# NEW JERSEY
# RULES OF EVIDENCE

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ADOPTED BY c. 52, L. 1960 (EFFECTIVE JULY 1, 1960)
AND BY COURT RULES EFFECTIVE
SEPTEMBER 11, 1967.

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With Annotations Prepared by
The Rules of Evidence Study Commission
of the N. J. Legislature.

NEW JERSEY SENATE

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TO THE MEMBERS OF THE BENCH AND BAR
OF THE STATE OF NEW JERSEY:

This booklet is being supplied to you by the Rules of Evidence Study Commission. It is intended to serve as a temporary guide. This resource material provides workable annotations which can be used until a more comprehensive and complete handbook becomes available. There is presently underway an extensive program updating our evidence rules and related materials for usage during trial. This new program is designed to carry out the purposes of Section 43, PL 1960, (N. J. S. 2A:84A-43).

Any member of the Bench or Bar having constructive comments as to methodology, format and substance are asked to forward them to our research director, Bartholomew Sheehan, Esq., c/o Hyland, Davis & Reberkenny, 130 North Broadway, Camden, New Jersey. Your efforts are reflected in the enclosed work, and are gratefully acknowledged on behalf of the Commission.

Your assistance is earnestly solicited.

Sincerely,

Frank J. Guarini, Jr.

FRANK J. GUARINI, JR.
CHAIRMAN
RULES OF EVIDENCE
STUDY COMMISSION

FJG:jb
Encl.

## SUPREME COURT OF NEW JERSEY

October 30, 1968

The Rules of Evidence are the product of the cooperative effort of the Legislature and the Supreme Court. I wish to thank the members of the Rules of Evidence Study Commission for their splendid services in bringing about the adoption of these Rules. We are also indebted to the members of the Rules of Evidence Study Commission for their temporary annotations which appear in this volume and look forward to the publication within the coming year of their permanent and more extensive annotations. Although in the nature of the subject the Supreme Court cannot adopt these annotations as the expression of its ultimate views, the annotations should nonetheless be useful to both the Bar and the Bench.

JOSEPH WEINTRAUB
*Chief Justice.*

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## Chapter I. GENERAL PROVISIONS

## PREFACE BY THE COMMISSION

The 1967 Rules of Evidence Commission has undertaken to bring to reality the adoption of a useful set of Evidence Rules. The effort began with the Report of the Jacobs Committee (1955), and was carried forward by the Bigelow Commission (1956).

A major step was taken by the adoption of the Evidence Act, 1960. That statute established the basic definitions and scope, and adopted the rules of privilege. Beyond that it created machinery for rules adoption with participation by all three branches of government, the judiciary being charged with the initiating function. Thus, the fearful jurisdictional problems of *Winberry* were laid to rest for this important subject.

After the publication of a further report by the Jacobs Committee (1963), and after extensive study and discussion, the remaining rules proposed by the Supreme Court were put in force on September 11, 1967.

This effort, spanning more than a dozen years, represented unstinting dedication toward achievement of the goal by bench and bar alike. The many individuals who contributed countless hours of research, discussion and debate, and secretarial assistance are too numerous to be listed here. They know who they are. Suffice it to say that they included appellate judges, trial judges, experienced lawyers, theoretical lawyers, and professors of evidence law from a number of law schools. All of them may justly take pride in the final product.

The effort, interestingly enough, began with a relatively academic format and was completed by sophisticated adjustments to reflect the realities of the courtroom. The

philosophy of the Rules is neither conservative nor liberal. It is realistic. The object throughout has been to compose a set of general rules in a complex field, that would provide useful anchors and guides in the day-to-day management of the trial process. For this to be efficient in an adversary posture with an impartial umpire, it is vital that both sides and the judge be equipped to deal quickly and surely with questions of evidence. No effort has been spared to make this possible.

There are, consequently, two separate phases to the whole effort. One is aimed at providing a solid foundation for dealing with the kind of question that arises repeatedly in endless trial after trial. The other is creative, and is aimed at constant improvement and broadening of the initial effort.

The 1967 Commission felt it had found an effective avenue for judicial-legislative cooperation that holds great hope for creative advances, not only in evidence law but in other areas of common concern as well.

It is hoped that the current pamphlet, and the more ambitious handbook to follow, will mark the start of a new era in the development of jurisprudence.

For the Commission

Senator Frank J. Guarini, Chairman.



## PRELIMINARY COMMENTS TO THE RULES

*Prepared by Vincent P. Biunno, Esq., of Newark, New Jersey, a member of the New Jersey Bar.*

### HOW THE RULES CAME INTO EXISTENCE.

The Evidence Act, 1960 (L. 1960, c. 52) adopted as law Rules 1(1) through 1(13)—Definitions; Rule 2—Scope of the Rules; and Rules 23 through 40—Privileges.

The same law set up machinery for the adoption of other rules by the joint participation of all three branches of government. Briefly, this contemplates an initiating function in the Supreme Court, which may propose rules after discussion at a Judicial Conference, and by a filing with both Houses and with the Governor. Rules so proposed take effect on July 1 of the next year unless the Legislature disagrees, this to be expressed by joint resolution approved by the Governor. See N.J.S. 2A:84A-33 to 44.

This mechanism, involving as it does the participation of all branches of State Government, renders moot any question of promulgating authority. It is borrowed from the arrangement under which the federal court rules have been promulgated, 28 U.S.C.A. sec. 723.

Rules were proposed by the Supreme Court in September, 1964. Their effective date was several times postponed. In 1967, by JR-5, changes in the language of some rules and deletion of others were set forth, with all the rules not already law to take effect September 11, 1967. In accordance with the joint resolution, a Supreme Court order was entered promulgating these rules as so modified.

## EFFECT OF THE RULES ON EXISTING STATUTES.

The enabling act is designed to prevent unintended repeal of existing statutes on evidence. Rule 2(4) declares that neither the rules enacted by statute nor those adopted by the Court are to repeal any statute by implication.

By section 40 of the Evidence Act, 1960, N.J.S. 2A:84A-40, rules adopted by the Court can supersede existing statutes, but to have this effect the statutes to be superseded must be expressly identified by footnote to the rule adopted. The text of such footnotes will be found among the rules in this publication.

This point has come up and has been dealt with exactly as intended by the Evidence Act, 1960. See, *Waterfront Comm'n,* 39 N. J. 436, at 454-456 (1963).

In keeping with this approach, the Evidence Act, 1960, in addition to adopting some rules and arranging for the Supreme Court to initiate others, made some statutory changes itself. These were as follows:

. . . the Dead Man's Act, N.J.S. 2A:81-2, was amended to allow testimony of transactions with a party decedent or lunatic, but requires the claim or affirmative defense involved to be established by clear and convincing proof;

. . . the statute on privilege from arrest in certain cases, N.J.S. 2A:81-17, was amended to correct an erroneous internal cross-reference;

. . . the statute on proof of foreign public record matters, N.J.S. 2A:82-16, was amended to overcome the effect of *State* v. *Black,* 31 N. J. Super. 418 (App. 1954), which had failed to recognize that I.C.C. tariffs are privately printed under Commission practice;



. . . part of the statute on judicial notice of foreign law, N.J.S. 2A:82-27 was amended to permit notice other than by pleading the foreign law; but that section, as well as others in the group, is now superseded by Rules 9, 10, 11 and 12, as indicated by the official footnote;

. . . a number of privilege statutes covered by new rules enacted in 1960 were repealed, as follows:

N.J.S. 2A:81-3, Marital Witnesses in Criminal Cases, now Rule 23(2);

N.J.S. 2A:81-5, Self-Incrimination, now Rules 23, 24, 25;

N.J.S. 2A:81-7, Marital Privilege, now Rule 28;

N.J.S. 2A:81-9, Priest-Penitent Privilege, now Rule 29;

N.J.S. 2A:81-10, Newspaperman's Privilege, now Rule 27.

## WHERE THE RULES APPLY.

The Privilege Rules (23 through 40), apply everywhere and these rules may not be relaxed. See Rule 2(1).

All the other rules apply to all proceedings, civil or criminal, in a court (unless the rule content is itself limited to civil or criminal cases). See Rule 2(2).

The same is true of such other rules in respect to formal hearings before administrative tribunals (at all levels of government) except to the extent that the enabling statute governing the tribunal states otherwise, or that the tribunal, under statutory authority, may adopt regulations to the effect that the rules of evidence shall not apply. Some examples of such statutes are:

R.S. 17:1-8.10 (Commissioner of Banking and Insurance)

R.S. 34:15-56 (Workmen's Compensation Claims)

R.S. 43:21-50(a) (Review of temporary disability claims)

R.S. 48:2-32 (Hearings before P.U.C.)

## EVIDENCE MATTERS NOT COVERED BY THESE RULES.

The group of evidence rules, from Rule 1(1) through Rule 71, does not purport to embody all the law of evidence.

The Model Code of Evidence, approved by the American Law Institute in 1942, attempted comprehensive coverage, but in so doing it presented so many details as to discourage official enactment anywhere. The Uniform Rules of Evidence approved by the National Conference of Commissioners on Uniform Rules in 1953 (on which the present rules are modelled) represented a much more modest approach.

Some examples of important areas in evidence law not dealt with by the present set of rules (in the sense that these matters have a daily or significant effect in the process of adducing evidence) are as follows:

... matters usually left to the control of the trial court, such as order of proof;

... the parol evidence rule;

... the several statutes of frauds and their equivalents;

... the special rules limiting the defenses available to a holder in due course of a negotiable instrument to stated "personal defenses", which have been described as being in the nature of evidence rules to the extent that a witness is not allowed to testify on certain matters as to special parties.



## RELATION OF THE RULES TO DECISIONAL LAW.

Rule 5 deals with this subject by stating that the adoption of rules is not to 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.

This is not a rule of relaxation, and neither trial judges nor appellate courts are to so consider it.

The rules, whether enacted by statute or adopted by the Supreme Court with legislative concurrence, are essentially statutory in nature. To the extent that a matter of evidence is dealt with by the rules, the rules are to be applied as written.

There will be areas in which evidence law will continue to develop on a case-by-case decisional basis.

One area will involve matters not dealt with by the formal rules (e.g., the parol evidence rule). Another area will involve cases with situations not foreseen specifically, and for which the formal rules will need to be construed and interpreted in the same way as statutes are. The third area will involve situations where some paramount requirement, such as constitutional provisions and decisions interpreting them, will bar the application of a formal rule or rule provision. This has already occurred in the case of Rule 23(4).

At the same time, it is not to be expected that the appellate courts will employ the decisional process on a case-by-case basis to modify the formal rules in the event it should seem that the applicable rules, as adopted, ought to be modified on the basis of experience or theory. In such situations the available flexible mechanism by which the Supreme Court initiates changes in the evidence rules is much more likely to be employed.

The creation of a permanent legislative commission to consult with the Court on such matters will very likely develop workable and flexible arrangements. See c. 183, L. 1968.

## GENERAL APPLICATION OF RULES.

The evidence rules were written as a comprehensive collection, and each rule is to be read and applied as part of the whole collection. In actual use it will therefore be important for users to have a good working familiarity with their overall content.

In addition, it must not be overlooked that the rules are to be applied in the context of the particular case and the issues which it involves, factually as well as legally. This is especially important in applying the hearsay exceptions which, by themselves, say that one or another kind of proof "is admissible". What this means, more accurately, is that the proof is not objectionable on the ground of hearsay; but it may be objectionable on some other ground.

