Jersey, these statutes shall be of no further force or effect after_____, the effective date of amended N.J.R.E. 603.

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] make an affirmation [or declaration] to interpret accurately.

803. HEARSAY EXCEPTIONS NOT DEPENDENT ON DECLARANT'S UNAVAILABILITY

The following statements are not excluded by the hearsay rule:

[803](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) … No change

(3) … No change

B. Proposed Amendment to N.J.R.E. 530, Waiver of Privilege by Contract or Previous Disclosure; Limitations

The Committee considered and approved an amendment to N.J.R.E. 530, Waiver of Privilege by Contract or Previous Disclosure: Limitations. The proposed amendment explicitly permits a court to enforce the terms of the parties' anti-waiver agreement regarding inadvertent litigation-related disclosures of privileged material. The amendment's genesis is multifold: the increasing use of electronic discovery in litigation and the attendant high risk of inadvertent disclosures of privileged materials coupled with the unsettled nature of the case law governing inadvertent disclosures of privileged material.

During the 2009-2011 cycle, the Committee considered whether to adopt a New Jersey Rule of Evidence equivalent to Federal Rule of Evidence 502, Attorney-Client Privilege and Work Product; Limitations on Waiver. In 2008, F.R.E. 502 was enacted to address concerns with the proliferation of electronic discovery and to resolve a conflict that had developed in the federal circuits on the consequences of an inadvertent disclosure of documents in discovery. After referring the issue for study and recommendation to a subcommittee, the consensus of the Committee was not to adopt the federal rule whole cloth, but rather, wait to see what developments would occur through case law to clarify which approach should be used. The Subcommittee believed that further case law in New Jersey would provide guidance for whether a rule change was appropriate.

Since 2004, the leading case in New Jersey in the area of waiver of privilege has been Kinsella v. NYT Television, 370 N.J. Super. 311 (App. Div. 2004). Kinsella outlines three separate approaches used by courts to analyze the issue of waiver of privilege but

declines to adopt one to be used as the test for determination of waiver of an evidentiary privilege. In the subsequent case of Stengart v. Loving Care Agency, Inc., 201 N.J. 300 (2010), the New Jersey Supreme Court also discussed these issues but declined to determine which standard should be applied to the issue of a waiver of privilege, i.e. whether the test was whether the plaintiff "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.

Since Stengart, however, there has been no guidance forthcoming in New Jersey case law regarding the standard to be applied in waiver situations. In the absence of such guidance and the need for certainty by practitioners and trial courts, the Committee formed a Subcommittee during the current term to consider a more limited issue – whether to amend N.J.R.E. 530 to explicitly permit a court to enforce the terms of an anti-waiver agreement reached by the parties for purposes of litigation-related disclosures. The Subcommittee did not address the larger issue of the appropriate standard to be applied by a court in determining whether waiver applies to a disclosure of privileged material. Additionally, the Committee believed that the Subcommittee should reconvene in the next term to explore in greater depth whether it would also be appropriate to adopt a rule of evidence akin to F.R.E. 502 which explicitly provides a standard to be used in evaluating whether waiver applies to a disclosure of a privileged document or whether that issue should remain to be developed through case law. In the meantime, however, the Committee believed that the proposed amendment would benefit the bench and bar by providing certainty for parties in this area where they enter into an agreement regarding inadvertent disclosures of privileged materials.

The members considered the Subcommittee's proposed language as set forth in the Subcommittee's report. See Subcommittee Report attached as Appendix B. The Committee ultimately voted to adopt slightly different language than that proposed, however. Specifically, the phrase "or other" was removed from subpart (c) as redundant, and subpart (d) was deleted altogether due to concerns that the section may be interpreted to impair rights of third parties' access where same was not intended. The Committee also noted that "a court" in the second sentence of subpart (c) would include an administrative law judge in agency proceedings. The proposed amended N.J.R.E. 530 as approved by the Committee is set forth below (additions underlined [deletions bracketed]):

(a) A person waives his right or privilege to refuse to disclose or to prevent another from disclosing a specified matter if he or any other person while the holder thereof has [(a)](1**)** contracted with anyone not to claim the right or privilege or, [(b)] (2) without coercion and with knowledge of his right or privilege, made disclosure of any part of the privileged matter or consented to such a disclosure made by anyone.

(b) A disclosure which is itself privileged or otherwise protected by the common law, statutes or rules of court of this State, or by lawful contract, shall not constitute a waiver under this section. The failure of a witness to claim a right or privilege with respect to one question shall not operate as a waiver with respect to any other question.

