

Trial Preparation/Trial Notebooks

A Lawyer's Perspective

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Trial Preparation

Please note, for purposes of this presentation, I will refer to the Plaintiff/Wife/Jane Doe as "my client" for ease of reference and continuity purposes.

1. It begins Day One when the Complaint for Divorce is filed or received, depending which party you represent.
  - a. You always have to keep the end game (the possibility that the case will need to be tried) in focus. Oftentimes this will assist in settling your case because it will highlight the strengths and weaknesses of each side's case, incentivizing the settlement of the issues.
  - b. Hope for the best (to settle your case), but prepare for the worst (to try your case)
  - c. As the case moves forward, create two (2) sets of timelines, that will ultimately merge at some point in time.
    - i. First timeline – This should include all major events/facts/circumstances of the marriage.
    - ii. Second timeline – This should include all major events, facts, and circumstances of the divorce litigation. Be sure to include any ancillary issues such as domestic violence matters or contempt hearings.
    - iii. You will want and need to access dates quickly. This is the easiest/most efficient way to keep important dates fresh in your memory or ready at your fingertips.
  - d. Settlement position v. Trial position
2. Discovery
  - a. Interrogatories
  - b. Notice to Produce
  - c. Requests for Admissions of Fact
  - d. Requests for Admissions of Genuineness of Documents
  - e. Subpoenas
  - f. Deposition Notices/Transcripts
3. Stipulations
  - a. Facts
    - i. This can eliminate extensive testimony on issues that are simply not in dispute, i.e., Date of marriage, number of children, names of children, Date of Complaint, etc.
    - ii. Compare Certifications, ESP Statements, ISC Statements, etc., to find all of the common ground that parties, no matter how far apart on the triable issues, actually agree.
  - b. Law
    - i. This can narrow the focus of arguments if both sides agree on the burden of proof necessary, controlling statutory language, etc.

- ii. Compare Letter memorandums, pre-trial briefs, etc., to find all of the common ground law that both sides agree, despite perhaps very different interpretations or applications of that law.
  - c. Exhibits
    - i. Enter any non-objectionable exhibits as Joint Exhibits, as this can minimize the time necessary for voir dire and foundations needing to be laid for the entry of exhibits into evidence.
    - ii. Any and all pleadings, Case Information Statements, Certifications, Joint tax returns, joint account statements, etc., can all be labeled as Joint Exhibits, assuming the parties agree. Be as inclusive as the facts and circumstances of your case permit.
  - d. Issues
    - i. Include any and all agreed to/resolved issues. For example, if the parties agree on the issues of Alimony and Child Support but need the Court to resolve Equitable Distribution, Custody/Parenting Time, and Counsel Fees, the Court should know this from the outset.
- 4. Pre-Trial Submissions
  - a. Different County, Different Judge may lead to different procedures so be prepared based upon the Trial Notices you receive.
  - b. Submissions to expect:
    - i. Updated, Trial Case Information Statement
      - 1. Include any and all documents your client has substantiating the information contained therein, i.e., tax returns, W-2s, paystubs, account statements, mortgage statements, etc.
    - ii. Stipulations
    - iii. Witness List
      - 1. Include a brief summary of the issues to be testified on and the approximate length of time anticipated for said testimony
    - iv. Outstanding Issues List
    - v. Legal Memorandum/Brief
    - vi. Pre-Marked Exhibit List
- 5. Rules of Evidence (Exhibit A)
  - a. Rule 408 – Settlement Offers and Negotiations
    - i. Proof of ability to pay example
  - b. Rule 504 – Lawyer Client Privilege
    - i. Phone logs, text messages, emails, etc., example
  - c. Rule 602 – Lack of Personal Knowledge
    - i. Good objection to be on the look out for during the other side's presentation of witnesses
  - d. Rule 611 – Mode and Order of Interrogation and Presentation
    - i. Parties v. Experts example
    - ii. Leading questions on direct/hostile or adversarial witness example
  - e. Rule 612 – Writing Used to Refresh Memory
    - i. Anything can be used example
  - f. Rule 615 – Sequestration of Witnesses
    - i. Be sure to request this at the start of testimony for each and every witness

## Trial Notebook

Please note, when referring to the Trial Notebook below, unless otherwise indicated, I am referring to your copy of the Trial Notebook, which should be extensively more detailed and contain significantly more work product than the copies of the Exhibit Binders that are provided to the Court and your adversary in advance of trial.

Also, please keep in mind that your Trial Notebook is a very personal document/creation and therefore your personal style and comfort should be utilized. Furthermore, the facts and circumstances of each case may dictate the style and presentation of your Trial Notebook as well. Do not feel as though a Trial Notebook has one and only one correct format.

1. Preliminary Issues
  - a. Motions in limine
  - b. Discovery issues
  - c. Expert fees/witness issues
  - d. Judicial Notice (may happen at any time during the trial, but if there is something at the outset you would like the Court to take judicial notice of, then first thing would be a great time to raise that issue).
  - e. Logistics -- Exchange of cell phone numbers
    - i. Any conflicts/upcoming vacations/etc.
2. Opening Statement
  - a. Roadmap for your case -- Tell the Judge what you will prove
  - b. Outline format v. Written format
    - i. You know your case
    - ii. Highlight your strengths
    - iii. Minimize, but definitely address, your weaknesses
3. Direct Examinations
  - a. Begin with your witness list (Exhibit B)
  - b. Separate section for each witness
  - c. Outline format v. Written format
    - i. Need to be able to react to the witness as he/she answers and follow up as needed
    - ii. Indicate any and all exhibits you intend to show each witness during their testimony, i.e., the Complaint, CIS, etc. Where possible, indicate specific page/line numbers that you wish to refer to in the witness' testimony.
    - iii. Indicate any and all exhibits you may need to either rebut or refresh a witness' testimony, i.e., Certifications, Deposition transcripts, etc. Where possible, indicate specific page/line numbers that you wish to refer to in the witness' testimony.
    - iv. Indicate any and all issues that you need each witness to cover/testify to during their direct to prove your client's case or disprove the other side's case.
4. Exhibits
  - a. Begin with your exhibit list (Exhibit C)
    - i. There should be three (3) columns after each labeled exhibit on the list:

