REPORT

OF THE

COMMISSION TO STUDY THE IMPROVEMENT OF THE LAW OF EVIDENCE

(J.R. 15, 1955)

INCLUDING

UNIFORM RULES OF EVIDENCE

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TABLE OF CONTENTS

PAGE

Report of the Commission 1

APPENDIX OF UNIFORM RULES

Chapter

I. General Provisions (Rules 1 to 8) 13
II. Judicial Notice (Rules 9 to 12) 19
III. Presumptions (Rules 13 to 16) 22
IV. Witnesses (Rules 17 to 22) 24
V. Privileges (Rules 23 to 40) 28
VI. Extrinsic policies affecting admissibility (Rules 41 to 55) 43
VII. Expert and other opinion Testimony (Rules 56 to 61) 49
VIII. Hearsay Evidence (Rules 62 to 66) 53
IX. Authentication and Content of Writings (Rules 67 to 72) 69
Index 73

Chapter I. GENERAL PROVISIONS

Rule 1. Definitions (Evidence, relevant evidence, proof, burden of proof, burden of producing evidence, conduct, the hearing, finding of fact, guardian, incompetent, judge, trier of fact, verbal, writing, perceive) 13
Rule 2. Scope of rules 14
Rule 3. Exclusionary Rules Not to Apply to Undisputed Matter 15
Rule 4. Effect of Erroneous Admission or Exclusion of Evidence (i.e., as basis for reversal of judgment) 16
Rule 5. [Effect of Erroneous Exclusion of Evidence] 16
Rule 6. Limited Admissibility (i.e., limitation as to party or purpose, and instructions to jury) 17
Rule 7. General Abolition of Disqualifications and Privileges of Witnesses, and of Exclusionary Rules (i.e., relevant evidence is prima facie admissible, subject only to the exclusionary grounds specified in later rules) 17

JUL 2021
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PAGE

Rule 8. Preliminary Inquiry by Judge (i.e., to determine admissibility, qualification or privilege). Review .. 17

Chapter II. JUDICIAL NOTICE

Rule 9. Facts which must or may be judicially noticed 19

Rule 10. Determination as to propriety of judicial notice and tenor of matter noticed 20

Rule 11. Instructing the trier of fact as to matter judicially noticed. Record 21

Rule 12. Judicial notice in proceedings subsequent to trial 21

Chapter III. PRESUMPTIONS

Rule 13. Definition of Presumption 22

Rule 14. Effect of presumptions (i.e., whether a presumption "survives" contrary proof) 22

Rule 15. Inconsistent Presumptions 23

Rule 16. Burden of proof not relaxed as to some presumptions 23

Chapter IV. WITNESSES

Rule 17. Disqualification of witnesses, Interpreters. (i.e., ability of expression and understanding duty to tell the truth) 24

Rule 18. Oath 24

Rule 19. Prerequisites of knowledge and experience 24

Rule 20. Evidence generally affecting credibility 25

Rule 21. Limitations on evidence as affecting credibility 25

Rule 22. Further limitations on admissibility of evidence affecting credibility 27

Chapter V. PRIVILEGES

Rule 23. Privilege of accused (i.e., not to testify and to prevent others from testifying) 28

Rule 24. Definition of incrimination 29

Rule 25. Self-incrimination 30

PAGE

Rule 26. Lawyer-Client Privilege 31
(1) General Rule 31
(2) Exceptions 32
(3) Definitions (Client, Lawyer) 32

Rule 27. [Physician-Patient Privilege] 33
Newspaperman's Privilege 35

Rule 28. Marital Privilege—Confidential Communications .. 36

Rule 29. Priest-Penitent privilege 37

Rule 30. Religious belief (i.e., privilege not to disclose) 38

Rule 31. Political vote (i.e., privilege not to disclose) 38

Rule 32. Trade secret (i.e., privilege not to disclose) 39

Rule 33. [Secret of state] 39

Rule 34. Official information (duty not to disclose) 39

Rule 35. [Communication to Grand Jury] 40

Rule 36. Identity of Informer (privilege not to disclose) 40

Rule 37. Waiver of privilege by contract or previous disclosure. Limitations 41

Rule 38. Admissibility of disclosure wrongfully compelled 41

Rule 39. Reference to exercise of privilege (i.e., right of court and counsel to comment, presumptions, adverse inferences, instructions to jury) 42

Rule 40. Effect of Error in overruling claim of privilege (i.e., who may raise on appeal) 42

Chapter VI. EXTRINSIC POLICIES AFFECTING ADMISSIBILITY

Rule 41. Evidence to test a verdict or indictment 43

Rule 42. Testimony by judge. Mistrial 43

Rule 43. Testimony by a juror. Mistrial 43

Rule 44. Testimony of jurors not limited except by these rules 44

Rule 45. Discretion of judge to exclude admissible evidence (i.e., evidence not expressly covered by specific exclusionary rules) 44

PAGE

Rule 46. Character and Character Trait; manner of proof 45
Rule 47. Character trait as proof of conduct 45
Rule 48. Character or character trait; limitations 46
Rule 49. Habit or custom to prove specific conduct 46
Rule 50. Opinion and specific instances of conduct to prove habit or custom 47
Rule 51. Subsequent remedial conduct 47
Rule 52. Offer to compromise and the like not evidence of liability 47
Rule 53. Offer to discount claim, not evidence of invalidity 48
Rule 54. Liability insurance 48
Rule 55. Other crimes or civil wrongs 48

Chapter VII. EXPERT AND OTHER TESTIMONY

Rule 56. Testimony in form of opinion 49
Rule 57. Preliminary examination 50
Rule 58. Hypothesis for expert opinion not necessary 50
Rule 59. Appointment of experts 50
Rule 60. [Compensation of expert witnesses.] 52
Rule 61. [Credibility of appointed expert witness.] 52

Chapter VIII. HEARSAY EVIDENCE

Rule 62. Definitions (Statement, Declarant, Public Official, State, A Business, Unavailable as a witness) 53
Rule 63. Hearsay evidence excluded—exceptions 54
(1) Recorded recollection 54
(2) Affidavits and Answers to Interrogatories 55
(3) Depositions and prior testimony 55
(4) Contemporaneous statements and statements admissible on ground of necessity generally 56
(5) Dying declarations 56
(6) Confessions 57

PAGE

(7) Admissions by parties 57
(8) Authorized and adoptive admissions 58
(9) Vicarious admissions 58
(10) Declarations against interest 59
(11) [Voter's statements.] 59
(12) Statements of physical or mental condition of declarant 59
(13) Business entries and the like 60
(14) Absence of entry in business records 60
(15) Reports and findings of public officials 60
(16) Filed reports, by persons exclusively authorized 61
(17) Content of official record 61
(18) Certificate of marriage 62
(19) Records of documents affecting an interest in property 62
(20) Judgment of previous conviction 63
(21) Judgment against persons entitled to indemnity 63
(22) Judgment determining public interest in land 63
(23) Statement concerning one's own family history 64
(24) Statement concerning family history of another 64
(25) [Statement concerning family history based on statement of another declarant.] 65
(26) Reputation in family concerning family history 65
(27) Reputation—Boundaries, general history, family history 65
(28) Reputation as to character 66
(29) Recitals in documents affecting property .. 66
(30) Commercial lists and the like 67
(31) [Learned treatises.] 67

Rule 64. Discretion of Judge under certain exceptions to Exclude Evidence 67

Rule 65. Credibility of declarant 68

Rule 66. Multiple hearsay 68

PAGE

Chapter IX. AUTHENTICATION AND CONTENT OF WRITINGS

Rule 67. Authentication required; ancient documents 69

Rule 68. Authentication of copies of records 69

Rule 69. Certificate of lack of record 70

Rule 70. Documentary originals as the best evidence 70

Rule 71. Proof of attested writings 71

Rule 72. [Photographic copies to prove contents of business and public records.] 72

REPORT OF THE COMMISSION TO STUDY THE IMPROVEMENT OF THE LAW OF EVIDENCE (J.R. 15, 1955)

To the Senate and General Assembly of the State of New Jersey:

The undersigned Commissioners now serving under a joint resolution of the Legislature entitled "A Joint Resolution establishing a commission to study the improvement of the Law of Evidence in this state," approved October 7, 1955, respectfully report:

I.

The Commission held its organization meeting on January 6, 1956 and chose a chairman from among its own members; it appointed Vincent P. Biunno, Esq., as secretary and counsel, and William D. Hardin, Esq., as associate counsel. Since then the Commission has held numerous meetings at which each rule of evidence mentioned below was fully considered and debated. We gladly record the great assistance received from our two counsel. In preparation for our consideration of the rules, they made careful studies and drafts which were distributed among the members of the Commission. In such preparatory work in the intervals between meetings of the Commission, our chairman generally participated.

II.

We took as a basis of our study the report dated May 25, 1955, made by a committee which had been appointed by the Supreme Court to consider a revision of the principles of evidence, and of which committee Justice Nathan L. Jacobs was chairman. That committee is sometimes herein referred to as the Court Committee.

In 1942 the American Law Institute had approved a Model Code of Evidence, which was the result of a prolonged study

by and under the leadership of Edmund M. Morgan as Reporter, John M. Maguire as Assistant Reporter and John H. Wigmore as Chief Consultant, aided by a distinguished Committee on Evidence and an impressive group of consultants. That Code was not adopted in any of the States. It was, however, the foundation of Uniform Rules of Evidence drafted by a committee appointed by the National Conference of Commissioners on Uniform Laws. Judge Spencer A. Gard of Kansas was chairman of that committee. The draft of Uniform Rules was approved by the Conference in 1953, as well as by the American Bar Association, and in the following year by the American Law Institute. The Uniform Rules, like the Model Code, have not been adopted anywhere; and we have not heard that their adoption is under consideration in any jurisdiction except Puerto Rico.

The Report of the Court Committee approved the Uniform Rules with changes in only 17 of the 104 rules and sub-rules. The proposed changes, except for perhaps one or two, went to matters of substance rather than form.

In our study of the New Jersey law of evidence, we quickly came to the conclusion that the administration of justice would be promoted by a codification of the law of evidence, at least in part. Although such a codification, no matter how carefully prepared, would immediately confront lawyers and the courts with some questions of interpretation, still the code should, in general, materially clarify the law and provide a quick way to find the applicable rule as to most problems of proof. The adoption of the code will also afford a suitable opportunity for making a number of needed changes in our New Jersey law of evidence.

As stated above, the basis of our detailed study was the report of the Court Committee. Each rule contained in that report was assumed prima facie to be sound in principle and to be expressed in apt phraseology. We do not recommend change in any of the rules except for what seem to us substantial reasons. The bases for this attitude of deference are obvious, but we may mention especially two of them: The Model Code of Evidence which is the foundation of the Uniform Rules was the work of the principal American authorities on the law of evidence; the Model Code itself, and the accompanying notes, are proof of the care, skill and wisdom of which the Code is the product. To that we add our admiration for the members of the Court

Committee, our confidence in them and especially their chairman, Mr. Justice Nathan L. Jacobs.

But we are aware that our duty to the Legislature and to the people you represent requires us to submit to you only what our own best judgment approves. We are impelled by what we consider substantial reasons to recommend change in a number of the rules and sub-rules. The majority are changes in form intended to secure more clarity and—in some cases—more of brevity. Of the changes in substance, some are intended to retain or even increase the discretionary power of the trial judge. A danger of codification is rigidity and a narrowing of the field of discretion, and we have sought to reduce or eliminate that risk. Other departures from the Court Committee report are in the field of privilege, where generally we follow the historic policy of New Jersey. Changes are also recommended in other areas. It is intended that the text of the rules now submitted be read according to the meaning apparent from the text itself, without drawing any conclusions from the fact that the language may differ from earlier proposals.

Annexed to this report is an appendix containing the code of evidence that we recommend for adoption. We have given to each rule the same number as the corresponding rule contained in the report of the Court Committee, which is also the number of the Uniform Rule, but this does not always hold for the numbered or lettered subparagraphs. When a change in form or substance is recommended by us, matter which is contained in the Court proposal or in the Uniform Rules, but is omitted from our recommendation, is enclosed in brackets; matter added by us is underlined. And there is added a brief statement about each of the proposed rules.

III.

A preliminary question to be considered is whether legislative power over the law of evidence is vested by the Constitution of New Jersey in the Legislature, or whether it is bestowed upon the Supreme Court. For the reasons now to be stated we hold the opinion that this power is vested in the Legislature.

Article IV, Section I, Paragraph I, reads:

> "The legislative power shall be vested in a Senate and General Assembly."

This language is identical to the language of Article IV, Section I, Paragraph I of the Constitution of 1844 and it is fairly to be presumed that the incorporation of the same language in the current Constitution constituted acquiescence in and adoption of the long-standing interpretation of the prior provision. *McCutcheon* v. *State Building Authority*, 13 N.J. 46, 97 A 2d 663 (1953). Unless there is an express restriction on the grant of legislative power, or an exclusive grant of a portion thereof to another branch of the government, the continued right of the Senate and General Assembly to exercise their historic legislative power over the law of evidence cannot be denied.

A number of exceptions to the legislative power which belongs to the Legislature, and limitations thereon, are contained in Section VII of Article IV; but the subject of evidence is not expressly excepted from the power of the Legislature.

The subject of evidence is certainly within the power of the Legislature unless it clearly appears to be within an exclusive grant to the Supreme Court. In Article VI, sec. II, par. 3 of the Constitution, we find:

> "The Supreme Court shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts".

And in Article XI, sec. IV, par. 5:

> "The Supreme Court shall make rules governing the administration and practice and procedure in the County Courts; * * *"

The Supreme Court in *Winberry* v. *Salisbury*, 5 N.J. 240, 74 A 2d 406 (1950) said that its authority to make rules governing practice and procedure is not subject to the overriding power of the Legislature.

The thesis has latterly been advanced that the enactment of rules of evidence such as are contained in the appendix is within the grant to the Supreme Court of power to make rules of practice and procedure and is impliedly excepted from the general power of the Legislature. In determining whether the proposition is sound, abstract or general definitions of "substantive law", "adjective law", "evidence", "practice" or "procedure" are of little help. Similarly cases on conflict of laws, ex post facto laws, and the Federal Conformity Acts shed little light on the present question. The problem is what the framers of our New

Jersey Constitution, and the citizens who adopted it, meant by rules governing practice and procedure.

Until our present Constitution became effective, the power to regulate practice and procedure in all the courts, resided in the legislative branch of the state government. And this power was exercised in a long series of enactments. Parallel with, but subordinate to, the power of the legislature, every court from early colonial times had inherent power, or power delegated to it by the legislature, to make rules, in harmony with the statutes, governing practice and procedure before it. This power the courts employed from early times, but never did the courts promulgate rules of evidence.

Various phrases were used to describe the class of rules the courts were authorized to make: Rules "for the more regular practicing and proceeding in the said Courts" (Cornbury's Ordinance of 1704). Rules to regulate "pleadings and practice in the court of chancery, as may in his [the Chancellor's] judgment, render the practice and proceedings therein more efficient, expeditious and simple." (P.L. 1852, p. 256). Rules to regulate "the proceedings and practice in the prerogative court and the orphans courts." (P.L. 1871, p. 104). Rules "for expediting and conducting suits and the management of business in their respective courts." (Practice Act, Rev. 1874, sec. 297). Rules "to give effect to the provisions of this act and to otherwise simplify judicial procedure." (P.L. 1912, c. 231). But whatever the precise words employed the courts never construed the statute to include the power to promulgate rules of evidence. In this connection should be noted P.L. 1878, p. 37, sec. 5 which empowered the Chancellor to make rules "to provide for, expedite and regulate the taking and production of evidence." Even this delegation of power did not lead to the promulgation of rules covering the subject matter of the Rules of Evidence submitted herewith, or any part thereof. Apparently the Chancellor considered that his authority over evidence extended only to such matters as the notice to be given on taking depositions, etc. (See Ch. Rules, Rev. of 1904, Rules 77 to 98, in Corbins N.J. Court Rules).

