

Garden State CLE presents:

**“I see it... but I don’t believe it”:**  
**Inspiring levels of belief at trial**



**Lesson Plan**

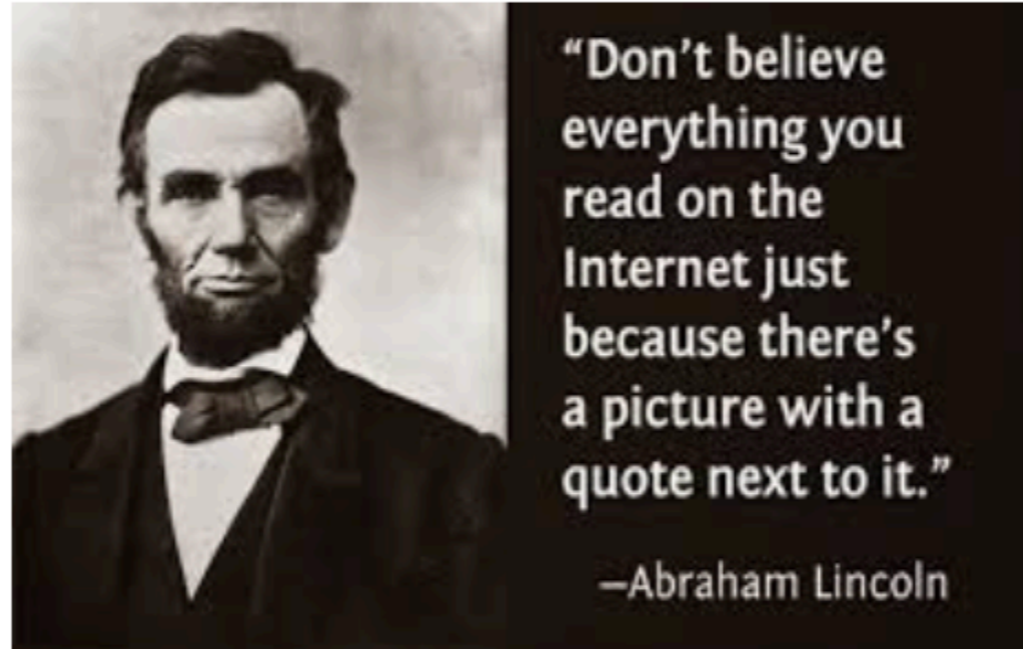
**Instructors:**

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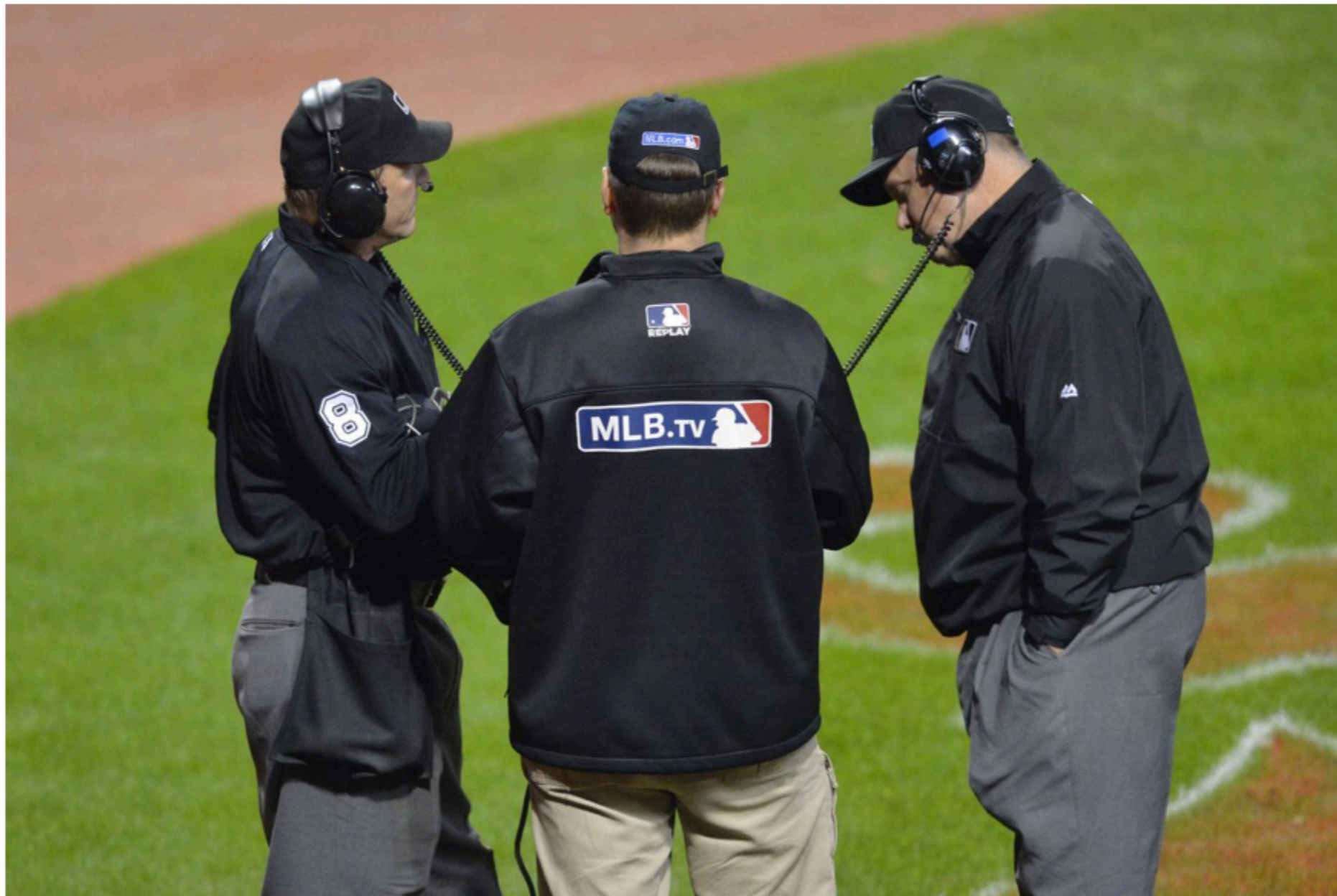
# Chapter 1 - Introduction



