

Garden State CLE presents:

New Jersey Rules of Evidence in Drunk-Driving Cases



Lesson Plan

Introduction – New Jersey DWI Offense

NJSA 39:4-50(a)(1)(i)

Except as provided in subsection (g) [school zone offenses] of this section, a person who operates a motor vehicle while under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug, or operates a motor vehicle with a blood alcohol concentration of 0.08% or more by weight of alcohol in the defendant's blood or permits another person who is under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug to operate a motor vehicle owned by him or in his custody or control or permits another to operate a motor vehicle with a blood alcohol concentration of 0.08% or more by weight of alcohol in the defendant's blood shall be subject:



I. Operation of a Motor Vehicle

Four Available Methods of Proof

1. Direct Evidence

2. Circumstantial Evidence



3. Admission

Rule 803. Hearsay Exceptions not Dependent on Declarant's Unavailability

The following statements are not excluded by the hearsay rule:

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

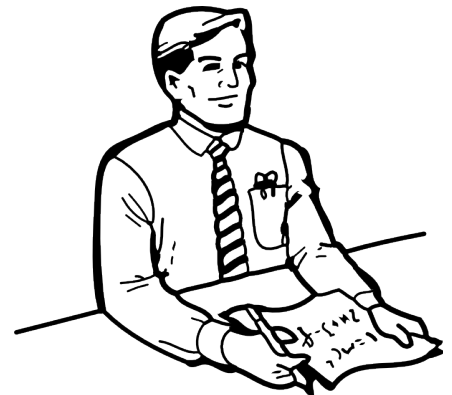
(2) a statement whose content the party has adopted by word or conduct or in whose truth the party has manifested belief, or

(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).



4. Stipulation

NJRE 101(a)(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.



II. Adverse Inferences – Consciousness of Guilt

1.) Unreasonable Refusal to provide blood sample: State v. Cryan, 363 NJ Super. 442 (App. Div. 2003).

2.) Refusal to submit to breath-test, State v. Tabisz, 129 NJ Super. 80 (App. Div. 1974); State v. Stever, 107 NJ 543 (1987).

3.) Refusal to perform FST: State v. Bryant, 328 NJ Super. 379 (App. Div. 2000)



III. Satisfying Conditions of Admissibility

1.) NJRE 104. PRELIMINARY QUESTIONS.

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



[Limitation on admissibility during the 104(a) hearing is restricted to relevance and trustworthiness of the evidence.]

See NJRE 101(a)(2) -

(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:



2.) Admissibility of Alcotest Results – Foundational requirements:

Testimony:

- **Twenty minute observation period [State v. Filson, 409 NJ Super. 246 (Law Div. 2009).]**
- **New mouthpiece for each test**
- **No cell phone or electro-magnetic devices**



Documents:

- a.) Operator's Qualification Card (*Chun* at 134) [Good for the year granted + 2 calendar years];
- b.) Most recent calibration report from NJSP - (*Chun* at 145);
- c.) Most recent standard solution change report prior to defendant's test (*Chun* at 145) (Note – this document may sometimes be included as part of (b) above);
- d.) Certificate of analysis used in defendant's control tests - (*Chun* 145);
- e.) The Alcohol Influence Report; (*Chun* at 134)
- f.) Worksheet A Tolerance Calculations (*Chun* 150-151).

ALCOHOL INFLUENCE REPORT FORM, ALCOTEST 7110 MKIII-C
MULICA TOWNSHIP POLICE

Department Case No.: 2007-12346
Barrow's Neck: 140378
Sequential File No.: 00044

Subject
Last Name: WHITEHEAD
D.O.B.: 07/12/1959 Age: 47
Driver License Number: W35166476157594
First Name: RENEE
Gender: FEMALE
Issuing State: NJ
Ht: 5 ft. 09 in.
MI: A
Wt: 150 lbs.