The early rule making power of the courts was, however, insufficient to establish an efficient procedure; but its inadequacy was not due to the fact that it did not include the subject of evidence. Rule making was ineffective (1) because a central

rule making agency, other than the legislature, had not been invented; each court made rules for itself alone, and (2) because the device of allowing rules to supersede statutory regulations had not been developed. The first short step toward a central rule making authority was taken when our Circuit Courts were first established. Since they were held by the several justices of the Supreme Court it was natural to give the Supreme Court power to make rules for the Circuit Courts, and this was done. (Practice Act, Rev. of 1847, sec. 8). The example was followed in 1871, when the Ordinary was directed to make rules for the Orphans Courts. Then in 1912, the Supreme Court was empowered to regulate procedure in the Common Pleas Courts. The culmination of this trend, in New Jersey, is the provision of the 1947 Constitution conferring on the Supreme Court power, subject to law, to make rules for all the courts.

The second handicap to the improvement of procedure by rules was overcome by the British Parliament in the very influential Supreme Court of Judicature Acts, 1874, 1875. They gave to the Supreme Court power to make rules regulating "any matters relating to the practice and procedure" in the various branches of the Court. The Acts required these rules to be laid before Parliament where they might be disapproved within a limited time. Subject to this provision, practice and procedure in the High Court have been governed by the rules in place of prior statutes. But the rules have never embraced a code of evidence.

Nearly sixty years later our American Congress took a similar step when it delegated to the United States Supreme Court power to prescribe by rule, "the forms of process, writs, pleadings and motions, and the practice and procedure" of the District Courts, and enacted that "all laws in conflict therewith shall be of no further force or effect." (28 U.S.C.A. sec. 723b, 723c). Under this statutory authority, the Federal Rules of Civil Procedure were made in 1937. The rules, with two minor exceptions, do not touch the subject of evidence.

We may also mention the Pennsylvania statute of 1937 which empowered the supreme court by rule to prescribe "the practice and procedure in civil actions." Pursuant thereto rules were adopted and became effective in 1939 (See Rules in 12 Purdon's Code). They do not include evidence.

If we should stop our narration at this point, we would say that the constitutional grant to our present Supreme Court of power to make rules governing the practice and procedure in all the courts, clearly does not embrace the subject of evidence. The delegation of authority dealt with a long familiar subject: the regulation of practice and procedure by court rule. Customary usage defined the power and excluded rules of evidence. If the framers of our constitution had intended to enlarge the scope of rule making so as to include evidence, they would have used specific language to make known their intention. Instead they adopted the term "practice and procedure" which they found in the British statute of 1875, the Federal Act of 1934, and which is remniscent of the term "practicing and proceeding" in Cornbury's ordinance and the language of other New Jersey statutes.

The intent of our Constitution was to improve judicial procedure by providing that practice and procedure should be regulated by rule of Court and by giving a single body—the Supreme Court—power to make rules of practice and procedure for all courts, subject to law.

That this is the correct interpretation of the rule making power of our Supreme Court is made doubly clear by the history of the struggle in New Jersey for the improvement of practice and procedure during the last half century.

In 1909 the legislature submitted to the electorate a constitutional amendment refashioning our judicial system along the lines of the British courts. P.L. 1909, p. 376. At the same time it adopted a statute implementing the amendment if it should be adopted. It authorized the new Supreme Court to prescribe "rules for pleading and practice" which would supersede existing "statutory and other legal regulations of procedure." The amendment was defeated at the polls and the legislature made the best of it by adopting the Practice Act, 1912, above mentioned, and the Companion Chancery Act of 1915. Here the matters stood until 1932.

In that year a draft of a constitutional amendment was submitted by the Judicial Council of New Jersey with its report of May 31, 1932. The judicial article then proposed directed that the chief justice and the chancellor, each,

"shall by rule regulate the practice and procedure" of the courts of law and equity, respectively. There is nothing in the

text, or in the discussion set out in the report, to suggest that the rule-making power should extend to the law of evidence.

The next proposal was that advanced by the Commission on Revision of the New Jersey Constitution (often referred to as the Hendrickson Commission) in 1942. The draft constitution contained a rule-making power as follows:

> "The Supreme Court shall make rules as to the administration of all the courts, and, subject to law, as to pleading, practice and evidence in all the courts." (Art. V, Sec. II, par. 3).

It is entirely clear that the rule-making power then proposed included the law of evidence, for the clause expressly says so.

The next proposal was in the constitution submitted to the people in 1944, and which was not adopted. That draft also provided for rule-making in Art. V, Sec. II, par. 3, as follows:

> "The Supreme Court shall make rules governing the administration of all the Courts in this State. It shall have power, also, to make rules as to pleading, practice and evidence, which may be applicable to all the courts in the State, and which shall have the force of law unless changed or abrogated by law."

In this case, as in the 1942 draft, there can be no dispute about the fact that evidence was included within the rule-making power.

At the Constitutional Convention which drafted the 1947 Constitution, lengthy hearings were conducted by the Committee on the Judiciary. The Judiciary Articles proposed in 1942 and 1944 were laid before the Committee and several other drafts were presented which included an express power to make rules as to evidence (4 Const. Conv. of 1947, pp. 27, 40, 254 and 595). A number of the speakers who addressed the Committee, discussed the rule making power, but none advocated giving the Supreme Court, or other rule making agency, authority over evidence.

Dean George S. Harris, whose text on Pleading and Practice was the state's handbook for 22 years, testified before the Committee as follows:

> "With respect to procedural matters, all procedural matters, I think should be entrusted to the court. I wouldn't include evidence. As far as I know, the court has never made any

attempt to change rules of evidence. * * * Section II, paragraph 3, [of the 1944 draft] reads: 'The Supreme Court shall make rules governing administration of all the courts in this State. It shall have power, also, to make rules as to pleading, practice and evidence.' Strike that out as far as I am concerned." (IV Const. Conv. of 1947, 191).

Attorney-General Van Riper said that he would be inclined not to include evidence within the rule-making power (IV Const. Conv. of 1947, 290).

Chancellor A. Dayton Oliphant expressed disagreement "with the wisdom of giving to the rule-making body, as provided in the 1944 draft, Art. V, Sec. II, par 3, power to make rules as to evidence. Any changes in the existing law of evidence should be made by the legislature, not by the courts." (IV, Const. Conv. of 1947, 409).

Judge Learned Hand commented that while Congress had given the Supreme Court power to enact rules, the power was "confined to procedure" "Evidence—no. Congress had never suggested that; that has been a very contentious subject." (IV Const. Conv. of 1947, 424, 425).

Note how Judge Hand as well as Dean Harris used the word *procedure* or *procedural* in a sense that did not include *evidence*. This is fully in accord with common usage.

When the Committee on the Judiciary reported to the Convention the draft of the Judicial Article, it omitted evidence from the grant of rule making authority. And the final draft, as voted upon by the people in November, 1947, omitted the word.

It is clear from these considerations that whatever the abstract nature of the law of evidence may be, the subject was deliberately excluded from the rule-making power vested by our Constitution in the Supreme Court.

Contemporary construction is helpful. In *Winberry* v. *Salisbury*, 5 N.J. 240 (1950), and again in *State* v. *Otis Elevator Co.*, 12 N.J. 1; 95 A 2d 715 (1953), the Supreme Court noted that the language of the Constitution is mandatory,—the Court *shall* make rules. Obedient to this mandate, the justices-designate of our new Supreme Court, even before the Court came into existence, prepared rules governing "the practice and procedure" in the upper courts. During the last months of 1948, they prepared and promulgated the rules for the other courts. Eight years

have passed, but the Court has not adopted rules of evidence. There is dictum, too, in *Winberry*, where it was said that the 1942 draft constitution, "unlike our present Constitution, gave the Supreme Court rule making power as to evidence." Evidently the Supreme Court shares in the opinion that it is without power to make rules as to evidence. This opinion is in harmony with the American tradition.

The enactment of rules governing practice and procedure, and having the force of law, is, of course, a law-making function. When our Supreme Court assembles to make rules, it sits not as court of justice, but as a law-making body. Under the *Winberry* doctrine, the Supreme Court is not a subordinate body like one of our boards of freeholders, but is supreme within its own field just as the legislature of New Jersey is supreme within the rest of the legislative domain. Indeed this special law-making assembly has advantages that the other does not possess; for its acts are not subject to veto; and the seven men who compose it can don their judicial robes, and render judgment on the extent of their own powers and the validity of their own acts.

Such a tribunal is exceptional in American history. It is an exception to the rule stated in Article III of our Constitution, that the legislative and judicial branches of government should be separate. It is exceptional among law-making bodies, in its composition and mode of procedure. The American tradition requires that a law-making body should be responsive to public opinion and to that end, should be elected directly by the people, and that at least one part thereof should be selected at frequent intervals; our tradition requires a legislature to debate and to act in public. But our Supreme Court was purposely removed from popular control; it was fashioned so that it might administer justice with even hand uninfluenced by popular appraisal of the controversy before the court. When exercising its rule-making power, the Court acts in private. The public do not know which member of the Court proposes any particular rule; who opposes, and what reasons each advances. The public is only informed that the justices have adopted such and such a rule. At the annual Judicial Conference there is sometimes a discussion of rules, but the members of the court do not participate in the debate.

The framers of our constitution and the people who ratified it cannot, we believe, have intended to vest an extensive law-making authority in a body constituted and operating so at variance with the traditional blueprint. In interpreting the grant of power to make rules, a narrow rather than an extensive meaning must be given to the term "practice and procedure." The theory of supremacy of the rule-making jurisdiction of the Supreme Court as expounded by the *obiter* in *Winberry*, must be offset by a strict limitation of the field in which the Court can properly act.

The suggestion has been made that some of the rules fall within the authority of the Legislature and some within the orbit of the Court and that some rules should be divided between the two tribunals. In our opinion the suggestion is unsound; a useful modernization and codification of the law of evidence must be an integrated whole, and must be the work of a single agency of the State, if only to avoid the dangers of omission, conflict and ambiguity. In this as in all matters, the Constitution should be so construed that the powers granted can be exercised in actual practice. There should be no concern over the inclusion in the Rules of Evidence of provisions which, if considered separately, might appear to relate to "practice and procedure", but which are necessarily included in the Rules in order to make them complete and workable.

IV.

The Resolution pursuant to which this Commission was appointed directs us to present to the Legislature any bills which we desire to recommend for adoption. It is our intention to present very shortly the draft of a legislative bill containing the same sections which are to be found in the appendix above mentioned, in appropriate form for legislative consideration.

It is probable that experience with the Rules of Evidence herewith presented will show the desirability of amendment and of additional rules from time to time. It seems to us that the Supreme Court is in excellent position to sense the need for such action. At such times the Supreme Court may propose that such amendments or additional rules be adopted. See, for example, *The Proprietary Ass'n* v. *Bd. of Pharmacy of New Jersey*, 16 N.J. 62, at 66 and 72 (1954); see also, R.R. 1:23-1(a), as amended September 1, 1956. But there is so much of general

public policy embodied in the Rules of Evidence that the Legislature should retain responsibility for the Rules.

Our proposed Rule 2(3) states that "The adoption of these rules shall not operate to repeal any statute or statutory provision, by implication or otherwise." There are a considerable number of enactments concerning evidence in our Revised Statutes, of which the most notable are the Statute of Frauds and some parts of the recording acts. It seems to us wise to deal with these statutes separately, repealing, amending or retaining in their present form the several provisions, and we hope to present to you before the end of the year, draft statutes having that effect. We recommend that meanwhile the existing statutory provisions relating to evidence be continued in full force as provided in proposed Rule 2(3).

Respectfully submitted,

s/ CLIFTON T. BARKALOW	s/ CARL KISSELMAN
s/ CHARLES E. GANT	s/ SCOTT M. LONG, JR.
s/ WILLIAM F. HYLAND	s/ ALBERT McCAY
s/ WALTER H. JONES	s/ W. HOWARD SHARP

s/ JOHN O. BIGELOW,
Chairman.

APPENDIX

(This Appendix includes the text promulgated by the National Conference of Commissioners on Uniform State Laws, as the same appeared in the Report of the Committee on the Revision of the Law of Evidence to the Supreme Court of New Jersey, dated May 25, 1955, as well as the text proposed by that Committee. Text which is to be deleted under this Commission's recommendations is enclosed in brackets [ ]; text to be added is underlined; text proposed by the Court Committee is enclosed in asterisks * * .)

I. GENERAL PROVISIONS

Rule 1. Definitions.

As used in these rules:

(1) "Evidence" is the means from which inferences may be drawn as a basis of proof in duly constituted judicial or fact-finding tribunals, and includes testimony in the form of opinion, and hearsay.

(2) "Relevant evidence" means evidence having any tendency in reason to prove any material fact.

(3) "Proof" is all of the evidence before the trier of the fact relevant to a fact in issue which tends to prove the existence or non-existence of such fact.

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

(5) "Burden of producing evidence" means the obligation of a party to introduce evidence when necessary to avoid the risk of a [directed verdict] judgment or peremptory finding against him on a material issue of fact.

(6) "Conduct" includes all active and passive behavior, both verbal and non-verbal.

(7) "The hearing" unless some other is indicated by the context of the rule where the term is used, means the hearing at which the question under a rule is raised, and not some earlier or later hearing.

(8) "Finding of fact" means the determination from proof or judicial notice of the existence of a fact. A ruling implies a

supporting finding of fact; no separate or formal finding is required unless required by a statute or rule of court of this state.

(9) "Guardian" means the person, committee, or other representative authorized by law to protect the person or estate or both of an incompetent or a sui juris person having a guardian and to act for him in matters affecting his person or property or both. An incompetent is a person under disability imposed by law.

(10) "Judge" means member or members or representative or representatives of a court conducting a trial or hearing at which evidence is introduced.

(10.5) "Perceive" means acquire knowledge through one's own senses.

(11) "Trier of fact" includes a jury and a judge when he is trying an issue of fact other than one relating to the admissibility of evidence.

(12) "Verbal" includes both oral and written words.

(13) "Writing" means handwriting, typewriting, printing, photostating, photography and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds or symbols, or combinations thereof, provided that such recording is (a) reasonably permanent and (b) readable by sight.

Comment

No substantial changes in the Court Committee draft of this rule have been made by this Commission. The definition in paragraph (10.5) was formerly in Rule 62(3). The change in paragraph (13) limits the definition of writing so as to be more in accord with common understanding.

Rule 2. Scope of Rules.

(1) [Except to the extent to which they may be relaxed by other procedural rule or statute applicable to the specific situation, t] These rules shall apply in every proceeding, [both] criminal or [and] civil, conducted by or under the supervision of a court, in which evidence is produced.

(2) Except to the extent to which the rules of evidence may be relaxed by or pursuant to statute applicable to the particular tribunal, these rules shall apply to formal hearings before admin-

istrative agencies and tribunals; but the provisions of Chapter V, Privileges, shall apply in all cases and to all proceedings.

(3) The adoption of these rules shall not operate to repeal any statute or statutory provision, by implication or otherwise.

(4) As the object of these rules is to advance justice, they may be relaxed by the judge in any case when it is manifest that a strict adherence to the rules will work injustice, but the provisions of Chapter V, Privileges, and Chapter VIII, Hearsay Evidence, shall not be relaxed.

Comment

Paragraph (1) provides that these rules apply in every court proceeding. Paragraph (2) provides that these Rules apply to formal hearings before administrative tribunals, except to the extent the rules of evidence may be relaxed by or pursuant to statutes applicable to such tribunal. The statutes establishing most administrative agencies provide that the formal rules of evidence shall not apply. The Rules governing privileges, however, apply in all cases and proceedings. Paragraph (3) has the effect of continuing all existing statutes. This Commission feels that it is necessary to review the New Jersey statutes in detail and to specifically treat each such statute dealing with evidence. Otherwise, a wholesale repeal of many statutes, without consideration of all the implications, would result. Paragraph (4) provides that all but the Rules dealing with privileges and hearsay may be relaxed.

