

# ASSEMBLY JOINT RESOLUTION

No. 78

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## STATE OF NEW JERSEY

### 219th LEGISLATURE

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INTRODUCED FEBRUARY 3, 2020

**Sponsored by:**

**Assemblyman BENJIE E. WIMBERLY**

**District 35 (Bergen and Passaic)**

**Assemblywoman VALERIE VAINIERI HUTTLE**

**District 37 (Bergen)**

**SYNOPSIS**

Clarifies exception to hearsay rule concerning medical diagnosis or treatment for purposes of providing, continuing, or ending mental health services.

**CURRENT VERSION OF TEXT**

As introduced.



(Sponsorship Updated As Of: 2/13/2020)

1   **A JOINT RESOLUTION** pursuant to P.L.1960, c.52 proposing an  
2       amendment to the Rules of Evidence.

3

4   **WHEREAS**, Decisions associated with the provision, continuation, or  
5       cessation of mental health services can profoundly impact the lives  
6       of those persons in need of or currently undergoing treatment, as  
7       well as their family, friends, and caretakers; and

8   **WHEREAS**, The use of hearsay testimony about a person's medical  
9       history or present condition may be a vital source in making  
10      decisions about the provision, continuation, or cessation of mental  
11      health services; and

12   **WHEREAS**, Clarifying the availability of such hearsay testimony as an  
13      exception to the general prohibition against using hearsay testimony  
14      in legal proceedings will eliminate efforts to prevent its  
15      admissibility; and

16   **WHEREAS**, Section 38 of P.L.1960, c.52 (C.2A:84A-38) provides a  
17      procedure for the adoption of rules of evidence without necessity  
18      for presentation at the Judicial Conference so that their adoption by  
19      the Supreme Court may be accelerated; now, therefore,

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21       **BE IT RESOLVED** *by the Senate and General Assembly of the*  
22      *State of New Jersey:*

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24       1. Pursuant to section 38 of P.L.1960, c.52 (C.2A:84A-38), the  
25      Supreme Court of New Jersey may adopt the amendatory rule  
26      specified in this section in the form set out, at any time after this  
27      joint resolution has been delivered to and signed by the Governor of  
28      the State of New Jersey, by entering an order that the amendment is  
29      adopted and by causing true copies of its order of adoption to be  
30      delivered to the President of the Senate, the Speaker of the General  
31      Assembly and the Governor, without presenting the subject matter  
32      and a tentative draft of rules at a Judicial Conference.

33

34       Rule 803 is amended to read as follows:

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

37       The following statements are not excluded by the hearsay rule:

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

42       (1) is inconsistent with the witness' testimony at the trial or hearing  
43      and is offered in compliance with Rule 613. However, when the  
44      statement is offered by the party calling the witness, it is admissible  
45      only if, in addition to the foregoing requirements, it (A) is contained in

**EXPLANATION – Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.**

**Matter underlined thus is new matter.**

1 a sound recording or in a writing made or signed by the witness in  
2 circumstances establishing its reliability or (B) was given under oath  
3 subject to the penalty of perjury at a trial or other judicial, quasi-  
4 judicial, legislative, administrative or grand jury proceeding, or in a  
5 deposition; or

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

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

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

13 (1) the party's own statement, made either in an individual or in a  
14 representative capacity, or

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

17 (3) a statement by a person authorized by the party to make a  
18 statement concerning the subject, or

19 (4) a statement by the party's agent or servant concerning a matter  
20 within the scope of the agency or employment, made during the  
21 existence of the relationship, or

22 (5) a statement made at the time the party and the declarant were  
23 participating in a plan to commit a crime or civil wrong and the  
24 statement was made in furtherance of that plan. In a criminal  
25 proceeding, the admissibility of a defendant's statement which is  
26 offered against the defendant is subject to Rule 104(c).

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

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

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

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

44 (4) Statements for purposes of medical diagnosis or treatment.  
45 Statements made in good faith for purposes of medical diagnosis or  
46 treatment which describe medical history, or past or present  
47 symptoms, pain, or sensations, or the inception or general character of  
48 the cause or external source thereof to the extent that the statements

1 are reasonably pertinent to diagnosis or treatment, including a course  
2 of treatment concerning the provision, continuation, or cessation of  
3 mental health services.

4 (5) Recorded recollection. A statement concerning a matter about  
5 which the witness is unable to testify fully and accurately because of  
6 insufficient present recollection if the statement is contained in a  
7 writing or other record which (A) was made at a time when the fact  
8 recorded actually occurred or was fresh in the memory of the witness,  
9 and (B) was made by the witness or under the witness' direction or by  
10 some other person for the purpose of recording the statement at the  
11 time it was made, and (C) the statement concerns a matter of which the  
12 witness had knowledge when it was made, unless the circumstances  
13 indicate that the statement is not trustworthy; provided that when the  
14 witness does not remember part or all of the contents of a writing, the  
15 portion the witness does not remember may be read into evidence but  
16 shall not be introduced as an exhibit over objection.