1. Date of Identification;
  2. Date into Evidence;
  3. Authority for introduction into evidence (your copy only)
- b. There should be four (4) complete sets of this section
- i. Your Copy
  - ii. Adversary's Copy
  - iii. Judge's Copy
  - iv. Court/Witness Copy
- c. Everything you want to offer into evidence, exclusive of rebuttal exhibits, by the end of the trial should be included in here.
- i. Assume that each and every exhibit will be objected to by opposing counsel.
  - ii. Include any and all Rules of Court, Rules of Evidence, Statutes, Case Law, as authority justifying why you are allowed to offer each and every exhibit into evidence, after a proper foundation has been laid.
  - iii. Save room to include any and all potential rebuttal evidence, which will likely need to be added to the list at some point in time or another.
5. Cross Examinations
- a. Begin with their witness list
  - b. Separate section for each witness
  - c. Outline format v. Written format
    - i. Need to be able to react to the witness as he/she answers and follow up as needed
    - ii. Lead your witness!!
    - iii. Indicate any and all exhibits you intend to show each witness during their testimony. Where possible, indicate specific page/line numbers that you wish to refer to in the witness' testimony.
    - iv. Indicate any and all exhibits you may need to either rebut or refresh a witness' testimony. Where possible, indicate specific page/line numbers that you wish to refer to in the witness' testimony.
    - v. Indicate any and all issues that you want to address with this client to further prove your client's case or disprove the other side's case.
6. Closing Argument
- a. Summarize your case – Remind the Judge what you have proven
  - b. This may not be necessary if the Court requests written summations, but depending on the length of the case/complexity of the issues, may be a good chance to tell the Judge everything he/she needs to know.
  - c. Outline format v. Written format
    - i. You know your case
    - ii. Highlight your strengths
    - iii. Minimize, but definitely address, your weaknesses
7. Trial Notes
- a. Separate section or separate notebook altogether for this
  - b. Indicate the Date and Times of actual testimony
  - c. Indicate the Witnesses that testified that date
  - d. Indicate any and all objections made and their outcomes

- e. Indicate any and all exhibits marked for ID or entered into evidence, including any exhibits that were precluded from evidence.
- f. Take notes as though someone who is not there will be drafting the summation or preparing an appeal solely from the notes after having not been present for any of the trial

# **EXHIBIT A**

New Jersey Rules of Evidence

RULE 101. SCOPE; DEFINITIONS

(a) *Applicability; exceptions.*

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

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

- (A) actions within the cognizance of the Small Claims Section of the Special Civil Part of the Superior Court, Law Division, and the Small Claims Division of the Tax Court whether or not the action was instituted in a Small Claims Section or Division;
- (B) in accordance with a statutory provision;
- (C) proceedings in a criminal or juvenile delinquency action in which information is presented for the court's use in exercising a sentencing or other dispositional discretion, including bail and pretrial intervention and other diversionary proceedings;
- (D) to the extent permitted by law, proceedings to establish probable cause, including grand jury proceedings, probable cause hearings, and ex parte applications;
- (E) proceedings to determine the admissibility of evidence under these rules or other law.

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

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

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

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

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

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

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

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

**HISTORY:** Adopted September 15, 1992 to be effective July 1, 1993; paragraph (b)(2) amended September 15, 2004 to be effective July 1, 2005.

#### **RULE 201. Judicial Notice of Law and Adjudicative Facts**

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

(b) *Notice of facts.* --Facts which may be judicially noticed include:



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

(a) *When discretionary.* --A court may take judicial notice whether requested or not.

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

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

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

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

**HISTORY:** Adopted September 15, 1992 to be effective July 1, 1993.

**RULE 401. Definition of "Relevant Evidence"**

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

**HISTORY:** Adopted September 15, 1992 to be effective July 1, 1993.

**Rule 402. Relevant Evidence Generally Admissible**

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

**HISTORY:** Adopted September 15, 1992 to be effective July 1, 1993.

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

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

**HISTORY:** Adopted September 15, 1992 to be effective July 1, 1993.

**Rule 408. Settlement Offers and Negotiations**

When a claim is disputed as to validity or amount, evidence of statements or conduct by parties or their attorneys in settlement negotiations, with or without a mediator present, including offers of compromise or any payment in settlement of a related claim, shall not be admissible to prove liability for, or invalidity of, or amount of the disputed claim. Such evidence shall not be excluded when offered for another purpose; and evidence otherwise admissible shall not be excluded merely because it was disclosed during settlement negotiations.

**HISTORY:** Adopted September 15, 1992 to be effective July 1, 1993; amended September 15, 1998 to be effective July 1, 1999.

**Rule 504. Lawyer-Client Privilege**

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

(1) **General rule.** Subject to Rule 37 [Rule 530] and except as otherwise provided by paragraph 2 of this rule communications between lawyer and his client in the course of that relationship

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

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

(3) **Definitions.** As used in this rule (a) "client" means a person or corporation or other association that, directly or through an authorized representative, consults a lawyer or the lawyer's representative for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity; and includes a person who is incapacitated whose guardian so consults the lawyer or the lawyer's representative in behalf of the person who is incapacitated, (b) "lawyer" means a person authorized, or reasonably believed by the client to be authorized to practice law in any State or nation the law of which recognizes a privilege against disclosure of confidential communications between client and lawyer. A communication made in the course of a 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.

**Note:** Adopted September 15, 1992 to be effective July 1, 1993; amended 2013, c. 103, § 16, eff. Aug. 7, 2013.

#### **Rule 505. Psychologist Privilege**

N.J.S.A. 45:14B-28 provides: The confidential relations and communications between and among a licensed practicing psychologist and individuals, couples, families or groups in the course of the practice of psychology are placed on the same basis as those provided between attorney and client, and nothing in this act shall be construed to require any such privileged communications to be disclosed by any such person.

There is no privilege under this section for any communication: (a) upon an issue of the client's condition in an action to commit the client or otherwise place the client under the control of another or others because of alleged incapacity, or in an action in which the client seeks to establish his competence or in an action to recover damages on account of conduct of the client which constitutes a crime; or (b) upon an issue as to the validity of a document as a will of the client; or (c) upon an issue between parties claiming by testate or intestate succession from a deceased client.

**Note:** Adopted September 15, 1992 to be effective July 1, 1993; section 45:14B-28 amended by the Legislature, L. 1994, c. 134, § 11, eff. Oct. 31, 1994; 1997, c. 379, § 11, eff. Jan 19, 1998.

#### **Rule 506. Patient and Physician Privilege**

N.J.S.A. 2A:84A-22.1 provides: As used in this act, (a) "patient" means a person who, for the sole purpose of securing preventive, palliative, or curative treatment, or a diagnosis preliminary to such treatment, of the patient's physical or mental condition, consults a physician, or submits to an examination by a physician; (b) "physician" means a person authorized or reasonably believed by the patient to be authorized, to practice medicine in the State or jurisdiction in which the consultation or examination takes place; (c) "holder of the privilege" means the patient while alive and not under the guardianship of the guardian of the person of a patient who is incapacitated, 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.