Most important of all, the value of the rules will be greatly increased if they are referred to as authority in the course of argument, briefs or decision, instead of strings of reported decisions, wherever possible. For the daily run-of-the-mill evidence question, this should be enough. It will only be in the relatively rare situation where more than this will be needed.

## FUNCTIONS OF THE COMMISSION.

During the period when rules proposed by the Supreme Court were under consideration, a legislative commission established by joint resolution each year undertook to study the rules content and advise the legislature in respect to whether the rules should be allowed to take effect.



The 1967 Commission went beyond the work of its predecessors. It reviewed the rules and sifted them into three categories. One group encompassed those rules that presented no difficulty. The second group included those few rules regarded as unacceptable as a matter of policy. The third group was made up of rules generally acceptable but felt to need some change of substance or of clarification.

Comments on the second and third groups of rules were written up, submitted to the Supreme Court for study, and then discussed at joint conferences between the Commission and the Court.

The joint conferences were highly constructive. In contrast to the prior atmosphere of gingerly felt distrust, the two groups quickly discovered that both sincerely wanted to develop a sound set of rules. The discussions disclosed, on the one hand, that the Court recognized the validity of the questions raised by the Commission, and on the other hand that the Court was able and willing to improve upon the expression of concepts raised by Commission comments.

The experience was so mutually gratifying that the 1967 Commission chairman was moved to introduce and secure enactment of c. 183, P.L. 1968 (Senate No. 99), which establishes the Commission on a permanent basis. This law has established a new avenue of communication between the Court and the Legislature in an important field of law with which both branches of government are inevitably concerned. The success of the early efforts is encouraging; the future results of this cooperative endeavor should provide a useful model for further enlarging the channels of communication.

## THE COMMISSION PROGRAM.

Once the basis for adoption of the rules had been established, the Commission undertook arrangements for prompt

publication and distribution. This was first done for early and broad distribution through publication in the New Jersey Law Journal.

Thereafter, the Commission arranged for publication and distribution by Gann Law Books of a pamphlet of the rules, in August of 1967.

Since then the Commission has prepared the present pamphlet, with brief comments, explanations and illustrations where appropriate.

As its next effort, the Commission has launched the preparation of a condensed but comprehensive handbook on New Jersey Evidence Law, embracing not only the Rules explicitly adopted, but other areas now governed by existing statute and case law. Publication is scheduled for the Summer of 1969.

## FOOTNOTES AND EDITORIAL NOTES.

In working with this edition of the evidence rules, several matters should be carefully noted in respect to footnotes, editorial notes, and the like:

... "Official Notes", which are entirely in boldface type immediately following a rule, are footnotes adopted by the Supreme Court as part of the rules themselves, and under the authority of N.J.S. 2A:84A-40, these have the effect of superseding the specific statutes mentioned. In this edition, the phrasing of these notes has been altered editorially to add the word "Official" as well as an explicit reminder that cited statutes are superseded;

... To avoid being misled, it is urged that you go through the "Official Notes" and make an entry in the margin of your statute books opposite each statute that is superseded; and noting there the



evidence rule number involved, to serve as a reminder until such time as the statute book publishers have made appropriate entries;

... Bracketed notations of rules originally proposed but which were not finally adopted are included in the text as well as in the table of contents and index; these are editorial entries included to preserve some of the history as it may bear on interpretation;

... Following many of the rules, brief editorial notes have been inserted to provide explanation, illustration, caution, cross-reference, and a restricted number of important citations; all of these entries are unofficial, but were prepared by the 1967 Commission as an aid to the bench and bar;

... Two additional privilege rules have been added editorially; Rule 26A-1 is a psychologist's privilege enacted by 1966 statute, and Rule 26A-2 is a physician's privilege enacted by 1968 statute. Neither statute was drafted to coordinate with the privilege rules enacted in 1960, although the 1968 statute is a supplement to the Evidence Act, 1960. Caution will be in order in analyzing these two new privilege laws, especially in regard to Rule 2, Scope, the application of which is uncertain.

# NEW JERSEY RULES OF EVIDENCE

[**Note:** By the Evidence Act, 1960, the Legislature enacted Rules 1 and 2 (Definitions and Scope), and Rules 23 through 40 (Privileges). The remaining rules, and a technical change to Rule 1(13), are effective September 11, 1967, in accordance with proposed rules submitted by the Supreme Court as modified by joint resolution. These rules do not supersede existing statutes except where expressly noted. See N.J.S. 2A:84A-40.].

## CHAPTER I. GENERAL PROVISIONS

### RULE 1. DEFINITIONS

As used in the rules set forth in this act or in rules adopted pursuant hereto, the terms defined in this article shall have the meaning specified unless the context indicates a contrary intention. L. 1960, c. 52, p. 452, § 1 [N.J.S. 2A:84A-1.]

**Caution:** The definitions apply to rules adopted by the Evidence Act itself as well as those initiated by the Supreme Court.

**Rule 1(1). "Evidence".**

"Evidence" is the means from which inferences may be drawn as a basis of proof in duly constituted judicial or fact-finding tribunals, and includes testimony in the form of opinion, and hearsay. L. 1960, c. 52, p. 452, § 2 [N.J.S. 2A:84A-2.]

**Rule 1(2). "Relevant evidence".**

"Relevant evidence" means evidence having any tendency in reason to prove any material fact. L. 1960, c. 52, p. 452, § 3 [N.J.S. 2A:84A-3.]

**Caution:** Observe that the term "material fact" is not defined by the rules.

**Rule 1(3). "Proof".**

"Proof" is all of the evidence before the trier of the fact relevant to a fact in issue which tends to prove the existence or non-existence of such fact. L. 1960, c. 52, p. 452, § 4 [N.J.S. 2A:84A-4.]

**Rule 1(4). "Burden of proof".**

"Burden of proof" 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. Burden of proof is synonymous with "burden of persuasion." L. 1960, c. 52, p. 452, § 5 [N.J.S. 2A:84A-5.]

**Caution:** In each field, rules of substance or policy will tend to control who carries the burden of proof and its nature. See, e.g., the revised Dead Man's Act, N.J.S. 2A:81-2. This "burden of proof" does not shift.

**Rule 1(5). "Burden of producing evidence".**

"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 a material issue of fact. L. 1960, c. 52, p. 453, § 6 [N.J.S. 2A:84A-6.]

**Caution:** This "burden of producing evidence" does shift according to the state of the proofs at various stages of the case.

**Rule 1(6). "Conduct".**

"Conduct" includes all active and passive behavior, both verbal and nonverbal. L. 1960, c. 52, p. 453, § 7 [N.J.S. 2A:84A-7.]



**Rule 1(7). "The hearing".**

"The hearing," unless some other is indicated by the context of the rule where the term is used, means the hearing at which the question under a rule is raised, and not some earlier or later hearing. L. 1960, c. 52, p. 453, § 8 [N.J.S. 2A:84A-8.]

**Caution:** In respect to discovery proceedings, compare R.R. 4:16-5, 4:20-3 and 4:22-3.

**Rule 1(8). "Finding of fact".**

"Finding of fact" means the determination from proof or judicial notice of the existence of a fact. A ruling implies a supporting finding of fact; no separate or formal finding is required unless required by a statute or rule of court of this State. L. 1960, c. 52, p. 453, § 9 [N.J.S. 2A:84A-9.]

**Caution:** This rule should be kept in mind when reading Rule 8, for example, insofar as the ruling implies the requisite finding.

**Rule 1(9). "Guardian".**

"Guardian" means the person, committee, or other representative authorized by law to protect the person or estate or both of an incompetent or a sui juris person having a guardian and to act for him in matters affecting his person or property or both. An incompetent is a person under disability imposed by law. L. 1960, c. 52, p. 453, § 10 [N.J.S. 2A:84A-10.]

**Rule 1(10). "Judge".**

"Judge" means member or members or representative or representatives of a court or other tribunal conducting a trial or hearing at which evidence is introduced. L. 1960, c. 52, p. 453, § 11 [N.J.S. 2A:84A-11.]

**Rule 1(11). "Trier of fact".**

"Trier of fact" includes a jury and a judge when he is trying an issue of fact other than one relating to the admissibility of evidence. L. 1960, c. 52, p. 453, § 12 [N.J.S. 2A:84A-12.]

**Rule 1(12). "Verbal".**

"Verbal" includes both oral and written words. L. 1960, c. 52, p. 453, § 13 [N.J.S. 2A:84A-13.]

**Rule 1(13). "Writing".**

"Writing" means handwriting, typewriting, printing, photostating, photography and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds or symbols, or combinations thereof, provided that such recording is (a) reasonably permanent and (b) readable by sight. When information or data is recorded by means of a generally accepted method or system, which is operated with suitable controls to safeguard the reliability and accuracy of the information or data, and which is equipped with means for providing a reproduction that is a "writing", such reproduction shall be treated as the equivalent of the information or data, notwithstanding that the form of recording does not itself constitute a "writing" as defined by this rule.

**Official Note: N.J.S. 2A:84A-14, Rule 1(13), is included in this Rule, which replaces the statute.**

**Illustrations:** Braille and teletypewriter tape are reasonably permanent and readable by sight. A printout on paper from invisible recordings in a computer is a writing; but proof of suitable safeguards is required. Sky-writing, TV-screen images, sand writing and other passing images are not "writings"; but photographs of them would be. And see, R.S. 14:1-3.1, for corporate records.



**Rule 1(14). "Perceive".**

"Perceive" means acquire knowledge through one's own senses. L. 1960, c. 52, p. 454, § 15 [N.J.S. 2A:84A-15.]

## RULE 2. SCOPE OF THE RULES

(1) The provisions of article II [Chapter V of the Rules], Privileges, shall apply in all cases and to all proceedings, places and inquiries, whether formal, informal, public or private, as well as to all branches of government and by whomsoever the same may be conducted, and none of said provisions shall be subject to being relaxed.

**Caution:** This comprehensive scope reflects a legislative determination that the policies behind each privilege are given greater weight than the evidence they make unavailable.

(2) All other rules contained in this act, or adopted pursuant hereto, shall apply in every proceeding, criminal or civil, conducted by or under the supervision of a court, in which evidence is produced.

**Distinction:** In the case of discovery depositions, where "inadmissible" evidence may be gathered, this rule applies at the point when the deposition is offered in evidence (subject to the various practice rules on waiver).

(3) Except to the extent to which the rules of evidence may be relaxed by or pursuant to statute applicable to the particular tribunal and except as provided in paragraph (1) of this rule, the rules set forth in this act or adopted pursuant hereto shall apply to formal hearings before administrative agencies and tribunals.

**Examples:** R.S. 17:1-8.1 (Banking and Insurance);
R.S. 34:15-16 (Workmen's Compensation);
R.S. 43:21-50(a) (Disability Claims);
R.S. 48:2-32 (P.U.C.)

(4) The enactment of the rules set forth in this act or the adoption of rules pursuant hereto shall not operate to repeal any statute by implication. L. 1960, c. 52, p. 454, § 16 [N.J.S. 2A:84A-16.]

**Example:** R.S. 32:23-86(5), in the Waterfront Commission Act, held not impliedly repealed by Rule 24. 39 N.J. at 453-455.

## RULE 3. EXCLUSIONARY RULES NOT TO APPLY TO UNDISPUTED MATTER

In civil proceedings, if the judge finds at the hearing that there is no bona fide dispute between the parties as to a material fact, such fact may be proved by any relevant evidence, and exclusionary rules shall not apply, except for Rule 4 or a valid claim of privilege.

