

# New Jersey Rules of Evidence

## Article VIII - Hearsay

### **N.J.R.E. 801. Definitions**

For purposes of this article, the following definitions apply:

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

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

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

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

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

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

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

### **N.J.R.E. 802. Hearsay Rule**

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

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

## **N.J.R.E. 803. Hearsay Exceptions Not Dependent on Declarant's Unavailability**

The following statements are not excluded by the hearsay rule:

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

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

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

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

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

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

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

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

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

(5) a statement made at the time the party and the declarant were participating in a plan to commit a crime or civil wrong and the statement was made in furtherance of that plan.

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

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

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

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

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

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

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

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

(7) *Absence of an entry in records of regularly conducted activity.* --Evidence that a matter is not included in a writing or other record kept in accordance with the provisions of Rule 803(c)(6), when offered to prove the nonoccurrence or nonexistence of the matter, if the

matter was of a kind of which a writing or other record was regularly made and preserved, unless the sources of information or other circumstances indicate that the inference of nonoccurrence or nonexistence is not trustworthy.

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

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

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

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

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

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

(14) *Records of documents affecting an interest in property.* --Subject to Rule 807, the record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by

whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorized the recording of documents of that kind in that office.

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

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

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

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

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

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

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

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

(23) *Judgment as to personal, family, or general history, or boundaries.* --Judgments as

proof of matters of personal, family or general history, or boundaries, essential to the judgment, if those matters would be provable by evidence of reputation.

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

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

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

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

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

## **N.J.R.E. 804. Hearsay Exceptions: Declarant Unavailable**

(a) *Definition of unavailable.* --Except when the declarant's unavailability has been procured or wrongfully caused by the proponent of declarant's statement for the purpose of preventing

declarant from attending or testifying, a declarant is "unavailable" as a witness if declarant:

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

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

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

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

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

(1) *Testimony in prior proceedings.*

(A) Testimony given by a witness at a prior trial of the same or a different matter, or in a hearing or deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered had an opportunity and similar motive in the prior trial, hearing or proceeding to develop the testimony by examination or cross-examination.

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

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

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

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

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

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

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

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

(8) [Deleted]

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

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

## **N.J.R.E. 805. Hearsay Within Hearsay**

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

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



## **N.J.R.E. 806. Attacking and Supporting Credibility of Declarant**

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or other conduct by a declarant, inconsistent with the declarant's hearsay statement received in evidence, is admissible although declarant had no opportunity to deny or explain it. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, that party is entitled to examine the declarant on the statement as if under cross-examination.

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

## **N.J.R.E. 807. Discretion of Judge to Exclude Evidence Under Certain Exceptions**

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

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

## **N.J.R.E. 808. Expert Opinion Included in a Hearsay Statement Admissible Under an Exception**

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

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