N.J.S.A. 2A:84A-22.2 provides: Except as otherwise provided in this act, a person, whether or not a party, has a privilege in a civil action or in a prosecution for a crime or violation of the disorderly persons law or for an act of juvenile delinquency to refuse to disclose, and to prevent a witness from disclosing, a communication, if he claims the privilege and the judge finds that (a) the communication was a confidential communication between patient and physician, and (b) the patient or the physician reasonably believed the communication to be necessary or helpful to enable the physician to make a diagnosis of the condition of the patient or to prescribe or render treatment therefor, and (c) the witness (i) is the holder of the privilege or (ii) at the time of the communication was the physician or a person to whom disclosure was made because reasonably necessary for the transmission of the communication or for the accomplishment of the purpose for which it was transmitted or (iii) is any other person who obtained knowledge or possession of the communication as the result of an intentional breach of the physician's duty of nondisclosure by the physician or his agent or servant and (d) the claimant is the holder of the privilege or a person authorized to claim the privilege for him.

N.J.S.A. 2A:84A-22.3 provides: There is no privilege under this act as to any relevant communication between the patient and his physician (a) upon an issue of the patient's condition in an action to commit him or otherwise place him under the control of another or others because of alleged incapacity, or in an action in which the patient seeks to establish his competence or in an action to recover damages on account of conduct of the patient which constitutes a criminal offense other than a misdemeanor, or (b) upon an issue as to the validity of a document as a will of the patient, or (c) upon an issue between parties claiming by testate or intestate succession from a deceased patient.

N.J.S.A. 2A:84A-22.4 provides: There is no privilege under this act in an action in which the condition of the patient is an element or factor of the claim or defense of the patient or of any party claiming through or under the patient or claiming as a beneficiary of the patient through a contract to which the patient is or was a party or under which the patient is or was insured.

N.J.S.A. 2A:84A-22.5 provides: There is no privilege under this act as to information which the physician or the patient is required to report to a public official or as to information required to be recorded in a public office, unless the statute requiring the report or record specifically provides that the information shall not be disclosed.

N.J.S.A. 2A:84A-22.6 provides: No person has a privilege under this act if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the services of the physician were sought or obtained to enable or aid anyone to commit or to plan to commit a crime or a tort, or to escape detection or apprehension after the commission of a crime or a tort.

N.J.S.A. 2A:84A-22.7 provides: A privilege under this act as to a communication is terminated if the judge finds that any person while a holder of the privilege has caused the physician or any agent or servant of the physician to testify in any action to any matter of which the physician or his agent or servant gained knowledge through the communication.

**Note:** Adopted September 15, 1992 to be effective July 1, 1993; section 2A:84A-22.3 amended by the Legislature, L. 1997, c. 379, § 10, eff. Jan. 19, 1998; amended 2013, c. 103, § 18, eff. Aug. 7, 2013.

#### **Rule 510. Marriage Counselor Privilege**

N.J.S.A. 45:8B-29 provides: A communication between a marriage and family therapist and the person or persons in therapy shall be confidential and its secrecy preserved. This privilege shall not be subject to waiver, except where the marriage and family therapist is a party defendant to a civil, criminal or disciplinary action arising from the therapy, in which case, the waiver shall be limited to that action.

**Note:** Adopted September 15, 1992 to be effective July 1, 1993; section 45:8B-29 amended by the Legislature, L. 1995, c. 366, § 16, eff. Jan. 5, 1996.

#### **Rule 511. Priest-Penitent Privilege**

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

Any communication made in confidence to a cleric in the cleric's professional character, or as a spiritual advisor in the course of the discipline or practice of the religious body to which the cleric belongs or of the religion which the cleric

professes, shall be privileged. Privileged communications shall include confessions and other communications made in confidence between and among the cleric and individuals, couples, families or groups in the exercise of the cleric's professional or spiritual counseling role.

As used in this section, "cleric" means a priest, rabbi, minister or other person or practitioner authorized to perform similar functions of any religion.

The privilege accorded to communications under this rule shall belong to both the cleric and the person or persons making the communication and shall be subject to waiver only under the following circumstances:

Both the person or persons making the communication and the cleric consent to the waiver of the privilege; or

The privileged communication pertains to a future criminal act, in which case, the cleric alone may, but is not required to, waive the privilege.

Note: Adopted September 15, 1992 to be effective July 1, 1993; section 2A:84A-23 amended by the Legislature, L. 1994, c. 123, § 1, eff. Oct. 26, 1994.

#### Rule 517. Victim Counselor Privilege

N.J.S.A. 2A:84A-22.13 provides:

The Legislature finds and declares that:

a. The emotional and psychological injuries that are inflicted on victims of violence are often more serious than the physical injuries suffered;

b. Counseling is often a successful treatment to ease the real and profound psychological trauma experienced by these victims and their families;

c. In the counseling process, victims of violence openly discuss their emotional reactions to the crime. These reactions are often highly intertwined with their personal histories and psychological profile;

d. Counseling of violence and victims is most successful when the victims are assured their thoughts and

feelings will remain confidential and will not be disclosed without their permission; and

e. Confidentiality should be accorded all victims of violence who require counseling whether or not they are able to afford the services of private psychiatrists or psychologists.

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

N.J.S.A. 2A:84A-22.14 provides:

As used in this act:

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



supervisor of the center and who has a primary function of rendering advice, counseling or assisting victims of acts of violence. "Victim counselor" includes a rape care advocate as defined in Section 4 of P.L.2001, c.81 (C.52:4B-52).

N.J.S.A. 2A:84A-22.15 provides:

Subject to Rule 37 [Rule 530] of the Rules of Evidence, a victim counselor has a privilege not to be examined as a witness in any civil or criminal proceeding with regard to any confidential communication. The privilege shall be claimed by the counselor unless otherwise instructed by prior written consent of the victim. When a victim is incapacitated or deceased consent to disclosure may be given by the guardian, executor or administrator except when the guardian, executor or administrator is the defendant or has a relationship with the victim such that he has an interest in the outcome of the proceeding. The privilege may be knowingly waived by a juvenile. In any instance where the juvenile is, in the opinion of the judge, incapable of knowing consent, the parent or guardian of the juvenile may waive the privilege on behalf of the juvenile, provided that the parent or guardian is not the defendant and does not have a relationship with the defendant such that he has an interest in the outcome of the proceeding. A victim counselor or a victim cannot be compelled to provide testimony in any civil or criminal proceeding that would identify the name, address, location, or telephone number of a domestic violence shelter or any other facility that provided temporary emergency shelter to the victim of the offense or transaction that is the subject of the proceeding unless the facility is a party to the proceeding.

N.J.S.A. 2A:84A-22.16 provides:

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

Note: Adopted September 15, 1992 to be effective July 1, 1993; section 2A:84A-22.14 amended by the Legislature, L. 2001, c. 81, § 1, eff. May 4, 2001; amended 2013, c. 103, § 19, eff. Aug. 7, 2013.