(c) Parties may stipulate, in writing, to the effect of an unintentional or inadvertent disclosure of privileged or protected information in the course of litigation or agency proceedings. A court shall have authority to order that there is no waiver of privilege or protection by operation of such written agreement. Such agreement shall control the issue of waiver as to disclosures made in the litigation process or agency proceedings, notwithstanding any common law, statute, or other law concerning waiver of privilege or protection. 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.

530. WAIVER OF PRIVILEGE BY CONTRACT OR PREVIOUS DISCLOSURE; LIMITATIONS

N.J.S. 2A:84A-29 provides:

(a) A person waives his right or privilege to refuse to disclose or to prevent another from disclosing a specified matter if he or any other person while the holder thereof has [(a)] (1) contracted with anyone not to claim the right or privilege or, [(b)] (2) without coercion and with knowledge of his right or privilege, made disclosure of any part of the privileged matter or consented to such a disclosure made by anyone.

(b) … No change

(c) Parties may stipulate, in writing, to the effect of an unintentional or inadvertent disclosure of privileged or protected information in the course of litigation or agency proceedings. A court shall have authority to order that there is no waiver of privilege or protection by operation of such written agreement. Such agreement shall control the issue of waiver as to disclosures made in the litigation process or agency proceedings, notwithstanding any common law, statute, or other law concerning waiver of privilege or protection. 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.

C. Article X Contents of Writings and Photographs Amendments to N.J.R.E. 1001(c) and (d)

N.J.R.E. 1001(c) and (d), Definitions of Original and Duplicate—Admission of Fax and Electronic Copies.

In 2011, a private attorney who represents companies providing telepsychiatry services wrote to Judge Jack Sabatino, Chair of the Civil Practice Committee, requesting that that Committee consider an amendment to R. 4:74-7(b)(1) to allow electronic or facsimile copies of clinical certificates to be accepted into evidence at civil commitment hearings. The letter copied Judge Messano and asked whether N.J.R.E. 1001, Definitions, could be amended to "specifically permit fax or electronic copies to be deemed originals under appropriate conditions . . . ." Judge Messano formed a Subcommittee on N.J.R.E. 1001 (Subcommittee), chaired by Judge Weissbard, to consider this issue.

The Committee first considered the proposal in the 2011-13 term. At that time, the Subcommittee recommended expanding the definition of "original" in N.J.R.E. 1001(c) to include "any electronically transmitted images." The full Committee was unsure whether such an expansion was advisable, however, because the added language would make it possible to turn a duplicate into an original simply by faxing it to someone. In response, the Subcommittee reconvened for further study in the 2013-2015 term.

In the meantime, the Civil Practice Committee recommended a change to R. 4:74-7(b)(1) which permitted a court to accept "a facsimile of the original screening certificate in lieu of the original." The Supreme Court adopted this recommended rule change on July 10, 2012.

In the 2013-15 term, the N.J.R.E. 1001 Subcommittee, after further study, proposed amending N.J.R.E. 1001(c) to provide as follows (additions underlined [deletions bracketed]):

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

The Subcommittee reasoned that this proposal would solve the problem raised by the Committee since an already existing duplicate faxed or scanned into a computer would no longer become an original. It would also resolve the perceived problem that the only original of an electronically created document is the hard disk itself.

The Subcommittee also recommended amending the definition of duplicate in N.J.R.E. 1001(d) to provide as follows (additions underlined):

> (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.

The Subcommittee believed that this amendment would avoid the potential of any one document constituting both an original and a duplicate. See the Subcommittee's report in Appendix C.

The Committee did not have the opportunity to discuss the Subcommittee's proposal to amend N.J.R.E. 1001(c) and (d) during the 2013-2015 term. Consideration

was held until the current term where the Committee discussed the proposal and agreed with the Subcommittee's recommendations to amend N.J.R.E. 1001(c) and (d) as set forth above.

1001. DEFINITIONS

For purposes of this article the following definitions are applicable:

(a) ... No change

(b) ... No change

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

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

II. Matters Held for Future Consideration

A. Restyling of the New Jersey Rules of Evidence

In the Fall of 2007, the federal court system undertook a major rewriting of the Federal Rules of Evidence with a goal "to make the [Federal Evidence] Rules simpler, easier to read, and easier to understand without changing their substance."[2] The restyling of the Federal Rules of Evidence was part of a larger effort to revise all the national rules of procedure so that they were all written in plain language with the same clear, consistent style conventions. The last set of federal procedure rules to be restyled were the Evidence Rules. The restyling of the Federal Rules of Evidence was scheduled last, at least in part, because the difficulty of the task was recognized.[3] As a result of this massive, multi-year effort, on December 1, 2011 the restyled Federal Rules of Evidence took effect.

