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Rule 804(b)(1): Former Testimony

RULE 804(b)(1): FORMER TESTIMONY

Federal Rule of Evidence 804(b)(1) states:

> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
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> (1) Former testimony. 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, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.[1]

Federal Rule of Evidence 804(b)(1) prevents the exclusion of former testimony of a witness as hearsay if the witness is unavailable to testify.[2] However, this rule is not as broad as it may appear with respect to exactly what "former testimony" will be admitted. In *United States v. Salerno*,[3] the United States Supreme Court noted that former testimony is admissible when the opposing party had a similar motive while questioning the witness in both proceedings.[4] Moreover, the court held that this requirement of a "similar motive" is not waivable, even in the interest of adversarial fairness.[5]

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1. FED. R. EVID. 804(b)(1).
2. *Id.*
3. 505 U.S. 317 (1992).
4. In the concurring opinion, Justice Blackmun describes the "similar motive" requirement as follows:

> Because similar motive" does not mean "identical motive," the similar-motive inquiry . . . is inherently a *factual* inquiry, depending in part on the similarity of the underlying issues and on the context of the grand jury questioning. . . . Moreover, like other inquiries involving the admission of evidence, the similar-motive inquiry appropriately reflects narrow concerns of ensuring the reliability of evidence admitted at trial--not broad policy concerns favoring either Government in the conduct of grand jury proceedings or the defendant in overcoming the refusal of other witnesses to testify.

Id. at 326 (Blackmun, J., concurring) (emphasis in original).
5. *Id.* at 325.

Salerno involved a criminal proceeding in which the defendants sought to admit grand jury transcripts of the testimony of two witnesses, who were allegedly members of the Genovese Family of La Cosa Nostra crime organization, in order to refute claims made by the government.[6] The witnesses, who had been granted immunity before the grand jury, invoked their Fifth Amendment right against self-incrimination upon being subpoenaed by the respondent.[7] The parties agreed that the witnesses were "unavailable" and that the grand jury testimony was "[t]estimony given as a witness at another hearing" in accordance with Rule 804(b)(1).[8] However, the parties disagreed as to whether the admissibility of the testimony be used based on the "similar motive" requirement.[9] The Supreme Court stressed that "[n]othing in the language of Rule 804(b)(1) suggests that a court may admit former testimony absent satisfaction of each of the Rule's elements."[10] Accordingly, the "similar motive" element must be satisfied before former testimony may be introduced.[11]

Salerno is illustrative of Rule 804(b)(1) because it delineates the federal parameters of "proceeding," "unavailable witness," and "similar motive."[12] First, *Salerno* demonstrates that former testimony in grand jury proceedings comes under the umbrella of Rule 804(b)(1).[13] Second, the case illustrates that witnesses who invoke their Fifth Amendment right against self-incrimination meet the unavailability requirement.[14] Finally, *Salerno* stands for the proposition that where a party did not have the "similar motive to develop the testimony by direct, cross, or redirect

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6. *Id.* at 318-19.
7. *Id.* at 319.
8. *Id.* at 321. The witnesses were deemed "unavailable" because they had "properly invoked [their] Fifth Amendment privilege and refused to testify." *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*

examination,"[15] the former testimony will not qualify as a hearsay exception.[16]

Former testimony can be offered under Rule 804(b)(1) in federal proceedings if the party or a predecessor in interest of the party "against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony . . . ."[17] McCormick offers two approaches used by courts when applying the ambiguous term "predecessor in interest."[18] First, the "community of interest" approach "requires some connection-some shared interest, albeit far less than a formal relationship-that helps to insure adequacy of cross-examination."[19] The second approach is broader in that it requires the federal courts to "insure fairness directly by seriously considering whether the prior cross-examination can be fairly held against the later party."[20] If the objecting party can show inadequacy in the cross-examination, the former testimony may not be introduced.[21]

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15. FED. R. EVID. 804(b)(1). *See* United States v. Feldman, 761 F.2d 380 (7th Cir. 1985). The court, in *Feldman*, listed several factors to consider whether a "similar motive" existed, including "(1) the type of proceeding in which the testimony is given, (2) trial strategy, (3) the potential penalties or financial stakes, and (4) the number of issues and parties." *Id.* at 385 (citation omitted).