**Rule 518. Social Worker Privilege**

N.J.S.A. 45:15BB-13 provides:

A social worker licensed or certified pursuant to the provisions of this act shall not be required to disclose any confidential information that the social worker may have acquired from a client or patient while performing social work services for that client or patient unless:

- a) Disclosure is required by other State law;
- b) Failure to disclose the information presents a clear and present danger to the health or safety of an individual;
- c) The social worker is a party defendant to a civil, criminal or disciplinary action arising from the social work services provided, in which case a waiver of the privilege accorded by this section shall be limited to that action;
- d) The patient or client is a defendant in a criminal proceeding and the use of the privilege would violate the defendant's right to a compulsory process or the right to present testimony and witnesses on that person's behalf; or
- e) A patient or client agrees to waive the privilege accorded by this section, and, in circumstances where more than one person in a family is receiving social work services, each such member agrees to the waiver. Absent a waiver from each family member, a social worker shall not disclose any information received from any family member.

**Note:** Adopted September 15, 1998 to be effective July 1, 1999.

**Rule 519. Mediator Privilege**

N.J.S. 2A:23C-4 provides:

a. Except as otherwise provided in section 6 of P.L. 2004, c. 157 (N.J.S. 2A:23C-6), a mediation communication is privileged as provided in subsection b. of this section and shall not be subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by section 5 of P.L. 2004, c. 157 (N.J.S. 2A:23C-5).

b. In a proceeding, the following privileges shall apply:

(1) a mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.

(2) a mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.

(3) a nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.

c. Evidence or information that is otherwise admissible or subject to discovery shall not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.

N.J.S. 2A:23C-5 provides:

a. A privilege under section 4 of P.L. 2004, c. 157 (N.J.S. 2A:23C-4) may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation and:

(1) in the case of the privilege of a mediator, it is expressly waived by the mediator; and

(2) in the case of the privilege of a nonparty participant, it is expressly waived by the nonparty participant.

b. A person who discloses or makes a representation about a mediation communication that prejudices another person in a proceeding is precluded from asserting a privilege under section 4 of P.L. 2004, c. 157 (N.J.S. 2A:23C-4), but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.

c. A person who intentionally uses a mediation to plan, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity is precluded from asserting a privilege under section 4 of P.L. 2004, c. 157 (N.J.S. 2A:23C-4).

N.J.S. 2A:23C-6 provides:

a. There is no privilege under section 4 of P.L. 2004, c. 157 (N.J.S. 2A:23C-4) for a mediation communication that is:

(1) in an agreement evidenced by a record signed by all parties to the agreement;

(2) made during a session of a mediation that is open, or is required by law to be open, to the public;

(3) a threat or statement of a plan to inflict bodily injury or commit a crime;

(4) intentionally used to plan a crime, attempt to commit a crime, or to conceal an ongoing crime or ongoing criminal activity;

(5) sought or offered to prove or disprove a claim or complaint filed against a mediator arising out of a mediation;

(6) except as otherwise provided in subsection c., sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation; or

(7) sought or offered to prove or disprove child abuse or neglect in a proceeding in which the Division of Youth and Family Services in the Department of Human Services is a party, unless the Division of Youth and Family Services participates in the mediation.

b. There is no privilege under section 4 of P.L. 2004, c. 157 (N.J.S. 2A:23C-4) if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in:

(1) a court proceeding involving a crime as defined in the 'New Jersey Code of Criminal Justice,' N.J.S. 2C:1-1 et seq.; or

(2) except as otherwise provided in subsection c., a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.

c. A mediator may not be compelled to provide evidence of a mediation communication referred to in paragraph (6) of subsection a. or paragraph (2) of subsection b.

d. If a mediation communication is not privileged under subsection a. or b., only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under subsection a. or b. does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.

N.J.S. 2A:23C-7 provides:

a. Except as required in subsection b., a mediator may not make a report, assessment, evaluation, recommendation, finding, or other oral or written communication regarding a mediation to a court, administrative agency, or other authority that may make a ruling on the dispute that is the subject of the mediation.

b. A mediator may disclose:

(1) whether the mediation occurred or has terminated, whether a settlement was reached, and attendance; or

(2) a mediation communication as permitted under section 6 of P.L. 2004, c. 157 (N.J.S. 2A:23C-6).

c. A communication made in violation of subsection a. may not be considered by a court, administrative agency, or arbitrator.

(e) N.J.S. 2A:23C-8 provides:

Unless made during a session of a mediation which is open, or is required by law to be open, to the public, mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State.

**Note:** Adopted September 17, 2007 to be effective July 1, 2008.

#### **Rule 534. Mental Health Service Provider - Patient Privilege**

(a) Definitions. In this rule:

(1) "Confidential communications" means such information transmitted between a mental-health service provider and patient in the course of treatment of, or related to, that individual's condition of mental or emotional health,

including information obtained by an examination of the patient, that is transmitted in confidence, and is not intended to be disclosed to third persons, other than:

(i) those present to further the interest of the patient in the diagnosis or treatment;

(ii) those reasonably necessary for the transmission of the information, including the entity through which the mental-health service provider practices; and

(iii) persons who are participating in the diagnosis or treatment of the patient under the direction of a mental-health service provider, including authorized members of the patient's family, the patient's guardian, the patient's conservator, and/or the patient's personal representative.

(2) "Diagnosis or treatment" shall include consultation, screening, interview, examination, assessment, evaluation, diagnosis or treatment.

(3) "Mental-health service provider" means a person authorized or reasonably believed by the patient to be authorized to engage in the diagnosis or treatment of a mental or emotional condition, and is specifically intended to include:

(i) Psychologists, consistent with the definition under N.J.R.E. 505 and N.J.S.A. 45:14B-2(a), 'licensed practicing psychologist,' and N.J.S.A. 45:14B-6(a)(1), (b), (c), (d), (e), (f), and (g), governing persons engaged in authorized activities of certain unlicensed practicing psychologists;

(ii) Physicians, including psychiatrists, consistent with the definition under N.J.R.E. 506 and N.J.S.A. 2A:84A-22.1(b);

(iii) Marriage and family therapists, consistent with the definition under N.J.R.E. 510 and N.J.S.A. 45:8B-2(a), "licensed marriage and family therapist," and N.J.S.A. 45:8B-6, governing unlicensed persons who may engage in specified activities related to, consisting of marriage and family therapy;

(iv) Social workers, consistent with the definition under N.J.R.E. 518 and N.J.S.A. 45:15BB-3, and including social work interns and certified school social worker as defined in N.J.S.A. 45:15BB-5(b) and (c);

(v) Alcohol and drug counselors, consistent with the definitions under N.J.S.A. 45:2D-3 and N.J.A.C. 13:34C-4.5 (licensed and certified Alcohol and drug counselors);

(vi) Nurses, consistent with the definition under N.J.S.A. 45:11-23;

(vii) Professional counselors, associate counselors or rehabilitation counselors consistent with the definition under N.J.S.A. 45:8B-40, -41, -41.18, and persons authorized to provide counseling pursuant to N.J.S.A. 45:8B-48(b), (c), (d);

(viii) Psychoanalysts, consistent with the definition under N.J.S.A. 45:14BB-3;

(ix) Midwives, consistent with the definition under N.J.S.A. 45:10-1

(x) Physician assistants, consistent with the definition under N.J.S.A. 45:9-27.15; and

(xi) Pharmacists, consistent with the definition under N.J.S.A. 45:14-41.