The New Jersey Rules of Evidence were extensively revised in 1991. The 1991 revision was the result of the Supreme Court seeking input from this Committee as to whether New Jersey should adopt the Federal Rules of Evidence. At that time, the Committee recommended against adopting the Federal Rules as a whole, but rather, as it explained, recommended adopting "the substance and language of the federal rules when we considered them equal to or better than our present rules. However, in a number of instances we preferred the prevailing New Jersey law . . . ." [4] Consequently, the 1991 New Jersey Evidence Rules generally are largely patterned after the Federal Rules of Evidence in effect in 1991, but are by no means identical to them.

---

[2] Davidson M. Douglas et al., The Restyled Federal Rules of Evidence, 53 Wm. & Mary L.Rev. 1435, 1440 (2012).
[3] Id. at 1444.
[4] 1991 Report of the New Jersey Supreme Court Committee on the Rules of Evidence.

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

As a result, in January 2012, Judge Messano appointed a Restyling Subcommittee led by Judge Philip Carchman, to embark on an in-depth study of the restyled Federal Evidence Rules. The Subcommittee's membership was carefully chosen to include judges, practitioners and an academic, all with expertise in the evidence rules, and additionally with expertise in varying substantive areas of the law, including civil and criminal practice, appellate practice, personal injury law, family law, and municipal court practice.

The Restyling Subcommittee subsequently undertook a systematic, rule-by-rule, word-by-word review of the New Jersey Rules of Evidence. Consistent with Chief Justice Rabner's charge, the Subcommittee recognized that its recommendations should be limited to making the New Jersey evidence rules clearer, plainer, and easier to understand, but without changing their meaning. The Subcommittee decided that initially it would be guided by the style rules and guidelines used by the federal Advisory Committee on Evidence Rules that are set forth as a note after Federal Rule of Evidence 101. These style rules include eliminating ambiguous words, minimizing the use of redundant intensifiers, and preserving "sacred phrases;" that is, phrases that have

become so familiar and have been interpreted so frequently in the case law that to alter them would be disruptive.

In its review, the Subcommittee used a meticulous method of analysis. For each Evidence Rule it considered, it compared the federal rule of evidence before the restyling, the federal rule after restyling, the current New Jersey Rule of Evidence, the notes of the federal Advisory Committee and the notes of the 1991 New Jersey Evidence Committee. The Subcommittee also considered revisions to the federal rules of evidence adopted since 1991.

In the 2011-2013 term, the Subcommittee restyled the Article IV evidence rules, N.J.R.E 401 – N.J.R.E. 411. In the 2013-2105 term, the Subcommittee completed restyling Articles I, II, III, VI, IX, X, and XI. The recommendations of the Subcommittee on these articles were adopted by the Committee as a whole.

During the current term, the Subcommittee completed its review of the remaining articles: Article VII, Opinions and Expert Testimony and Article VIII, Hearsay. Article VII had been put aside in prior terms pending the completion of the work of the N.J.R.E. 702 Subcommittee during the 2013-2015 term. Ultimately, the Committee and the Court did not make any changes to N.J.R.E. 702 during the last term, and the Subcommittee proceeded with its restyling review this term. The Subcommittee also reviewed the entirety of Article VIII which contains numerous subsections and thus required substantial examination. As noted in earlier reports, the Restyling Subcommittee did not restyle Article V, Privileges, since this Article consists of privileges that were enacted by statute and incorporated into the Evidence Rules for convenience. See N.J.R.E. 500. The Subcommittee has thus completed its restyling review of all of the articles.

The only task that remains to be completed is an overall review of the proposed changes to ensure consistency in language both in the title and body of the rules. Thereafter, the entire body of work will be presented to the full Committee for vote and, ultimately, presentation to the Supreme Court for its review and approval. The Committee anticipates that this project will conclude in the 2017-2019 cycle.

