



Report of the Supreme Court Committee on the Rules of Evidence

REPORT OF THE NEW JERSEY SUPREME COURT COMMITTEE ON THE RULES OF EVIDENCE

To the Honorable Chief Justice Robert N. Wilentz
and the Associate Justices of the
Supreme Court of New Jersey

The task which you assigned to the Committee was to consider whether or to what extent New Jersey should adopt the Federal Rules of Evidence which are now followed by many states. You perceived that the bench and bar might benefit by this uniformity. New Jersey attorneys who appear in federal courts, and in the courts of sister states which have adopted the federal rules, would be conversant with a common body of law. In addition, judges and attorneys would gain insight and understanding in using the rules of evidence by the availability of a wider body of precedent. In considering the adoption of the federal rules, we were authorized to review their substance and to recommend appropriate changes.

The rules presented in this Report reflect what our Committee perceived as the best of the 1967 New Jersey Rules of Evidence and the 1975 Federal Rules of Evidence as amended. Both sets of rules have much in common; they both derived from the 1953 Uniform Rules of Evidence.

In working on this project the Committee examined in detail the New Jersey rules and the federal rules as a whole, the substance and wording of each individual rule, and issues in cases spawned by the rules. We considered the interplay between the rules of evidence and the Rules of Court, because the admissibility of evidence is affected occasionally by both sets of rules. For example, R. 4:16-1(c) provides for the use of testimony given in depositions. In general, these proposed rules of evidence do not address matters of practice and procedure, although some rules may be said to fall into that category, such as Rule 615 dealing with sequestration of witnesses.

The Committee represented all segments of the profession. It was composed of practicing attorneys, prosecuting attorneys, public and private defense counsel, judges, and academics who teach evidence at law schools in this state. Many of the published opinions on our law of evidence were written by judges serving on the Committee. Several of our members had the advantage of having participated in the judicial conference which considered the 1963 report of the committee whose invaluable work, Report of the Supreme Court Committee on Evidence, was the foundation for the 1967 rules. Many members of the Committee had worked on the ad hoc committee whose recommendations for amending several evidence rules were previously adopted. See, for

example, the amendments to N.J. Evid. R. 13 to 15, 20, 56, and 63(1)(a) and the commentary published in 108 N.J.L.J. 293, 301-302 (1981).

We did not have the services of an official reporter. As a result, this product represents the work of the Committee members themselves. The Committee took a practical approach based on the experience of its members in living with the 1967 rules. Nevertheless, our debates often returned to first principles.

The rules contained in this Report may be characterized broadly as follows. The organization essentially follows the format of the federal rules. Thus, the rules are divided into eleven articles. The number of each rule corresponds to the number of the federal rule with occasional deviations necessitated by some differences in approach, most noticeable in the organization of the hearsay exceptions in Article VIII. These changes in organization, however, do not affect precepts of admissibility.

In general, we have adopted the substance and language of the federal rules when we considered them equal to or better than our present rules. However, in a number of instances we preferred the prevailing New Jersey law, especially when it reflected a resolution of previous controversy over important principles. For example, Rule 609 embodies the holding of State v. Sands, 76 N.J. 127 (1978), as to the use of prior convictions for impeachment purposes, and Rule 607 retains vestiges of the voucher rule found in N.J. Evid. R. 20. Frequently, language changes were made without intending any change in substance. The wording of some 1967 rules was retained when we considered it superior to the corresponding federal rules. The purpose was to improve the clarity of expression of numerous rules so that they could be better understood and applied.

These rules differ in many respects from the federal and 1967 New Jersey rules. We broadened some rules, tightened others, omitted some federal rules entirely, corrected aspects of the 1967 Rules to the extent that they conflicted with established practice (for example, N.J. Evid. R. 2 as to scope of application), and filled in gaps in the law not covered by the 1967 Rules. The overall effect, however, is neither startling nor radical and will not substantially alter prevailing practice, although there are some important changes which are noted in the Comments. The similarities between the federal rules and the 1967 New Jersey rules are far greater than their differences, and the perception of the Committee is that the New Jersey rules have worked well for the most part. Nevertheless, we endeavored to improve the substance and language of the rules. In the main,

basic principles which served the interests of justice well in the past have been retained. We relied heavily on the valuable work of our colleagues and predecessors. With the adoption of this revision of the rules of evidence, New Jersey should continue to move forward in modernizing the law of evidence as was done in this state in 1967 and by the United States in 1975.

The law of evidence is not static. This is not the last word. But we hope to have contributed logic and good sense to this body of law and something to its beauty.

Respectfully submitted,

NEW JERSEY SUPREME COURT COMMITTEE ON RULES OF EVIDENCE

Hon. Theodore I. Botter, Chair

Jeffrey Blitz
Hon. Warren Brody
John Cannel
Hon. Philip Carchman
Marina Corodemus
Richard Carley
Robert Carter
Alfred C. Clapp*
Hon. Erminie L. Conley
Hon. William Dreier
Zulima V. Farber
Hon. E. Stevenson Fluharty
Hon. Myron Gottlieb
*Deceased

Francis Hartman
Hon. Michael P. King
Hon. Sylvia B. Pressler
Michael Risinger
Robert E. Rochford
Hon. Edwin H. Stern
Harvey Weissbard

Joyce Usiskin, Staff
Representatives of the
Administrative Office of
the Courts

Charles Hollenbeck, NJSBA
Former Staff of the
Administrative Office
of the Courts

June 1991

Summary Analysis of Evidence Rule Changes

ARTICLE I - GENERAL PROVISIONS

101 - Scope, Applicability

(a)(1) - privileges (no substantial change)

(a)(2) - relaxation: the proposed rule collects all the various proceedings and circumstances in which the rules of evidence may be relaxed, including small claims proceedings, statutory stipulations, sentencing and disposition proceedings, probable cause hearings and hearings to determine admissibility (present Rule 8, proposed Rule 104). While this rule accords with present practice, the only relaxation provision in the present rules is small claims, which this rule amends by making clear that the relaxation provision applies to all matters within small claims jurisdiction, whether or not brought there initially.

(a)(3) - administrative proceedings: the proposed rule clarifies and expands the present rule to include all administrative hearings: contested, uncontested, formal or informal.

(a)(4) - undisputed facts: the proposed rule extends the binding stipulation of fact provision of the present rule to criminal actions.

(b) definitions: the proposed rule preserves only three of the present fourteen definitions: burden of proof, burden of producing evidence, and writing. Relevance is defined by proposed 401 and some other definitions are provided by the hearsay rules. The omitted definitions were considered too obvious or unhelpful for inclusion.

102 - Purpose and Construction. Essentially unchanged

103 - Federal Rule 103 (rulings on evidence). Not adopted since this material is covered by rules of procedure.

104 - Preliminary Questions. Substantially unchanged, except for the addition of (d), taken from the federal rule and consistent with N.J. practice, providing that testimony by an accused on preliminary hearing does not subject him to cross-examination on other issues.

105 - Limited Admissibility. Changes present rule by requiring the party to request a limiting instruction and by expressly authorizing the judge to permit a party to waive the limiting instruction.

106 - Remainder of or Related Writings or Recorded Statements. The proposed rule follows the federal rule by permitting the adverse party to require the proffering party to introduce any other relevant portion of the statement or other writing bearing on the issue. There is no such present evidence rule although the rules of procedure to some extent so provide. This accords with present practice.

ARTICLE II - JUDICIAL NOTICE

201 - Judicial Notice of Law and Adjudicative Facts. By and large the substance of the proposed rule follows the present

rules more closely than the federal rule but the material has been reorganized consistently with the federal rule, replacing present Rules 9, 10, and 11. The main change is in 201(g) which provides, for sixth amendment confrontation purposes, that the judge's instruction as to the conclusiveness of judicially noticed fact is limited to civil cases. In criminal cases, the jury cannot be compelled to accept a judicially noticed fact.

202 - Judicial Notice in Proceedings Subsequent to Trial. The proposed rule follows the present N.J. rule in both substance and format rather than the analogous federal rule.

ARTICLE III - PRESUMPTIONS

301 - Effect of Presumption. Substantially unchanged.

302 - Choice of Law. - The proposed rule follows the federal rule; there is no New Jersey analogue. It provides that the law of existence and effect of presumption follows the law governing the claim or defense to which it relates. The rule expressly applies only to civil actions.

303 - Presumptions Against the Accused in Criminal Cases. There is no analogous state or federal rule. The proposed rule follows well-established New Jersey case law on the effect of statutory presumptions and instructions to juries where presumed facts are involved. The proposed rule follows, generally, the 1974 Uniform Rules of Evidence. The rule replaces N.J. Evid. R. 15, which was adopted as a stop-gap measure.

ARTICLE IV - RELEVANCY AND ITS LIMITS

401 - Definition of Relevant Evidence. The proposed rule is substantially the same as the present rule, substituting however for the phrase "material fact", the phrase "fact of consequence to the determination of the action."

402 - Relevant Evidence Generally Admissible. Substantially unchanged.

403 - Exclusion of Relevant Evidence. Substantially the same as present rule with new introductory phrase cross-referencing to other rules and statutes.

404 - Character Evidence Not Admissible to Prove Conduct. The proposed rule replaces present Rules 46, 48, 55 and part of 47, generally following the federal formulation without substantial change in New Jersey practice except to render clearly inadmissible proof of a trait of character for the purposes of drawing inferences as to conduct on a specific occasion. Trait of character is consequently only admissible where it itself is in issue or to affect credibility in accordance with proposed Rule 608.

405 - Methods of Proving Character. Proposed paragraph (a) (reputation, opinion, or conviction of crime) is substantially unchanged, rejecting the federal provision permitting general inquiry on cross-examination into specific instances of conduct. Proposed paragraph (b) (specific instances of conduct when an essential element of a charge, claim or defense) follows the federal formulation without change in New Jersey practice.

406 - Habit, Routine Practice. The proposed rule generally follows present Rules 49 and 50. There is no federal analogue to paragraph (b).

407 - Subsequent Remedial Measures - The proposed rule, in addition to streamlining and clarifying the verbiage of present Rule 51, also makes clear that proof of subsequent remedial measures is admissible for purposes other than proof of negligence such as control, routine maintenance, feasibility and credibility. This comports not only with the federal analogue but with New Jersey case law.

408 - Settlement Offers and Negotiations - The proposed rule follows the formulation of the federal analogue which is more felicitously phrased than the New Jersey rule, also making clear its applicability to statements and conduct of the parties' attorneys as well as those of the parties themselves. It also expands the issues as to which such proof may be introduced from "accord and satisfaction" only, as at present, to a purpose other than validity or amount of the claim. It expressly provides that otherwise relevant evidence to be admitted despite its disclosure during settlement negotiations.

409 - Payment of Medical and Similar Expenses - The proposed rule follows the federal rule which is consistent with the principles of N.J. Evid. R. 52(1), although expressed in different terms.

410 - Inadmissibility of Pleas, Plea Discussions and Related Statements - The proposed rule expands the formulation of the present New Jersey rule, also overruling case law which permitted admissibility of statements made by defendant during unconsummated plea negotiations. The verbiage generally follows the federal analogue.

411 - Liability Insurance -- The proposed rule follows the federal formulation and changes the N.J. Evid. R. 54 by making clear that while evidence of insurance is not admissible to prove negligence or wrongdoing, it may be admitted for other purposes such as proof of ownership, agency, control or bias.

412 - Federal Rule 412 (rape-shield law). Not adopted. This subject is covered by N.J.S.A. 2A:2C: 14-7, which is not proposed to be changed at this time. Note, however, that recent decision (*see State v. Budia*) challenge a literal interpretation of 2C:14-7(c), suggesting that a future change may be necessary depending on the substantive nature of Supreme Court review.

ARTICLE V - PRIVILEGES

No change is suggested in any of the statutory formulations constituting the rules of privilege. The statutes are merely restated in this draft.

ARTICLE VI - WITNESSES

601 - General Rule of Competency - The proposed rule reflects current practice, collecting the cognate provisions of present Rules 7(a) and (b) and 17 (a) and (b). It adds a sentence to accommodate questioning of a child of tender years as to sexual activity pursuant to proposed Rule 804(b)(8) notwithstanding the child may be incompetent to testify as a witness. See present Rule 63(33).

602 - Lack of Personal Knowledge - The proposed rule follows the federal formulation, making no substantial change in New Jersey practice.

603 - Oath or Affirmation - The proposed rule makes no substantial change in the present rule.

604 - Interpreters - The proposed rule codifies the practice of requiring the interpreter to take an oath or affirmation that he will interpret accurately. It rejects, as confusing, the federal stipulation that the interpreter is subject to "qualification as an expert," leaving the qualifications of the interpreter to be determined by the judge.

605 - Restriction on Judge as Witness - The proposed rule follows the federal formulation which is not substantially different from the present New Jersey rule.

606 - Restrictions on Juror as Witness - The proposed rule is substantially the same as both the analogous federal and present state rule.

607 - Credibility and Neutralization - The proposed rule follows, almost verbatim, present Rule 20, whose formulation was deemed preferable to the federal rule.

608 - Evidence of Character for Truthfulness or Untruthfulness - The proposed rule generally follows the federal formulation, remaining consistent with N.J.Evid. R. 47.

609 - Impeachment by Evidence of Crime - There is no present New Jersey rule, but rather a statute N.J.S.A. 2A:81-12, which was interpreted by State v. Sands. For completeness, the substance of that statute is followed by this rule and the federal formulation is rejected in favor of Sands, which is intended to be incorporated into the rule by its reference to the judge's discretion. The proposed rule, by its silence on the subject, follows New Jersey case law and rejects the contrary provision of the federal rule respecting the inadmissibility for impeachment purposes of a conviction pending appeal.

610 - Religious Beliefs or Opinions - There is no present New Jersey rule other than the privilege of N.J.S.A. 2A:84A-24 (reiterated by present Rule 30 and proposed Rule 512). The proposed rule follows the federal rule and is not inconsistent with the privilege.

611 - Mode and Order of Interrogation and Presentation - The proposed rule follows the federal rule almost verbatim. While there is no New Jersey analogue, the provisions of the proposed rule follow accepted New Jersey practice.

612 - Writing Used to Refresh Recollection - While there is no present New Jersey rule, the proposed rule is consistent with New Jersey practice. It generally follows the federal rule but omits the Jencks Act reference (whose substance is covered by R.3:17), makes clear that the writing used to refresh recollection has no substantive evidential import, omits the reference to preservation of excised portions (covered by R. 1:7-3), and omits the reference to sanctions (covered by various rules of practice).

613 - Prior Statements of Witnesses - The proposed rule generally follows both the federal and state analogues.

614 - Calling and Interrogation of Witnesses by Judge - The proposed rule generally follows the federal rule. While there is no New Jersey analogue, the rule comports with present New Jersey practice.

615 - Sequestration of Witnesses - While there is no present New Jersey evidence rule, there is a body of New Jersey case law on the subject. For purposes of completeness, the proposed rule merely cross-references to that body of law, thus rejecting the federal formulation.

ARTICLE VII --OPINIONS AND EXPERT TESTIMONY

- 701 - Opinion Testimony of Law Witness
702 - Testimony By Experts
703 - Bases of Opinion by Experts
704 - Opinion on Ultimate Issue
705 - Disclosure of Facts or Data Underlying Expert Opinion

The text of these proposed rules is substantially the same as both their New Jersey and federal analogues. Only clarifying language changes have been made as well as those format changes necessary to conform to the federal rules. Note that

proposed 704 rejects the recent amendment of federal analogue barring on expert from testifying on the mental state of defendant in a criminal case.

706 - Court Appointed Experts - Federal rule 706 was not adopted since the subject is well-covered both by New Jersey case law and rules of practice. There is no New Jersey evidence rule analogue.

ARTICLE VIII --HEARSAY

801 - Definitions - The proposed rule defines six terms: statement, declarant, hearsay, business, writing and public official. The definitions of the first three make no change in the present New Jersey analogues. The definition of "business" follows the New Jersey analogue which, unlike the federal rule, includes governmental agencies. The definition of "writing" substantially broadens the form of expression included thereby. The definition of "public official" has been broadened to include federal officials. The omission of officials of the federal government from the definition in Rule 62(3) appears to have been an oversight since Rule 63(15) as initially proposed included public officials of the United States as well as state officials.

802 - Hearsay Rule - The formulation of the proposed rule follows the federal rule, broadening the New Jersey analogue by excepting not only hearsay exceptions provided for by rules of evidence but also those provided for by law generally.

803 - Hearsay Exceptions Not Dependent on Declarant's Unavailability. As a general matter, the proposed rule, together with proposed Rule 804, represents a significant format change in the rules and something of a format change from the federal rules as well. First, these rules separate exceptions which are not dependent on unavailability (Rule 803) and those which are (Rule 804), a formal distinction not made by present Rule 63, which collects all exceptions. Secondly, 803(a) and 803(b)(prior statements of witnesses and statement by party-opponents) are treated differently from the federal rules. The federal rules do not consider these statements as hearsay, but rather expressly excludes them from the hearsay definition (Federal rule 801(d)). The New Jersey rules continue to regard such statements as exceptions to the hearsay rule rather than as exclusions from it. In order to maintain parallelism with federal enumeration, these two types of statements were designated as 803(a) and (b), respectively. All other hearsay exceptions not dependent on unavailability are grouped together in Rule 803(c) in the same order as in the federal rule 803.

803(a) - Prior Statements - The proposed rule makes no substantial change in the analogous New Jersey source rules, which are here reorganized. Subsection (1), dealing with the substantive use of prior inconsistent statements, is broader than the federal rule, which admits such statement only if they were made under oath.

803(b) - Party Statements - The proposed rule makes no substantial change in the analogous New Jersey source rules which are here reorganized.

803(c) - Hearsay Exceptions Not Dependent on Unavailability

(c)(1) - Present Sense Impression - The proposed rule includes elements of both the analogous federal and state rule, adding to the latter the provision for admissibility of a statement made immediately after the observation if the declarant had no opportunity to deliberate or fabricate. This is the standard employed by the excited utterance rule as well.

(c)(2) - Excited Utterances - The proposed rule follows the federal formulation with no substantial change in the New Jersey rule.

(c)(3) - Then Existing Mental, Emotional or Physical Condition - The proposed rule follows the federal formulation with little substantial change in but considerable streamlining of the present New Jersey Rule. This rules, however, does add the provision respecting a declarant's will for the purpose of proving probable intent.

(c)(4) - Statements for Purposes of Medical Diagnosis or Treatment. The proposed rule follows the federal formulation, substantially streamlining the present New Jersey rule with one change in substance. The present rule requires the statement to be made to a physician. In light of present-day medical practice, that restriction was deemed too narrow and was consequently deleted. Statements made in good faith to anyone for purposes of diagnosis and treatment are included in the exception.

(c)(5) - Recorded Recollection - The proposed rule is substantially the same as both the state and federal analogues, but adds to the state rule the provision permitting exclusion of the statement if made in circumstances indicating that it is not reliable.

(c)(6) - Records of Regularly Conducted Activity - The proposed rule combines provisions of both the federal and present New Jersey rule. Added to the present New Jersey rule is the provision that the record not only be made in the regular course of business but that it also be the regular practice of the business to make the record. Also added is the provision permitting admission of opinions and diagnoses contained in business records subject to Rule 808, a new provision hereafter referred to. Records prepared in anticipation of litigation are not expressly excluded as a class; that fact of preparation goes to the issue of trustworthiness. Unlike the federal rule, the rule continues to include government records. It also rejects the federal requirement that the record must be introduced by its custodian or other qualified purpose. Thus the present New Jersey practice of a general trustworthy criterion is continued.

(c)(7) - Absence of an entry in records of regularly conducted activity - The only change the proposed rule makes in the present New Jersey rule is the addition of the express provision permitting exclusion of the evidence if the source of information or other circumstances indicate that the inference of nonoccurrence is not trustworthy.

(c)(8) - Public Records, Reports, and Findings - The proposed rule follows the present New Jersey rule, rejecting two key provisions of the federal rule. First, the federal rule excludes from criminal cases statements of observations by law enforcement personnel. The proposed rule does not. Second, the federal rule includes, except against the accused in criminal cases, "factual findings resulting from an investigation." The proposed rule permits only "statistical findings" but in both civil and criminal cases.

(c)(9) - Records of Vital Statistics - The proposed rule follows the federal formulation, replacing present New Jersey Rule 63(16), which was intended, although not expressly so stated, as a "vital statistic" rule. No change in practice is intended.

(c)(10) - Absence of Public Record or Entry - The proposed rule follows the federal formulation, adding to the present New Jersey rule the express provision that the failure to discover an official record is admissible to prove not only the non-existence of the record itself but also the nonoccurrence or nonexistence of the fact not recorded.

(c)(11) - Records of Religious Organizations - The proposed rule follows the federal rule. There is no New Jersey analogue. Thus religious records may be admissible, if otherwise reliable, even if the information was not provided by a person in the regular course of that person's business.

(c)(12) - Marriage, Baptismal and Other Records - The proposed rule follows the federal rule, enlarging the present New Jersey rule, which includes only marriage certificates.

(c)(13) - Family Records - The proposed rule, admitting family records contained in Bible, genealogies, inscriptions and the like, follows the federal rule. There is no New Jersey analogue.

(c)(14) - Records of Documents Affecting an Interest in Property - The proposed rule follows the federal formulation, making no substantial change in the New Jersey rule.

(c)(15) - Statements in Documents Affecting an Interest in Property - The proposed rule follows the federal formulation, making no substantial change in the New Jersey rule.

(c)(16) - Statements in Ancient Documents - The proposed rule follows the federal formulation, substituting a 30-year period for the federal rule's 20-year period. Although there is no New Jersey analogue, New Jersey has followed the 30-year common-law rule on ancient documents. Hence no practice change is made.

(c)(17) - Market Reports, Commercial Publications - The proposed rule follows the federal formulation, broadening the present New Jersey rule by including commercial publications relied on by the general public, not just by persons engaged in a particular field.

(c)(18) - Learned Treatises - The proposed rule follows the federal rule, adding the proviso respecting the display of graphics to the jury. There is no New Jersey analogue. Hence this rule changes New Jersey practice by admitting learned treatises established as authoritative even if not so acknowledged by an expert witness on cross-examination.

(c)(19) - Reputation of Personal or Family History - The proposed rule follows the federal formulation, modifying the present New Jersey rule by eliminating the requirement of Rule 63(27)(c) that the person whose history is being proved be "resident in the community at the time of the reputation."

(c)(20) - Reputation of Boundaries or General History - The proposed rule follows the federal formulation, making no substantial change in the present New Jersey rule.

(c)(21) - Reputation as to Character - The proposed rule follows the federal rule with no substantial change in the present New Jersey rule.

(c)(22) - Judgment of Previous Conviction of Crime - The proposed rule follows the present New Jersey rule, rejecting the federal provision which permits substantive use of prior convictions in criminal cases as well as civil cases to prove facts essential to the judgment.

(c)(23) - Judgments as to Personal, Family or General History - The proposed rule follows the federal formulation. Although there is no New Jersey analogue, the rule follows the common-law exception recognized by case law in this jurisdiction.

(c)(24) - Other Exceptions - The federal rule is not proposed.

(c)(25) - Statement Against Interest - The proposed rule generally follows the present New Jersey rule but deletes, as imprecise, the phrase "social interest," which is not included in the federal rule. The proposed rule rejects the federal provision which conditions admissibility on unavailability and also rejects

the federal requirement of corroborating circumstances indicating trustworthiness of statements against penal interest made by another which exculpate the accused in a criminal case.

(c)(26) - Judgments Against Persons Entitled to Indemnity - The proposed rule makes no substantial change in the present New Jersey rule. There is no federal analogue.

804 - Hearsay Exceptions: Declarant Unavailable

(a) - Definition of Unavailable - The proposed rule is an amalgam of the federal and present New Jersey rules. Paragraphs (1), (2), and (3) generally follow the formulation of the federal rule without substantial change in New Jersey practice. Paragraph (4) modifies both federal and state practice by limiting the requirement that depositions first be taken or be attempted to be taken to 804(b)(4) and (7) only (personal and family history and voter statements). Paragraph (5) is included to implement the requirements respecting the admissibility of a statement by a child of sexual conduct under 804(b)(8) (present 63(33)).

(b)(1) - Testimony in Prior Proceedings - The proposed rule follows the federal formulation, differing, however, in some respects both from that rule and the present New Jersey rule in format and substance. Subsection (A) applies to testimony against a party who was a party to the prior proceeding. Such testimony is admissible if the party had the same motive and opportunity to develop the testimony in the prior case as in the instant case. Subsection (B) applies to testimony against a party who was not a party to the prior action. Such evidence is limited to civil actions and, in criminal actions, only if offered by the defendant. The criterion of similarity of motive and opportunity to develop is the same even though they may be motive and opportunity of different persons. The requirement of "predecessor in interest" of both the federal and state rule is not retained. The rule applies to depositions as well as trial testimony but excludes prior testimony of expert witnesses if similar experts are available, subject to exceptions.

