PROPOSED AMENDMENTS

Currently:

N.J.R.E. 803. Hearsay Exceptions Not Dependent on Declarants' Unavailability

The following statements are not excluded by the hearsay rule:

* * *

(c) Statements Not Dependent on Declarant's Availability. The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

* * *

(25) Statement Against Interest. A statement that a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary, pecuniary or social interest, or had so great a tendency to invalidate the declarant's claim against another or to expose the declarant to civil or criminal liability. Such a statement is admissible against a defendant in a criminal proceeding only if the defendant was the declarant.

* * *

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

* * *

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

* * *

(3) Statement Against Interest. [Adopted as Rule 803(c)(25).]

* * *

Proposed:

N.J.R.E. 803. Hearsay Exceptions Not Dependent on Declarants' Unavailability

The following statements are not excluded by the hearsay rule:

* * *

(c) Statements Not Dependent on Declarant's Availability. The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

* * *

(25) Statement Against Interest. [Moved to Rule 804(b)(3).]

* * *

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

* * *

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

* * *

(3) Statement Against Interest. A statement that a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary, pecuniary or social interest, or had so great a tendency to invalidate the declarant's claim against another or to expose the declarant to civil or criminal liability. Such a statement is admissible against a defendant in a criminal proceeding only if the defendant was the declarant.

* * *

JUDICIAL CONFERENCE
2023

PROPOSAL TO AMEND RULES OF EVIDENCE 803(c)(25) AND 804(b)(3) (HEARSAY – STATEMENT AGAINST INTEREST) TO REQUIRE THAT THE DECLARANT BE UNAVAILABLE

The Supreme Court proposes to amend N.J.R.E. 803(c)(25) and N.J.R.E. 804(b)(3) to require that statements against interest hearsay is admissible into evidence only when the declarant (the person who made the statement) is unavailable to testify. N.J.R.E. 803(c)(25) currently provides that this type of hearsay is admissible in evidence even when the declarant is available to testify but is not called to do so. The amendments will bring New Jersey in line with the federal government and overwhelming majority of other states.

This proposal arose after the Court reviewed the 2021-2023 Report of the Supreme Court Committee on the Rules of Evidence, which considered whether the Rules of Evidence should be amended to require corroboration as a condition of admissibility of a statement against interest. The Committee did not recommend such an amendment. After considering the Committee's rationale and conclusions, the Supreme Court decided to propose an amendment to the Rules of Evidence to require unavailability (but not corroboration) for the statement against interest exception to hearsay. The amendment would be accomplished by relocating this hearsay exception from N.J.R.E. 803(c)(25) to N.J.R.E. 804(b)(3).

New Jersey differs from the federal government and 47 other states – all but Kansas and Texas – by not requiring that the person who makes a statement against interest be unavailable to testify before the statement can be admitted into evidence. It further differs from the federal government and 44 other states by not including a requirement that the hearsay statement be supported by corroborating circumstances that indicate its trustworthiness. New Jersey and Kansas are the only states that have neither of these provisions.

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." N.J.R.E. 801(c). A "declarant" is the person who makes a statement. N.J.R.E. 801(b). Hence, hearsay is a statement made by someone who is not in the courtroom, offered to prove the truth of what the person said.

Rule 803(c)(25) currently provides:

> Statement Against Interest. A statement that a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary, pecuniary or social interest, or had so great a tendency to invalidate the declarant's claim against another or to expose the declarant to civil or criminal liability. Such a statement is admissible against a defendant in a criminal proceeding only if the defendant was the declarant.
>
> [N.J.R.E. 803(c)(25).]

As noted above, this statement against interest hearsay exception does not require that the declarant be unavailable to testify.[1] Rule 804 defines "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

[1] The statement against interest exception is distinct from the exception for statements against party-opponents or their agents under N.J.R.E. 803(b), which are admissible regardless of the availability of the party-opponent declarant.