(4) "Patient" means an individual, who undergoes diagnosis or treatment with or by a mental-health service provider for the purpose of diagnosis or treatment related to that patient's condition of mental or emotional health, including addiction to legal or illegal substances, whether referred to as client, person in therapy, or some other equivalent term in the context of the relationship.

**(b) General Rule of Privilege.** A patient has a privilege to refuse to disclose in a proceeding, and to prevent any other person from disclosing confidential communications, as defined in subsection (a)(1).

**(c) Who May Claim the Privilege.** The privilege under this rule may be claimed by the patient, the patient's guardian or conservator, the personal representative of a deceased patient, or if authorized by the patient, a member or members of the patient's family. The person who was the mental-health service provider at the time of the communication is presumed to have authority to claim the privilege, but only on behalf of the patient or deceased patient. The mental-health service provider shall claim the privilege unless otherwise instructed by the patient or, as applicable, members of the patient's family, the

patient's guardian or conservator, or the personal representative of a deceased patient.

**(d) Violent Crime Victim; Other Communications.**

(1) Violent Crime Victim. Any confidential communication between any of the mental health service providers listed in this rule and a victim of violent crime, as defined in N.J.S.A. 2A:84A-22.14c, shall be evaluated under the provisions of the "Victim Counselor Privilege" contained in N.J.R.E. 517, and not under the provisions set forth herein. Nothing in this act shall be construed to dilute or alter the scope of the Victim Counselor Privilege.

(2) Other Communications. Nothing in this rule shall be construed to limit or otherwise affect any privileges that may apply to communications outside the scope of confidential communications as defined in subsection (a)(1) above.

**(e) Exceptions.** There is no privilege under this rule for a communication:

(1) Relevant to an issue of the patient's condition in a proceeding to commit the patient or otherwise place the patient under the control of another or others because of alleged incapacity;

(2) Relevant to an issue in a proceeding in which the patient seeks to establish his competence, or in a criminal matter where the defendant's competence to stand trial is put at issue;

(3) Relevant to an issue in a proceeding to recover damages on account of conduct of the patient which constitutes a crime;

(4) Upon an issue as to the validity of a will of the patient;

(5) Relevant to an issue in a proceeding between parties claiming by testate or intestate succession from a deceased patient;

(6) Made in the course of any investigation or examination, whether ordered by the court or compelled pursuant to Court Rule, of the physical, mental, or emotional condition of the patient, whether a party or a witness, with respect to



the particular purpose for which the examination is ordered, unless the court orders otherwise, and provided that a copy of the order is served upon the patient prior to the communication, indicating among other things that such communications may not be privileged in subsequent commitment proceedings;

(7) Relevant to an issue in a proceeding in which the condition of the patient is an element or factor of the claim or defense of the patient or of any party claiming through or under the patient or claiming as a beneficiary of the patient through a contract to which the patient is or was a party or under which the patient is or was insured;

(8) If the court finds that any person, while a holder of the privilege, has caused the mental-health service provider to testify in any proceeding to any matter of which the mental-health service provider gained knowledge through the communication;

(9) In the course of mental health services sought or obtained in aid of the commission of a crime or fraud, provided that this exception is subject to the protections found in N.J.R.E. 501 and N.J.R.E. 509 and is not intended to modify or limit them;

(10) Relevant to an issue in a proceeding against the mental-health service provider, arising from the mental-health services provided, in which case the waiver shall be limited to that proceeding.

(11) Relevant to a proceeding concerning an application to purchase, own, sell, transfer, possess or carry a firearm, including but not limited to applications pursuant to N.J.S.A. 2C:58-3, or 2C:58-4, or a proceeding concerning the return of a firearm pursuant to N.J.S.A. 2C:25-21(d)(3).

(f) **Disclosure Pursuant to Statutory Duty to Report to a Public Official or Office.** Nothing in this rule shall prevent a court from compelling disclosure of a statement by a mental-health service provider, patient or other third party to a public official when such statement is made in compliance with a statutory duty to report to a public official, or information required to be recorded in a public office that was in fact recorded in a public office, including but not limited to reports of child or elder abuse or neglect or the abuse or neglect of disabled or incompetent persons, unless the statute

requiring the report of record specifically provides that the statement or information shall not be disclosed.

(g) Disclosure Where Waiver or Where Exercise of Privilege Would Violate a Constitutional Right. Nothing in this rule shall prevent a court from compelling disclosure where:

(1) the patient has expressly or implicitly waived the privilege or authorized disclosure; or

(2) exercise of the privilege would violate a constitutional right.

Note: Adopted September 15, 2015 to be effective July 1, 2016.

#### Rule 602. Lack of Personal Knowledge

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

HISTORY: Adopted September 15, 1992 to be effective July 1, 1993; amended September 15, 2004 to be effective July 1, 2005.

#### Rule 611. Mode and Order of Interrogation and Presentation

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

(b) *Scope of cross-examination.* --Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) *Leading questions.* --Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily, leading questions should be permitted on cross-examination. When a party

calls an adverse party or a witness identified with an adverse party, or when a witness demonstrates hostility or unresponsiveness, interrogation may be by leading questions, subject to the discretion of the court.

HISTORY: Adopted September 15, 1992 to be effective July 1, 1993.

#### Rule 612. Writing Used to Refresh Memory

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

HISTORY: Adopted September 15, 1992 to be effective July 1, 1993.

#### Rule 615. Sequestration of Witnesses

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

HISTORY: Adopted September 15, 1992 to be effective July 1, 1993.

#### Rule 701. Opinion Testimony of Lay Witnesses

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

HISTORY: Adopted September 15, 1992 to be effective July 1, 1993.

**Rule 702. Testimony by Experts.**

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

HISTORY: Adopted September 15, 1992 to be effective July 1, 1993.

**Rule 703. Bases of Opinion Testimony by Experts**

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

HISTORY: Adopted September 15, 1992 to be effective July 1, 1993.

**Rule 704. Opinion on Ultimate Issue**

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

HISTORY: Adopted September 15, 1992 to be effective July 1, 1993.

