

18. RULE 804: STATEMENTS BY UNAVAILABLE DECLARANTS.

A. IN GENERAL

1. The exceptions contained in Rule 804 bear no relation to each other except that they all require proof that the declarant has become unavailable. In that way they are very different from the exceptions we have been studying, none of which depend on the unavailability of the declarant.

2. As with all other exceptions, each 804 exception has both a name and a very specific foundation. You must be very careful to distinguish these two. There is an exception called "former testimony," but not all former testimony falls into the exception. There is an exception for "statements against interest," but not all statements against interest fall into the exception. Only those statements that strictly satisfy the conditions specified in the fine print fall into the exceptions. Note that there is no general exception for hearsay when the declarant has become unavailable.

3. The four traditional exceptions requiring proof of unavailability are:

- a) 804(b)(1) -- Former testimony.
- b) 804(b)(2) -- Statements made under belief of impending death, known everywhere by its common law name: Dying Declarations.
- c) 804(b)(3) -- Statements against interest
- d) 804(b)(4) -- Statements of personal or family history

4. A fifth exception was added recently called either "Forfeiture By Wrongdoing," or "Statement Offered Against a Party Who Wrongfully Caused the Unavailability." It is not actually a hearsay exception at all, but a principle of fairness. If the proponent can prove that a party has engaged in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness (i.e., killed, bribed, or intimidated the witness), then the party has forfeited the right to object to the other side using hearsay statements by the unavailable witness.

5. Only former testimony and statements against interest are important. Exceptions 2 and 4 are relics from frontier days when people were born in log cabins, went prospecting in Colorado, got married in front of itinerant preachers, and died in gunfights at the OK Corral.

- a) Dying declarations require proof that the declarant truly believe death was imminent. This was easy 150 years ago when the nearest doctor was a drunk who was a 2-day buggy ride away. This is almost impossible to establish now, when everyone is a 15-minute ride from a modern emergency room where they will save you even if you have no insurance.
- b) Unofficial statements of family history which were important 150 years ago when there were no official records of birth, marriage and death, have become unimportant now that everyone can just go down to the health department and get an official certificate.

6. Recall that your responsibility as lawyer in objecting and responding is to be specific. Therefore, if you are invoking an exception to the hearsay rule as your response to a hearsay objection, you must point out which exception applies, using its name, e.g., **"This evidence falls within the exception for former testimony."**

7. The name by itself is not specific enough. You must convince the judge that the foundation has been laid, i.e., that all the conditions specified in the text of the Rule have been satisfied. E.g.:

This evidence falls within the former testimony exception. We have shown that the declarant is unavailable by introducing a death certificate. The evidence constitutes testimony given as a witness in a deposition. We are offering it against the defendant. The deposition indicates that the defendant's attorney was present, and thus had an opportunity to examine the witness. The deposition shows that it was taken in connection with this case, so the defendant's motive to examine the witness was similar to his motive at trial today.

8. Rule 804 has a precise definition of unavailability, and you must prove strict compliance with one of the 5 categories in order to establish unavailability. The fact that the declarant is not present is not "unavailability". This is another trap for the unwary and the imprecise. The types of unavailability are:

- (1) Being exempted from testifying by a court ruling that a privilege applies.
- (2) Refusing to testify despite a court order. *See Guy v. State*, 755 N.E.2d 248, 253-54 (Ind. Ct. App. 2001) (child victim cried and refused to cooperate; held unavailable for refusing to testify despite court order).
- (3) Testifying to a lack of memory.
- (4) Being unavailable because of death, infirmity, physical illness or mental illness.
- (5) Being absent despite reasonable attempts to obtain the person's attendance. What constitutes a reasonable attempt is a matter for the judge's discretion. *See Berkman v. State*, 976 N.E.2d 68, 76 (Ind. Ct. App. 2012) (prosecutor had tried unsuccessfully to serve subpoena, could not locate witness or contact him by phone, and an open arrest warrant for the witness already existed). If the witness lives far away, "reasonable attempts" normally require an offer to pay transportation costs.

B. THE TWO EXCEPTIONS THAT MATTER

1. Former testimony:

Rule 804(b)(1) creates a hearsay exception for former testimony given at an earlier trial or hearing, or in a deposition, if the witness has become unavailable, and the party against whom it is offered had an opportunity and similar motive to question the declarant at the earlier proceeding. The foundation is:

(A) The former testimony must have been given at a trial, hearing or deposition in which the witness takes an oath and is subject to cross-examination. The prior proceeding may have been part of an unrelated case.

(B) The party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct or cross-examination. In civil cases, this element is satisfied if a predecessor in interest had the opportunity. The only requirement is the opportunity to question the witness -- the party need not have actually asked any questions, nor must the questioning have been successful. A discovery deposition may be used even though the motives for developing the deposition are slightly different than those for cross-examining at trial.

The fact that prior testimony falls into a hearsay does not make everything in a deposition admissible. The content must also be relevant, based on personal knowledge, and satisfy the opinion rules.

2. Statements against interest:

Rule 804(b)(3) creates a hearsay exception for statements against the declarant's pecuniary, proprietary, penal, or legal interests at the time they were made. The foundation required is unavailability plus:

(A) The statement must have been clearly against the declarant's interests at the time it was made.

1) *Pecuniary interest.* A statement is against pecuniary interest if the statement acknowledges a debt or that someone has paid a debt, or otherwise contains language likely to cost the declarant money.

2) *Proprietary interest.* A statement is against proprietary interest if it places the declarant in a worse position with respect to ownership, occupancy, use or other interest in property.

3) *Penal interest.* A statement is against penal interest if it is incriminating on its face and either substantially admits criminal liability or clearly tends to subject the declarant to criminal prosecution. It is not enough that the statement cast suspicion on the declarant or place him in a worse position at trial when considered with other evidence. A statement also may be against penal interest if it makes it more likely that the declarant will lose an appeal or receive a harsher sentence.

4) *Legal interest.* A statement is against legal interest if it tends to subject the declarant to civil liability, or weakens the declarant's actual or potential claim against another.

(B) The declarant had personal knowledge of the facts stated.

(C) A reasonable person would not have made the statement unless it were true. It is relevant in making this determination to look at all the circumstances surrounding the statement, including whether the declarant had a probable motive to make a false statement, whether the present controversy had already arisen at the time the statement was made, and whether it is self-serving.

(D) The statement must appear to be reliable under the circumstances. At a minimum, this requires corroborating evidence that clearly indicates its trustworthiness, if the statement is offered in a criminal case and tends to expose the declarant to criminal liability

A confession made by a codefendant which implicates both the codefendant and the accused is not within this exception despite the fact that it is against the co-defendant's interests. If the codefendant testifies in person against the defendant, the prosecution cannot prove unavailability. If the co-defendant does not testify, the defendant lacks the ability to cross-examine and the Confrontation Clause is violated. *Bruton v. United States*, 391 U.S. 123 (1968).