Rule 3. Exclusionary Rules Not to Apply to Undisputed Matter.

If upon the hearing there is no bona fide dispute between the parties as to a material fact, such fact may be proved by any relevant evidence, and exclusionary rules shall not apply, subject, however, to Rule 45 and any valid claim of privilege. This rule shall not apply when (a) a party requires his opponent to prove any material fact needed to establish a claim or defense or (b) a party has reserved the right to object to the admissibility of evidence although stipulating the truth of the fact.

Comment

This Rule provides that the Rules of Evidence only apply to disputed matters. Where there is no bona fide dispute as to a matter, it may be proved in any way.

Rule 4. Effect of Erroneous Admission or Exclusion of Evidence.

Neither error in the admission nor in the exclusion of evidence shall constitute ground for granting a new trial or setting aside a verdict, or for vacating, modifying or otherwise disturbing a judgment or order if, in the opinion of the court, the error probably did not affect the verdict or finding.

[A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless (a) there appears of record objection to the evidence timely interposed and so stated as to make clear the specific ground of objection, and (b) the court which passes upon the effect of the error or errors is of opinion that the admitted evidence should have been excluded on the ground stated and probably had a substantial influence in bringing about the verdict or finding.]

[, however the appellate court may notice plain errors affecting substantial rights of a party, although they were not brought to the attention of the trial court.]

Comment

Upon review, an erroneous ruling as to the admission or exclusion of evidence will not be disturbed if, in the opinion of the court, the error probably did not affect the result. This is a combination of the Court Committee's Draft of Rules 4 and 5. The necessity of objection and the right of the reviewing court to notice plain errors in the absence of objection are matters treated by rule of court. Although this Commission has not adopted the old New Jersey view that any error which "might" have affected the result is error, this Rule requires that the court be of the opinion that the error "probably did not" affect the verdict. This is a change in emphasis from the Court Committee Draft, which provided that the error must probably have had a substantial influence upon the result. Under this Commission's draft the showing must be that the erroneous ruling probably had no effect, rather than a showing by the injured party that the error had a substantial influence on the result.

[Rule 5. Effect of Erroneous Exclusion of Evidence.]

[A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless (a) it appears of record that the proponent of the evidence either made known the substance of the evidence in a form and by a method approved by the judge, or indicated the substance of the expected evidence

by questions indicating the desired answers, and (b) the court which passes upon the effect of the error or errors is of opinion that the excluded evidence would probably have had a substantial influence in bringing about a different verdict or finding.]

[however the appellate court may notice plain errors affecting the substantial rights of a party, although they were not brought to the attention of the trial court.]

Comment

This rule is combined with Rule 4.

Rule 6. Limited Admissibility.

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

Comment

This is the well settled New Jersey Rule.

Rule 7. General Abolition of Disqualifications and Privileges of Witnesses, and of Exclusionary Rules.

Except as otherwise provided in these Rules, (a) every person is qualified to be a witness, and (b) no person has a privilege to refuse to be a witness, and (c) no person is disqualified to testify to any matter; and (d) no person has a privilege to refuse to disclose any matter or to produce any object or writing, and (e) no person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any object or writing, and (f) all relevant evidence is admissible.

Comment

This is the basic rule whereby every person is competent and compellable to testify and all relevant evidence is admissible, except as otherwise provided in these Rules. The other Rules are exceptions to this general rule when they are exclusionary in nature.

Rule 8. Preliminary Inquiry by Judge. Review.

(1) When the qualification of a person to be a witness, or the admissibility of evidence, or the existence of a privilege is stated

in these rules to be subject to a condition, and the fulfillment of the condition is in issue, the issue is to be determined by the judge, and he shall indicate to the parties which one has the burden of producing evidence and the burden of proof on such issue as implied by the rule under which the question arises. The judge may hear and determine such matters out of the presence or hearing of the jury, except that on the admissibility of a confession the judge, if requested by the defendant, shall hear and determine the question out of the presence and hearing of the jury. But this rule shall not be construed to limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

(2) If the judge admits a statement of the accused pursuant to Rule 63(6) he shall, if requested, instruct the jury to consider the issue of the fulfillment of the condition and to disregard the statement if they find the condition was not fulfilled. In other situations, if the judge admits the evidence, he may in his discretion instruct the jury to the same effect.

(3) If the condition is stated in these rules to be a certain finding by the judge, and if he makes such finding, then upon a review of the judgment the finding shall be accepted as correct if there was substantial evidence to support it. If the judge refused to make such finding, the reviewing court shall accept such ruling as correct unless the evidence to the contrary was convincing and was without substantial contradiction.

(4) If the condition is stated in these rules to be the existence, or nonexistence, of certain facts, then upon review of the judgment, the reviewing court, if so requested, shall determine from all the evidence relevant to the issue whether or not the condition was fulfilled and if their determination is contrary to that of the trial judge, they shall treat the admission or exclusion of the evidence as error to be governed by Rule 4.

Comment

Paragraph (1) is the Court Committee draft of Rule 8 with one change, namely that only upon request by the *defendant* must the judge hear the preliminary question as to the admissibility of a confession out of the presence of the jury. In general, this paragraph provides that all preliminary matters are for the judge. This is, for the most part, the present New Jersey rule.

Paragraph (2) is a change from the present New Jersey rule, and provides that the judge may submit to the jury for their determination pre-

liminary questions of fact on which he has previously ruled, but that he must submit to the jury the voluntary nature of a confession, if requested. A desirable use of this rule will be in the latter connection. See, *State* v. *Tune*, 17 N.J. 100 (1954) cert. den. 349 U.S. 907, 75 S. Ct. 584, 99 L. ed. 1243 (1955).

Paragraphs (3) and (4) apply to the finality of the trial judge's determination of preliminary matters. When a Rule is phrased so as to require a finding by the trial judge, such finding will not be disturbed on appeal if there is substantial evidence to support it. An example is Rule 17. If a Rule is conditioned upon the existence or non-existence of a certain fact, the appellate court shall review the evidence as to that fact and make its own determination. An example is Rule 38, where this Commission has deleted the phrase "if the judge finds."

II. JUDICIAL NOTICE

Rule 9. Facts Which Must or May Be Judicially Noticed.

(1) Judicial notice shall be taken without request by a party, of the common law, constitutions and public statutes of this state, the constitution and the public statutes of the United States which are in force in this state, [every state, territory and jurisdiction of the United States.] and of such specific facts and propositions of generalized knowledge as are so universally known that they cannot reasonably be the subject of dispute.

(2) Judicial notice may be taken without request by a party, of (a) the common law, constitutions and public statutes in force in every other state, territory and jurisdiction of the United States, private acts and resolutions of the Congress of the United States and of the legislature of this state, and duly enacted ordinances and duly published regulations of governmental subdivisions or agencies of this state, agencies of the United States and records of the court in which the action is pending, and (b) the laws of foreign countries, and (c) such facts as are so generally known or of such common notoriety within the [territorial jurisdiction of the court] county wherein the court is sitting, that they cannot reasonably be the subject of dispute, and (d) specific facts and propositions of generalized knowledge which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy.

(3) Judicial notice shall be taken of each matter specified in paragraph (2) of this rule if a party requests it and (a) fur-

nishes the judge sufficient information to enable him properly to comply with the request and (b) has given each adverse party [such notice as the judge may require to enable the adverse party to prepare to meet the request.] notice thereof at or before the pretrial conference, or at least 10 days before the trial when there is no pretrial conference; but the judge may fix such other notice, if any, as the circumstances may require.

Comment

This rule would change the present requirement of N.J.S. 2A:82-27 that foreign law be pleaded before it may be judicially noticed. The principal change from the Court Committee draft is to make it discretionary with the trial judge, rather than mandatory, whether to judicially notice the laws of other states in the absence of request by a party. Notice is required to be given by a party to each adverse party if a request is to be made of the judge to notice the matters contained in paragraph (2), following the suggestion of several bar associations.

Rule 10. Determination as to Propriety of Judicial Notice and Tenor of Matter Noticed.

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

[(2) In determining the propriety of taking judicial notice of a matter or the tenor thereof, (a) the judge may consult and use any source of pertinent information, whether or not furnished by a party, and (b) no exclusionary rule except a valid claim of privilege shall apply.]

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

[(4) In any event the] The determination either by judicial notice or from evidence of the applicability and the tenor of any matter of common law, constitutional law, or of any statute, private act, rule of court, resolution, ordinance or regulation falling within Rule 9, shall be a matter for the judge and not for the jury.

Comment

Paragraphs (1), (2) and (3) of the Court Committee draft are deleted because the matters therein are properly within the discretion of the trial judge or do not require specific treatment. Paragraph (4) states the present New Jersey law that matters of local and foreign law are to be determined by the judge and not the jury.

Rule 11. Instructing the Trier of Fact as to Matter Judicially Noticed. Record of Matter Noticed and Source.

If requested by a party, the judge shall instruct the trier of fact to accept a matter judicially noticed. If a matter is [judicially] noticed [is other than the common law or constitution or public statutes of this state,] under Rule 9(2) or (3), the judge shall indicate for the record the matter [which is judicially] so noticed, and if requested, the source of his information. [if the matter would otherwise have been for determination by a trier of fact other than the judge, he shall instruct the trier of the fact to accept as a fact the matter so noticed.]

Comment

As recommended by several bar associations, the judge is required, if requested by a party, to state for the record the source of his information of any matter noticed under Rule 9(2) or 9(3).

Rule 12. Judicial Notice in Proceedings Subsequent to Trial.

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

[(2) The rulings of the judge under Rules 9, 10 and 11 are subject to review.]

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

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

Comment

Paragraph (2) is deleted because it is self-evident and unnecessary in view of the broad powers of review of the appellate courts of this State. Paragraph (4) is deleted because the matter is properly within the discretion of the appellate court, depending on the nature of the matter noticed.

III. PRESUMPTIONS

Rule 13. Definition of Presumption.

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

Comment

This definition clearly points out that a presumption is an assumption of fact based on a rule of law and not an inference based in logic. Most presumptions have some basis in logic, although the rule of law requires that more weight be given to the assumption than pure logic alone would dictate.

Rule 14. Effect of Presumptions.

[Subject to Rule 16, and except for presumptions which are conclusive or irrefutable under the rules of law from which they arise, (a) if the facts from which the presumption is derived have any probative value as evidence of the existence of the presumed fact, the presumption continues to exist and the burden of establishing the non-existence of the presumed fact is upon the party against whom the presumption operates, (b) if the facts from which the presumption arises have no probative value as evidence of the presumed fact, the presumption does not exist when evidence is introduced which would support a finding of the non-existence of the presumed fact, and the fact which would otherwise be presumed shall be determined from the evidence exactly as if no presumption was or had ever been involved.]

Subject to Rule 16, a presumption continues to exist until the trier of the fact is persuaded by evidence to the contrary. If such evidence is uncontradicted, and if reasonable minds could not differ over accepting it as true, the judge shall instruct the trier of the fact to do so.

Comment

This changes the present New Jersey rule and the Court Committee draft, to a lesser degree. The rule provides that the trier of the fact may find in accordance with the presumption even after the introduction of evidence to the contrary. The present New Jersey rule is that such presumption must be ignored, although any remaining logical inference may be considered. The Court Committee draft adopts the present New Jersey rule as to those presumptions which do not also have a basis in logic and this Commission's view as to those presumptions which do have such logical basis. Because of the small number of the former and the inevitable confusion in making the distinction, Rule 14, as prepared by this Commission, provides that all ordinary presumptions shall be treated alike. If the evidence contrary to the presumption is uncontradicted and is such that reasonable minds could not differ over accepting it as true, the judge shall instruct the trier of the fact to do so.

Rule 15. Inconsistent Presumptions.

If two presumptions arise which are conflicting with each other the judge shall apply the presumption which is founded on the weightier considerations of policy and logic. If there is no such preponderance both presumptions shall be disregarded.

Comment

This leaves to the trial judge the determination as to which of two conflicting presumptions is founded on the weightier considerations of policy and logic. If the two are of equal weight, both are disregarded.

Rule 16. Burden of Proof Not Relaxed as to Some Presumptions.

A presumption which is conclusive or irrefutable under the rules of law from which it arises, or which by a rule of law may be overcome only by proof beyond a reasonable doubt, or by clear and convincing evidence, shall not be affected by Rules 14 or 15 and, when it may be overcome, the burden of proof to overcome it continues on the party against whom the presumption operates.

Comment

This excludes from Rules 14 and 15 presumptions which, by the rules of law which create such presumptions, are given special weight. As to these presumptions, the weight and effect to be given are governed by the rule of law which creates them and not these rules. The new matter is transferred from Rule 14 of the Court Committee draft.

IV. WITNESSES

Rule 17. Disqualification of Witness, Interpreters.

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

Comment

This rule adopts a general rule as to who is disqualified to be a witness. Except for the provisions of Rule 2(3) preserving existing statutes pending their individual review and revision, this would have the effect of changing some existing statutes.

Rule 18. Oath.

Every witness before testifying shall be required to express his purpose to testify by the oath or affirmation required by law.

Comment

A witness who is not disqualified under Rule 17 must express his purpose to testify by the oath or affirmation required by law. An oath is required of all witnesses. *State* v. *Gambutti*, 36 N.J.Super. 219 (App. Div. 1955) except in cases where our present statute permits an affirmation in lieu of an oath (R.S. 41:1-6).

Rule 19. Prerequisites of Knowledge and Experience.

As a prerequisite for the testimony of a witness on a relevant or material matter, there must be evidence that he has personal knowledge thereof, or experience, training or education if such be required. Such evidence may be by the testimony of the witness himself. The judge may reject the testimony of a witness that he perceived a matter if he finds that no trier of fact could reasonably believe that the witness did perceive the matter. The judge may receive conditionally the testimony of the witness as to a relevant or material matter, subject to the evidence of knowledge, experience, training or education being later supplied in the course of the trial.

Comment

This embodies the present general rule that the party offering a witness must show that such witness is qualified to testify. For the ordinary witness, this means he must testify from personal knowledge while, in the case of an expert, there must be a showing of the necessary expert qualifications. Compare Rule 56(2).

Rule 20. Evidence Generally Affecting Credibility.

Subject to Rules 21 and 22, for the purpose of impairing or supporting the credibility of a witness, any party including the party calling him may examine him and introduce extrinsic evidence concerning any conduct by him and any other matter relevant upon the issues of credibility.

Comment

Except as otherwise limited in Rules 21 and 22, any party may introduce any evidence to support or impair the credibility of a witness. Credibility, although normally associated with veracity, extends to all matters relating to the accuracy of the testimony, such as opportunity to observe, ability to remember and relate what transpired, etc. This rule, although very broad, must be considered in the light of the limitations of Rules 21 and 22.

Rule 21. Limitations on Evidence [of Conviction of Crime as] Affecting Credibility.

(1) Where a witness is questioned as to matters outside the issues in the action, extrinsic evidence shall not be received solely to contradict his answers, in order to impair his credibility.

(2) A party shall not, by questions asked his own witness, or by extrinsic evidence, seek to impair the credibility of the witness after he has examined him at the trial on any of the issues in the action, but this shall not prevent the neutralizing of his testimony in case of surprise.

(3) No evidence to support the credibility of a witness shall be received unless evidence has been received to impair his credibility.

(4) Evidence of the conviction of a witness for a crime [not involving dishonesty] shall be inadmissible for the purpose of affecting his credibility unless the crime involves fraud, lack of veracity or false statement [shall be inadmissible for the purpose of impairing his credibility].