**For the first 150 years of its existence, professional baseball relied upon and accepted the determinations made by umpires. Calls of safe or out were often the subject of loud, raucous arguments from players or managers, but in the end, the umpire’s word was final. This was because the players had no choice. The technology of the time did not allow for any form of objective review. Conversely, the ability of human beings to accurately observe and judge an event that occurs within a few 100 hundredths of a second does not exist.**



**Modern-day baseball audiences no longer wish to see games decided on purely subjective opinion. The current technology now affords umpires and baseball players an objective view of close plays on the field. Judgments that are impossible for human beings to make in real-time now can be objectively and accurately made by digital technology that slows the action down to a few frames per second or even slower. As a result, the critical decisions in baseball games are decided by objective evidence.**



**Unlike professional baseball, for the past millennium, criminal trials have decided by purely subjective evidence. In the absence of modern-day video or audio evidence, juries decide cases based upon wholly subjective levels of belief. Whether the defendant is objectively guilty is both unknowable and unnecessary to the process. If the jury believes that each element of the offenses charged in the indictment has been proved beyond a reasonable doubt, the defendant is legally guilty. Given this reality, it is the process of proving subjective facts that is integral to the trial process.**

**In the final analysis, criminal trials are about persuasion and levels of belief. Each of the advocates desires to persuade the judge that his position on the law is correct. Each one wants the jury to be convinced that his version of the facts is the more likely to be true. Opening and closing statements, direct and cross examination and the introduction of evidence provide the opportunities to persuade. Each of these opportunities must be utilized within the constraints of the New Jersey Rules of Evidence, the Rules of Court, many decades of reported case law, the *New Jersey Code of Criminal Justice* (Title 2C) and the Rules of Professions Conduct.**



**With this in mind, the following CLE will explore subjective persuasion tactics and strategies in a criminal trial within the context and constraints of the case law and Rules.**

## **Chapter 2 - Relevant evidence**

**In making a determination to the guilt or innocence of a defendant in a criminal trial, jurors are free to reject or accept the evidence that has been placed before them. The one common denominator that all the evidence admitted for consideration before the jury is that it has all been found to relevant by the judge. Proof of facts in a criminal trial is largely dependent on the admission into evidence of relevant pieces of information.**

**In a sense, the limitation to consideration of relevant evidence provides assurance that the trial of a criminal case will come to an end at some point. Were it not for this limitation, no trial would ever end. The criminal trial would just continue on indefinitely as all manner of irrelevant evidence would be placed in evidence.**

**Trial judges, as gatekeepers, are tasked with the responsibility of deciding whether a proposed piece of evidence meets the threshold of relevance before it can be considered by the jury. In making this decision, the judge must gauge the evidence within the context of the definition of relevant evidence in N.J.R.E. 401.**

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



**Notice that the concept of materiality is not a part of the New Jersey definition of relevance. Nor is there any test as to how important the relevant evidence must be. Outside of evidence that is merely trivial or cumulative, any evidence that will help prove or disprove any fact of consequence related to the case is relevant. The proposed evidence may be relevant under the definition in N.J.R.E. 401, but carry little probative weight. Yet, once the proffered evidence has been deemed to be relevant, it is admissible. Indeed, NJRE 402 so provides with the simple mandate that except as otherwise provided by the Rules of Evidence, all relevant evidence is admissible.**

