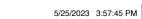


Table of Contents

Chapt	er 1: Trial	Calendar and Pretrial Information Exchange	1
1-1	TRIAL	CALENDAR	1
	1-1:1	New Jersey Court Rule 4:36-3. Trial Calendar	1
	1-1:2	Discussion	2
1-2	FAILUI	RE TO APPEAR AT TRIAL	3
1-3	DESIG	NATION OF TRIAL COUNSEL UNDER	
	RULE 4	4:25-4	5
	1-3:1	New Jersey Court Rule 4:25-4. Designation of	
		Trial Counsel	5
	1-3:2	Discussion	5
	1-3:3	Practice Point	6
1-4	ATTOR	RNEY AS WITNESS	6
	1-4:1	RPC 3.7 - Lawyer as Witness	6
	1-4:2	Discussion	6
	1-4:3	Practice Point	7
1-5	ATTOR	RNEY CONFERENCES; EXCHANGE	
	OF INF	FORMATION	7
	1-5:1	New Jersey Court Rule 4:25-7. Attorney Conferences;	
		Exchange of Information	7
	1-5:2	Discussion	8
	1-5:3	Misuse of Rule 4:25-7	10
	1-5:4	Practice Point	14
	1-5:5	New Jersey Court Rule 4:25-8. Motions in Limine	14
	1-5:6	Discussion	16
Chapt	er 2: Selec	ting a Jury	17
2-1	DEMA	ND FOR JURY TRIAL	17
	2-1:1	New Jersey Court Rule 4:35-1. Demand for Jury Trial	17
	2-1:2	Discussion	18
	2-1-3	Amendments to Pleadings	19

NEW JERSEY TRIAL EVIDENCE AND PROCEDURE









2-2	NUMBI	ER OF JURORS	19
	2-2:1	New Jersey Court Rule 1:8-2. Number of Jurors	19
2-3	ALTER	NATE JURORS	22
2-4	NUMBI	ER OF JURORS DECIDING VERDICT	23
2-5	PETIT J	TUROR LIST	24
	2-5:1	New Jersey Court Rule 1:8-5. Availability of	
		Petit Jury List	24
	2-5:2	Discussion	24
2-6	VOIR D	OIRE QUESTIONS UNDER DIRECTIVE #4-07	25
	2-6:1	Background Questions	26
	2-6:2	Biographical Questions	26
	2-6:3	Omnibus Qualification Questions	27
	2-6:4	Open-Ended Questions	28
	2-6:5	Case Categories	30
	2-6:6	Criminal Cases	30
2-7	ADDIT	IONAL VOIR DIRE QUESTIONS	31
	2-7:1	New Jersey Court Rule 1:8-3. Conference with	
		Court on Juror Questions	31
	2-7:2	Practice Point	31
2-8	WHO C	ONDUCTS VOIR DIRE	33
	2-8:1	New Jersey Court Rule 1:8-3. Examination	
		of Jurors; Challenges	33
	2-8:2	Discussion	34
2-9	PEREM	IPTORY CHALLENGES	34
	2-9:1	New Jersey Court Rule 1:8-3. Examination	
		of Jurors; Challenges	34
	2-9:2	Discussion	35
	2-9:3	Practice Point	37
2-10		VAL FOR CAUSE	38
2-11	FORCE	D USE OF PEREMPTORY CHALLENGE	39
2-12	THE IN	ATTENTIVE JUROR	39
2-13	ORDER	R OF EXERCISING OF PEREMPTORY	
	CHALL	ENGES	40
	2-13:1	New Jersey Court Rule 1:8-3(e). Order of	
		Exercising of Peremptory Challenges	40
2-14		VERSUS JURY DECISION-MAKING	41
2-15		GE OF VENUE WHERE PRETRIAL PUBLICITY	
	PREJUI	DICES JURY	41

xvi NEW JERSEY TRIAL EVIDENCE AND PROCEDURE



	2-15:1	New Jersey Court Rule 4:3-3. Change of Venue	4.1		
	2 15 2	in the Superior Court	41		
	2-15:2	Discussion	42		
	2-15:3	Practice Point	44		
	Chapter 3: Jury Note Taking and Jury Questions				
3-1	JUROR N	NOTE TAKING	45		
	3-1:1	New Jersey Court Rule 1:8-8. Materials to be			
		Submitted to the Jury; Note-Taking	45		
	3-1:2	Model Civil Jury Charge 1.15. Note-Taking by Jurors	45		
	3-1:3	Practice Point	46		
3-2	JUROR (QUESTIONS	46		
	3-2:1	New Jersey Court Rule 1:8-8. Materials to be			
		Submitted to the Jury; Note-Taking; Juror Questions	46		
	3-2:2	Discussion	47		
	3-2:3	Model Civil Jury Charge 1.23. Preliminary			
		Instructions Regarding Juror's Questions	48		
	3-2:4	Practice Point	49		
Chapte	r 4: Opening	g Statement	51		
Chapter 4-1		g Statement RSEY COURT RULE 1:7-1. OPENING	51		
-		RSEY COURT RULE 1:7-1. OPENING	51 51		
-	NEW JEF	RSEY COURT RULE 1:7-1. OPENING			
-	NEW JEF STATEM	RSEY COURT RULE 1:7-1. OPENING ENT	51		
-	NEW JEF STATEM 4-1:1	RSEY COURT RULE 1:7-1. OPENING ENT Order of Opening	51 51		
-	NEW JEF STATEM 4-1:1 4-1:2	RSEY COURT RULE 1:7-1. OPENING ENT Order of Opening Purpose and Scope of Opening	51 51 51		
-	NEW JEF STATEM 4-1:1 4-1:2 4-1:3	RSEY COURT RULE 1:7-1. OPENING ENT Order of Opening Purpose and Scope of Opening Examples of Improper Opening Statements	51 51 51 52		
4-1	NEW JEF STATEM 4-1:1 4-1:2 4-1:3 4-1:4 4-1:5	RSEY COURT RULE 1:7-1. OPENING ENT Order of Opening Purpose and Scope of Opening Examples of Improper Opening Statements Curative Instructions Practice Point	51 51 51 52 53		
4-1	NEW JEF STATEM 4-1:1 4-1:2 4-1:3 4-1:4 4-1:5	RSEY COURT RULE 1:7-1. OPENING ENT Order of Opening Purpose and Scope of Opening Examples of Improper Opening Statements Curative Instructions	51 51 51 52 53 55		
4-1 Chapte	NEW JEF STATEM 4-1:1 4-1:2 4-1:3 4-1:4 4-1:5 r 5: Prelimin	RSEY COURT RULE 1:7-1. OPENING ENT Order of Opening Purpose and Scope of Opening Examples of Improper Opening Statements Curative Instructions Practice Point nary Hearing	51 51 51 52 53 55		
4-1 Chapte	NEW JEF STATEM 4-1:1 4-1:2 4-1:3 4-1:4 4-1:5 r 5: Prelimin	RSEY COURT RULE 1:7-1. OPENING ENT Order of Opening Purpose and Scope of Opening Examples of Improper Opening Statements Curative Instructions Practice Point mary Hearing RSEY RULE OF EVIDENCE 104(A). INARY QUESTIONS	51 51 51 52 53 55		
4-1 Chapte	NEW JEF STATEM 4-1:1 4-1:2 4-1:3 4-1:4 4-1:5 r 5: Prelimin NEW JEF PRELIMI	RSEY COURT RULE 1:7-1. OPENING ENT Order of Opening Purpose and Scope of Opening Examples of Improper Opening Statements Curative Instructions Practice Point mary Hearing RSEY RULE OF EVIDENCE 104(A).	51 51 51 52 53 55 57		
4-1 Chapte	NEW JEF STATEM 4-1:1 4-1:2 4-1:3 4-1:4 4-1:5 r 5: Prelimin NEW JEF PRELIMI 5-1:1	RSEY COURT RULE 1:7-1. OPENING ENT Order of Opening Purpose and Scope of Opening Examples of Improper Opening Statements Curative Instructions Practice Point mary Hearing RSEY RULE OF EVIDENCE 104(A). INARY QUESTIONS New Jersey Rule of Evidence 104 Hearing	51 51 51 52 53 55 57 57		
4-1 Chapte	NEW JEF STATEM 4-1:1 4-1:2 4-1:3 4-1:4 4-1:5 r 5: Prelimin NEW JEF PRELIMI 5-1:1 5-1:2	RSEY COURT RULE 1:7-1. OPENING ENT Order of Opening Purpose and Scope of Opening Examples of Improper Opening Statements Curative Instructions Practice Point mary Hearing RSEY RULE OF EVIDENCE 104(A). INARY QUESTIONS New Jersey Rule of Evidence 104 Hearing Fulfilling Conditions of Evidence Rules Burden	51 51 51 52 53 55 57 57 57		
4-1 Chapte	NEW JEF STATEM 4-1:1 4-1:2 4-1:3 4-1:4 4-1:5 r 5: Prelimin NEW JEF PRELIMI 5-1:1 5-1:2 5-1:3	RSEY COURT RULE 1:7-1. OPENING ENT Order of Opening Purpose and Scope of Opening Examples of Improper Opening Statements Curative Instructions Practice Point mary Hearing RSEY RULE OF EVIDENCE 104(A). INARY QUESTIONS New Jersey Rule of Evidence 104 Hearing Fulfilling Conditions of Evidence Rules	51 51 51 52 53 55 57 57 57 57 57		
4-1 Chapte	NEW JEF STATEM 4-1:1 4-1:2 4-1:3 4-1:4 4-1:5 r 5: Prelimin NEW JEF PRELIMI 5-1:1 5-1:2 5-1:3 5-1:4	RSEY COURT RULE 1:7-1. OPENING ENT Order of Opening Purpose and Scope of Opening Examples of Improper Opening Statements Curative Instructions Practice Point mary Hearing RSEY RULE OF EVIDENCE 104(A). INARY QUESTIONS New Jersey Rule of Evidence 104 Hearing Fulfilling Conditions of Evidence Rules Burden Where Preliminary Hearing Is Held	51 51 52 53 55 57 57 57 57 58 59		
4-1 Chapte	NEW JEF STATEM 4-1:1 4-1:2 4-1:3 4-1:4 4-1:5 r 5: Prelimin NEW JEF PRELIMI 5-1:1 5-1:2 5-1:3 5-1:4 5-1:5	RSEY COURT RULE 1:7-1. OPENING ENT Order of Opening Purpose and Scope of Opening Examples of Improper Opening Statements Curative Instructions Practice Point mary Hearing RSEY RULE OF EVIDENCE 104(A). INARY QUESTIONS New Jersey Rule of Evidence 104 Hearing Fulfilling Conditions of Evidence Rules Burden Where Preliminary Hearing Is Held Rules of Evidence Do Not Apply	51 51 52 53 55 57 57 57 57 58 59 60		