(5) If the witness be the [accused] defendant on trial in a criminal proceeding, no evidence of his conviction of a crime shall be admissible for the sole purpose of impairing his credibility unless he has first introduced evidence of his own good character or evidence admissible solely for the purpose of supporting his credibility.

Comment

As proposed by this Commission, this Rule is more in accord with the present New Jersey law than is the Court Committee draft.

Paragraph (1) is the present New Jersey rule that if a party examines a witness as to matters outside the issues, the answers cannot be contradicted by extrinsic evidence. *Bullock* v. *State*, 65 N.J.L. 557 (E & A 1900). Of course, this would not prohibit the introduction of evidence which is otherwise admissible.

Paragraph (2) is also the present New Jersey rule. *State* v. *Costa*, 11 N.J. 239 (1953). This Commission is strongly of the view that a party calling a witness should not be able to attack his credibility after testimony has been given. To do so would permit a party to hear the testimony first and then, if the testimony were unfavorable, attack the witness' credibility; while if the testimony were favorable, he could leave the witness unchallenged. This rule does not prohibit the introduction of contrary evidence by another witness or the neutralization of a witness' testimony in the case of surprise. As now, neutralization would be employed when a witness testifies, to the surprise of a party, contrary to what he told the party before trial. In such case, the earlier statement is shown in an attempt to cancel or neutralize the testimony given.

Paragraph (3) is based on the proposition that every witness is presumed to speak the truth and evidence to support credibility is not admissible until credibility has been attacked. See *State* v. *Orlando*, 119 N.J.L. 175 (Sup. Ct. 1937).

Paragraph (4) changes the present New Jersey rule by limiting the admissibility of prior convictions to impair credibility to convictions of crimes involving fraud, lack of veracity, or false statement. The deletion of crimes involving dishonesty is in accord with the Court Committee draft and the suggestion of several bar associations.

Paragraph (5), along with the preceding paragraph, embodies the substance of the Court Committee draft. The primary purpose of this paragraph is to encourage defendants in criminal actions to take the witness stand and testify. A substantial factor discouraging this is the fact that, under present law, once a defendant testifies the State may then show all prior convictions of misdemeanors and felonies to impair his credibility. The obvious prejudicial effect on the jury is enough to discourage the defendant from taking the stand and testifying. One change made by this Commission is to provide that convictions of those crimes within the scope of paragraph (4) are admissible to impair credibility after the defendant has introduced evidence of his good character under Rule 48(2), as well

as evidence to support his credibility. Under paragraph (3) the latter is only admissible after the State introduces evidence, other than the convictions within paragraph (4) to impair his credibility.

Rule 22. Further Limitations on Admissibility of Evidence Affecting Credibility.

As affecting the credibility of a witness (a) in examining the witness as to a statement made by him in writing inconsistent with any part of his testimony it shall not be necessary to show or read to him any part of the writing [provided that] if [the judge deems it feasible] the time [and place] of the writing and the name of the person addressed, if any, shall be indicated to the witness, provided, however, that the judge in his discretion may require the writing to be shown to the witness; (b) extrinsic evidence of prior contradictory statements, whether oral or written, made by the witness, [may in the discretion of the judge] shall be excluded unless the witness was so examined while testifying as to give him an opportunity to identify, explain or deny the statement; (c) evidence of traits of his character other than honesty or veracity or their opposites, shall be inadmissible; (d) evidence of specific instances of his conduct relevant only as tending to prove a trait of his character, shall be inadmissible.

Comment

The changes made by this Commission in the Court Committee draft are in the direction of existing law.

Paragraph (a) provides that if a witness is to be examined about a statement made by him in writing, to impair his credibility, the time of the writing and the person, if any, to whom the writing was addressed must be indicated to the witness. If not, or if the judge otherwise requires, the entire writing must be shown the witness.

Paragraph (b) prevents evidence as to contradictory statements made by a witness unless the witness was so examined while testifying as to give him an opportunity to explain the statement. This is mandatory and not discretionary with the trial judge, as was provided in the Court Committee draft.

Paragraph (c) is the present general rule in New Jersey. *State* v. *Tomassi*, 75 N.J.L. 739 (E & A 1907). It is only evidence as to the character traits of truth and veracity, and not general character, which is admissible. Compare Rule 21(4).

Paragraph (d) is also the present rule in New Jersey. *State* v. *Hatch*, 21 N.J.Super. 394 (App. Div. 1952).

V. PRIVILEGES

Rule 23. Privilege of Accused.

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

(2) [An accused in a criminal action has a privilege to prevent his spouse from testifying in such action with respect to any confidential communication had or made between them while they were husband and wife, excepting only (a) in an action in which the accused is charged with (i) a crime involving the marriage relation, or (ii) a crime against the person or property of the other spouse or the child of either spouse, or (iii) a desertion of the other spouse or a child of either spouse, or (b) as to the communication, in an action in which the accused offers evidence of a communication between himself and his spouse.] 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.

(4) If an accused in a criminal action does not testify after direct evidence is received of facts which tend to prove some element of the crime and which facts, if untrue, he could disprove by his own testimony, counsel and the judge may comment [upon accused's] on his failure to testify, and the trier of fact may draw an inference that accused cannot truthfully deny those facts. [all reasonable inferences therefrom.]

Comment

The principal change from the Court Committee draft is to more nearly conform to existing New Jersey law.

Paragraph (2) adopts in a large measure the present New Jersey rule. This paragraph retains the general rule that a spouse may not, in most matters, be compelled or permitted, over the objection of the defendant, to

testify against her husband in a criminal action. The presently existing exceptions are embodied in paragraphs (b) and (c).

Paragraph (3) provides that an accused has no privilege to refrain from doing certain acts, such as walking, submitting himself to view for purposes of identification, etc.

Paragraph (4) embodies the present rule that an unfavorable inference may be commented on by counsel and the judge, and drawn by the jury, upon the failure of a defendant to take the stand and to disprove facts as to which direct evidence has been given.

Rule 24. Definition of Incrimination.

Within the meaning of these rules, a [A] matter will incriminate [a person within the meaning of these Rules] if it constitutes [, or forms an essential part of, or, taken in connection with other matters disclosed, is a basis for a reasonable inference of such a violation of the laws of this State as to subject him to liability to punishment therefor, unless he has become for any reason permanently immune from punishment for such violation.] 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.

Comment

This rule adopts a broad definition of self-incrimination. It extends to all matters which are an element in a crime against this State, or any state or the United States, and includes circumstances inferring the commission of a crime as well as matters which are a clue to the discovery of any such element or circumstance. The present New Jersey rule only applies to crimes against this State and does not extend to matters which might be considered a clue. But cf. *Marsh* v. *Marsh*, 16 N.J.Eq. 391, 397 (Ch. 1863). The definition of this Commission is limited in that the trial judge may rule that a matter is not incriminating if it clearly appears that the witness has no reasonable cause to apprehend criminal prosecution. In

determining whether or not a matter is incriminating, all relevant factors shall be considered. The definition adopted by this Commission is that enunciated by the Supreme Court of the United States in *United States* v. *Hoffman*, 341 U.S. 479, 71 S. Ct. 814, 95 L. ed. 1118 (1951).

Rule 25. Self-Incrimination: Exceptions.

Subject to Rule[s 23 and] 37, every natural person has a right [privilege, which he may claim,] to refuse to disclose in an action or to a police officer or other [public] official, [of this state or any governmental agency or division thereof] any matter that will incriminate him or expose him to a penalty or a forfeiture of his estate,

[*Subject to Rules 23 and 37, no witness shall be compelled to answer if the court finds it is likely that the answer will expose him to a criminal prosecution or penalty or to a forfeiture of his estate,*] except that under this rule,

[(a) if the privilege is claimed in an action the matter shall be disclosed if the judge finds that the matter will not incriminate the witness; and]

(a) [(b)] 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; [and]

[*(b)* (c) no person has the privilege to refuse to furnish or permit the taking of samples of body fluids or substances for analysis; and]

(b) [*(c)* (d)] 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 [constituting, containing or disclosing matter *exposing him to a criminal prosecution, or a penalty or forfeiture of his estate,* incriminating him] if [the judge *court* finds that, by the applicable rules of the substantive law,] some other person or a corporation [,] or other association has a superior right to the possession of the thing ordered to be produced; [and]

(c) [*(d)* (e) a public official or any person who engages in any activity, occupation, profession or calling does not have the privilege] no person has a privilege to refuse to disclose any matter which the statutes or regulations governing [the] 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 [concerning it]; [and]

[*(e)* (f) a person who is an officer, agent or employee of a corporation or other association, does not have the privilege to refuse to disclose any matter which the statutes or regulations governing the corporation or association or the conduct of its business require him to record or report or disclose; and]

(d) [*(f)* (g)] subject to Rule 21, [a defendant] the accused in a criminal action or a party in a civil action, who voluntarily testifies in the action upon the merits [before the trier of *the* fact *s*] does not have the privilege to refuse to disclose in that action, any matter relevant to any issue [in the action] therein. [*though by so testifying, he does not waive the privilege as to any matter affecting credibility.*]

Comment

This rule is the corollary to the constitutional right against self-incrimination.

Paragraph (a) of the Court Committee draft is deleted as being unnecessary. The trial judge determines whether or not a matter is incriminating and his determination is subject to review by the standards of Rule 8. The Court Committee provision of paragraph (c), compelling a person to submit to the taking of body fluids, is also deleted. This Commission feels that this is not only a matter of incrimination, but also of personal privacy.

Paragraphs (b) and (c) of this Commission's draft provide that no person may refuse to produce a document or other thing under his control to which some other person or corporation has a superior right, and that a person who is an agent or employee of a corporation does not have the privilege to refuse to disclose any matter which he is required by statute or regulation to record or report or disclose.

The Court Committee's paragraphs (e) and (f) are combined with this Commission's draft of paragraph (c).

Rule 26. Lawyer-Client Privilege.

(1) **General Rule.** Subject to Rule 37 and except as otherwise provided by Paragraph 2 of this rule communications [found by the judge to have been] between lawyer and his client in the course of that relationship and in professional confidence, are privileged, and a client has a privilege (a) [if he is the witness] 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 knowl-

edge 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 [by the client], or (iii) as a result of a breach of the lawyer-client relationship. 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 by his lawyer], or if incompetent or deceased, by his guardian[,] or [if deceased, by his] personal representative. [The privilege available to a corporation or association terminates upon dissolution.] 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[s] shall not extend (a) to a communication [if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the] in the course of legal service [was] sought or obtained in [order to enable or] aid of the commission of a crime or a fraud, [the client to commit or plan to commit a crime or a tort,] 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, or (d) [to a communication relevant to an issue concerning an attested document of which the lawyer is an attesting witness, or (e) to a communication relevant to a matter of common interest between two or more clients if made by any of them to a lawyer whom they have retained in common when offered in an action between any of such clients.] where two 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) [“communication” includes advice given by the lawyer in the course of representing the client and includes disclosures of the client to a representative, associate or employee of the lawyer incidental to the professional relationship, (c)] “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.

Comment

This privilege is well recognized by the common law of New Jersey. The privilege is for the benefit of the client and the lawyer is under a duty to assert the privilege on behalf of the client. Paragraph (2) enumerates the exceptions to the privilege, most of which, if not all, are the present New Jersey law. The definition of communication in paragraph (3) is deleted as unnecessary. The last sentence is added to provide that a private communication between a lawyer and client is presumptively confidential.

[Rule 27. Physician-Patient Privilege.]

[(1) As used in this rule, (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 guardianship or the guardian of the person of an incompetent patient, or the personal representative of a deceased patient; (d) “confidential communication between physician and patient” means such information transmitted between physician and patient, including information obtained by an examination of the patient, as is transmitted in confidence and by a means which, so far as the patient is aware, discloses the information to no third persons other than those reasonably necessary for the transmission of the information or the accomplishment of the purpose for which it is transmitted.]

[(2) Except as provided by paragraphs (3), (4), (5) and (6) of this rule, a person, whether or not a party, has a privilege in a civil action or in a prosecution for a misdemeanor to refuse to disclose, and to prevent a witness from disclosing, a communication, if he claims the privilege and the judge finds that (a) the communication was a confidential communication between patient and physician, and (b) the patient or the physician reasonably believed the communication to be necessary or helpful to enable the physician to make a diagnosis of the condition of the patient or to prescribe or render treatment therefor, and (c) the witness (i) is the holder of the privilege or (ii) at the time of the communication was the physician or a person to whom disclosure was made because reasonably necessary for the transmission of the communication or for the accomplishment of the purpose for which it was transmitted or (iii) is any other person who obtained knowledge or possession of the communication as the result of an intentional breach of the physician's duty of nondisclosure by the physician or his agent or servant and (d) the claimant is the holder of the privilege or a person authorized to claim the privilege for him.]

[(3) There is no privilege under this rule 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 offence other than a misdemeanor, or (b) upon an issue as to the validity of a document as a will of the patient, or (c) upon an issue between parties claiming by testate or intestate succession from a deceased patient.]

[(4) There is no privilege under this rule 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.]

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

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

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

Rule 27. Newspaperman's Privilege.

Subject to Rule 37, a person connected with, or employed by, a newspaper has a privilege to refuse to disclose in a court or before a grand jury the source of any information procured or obtained by him and published in such newspaper.

*[No person engaged on, connected with or employed on any newspaper shall be compelled to disclose, in any legal proceeding or trial, before any court or before any grand jury of any county or any petit jury of any court the source of any information procured or obtained by him and published in the newspaper on which he is engaged, connected with or employed.]

[As used in this section the word "court" means and includes the supreme court, the superior court, the county courts, the juvenile and domestic relations courts, the county district courts, the criminal judicial district courts, the surrogate's courts, any municipal court, any inferior court of limited criminal jurisdiction and any tribunal, commission or inquest operating under any order of any of the above enumerated courts.]*

Comment

This rule is deleted, following the suggestion of the Court Committee draft and several bar associations. New Jersey at present has no physician-patient privilege and this Commission does not consider it desirable to adopt such a privilege at this time. This Commission has adopted the recommendation of the Court Committee that the newspaperman's privilege, presently embodied in N.J.S. 2A:81-10, be incorporated in this rule.

Rule 28. Marital Privilege—Confidential Communications.

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

[(1) **General Rule.** Subject to Rule 37 and except as otherwise provided in Paragraphs (2) and (3) of this rule, a spouse who transmitted to the other the information which constitutes the communication, has a privilege during the marital relationship which he may claim whether or not he is a party to the action, to refuse to disclose and to prevent the other from disclosing communications found by the judge to have been had or made in confidence between them while husband and wife. The other spouse or the guardian of an incompetent spouse may claim the privilege on behalf of the spouse having the privilege.]

[*(1) **General Rule.** Except as provided in Rule 37 and Paragraphs 2 and 3 of this rule, if the court finds that a communication has been made in confidence by one spouse to the other while husband and wife, the spouse making the communication has a privilege not to disclose it and not to have it disclosed by the other spouse. If the spouse making the communication is absent, the other spouse may claim the privilege on his behalf, and if the spouse making the communication is incompetent or deceased, his guardian or personal representative may claim it on his behalf. For the purposes of this rule, spouses shall not be deemed to be husband and wife if they are divorced from bed and board.*]

[(2) **Exceptions.** Neither spouse may claim such privilege (a) in an action by one spouse against the other spouse, or (b) in an action for damages for the alienation of the affections of the other, or for criminal conversation with the other, or (c) in a criminal action in which one of them is charged with a crime against the person or property of the other or of a child

of either, or a crime against the person or property of a third person committed in the course of committing a crime against the other, or bigamy or adultery, or desertion of the other or of a child of either, or (d) in a criminal action in which the accused offers evidence of a communication between him and his spouse, or (e) if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the communication was made, in whole or in part, to enable or aid anyone to commit or to plan to commit a crime or a tort.]