**Finally, on occasion, the relevance of a proffered piece of evidence may not initially appear to be relevant. It will only become relevant in the trial when it is linked to additional evidence that will be offered later in the case. In these instances, trial judges may admit the initial evidence conditionally, subject to the admission of the subsequent evidence that makes it relevant.**



## **Chapter 3 – Exclusion of relevant evidence**

**Relevant evidence can be excluded by the trial judge for a variety of reasons, most of which are grounded in the need to avoid wasting time or assuring a fair trial. N.J.R.E. 403 provides:**

**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.**



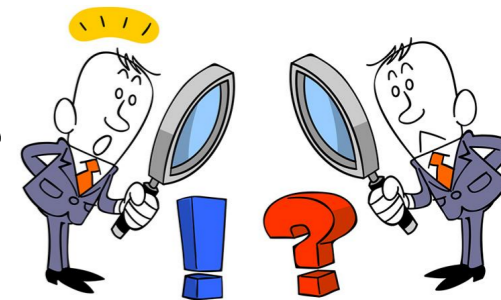
**Any piece of relevant evidence can be challenged on the basis of N.J.R.E. 403. Evidence introduced at trial by the adverse party is always harmful to the other side to one degree or another. Yet the mere possibility that a proffered piece of evidence could be prejudicial does not justify its exclusion under N.J.R.E. 403. The question is whether the risk of undue influence or waste of time is too high. The trial judge, in his gatekeeper function, must exercise the necessary discretion to properly balance between the probative value of the evidence and the risks of confusion, waste of time or undue prejudice.**

**In terms of wasting time, cumulative evidence is unnecessary if the jury has already considered evidence earlier in the trial that is later offered to prove the same issue. In an identical sense, presentation of evidence that would delay the trial or waste time due to its marginal relevance are also subject to exclusion in the discretion of the trial judge. The only limitation on the ability of the trial judge to restrict cumulative evidence is the introduction of evidence of good character by the defendant.**

**Most of the case law related to the exclusion of relevant evidence stems from the argument that its probative value is substantially outweighed by the risk of undue prejudice. This type of evidence has the tendency to inflame the emotions of the jury such that their verdict becomes rooted in passion as opposed to admissible evidence. By way of example, color autopsy photographs of an infant that was beaten to death may be highly relevant in a murder case to prove cause of death. Yet, to the average person, such photographs are so highly charged, shocking and horrific so as to raise likelihood that the evidence's probative value would be substantially outweighed by the risk that it would be unduly prejudicial.**

**For the same reasons, a defendant's prior criminal record is inadmissible as having the potential for confusing the jury. If a defendant is to be convicted, it must be based upon relevant evidence, not the fact that he is a bad person or an inveterate criminal.**

**As can be seen from the foregoing, trial judges are accorded wide discretion in the area of excluding relevant evidence, keeping constant attention to assure a fair and efficient trial for the prosecution and the defendant.**



# Chapter 4 – Burdens of proof

**The burden of proof in a criminal case is defined under NJRE 101(b)(1). This rule provides that the burden of proof is the obligation of a party to meet the requirements of a rule of law that a 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. The same Rule of Evidence also defines the burden of going forward with the evidence. NJRE 101(b)(2) says that burden refers to 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. The constitution and related case law assign different burdens of proof in criminal proceedings to be used at different times during a criminal proceeding. It is incumbent upon the party with the burden of going forward with the evidence to meet the required burden of proof to the satisfaction of the trier of fact. The following sections will define the required levels of proof and provide information about when they are required.**



# Chapter 5 – Reasonable suspicion

**As a practical matter, reasonable suspicion is ordinarily the lowest level of proof that will be required to support a fact. It can be best thought of as a slight amount of evidence that is supported by reasons that the investigating police officer can articulate: thus the expression, reasonable and articulable suspicion. Regardless of the low level of proof necessary to meet this burden, it is more than a mere hunch based upon nothing more than instinct or conjecture. It is a suspicion based upon objective facts and the rational inferences that flow from those facts.**



**In the criminal justice system, reasonable suspicion is used in a variety of police/citizen encounters. Among them are the following:**

**Motor vehicle stops based upon a suspicion that the motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law.**

**Terry stop - Investigative detention for the purpose of either confirming or dispelling a reasonable suspicion of criminal activity.**

**Terry Frisk – A limited search of a person by patting down the outer clothing in an effort to discover and remove weapons.**

**Weapons search of a motor vehicle.**

**Request to conduct a search of a motor vehicle by consent.**



## Chapter 6 – Probable cause

**Probable cause is the minimum level of suspicion that is required to effect an arrest or obtain a search warrant. It is a level of proof required by both the federal and state constitutions to support a search or seizure. It has been defined in the arrest context as a well-grounded suspicion that an offense has been committed and the named defendant committed it. For purposes of search warrants, the evidence must establish probable cause to believe that contraband or evidence of a crime can be found at a specified location.**