NEW JERSEY TRIAL EVIDENCE AND PROCEDURE xvii



Chapter	6: Condition	onal Evidence	63
6-1	NEW JER	RSEY RULE OF EVIDENCE 104(B). RELEVANCE	
	THAT DE	EPENDS ON A FACT	63
	6-1:1	Discussion	63
	6-1:2	Practice Point	64
Chapter	7: Judicial	Notice	65
7-1		EGARDING JUDICIAL NOTICE	65
	7-1:1	New Jersey Rule of Evidence 201. Judicial Notice	
		of Law and Adjudicative Facts	65
	7-1:2	New Jersey Rule of Evidence 202. Judicial Notice	
		in Proceedings Subsequent to Trial	66
7-2	OVERVIE	· · · · · · · · · · · · · · · · · · ·	67
7-3	PURPOSI	E	67
7-4	PROCED	URE FOR INVOKING JUDICIAL NOTICE	68
7-5	WHEN JU	UDICIAL NOTICE IS MANDATORY OR	
	DISCRET	TIONARY	69
7-6	EFFECT	OF JUDICIAL NOTICE	69
7-7	EXAMPL	ES OF JUDICIALLY NOTICED FACTS	69
7-8	TIME TO	REQUEST JUDICIAL NOTICE	72
7-9	WHERE.	JUDICIAL NOTICE HAS BEEN REJECTED	72
7-10	SUBSEQU	UENT PROCEEDINGS AND APPEALS	73
7-11	PRACTIC	CE POINT	74
Chapter	8: Presum	ptions	75
8-1	INTROD	UCTION	75
8-2	RULES		75
	8-2:1	New Jersey Rule of Evidence 301. Effect of Presumption	75
	8-2:2	New Jersey Rule of Evidence 302. Choice of Law	76
	8-2:3	New Jersey Rule of Evidence 303. Presumptions	
		Against Defendant in Criminal Proceedings	76
8-3	EFFECTS	S OF PRESUMPTIONS	77
8-4	THE BUR	RDEN DOES NOT SHIFT	77
8-5	WHERE	CONTRARY EVIDENCE IS INTRODUCED	
	THE FAC	T MUST BE DECIDED BY THE FACT	
	FINDER		78
8-6	OFFICIA	L COMMENT TO NEW JERSEY RULE OF	
	EVIDEN	CE 301	79

xviii NEW JERSEY TRIAL EVIDENCE AND PROCEDURE



8-7	INFERE	ENCE VERSUS PRESUMPTION	79
	8-7:1	Res Ipsa Loquitur	81
	8-7:2	Model Civil Jury Charge 5.10D. Res Ipsa Loquitur	82
8-8	PROOFS	S NECESSARY TO PROVE OR DISPROVE	
	A PRES	UMPTION	83
8-9	STATUT	TORY PRESUMPTIONS	85
8-10	PRESUM	MPTIONS CREATED BY CASE LAW	85
8-11	PRESUM	MPTIONS IN CRIMINAL CASES	87
8-12	PRACTI	ICE POINT	88
8-13	SHIFTI	NG OF BURDEN	89
Chapte	r 9: Releva	nce, Exclusionary Rules, Limiting Instructions,	
and Sti	pulations		91
9-1	RELEVA	ANCE RULES	91
	9-1:1	New Jersey Rule of Evidence 401. Definition of	
		"Relevant Evidence"	91
	9-1:2	New Jersey Rule of Evidence 402. Relevant Evidence	
		Generally Admissible	91
9-2	DISCUS	SSION	91
9-3	EXCLUS	SIONARY RULES	92
	9-3:1	New Jersey Rule of Evidence 403. Exclusion of	
		Relevant Evidence on Grounds of Prejudice,	
		Confusion, or Waste of Time	92
	9-3:2	New Jersey Rule of Evidence 407. Subsequent	
		Remedial Measures	95
	9-3:3	New Jersey Rule of Evidence 408. Settlement	
		Offers and Negotiations	98
	9-3:4	New Jersey Rule of Evidence 411. Liability Insurance	100
	9-3:5	New Jersey Rule of Evidence 409. Payment of	
		Medical and Similar Expenses	102
	9-3:6	Practice Point	102
	9-3:7	Other Exclusionary Rules	102
9-4		NG INSTRUCTIONS	103
	9-4:1	New Jersey Rule of Evidence 105.	
		Limited Admissibility	103
	9-4:2	When to Ask for an Instruction on	
		Limited Admissibility	105
9-5	STIPUL	ATIONS	106

NEW JERSEY TRIAL EVIDENCE AND PROCEDURE







xix



	9-5:1	New Jersey Rule of Evidence 101(a)(4). Undisputed Facts	106
	9-5:2	Discussion	106
		ter Evidence	109
10-1	INTRODU	UCTION	109
10-2	RULES		109
	10-2:1	New Jersey Rule of Evidence 404. Character	
		Evidence Not Admissible to Prove Conduct;	
		Exceptions; Other Crimes Evidence	109
	10-2:2	New Jersey Rule of Evidence 405. Methods of	
		Proving Character	110
	10-2:3	New Jersey Rule of Evidence 406. Habit;	
		Routine Practice	110
	10-2:4	New Jersey Rule of Evidence 608. Evidence of	
		Character for Truthfulness or Untruthfulness	111
10-3		TER TRAIT AT ISSUE	112
10-4	ATTACK	ON CREDIBILITY	114
10-5	SPECIFIC	C INSTANCES OF CONDUCT	115
	10-5:1	New Jersey Rule of Evidence 405(b). Specific	
		Instances of Conduct	115
	10-5:2	Federal Rule of Evidence 608. Evidence of	
		Character and Conduct of Witness	116
10-6	METHOD	OS TO PROVE CHARACTER	116
	10-6:1	Opinion Witness	117
	10-6:2	Reputation Evidence	118
10-7	EVIDENO	CE OF HABIT	119
10-8	PRIOR W	RONGS	122
	10-8:1	The Cofield Four-Part Analysis	123
	10-8:2	Other Wrongs Deemed Admissible	126
	10-8:3	Other Wrongs Deemed Inadmissible	128
	10-8:4	Limited Instruction Given to Jury	130
10-9	PRIOR A	CCIDENT EVIDENCE	131
10-10	CONVICT	ΓΙΟΝ OF A CRIME	132
	10-10:1	New Jersey Rule of Evidence 609. Impeachment	
		by Evidence of Conviction of Crime	132
	10-10:2	Federal Rule of Evidence 609. Impeachment by	
		Evidence of Conviction of Crime	139
	10-10:3	Practice Point	140

XX NEW JERSEY TRIAL EVIDENCE AND PROCEDURE



10-11	SUMMAR	RY		140
Chapter	11: Privileg	ges		143
11-1	INTRODU	JCTION		143
11-2	PRIVILEGES NARROWLY CONSTRUED			143
11-3	ATTORN	EY-CLIEN	T PRIVILEGE	144
	11-3:1	New Jersey	Rule of Evidence 504. Lawyer-Client	
		Privilege		144
	11-3:2	Discussion		145
	11-3:3	Attorney (Client Privilege Between Persons	
		Represente	ed by the Same Attorney	146
	11-3:4	Litigation	Control Group	147
		11-3:4.1	Rule of Professional Conduct 1.13.	
			Organization as the Client	147
		11-3:4.2	Rule of Professional Conduct 4.2.	
			Communication With Person Represented	
			by Counsel	147
		11-3:4.3	Rule of Professional Conduct 4.3.	
			Dealing With Unrepresented Person;	
			Employee of Organization	148
		11-3:4.4	Discussion	148
		11-3:4.5	Practice Point	150
	11-3:5	•	Client Privilege Not Absolute	150
11-4			PRIVILEGE	152
	11-4:1	-	Court Rule 4:10-2(c).	
			Discovery; Treating Physician;	
			aration; Materials.	152
	11-4:2	-	Court Rule 4:10-2(d)(1).	
		-	Discovery; Treating Physician;	4.50
	44.40	_	aration; Experts.	153
	11-4:3	Discussion		153
		11-4:3.1	Draft Expert Reports	157
	11-4:4	Practice Po		157
11-5		N INTERE		158
11-6			NT PRIVILEGE	160
	11-6:1	-	Rule of Evidence 506. Patient and	1.00
	11.62	Physician I	e .	160
	11-6:2	Discussion		163

NEW JERSEY TRIAL EVIDENCE AND PROCEDURE

xxi



	11-6:3	Interviewing a Treating Physician	164
	11-6:4	Calling a Treating Physician as an Expert	165
11-7	PSYCHO	DLOGIST PRIVILEGE	166
	11-7:1	New Jersey Rule of Evidence 505.	
		Psychologist Privilege	166
	11-7:2	Discussion	166
11-8	MENTA	L HEALTH SERVICE PROVIDER PRIVILEGE	168
	11-8:1	New Jersey Rule of Evidence 534. Mental Health	
		Service Provider - Patient Privilege	168
	11-8:2	Discussion	173
11-9	MARITA	AL PRIVILEGE	174
	11-9:1	New Jersey Rule of Evidence 509. Marital Privilege—	
		Confidential Communications	174
	11-9:2	New Jersey Rule of Evidence 501. Privilege of	
		Accused	175
	11-9:3	Discussion	175
11-10	SELF-C	RITICAL ANALYSIS PRIVILEGE	178
	11-10:1	The Patient Safety Act	179
11-11	LITIGA	TION PRIVILEGE	181
11-12	JUDICIA	AL IMMUNITY	184
11-13	FAIR CO	OMMENT PRIVILEGE	186
11-14	DELIBE	RATIVE PROCESS PRIVILEGE	186
11-15	EXECU'	TIVE PRIVILEGE	188
11-16	CRIMIN	VAL INVESTIGATION RECORDS	188
11-17	OTHER	OPRA RULINGS	189
11-18	FEE AW	ARD UNDER OPRA	190
11-19	COMMO	ON-LAW RIGHT OF ACCESS	190
11-20	VAUGH	N INDEX	192
11-21	SELF-IN	NCRIMINATION	192
	11-21:1	New Jersey Rule of Evidence 503. Self-Incrimination	192
	11-21:2	New Jersey Rule of Evidence 501. Privilege of	
		Accused	193
	11-21:3	Discussion	193
11-22	RELIGI	OUS BELIEFS	194
	11-22:1	New Jersey Rule of Evidence 512. Religious Beliefs	194
	11-22:2	New Jersey Rule of Evidence 610. Religious	
		Beliefs or Opinions	195
11-23	OTHER	PRIVILEGES	195