[(3) **Termination.** A spouse who would otherwise have a privilege under this rule has no such privilege if the judge finds that he or the other spouse while the holder of the privilege testified or caused another to testify in any action to any communication between the spouses upon the same subject matter.]

Comment

This Commission has changed the Court Committee draft so as to more nearly conform to existing New Jersey law. The privilege against disclosing confidential communications between spouses is restored. The Court Committee draft limited the privilege to the one who originated the confidential communication. Furthermore, the privilege as to such communication extends beyond termination of the marital relationship. The privilege does not extend to actions between spouses nor to criminal actions within the scope of Rule 23(2).

Rule 29. Priest-Penitent Privilege [; Definition; Penitential Communications].

[(1) As used in this rule, (a) "priest" means a priest, clergyman, minister of the gospel or other officer of a church or of a religious denomination or organization, who in the course of its discipline or practice is authorized or accustomed to hear, and has a duty to keep secret, penitential communications made by members of his church, denomination or organization; (b) "penitent" means a member of a church or religious denomination or organization who has made a penitential communication to a priest thereof; (c) "penitential communication" means a confession of culpable conduct made secretly and in confidence by a penitent to a priest in the course of discipline or practice of the church or religious denomination or organization of which the penitent is a member.]

[(2) A person, whether or not a party, has a privilege to refuse to disclose, and to prevent a witness from disclosing a com-

munication if he claims the privilege and the judge finds that (a) the communication was a penitential communication and (b) the witness is the penitent or the priest, and (c) the claimant is the penitent, or the priest making the claim on behalf of an absent penitent.]

Subject to Rule 37,* [A] a clergyman, or other minister of any religion, shall not be allowed or compelled to disclose in court, or to a public officer, a confession or other confidential communication made to him in his professional character, or as a spiritual advisor [, or as a spiritual advisor] in the course of the discipline or practice [enjoined by the rules or practice] of the religious body to which he belongs or of the religion which he professes.*

Comment

This Commission has adopted the Court Committee Draft to a large extent. The Court Committee recommended adoption of N.J.S. 2A:81-9 verbatim. This Commission had added confidential communications, which might not qualify as confessions but which should be privileged.

Rule 30. Religious Belief.

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

Comment

This Commission feels that unless religious belief is material to an issue other than that of credibility, it is a personal matter which a witness should be entitled to refuse to disclose.

Rule 31. Political Vote.

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

Comment

This privilege extends to the tenor of a person's vote and not to the fact of voting. The case of an illegal vote is excepted from the rule. See the comparable present statute, R.S. 19:29-7.

Rule 32. Trade Secret.

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

Comment

Although a trade secret might be relevant or material, its disclosure might not be of too great importance. The burden is on the owner to show that failure to disclose will not tend to conceal fraud or otherwise work injustice. The purpose is to protect a secret that might be of commercial value from unnecessary disclosure.

[Rule 33. Secret of State.]

[(1) As used in this Rule, "secret of state" means information not open or theretofore officially disclosed to the public involving the public security or concerning the military or naval organization or plans of the United States, or a State or Territory, or concerning international relations.**]**

[(2) A witness has a privilege to refuse to disclose a matter on the ground that it is a secret of state, and evidence of the matter is inadmissible, unless the judge finds that (a) the matter is not a secret of state, or (b) the chief officer of the department of government administering the subject matter which the secret concerns has consented that it be disclosed in the action.**]**

Comment

This rule has been combined with Rule 34.

Rule 34. Official Information.

[(1) As used in this Rule, "official information" means information not open or theretofore officially disclosed to the public relating to internal affairs of this State or of the United States acquired by a public official of this State or the United States in the course of his duty, or transmitted from one such official to another in the course of duty.**]**

[(2) A witness has a privilege to refuse to**]** No person shall disclose **[**a matter on the ground that it is**]** official information of this State or of the United States**[**, and evidence of the matter

is inadmissible, if the judge finds that the matter is official information, and] (a) if disclosure is forbidden by [an] or pursuant to any Act of [the] Congress [of the United States] or [a statute] 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. [government of which the witness is an officer in a governmental capacity.]

Comment

This rule prohibits disclosure of official information if disclosure is forbidden by statute or harmful to the interests of the public, thus leaving to other statutes the identification of such matter.

[Rule 35. Communication to Grand Jury.]

[A witness has a privilege to refuse to disclose a comunication made to a grand jury by a complainant or witness, and evidence thereof is inadmissible, unless the judge finds (a) the matter which the communication concerned was not within the function of the grand jury to investigate, or (b) the grand jury has finished its investigation, if any, of the matter, and its finding, if any, has lawfully been made public by filing it in court or otherwise, or (c) disclosure should be made in the interests of justice.]

Comment

This Commission recommends that this rule not be adopted. The privilege contained in the Court Committee Draft only extends to the period during which the grand jury is making its investigation and prior to the time it has made its findings, if any, and does not prohibit the witness from disclosing what his communication to the grand jury was.

Rule 36. Identity of Informer.

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

Comment

This privilege is for the purpose of inducing persons to furnish information disclosing violation of the law. The identity of such person may, by this rule, be kept secret unless such identity has already been disclosed or disclosure is essential to assure a fair determination of the issues. The privilege belongs to the representative of the government and not the informant.

Rule 37. Waiver of Privilege by Contract or Previous Disclosure. Limitations.

A person waives his right or [who would otherwise have a] privilege to refuse to disclose or to prevent another from disclosing a specified matter [has no such privilege with respect to that matter] if [the judge finds that] he or any other person while the holder thereof [of the privilege] 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 matter or consented to such a disclosure made by any one.

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 rule. 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.

Comment

This Rule provides that a person waives his right or privilege if, while the holder thereof, he has contracted not to claim the right or privilege or has made disclosure of any part of the matter. The additional paragraph is added to insure that a disclosure which is itself privileged does not constitute a waiver hereunder. The failure of a witness to claim a right or privilege with respect to one question shall not operate with respect to any other question.

Rule 38. Admissibility of Disclosure Wrongfully Compelled.

Evidence of a statement or other disclosure is inadmissible against the holder of the privilege if [the judge finds that he had and claimed a privilege to refuse to make] the disclosure [but was nevertheless required to make it.] was wrongfully made or erroneously required.

Comment

If disclosure is wrongfully made or erroneously required, such disclosure is not a waiver of the privilege.

Rule 39. Reference to Exercise of Privileges

Subject to Paragraph (4), Rule 23, if a privilege is exercised not to testify or to prevent another from testifying, either in the action or with respect to particular matters, or to refuse to disclose or to prevent another from disclosing any matter, the judge and counsel may not comment thereon, no presumption shall arise with respect to the exercise of the privilege, and the trier of fact may not draw any adverse inference therefrom. In those jury cases wherein the right to exercise a privilege, as herein provided, may be misunderstood and unfavorable inferences drawn by the trier of the fact, or be impaired in the particular case, the court, at the request of the party exercising the privilege, may instruct the jury in support of such privilege.

[*If a privilege to refuse to disclose a matter, or not to have it disclosed by another, is claimed and allowed, or if an accused in a criminal action does not testify, the court and counsel may comment thereon, and the trier of fact may draw all reasonable inferences therefrom.*]

Comment

Subject to the exceptions in Rule 23(4), the judge and counsel may not comment on the exercise of any privilege and no presumptions or adverse inferences shall be drawn therefrom. The exception is as to the right to comment upon the failure of the accused in a criminal action to deny facts which he could disprove if they were false, and the adverse inference which may be drawn therefrom.

Rule 40. Effect of Error in Overruling Claim of Privilege.

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

(2) If a witness refuses to answer a question, under color of a privilege claimed pursuant to Rules 23 through 38, after the judge has ordered the witness to answer, and a contempt proceeding is brought against the witness, the court hearing the same shall order it dismissed if it appears that the order directing the witness to answer was erroneous.

Comment

Since privileges are designed, because of matters of policy, to protect the holder thereof, the disclosure of privileged matter cannot be error as to any person other than the holder. If a witness refuses to answer a question under color of privilege after being directed to do so by the judge, the court hearing the subsequent contempt proceeding shall dismiss the proceeding if the order was erroneous.

VI. EXTRINSIC POLICIES AFFECTING ADMISSIBILITY

Rule 41. Evidence to Test a Verdict or Indictment.

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

Comment

This rule is substantially the present New Jersey rule. *State* v. *Kociolek*, 20 N.J. 92 (1955).

Rule 42. Testimony by the Judge. Mistrial.

Against the objection of a party, the judge presiding at the trial may not testify in that trial as a witness. If the judge finds that his testimony would be of importance, he shall declare a mistrial.

Comment

If the judge finds that his testimony would be of importance, he shall declare a mistrial and the case shall be heard by another judge. This Commission feels that if the judge is a witness, the possible prejudicial effect upon the jury is such that he should not preside at the trial.

Rule 43. Testimony by a Juror. Mistrial.

A member of a jury [sworn and empanelled] in the trial of an action, may not testify in that trial as a witness. If the judge finds that the juror's testimony would be of sufficient importance, he shall declare a mistrial.

Comment

A member of a jury (including any alternate jurors) may not testify as a witness. If the judge finds that the testimony would be of sufficient importance, he shall declare a mistrial and have a new jury impanelled. This is probably a change in the present New Jersey rule.

Rule 44. Testimony of Jurors Not Limited Except by These Rules.

These rules shall not be construed to (a) exempt a juror from testifying as a witness, [if the law of the state permits,] to conditions or occurrences either within or outside of the jury room having a material bearing on the validity of the verdict or the indictment, except as expressly limited by Rule 41; (b) exempt a grand juror from testifying to testimony or statements of a person appearing before the grand jury, where such testimony or statements are the subject of lawful inquiry in the action in which the juror is called to testify.

Comment

This rule specifies that a juror may testify as to conditions or occurrences of material bearing on the validity of the verdict or indictment, and that a grand juror may testify to testimony or statements made by a person before the grand jury. This rule would not change the substantive rules of law as to what must be shown to impeach a verdict or indictment.

Rule 45. Discretion of Judge to Exclude Admissible Evidence.

[Except as in these rules otherwise provided, the] The judge may in his discretion exclude evidence if he finds (1) that its probative value is slight and is substantially outweighed by the risk that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered[.], or (2) that its bearing on the issues is too remote.

Comment

This rule gives the judge discretion to exclude evidence which has only an inconsequential relation to the issues to be tried. To be excluded under this rule, the probative value must be slight and must be substantially outweighed by the various risks enumerated. In addition, evidence which is too remote may be excluded. This rule is similar to the present New

Jersey rule; and is necessary in order to give the judge the necessary control over the conduct of the litigation. The exception to this rule is contained in Rule 48(2), providing that the judge may not exclude evidence introduced by a defendant to prove his good character.

Rule 46. Character and Character Trait—Manner of Proof.

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

Comment

This rule is limited to those situations where character or trait of character is in issue, that is, one of the ultimate facts to be proved. In such cases, character may be proved by opinion, reputation or specific instances of conduct. The number of instances where character is in issue are very few.

Rule 47. Character Trait as Proof of Conduct.

Subject to Rule 48, when a trait of a person's character is relevant as tending to prove his conduct on a specified occasion, such trait may be proved by testimony in the form of opinion, evidence of reputation, or evidence of conviction of a crime which tends to prove the trait. [in the same manner as provided by Rule 46, except that (a) evidence of specific instances of conduct other than evidence of conviction of a crime which tends to prove the trait to be bad shall be inadmissible, and (b) in a criminal action evidence of a trait of an accused's character as tending to prove his guilt or innocence of the offense charged, (i) may not be excluded by the judge under Rule 45 if offered by the accused to prove his innocence, and (ii) if offered by the prosecution to prove his guilt, may be admitted only after the accused has introduced evidence of his good character.]

Comment

This rule covers the more usual cases where proof of character is offered to prove conduct on a specific occasion. In such cases, character may not be proved by specific instances of conduct other than conviction of a crime. The present New Jersey rule is well established and excludes evidence of specific instances of conduct to prove general character. Any other rule would lead to confusion and a trial of collateral issues.

Rule 48. Character or Character Trait [for Care or Skill—Inadmissible to Prove Quality of Conduct.]—Limitations.

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

(2) When evidence of the character or a trait of character of accused is offered in a criminal action as tending to prove his guilt or innocence, such evidence (a) may not be excluded under Rule 45 if offered by the accused, and (b) if offered by the prosecution, may be admitted only after the accused has introduced such evidence.

Comment

Paragraph (1) is the well accepted rule that a person's character with respect to care or skill is inadmissible to prove the quality of his conduct on a specified occasion.

Paragraph (2) is a matter formerly contained in Rule 47 of the Court Commission draft. This paragraph provides that evidence of an accused's character may not be excluded by the judge as being too inconsequential if offered by the accused. The prosecution may not introduce evidence of an accused's bad character unless the accused has offered evidence of his good character. This is the corollary of Rule 21(5) with respect to the credibility of an accused.

Rule 49. Habit or Custom to Prove Specific [Behavior] Conduct.

Evidence of habit or custom whether corroborated or not is [relevant to an issue of] admissible to prove [behavior] conduct on a specified occasion [, but is admissible on that issue only as tending to prove that the behavior on such occasion conformed to] in conformity with the habit or custom.

Comment

This rule makes a slight change in the present New Jersey rule in that it does not require corroboration as to conformity to the habit or custom. The present rule not only requires evidence of the habit or custom, but also evidence that such habit or custom was followed on the particular occasion in question. This Commission feels that proof of the habit or custom alone is evidential as to conduct on the particular occasion and that corroboration goes only to weight.

Rule 50. Opinion and Specific Instances of [Behavior] Conduct to Prove Habit or Custom.

Testimony in the form of opinion is admissible on the issue of habit or custom. Evidence of specific instances of [behavior] conduct is admissible to prove habit or custom if the evidence is of a sufficient number of such instances to warrant a finding of such habit or custom.

Comment

This rule states that evidence in the form of opinion or of numerous instances of conduct are admissible to prove habit or custom. Before a witness may testify as to his opinion, it must be shown that he has the necessary qualifications to give such opinion. See Rule 56(1).

Rule 51. Subsequent Remedial Conduct.

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

Comment

This is the well established rule that remedial or precautionary measures taken after the occurrence of an event are not admissible to prove negligence or culpable conduct. The policy behind this rule is to encourage persons to take such measures. The exception added to the Court Committee draft by this Commission protects the *res gestae* principle.

Rule 52. Offer to Compromise and the Like, Not Evidence of Liability.

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

part of his pre-existing debt as tending to prove the creation of a new duty on his part, or a revival of his pre-existing duty.

Comment

The policy of this rule is to encourage litigants to settle their disputes. An offer to pay money in compromise or from humanitarian motives should not be admissible as evidence of liability.

Rule 53. Offer to Discount Claim, Not Evidence of Invalidity.

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

Comment

This rule is the corollary to Rule 52 and is designed to encourage settlements of disputes.

Rule 54. Liability Insurance.

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

Comment

This is the well settled New Jersey law that the existence of liability insurance is not admissible as tending to prove negligence or other wrongdoing.

Rule 55. Other Crimes or Civil Wrongs.

Subject to Rule [47] 48(2) evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his disposition to commit crime or civil wrong as the basis for an inference that he committed a[nother] crime or civil wrong on another specified occasion but, subject to Rules 45 and 48(1) , such evidence is admissible when relevant to prove some other material fact including [absence of mistake or accident,] motive, opportunity, intent, preparation, plan, knowledge, [or] identity[.], or absence of mistake or accident.

Comment

While evidence of the commission of a crime or civil wrong is inadmissible to prove a disposition to commit crime or civil wrong as the basis for an inference that he committed a crime on another specified occasion, this rule preserves admissibility to prove plan, intent and the like, when material.

VII. EXPERT AND OTHER OPINION TESTIMONY

Rule 56. Testimony in Form of Opinion.