(b)(2) - Statement Under Belief of Impending Death - The proposed rule, applicable to all criminal cases, follows the present New Jersey rule, rejecting the federal rule, which applies only to homicide cases but also to civil cases and also applies if the declarant survives. Statements by deceased declarants are admissible in civil cases under 804(b)(6), which follows N.J. Evid. R. 63(32).

(b)(3) - Statement against Interest - Adopted in these proposed rules as 803(c)(25) (unavailability not required).

(b)(4) - Statement of Personal or Family History - The proposed rule follows the formulation of the federal rule, making no substantial change in present Rule 63(24). It modifies present Rule 63(25), however, by eliminating the requirement of unavailability of both declarants.

(b)(5) - Other exceptions - The federal rule is not proposed.

(b)(6) - Trustworthy Statement by Deceased Declarants - The proposed rule, applicable to civil cases only, follows the present New Jersey rule. There is no direct federal analogue. See note to proposed 804(b)(2), supra.

(b)(7) - Voters' Statements - The proposed rule follows the present New Jersey rule adding the notice requirement of Rule 807. There is no federal analogue.

(b)(8) - Statements by a Child Concerning Sexual Activity - There is no federal analogue. The proposed rule makes several important changes in present Rule 63(33). It makes its provisions applicable to all types of proceedings. It substitutes the phrase "tender years" for the strict 12-year old stipulation. It does permit the hearsay admission if the declarant is able to testify fully and cogently. It permits the statement of other declarants who are physically available only if an adverse party who so requests has the opportunity to question the child. It clarifies the general standards of admissibility. Finally, it permits the adverse party to introduce other parts of the statement and other relevant statements made by the child.

805 - Hearsay Within Hearsay - The proposed rule follows the present New Jersey rule, which is consistent with the federal rule.

806 - Attacking and Supporting Credibility of Declarant - The proposed rule follows the formulation of the federal rule adding to the present state rule the provision, consistent with current state practice, that if the party against whom a hearsay statement has been admitted calls the declarant as a witness, he may examine the declarant as if under cross-examination.

807 - Discretion of the Judge to Exclude Evidence under Certain Exceptions - The proposed rule follows the present New Jersey rule which requires advance notice of an intention to offer hearsay admissible under certain designated exceptions. There is no direct federal analogue.

808 - Included Expert Opinion - The proposed provision appears in neither the federal nor the New Jersey rules. It permits the admission of included expert hearsay under designated indicia of trustworthiness.

ARTICLE IX - AUTHENTICATION AND IDENTIFICATION

901 - Requirement of Authentication or Identification - The proposed rule makes no substantial change in the present New Jersey rule, rejecting the detailed formulation of the federal rule.

902 - Self-Authentication - While the proposed rule follows federal formulation and format, it makes little substantial change in the New Jersey rules. Note, however, that following the federal rule, the categories of newspapers and periodicals, trade inscriptions and the like, acknowledged documents, commercial paper and statutorily presumed authenticity have been added.

903 - Testimony of Subscribing Witness Unnecessary - The proposed rule follows the federal formulation, making no substantial change in the present New Jersey rule.

ARTICLE X- CONTENTS OF WRITINGS AND PHOTOGRAPHS

1001 - Definitions - The proposed rule follows the federal format and formulation with no substantial change in New Jersey sources.

1002 - Requirement of Original - The proposed rule follows the federal format with no substantial change in the present New Jersey rule.

1003 - Admissibility of Duplicates - The proposed rule follows the federal rule. There is no New Jersey analogue, and the provision that a duplicate is admissible as an original under the circumstances specified in the rule.

1004 - Admissibility of Other Evidence of Contents - The proposed rule follows the federal formulation with no substantial change in the present New Jersey rule other than eliminating the preference for written secondary sources over oral testimony.

1005 - Public Records - The proposed rule follows the federal formulation with no substantial change in the present New Jersey rule.

1006 - Summaries - The proposed rule follows the federal rule, eliminating from the present New Jersey rule the requirement that the underlying data be routinely produced in court. This rule requires only that they be made available and produced in court only when ordered.

1007 - Testimony of Written Admission of Party - The proposed rule follows the federal rule with no substantial change in the New Jersey rule.

1008 - Functions of Judge and Jury - The proposed rule follows the federal formulation with no substantial change in the present New Jersey rule.

ARTICLE XI- MISCELLANEOUS RULES

1101 - Applicability of Rules - The federal rule is not proposed for adoption as it overlaps proposed Rule 101.

1102 - Amendment of Rules - The federal rule is not proposed for adoption. See N.J.S.A. 2A:84A-33, et seq.

1103 - Citation of Rules - The proposed rule is based on the federal rule, providing an approved citation form.

ANALYSIS OF SIGNIFICANT RULE CHANGES

This analysis summarizes the principal changes in the Rules of Evidence proposed in the June 1991 Report of the New Jersey Supreme Court Committee on the Rules of Evidence. I will also discuss significant comparisons with the Federal Rules of Evidence.

In many respects the proposed rules closely reflect the present state of New Jersey evidence law, but they have been organized and numbered according to the federal format. Overall, where differences exist substantively, the proposed rules are more akin to our present law than to the Federal Rules of Evidence. Previous amendments to the 1967 New Jersey evidence rules, such as to Rule 63(1)(a) (prior inconsistent statements) and Rule 56(2) (expert opinion), incorporated some concepts taken from the federal rules, and to a large extent the similarities in the present New Jersey rules and the federal rules are far more pervasive than their differences. It should be remembered that the New Jersey evidence rules, adopted in 1967, and the federal rules, adopted in 1975, derived, in different degrees, from the 1953 Uniform Rules of Evidence.

The following comments deal with significant differences from the federal rules and changes and additions to the 1967 New Jersey Rules of Evidence as amended to date, which are contained in the rules proposed in the Committee's June 1991 Report.

1. Prior inconsistent statements of a non-party witness.

In proposed Rule 803(a)(1) and Rule 607, we retain existing provisions of N.J.Evid.R. 63(1)(a) and N.J.Evid.R. 20. These rules had been amended in 1982, with 63(1)(a) borrowing a small part of the concept contained in federal Rule 801(d)(1)(A). However, we then adopted a much broader rule than the federal rule, retaining the original form of the 1967 version of 63(1)(a)

to admit for substantive use a prior inconsistent statement of a non-party witness made in any form so long as the witness was not called by the party offering the extra-judicial statement. The federal rule limits the substantive use of prior inconsistent statements to those made under oath at a trial, hearing, deposition or other proceeding, no matter which party offers the prior statement. Under our proposed Rule 803(a)(1), a prior inconsistent statement made by a party's own witness can be used substantively only if it was made under oath or in writing made or signed by the declarant, or is contained in a sound recording.

In amending Rule 63(1)(a) in 1982 it was felt that the requirement that the prior inconsistent statement be made under oath was too narrow and limiting. A sound recording or written record made or signed by the declarant was deemed of sufficient reliability for the purpose, and a statement in any form, even an informal verbal statement, made in circumstances indicating reliability, should suffice as to another party's witness, since the witness can, in testimony, deny or explain the extra-judicial statement.

Thus, the Committee felt that our rule is and has been a better rule than its federal counterpart.

2. Attacking the credibility of a witness by a prior inconsistent statement.

Under N.J.Evid.R. 20, a party calling a witness may not neutralize his testimony by a prior inconsistent statement unless the statement is in a form admissible under Rule 63(1)(a) or the judge finds that the party calling the witness was surprised by his testimony. This reflects to some extent the common law "voucher" principle. This rule is continued in proposed Rule 607. It is narrower than federal rule 607 which permits the credibility of a witness to be attacked by any party, including the party who called the witness, without limitation on the use of prior inconsistent statements for the purpose. Whether the narrower New Jersey rule is better may be debated. A broader rule was proposed in the 1963 Report of the New Jersey Supreme Court Committee on Evidence ("The 1963 Report") but was rejected. See also a proposed amendment to Fed. R. Evid. 607 that would impose stricter conditions for admission of a prior inconsistent statement offered by the party calling the witness. A.B.A. Section of Litigation, Proposed Amendments to the Federal Rules of Evidence (1985) at p. 75.

Our Committee adhered to the present form of Rule 20, as it was broadened somewhat in 1982 to admit statements under oath, sound recordings or writings as in 63(1)(a) for this purpose. This modification of Rule 20 produced a comfortable compromise.

3. Supporting the credibility of a witness by character evidence.

N.J.Evid. 20, as adopted in 1967, provided that "[n]o evidence to support the credibility of a witness shall be admitted except to meet a charge of recent fabrication of testimony." Evidence of a witness' trait of character for truthfulness could not be offered generally unless the credibility of the witness had first been attacked. See The 1963 Report at 64.

The provision of N. J. Evid. R. 20 referred to above was literally too restrictive since corroborating evidence is frequently introduced which has the incidental effect of supporting the credibility of a witness. Thus, when N. J. Evid. R. 20 was amended in 1982, that sentence was revised to provide that "a prior consistent statement" of the witness could not be admitted to support his credibility except to meet an express or implied charge of recent fabrication (and except as otherwise provided by law, e.g., the fresh complaint rule and prior identification testimony under N. J. Evid. R. 63(1)(c)). Unfortunately, this amendment was given a broader reading than intended. See State v. Frost, 242 N. J. Super. 601, 613 (App. Div. 1990); Cogdell v. Brown, 220 N. J. Super. 330, 336 (Law Div. 1987). Relevant evidence which incidentally supports the credibility of a witness is always admissible, but evidence of the witness' truthful character could not be offered unless the witness' credibility was first attacked. State v. Johnson, 216 N.J. Super. 588, 605-607 (App. Div. 1987).

While the provisions of N. J. Evid. R. 20 have been incorporated into proposed Rule 607, as discussed above, the prior history of N. J. Evid. R. 20 requires a change in proposed Rule 608 to provide that evidence of truthful character of a witness cannot be offered unless the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise. This is not intended to alter the right of an accused in a criminal case to offer character evidence tending to rebut the likelihood that he would commit a crime. This amendment will clarify the confusion in interpreting N.J. Evid. R. 20 and is consistent with Fed. Evid. R. 608(a) as well as the intent of N. J. Evid. R. 20 as adopted in 1967 and New Jersey practice prior to the 1982 amendment of that rule.

4. Public records, reports, and findings.

Proposed Rule 803(c)(8) retains the provisions of N.J.Evid.R. 63(15)(b) and rejects the provisions of federal Rule 803(8)(C) which are broader in scope (except as to evidence offered against an accused in criminal cases). The Committee also retained the present design of the 1967 New Jersey rules by including regularly conducted activities of governmental agencies in the business record rule, 803(c)(6), defining business in Rule 801(d) to include "activities of governmental agencies," as in

N.J.Evid.R. 62(5). Thus, in Rules 803(c)(6) and 803(c)(8) we have retained the pattern of our present rules, 63(13) and 63(15), maintaining two rules through which governmental records may be introduced in evidence. See *State v. Matulewicz*, 101 N.J. 27 (1985). The federal rules do not expressly include governmental activity within the definition of business contained in federal Rule 803(6). However, business records of government agencies are generally admissible under federal Rule 803(8).

The principal difference between our proposed Rule 803(c)(8) and federal Rule 803(8) is that we continue N.J.Evid.R. 63(15)'s limitation on the admissibility of findings in governmental investigations to "statistical" findings. Under the federal counterpart, Rule 803(8)(C), records, reports, statements or data compilations of public offices or agencies containing "factual findings resulting from an investigation made pursuant to authority granted by law," derived from trustworthy sources and circumstances, are admissible in civil cases and against the government in criminal cases. Thus, proposed Rule 803(c)(8), like N.J.Evid.R. 63(15), is narrower than the business record rule, and may serve no separate purpose unless broadened in the direction of the federal rule. This was not proposed by the Committee but is a matter for the Supreme Court's consideration. See *Matulewicz*, *supra*, in which the Court referred to the provisions of N.J.Evid.R. 63(15) which seem to exclude conclusions and opinions rather than observations or statistical findings as a "problematic exclusionary limitation." 101 N.J. at 32. Sculpting a rule that secures the benefits of governmental agencies' investigations while rejecting the impurities and disadvantages of such evidence is a difficult task. See Comment on Rule 803(c)(8) in the Committee's Report, referring to conflicts in federal decisions on the admissibility of opinions and conclusions in investigative records and evaluative reports.

5. Exclusion of expert opinion in otherwise admissible hearsay.

Proposed Rule 808 is a new rule not found in the current New Jersey or the Federal Rules of Evidence. It requires that expert opinion of a declarant who is not produced as a witness at trial be excluded from hearsay, such as business records, unless the circumstances in which the opinion was rendered, including motive, interest, contemplation of litigation, complexity of the subject matter, and likelihood of accuracy, tend to establish the trustworthiness of the opinion.

As an example, this rule would allow the exclusion of an opinion contained in a hospital record of a patient admitted for the treatment of cancer that the cause of cancer was a traumatic injury suffered in an auto accident, then in litigation, unless the medical expert is produced as a witness subject to cross-examination. The rule incorporates principles expressed in *State v. Matulewicz*, 101 N.J. 27, 30 (1985), holding that the admissibility of a State chemist's laboratory report identifying a substance as marijuana would depend on the method and circumstances involved in the report's preparation, the complexity or routine nature of the analysis, the degree of objectivity or subjectivity involved, the motive for untrustworthiness, and the duty of the declarant to be accurate and reliable.

This rule has been developing over time. See *State v. Martorelli*, 136 N.J. Super. 449 (App. Div. 1975), cert. denied, 69 N.J. 445 (1976) (blood alcohol report in hospital record) and *dicta* in *Gunter v. Fischer Scientific American*, 193 N.J. Super. 688, 694 (App. Div. 1984) and *Lazorick v. Brown*, 195 N.J. Super. 444, 451 (App. Div. 1984). Notwithstanding the complexity of the condition which is the subject of the expert opinion, many records containing such opinions, particularly hospital records, are routinely admitted without objection. However, where the conclusion expressed is a matter of dispute, and may be critical to the outcome of the case, judges should be aware of their discretion to exclude opinions of questionable trustworthiness unless the expert is produced as a witness. The rule is intended to embody principles found in case law and recognized by other authorities. See *McCormick on Evidence* (Cleary 2d ed. 1972), §313 at 732; 4 *Weinstein's Evidence*, par. 803(6)[06], 803-199 to 201 (1988).

6. Presumptions in civil cases.

The presumption provisions of proposed Rule 301 generally follow its federal counterpart and existing New Jersey law. The Committee considered adopting the "Morgan view" which was incorporated in Rule 301 of the Uniform Rules of Evidence (1974), and was proposed to the United States Supreme Court by its Advisory Committee on Rules of Evidence, namely, that a presumption should not disappear in the face of evidence on the subject as in the classical "Thayer view," but should serve to shift the burden of persuasion to the party against whom the presumption operates. E.M. Morgan, "Instructing the Jury Upon Presumptions and Burden of Proof," 47 *Harv. L. Rev.* 59, 83 (1933). That position was rejected by our Committee and is expressly rejected by federal Rule 301 as adopted by Congress. By contrast, the California Evidence Code, successfully or not divides all presumptions into those which affect the burden of producing evidence (§603) and those which affect the burden of proof, i.e., persuasion (§605), and undertakes the task of allocating a number of existing presumptions to one or the other of these categories. The New York State Law Revision Commission, in its 1982 Proposed Code of Evidence, recommended adoption of the "Morgan" view, shifting the burden of persuasion to the party

against whom the presumption operated. §302, at 24 (West. Pub. Co.). But the Committee recognized that no one rule can ideally give the appropriate effect to all presumptions. *Id.* at 26.

The large number and variety of presumptions, their different purposes, and the differing probative force of the factual inferences on which they are based make it difficult to provide comfortably in one rule for all eventualities. For example, the presumption that a driver is the agent of a motor vehicle's owner may serve a purpose in the absence of any evidence on the subject, but in many circumstances it may be a highly unlikely inference. Should the presumption do more than shift the burden of producing evidence on the issue? It may be sufficient to provide, as in Rule 301, that the inferences that may be drawn from the evidence remain in the case, and to consider the presumed fact established from proof of the basic fact in the absence of contradictory evidence.

7. Presumptions against the accused in criminal cases.

Rule 303 is new. It deals with the effect of presumptions in criminal cases and incorporates principles of constitutional law enunciated in both federal and New Jersey cases. A proposed federal rule for presumptions in criminal cases was not adopted. The 1967 New Jersey rules did not contain a separate rule on the subject. As a result, N.J.Evid.R. 15 was adopted in 1982 as a stop-gap measure to assure that Rules 13 and 14 were not applied against an accused in criminal cases by virtue of N.J.S. 2C:1-13(e). The Committee considers Rule 303 a useful addition to New Jersey law.

8. The residual hearsay exception in federal rules 803(24) and 804(b)(5).

A significant difference between the Committee's Report and the federal rules is the rejection of residual exceptions to the hearsay rules contained in the federal enactment that permit "other" unspecified exceptions to the hearsay rules in limited instances. A general rule permitting any evidence rule to be "relaxed" in civil cases in the interest of justice was proposed as Rule 2(4) in *The 1963 Report*, but it was not adopted.

Federal Rules 803(24) and 804(b)(5) are identical and are carefully crafted to meet rare exceptional needs. Ironically, a residual exception was made part of Rule 803 (which applies whether or not the extra-judicial declarant is available as a witness) as well as Rule 804, which conditions the admission of hearsay statements of declarants only when they are unavailable as witnesses. There should be no need for a residual exception in Rule 803 if the declarant is available as a witness.

The federal residual exception rules contain strict criteria for admissibility in addition to advance notice to an adversary of an intention to introduce such hearsay evidence. The conjoined criteria for admissibility are:

- the statement is offered as evidence of a material fact;
- the statement is more probative on the issue than any other evidence reasonably available;
- the interests of justice and the general purposes of the evidence rules will best be served by admission of the hearsay statement; and,
- The statement is not covered by an express hearsay exception but has equivalent circumstantial guarantees of trustworthiness.

The federal courts have not been consistent in the application of these criteria, some being less strict than others. One general problem is whether the rule can be applied to admit a type of hearsay which is governed by an express exception if the conditions of that exception have not been satisfied. The terms of the rules suggest otherwise. *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 500 F. Supp. 1190, 1262-1263 (E.D. Pa. 1980); but cf. *Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179 (3d Cir. 1978), cert. denied, 439 U.S. 969 (1979) (concurring opinion).

In the search for truth there is often a gnawing temptation to use some seemingly reliable evidence of a material fact in the absence of other probative evidence or which appears superior to other available evidence on the issue. The case often used to prove the need for such a rule is *Dallas County v. Commercial Union Assurance Co., Ltd.*, 286 F.2d 388 (5th Cir. 1961). The case was cited in *The 1963 Report* to support its relaxation proposal, and by the Report of Senate Committee on the Judiciary, in support of its amendment to add a residual exception rule to the proposed federal rules.

The issue in the *Dallas County* case was whether the county courthouse tower collapsed because it was struck by lightning, for which there was insurance coverage, or because of structural weakness and deterioration. There was evidence of charcoal and charred timbers present. However, the insurer offered in evidence an article published 56 years earlier in a local newspaper describing a fire in the courthouse while it was under construction. The court held that the article was admissible out of necessity as trustworthy hearsay, consistent with the rationale of the ancient document exception, but not admitted as such nor as a business record.

The federal rule is not as broad as Rule 2(4) proposed in *The 1963 Report*, and does require warning to an adversary in

advance of trial, a condition not contained in proposed Rule 2(4). Advance notice to an adversary tends to reduce the fear of uncertainty that unspecified exceptions engender. The Supreme Court may wish to consider the possibility that within a state system greater discipline may be exercised to apply the criteria of the rule more strictly than in the far-flung federal court system.

9. Statements of a child concerning sexual activity.

Rule 804(b)(8) makes significant changes in N.J.Evid.R. 63(33) which was adopted in 1989 pursuant to authority of Joint Resolution No. 4, 1989, following principles announced in *State v. D.R.*, 109 N.J. 348 (1988). The Committee's proposed rule is consistent with D.R.'s holding, but it contains important differences: (a) it limits the rule to statements of a child who is unavailable as a witness or cannot give full and cogent testimony; (b) the child must be of "tender years" rather than under 12 years of age; (c) the rule is not limited to criminal actions but may be applied in all actions and proceedings; and (d) it contains more detailed criteria for admissibility of the out-of-court statement.

Thus, the rule narrows N.J.Evid.R. 63(33) by excluding hearsay statements of an available witness who is able to give full and cogent testimony concerning the substance of the statement (see Rule 804(5)), since there is no need for such hearsay to be used substantively in such cases, as distinguished from its use as a fresh complaint when appropriate. But it broadens N.J.Evid.R. 63(33) to make it applicable to all proceedings, civil as well as criminal.

There is no Federal Rule of Evidence on this subject.

10. Inadmissibility of plea discussions and withdrawn guilty pleas, and related statements.

Rule 410 generally follows Fed.R.Evid. 410 and contains provisions not present in our current rules of evidence. It protects against the use of guilty pleas that have been withdrawn and statements made in the course of the plea proceeding as well as during plea negotiations if a guilty plea was not effectively consummated. If adopted, it would supersede the holding in *State v. Boyle*, 198 N.J. Super. 64, 69-73 (App. Div. 1984). The rule is consistent with N.J.Evid.R. 52(2) (evidence that defendant offered to plead guilty to a lesser offense or upon terms is inadmissible against him in that criminal proceeding) and *State v. Boone*, 66 N.J. 38 (1974), but it covers more ground. This is a protective rule similar to but broader than Rule 52(2) as originally proposed in The 1963 Report. N.J.Evid. R. 52(2) was narrowed when adopted in 1967, and the Boyle case was faithful to that rule in the form in which it was adopted. Rule 310 would add broader protections in both civil and criminal actions for withdrawn guilty pleas and statements made during plea negotiations that were not consummated by effective guilty pleas, subject to exceptions, including use in a criminal proceeding for perjury. The federal rule was seen as a needed improvement to current New Jersey law.

11. Learned treatises.

Proposed Rule 803(c)(18) follows Fed. R. Evid. 803(18) and changes New Jersey practice. A similar rule was proposed in The 1963 Report as Rule 63(31) but was not adopted. As a result we have no rule governing learned treatises in our present rules of evidence, and our practice is more restrictive than the proposed rule.

Rule 803(c)(18) would allow the use of learned treatises as evidence, although not accepted as authoritative by a witness cross-examined on the subject, providing it is established as authoritative by other testimony or by judicial notice. The work may be read into evidence as substantive evidence although not received as an exhibit. Its use is not limited to the function of impeaching an expert on cross-examination who acknowledges the text as a recognized authority, as in *Ruth v. Fenichel*, 21 N.J. 171, 176-179 (1956).

The proposed rule has long had the widespread approval of scholars of the law of evidence. The 1963 Report, at 213. Adoption of this rule is overdue.

12. Declarations against interest.

The federal rules assign declarations against interest (extra-judicial statements against declarant's pecuniary or proprietary interest or which expose declarant to civil or criminal liability) to the category of hearsay which requires proof that declarant is unavailable as a witness. Fed. Evid. R. 804 (b)(3). Consistent with N.J.Evid.R. 63(10), the Committee rejected this principle and, in proposed Rule 803(c)(25), continued this hearsay exception whether declarant is available or not.

13. Testimony in Prior Proceedings.

Proposed Rule 804(b)(1) is similar both to its federal counterpart and N.J.Evid. R. 63(3) in a number of respects but differs from both rules. Unavailability of the declarant as a witness is a condition of admissibility of prior testimony, as in the present rule.

Proposed Rule 804(b)(1) is divided into two parts, respectively applicable to cases (A) in which the former testimony is offered against a party who was a party to the earlier proceeding and to cases (B) in which it is offered against a party who was not in the prior proceeding. In both instances the rule requires that the opportunity and motive to develop the earlier testimony by examination or cross-examination be the same or similar to that which the party against whom the evidence is offered has in the present proceeding. If the party against whom the evidence is offered was not a party to the earlier proceeding, it is admissible in civil cases and when offered by the defendant in criminal cases, provided the party who offered it or against whom it was offered in the prior proceeding had an interest as well as the opportunity and motive to develop the testimony identical or similar to that of the party against whom it is later offered.

The federal rule admits the testimony in a civil case if the party against whom it is offered was a party to the earlier action or proceeding or was a "predecessor in interest." This language is narrower than the proposed rule, tempting federal courts to read "predecessor in interest" broadly and not literally. *Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179 (3d. Cir.), cert. denied 439 U.S. 969 (1978); but cf. *In re Screws Antitrust Litigation*, 526 F. Supp. 1316, 1319 (D. Mass. 1981). The proposed rule would include predecessors in interest in category (B), but that provision is not limited to such parties. Note that Rule 63(3) used the successor-in-interest criterion with respect to testimony offered by a party in the earlier proceeding. The proposed rule is also broader than N.J. Evid.R. 63(3)(a) with respect to the use of prior depositions in that the present rule applies only to de bene esse depositions. While the proposed rule is slightly more flexible than N.J.Evid. R. 63(3), the criteria must be carefully applied to assure a just result.