xxii NEW JERSEY TRIAL EVIDENCE AND PROCEDURE



11-24	PIERCIN	G A PRIVI	LEGE	195
11-25	WAIVER OF PRIVILEGE			196
	11-25:1	New Jerse	y Rule of Evidence 530. Waiver of	
		Privilege b	y Contract or Previous Disclosure;	
		Limitation	IS	196
	11-25:2	Discussion	1	198
	11-25:3	Inadverter	at Disclosure of Privileged Information	200
		11-25:3.1	Rule of Professional Conduct 4.4.	
			Respect for Rights of Third Persons	200
		11-25:3.2	New Jersey Court Rule 4:10-2(e)(2).	
			Information Produced	201
		11-25:3.3	Discussion	201
	11-25:4	Practice Po	oint	202
11-26	TAX RET	ΓURNS AR	E NOT PRIVILEGED BUT	
	CAN ON	LY BE DIS	CLOSED FOR GOOD CAUSE	202
Chapter	12: Lack o	of Personal l	Knowledge	205
12-1	NEW JEE	RSEY RUL	E OF EVIDENCE 602. LACK OF	
	PERSON	AL KNOW	LEDGE	205
12-2	DISCUSS	SION		205
Chapter	13: Order	of Interroga	ation and Presentation of Proofs	209
13-1	NEW JEH	RSEY RUL	E OF EVIDENCE 611. MODE AND	
	ORDER	OF INTER	ROGATION AND PRESENTATION	209
13-2	CONTRO	DL BY COU	RT	210
	13-2:1	Cumulativ	e Evidence	210
13-3	SCOPE C	F CROSS-I	EXAMINATION	210
	13-3:1	Restriction	ns on Cross-Examination	212
13-4	PRACTIO	CE POINT		213
13-5	ASKING	ADVERSA	ARY LEADING QUESTIONS	214
13-6	OBLIGA	TION TO D	DISCLOSE CHANGE IN TESTIMONY	
	AT TRIA	L		215
13-7	REOPEN	ING PROC	DFS	215
13-8	PRACTIO	CE POINT		216
13-9	CONTIN	UANCE O	F A TRIAL	216
	13-9:1	The Surpr	ise Witness	217
	13-9:2	Deposition	n at Mid-Trial	218

NEW JERSEY TRIAL EVIDENCE AND PROCEDURE xxiii







Chapte	r 14: Refres	hing Recollection and Past Recollection Recorded	219
14-1	REFRES	HING RECOLLECTION	219
	14-1:1	New Jersey Rule of Evidence 612. Writing	
		Used to Refresh Memory	219
	14-1:2	Items That Can Be Used to Refresh Recollection	219
	14-1:3	Procedure to Refresh Recollection	220
	14-1:4	Requirements to Refresh Recollection	220
	14-1:5	Objections to Refreshing Recollection	221
	14-1:6	Impeachment by Adversary	222
	14-1:7	Memory Refreshed Before Trial	222
14-2	PAST RE	COLLECTION RECORDED	223
	14-2:1	New Jersey Rule of Evidence 803(c)(5).	
		Recorded Recollection	223
	14-2:2	Requirements for Admission	223
	14-2:3	Practice Point	224
Chapte	r 15: Questi	oning and Calling of Witnesses by the Trial Judge	227
15-1	NEW JEF	RSEY RULE OF EVIDENCE 614. CALLING AND	
	INTERRO	OGATION OF WITNESSES BY COURT	227
15-2	INTROD	UCTION	227
15-3	JUDGE'S	QUESTIONS	228
15-4	JUDGE (CALLING OWN WITNESSES	229
15-5	CAUTIO	N: JUDGE MUST NOT OVERSTEP JUDICIAL	
	ROLE		230
15-6	PRACTIO	CE POINT	231
15-7	COURT N	MUST NOT IMPEACH THE INTEGRITY OF	
	COUNSE	L IN THE PRESENCE OF THE JURY	231
Chapte	r 16: Seques	stration of Witnesses	233
16-1	SEQUEST	TRATION RULES	233
	16-1:1	New Jersey Rule of Evidence 615. Sequestration	
		of Witnesses	233
	16-1:2	Federal Rule of Evidence 615. Excluding Witnesses	233
16-2	POLICY		233
16-3	STANDA	RD FOR GRANTING	234
16-4	EXCEPT	IONS TO SEQUESTRATION	234
	16-4:1	Party	234
	16-4:2	Witness	234
	16-4:3	Designated Representative	235
	16-4:4	Analogous Federal Rule of Evidence	235

xxiv NEW JERSEY TRIAL EVIDENCE AND PROCEDURE



16-5	SEQUESTRATION OF WITNESSES AT DEPOSITIONS	235
	16-5:1 New Jersey Court Rule 4:10-3. Protective Orders	235
	16-5:2 Discussion	236
	16-5:3 Practice Point	236
-	: 17: Attacking Credibility	237
17-1	NEW JERSEY RULE OF EVIDENCE 607. WITNESS	
	IMPEACHMENT, SUPPORT AND NEUTRALIZATION	237
17-2	ATTACKING A WITNESS' CREDIBILITY	237
17-3	PRESENTING EVIDENCE OF A PRIOR INJURY OR	
	CONDITION	239
17-4	NECESSITY OF DISCLOSURE OF EXTRINSIC	
	EVIDENCE USED TO IMPEACH CREDIBILITY	241
	17-4:1 Practice Point	242
17-5	IMPEACHING YOUR OWN WITNESS	242
17-6	PRACTICE POINT	244
17-7	IMPEACHING ONE'S WITNESS UNDER THE FEDERAL	
	RULES OF EVIDENCE	245
	17-7:1 Federal Rule of Evidence 607. Who May Impeach	245
	17-7:2 Discussion	246
17-8	DISCUSSIONS BETWEEN A PARTY AND COUNSEL	
	BEFORE COMPLETION OF THE PARTY'S TRIAL	
	TESTIMONY	246
	17-8:1 Practice Point	246
17-9	MALINGERING OR SYMPTOM MAGNIFICATION	
	EVIDENCE	247
Chanta	: 18: Prior Inconsistent Statement Used to Impeach the Witness	249
18-1	NEW JERSEY RULE OF EVIDENCE 613. PRIOR	447
10-1	STATEMENTS OF WITNESSES	249
18-2	GENERAL	249
18-3	NEUTRALIZATION	250
18-4	PRIOR WRITTEN STATEMENT	251
18-5	PRIOR ORAL STATEMENT	252
18-6	PRIOR DEPOSITION TESTIMONY	252
18-7	PRACTICE POINT	254
18-8	OPPORTUNITY TO EXPLAIN THE INCONSISTENCY	254
18-9	RELIABILITY	256
10)		

NEW JERSEY TRIAL EVIDENCE AND PROCEDURE xxv









18-10		ON OF SURPRISE INSCONSISTENT	256		
	STATEMI		256		
18-11	COLLATI	ERAL IMPEACHMENT EVIDENCE	257		
-	er 19: Prior Inconsistent Statements Admitted for Their Truth				
19-1		SEY RULE OF EVIDENCE 803(A)(1). HEARSAY			
		ONS NOT DEPENDENT ON DECLARANT'S			
		ABILITY - PRIOR STATEMENT OF WITNESS	259		
19-2	DISCUSS		259		
19-3		STANTIVE EVIDENCE IF YOU CALL WITNESS			
		REQUIREMENTS ARE FULFILLED	260		
19-4	FEDERA	L RULES OF EVIDENCE	261		
	19-4:1	Federal Rule of Evidence 801(d). Statements That			
		Are Not Hearsay	261		
	19-4:2	Discussion	261		
Chapter	20: Prior C	Consistent Statements and Vouching	263		
20-1	RULES	S	263		
	20-1:1	New Jersey Rule of Evidence 607. Witness			
		Impeachment, Support and Neutralization	263		
	20-1:2	New Jersey Rule of Evidence 803(a)(2).			
		Hearsay Exceptions Not Dependent on			
		Declarant's Unavailability	263		
20-2	PRIOR CO	ONSISTENT STATEMENT OF WITNESS TO			
		R TESTIMONY INADMISSIBLE	264		
20-3		ONSISTENT STATEMENT TO BOLSTER			
		S AFTER HIS CREDIBILITY HAS BEEN			
		ED IS ADMISSIBLE	264		
20-4		THER WITNESSES TO BOLSTER TESTIMONY			
20 .	IS PROHI		265		
20-5	PRACTIC		265		
20 3	11010110		203		
Chapter	21: Expert	Testimony	267		
21-1	INTRODU	UCTION	267		
21-2	WHEN EX	XPERT TESTIMONY IS REQUIRED AND WHEN			
	THE COM	MMON KNOWLEDGE DOCTRINE APPLIES	267		
	21-2:1	New Jersey Rule of Evidence 702. Testimony by Experts	267		
	21-2:2	The Common Knowledge Doctrine	268		

xxvi NEW JERSEY TRIAL EVIDENCE AND PROCEDURE



	21-2:3	Beyond the Ken of Jurors	271			
	21-2:4	Practice Point	274			
21-3	WHAT QUALIFICATIONS ARE REQUIRED FOR					
	AN EXF	AN EXPERT				
	21-3:1	New Jersey Medical Care Access and Responsibility				
		and Patients First Act	281			
	21-3.2	Practice Point	284			
	21-3:3	Non-Medical Professionals	284			
21-4	IMPEAG	CHING AN EXPERT WITNESS	286			
	21-4:1	Model Civil Jury Charge 1.13C. Optional Charge				
		Concerning Fee Paid to Expert	286			
21-5	THE NE	ET OPINION RULE	287			
	21-5:1	Motion to Dismiss Expert Testimony as a Net Opinion	287			
	21-5:2	Striking of Expert Reports Related to				
	21 0.2	Preexisting Injuries	293			
	21-5:3	Practice Point: Countering the Net Opinion Motion	295			
21-6		HETICAL QUESTIONS	296			
21 0	21-6:1	New Jersey Rule of Evidence 705. Disclosure of	270			
	21 0.1	Facts or Data Underlying Expert Opinion;				
		Hypotheses Not Necessary	296			
	21-6:2	Discussion	296			
	21-6:3	Practice Point	297			
21-7		BILITY OF EXPERT OPINION	298			
21-7	21-7:1	General Acceptance Test	298			
	21-7:1	General Acceptance Test Is Rejected in Toxic				
	21-7.2	Tort Cases	298			
		21-7:2.1 Discussion of the <i>Rubanick</i> Decision	298			
		21-7:2.2 Discussion of the <i>Kaodanck Decision</i> 21-7:2.2 Discussion of the <i>Landrigan</i> Decision	301			
	21-7:3	The <i>Kemp</i> Test: Expansion of <i>Rubanick</i> and <i>Landrigan</i>	301			
	21-7.3	to Other Areas of Expertise	302			
	21-7:4	Proof of Reliability	302			
	21-7.4	New Jersey Court Rule 104 Hearing	304			
	21-7:5	Practice Point	304			
			306			
	21-7:7	Application of <i>Kemp</i> Standard				
21.0	21-7:8 EEDED	Practice Point AL RULE OF EVIDENCE 702. TESTIMONY	312			
21-8			212			
21.0		PERT WITNESSES	313			
21-9		PREME COURT'S ADOPTION OF	214			
	THE DA	AUBERT FACTORS	314			