Arresting Officer
Last Name: MCRAE
Badge No.: 22
Arrest Date: 02/26/2007
First Name: ROBERT
Arrest Time: 01:38
Arrest Location: 0112
MI: L

Instrument
Location: Alcotest 7110 MKIII-C
MULICA TOWNSHIP POLICE
Serial No.: ARWP-0402
Calibration File No.: 00003
Certification File No.: 00004
Linearity File No.: 00005
Solution File No.: 00042
Supplemental File No.: 00044
Calib. Date: 04/18/2006
Cert. Date: 04/18/2006
Lin. Date: 04/18/2006
Soln. Date: 02/02/2007
File Date: 02/26/2007

Calibrating Unit: WET
Control Solution %: 0.100%
Solution Control Lot: 06C027
Model No.: CU-34
Serial No.: DDWK S3-0410
Report: 03/03/2008
Bottle No.: 0769

Breath Test Information

Function	Result %BAC	Time HH:MM	Volume (L)	Duration Sec (s)	Date of Test Temp Sec (°C)	Error Message
Ambient Air Blank	0.000%	03:03S				
Control Test 1					33.9°C	
EC Result	0.101%	03:04S				
IR Result	0.099%	03:04S				
Ambient Air Blank	0.000%	03:05S				
Breath Test 1			2.5L	16.6s		
EC Result	0.165%	03:06S				
IR Result	0.165%	03:06S				
Ambient Air Blank	0.000%	03:07S				
Breath Test 2			3.0L	20.5s		
EC Result	0.169%	03:09S				
IR Result	0.169%	03:09S				
Ambient Air Blank	0.000%	03:10S				
Control Test 2					33.9°C	
EC Result	0.099%	03:10S				
IR Result	0.098%	03:10S				
Ambient Air Blank	0.000%	03:11S				

REPORTED BREATH TEST RESULT: 0.16% BAC

Breath Test Operator
Last Name: MCRAE
First Name: ROBERT
Signature: _____
Date: 02/26/2007
MI: L

Copy Given to Subject

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3. Motion to suppress evidence

[Foundational requirement: Seizure of the evidence without a search warrant was reasonable in that under the totality of the circumstances, because the search objectively fit within one of the recognized exceptions to the warrant requirement.]

**4.) Qualifications of an expert or specialized lay witness
[S.K.E.E.T.]**

**5.) Authentication of Blood/Drug samples (chain of custody)
State v. Morton, 155 NJ 383 (1998). See also NJRE 901 (section X *infra*)**

6.) Other – Business records, public records (e.g. school zone maps), privilege, etc.

7. When should the NJRE 104(a) hearing occur?

- a. For motion to suppress (Rule 7:5-2) or *Miranda* hearing (Rule 7:7-5(b)) always prior to trial per Rules of Court**
- b. In all other instances, see NJRE 611(a)**

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.

Cross ref NJRE 403



8. Testimony By the Defendant

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

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

Cross examination – Leading Questions - NJRE 611(c)

Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his 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.



IV. Burdens of Proof & Production

1. NJRE 101(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.



- a.) Reasonable suspicion – motor vehicle stop, weapons search**
- b.) Probable cause – arrest or search of vehicle for criminal evidence**
- c.) Preponderance of evidence – MTS hearings**
- d.) Clear and Convincing – Rule 104(a) on Alcotest conditions of admissibility. Romano v. Kimmelman, 96 NJ 66, 90-91 (1984); consent in MTS**

Defined as: Clear-and-convincing evidence is that which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the fact-finder to come to a clear conviction, without hesitancy, of the precise facts in issue. In re Seaman, 133 NJ 67, 74 (1993).

- e.) Beyond a reasonable doubt – NJRE 104(c) and proof on each element of the DWI offense.**

(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.

[Initially, this burden is usually on the State but may revert to defendant in a telephonic search warrant blood-draw case.]



