NEW JERSEY ASSOCIATION for JUSTICE Inc.
Formerly the Association of Trial Lawyers of America - New Jersey (ATLA-NJ)

150 West State Street
Capitol View Building • Trenton NJ 08608
P: 609-396-0096 • F: 609-396-2463
www.nj-justice.org • info@nj-justice.org

September 6, 2023

Hon. Glenn A. Grant
Administrative Office of the Courts
Hughes Justice Complex
P.O. Box 037
Trenton, NJ 08625

Attn: 2023 Judicial Conference on Evidence Rules

Dear Judge Grant:

On behalf of the more than 2,600 members of the New Jersey Association for Justice, thank you for convening this important Judicial Conference on the Proposal to Amend Rules of Evidence 803 (c) (25) and 804 (b) (3) and for the opportunity to present our opposition to this proposal.

New Jersey's Rules of Evidence encourage cross-examination as a means to find the truth. A statement against interest should not be conditioned upon unavailability for its admissibility. Moving the Rule to 804 rather than 803(c)(25), while simultaneously eliminating the federal rule's requirement for corroboration, would actually hurt the process for truth rather than encouraging it.

Permitting admissibility, even when the declarant is available, promotes the search for truth because it gives the opponent of the statement the opportunity to cross-examine the declarant.

New Jersey has maintained that a statement against interest is non-hearsay since 1961. In 1991, New Jersey's rules committee discussed that New Jersey should not follow the federal version because the statements were deemed sufficient to justify their admission even if the declarant is an available witness. Report of the Supreme Court Committee on the Rules of Evidence, 129 N.J.L.J. 44 (Oct. 10, 1991). There has not been any case to suggest that our current well-developed body of law regarding statements against interest is not working.

To show how the current rule promotes the ultimate goal of finding the truth is best demonstrated by example.

In 2019, the New Jersey Supreme Court permitted the use of a settling defendant's interrogatory answers and deposition testimony of its agents because the statements were adverse to the settling defendants' litigation positions. *Rowe v. Bell & Gossett Co.*, 239 N.J. 531, 562 (2019). The interrogatory answers and deposition testimony were admissible under N.J.R.E. 803(c)(25) because they demonstrated successor liability of the remaining defendant in a products liability matter where an injured party contracted cancer from a product. The Court emphasized that the fact that the statements could also be deemed exculpatory did not mean the statements were inadmissible under the exception.

Using similar circumstances as a hypothetical, under the proposed changes, the non-settling defendant would be prohibited from proffering the settling defendant's statements against interest unless the declarants were unavailable. In effect, this would allow the admission of a statement against interest without any corroborating evidence while at the same time depriving the opponent of the statements an opportunity to challenge the veracity of the statements.

Under the current framework, the statement may be admitted regardless of the declarant's availability. While there is no corroboration requirement, the Rule permits flexibility. The proponent does not necessarily need to subpoena the witness, but the opponent may decide to do so in order to explore or undermine the evidence.

Adding a corroboration element to the proposed Rule does not eliminate the problem that the opponent of the statement faces – failure to cross-examine the declarant. Under the current rule, the witness may, in fact, be available, but the proponent may spare the expense of calling that witness and leave it to the opponent to decide to call that witness at trial.

The current Rule further provides flexibility because litigation costs are expensive. Leaving the statement against interest exception in N.J.R.E. 803(c)(25) permits the proponent to use the evidence without needing to subpoena persons, who may not cooperate, or who might be difficult to locate, while giving the opponent of the evidence the opportunity to call the declarant as a witness at trial.

Aside from joining other jurisdictions that permit the admission of statements against interest only when the declarant is unavailable, there appears to be no justification [or need] for changing New Jersey's long-standing jurisprudence, which has been in place since the 1960s.

The current rule works well and should be retained.

Respectfully,

P.M. Giordano

Patricia M. Giordano, Esq.
President

cc: Cornelius J. Larkin, CAE, CMP, CEM, CMM, DES