NEW JERSEY TRIAL EVIDENCE AND PROCEDURE xxvii



	21-9:1	Application to Civil Cases	314
	21-9:2	Application to Criminal Cases	317
21-10	JUROR D	DISCRETION ON EXPERT TESTIMONY	317
	21-10:1	Model Civil Jury Charge 1.13. Expert Testimony	318
21-11	PRACTIC	CE POINT	318
21-12	TRIAL E	XPERT'S USE OF HEARSAY IN FORMULATING	
	OPINION	NS .	319
	21-12:1	Experts' Use of Hearsay	319
	21-12:2	Use of Other Expert's Reports	321
	21-12:3	Complexity of Underlying Expert Opinion	322
	21-12:4	Agha v. Feiner Circumscribes the Use of	
		the Reports of Non-Testifying Experts	323
	21-12:5	Model Civil Jury Charge 1.13. Expert Testimony	325
	21-12:6	Practice Point	325
	21-12:7	Admissibility of Expert Opinions Found in Records	
		or Reports	326
		21-12:7.1 New Jersey Rule of Evidence 808. Expert	
		Opinion Included in a Hearsay Statement	
		Admissible Under an Exception	326
		21-12:7.2 Routine Diagnostic Tests	327
		21-12:7.3 More Than Average Difficulty of	
		Interpretation	328
21-13		S AND THE LEARNED TREATISE RULE	329
	21-13:1	Traditional Rule	329
	21-13:2	Expanded Rule; New Jersey Rule of Evidence 803(c)(18).	
		Learned Treatises	329
	21-13:3	Procedure to Admit Learned Treatise	330
	21-13:4	Sample Examination for Admission of Learned	
		Treatise	330
	21-13:5	Model Civil Jury Charge 1.13D. Optional Charge	
		Concerning Statements From Publications	331
	21-13:6	Practice Point	332
21-14		ERT CANNOT TESTIFY BEYOND THE FOUR	
	CORNER	RS OF THE EXPERT REPORT	332
	21-14:1	Relevant Rules	332
		21-14:1.1 New Jersey Court Rule 4:10-2(d). Trial	
		Preparation; Experts	332
		21-14:1.2 New Jersey Court Rule 4:17-4. Form,	
		Service and Time of Answers	333

XXVIII NEW JERSEY TRIAL EVIDENCE AND PROCEDURE



			New Jersey Court Rule 4:10-2(d). Trial		
			Preparation; Experts	333	
			New Jersey Rule of Evidence 705. Disclosure		
			of Facts or Data Underlying Expert Opinion;		
	21.112		Hypotheses Not Necessary	333	
	21-14:2		Corners Rule	334	
	21-14:3	Practice Po		337	
21-15			ONY ON THE ULTIMATE ISSUE	338	
	21-15:1	•	Rule of Evidence 704. Opinion on		
		Ultimate Is	sue	338	
	21-15:2	Discussion		338	
	21-15:3	Practice Po		341	
21-16			FACTUAL WITNESS	341	
21-17		CE POINT		343	
21-18			WITH EXPERT KNOWLEDGE	344	
21-19			FOR ADMISSION OF EXPERT		
	TESTIM			344	
21-20	PROCEDURE TO SEEK TO SERVE LATE EXPERT				
			IT EXPERT TESTIMONY AT TRIAL	345	
	21-20:1	New Jersey	Court Rule 4:24-1(c). Time for Completion		
		of Discover	у	345	
	21-20:2	New Jersey	Court Rule 4:17-7. Amendment of Answers	345	
	21-20:3	Discussion		346	
21-21	EXPERT	"S UNAVAIL	ABILITY FOR TRIAL	348	
	21-21:1	New Jersey	Court Rule 4:36-3(c). Trial Calendar	348	
	21-21:2	Discussion		348	
	21-21:3	Practice Po	int	349	
21-22	LAY EX	PERT TESTI	MONY	350	
	21-22:1	New Jersey	Rule of Evidence 701. Opinion Testimony		
		of Lay Witi	nesses	350	
	21-22:2	Prerequisite	es	350	
	21-22:3	Pure Lay W	Vitness Testimony	351	
	21-22:4	Knowledge	Based on Experience and Work on Project	352	
	21-22:5	Lay Witnes	ses With Specialized Knowledge	352	
	21-22:6	-	Expert Testimony Crosses the Line Into		
		Expert Test	÷	353	
	21-22:7	-	Charge 1.13. Expert Testimony	355	
	21-22:8	Practice Po	- · · · · · · · · · · · · · · · · · · ·	355	

NEW JERSEY TRIAL EVIDENCE AND PROCEDURE xxix









21-23	USE OF ANOTHER PARTY'S EXPERT AT TRIAL			
	21-23:1	Introduction	on	357
	21-23:2	Use of an l	Expert Who Was Only Consulted and	
		Whose Rep	oort Was Not Served on the Other Side	357
		21-23:2.1	New Jersey Court Rule 4:10-2(d)(3).	
			Trial Preparation; Experts	357
		21-23:2.2	Discussion	357
	21-23:3	Withdrawa	l of Expert After That Expert's Report	
		Has Been S	Served and After the Deposition of	
		the Expert	Has Been Taken	358
		21-23:3.1	New Jersey Court Rule 4:10-2(d).	
			Trial Preparation; Experts	358
		21-23:3.2	New Jersey Court Rule 4:10-2(d)(2).	
			Trial Preparation; Experts	359
		21-23:3.3	Discussion	359
		21-23:3.4	Practice Point	360
	21-23:4	Use of the	Testimony of Another Party's Treating	
		Physician o	or Factual Expert	361
		21-23:4.1	Practice Point	362
	21-23:5	Videotape	Depositions Pursuant to New Jersey Court	
		Rule 4:14-9)	362
		21-23:5.1	New Jersey Court Rule 4:14-9(e). Use.	362
		21-23:5.2	Discussion	363
		21-23:5.3	Practice Point	363
	21-23:6	Summary		364
21-24	RELIANO	CE ON STA	TUTES AND REGULATIONS	
	IN LIEU	OF EXPER	T TESTIMONY	365
21-25	AUTHOR	ITIES DIV	IDED ON ADVERSE INFERENCE	
	CHARGE	ON EXPE	RT TESTIMONY	365
21-26	MALPRA	CTICE CL	AIMS AGAINST PROFESSIONALS	368
	21-26:1		f Merit Statute, New Jersey	
		Statute 2A	:53A-27. Affidavit Required in	
		Certain Ac	tions Against Licensed Persons	368
	21-26:2	Common I	Knowledge Cases	370
	21-26:3		eptions to Affidavit of Merit	371
	21-26:4	Statement	in Lieu of Affidavit	372
	21-26:5	Equitable I	Doctrines Ameliorating the Draconian	
		Effect of th	ne AMS	373

XXX NEW JERSEY TRIAL EVIDENCE AND PROCEDURE



		21-26:5.1	Ferriera Hearing	373
			Designating Specialty in Answer	374
		21-26:5.3	Substantial Compliance	374
		21-26:5.4	Extraordinary Circumstances	375
Chapter	22: Use of	Depositions	s and Prior Testimony at Trial	377
22-1	INTRODU	UCTION		377
22-2	UNAVAIL	LABILITY		377
	22-2:1	Generally		377
	22-2:2	Rules		378
		22-2:2.1	New Jersey Court Rule 4:16-1(c). Use of	
			Depositions	378
		22-2:2.2	New Jersey Rule of Evidence 804(b)(1)(A).	
			Testimony in Prior Proceedings	378
		22-2:2.3	New Jersey Rule of Evidence 804(a)(4).	
			Definition of Unavailable	379
	22-2:3		of Unavailability	379
	22-2:4	_	n Procuring Witness to Testify	380
	22-2:5		etermine Unavailability	382
	22-2:6	Practice Po		382
	22-2:7	Stipulation	Regarding Admissibility	382
	22-2:8	New Jersey	y Court Rule 4:16-1(c). Exceptional	
		Circumsta	nces Rule	383
22-3	ADVERS	E INFERE	NCE CHARGE	384
22-4	DEPOSIT	ION OF PA	ARTY	384
	22-4:1	Reading of	f Adversary's Deposition Into Evidence	384
		22-4:1.1	New Jersey Court Rule 4:16-1. Use of	
			Depositions	384
		22-4:1.2	New Jersey Rule of Evidence 803(b)(1).	
			Statement by Party-Opponent	385
		22-4:1.3	Discussion	385
	22-4:2	Completer	ness Doctrine Rules	386
		22-4:2.1	New Jersey Court Rule 4:16-1(d). Use of	
			Depositions	386
		22-4:2.2	New Jersey Rule of Evidence 106.	
			Remainder of or Related Writings or	
			Recorded Statements	386
	22-4:3	Practice Po	oint	386