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 trial, hearing or proceeding because of death, physical or mental illness or infirmity, or other cause; and
>
> (A) the proponent of the statement is unable by process or other reasonable means to procure the declarant's attendance at the trial, hearing, or proceeding; and
>
> (B) with respect to statements proffered under Rules 804(b)(4) and (7), the proponent must be unable, without undue hardship or expense, to obtain declarant's deposition for use in lieu of testimony at the trial, hearing, or proceeding; or
>
> (5) [Deleted – see N.J.R.E. 803(c)(27)].
>
> [N.J.R.E. 804(a).]

Hence, a declarant is unavailable to testify if the declarant has been exempted from testifying due to privilege such as the Fifth Amendment right not to incriminate oneself; refuses to testify even after being held in contempt; testifies to a lack of memory; or is ill or deceased.

At a trial, witnesses testify under oath with knowledge that false testimony can be punished as perjury. They are subject to cross-examination by the opposing side to probe whether the witness's memory is strong, whether the witness had the ability to see or hear the subject of the testimony, and whether the witness is biased. The jury has the opportunity to observe the witness's demeanor in order to assess credibility.

Out-of-court hearsay statements presented as evidence at trial, however, are subject to "particular hazards." Williamson v. United States, 512 U.S. 594, 598 (1994). "The declarant might be lying; he might have misperceived the events which he relates; he might have faulty memory; his words might be misunderstood or taken out of context by the listener. And the ways in which these dangers are minimized for in-court statements – the oath, the witness' awareness of the gravity of the proceedings, the jury's ability to observe the witness demeanor, and, most importantly, the right of the opponent to cross-examine – are generally absent for things said out of court." Ibid.

Some categories of hearsay exceptions, those codified in Rule 803, do not require the witness to be unavailable to testify. Other categories, those codified in Rule 804, do require that the witness be unavailable to testify. When hearsay is admissible only when the witness is unavailable, the Rule 804 exceptions reflect a preference for live testimony. When hearsay is admissible even when the witness is available to testify but does not, the Rule 803 exceptions reflect an assumption as to the reliability of the out-of-court statement. As shown below, however, statements against interest, particularly statements against penal interest (statements that would expose the declarant to criminal liability), may not be deserving of this badge of heightened reliability.

"The rationale for this exception to the hearsay rule 'derives from 'the theory that, by human nature, individuals will neither assert, concede, nor admit to facts that would affect them unfavorably' and that, accordingly, 'statements that so disserve the declarant are deemed inherently trustworthy and reliable.' Rowe v. Bell & Gossett Co., 239 N.J. 531, 558, (2019) (quoting State v. Brown, 170 N.J. 138, 148-49 (2001))." State v. Hannah, 248 N.J. 148, 183 (2021). From the early 1800s, statements against interest were generally accepted as an exception to the hearsay rule, but only if the declarant were deceased. 5 Wigmore on Evidence, § 1476, p. 348 (Chadbourn rev. 1974).

In 1844, Anglo-American common law evolved such that this hearsay exception was found reliable only as to statements against pecuniary or propriety interests, but not against penal interests. Sussex Peerage Case, 11 Cl. & F. 85, 8 Eng. Rep. 1034 (1844). This distrust of statements against penal interests was based on concerns about a "flood of witnesses testifying falsely to confessions that were never made or testifying truthfully to confessions that were false." 2 McCormick on Evidence, § 318 (7th ed. 2013). "This fear was based on the likely criminal character of the declarant and the witness who would recount the alleged

statement . . . ." Ibid. "It is believed that confessions of criminal activity are often motivated by extraneous considerations and, therefore, are not as inherently reliable as statements against pecuniary or proprietary interest." Chambers v. Mississippi, 410 U.S. 284, 299-300 (1973).

This was the state of the law in 1913, when Justice Holmes issued a persuasive dissent in Donnelly v. United States, 228 U.S. 243, 277-78 (1913), contending that a statement against penal interest should have been admitted into evidence. The case involved a confession to murder by a man who died before the trial of defendant. The confession was excluded from evidence as a statement against penal interest and the defendant was convicted.