[**Rule 4. Effect of Erroneous Admission of Evidence.** Not adopted. Rule 45 renumbered and adopted in substitution therefor as Rule 4, following.]

## RULE 4. DISCRETION OF JUDGE TO EXCLUDE ADMISSIBLE EVIDENCE

The judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will either (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury.

**Reference:** See Rule 47, which bars use of Rule 4 in connection with character evidence for accused in criminal cases.

[**Rule 5. Effect of Erroneous Exclusion of Evidence.** Not adopted. Rule 5, following, adopted in substitution therefor.]



## RULE 5. RELATION OF THESE RULES TO LAW OF EVIDENCE

The adoption of these rules 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.

**Caution:** Distinguish from Rule 2(4). Rule 5 itself reflects the concept that the whole group of rules is not considered the "final word forever." The ordinary decisional process will function as to matters not covered by the rules, and the rules themselves are open to change by the Supreme Court through the amendment process as experience may require. But Rule 5 is not a rule of relaxation.

## RULE 6. LIMITED ADMISSIBILITY

When relevant evidence is admissible as to one party or for one purpose and is inadmissible as to other parties or for another purpose, the judge shall restrict the evidence to its proper scope and instruct the jury accordingly.

**Example:** See *Ordog,* 45 N.J. at 355 (1965) and *Young,* 46 N.J. at 159 (1965) for jury instruction and effective deletion procedures in criminal cases when offering statement by one accused which implicates another on trial. Also see *Bruton,* 36 L.W. 4447 (1968), overruling *Delli Paoli,* 352 U.S. 232 (1957) in respect to jury instructions to disregard.

## RULE 7. GENERAL ABOLITION OF DISQUALIFICATIONS AND PRIVILEGES OF WITNESSES, AND OF EXCLUSIONARY RULES

Except as otherwise provided in these rules or by other law of this State, (a) every person is qualified to be a

witness, and (b) no person has a privilege to refuse to be a witness, and (c) no person is disqualified to testify to any matter, and (d) no person has a privilege to refuse to disclose any matter or to produce any object or writing, and (e) no person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any object or writing, and (f) all relevant evidence is admissible.

**Official Note: N.J.S. 2A:81-1 and 8 are included in this Rule. R.S. 19:-34-26 is inconsistent with this Rule. These statutes are superseded by this Rule.**

**Caution:** The operation of Rule 7 is restricted by Rule 2(4). See, 39 N.J. at 453-455.

## RULE 8. PRELIMINARY INQUIRY BY JUDGE

(1) When the qualification of a person to be a witness, or the admissibility of evidence, or the existence of a privilege is stated in these rules to be subject to a condition, and the fulfillment of the condition is in issue, that issue is to be determined by the judge. In his determination the rules of evidence shall not apply except for Rule 4 or a valid claim of privilege. The judge shall indicate to the parties which one has the burden of producing evidence and the burden of proof on such issue as implied by the rule under which the question arises. The judge may hear and determine such matters out of the presence or hearing of the jury. This rule shall not be construed to limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

(2) Where evidence is otherwise admissible if competent and its competence is subject to a condition, the judge shall admit it if there is 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 they find that the condition was not fulfilled. The judge shall instruct the jury to disregard the evidence if he subsequently determines that a jury could not reasonably find that the condition was fulfilled.

(3) In the case of a statement against the penal interest of the defendant on trial in a criminal proceeding, the judge, if requested, shall hear and determine the question of its admissibility out of the presence and hearing of the jury. In such a hearing the rules of evidence shall apply and the burden of proof as to admissibility of the statement is on the prosecution. If the judge admits the statement he shall not inform the jury that he has made a finding that the statement is admissible, and he shall instruct the jury that they are to disregard the statement if they find that it is inadmissible under the rules of law pertaining to such statements. The judge shall strike the statement from the record and instruct the jury to disregard it if he subsequently determines that a jury could not reasonably find that the statement was admissible.

**Example:** *Yough,* 49 N.J. at 597-598 requires the preliminary finding on admissibility of an accused's statement to be "beyond a reasonable doubt", and equates this with being "satisfied" on the preliminary fact issues.

**History:** Rule 8(3) embodies the current New Jersey practice as adopted by *Smith,* 32 N.J. 501 at 557 (1960). For discussion of other practices, see *Denno,* 378 U.S. 368 (1964) and *Pinto,* 389 U.S. 31, 19 L. ed. 31 (1967), and the analysis in *Broxton,* 49 N.J. 373 (1967).

## CHAPTER II. JUDICIAL NOTICE

### RULE 9. FACTS AND LAW WHICH MUST OR MAY BE JUDICIALLY NOTICED

(1) Judicial notice shall be taken, without request by a party, of the decisional, constitutional, and public statutory law and rules of court of this State and the decisional, constitutional, and public statutory law and rules of court of the United States, and of such specific facts and propositions of generalized knowledge as are so universally known that they cannot reasonably be the subject of dispute.

(2) Judicial notice may be taken, without request by a party, of (a) the decisional, constitutional and public statutory law and rules of court of every other state, territory and jurisdiction of the United States, private acts and resolutions of the Congress of the United States and of the legislature of this State, and of every other state, territory and jurisdiction of the United States, and duly enacted ordinances and duly published regulations and determinations of governmental subdivisions or agencies of the United States, of this State, and of every other state, territory and jurisdiction of the United States; (b) records of the court in which the action is pending and of any other court of this State or federal court sitting in or for this State; (c) the law of foreign countries; (d) such facts as are so generally known or of such common notoriety within the area pertinent to the event that they cannot reasonably be the subject of dispute; and (e) specific facts and propositions of generalized knowledge which are capable of immediate determination by resort to sources of reasonably indisputable accuracy.

(3) Judicial notice shall be taken of each matter specified in paragraph (2) of this rule if a party requests it and (a) furnishes the judge sufficient information to enable him properly to comply with the request and (b) has given each adverse party notice thereof in the pleadings or at least 20 days before the trial. The judge, however, may permit such notice to be given at any time in the interest of justice. In the absence of an adequate basis for taking judicial notice of the law of any jurisdiction other than this State and the United States, the judge shall apply the law of this State.

**Official Note: N.J.S. 2A:82-27 through 33 are rendered obsolete by this Rule and Rules 10 through 12, and are superseded thereby.**

**Explanation:** Rule 9(1) lists items that the court must notice in any case; 9(2) lists items the court is allowed to notice on its own; 9(3) makes it mandatory for the court to notice the 9(2) items if a party so requests and supplies the requisite data, on proper notice.

**Caution:** Note the requirement, in the last sentence of Rule 9(3), that the law of New Jersey is to be applied in the absence of a basis for applying foreign law.

### RULE 10. DETERMINATION AS TO PROPRIETY OF JUDICIAL NOTICE AND TENOR OF MATTER NOTICED

(1) The judge shall afford each party reasonable opportunity to present to him information relevant to the propriety of taking judicial notice of a matter or to the tenor of the matter to be noticed.

(2) In determining the propriety of taking judicial notice of a matter or the tenor thereof, (a) any source of relevant information may be consulted or used, whether or not furnished by a party, and (b) no rule of evidence except Rule 4 or a valid claim of privilege shall apply.

(3) If the information possessed by or readily available to the judge, whether or not furnished by the parties, fails to convince him that a matter falls within Rule 9, or if it is insufficient to enable him to notice the matter judicially, he shall decline to take judicial notice thereof.

(4) The determination of the applicability and the tenor of any matter falling within Rule 9 shall be for the judge and not for the jury.

**Official Note: See note to Rule 9.**

**Explanation:** Rule 10 provides great procedural flexibility in dealing with judicial notice matters. It is designed to avoid needless trial of matters that are to be noticed, and to preclude the risk that erroneous findings would be made.

### RULE 11. INSTRUCTING THE JURY, RECORDING AND INDICATING SOURCE OF MATTER JUDICIALLY NOTICED

On request the judge shall (a) instruct the trier of fact to accept a matter judicially noticed; (b) indicate for the record the matter noticed; and (c) indicate the source of his information.

**Official Note: See note to Rule 9.**

### RULE 12. JUDICIAL NOTICE IN PROCEEDINGS SUBSEQUENT TO TRIAL

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



(2) The reviewing court in its discretion may take judicial notice of any matter specified in Rule 9, whether or not judicially noticed by the judge.

(3) A judge or a reviewing court taking judicial notice under paragraph (1) or (2) of this rule of matter not theretofore so noticed in the action may afford the parties opportunity to present information relevant to the propriety of taking such judicial notice and to the tenor of the matter to be noticed.

**Official Note: See note to Rule 9.**

**Explanation:** Presumably, a reviewing court would feel itself obliged to notice a matter which the lower court failed to notice when it was mandatory to do so. This would be especially true in respect to local matters. Note, also, that much the same result can be reached through the exercise of original jurisdiction under N.J. Const. 1947, Art. VI, Sec. V, par. 3, and the practice rules.

## CHAPTER III. PRESUMPTIONS

### RULE 13. DEFINITION OF PRESUMPTION

A presumption is a rebuttable assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts found or otherwise established in the action.

**Explanation:** The definition is limited to presumptions that may be rebutted, whether by a preponderance, by clear and convincing proof, or by proof beyond a reasonable doubt. Conclusive presumptions are not affected by Rules 13 and 14, BUT NOTE that even for these, a fact issue may be raised on the "underlying fact" from which the "assumed fact" is required.

### RULE 14. EFFECT OF PRESUMPTION

If evidence to the contrary of a presumed fact is offered, the existence or nonexistence of such fact shall be for the trier of fact, unless the evidence is such that the minds of reasonable men would not differ as to the existence or nonexistence of the presumed fact.

**Explanation:** This rule changes existing law. The rule has been that if contrary evidence was introduced, the presumption was gone (at least for "ordinary" presumptions). Under this rule a fact issue remains, with no distinction between "logical" and "artificial" presumptions. The effect of the rule is that (a) if there is no evidence to contradict either the underlying fact or the assumed fact, the assumed fact *must* be taken to exist and the jury should be so instructed (without using the word "presumption"); and (b) if there is evidence to contradict either the underlying fact or the assumed fact (including matters going to credibility), the jury is to determine the existence of the assumed fact as on any other contested issue.

**[Rule 15. Inconsistent Presumptions.** Not adopted.]

**[Rule 16. Burden of Proof not Relaxed as to Some Presumptions.** Not adopted.]

## CHAPTER IV. WITNESSES

### RULE 17. DISQUALIFICATION OF WITNESS; INTERPRETERS

A person is disqualified to be a witness if the judge finds that (a) the proposed witness is incapable of expressing himself concerning the matter so as to be understood by the judge and jury either directly or through interpretation by one who can understand him, or (b) the proposed witness is incapable of understanding the duty of a witness to tell the truth. An interpreter is subject to all the provisions of these rules relating to witnesses.



**Explanation:** This rule qualifies Rule 7 (a), and goes to the competence of the witness to testify at all. Issues of mental capacity (e.g., insanity or infancy) are tested by this rule and are decided by the judge under Rule 8. A ruling allowing the witness to testify does not bar challenges to the weight of the testimony. Compare Rule 19. Also note the 1960 change to the Dead Man's Act, N.J.S. 2A:81-2.