The proposed rule contains a limitation with respect to the admissibility of expert testimony given in a prior proceeding, namely, the requirement of a finding that experts of "like kind" are not readily available and that the interests of justice require admission of the prior testimony. See *Thompson v. Merrill Dow Pharmaceuticals, Inc.*, 229 N.J. Super. 230, 252 (App. Div. 1988); cf. *Sacawa v. Polikoff*, 150 N.J. Super. 172, 177-179 (App. Div. 1977). This limitation is not contained in the federal or state analogues. But see *Carter-Wallace, Inc. v. Otte*, 474 F.2d. 529, 535-537 (2d Cir. 1972), cert. denied 412 U.S. 929 (1973), to the same effect.

14. Dying Declarations.

Proposed rule 804 (b)(2) follows N.J.Evid. R. 63(5) but requires prior notice to an adversary of an intention to offer such hearsay, a condition not presently required. Cf. N.J.Evid. R. 64, making prior notice a condition for admitting hearsay under certain rules if the statement is in writing. Rule 804 (b)(2) differs in a number of respects from its federal counterpart. The present and proposed New Jersey rules are limited to criminal proceedings and to statements of victims who are dead. Cf. N.J. Evid. R. 63(32) and proposed Rule 804(b)(6) for admission in civil proceedings of trustworthy statements of declarants generally who are dead. The federal rule is limited to statements "concerning the cause or circumstances of what the declarant believed to be impending death"; and the only type of criminal case in which the evidence is admissible is a homicide case. The New Jersey rule is not so limited.

The federal rule stays close to the common-law origin of the rule, that the declarant be a victim of homicide, but it recognizes also that the declarant's psychological or religious impulse for veracity justifies admission in civil cases. It continues the limitation to homicide in criminal cases and the limitation on the subject matter of the declaration, namely, the cause or circumstances of declarant's impending death. The New Jersey rule, which requires the death of the declarant, does not limit the statement to the cause or circumstances of his impending death, which he believed was imminent. The statement may be on another subject, provided it was made voluntarily and in good faith. As noted above, there is no need to apply the rule to civil cases in view of the broader state rule admitting trustworthy statements of persons who are unavailable as witnesses because of their death. N.J.Evid. R. 63(32) and proposed Rule 804(b)(6). But the proposed rule leaves one gap in criminal cases which is covered by the federal rule: dying declarations of declarants who survive the impending death but are, nevertheless, unavailable as witnesses. The Committee chose not to close this small gap.

15. Admissibility of Duplicates.

Proposed Rule 1003 alters our present "best evidence" rule by admitting duplicate writings without proof of the unavailability of the original, subject to an exception if the authenticity of the original is questioned or other circumstances make it "unfair" to admit the duplicate rather than the original. This is consistent with provisions found currently in many contracts making a duplicate the equivalent of an original.

CONCLUSION

In addition to substantive changes, some of which are discussed above, numerous language and organizational changes in the rules of evidence were made in an effort to improve the rules and their interpretation. A brief rule by rule summary has been prepared by Sylvia B. Pressler, P.J.A.D. and is attached as a "Summary Analysis of Evidence Rule Changes."

My references to positions taken by the Committee should not suggest that its members agreed unanimously with the Report as a whole or with all the individual rules contained in the Report. The rules of evidence will never be static or beyond debate; they will always be subject to varying judgments as to logic, need and fairness.

Almost 25 years have passed since this body of law was reviewed as a whole in New Jersey. We have our own experience to consider as well as the federal rules which followed, and the interpretation and controversy their adoption and application engendered. See, for example, A.B.A. Section of Litigation, *Emerging Problems Under the Federal Rules of Evidence* (1983). The Committee's Report will serve to stimulate discussion and improvement of the rules proposed here. Some will argue against change. Some attorneys, skilled in advocating their cause and partisan by habit, will argue against narrowing some rules or loosening others. At the very least, merging the New Jersey rules with the federal rules, selecting the best portions of each, with one set of numbers, should benefit New Jersey trial attorneys in state and federal courts and will expose the bench and bar to a larger field of decisional law and academic comment. More than one-half of our sister states have adopted the federal rules.

More importantly, we hope this process will improve our body of evidence law and that not only logic but the quest for truth and justice will be better served.

Theodore I. Botter,
Chairman, New Jersey Supreme
Court Committee on Evidence

ARTICLE I GENERAL PROVISIONS

RULE 101

SCOPE; DEFINITIONS

(a) Applicability; exceptions.

(1) Privileges. The provisions of Rule 500 (privileges) shall apply, without relaxation, to all proceedings and inquiries, whether formal, informal, public or private, and to all branches and agencies of government.

(2) Court proceedings; relaxation. These rules of evidence shall apply in all proceedings, civil or criminal, conducted by or under the supervision of a court. Except as provided by paragraph (a)(1) of this rule, these rules may be relaxed in the following instances to admit relevant and trustworthy evidence in the interest of justice:

(A) actions within the cognizance of the Small Claims Section of the Special Civil Part of the Superior Court, Law Division, whether or not the action was instituted in a Small Claims Section;

(B) in accordance with a statutory provision;

(C) proceedings in a criminal or juvenile delinquency action in which information is presented for the court's use in exercising a sentencing or other dispositional discretion, including bail and pretrial intervention and other diversionary proceedings;

(D) to the extent permitted by law, proceedings to establish probable cause, including grand jury proceedings, probable cause hearings, and ex parte applications;

(E) proceedings to determine the admissibility of evidence under these rules or other law.

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

(4) Undisputed facts. If there is no bona fide dispute between the parties as to a relevant fact, the judge may permit that fact to be established by stipulation or binding admission. In civil proceedings the judge may also permit that fact to be proved by any relevant evidence, and exclusionary rules shall not apply, except Rule 403 or a valid claim of privilege.

(5) Affidavit in lieu of testimony. These rules shall not be construed to prohibit the use of an affidavit in lieu of oral testimony to the extent permitted by law.

(b) Definitions. As used in these rules, the following terms shall have the meaning hereafter set forth unless the context otherwise indicates:

(1) "Burden of persuasion" means the obligation of a party to meet the requirements of a rule of law that the fact be proved either by a preponderance of the evidence or by clear and convincing evidence or beyond a reasonable doubt, as the case may be.

(2) "Burden of producing evidence" means the obligation of a party to introduce evidence when necessary to avoid the risk of a judgment or peremptory finding against him on an issue of fact.

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

(c) Repeal. The adoption of these rules of evidence shall not operate to repeal any existing statute by implication. However, where an existing statute has been expressly superseded pursuant to N.J.S.A. 2A:84A-40 by an official note heretofore or hereafter appended to a rule of evidence, such statute shall have no further force or effect.

COMMENT

Rule 101 is based on N.J. Evid. R. 1, 2, and 3 of the 1967 Rules of Evidence¹; Fed. R. Evid. 101 and 1101 deal with the scope and applicability of the federal rules.

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

With respect to the structure and specific provisions of paragraph (a) of this rule, subparagraph (1) provides that

¹The 1967 Rules of Evidence, as amended, are referred to in these Comments either as the 1967 rule or rules or N.J. Evid. R. These rules are referred to as N.J.R.E. or Rule(s). See Rule 1103. The Report of the New Jersey Supreme Court Committee on Evidence (1963) is referred to in these comments as The 1963 Report.

privileges shall apply without relaxation to all proceedings and inquiries, formal, informal, public or private, and to all branches and agencies of government. This provision follows both N.J. Evid. R. 2(1) and Fed. R. Evid. 1101(c) without substantive change.

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

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

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

(C) Sentencing and dispositional proceedings. The federal rule analogue to this provision is Fed. R. Evid. 1101(d)(3). It enumerates various miscellaneous proceedings to which the rules do not apply, including extradition or rendition proceedings, preliminary examination in criminal cases, sentencing, probation proceedings, issuance of warrants and summonses, and proceedings with respect to bail release. While there is no 1967 analogue to this rule, it is accepted practice in New Jersey not to apply the rules of evidence to these proceedings. See, e.g., State v. Stewart, 96 N.J. 596, 606 (1984); State v. Kunz, 55 N.J. 128 (1969).

Paragraph (a)(2)(C) of this rule generally follows the intent of the federal rule but is limited to those proceedings in which information is produced which forms the basis for the court's exercise of sentencing or dispositional discretion in criminal and juvenile delinquency actions. Such proceedings include final juvenile dispositions, pre-disposition detention

determinations in juvenile delinquency actions, bail proceedings, pretrial intervention and other diversionary proceedings, and any other proceedings in which the exercise of judicial discretion determines the custodial status of or other restraints upon an accused or juvenile charged with delinquency.

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

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

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

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

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

of K-55 radar readings, illustrates this rule's application. See also Comment on Rule 104(a).

The rules of evidence have never been strictly applied in arbitration proceedings, although the parties might otherwise agree or stipulate. See Local Union 560 v. Eazor Express, Inc., 95 N.J. Super. 219, 227 (App. Div. 1967); Livingston v. Combs & wife, Adm'rs, 1 N.J.L. 50 (Sup. Ct. 1790). N.J.S.A. 39:6A-24 to 35 and N.J.S.A. 2A:23A-20 to - 30, respectively, provide for arbitration under court supervision of motor vehicle and personal injury claims of \$15,000 or less. See also R. 4:21A. The provision for court supervision does not compel a change in this principle.

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

Paragraph (a)(4) of Rule 101 replaces N.J. Evid. R. 3, for which there is no federal analogue. N.J. Evid. R. 3 applied to civil proceedings only and permitted undisputed facts to be proved by any relevant evidence without reference to exclusionary rules. The provision is retained,

nearly verbatim, by the second sentence of this rule. The first sentence is a new provision, applicable to both civil and criminal proceedings, which conforms with actual practice by permitting an undisputed fact to be established by stipulation or binding admission. See State v. Mack, 131 N.J. Super. 542 (App. Div. 1974). This rule does not affect the scope of the jury function constitutionally required in criminal trials. It is intended only to relieve parties of the need for formal proof of specific facts. See Horning v. District of Columbia, 254 U.S. 135, 65 L. Ed. 2d 185 (1920).

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

Paragraph (b) of Rule 101 replaces N.J. Evid. R. 1, which contained the definition of 14 terms: evidence, relevant evidence, proof, burden of proof, burden of producing evidence, conduct, the hearing, finding of fact, guardian, judge, trier of fact, verbal, writing, and perceive. Paragraph (b) retains only three of these definitions, burden of proof (N.J. Evid. R. 1(4)), burden of producing evidence (N.J. Evid. R. 1(5)), and writing (N.J. Evid. R. 1(13)). Paragraph (b)(2) of this rule follows N.J. Evid. R. 1(5), and writing (N.J. Evid. R. 1(13)). Paragraph (b)(2) of this rule follows N.J. Evid. R. 1(5) almost verbatim. As to N.J. Evid. R. 1(4), the term "burden of proof" has been replaced in paragraph (b)(1) by the more accurate term "burden of persuasion." This obviates the need for the last sentence of N.J. Evid. R. 1(4) which provides that burden of proof is synonymous with burden of persuasion. The definition of writing, now contained in Rule 801(e) under the hearsay rules, is made applicable to all evidence rules by incorporation.

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

The first sentence of paragraph (c) of Rule 101 follows N.J. Evid. R. 2(4), making clear that the adoption of these rules should not be construed as an implied repeal of any presently existing statute. There is no federal analogue.

The second sentence is a new provision intended to call attention to the supersession provision of N.J.S.A. 2A:84A-40, pursuant to which official footnotes were appended to specific 1967 rules to supersede existing statutes and pursuant to which footnotes may be appended to future rule

By way of catalog, the 1967 official footnotes are as follows:

<u>N.J. Evid. R. Statute</u>	<u>N.J.R.E.</u>	<u>Superseded</u>
7(a) (witness competency)	601	2A:81-1 and 8 19:34-26
9, 10, 11, 12 (judicial notice)	201, 202	2A:87-27 to 33
62(5) (business defined)	801(d)	2A:82-34 to 37
63(3) (depositions, prior testimony)	804(b)(1)	2A:81-13 and 14
63(13) (Business records exception)	803(c)(6) and (7)	2A:82-34 to 37
63(17) (official records)	803(c)(8),(9), and (10)	2A:11-55 2A:82-8 to 12 2A:82-14 to 16 2A:82-20 to 22 4:20-20
63(19) (documents concerning property interests)	803(c)(14) and (15)	2A:82-22
63(20) (previous conviction)	803(c)(22)	2A:81-12, in part
68 (authentication)	902	2A:11-55 2A:82-8 to 12 2A:82-14 to 16 2A:82-25 45:6-30 and 31 45:9-20 45:14-28
70 (best evidence)	1002, 1004, 1005	2A:11-55 2A:82-8 to 12
70 (best evidence)	1002, 1004, 1005	2A:11-55 2A:82-8 to 12 2A:82-14 to 16 2A:82-20 to 23 4:20-20
71 (attested writings)	903	2A:82-2

RULE 102

PURPOSE AND CONSTRUCTION

These rules shall be construed to secure fairness in administration and elimination of unjustified expense and delay. The adoption of these rules shall not bar the growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

COMMENT

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

It should be noted that this rule is not intended as a rule authorizing the trial judge to relax the rules of evidence in a particular case. A proposed relaxation provision, N.J. Evid. R.

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

RULE 103

RULINGS ON EVIDENCE

[Not Adopted]

COMMENT

Fed. R. Evid. 103 was not adopted. It provides for (1) the effect of erroneous rulings; (2) making a record of offers of proof and rulings thereon; (3) requiring that proceedings on evidential questions be held out of the hearing of the jury; and (4) notice of plain error. These matters are covered in the New Jersey Rules of Court and established case law and need not be repeated in the rules of evidence. See R. 1:7-2, R. 1:7-3 and R. 2:10-2.

RULE 104

PRELIMINARY QUESTIONS

(a) Questions of admissibility generally. When the qualification of a person to be a witness, or the admissibility of evidence, or the existence of a privilege is subject to a condition, and the fulfillment of the condition is in issue, that issue is to be determined by the judge. In making that determination the judge shall not apply the rules of evidence except for Rule 403 or a valid claim of privilege. The judge may hear and determine such matters out of the presence or hearing of the jury.

(b) Relevance conditioned on fact. Where evidence is otherwise admissible if relevant and its relevance is subject to a condition, the judge shall admit it upon or subject to the introduction of sufficient evidence to support a finding of the condition. In such cases the judge shall instruct the jury to consider the issue of the fulfillment of the condition and to disregard the evidence if it finds that the condition was not fulfilled. The jury shall be instructed to disregard the evidence if the judge subsequently determines that a jury could not reasonably find that the condition was fulfilled.

(c) Preliminary hearing on admissibility of defendant's statements. Where by virtue of any rule of law a judge is required in a criminal action to make a preliminary determination as to the admissibility of a statement by the defendant, the judge shall hear and determine the question of its admissibility out of the presence of the jury. In such a hearing the rules of evidence shall apply and the burden of persuasion as to the admissibility of the statement is on the prosecution. If the judge admits the statement the jury shall not be informed of the finding that the statement is admissible but shall be instructed to disregard the statement if it finds that it is not credible. If the judge subsequently determines from all of the evidence

that the statement is not admissible, the judge shall take appropriate action.

(d) Testimony by accused. By testifying upon a preliminary matter, the accused does not become subject to cross-examination as to other issues in the case.

(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility

COMMENT

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

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

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

and other evidence as well.

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

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

RULE 105

LIMITED ADMISSIBILITY

When evidence is admitted as to one party or for one purpose but is not admissible as to another party or for another purpose, the judge, upon request, shall restrict the evidence to its proper scope and shall instruct the jury accordingly, but may permit a party to waive a limiting instruction.

COMMENT

The first sentence of Rule 105, which replaces N.J. Evid. R. 6, is identical to Fed. R. Evid. 105. The second sentence has no analogue either in the 1967 New Jersey rules or the federal rules.

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

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

RULE 106

REMAINDER OF OR RELATED WRITINGS OR RECORDED STATEMENTS

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which in fairness ought to be considered contemporaneously.

COMMENT

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

The federal rule is adopted because it incorporates the prevailing practice in this state.

ARTICLE II JUDICIAL NOTICE

RULE 201

JUDICIAL NOTICE OF LAW AND ADJUDICATIVE FACTS

(a) Notice of law. Law which may be judicially noticed includes the decisional, constitutional and public statutory law, rules of court, and private legislative acts and resolutions of the United States, this state, and every other state, territory and jurisdiction of the United States as well as ordinances, regulations and determinations of all governmental subdivisions and agencies thereof. Judicial notice may also be taken of the law of foreign countries.

(b) Notice of facts. Facts which may be judicially noticed include (1) such specific facts and propositions of generalized knowledge as are so universally known that they cannot reasonably be the subject of dispute, (2) such facts as are so generally known or are of such common notoriety within the area pertinent to the event that they cannot reasonably be the subject of dispute, (3) specific facts and propositions of generalized knowledge which are capable of immediate determination by resort to sources whose accuracy cannot reasonably be questioned, and (4) records of the court in which the action is pending and of any other court of this state or federal court sitting for this state.

(c) When discretionary. A court may take judicial notice whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party on notice to all other parties and if supplied with the necessary information.

(e) Opportunity to be heard. Each party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) How taken. In determining the propriety of taking judicial notice of a matter or the tenor thereof, any source of relevant information may be consulted or used, whether or not furnished by a party, and the rules of evidence shall not apply except Rule 403 or a valid claim of privilege.

(g) Instructing the jury. In a civil action or proceeding, the judge shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the judge shall instruct the jury that it may, but is not required to, accept as established any fact which has been judicially noticed.

COMMENT

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

The scheme of the federal analogue is to provide for a single rule addressing judicial notice of adjudicative facts.

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

Paragraph (a) of this rule deals with judicial notice of law. There is no analogue in the federal evidence rules because notice of law is addressed by the federal practice rules. See Fed. R. Civ. P. 44.1 and Fed. R. Crim. P. 26.1. This paragraph of Rule 201 collects the provisions of N.J. Evid. R. 9(1) and (2) as to judicial notice of law. New Jersey Rules of Court do not address this subject.

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

Paragraphs (c) and (d) of this rule follow Fed. R. Evid. 201(c) and (d), respectively, and replace the mandatory/discretionary provisions of N.J. Evid. R. 9(1), (2), and (3). Paragraph (d) does not contain a limitation as to the time when a request to take judicial notice must be made, as did N.J. Evid. R. 9(3). N.J. Evid. R. 10(3) provided that judicial notice need not be taken if the information available or supplied is insufficient or unconvincing. N.J. Evid. R. 10(4) provided that all matters pertaining to judicial notice are for the judge rather than the jury. Neither of these two provisions is expressly contained in Fed. R. Evid. 201, but they are implied by the language of this rule and the federal rule, particularly subsection (d).

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

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

Paragraph (g) of this rule is identical to Fed. R. Evid. 201(g) and replaces N.J. Evid. R. 11. It omits as unnecessary the provision of the New Jersey rule which required the judge to indicate to the jury the source of his information. The 1967 rule failed to distinguish between instructions to the jury in civil and criminal cases. This distinction is made in Rule 201(g). While the need to make this distinction has been

debated, the rule takes the safer course in view of a defendant's sixth amendment right to trial by jury. However, the court retains the power to charge the jury on the legal significance of adjudicative facts which have been judicially noticed. See A.B.A. Section of Litigation, Emerging Problems Under the Federal Rules of Evidence 35-38 (1983).

RULE 202

JUDICIAL NOTICE IN PROCEEDINGS SUBSEQUENT TO TRIAL

- (a) Subsequent proceedings. The failure or refusal of the judge to take judicial notice of a matter or to instruct the trier of the fact with respect to it shall not preclude the judge from taking judicial notice of the matter in subsequent proceedings in the action.
- (b) On appeal. The reviewing court in its discretion may take judicial notice of any matter specified in Rule 201, whether or not judicially noticed by the judge.
- (c) Opportunity to be heard. A judge or a reviewing court taking judicial notice under paragraph (a) or (b) of this rule of a matter not previously noticed in the action may afford the parties the opportunity to present information relevant to the propriety of taking such judicial notice and to the tenor of the matter to be noticed.

COMMENT

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

ARTICLE III. PRESUMPTIONS

RULE 301

EFFECT OF PRESUMPTION

Except as otherwise provided in Rule 303 or by other law, a presumption discharges the burden of producing evidence as to a fact (the presumed fact) when another fact (the basic fact) has been established.

If evidence is introduced tending to disprove the presumed fact, the issue shall be submitted to the trier of fact for determination unless the evidence is such that reasonable persons would not differ as to the existence or nonexistence of the presumed fact. If no evidence tending to disprove the presumed fact is presented, the presumed fact shall be deemed established if the basic fact is found or otherwise established. The burden of persuasion as to the proof or disproof of the presumed fact does not shift to the party against whom the presumption is directed unless otherwise required by law. Nothing in this rule shall preclude the judge from commenting on inferences that may be drawn from the evidence.

COMMENT

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

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

RULE 302

CHOICE OF LAW

In civil actions or proceedings, the existence and effect of a presumption respecting a fact which is an element of a claim or defense as to which federal law or the law of another jurisdiction supplies the rule of decision shall be determined in accordance with that federal or other law.

COMMENT

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

RULE 303

PRESUMPTIONS AGAINST THE ACCUSED IN CRIMINAL CASES

(a) Scope. Except as otherwise provided by law, in criminal cases presumptions against an accused, recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt, are governed by this rule. As used in this rule, the term "element of the offense" shall include any issue on which the prosecution bears the burden of persuasion beyond a reasonable doubt.

(b) Submission to jury. The judge may not direct the jury to find a presumed fact against the accused. If a presumed fact establishes an element of the offense, the judge may submit the question of the existence of the presumed fact to the jury upon proof of the basic fact but only if a reasonable juror on the

evidence as a whole, including the evidence of the basic fact, could find the presumed fact beyond a reasonable doubt. If the presumed fact has a lesser effect, the question of its existence may be submitted to the jury provided the basic facts are supported by sufficient evidence or are otherwise established, unless the judge determines that reasonable jurors on the evidence as a whole could not find the existence of the presumed fact.

(c) Instructing the jury. Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge may instruct the jury that it may regard the basic fact as sufficient evidence of the presumed fact but that it is not required to do so. In addition, if the presumed fact establishes guilt or is an element of the offense, the judge shall instruct the jury that its existence, on all of the evidence, must be proved beyond a reasonable doubt. The judge shall not use the word "presumed" or "presumption" in his instructions to the jury.

COMMENT

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

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

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

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

ARTICLE IV. RELEVANCY AND ITS LIMITS

RULE 401

DEFINITION OF "RELEVANT EVIDENCE"

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

COMMENT

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

RULE 402

RELEVANT EVIDENCE GENERALLY ADMISSIBLE

Except as otherwise provided in these rules or by law, all relevant evidence is admissible.

COMMENT

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

RULE 403

EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE CONFUSION, OR WASTE OF TIME

Except as otherwise provided by these rules or other law, relevant evidence may be excluded if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence.

COMMENT

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

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

RULE 404

CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES; EVIDENCE

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

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

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness as provided in Rule 608.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that he acted in conformity therewith. Such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute.

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

COMMENT

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

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

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

crimes evidence may be admitted.

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

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

RULE 405

METHODS OF PROVING CHARACTER

(a) Reputation, opinion, or conviction of crime. When evidence of character or a trait of character of a person is admissible, it may be proved by evidence of reputation, evidence in the form of opinion, or evidence of conviction of a crime which tends to prove the trait. Specific instances of conduct not the subject of a conviction of a crime shall be inadmissible.

(b) Specific instances of conduct. When character or a trait of character of a person is an essential element of a charge, claim, or defense, evidence of specific instances of conduct may also be admitted.

COMMENT

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

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

RULE 406

HABIT, ROUTINE PRACTICE

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

(b) Evidence of specific instances of conduct is admissible

to prove habit or routine practice if evidence of a sufficient number of such instances is offered to support a finding of such habit or routine practice.

COMMENT

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

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

RULE 407

SUBSEQUENT REMEDIAL MEASURES

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

COMMENT

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

RULE 408

SETTLEMENT OFFERS AND NEGOTIATIONS

When a claim is disputed as to validity or amount, evidence of statements or conduct by parties or their attorneys in settlement negotiations, including offers of compromise, shall not be admissible to prove liability for, or invalidity of, or amount of the claim. Such evidence shall not be excluded when offered for another purpose; and evidence otherwise admissible shall not be excluded merely because it was disclosed during settlement negotiations.

COMMENT

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

simplified.

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

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

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

RULE 409

PAYMENT OF MEDICAL AND SIMILAR EXPENSES

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

COMMENT

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

RULE 410

INADMISSIBILITY OF PLEAS, PLEA DISCUSSIONS AND

RELATED STATEMENTS

Except as otherwise provided in this rule, evidence of a plea of guilty which was later withdrawn, of any statement made in the course of that plea proceeding, and of any statement made during plea negotiations when either no guilty plea resulted or a guilty plea was later withdrawn, is not admissible in any civil or criminal proceeding against the person who made the plea or statement or who was the subject of the plea negotiations. However, such a statement is admissible (1) in any proceeding in which another statement made in the course of the same plea or plea discussions has been introduced and the statement should in fairness be considered contemporaneously with it, or (2) in a criminal proceeding for perjury, false statement, or other similar offense, if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

COMMENT

Rule 410 generally follows Fed. R. Evid. 410. Deleted, however, are those provisions of the federal rule which are unique to the federal practice. In replacing the abbreviated

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

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

See also R. 3:9-2 which provides that in accepting a guilty plea, the judge, for good cause shown, may order that it not be admissible in a civil proceeding.

