Fed. R. Evid. 804(b)(1)
The former testimony exception to the hearsay rule

First, a quick drill on “unavailability.”
In order for an out-of-court statement to be admitted under the former testimony exception, the declarant must be “unavailable” within the meaning of Fed. R. Evid. 804(a).

1. True.
2. False
3. It depends
If the declarant refuses to testify despite an order of the court to do so, the unavailability requirement is satisfied. (Assume that the proponent did not encourage the declarant to refuse to testify.)

Ref.: Rule 804(a).

1. True.
2. False
3. It depends
In deciding whether the declarant is unavailable, the judge can resolve factual issues.

1. True.
2. False
3. It depends
The party seeking to invoke the former testimony exception in order to put in evidence bears the burden of proof in showing that the foundation facts are true.

1. True.
2. False
3. It depends
If the judge thinks that the evidence on unavailability is in equipoise, then for purposes of the former testimony exception the judge should determine that --

1. the unavailability requirement has not been satisfied
2. the unavailability requirement has been satisfied
3. the judge should decline to rule.
(The federal rules apply.) In a robbery case, the state claims that Buzzy committed the robbery and Beany drove the getaway car. Buzzy and Beany are tried separately. In State v. Buzzy, the defendant cross-examined the victim in an attempt to show that she was mistaken in identifying him as the robber. In State v. Beany, Beany also claims that the victim mistakenly identified Buzzy. If the victim is unavailable, the state may use the victim’s former testimony as evidence against Beany.

1. True.
2. False
(b) The Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former Testimony. Testimony that:
(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and
(B) is now offered against a party who had -- or, in a civil case, whose predecessor in interest had -- an opportunity and similar motive to develop it by direct, cross-, or redirect examination.
What’s the rationale of the former testimony exception?

Why limit it to witnesses who are unavailable?
Lawsuits:

1. State v. JB

Witnesses who testified against JB in the first action invoked the privilege against self-incrimination in the second action.
Under the restrictive common-law rule discussed (but not adopted) in the *Travelers* case, the following foundation was required for the former testimony exception:

-- Declarant is now **unavailable**, and
-- the **party** against whom the testimony is now offered had
  -- an **opportunity to cross** in the earlier trial,
  -- the testimony concerned the **same issue** in both trials.
The strongest argument for exclusion of the prior testimony in the *Travelers* case was that --

1. The witnesses were still available
2. The issue was different
3. The testimony was being offered against a party who had no prior chance to cross-examine
The *Travelers* case held that --

1. The same issue was involved in both trials
2. Regarding the same party requirement, it is sufficient that the cross-examiner had the same motive in both trials.
3. Both of the above.
Relevant quotes from *Travelers*:

1. Same issue:

   “The issue [on which these witnesses testified] in both the civil and criminal cases was whether J.B. Wright procured the burning of the building.” (p. 345)

2. Same party:

   “We conclude that J.B. Wright’s opportunity to cross-examine the witness in the criminal case on the same issue, with the same interest and motives that J.C. Wright would have had in the instant case, satisfies the rule of substantial identity of issues and parties. . . .” (p. 346)
“Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

“(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.”

Can a substantial argument be made that the Federal Rules of Evidence would call for a different result under the facts of Travelers?

1. Yes. Not same party or predecessor.
2. Yes. Different motive.
3. Yes. The witnesses who took the 5th were not “unavailable.”
4. No.
Would the federal rules of evidence call for a different result under the facts of *Travelers*?

1. Yes. Not same party or predecessor.
2. Yes. Different motive.
3. Yes. The witnesses who took the 5th were not “unavailable.”
4. No.
This time, assume that the brother who was the defendant in the criminal case was not a predecessor in interest of the brother who was one of the plaintiffs in the subsequent civil case.

Can a substantial argument be made that the Federal Rules of Evidence would call for a different result under the facts of *Travelers*?

1. Yes. Not same party or predecessor.
2. Yes. Different motive.
3. Yes. The witnesses who took the 5\(^{th}\) were not “unavailable.”
4. No.
Conventional definition of “predecessor in interest”

• “[T]he expression generally refers to the predecessor from whom the present party received the right, title, interest or obligation that is at issue in the current litigation.” Lilly et al., p.349.