(1) If the witness is not testifying as an expert his testimony in the form of opinions or inferences is limited to such opinions or inferences as the judge finds (a) may be rationally based on the perception of the witness and (b) are helpful to a clear understanding of his testimony or to the determination of the fact in issue.

(2) If the witness is testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to such opinions as the judge finds are (a) based on facts or data perceived by or personally known or made known to the witness at or before the hearing and (b) within the scope of the special knowledge, skill, experience or training possessed by the witness.

[(3) Unless the judge excludes the testimony he shall be deemed to have made the finding requisite to its admission.]

(3) [(4)] Testimony in the form of opinions or inferences otherwise admissible under these rules is not objectionable because it embraces the ultimate issue or issues to be decided by the trier of the fact.

Comment

This rule sets out the qualifications for opinion testimony. If the witness is not testifying as an expert, his opinion must be based on his own perception and must be helpful to the understanding of his testimony or to the determination of the fact in issue. If the witness is testifying as an expert, his opinion must be based on facts or data, either perceived by, presently known or made known to the witness at or before the hearing. The opinion of an expert must be within the scope of his expert qualifications.

Paragraph (3) of the Court Committee draft is deleted by this Commission as unnecessary. See Rule 1(8).

Paragraph (4) of the Court Committee draft is retained out of an abundance of caution to insure that the rule, that an opinion may not

embrace ultimate issues of fact, is not adopted. This rule exists in some jurisdictions, but there is no indication that it is the present rule in New Jersey.

Rule 57. Preliminary Examination.

[The judge may require that] On his direct examination, a witness [before] testifying in terms of opinion or inference shall indicate at least in general terms [be first examined concerning] the data upon which the opinion or inference is founded[.] , and the judge may require that he be first examined concerning such data before so testifying.

Comment

The draft submitted by this Commission requires that a witness before testifying in terms of opinion shall indicate in general terms the data upon which his opinion is founded. The judge may require that he first be examined in detail concerning such data.

Rule 58. Hypothesis for Expert Opinion Not Necessary.

Questions calling for the opinion of an expert witness need not be hypothetical in form unless the judge in his discretion so requires[, but the witness may state his opinion and reasons therefor without first specifying data on which it is based as an hypothesis or otherwise; but upon cross examination he may be required to specify such data].

Comment

This rule makes clear that it is not required that expert testimony be given in the form of an answer to an hypothetical question. The requirement that hypothetical questions be used under certain circumstances, although the present law of New Jersey, has been severely criticized as unnecessary, confusing, prejudicial and a waste of time.

Rule 59. Appointment of Experts.

[If the judge determines that the appointment of expert witnesses in an action may be desirable, he shall order the parties to show cause why expert witnesses should not be appointed, and after opportunity for hearing may request nominations and appoint one or more such witnesses. If the parties agree in the selection of an expert or experts, only those agreed upon shall

be appointed. Otherwise the judge may make his own selection. An expert witness shall not be appointed unless he consents to act. The judge shall determine the duties of the witness and inform him thereof at a conference in which the parties shall have an opportunity to participate. A witness so appointed shall advise the parties of his findings, if any, and may thereafter be called to testify by the judge or any party. He may be examined and cross-examined by each party. This rule shall not limit the parties in calling expert witnesses of their own selection and at their own expense.]

(1) The judge, with the consent of the parties not in default, may appoint one or more expert witnesses. A witness so appointed shall inform the parties of his findings, if any, and may thereafter be called to testify by the judge or any party. He may be examined and cross-examined by each party.

(2) Where an expert witness is appointed, the order may direct that the parties or their attorneys, and any experts of their own selection, shall confer with the expert appointed by the court, and shall make available to him relevant data and opinions in their possession, subject, however, to such protective restrictions as may be appropriate.

Comment

This Commission has not adopted the Court Committee draft permitting the appointment by the court of expert witnesses without the consent of the parties to the litigation. To permit the court to appoint an expert witness and to reveal that fact to the jury pursuant to the Court Committee draft of Rule 61, would result in undue weight being given to that expert's testimony. The basis of our judicial system is that justice will be done when each party to a litigated matter presents his own case in the best light. To permit a court appointed expert to testify, considering the weight which would be given to his testimony, would remove to a large degree the conduct of litigation from the parties.

This Commission feels that such a change is too substantial and too debatable to be incorporated as part of this revision. This Commission has incorporated provisions permitting the appointment of a court appointed expert with the consent of the parties. The form of such consent would embody the matters contained in Rules 60 and 61 of the Court Committee draft. Encouragement should be given to this practice and it is hoped that litigants will avail themselves of the opportunity presented.

[Rule 60. Compensation of Expert Witnesses.]

[Expert witnesses appointed by the judge shall be entitled to reasonable compensation in such sum only as the judge may allow. Except as may be otherwise provided by statute of this state applicable to a specific situation, the compensation shall be paid (a) in a criminal action by the **[**county**]** in the first instance under order of the judge and charged as costs in the case, and (b) in a civil action by the opposing parties in equal portions to the clerk of the court at such time as the judge shall direct, and charged as costs in the case. The amount of compensation paid to an expert witness not appointed by the judge shall be a proper subject of inquiry as relevant to his credibility and the weight of his testimony.**]**

Comment

In view of the changes in Rule 59, this rule is deleted.

[Rule 61. Credibility of Appointed Expert Witnesses.]

[The fact of the appointment of an expert witness by the judge may be revealed to the trier of the facts as relevant to the credibility of such witness and the weight of his testimony.**]**

Comment

In view of the changes made in Rule 59, this rule is deleted.

VIII. HEARSAY EVIDENCE

Rule 62. Definitions.

As used in Rule 63 and its exceptions and in the following rules,

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

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

[(3) "Perceive" means acquire knowledge through one's own senses.]

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

(5) "State" includes the District of Columbia.

(6) "A business" as used in exceptions (13) or (14) shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.

(7) "Unavailable as a witness" means that (a) the witness is dead, or (b) the witness is beyond the jurisdiction of the court's process to compel appearance, or (c) the witness is unable to testify because of then existing disability, or (d) the proponent of the statement is unable, despite due diligence, to procure the attendance of the witness by subpoena. [includes situations where the witness is (a) exempted on the ground of privilege from testifying concerning the matter to which his statement is relevant, or (b) disqualified from testifying to the matter, or (c) unable to be present or to testify at the hearing because of death or then existing physical or mental illness, or (d) absent beyond the jurisdiction of the court to compel appearance by its process, or (e) absent from the place of hearing because the proponent of his statement does not know and with diligence has been unable to ascertain his whereabouts.]

But a witness is not unavailable [(a) if the judge finds that his exemption, disqualification, inability or absence is due to] when the condition was brought about by the procurement, [or] wrongdoing [of the proponent of his statement for the purpose of preventing the witness from attending or testifying, or to the] or culpable neglect of [such] the party offering his statement, or when his [(b) if unavailability is claimed under clause

(d) of the preceding paragraph and the judge finds that the] deposition [of the declarant] could have been or can be taken by the exercise of reasonable diligence and without undue hardship, and [that] the probable importance of the testimony is such as to justify the expense of taking such deposition.

Comment

This rule contains the definition for words used in Rule 63 governing hearsay testimony. The definition of "perceive" has been transferred from this rule to Rule 1. The definition of "unavailable as a witness" has been changed from the Court Committee draft to more nearly conform to present standards. A witness is not unavailable under this Commission's draft, due to the existence of a privilege. The definition adopted by this Commission conforms to R.R. 4:16-4(c).

Rule 63. Hearsay Evidence Excluded—Exceptions.

Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:

Comment

In conformity to existing practice, all hearsay evidence is inadmissible except as hereinafter stated in the subdivisions of this rule. The significant portions of Rule 63 are the exceptions.

(1) Recorded Recollection.

[Previous Statements of Persons Present and Subject to Cross Examination.]

[A statement previously made by a person who is present at the hearing and available for cross examination with respect to the statement and its subject matter, provided the statement would be admissible if made by declarant while testifying as a witness;]

A written statement of what was perceived by the witness is admissible if the judge finds that the witness wrote or signed the statement, or put some distinctive symbol thereon, or caused the written statement to be made, as an accurate record of what he perceived, at the time of the occurrence or shortly thereafter and while the recollection of the witness was still clear;

Comment

The Court Committee draft is not adopted. Statements made by a person who is present should not be admissible through the testimony of another witness. The declarant should be called to the stand and testify himself. This Commission has substituted the present New Jersey rule as to "past recollection recorded," *Kazanjian* v. *Atlas Novelty Co.*, 34 N.J.Super. 362 (App. 1955), with the exception that the witness need not be unable to have his recollection refreshed.

(2) Affidavits[.] and Answers to Interrogatories.

Subject to Rule 64, affidavits, and answers to interrogatories, to the extent admissible by the statutes of this state or by rules of court, shall be admitted;

Comment

This Commission has added answers to interrogatories to the Court Committee draft, as they are admissible under certain circumstances, pursuant to R.R. 4:23-10.

(3) Depositions and Prior Testimony.

Subject to Rule 64, and subject to the same limitations and objections as though the declarant were testifying in person, a statement is admissible (a) when it is testimony in the form of a deposition taken in the cause [in compliance with] but only to the extent it is admissible under the [law] statutes or rules of court of this state [for use as testimony in the trial of the action in which offered], or (b) if the judge finds that the declarant is unavailable as a witness at the hearing, when it is testimony given by him as a witness in another action or in a deposition [taken in compliance with law for use as testimony] which was admissible in the trial of another action, [when] and (i) the testimony is offered against a party who offered it in his own behalf on the former occasion, or against the successor in interest of such party, or (ii) in a civil case or when offered by the defendant in a criminal case, the issue is such that the adverse party on the former occasion had the right and opportunity for cross examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered;

Comment

This rule provides that testimony in the form of a deposition taken in the cause is admissible to the extent provided by statute or rule of court. This Commission feels that depositions taken in the cause are part of the cause and their mechanics are subject to regulation by rule. As to depositions and testimony in another action, this Commission provides that they are admissible when the declarant is unavailable and when the evidence is offered against a party, or his successor in interest, who offered it in his own behalf on the former occasion; also in a civil case or when offered by the defendant in a criminal case, when interest and motive of the adverse party on the former occasion are similar to that of the adverse party in the present case.

(4) Contemporaneous Statements and Statements Admissible on Ground of Necessity Generally.

A statement is admissible when (a) [which the judge finds] it was made while the declarant was perceiving the event or condition which the statement narrates, describes or explains, or (b) [which the judge finds] it was made while the declarant was under [the] nervous stress [of a nervous] or excitement caused by such perception. [,or (c) if the declarant is unavailable as a witness, a statement narrating, describing or explaining an event or condition which the judge finds was made by the declarant at a time when the matter had been recently perceived by him and while his recollection was clear, and was made in good faith prior to the commencement of the action]

Comment

This rule is in substance the *res gestae* exception and embodies both of its recognized forms. The statement made while the declarant was actually perceiving the event or made while the declarant was under nervous stress or excitement is admissible. The reason for this exception is that the spontaneity of the statement or the conditions under which it was made are such as to render it credible. This Commission has not adopted the third paragraph of the Court Committee draft because of the possible unreliability of the proof.

(5) Dying Declarations.

A statement by a person unavailable as a witness because of his death, made in respect to the fatal event from which death ensues is admissible if [the judge finds that] it was made voluntarily and in good faith and while the declarant was conscious

of his impending death and believed that there was no hope of his recovery;

Comment

This also is a presently recognized exception to the hearsay rule. This Commission has changed the Court Committee draft to the extent that the dying declaration must be made with respect to the fatal event. It is not subject to the possible present New Jersey limitation providing that the exception is only recognized in criminal cases.

(6) Confessions.

In a criminal proceeding as against the accused, a previous statement by him relative to the offense charged is admissible if, and only if, [the judge finds that] the accused when making the statement was conscious and was capable of understanding what he said and did, and [that] if he was not induced to make the statement (a) [under] by compulsion or by infliction or threats of infliction of suffering upon him or another, or by prolonged interrogation under such circumstances as to render the statement involuntary, or (b) by threats or promises concerning action to be taken by a public official [with reference to the crime], likely to cause the accused to make such a statement falsely [, and made by a person whom the accused reasonably believed to have the power or authority to execute the same];

Comment

This exception provides for the admissibility of confessions in criminal actions. As under present practice, the rule is that such confessions must be voluntary. This Commission has expanded the scope of paragraph (b) as to what threats or promises will render a confession inadmissible.

(7) Admissions by Parties.

As against himself a statement is admissible when made by a person who is a party to the action in his individual or a representative capacity and if the latter, who was acting in such representative capacity in making the statement;

Comment

This covers the well recognized exception that any admission made by a party to the action is receivable against him.

(8) Authorized and Adoptive Admissions.

As against a party, a statement is admissible (a) when made by a person authorized by the party to make a statement or statements for him concerning the subject of the statement, or (b) [of which] when the party with knowledge of the content thereof has, by words or other conduct, manifested his adoption or his belief in its truth;

Comment

This provides for the admissibility against a party of statements made by a person authorized to make statements concerning the subject of the statement. It also includes statements which the party has adopted as his own by words or other conduct.

(9) Vicarious Admissions.

As against a party, a statement [which] is admissible if it would be admissible [if] when made by the declarant at the hearing if [(a) the statement concerned a matter within the scope of an agency or employment of the declarant for the party and was made before the termination of such relationship, or (b)] (a) the party and the declarant, when the statement was made, were participating in a plan to commit a crime or a civil wrong and the statement was made in furtherance of the plan, [relevant to the plan or its subject matter and was made while the plan was in existence and before its complete execution or other termination,] or [(c)] (b) one of the issues between the party and the proponent of the evidence of the statement is a legal liability of the declarant, and the statement tends to establish that liability;

Comment

This rule embodies the well recognized exception governing the admissibility of statements by co-conspirators under certain circumstances. This conforms the New Jersey rule to the Federal rule, by requiring that the statement must be in furtherance of the plan. It preserves the requirement that both the party and the declarant be members of the conspiracy when the statement is made. This Commission has not adopted the provision of the Court Committee draft as to the admissibility of statements by an agent against the principal where the agent was not authorized to make the statement. Paragraph (b) governs the particular type of declaration against interest where the declarant need not be unavailable.

(10) Declarations Against Interest.

[Subject to the limitations of exceptions (6), a] A statement [which] by a declarant who is unavailable as a witness is admissible if the judge finds [was] that, at the time of the assertion, it was so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to civil or criminal liability or so far rendered invalid a claim by him against another or created such risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true;

Comment

The Commission has added the requirement to the Court Committee draft that the declarant of a statement against interest be unavailable as a witness. This requirement of unavailability is the present New Jersey rule. The Court Committee draft, as well as this Commission's draft, broadens the present rule as to the type of disserving statements which are admissible.

[(11) Voter's Statements.]

[A statement by a voter concerning his qualifications to vote or the fact or content of his vote;]

Comment

The Court Committee draft, with which this Commission agrees, recommends the deletion of this exception because "the matter is minuscule."

(12) Statements of Physical or Mental Condition of Declarant.

Unless the judge finds it was made in bad faith, a statement is admissible when it is of the declarant's (a) then existing state of mind, emotion or physical sensation, including statements of intent, plan, motive, design, mental feeling, pain and bodily health, but not including memory or belief to prove the fact remembered or believed, when such a mental or physical condition is in issue or is relevant to prove or explain acts or conduct of the declarant, or (b) previous symptoms, pain or physical sensation, made to a physician consulted for treatment or for diagnosis with a view to treatment, and relevant to an issue of declarant's bodily condition;

Comment

Paragraph (a) of this rule is usually referred to as the "state of mind" exception and is the presently existing New Jersey law. Paragraph (b) is also the present New Jersey rule, rendering admissible statements to treating physicians. The only change from the Court Committee draft was in form.

(13) Business Entries and the Like.