16. *Salerno*, 505 U.S. at 321. The requirement of Rule 804(b)(1) that the statements be given under oath does not concern adversarial fairness. *Id.* at 320-23. Rather, it applies to the literal meaning of the word "testimony," that is, "statements made under oath or affirmation." *Id.* at 322. Also, the Court rejected the respondents' argument that the Government forfeited its right to admit testimony by later admitting contradictory evidence. *Id.* at 323.

17. FED. R. EVID. 804(b)(1).

18. MCCORMICK ON EVIDENCE § 303, at 314 (John William Strong ed., 4th ed. 1992).

19. *Id.*

20. *Id.*

21. *Id. Compare* Mark Lawrence, *The Admissibility of Former Testimony Under Rule 804(b)(1): Defining a Predecessor in Interest*, 42 U. MIAMI L. REV. 975, 977 (1987). The author explains: "[M]ost federal courts employ analytical approaches that in effect ignore the predecessor-in-interest requirement. . . . These courts rely instead on the trustworthy nature of the former testimony itself. . . . Consequently, the term 'predecessor in interest,' which appears in the rule's text, has become a dead letter." *Id.*; *with*

The New York law on admissibility of former testimony is addressed in Criminal Procedure Law section 670.10 [hereinafter C.P.L.][22] for criminal actions and Civil Practice Law and Rules section 4517[23] [hereinafter C.P.L.R.] for civil actions. In order

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MCCORMICK ON EVIDENCE § 303, at 518 (John William Strong ed., 4th ed. 1992) (explaining that the predecessor-in-interest analysis can be avoided if courts focus on the "adequacy of the testing of the prior testimony"); *see, e.g.*, Lloyd v. American Export Lines, Inc., 580 F.2d 1179 (3d Cir. 1978) (adopting the community-of-interest approach without employing the predecessor-in-interest requirement); Pacelli v. Nassau County Police Dep't, 639 F. Supp 1382 (E.D.N.Y. 1986) (utilizing the community-of-interest approach and avoiding the predecessor-of-interest requirement).

22. N.Y. CRIM. PROC. LAW § 670.10 (McKinney 1992). This section states:

> 1. Under circumstances prescribed in this article, testimony given by a witness at:
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> (a) a trial of an accusatory instrument, or
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> (b) a hearing upon a felony complaint conducted pursuant to section 180.60, or
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> (c) an examination of such witness conditionally, conducted pursuant to article six hundred sixty, may, where otherwise admissible, be received into evidence at a subsequent proceeding in or relating to the action involved when at the time of such subsequent proceeding the witness is unable to attend the same by reason of death, illness or incapacity, or cannot with due diligence be found, or is outside the state or in federal custody and cannot with due diligence be brought before the court. Upon being received into evidence, such testimony may be read and any videotape or photographic recording thereof played. Where any recording is received into evidence, the stenographic transcript of that examination shall also be received.
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> 2. The subsequent proceedings at which such testimony may be received in evidence consist of:
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> (a) Any proceeding constituting a part of a criminal action based upon the charge or charges which were pending against the defendant at the time of the witness's testimony and to which such testimony related; and
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> (b) Any post-judgment proceeding in which a judgment of conviction upon a charge specified in paragraph (a) is challenged.

Id.

23. N.Y. CIV. PRAC. L. & R. 4517 (McKinney 1992). Section 4517 states:

> In a civil action, if a witness' testimony is not available because of privilege, death, physical or mental illness, absence beyond the

for former testimony to be admissible in New York, the testimony must fall into one of three categories outlined in *People v. Peterson.*[24] Those categories include: "(1) a trial of an accusatory instrument, or (2) a hearing upon a felony complaint conducted pursuant to [C.P.L.] Section 180.60, or (3) an examination of a witness conditionally conducted pursuant to Article 660 [of the Penal Law]."[25] In addition, New York requires that the offered testimony originate from a witness who is unavailable or is unable to be found with due diligence.[26]

In *Fleury v. Edwards*,[27] the court of appeals stated that the early legislative equivalent of C.P.L.R. 4517 must be interpreted in conjunction with the common law and that "while the statute authorizes the after-death use of prior testimony, it is not intended to state the precise and only circumstances under which

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jurisdiction of the court to compel appearance by its process or absence because the proponent of his statement does not know and with diligence has been unable to ascertain his whereabouts, or because he is incompetent to testify by virtue of section 4519, his testimony, taken or introduced in evidence at a former trial, together with all exhibits and documents introduced in connection with it, may be introduced in evidence by any party upon any trial of the same subject-matter in the same or another action between the same parties or their representatives, subject to any objection to admissibility other than hearsay. Such testimony may not be used if the witness' unavailability was procured by, or through the culpable neglect or wrongdoing of, the proponent of his statement. The original stenographic notes of testimony taken by a stenographer who has since died or become incompetent may be read in evidence by any person whose competency to read them accurately is established to the satisfaction of the court.

