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Admissibility of Prior-Action Depositions and FormerTestimony Under Fed. R. Civ. P. 32(a)(4) andFed. R. Evid. 804(b)(1): Courts DifferingInterpretations

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ADMISSIBILITY OF PRIOR-ACTION DEPOSITIONS AND FORMER TESTIMONY UNDER FED. R. CIV. P. 32(a)(4) AND FED. R. EVID. 804(b)(1): COURTS DIFFERING INTERPRETATIONS

The common-law hearsay rule excludes from evidence out-of-court statements offered to prove the truth of the facts asserted therein.[1] The Federal

1. *See* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 244 (2d ed. 1972); 5 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1364 (rev. ed. Chadbourn 1974); *see also* Tappan v. Beardsley, 77 U.S. (10 Wall.) 427, 435 (1870) (depositions incorporated into trial record not admissible in subsequent suit when witness is competent and party can procure witness); Rutherford v. Geddes, 71 U.S. (4 Wall.) 220, 224 (1866) (court properly excluded deposition as hearsay when party had shown no reason for failing to produce witness).

The rationale for the exclusion of certain statements as hearsay rests upon the conviction that such testimony is less reliable than a witness' testimony under oath in the presence of the trier of fact and subject to cross-examination. *See* C. MCCORMICK, *supra* § 245, at 581; Martin, *The Former Testimony Exception in the Proposed Federal Rules of Evidence*, 57 IOWA L. REV. 547, 550 (1972) [hereinafter cited as *Former Testimony Exception*] (oath, physical presence, and opportunity to cross-examine are traditionally indications of reliability); Strahorn, *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. PA. L. REV. 484, 484 (1937) (oath, perjury penalty, sequestration, discovery, publicity, confrontation, and cross-examination are conditioning devices that improve trustworthiness of witness' testimony). The purpose of the oath is to impress upon the witness the solemnity of the occasion and the importance of testifying truthfully. *See* Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 182 (1948) (purpose of oath is to produce what witness believes is exact truth); White, *Oaths in Judicial Proceedings and Their Effect Upon the Competency of Witnesses*, 42 AM. L. REG. (N.S.) 373, 374-85 (1903) (religious implications of oaths). The oath is important both as an indication of the religious obligation to speak truthfully and in order to indicate to the witness the possibility of criminal punishment for perjury. C. MCCORMICK, *supra*, § 245, at 582. The presence of the witness at trial provides an opportunity for the trier of fact to observe the demeanor of the witness and to judge the witness' veracity. *See* FED. R. EVID. 804 advisory committee note (demeanor confers depth and meaning upon oath and cross-examination); 5 J. WIGMORE, *supra*, § 1395(2) (presence of witness allows judge and jury to observe witness' deportment while testifying and has subjective moral effect upon witness); *Morgan, supra*, at 179 (witness' presence at trial allows trier of fact to judge trustworthiness of witness); *see also* Universal Camera Corp. v. NLRB, 340 U.S. 474, 495-96 (1951) (demeanor of witness furnishes valuable clues to trier of fact and opponent). In addition, cross-examination permits the adversary to expose deficiencies in the witness' sincerity, memory, perception, and choice of language. *See* FED. R. EVID. 804 advisory committee note (opportunity to observe demeanor confers depth on oath and cross-examination); *Morgan, supra*, at 179 (same); *see also* Ohio v. Roberts, 448 U.S. 56, 73 (1980) (opportunity to cross-examine is indication of reliability); In re Paducah Towing Co., 692 F.2d 412, 418 (6th Cir. 1982) (same); United States v. Amaya, 533 F.2d 188, 191 (5th Cir. 1976) (opportunity to cross-examine renders former testimony admissible in criminal proceeding), *cert. denied*, 429 U.S. 1101 (1977); United States v. Wingate, 520 F.2d 309, 316 (2d Cir. 1975) (prior testimony is not admissible against government when government lacked meaningful opportunity to cross-examine), *cert. denied*, 423 U.S. 1074 (1976). Dean Wigmore referred to cross-examination as both "a distinctive and vital feature of our law" and as "the greatest legal engine ever invented for the discovery of truth." 5 J. WIGMORE, *supra*, § 1367, at 32. Consequently, Wigmore viewed the hearsay rules as a means of requiring cross-examination of testimonial assertions, with the attendant requirements of oath and physical presence as merely incidental. *Id.* § 1362, at 10.

