

A defendant has been sued for theft by his former employer. At trial, the employer seeks to call the defendant's estranged daughter to testify. The daughter would testify that her brother told her, "I helped [the defendant] steal money from his employer." The brother is available to testify but would be a hostile witness. The defendant's attorney objects to the daughter's testimony on hearsay grounds. The employer argues that the statement is admissible under the hearsay exception for statements against interest.

Should the court permit the daughter to testify about her brother's statement over the defendant's objection?

- A. No, because the brother is available to testify.
- B. No, because the hearsay exception for statements against penal interest applies only in criminal cases.
- C. Yes, because the statement exposes the brother to criminal liability.
- D. Yes, but only if corroborating circumstances clearly indicate the statement's trustworthiness.

Incorrect

Correct answer A

Collecting Statistics

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**Explanation:**

**Unavailable declarant**

(FRE 804(a))

Declarant is unavailable as witness if declarant:

is exempted from testifying by privilege

refuses to testify

has lapse of memory

is dead or ill

is absent from trial or hearing & proponent could not obtain attendance or testimony by subpoena or other reasonable means

**FRE** = Federal Rule of Evidence.

The **statement-against-interest exception** to the rule against hearsay applies to statements that a reasonable person in the declarant's position would have made only if that person believed the statement to be true because it:

was contrary to the declarant's **proprietary** (ie, ownership) or **pecuniary** (ie, monetary) **interest**

tended to **invalidate the declarant's claim** against someone else *or* exposed the declarant to **civil or criminal liability**.

Here, the brother's statement—that he helped the defendant steal money from the employer—exposes the brother to criminal liability (**Choice C**). But the statement-against-interest exception **applies only when** the **declarant is unavailable as a witness** (see table above). And hostility—like the brother's—does not render a witness unavailable. Therefore, the brother is available to testify, and this hearsay exception is inapplicable. Accordingly, the court should *not* permit the daughter to testify about her brother's statement.

**(Choice B)** The hearsay exception for statements against penal interest applies in both civil *and* criminal cases.

**(Choice D)** An *unavailable* declarant's statement against interest must also be supported by corroborating circumstances that clearly indicate its trustworthiness when the statement (1) is offered in a criminal case and (2) tends to expose the declarant to criminal liability. But here, even if the employer could corroborate the brother's statement, the brother is *available*—and his statement is therefore inadmissible.

**Educational objective:**

The statement-against-interest exception applies to hearsay statements that (1) are contrary to an unavailable declarant's proprietary or pecuniary interest, (2) tend to invalidate the declarant's claim against someone else, or (3) expose the declarant to civil or criminal liability.

**References**

Fed. R. Evid. 804 (listing the hearsay exceptions for unavailable declarants).

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