### RULE 18. OATH, AFFIRMATION OR DECLARATION

A witness before testifying shall be required to take an oath or make an affirmation or declaration to tell the truth under the penalty provided by the law. No witness may be barred from testifying because of religion or lack of it.

**Caution:** The form of the oath or declaration continues to be governed by the statute, R.S. 41:1-6.

### RULE 19. PREREQUISITES OF PERSONAL KNOWLEDGE AND EXPERIENCE

As a prerequisite for the testimony of a witness there must be evidence that he has personal knowledge of the matter, or experience, training or education, if such be required. Such evidence may be provided by the testimony of the witness himself. The judge may reject the testimony of a witness that he perceived a matter if he finds that no trier of fact could reasonably believe that the witness did perceive the matter. In exceptional circumstances the judge may receive the testimony of the witness conditionally, subject to the evidence of knowledge, experience,

training or education being later supplied in the course of the trial.

**Explanation:** Unlike Rule 17, this rule goes to a witness' qualification to testify to a particular matter and deals with foundation evidence.

**Illustration:** A question asking a deaf witness what he heard, or a blind witness what he saw. Distinguish the effect of N.J.S. 3A:3-6, under which a beneficiary who witnesses the will is disqualified from taking under it. And cf. N.J.S. 3A:3-22.

## RULE 20. EVIDENCE GENERALLY AFFECTING CREDIBILITY

Except as otherwise provided by Rules 22 and 47, for the purpose of impairing or supporting the credibility of a witness, any party including the party calling him may examine him and introduce extrinsic evidence relevant upon the issue of credibility, except that the party calling a witness may not neutralize his testimony by a prior contradictory statement unless the judge finds he was surprised. No evidence to support the credibility of a witness shall be admitted except to meet a charge of recent fabrication of testimony.

**Caution:** While the original proposal was broad enough to permit impeachment of one's own witness, the exception added in the final draft probably limits this to neutralization in cases of surprise. These would be no point to an impeachment (i.e., an attack on the witness' general reputation for truth and veracity) for other purposes not permitted. Query: There may be open questions in cases of witnesses who switch stories: (a) if the party is aware of the switch and so informs the court, may the witness be called as the court's witness; (b) in the same



case, should the witness first testify without the jury—it may be that he will not switch.

**[Rule 21. Evidence of Conviction of Crime as Affecting Credibility.** Not adopted.]

**Caution:** The omission of this rule leaves the statute, N.J.S. 2A:81-12, in force, except for the last part which is superseded by the official note to Rule 63 (20).

## RULE 22. 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 in writing inconsistent with any part of his testimony it shall not be necessary to show or read to him 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 an opportunity to identify, explain or deny the statement; (c) evidence of traits of his character other than honesty or veracity or their opposites, shall be inadmissible; (d) evidence of specific instances of his conduct, relevant only as tending to prove a trait of his character, shall be inadmissible.

**Explanation:** Part (a) wipes out the rule of *Queen Caroline's Case,* 2B & B 284 (1820); and see *Wassmer,* 122 N.J.L. 367 at 372-3 (E & A 1939). And note that parts (c) and (d) do not apply to proof of character or reputation of the accused on trial, offered not as affecting credibility but to raise a reasonable doubt on guilt or innocence. See Rule 47, and *Baker,* 53 NJL 45, 47 (Sup.Ct. 1890).

## CHAPTER V. PRIVILEGES

**Caution:** All of the privilege rules (23 to 40) were enacted by statute, c. 52, L. 1960, and have been law since that time. All of these rules reflect legislative determinations of public policy considered to be more important than the evidence excluded. ALSO NOTE that the privilege rules apply everywhere, not only in the courts. See Rule 2. See also editorial rules 26A-1 and 26A-2 for newly enacted privileges (psychologists and physicians).

### RULE 23. PRIVILEGE OF ACCUSED

(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.

**Explanation:** This is the right of the accused not to testify at all. Distinguish from "self-incrimination" under Rule 25. If the accused *does* testify, note the effect of Rule 25(d).

(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.

**Explanation:** This replaces N.J.S. 2A:81-3, repealed. It goes to competence and compellability and is not limited to marital communications, cf. Rule 28. Changes effected are: (a) no distinction is made between competence and compellability; and (b) offenses against children are added to the exceptions.

(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.

**Explanation:** This is mainly directed to courtroom situations, such as asking the accused to stand, display a scar, etc.

(4) If an accused in a criminal action does not testify after direct evidence is received of facts which tend to prove some element of the crime and which facts, if untrue, he could disprove by his own testimony, counsel and the judge may comment on his failure to testify, and the trier of fact may draw an inference that accused cannot truthfully deny those facts. L. 1960, c. 52, p. 454, § 17 [N.J.S. 2A:84A-17.]

**Caution:** This provision is no longer law. See *Griffin,* 380 U.S. 609 (1965); *Lanzo,* 44 N.J. 560 (1965); *Aviles,* 45 N.J. 152 (1965) and 49 N.J. 192 (1967).

### RULE 24. DEFINITION OF INCRIMINATION

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. L. 1960, c. 52, p. 455, § 18 [N.J.S. 2A:84A-18.]

**Explanation:** This is from the Bigelow Commission draft (1956) which was based on *Hoffman,* 341 U.S. 479 (1951). Matter will incriminate if it is an element, a circumstance, or a clue to discovery of either. Note the connection with Rule 37 (Waiver), the last sentence of which enables the non-party witness to draw the line between matters waived and those not waived, without "opening the door" all the way; and distinguish that from Rule 25(d), which covers the party witness.

### RULE 25. SELF-INCRIMINATION: EXCEPTIONS

Subject to Rule 37, 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;

**Explanation:** This applies to matters of a non-testimonial nature, such as fingerprinting, photographing, physical characteristics, drunkometer tests, blood tests, voice identification, handwriting, and so on. *King,* 44 N.J. 346 (1965); *Cary,* 49 N.J. 343 (1967). Procedure for orders to make a blood test is dealt with in *Billingsley,* 46 N.J. at 238 (1966).

(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;

**Caution:** Possible constitutional limitations are not yet clear; see caution under 25(c).



(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;

**Caution:** Enforceability of this provision is in doubt under 5th and 14th Amendments. See *Garrity,* 385 U.S. 493 (1967) holding that statements by police officers given on investigation of ticket-fixing and used to convict for conspiracy to obstruct administration of Motor Vehicle Law (N.J.S. 2A:98-1) were not voluntary in view of N.J.S. 2A:81-17.1, exposing officer to forfeiture of office if he refuses to testify. But Note that the opinions (as well as the opinion below in *Naglee,* 44 N.J. 209), make no reference to Rule 25(c), which was already law. See, also, *Spevack,* 385 U.S. 511 (1967) holding that attorney could not be disbarred for refusal to produce records in disciplinary proceedings, and overruling *Cohen,* 366 U.S. 117 (1961) on the basis of *Malloy,* 378 U.S. 1 (1964). The status of the "records retention" doctrine was left open, and no reference was made to the concept of Rule 25(b), applying to records and papers belonging to others (e.g., the client).

(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. L. 1960, c. 52, p. 455, § 19 [N.J.S. 2A:84A-19.]

**Explanation**: In substance, though not in form, this provision amounts to a rule of waiver for the party who is a witness, as distinguished from a non-party witness; note that the scope is different in comparison with the last sentence of Rule 37.

**See also**: the new Witness Immunity Act, c. 195, L. 1968.

## RULE 26. LAWYER-CLIENT PRIVILEGE

(1) General rule. Subject to Rule 37 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. L. 1960, c. 52, p. 456, § 20 [N.J.S. 2A:84A-20.]

**Explanation**: This is substantially the lawyer-client privilege as generally understood, with a number of special points to be noted: (a) the concept, as with other privileges, is that the test is whether the communication is privileged when made; "once privileged, always privileged"; (b) it continues beyond death of a natural person or dissolution of a corporate client; (c) the relationship controls, not the form of compensation; hence corporate staff attorneys are included as well as outside counsel. See, e.g., *Radiant*, 320 F. 2d 314 (1963), *cert. den.*,

375 U.S. 929; (d) the communication may be in either direction ("between" lawyer and his client), and the privilege bars eavesdroppers and interlopers as well as the amenuensis (who may be an engineer, accountant or other specialist needed to facilitate the communication); (e) the "lawyer" need not be a lawyer in fact, or may be admitted in some other State, so long as the client has reasonable ground to believe he is a lawyer, or if he is a lawyer in any jurisdiction recognizing the privilege. The purpose of the privilege is to assure the client freedom for full and free disclosure and advice without risk, save for the rare exceptions.

**See also:** the provision for this privilege in the Public Defender Act, and the exception there provided. N.J.S. 2A:158A-12 (1967).

## RULE 26A-1. PSYCHOLOGIST'S PRIVILEGE

EDITORIAL NOTE: A psychologist's privilege was separately enacted in 1966 and its text is inserted here for convenience:

"45:14B-28. Confidential relations and communications.

The confidential relations and communications between a licensed practicing psychologist and the individuals with whom he engages in 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 communication to be disclosed." L. 1966 c. 282 § 28.

## RULE 26A-2. PHYSICIAN'S PRIVILEGE

EDITORIAL NOTE: A physician's privilege was separately enacted in 1968 as a supplement to the Evidence Act, 1960, and its text is included here for convenience:

"P.L. 1968, c. 184. Physicians' Privilege.

"1. 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 or 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.

"2. 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.

"3. 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.

"4. 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.

"5. 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.

"6. 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.

"7. 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 27. NEWSPAPERMAN'S PRIVILEGE

Subject to Rule 37, a person engaged on, connected with, or employed by, a newspaper has a privilege to refuse to disclose the source, author, means, agency or person from or through whom any information published in such newspaper was procured, obtained, supplied, furnished, or delivered. L. 1960, c. 52, p. 458, § 21 [N.J.S. 2A:84A-21.]

**Explanation:** The 1960 statute adopted this provision in place of the physician's privilege, as recommended by the Bigelow Commission report (1956). Note the language of the Rules 2(1) and 2(3), intended to buttress this and other privileges against dilution. This privilege is limited in scope to disclosures of source, means, agency or person. Hence: (a) if these are disclosed in the newspaper, there is a



waiver under Rule 37; and (b) if a newspaperman has a story which has not been published, there is no privilege.

## RULE 28. MARITAL PRIVILEGE—CONFIDENTIAL COMMUNICATIONS

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). When a spouse is incompetent or deceased, consent to the disclosure may be given for such 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. L. 1960, c. 52, p. 458, § 22 [N.J.S. 2A:84A-22.]

**Explanation:** The test here is whether the communication was privileged when made; "once privileged, always privileged." If so, both parties (or representatives) must consent to disclosure. This recognizes the impossibility of separating statements in the course of a conversation, including conduct substituting for verbal statements. The New Jersey "divorce from bed and board" is treated as an absolute divorce and communications thereafter made are not privileged.

## RULE 29. PRIEST-PENITENT PRIVILEGE

Subject to Rule 37, 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. L. 1960, c. 52, p. 458, § 23 [N.J.S. 2A:84A-23.]

**Explanation:** This replaces N.J.S. 2A:81-9 (repealed) which was substantially limited to those religions in which confession is part of the official rules or discipline. The rule now applies to all functions that a religious practitioner may perform (e.g. including marital counseling, straightening out bad boys). The policy is to help the practitioner accomplish his purpose without having the law get in his way by compulsory disclosure.

## RULE 30. RELIGIOUS BELIEF

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. L. 1960, c. 52, p. 458, § 24 [N.J.S. 2A:84A-24.]