Rules of Evidence likewise exclude hearsay statements unless those statements satisfy one of the exceptions to the hearsay rule that the common-law recognized and that the Federal Rules of Evidence adopted.[2] For example, former testimony, in the form of statements that a witness made at a deposition or previous hearing, is one of the exceptions to the hearsay rule that the Federal Rules of Evidence incorporated from the common law.[3] Rule 804(b)(1) of the Federal Rules of Evidence[4] currently governs the conditions under which former testimony is admissible into evidence in a subsequent action. In addition to rule 804(b)(1), rule 32(a)(4) of the Federal Rules of Civil Procedure[5] permits

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2. *See* FED. R. EVID. 802 (hearsay inadmissible except as provided under Federal Rules of Evidence); *see also* FED. R. EVID. 802 advisory committee note (Federal Rules of Evidence follow common-law approach to hearsay and hearsay exceptions); FED. R. EVID., Introductory Note: The Hearsay Problem (same); *Former Testimony Exception, supra* note 1, at 550 (Federal Rules of Evidence retain common-law tradition of excluding hearsay evidence unless evidence falls within exception to hearsay rule). The Federal Rules of Evidence define hearsay as a "statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c). Professor McCormick observed that the value of hearsay rests upon the credibility of the out-of-court declarant. C. MCCORMICK, *supra* note 1, § 246, at 584.

Absent the qualifications of oath, physical presence of the witness, and opportunity to cross-examine, statements of a witness are hearsay and are inadmissible unless the evidence is either necessary or has other circumstantial guarantees of trustworthiness that establish the reliability of the evidence. *See* C. MCCORMICK, *supra* note 1, § 253; 5 J. WIGMORE, *supra* note 1, §§ 1420-23; *Former Testimony Exception, supra* note 1, at 550. Using the requirements of necessity and trustworthiness, common law developed several exceptions to the hearsay rule to allow the admission of reliable evidence. *See* C. MCCORMICK, *supra* note 1, § 253. The hearsay exceptions that developed at common law generally require the "unavailability" of the declarant before evidence otherwise qualifying under one of the hearsay exceptions is admissible. *See* Comment, *Hearsay Under the Proposed Federal Rules: A Discretionary Approach*, 15 WAYNE L. REV. 1079, 1201 (1969) (unavailability of declarant creates necessity for hearsay exception for former testimony); *see also infra* notes 20-29, & 36-40 and accompanying text (unavailability requirements under modern practice). Historically, the unavailability requirements developed in connection with each of the specific exceptions to the hearsay rule. *See* FED. R. EVID. 804 advisory committee note; C. MCCORMICK, *supra*, § 253, at 608. The common law recognized death, absence, physical or mental disability, failure of memory, exercise of privilege, refusal to testify, and supervening disqualification of the declarant as forms of unavailability. *See* C. MCCORMICK, *supra* note 1, § 253, at 609-12.

The exceptions to the hearsay rule at common law included declarations against interest, dying declarations, statements of pedigree and family history, and former testimony. C. MCCORMICK, *supra* note 1, § 253, at 608 n.20. These hearsay exceptions satisfy the evidentiary requirement of reliability since such evidence either is necessary, in the sense that a failure of justice may result from loss of the testimony, or is trustworthy. *See* 5 J. WIGMORE, *supra* note 1, §§ 1421-22. Thus, when a declarant was "unavailable" and the testimony qualified under one of the exceptions to the hearsay rule, the declarant's hearsay statement was admissible into evidence. *See* C. MCCORMICK, *supra* note 1, § 253, at 608-13.

3. *See* FED. R. EVID, 804(b)(1) (hearsay exception for former testimony); C. MCCORMICK, *supra* note 1, § 255 (conditions for admission of former testimony into evidence); Note, *Former Testimony: A Comparison of the California and Federal Rules of Evidence*, 9 U.C.D. L. REV. 167, 167-69 (1976) (same); *supra* note 2 (common-law hearsay exceptions).