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

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

HISTORY: Adopted September 15, 1992 to be effective July 15, 1993; amended September 15, 2004 to be effective July 1, 2005.

#### Rule 801. Definitions

For purposes of this article, the following definitions apply:

(a) *Statement*. --A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person if the person intends it as an assertion.

(b) *Declarant*. --A "declarant" is a person who makes a statement.

(c) *Hearsay*. --"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) *Business*. --A "business" includes every kind of business, institution, association, profession, occupation and calling, whether or not conducted for profit, and also includes activities of governmental agencies.

(e) *Writing*. --A "writing" consists of letters, words, numbers, data compilations, pictures, drawings, photographs, symbols, sounds, or combinations thereof or their equivalent, set down or recorded by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or by any other means, and preserved in a perceptible form, and their duplicates as defined by Rule 1001(d).

(f) *Public Official*. --A "public official" includes an official of the United States, its territories, the District of Columbia and states, as well as political subdivisions, regional and other governmental agencies thereof.

HISTORY: Adopted September 15, 1992 to be effective July 15, 1993; paragraph (a) amended September 15, 2004 to be effective July 1, 2005.

#### Rule 802. Hearsay Rule

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

HISTORY: Adopted September 15, 1992 to be effective July 1, 1993.

**Rule 803. Hearsay Exceptions Not Dependent on Declarant's Unavailability**

The following statements are not excluded by the hearsay rule:

(a) **Prior statements of witnesses.** --A statement previously made by a person who is a witness at a trial or hearing, provided it would have been admissible if made by the declarant while testifying and the statement:

(1) is inconsistent with the witness' testimony at the trial or hearing and is offered in compliance with Rule 613. However, when the statement is offered by the party calling the witness, it is admissible only if, in addition to the foregoing requirements, it (A) is contained in a sound recording or in a writing made or signed by the witness in circumstances establishing its reliability or (B) was given under oath subject to the penalty of perjury at a trial or other judicial, quasi-judicial, legislative, administrative or grand jury proceeding, or in a deposition; or

(2) is consistent with the witness' testimony and is offered to rebut an express or implied charge against the witness of recent fabrication or improper influence or motive; or

(3) is a prior identification of a person made after perceiving that person if made in circumstances precluding unfairness or unreliability.

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

- (1) the party's own statement, made either in an individual or in a representative capacity, or
- (2) a statement whose content the party has adopted by word or conduct or in whose truth the party has manifested belief, or
- (3) a statement by a person authorized by the party to make a statement concerning the subject, or
- (4) a statement by the party's agent or servant concerning a matter within the scope of the

- agency or employment, made during the existence of the relationship, or
- (5) a statement made at the time the party and the declarant were participating in a plan to commit a crime or civil wrong and the statement was made in furtherance of that plan.

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

(c) *Statements not dependent on declarant's availability.*  
--Whether or not the declarant is available as a witness:

(1) *Present sense impression.* --A statement of observation, description or explanation of an event or condition made while or immediately after the declarant was perceiving the event or condition and without opportunity to deliberate or fabricate.

(2) *Excited utterance.* --A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition and without opportunity to deliberate or fabricate.

(3) *Then existing mental, emotional, or physical condition.* --A statement made in good faith of the declarant's then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) *Statements for purposes of medical diagnosis or treatment.* --Statements made in good faith for purposes of medical diagnosis or treatment which describe medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof to the extent that the statements are reasonably pertinent to diagnosis or treatment.

(5) *Recorded recollection.* --A statement concerning a matter about which the witness is unable to testify fully and accurately because of insufficient present recollection if the statement is contained in a writing or other record which (A) was made at a time when the fact recorded actually occurred or

was fresh in the memory of the witness, and (B) was made by the witness or under the witness' direction or by some other person for the purpose of recording the statement at the time it was made, and (C) the statement concerns a matter of which the witness had knowledge when it was made, unless the circumstances indicate that the statement is not trustworthy; provided that when the witness does not remember part or all of the contents of a writing, the portion the witness does not remember may be read into evidence but shall not be introduced as an exhibit over objection.

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

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

(8) *Public records, reports, and findings.* --Subject to Rule 807, (A) a statement contained in a writing made by a public official of an act done by the official or an act, condition, or event observed by the official if it was within the scope of the official's duty either to perform the act reported or to observe the act, condition, or event reported and to make the written statement, or (B) statistical findings of a public official based upon a report of or an investigation of acts, conditions, or events, if it was within the scope of the official's duty to make such statistical findings, unless the sources of information or other circumstances indicate that such statistical findings are not trustworthy.

(9) *Records of vital statistics.* --Subject to Rule 807, a statement contained in any form such as records of births, fetal



deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

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

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

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

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

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

(15) *Statements in documents affecting an interest in property.* --Subject to Rule 807, a statement contained in a document purporting to establish or affect an interest in

property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

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

(17) *Market reports, commercial publications.* --Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

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

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

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

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

(22) *Judgments of previous conviction of crime.* --In a civil proceeding, except as otherwise provided by court order on acceptance of a plea, evidence of a final judgment against a party adjudging the party guilty of an indictable offense in New Jersey or of an offense which would constitute an indictable

offense if committed in this state, as against that party, to prove any fact essential to sustain the judgment.

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

(24) *Other exceptions.* --[Not Adopted]

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

(26) *Judgments against persons entitled to indemnity.* --Subject to Rule 807 and except in a proceeding brought under the Joint Tortfeasors Contribution Law, N.J.S.A. 2A:53A-1 et seq., the record of a final judgment is admissible if offered by the judgment debtor in an action in which the debtor seeks to recover partial or total indemnity or exoneration for money paid or a liability incurred because of the judgment, as evidence of the liability of the judgment debtor, of the facts on which the judgment is based, and of the reasonableness of the damages recovered. If the defendant in the second action had notice of and opportunity to defend the first action, the judgment is conclusive evidence.

(27) *Statements by a child relating to a sexual offense.* --A statement made by a child under the age of 12 relating to sexual misconduct committed with or against that child is admissible in a criminal, juvenile, or civil proceeding if (a) the proponent of the statement makes known to the adverse party an intention to offer the statement and the particulars of the statement at such time as to provide the adverse party with a fair opportunity to prepare to meet it; (b) the court finds, in a hearing conducted pursuant to Rule 104(a), that on the basis of the time, content and circumstances of the statement there is a probability that the statement is trustworthy; and (c) either (i) the child testifies at the proceeding, or (ii) the child is unavailable as a witness and there is offered admissible

evidence corroborating the act of sexual abuse; provided that no child whose statement is to be offered in evidence pursuant to this rule shall be disqualified to be a witness in such proceeding by virtue of the requirements of Rule 601.