RULE 411

LIABILITY INSURANCE

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

COMMENT

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

RULE 412

PROSECUTIONS FOR RAPE AND RELATED OFFENSES

[NOT ADOPTED]

COMMENT

Fed. R. Evid. 412 was not adopted since this subject is covered by N.J.S.A. 2C:14-7, the Rape-Shield Law, which provides:

a. In prosecutions for aggravated sexual assault, sexual assault, aggravated criminal sexual contact, criminal sexual contact, or endangering the welfare of a child in violation of N.J.S. 2C:24-4, evidence of the victim's previous sexual conduct shall not be admitted nor reference made to it in the presence of the jury except as provided in this section. When the defendant seeks to admit such evidence for any purpose, he must apply for an order of the court before the trial or preliminary hearing, except that the court may allow the motion to be made during trial if the court determines that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence. After the application is made, the court shall conduct a hearing in camera to determine the admissibility of the evidence. If the court finds that evidence offered by the defendant regarding the sexual conduct of the victim is relevant and that the probative value of the evidence offered is not outweighed by its collateral nature or by the

probability that its admission will create undue prejudice, confusion of the issue, or unwarranted invasion of the privacy of the victim, the court shall enter an order setting forth with specificity what evidence may be introduced and the nature of the questions which shall be permitted, and the reasons why the court finds that such evidence satisfies the standards contained in this section. The defendant may then offer evidence under the order of the court.

b. In the absence of clear and convincing proof to the contrary, evidence of the victim's sexual conduct occurring more than one year before the date of the offense charged is presumed to be inadmissible under this section.

c. Evidence of previous sexual conduct shall not be considered relevant unless it is material to negating the element of force or coercion or to proving that the source of semen, pregnancy or disease is a person other than the defendant. For the purpose of this section, "sexual conduct" shall mean any conduct or behavior relating to sexual activities of the victim, including but not limited to previous or subsequent experience of sexual penetration or sexual contact, use of contraceptives, living arrangement and life style.

Note that the two categories of admissible prior sexual conduct prescribed by N.J.S.A. 2C:14-7(c) have been held on sixth amendment confrontation grounds, to be illustrative rather than exclusive. See State v. Budis, 243 N.J. Super. 498 (App. Div. 1990), *aff'd*, ___ N.J. ___ (1991), permitting evidence of the prior sexual abuse of the child victim by another in order to rebut her assumed naivete.

ARTICLE V. PRIVILEGES

RULE 500

GENERAL RULE

Privileges as they now exist or may be modified by law shall be unaffected by the adoption of these rules. For convenience in reference certain existing provisions of law relating to privileges are enumerated in Article V.

COMMENT

This rule leaves undisturbed the law of privileges in its present form or as it may be developed.

RULE 501

PRIVILEGE OF ACCUSED

N.J.S.A. 2A:84A-17 provides:

(1) Every person has in any criminal action in which he is an accused a right not to be called as a witness and not to testify.

(2) The spouse of the accused in a criminal action shall not testify in such action except to prove the fact of marriage unless (a) such spouse and the accused shall both consent, or (b) the accused is charged with an offense against the spouse, a child of the accused or of the spouse, or a child to whom the accused or the spouse stands in the place of a parent, or (c) such spouse is the complainant.

(3) An accused in a criminal action has no privilege to refuse when ordered by the judge, to submit his body to examination or to do any act in the presence of the judge or the trier of the fact, except to refuse to testify.

NOTE: N.J.S.A. 2A:84A-17(4) which, as adopted in 1960, permitted adverse comment and inferences from a criminal defendant's failure to testify, in certain circumstances, was declared unconstitutional in State v. Lanzo, 44 N.J. 560, 562-564 (1965), citing Griffin v. California, 380 U.S. 609, 14 L. Ed. 2d 106 (1965). Accordingly, N.J. Evid. R. 23(4) was deleted by amendment adopted by the New Jersey Supreme Court, effective July 1, 1980.

RULE 502

DEFINITION OF INCRIMINATION

N.J.S.A. 2A:84A-18 provides:

Within the meaning of this article, a matter will incriminate (a) if it constitutes an element of a crime against this State, or another State or the United States, or (b) is a circumstance which with other circumstances would be a basis for a reasonable inference of the commission of such a crime, or (c) is a clue to the discovery of a matter which is within clauses (a) or (b) above; provided, a matter will not be held to incriminate if it clearly appears that the witness has no reasonable cause to apprehend a criminal prosecution. In determining whether a matter is incriminating under clauses (a), (b) or (c) and whether a criminal prosecution is to be apprehended, other matters in evidence, or disclosed in argument, the implications of the question, the setting in which it is asked, the applicable statute of limitations and all other factors, shall be taken into consideration.

RULE 503

SELF-INCRIMINATION

N.J.S.A. 2A:84A-19 provides:

Subject to Rule 37 [Rule 530], every natural person has a right to refuse to disclose in an action or to a police officer or other official any matter that will incriminate him or expose him to a penalty or a forfeiture of his estate, except that under this rule:

- (a) no person has the privilege to refuse to submit to examination for the purpose of discovering or recording his corporal features and other identifying characteristics or his physical or mental condition;
- (b) no person has the privilege to refuse to obey an order made by a court to produce for use as evidence or otherwise a document, chattel or other thing under his control if some other person or a corporation or other association has a superior right to the possession of the thing ordered to be produced;
- (c) no person has a privilege to refuse to disclose any matter which the statutes or regulations governing his office, activity, occupation, profession or calling, or governing the corporation or association of which he is an officer, agent or employee, require him to record or report or disclose except to the extent that such statutes or regulations provide that the matter to be recorded, reported or disclosed shall be privileged or confidential;
- (d) subject to the same limitations on evidence affecting credibility as apply to any other witness, the accused in a criminal action or a party in a civil action who voluntarily testifies in the action upon the merits does not have the privilege to refuse to disclose in that action, any matter relevant to any issue therein.

RULE 504

LAWYER-CLIENT PRIVILEGE

N.J.S.A. 2A:84A-20 provides:

- (1) General rule. Subject to Rule 37 [Rule 530] and except as otherwise provided by paragraph 2 of this rule communications between lawyer and his client in the course of that relationship and in professional confidence, are privileged, and a client has a privilege (a) to refuse to disclose any such communication, and (b) to prevent his lawyer from disclosing it, and (c) to prevent any other witness from disclosing such communication if it came to the knowledge of such witness (i) in the course of its transmittal between the client and the lawyer, or (ii) in a manner not reasonably to be anticipated, or (iii) as a result of a breach of the lawyer-client relationship, or (iv) in the course of a recognized confidential or privileged communication between the client and such witness. The privilege shall be claimed by the lawyer unless otherwise instructed by the client or his representative; the privilege may be claimed by the client in person, or if incompetent or deceased, by his guardian or personal representative. Where a corporation or association is the client having the privilege and it has been dissolved, the privilege may be claimed by its successors, assigns or trustees in dissolution.

- (2) Exceptions. Such privilege shall not extend (a) to a communication in the course of legal service sought or obtained in aid of the commission of a crime or a fraud, or (b) to a communication relevant to an issue between parties all of whom claim through the client, regardless of whether the respective claims are by testate or intestate succession or by inter vivos transaction, or (c) to a communication relevant to an issue of breach of duty by the lawyer to his client, or by the client to his lawyer. Where 2 or more persons have employed a lawyer to act for them in common, none of them can assert such privilege as against the others as to communications with respect to that matter.

- (3) Definitions. As used in this rule (a) "client" means a person or corporation or other association that, directly or through an authorized representative, consults a lawyer or the lawyer's representative for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity; and includes an incompetent whose guardian so consults the lawyer or the lawyer's representative in behalf of the incompetent, (b) "lawyer" means a person authorized, or reasonably believed by the client to be authorized to practice law in any State or nation the law of which recognizes a privilege against disclosure of confidential communications between client and lawyer. A communication made in the course of relationship between lawyer and client shall be presumed to have been made in professional confidence unless knowingly made within the hearing of some person whose presence nullified the privilege.

RULE 505

PSYCHOLOGIST PRIVILEGE

N.J.S.A. 45:14B-28 provides:

The confidential relations and communications between and among a licensed practicing psychologist and individuals, couples, families or groups in the course of the practice of psychology are placed on the same basis as those provided between attorney and client, and nothing in this act shall be construed to require any such privileged communications to be disclosed by any such person.

RULE 506

PATIENT AND PHYSICIAN PRIVILEGE

(a) N.J.S.A. 2A:84A-22.1 provides:

As used in this act, (a) "patient" means a person who, for the sole purpose of securing preventive, palliative, or curative treatment, or a diagnosis preliminary to such treatment, of his physical or mental condition, consults a physician, or submits to an examination by a physician; (b) "physician" means a person authorized or reasonably believed by the patient to be authorized, to practice medicine in the State or jurisdiction in which the consultation or examination takes place; (c) "holder of the privilege" means the patient while alive and not under the guardianship of the guardian of the person of an incompetent patient, or the personal representative of a deceased patient; (d) "confidential communication between physician and patient" means such information transmitted between physician and patient, including information obtained by an examination of the patient, as is transmitted in confidence and by a means which, so far as the patient is aware, discloses the information to no third persons other than those reasonably necessary for the transmission of the information or the accomplishment of the purpose for which it is transmitted.

(b) N.J.S.A. 2A:84A-22.2 provides:

Except as otherwise provided in this act, a person, whether or not a party, has a privilege in a civil action or in a prosecution for a crime or violation of the disorderly persons law or for an act of juvenile delinquency to refuse to disclose, and to prevent a witness from disclosing, a communication, if he claims the privilege and the judge finds that (a) the communication was a confidential communication between patient and physician, and (b) the patient or the physician reasonably believed the communication to be necessary or helpful to enable the physician to make a diagnosis of the condition of the patient or to prescribe or render treatment therefor, and (c) the witness (i) is the holder of the privilege or (ii) at the time of the communication was the physician or a person to whom disclosure was made because reasonably necessary for the transmission of the communication or for the accomplishment of the purpose for which it was transmitted or (iii) is any other person who obtained knowledge or possession of the communication as the result of an intentional breach of the physician's duty of nondisclosure by the physician or his agent or servant and (d) the claimant is the holder of the privilege or a person authorized to claim the privilege for him.

- (c)
- N.J.S.A. 2A:84A-22.3
- provides:

There is no privilege under this act as to any relevant communication between the patient and his physician (a) upon an issue of the patient's condition in an action to commit him or otherwise place him under the control of another or others because of alleged mental incompetence, or in an action in which the patient seeks to establish his competence or in an action to recover damages on account of conduct of the patient which constitutes a criminal offense other than a misdemeanor, or (b) upon an issue as to the validity of a document as a will of the patient, or (c) upon an issue between parties claiming by testate or intestate succession from a deceased patient.

- (d)
- N.J.S.A. 2A:84A-22.4
- provides:

There is no privilege under this act in an action in which the condition of the patient is an element or factor of the claim or defense of the patient or of any party claiming through or under the patient or claiming as a beneficiary of the patient through a contract to which the patient is or was a party or under which the patient is or was insured.

- (e)
- N.J.S.A. 2A:84A-22.5
- provides:

There is no privilege under this act as to information which the physician or the patient is required to report to a public official or as to information required to be recorded in a public office, unless the statute requiring the report or record specifically provides that the information shall not be disclosed.

- (f)
- N.J.S.A. 2A:84A-22.6
- provides:

No person has a privilege under this act if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the services of the physician were sought or obtained to enable or aid anyone to commit or to plan to commit a crime or a tort, or to escape detection or apprehension after the commission of a crime or a tort.

- (g)
- N.J.S.A. 2A:84A-22.7
- provides:

A privilege under this act as to a communication is terminated if the judge finds that any person while a holder of the privilege has caused the physician or any agent or servant of the physician to testify in any action to any matter of which the physician or his agent or servant gained knowledge through the communication.

RULE 507

UTILIZATION REVIEW COMMITTEES OF CERTIFIED HOSPITAL OR EXTENDED CARE FACILITY; EXCEPTIONS

- (a)
- N.J.S.A. 2A:84A-22.8
- provides:

Information and data secured by and in the possession of utilization review committees established by any certified hospital or extended care facility in the performance of their duties shall not be revealed or disclosed in any manner or under any circumstances by any member of such committee except to: (a) a patient's attending physician, (b) the chief administrative officer of the hospital or extended care facility which it serves, (c) the medical executive committee, or comparable enforcement unit, of such hospital or extended care facility, (d) representatives of, including intermediaries or carriers for, government agencies in the performance of their duties, under the provisions of Federal and State law, or (e) any hospital service corporation, medical service corporation or insurance company with which said patient has pertinent coverage under a contract, policy or certificate, the terms of which authorize the carrier to request and be given such information and data.

- (b)
- N.J.S.A. 2A:84A-22.9
- provides:

No member of a utilization review committee may be held liable for damages or otherwise prejudiced in any manner by reason of recommendations or findings made by said committee or for furnishing information or data obtained in the course of his duties as a member of a committee to the persons and officials mentioned in section 1 [2A:84A-22.8] hereof.

RULE 508

NEWSPERSON'S PRIVILEGE

- (a)
- N.J.S.A. 2A:84A-21
- provides:

Subject to Rule 37 [Rule 530], a person engaged on, engaged in, connected with, or employed by news media for the purpose of gathering, procuring,

transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated has a privilege to refuse to disclose, in any legal or quasilegal proceeding or before any investigative body, including, but not limited to, any court, grand jury, petit jury, administrative agency, the Legislature or legislative committee, or elsewhere:

- a. The source, author, means, agency or person from or through whom any information was procured, obtained, supplied, furnished, gathered, transmitted, compiled, edited, disseminated, or delivered; and
- b. Any news or information obtained in the course of pursuing his professional activities whether or not it is disseminated.

The provisions of this rule insofar as it relates to radio or television stations shall not apply unless the radio or television station maintains and keeps open for inspection, for a period of at least 1 year from the date of an actual broadcast or telecast, an exact recording, transcription, kinescopic film or certified written transcript of the actual broadcast or telecast.

- (b)
- N.J.S.A. 2A:84A-21a
- provides:

Unless a different meaning clearly appears from the context of this act, as used in this act:

- a. "News media" means newspapers, magazines, press associations, news agencies, wire services, radio, television or other similar printed, photographic, mechanical or electronic means of disseminating news to the general public.
- b. "News" means any written, oral or pictorial information gathered, procured, transmitted, compiled, edited or disseminated by, or on behalf of any person engaged in, engaged on, connected with or employed by a news media and so procured or obtained while such required relationship is in effect.
- c. "Newspaper" means a paper that is printed and distributed ordinarily not less frequently than once a week and that contains news, articles of opinion, editorials, features, advertising, or other matter regarded as of current interest, has a paid circulation and has been entered at a United States post office as second class matter.
- d. "Magazine" means a publication containing news which is published and distributed periodically, has a paid circulation and has been entered at a United States post office as second class matter.
- e. "News agency" means a commercial organization that collects and supplies news to subscribing newspapers, magazines, periodicals and news broadcasters.
- f. "Press association" means an association of newspapers or magazines formed to gather and distribute news to its members.
- g. "Wire service" means a news agency that sends out syndicated news copy by wire to subscribing newspapers, magazines, periodicals or news broadcasters.
- h. "In the course of pursuing his professional activities" means any situation, including a social gathering, in which a reporter obtains information for the purpose of disseminating it to the public, but does not include any situation in which a reporter intentionally conceals from the source the fact that he is a reporter, and does not include any situation in which a reporter is an eyewitness to, or participant in, any act involving physical violence or property damage.

- (c)
- N.J.S.A. 2A:84A-21.1
- provides:

Where a newsperson is required to disclose information pursuant to a subpoena issued by or on behalf of a defendant in a criminal proceeding, not including proceedings before administrative or investigative bodies, grand juries, or legislative committees or commissions, the provisions and procedures in this act are applicable to the claim and exercise of the newsperson's privilege under Rule 27 (C.2A:84A-21).

- (d)
- N.J.S.A. 2A:84A-21.2
- provides:

Proceedings pursuant to this act shall take place before the trial, except that the court may allow a motion to institute proceedings pursuant to this act to be made during trial if the court determines that the evidence sought is newly discovered and could not have been discovered earlier through the exercise of due diligence.

(e) N.J.S.A. 2A:84A-21.3 provides:

a. To sustain a claim of the newsperson's privilege under Rule 27 [Rule 508(a)] the claimant shall make a prima facie showing that he is engaged in, connected with or employed by a news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated, and that the subpoenaed materials were obtained in the course of pursuing his professional activities.

b. To overcome a finding by the court that the claimant has made a prima facie showing under a. above, the party seeking enforcement of the subpoena shall show by clear and convincing evidence that the privilege has been waived under Rule 37 [Rule 530] (C. 2A:84A-29) or by a preponderance of the evidence that there is a reasonable probability that the subpoenaed materials are relevant, material and necessary to the defense, that they could not be secured from any less intrusive source, that the value of the material sought as it bears upon the issue of guilt or innocence outweighs the privilege against disclosure, and that the request is not overbroad, oppressive, or unreasonably burdensome which may be overcome by evidence that all or part of the information sought is irrelevant, immaterial, unnecessary to the defense, or that it can be secured from another source. Publication shall constitute a waiver only as to the specific material published.

c. The determinations to be made by the court pursuant to this section shall be made only after a hearing in which the party claiming the privilege and the party seeking enforcement of the subpoena shall have a full opportunity to present evidence and argument with respect to each of the materials or items sought to be subpoenaed.

(f) N.J.S.A. 2A:84A-21.4 provides:

Upon a finding by the court that there has been a waiver as to any of the materials sought or that any of the materials sought meet the criteria set forth in subsection 3.b., the court shall order the production of such materials, and such materials only, for in camera inspection and determination as to its probable admissibility in the trial. The party claiming the privilege and the party seeking enforcement of the subpoena shall be entitled to a hearing in connection with the in camera inspection of such materials by the court, during which hearing each party shall have a full opportunity to be heard. If the court, after its in camera review of the materials, determines that such materials are admissible according to the standards set forth in subsection 3.6., the court shall direct production of such materials, and such materials only.

(g) N.J.S.A. 2A:84A-21.5 provides:

After any hearing conducted by the court pursuant to section 3 or 4 hereof, the court shall make specific findings of fact and conclusions of law with respect to its rulings, which findings shall be in writing or set forth on the record.

(h) N.J.S.A. 2A:84A-21.6 provides:

An interlocutory appeal taken from a decision to uphold or quash a subpoena shall act as a stay of all penalties which may have been imposed for failure to comply with the court's order. The record on appeal shall be kept under seal until such time as appeals are exhausted. In the event that all material or any part thereof is found to be privileged, the record as to that privileged material shall remain permanently sealed. Any subpoenaed materials which shall, upon exhaustion and determination of such appeals, be found to be privileged, shall be returned to the party claiming the privilege.

(i) N.J.S.A. 2A:84A-21.7 provides:

Where proceedings are instituted hereunder by one of several co-defendants in a criminal trial, notice shall be provided to all of the co-defendants. Any co-defendant shall have the right to intervene if the co-defendant can demonstrate, pursuant to section 3, that the materials sought by the issuance of the subpoena bear upon his guilt or innocence. Where such intervention is sought by a co-defendant, that co-defendant shall be required, prior to being permitted to participate in any in camera proceeding, to make that showing required of a defendant in section 3.

(j) N.J.S.A. 2A:84A-21.8 provides:

If the court finds no reasonable basis for requesting the information has been shown, costs, including counsel fee, may be assessed against the party seeking enforcement of the subpoena. Where an application for costs or counsel fee is made, the judge

shall set forth his reasons for awarding or denying same.

RULE 509

MARITAL PRIVILEGE--CONFIDENTIAL COMMUNICATIONS

N.J.S.A. 2A:84A-22 provides:

No person shall disclose any communication made in confidence between such person and his or her spouse unless both shall consent to the disclosure or unless the communication is relevant to an issue in an action between them or in a criminal action or proceeding coming within Rule 23(2) [Rule 501(2)]. When a spouse is incompetent or deceased, consent to the disclosure may be given for such a spouse by the guardian, executor or administrator. The requirement for consent shall not terminate with divorce or separation. A communication between spouses while living separate and apart under a divorce from bed and board shall not be a privileged communication.

RULE 510

MARRIAGE COUNSELOR PRIVILEGE

N.J.S.A. 45:8B-29 provides:

Any communication between a marriage counselor and the person or persons counseled shall be confidential and its secrecy preserved. This privilege shall not be subject to waiver, except where the marriage counselor is a party defendant to a civil, criminal or disciplinary action arising from such counseling, in which case, the waiver shall be limited to that action.

RULE 511

PRIEST-PENITENT PRIVILEGE

N.J.S.A. 2A:84A-23 provides:

Subject to Rule 37 [Rule 530], a clergyman, minister or other person or practitioner authorized to perform similar functions, of any religion shall not be allowed or compelled to disclose a confession or other confidential communication made to him in his professional character, or as a spiritual advisor in the course of the discipline or practice of the religious body to which he belongs or of the religion which he professes, nor shall he be compelled to disclose the confidential relations and communications between and among him and individuals, couples, families or groups with respect to the exercise of his professional counselling role.

RULE 512

RELIGIOUS BELIEF

N.J.S.A. 2A:84A-24 provides:

Every person has a privilege to refuse to disclose his theological opinion or religious belief unless his adherence or nonadherence to such an opinion or belief is material to an issue in the action other than that of his credibility as a witness.

RULE 513

POLITICAL VOTE

N.J.S.A. 2A:84A-25 provides:

Every person has a privilege to refuse to disclose the tenor of his vote at a political election unless the judge finds that the vote was cast illegally.

RULE 514

TRADE SECRET

N.J.S.A. 2A:84A-26 provides:

The owner of a trade secret has a privilege, which may be claimed by him or his agent or employee, to refuse to disclose the secret and to prevent other persons from disclosing it if the judge finds that the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.

RULE 515

OFFICIAL INFORMATION

N.J.S.A. 2A:84A-27 provides:

No person shall disclose official information of this State or of the United States (a) if disclosure is forbidden by or pursuant to any Act of Congress or of this State, or (b) if the judge finds that disclosure of the information in the action will be harmful to the interests of the public.

RULE 516IDENTITY OF INFORMER

N.J.S.A. 2A:84A-28 provides:

A witness has a privilege to refuse to disclose the identity of a person who has furnished information purporting to disclose a violation of a provision of the laws of this State or of the United States to a representative of the State or the United States or a governmental division thereof, charged with the duty of enforcing that provision, and evidence thereof is inadmissible, unless the judge finds that (a) the identity of the person furnishing the information has already been otherwise disclosed or (b) disclosure of his identity is essential to assure a fair determination of the issues.

RULE 517VICTIM COUNSELOR PRIVILEGE

(a) N.J.S.A. 2A:84A-22.13 provides:

The Legislature finds and declares that:

- a. The emotional and psychological injuries that are inflicted on victims of violence are often more serious than the physical injuries suffered;
- b. Counseling is often a successful treatment to ease the real and profound psychological trauma experienced by these victims and their families;
- c. In the counseling process, victims of violence openly discuss their emotional reactions to the crime. These reactions are often highly intertwined with their personal histories and psychological profile;
- d. Counseling of violence and victims is most successful when the victims are assured their thoughts and feelings will remain confidential and will not be disclosed without their permission; and
- e. Confidentiality should be accorded all victims of violence who require counseling whether or not they are able to afford the services of private psychiatrists or psychologists.

Therefore, it is the public policy of this State to extend a testimonial privilege encompassing the contents of communications with a victim counselor and to render immune from discovery or legal process the records of these communications maintained by the counselor.

(b) N.J.S.A. 2A:84A-22.14 provides:

As used in this act:

- a. "Act of violence" means the commission or attempt to commit any of the offenses set forth in subsection b. of section 11 of P.L. 1971, c. 317 (C.52:4B-11).
- b. "Confidential communication" means any information exchanged between a victim and a victim counselor in private or in the presence of a third party who is necessary to facilitate communication or further the counseling process and which is disclosed in the course of the counselor's treatment of the victim for any emotional or psychological condition resulting from an act of violence. It includes any advice, report or working paper given or made in the course of the consultation and all information received by the victim counselor in the course of that relationship.
- c. "Victim" means a person who consults a counselor for the purpose of securing advice, counseling or assistance concerning a mental, physical or emotional condition caused by an act of violence.
- d. "Victim counseling center" means any office, institution, or center offering assistance to victims and their families through crisis intervention, medical and legal accompaniment and follow-up counseling.
- e. "Victim counselor" means a person engaged in any office, institution or center defined as a victim counseling center by this act, who has undergone 40 hours of training and is under the control of a direct services supervisor of the center and who has a primary function of rendering advice, counseling or assisting victims of acts of violence.