B. N.J.R.E. 803(c)(27)

During the term, a member requested that the Committee review N.J.R.E. 803(c)(27), Statements Made By a Child Relating to a Sexual Offense, and consider whether portions of this rule are unconstitutional under Crawford v. Washington, 541 U.S. 36 (2004). In the more recent case of State v. P.S., 202 N.J. 232 (2010), the Supreme Court declared subsection (ii) of the rule invalid because it violates the right of confrontation. After discussion and consideration, the Committee initially voted to amend subsection (ii) of the rule to read as follows: "…(ii) in civil proceedings, only, the child is unavailable as a witness and there is offered admissible evidence corroborating the act of sexual abuse…" and include a citation to P.S. in the notes to the Rule.

At the time of the Committee's vote, however, State in the Interest of A.R. A-2238-14T3 was pending before the Appellate Division which could impact another portion of N.J.R.E. 803(c)(27), namely, the "incompetency proviso" within the rule. The Appellate Division issued an opinion in that case in November of 2016 and a petition for Certification to the Supreme Court was filed thereafter. In light of these circumstances, Judge Messano recommended that the Committee consider rescinding its earlier vote regarding N.J.R.E. 803(c)(27)(ii) and wait for further guidance from the Supreme Court so the Committee could address issues related to N.J.R.E. 803(c)(27) in a more comprehensive fashion.

In considering Judge Messano's recommendation, members raised other issues within the rule and discussed relevant case law, which would also require review before any changes are proposed. The Committee voted unanimously to rescind the changes made to N.J.R.E. 803(c)(27)(ii) and revisit this issue by forming a subcommittee to consider these issues in the 2017-2019 term.

C. State v. Bueso, 225 N.J. 198 (2016).

Toward the end of the cycle, the Committee received a referral from Judge Harry Carroll, Chairperson of the Criminal Practice Committee, requesting the Committee's input on developing form questions to pose to a child or a potentially incompetent witness. The request arose out of the case of State v. Bueso, 225 N.J. 193 (2016) where the Supreme Court included a footnote referral to the Criminal Practice Committee to develop the form questions. Because of the potentially significant evidential implications, the Criminal Practice Committee believed that this Committee could provide valuable input when developing the form questions. After consideration and discussion, the Evidence Committee members overwhelmingly agreed that the Evidence Committee should review the issue and make recommendations in conjunction with the Criminal Practice Committee. As a result, the Committee will be forming a joint subcommittee with members of the Criminal Practice Committee to undertake this project during the 2017-2019 cycle.

D. New Rule Proposal to Admit Statements in Treating Physicians' Records.

Toward the end of the cycle, the Committee received a letter from a private attorney proposing the adoption of a new evidence rule which would permit the admission of statements in treating physician's records that are relied upon or intended to be relied upon by any other treating physician. The proposal was made in light of the Appellate Division's 2015 decision of James v. Ruiz, 440 N.J. Super. 45 (App. Div. 2015). The Committee also considered that the fact that the issue of the admission of statements in treating physicians' records is pending before the Supreme Court in the matter of A-4-16 Hayes v. Delamotte (077819), and that these issues could impact N.J.R.E. 808. In light of the timing of the proposal toward the end of the cycle and the pending relevant cases, the Committee agreed that consideration of this proposal should be postponed until the 2017-2019 cycle.

III. Rules Considered and Rejected

A. Revision of N.J.R.E. 803(a), Prior Statements of Witnesses

The Committee considered whether N.J.R.E. 803(a)(2) should be reviewed in light of the 2014 changes to F.R.E. 801(d)(1)(B) which is the analogous federal rule. Specifically, F.R.E. 801(d)(1)(B)(ii) was added to now allow the introduction of a prior consistent statement as substantive evidence when offered, not only to rebut a charge of recent fabrication or improper influence or motive (as under the prior rule), but also to rehabilitate a witness's credibility "when attacked on another ground." This is in contrast to, N.J.R.E. 803(a)(2) which, similar to the former federal rule, only allows introduction of a prior consistent statement as substantive evidence when offered to rebut a charge of recent fabrication or improper influence or motive. Under N.J.R.E. 803(a)(2), a prior consistent statement is not admissible for any other reason.

As part of its consideration, the Committee also reviewed N.J.R.E. 607, which deals with evidence offered to support or impair the credibility of a witness. This Rule specifically states that a prior consistent statement may not be admitted to support the credibility of a witness except to rebut a charge of recent fabrication or improper influence or motive, thus directly linking a credibility offer to the hearsay limit of N.J.R.E. 803(a)(2). The Committee believed that New Jersey's Rule 607 was very "well thought out" in this regard as compared to its federal analogue (F.R.E. 607) which is "abbreviated."