**Explanation:** This comes closer to protecting civil rights or privacy, as a man's religion (or lack of one) has no place in the judicial process unless it bears upon a specific issue (e.g., in litigation over the right to hold office in a religious corporation).

## RULE 31. POLITICAL VOTE

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. L. 1960, c. 52, p. 459, § 25 [N.J.S. 2A:84A-25.]

**Explanation:** Compare with the hearsay exception in Rule 63(11). The privilege issue is unlikely to arise



under 63(11) because if the voter made an out-of-court declaration there would doubtless have been a waiver. See, also, R.S. 19:29-7, compelling a disqualified voter to disclose his vote in an election contest; the reliability of the testimony would be naturally uncertain with a secret ballot system.

## RULE 32. TRADE SECRET

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. L. 1960, c. 52, p. 459, § 26 [N.J.S. 2A:84A-26.]

**Explanation:** This rule is carefully worded to cover a wide variety of situations, balanced with means to compel disclosure in proper cases on terms to prevent the disclosure from destroying the value of the secret. The word "agent" is to be read broadly to include, for example, a licensee under contract to use the secret and not to disclose. This coordinates with Rule 37, second paragraph, that " a disclosure which is itself privileged . . . by lawful contract, shall not constitute a waiver."

**[Rule 33. Secret of State.** Not enacted.]

## RULE 34. OFFICIAL INFORMATION

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. L. 1960, c. 52, p. 459, § 27 [N.J.S. 2A:84A-27.]

**Explanation:** As recommended by the Bigelow Commission report (1956) this rule was rephrased to cover proposed Rule 33 as well, and makes no distinction between a "secret of state" and "official information." The two tests are alternative: the privilege applies if disclosure is forbidden by statute OR if it is found that it would be against public interest. The scope of this privilege may be partly measured by the "Right to Know Law", L. 1963, c. 73 (R.S. 47:1A-1 to 4) and the executive orders thereunder. And see other "non-disclosure" statutes such as R.S. 54:32A-47 (foreign corporations), and R.S. 54:33-8 (inheritance tax reports).

**[Rule 35. Communication to Grand Jury.** Not enacted.]

**Explanation:** The Bigelow Commission saw no point to this proposed rule as it was limited to the period of investigation and put control over disclosure in the hands of the witness. The Grand Jurors are on a different basis and are immune to examination. *Borg,* 8 N.J. Misc. 349, *aff'd.,* 8 N.J. Misc. 705 (Sup. Ct. 1930); *Silverman,* 100 N.J.L. 249 (Sup. Ct. 1924); *McFeeley,* 134 N.J.L. 463 (Sup. Ct. 1946); *Donovan,* 129 N.J.L. 478 (Sup. Ct. 1943).

## RULE 36. IDENTITY OF INFORMER

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. L. 1960, c. 52, p. 459, § 28 [N.J.S. 2A:84A-28.]

**Explanation:** This is declaratory of common law, *Burnett,* 42 N.J. 377, 380 (1964); *Morss,* 24 N.J. 341, 360-362 (1957). A comprehensive discussion is found in *Dolce,* 4 N.J. 422 (1964). The most recent ruling is *Oliver,* 50 N.J. 39 (1967), which was followed in *Bacsko,* 50 N.J. 49 (1967) and *Krempecki,* 50 N.J. 50 (1967). Note that where the informer's statement is not used to show the truth of its content but merely to establish the basis for government action, it is not hearsay and disclosure of identity is unlikely to be required. So also where the informer is merely an observer of the event and is not a significant participant.

## RULE 37. WAIVER OF PRIVILEGE BY CONTRACT OR PREVIOUS DISCLOSURE; LIMITATIONS

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 1 question shall not operate as a waiver with respect to any other question. L. 1960, c. 52, p. 459, § 29 [N.J.S. 2A:84A-29.]

**Explanation:** The holder of the privilege is the only one who can waive; see *Selser,* 15 N.J. 393, 404 (1954) (attorney-client) and *Auld,* 2 N.J. 426, 436 (1949) (self-incrimination).

**Caution:** Part (b) is broad enough to include any disclosure, including one during other proceedings, and differs from views elsewhere. 1 Morgan, Basic Problems of Evidence 152 (1954); 8 Wigmore, 450, et seq.

**Explanation:** Note that the waiver is for "specified matter", any *part* of which is disclosed. Waiver for fact A is a waiver for fact B when both are parts of the same specified matter.

**Distinguish** from Rule 25(f), applicable to the party-witness for self-incrimination, where the waiver from voluntary appearance applies to "any matter relevant to any issue in the case."

**Explanation:** The second paragraph was added by the Bigelow Commission. The "lawful contract" protection extends to any contract for non-disclosure with a reasonable basis (e.g., trade-secret licenses, credit reports, etc.). The last sentence permits the non-party witness to answer questions up to a point he chooses without "opening the door" all the way. See Rule and 24 and 25(d).

**Distinguish** from immunity concepts in many statutes, either from prosecution or from use of the evidence. There may be new questions in this area as most were drawn before the enactment in 1960 of Rule 24 which embodies the element, circumstances and clue doctrines; the witness might object that a prohibition against use of the testimony as evidence may not be enough protection. See, e.g., R.S. 32:23-86(5); R.S. 48:2-36; R.S. 52:13-3; Ch. 195, P.L. 1968; 2A:81-17.3.



**Distinguish** from privileged communications in the civil liability sense where the effect is to make the event non-actionable (e.g., defamation, malicious prosecution, etc.) Some of these privileges are absolute (i.e., statements in court proceedings); some are qualified (i.e., fair comment, statements to those with a legitimate interest, etc.). Typical recent cases are *Jorgensen,* 25 N.J. 541 (1958); *Coleman,* 29 N.J. 357 (1959) and *Nusbaum,* 86 N.J. Super. 132 (App. Div., 1965).

## RULE 38. ADMISSIBILITY OF DISCLOSURE WRONGFULLY COMPELLED

Evidence of a statement or other disclosure is inadmissible against the holder of the privilege if the disclosure was wrongfully made or erroneously required. L. 1960, c. 52, p. 460, § 30 [N.J.S. 2A:84A-30.]

**Caution:** There may be difficult problems in some special cases, as where the erroneous direction to disclose may do damage not curable by reversal (as, disclosure of a trade-secret).

## RULE 39. REFERENCE TO EXERCISE OF PRIVILEGES

Subject to paragraph (4) of Rule 23, 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. L. 1960, c. 52, p. 460, § 31 [N.J.S. 2A:84A-31.]

**Caution:** The opening phrase, "Subject to paragraph 4 of Rule 23" should be deleted as that provision is unconstitutional.

**Caution:** There can be problems here because of the law which permits comments on the evidence by the judge and by counsel. Thus, it is usually proper to comment on a failure to offer evidence to controvert stated proofs, but if the failure is due to exercise of a privilege, a policy conflict can arise. The provision for specific instructions (second sentence) could cover this, but might have a backlash effect. In borderline cases it is probably better to refrain from comment. Otherwise the matter should be resolved on measures of fairness, importance and the like. On this question, see *Smith*, 100 N.J. Super. at 422 (App. Div., 1968). And see *Boscia*, 93 N.J. Super. 586, (App. Div., 1967) where an attempt to attack credibility of a witness, based on his refusal to waive immunity before a Grand Jury, was disapproved as unfair. Of course a party may want to comment to explain his failure to adduce proof because a non-party witness raised a privilege.

## RULE 40. EFFECT OF ERROR IN OVERRULING CLAIM OF PRIVILEGE

(1) A party may predicate error on a ruling disallowing a claim of privilege only if he is the holder of the privilege.

**Explanation:** An erroneous ruling disallowing a claim of privilege by a non-party witness is not ground for appeal by the party, But if the privilege is erroneously allowed (i.e., the evidence is not adduced) it will provide a ground.

(2) If a witness refuses to answer a question, under color of a privilege claimed pursuant to Rules 23 through 38, 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. L. 1960, c. 52, p. 460, § 32 [N.J.S. 2A:84A-32.]

**Explanation:** This was added by the Bigelow Commission to assure protection to the non-party witness, as he might have no certain standing to appeal and might be held in contempt even if the ruling on privilege was erroneous.

# CHAPTER VI. EXTRINSIC POLICIES AFFECTING ADMISSIBILITY

## RULE 41. EVIDENCE TO TEST A VERDICT OR INDICTMENT

Upon an inquiry as to the validity of a verdict or an indictment no evidence shall be received to show the effect of any statement, conduct, event or condition upon the mind of a juror as influencing him to assent to or dissent from the verdict or indictment or concerning the mental processes by which it was determined.

**Explanation:** This is a narrow restriction and applies only to evidence of effect on or mental processes of the juror. Testimony can be received about conditions or events bearing on the verdict. And Note the further restriction imposed by practice rules, R.R. 1:25A.

## RULE 42. TESTIMONY BY THE JUDGE

The judge presiding at the trial of an action may not testify as a witness.

**Caution:** This does not bar the taking of judicial notice.

## RULE 43. TESTIMONY BY A JUROR

A member of a jury trying an action may not testify as a witness.

**Explanation:** In a proper case, as where the testimony of the juror (or of the judge under Rule 42) is essential to a fair trial, the court can declare a mistrial.

**[Rule 44. Testimony of Jurors Not Limited Except by the Rules.** Not adopted.]

**[Rule 45. Discretion of Judge to Exclude Admissible Evidence.** Renumbered and adopted as Rule 4.]

## RULE 46. CHARACTER AND CHARACTER TRAIT IN ISSUE; MANNER OF PROOF

When a person's character or a trait of his character is in issue, it may be proved by testimony in the form of opinion, by evidence of reputation, or by evidence of specific instances of the person's conduct, subject, however, to the limitation of Rules 47 and 48.

**Explanation:** Only applies to situations where character is itself in issue under applicable substantive law.

**Examples:** Unchaste character of accuser in a rape case as evidence of consent; character of contractor where



liability depends on selection. Where pertinent, specific instances which amount to commission of crime may be shown even though not convicted, as the limitation of Rules 47 and 48 only applies where a character trait is offered as proof of conduct or quality of conduct.

## RULE 47. CHARACTER TRAIT AS PROOF OF CONDUCT

Subject to Rules 48 and 55, a trait of character offered for the purpose of drawing inferences as to the conduct of a person on a specified occasion may be proved only by: (a) testimony in the form of opinion, (b) evidence of reputation, or (c) 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. In a criminal proceeding, evidence offered by the prosecution of a trait of character of the defendant on trial may be admitted only if the judge has admitted evidence of good character offered by the defendant. Character evidence offered by the defendant may not be excluded under Rule 4. The credibility of a character witness testifying on behalf of the defendant may not be impaired by an inquiry into his knowledge of the defendant's alleged criminal conduct not evidenced by a conviction.

**Explanation:** This rule applies where character as such is not itself directly in issue; the issue is conduct on a specified occasion and the proof is by one of the three methods indicated.

**Caution:** The restriction on exclusions under Rule 4 refers only to the defendant on trial in a criminal case who offers character witnesses to raise a reasonable doubt.

## RULE 48. CHARACTER TRAIT FOR CARE OR SKILL; INADMISSIBLE TO PROVE QUALITY OF CONDUCT

Evidence of a trait of a person's character with respect to care or skill is inadmissible as tending to prove the quality of his conduct on a specified occasion.