**When determining whether probable cause has been demonstrated, courts are to utilize the totality of the circumstances test; this means viewing all the relevant facts in their entirety as opposed to individual facts in isolation.**



**In the New Jersey criminal justice system, probable cause is the level of proof that is necessary to support the issuance of:**

**A search warrant;**

**An arrest warrant;**

**Wiretaps under *N.J.S.A. 2A:156A-1 to -26*, the Wiretapping and Electronic Surveillance Control Act; or**

**To make an arrest without a warrant;**

**To conduct a search without a warrant based upon exigent circumstances;**

**To conduct a search of a readily mobile motor vehicle;**

**To make a motor vehicle stop based upon an observed traffic infraction.**



# Chapter 7 – Preponderance of evidence

**A preponderance of the evidence simply means more than 50% of the credible evidence advanced by the proponent of the evidence. The party in a case which produces more than 50% of the credible evidence on a given issue should prevail. This is the standard that is used in the United States in civil cases. In the criminal procedure context in New Jersey, it is used in the following instances:**

**Motions to suppress evidence;**

**Post-conviction relief applications under Rule 3:22-1 and Rule 7:10-2;**

**Civil forfeiture actions.**



# Chapter 8 – Clear and convincing evidence

**This standard of proof lies on a continuum somewhere between a preponderance of the evidence and proof beyond a reasonable doubt. It has been defined in the case law as follows:**

**Clear-and-convincing evidence is “that which ‘produce[s] 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 factfinder] to come to a clear conviction, without hesitancy, of the precise facts in issue.’ ”**

**In New Jersey criminal procedure, this standard of proof is utilized in the following circumstances:**

**Motions to consent where the warrant exception is voluntary consent;**

**Motions to consent where the warrant exception is the collateral source rule;**

**Motions to consent where the warrant exception is inevitable discovery;**

**Admissibility of Alcotest results in a drunk-driving prosecution;**

**Prosecutor’s Pre-trial Intervention rejection as an abuse of discretion.**



# Chapter 9 – Beyond a reasonable doubt

**This is the standard of proof that is constitutionally required to support a finding of guilt in a criminal case in the United States. It has been defined in the case law as follows:**

**A reasonable doubt is an honest and reasonable uncertainty in your minds about the guilt of the defendant after you have given full and impartial consideration to all of the evidence. A reasonable doubt may arise from the evidence itself or from a lack of evidence. It is a doubt that a reasonable person hearing the same evidence would have. Proof beyond a reasonable doubt is proof, for example, that leaves you firmly convinced of the defendant's guilt. In this world, we know very few things with absolute certainty. In criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If, on the other hand, you are not firmly convinced of defendant's guilt, you must give defendant the benefit of the doubt and find him not guilty.**

**This level of proof is required in New Jersey in the following circumstances:**

- 1.) Criminal Trial - Every element of the charge must be proved to this standard; and**
- 2.) *Miranda* hearing under NJRE 104(c).**



# **Chapter 10 – Circumstantial evidence**

**Rather than demonstrating facts directly, circumstantial proof proves facts through the use of inferences. Typically, proof of one or more reliable facts leads to the logical conclusion that an inferential proposition is true.**

**There is no preference in New Jersey law between direct and circumstantial evidence. Each type is perfectly capable of proving a fact beyond a reasonable doubt. In fact, many times circumstantial proof can be more satisfying and persuasive than direct evidence. By way of example, biological evidence matching the defendant's DNA profile found at a crime scene on the clothing of the victim raises an almost irrefutable inference that the defendant was at the crime scene. In the same manner, as a matter of logic, fingerprints belonging to the defendant found on the murder weapon constitute strong proof that the defendant had the weapon in his possession at some point.**

**Circumstantial evidence is best thought of in terms of probabilities. In a motor vehicle accident, if blood-splatter belonging to the defendant is found on the steering wheel and interior driver's side of a smashed windshield, what is the probability that the defendant was the driver of the car when it crashed? Logically, such circumstantial proof raises an extremely high probability that the defendant was the driver, especially if the defendant had evidence of a head wound near the time of the accident.**

**Yet, the use of probabilities in circumstantial evidence is the key to attacking its reliability. In fact, it goes to the heart of successful trial advocacy. Every inference that can be drawn from circumstantial evidence is capable of more than one explanation. The vital issue for an advocate attacking circumstantial proofs is to marshal sufficient facts and counter-inferences so as to make the suggested inference less likely to be true. The closer the probability of two alternative explanations for a piece of circumstantial evidence tends to reach 50%, the more likely it is that the prosecution's version will be rejected by the jury.**