Writings offered as memoranda or records of acts, conditions or events are admissible to prove the facts stated therein, if the judge finds that they were made in the regular course of a business at or about the time of the act, condition or event recorded, and that the sources of information from which made and the method and circumstances of their preparation were such as to indicate their trustworthiness;

Comment

This rule is also the present New Jersey rule embodied in N.J.S. 2A:82-34, et seq. The foundation for this rule is the probable trustworthiness of such testimony.

(14) Absence of Entry in Business Records.

Evidence of the absence of a memorandum or record from the memoranda or records of a business of an asserted act, event or condition, is admissible to prove the non-occurrence of the act or event, or the non-existence of the condition, if the judge finds that it was the regular course of that business to make such memoranda of all such acts, events or conditions at the time thereof or within a reasonable time thereafter, and to preserve them;

Comment

This rule is the corollary to the prior rule, rendering admissible the absence of a business record where such record is normally kept.

(15) Reports and Findings of Public Officials.

Subject to Rule 64 written reports or findings of fact made by a public official of the United States or of a state or territory of the United States, other than officials acting in a judicial or quasi-judicial capacity, are admissible if the judge finds that the making thereof was within the scope of the duty of such official

and that it was his duty (a) to perform the act reported, or (b) to observe the act, condition or event reported, or (c) to investigate the facts concerning the act, condition or event and to make statistical findings [or draw conclusions based on such investigation];

Comment

This Commission's draft differs from the Court Committee draft and agrees with the view of one member of that committee in that findings or reports of officials acting in a judicial or quasi judicial capacity are inadmissible. In many cases, the official would be drawing conclusions which would otherwise be for the jury. This Committee feels that such testimony would be of too great prejudicial effect on the jury. Paragraph (c) has been limited to statistical findings.

(16) Filed Reports, Made by Persons Exclusively Authorized.

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

Comment

This rule renders admissible records, reports and findings of fact made by persons who are under a statutory duty to do so. Examples are marriage, birth and death certificates, which are now rendered admissible by N.J.S. 2A:82-12.

(17) Content of Official Record.

Subject to Rule 64, (a) [if meeting the requirements of authentication under Rule 68, to prove the content of the record,] a writing purporting to be a copy of an official record or of an entry therein[,] is admissible to prove the content of the record, if it meets the requirements of authentication under Rule 68; and (b) [to prove the absence of a record in a specified office,] a writing made by the official custodian of the official records of the office, reciting diligent search and failure to find such record is admissible to prove the absence of a record in that office;

Comment

This rule provides that an authentic copy of an official record is admissible to prove the content of the record. The rule also covers the absence of an official record.

(18) Certificate of Marriage.

Subject to Rule 64, a certificate[s] that the maker thereof performed a marriage ceremony[,] is admissible [to prove the truth of the recitals thereof] as evidence of the matter certified, if [the judge finds that (a) the maker of the certificate at the time and place certified as the time and place of the marriage was authorized by law to perform marriage ceremonies, and (b) the certificate was issued at that time or within a reasonable time thereafter;] it purports (a) to have been made within a reasonable time after the marriage ceremony and (b) to have been made by a person who at the time and place of the marriage was authorized by law to perform marriage ceremonies;

Comment

A marriage certificate is admissible if it purports to have been made within a reasonable time after the marriage and purports to have been made by a person who was authorized by law to perform the ceremony. The change from the Court Committee draft was to make such certificates admissible if they purport to have been made by an authorized person and not requiring an affirmative finding by the judge to that effect.

(19) Records of Documents Affecting an Interest in Property.

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

Comment

This rule makes admissible the official record of a document purporting to establish or affect an interest in property to prove the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed. This rule is different from the present New Jersey rule, principally in N.J.S. 2A:82-20 governing ancient deeds or those recorded more than 10 years after the date of acknowledgment.

(20) Judgment of Previous Conviction.

[Evidence of a final judgment adjudging a person guilty of a felony, to prove any fact essential to sustain the judgment,]

In a civil action, evidence of a final judgment adjudging a person guilty of a high misdemeanor, or of a crime which would constitute a high misdemeanor if committed in this state, is admissible as against that person to prove any fact essential to sustain the judgment;

Comment

This rule makes admissible in a civil action a final judgment of guilt of a high misdemeanor. This changes the present New Jersey rule.

(21) Judgment Against Persons Entitled to Indemnity.

[To prove the wrong of the adverse party and the amount of damages sustained by the judgment creditor, evidence of a final judgment if offered by a judgment debtor in an action in which he seeks to recover partial or total indemnity or exoneration for money paid or liability incurred by him because of the judgment, provided the judge finds that the judgment was rendered for damages sustained by the judgment creditor as a result of the wrong of the adverse party to the present action;]

Subject to Rule 64, the record of a final judgment, 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 liability incurred because of the judgment, is admissible as evidence of the liability of the judgment debtor and of the facts on which the judgment is based. If the defendant in the second action had notice of and opportunity to defend the first action, the judgment is conclusive evidence;

Comment

A judgment against a judgment debtor is admissible to prove his liability in a subsequent action in which the judgment debtor seeks indemnity or exoneration. Such earlier judgment is conclusive evidence if the defendant in the second action had notice of the prior action.

(22) Judgment Determining Public Interest in Land.

To prove any fact which was essential to the judgment, evidence of a final judgment determining the interest or lack of

interest of the public or of a state or nation or governmental division thereof in land[,] is admissible subject to Rule 64 if offered [by a party] in an action in which any such fact or such interest or lack of interest is a material matter;

Comment

This rule provides that evidence of a final judgment determining the interest of the public in land is admissible in subsequent actions between private litigants. There are no New Jersey cases which either support or reject this rule, but this Commission considers the rule a good one.

(23) Statement Concerning One's Own Family History.

A statement of a matter concerning a declarant's own birth, marriage, divorce, legitimacy, relationship by blood or marriage, race-ancestry or other similar fact of his family history[,] is admissible even though the declarant had no means of acquiring personal knowledge of the matter declared, if the judge finds that the declarant is unavailable;

Comment

This rule and the succeeding three rules embody the so-called pedigree exception to the hearsay rule. Rule 63(23) makes admissible a statement by a person as to his own family history, if such person is unavailable.

(24) Statement Concerning Family History of Another.

A statement concerning the birth, marriage, divorce, death, legitimacy, [race-ancestry,] relationship by blood or marriage , race ancestry or other similar fact of the family history of a person other than the declarant is admissible if the judge (a) finds that the declarant was related to the other by blood or marriage or finds that he was otherwise so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared, [and made the statement as upon information received from the other or from a person related by blood or marriage to the other, or as upon repute in the other's family,] and (b) finds that the declarant is unavailable as a witness;

Comment

This rule provides that a statement made by an unavailable declarant as to the family history of some other person is admissible if the declarant and such other person were related or otherwise intimately associated.

This Commission has deleted the Court Committee proposal as to the basis for such statement. In most cases the basis would be unknown or indefinite.

(25) [Statement Concerning Family History Based on Statement of Another Declarant.]

[A statement of a declarant that a statement admissible under exceptions (23) or (24) of this rule was made by another declarant [,] is admissible when offered as tending to prove the truth of the matter declared by both declarants, if the judge finds that both declarants are unavailable as witnesses;]

Comment

This rule is deleted by this Commission as not having the same probability of accuracy as the prior two rules. This rule would make admissible the testimony of C as to a statement made by A to B and by B to C.

(26) Reputation in Family Concerning Family History.

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

Comment

Reputation among members of a family as to matters of family history is made admissible by this rule. Rule 63(23) and (24) apply to statements and not to reputation.

(27) Reputation—Boundaries, General History, Family History.

Evidence of reputation in a community is admissible as tending to prove the truth of the matter reputed, if (a) the reputation concerns boundaries of, or customs affecting, land in the community, and the judge finds that the reputation, if any, arose before controversy, or (b) the reputation concerns an event of general history of the community or of the state or nation of which the community is a part, and the judge finds that the event was of importance to the community, or (c) the reputation concerns the birth, marriage, divorce, death, legitimacy, relationship by blood or marriage, or race-ancestry of a person

resident in the community at the time of the reputation, or some other similar fact of his family history or of his personal status or condition which the judge finds likely to have been the subject of a reliable reputation in that community;

Comment

This rule applies to reputation in a community as to the matters enumerated. In general, such matters would be those in which the community would have an interest and the reputation probably accurate. Some approach the area of judicial notice.

(28) Reputation as to Character.

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

Comment

This would extend the present New Jersey rule to groups with which a person habitually associated. Reputation among co-employees, co-servicemen, etc., may be in some cases of greater weight than reputation in the community where he resides.

(29) Recitals in Documents Affecting Property.

[Evidence of a statement relevant to a material matter, contained in a deed of conveyance or a will or other document purporting to affect an interest in property, offered as tending to prove the truth of the matter stated, if the judge finds that the matter stated would be revelant upon an issue as to an interest in the property, and that the dealings with the property since the statement was made have not been inconsistent with the truth of the statements;]

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

Comment

Because of the inherent probability of truth, this rule makes admissible certain statements in instruments purporting to affect an interest in property. This rule would change the present New Jersey rule, which limits admissibility to ancient documents. In practice, such statements are widely relied upon.

(30) Commercial Lists and the Like.

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

Comment

This rule applies to trade journals or trade publications. There is authority to the effect that this is the present New Jersey rule. *State* v. *Carrano*, 27 N.J.Super. 382 (App. Div. 1953). This Commission feels that such publications are prepared under such circumstances as to make them reliable.

[(31) Learned Treatises.]

[A published treatise, periodical or pamphlet on a subject of history, science or art to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the treatise, periodical or pamphlet is a reliable authority in the subject.**]**

Comment

This Commission feels that the adoption of this rule would be unwise. It is considered that to permit the reading or submission of such material to the jury would impart excessive weight without suitable control. Only a few states accept this exception to the hearsay rule.

Rule 64. Discretion of Judge [under exceptions (15), (16), (17), (18) and (19)] to Exclude Evidence[.] under certain exceptions.

[Any writing admissible under exceptions (15), (16), (17), (18), and (19) of Rule 63 shall be received only if the party offering such writing has delivered a copy of it or so much thereof as may relate to the controversy, to each adverse party

a reasonable time before trial unless the judge finds that such adverse party has not been unfairly surprised by the failure to deliver such copy.] Whenever a declaration admissible by reason of paragraph (2), (3), (15), (16), (17), (18), (19), (21), (22) or (29) of Rule 63 is a writing, the judge may exclude it at the trial if it appears that the writing was not made known to the adverse party at such time as to prevent unfair surprise or deprive him of a fair opportunity to prepare to meet it.

Comment

This rule provides that certain written declarations admissible under Rule 63 may be excluded if it appears that the writing was not made known to the adverse party at such time as to prevent unfair surprise or deprive him of a fair opportunity to prepare to meet it. This rule would not apply to prior inconsistent statements in writing which are employed to impair credibility, and not as exceptions to the hearsay rule.

Rule 65. Credibility of Declarant.

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

Comment

This rule provides that the credibility of the declarant of a hearsay statement may be impaired or supported. Prior statements or conduct inconsistent with the hearsay statement are admissible even though the declarant had no opportunity to explain such prior statements or conduct.

Rule 66. Multiple Hearsay.

A statement within the scope of an exception to Rule 63 shall not be inadmissible on the ground that it includes a statement made by another declarant and is offered to prove the truth of the included statement if such included statement meets the requirements of an exception.

Comment

Multiple hearsay is admissible if each of the hearsay statements is covered by an exception to the hearsay rule enumerated in Rule 63.

IX. AUTHENTICATION AND CONTENT OF WRITINGS

Rule 67. Authentication Required; Ancient Documents.

Prima facie authentication of a writing is required before it may be received in evidence. Authentication may be by evidence sufficient to sustain a finding of its authenticity or by any other means provided by law. If the judge finds that a writing (a) is at least thirty years old at the time it is offered, and (b) is in such condition as to create no suspicion concerning its authenticity, and (c) at the time of its discovery was in a place in which such a document, if authentic, would be likely to be found, it is sufficiently authenticated.

Comment

Prima facie authentication of a writing is required before it may be received in evidence. The last sentence of this rule is a specification of one of the methods of authentication, to prevent its unintentional abolition.

Rule 68. Authentication of Copies of Records.

(1) A writing purporting to be a copy of an official record or of an entry therein, meets the requirement of prima facie authentication if (a) [the judge finds that] the writing purports to be published by authority of the nation, state or subdivision thereof, in which the record is kept; or (b) [evidence has been introduced sufficient to warrant a finding that the writing is a correct copy of the record of entry] the writing is authenticated by any method provided by law including judicial notice or evidence that it is a true or correct copy; or (c) the office in which the record is kept is within this state and the writing is attested as a true or correct copy of the record or entry by a person purporting to be an officer, or a deputy of an officer, having the legal custody of the record; or (d) if the office is not within the state, the writing is attested as required in clause (c) and is accompanied by a certificate that such officer has the custody of the record.

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

of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office.

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

(4) The authority of the officer, his custody of the record, and the genuineness of his signature and the seal of his office, shall be prima facie established by any designation or recital in or on the copy or certificate.

Comment

Paragraph (1) enumerates the methods by which a copy of an official record may be prima facie authenticated. Paragraphs (2), (3) and (4) deal with the type of the certificate of the officer required by paragraph (1)(d). This Commission has added paragraph (4) to insure that the authority of the officer, his custody of the record, the genuineness of his signature and the seal of his office, shall be prima facie established by any designation or recital in or on the copy or certificate.

Rule 69. Certificate of Lack of Record.

A writing admissible under exception (17) (b) of Rule 63 is authenticated in the same manner as is provided in clause (c) or (d) of Rule 68.

Comment

This provides the same method for authentication of a certificate as to the lack of an official record. The method of authentication is the same as in Rule 68(1)(c) and (d).

Rule 70. Documentary Originals as the Best Evidence.

(1) As tending to prove the content of a writing, no evidence other than the writing itself is admissible [, except as otherwise provided in these rules,] unless the judge finds (a) that the writing is lost or has been destroyed without fraudulent intent on the part of the proponent, or (b) that [the writing is outside the reach of the court's process and not procurable by the proponent,] the writing was not reasonably procurable by the

proponent by use of the court's process or by other available means, or (c) that [the opponent, at a time when the writing was under his control has been notified, expressly or by implication from the pleadings, that it would be needed at the hearing, and on request at the hearing has failed to produce it,] it is not within the possession or control of the proponent and the opponent did not produce the writing at the hearing after having been notified by the proponent that it would be needed, or (d) that the writing is not closely related to the controlling issues and it would be inexpedient to require its production, or (e) that the writing is an official record, or [is a writing affecting property authorized to be recorded and actually recorded in the public records as described in Rule 63, exception (19).] (f) that the writing is one which may be proved by other means provided by statute or by these rules.

(2) If the judge makes one of the findings specified in the preceding paragraph secondary evidence of the content of the writing is admissible. Evidence offered by the opponent tending to prove (a) that the asserted writing never existed, or (b) that [a] another writing produced at the trial is the asserted writing, or (c) that the secondary evidence does not correctly reflect the content of the asserted writings, is irrelevant and inadmissible upon the question of admissibility of the secondary evidence but is relevant and admissible upon the issues of the existence and content of the asserted writing to be determined by the trier of fact.

Comment

This rule is commonly known as the best evidence rule. The original of a writing must be produced unless any one or more of the enumerated conditions exist.

Rule 71. Proof of Attested Writings.

[When the execution of an attested writing is in issue,] Whether or not attestation of a writing is a statutory requisite of its effective execution, no attester is a necessary witness even though all attesters are available unless the statute requiring attestation specifically provides otherwise. This rule, however, shall not apply to a last will and testament or codicil or a document or paper purporting to be such.

Comment

This rule provides that the testimony of an attesting witness is not necessary, but it does not apply to last wills and testaments.