**HISTORY:** Adopted September 15, 1992 to be effective July 1, 1993; paragraph (c)(25) amended and paragraph (c)(27) added June 30, 1993 to be effective July 1, 1993; paragraphs (c)(5), (c)(22), (c)(26), and (c)(27) amended September 15, 2004 to be effective July 1, 2005.

**Rule 804. Hearsay Exceptions: Declarant Unavailable**

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

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the statement; or

(2) persists in refusing to testify concerning the subject matter of the statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the statement; or

(4) is absent from the hearing because of physical or mental illness or infirmity, or other cause, and the proponent of the statement is unable by process or other reasonable means to procure the declarant's attendance at trial, and, with respect to statements proffered under Rules 804(b)(4) and (7), the proponent is unable, without undue hardship or expense, to obtain declarant's deposition for use in lieu of testimony at trial.

(b) *Hearsay exceptions.* --Subject to Rule 807, the following are not excluded by the hearsay rule if the declarant is unavailable as a witness.

(1) *Testimony in prior proceedings.*

(A) Testimony given by a witness at a prior trial of the same or a different matter, or in a hearing or deposition taken in compliance with law in the course of the same or another proceeding, if the party

against whom the testimony is now offered had an opportunity and similar motive in the prior trial, hearing or proceeding to develop the testimony by examination or cross-examination.

(B) In a civil action or proceeding, and only when offered by the defendant in a criminal action or proceeding, testimony given in a prior trial, hearing or deposition taken pursuant to law to which the party against whom the testimony is now offered was not a party, if the party who offered the prior testimony or against whom it was offered had an opportunity to develop the testimony on examination or cross-examination and had an interest and motive to do so, which is the same or similar to that of the party against whom it is now offered.

Expert opinion testimony given in a prior trial, hearing, or deposition may be excluded, however, if the judge finds that there are experts of a like kind generally available within a reasonable distance from the place in which the action is pending and the interests of justice so require.

(2) *Statement under belief of imminent death.* --In a criminal proceeding, a statement made by a victim unavailable as a witness is admissible if it was made voluntarily and in good faith and while the declarant believed in the imminence of declarant's impending death.

(3) *Statement against interest.* --[Adopted in 1993 as Rule 803(c)(25)]

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

(5) *Other exceptions.* --[Not Adopted]

(6) *Trustworthy statements by deceased declarants.* --  
-In a civil proceeding, a statement made by a person unavailable as a witness because of death if the statement was made in good faith upon declarant's personal knowledge in circumstances indicating that it is trustworthy.

(7) *Voters' statements.* --A statement by a voter concerning the voter's qualifications to vote or the fact or content of the vote.

(8) [Deleted]

(9) *Forfeiture by wrongdoing.* --A statement offered against a party who has engaged, directly or indirectly, in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

**HISTORY:** Adopted September 15, 1992 to be effective July 1, 1993; paragraphs (a)(5) and (b)(8) deleted and paragraph (b)(2) amended June 30, 1993 to be effective July 1, 1993; paragraphs (a) and (b) amended September 15, 2004 to be effective July 1, 2005; paragraph (b)(9) added September 15, 2010 to be effective July 1, 2011.

#### **Rule 805. Hearsay Within Hearsay**

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

**HISTORY:** Adopted September 15, 1992 to be effective July 1, 1993.

#### **Rule 806. Attacking and Supporting Credibility of Declarant**

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or other conduct by a declarant,

inconsistent with the declarant's hearsay statement received in evidence, is admissible although declarant had no opportunity to deny or explain it. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, that party is entitled to examine the declarant on the statement as if under cross-examination.

**HISTORY:** Adopted September 15, 1992 to be effective July 1, 1993.

**Rule 807. Discretion of Judge to Exclude Evidence Under Certain Exceptions**

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

**HISTORY:** Adopted September 15, 1992 to be effective July 1, 1993.

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

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

**HISTORY:** Adopted September 15, 1992 to be effective July 1, 1993.

**Rule 1001. Definitions**

For purposes of this article the following definitions are applicable:

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

- (b) *Photographs.* --"Photographs" include still photographs, X-ray films, video tapes, motion pictures and similar forms of reproduced likenesses.
- (c) *Original.* --An "original" of a writing is the writing itself or any counterpart intended by the person or persons executing or issuing it to have the same effect. An "original" of a photograph includes the negative or any print therefrom. If data are stored by means of a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."
- (d) *Duplicate.* --A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and reductions, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent technique which accurately reproduces the original.

**HISTORY:** Adopted September 15, 1992 to be effective July 1, 1993.

#### **Rule 1002. Requirement of Original**

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

**HISTORY:** Adopted September 15, 1992 to be effective July 1, 1993.

#### **Rule 1003. Admissibility of Duplicates**

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

**HISTORY:** Adopted September 15, 1992 to be effective July 1, 1993.

#### **Rule 1004. Admissibility of Other Evidence of Contents**

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



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

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

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

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

**HISTORY:** Adopted September 15, 1992 to be effective July 1, 1993.

# **EXHIBIT B**

Daniel A. Burton, Esq. - 017042009  
 LAWRENCE LAW, LLC  
 744 Mountain Blvd.  
 Watchung, NJ 07069  
 (908) 645-1000  
 Attorneys for Plaintiff

JANE DOE  PLAINTIFF,  v.  JOHN DOE  DEFENDANT.	: : : : : : : : : : :	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION:FAMILY PART SOMERSET COUNTY Docket No. FM-18-1234-17  <p style="text-align: center;"><u>CIVIL ACTION</u></p> <p style="text-align: center;">PLAINTIFF'S WITNESS LIST</p>
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To: Andrew Adversary, Esq.  
 Adversary, Opposition, & Foe, LLC  
 123 Defense Drive  
 Somerville, New Jersey 08876

Plaintiff hereby submits the within preliminary list of anticipated fact witnesses:

**WITNESS LIST**

1. Jane Doe (Plaintiff): testimony relative to all material issues in dispute.
2. John Doe (Defendant): testimony relative to all material issues in dispute.
3. Jim Deere (CFO, ABC Corp.): testimony relative to ABC Corp., its operations, its financials, and all material issues relative to its valuation.
4. Dr. Michael Smith (Court appointed Best Interests Evaluator): testimony relative to his custody/best interests evaluation relative to all custody and parenting time issues.
5. Tom Johnson (Court appointed Business Valuator): testimony relative to the value of ABC Corp., and as to the parties' lifestyle and cash flow analysis.
6. Elizabeth Jones (Court appointed Appraiser): testimony relative to the valuation of the real property owned by the parties and/or ABC Corp.