NEW JERSEY TRIAL EVIDENCE AND PROCEDURE xxxi



Depositions 388		22-4:4	Effect of Notice in Lieu of Subpoena in Reading	200
Deposition Into Evidence 388		22.4.5	Depositions The FSS at SS 441 and the Parking So Parking	388
22-5		22-4:5		200
AS ADVERSARY 22-5:1 Officer or Director 22-5:2 Applicable Rules 22-5:2.1 General Rule on Depositions of Business Entities: New Jersey Court Rule 4:16-1(b) 22-5:2.2 Designated Deponent on Behalf of Corporation or Other Entity: New Jersey Court Rule 4:14-2(c) 22-5:2.3 Managing or Authorized Agent: New Jersey Court Rule 4:16-1(b) 22-5:3 Absence of Employees "Procured" by Offering Party 22-6:1 New Jersey Rule of Evidence 803(b). Statement by Party-Opponent 22-6:2 New Jersey Rule of Evidence 803(b)(4). Statements Made Within Scope of Agency or Employment 22-6:3 New Jersey Rule of Evidence 803(b)(3). Statement by Authorized Person 22-6:4 Practice Point 22-7:1 Risk of Losing Prior Deposition Testimony 22-7:2 Practice Point 395 22-7:2 Practice Point 396 22-8:1 New Jersey Rule of Evidence 804(b)(1)(A). Testimony in Prior Proceedings 22-8:2 New Jersey Rule of Evidence 804(b)(1)(B). Testimony in Prior Proceedings 396 22-8:3 Application 397 22-8:4 Practice Point 398 22-8:5 Committee Comment to New Jersey Rule of Evidence 804 399 22-9 DE BENE ESSE DEPOSITIONS 390	22.5	CORROL	÷	388
22-5:1	22-3			200
22-5:2				
22-5:2.1 General Rule on Depositions of Business Entities: New Jersey Court Rule 4:16-1(b) 390				
Entities: New Jersey Court Rule 4:16-1(b) 390		22-5:2	= =	390
22-5:2.2 Designated Deponent on Behalf of Corporation or Other Entity: New Jersey Court Rule 4:14-2(c) 390 22-5:2.3 Managing or Authorized Agent: New Jersey Court Rule 4:16-1(b) 391 22-5:3 Absence of Employees "Procured" by Offering Party 392 22-6:1 New Jersey Rule of Evidence 803(b). Statement by Party-Opponent 393 22-6:2 New Jersey Rule of Evidence 803(b). Statements Made Within Scope of Agency or Employment 394 22-6:3 New Jersey Rule of Evidence 803(b)(3). Statement by Authorized Person 394 22-6:4 Practice Point 395 22-7:1 Risk of Losing Prior Deposition Testimony 395 22-7:2 Practice Point 396 22-7:2 Practice Point 396 22-7:2 Practice Point 396 22-8:1 New Jersey Rule of Evidence 804(b)(1)(A). Testimony in Prior Proceedings 396 22-8:1 New Jersey Rule of Evidence 804(b)(1)(B). Testimony in Prior Proceedings 396 22-8:3 Application 397 22-8:4 Practice Point 398 22-8:5 Committee Comment to New Jersey Rule of Evidence 804 399 22-9 DE BENE ESSE DEPOSITIONS 399			1	200
Corporation or Other Entity: New Jersey Court Rule 4:14-2(c) 390 22-5:2.3 Managing or Authorized Agent: New Jersey Court Rule 4:16-1(b) 391 22-5:3 Absence of Employees "Procured" by Offering Party 392 22-6:1 New Jersey Rule of Evidence 803(b). Statement by Party-Opponent 393 22-6:2 New Jersey Rule of Evidence 803(b)(4). Statements Made Within Scope of Agency or Employment 394 22-6:3 New Jersey Rule of Evidence 803(b)(3). Statement by Authorized Person 394 22-6:4 Practice Point 395 22-7:1 Risk of Losing Prior Deposition Testimony 395 22-7:2 Practice Point 396 22-8:1 New Jersey Rule of Evidence 804(b)(1)(A). Testimony in Prior Proceedings 396 22-8:2 New Jersey Rule of Evidence 804(b)(1)(B). Testimony in Prior Proceedings 396 22-8:3 Application 397 22-8:4 Practice Point 398 22-8:5 Committee Comment to New Jersey Rule of Evidence 804 22-9 DE BENE ESSE DEPOSITIONS 399			•	390
New Jersey Court Rule 4:14-2(c) 390				
22-5:2.3 Managing or Authorized Agent: New Jersey Court Rule 4:16-1(b) 391			- · · · · · · · · · · · · · · · · · · ·	200
New Jersey Court Rule 4:16-1(b) 391			· · · · · · · · · · · · · · · · · · ·	390
22-5:3 Absence of Employees "Procured" by Offering Party 392 22-6 VICARIOUS ADMISSIONS 393 22-6:1 New Jersey Rule of Evidence 803(b). Statement by Party-Opponent 393 22-6:2 New Jersey Rule of Evidence 803(b)(4). Statements Made Within Scope of Agency or Employment 394 22-6:3 New Jersey Rule of Evidence 803(b)(3). Statement by Authorized Person 394 22-6:4 Practice Point 395 22-7:1 Risk of Losing Prior Deposition Testimony 395 22-7:2 Practice Point 396 22-8:1 USE OF PRIOR DEPOSITION OR OTHER TESTIMONY: THE "SIMILAR MOTIVE" REQUISITE 396 22-8:1 New Jersey Rule of Evidence 804(b)(1)(A). Testimony in Prior Proceedings 396 22-8:2 New Jersey Rule of Evidence 804(b)(1)(B). Testimony in Prior Proceedings 396 22-8:3 Application 397 22-8:4 Practice Point 398 22-8:5 Committee Comment to New Jersey Rule of Evidence 804 399 22-9 DE BENE ESSE DEPOSITIONS 399				201
22-6 VICARIOUS ADMISSIONS 393 22-6:1 New Jersey Rule of Evidence 803(b). Statement by Party-Opponent 393 22-6:2 New Jersey Rule of Evidence 803(b)(4). Statements Made Within Scope of Agency or Employment 394 22-6:3 New Jersey Rule of Evidence 803(b)(3). Statement by Authorized Person 394 22-6:4 Practice Point 395 22-7:1 Risk of Losing Prior Deposition Testimony 395 22-7:2 Practice Point 396 22-8:1 USE OF PRIOR DEPOSITION OR OTHER TESTIMONY: THE "SIMILAR MOTIVE" REQUISITE 396 22-8:1 New Jersey Rule of Evidence 804(b)(1)(A). Testimony in Prior Proceedings 396 22-8:2 New Jersey Rule of Evidence 804(b)(1)(B). Testimony in Prior Proceedings 396 22-8:3 Application 397 22-8:4 Practice Point 398 22-8:5 Committee Comment to New Jersey Rule of Evidence 804 399 22-9 DE BENE ESSE DEPOSITIONS 399		22.5.2	· · · · · · · · · · · · · · · · · · ·	
22-6:1 New Jersey Rule of Evidence 803(b). Statement by Party-Opponent 393	22.6			
Party-Opponent 393	22-6			393
22-6:2 New Jersey Rule of Evidence 803(b)(4). Statements Made Within Scope of Agency or Employment 394		22-6:1		202
Made Within Scope of Agency or Employment 22-6:3 New Jersey Rule of Evidence 803(b)(3). Statement by Authorized Person 394 22-6:4 Practice Point 395 22-7:1 Risk of Losing Prior Deposition Testimony 22-7:2 Practice Point 396 22-8:1 New Jersey Rule of Evidence 804(b)(1)(A). Testimony in Prior Proceedings 396 22-8:2 New Jersey Rule of Evidence 804(b)(1)(B). Testimony in Prior Proceedings 396 22-8:3 Application 397 22-8:4 Practice Point 398 22-8:5 Committee Comment to New Jersey Rule of Evidence 804 399 22-9 DE BENE ESSE DEPOSITIONS 394 395 396 397 397 398		22.62	• 11	393
22-6:3 New Jersey Rule of Evidence 803(b)(3). Statement by Authorized Person 394 22-6:4 Practice Point 395 22-7 JOINING ADDITIONAL PARTIES 395 22-7:1 Risk of Losing Prior Deposition Testimony 395 22-7:2 Practice Point 396 22-8 USE OF PRIOR DEPOSITION OR OTHER TESTIMONY: THE "SIMILAR MOTIVE" REQUISITE 396 22-8:1 New Jersey Rule of Evidence 804(b)(1)(A). Testimony in Prior Proceedings 396 22-8:2 New Jersey Rule of Evidence 804(b)(1)(B). Testimony in Prior Proceedings 396 22-8:3 Application 397 22-8:4 Practice Point 398 22-8:5 Committee Comment to New Jersey Rule of Evidence 804 Evidence 804 399 22-9 DE BENE ESSE DEPOSITIONS 399		22-6:2	* * * * *	20.4
Statement by Authorized Person 22-6:4 Practice Point 395 22-7 JOINING ADDITIONAL PARTIES 22-7:1 Risk of Losing Prior Deposition Testimony 395 22-7:2 Practice Point 396 22-8:1 New Jersey Rule of Evidence 804(b)(1)(A). Testimony in Prior Proceedings 22-8:2 New Jersey Rule of Evidence 804(b)(1)(B). Testimony in Prior Proceedings 396 22-8:3 Application 397 22-8:4 Practice Point 398 22-8:5 Committee Comment to New Jersey Rule of Evidence 804 22-9 DE BENE ESSE DEPOSITIONS 399		22.62		394
22-6:4 Practice Point 395 22-7 JOINING ADDITIONAL PARTIES 395 22-7:1 Risk of Losing Prior Deposition Testimony 395 22-7:2 Practice Point 396 22-8 USE OF PRIOR DEPOSITION OR OTHER TESTIMONY: THE "SIMILAR MOTIVE" REQUISITE 396 22-8:1 New Jersey Rule of Evidence 804(b)(1)(A). 396 22-8:2 New Jersey Rule of Evidence 804(b)(1)(B). 396 22-8:3 Application 397 22-8:4 Practice Point 398 22-8:5 Committee Comment to New Jersey Rule of Evidence 804 399 22-9 DE BENE ESSE DEPOSITIONS 399		22-6:3	• • • • • • • • • • • • • • • • • • • •	20.4
22-7:1 Risk of Losing Prior Deposition Testimony 395 22-7:2 Practice Point 396 22-8 USE OF PRIOR DEPOSITION OR OTHER TESTIMONY: THE "SIMILAR MOTIVE" REQUISITE 396 22-8:1 New Jersey Rule of Evidence 804(b)(1)(A). Testimony in Prior Proceedings 396 22-8:2 New Jersey Rule of Evidence 804(b)(1)(B). Testimony in Prior Proceedings 396 22-8:3 Application 397 22-8:4 Practice Point 398 22-8:5 Committee Comment to New Jersey Rule of Evidence 804 22-9 DE BENE ESSE DEPOSITIONS 399		22 ()	•	
22-7:1 Risk of Losing Prior Deposition Testimony 395 22-7:2 Practice Point 396 22-8 USE OF PRIOR DEPOSITION OR OTHER TESTIMONY: THE "SIMILAR MOTIVE" REQUISITE 396 22-8:1 New Jersey Rule of Evidence 804(b)(1)(A). Testimony in Prior Proceedings 396 22-8:2 New Jersey Rule of Evidence 804(b)(1)(B). Testimony in Prior Proceedings 396 22-8:3 Application 397 22-8:4 Practice Point 398 22-8:5 Committee Comment to New Jersey Rule of Evidence 804 399 22-9 DE BENE ESSE DEPOSITIONS 399	22.7		110000010000	
22-7:2 Practice Point 396 22-8 USE OF PRIOR DEPOSITION OR OTHER TESTIMONY: THE "SIMILAR MOTIVE" REQUISITE 396 22-8:1 New Jersey Rule of Evidence 804(b)(1)(A). Testimony in Prior Proceedings 396 22-8:2 New Jersey Rule of Evidence 804(b)(1)(B). Testimony in Prior Proceedings 396 22-8:3 Application 397 22-8:4 Practice Point 398 22-8:5 Committee Comment to New Jersey Rule of Evidence 804 399 22-9 DE BENE ESSE DEPOSITIONS 399	22-7			
22-8 USE OF PRIOR DEPOSITION OR OTHER TESTIMONY: THE "SIMILAR MOTIVE" REQUISITE 396 22-8:1 New Jersey Rule of Evidence 804(b)(1)(A). Testimony in Prior Proceedings 396 22-8:2 New Jersey Rule of Evidence 804(b)(1)(B). Testimony in Prior Proceedings 396 22-8:3 Application 397 22-8:4 Practice Point 398 22-8:5 Committee Comment to New Jersey Rule of Evidence 804 399 22-9 DE BENE ESSE DEPOSITIONS 399				
THE "SIMILAR MOTIVE" REQUISITE 396 22-8:1 New Jersey Rule of Evidence 804(b)(1)(A). 396 22-8:2 New Jersey Rule of Evidence 804(b)(1)(B). 396 Testimony in Prior Proceedings 396 22-8:3 Application 397 22-8:4 Practice Point 398 22-8:5 Committee Comment to New Jersey Rule of Evidence 804 399 22-9 DE BENE ESSE DEPOSITIONS 399	•••			396
22-8:1 New Jersey Rule of Evidence 804(b)(1)(A). Testimony in Prior Proceedings 396 22-8:2 New Jersey Rule of Evidence 804(b)(1)(B). Testimony in Prior Proceedings 396 22-8:3 Application 397 22-8:4 Practice Point 398 22-8:5 Committee Comment to New Jersey Rule of Evidence 804 399 22-9 DE BENE ESSE DEPOSITIONS 399	22-8			206
Testimony in Prior Proceedings 396 22-8:2 New Jersey Rule of Evidence 804(b)(1)(B). Testimony in Prior Proceedings 396 22-8:3 Application 397 22-8:4 Practice Point 398 22-8:5 Committee Comment to New Jersey Rule of Evidence 804 399 22-9 DE BENE ESSE DEPOSITIONS 399			*	396
22-8:2 New Jersey Rule of Evidence 804(b)(1)(B). Testimony in Prior Proceedings 396 22-8:3 Application 397 22-8:4 Practice Point 398 22-8:5 Committee Comment to New Jersey Rule of Evidence 804 399 22-9 DE BENE ESSE DEPOSITIONS 399		22-8:1	* * * * * * * * * * * * * * * * * * * *	206
Testimony in Prior Proceedings 396 22-8:3 Application 397 22-8:4 Practice Point 398 22-8:5 Committee Comment to New Jersey Rule of Evidence 804 399 22-9 DE BENE ESSE DEPOSITIONS 399			•	396
22-8:3 Application 397 22-8:4 Practice Point 398 22-8:5 Committee Comment to New Jersey Rule of Evidence 804 399 22-9 DE BENE ESSE DEPOSITIONS 399		22-8:2	* * * * * * * * * * * * * * * * * * * *	
22-8:4 Practice Point 398 22-8:5 Committee Comment to New Jersey Rule of Evidence 804 399 22-9 DE BENE ESSE DEPOSITIONS 399				
22-8:5 Committee Comment to New Jersey Rule of Evidence 804 399 22-9 DE BENE ESSE DEPOSITIONS 399			11	
Evidence 804 399 22-9 DE BENE ESSE DEPOSITIONS 399				398
22-9 DE BENE ESSE DEPOSITIONS 399		22-8:5	· · · · · · · · · · · · · · · · · · ·	
22-9:1 Introduction 399	22-9			
		22-9:1	Introduction	399