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

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

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

45 (9) Records of vital statistics. Subject to Rule 807, a statement  
46 contained in any form such as records of births, fetal deaths, deaths, or  
47 marriages, if the report thereof was made to a public office pursuant to  
48 requirements of law.

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

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

15 (12) Marriage, baptismal, and similar certificates. Subject to Rule  
16 807, statements of fact contained in a certificate that the maker  
17 performed a marriage or other ceremony or administered a sacrament,  
18 made by a clergyman, public official, or other person authorized by the  
19 rules or practices of a religious organization or by law to perform the  
20 act certified, and purporting to have been issued at the time of the act  
21 or within a reasonable time thereafter.

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

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

33 (15) Statements in documents affecting an interest in property.  
34 Subject to Rule 807, a statement contained in a document purporting to  
35 establish or affect an interest in property if the matter stated was  
36 relevant to the purpose of the document, unless dealings with the  
37 property since the document was made have been inconsistent with the  
38 truth of the statement or the purport of the document.

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

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

45 (18) Learned treatises. To the extent called to the attention of an  
46 expert witness upon cross-examination or relied upon by the expert in  
47 direct examination, statements contained in published treatises,  
48 periodicals, or pamphlets on a subject of history, medicine, or other

1 science or art, established as a reliable authority by testimony or by  
2 judicial notice. If admitted, the statements may not be received as  
3 exhibits but may be read into evidence or, if graphics, shown to the  
4 jury.

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

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

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

20 (22) Judgments of previous conviction of crime. In a civil  
21 proceeding, except as otherwise provided by court order on acceptance  
22 of a plea, evidence of a final judgment against a party adjudging the  
23 party guilty of an indictable offense in New Jersey or of an offense  
24 which would constitute an indictable offense if committed in this state,  
25 as against that party, to prove any fact essential to sustain the  
26 judgment.

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

31 (24) Other exceptions. [Not Adopted]

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

40 (26) Judgments against persons entitled to indemnity. Subject to  
41 Rule 807 and except in a proceeding brought under the "Joint  
42 Tortfeasors Contribution Law," **[N.J.S.A.] P.L.1952, c.335**  
43 **(C.2A:53A-1 et seq.)**, the record of a final judgment is admissible if  
44 offered by the judgment debtor in an action in which the debtor seeks  
45 to recover partial or total indemnity or exoneration for money paid or a  
46 liability incurred because of the judgment, as evidence of the liability  
47 of the judgment debtor, of the facts on which the judgment is based,  
48 and of the reasonableness of the damages recovered. If the defendant

1 in the second action had notice of and opportunity to defend the first  
2 action, the judgment is conclusive evidence.

3 (27) Statements by a child relating to a sexual offense. A  
4 statement made by a child under the age of 12 relating to sexual  
5 misconduct committed with or against that child is admissible in a  
6 criminal, juvenile, or civil proceeding if **[(a)]** (A) the proponent of the  
7 statement makes known to the adverse party an intention to offer the  
8 statement and the particulars of the statement at such time as to  
9 provide the adverse party with a fair opportunity to prepare to meet it;  
10 **[(b)]** (B) the court finds, in a hearing conducted pursuant to Rule  
11 104(a), that on the basis of the time, content and circumstances of the  
12 statement there is a probability that the statement is trustworthy; and  
13 **[(c)]** (C) either (i) the child testifies at the proceeding, or (ii) the child  
14 is unavailable as a witness and there is offered admissible evidence  
15 corroborating the act of sexual abuse; provided that no child whose  
16 statement is to be offered in evidence pursuant to this rule shall be  
17 disqualified to be a witness in such proceeding by virtue of the  
18 requirements of Rule 601.

19

20 2. The rule set forth in section 1 of this Joint Resolution, if  
21 ordered adopted by the Supreme Court, shall take effect on the date  
22 set forth in the order of adoption.

23

24 3. This joint resolution shall take effect immediately upon  
25 signature thereof by the Governor; and the Secretary of State is  
26 directed to transmit an authenticated copy forthwith to the Chief  
27 Justice of the Supreme Court of New Jersey.

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# STATEMENT

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32 This joint resolution would clarify an exception to the hearsay  
33 rule, Rule 803 of the Rules of Evidence, concerning a person's  
34 medical diagnosis or treatment for purposes of providing,  
35 continuing, or ending mental health services. The use of hearsay  
36 testimony about a person's medical history or present condition  
37 may be a vital source in making such treatment decisions.

38 In accordance with the procedure set forth in "The Evidence Act,  
39 1960," P.L.1960, c.52 (C.2A:84A-1 et al.), the Legislature may  
40 initiate a rule change by passage of a joint resolution, which if  
41 signed by the Governor will be presented to the Supreme Court for  
42 consideration of adoption. As per the statutory procedure and  
43 further specified in this joint resolution, if the rule change is  
44 adopted by the Supreme Court it would take effect on a date set  
45 forth in the order of adoption.