V. Crawford and NJRE 803(c)

Crawford v. Washington, 541 US 36 (2004)

Davis v. Washington, 126 S. Ct. 2266 (2006)

1.) DWI Blood Cases

State v. Berezansky, 386 N.J.Super. 84 (App. Div. 2006)

State v. Renshaw, 390 N.J.Super. 456 (App. Div. 2007)

State v. Kent, 391 N.J.Super. 352 (App. Div. 2007)



2.) Laboratory Reports

Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011)

Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009)

State v. Rehmann, 419 NJ Super. 451 (App. Div. 2011)

But when the report is prepared for diagnosis and treatment:

State v. Dyal, 97 NJ 229 (1984)

NJSA 2A:62A-10 and 11

NJSA 2C:35-19

3.) Statements Given During An Emergency

State in the Interest of J.A. 195 N.J. 324 (2008)

VI. Opinion Testimony

1.) Rule 701. Opinion Testimony by Lay Witnesses.

If the witness is not testifying as an expert, his 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.



2.) Under the influence defined:

The language ‘under the influence’ used in the statute has been interpreted many times. Generally speaking, it means a substantial deterioration or diminution of the mental faculties or physical capabilities of a person whether it be due to intoxicating liquor, narcotic, hallucinogenic or habit-producing drugs. In [State v. Johnson, 42 N.J. 146, 165, 199 A.2d 809 \(1964\)](#), an intoxicating liquor case, we stated that ‘under the influence’ meant a condition which so affects the judgment or control of a motor vehicle operator as to make it improper for him to drive on the highway. More recently, in [State v. DiCarlo, 67 N.J. 321, 338 A.2d 809 \(1975\)](#), we held that an operator of a motor vehicle **405 was under the influence of a narcotic drug within the meaning of [N.J.S.A. 39:4-50\(a\)](#) if the drug produced a narcotic effect ‘so altering his or her normal physical coordination and mental faculties as to render such person a danger to himself as well as to other persons on the highway

State v. Tamburro, 68 NJ 414, 420-421 (1975)

3.) Intoxication by alcohol – State v. Guerrido, 60 NJ Super. 505, 511 (App. Div. 1960)

Although examination by a physician or tests to determine intoxication, or both, are usually given, there is, as we said in the [State v. Pichadou, 34 N.J. Super. 177, 181 (App. Div. 1955)], no persuasive reason to hold that a state of intoxication of the degree contemplated by [N.J.S.A. 39:4-50](#) cannot factually be established by lay evidence. We there held that the average witness of ordinary intelligence, although lacking special skill, knowledge and experience, but who has had the opportunity of observation, may testify whether a certain person was sober or intoxicated. In Damoorgian the state troopers who testified stated, without equivocation, that in their opinion defendant was under the influence of alcoholic liquor and unfit to operate a motor vehicle. The court said:

Whether a man is sober or intoxicated is a matter of common observation, not requiring any special knowledge or skill, and is habitually and properly inquired into of witnesses who have occasion to see him and whose means of judging correctly must be submitted to the trier of the facts.

[see also [State v. Greul, 59 N.J. Super. 34, 36-37, 157 A.2d 44 \(Cty. Ct. 1959\).](#)]

4.) 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.

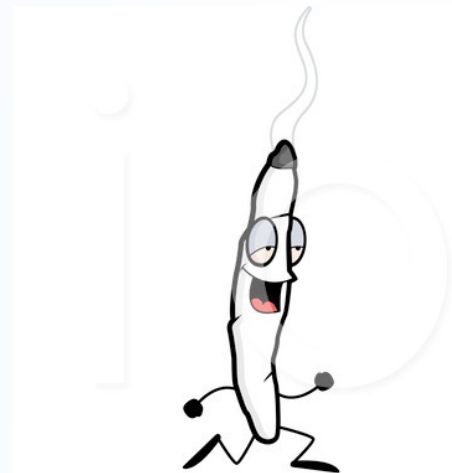
5. Intoxication by drugs – State v. Bealor, 187 NJ 574, 592 (2006)

That said, expert testimony remains the preferred method of proof of marijuana intoxication. We arrive at that conclusion in the knowledge that it is not too difficult a burden for the State to offer an expert opinion as to marijuana intoxication. Prosecutors in municipal courts throughout the State routinely qualify local and state police officers to testify as experts on the subject of marijuana intoxication. Expert testimony only requires that a witness be qualified “by knowledge, skill, experience, training, or education.”