**Caution**: Distinguish this from proof of habit or custom under Rule 49, e.g., "I know that's a bad corner and I always come to a full stop before I cross."

## RULE 49. HABIT OR CUSTOM TO PROVE SPECIFIC CONDUCT

Evidence of habit or custom whether corroborated or not is admissible to prove conduct on a specified occasion in conformity with the habit or custom.

**Explanation**: The change here is to eliminate the formal requirement of corroboration; weight, of course, will be less on contested issues without corroboration.

## RULE 50. SPECIFIC INSTANCES OF CONDUCT TO PROVE HABIT OR CUSTOM

Evidence of specific instances of conduct is admissible to prove habit or custom if the evidence is of a sufficient number of such instances to warrant a finding of such habit or custom.

**Explanation**: This is the reverse of Rule 49, permitting evidence of specific instances to show that there was a habit or custom. It does not imply that this is the only method to prove the existence of habit or custom.



## RULE 51. SUBSEQUENT REMEDIAL CONDUCT

When after the occurrence of an event remedial or precautionary measures are taken, which, if taken previously would have tended to make the event less likely to occur, evidence of such subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event.

**Explanation**: This makes no change in present law. It does not bar the evidence when offered for other purposes, e.g., to show control. *Query* whether the "subsequent" measures may be shown if they amount to spontaneous conduct forming part of the event in the "res gestae" sense and not intended as a substitute for words outside of Rule 63 (4). Such spontaneous conduct could rationally support inferences of knowledge, realization of error, etc.

## RULE 52. OFFER TO COMPROMISE AND THE LIKE NOT EVIDENCE OF LIABILITY OR CRIMINAL WRONGDOING

(1) Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money, or any other thing, act or service to another who has sustained or claimed to have sustained loss or damage, is inadmissible to prove his liability for the loss or damage or any part of it. This rule shall not affect the admissibility of evidence (a) of partial satisfaction of an asserted claim on demand without questioning its validity, as tending to prove the validity of the claim, or (b) of a debtor's payment or promise to pay all or a part of his pre-existing debt as tending to prove the creation of a new duty on his part, or a revival of his pre-existing duty.

**Explanation**: This eliminates any formal requirement to expressly state that the offer is "without prej-

udice", or its equivalent, under *Richardson* 63 N.J.L. 248 (E & A 1899). But the safe practice is to make the explicit notation, even though not required. Distinguish *Rynar,* 129 N.J.L. 525 (E & A 1942), indicating that settlements with other claimants could be shown for the limited purpose of showing their bias as witnesses.

(2) Evidence that the defendant offered to plead guilty to a lesser offense or upon terms, is inadmissible against him in that criminal proceeding.

**Caution:** Note also the practice rules, R.R. 3:5-2(a) and 8:4-3, providing for orders that the plea may not be shown in a civil proceeding.

### RULE 53. ACCEPTANCE OR OFFER OF COMPROMISE NOT EVIDENCE OF INVALIDITY OF CLAIM

Evidence that a person has in compromise accepted, or offered or promised to accept, a sum of money or any other thing, act, or service in satisfaction of a claim, is inadmissible to prove the invalidity of the claim or any part of it, but it is admissible to prove an accord and satisfaction or other material fact.

**Explanation:** This covers the reverse situation dealt with by Rule 52 (1).

### RULE 54. LIABILITY INSURANCE

Evidence that a person was, at the time a harm was suffered by another, insured wholly or partially against loss arising from liability for that harm is inadmissible as tending to prove negligence or other wrongdoing.

**Caution:** Watch the issues in the particular case. If A sues B for negligent failure to provide in-



surance, A can offer proof that he was not insured and B can offer proof that A was in fact insured under another policy.

### RULE 55. OTHER CRIMES OR CIVIL WRONGS

Subject to Rule 47, evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his disposition to commit crime or civil wrong as the basis for an inference that he committed a crime or civil wrong on another specified occasion but, subject to Rule 48, such evidence is admissible to prove some other fact in issue including motive, intent, plan, knowledge, identity, or absence of mistake or accident.

**Caution:** There is some debate whether "civil wrong" refers only to quasi-criminal or intentional wrongs, or to all kinds of torts. The latter is probably the sounder interpretation.

## CHAPTER VII. EXPERT AND OTHER OPINION TESTIMONY

**Caution:** Note the connection with Rule 8 (Preliminary Inquiry), Rule 17 (Qualifications of Witness—including ability of witness to make himself understood by judge and jury), Rule 19 (Knowledge and Experience), and Rule 20 (Credibility). See *Lawlor,* 92 Super. 309 (App. Div., 1966) where a doctor's credibility was attacked by showing large variety of books on subjects and with titles indicating that he adhered to peculiar views.

### RULE 56. TESTIMONY IN THE FORM OF OPINION

(1) If the witness is not testifying as an expert his testimony in the form of opinions or inferences is limited to

such opinions or inferences as the judge finds (a) may be rationally based on the perception of the witness and (b) are helpful to a clear understanding of his testimony or to the determination of the fact in issue.

**Explanation:** This applies to the lay witness and is substantially the present law. The key phrase is: "rationally based on the perception of the witness." See Rule 1(14). The elements are (a) an opportunity to observe and (b) actual observation of the facts on which the opinion is based. A lay witness cannot give an opinion on matters he did not himself perceive.

(2) If the witness is testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to such opinions as the judge finds are (a) based primarily on facts, data or other expert opinion established by evidence at the trial and (b) within the scope of the special knowledge, skill, experience or training possessed by the witness.

**Explanation:** This covers "expert" witnesses. The opinion must rest on matters established "by evidence at the trial". This phrase was added by the Legislative Commission in JR-5 (1967). The key to all opinion testimony is that it must be helpful to the trier of fact without doing its job for it. On the matter of qualifications, see *Mazza,* 95 N.J. Super. 71 (App. Div., 1967), which held it improper to refer to a doctor's appointment to a Supreme Court panel of impartial experts. The expert may, of course, himself establish some part or all of the necessary facts; such witnesses can be the most informative.

(3) Testimony in the form of opinions or inferences otherwise admissible under these rules is not objectionable



because it embraces the ultimate issue or issues to be decided by the trier of the fact.

**Caution:** This does not mean that the witness may merely give conclusions; it means that the testimony, if otherwise proper, is not objectionable because it embraces the ultimate issue. This is a matter of balance and emphasis. It is fundamental in scientific reasoning to avoid claiming more than can be proved; the jury should be left to draw the inferences. See *Vigliano,* 50 N.J. 51 (1967) for an extreme example.

## RULE 57. PRELIMINARY EXAMINATION

The judge may require that a witness before testifying in terms of an opinion or inference be first examined concerning the data upon which the opinion or inference is based.

**Explanation:** In complex issues, it will be better to get the data in first, but it can help understanding if this is done with opinions at intermediate stages. The basic guide is to select a method that will provide clearest understanding.

## RULE 58. HYPOTHESIS FOR EXPERT OPINION NOT NECESSARY

Questions calling for the opinion of an expert witness need not be hypothetical in form unless the judge in his discretion so requires.

**Explanation:** This follows existing good trial practice. There is no problem with the hypothetical question on simple issues but for complex matters it confuses rather than helps. These are best subdivided into steps to display the rationale and provide understanding of the effect of each factor. Probability,

and the degrees thereof, will be the index, as most fields are empirical rather than exact.

[**Rule 59. Appointment of Experts.** Not adopted.]

[**Rule 60. Compensation of Expert Witnesses.** Not adopted.]

[**Rule 61. Credibility of Appointed Expert Witnesses.** Not adopted.]

## CHAPTER VIII. HEARSAY EVIDENCE

### RULE 62. DEFINITIONS

As used in Rules 63 through 66.

(1) "Statement" means not only an oral or written expression but also nonverbal conduct of a person intended by him as the substitute for words in expressing the matter stated.

(2) "Declarant" is a person who makes a statement.

(3) "Public Official" of a state or territory of the United States includes an official of a political subdivision or regional or other agency of such state or territory and of a municipality.

(4) "State" means each of the United States and the District of Columbia.

(5) "A business" as used in Rules 63(13) and 63(14) shall include every kind of business, governmental activity, profession, occupation, calling or operation of institutions, whether carried on for profit or not.

(6) "Unavailable as a witness" means that (a) the witness is dead, or (b) the witness is beyond the jurisdiction of the court's process to compel appearance, or (c) the witness is unable to testify because of then existing physical or mental disability, or (d) the proponent of the statement is unable, despite due diligence, to procure the attendance



of the witness. A witness is not unavailable when the condition was brought about by the procurement, wrongdoing or culpable neglect of the party offering his statement, or when his deposition can be taken by the exercise of reasonable diligence and without undue hardship, and the probable importance of the testimony is such as to justify the expense of taking such deposition.

**Official Note: See note to Rule 63(13) with respect to paragraph (5) of this Rule.**

**Explanation:** This rule contains the definition for key words used in Rules 63 through 66 (Hearsay). Note, especially, that "statement" has a broad meaning, and includes some nonverbal conduct; also that "public official" includes officials of a municipality, and "business" includes government agencies and operations *not* carried on for profit.

**Caution:** Definition of a business applies only for the purposes of Rules 63(13) and 63(14) (business records).

**Caution:** Rule 63 excludes hearsay except as allowed by the exceptions in 63(1) to (32); but the phrasing, in each exception, that a statement is "admissible" means only that an objection that it is hearsay will be overruled; other grounds of objection remain available.

### RULE 63. HEARSAY EVIDENCE EXCLUDED; EXCEPTIONS

Evidence of a statement offered to prove the truth of the matter stated which is made other than by a witness while testifying at the hearing is hearsay evidence and is inadmissible except as provided in Rules 63(1) through 63(32).

**Explanation:** This rule adopts the classic definition of hearsay. Thus, whether evidence is or is not

hearsay can depend on the purpose for which it is offered.

**Illustration:** Evidence that the owner of a car gave instructions to a driver is not hearsay if offered to prove agency; but it would be hearsay if the content of the instructions related to delivery, and were offered to prove delivery.

**Rule 63(1). Previous statements of witnesses.**

A statement is admissible if previously made by a person who is a witness at a hearing, provided it would have been admissible if made by him while testifying and the statement:

(a) Is inconsistent with his testimony at the hearing and is offered in compliance with the requirements of Rule 22(a) and (b), except that such a statement may be admitted if offered by the party calling the witness only as permitted by Rule 20; or

(b) Concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately and is contained in a writing which (i) was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness's memory, (ii) was made by the witness himself or under his direction or by some other person for the purpose of recording the witness's statement at the time it was made, and (iii) is offered after the witness has testified that the statement he made was a true statement of such fact, provided that where the witness remembers only a part of the contents of a writing, the part he does not remember may be read to the jury but shall not be introduced as a written exhibit over objection; or

(c) Is a prior identification of a party where identity is in issue, if made under circumstances precluding unfairness or unreliability.



**Explanation:** Three categories of prior statement are covered: (a) prior inconsistent statements offered on the issue of credibility; (b) "past recollection recorded", with a refinement to cover cases of partial recollection; (c) prior identification of a party. (*Matlack,* 49 N.J. 491).

**Caution:** For all three categories, the declarant must be a witness at the hearing and the statement must be of facts to which he could testify.