• But see Lloyd v. American Export Lines, noted p. 349, which treats the “predecessor” requirement as satisfied when a party in the prior case had similar interests and a similar motive to cross-examine.
804(b)(1) Former Testimony exception

Foundation facts (federal law, criminal case)

--Declarant’s prior testimony is offered
--Declarant is unavailable
--Declarant’s testimony is now offered against a party who had a previous opportunity to develop the testimony
--That party also had a similar motive to develop the testimony.
804(b)(1) Former Testimony exception

Foundation facts (federal law, civil case)

--Declarant’s prior testimony is offered
--Declarant is unavailable
--Declarant’s testimony is now offered against a party who had -- or whose predecessor in interest had -- a previous opportunity to develop the testimony
--The party or predecessor had a similar motive to develop the testimony.
In **civil** cases, California law allows former testimony to be admitted against someone who was not a party to the prior case if the cross-examiner in the prior case had a similar “interest and motive.”
Before the grand jury, declarants testified “Salerno was not involved.”

At trial, declarants took the 5th.

Salerno offered the grand jury testimony into evidence.
The grand jury proceeding is a secret proceeding in which a prosecutor questions persons who have been subpoenaed to testify. Prosecutors can use grand juries to investigate a crime.

Witnesses can decline to talk to police officers, but they cannot decline to testify before the grand jury unless they invoke a privilege, such as the privilege against self-incrimination. If a witness invokes the privilege against self-incrimination, the prosecutor can grant immunity to the witness. The grant of immunity removes the danger of self-incrimination. The witness can no longer refuse to testify on grounds of self-incrimination.

A person being investigated has no right to be present during other witnesses’ grand jury testimony or to be represented by an attorney before the grand jury.
In *Salerno*, the Supreme Court held that the prior grand jury testimony was --

1. Not admissible, if the prosecutor’s motive was different when he was questioning the witnesses before the grand jury.
2. Not admissible, because the witnesses were available to testify.
3. Not admissible because the issue was different.
4. Admissible
Q. Why might the prosecutor have a different motive when questioning before the grand jury than she would have when questioning at trial?

Ans. Because before the grand jury, she might --

1. want to keep secrets
2. know fewer case facts than at trial
3. be more willing to explore evidence helpful to the defense
4. 1 and 2, above
5. All of the above.
Suppose a case in which witnesses voluntarily incriminated the defendant in their grand jury testimony. Then at trial the same witnesses refused to testify on grounds of self-incrimination. The prosecutor could --

1. Place the witnesses’ grand jury testimony into evidence.
2. Force the witnesses to testify by granting them immunity.
3. Both of the above.
In *Salerno*, the defendant argued that “adversarial fairness” required that it be allowed to put the grand jury testimony into evidence. What is the “adversarial fairness” argument?

Ref : p. 352
Hypo. Buzzy is charged with robbery. At the preliminary hearing, a police officer testified against Buzzy. Buzzy’s lawyer asked questions such as “why did you arrest my client?” “did you notice anything else at the crime scene?” and “do you know of any other evidence against my client?” The judge found probable cause and Buzzy was tried before a jury. The police officer now unavailable. Is the officer’s preliminary hearing testimony admissible against Buzzy?

1. No, because the parties are different.
2. No, because the cross-examiner had a different motive.
3. No, because the police officer is still alive.
4. Yes.
Possible uses of former testimony and judgments:

- Testimony as evidence – former testimony rule
- Judgment as evidence – FRE 803(22)
- Judgment as preclusion
Hypo. JB was charged with arson and acquitted. He then sued his insurance company to recover for loss of the same property. The insurance company defends on grounds that he committed arson (the same issue involved in the criminal trial). JB seeks to preclude the insurance company from re-litigating the arson issue. Is the insurance company precluded?

Ref: Issue preclusion note, p. 347.

1. No, because it was not a party to the first action.

2. No, because the burden of proof was different in the criminal case.

3. Both of the above.
Same case, except that JB was convicted of arson in the criminal case after a full trial. As before, he sued the insurance company to recover for the lost property. The insurance company seeks to preclude him from re-litigating the arson issue. Is JB precluded?

Ref: p. 348

1. No, because there were different parties in the criminal case.
2. No, because the burden of proof was different in the criminal case.
3. Both of the above.
4. Yes.
Assume a jurisdiction that allows preclusion of a prior party whenever the issue was fully and fairly litigated. In the prior example, where JB was convicted and the insurance company sought to preclude him, would he be precluded if the prior conviction was based upon a guilty plea?

1. Yes
2. No
In the prior example, would JB’s guilty plea be admissible in evidence?

1. Yes
2. No
The end.