6. Proof without expert opinion- State v. Bealor, 187 NJ 574, 591-592 (2006)

As in the context of driving while under the influence of alcohol cases, we reject the Appellate Division's restriction on the logical and inferential ability of the fact-finder to connect the objective facts of intoxication with the proven presence of a cause of intoxication in order to conclude that defendant drove while intoxicated. We also reject the notion that a conviction for driving under the influence of a narcotic, hallucinogen or habit-producing drug must be based *exclusively* on proofs of “the subject's conduct, physical and mental condition and the symptoms displayed” together with “a qualified expert ... determin[ing] that he or she is ‘under the influence’ of a narcotic.” On the contrary, we acknowledge that [t]he thrust of the Motor Vehicle Act is safety on the highway. The particular section is addressed to the evil of operating a motor vehicle while one's physical coordination or mental faculties are substantially diminished by “intoxicating liquor, narcotic, hallucinogenic or habit-producing drug.” Competency to operate a motor vehicle safely is the critical question.

The rule adopted by the panel—that the nexus between the facts of intoxication and the cause of intoxication can only be proved by expert opinion—impermissibly impinges on the traditional role of the fact-finder and is explicitly disavowed. In these circumstances, determining whether defendant was under the influence of marijuana was not “beyond the ken of the average [finder of fact.]”



VII. Judicial Notice

RULE 201. JUDICIAL NOTICE OF LAW AND ADJUDICATIVE FACTS.

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



Examples:

Serum is derived when the tube containing whole blood is spun so that the solid and fluid portions separate. The fluid portion is then analyzed providing a “serum alcohol value.” Serum contains more water than does blood, so that the resulting alcohol reading is sixteen percent higher in serum than it would be in blood. A serum alcohol value is therefore converted to blood alcohol by dividing the serum value by 1.16.

State vs. Lutz, 309 N.J.Super 317, 322 (App.Div.1998)

Definition of Motor Vehicle, driver, automobile, etc – see NJSA 39:1-1.

Alcotest test procedures – see State v. Chun, 194 NJ 54 (2008).



a.) Foundational Requirements for Novel Scientific Proofs [HGN]

“However, absent a [determination] by this court or our Supreme Court, the trial courts in this State are not at liberty to admit evidence of newly-devised scientific technology unless the general acceptance thereof is demonstrated by expert testimony, authoritative scientific and legal writings or judicial opinions.” State v. Doriguzzi, 334 N.J. Super. 530, 533 (App. Div. 2000)

“When reviewing a decision on the admission of scientific evidence, an appellate court should scrutinize the record and independently review the relevant authorities, including judicial opinions and scientific literature. In the rapidly changing world of modern science, continuing research may affect the scientific community's acceptance of a novel technology. By reviewing post-trial publications, an appellate court can account for the rapid pace of new technology. The continuing review also recognizes that general acceptance may change between the time of trial and the time of appellate review.” State v. Harvey, 151 N.J. 117, 167-168 (1997).

“[T]he test in criminal cases remains whether the scientific community generally accepts the evidence.

A proponent of a newly-devised scientific technology can prove its general acceptance in three ways:

(1) by expert testimony as to the general acceptance, among those in the profession, of the premises on which the proffered expert witness based his or her analysis;

(2) by authoritative scientific and legal writings indicating that the scientific community accepts the premises underlying the proffered testimony; and

(3) by judicial opinions that indicate the expert's premises have gained general acceptance.

