

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant:

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

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

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

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b) (2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former testimony.* In a civil proceeding testimony given as a witness at another hearing of the same or a different proceeding, or in a 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 or a party with substantially the same interest or motive with respect to the outcome of the litigation, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. In a criminal proceeding involving a retrial of the same defendant for the same or an included offense, testimony given as a witness at the prior trial or in a deposition taken in the course thereof.

(2) *Statement under belief of impending death.* In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) *Statement against interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) *Statement of personal or family history.* (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, 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) a statement concerning the foregoing matters, and 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 matter declared.

(5) [Intentionally left blank]

(6) *Forfeiture by wrongdoing.* A statement offered against a party who wrongfully caused or acquiesced in wrongfully causing the declarant's unavailability as a witness and did so intending that result.

(Amended effective January 1, 1990; amended effective September 1, 2006; amended effective July 1, 2016.)

Committee Comment - 1989

Rule 804 includes those exceptions to the hearsay rule that are conditioned upon a showing that the declarant is unavailable. As with the exceptions in Rule 803 the requirements of relevancy (Article 4) and firsthand knowledge (Rule 602) must be satisfied. Of necessity the decision as to whether or not a hearsay declaration is based on firsthand knowledge must be made on circumstantial evidence, and this requirement should be sufficiently flexible to accomplish the purposes set out in Rule 102.

Rule 804(a)

Traditionally the definition of unavailability varied among the several hearsay exceptions. The rule takes the general approach that the concept of unavailability should be applied consistently among each of the exceptions. Contra, Rule 804(a)(5). The definition of unavailability indicates that the primary concern is the unavailability of the testimony and not necessarily the unavailability of the declarant. If the declarant is present at trial but will not or cannot testify as to an issue for any reason, whether justified or not, the declarant is deemed to be unavailable on that issue for the purposes of the rule. With the exception of Rule 804(b)(1), a witness will not be deemed unavailable if his testimony can be procured by reasonable means, e.g., by taking his deposition. This is a judgment that evidence by means of deposition would be preferable to the hearsay statement. In determining whether testimony could be procured by reasonable means the judge has some discretion. Appropriate considerations would include such things as the stakes involved, the nature of the testimony, and the expense that would be incurred by out of state depositions. See Rule 102.

The application of the Sixth Amendment confrontation clause will dictate when the declarant must be produced in many criminal cases. See gen. Barber v. Page, 88 S.Ct. 1318, 390 U.S. 719, 20 L.Ed.2d 255 (1968); Mancusi v. Stubbs, 92 S.Ct. 2308, 408 U.S. 204, 33 L.Ed.2d 293 (1972); State v. Shotley, Minn., 233 N.W.2d 755, 757-758 (1975).

Rule 804(b)(1)

This exception deals with the introduction of former testimony when the declarant is unavailable. Former testimony of a witness who testifies at trial might be admissible under Rule 801(d)(1)(A) if inconsistent with the witness' present testimony. The rule distinguishes between civil and criminal cases.

In a civil case the former testimony in the same or different litigation is excepted from the hearsay rule if:

- 1. the declarant is unavailable; and*

2. the party against whom the testimony is being offered or another party with substantially the same interest, had an opportunity and motive to develop the testimony. *Briggs v. Chicago Great Western Ry.*, 248 Minn. 418, 426, 80 N.W.2d 625, 633 (1957).

In a criminal proceeding the rule is only applicable when there is a retrial of the same defendant for the same or an included offense. Even this limited application might raise issues under the confrontation clause. The rule is not intended to codify the scope of the Sixth Amendment.

To the extent that the admissibility of depositions is governed by rules of procedure, the procedural rules shall still be in effect pursuant to Rule 802. See Minn. R. Civ. P. 32.01(3) and Minn. R. Crim. P. 21.06.