[Rule 72. Photographic Copies to Prove Content of Business and Public Records.]

[The content of any admissible writing made in the regular course of "a business" as defined by Rule 62 or in the regular course of duty of any "public official" as defined by said rule, may be proved by a photostatic, microfilm, microcard, miniature photographic or other photographic copy or reproduction or by an enlargement thereof, when duly authenticated, if it was in the regular course of such business or official activity to make and preserve such copies or reproductions as a part of the records of such business or office. The introduction of such copy, reproduction or enlargement does not preclude admission of the original writing if it is still in existence.]

Comment

This rule is obviously included for the benefit of those states which have not adopted the Uniform Photographic Copies of Business and Public Records as Evidence Act, which is of broader application and more comprehensive. It was adopted in New Jersey by P.L. 1951, ch. 286 (N.J.S. 2A:82-38, ff), and this Commission considers it unwise to adopt the more restricted form of Rule 72.

SUBJECT INDEX

—A—

PAGE

Absence; unavailability of witness 53, 55, 59, 64, 65
Accident; prior crimes or wrongs 48
Administrative proceedings; scope of rules 14
Admissibility of evidence. See Exclusion; see, also, Privilege; see, also Hearsay; see also, Witnesses
Admissibility; limited purpose, instruction 17
preliminary inquiry; burden of proof; presence of jury 17
Admission of privileged evidence; errors; who is aggrieved; review 42
Admissions; hearsay exception 57
hearsay exception; agent's statements (authorized or adoptive) 58
proof of subsequent repairs 47
vicarious; conspiracy; privity 58
Adultery; marital privilege 36
Affidavits; admissibility; hearsay 55
Affirmation; oath 24
Agent; admissions by; ratification 58
Alienation of affections; marital privilege 36
Ancestry; declaration; hearsay exception 64, 65
Ancient Documents; hearsay exception 66, 69
See also, Writings.
Appeal; erroneous admission of privileged testimony; who may raise 42
judicial notice on 21
rejection of remote evidence 44
Attestation. See Writings. See Witnesses.
Attorney and Client; Privileged Communications 31
Authentication. See Writings.

PAGE

—B—

Belief; hearsay 59
Best evidence 70
Bigamy; marital privilege 37
Birth; declaration; hearsay exception 64, 65
records; hearsay 61
Boundaries of land; reputation; hearsay exception 65
"Burden of persuasion"; definition 13
"Burden of producing evidence"; definition 13
admissibility 18
Burden of proof; admissibility 18
beyond a reasonable doubt 13, 23
clear and convincing evidence 13, 23
competence of witness 17
preponderance 17
presumptions 22, 23
"Business"; definition 53
Business records; hearsay exception 60
photographic copies 72

—C—

"Calling"; definition 53
Certified copies; authentication 69
Character evidence 45, 46
Character; hearsay exception 66
how proved 45
proof of care or skill; exclusion 46
trait of; how proved 46, 47
Child; crime against; privilege 28, 36
Civil actions; proof of conviction of crime 63
Civil proceedings; Scope of rules 14
Clergyman. See Priest. See Privilege; Priest.
"Client"; Definition 32
Codicil. See Will.
Collateral issues; Exclusion 44
Comment to jury; exercise of privilege 42
failure to testify 28, 42
Commercial lists; trades; hearsay exception 67

PAGE

Common law; judicial notice mandatory 19
"Communication"; definition 33
Competence; preliminary inquiry; burden of proof 17, 18
unavailability of witness 53
Compromise; exclusion on issue of liability 47, 48
"Conduct"; behavior, verbal, non-verbal 13
character trait; exclusion 46
mode of proof 46, 47
Confession; admissibility; presence of jury 18
criminal proceedings; hearsay 57
Confidential communications; spouses; privilege 36
spouses, consent to disclosure 22
Confusing evidence; Exclusion 44
Conspiracy; declarations of co-conspirators 58
Constitutions; Judicial notice mandatory 19
Contribution claims; judgment in first suit; hearsay 63
Copies; official records; authentication 69
Credibility 17, 24, 25, 26, 27, 38, 52, 68
Crime, conviction of; credibility of witness; exclusion 25
hearsay 63
Crimes; confessions 57
exclusion 25, 48
marital privilege 28, 36
proof of; character trait 45, 46
Criminal proceedings; Scope of rules 14
Cure; proof of tendency for; exclusion 46
Custom affecting land; reputation; hearsay exception 65
Custom; opinion evidence 47
proof of specific behavior 46

— D —

Death; declaration; hearsay exception 64, 65
Death; party or witness; testimony in prior trial, admissibility 55
Death; unavailability of witness 53
"Declarant"; definition 53
Declarations against interest 59

PAGE

Deeds; record of; hearsay 66
Defendant; failure to testify; comment to jury 28, 42
privilege not to testify in criminal action 28
privilege to prevent spouse's testimony 28
submission to physical examination 28
Definition; "Burden of persuasion" 13
"Burden of producing evidence" 13
"Burden of proof" 13
"business" 53
"calling" 53
"Client" 32
"communication" 33
"Conduct" 13
"confidential communication between physician and patient" 33
"declarant" 53
"District of Columbia" 53
"Evidence" 13
"Finding of fact" 13
"Guardian" 14
"Hearing" 13
"hearsay evidence" 54
"holder of privilege" 33
"Incompetent" 14
"Incrimination" 29
"institution, operation of" 53
"Judge" 14
"Lawyer" 33
"occupation" 53
"official information" 39
"patient" 33
"penitent" 37
"penitential communication" 37
"perceive" 14, 53
"physician" 33
"presumption" 22
"priest" 37
"profession" 53
"proof" 13
"public official" 53

PAGE

"relevant evidence" 13
"ruling" 13
"secret of state" 39
"State" 53
"statement" 53
"Trier of fact" 14
"unavailable as a witness" 53
"Verbal" 14
"Writing" 14
Depositions; admissibility; hearsay 55
Design; hearsay 59

—E—

Emotion; hearsay 59
Error; admission or exclusion of evidence 16
Exclusion; care, proof of character trait 46
collateral issues 44
compromise offers 47, 48
conduct; proof of character trait 45, 46
confusing evidence 44
custom; corroborating circumstances 46
custom; opinion 47
custom; specific instances of conduct 47
habit; see custom, this heading.
hearsay evidence 54
indictment; mental process of juror 43
insurance as proof of negligence 48
lack of perception 24
misleading evidence 44
partial satisfaction 47, 48
precautionary measures 47
prejudicial evidence 44
prior crimes or wrongs 48
qualification of witness 24
remedial measures 47
remoteness 44
similar events 48
skill; proof of character trait 46

PAGE

slight probative value 44
statement of intent or purpose 59
subsequent repairs 47
testimony by judge 43
testimony by juror 43, 44
time-consuming evidence 44
unfair surprise 44, 68
verdict; mental process of juror 43
Exemplified copies; authentication 69
Exhibits; authentication 69
Exoneration claims; judgment in first suit 63
Expert witnesses 24, 49, 50, 51, 52

—F—

Failure to testify 28, 42
Family history 64, 65
Felony conviction; hearsay exception 63
"Finding of fact"; definition 13
requirement for separate or formal finding 14
Foreign law; judicial notice 19

—G—

Genealogy; hearsay exception 64, 65
Grand Jury; privileged communications 40
secrecy of proceedings 44
Guarantor; judgment in first suit 63
"Guardian"; definition 14

—H—

Habit; method of proof 46, 47
Handwriting as writing 14
Health; hearsay exception 59
"Hearing"; definition 13

PAGE

Hearsay; basic definitions; limitations 53
basic exclusion 54
Hearsay; exception; admission by agent 58
admissions by others 58
admissions by party 57
affidavits 55
ancestry 64, 65
ancient documents 66
answers to interrogatories 55
belief 59
birth 64, 65
boundaries 65
business entries 60
character 66
co-conspirators 58
commercial lists 67
confession of crime 57
contemporaneous memoranda 54
contribution claims 63
conviction of crime 63
copies to be furnished 67
credibility of declarant 68
custom affecting land 65
death 64, 65
declarations against interest 59
depositions 55
design 59
discretion of court 67
divorce 64, 65
double hearsay 68
dying declarations 56
emotion 59
exciting event 56
exoneration claims 63
family history 64, 65
family history by reputation 65
filed reports 61
findings of public officials 60
health 59
historical events 65

PAGE

imputed admissions 58
indemnity claims 63
intent 59
judgment in another cause 63
judgment of conviction 63
judgment of public interest in land 63
legitimacy 64, 65
marriage 64, 65
marriage certificate 62
memory 59
mental feeling 59
motive 59
multiple hearsay 68
notice to adversary 67
official record 61
pain 59
pamphlets, learned 67
periodicals, learned 67
plan 59
property records 62
public official's reports 60
race 64, 65
recitals in title papers 66
recorded recollection 54
records of property 62
relationship 64, 65
reports of public officials 60
reputation 65, 66
res gestae 56
sensation 59
state of mind 59
symptoms 59
testimony in prior trial 55
trade publications 67
treatises, learned 67
vicarious admissions 58
Hearsay within hearsay 68
History; hearsay exception 65
"Holder of privilege"; definition 33

PAGE

—I—

Identity; prior crimes or wrongs 48
Illness, unavailability of witness 53
Impeaching witness 25, 26
"Incompetent"; definition 14
Inconsistent statements; credibility; limitations 27
Incrimination; body fluids 30
corporate personnel 30
finding by judge 30
forfeiture of estate; penalty 30
physical examination 30
production of papers or chattels 30
professions 30
public officials 30
State laws 29
waiver 31, 41
whom may claim 30
"Incrimination"; definition 29
Indemnity claims; judgment in first suit 63
Indictment; evidence of mental process of juror 43
Informers; privilege not to disclose 40
Instruction to jury; admissibility 18
confession 18
judicial notice 21
limiting the evidence 17
Insurance; not proof of negligence 48
Intent; prior crimes or wrongs 48
hearsay 59
Interpreters 24

—J—

Judge; comment by 28, 42
discretion 22, 44, 50
finding by 13, 16, 17, 18, 20, 24, 30, 32, 34, 36, 38, 39, 40, 41, 43, 49, 53, 54, 55, 56, 57, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71

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PAGE

testimony by; mistrial 43
as trier of fact 14
"Judge"; definition 14
Judgment of conviction; hearsay exception 63
restrictions 25, 26, 45, 48
Judicial findings; hearsay 60
Judicial notice; exclusionary rules 20
instruction to jury 21
Mandatory; common law 19
constitutions 19
request to notice 19
statutes 19
universal facts 19
permissive; foreign laws 19
ordinances 19
private laws 19
regulations 19
special custom 19
verifiable facts 19
procedure 20
proceedings after trial 21
question for court 20
review of 21
Jury; evidence of mental process 43
comment to; failure to testify 28, 42
privilege 28, 42
judicial notice; instructions 21
presence of, confessions 18
preliminary inquiries 18
testimony by juror 43, 44
"trier of fact" 14

—K—

Knowledge; prior crimes or wrongs 48

—L—

Lawyer; privileged communication 31
Legitimacy; hearsay exception 64, 65
Lost documents; secondary evidence 70

PAGE

—M—

Marital privilege 28, 36
Marriages; crime involving 28
certificate 62
hearsay exception 61, 64, 65
Material fact or matter 13, 15, 38, 44, 48, 64
Memoranda; hearsay exception 54, 60
Memory; hearsay 59
Microfilm; hearsay exception 72
Misleading evidence; exclusion 44
Mistake; prior crimes or wrongs 48
Motive 48, 59
Multiple hearsay 68

—N—

Negligence; insurance 48
offer of compromise 47
subsequent repairs 47
Neutralizing witness 25, 26
Newspaperman's privilege 35
Notice to produce; secondary evidence 71

—O—

Oath of witness 24
Objection to evidence 16
Observation; opinion of lay witness 49
"Occupation"; definition 53
"Official Information"; privilege 39
Opinion; expert witnesses 49
factual basis 50
habit or custom 47
hypothetical questions 50
non-experts 49
proof of character 45
Opportunity; prior crimes or wrongs 48

Order of proof 24, 50
Original writings 70, 72

—P—

Pain; hearsay exception 59
Partial satisfaction; exclusion 47, 48
Perception; definition 14, 53
opinions 49
res gestae 56
testimony 24
Personal knowledge 24
Photographs 14, 72
Photostats 14, 72
Physician's privilege 33
testimony of symptoms; hearsay exception 59
Pictures as writing 14
Plan 48, 58, 59
Post hoc ergo propter hoc 47
Prejudicial evidence, exclusion 44
Preparation; crimes or wrongs 48
Presumption; attorney-client relation 33
burden of proof 22, 23
conflicting presumptions 23
definition 22
effect 22
standard of proof 22, 23
"Priest"; definition 37
Printing as writing 14
Prior testimony; hearsay exception 55
Privilege; accused in criminal action 28
comment to jury 28, 42
communication to Grand Jury 40
disallowance; error 16, 18, 42
informer's identity 40
lawyer-client 31
limitations 30
marital 28, 36
newspaperman 35

PAGE

official information 39
physician-patient 33
political vote 38
priest-penitent 37
religious belief 38
secret of state 39
trade secret 39
undisputed matter 15
waiver or consent 28, 35, 36, 37, 39, 41
Profession; definition 53
Proof; definition 13
Property records; hearsay exception 62
Public official; definition 53
privilege 30
reports and findings 60

— R —

Race; hearsay exception 64, 65
Ratification; agent's admissions 58
Recitals in title papers 66
Records 60, 61, 62, 69, 70, 72
Regulations; judicial notice 19
Relationship; hearsay exception 64, 65
Relaxation of evidence rules 15
Relevant evidence; admissibility 17
definition 13
Remoteness; exclusion of evidence 44
Reports of public officials; hearsay exception 60
Reputation; hearsay exception 66
proof of character 45
Res gestae 56
Res inter alios acta 46, 47, 48
"Ruling"; definition 13

— S —

Scope of rules 14
Secret of state; definition 39

PAGE

Self-incrimination 28, 29, 30
Sensation; hearsay exception 59
Silence; effect as admission 58
Skill, tendency for; proof of trait 46
Slight probative value 44
Sounds as writings 14
Special custom; judicial notice 19
Spontaneous declarations 56
Spouse; crime or wrong against 28, 36
"State"; definition 53
State of mind; hearsay exception 59
"Statement"; definition 53
Statutes; judicial notice of 19
not affected by these rules 14
official information; non-disclosure 39
private laws, judicial notice of 19
Surprise; neutralizing testimony 25, 26
Symbols as writing 14
Symptoms; hearsay exceptions 59

—T—

Time-consuming evidence; exclusion 44
Trade secret; privilege 39
Treatises, learned; hearsay 67
"Trier of fact"; definition 14
Typewriting as writing 14

—U—

Ultimate facts; opinion evidence 49
Unavailability of witness 53, 55, 59, 64, 65
Undisputed matter 15
Unfair surprise 44, 68
Universally known facts; judicial notice 19

PAGE

—V—

"Verbal"; definition 14
Verdict set aside 16
Verifiable facts; judicial notice 19
Vicarious admissions; hearsay exception 58
Voting 38, 59

—W—

Weight of evidence; court-appointed expert 52
fees paid to experts 52
Wills; attestation 71
recitals in; hearsay exception 66
Witnesses; absence of 53
affirmation 24
attesting 71
competence and qualification 17, 24, 28, 43, 44, 49
credibility 17, 18, 25, 26, 27, 31, 38, 52, 68
death; prior testimony 55
unavailability 53
experts 49, 51, 52
neutralizing testimony 26
oath 24
opinion 49, 50
reputation for truth and veracity 27
Words as writing 14
"Writing"; definition 14
Writings; attestation 71
authentication 69
copies 69, 70
notice before use as hearsay 67
notice to produce 71
Wrongful procurement; unavailability of witness 53