During the middle part of the twentieth century, commentators drew on Justice Holmes' dissent and argued in favor of admission of statements against penal interests. "The truth is that any rule which hampers an honest man in exonerating himself is a bad rule, even if it also hampers a villain in falsely passing for an innocent." 5 Wigmore on Evidence, § 1477, p. 359 (Chadbourn rev. 1974). As the Advisory Committee Note to the Federal Rule of Evidence states:

> The refusal of the common law to concede the adequacy of a penal interest was no doubt indefensible in logic, see the dissent of Mr. Justice Holmes in Donnelly v. United States, 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed.820 (1913), but one senses in the decisions a distrust of evidence of confessions by third persons offered to exculpate the accused arising from suspicions of fabrication either of the fact of the making of the confession or in its contents, enhanced in either instance by the required unavailability of the declarant. . . . The requirement of corroboration is included in the rule in order to effect an accommodation between these competing considerations.
>
> [28 U.S.C. App., p. 789 (1975).]

During the latter part of the twentieth century, the federal government and many states amended their evidence rules to permit admission of statements against penal interests, provided the declarant is unavailable to testify and corroborating evidence is provided.

This was the landscape when the New Jersey Supreme Court Committee on Evidence drafted the first codified New Jersey Rules of Evidence in 1963. At this point in time, the State's common law on statement against interest hearsay

evidence required the declarant to be unavailable and prohibited admission of statements against penal interest. See Bank's Refuse Removal, Inc. v. Fairlawn, 62 N.J. Super 522, 559-561 (App. Div.), certif. den. 33 N.J. 387 (1960) (declarant must be unavailable). The Supreme Court Committee proposed a new rule that, for the first time, included statements against penal interests along with other kinds of statements against interest, and further provided that the declarant need not be unavailable for such statements to be admitted into evidence, with no requirement of corroboration. Report of the New Jersey Supreme Court Committee on Evidence (March 1963), p. 169. The new Rule was codified as Evidence Rule 63(10).

This was a significant change in the law. The Report of the Committee notes that some Committee members disagreed with the removal of the requirement that declarant be unavailable to testify, stating that trial testimony is preferable to hearsay statements and "the trustworthiness of that statement may not be very great." Report of the New Jersey Supreme Court Committee on Evidence (March 1963), p. 169. The Legislative Commission, which also reviewed the proposed codified evidence rules, rejected the unavailability provision. Ibid. The Committee, however, quoted Comment 2 of the Model Code of Evidence (which drew on Dean Wigmore's writings): "Since [a declaration against interest] has as much trustworthiness as one made by the declarant on the witness stand, there is no necessity for showing the declarant to be unavailable as a witness."[2] Ibid. The Committee concluded: "While it is true that a guilty defendant might suborn such a statement, nevertheless criminal defendants as a class should be able to use such statements on the basis that an innocent man would otherwise be denied the necessary evidence of a statement which clears him of the crime. See Justice Holmes's dissent in Donnelly v. United States, 228 U.S. 243, 57 L.Ed. 820, 33 S.Ct. 449 (1913) and Newberry v. Commonwealth, 191 Va. 445, 460-62, 61 S.Ed.2d 318, 325-26 (1950) (admitting the confession of a defendant which exculpated a co-defendant). Wigmore's statement of this position is frequently quoted. See 5 Wigmore, Evidence Section 1477 (3d ed. 1940)." Report of the New Jersey Supreme Court Committee on Evidence (March 1963), p. 171.

The Supreme Court Committee's Report was presented to a Judicial Conference on June 20, 1963. No comments were made on proposed new Rule of Evidence 63(10). Thereafter, the Legislature created the Rules of Evidence Study

[2] As stated by Dean Wigmore, statements against interest are "as trustworthy as if made on the stand under cross-examination." 5 Wigmore on Evidence, § 1475, p. 348 (Chadbourn rev. 1974).

Commission to review the Court's proposed rules. Rule 63(10) was not discussed in the Report of the Commission, nor was it mentioned in the public hearing held by the Commission. Report of the Rules of Evidence Study Commission (April 1967); Public Hearing Transcript (January 20, 1967). The Commission Note appended to the new Rule simply states: "This applies to party and non-party statements. It includes 'confessions' in criminal cases, but only as to the defendant who made the statement (unless otherwise admissible against other defendants as in conspiracy cases). Unavailability is not a prerequisite." The 1991 Commission on the Rules of Evidence re-adopted the Rule without substantive change and codified it at N.J.R.E. 803(c)(25).

