

## **8.11. Statement Against Penal or Pecuniary Interest**

**(1) A statement made by a declarant based upon personal knowledge which at the time of its making the declarant knew was contrary to the declarant's pecuniary or proprietary interest, or tended to subject the declarant to criminal liability, is admissible, provided the declarant is unavailable as a witness.**

**(2) Notwithstanding subdivision (1), in a criminal proceeding:**

**(a) where the statement is testimonial, such as a plea allocution, it is not admissible against a defendant;**

**(b) where the statement is not testimonial and tends to expose the declarant to criminal liability and is offered against the defendant, the statement is admissible only as to that part which is disserving to the declarant and when evidence independent of the statement establishes that the statement was made under circumstances which render it highly probable that it is truthful; and**

**(c) where a statement tends to expose the declarant to criminal liability and is offered to exculpate the defendant, the statement is admissible only when evidence independent of the statement establishes a reasonable possibility that the statement might be true.**

### **Note**

**Subdivision (1).** Subdivision (1) is derived from Court of Appeals decisions which have created a hearsay exception, "declarations against interest," for certain statements that are disserving to the declarant at the time they were made. (*See People v Brown*, 26 NY2d 88, 91 [1970]; *Kittredge v Grannis*, 244 NY 168, 175 [1926].) The particular interests specified are ones identified by the Court. (*See Kittredge v Grannis*, 244 NY at 175 [pecuniary]; *Lyon v Ricker*, 141 NY 225, 231 [1894] [proprietary]; *People v Brown*, 26 NY2d 88 [1970], *supra* [penal].) As to

the knowledge element, the Court of Appeals has insisted that to invoke the exception there must be a showing that the declarant had to have been aware at the time the statement was made that it was against interest. (See e.g. *People v Maerling*, 46 NY2d 289, 298 [1978] [“the declarant must actually be conscious of the adversity” and “the knowledge of the facts on which its adversity hangs and the awareness of the adversity must act on one another and therefore must be contemporaneous”].) The declarant’s awareness that the statement was against his or her interest may be proved directly or inferred from the “nature of the adverse matter declared and its relationship to the declarant.” (*Maerling*, 46 NY2d at 298.)

In *People v Brown* (26 NY2d at 93), the Court of Appeals held that unavailability of the declarant must be established before a declaration against interest can be admitted and that unavailability may be established by the declarant’s death, absence beyond the jurisdiction, or privileged refusal to testify. However, the decision does not preclude the recognition of other grounds of unavailability for the exception.

**Subdivision (2) (a).** Subdivision (2) (a) is derived from *People v Hardy* (4 NY3d 192 [2005]) and *People v Douglas* (4 NY3d 777 [2005]) where the Court held that, in light of *Crawford v Washington* (541 US 36 [2004]), it was error to admit against the defendant on trial a declaration against penal interest set forth in the declarant’s plea allocution.

**Subdivision (2) (b).** Subdivision (2) (b) is derived from *People v Brensic* (70 NY2d 9 [1987]) wherein the Court stated “the trial court must determine, by evaluating competent evidence independent of the declaration itself, whether the declaration was spoken under circumstances which render it highly probable that it is truthful” (*id.* at 14-15); and “[i]f the court decides to allow such evidence, it should admit only the portion of that statement which is opposed to the declarant’s interest since the guarantee of reliability contained in declarations against penal interest exists only to the extent the statement is dis-serving to the declarant” (*id.* at 16).

**Subdivision (2) (c).** Subdivision (2) (c) is derived from *People v Settles* (46 NY2d 154, 168, 169-170 [1978]), wherein the Court of Appeals stated that “there must be some evidence, independent of the declaration itself . . . [which] establishes a reasonable possibility that the statement might be true.” See also *People v Soto* (26 NY3d 455, 457 [2015]) reaffirming *Settles* (“The central issue in this case is whether an unavailable witness’s statement to a defense investigator—that she, not defendant, was the driver at the time of the accident and that she fled the scene—should have been admitted as a declaration against interest. Because the witness was aware at the time she made the statement that it was against her interest, the four prongs of the test described in *People v Settles* [46 NY2d 154 (1978)] were met and the statement should have been admitted as a declaration against interest”).