**[Rule 63(2). Affidavits.** Not adopted.]

**Rule 63(3). Depositions and prior testimony.**

Subject to Rule 64 and to the same limitations and objections as though the declarant were testifying in person, and where the declarant is unavailable as a witness, testimony is admissible if (a) it was given by the declarant as a witness in a prior trial of the action or in another action or in a deposition taken in compliance with law for use as testimony in the trial of another action where (i) the testimony is offered in evidence against a party who offered it in his own behalf on the former occasion, or against the successor in interest of such party, or (ii) in a civil case, or only when offered by the defendant in a criminal case, the issue is such that the adverse party on the former occasion had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered, or (b) in a criminal proceeding, the testimony was given by the declarant personally as a witness in a former trial of a criminal proceeding in which the issue was such that the present defendant had the right and opportunity for cross-examination with an interest and motive similar to that which he has in the present proceeding.

**Official Note: N.J.S. 2A:81-13 and 14 are included in this Rule, and are superseded thereby.**

**Caution:** The rule covers prior testimony in an earlier trial of the same action, or in the trial of another action, and depositions in another action. Deposition material would be subject to the same objections available in the case of depositions for discovery, de bene esse, or to perpetuate testimony, taken in the same action; but the rules on waiver of objections might not apply.

Note that notice of intention to offer must be given under Rule 64, and that the witness must be unavailable; but distinguish cases coming within Rule 63(1).

**Illustration:** In a workmen's compensation case, claimant calls a witness who testifies that injury occurred in parking lot. In a later third-party case, claimant contends injury was caused by defectively designed machinery inside the plant. Third-party defendant may offer the testimony of the unavailable witness. Rule 63(3)(a)(i).

**Illustration:** In a negligence suit, a witness testifies that an unidentified car cut off defendant and caused accident. In a later criminal case (e.g., death by auto), defendant may offer the unavailable witness' testimony. Rules 63(3)(a)(ii).

**Illustration:** Defendant in federal criminal case on charge of carrying pistol interstate may offer testimony of unavailable witness from earlier state criminal trial for illegal purchase of pistol. Rule 63(3)(b).

### Rule 63(4). Spontaneous and contemporaneous statements.

A statement is admissible if it was made (a) while the declarant was perceiving an event or condition which the statement narrates, describes or explains, or (b) while the



declarant was under the stress of a nervous excitement caused by such perception, in reasonable proximity to the event, and without opportunity to deliberate or fabricate.

**Illustrations:**

Rule 63(4)(a): Statement of a radio announcer that Senator Kennedy was shot, made while he watched it happen. See also *Aladits* v. *Simmons Co.*, 47 N.J. 115 (1966).

Rule 63(4)(b): Driver of car injured in accident blurts out to police when they arrive at scene, "Did you get the car that cut me off?"

**Note:** There is no requirement that the witness be unavailable.

### Rule 63(5). Dying declarations.

In a criminal proceeding, a statement made by a victim unavailable as a witness because of his death is admissible if it was made voluntarily and in good faith and while the declarant was conscious of his impending death.

**Illustration:** X is held up. Three months later he is dying from unrelated cause and says on death bed, "Y held me up."

**Note:** The rule is different from the common law rule in that death need not be the result of the act upon which the indictment is based.

**[Rule 63(6). Confessions.** Not adopted.] See Rule 63(10).

### Rule 63(7). Admissions by parties.

A statement made by a person who is a party to a civil action is admissible against him in that action.

**Caution:** This rule is only applicable in civil cases and should not be confused with Rule 63(10), (declarations against interest). The statement un-

der Rule 63(7) need not be contrary to the party's interest when made.

**Rule 63(8). Authorized and adoptive admissions.**

A statement is admissible against a party (a) if it was made by a person authorized by the party to make a statement or statements concerning the subject matter of the statement, or (b) if the party with knowledge of the content of the statement has, by words or other conduct, manifested his adoption of it or his belief in its truth.

**Caution:** The burden of proving that either conduct or silence is an adoption is on the proponent of the evidence; use of the rule should be approached with caution. *Greenberg* v. *Stanley,* 30 N.J. 485, 498 (1959).

**Rule 63(9). Vicarious admissions.**

A statement which would be admissible if made by the declarant at the hearing is admissible against a party if (a) when made it concerned a matter within the scope of a then existing agency, employment or representative relationship, or (b) at the time the statement was made 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.

**Explanation:**

Under (a), the statement must have been made within the scope of a *then existing* relationship. See *Hansen* v. *Eagle Picher Lead,* 8 N.J. 133 (1951). Under (b) a statement of a co-conspirator, at the time made, needs to have been "in furtherance" of *the* plan. This conforms to the federal rule. See *Ledwab,* 43 N.J. Super. 367 (App. 1951).

**Note:** Unavailability of the declarant is not a requisite.



**Rule 63(10). Declarations against interest.**

A statement is admissible if at the time it was made it was so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to a civil or criminal liability or so far rendered invalid a claim by him against another or created such a risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true, except that such a statement is not admissible against a defendant other than the declarant in a criminal prosecution.

**Explanation:** This applies to party and non-party statements. It includes "confessions" in criminal cases, but only as to the defendant who made the statement (unless otherwise admissible against other defendants as in conspiracy cases). Unavailability is not a prerequisite. For earlier decisions, see *Band's Refuse Removal,* 62 N.J. Super. 522 (App. Div., 1960); *Appelget,* 44 N.J. Super. 506 (App. Div., 1957); *Sejules,* 94 N.J. Super. 576 (App. Div., 1967).

**Rule 63(11). Voters' statements.**

A statement by a voter concerning his qualifications to vote or the fact or content of his vote is admissible if the declarant is unavailable as a witness.

**Rule 63(12). Statements of physical or mental condition of declarant and related history.**

A statement is admissible if it was made in good faith and it (a) described the declarant's then existing state of mind, emotion or physical sensation, including statements of intent, plan, motive, design, mental feeling, pain and bodily health, but not including memory or belief, to prove the fact remembered or believed, when such a mental or

physical condition is in issue or is relevant to prove or explain acts or conduct of the declarant, or (b) described previous symptoms, pain or physical sensations to a physician consulted for purposes of treatment and relevant to an issue of declarant's bodily condition, or (c) described to a physician consulted for purposes of treatment the inception, general character of the cause or external source of symptoms, pain or physical sensation where such a description was relevant to diagnosis and treatment.

**Caution:** A preliminary finding of good faith is required (Rule 8). Statements reflecting existing state of mind, etc., are admissible regardless of to whom they are made; but memory or belief are excluded. Statements to a treating physician to describe symptoms, pain, sensations, etc., as well as inception, general character of cause, etc. are admissible under the conditions specified by the rule. And see 63(13), "business records", as including hospital records containing medical history. See *Gardner,* 51 N.J. 444, at 461-462 (1968).

**Rule 63(13). Business entries.**

A writing offered as a memorandum or record of acts, conditions or events is admissible to prove the facts stated therein if the writing or the record upon which it is based was made in the regular course of a business, at or about the time of the act, condition or event recorded, and if the sources of information from which it was made and the method and circumstances of its preparation were such as to justify its admission.

**Official Note: N.J.S. 2A:82-34 through 37 are rendered obsolete by this Rule and paragraph (5) of Rule 62, and are superseded thereby.**

**Explanation:** This rule, and 63(14), replace the Uniform Act, N.J.S. 2A:82-34 through 37.



**Comment:** In combination with Rule 1(13), this rule covers printouts of computer records that would otherwise not be considered "writings".

See *Gardner,* 51 N.J. 444, at 461-462 (1968) for a case where hospital records contained statements going beyond this rule and Rule 63(12).

See *Brown,* 100 N.J. Super. 395, at 402-404 (App. 1968) for a case allowing a police report as a business record. *Fagan,* 78 N.J. Super. 294, at 309-313 (App. 1963) has a partial review of the legislative history as applied to accident reports.

**Caution:** Note the limitations of Rule 63(15) in regard to official reports.

**Rule 63(14). Absence of entry in business records.**

Evidence of the absence of a memorandum or record concerning an asserted act, event or condition from the memoranda or records of a business is admissible to prove the nonoccurrence of that act or event, or the nonexistence of that condition if it was the regular practice of the business to make such a memorandum or record of all such acts, events or conditions at the time thereof or within a reasonable time thereafter, and to preserve it.

**Rule 63(15). Reports and findings of public officials.**

Subject to Rule 64, a statement is admissible if in the form of (a) a written statement of an act done, or an act, condition or event observed by a public official if it was within the scope of his 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 made by a public official whose duty it was to investigate the facts concerning the act, condition or event and to make statistical findings.

**Explanation:** Rule 63(15)(a) should be read in the light of Rule 63(13) and always subject to the considerations expressed in Rule 4. A standard problem will be the police report, some parts of which should be admitted and others excluded. Examples: Measurement of skid marks admissible; statements of witnesses admissible only where such statements would be admissible under another exception to the hearsay rule, such as Rule 63(7); opinions as to fault ordinarily inadmissible. See, for example, *Brown,* 100 N.J. Super. 395, at 405 (App. Div., 1968), requiring excision of police officer's opinion as embodying a conclusion.

### Rule 63(16). Filed reports made by persons exclusively authorized.

Subject to Rule 64, a writing made as a record, report or finding of fact is admissible if (a) the maker was authorized by statute to perform, to the exclusion of persons not so authorized, the functions reflected in the writing, and was required by statute to file in a designated public office a written report of specified matters relating to the performance of such functions, and (b) the writing was made and filed as required by the statute.

**Examples:** Records of birth, marriage, death, etc. Notice is required under Rule 64; see Rule 68 for requirement of authentication.

### Rule 63(17). Copies of official records and writings asserting their absence.

Subject to Rule 64, a writing purporting to be a copy of an official record or of an entry therein is admissible to prove the content of that record provided the writing meets the authentication requirements of Rule 68. A writing made by the official custodian of the official records of an office, reciting diligent search and failure to find such a record,



is admissible to prove the absence of a record in a specified office.

**Official Note: Statutes relating to the admissibility of copies of official records, such as N.J.S. 2A:11-55, N.J.S. 2A:82-8, 9, 10, 11, 12, 14, 15, 16, 20, 21 and 22, and R.S. 4:20-20 are included in this Rule. The identified statutes are superseded.**

### Rule 63(18). Certificates of marriage.

A certificate that the maker thereof performed a marriage ceremony is admissible as evidence of the matter certified, if it purports (a) to have been made within a reasonable time after the marriage ceremony and (b) to have been made by a person who at the time and place of the marriage was authorized by law to perform marriage ceremonies.

### Rule 63(19). Records of documents affecting an interest in property.

Subject to Rule 64, the official record of a document purporting to establish or affect an interest in property is admissible to prove the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if (a) the record is in fact a record of an office of a state or nation or of any governmental subdivision thereof, and (b) an applicable statute authorized such a document to be recorded in that office.

**Official Note. N.J.S. 2A:82-22 is included in this Rule, and is superseded thereby.**

### Rule 63(20). Judgments of previous conviction of crime.

In a civil proceeding, except as otherwise provided by court order on acceptance of a plea, evidence is admissible 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.

**Official Note: The language, "but no conviction of an offender shall be received in evidence against him in a civil action to prove the truth of the facts upon which the conviction was based," in N.J.S. 2A:-81-12 is in conflict with this Rule, and is superseded thereby.**

**Comment:** This rule permits the offer of a criminal conviction (indictable offenses only) in a civil action as proof of any fact essential to the conviction. See the practice rules for situations where the criminal court may bar use of this rule when a plea of guilty, etc., is accepted.