The Committee endeavored to determine whether practitioners or judges were experiencing issues on the trial level concerning these rules as well as the impact of any proposed changes on the established published case law. The members' sentiment was that the mere change of the federal rule should not be a sufficient basis for New Jersey

to change its rule without a showing that there is some need to do so. Ultimately, after much discussion and sharing of members' experiences with this rule, the members indicated that they were not experiencing nor were they aware of any problems with this rule at the trial level. The Committee decided that no change was appropriate at this point but requested that the Restyling Subcommittee reflect in its notes that the Committee was not necessarily opposed to a change, rather, it did not see any basis for one. As such, the Committee voted not to make any changes during the current cycle.

B. Government and Business Records: N.J.R.E. 803(c)(6)and(8)

During the term, an issue was referred by the Restyling Subcommittee to the full Committee regarding whether N.J.R.E. 803(c)(8), Public Records, Reports, and Findings, more commonly referred to as the "public records exception," should be amended in light of two federal cases that were decided, U.S. v. Cain, 615 F.2d 380,382(5th Cir. 1980), and U.S. v. Orellana-Blanco, 294 F.3d 1143, 1149(9th Cir. 2002). Specifically, whether the rule should clarify that a record that is excluded under the public records exception should not be admitted pursuant to the more lenient standards of N.J.R.E. 803(c)(6), the so-called "business records exception." Of particular note was the fact that certain records that might traditionally be considered "public records," such as police reports, are being admitted by trial courts under the "business records exception" of 803(c)(6) because they do not meet the more stringent test for public records under 803(c)(8). In response to the referral, Judge Messano formed a subcommittee to review and compare the rules as well as evaluate the federal case law and provide a recommendation regarding whether either or both of the rules should be amended.

The Subcommittee issued a comprehensive report on the issue and recommended making no change to the current rules. The Committee unanimously adopted the Subcommittee's recommendation in this regard. The Subcommittee's report is annexed hereto as Appendix D. As set forth in the Subcommittee's report, there were several reasons for its recommendations. First, the Subcommittee determined that the federal case law did not articulate a uniform standard to be applied in determining admissibility for these types of records. Next, it was apparent from the historical background of the New Jersey Rules of Evidence that New Jersey always contemplated that "government

records" would be admissible as "business records" under N.J.R.E. 803(c)(6) because New Jersey includes a "government agency" in its definition of a "business." Finally, based on an informal survey by the Subcommittee members to practitioners, the Committee determined that practitioners were not experiencing problems with admissibility of these records at the trial level. Based on these factors, the Committee voted not to take any action with respect to proposing any rule changes at the current time and left the issue open for either case law or the Committee to address in the future, if necessary.

IV. CONCLUSION

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

Respectfully submitted,

Hon. Carmen Messano, P.J.A.D., Chair
Hon. Jamie D. Happas, P.J.S.C., Vice-Chair
Daniel Bornstein, Deputy Attorney General
Hon. Philip S. Carchman, J.A.D. (ret.)
Lori E. Caughman, Esq.
John C. Connell, Esq.
William F. Cook, Esq.
Hon. Rudoplh A. Filko, J.S.C.
Hon. Michele M. Fox, J.S.C.
Husain Gatlin, Esq.
Benjamin Goldstein, Esq.
Hon. James J. Hely, J.S.C.
Hon. Robert Kirsch, J.S.C.
Hon. Lawrence M. Lawson, A.J.S.C. (ret.)
Fahd Majiduddin, Esq.
Jeffrey S. Mandel, Esq.
Hon. Roy F. McGeady, P.J.M.C.
Professor Denis F. McLaughlin
William H. Mergner, Jr., Esq.
Hon. Stephanie Ann Mitterhoff, J.S.C.
Carolyn Murray, Esq.
Hon. Mitchel E. Ostrer, J.A.D.
Fernando M. Pinguelo, Esq.
Jeffrey M. Pollock, Esq.
Joseph J. Rodgers, Esq.
Hon. Patricia B. Roe, P.J.S.C.
John D. Rosero, Esq.
Associate Dean Andrew Rossner
Hon. Jack M. Sabatino, P.J.A.D.
Hon. James P. Savio, J.S.C.
Christopher F. Struben, Esq.
Hon. Francis Vernoia, J.S.C.
Kevin Walker, Esq.
Hon. Harvey Weissbard, J.A.D. (ret.)
Alan L. Zegas, Esq.
Bridget Dorney Chater, Esq., Committee Staff
Kya Saunders, Esq., Committee Staff