**This proposition can be best illustrated through use of the classic “smoking gun” paradigm. In a murder prosecution, a neutral witness testifies to having heard a gunshot coming from an adjacent room in a residence. Within a matter of a few seconds, the witness entered the room and saw the defendant, standing next to the body of the deceased, holding a smoking gun. The natural inference to be drawn from these facts is that the defendant had just shot and killed the victim. Initially, this inference appears to have a high degree of probably being true. However, as additional evidence is introduced, the defendant testifies that he was in the same room as the victim and saw the victim shoot himself. The defendant then explains at trial that he immediately removed the pistol from the victim’s hand to prevent any further carnage. At that moment, the witness entered the room.**



**So, which of these two versions is true? The reality is that no one (except for the defendant) can ever know the objective truth. But criminal trials are not decided upon objective truth. The mission for the jury during deliberations will be to decide which version of two alternative stories is more likely to be true. The credibility of the defendant, subject to cross-examination by the prosecutor and considered in the light of logic, common experience and self-interest will guide the jury as to how probable the inferences the defense suggests are true. Additional evidence from the prosecution demonstrating that the defendant had gun powder residue on his right hand or clothing would reduce the probability of the likelihood of defendant's suggested version. But in the final analysis, if the probability of the prosecution's version does not meet the threshold of proof beyond a reasonable doubt, the defendant must be acquitted.**

**In the specific context of a criminal trial, culpability states are almost always proved by way of circumstantial evidence. In the absence of a confession or admission, the proof that a defendant acted purposefully, knowingly, recklessly or negligently can only be inferred by conduct or related circumstantial proofs. By way of example, in a prosecution for aggravated manslaughter, the speed at which the defendant drove his vehicle and his high blood-alcohol level at the time he operated his vehicle are circumstantial proofs that the defendant recklessly caused the death of another person under circumstances manifesting extreme indifference to human life. In a prosecution for murder, the fact that the defendant acted knowingly in that his actions were certain or practically certain to result in the death of a human being could be inferred by the actions he took by firing a pistol at people through a closed door.**



**Example - Take a moment to remember the infamous 1995 O.J. Simpson trial in Los Angeles where blood evidence and DNA samples belonging to both the defendant and the two murder victims were found on the defendant's clothing at the crime scene and the defendant's residence. Despite the strength of the natural inferences to be drawn from this scientific evidence, the jury found an alternative explanation and rejected the prosecution's version within a matter of a few hours of deliberations.**



# Chapter 11 – Direct evidence

**Direct evidence proves facts directly, without inferences. Examples include eyewitness statements, admission and confessions. Although each of these types of evidence is subject to credibility determinations based upon accuracy, self-interest or dishonesty, if the jury believes the proffered evidence, it proves the underlying fact directly. Technologically based evidence in the form of video or audio recordings is also capable of proving facts directly. By way of example, in a prosecution for eluding, police dash-board camera video of a high-speed pursuit showing the defendant crashing into a tree and fleeing the suspect vehicle could directly prove the defendant was the operator.**

**The universal proliferation of video recordings by police and members of the public will provide for more and more direct evidence, objective evidence. Ironically, this technology will also result in many fewer trials due to the conclusive and persuasive nature of this form of direct evidence.**



# Chapter 12 – Presumptions

**A presumption can best be thought of as a legislative mandate related to factual findings that must be made based upon circumstantial evidence. Typically, the legislation creating a presumption will establish one or more basic facts and one presumed fact. The presumption will require that if the jury finds all the basic facts to be true, it must find the presumed fact to be true as well. Significantly, New Jersey follows the “Bursting bubble” theory of presumptions in that if one of the basic facts is either rebutted or disbelieved by the jury, the presumed fact cannot be found as true.**

**A good example of a statutory presumption can be found in N.J.S.A. 39:4-51(a). This statute makes it a traffic violation to consume an alcoholic beverage in a vehicle that is being operated. Due to the difficult nature of proving this offense by direct evidence, the Legislature created a presumption to facilitate the prosecution. The presumption provides the following basic facts:**

**A person shall be presumed to have consumed an alcoholic beverage in violation of this section if an unsealed container of an alcoholic beverage is located in the passenger compartment of the motor vehicle, the contents of the alcoholic beverage have been partially consumed and the physical appearance or conduct of the operator of the motor vehicle or a passenger may be associated with the consumption of an alcoholic beverage.**



**If each of these statutory basic facts can be proved, the fact-finder can conclude the presumed fact: the operator of the motor vehicle consumed an alcoholic beverage while the vehicle was being operated.**