Id.

24. 160 A.D.2d 563, 554 N.Y.S.2d 521 (1st Dep't 1990).

25. *Id.* at 564, 554 N.Y.S.2d at 522.

26. *See supra* note 22 for an exhaustive list of the unavailability requirement for admission of prior testimony in subsequent criminal proceedings. *See also* People v. Robinson, 637 N.Y.S.2d 549 (4th Dep't 1996) (holding that "[a] defendant has the constitutional right to introduce the prior testimony of an unavailable witness at trial if he establishes that (1) the evidence bears sufficient indicia of reliability, and (2) the witness is no longer available.")

27. 14 N.Y.2d 334, 200 N.E.2d 550, 251 N.Y.S.2d 647 (1964).

such use is permissible."[28] Thus, although the statute refers to admissible testimony from a former civil trial where the witness is now deceased,[29] the court of appeals has extended its applicability to administrative proceedings.[30] The *Fleury* court, therefore, held that where the deceased had given testimony at a motor vehicle administrative proceeding, that testimony could be offered in a subsequent civil action because it had the same degree of reliability as if it had been given in a judicial proceeding.[31]

There are similarities and differences between Federal Rule of Evidence 804(b)(1) and New York law. Both jurisdictions have recognized that a witness' invocation of the Fifth Amendment right against self-incrimination meets the requirement of unavailability.[32] However, a significant difference between the two jurisdictions exists concerning the unavailability of a witness due to the culpable neglect of the offeror of the former testimony. That is, although New York law does not allow introduction of former testimony of an individual whose unavailability was caused by the proponent's "culpable neglect,"[33] federal law only disallows the former testimony if the witness' unavailability is due to the deliberate "procurement or wrongdoing of the proponent."[34] New York law is also more restrictive in criminal cases because it limits the introduction of former testimony to the

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28. *Id.* at 338, 200 N.E.2d at 552, 251 N.Y.S.2d at 650-51.

29. *See supra* note 23.

30. *Fleury*, 14 N.Y.2d at 339, 200 N.E.2d at 553, 251 N.Y.S.2d at 651.

31. *Id.* at 338-39, 200 N.E.2d at 552-53, 251 N.Y.S.2d at 651. The court stated that "[the testimony] was given under oath, referred to the same subject-matter, and was heard in a tribunal where the other side was represented and allowed to cross-examine." *Id.*

32. *See* United States v. Salerno, 505 U.S. 317, 321 (1992) (holding that the witnesses were "unavailable" to the defense as they "properly invoked the Fifth Amendment privilege and refused to testify."); People v. Brown, 26 N.Y.2d 88, 257 N.E.2d 16, 308 N.Y.S.2d 825 (1970) (holding that the rule in New York should allow an "admission against penal interest" to be received when the person making the admission will not testify to the fact on the ground of self incrimination).

33. N.Y. CIV. PRAC. L. & R. 4517. *See supra* note 23.

34. FED. R. EVID. 804(a).

three specific situations enumerated in C.P.L. 670.10.[35] Federal Rule 804(b)(1) contains no such restriction.[36]

Finally, Federal Rule of Evidence 804(b)(1) is more liberal than New York law in that the rule has been construed to allow introduction of former testimony where the prosecutor has made a good faith effort to produce the witness and such witness either refuses to answer, claims memory loss, or otherwise invokes his or her Fifth Amendment right against self-incrimination.[37] In New York, no such provision exists. Thus, Rule 804(b)(1) is more flexible in the introduction of former testimony into evidence than New York law.

35. *See supra* note 22.
36. FED. R. EVID. 804(b)(1).
37. *See* California v. Green, 399 U.S. 149, 167-69 (1970).