xxxii NEW JERSEY TRIAL EVIDENCE AND PROCEDURE



	22-9:2	Procedure		400
		22-9:2.1	New Jersey Court Rule 4:14-9(f). Objections	400
		22-9:2.2	Discussion	400
	22-9:3	Objective		401
22-10	VIDEOTA	APE DEPOS	SITIONS	402
	22-10:1	Parties and	l Lay Witnesses	402
	22-10:2	Experts		402
22-11	USE OF I	DEPOSITIO	ON TO IMPEACH A PARTY	
	OR WITN	IESS		402
	22-11:1	New Jersey	Court Rule 4:16-1. Use of Depositions	402
	22-11:2	Collateral	Impeachment by Use of Other Witness'	
		Deposition	1	403
	22-11:3	Exceptions	s to Use of Depositions as Collateral	
		Impeachm	ent: Adoptive and Vicarious Admissions	404
		22-11:3.1	Adoptive Admissions; New Jersey Rule	
			of Evidence 803(b)(2). Statement by	
			Party-Opponent	404
		22-11:3.2	Vicarious Admissions; New Jersey Rule of	
			Evidence 803(b)(3). Statement by Party-	
			Opponent	405
22-12		TONS OF I		406
	22-12:1		Court Rule 4:10-2(d). Deposing Expert	406
	22-12:2		Court Rule 4:14-9. Videotaping Experts'	
		Deposition		406
	22-12:3		of Videotape Testimony	408
	22-12:4		y Rule of Evidence 804(b)(1)(C).	
			for Local Experts	408
22-13			ORE ACTION—PERPETUATION	
		L TESTIM	ONY	409
22-14	CONCLU	SION		410
	22 TI 6	.		
_		_	ry Answers at Trial	44.4
	uests for Ad		DT DILLE 4 17 0 LIGE FILIDIC	411
23-1			RT RULE 4:17-8. USE, FILING	411
22.2			NTERROGATORIES	411
23-2	GENERA		ATODY ANGWEDS ARE DEEMED	411
23-3			ATORY ANSWERS ARE DEEMED	412
	IO RE AV	N ADOPTT	VE ADMISSION	412

NEW JERSEY TRIAL EVIDENCE AND PROCEDURE xxxiii



	23-3:1	New Jersey Rule of Evidence 803(b). Statement by	
	20 0.1	Party-Opponent	412
	23-3:2	Discussion	412
23-4	EFFECT	OF SETTLEMENT ON ADMISSION OF	
		OGATORY ANSWERS	415
23-5	PRACTI	CE POINT	415
23-6	REQUES	STS FOR ADMISSIONS	416
	23-6:1	New Jersey Court Rule 4:22-1. Request for Admission	416
	23-6:2	New Jersey Court Rule 4:22-2. Effect of Admission	417
		23-6:2.1 Discussion	417
Chapte	r 24: Hears	say	419
24-1		DUCTION	419
24-2	DEFINIT	ΓΙΟΝ OF HEARSAY	420
	24-2:1	New Jersey Rule of Evidence 801. Definitions	420
	24-2:2	New Jersey Rule of Evidence 802. Hearsay Rule	420
	24-2:3	Discussion	420
24-3	WHETH	ER DECLARANT IS A WITNESS AT TRIAL	420
24-4	NON-HE	EARSAY STATEMENTS	421
	24-4:1	For What Purpose?	421
	24-4:2	Not Admitted for the Truth of the Matter	421
24-5		RSEY RULE OF EVIDENCE 803(C)(3), FORMERLY	
		I AS "RES GESTAE," STATEMENTS NOT	
		DENT ON DECLARANT'S AVAILABILITY	426
24-6		CE POINT	429
24-7	RELIAB		429
24-8		CE POINT	430
24-9		AY RULES WHICH RELATE TO OTHER	
		OF EVIDENCE	430
	24-9:1	New Jersey Rule of Evidence 803(a). Prior Statements	420
	2402	of Witnesses	430
	24-9:2	New Jersey Rule of Evidence 803(b). Statement by	420
	24.0.2	Party-Opponent	430
	24-9:3	New Jersey Rule of Evidence 803(c)(21). Reputation	421
	24.0.4	as to Character	431
	24-9:4	New Jersey Rule of Evidence 803(c)(22). Judgments of Previous Convictions of Crime	421
	24-9:5		431
	24-9:3	New Jersey Rule of Evidence 803(c)(18). Expert Testimony	431
		Expert resultions	431

xxxiv NEW JERSEY TRIAL EVIDENCE AND PROCEDURE



	24-9:6	New Jersey Rule of Evidence 803(c)(5). Recorded Recollection; New Jersey Rule of Evidence 612.	
		Refreshing Recollection	431
24-10	SPECIFIC	C HEARSAY EXCEPTIONS	431
24-10	24-10:1	New Jersey Rule of Evidence 803(b). Party	TJ1
	24-10.1	Admissions and Vicarious Admissions	432
	24-10:2	New Jersey Rule of Evidence 803(c)(6).	732
	24 10.2	Business Entries	434
		24-10:2.1 Computer Data and Printouts	437
		24-10:2.2 E-Mails	439
	24-10:3	New Jersey Rule of Evidence 803(c)(8).	137
	21 10.5	Public Records	440
	24-10:4	State Medical Examiners Act and	
		New Jersey Rule of Evidence 803(c)(9)	442
	24-10:5	New Jersey Rule of Evidence 803(c)(7).	
		Absence of an Entry in Records of Regularly	
		Conducted Activity; New Jersey Rule of	
		Evidence 803(c)(10). Absence of Public Record	
		or Entry.	444
	24-10:6	New Jersey Rule of Evidence 803(c)(5).	
		Recorded Recollection	446
	24-10:7	New Jersey Rule of Evidence 808.	
		Expert Opinions in Records	446
	24-10:8	New Jersey Rule of Evidence 803(c)(1).	
		Present Sense Impression	449
	24-10:9	New Jersey Rule of Evidence 803(c)(2).	
		Excited Utterance	449
	24-10:10	New Jersey Rule of Evidence 803(c)(4).	
		Medical Diagnosis or Treatment	452
	24-10:11	New Jersey Rule of Evidence 803(c)(25).	
		Statement Against Interest	453
	24-10:12	New Jersey Rule of Evidence 804(b)(6). Trustworthy	
		Statements by Deceased Declarants; New Jersey Statute	
		2A:81-2. Transactions With Decedent, Proof Required	454
	24-10:13	New Jersey Rule of Evidence 804(b)(1).	
		Prior Testimony	457
	24-10:14	New Jersey Rule of Evidence 805.	
		Hearsay Within Hearsay	458