(c) N.J.S.A. 2A:84A-22.15 provides:

Subject to Rule 37 [Rule 530] of the Rules of Evidence, a victim counselor has a privilege not to be examined as a witness in any civil or criminal proceeding with regard to any confidential communication. The privilege shall be claimed by the counselor unless otherwise instructed by prior written consent of the victim. When a victim is incompetent or deceased consent to disclosure may be given by the guardian, executor or administrator except when the

guardian, executor or administrator is the defendant or has a relationship with the victim such that he has an interest in the outcome of the proceeding. The privilege may be knowingly waived by a juvenile. In any instance where the juvenile is, in the opinion of the judge, incapable of knowing consent, the parent or guardian of the juvenile may waive the privilege on behalf of the juvenile, provided that the parent or guardian is not the defendant and does not have a relationship with the defendant such that he has an interest in the outcome of the proceeding. A victim counselor or a victim cannot be compelled to provide testimony in any civil or criminal proceeding that would identify the name, address, location, or telephone number of a domestic violence shelter or any other facility that provided temporary emergency shelter to the victim of the offense or transaction that is the subject of the proceeding unless the facility is a party to the proceeding.

(d) N.J.S.A. 2A:84A-22.16 provides:

Nothing in this act shall be deemed to prevent the disclosure to a defendant in a criminal action of statements or information given by a victim to a county victim-witness coordinator, where the disclosure of the statements or information is required by the constitution of this State or of the United States.

RULE 518 TO RULE 529

[Reserved]

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

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

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

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

RULE 531ADMISSIBILITY OF DISCLOSURE WRONGFULLY COMPELLED

N.J.S.A. 2A:84A-30 provides:

Evidence of a statement or other disclosure is inadmissible against the holder of the privilege if the disclosure was wrongfully made or erroneously required.

RULE 532REFERENCE TO EXERCISE OF PRIVILEGES

N.J.S.A. 2A:84A-31 provides:

If a privilege is exercised not to testify or to prevent another from testifying, either in the action or with respect to particular matters, or to refuse to disclose or to prevent another from disclosing any matter, the judge and counsel may not comment thereon, no presumption shall arise with respect to the exercise of the privilege, and the trier of fact may not draw any adverse inference therefrom. In those jury cases wherein the right to exercise a privilege, as herein provided, may be misunderstood and unfavorable inferences drawn by the trier of the fact, or be impaired in the particular case, the court, at the request of the party exercising the privilege, may instruct the jury in support of such privilege.

RULE 533EFFECT OF ERROR IN OVERRULING CLAIM OF PRIVILEGE

N.J.S.A. 2A:84A-32 provides:

- (1) A party may predicate error on a ruling disallowing a claim of privilege only if he is the holder of the privilege.
- (2) If a witness refuses to answer a question, under color of a privilege claimed pursuant to Rules 23 through 38 [Rules 501 through 531], after the judge has ordered the witness to answer, and a contempt proceeding is brought against the witness, the court hearing the same shall order it dismissed if it appears that the order directing the witness to answer was erroneous.

ARTICLE VI. WITNESSES

RULE 601

GENERAL RULE OF COMPETENCY

Every person is competent to be a witness unless (a) the judge finds that the proposed witness is incapable of expression concerning the matter so as to be understood by the judge and jury either directly or through interpretation, or (b) the proposed witness is incapable of understanding the duty of a witness to tell the truth, or (c) except as otherwise provided by these rules or by law.

COMMENT

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

RULE 602

LACK OF PERSONAL KNOWLEDGE

Except as otherwise provided by Rule 703 (bases of opinion testimony by experts), a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself.

COMMENT

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

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

RULE 603

OATH OR AFFIRMATION

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

COMMENT

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

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

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

RULE 604

INTERPRETERS

The judge shall determine the qualifications of a person testifying as an interpreter. An interpreter shall be subject to all provisions of these rules relating to witnesses and shall take an oath or make an affirmation or declaration to interpret accurately.

COMMENT

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

Because the use of an interpreter always presents some risk of distortion of the "message communicated by the primary witness," the use of an interpreter should be limited to those situations in which the trial judge is satisfied that the "witness' natural mode of expression is not intelligible to the tribunal." State in Interest of R.R., 79 N.J. 97, 116 (1979). To insure the integrity of the interpretation, the interpretation must be wholly impersonal, that is, an exact rendering of the witness' communication, neither paraphrased, summarized, expanded or otherwise modified. Id. at 117-118. More significantly, the interpreter must have no interest in the matter before the court; an interested interpreter may be allowed to act, if at all, only when there is no reasonable possibility of obtaining the services of a disinterested interpreter. Ibid. See State v. Lee, 211 N.J. Super. 590, 594-596 (App. Div. 1986). In no circumstances may a primary witness act as interpreter for another primary witness. State in the Interest of R.R., supra, 79 N.J. at 119-120.

RULE 605

RESTRICTION ON JUDGE AS WITNESS

The judge presiding at the trial may not testify as a witness in that trial. No objection need be made to preserve the point.

COMMENT

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

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

RULE 606

RESTRICTION ON JUROR AS WITNESS

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

COMMENT

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

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

RULE 607

CREDIBILITY AND NEUTRALIZATION

Except as otherwise provided by Rules 405 and 608, for the purpose of impairing or supporting the credibility of a witness,

any party including the party calling the witness may examine the witness and introduce extrinsic evidence relevant to the issue of credibility, except that the party calling a witness may not neutralize the witness' testimony by a prior contradictory statement unless the statement is in a form admissible under Rule 803(a)(1) or the judge finds that the party calling the witness was surprised. A prior consistent statement shall not be admitted to support the credibility of a witness except to rebut an express or implied charge against the witness of recent fabrication or of improper influence or motive and except as otherwise provided by the law of evidence.

COMMENT

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

Fed. R. Evid. 607 was coupled in the original draft of the Federal Rules of Evidence with a hearsay exception providing for the substantive admissibility of all prior statements of a witness. See Notes of Committee on the Judiciary, House Report No. 93-650, Note to Fed. R. Evid. 801(d)(1), 28 U.S.C.A. (1984). When all prior statements of a witness are thus admissible, there is no longer the danger that a witness will be called solely to obtain forbidden hearsay benefits under the guise of impeachment, since the benefits are no longer forbidden. See Notes of Advisory Committee on Proposed Rules, Note to Fed. R. Evid. 607, 28 U.S.C.A. (1984). However, if some prior statements of a witness remain subject to hearsay restrictions on substantive use, restrictions on "impeaching" one's own witness should be retained, at least to some extent. This point was apparently overlooked by Congress when the wide open prior witness statement hearsay exception was narrowed, but a corresponding change was not made in the impeachment rule. Rule 607 reflects the properly tailored restrictions on impeachment of one's own witness contained in N.J. Evid. R. 20.

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

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

amendments to N.J. Evid. R. 20 and N.J. Evid. R. 63(1)(a) was given in the commentary to the proposed amendments to these rules published in 108 N.J.L.J. 301, 302 (1981).

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

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

RULE 608

EVIDENCE OF CHARACTER FOR TRUTHFULNESS OR UNTRUTHFULNESS

The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, provided, however, that the evidence relates only to the witness' character for truthfulness or untruthfulness, and provided further that evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise. Except as otherwise provided by Rule 609, a trait of character cannot be proved by specific instances of conduct.

COMMENT

Rule 608 incorporates the limiting principles of N.J. Evid. R. 22(c) and (d) with respect to admission of evidence of a trait of character for truthfulness or untruthfulness when offered under N.J. Evid. R. 20 to affect the credibility of a witness. The form of language follows the federal analogue, Fed. R. Evid. 608, rather than the current New Jersey rule. The federal rule has the advantage of explicitly stating the mode of proof of character for veracity in its reference to "opinion or reputation" evidence. Although the current New Jersey rule does not specify the mode of proof, both opinion and reputation evidence were contemplated by The 1963 Report at 71. Rule 608 also incorporates expressly the provision found in the federal rule that evidence of truthful character is admissible only after

the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise. This is consistent with established New Jersey law. State v. Johnson, 216 N.J. Super. 588, 605-607 (App. Div. 1987); The 1963 Report at 64.

However, the 1982 amendment of N.J. Evid. R. 20 which amended the provision that "[n]o evidence to support the credibility of a witness shall be admitted except to meet a charge of recent fabrication of testimony" has been broadly interpreted to suggest that evidence of good character to support the credibility of a witness can be introduced without prior impeachment by character evidence. See State v. Frost, 242 N.J. Super. 601, 613 (App. Div. 1990); Cogdell v. Brown, 220 N.J. Super. 330, 336 (Law Div. 1987). This was not the intent of the 1982 amendment of N.J. Evid. R. 20. The provision which was changed was literally too restrictive; corroborating evidence the credibility of a witness. What was intended by the 1967 version of rule 20 was that, generally, credibility could not be supported by a prior consistent statement except to meet an express or implied charge of recent fabrication. The 1982 amendment revised the last sentence of this rule to express this principle more accurately. The revision was not intended to open the door to supporting character evidence of truthfulness when the character of the witness for truthfulness had not first been attacked. Rule 608 is intended to ratify the long-standing New Jersey rule in this respect.

Another change in the New Jersey rule is the express provision in the second sentence of the rule that the prohibition against proof of trait of character for truthfulness or untruthfulness does not apply to evidence of prior conviction admissible pursuant to Rule 609, which incorporates N.J.S.A. 2A:81-12 as interpreted by State v. Sands, 76 N.J. 127 (1978). Note further that the subject matter of N.J. Evid. R. 22(a) and (b) is dealt with in Rule 613.

Although this rule follows the formulation of Fed. R. Evid. 608, it retains present New Jersey practice by rejecting the provision of paragraph (b) of the federal rule which permits limited admissibility of specific instances of conduct on cross-examination. N.J. Evid. R. 22(d), followed by this rule, prohibited "specific instances of conduct" proof in any form if introduced to prove a trait of character. Thus, this rule is consistent in philosophy and effect with the choice made in respect of Rule 405(a), namely adopting the state rather than the federal analogue. It is the Committee's view that Rule 607 affords sufficient scope for the effective impeachment of credibility.

As to other rules dealing with proof of character traits for purposes other than impeaching credibility, see Rules 404 and 405 incorporating former N.J. Evid. R. 46, 47, 48 and 55.

RULE 609

IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

For the purpose of affecting the credibility of any witness, the witness' conviction of a crime shall be admitted unless excluded by the judge as remote or for other causes. Such conviction may be proved by examination, production of the record thereof, or by other competent evidence.

COMMENT

Rule 609 is adopted in place of Fed. R. Evid. 609. The rule follows provisions contained in N.J.S.A. 2A:81-12 as interpreted by State v. Sands, 76 N.J. 127 (1978). There is no comparable 1967 rule, since the then proposed Rule 21, which contained restrictive provisions on the use of criminal convictions to impair credibility, was not adopted, the intention then being to leave N.J.S.A. 2A:81-12 in effect, except for the portion concerning the use in civil actions of judgments of conviction as substantive evidence of facts, which was superseded by virtue of the official note to N.J. Evid. R. 63(20). See R. 3:9-2 and R. 7:4-2(b).

The general rule stated by Fed. R. Evid. 609(a) limits the use of convictions to impeach the credibility of a witness to (1) crimes punishable by death or imprisonment in excess of a year and (2) all crimes involving dishonesty or false statement regardless of punishment. A further qualification in respect of the first category only is the determination by the judge that the probative value of admitting the evidence outweighs its prejudicial effect to the defendant. This rule makes no admissibility distinction in terms of the crime of which the witness has been convicted. Evidence of any conviction of crime is subject to exclusion if its probative value is outweighed by its prejudicial effect, but it is the defendant who bears the burden of proving the exclusion. See State v. Kelly, 97 N.J. 178, 217 n.21 (1984); State v. Balthrop, 92 N.J. 542, 544-547 (1983). Paragraph (b) of the federal rule deals with the admissibility of convictions which are more than ten years old. This rule does not refer explicitly to the ten-year limitation and exceptions thereto. These are matters dealt with by State v. Sands, *supra*, whose principles, similar to those embodied by Fed. R. Evid. 609(b), should be deemed to have been incorporated in this rule.

While this rule draws no distinction between crimes of dishonesty or false statement and other crimes, it is clear that it applies only to indictable offenses which are the subject of valid convictions. Neither evidence of arrests for or charges of crime are admissible under this rule. See, e.g., State v. McBride, 213 N.J. Super. 255, 267 (App. Div. 1986). Neither are convictions of disorderly persons offenses or traffic violations. See, e.g., State v. Rowe, 52 N.J. 293, 302 (1970). Nor are adjudications of juvenile delinquency. See State in Interest of K.P., 167 N.J. Super. 290, 293-294 (App. Div. 1979), *certif. denied*, 87 N.J. 394 (1981). And, it has been held, uncounseled convictions are inadmissible. State v. Rios, 155 N.J. Super. 11, 15 (Law Div. 1978). See also State v. Koch, 119 N.J. Super. 184 (App. Div. 1972).

As to the impeachment use of a prior conviction against a witness in a criminal trial rather than against the defendant himself and particularly against a prosecution witness, see State v. Balthrop, *supra*, 92 N.J. at 544-547, where the Court explained that while the same balancing test of probative value versus prejudicial effect applies to determine exclusion, nevertheless

the prejudice to the defendant, not merely to the witness, must be a significant factor in the equation. In this regard, the federal rule is explicit, paragraph (a)(1) specifically defining prejudice as prejudice to the defendant.

As to the use of prior convictions for impeachment of witnesses in civil causes, see, e.g., Tonsberg v. VIP Coach Lines, Inc., 216 N.J. Super. 522, 529 (App. Div. 1987); Vartenissian v. Food Haulers, Inc., 193 N.J. Super. 603, 610-611 (App. Div. 1984).

With respect to the mode of proof of prior convictions, Fed. R. Evid. 609(a) expressly requires proof by way of public record or admission by the witness. This rule incorporates both modes, which have been held to be acceptable. See State v. H.G.G., 202 N.J. Super. 267 (App. Div. 1985); State v. Mazur, 158 N.J. Super. 89, 106 (App. Div. 1978), *certif. denied*, 75 N.J. 399 (1978). In addition, the rule also permits, without definition, proof by "other competent evidence." This provision may be deemed to incorporate N.J.S.A. 2C:44-4(d), which provides: "Any prior conviction may be proved by any evidence, including fingerprint records, made in connection with arrest, conviction or imprisonment, that reasonably satisfies the court that the defendant was convicted." Cf. State v. Carey, 232 N.J. Super. 553, 555-558 (App. Div. 1989) (holding a computer printout of defendant's driving record admissible to prove a prior driving-while-intoxicated conviction).

This rule contains no provisions comparable to Fed. R. Evid. 609(c), (d) and (e). Paragraph (c) of the federal rule deals with the effect of a pardon, annulment or other procedure upon the viability of the conviction. This subject is left for development by case law and the judicial interpretation of applicable statutes or other pertinent laws both of the jurisdiction in which the conviction was entered and in this jurisdiction. See, for example, N.J.S.A. 2C:52-27 which provides that, if an order of expungement is entered, the conviction "shall be deemed not to have occurred."

Paragraph (d) of the federal rule addresses juvenile adjudications. Since adjudications of juvenile delinquency are not convictions of crime in New Jersey, such adjudications do not come within this rule. State in Interest of K.P., *supra*, 167 N.J. Super. at 293-294. However, if a juvenile has been tried and convicted of a crime as an adult on a waiver of jurisdiction by the Chancery Division, Family Part, that conviction may be shown to impeach his credibility. State v. Steffanelli, 133 N.J. Super. 512 (App. Div. 1975).

Paragraph (e) of Fed. R. Evid. 609 deals with effect of a pending appeal on the use of a conviction to impeach credibility and provides that such pendency does not render evidence of the conviction inadmissible. New Jersey case law holds to the contrary. See State v. Biegenwald, 96 N.J. 630, 638 (1984), citing with approval State v. Blue, 129 N.J. Super. 8, 12 (App. Div. 1974), *certif. denied*, 66 N.J. 328 (1974). See also State v. Eddy, 189 N.J. Super. 22 (Law Div. 1982). The conviction is, however, admissible pending appeal if the appeal challenges only the sentence and not the validity or integrity of the guilt adjudication. See State v. Anderson, 177 N.J. Super. 334 (App.

Div. 1981); State v. Eddy, *supra*, 189 N.J. Super. at 23. Cf. State v. Rodriguez, 202 N.J. Super. 543 (Law Div. 1985).

This rule is not limited to convictions of crimes obtained in New Jersey. See State v. Koch, 118 N.J. Super. 421, 424-425 (App. Div. 1972). Cf. State v. Lueder, 74 N.J. 62 (1977).

Note that New Jersey law permits a defendant who does not testify to appeal a trial court determination that a prior conviction could be used to impeach him if he were to testify at the trial. See State v. Whitehead, 104 N.J. 353 (1986). This is contrary to the federal rule which requires the defendant to testify in order to preserve for appeal the claim that a prior conviction was improperly admitted for impeachment purposes. See Luce v. United States, 469 U.S. 38, 83 L. Ed. 2d 443 (1984).

RULE 610

RELIGIOUS BELIEFS OR OPINIONS

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

COMMENT

Rule 610 follows Fed. R. Evid. 610 verbatim. It is not inconsistent with N.J. Evid. R. 30, which cited the statutory privilege contained in N.J.S.A. 2A:84A-24. By virtue of that privilege a witness may "refuse to disclose his theological opinion or religious belief unless his adherence or nonadherence to such an opinion or belief is material to an issue in the action other than that of his credibility as a witness." Rule 610 makes inadmissible proof of the religious beliefs or opinions of a witness when offered through the testimony of that witness or by other evidence if the sole purpose is to affect the credibility of that witness by reason of the nature of those beliefs. Consistent with N.J.S.A. 2A:84A-24, this rule does not exclude proof of religious beliefs or opinions when offered for another purpose that is material to an issue in the action. See, e.g., In re Conroy, 98 N.J. 321, 361-362 (1985) (religious beliefs of an incompetent patient are admissible to determine the patient's prior intent to have life-sustaining medical intervention).

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

RULE 611

MODE AND ORDER OF INTERROGATION AND PRESENTATION

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and

matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily, leading questions should be permitted on cross-examination. When a party calls an adverse party or a witness identified with an adverse party, or when a witness demonstrates hostility or unresponsiveness, interrogation may be by leading questions, subject to the discretion of the court.

COMMENT

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

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

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

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

RULE 612

WRITING USED TO REFRESH MEMORY

Except as otherwise provided by law in criminal proceedings, if a witness while testifying uses a writing to refresh the witness' memory for the purpose of testifying, an adverse party is entitled to have the writing produced at the hearing for inspection and use in cross-examining the witness. The adverse party shall also be entitled to introduce in evidence those portions which relate to the testimony of the witness but only for the purpose of impeaching the witness. If it is claimed that the writing contains material not related to the subject of the testimony, the court shall examine the writing *in camera* and excise any unrelated portions. If the witness has used a writing to refresh the witness' memory before testifying, the court in its discretion and in the interest of justice may accord the adverse party the same right to the writing as that party would have if the writing had been used by the witness while testifying.

COMMENT

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

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

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

than that available in the federal practice, has effectively eliminated the need of defendants to rely on R. 3:17, which is little used.

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

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

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

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

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

RULE 613

PRIOR STATEMENTS OF WITNESSES

(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown or its contents disclosed to the witness at that time. Upon request the statement shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement made by a witness may in the judge's discretion be excluded unless the witness is afforded an opportunity to explain or deny the statement and the opposing party is afforded an opportunity to interrogate on the statement, or the interests of justice otherwise require. This rule does not apply to admissions of a party opponent as defined in Rule 803(b).

COMMENT

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

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

RULE 614

CALLING AND INTERROGATION OF WITNESSES BY JUDGE

The judge, in accordance with law and subject to the right of a party to make timely objection, may call a witness and may interrogate any witness.

COMMENT

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

RULE 615

SEQUESTRATION OF WITNESSES

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

COMMENT

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

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

RULE 701

OPINION TESTIMONY OF LAY WITNESSES

If a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences may be admitted if it (a) is rationally based on the perception of the witness and (b) will assist in understanding the witness' testimony or in determining a fact in issue.

COMMENT

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

RULE 702

TESTIMONY BY EXPERTS

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

COMMENT

Rule 702 follows Fed. R. Evid. 702 verbatim and makes only minor language changes in the first sentence of N.J. Evid. R. 56(2). The foundation requirement set forth in N.J. Evid. R. 19 has been omitted as necessarily implied by the use in this rule of the word "expert" rather than the word "witness" used in the 1967 New Jersey analogue.

RULE 703**BASES OF OPINION TESTIMONY BY EXPERTS**

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

COMMENT

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

RULE 704**OPINION ON ULTIMATE ISSUE**

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

COMMENT

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

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

RULE 705**DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION; HYPOTHESES NOT NECESSARY**

The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination. Questions calling for the opinion of an expert witness need not be hypothetical in form unless the judge in his discretion so requires.

COMMENT

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

commentary published in 108 N.J.L.J. 301, 302 (1981).

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

RULE 706**COURT APPOINTED EXPERTS**

[NOT ADOPTED]

COMMENT

Contrary to the recommendation of The 1963 Report at 115-121 (proposed N.J. Evid. R. 59, 60 and 61), the 1967 New Jersey rules did not include provisions for the court appointment of experts. The power of a court to appoint expert witnesses and to deal with related procedural matters may be viewed primarily as a matter of practice and procedure rather than as a part of the law of evidence. The court rules provide in detail for the appointment by the court of an impartial medical expert in personal injury and wrongful death actions. R. 4:20-1 et seq. The rules provide the method of appointment, disclosure to the jury of court appointment, and compensation. R. 4:20-3, 10 and 11. Court appointment of experts is also provided for in family actions. R. 5:3-3.

The power of the court to appoint experts is also established by the case law. See Wayne Tp. v. Kosoff, 73 N.J. 8, 13-15 (1977); Handleman v. Marwen Stores Corp., 53 N.J. 404, 408-414 (1969). For related procedures, see Kosoff, 73 N.J. at 15.

ARTICLE VIII. HEARSAY**RULE 801****DEFINITIONS**

For purposes of this article, the following definitions apply:

- (a) **Statement.** A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person if it is intended by him as an assertion.
- (b) **Declarant.** A "declarant" is a person who makes a statement.
- (c) **Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
- (d) **Business.** A "business" includes every kind of business, institution, association, profession, occupation and calling, whether or not conducted for profit, and also includes activities of governmental agencies.
- (e) **Writing.** A "writing" consists of letters, words, numbers, data compilations, pictures, drawings, photographs, symbols, sounds, or combinations thereof or their equivalent, set down or recorded by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or by any other means, and preserved in a perceptible form, and their duplicates as defined by Rule 1001(d).
- (f) **Public Official.** A "public official" includes an official of the United States, its territories, the District of Columbia and states, as well as political subdivisions, regional and other governmental agencies thereof.

The
contain
identical
respecti
R. 62(1)
The
N.J. Evid.
of Fed.
include
See Comm
Evid. 80
covers m
business
public r
The
Fed. R.
definiti
some rul
terms "w
Rul
federal
Evid. R.
includes
federal
forms of
reasonab
incompat
The requ
the requ
forms o
writing
stored
forms o
other s
separat
photogr
TH
follows
definit
of the
analog
record
"busin
governm
of a p
803(c)
public
not sp
recor
803(10
I
self-

COMMENT

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

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

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

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

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

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

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

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

As noted in the comment to Rule 802, neither the hearsay rule nor its exceptions address issues concerning a criminal defendant's right of confrontation under the sixth amendment. The right of confrontation was not the basis for the distinction between hearsay exceptions under Rules 803(c)(1) to (26), which do not depend on the unavailability of a witness, and hearsay exceptions under Rule 804(b), which do require proof of

unavailability. See discussion of the confrontation clause, which normally requires a showing of witness unavailability, Ohio v. Roberts, 448 U.S. 56, 66, 65 L. Ed. 2d 597, 608 (1980), under Comment, Rule 804(b)-Hearsay Exceptions, Introduction, infra.

RULE 802

HEARSAY RULE

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

COMMENT

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

As stated in the Advisory Committee's Note to Fed. R. Evid. 803, the exceptions "are phrased in terms of nonapplication of the hearsay rule, rather than in positive terms of admissibility, in order to repel any implication that other possible grounds for exclusion are eliminated from consideration." Notes of Advisory Committee on Proposed Rules, Note to Fed. R. Evid. 803, 28 U.S.C.A. (1984). To illustrate this point, lay opinion evidence that would not be admissible if the declarant were testifying in person does not become admissible because it is contained in business records that may be introduced as an exception to the hearsay rule. See Brown v. Mortimer, 100 N.J. Super. 395, 405-406 (App. Div. 1968). Moreover, no attempt has been made to determine the extent to which hearsay exceptions may conflict with a criminal defendant's right of confrontation under the sixth amendment. See Ohio v. Roberts, 448 U.S. 56, 65-66, 65 L. Ed. 2d 597, 607-608 (1980); Dutton v. Evans, 400 U.S. 74, 27 L. Ed. 2d 213 (1970); California v. Green, 399 U.S. 149, 26 L. Ed. 2d 489 (1970); State v. Burgos, 200 N.J. Super. 6, 12 (App. Div. 1985), certif. denied, 101 N.J. 304 (1985).