### Rule 63(21). Judgments against persons entitled to indemnity.

Subject to Rule 64, and except in a proceeding brought under the Joint Tortfeasors Contribution Law, N.J.S. 2A:53A-1 through 5, 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.

**Caution:** An indemnitor is bound by what transpires in an action which he fails to defend after being vouched in, *U.S. Wire & Cable Corp.* v. *Ascher Corp.*, 34 N.J. 121, 126 (1961); but until the obligation to indemnify is established, the testimony given in the action may not be used to prove the existence of the obligation. *Farm Bureau Mut. Automobile Ins. Co.* v. *Hammer,* 177 F. 2d 793 (4 Cir. 1949), cert. denied, 339 U.S. 914, 70 S. Ct. 575, 94 L. Ed. 1339 (1950); *Restatement, Judgments,* Sec. 107, *Comment g,* p. 517, 1942; 30A *Am. Jur., Judgments,* Sec. 421, p. 475 (1958).

Under this rule, the judgment in the first suit is receivable to cover the three categories listed in the rule; other matters remain open.



**[Rule 63(22). Judgment Determining Public Interest in Land. Not adopted.]**

### Rule 63(23). Statements concerning one's own family history.

A statement of a matter concerning a declarant's own birth, marriage, divorce, legitimacy, ancestry, relationship by blood or marriage, or other similar fact of his family history is admissible, even though the declarant had no means of acquiring personal knowledge of the matter declared, if the declarant is unavailable as a witness.

### Rule 63(24). Statements concerning family history of another.

A statement concerning the birth, marriage, divorce, death, legitimacy, ancestry, relationship by blood or marriage or other similar fact of the family history of a person other than the declarant is admissible if the declarant is unavailable as a witness and was related to the other by blood or marriage or was otherwise so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

### Rule 63(25). Statements concerning family history based on statement of another declarant.

A statement of a declarant that a statement admissible under Rules 63(23) or 63(24) was made by another declarant, offered as tending to prove the truth of the matter declared by both declarants, is admissible if both declarants are unavailable as witnesses.

**Rule 63(26). Reputation in family concerning family history.**

Evidence of reputation among members of a family is admissible if the reputation concerns the birth, marriage, divorce, death, legitimacy, ancestry, relationship by blood or marriage, or other similar fact of the family history of a member of the family by blood or marriage.

**Rule 63(27). Reputation: boundaries, general history, family history.**

Evidence of reputation in a community as tending to prove the truth of the matter reputed is admissible if (a) the reputation concerns boundaries of, or customs affecting, land in the community, where the reputation, if any, arose before controversy, or (b) the reputation concerns an event of general history of the community or of the state or nation of which the community is a part, where the event was of importance to the community, or (c) the reputation concerns the birth, marriage, divorce, death, legitimacy, ancestry, or relationship by blood or marriage of a person resident in the community at the time of the reputation, or some other similar fact of his family history or of his personal status or condition which was likely to have been the subject of a reliable reputation in that community.

**Rule 63(28). Reputation as to character.**

If a trait of a person's character at a specified time is relevant, evidence of his reputation with reference thereto at a relevant time in the community in which he then resided or in a group with which he then habitually associated is admissible to prove the truth of the matter reputed.

**Example:** Evidence of reputation at place of employment may now be offered. Compare *State* v. *Brady,* 71 N.J.L. 360 (Sup. Ct. 1904). Generally, the rule



is more tolerant than common law, subject, however, to Rule 4 considerations.

**Rule 63(29). Recitals in documents affecting property.**

Subject to Rule 64, a statement contained in a conveyance, assignment, will, or other instrument purporting to affect an interest in property is admissible to prove the truth of the matter stated if the matter would be relevant to an issue which involved an interest in that property and if dealings with the property since the instrument was made have not been inconsistent with the truth of the statement or the purport of the instrument.

**Comment:** This rule formalizes the widespead practice of setting out in deeds, etc., matters of fact which are pertinent to the devolution of title and similar matters, and which are commonly relied upon.

**Rule 63(30). Commercial publications and the like.**

Evidence of a statement of matters of interest to persons engaged in an occupation contained in a list, register, periodical, or other published compilation is admissible to prove the truth of any relevant matter so stated if the compilation is published for use by persons engaged in that occupation and is generally used and relied upon by them.

**Example:** Market prices for steel established by introduction of weekly trade publication in *Associated Metals & Min. Corp.* v. *Dixon Chem. & Res.,* 82 N.J. Super. 281 (App. Div. 1963).

**[Rule 63(31). Learned treatises.** Not adopted.]

**Caution:** Effect of failure to adopt uncertain. Some items may be within Rule 9, judicial notice.

**Rule 63(32). Trustworthy statements made in good faith by declarants unavailable because of death.**

Subject to Rule 64, in a civil proceeding, a statement made by a person unavailable as a witness because of his death is admissible if the statement was made in good faith, upon the personal knowledge of the declarant, and there is a probability from the circumstances that the statement is trustworthy.

**Caution:** Manifest hazards require careful preliminary inquiry (Rule 8) and reference to policy considerations expressed in Rule 4. Note, particularly, that the measure of trustworthiness must appear from the circumstances, rather than from the content of the hearsay declaration itself.

## RULE 64. DISCRETION OF JUDGE TO EXCLUDE EVIDENCE UNDER CERTAIN EXCEPTIONS

Whenever a statement admissible by reason of Rules 63(3), 63(15), 63(16), 63(17), 63(19), 63(21), 63(29), or 63(32) is in the form of a writing, the judge may exclude it at the trial if it appears that the proponent's intention to offer the writing in evidence was not made known to the adverse party at such a time as to provide him with a fair opportunity to prepare to meet it.

## RULE 65. CREDIBILITY OF DECLARANT

Evidence of a statement or other conduct by a declarant inconsistent with a statement received in evidence under an exception to Rule 63, is admissible for the purpose of discrediting the declarant, though he had no opportunity to deny or explain such inconsistent statement. Any other evidence tending to impair or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness.



**Comment:** Since the declarant is ordinarily not present for possible cross-examination (c.f. Rule 63(1)), this rule permits the use of his other hearsay statements to assist in assessing credibility.

## RULE 66. INCLUDED HEARSAY

A statement within the scope of an exception to Rule 63 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 63.

**Example:** Statement of plaintiff reflected in "history" portion of hospital record admissible *against* plaintiff as admission under Rule 63(7).

# CHAPTER IX. AUTHENTICATION AND CONTENT OF WRITINGS

## RULE 67. AUTHENTICATION REQUIRED

Authentication of the original or a copy of a writing is required before it may be received in evidence. Authentication may be by evidence sufficient to sustain a finding of its authenticity or by any other means provided by law.

**Examples:** Proof of the genuineness of letters, contracts and the like (i.e., authentication) is usually provided directly by a participant. Indirect proof may be by a person who can identify a signature, or by the common-law rule on ancient documents, and the like. Admission of genuineness, under R.R. 4:26, obviates need for formal proof.

## RULE 68. AUTHENTICATION OF COPIES OF RECORDS

(1) A writing purporting to be a copy or transcript of an official record or of an entry therein meets the require-

ment of authentication if (a) the writing purports to be published by authority of the nation, state or subdivision thereof, in which the record is kept; or (b) the writing is authenticated by any method provided by law including judicial notice or evidence that it is a true or correct copy or transcript; or (c) the office in which the record is kept is within this State and the writing is attested as a true or correct copy or transcript of the record or entry by a person purporting to be an officer, or a deputy of an officer, having the legal custody of the record; or (d) if the office is not within this State, the writing is attested as required in clause (c) and is accompanied by a certificate that such officer has the custody of the record.

(2) If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office.

(3) If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign or military service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.

(4) The authority of the officer, his custody of the record, and the genuineness of his signature and of the seal of his office, shall be prima facie established by (a) the signature of a person purporting to be that of the officer and (b) the affixation of a seal purportedly the seal of his office.

**Official Note: N.J.S. 2A:82-8, 9, 10, 11, 12, 14, 15, 16 and 25, and N.J.S. 2A:11-55; and R.S. 45:6-30 and 31, 45:9-20 and 45:14-28, in so far as they relate to authentication of copies of records, are included in this Rule, and are superseded thereby.**

**Caution:** Tariffs filed with I.C.C. and F.C.C., though privately published, are published "by authority of the nation." The contrary view in *State* v. *Black*, 31 N.J. Super. 418 (App. 1954) was changed by the 1960 amendment to N.J.S. 2A:82-16, included in this rule.



## RULE 69. CERTIFICATE OF LACK OF RECORD

A writing asserting the absence of an official record admissible under Rule 63(17) is authenticated in the same manner as is provided in clause (c) or (d) of paragraph (1) and paragraphs (2) through (4) of Rule 68.

## RULE 70. ORIGINAL WRITINGS AS THE BEST EVIDENCE

(1) As tending to prove the content of a writing, no evidence other than the original writing itself is admissible, unless (a) the writing is lost or has been destroyed without fraudulent intent on the part of the proponent, or (b) the writing was not reasonably procurable by the proponent by use of the court's process or by other available means, or (c) the writing is within the possession or control of the opponent, who did not produce it at the hearing after having received a notice to produce it, or (d) the writing is not closely related to the controlling issues and it would be inexpedient to require its production, or (e) the writing is a record or other document in the custody of a public officer, or (f) the writing is one which may be proved by other means provided by statute or by these rules, or (g) a calculation or a summary of contents is called for as the result of an examination by a qualified witness of multiple or voluminous writings which cannot conveniently be examined

in court, provided that such writings are present in court for use in cross-examination, or the adverse party has waived their production, or the judge finds that their production is unnecessary, or (h) the evidence is in the form of an oral testimonial or written admission of the party.

(2) If the judge makes one of the findings specified in the preceding paragraph, the best written secondary evidence of the content of the writing conveniently available is admissible. Oral testimony of the content of the writing is admissible only if there is no conveniently available written secondary evidence.

(3) A contention by the opponent (a) that the asserted writing never existed, or (b) that another writing produced at the trial is the asserted writing, or (c) that the secondary evidence does not correctly reflect the content of the asserted writing is not an issue of fact for determination by the judge under the first paragraph of this rule, nor is a finding by the judge that secondary evidence is admissible to be deemed a finding as to any one of these issues of fact. Evidence relevant to such an issue is to be submitted at the hearing solely to the trier of fact, which shall determine it.

**Official Note: N.J.S. 2A:11-55; N.J.S. 2A:82-8, 9, 10, 11, 12, 14, 15, 16, 20, 21, 22 and 23; and R.S. 4:20-20, in so far as they authorize admitting in evidence copies or transcripts of official records, are included in this Rule, and are superseded thereby.**

**Caution:** Observe that the eight categories listed in Rule 70(1) are in the alternative. A showing of any one of them is enough to allow admission of secondary evidence.

## RULE 71. PROOF OF ATTESTED WRITINGS

No attester is a necessary witness unless the statute requiring attestation specifically so requires.

**Official Note: N.J.S. 2A:82-2 is included in this Rule, and is superseded thereby.**



**Caution:** N.J.S. 2A:82-2, substantially to the same effect as Rule 71, was expressly inapplicable to wills and codicils. The execution requirements of N.J.S. 3A:3-2 call for more than simple "attestation"; hence, in the absence of a proper attestation clause (which "proves itself"), the witness may be essential to establish that the execution requirements were satisfied.

**[Rule 72. Photographic Copies to Prove Content of Business and Public Records.** Not adopted.]

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