4. FED. R. EVID. 804(b)(1); *see infra* notes 47-74 and accompanying test (discussing provisions of FED. R. EVID. 804).

5. FED. R. CIV. P. 32(a)(4); *see infra* notes 7-35 and accompanying text (discussing provisions of FED. R. CIV. P. 32(a)). The Supreme Court amended rule 32 of the Federal Rules of

the admission of prior action depositions[6] into evidence in a subsequent action under certain circumstances.

Rule 32(a)(4) provides for the use of depositions from a prior action when the subsequent action involves the "same subject matter"[7] and the "same parties or their representatives or successors in interest."[8] If a subsequent action

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Civil Procedure in 1970 when the Court reorganized the discovery rules. *See* 4A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 32.01[3], at 32-5 (2d ed. 1981). The reorganization of the discovery rules shifted subdivisions (d), (e), and (f) of rule 26 of the Federal Rules of Civil Procedure to rule 32. *Id.* The text of rule 32(a)(4), previously rule 26(d)(4), remains substantially the same as rule 26(d)(4) prior to the reorganization of the Federal Rules of Civil Procedure. *Id.* at 32-36.

6. *See* FED. R. CIV. P. 32. Rule 32 provides only for the use of depositions in court proceedings but the courts have treated the term "deposition" as including both deposition testimony and testimony from a former hearing since, in principle, no distinction between the two forms of testimony exists. *See* 5 J. WIGMORE, *supra* note 1, § 1401, at 201-202; 552 F.2d 711, 713 (6th Cir. 1977) (trial transcript admissible as deposition under rule 32); Castilleja v. Southern Pac. Co., 445 F.2d 183, 186 (5th Cir. 1971) (trial transcript admitted under rule 26(d) [now rule 32(a)] since trial transcript is equivalent to deposition for purposes of Federal Rules of Civil Procedure).

7. FED. R. CIV. P. 32(a)(4); *see infra* notes 75-89 and accompanying text (analysis of what constitutes "same subject matter" under rule 32). Although rule 32(a)(4) of the Federal Rules of Civil Procedure limits the use of prior action depositions to situations in which an earlier action involved the "same subject matter" as a later action, courts will look to the issues in each case rather than strictly to the subject matter to determine whether a prior action deposition is admissible in a subsequent action. *See* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2150, at 468 (1970). Most courts require only a substantial identity of issues to satisfy rule 32(a)(4). *See, e.g.*, Rule v. International Ass'n of Bridge, Structural and Ornamental Ironworkers, Local Union No. 396, 568 F.2d 558, 568 (8th Cir. 1977) (substantial identity of parties and issues is required for use of deposition from prior action); Batelli v. Kagan & Gaines Co., 236 F.2d 167, 169 (9th Cir. 1956) (same); Fullerform Continuous Pipe Corp. v. American Pipe & Constr. Co., 44 F.R.D. 453, 455 (D. Ariz. 1968) (same); Hertz v. Graham, 23 F.R.D. 17, 22 (S.D.N.Y. 1958) (same), *aff'd* 292 F.2d 443, 447 (2d Cir.), *cert. denied*, 368 U.S. 929 (1961); *cf.* Baldwin-Montrose Chem. Co. v. Rothberg, 37 F.R.D. 354, 356 (S.D.N.Y. 1964) (prior action depositions are admissible when both prior and subsequent actions contain common questions of law or fact and substantial identity of issues). Generally, courts have not provided a fixed standard for determining whether an action satisfies the substantial identity of issue(s) requirement under rule 32(a)(4). *See infra* notes 75-76 & 88-108 and accompanying text.

8. FED. R. CIV. P. 32(a)(4); *see infra* notes 75-108 and accompanying text. The "parties" requirement for the admission of prior action depositions under rule 32(a)(4) has received broad interpretation from most courts. *See* Rule v. International Ass'n of Bridge, Structural and Ornamental Ironworkers, Local Union No. 396, 568 F.2d 558, 568-69 (8th Cir. 1977) (prior opponents with interest to cross-examine as thoroughly as present opponent satisfies "same parties" requirement of rule 32(a)(4)); Ikerd v. Lapworth, 435 F.2d 192, 205 (7th Cir. 1970) (presence of adversary in prior action with same motive to cross-examine required to admit prior action deposition in subsequent action); Hertz v. Graham, 23 F.R.D. 17, 22 (S.D.N.Y. 1958) (identity of interest rather than identity of parties necessary to admit prior action deposition under rule 32(a)(4)), *aff'd*, 292 F.2d 443, 447 (2d Cir. 1961). *But see* Alamo v. Pueblo Int'l. Inc., 58 F.R.D. 193, 195 (D.P.R. 1972) (court interpreted rule 32(a)(4) strictly to require complete identity of issues and parties).