NEW JERSEY TRIAL EVIDENCE AND PROCEDURE xxxv



	24-10:15	New Jersey Rule of Evidence 804(b)(9).	
		Forfeiture by Wrongdoing	460
24-11	STATEM	ENTS ADMISSIBLE UNDER ALTERNATE	
	EXCEPT	IONS	461
24-12	REDACT	TION	461
24-13	NOTICE	REQUIREMENT	462
	24-13:1	New Jersey Rule of Evidence 807. Discretion	
		of Court to Exclude Evidence Under Certain	
		Exceptions	462
	24-13:2	Practice Point	462
24-14	NEW JEF	RSEY RULE OF EVIDENCE 804. HEARSAY	
	EXCEPTI	IONS: DECLARANT UNAVAILABLE	463
24-15	WHERE	HEARSAY IS ADMISSIBLE WHERE	
	NO EXCI	EPTION IS APPLICABLE	464
24-16	FEDERA	L RULE OF EVIDENCE 807.	
	RESIDUA	AL EXCEPTION	465
24-17	PRACTIO	CE POINT	466
24-18	ATTACK	ING THE CREDIBILITY OF THE HEARSAY	
	DECLAR	ANT	466
	24-18:1	New Jersey Rule of Evidence 806. Attacking and	
		Supporting Credibility of Declarant	466
	24-18:2	Discussion	467
	24-18:3	Practice Point	468
24-19	LIMITED	O APPLICATION OF COURT RULE 1:1-2	468
Chapte	r 25: Auther	ntication of Trial Exhibits	469
25-1	RULES		469
	25-1:1	New Jersey Rule of Evidence 901. Requirement of	
		Authentication or Identification	469
	25-1:2	New Jersey Rule of Evidence 1001. Definitions	469
	25-1:3	New Jersey Rule of Evidence 801. Definitions	469
25-2	INTROD	UCTION	470
25-3	DEMONS	STRATIVE EVIDENCE	470
25-4	CONDIT	IONAL ADMISSIBILITY	470
25-5	BURDEN	N OF PROOF	471
25-6	APPLICA	ATION OF AUTHENTICATION RULES	471
	25-6:1	Authentication of Photographs, Videotapes,	
		DVD Simulations	472
		25-6:1.1 Photographs of Damaged Vehicles	473

XXXVI NEW JERSEY TRIAL EVIDENCE AND PROCEDURE



	25-6:2	Letters		474
	25-6:3		eation of Telephone Conversations	475
	25-6:4		ne Evidence	476
	25-6:5		Social Media	
	25-6:6	New Jerse	ey Rule of Evidence 903. Testimony of	477
			ng Witness Unnecessary	478
	25-6:7		ey Rule of Evidence 1005. Public Records	479
	25-6:8	Business	•	480
25-7	ORIGIN	IALS AND	DUPLICATES: THE BEST	
	EVIDEN	ICE RULE		481
	25-7:1	Rules		481
		25-7:1.1	New Jersey Rule of Evidence 1001.	
			Definitions	481
		25-7:1.2	New Jersey Rule of Evidence 1002.	
			Requirement of Original	481
		25-7:1.3	New Jersey Rule of Evidence 1003.	
			Admissibility of Duplicates	481
		25-7:1.4	New Jersey Rule of Evidence 1004.	
			Admissibility of Other Evidence of	
			Contents	482
		25-7:1.5	Discussion	482
	25-7:2	Authentic	eation of Document Which Has Been Lost	485
25-8	SELF-A	UTHENTIC	CATING DOCUMENTS	486
	25-8:1	New Jerse	ey Rule of Evidence 902. Self-Authentication	486
	25-8:2	•		488
	25-8:3	Practice I	Practice Point	
25-9	NEW JE	RSEY RUL	E OF EVIDENCE 1006. SUMMARIES	489
25-10	SAMPL	E TESTIMO	ONY TO AUTHENTICATE SUMMARY	491
25-11	CHAIN	OF CUSTO	DDY	493
25-12	ADMITTING OTHER PARTS OF A WRITING			493
	25-12:1	New Jerse	ey Rule of Evidence 106. Remainder of	
			d Writings or Recorded Statements	493
	25-12:2	Discussio	•	494
25-13	AUTHE	NTICATIN	G EXHIBIT BY ADMISSION OF PARTY	495
	25-13:1	New Jerse	ey Rule of Evidence 1007. Testimony or	
			tatement of Party	495
	25-13:2	Discussio	•	495
25-14	ROLE O	F JUDGE	AND JURY IN AUTHENTICATING	
	DOCUMENTS			495

NEW JERSEY TRIAL EVIDENCE AND PROCEDURE xxxvii



	25-14:1	New Jerse	y Rule of Evidence 1008. Functions of	
		Court and	Jury	495
	25-14:2	Discussion	1	496
25-15	PRACTIO	CE POINT		496
25-16	AMENDI	MENT TO	INTERROGATORY ANSWERS	
	AND WH	ETHER T	HE COURT WILL ADMIT	
	EVIDEN	CE AT TRI	AL	496
25-17	NEW JEF	RSEY WIR	ETAPPING AND ELECTRONIC	
	SURVEIL	LANCE C	ONTROL ACT, N.J.S.A 2A: 156A-1	
	ET SEQ.			498
	25-17:1	Introducti	on	498
	25-17:2	Authentica	ation	498
	25-17:3	Applicabil	ity of the Wiretapping Act	499
		25-17:3.1	Where One of the Parties Is a Participant	
			in the Conversation	499
		25-17:3.2	Conversation Taped Between Two	
			Persons Other Than the Person Taping	
			the Conversation	499
		25-17:3.3	Videotaping Is Not Covered by	
			the Wiretapping Act	499
		25-17:3.4	E-Mails and Other Electronic Data	
			Stored in a Computer Accessible to	
			Both Parties	500
		25-17:3.5	Sanctions for Violating the Act	502
		25-17:3.6	Summary	502
Chapte		arol Evidenc	e Rule	503
26-1	INTROD	UCTION		503
26-2	DEFINIT			503
26-3			THE PAROL EVIDENCE RULE	503
26-4	COURT V	VERSUS JU	JRY DECISION-MAKING	504
26-5			DUCEMENT	505
26-6		DEFENSES		506
26-7			ENCE RULE DOES NOT APPLY TO	
			REEMENTS	507
26-8	PRACTIC	CE POINT		507

xxxviii NEW JERSEY TRIAL EVIDENCE AND PROCEDURE



Chapte	r 27: Trial	Objections	509	
27-1	HOW T	O MAKE AND PRESERVE OBJECTIONS		
	FOR AF	PPEAL	509	
	27-1:1	New Jersey Court Rule 1:7-2. Objections	509	
	27-1:2	New Jersey Court Rule 2:10-2. Notice of		
		Trial Errors	509	
	27-1:3	Discussion	510	
27-2	HOW T	O MAKE A RECORD ON EXCLUDED		
	EVIDE	NCE	510	
	27-2:1	New Jersey Court Rule 1:7-3. Record of		
		Excluded Evidence	510	
	27-2:2	Discussion	511	
27-3	TYPES	OF OBJECTIONS	512	
27-4	WHEN	TO OBJECT	513	
27-5	CUMUI	LATIVE ERRORS	514	
27-6	INVITE	D ERROR	515	
27-7	PRACT	ICE POINTS	517	
27-8	MOTIO	N FOR MISTRIAL	518	
Chapte	r 28: Closi	ing Statement	519	
28-1		ERSEY COURT RULE 1:7-1(B). CLOSING		
	STATE	MENT	519	
28-2	ORDER	OF CLOSING STATEMENTS	519	
28-3	GREAT	LATITUDE ALLOWED	519	
28-4	PROMIS	SES MADE TO THE JURY	520	
28-5	RESTR	ICTIONS ON STATEMENTS IN CLOSINGS	520	
28-6	CURAT	TIVE INSTRUCTIONS AND OBJECTIONS	525	
28-7	REPLA	Y OF VIDEOTAPE TESTIMONY AT THE CLOSING	527	
28-8	PERCE	NTAGES OF FAULT	527	
28-9	STATE	MENTS AS TO DAMAGES	528	
	28-9:1	Unliquidated Damages	528	
	28-9:2	New Jersey Court Rule 1:7-1(b). Time-Unit Rule	528	
	28-9:3	Liquidated Damages—Economic Losses	529	
	28-9:4	Summary	530	
Chapte	r 29: Jury	Charge and Verdict Sheet	531	
29-1	NEW JE	ERSEY COURT RULE 1:8-7. REQUESTS TO		
	CHARGE THE JURY; CHARGE CONFERENCE,			
	OBJECT	TIONS	531	

NEW JERSEY TRIAL EVIDENCE AND PROCEDURE xxxix



29-2	INSTRU	RUCTIONS TO JURORS			
29-3	OBJECTI	TONS TO JURY CHARGE			
29-4	MODEL CIVIL JURY CHARGES			533	
	29-4:1 False in One; False in All Jury Charge				
		Model Ci	vil Jury Charge 1.12	534	
	29-4:2	Jury Char	rges on Damages	535	
		29-4:2.1	Model Civil Charge 1.12O Damages	535	
		29-4:2.2	Jury Charge on Disability, Impairment		
			and Loss of the Enjoyment of Life,		
			Pain and Suffering	536	
	29-4:3	•	ge on the New Jersey		
		-	tive Negligence Act	538	
	29-4:4	Adverse I	nference Charge	540	
		29-4:4.1	Model Civil Jury Charge 1.18.		
			Witness: Failure of a Party		
			To Produce	540	
		29-4:4.2	Discussion	541	
		29-4:4.3	Practice Point	543	
	29-4:5	Practice P	Point	543	
29-5			NTS ON EVIDENCE	544	
29-6			JRT RULE 4:39-1. SPECIAL VERDICTS	545	
29-7			JRT RULE 4:39-2. GENERAL VERDICT		
	ACCOMI	PANIED B	Y ANSWER TO INTERROGATORIES	546	
	29-7:1	General V		546	
	29-7:2	Interrogat		546	
29-8	MODEL		RY INTERROGATORIES	549	
	29-8:1		vil Jury Charge 7.32. Interrogatories		
		~ ~	ence Case	549	
	29-8:2		vil Jury Charge 8.21. Jury Verdict Sheet in		
			ile Accident Case, Including Seat Belt Defense	550	
	29-8:3		vil Jury Charge 5.33A. Sample Verbal		
		Threshold	l Interrogatories Under New Jersey		
		Statute 39		552	
	29-8:4		vil Jury Charge 8.10. Sample Damage		
			neet for a Personal Injury Case	553	
	29:8-5		vil Jury Charge 2.21. Sample Jury		
		_	tories in Discrimination Case	553	
29-9	MATERI	ALS IN TH	HE JURY ROOM	554	

xl NEW JERSEY TRIAL EVIDENCE AND PROCEDURE



	29-9:1	New Jersey Court Rule 1:8-8. Materials to be		
		Submitted to the Jury (Exhibits and Lists;		
		Jury Instructions)	554	
	29-9:2	Exhibits and Documents Allowed in the Jury Room	555	
29-10	REPLAY	OF WITNESS TESTIMONY	556	
29-11	SEQUEST	TRATION OF JURORS AND JURORS'		
	VIOLATI	ON OF COURT INSTRUCTIONS	558	
	29-11:1	New Jersey Court Rule 1:8-6. Sequestration		
		of Juries	558	
	29-11:2	Third Circuit Model Civil Jury Charge 1.3,		
		Preliminary Instructions—Conduct of the Jury	563	
29-12	REOPEN	ING TRIAL AFTER DELIBERATIONS BEGIN	564	
29-13	NEW JER	RSEY COURT RULE 1:8-9. RETURN		
	OF VERD	DICT	565	
	29-13:1	Number of Jurors Necessary for a Verdict	565	
	29-13:2	Presumption of Correctness of a Jury Verdict	566	
29-14	DISMISS.	AL OF JURORS AFTER DELIBERATIONS		
		GUN WHERE JURY IS DEADLOCKED	566	
29-15	DEADLO	CKED JURY—THE "ALLEN CHARGE"	567	
	29-15:1	Criminal Case	567	
	29-15:2	Model Criminal Jury Charge	568	
	29-15:3	Civil Cases	568	
		29-15:3.1 Model Civil Jury Charges	568	
	29-15:4	Practice Point	569	
29-16		OF TIME THE JURY DELIBERATES BEFORE		
		ING A VERDICT	570	
29-17	POLLING	G OF THE JURY	570	
	29-17:1	New Jersey Court Rule 1:8-10. Polling of Jury	570	
29-18		NT AND COMPROMISE VERDICTS	571	
	29:18:1	Practice Point	572	
29-19		G THE VERDICT IN NEGLIGENCE CASES	572	
	29-19:1	Contributory and Comparative Negligence	572	
	29-19:2	Discussion	574	
29-20		RDICT INTERVIEW OF JURORS PROHIBITED	574	
	29-20:1	New Jersey Court Rule 1:16-1. Interviewing Jurors		
		Subsequent to Trial	574	
29-21		NING JURORS BACK FOR POTENTIAL BIAS	576	
29-22	INCONSISTENT VERDICTS 577			