RULE 803

HEARSAY EXCEPTIONS NOT DEPENDENT ON DECLARANT'S UNAVAILABILITY

The following statements are not excluded by the hearsay rule:

- (a) Prior statements of witnesses. A statement previously made by a person who is a witness at a trial or hearing, provided it would have been admissible if made by the declarant while testifying and the statement:
- (1) is inconsistent with the witness' testimony at the trial or hearing and is offered in compliance with Rule 613.

However, when the statement is offered by the party calling the witness, it is admissible only if, in addition to the foregoing requirements, it (A) is contained in a sound recording or in a writing made or signed by the witness in circumstances establishing its reliability or (B) was given under oath subject to the penalty of perjury at a trial or other judicial, quasi-judicial, legislative, administrative or grand jury proceeding, or in a deposition; or

- (2) is consistent with the witness' testimony and is offered to rebut an express or implied charge against the witness of recent fabrication or improper influence or motive; or
- (3) is a prior identification of a person made after perceiving that person if made in circumstances precluding unfairness or unreliability.

- (b) Statement by party-opponent. A statement offered against a party which is:

- (1) the party's own statement, made either in an individual or in a representative capacity, or
- (2) a statement whose content the party has adopted by word or conduct or in whose truth the party has manifested belief, or
- (3) a statement by a person authorized by the party to make a statement concerning the subject, or
- (4) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or
- (5) a statement made at the time the party and the declarant were participating in a plan to commit a crime or civil wrong and the statement was made in furtherance of that plan.

In a criminal proceeding, the admissibility of a defendant's statement which is offered against the defendant is subject to Rule 104(c).

- (c) Statements not dependent on declarant's availability.

Whether or not the declarant is available as a witness:

- (1) Present sense impression. A statement of observation, description or explanation of an event or condition made while or immediately after the declarant was perceiving the event or condition and without opportunity to deliberate or fabricate.
- (2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition and without opportunity to deliberate or fabricate.
- (3) Then existing mental, emotional, or physical condition. A statement made in good faith of the declarant's then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.
- (4) Statements for purposes of medical diagnosis or treatment. Statements made in good faith for purposes of

medical diagnosis or treatment which describe medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof to the extent that the statements are reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection. A statement concerning a matter about which the witness is unable to testify fully and accurately because of insufficient present recollection if the statement is contained in a writing or other record which (A) was made at a time when the fact recorded actually occurred or was fresh in the memory of the witness, and (B) was made by the witness himself or under the witness' direction or by some other person for the purpose of recording the statement at the time it was made, and (C) the statement concerns a matter of which the witness had knowledge when it was made, unless the circumstances indicate that the statement is not trustworthy; provided that when the witness does not remember part or all of the contents of a writing, the portion the witness does not remember may be read into evidence but shall not be introduced as an exhibit over objection.

(6) Records of regularly conducted activity. A statement contained in a writing or other record of acts, events, conditions, and, subject to Rule 808, opinions or diagnoses, made at or near the time of observation by a person with actual knowledge or from information supplied by such a person, if the writing or other record was made in the regular course of business and it was the regular practice of that business to make it, unless the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy.

(7) Absence of an entry in records of regularly conducted activity. Evidence that a matter is not included in a writing or other record kept in accordance with the provisions of Rule 803(c)(6), when offered to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a writing or other record was regularly made and preserved, unless the sources of information or other circumstances indicate that the inference of nonoccurrence or nonexistence is not trustworthy.

(8) Public records, reports, and findings. Subject to Rule 807, (A) a statement contained in a writing made by a public official of an act done by the official or an act, condition, or event observed by the official if it was within the scope of the official's duty either to perform the act reported or to observe the act, condition, or event reported and to make the written statement, or (B) statistical findings of a public official based upon a report of or an investigation of acts, conditions, or events, if it was within the scope of the official's duty to make such statistical findings, unless the sources of information or other circumstances indicate that such

statistical findings are not trustworthy.

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

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

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

(12) Marriage, baptismal, and similar certificates. Subject to Rule 807, statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

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

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

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

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

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by

the public or by persons in particular occupations.

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

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

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

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

(22) Judgments of previous conviction of crime. In a civil proceeding, except as otherwise provided by court order on acceptance of a plea, evidence of a final judgment against a party adjudging him guilty of an indictable offense in New Jersey or of an offense which would constitute an indictable offense if committed in this state, as against that party, to prove any fact essential to sustain the judgment.

(23) Judgment as to personal, family, or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if those matters would be provable by evidence of reputation.

(24) Other exceptions.

[Not Adopted]

(25) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject declarant to civil or criminal liability, or to render invalid declarant's claim against another, that a reasonable person in declarant's position would not have made the statement unless the person believed it to be true. Such a statement is admissible against an accused in a criminal action only if the accused was the declarant.

(26) Judgments against persons entitled to indemnity. Subject to Rule 807 and except in a proceeding brought under

the Joint Tortfeasors Contribution Law, N.J.S.A. 2A:53A-1 et seq., the record of a final judgment is admissible if offered by the judgment debtor in an action in which he seeks to recover partial or total indemnity or exoneration for money paid or a liability incurred because of the judgment, as evidence of the liability of the judgment debtor, of the facts on which the judgment is based, and of the reasonableness of the damages recovered. If the defendant in the second action had notice of and opportunity to defend the first action, the judgment is conclusive evidence.

COMMENT

Rule 803 Generally

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

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

Rule 803(a) - Prior Statements

Rule 803(a)(1) follows almost verbatim N.J. Evid. R. 63(1)(a), as amended effective July 1, 1982. The words "sound recording" are omitted because they are contained in the definition of writing in Rule 801(e). The New Jersey formulation as to the substantive use of prior inconsistent statements of witnesses is less restrictive than the federal formulation in Fed. R. Evid. 801(d)(1)(A). The New Jersey rule permits the use of a prior inconsistent statement as substantive evidence when offered by a party other than the proponent of the witness, State v. Provet, 133 N.J. Super. 432, 435-439 (App. Div. 1975), certif. denied, 68 N.J. 174 (1975), and also allows such use when offered by the party calling the witness if the inconsistent statement is in written or recorded form in circumstances bespeaking reliability, or was made under oath as specified by the rule. State v. Mancine, 124 N.J. 232, 236-256 (1991); State v. Gross, 121 N.J. 1, 7-15 (1990); State v. Gross, 121 N.J. 18 (1990). By contrast, Fed. R. Evid. 801(d)(1)(A) makes no distinction based upon which party called the witness and admits inconsistent statements as substantive evidence only if made under oath. Thus, the federal rule is much narrower than the New Jersey rule. For the history and application of the New Jersey rule and its relationship to Rule 607, see State v. Hacker, 177 N.J. Super. 533, 537 n.2 (App. Div.), certif. denied, 87 N.J. 364 (1981), and commentary on the 1982 amendment published in 108 N.J.L.J. 302

(1981). See also *State v. Gross*, 121 N.J. 1 (1990), defining circumstantial reliability with regard to a prior inconsistent statement of an accomplice called by the prosecution as a witness.

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

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

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

Comment on Rule 607. This rule follows *Fed. R. Evid.* 801(d)(1)(B) verbatim.

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

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

Rule 803(b) - Party Admissions

Rule 803(b) follows the structure as well as the substantive content of *Fed. R. Evid.* 801(d)(2), while retaining some of the language of the 1967 New Jersey rule analogues. The last sentence of this rule was added to emphasize that the admissibility of statements by an accused is subject to Rule 104(c), formerly *N.J. Evid. R.* 8(3).

While Rule 803(b) changes some of the language of the 1967 New Jersey rule analogues, it makes no substantive change in current New Jersey practice. Paragraph (b)(1) replaces *N.J. Evid. R.* 63(7); paragraphs (b)(2) and (b)(3) replace *N.J. Evid. R.* 63(8); paragraph (b)(4) replaces *N.J. Evid. R.* 63(9)(a); and paragraph (b)(5) replaces *N.J. Evid. R.* 63(9)(b).

Rule 803(c) - Other Statements

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

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

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

(3) Then existing mental, emotional, or physical condition. Rule 803(c)(3) follows *Fed. R. Evid.* 803(3) almost verbatim, adding the good faith requirement contained in *N.J. Evid. R.* 63(12). This rule replaces paragraph (a) of *N.J. Evid. R.*

63(12), first adding the term "physical condition" and, consistent with New Jersey law, the provision respecting declarant's will. See Engle v. Siegel, 74 N.J. 287, 293-294 (1977); Wilson v. Flowers, 58 N.J. 250, 261-264 (1971); Fidelity Union Trust Co. v. Robert, 36 N.J. 561 (1962). See also N.J.S.A. 3B:3-33, permitting proof of the testator's intent by way of extrinsic "relevant circumstances." The phrase "relevant circumstances" had been construed by Engle v. Siegel, *supra*, 74 N.J. at 291, as including testator's statements of intent.

With respect to conduct inferred from a declarant's statement of intent, there is some conflict among federal cases as to the viability of the Hillmon doctrine under Fed. R. Evid. 803(1). The United States Supreme Court held in Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 295-300, 36 L. Ed. 706, 709-712 (1892), that letters of the declarant, Walters, to his family and his fiancée stating that he was leaving on a trip to Colorado with a man named Hillmon were admissible to prove from declarant's intention not only the likelihood that declarant went on the trip but also the likelihood that Hillmon went with declarant. Walters was never heard from again. The Advisory Committee on the Proposed [Federal] Rules stated that Rule 803(3) was intended to leave the Hillmon doctrine undisturbed. Notes of Advisory Committee on Proposed Rules, Note to Fed. R. Evid. 803(3), 28 U.S.C.A. (1984). However the House Committee on the Judiciary preferred to limit the Hillmon doctrine to permit statements of intent to show declarant's own future conduct, not the future conduct of another person. Notes of Committee on the Judiciary, House Report No. 93-650, Note to Fed. R. Evid. 803(3), 28 U.S.C.A. (1984).

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

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

(4) Statements for purposes of medical diagnosis or treatment. Rule 803(c)(4) follows Fed. R. Evid. 803(4) almost verbatim, adding the good faith requirement of N.J. Evid. R. 63(12). This rule replaces N.J. Evid. R. 63(12)(b) and (c)

without substantive change except that the requirement of the New Jersey rule that the statement be made to a physician was omitted as too narrow since statements made for the purpose of diagnosis or treatment may be made to other health care professionals and paraprofessionals. For example, many psychotherapists are not MDs; they may be psychologists, social workers or practitioners of other disciplines.

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

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

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

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

In contrast to its federal counterpart, Rule 803(c)(6) follows the 1967 New Jersey rule in not requiring testimony of the custodian or other qualified witness as a condition for admission of business records. The requirement that a foundation be laid establishing the criteria for admissibility may be met by the kind of proof that would satisfy a trial judge in a hearing under Rule 104(a), including proof presented in affidavit form, such as in the case of hospital records. Gunter v. Fischer

Scientific American, 193 N.J. Super. 688, 691-692 (App. Div. 1984); see The 1963 Report at 186-187; see also Comment on Rule 101(a)(2)(E) and Rule 104(a).

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

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

Police reports in civil cases in which the police officer making the report has no interest in the anticipated litigation are generally admissible under established law. See Sas v. Strelecki, supra, 110 N.J. Super. at 19-22; Schneiderman v. Strelecki, 107 N.J. Super. 113, 118-119 (App. Div. 1969), certif. denied, 55 N.J. 163 (1969); Brown v. Mortimer, 100 N.J. Super. 395, 402-406 (App. Div. 1968). The admissibility of a business record, however, does not mean that all parts of the record are necessarily admissible. For example, in Sas the court held inadmissible portions of a police report which contained statements given to a police officer because the statements were made by persons not under a "business duty" to render a truthful account of the automobile accident involved in the case. 110 N.J. Super. at 22. See also State v. Lungsford, 167 N.J. Super. 296, 309-310 (App. Div. 1979). Nevertheless, the rule does not condition admissibility of business records on proof that all information which they contain came from persons with a business

duty to report the information accurately. The duty to report accurately may enhance the reliability of the business record. See State v. Matulewicz, supra, 101 N.J. at 30-31. But many business organizations regularly keep, use and rely upon information derived from sources without such a duty. Thus, to the extent that the holding in Phoenix Associates, Inc. v. Edgewater Park Sewerage Auth., 178 N.J. Super. 109, 116 (App. Div. 1981), aff'd on other grounds sub nom. Phoenix apartments, Inc. v. Edgewater Park Sewerage Auth., 89 N.J. 2(1982), was based on the lack of a duty on the informant to report truthfully and accurately, it is not followed here. See Matter of Ollaq Constr. Equip. Corp., 665 F.2d 43, 46 (2d Cir. 1981), which upheld the admissibility of financial statements prepared on a bank's form by the debtor, although the debtor was not under a business duty to supply the information.

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

(7) Absence of an entry in records of regularly conducted activity. Rule 803(c)(7) follows both Fed. R. Evid. 803(7) and N.J. Evid. R. 63(14), with language changes that do not alter the basic principle of the rule. The "unless" clause at the end of the rule derives from the federal rule; it is not contained in N.J. Evid. R. 63(14).

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

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

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

The federal rule embodies the business record rule. Unlike the federal rules, these rules, like the New Jersey 1967 evidence rules, define the term "business" to include activities of

governmental agencies. Thus, many records of governmental agencies can be admitted either under this rule or the traditional business record rule, Rule 803(c)(6). See State v. Matulewicz, 101 N.J. 27 (1985).

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

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

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

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

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

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

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

(11) Records of religious organizations. Rule 803(c)(11) follows Fed. R. Evid. 803(11) almost verbatim. There is no 1967 New Jersey rule analogue. Religious records may be admitted as business records under Rule 803(c)(6) if made by an official of the religious organization who had a duty to make the record. Such records are also admissible under this rule even if the information contained in the record of the religious organization came from a person who had no duty to make the report, as is typically the case.

(12) Marriage, baptismal and similar certificates. Rule 803(c)(12) follows verbatim Fed. R. Evid. 803(12) except for the reference to Rule 807. The 1967 New Jersey analogue, N.J. Evid. R. 63(18), covered only certificates of marriage made by persons authorized by law to perform the marriage ceremony. The federal rule was adopted because of the high degree of reliability of the certificates it includes.

(13) Family records. Rule 803(c)(13) follows Fed. R. Evid. 803(13) almost verbatim, adding the reference to Rule 807. There is no 1967 New Jersey rule analogue. Frequently, authorities referred to in 5 J. Wigmore, Evidence §§1495-1496 (1974), are cited in support of the federal rule; see Notes of Advisory Committee on Proposed Rules, Note to Fed. R. Evid. 803(13) 28

U.S.C.A. (1984). The federal rule has some support in New Jersey law. See In re Blau, 4 N.J. Super. 343, 350-351 (App. Div. 1949); but cf. Supreme Council v. Conklin, 60 N.J.L. 565, 569-571 (E. & A. 1897). As to the application of the rule, see 4 J. Weinstein & M. Berger, Weinstein's Evidence §803(13)[01] at 803-299 to 300 (1990). The cases usually look for some evidence of reliability of the source of the statement. Unavailability of the declarant is not required as under the common law rule.

(14) Records of documents affecting an interest in property. Rule 803(c)(14) follows Fed. R. Evid. 803(14) almost verbatim except for the reference to Rule 807. It makes no substantive change in N.J. Evid. R. 63(19), which it replaces.

(15) Statements in documents affecting an interest in property. Rule 803(c)(15) follows Fed. R. Evid. 803(15) almost verbatim except for the reference to Rule 807. It makes no substantive change in N.J. Evid. R. 63(29), which it replaces.

(16) Statements in ancient documents. Rule 803(c)(16) follows Fed. R. Evid. 803(16) but substitutes a 30-year period for the 20-year period used by the federal rule. This is consistent with New Jersey law on the admissibility of ancient documents of apparent authenticity. See Havens v. Sea Shore Land Co., 47 N.J. Eq. 365, 373-379 (Ch. 1890). There is no New Jersey rule analogue. For criteria used to authenticate ancient documents, see Fed. R. Evid. 901(b)(8). See also Comment to Rule 901. These rules do not establish particular criteria to satisfy the required proof of authenticity.

(17) Market reports, commercial publications. Rule 803(c)(17) follows Fed. R. Evid. 803(17) verbatim. While it changes the language of N.J. Evid. R. 63(30), it makes no substantial change in practice. The 1967 New Jersey rule analogue did not include documents relied on by the public but only those published for and used by persons in particular occupations. However, the same principle supports the admissibility of both categories of publications.

Although the formulation of this rule is somewhat broader than its predecessor, it is not intended to affect the holdings of State v. McGee, 131 N.J. Super. 292, 296-298 (App. Div. 1974) (compilations of the National Crime Information Center not admissible) and State v. Lungford, *supra*, 167 N.J. Super. at 301-306 (compilations of the National Automobile Theft Bureau not admissible), for reasons stated in these opinions.

(18) Learned treatises. Rule 803(c)(18) follows Fed. R. Evid. 803(18) almost verbatim, adding the proviso respecting the display of graphics to the jury. Although a rule similar to this was proposed as N.J. Evid. R. 63(31) in The 1963 Report at 212, it was not adopted, and there is no 1967 New Jersey rule analogue. The adoption of this rule represents a change in practice by allowing the use of learned treatise evidence even if an expert witness fails to acknowledge that it is authoritative, so long as the reliability of the authority is established by other testimony or by judicial notice.

(19) Reputation concerning personal or family history. Rule 803(c)(19) follows Fed. R. Evid. 803(19) almost verbatim.

It combines N.J. Evid. R. 63(26) and 63(27)(c) with language changes but with no change in substance except for the omission of the phrase "resident in the community at the time of the reputation," a factor which would affect the weight of the evidence but not its admissibility.

(20) Reputation concerning boundaries or general history. Rule 803(c)(20) follows Fed. R. Evid. 803(20) almost verbatim and makes language changes but no substantive changes in N.J. Evid. R. 63(27)(a) and (b), which it replaces, except for broadening the condition that the event be "of importance to the community" to include "or state or nation" as well.

(21) Reputation as to character. Rule 803(c)(21) follows Fed. R. Evid. 803(21) almost verbatim. It incorporates the concept of "relevant time" included in N.J. Evid. R. 63(28), which this rule replaces with language changes but no substantive changes.

(22) Judgments of previous conviction of crime. Rule 803(c)(22) follows almost verbatim N.J. Evid. R. 63(20), which limits to civil proceedings the substantive use of judgments of convictions against a party. By contrast, the federal rule, Fed. R. Evid. 803(22), permits substantive use of prior convictions against the accused in criminal prosecutions. As to the difference between the 1967 New Jersey analogue, followed by this rule, and the federal rule, see State v. Ingenito, 87 N.J. 204, 222-224 (1981) (Schreiber, J., concurring), which notes that a prior conviction may be admitted in a criminal case if the fact of conviction constitutes an essential element of the subsequent offense. A prior conviction of a witness, whether or not a party, can also be used in both civil and criminal proceedings for impeachment purposes. See *id.* at 224, and N.J.S.A. 2A:81-12, to the extent that that statute was not superseded by the official footnote accompanying the 1967 adoption of N.J. Evid. R. 63(20). See also Rule 609 and Comment thereon. The provision in the federal rule allowing proof of convictions on appeal was not adopted as contrary to New Jersey law. State v. Biegenwald, 96 N.J. 630, 638 (1984) (citing with approval State v. Blue, 129 N.J. Super. 8, 11-12 (App. Div. 1974), *certif. denied*, 66 N.J. 328 (1974)).

(23) Judgments as to personal, family, or general history, or boundaries. Rule 803(c)(23) follows Fed. R. Evid. 803(23). While there is neither a 1967 New Jersey rule analogue nor New Jersey case law on the subject, this exception has long been recognized by the general common law. See City of London v. Clerke, 90 Eng. Rep. 710 (K.B. 1691); Patterson v. Gaines, 47 U.S. 550, 599, 12 L. Ed. 553, 573 (1848). The federal rule embodying the common law was adopted because judgments are ordinarily more reliable than the evidence of reputation concerning those matters admissible under Rules 803(c)(19) and (20).

(24) Other exceptions -- not adopted. Fed. R. Evid. 803(24), which creates a general hearsay exception for statements not covered by a specific hearsay rule, provided they are attended by "equivalent circumstantial guarantees of trustworthiness" and are the most probative evidence reasonably available, and provided further that other stated criteria are met, was not adopted. The adoption of the federal rule was

attended by substantial controversy and its application since its adoption has been disparate among the federal courts. See A.B.A. Section of Litigation, Emerging Problems Under the Federal Rules of Evidence 279-281 (1983). The adoption of Fed. R. Evid. 803(24), construable as a general relaxation rule, would represent a radical departure from New Jersey practice. The advantages and disadvantages of this departure are debatable. For the same reason, Fed. R. Evid. 804(b)(5) was not adopted. It should be noted that a broad relaxation rule proposed as Rule 2(4) in The 1963 Report at 9 was rejected.

(25) Statement against interest. Rule 803(c)(25) follows almost verbatim the first sentence of Fed. R. Evid. 804(b)(3) and replaces N.J. Evid. R. 63(10) without substantive change. The placement of this rule as a section of Rule 803 preserves the present New Jersey practice of permitting the use of declarations against interest irrespective of the declarant's availability as a witness. See State v. Barry, 86 N.J. 80, 91-92 (1981), cert. denied, 454 U.S. 1017 (1981); Portner v. Portner, 186 N.J. Super. 410, 416-418 (App. Div. 1982), rev'd on other grounds, 93 N.J. 215 (1983). The federal rule, by placing this provision in Rule 804, conditions the use of such statements on the declarant's unavailability.

This rule follows the federal formulation by excluding statements against "social interest." That term is vague, and some declarations which are against social interest may also be against penal or other specified interest. See, e.g., State v. West, 145 N.J. Super. 226, 232-233 (App. Div. 1976), certif. denied, 73 N.J. 67 (1977).

This rule also rejects the second sentence of the federal analogue which requires corroborating circumstances indicating trustworthiness as a condition for the admission of declarations against penal interest by another person exculpating an accused. See Chambers v. Mississippi, 410 U.S. 284, 299-302, 35 L. Ed. 2d 297, 311-313 (1973).

(26) Judgments against persons entitled to indemnity. Rule 803(c)(26) follows N.J. Evid. R. 63(21) almost verbatim. The reference in the rule to the Joint Tortfeasors Contribution Law is intended to incorporate the modifying provision of the Comparative Negligence Law, N.J.S.A. 2A:15-5.3. While the rule does not so state in terms, it is clear that a judgment obtained by fraud is not admissible for the purposes stated by the rule. Cf. Scaaglione v. St. Paul-Mercury Indem. Co., 28 N.J. 88 (1958). There is no federal analogue.

RULE 804

HEARSAY EXCEPTIONS: DECLARANT UNAVAILABLE

(a) Definition of unavailable. Except when the declarant's unavailability has been procured or wrongfully caused by the proponent of declarant's statement for the purpose of preventing declarant from attending or testifying, a declarant is "unavailable" as a witness if declarant:

- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the

subject matter of the statement; or

- (2) persists in refusing to testify concerning the subject matter of the statement despite an order of the court to do so; or
- (3) testifies to a lack of memory of the subject matter of the statement; or
- (4) is absent from the hearing because of death, physical or mental illness or infirmity, or other cause, and the proponent of the statement is unable by process or other reasonable means to procure the declarant's attendance at trial, and, with respect to statements proffered under Rules 804(b)(4) and (7), the proponent is unable, without undue hardship or expense, to obtain declarant's deposition for use in lieu of testimony at trial; or
- (5) for the purpose of Rule 804(b)(8), is unable to give full and cogent testimony concerning the substance of the statement because of lack of memory or other cause, including disqualification as a witness pursuant to Rule 601.
 - (b) Hearsay exceptions. Subject to Rule 807, the following are not excluded by the hearsay rule if the declarant is unavailable as a witness.
 - (1) Testimony in prior proceedings.
 - (A) Testimony given by a witness at a prior trial of the same or a different matter, or in a hearing or deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered had an opportunity and similar motive in the prior trial, hearing or proceeding to develop the testimony by examination or cross-examination.
 - (B) In a civil action or proceeding, and only when offered by the defendant in a criminal action or proceeding, testimony given in a prior trial, hearing or deposition taken pursuant to law to which the party against whom the testimony is now offered was not a party, if the party who offered the prior testimony or against whom it was offered had an opportunity to develop the testimony on examination or cross-examination and had an interest and motive to do so which is the same or similar to that of the party against whom it is now offered. Expert opinion testimony given in a prior trial, hearing, or deposition may be excluded, however, if the judge finds that there are experts of a like kind generally available within a reasonable distance from the place in which the action is pending and the interests of justice so require.
 - (2) Statement under belief of impending death.