The burden to “clearly establish” each of these methods is on the proponent. State v. Harvey, *supra* at 170.

State v. Chun, 194 N.J. 54 (2008); Frye v. United States, 293 F.1013 (D.C.Cir. 1923).

VIII. Privileges

Rule 500. General Rule

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

Rule 501. Privilege of Accused

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

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

NJRE 501 is the N.J. statutory analog of Amendment V of United States Constitution.

NJRE 506 – Patient & Physician Privilege

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

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

Does not apply to DWI cases:

State v. Schreiber, 122 NJ 579 (1991)

Rule 503. Self-Incrimination (vs. non-testimonial activities)

NJSA 39:4-50.4a Refusals – State v. Stever, 107 NJ 543 (1987).

FST – State v. Macuk, 57 NJ 1(1970).

Blood Draw – Schmerber v. California, 384 US 757 (1966)

Court room demonstrations

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

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

(a) no person has the privilege to refuse to submit to examination for the purpose of discovering or recording his corporal features and other identifying characteristics or his physical or mental condition;

(b) no person has the privilege to refuse to obey an order made by a court to produce for use as evidence or otherwise a document, chattel or other thing under his control if some other person or a corporation or other association has a superior right to the possession of the thing ordered to be produced;

(c) no person has a privilege to refuse to disclose any matter which the statutes or regulations governing his office, activity, occupation, profession or calling, or governing the corporation or association of which he is an officer, agent or employee, require him to record or report or disclose except to the extent that such statutes or regulations provide that the matter to be recorded, reported or disclosed shall be privileged or confidential;

(d) subject to the same limitations on evidence affecting credibility as apply to any other witness, the accused in a criminal action or a party in a civil action who voluntarily testifies in the action upon the merits does not have the privilege to refuse to disclose in that action, any matter relevant to any issue therein.

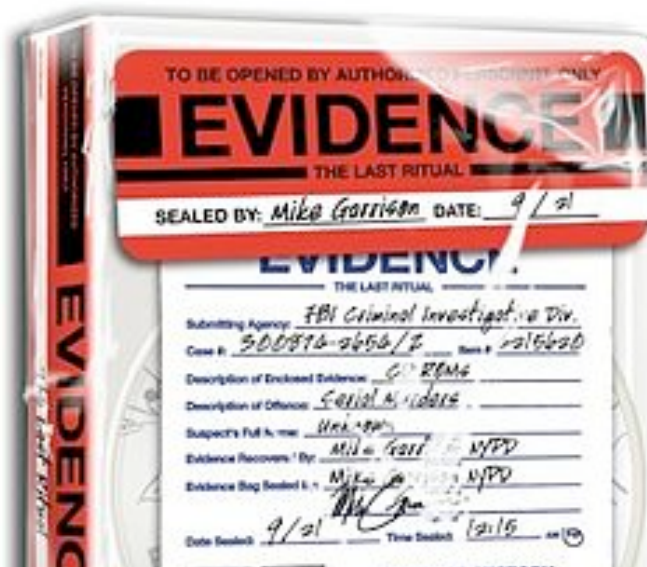
IX - NJRE 803(c)(5) – Past Recollection Recorded

(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.



Consider *Crawford* Issues

Contrast – past recollection refreshed (writings vs. other objects) NJRE 612



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.



X. Authentication

Rule 901. Requirement of Authentication or Identification.

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

Cross Ref NJRE 104(a)

Cross Ref NJRE 602

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 find 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.

Cross ref NJRE 902(d) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (a), (b), or (c) of this rule or complying with any law or rule of court.

Cross ref NJRE 1005. Public records

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

Evidence that must be authenticated includes:

Testimony

Documents and writings

Photographs & video

Scientific Exhibits

Real & Demonstrative Evidence

Reports

Opinions

**Chain of Custody as a matter of weight –
State v. Morton, 155 NJ 383 (1998)**



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