

A defendant was indicted for engaging in a fraudulent investment scheme. At the criminal trial, the prosecutor called a witness who had participated in the scheme with the defendant. The witness testified about the operation of the scheme and was cross-examined by the defendant's attorney. The case resulted in a mistrial.

An investor who was allegedly defrauded by the scheme has now brought a civil action against the defendant. She seeks to introduce the witness's testimony from the criminal trial. The witness has moved to a foreign country.

Is the witness's testimony in the criminal trial admissible in the civil action?

- A. No, because the burden of proof in a criminal action is different from the burden of proof in a civil action.
- B. No, because the parties are not identical in the two actions.
- C. Yes, because it is prior testimony of an unavailable declarant.
- D. Yes, but only if the investor demonstrates that she was unable to obtain the witness's attendance by subpoena or other reasonable means.

## 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.

**Hearsay** is a statement made outside the present proceeding that is offered to prove the truth of the matter asserted therein and is **generally inadmissible**. But an **exception** to the rule against hearsay applies to a **declarant's former testimony** if:

the testimony was given at a **trial**, hearing, or deposition in the current case or a different proceeding that involved **similar parties and issues**

the party against whom the testimony is offered had an **opportunity** and similar motive to develop that testimony through **direct or cross-examination** of the declarant *and*

the declarant is unavailable as a witness.

A **declarant** is **unavailable** if (1) he/she is **absent** from the trial or hearing and (2) the proponent **could not obtain** the declarant's **attendance by subpoena** or other reasonable means.

Here, the investor seeks to introduce the witness's testimony from the defendant's criminal fraud trial in the civil fraud action against the defendant (similar parties and issues). That former testimony is being introduced against the defendant, whose attorney cross-examined the witness in the criminal case. And though the witness is absent from the civil trial (in foreign country), the witness's former testimony is only admissible if the investor also shows that she could not obtain the witness's attendance by subpoena or other reasonable means **(Choice C)**.

**(Choice A)** The **burden of proof** in a criminal action *is* different from the burden of proof in a civil action. But this has no bearing on the admissibility of the former testimony of an unavailable declarant.

**(Choice B)** The parties need not be identical in the two actions for the former testimony of an unavailable declarant to be admissible.

**Educational objective:**

A declarant's former testimony is admissible if (1) the testimony was given at a trial, hearing, or deposition in the same case or a different proceeding that involved similar parties and issues, (2) the party against whom the testimony is offered had an opportunity and similar motive to develop that testimony through examination of the declarant, and (3) the declarant is unavailable.

**References**

Fed. R. Evid. 804(b)(1) (hearsay exception – former testimony).

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