**Although the Legislature is perfectly free to create all manner of conclusive presumptions in civil cases, a conclusive presumption is unconstitutional in a criminal case. Juries must be free to decide the facts of a case based upon their own collective view of the evidence and cannot be compelled to make factual findings. Accordingly, statutory presumptions in criminal cases are legally regarded as permissive inferences that the jury may accept or reject in its sole discretion. A few examples of presumptions in the *Code of Criminal Justice* include N.J.S.A. 2C:39-2(a) (presumption that a firearm found in a vehicle is in possession of all the occupants) and N.J.S.A. 2C:20-7(b) (knowledge of the stolen character of evidence can be presumed if the defendant is found in possession or control of two or more items of property stolen on two or more separate occasions.) Regardless of the wording in these statutes, the presumption serves merely as a permissive inference that the jury may accept or reject.**

# Chapter 13 – Stipulations

**In a criminal trial, it is not unusual for the prosecution and defense to stipulate to certain facts. Typically these facts are uncontested will not be subject to any serious dispute. In addition, the use of a stipulation saves time and allows the advocates to focus the jury's attention on legitimately contested issues in the trial. By way of example, the parties may agree that the defendant's residence was located within 500 feet of a public park. This agreement can be presented to the jury without the need to provide any specific evidence that proves the stipulated fact.**



**Notwithstanding the foregoing, a jury is entirely free to accept or reject a stipulation of the parties. A jury is not bound by a stipulation of the parties in a criminal trial.**

# Chapter 14 – Admissions and confessions

**Proof of facts in the form of statements that are voluntarily provided from the lips of the defendant can constitute powerful evidence of guilt. These statements are viewed at trial as an exception to the Hearsay Rule under N.J.R.E. 803(b)(1) and are admissible in evidence subject to a findings by both the judge and jury that the statement was made voluntarily. Generally speaking, an admission will involve any statement made by the defendant that is relevant and has evidentiary value. Admissions can inferentially or directly reveal an unlimited number of pieces of relevant evidence, including the defendant's state of mind, his plan, intention, involvement with the crime scene or the victims and his culpability state. Admissions also provide an enormous advantage to the prosecutor for cross-examination and impeachment if the defendant decides to take the witness stand at trial and tells a story under oath that varies from his admissions.**

**Confessions deal with acknowledgements of guilt. The persuasive power of this evidence on the jury so is great and the need for assurances of voluntariness so critical that the Rules of Court require that custodial interrogations for serious crimes be video and that the voluntariness of all confessions be proved beyond a reasonable doubt.**



# Chapter 15 – Conduct of the defendant- consciousness of guilt

**There is certain pre-arrest and post-arrest conduct by the defendant from which a jury can draw legitimate inferences of guilt. The introduction of this conduct by the prosecution should be preceded by a Rule 104(a) hearing to assure that the probative value of this evidence is not substantially outweighed by its prejudicial impact. Among these actions are the following:**

**Breath-test refusal:** Refusal to submit to chemical breath testing following an arrest for driving while intoxicated raises an inference that the refusal was based upon guilt of drunk driving.

**Blood sample refusal:** The unreasonable refusal to provide blood samples upon the lawful request of a police officer raises an inference of consciousness of guilt.

**Field sobriety tests:** Refusal to perform standardized field sobriety tests permits an inference of consciousness of guilt.

**Escape:** Escape from pre-trial custody raises an inference of consciousness of guilt.





**Absconding after posting bail: Evidence showing that, after his arrest for armed robbery and release on bail, the defendant's act of leaving New Jersey and living Illinois for four years under an assumed name constituted flight tending to show a consciousness of guilt.**

**Absconding after start of trial: Jury may conclude that flight after the start of the trial raises consciousness of guilt.**

**Crime scene: Flight from a crime scene (as opposed to mere departure), motivated by a desire to evade arrest or prosecution may provide evidence of consciousness of guilt.**

**Suicide attempt: Evidence of defendant's suicide attempt may provide evidence of consciousness of guilt.**

## **Chapter 16 – Judicial notice**

**The purpose of judicial notice is to save time and promote judicial economy by precluding the necessity of proving facts that cannot seriously be disputed and are either generally or universally known. It provides a quick procedure for getting uncontested evidentiary issues before the jury. A court may take judicial notice on the motion of a party or on its own motion. When the issue of judicial notice is contested, each party is entitled to an opportunity to be heard as to the propriety of taking judicial notice. In the absence of prior notification, the request may be made after judicial notice has been taken.**

**Under New Jersey law, there are two types of judicial notice: Notice of legislative facts and notice of adjudicate facts. Legislative facts are defined under NJRE 201(a) as follows:**

**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.**



**The use of legislative facts can be of enormous importance in criminal cases, especially when utilizing published case law as precedent supporting an affirmative defense or a an inference of guilt. By way of example, a trial level court may take judicial notice of a finding by a court of appellate authority that a novel scientific device or procedure has met the test of generally accepted scientific reliability. Even legislative efforts to enact new statutes to address a social issue can be the subject of judicial notice of a legislative fact. By contrast, a determination by a trial-level court on the credibility of a witness is not the proper subject of judicial notice.**