7. Any and all rebuttal witnesses, as necessary.

LAWRENCE LAW, LLC  
Attorneys for Plaintiff

BY: \_\_\_\_\_  
Daniel A. Burton, Esq.  
For the Firm

Dated:

# **EXHIBIT C**

JANE DOE V. JOHN DOE  
DOCKET NUMBER: FM-18-1234-17

**TRIAL EXHIBITS ON BEHALF OF PLAINTIFF, JANE DOE**

Exhibit	Description	Identification	Evidence	Rule/Authority
P-1	Complaint for Divorce, dated January 2, 2015			
P-2	Answer and Counterclaim, dated February 1, 2015			
P-3	Answer to Counterclaim, dated February 13, 2015			
P-4	Plaintiff's Notice of Motion, dated November 5, 2015			
P-5	Plaintiff's Certification (with Exhibits) in support of Notice of Motion, dated November 5, 2015			
P-6	Defendant's Notice of Cross-Motion, dated November 16, 2015			
P-7	Defendant's Certification (with Exhibits) in support of Notice of Cross-Motion, dated November 16, 2015			
P-8	Plaintiff's Reply Certification (with Exhibits) filed November 30, 2015			
P-9	Plaintiff's Notice of Motion, dated May 5, 2016			
P-10	Plaintiff's Certification (with Exhibits) in support of Notice of Motion, dated May 5, 2016			
P-11	Defendant's Notice of Cross-Motion, dated May 16, 2016			
P-12	Defendant's Certification (with Exhibits) in support of Notice of Cross-Motion, dated May 16, 2016			
P-13	Plaintiff's Reply Certification (with Exhibits) filed May 30, 2016			
P-14	Court Order filed December 16, 2015			
P-15	Court Order filed June 12, 2016			
P-16	Court Case Management Order, filed August 1, 2016			
P-17	Court Order Scheduling Trial, filed October 10, 2016			

Exhibit	Description	Identification	Evidence	Rule/Authority
P-18	Plaintiff's Case Information Statement dated February 19, 2015			
P-19	Plaintiff's Case Information Statement dated November 5, 2015			
P-20	Plaintiff's Case Information Statement dated May 5, 2016			
P-21	Defendant's Case Information Statement dated February 19, 2015			
P-22	Defendant's Case Information Statement dated November 16, 2015			
P-23	Defendant's Case Information Statement dated May 16, 2016			
P-24	Plaintiff's Subpoena Duces Tecum to ABC Corp., dated August 11, 2016			
P-25	ABC Corp.'s Response to Plaintiff's Subpoena			
P-26	Plaintiff's Subpoena Duces Tecum to American Express dated August 11, 2016			
P-27	American Express' Response to Plaintiff's Subpoena			
P-28	Defendant's Subpoena Duces Tecum to PNC Bank, dated August 11, 2016			
P-29	PNC Bank's Response to Plaintiff's Subpoena			
P-30	Transcript of Deposition of John Doe - April 7, 2015			
P-31	Transcript of Deposition of John Doe - April 13, 2015			
P-32	Transcript of Deposition of Jim Deere - April 13, 2015			
P-33	Transcript of Deposition of Jim Deere - April 20, 2015			
P-34	Plaintiff's Interrogatories, dated March 15, 2015			
P-35	Plaintiff's Notice to Produce, dated March 15, 2015			
P-36	Plaintiff's Requests for Admission, dated June 1, 2016			
P-37	Defendant's Responses to Interrogatories			
P-38	Defendant's Responses to Notice to Produce			

Exhibit	Description	Identification	Evidence	Rule/Authority
P-39	Defendant's Responses to Requests for Admission			
P-40	2012 Joint Income Tax Return			
P-41	2013 Joint Income Tax Return			
P-42	2014 Joint Income Tax Return			
P-43	2015 Individual Income Tax Return - Plaintiff			
P-44	2016 Individual Income Tax Return - Plaintiff			
P-45	2012 W-2 Plaintiff			
P-46	2013 W-2 Plaintiff			
P-47	2014 W-2 Plaintiff			
P-48	2015 W-2 Plaintiff			
P-49	2016 W-2 Plaintiff			
P-50	2015 Individual Income Tax Return - Defendant			
P-51	2016 Individual Income Tax Return - Defendant			
P-52	2012 W-2 Defendant			
P-53	2013 W-2 Defendant			
P-54	2014 W-2 Defendant			
P-55	2015 W-2 Defendant			
P-56	2016 W-2 Defendant			
P-57	Chase Joint Checking Account Statements, dated January 2012 through December 2016			
P-58	Chase Joint Savings Account Statements, dated January 2012 through December 2016			
P-59	PNC Bank Individual Checking Account Statements, dated January 2015 through December 2016			
P-60	PNC Bank Individual Savings Account Statements, dated January 2015 through December 2016			
P-61	ABC Corp., 401(k) Account Statement, January 2015			
P-62	ABC Corp., Pension Account Statement, January 2015			
P-63	New York Life Insurance Policy Statement, January 2015			



Exhibit	Description	Identification	Evidence	Rule/Authority
P-64	Fidelity Brokerage Account Statement, January 2015			
P-65	Best Interests Evaluation Report, dated October 31, 2016, Dr. Michael Smith			
P-66	Curriculum Vitae for Dr. Michael Smith			
P-67	Business Valuation Report, ABC Corp., October 31, 2016, Tom Johnson			
P-68	Lifestyle and Cash Flow Analysis, John and Jane Doe, October 31, 2016, Tom Johnson			
P-69	Curriculum Vitae for Tom Johnson			
P-70	Appraisal Report, 123 Marital Home Way, Bridgewater, New Jersey, October 31, 2016, Elizabeth Jones			
P-71	Appraisal Report, 456 ABC Corp., Drive, Bridgewater, New Jersey, October 31, 2016, Elizabeth Jones			
P-72	Curriculum Vitae for Elizabeth Jones			
P-73	Deed, 123 Marital Home Way, Bridgewater, New Jersey			
P-74	Deed, 456 ABC Corp., Drive, Bridgewater, New Jersey			
P-75	Closing Documents for 123 Marital Home Way			
P-76	Closing Documents for 456 ABC Corp., Drive			
P-77	Wells Fargo Mortgage Statement, 123 Marital Home Way, January 2015			
P-78	Wells Fargo Mortgage Statement, 456 ABC Corp., Drive			
P-79	Family photos of Caribbean Vacation 2012			
P-80	Family photos of African Safari Vacation 2013			
P-81	Family photos of Australian Outback Vacation 2013			
P-82	Family photos of Caribbean Vacation 2014			
P-83	Family photos of European Vacation 2014			
P-84	Notice In Lieu to Defendant			

Exhibit	Description	Identification	Evidence	Rule/Authority
P-85	Documents to be provided by Defendant in response to Notice In Lieu			
P-86	<i>To be submitted under seal after conclusion of trial: Certification of Attorney Services and supporting exhibits in support of Plaintiff's request for counsel and expert fees</i>			
P-87				
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