



## NEW JERSEY STATE BAR ASSOCIATION

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August 31, 2023

Hon. Glenn A. Grant  
Administrative Director of the Courts  
Attention: 2023 Judicial Conference on Evidence Rules  
Hughes Justice Complex  
P.O. Box 037  
Trenton, NJ 08625-0037

RE: Comments on proposal to amend Rules of Evidence 803(c)(25) and  
804(b)(3) to require that the declarant be unavailable

Dear Judge Grant:

On behalf of the New Jersey State Bar Association (NJSBA), thank you for the opportunity to provide comments on the proposal to amend Rules of Evidence 803(c)(25) and 804(b)(3) to require that the declarant be unavailable. Such a requirement could have far-reaching implications in both the criminal and civil arenas, and the NJSBA appreciates the opportunity to convey its views.

The NJSBA notes that the 2021-2023 Report of the Supreme Court Committee on the Rules of Evidence (Evidence Rules Committee) and the proposal attached to the Notice to the Bar contained a thorough review and analysis of the impact of admissibility of statements against interest in the criminal context. The NJSBA agrees with the rationale for the rule change set forth in the proposal for criminal matters. Allowing for the admissibility of such statements in criminal matters where the declarant is unavailable provides additional safeguards for reliability in matters of consequential magnitude and offers a sufficient vehicle for the proponent to seek admission of the statement when live testimony is not possible.

In civil matters, however, the NJSBA believes the impact of the proposed rule changes would benefit from more extensive discussion and debate. The NJSBA notes that the report accompanying the Notice to the Bar recognizes differences in the civil context when it says, “Statements against proprietary, pecuniary, or social interest, or statements that may invalidate the declarant’s claim against another or expose the declarant to civil liability, may be more reliable than statements against penal interest but they still present hazards.” The NJSBA suggests that the applicability of the rule change in civil cases be sent to the Evidence Rules Committee for further exploration about whether the rule should be applied in civil, or if other considerations may warrant a separate rule governing civil matters.

In summary, the NJSBA supports adoption of the proposed Evidence Rule changes in the criminal context, and recommends further study before adopting the changes for civil matters.

The NJSBA appreciates the opportunity to provide these written comments and to be a part of this important process. Because we believe these comments sufficiently convey the NJSBA’s thoughts on the proposal, we do not intend to speak at the Judicial Conference. Thank you again for the Judiciary’s consideration.

Sincerely,

A handwritten signature in blue ink, appearing to read "Tim McGoughran". The signature is fluid and cursive, with a large initial "T" and "M".

Timothy F. McGoughran, Esq.  
President

cc: William H. Mergner Jr. Esq., NJSBA President-Elect  
Angela C. Scheck, NJSBA Executive Director