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

- (3) Statement against interest--Adopted as Rule 803(c)(25)]

- (4) Statement of personal or family history.

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

- (5) Other Exceptions--not adopted]

- (6) Trustworthy statements by deceased declarants.

In a civil proceeding, a statement made by a person unavailable as a witness because of death if the statement was made in good faith upon declarant's personal knowledge in circumstances indicating that it is trustworthy.

- (7) Voters' statements.

A statement by a voter concerning the voter's qualifications to vote or the fact or content of the voter's vote.

- (8) Statements by a child concerning sexual activity.

A statement made by a child of tender years concerning sexual activity involving the child if

(A) after a hearing pursuant to Rule 104(a), the judge finds that

(i) the statement was not the product of fabrication or suggestion, after considering the content of the statement in light of the child's youth and lack of knowledge and experience and the circumstances surrounding the statement, including when and to whom it was made, and the nature of any questions leading to it, and

(ii) the statement is otherwise reliable; and

(iii) the statement is corroborated by other reliable evidence of the occurrence of the sexual activity described in the statement; and

(B) the child is produced for questioning on request of the person against whom the statement is used when the child has not testified as a witness at the hearing but is physically available.

If a statement has been admitted under this rule the party against whom it was admitted may introduce other statements of the child on the same subject.

COMMENT

Rule 804(a) - Definition of "Unavailable"

Rule 804(a) specifies the circumstances in which a declarant will be deemed "unavailable" as a witness in order to satisfy this condition for admitting his prior statement in evidence under hearsay exceptions contained in Rule 804(b). In general, Rule 804(a) follows the provisions of the federal rule and incorporates some of the provisions of N.J. Evid. R. 62(6), which defines the terms "unavailable as a witness" for the purpose of certain hearsay exceptions.

Paragraphs (1), (2) and (3) of Rule 804(a) are identical to the federal rule. These provisions define unavailability to include (1) a declarant whose privilege not to testify has been upheld, (2) a declarant who refuses to testify despite a court order to do so, and (3) a declarant who testifies that he cannot recall the subject of his prior statement. These circumstances were not expressly included in N.J. Evid. R. 62(6). The issue raised in State v. Wilson, 57 N.J. 39, 47-48 (1970), that a declarant who can assert a privilege is not "unavailable" within the meaning of the hearsay exception for former testimony, will no longer present a problem under the expanded definition of "unavailable" contained in Rule 804(a). These new provisions are consistent with the principles underlying N.J. Evid. R. 62(6).

The contents of paragraphs (4) and (5) of Fed. R. Evid. 804(a) have been combined in paragraph (a)(4) of this rule, to which have been added principles embodied in N.J. Evid. R. 62(6) concerning the taking of a declarant's deposition with respect to only two Rule 804(b) exceptions, (b)(4) and (b)(7), applicable to statements of personal and family history and to voters' statements respectively. But see comment on Rule 804(b)(7).

Paragraph (4) of this rule does not specifically enumerate all possible causes for the inability to compel the appearance of the person whose prior statement will be offered. The rule expressly includes death of the declarant as well as mental or physical illness or infirmity. These terms are found in the federal rule and the 1967 New Jersey rule as well as in R. 4:16-1(c), dealing with use of depositions. The court rule also includes the terms "age" and "imprisonment". The provision for "other cause" in paragraph (4) would include imprisonment as well as all other circumstances resulting in the inability to produce the declarant as a witness at trial. Absence from the jurisdiction may be another cause. It was expressly included in N.J. Evid. R. 62(6) and R. 4:16-1(c). However, it was omitted

from paragraph (4) because a person may be deemed available in certain circumstances despite absence from the jurisdiction if he or she is within the control of the proponent of the hearsay statement. As to the sufficiency of efforts to procure the witness' attendance at trial, see generally Annotation, "Sufficiency of Efforts to Procure Missing Witness' Attendance to Justify Admission of his Former Testimony -- State Cases," 3 A.L.R.4th 87 (1981).

Federal Rule 804(a)(5) requires the attempt to depose an absent declarant whose hearsay statement is proffered under 804(b)(2) (statement under belief of impending death), (b)(3) (statement against interest) and (b)(4) (statement of personal or family history). As noted above this rule requires an attempt to depose a declarant only with respect to statements of personal or family history and voters' statements offered under Rules 804(b)(4) and (b)(7), respectively. This rule does not require an attempt to depose declarant in order to admit statements made under belief of impending death because the New Jersey rule, unlike the federal rule, permits admission of such statements only if the declarant is dead. Rule 804(b)(2), following N.J. Evid. R. 63(5). Nor does this rule require the deposition attempt for admission of statements against interest. Under New Jersey practice, the admissibility of declarations against interest is not dependent on the unavailability of the declarant. Rule 803(c)(25), following N.J. Evid. R. 63(10). In addition, this rule, like the federal rule, does not require the deposition attempt with respect to prior testimony. There is no reason to depose a declarant who has previously testified subject to cross-examination.

The federal rule has no counterpart to Rule 804(b)(7) (voter statements). Since the validity of an election may depend upon the content of the statement, the better practice is to require the deposition attempt, and this rule so provides. However, for self-evident reasons, the rule does not require deposition attempts for the two remaining "unavailability" exceptions, statements of deceased declarants and statements of children regarding sexual abuse, Rules 804(b)(6) and (b)(8), respectively.

Even where the deposition attempt is required, the failure to have made that attempt will not always preclude admissibility. The importance of the declarant's statement to the proceeding, the expectation that he would ordinarily be available at trial, the extent of the hardship and expense in taking the deposition, and other factors, may be considered in determining whether a declarant's deposition is required. Note that the additional provision in N.J. Evid. R. 62(6), "and the probable importance of the [declarant's] testimony is such as to justify the expense of taking such deposition" was omitted as embraced in the concept "without undue hardship or expense." Of course, if unavailability is disputed, the trial judge will be required to determine the issue pursuant to Rule 104(a). There are many factors that can be considered, and Rule 804(a) establishes general principles to guide the discretion of the court.

Paragraph (5) was added to enlarge the definition of

unavailability with respect to statements concerning sexual activity of a child of tender years, made admissible under Rule 804(b)(8), in keeping with the principles of State v. D.R., 109 N.J. 348, 351-377 (1988). See N.J. Evid. R. 63(33). There is no federal analogue.

RULE 804(b) - Hearsay Exceptions

Introduction. Rule 804(b), like Fed. R. Evid. 804(b), provides certain hearsay exceptions if the declarant is unavailable as a witness. Under the 1967 New Jersey rules, the exceptions to the hearsay rule contained in N.J. Evid. R. 63 were not divided into categories according on the availability of the declarant as a witness. However, several exceptions were individually conditioned on the declarant's unavailability, namely, New Jersey Evidence Rules 63(3) (depositions and prior testimony), 63(5) (dying declarations), 63(23) and (24) (statements concerning one's own or another's family history), 63(32) (statements of declarants who have died), 63(11) (voters' statements), and to some extent, 63(33) (statements by a child relating to a sexual offense). These New Jersey evidence rules are the antecedents of Rules 804(b)(1), (2), (4), (6), (7) and (8), respectively. There are no federal counterparts to Rules 804(b)(6), (7), and (8). Fed. R. Evid. 804(b)(5), which contains a general exception for other trustworthy statements of unavailable declarants, was not adopted.

Like Rule 803, Rule 804(b) is phrased in the negative. It provides that certain statements are not excluded by the hearsay rule if the declarant is unavailable as a witness. However, statements of unavailable witnesses otherwise admissible under Rule 804(b) may be excluded under another rule of evidence, for example, in most instances when the statement is not based on the personal knowledge of the declarant or when the statement contains an opinion which the declarant is not qualified to give. On the other hand, statements of unavailable witnesses may also be admitted under any of the other hearsay exceptions contained in Rule 803(c).

Note that the admissibility of all hearsay offered pursuant to Rule 804(b) is subject to the notice requirements contained in Rule 807.

As a general caution, it must be noted that in criminal cases, "when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable." Ohio v. Roberts, 448 U.S. 56, 66, 65 L. Ed. 2d 597, 608 (1980). Unavailability in the constitutional sense requires proof that the prosecutor has made a "good-faith effort" to produce the declarant at trial. 448 U.S. at 74, 65 L. Ed. 2d at 613; Barber v. Page, 390 U.S. 719, 724-724, 20 L. Ed. 2d 255, 260 (1968). When unavailability has been established, the Roberts court said: "Even then, [the] statement is admissible only if it bears adequate 'indicia of reliability'. Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." Roberts, supra, 448 U.S. at 66, 65 L. Ed. 2d at 608.

deali
earli
same
N.J.
respe
the p
4:16-
not u
party
invol
appli
was n
testi
unava
prese
proce
motiv
case.
1988)
exami
exami
804(b
or mo
part.
case
does
prob
exter
Stat
Stat
Cali
the
stri
such
his
case
the
part
the
that
had
By v
woul
prio
pres
in k
proc
pres
the

(1) Testimony in prior proceedings. Rule 804(b)(1), dealing with the admissibility of former testimony given at an earlier trial, hearing or proceeding or in a deposition in the same case or in another case, is similar to the federal rule and N.J. Evid. R. 63(3) in a number of respects, but differs in some respects from both rules. As for the use of depositions taken in the pending case, see generally R. 4:16 and, in particular, R. 4:16-1(c) with respect to unavailable witnesses and absent but not unavailable witnesses.

Rule 804(b)(1)(A) applies to testimony offered against a party who was a party to an earlier trial, hearing or proceeding involving the same or a different matter. Rule 804(b)(1)(B) applies to prior testimony which is offered against a party who was not a party to the prior action or proceeding in which the testimony was given.

Under Rule 804(b)(1)(A), testimony of a declarant who is unavailable as a witness is admissible against a party to the present civil or criminal case who was a party to the prior proceeding in which the testimony was given and had a similar motive and opportunity to develop the testimony as in the present case. See State v. Wooters, 228 N.J. Super. 171, 179 (App. Div. 1988). The term "develop the testimony by examination or cross-examination" is intended to include direct and redirect examination as well as cross-examination as in Fed. R. Evid. 804(b)(1). In some cases a party may not have had an opportunity or motive to develop the testimony on the earlier occasion, particularly if the issues were dissimilar. Examples in criminal cases include proceedings before a grand jury, where defendant does not have a right to appear and examine a witness, and in probable cause hearings where the motive to examine the witness extensively may be lacking or the opportunity curtailed. See State v. Moody, 169 N.J. Super. 177 (Law Div. 1978); but see State v. Ewings, 154 N.J. Super. 472 (Law Div. 1977); cf. California v. Green, 399 U.S. 149, 26 L.Ed.2d 489 (1970).

When testimony has been given in another proceeding in which the party against whom it is later offered was not a party, stricter rules apply. Rule 804(b)(1)(B). In criminal cases, such evidence cannot be admitted against a defendant because of his constitutional right to confront the declarant. In civil cases, or when offered by a defendant in a criminal proceeding, the former testimony may be admitted under this rule against a party who was not a party in the prior proceeding if a party in the prior proceeding had an interest substantially similar to that of the party against whom it is now being offered and also had a similar motive and an opportunity to develop the testimony. By virtue of this rule, testimony given in a prior proceeding would be admissible against a present party if a party in the prior proceeding was a predecessor in interest or privy of the present party or one with a common interest, provided the issues in both proceedings are such that the party in the prior proceeding had an interest substantially similar to that of the present party and had a similar motive and opportunity to develop the testimony on direct, cross, or redirect examination.

Rule 804(b)(1)(B) is broader than a literal reading of its federal analogue with respect to testimony given in an earlier proceeding which is offered against a party who was not a party to that proceeding. Under the federal rule such former testimony is not admissible unless offered against a party whose "predecessor in interest" was a party to the proceeding in which the testimony was given. Rule 804(b)(1)(B) would admit such testimony in a civil case or in a criminal proceeding when offered by an accused if a party to the earlier proceeding had an interest similar to that of the party to the present proceeding against whom the testimony is offered and had a similar motive and an opportunity to develop the testimony.

The term "predecessor in interest" has caused difficulty in applying Fed. R. Evid. 804(b)(1). Some federal courts have given it an expansive reading comparable to the term "community of interest." See Lloyd v. American Export Lines, Inc., 580 F.2d 1179, 1184-1187 (3d Cir. 1978), cert. denied, 439 U.S. 969 (1978); Clay v. Johns-Mansville Sales Corp., 722 F.2d 1289, 1293-1295 (6th Cir. 1983), cert. denied, 467 U.S. 1253 (1984); Carpenter v. Dizio, 506 F.Supp. 1117, 1123-1124 (E.D.Pa. 1981), aff'd mem., 673 F.2d 1298 (3d Cir. 1981). This interpretation is akin to the intent of Rule 804(b)(1)(B). But see cases cited in A.B.A. Section of Litigation, Emerging Problems Under the Federal Rules of Evidence 297 et seq. (1983).

Rule 804(b)(1) follows the substance of N.J. Evid. R. 63(3)(a) except that former deposition testimony under N.J. Evid. R. 63(3)(a) was limited to de bene esse depositions "for use as testimony in the trial" as distinguished from depositions taken for discovery purposes only. Rule 804(b)(1) makes admissible testimony of an unavailable witness, including a discovery deposition as well as a de bene esse deposition, if the other conditions of the rule are satisfied. The important safeguard is the inquiry into the motive, interest, and opportunity to examine the witness in the prior proceedings. For tactical reasons a party may not avail himself of the opportunity to fully examine or cross-examine a witness during a discovery deposition, preferring to retain an element of surprise for the actual trial. For this reason extra care should be taken in admitting deposition testimony taken for discovery purposes whether or not the present party against whom the testimony is offered was a party to the prior proceeding.

Rule 804 (b)(1) contains a limitation on the admissibility of expert testimony given in a prior trial not found in either its federal or state analogues. See Sacawa v. Polikoff, 150 N.J. Super. 172, 177-179 (App. Div. 1977).

(2) Statement under belief of impending death. Rule 804(b)(2) incorporates N.J. Evid. R. 63(5) verbatim, but like the other rules respecting statements of unavailable witnesses, it is made subject to the notice requirements of Rule 807 by virtue of the preamble in Rule 804(b).

Like its 1967 New Jersey Rule analogue, this rule is limited to criminal proceedings and covers all statements made by a declarant voluntarily and in good faith while believing his death is imminent, provided both that declarant is unavailable because of his death and was a victim of the crime. The federal rule analogue, Rule 804(b)(2), limits admissible dying declarations to

statements concerning the cause or circumstances of declarant's perceived imminent death offered in all civil actions but restricts admission in criminal cases to prosecutions for homicide only. The New Jersey rule, applicable only to criminal actions, is not, however, limited to homicide cases. While the New Jersey rule is limited to criminal proceedings, any relevant statements made by a declarant who is dead may be admitted under Rule 804(b)(6) in civil actions if "made in good faith upon his personal knowledge in circumstances indicating that it is trustworthy." Thus, dying declarations may be admitted in civil actions if these conditions are met. Note, also, that unlike the New Jersey rule, the federal rule applies if the declaration was made while declarant believed his death was imminent, even if the declarant survived but is otherwise unavailable as a witness.

A dying declaration may include a conclusion or opinion, but before admitting such a statement the trial judge should determine in a preliminary hearing whether the inferences and conclusions were drawn from facts known or observed by the declarant, and whether, considering all the circumstances, the statement can be received without undue prejudice to the defendant. *State v. Heqel*, 113 N.J. Super. 193 (App. Div. 1971), *certif. denied*, 58 N.J. 596 (1971).

(3) Statement against interest -- adopted as Rule 803(c)(25). Fed. R. Evid. 804(b)(3), dealing with statements against interest, was not adopted as part of Rule 804(b) because such statements are made admissible under Rule 803(c)(25) regardless of declarant's availability. The inherent reliability

TAKE THE LAW INTO YOUR OWN HANDS.

Create your own opportunities for advancement, discreetly and effectively. Reach the decision makers at virtually every law firm in New Jersey through the *New Jersey Law Journal's* Positions Wanted section. Let them know you're interested in them and tell them why they should be interested in you.

Your one inch message will be presented weekly to hiring partners at law firms and in-house counsel throughout the state of New Jersey.

For only \$150 you will receive 4 consecutive insertions. It also includes a blind box for confidential replies and our forwarding service. The blind box fee alone is usually \$100.

For more information, call us at (201) 642-0075.

NEW JERSEY LAW JOURNAL
Since 1878
238 Mulberry Street
Newark, New Jersey 07102

of such statements was deemed sufficient to justify their admission even if the declarant is available as a witness. See Comment on Rule 63(10), *The 1963 Report* at 169. For other comment on Fed. R. Evid. 804(b)(3), see Rule 803(c)(25).

(4) Statement of personal or family history. Rule 804(b)(4) follows Fed. R. Evid. 804(4) almost verbatim. Section A replaces N.J. Evid. R. 63(23), and Section B replaces N.J. Evid. R. 63(24) with language changes only. N.J. Evid. R. 63(25) (statements concerning family history based on statement of another declarant) has not been separately adopted as its substance is comprehended by the formulation of Section A of this rule. However, this rule, unlike N.J. Evid. R. 63(25), does not require the unavailability of both declarants and is subject to the notice requirements of Rule 807.

(5) Other exceptions -- not adopted. Fed. R. Evid. 804(b)(5), which provides for unspecified "other exceptions," has not been adopted. See Comment of Rule 803(c)(24) above explaining the failure to adopt a counterpart to Fed. R. Evid. 803(24) (other exceptions).

(6) Trustworthy statements by deceased declarants. Rule 804(b)(6) follows N.J. Evid. R. 63(32). While it makes some language changes, it does not change the substance of the New Jersey rule. There is no direct federal rule analogue to this rule, but such evidence may be admitted under the residual exception provisions of Fed. R. Evid. 804(b)(5) if the conditions of that rule are satisfied. The hearsay exception for dying declarations in civil proceedings, provided for by Fed. R. Evid. 804(b)(2), is encompassed by the broader terms of this rule.

Note that this rule is expressly limited to civil proceedings. However, statements of declarants who are dead may meet the requirements of other exceptions to the hearsay rule, such as Rules 803(c)(1) (present sense impression) and 803(c)(2) (excited utterances) and may be admitted in criminal as well as civil proceedings without violating a defendant's right of confrontation so long as adequate indicia of reliability inhere in the exception or are otherwise established. *Ohio v. Roberts*, *supra*, 448 U.S. at 66, 65 L. Ed. 2d at 608.

(7) Voters' statements. Rule 804(b)(7) follows N.J. Evid. R. 63(11) verbatim, to which were added the notice requirements of Rule 807, which were not included in the 1967 New Jersey rule. There is no federal rule analogue. This rule is not inconsistent with N.J.S.A. 2A:84A-25 (N.J. Evid. R. 31) which accords a voter the privilege to refuse to disclose the tenor of his vote at a political election unless the judge finds that the vote was cast illegally. Clearly, the illegality of the vote must be determined before the hearsay statements provided for by this rule could be admitted. See N.J.S.A. 19:29-7, authorizing a judge to compel a voter, found to be unqualified, to disclose for whom he voted. See also *In re Mallon*, 232 N.J. Super. 249, 273 (App. Div. 1989), *certif. denied*, 117 N.J. 166 (1989), where the court encouraged the "resourceful" procedure used by the trial judge and the attorneys in questioning unavailable voters by telephone conference. However, in a case where the illegal vote of a voter who is not available as a witness is critical to the

outcome
the depo
circumst
(8)
804(b)(6)
announc
there ar
is no fe
13, 1985
See N.J.
The
63(33) a
804(b)(6)
give ful
of the e
availabl
804(a),
of the p
admitte
actions
defendan
rule app
all chil
permits
admitted
Ava
exclude
competen
that pos
exceptio
because
much rel
possibly
permits.
a child
suggesti
the dict
introduc
should r
addition
able to
contain
Ru
definit:
conditio
require
that th
is not
subject
unavail
testimo
memory,
and art

outcome of the election, a judge may require the parties to take the deposition of the voter, if reasonable in the light of all circumstances, pursuant to the requirements of Rule 804(a)(4).

(8) Statements by a child concerning sexual activity. Rule 804(b)(8), like N.J. Evid. R. 63(33), derives from principles announced in State v. D.R., 109 N.J. 348, 351-377 (1988), but there are significant differences between the two rules. There is no federal analogue. N.J. Evid. R. 63(33) was adopted on June 13, 1989, pursuant to authority of Joint Resolution No. 4, 1989. See N.J.S.A. 2A:84A-38.

The main differences between this rule and N.J. Evid. R. 63(33) are discussed below. Unlike N.J. Evid. R. 63(33), Rule 804(b)(8) does not admit hearsay statements of declarants who can give full and cogent testimony at trial concerning the substance of the extra-judicial statement; but if the child is physically available, although unavailable as a witness as defined by Rule 804(a), the child must be produced for questioning upon request of the party against whom the child's statement has been admitted. In addition, this rule applies to civil and other actions and is not limited to criminal proceedings against a defendant charged with a sexual offense against the child. This rule applies to statements of children of tender age only, not all children under 12 years of age; and this rule expressly permits a party against whom the extra-judicial statements are admitted to introduce other relevant statements of the child.

Availability of the Child. N.J. Evid. R. 63(33) does not exclude the child's hearsay statement if the child is able to competently testify as a witness at trial. This rule rejects that position. Most out-of-court statements admitted as hearsay exceptions are admitted despite the availability of the declarant because various circumstances are deemed to give the hearsay as much reliability as, or, in the case of business records, possibly more reliability than, the frail memory of a witness permits. As noted below, however, statements of sexual abuse by a child of tender years may be reliable or may be the product of suggestion or even fantasy. For this reason, and also because of the dictates of the Confrontation Clause discussed in the introductory comment on Rule 804(b), such statements ordinarily should not be admitted as substantive evidence in place of or in addition to the child's testimony if the child is available and able to testify fully and cogently about the subject matter contained in the proffered statements.

Rule 804(b)(8), in conjunction with the unavailability definition in Rule 804(a)(5), applies an "unavailability" condition that is more broadly defined than is customary. This requirement is consistent with the spirit and principles of D.R. that the hearsay statement should be admitted whenever the child is not able to give full and cogent testimony respecting the subject matter of the statement, not only because of unavailability in the usual sense or because of lack of testimonial capacity, but also because of fear, trauma, lack of memory, or other cause. If the child does testify and has recall and articulation ability, the hearsay is not admissible under

this rule, although it may come in under some other exception such as Rule 803(a)(2) (prior consistent statements) or 803(c)(3) (statements of sensation or physical condition) or otherwise. To some extent, a child's statement complaining of sexual abuse may also be admissible under the fresh complaint doctrine. See, e.g., State v. Tirone, 124 N.J. Super. 530 (App. Div. 1973), rev'd on other grounds, 64 N.J. 222 (1974); State v. Ramos, 203 N.J. Super. 197, 202-203 (Law Div. 1985).

This rule attempts to meet these special considerations by conditioning the substantive use of the child's statements on unavailability, testimonial incapacity, or other testimonial inability.

Age of child. Rule 804(b)(8) applies to children "of tender years." The intent was to use a phrase that focuses on young children but to give a court discretion to apply the rule for older children when the circumstances make its application appropriate. The phrase "of tender years" is one frequently used in the common law. Its most common use was in connection with the custom of giving custody of a child "of tender years" to its mother. See, e.g., Esposito v. Esposito, 41 N.J. 143, 145 (1963); Grove v. Grove, 21 N.J. Super. 447, 454 (App. Div. 1952). However, the phrase is used in other contexts, such as in regard to children who may be competent to testify but of whom inquiry must be made before being sworn. See, e.g., Hare v. Pennell, 37 N.J. 558, 565 (App. Div. 1955); State v. Walton, 72 N.J. Super. 527, 534 (Cty. Ct. 1962). In this latter context especially, the phrase seems appropriate for this rule as it refers to those children who cannot be held to an adult standard of testimony. Although many of the cases use "children of tender years" in referring to very young children, Seitz v. Seitz, 1 N.J. Super. 234, 237, 240 (App. Div. 1949) (6-year-old), there is a substantial range in the phrase. See Wojnarowicz v. Wojnarowicz, 48 N.J. Super. 349, 352-353 (Ch. Div. 1958) (3-, 5-, and 7-year-olds); State v. Walton, supra, 72 N.J. Super. at 530, 534 (10-year-old); Mayer v. Mayer, 150 N.J. Super. 556 (Ch. Div. 1977) (11- and 13-year-olds treated as borderline: "not of such tender years"). The flexibility of the phrase is more appropriate for use in this rule than a prestipulated age. The focus of the rule on the child's lack of knowledge and experience should assure that statements made by younger children are more frequently admitted than statements of older children.