Rule 804(b)(2)

*This provision represents the traditional "dying declaration exception" to the hearsay rule. At common law the exception was limited to homicide prosecutions. The rule extends this to include civil actions. Otherwise the rule is consistent with the Minnesota approach as stated in *State v. Eubanks*, 277 Minn. 257, 262, 152 N.W.2d 453, 456, 457 (1967).*

*In prosecutions for homicide the dying declarations of the deceased as to the cause of his injury or as to the circumstances which resulted in the injury are admissible if it be shown, to the satisfaction of the trial court, that they were made when the deceased was in actual danger of death and had given up all hope of recovery. *State v. Elias*, 205 Minn. 156, 158, 285 N.W. 475, 476 (1939).*

Rule 804(b)(3)

Declarations against interest have traditionally been excepted from the hearsay rule when the declarant is unavailable. Unlike the admission of a party (Rule 801(d)(2)), the basis for this exception centers in notions of trustworthiness and necessity.

The statement must not only be contrary to the declarant's interest at the time made, but so far contrary to his interest that a reasonable person would not have made the statement unless he believed it to be true. Implicit in the rule is the requirement that the declarant have first-hand knowledge (Rule 602), and that he understand or should understand that the statement is likely to be contrary to his interest at the time the statement is made.

*The common law exception was originally limited to declarations against proprietary or pecuniary interests. Many jurisdictions, including Minnesota, have expanded this to include statements that might give rise to civil liability, *Johnson v. Sleizer*, 268 Minn. 421, 426, 129 N.W.2d 761, 764 (1964), and statements against penal interest, *State v. Higginbotham*, 298 Minn. 1, 212 N.W.2d 881 (1973). This rule was not intended to affect the application of Minnesota Statutes 1974, section 169.94. See *Warren v. Marsh*, 215 Minn. 615, 11 N.W.2d 528 (1943).*

*The corroboration requirement in criminal cases for statements that exculpate the accused has been expressly approved by the Supreme Court. *State v. Higginbotham*, 298 Minn. 1, 212 N.W.2d 881 (1973).*

Rule 804(b)(4)

Statements of personal or family history have traditionally been admissible as an exception to the hearsay rule. See gen. 5 Wigmore, Evidence section 1480 et seq. (Chadbourn ed. 1974). The rule does not require that the statement be made prior to the controversy, as was the case at common law. It is thought that the timing of the statement goes more to its evidentiary weight than admissibility. The relaxation of the requirement of first-hand knowledge will allow admission of

the statement of an unavailable declarant relating to the date of his birth. See United States Supreme Court Advisory Committee Note.

Rule 804(b)(5)

Other than the requirement of unavailability, this exception is identical to Rule 803(24). Since the unavailability of the declarant will increase the necessity for resorting to hearsay statements, it is likely that this provision will be used more frequently than Rule 803(24) in fashioning new exceptions to the hearsay rule.

Committee Comment - 2006

Rule 804(b)(5)

The substance of this rule is combined with Rule 803(24) in new Rule 807.

Advisory Committee Comment - 2016 Amendments

Consistent with the 2010 amendment to the federal rule, Rule 804(b)(3) has been amended to provide that the corroborating circumstances requirement applies to all declarations against penal interest offered in criminal cases. As the federal advisory committee explained: "A unitary approach to declarations against penal interest assures both the prosecution and the accused that the Rule will not be abused and that only reliable hearsay statements will be admitted under the exception."

*Rule 804(b)(6) has been added to codify the forfeiture by wrongdoing exception. Rule 804(b)(6) is consistent with the Minnesota Supreme Court's decisions addressing waiver of the sixth amendment right to confrontation. See *State v. Cox*, 779 N.W.2d 844, 851 (Minn. 2010) (stating that forfeiture by wrongdoing requires the state to prove that the declarant-witness is unavailable, that the defendant engaged in wrongful conduct, that the wrongful conduct procured the unavailability of the witness, and that the defendant intended to procure the unavailability of the witness); *State v. Her*, 781 N.W.2d 869 (Minn. 2010).*