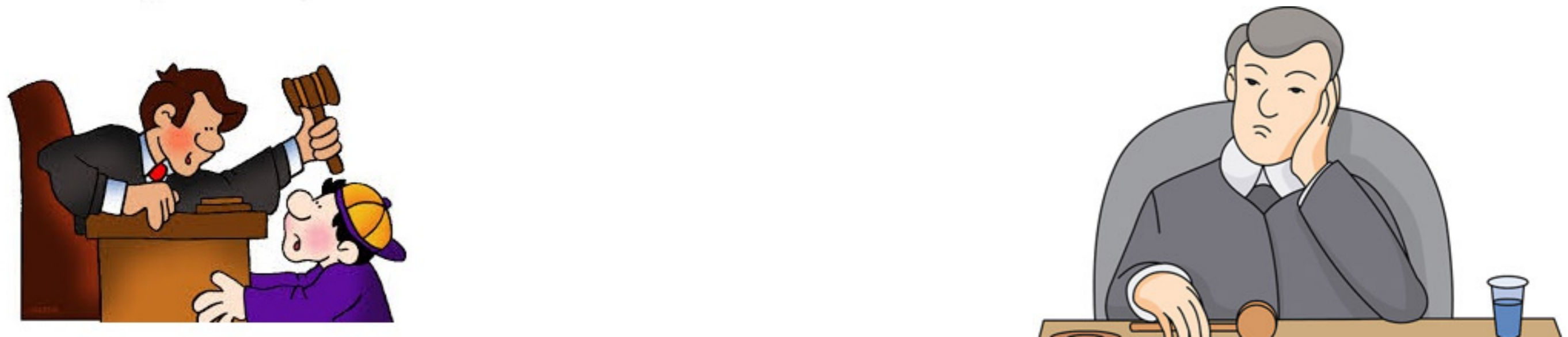
**Judicial notice of adjudicate facts is defined under N.J.R.E. 201(b):**

**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.**



**Judicial notice may not be taken of the truth of facts that are reasonably open to dispute, not generally or universally known, or not easily verifiable. In short, it does not apply to facts that can be reasonably questioned or disputed. For example, the trial judge could not take judicial notice that a particular neighborhood in Maywood, New Jersey had a reputation as a dangerous area. By contrast, in the criminal trial, valid subjects for judicial notice would include dates on the calendar, the location of the county courthouse, the weather on a particular day, the day of the week on a particular date, or the the phases of the moon.**

**A hearing on the issue of the propriety of judicial notice should be conducted by the trial judge under Evidence Rule 104(a) where the general Rules of Evidence do not apply except for a valid claim of privilege or waste of time under N.J.R.E. 403.**



**Finally, it is critical to remember that facts that have been proved by way of judicial notice are not binding on a jury in a criminal trial. In this regard, facts subject to judicial notice are identical to facts inferred by way of a statutory presumption or stipulations. In a criminal case, the trial judge must instruct the jury that it may, but is not required to, accept as established any fact which has been either judicially noticed, subject to a stipulation of the parties or inferred by the presumption.**



## **Chapter 17 – Other crimes, wrongs or acts by the defendant**

**Prior crimes, wrongs or acts of the defendant have the clear capacity to adversely impact the defendant's case. The jury may conclude that the defendant deserves to be convicted because he is simply a bad person or an inveterate criminal. By way of example, the fact that a defendant charged with burglary has three prior convictions for this offense over the past ten years is not relevant to any important issue in the case. It may also confuse the jury and be unduly prejudicial. The danger is that, upon hearing this evidence, the jury may convict the defendant based upon speculative probabilities of guilt as opposed to hard evidence proving the current offense beyond a reasonable doubt. For this reason, if other crime evidence is offered solely to prove criminal disposition, it must be excluded under the N.J.R.E. 403.**

**Yet prior bad acts by the defendant can have significant relevance under certain circumstances. For example, consider the so-called "Pink Panther" signature crime case. When the issue of identity is contested, if the perpetrator of the current burglary left a pink glove at the scene and the proofs demonstrate by clear and convincing evidence that the defendant left a pink glove at each of the scenes of his three previous burglaries, the jury could draw an inference that the pink glove is this defendant's signature at such crimes. In this context, the probative value of the three prior burglary convictions on the issue of identity may outweigh the possibility of undue prejudice.**





**In the context of proving motive, the granting of a recent domestic violence restraining order, when sanitized and subject to proper limiting instructions to the jury, can serve as evidence of motive on a conspiracy to commit murder.**

**The introduction at trial of other crimes, wrongs or acts by a defendant is controlled by N.J.R.E. 404(b). The Rule provides:**