In the interim, in 1975, the federal government codified its rules of evidence. The federal version of the statement against interest hearsay exception was adopted as Rule of Evidence 804(b)(3), which requires unavailability and corroboration.

Hence, starting in 1967, the New Jersey Rules of Evidence permits admission of statements against interest with no requirement of corroboration and no requirement that the declarant be unavailable. As noted above, only Kansas takes the same position, while the federal government and all other states maintain more of a level of caution on this type of hearsay evidence.

The notion that statements against penal interests are trustworthy enough to justify the waiver of live testimony is questionable. False confessions are not uncommon. A family member could falsely confess to a crime of which another member is accused, and the hearsay statement could be admitted into evidence without the live testimony of the family member. It would not be unlikely for a junior gang member with no prior criminal record to present a written confession to a crime with which a more senior member with a lengthy record has been charged. Jailmates could present their own confessions, perhaps in exchange for money from the defendant's family.

In State v. Miley Anthony Wilson, 1980 Ohio App. LEXIS 9888, 1980 WL 352600 (2nd App. Dist. Ohio 1980), the defendant moved for a new trial based on newly discovered evidence that a fellow prison inmate admitted to him that he committed the crime. The fellow prison inmate later testified that he intended to confess to the crime if he was granted immunity and then defendant would sue the State for a wrongful conviction and pay the fellow inmate a portion of the proceeds.

In State v. Bell, 249 N.J.Super. 506 (App. Div. 1991), a co-defendant's guilty plea was entered into evidence as a statement against penal interest; the co-defendant did not testify. The co-defendant stated in his plea that the defendant was a block away from the robbery and was not involved. The co-defendant declined to testify because he would have been moved to the county jail during trial and would have lost some of his State prison privileges. The court noted the prosecutor's objection that the co-defendant was available to testify and the State would not be able to cross-examine him if only his statement was presented. The reviewing court replied: "This argument is logical; however, as mentioned earlier, Evid. R. 63(10) does not in any way make unavailability of the declarant a requirement for admissibility of the statements." Id. at 512.

The facts of Chambers v. Mississippi, 410 U.S. 284 (1973), demonstrate the pitfalls of not requiring unavailability of the declarant. In this case, a man made a sworn statement stating that he, not defendant, killed the police officer. He then repudiated his statement, saying that he was promised that he would share in the proceeds of a lawsuit brought against the town by the defendant after the defendant was acquitted. Id. at 288. The man had also told three people that he killed the police officer. The State did not call this man to testify. The defendant called him but was not permitted to impeach his story about repudiating his confession due to technicalities of Mississippi court rules. The three people the man told were not permitted to testify – Mississippi did not permit admission of statement against penal interest hearsay. This man was in the courtroom – as available as one could be – but his story was never the subject of cross-examination.

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 declarant's words may have been misunderstood or taken out of context by the person who heard the statement. The person who heard the statement may not have a strong memory of exactly what was said, may be biased against the speaker, or may be flat-out lying.

Further, when statements against interest are obtained by an investigator for a party to a civil action, the jury does not observe the person who made the statement – it observes only the investigator telling the story. Cross-examination of the investigator would not be fruitful, as the investigator testifies only to what was heard with no further details. See Portner v. Portner, 186 N.J. Super. 410, 417 (App. Div. 1982), rev'd on other grounds, 93 N.J. 215 (1983) (hearsay evidence of statement against interest admitted; investigator interviewed brother of husband in

matrimonial action, pretending to interview the brother for issuance of a credit card and learning that the husband secretly owns property that is in the name of the brother). Live testimony of the declarant is obviously preferable.

In sum, statements against interest should be admitted into evidence only when the witness is unavailable. Live testimony by an available witness presents the jury with the opportunity to observe the witness and assess credibility, and the opposing side has the opportunity to cross-examine the witness. For these reasons, and to align New Jersey with the federal government and the overwhelming majority of other states, the Court proposes to amend N.J.R.E. 803(c)(25) and N.J.R.E. 804(b)(3) to require that this type of hearsay is admissible into evidence only when the declarant is unavailable to testify.