NEW JERSEY TRIAL EVIDENCE AND PROCEDURE

xli





Chapter	30: Trial M	Iotions		581	
30-1	INTRODUCTION			581	
30-2	MOTION	FOR DIR	ECTED VERDICT	582	
	30-2:1	New Jersey	y Court Rule 4:37-2. Involuntary Dismissal;		
		Effect The	reof	582	
30-3	MOTION	FOR JUD	GMENT	584	
	30-3:1	New Jersey	y Court Rule 4:40-1. Motion for Judgment		
		at Trial		584	
30-4	MOTION	FOR JUD	GMENT NOTWITHSTANDING		
	VERDIC	Γ		584	
	30-4:1	New Jersey	y Court Rule 4:40-2. Motion for Judgment		
		Notwithsta	anding the Verdict	584	
	30-4:2	Standard		585	
	30-4:3	Asking the	e Court to Submit a Case to Jury Before		
		the Court	Grants Judgment	586	
30-5	MOTION	FOR NEW	TRIAL	586	
	30-5:1	New Jersey	y Court Rule 4:49-1. Motion for		
		New Trial		586	
	30-5:2	Standard		589	
30-6	MOTION	FOR REM	IITTITUR AND ADDITUR	590	
	30-6:1	Case Law	before the Supreme Court's Decision		
		in Oriental	le v. Jennings	590	
		30-6:1.1	Motion for Remittitur Before Orientale	591	
		30-6:1.2	Motion for Additur Before Orientale	599	
30-7	REVISIO	NS TO REI	MITTITUR AND ADDITUR		
	PROMUL	GATED B	Y ORIENTALE	599	
30-8	EXAMPL	ES OF DE	CISIONS ON REMITTITUR		
	AND ADI	DITUR		601	
30-9	PUNITIV	E DAMAG	SES AND REMITTITUR OR ADDITUR	602	
30-10	PRACTIC	E POINT		603	
30-11	MOTION FOR RELIEF FROM JUDGMENT				
	OR ORDI	ER		604	
	30-11:1	New Jersey	y Court Rule 4:50. Relief from Judgment		
		or Order	-	604	
		30-11:1.1	New Jersey Court Rule 4:50-1.		
			Grounds of Motion	604	
		30-11:1.2	New Jersey Court Rule 4:50-2.		
	Time of Motion 60				

xlii NEW JERSEY TRIAL EVIDENCE AND PROCEDURE



		30-11:1.3	New Jersey Court Rule 4:50-3.	
			Effect of Motion	605
	30-11:2	Motion Re	equirements	605
	30-11:3	Practice Po	pint	609
30-12	APPELL	ATE COUR	T RULES RELATING TO TRIAL	
	MOTIO	NS		609
	30-12:1	-	eight of Evidence, New Jersey Court	
		Rule 2:10-1	l	609
	30-12:2		ons Toll Time to Appeal	609
	30-12:3	-	Court Rule 2:4-3. Tolling of	
			appeal and Certification	610
30-13	PRACTI	CE POINT		610
				-10
_		ive Damages		613
31-1			PUNITIVE DAMAGES ACT	613
31-2			NITIVE DAMAGES	613
31-3		ARD OF PRO		613
31-4			ONSIDERED BY THE JURY	614
31-5		CATED TRIA		614
31-6			DAMAGES	614
31-7			TIVE DAMAGES	615
31-8			HE TRIAL JUDGE TO REDUCE	
			MAGES AWARD	615
31-9			ED FOR CRIMINAL	
		IGATION		615
31-10			AUD WILL NOT NECESSARILY	c4 #
	RESULI	IN PUNITI	VE DAMAGES	615
Chante	r 32: Snolis	ation of Evide	ance	617
32-1	_		POLIATION ACTION	617
32-2			IATION HAS NOT YET BEEN	017
32 2			A CAUSE OF ACTION	619
32-3			CTIONS IMPOSED	620
32-4		` /	NCE CHARGE	620
32-5			VERY OF SPOLIATION	621
32-6		ATION OF		622
32-7			IT IS THE SPOLIATOR	623
32-8			IS THE SPOLIATOR	625

NEW JERSEY TRIAL EVIDENCE AND PROCEDURE xliii



32-9	SPOLIA	TION BY THIRD PARTIES	626
32-10	ESSENT	TIAL PURPOSES SANCTIONS ARE DESIGNED	
	TO ACH	HIEVE	626
32-11	OTHER	REMEDIES AGAINST SPOLIATORS	627
32-12	THE UL	TIMATE SANCTION: DISMISSAL OF	
	THE CA	SE	627
32-13	SANCT	IONS AGAINST ATTORNEY	629
	32-13:1	Rule of Professional Conduct 3.4. Fairness to	
		Opposing Party and Counsel	629
32-14	APPLIC	ATION OF A SPOLIATION DEFENSE TO	
	CRIMIN	NAL CASES	630
32-15	DEFEA	TING A CLAIM OF SPOLIATION	
	OF EVII	DENCE	631
32-16	PRACTI	ICE POINT	633
Chapte	r 33: Offer	of Judgment	637
33-1	INTROI	DUCTION	637
33-2	OFFER	OF JUDGMENT RULE	637
	33-2:1	New Jersey Court Rule 4:58-1. Time and Manner of	
		Making and Accepting Offer	637
	33-2:2	New Jersey Court Rule 4:58-2. Consequences of	
		Non-Acceptance of Claimant's Offer	638
	33-2:3	New Jersey Court Rule 4:58-3. Consequences on	
		Non-Acceptance of Offer of Party Not a Claimant	639
	33-2:4	New Jersey Court Rule 4:58-4. Multiple Claims;	
		Multiple Parties	640
	33-2:5	New Jersey Court Rule 4:58-5. New Trial	643
	33-2:6	New Jersey Court Rule 4:58-6. Applications for Fee;	
		Limitations	643
	33-2:7	New Jersey Court Rule 4:58-7. Acceptance of	
		Offer Not Deemed a Judgment; Payment of	
		Accepted Offer	643
33-3	PURPO	SE OF THE OFFER OF JUDGMENT RULE	644
33-4	SERVIN	G, FILING AND ACCEPTING THE OFFER OF	
	JUDGM	IENT	645
33-5	CONSE	QUENCES OF NON-ACCEPTANCE OF	
		MANT'S OFFER OF JUDGMENT	646

xliv NEW JERSEY TRIAL EVIDENCE AND PROCEDURE



33-6	CONSEQUENCES OF NON-ACCEPTANCE OF				
	A NON-CLAIMANT'S OFFER OF JUDGMENT	646			
33-7	INSTANCES WHERE THE COURT WILL DISALLOW OR				
	REDUCE THE EFFECT OF AN OFFER OF JUDGMENT	647			
	33-7:1 Practice Point	648			
33-8	FEE APPLICATION	648			
	33-8:1 Deadline for Filing Fee Application	648			
	33-8:2 Form of Fee Application	648			
	33-8:3 Date When Allowances Commence	649			
	33-8:4 No Duplicative Fees	649			
	33:8-5 An Offer of Judgment Will Be Awarded Where				
	There Is a Contingency Fee Agreement	649			
33-9	MANDATORY NATURE OF OFFER OF JUDGMENT RULE	650			
33-10	APPLICATION OF OFFER OF JUDGMENT RULE				
	IN APPEALS	651			
33-11	HISTORY OF THE OFFER OF JUDGMENT RULE	651			
33-12	MAKING MORE THAN ONE OFFER OF JUDGMENT	652			
33-13	MAKING AN OFFER OF JUDGMENT IN MULTIPLE				
	PARTY CASES	652			
33-14	ALTERING OFFER OF JUDGMENT RULE:				
	HIGH-LOW AGREEMENTS	653			
33-15	FEDERAL RULE OF CIVIL PROCEDURE 68	654			
	33-15:1 Federal Rule of Civil Procedure 68. Offer of Judgment	654			
	33-15:2 Discussion	655			
33-16	OFFER OF JUDGMENT RULE COMPARED TO				
	FRIVOLOUS LAWSUIT RULE	655			
33-17	PRACTICE POINT	656			
Chapte	er 34: Video Transmission of Trial Testimony	659			
34-1	LAY TRIAL TESTIMONY BY VIDEO TRANSMISSION	659			
34-2	FACTORS CONSIDERED IN DECIDING IF REMOTE				
	TESTIMONY PERMITTED	660			
34-3	ADDITIONAL CONDITIONS JUDGE MAY IMPOSE				
	ABOUT ADMISSIBILITY OF REMOTE TESTIMONY	660			
34-4	PRACTICE POINT	661			

NEW JERSEY TRIAL EVIDENCE AND PROCEDURE





 \mathbf{xlv}



Chapte	r 35: Judge Recusal	663
35-1	CODE OF JUDICIAL CONDUCT	663
35-2	AVOIDING THE APPEARANCE OF IMPROPRIETY	663
35-3	EX PARTE COMMUNICATIONS PROHIBITED	
	WITH EXCEPTIONS	664
35-4	DUTY TO SIT WHERE APPROPRIATE	664
35-5	"JUDGE-SHOPPING" PROHIBITED	664
Table o	of Cases	667
Table o	of Rules, Statutes and Jury Instructions	737
Index		745





xlvi NEW JERSEY TRIAL EVIDENCE AND PROCEDURE