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

**Obviously, the potential for undue prejudice is always a consideration for the trial judge when deciding whether to allow this type of evidence. N.J.R.E. 404(b) seeks to strike a balance between the prejudice to a defendant that is inherent in other-crimes evidence and the recognition that the evidence may be highly relevant to prove a defendant's guilt of the crime charged.**

**The New Jersey Supreme Court has devised a four part test to gauge the admissibility of this type of evidence, set forth in the landmark decision State v. Cofield, 127 N.J. 328 (1992).**

- 1. The evidence of the other crime must be admissible as relevant to a material issue;**
- 2. It must be similar in kind and reasonably close in time to the offense charged;**
- 3. The evidence of the other crime must be clear and convincing; and**
- 4. The probative value of the evidence must not be outweighed by its apparent prejudice.**

**The first prong of the *Cofield* test echoes the definition of relevancy set forth in N.J.R.E. 401. The evidence must logically relate to a material issue in dispute, such as motive, intent, or an element of the charged offense, and so the Court should consider whether the matter was projected by the defense as arguable before trial, raised by the defense at trial, or was one that the defense refused to concede.**

**The second prong of this test is not included in the Rules of Evidence and, except in cases that are factually identical to *Cofield*, may be eliminated when it will serve no useful purpose.**

**The third step deal with the enhanced level of proof required for admissibility. Clear and convincing evidence is so direct, weighty and convincing so as to allow the trial judge to come to a clear conviction, without hesitancy, on the issue of whether the defendant committed the other crime or wrong.**

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**The fourth step in the test is the most difficult for judges to perform. Typically, the other crimes evidence is so powerful and the risk of prejudice so great, that judges should consider whether the same issue could be provide through other means.**

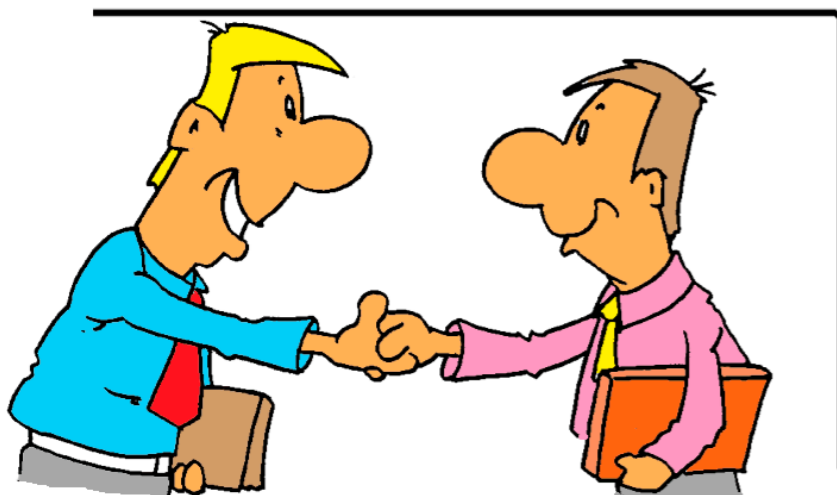
**The trial judge should be careful to exclude other torts or crimes evidence, even though it is independently relevant, wherever he can reasonably do so without damaging the plaintiff's or prosecutor's case. For example, if the prosecutor has adequate proof of identity, or of motive and the like, he should not be permitted to use the highly inflammatory evidence of other crimes to establish those facts. In a forgery case where authorship of the allegedly forged writing is in issue, the trial judge, for instance, should not admit standards indicating the defendant's guilt of other forgeries if neutral standards of the defendant's handwriting are available to the prosecutor.**

**Two additional steps judges must take to reduce the risk of undue prejudice are sanitizing the prior offenses and providing appropriate detailed, limiting instructions to the jury. By sanitizing the offenses, the judge should remove any details related to the prior bad act that contain inflammatory details which will tend to be more prejudicial than probative. Apart from sanitizing duties of the judge, the limiting instruction should be given both when the evidence is admitted and once again during the final jury charge.**



**Practice tip – In a municipal bench trial, where the trial judge will also be the finder of fact, even a losing effort at introducing prior bad acts may have a subliminal beneficial impact. For example, a rejected effort to introduce two or three prior convictions for shoplifting or drunk-driving on the issue of absence of mistake will serve to let the judge know that the defendant is a multiple offender. This attempt can be made by the prosecutor with the knowledge that the municipal court judge has been trained to exclude this rejected information from his final decision on guilt or innocence.**

**Finally, the prior crimes, wrongs and bad acts evidence is often better used during the State's rebuttal case after the defendant has asserted a defense of mistake, identity, lack of motive and the like. Such evidence, when tactically introduced into evidence at this point in the trial may utterly deflate the defense case.**



Garden State CLE presents:

**“I see it... but I don’t believe it”:**  
**Inspiring levels of belief at trial**



**Lesson Plan**

**Instructors:**

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