Proceedings in which Rule 804(b)(8) applies. N.J. Evid. R. 63(33) is limited to statements relating to "a sexual offense under the Code of Criminal Justice ... in a criminal proceeding brought against a defendant for the commission of such offense...." The rule does not apply to civil cases, although some civil cases involve proof of sexual activity with a child. Rule 804(b)(8) is not limited to criminal cases. N.J.S.A. 9:6-8.46 allows the use of out-of-court statements alleging child abuse, but it applies only in certain child-protection proceedings. Taken literally, N.J. Evid. R. 63(33) would not apply in juvenile delinquency proceedings or in prosecutions related to, but not for, sexual offenses (e.g., prosecutions for burglary with intent to commit sexual assault, under N.J.S.A. 2C:18-2, or murder while attempting to commit sexual assault,

under N.J.S.A. 2C:11-3a(3)). This limitation seems artificial. If evidence of this nature is trustworthy, there seems no reason not to admit it in all criminal cases when it is material to the crime charged. See State v. D.R., *supra*, 109 N.J. at 359-360. While this evidence may be the result of fabrication or suggestion in custody disputes, the same can be said for criminal cases as well. Thus, the hearsay exception in Rule 804(b)(8) applies to civil and juvenile delinquency proceedings as to all criminal proceedings in which the fact of sexual activity involving a child is relevant.

Criteria for admissibility. Rule 804(b)(8) is more detailed than N.J. Evid. R. (63)(33). Because the rule embodies a new exception to the hearsay rule, it is important to give considerable guidance in its application. D.R. states that this sort of statement by a child is very seldom the product of conscious lying. 109 N.J. at 360. See also Skoler, "New Hearsay Exceptions for a Child's Statement of Sexual Abuse," 18 J. Marshall L. Rev., 1, 44-45 (1984) (hereafter Skoler). That does not mean that all such statements are reliable. Note, "A Comprehensive approach to Child Hearsay Statements in Sex Abuse Cases," 83 Colum. L. Rev. 1745, 1751 (1983) (hereafter Colum. Note). The problem generally concerns statements that are the product of suggestion or fantasy, or occasionally the intentional falsehood or fabrication by persons other than the child. Colum. Note, supra, at 1751; and Note, "The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations," 98 Harv. L. Rev. 806, 820 (1985) (hereafter Harvard Note). The proposed rule focuses on those problems. The content of the statement is to be judged against other factors. Colum. Note, supra, at 1751-62. Thus, if there are facts in the statement that could not have been known by the child unless the event in question had taken place, that would tend to rule out fantasy as the source of the statement and would support its admission. Skoler, *supra*, at 44. But care must be used in deciding what might be within the child's knowledge and experience. Harvard Note, supra, at 820. The statement must also be judged against the circumstances in which it was made. The nature of the questioning that led to the statement may be important in determining whether the statement was really that of the child rather than the product of suggestion. Questioning either by the person to whom the statement was made or by previous questioners of the child may produce a statement that is not descriptive of the experience of the child, but rather what the child thinks adults wish to hear. The time of the statement is also important, inasmuch as a child's memory may fade with time, and time may allow other factors to affect the statement. For these reasons, special care should be taken in applying this rule.

Other statements. Rule 804(b)(8) allows the party against whom a hearsay statement is admitted under this rule to use any other statements of the child in his or her defense. This provision is not contained in N.J. Evid. R. 63(33), although other statements may come in under that rule. This provision is consistent with the holding in D.R. that a person against whom

this kind of statement is used should be given the full opportunity to rebut it. 109 N.J. at 369-371. Other statements of the child should be admissible when proffered by the adverse party even though they do not meet all the standards of the rule for the same reason that the child's testimony may be introduced even though the child does not meet the ordinary criteria for witness competency.

RULE 805

HEARSAY WITHIN HEARSAY

A statement within the scope of an exception to Rule 802 shall not be inadmissible on the ground that it includes a statement made by another declarant which is offered to prove the truth of its contents if the included statement itself meets the requirements of an exception to Rule 802.

COMMENT

Rule 805 follows N.J. Evid. R. 66 almost verbatim. Fed. R. Evid. 805 expresses the same principle in different language, providing that included hearsay is not excluded from an admissible hearsay statement if both hearsay statements conform with an exception to the hearsay rule.

RULE 806

ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or other conduct by a declarant, inconsistent with the declarant's hearsay statement received in evidence, is admissible although declarant had no opportunity to deny or explain it. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, that party is entitled to examine the declarant on the statement as if under cross-examination.

COMMENT

Rule 806 generally follows Fed. R. Evid. 806. Its first two sentences replace N.J. Evid. R. 65 without substantial change. The last sentence of this rule, which is taken from the federal rule, has no direct New Jersey analogue but was included here because it is consistent with current New Jersey practice.

RULE 807

DISCRETION OF JUDGE TO EXCLUDE EVIDENCE UNDER CERTAIN EXCEPTIONS

Except if offered by an accused in a criminal proceeding, when any statement is admissible by reason of Rules 803(c)(8), 803(c)(9), 803(c)(10), 803(c)(11), 803(c)(12), 803(c)(13), 803(c)(14), 803(c)(15), 803(c)(26) or 804(b), the judge may exclude it at the trial if it appears that the proponent's intention to offer the statement in evidence was not made known to the adverse party at such time as to provide that party with a fair opportunity to meet it.

COMMENT

Rule 807 follows N.J. Evid. R. 64 almost verbatim, with appropriate changes in the cross-references. There is no direct

federal
residual
neither
intended
applicab
3:13-3;
and 4:23

Exp
statemen
produced
circumst
motive,
was cont
matter,
establis

Rul
statemen
other fo
expert o
counterp
N.J. Evi
record o
and circ
admissio
v. Matul
admissib
identify
and circ
complexi
analysis
the exis
responsi

The
proposed
The 1963
"relativ
test, an
"relativ
records
followed
1975), c
in hospi
(Cleary
ordinary
and not
interpre

federal analogue. Although notice provisions are included in the residual exception rules, Fed. R. Evid. 803(24) and 804(b)(5), neither of these rules has been adopted. Rule 807 is not intended to affect the notice requirements in the Rules of Court applicable to civil or criminal cases. See, e.g., R. 3:11-1; 3:13-3; 4:10 to 4:25, particularly 4:17-7, 4:23-2(b)(2), 4:23-4 and 4:23-5(b).

RULE 808

**EXPERT OPINION INCLUDED IN A
HEARSAY STATEMENT ADMISSIBLE UNDER AN EXCEPTION**

Expert opinion which is included in an admissible hearsay statement shall be excluded if the declarant has not been produced as a witness unless the trial judge finds that the circumstances involved in rendering the opinion, including the motive, duty, and interest of the declarant, whether litigation was contemplated by the declarant, the complexity of the subject matter, and the likelihood of accuracy of the opinion, tend to establish its trustworthiness.

RULE 808

COMMENT

Rule 808 deals with the admissibility of extra-judicial statements of expert opinion included in business records or other forms of admissible hearsay when the declarant of the expert opinion is not produced as a witness. There is no express counterpart in the federal or present New Jersey rules. However, N.J. Evid. R. 63(13) conditions the admission of a business record on proof that the "sources of information" and "the method and circumstances of its preparation were such to justify its admission." Relying on this language the Supreme Court in State v. Matulewicz, 101 N.J. 27, 30 (1985), held that the admissibility of a State Police chemist's laboratory report identifying a substance as marijuana would depend on the "method and circumstances" involved in preparing the report, such as the complexity or routine nature of the procedures used in making the analysis, the degree of objectivity and subjectivity involved, the existence of motive for untrustworthiness, and the responsibility of the declarant to be accurate and reliable.

The Matulewicz holding is consistent with the comment on proposed rule 63(13) contained in The 1963 Report at 185-186. The 1963 Report contemplated that opinions derived from a "relatively well-established" test, such as a "blood-grouping test, an alcoholism test, or the taking of an x-ray," and other "relatively simple" diagnostic tests contained in hospital records would be admitted in evidence. This approach has been followed. State v. Martorelli, 136 N.J. Super. 449 (App. Div. 1975), certif. denied, 69 N.J. 445 (1976) (blood alcohol report in hospital record). See also McCormick on Evidence §313 at 732 (Cleary 2d ed. 1972), §313 at 732: "The admissibility of ordinary diagnostic findings customarily based on objective data and not usually presenting more than average difficulty of interpretation is usually conceded," but "diagnostic opinions

which on their face are speculative are reasonably excluded." However, "under the Uniform Act, it would not be unreasonable ... to permit introduction of the record only if the declarant were produced for cross-examination," in those "borderline cases" of records with opinions "involving difficulty of interpretation," although "most courts favor admissibility." Ibid. See also State in Interest of J.H., 244 N.J. Super. 207 (App. Div. 1990), holding that, to satisfy the confrontation clause requirement of particularized trustworthiness, a laboratory drug analysis certificate offered in evidence pursuant to N.J.S.A. 2C:35-19 must satisfy the Matulewicz criteria.

In dealing with the admissibility of diagnoses found in hospital records before adoption of Fed. R. Evid. 803(6), federal courts tended to admit entries relating to physical conditions and diagnoses as to which competent physicians would not differ and to exclude opinions based on conjecture or on an evaluation of subjective factors, such as psychiatric diagnoses. 4 J. Weinstein & M. Berger, Weinstein's Evidence, ¶803(6)[06], 803-199 to 200 (1990). Federal Rule 803(6) makes opinions and diagnoses contained in business records admissible without distinction but subject to exclusion by the trial judge where indicia of trustworthiness are lacking. Id. at 803-200 to 201. If the expert can be produced, the trial judge may require him to testify "to ensure trustworthiness through cross-examination," particularly when the issue is crucial and competent experts could disagree. Ibid.

The formulation of Rule 808 is intended to include in general terms all of the specific criteria discussed in Matulewicz.

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

RULE 901

REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter is what its proponent claims.

COMMENT

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

provided by law, commercial paper and signatures thereon as provided by applicable law, and documents, signatures and the like as declared by state or federal law.

RULE 902

SELF-AUTHENTICATION

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(a) New Jersey public documents. A document purporting to bear a signature affixed in an official capacity by an officer or employee of the State of New Jersey or of a political subdivision, department, office, or agency thereof.

(b) Other domestic public documents. A document (1) bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or possession thereof, or of a political subdivision, department, office, or agency thereof, and a signature purporting to be an attestation or execution, or (2) purporting to bear a signature affixed in an official capacity by an officer or employee of such an entity, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer had the official capacity and that the signature is genuine.

(c) Foreign public documents. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, provided that either an apostille is affixed to the document certifying its genuineness pursuant to international agreement to which the United States is a party or the document is accompanied by a final certification as to the genuineness of the signature and official position (1) of the executing or attesting person, or (2) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(d) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (a), (b), or (c) of this rule or complying with

any law or rule of court.

(e) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.

(f) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.

(g) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(h) Acknowledged documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(i) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by applicable commercial law.

(j) Presumption under statute. Any signature, document, or other matter declared by state or federal law to be presumptively or prima facie genuine or authentic.

(k) Certificate of lack of record. A writing asserting the absence of an official record authenticated in the manner prescribed for public documents in paragraph (a), (b), or (c) of this rule.

COMMENT

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

Rule 902(c) follows Fed. R. Evid. 902(3) and replaces N.J. Evid. R. 68(3). The only change from the federal rule is for the purpose of conforming this rule with the Hague Convention on Authentication of Foreign Documents. That convention allows authentication by apostille as an alternative to final certification by a consular official.

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

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

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

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

There a
section
for aut
Comment
Ru
federal
with Fe
N.
genuine
by the
authent
always

auther
juris

repla

F
applic
(
define
(
X-ray
repro
(
itsel
execut
of a p
data
print
data
(
the s
by me
or by
repro
repro

New
by Ru
in ti
reco

in R
incl

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

Rule 902(k) follows N.J. Evid. R. 69. There is no specific federal analogue although the content of this rule is consistent with Fed. R. Evid. 902(4). See Rule 803(e)(10).

N.J. Evid. R. 68(4), providing prima facie indicia of genuineness, was not adopted since its substance is comprehended by the concept of self-authentication under this rule. Despite authentication under this rule, the genuineness of a document may always be challenged.

RULE 903

TESTIMONY OF SUBSCRIBING WITNESS UNNECESSARY

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the law of the jurisdiction whose law governs the validity of the writing.

COMMENT

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

ARTICLE X. CONTENTS OF WRITINGS AND PHOTOGRAPHS

RULE 1001

DEFINITIONS

For purposes of this article the following definitions are applicable:

(a) Writings. "Writings," which include recordings, are defined in Rule 801(e).

(b) Photographs. "Photographs" include still photographs, X-ray films, video tapes, motion pictures and similar forms of reproduced likenesses.

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

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

COMMENT

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

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

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

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

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

RULE 1002

REQUIREMENT OF ORIGINAL

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

COMMENT

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

RULE 1003

ADMISSIBILITY OF DUPLICATES

A duplicate as defined by Rule 1001(d) is admissible to the same extent as an original unless (a) a genuine question is raised as to the authenticity of the original, or (b) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

COMMENT

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

RULE 1004

ADMISSIBILITY OF OTHER EVIDENCE OF CONTENTS

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

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

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

(c) Original in possession of opponent. At a time when an original was under the control of the party against whom offered,

that party was put on notice by the pleadings or otherwise that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

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

COMMENT

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

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

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

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

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

RULE 1005

PUBLIC RECORDS

The contents of an official record or of a writing authorized to be recorded or filed and actually recorded or filed, if otherwise admissible, may be proved by a copy, certified as correct in accordance with Rule 902, or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, other evidence of the contents may be admitted.

COMMENT

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

RULE 1006

SUMMARIES

The contents of voluminous writings or photographs which cannot conveniently be examined in court may be presented by a qualified witness in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The judge may order that they be produced in court.

COMMENT

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

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

RULE 1007

TESTIMONY OR WRITTEN ADMISSION OF PARTY

The contents of writings or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.

COMMENT

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

RULE 1008

FUNCTIONS OF JUDGE AND JURY

Ordinarily the judge shall determine the sufficiency of proof of a condition for the admission of evidence of the contents of a writing or photograph other than the original in accordance with Rule 104. However, when a party raises an issue as to (a) whether the asserted writing or photograph ever existed, or (b) whether another writing or photograph produced at the trial is the original, or (c) whether the evidence correctly reflects the content of the original writing or photograph, the issue shall be determined by the trier of fact as in the case of other issues of fact.

COMMENT

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

ARTICLE XI. MISCELLANEOUS RULES

RULE 1101

APPLICABILITY OF RULES

[NOT ADOPTED]

COMMENT

Fed. R. Evid. 1101 was not adopted since the provisions relating to the applicability of these rules of evidence, including privileges, are covered by Rule 101.

F
amendi
Amendm
See, e

Present

- 1(1)
- 1(2)
- 1(3)
- 1(4)
- 1(5)
- 1(6)
- 1(7)
- 1(8)
- 1(9)
- 1(10)
- 1(11)
- 1(12)
- 1(13)
- 1(14)
- 2(1)
- 2(2)
- 2(3)
- 2(4)
- 2(4)
- 3

RULE 1102
AMENDMENT OF RULES
[NOT ADOPTED]

COMMENT

Fed. R. Evid. 1102, which deals with the procedure for amending the Federal Rules of Evidence, was not adopted. Amendment of the rules of evidence is governed by New Jersey law. See, e.g., N.J.S.A. 2A:84A-33 et. seq.

RULE 1103
TITLE

The title of these rules is the New Jersey Rules of Evidence and they may be cited as N.J.R.E.

COMMENT

Rule 1103 is based on Fed. R. Evid. 1103 with the addition of an approved citation form. There is no 1967 New Jersey rule analogue.

TABLE OF DISPOSITIONS

<u>Present N.J. Rule</u>	<u>Proposed N.J. Rule</u>
1(1)	Deleted. See Comment on Rule 101(b).
1(2)	401
1(3)	Deleted. See Comment on Rule 101(b).
1(4)	101(b)(1)
1(5)	101(b)(2)
1(6)	Deleted. See Comment on Rule 101(b).
1(7)	Deleted. See Comment on Rule 101(b).
1(8)	Deleted. See Comment on Rule 101(b).
1(9)	Deleted. See Comment on Rule 101(b).
1(10)	Deleted. See Comment on Rule 101(b).
1(11)	Deleted. See Comment on Rule 101(b).
1(12)	Deleted. See Comment on Rule 101(b).
1(13)	1001
1(14)	1001
2(1)	101(a)(1)
2(2)	101(a)(2) (first sentence) and 101(a)(2)(A)
2(3)	101(a)(3)
2(4) (first sentence)	101(c)
2(4) (second sentence)	no analogue
3	101(a)(4)

Table of Dispositions (cont.)

<u>Present N.J. Rule</u>	<u>Proposed N.J. Rule</u>
4	403
5	102
6	105
7(a)	601
7(b)	Deleted. See Comment on Rule 402.
7(c)	601
7(d)	Deleted. See Comment on Rule 402.
7(e)	Deleted. See Comment on Rule 402.
7(f)	402
8(1) (first sentence)	104(a)
8(1) (second sentence)	101(a)(2)(E), 104(a)
8(1) (third sentence)	104(a)
8(1) (fourth sentence)	104(e)
8(2)	104(b)
8(3)	104(c)
9(1)	201(a)(b)
9(2)	201(a)(b)
9(3)	201(c)(d)(e)
10(1)	201(e)
10(2)	201(f)
10(3)	Deleted. See Comment on Rule 201.
10(4)	Deleted. See Comment on Rule 201.

Table of Dispositions (cont.)

<u>Present N.J. Rule</u>	<u>Proposed N.J. Rule</u>
11	201(g)
12(1)	202
12(2)	202
12(3)	202
13	301
14	301
15	303
16 (not adopted)	
17 (first sentence) (a)	601(a)
17 (first sentence) (b)	601(b)
17 (second sentence)	604
18	603
19	602
20	607, 803(a)(2)
21 (not adopted)	609
22(a)	613(a)
22(b)	613(b)
22(c)	608
22(d)	608
23	501
24	502
25	503
26	504
26A-1	505

Table of Dispositions (cont.)

<u>Present N.J. Rule</u>	<u>Proposed N.J. Rule</u>
26A-2	506
26A-3	507
26A-4 (repealed <u>L.</u> 1987, <u>C.</u> 169, §6)	
26A-5	517
27	508
28	509
28A-1	510
29	511
30	512, 610
31	513
32	514
33 (not enacted) (secret of state)	
34	515
35 (not enacted) (communication to grand jury)	
36	516
37	530
38	531
39	532
40	533
40A-1	See 412
41	Deleted. See Comment on Rule 606
42	605
43	606

Table of Dispositions (cont.)

<u>Present N.J. Rule</u>	<u>Proposed N.J. Rule</u>
44 (
45 (
46	
47	
48	
49	
50	
51	
52 (
52 (
53	
54	
55	
56 (
56 (
56 (
57	
58	
59	
60	
61	
62 (
62 (

Table of Dispositions (cont.)

<u>Present N.J. Rule</u>	<u>Proposed N.J. Rule</u>
44 (not adopted)	
45 (not adopted)	
46	405(a)
47	404(a)(1), 405
48	404(a)
49	406(a)
50	406(b)
51	407
52(1)	408
52(2)	410
53	408
54	411
55	404(b)
56(1)	701
56(2) (first sentence)	702
56(2) (second & third sentences)	703
56(3)	704
57	705
58	705
59 (not adopted)	
60 (not adopted)	
61 (not adopted)	
62(1)	801(a)
62(2)	801(b)

Table of Dispositions (cont.)

<u>Present N.J. Rule</u>	<u>Proposed N.J. Rule</u>
62(3)	801(f)
62(4)	Deleted as self-evident. See Comment on Rule 801.
62(5)	801(d)
62(6)	804(a)
63	801(c), 802
63(1)(a)	803(a)
63(1)(b)	803(c)(5)
63(1)(c)	803(c)
63(2) (not adopted)	
63(3)	804(b)(1)
63(4)(a)	803(c)(1)
63(4)(b)	803(c)(2)
63(5)	804(b)(2)
63(6) (not adopted)	
63(7)	803(b)(1)
63(8)	803(b)(2) & (3)
63(9)(a)	803(b)(4)
63(9)(b)	803(b)(5)
63(10)	803(c)(25)
63(11)	804(b)(7)
63(12)(a)	803(c)(3)
63(12)(b)	803(c)(4)
63(12)(c)	803(c)(4)
63(13)	803(c)(6)

Table of Dispositions (cont.)

<u>Present N.J. Rule</u>	<u>Proposed N.J. Rule</u>
63(14)	803(c)(7)
63(15)	803(c)(8)
63(16)	803(c)(9)
63(17)	803(c)(10)
63(18)	803(c)(12)
63(19)	803(c)(14)
63(20)	803(c)(22)
63(21)	803(c)(26)
63(22) (not adopted)	
63(23)	804(b)(4)
63(24)	804(b)(4)
63(25)	804(b)(4)
63(26)	804(b)(4)
63(27)(a)	803(c)(20)
63(27)(b)	803(c)(20)
63(27)(c)	803(c)(19)
63(28)	803(c)(21)
63(29)	803(c)(15)
63(30)	803(c)(17)
63(31) (not adopted)	See Rule 803(c)(18)
63(32)	804(b)(6)
63(33)	804(b)(8)
64	807
65	806

Table of Dispositions (cont.)

<u>Present N.J. Rule</u>	<u>Proposed N.J. Rule</u>
66	805
67	901
68(1)	902(a)(b)(e)
68(2)	902(b)
68(3)	902(c)
68(4)	Deleted. See Comment on Rule 902.
69	902(k)
70(1) (Introductory Clause)	1002
70(1)(a)	1004(a)
70(1)(b)	1004(b)
70(1)(c)	1004(c)
70(1)(d)	1004(d)
70(1)(e)	1005
70(1)(f)	1002
70(1)(g)	1006
70(1)(h)	1007
70(2)	Deleted. See Comment on Rule 1004.
70(3)	1008
71	903
72 (not adopted)	

EASY RESEARCH using
New Jersey Law Journal

Three ways to assure easy and complete access to the articles and case digests in past issues of the New Jersey Law Journal:



1. BOUND VOLUMES

Bound Volume 128 (May-Aug. 1991) complete with four-month index will be ready for shipment in late October . . . **\$115.00 each.**
Prior volumes also available



2. BINDERS

Store your copies of the New Jersey Law Journal in our handsome hard cover binders. Easy insertion. Stands upright on shelf. Holds approximately four months . . . **\$62.50 each.**



3. MICROFILM AND MICROFICHE

Volume 128 (May-Aug. 1991), complete with four-month index, will be ready for shipment in late October . . . **\$95.00 each.**

To order a bound volume, binder, microfilm or microfiche, simply mail your check or purchase order to Valerie Lacey at the address below, or for information call her at (201) 642-0075.

ORDER FORM

NAME _____
 FIRM _____
 ADDRESS _____
 PHONE _____

Check enclosed Charge to: MasterCard Visa American Express
 Card# _____ Exp. Date _____ Signature _____

Bound Volumes	QUANTITY	PRICE/EACH
Volume 128	_____	\$115.00
Past Volume # _____	_____	-
Binders	_____	\$62.50
Microfilm Volume 128	_____	\$95.00
Microfiche Volume 128	_____	\$95.00
		TOTAL \$ _____

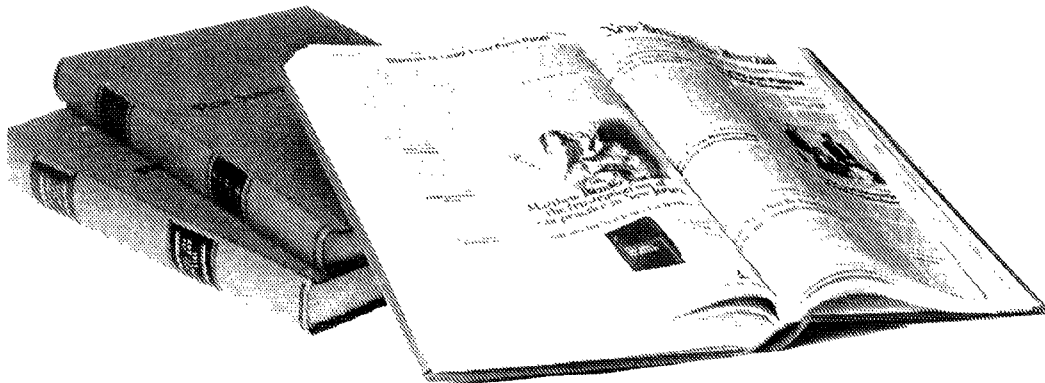
All orders must be prepaid. Prices include shipping and sales tax (where applicable). Please mail coupon with payment to:

Valerie Lacey
New Jersey Law Journal
P.O. Box 20081
Newark, NJ 07101-6081

If you are not completely satisfied, simply return the item to us for a full refund.

New Jersey Law Journal

BOUND VOLUME



- * Permanent storage.
- * Quick & easy reference.
- * A must to complete your law library.
- * 6 months of issues plus an index.

\$115⁰⁰

Our newest volume (#128) covering May through August 1991 will be ready for shipment soon.

To order this new bound volume, simply mail your check, or purchase order for \$115.00 (price includes shipping).

Please mail your check to:

New Jersey Law Journal

Attn: Valerie Lacey
P.O. Box 20081
Newark, NJ 07101-6081

If you are not completely satisfied with your bound volume, simply return it to us for a full refund.