At common law, the parties who offered a prior action deposition into evidence must have been the same as the parties in the litigation in which the declarant gave the testimony or a party in the subsequent action must have been in narrowly construed privity with an earlier party. *See* 5 J. WIGMORE, *supra* note 1, § 1388, at 111. "Privity" at common law concerns "mutual or successive relationships" to the same property rights. Metropolitan St. Ry. v. Gumby, 99 F. 192, 198 (2d Cir. 1900); *see* National Lead Co. v. Nulsen, 131 F.2d 51, 56 (3d Cir. 1942) (privity

meets the requirements of rule 32(a)(4), a party may use depositions from the former action as provided under rule 32(a)(1)-(3) or as permitted by the Federal Rules of Evidence.[9]

As a threshold requirement, the introductory paragraph of rule 32(a) of the Federal Rules of Civil Procedure states that a party may use a deposition only against a party who was present or represented at the taking of the testimony or who had reasonable notice thereof.[10] Rule 32(a) further provides that the rules of evidence apply to statements in depositions that a party uses pursuant to rule 32(a) as though the witness were present and testifying at the subsequent proceeding.[11]

The provisions of rule 32(a)(1)[12] authorize the use of a witness' deposition by any party for the limited purpose of contradicting or impeaching the subsequent testimony of that witness[13] or for any other purpose that the Federal Rules of Evidence permit.[14] In contrast, under rule 32(a)(2),[15] a party may

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means mutual or successive relationship to same rights of property as "testator and executor, ancestor and heir, assignor and assignee, grantor and grantee, lessor and lessee"). When a party was not present in a prior suit or was not in privity with a party in the prior suit, the former testimony of a witness, in a deposition or otherwise, was inadmissible at common law in the subsequent action. *See* Metropolitan St. Ry. v. Gumby, 99 F. 192, 198 (2d Cir. 1900) (prior action depositions inadmissible unless all parties same in both actions); *see also* Rumford Chem. Works v. Hygienic Chem. Co., 215 U.S. 156, 159-60 (1909) (prior action deposition is inadmissible in subsequent action unless parties or privies are present in previous proceeding); Tappan v. Beardsley, 77 U.S. (10 Wall.) 427, 435 (1870) (depositions from previous suit inadmissible against one who was neither party nor in privity with party in former action); Rutherford v. Geddes, 71 U.S. (4 Wall.) 220, 224 (1866) (depositions party took in another suit involving same subject matter inadmissible if parties were not present or in privity with party to previous suit).

9. FED. R. CIV. P. 32(a)(4); *see* FED. R. EVID. 802; *id.* advisory committee note (advisory committee cites rule 32 as example of hearsay exception under rule 802 of the Federal Rules of Evidence).

10. FED. R. CIV. P. 32(a); *see* Klein v. Tabatchnick, 459 F. Supp. 707, 712 (S.D.N.Y. 1978) (waiver of opportunity to cross-examine does not affect admissibility of deposition under rule 32(a)); Hewitt v. Hutter, 432 F. Supp. 795, 799 (W.D. Va. 1977) (depositions inadmissible when party-opponent received no notice nor any opportunity to cross-examine), *aff'd*, 568 F.2d 773 (4th Cir. 1978).

The Supreme Court substituted the phrase "reasonable notice" for "due notice" when the Court amended rule 32 in 1970. *See* FED. R. CIV. P. 32; *see also* 8 C. WRIGHT & A. MILLER, *supra* note 7, § 211, at 400-01 nn. 60-62; *id.* § 2142, at 450 & n.14 (discussing what constitutes "reasonable notice").

11. FED. R. CIV. P. 32(a); *see* SEC v. American Realty Trust, 429 F. Supp. 1148, 1178 (E.D. Va. 1977) (even if depositions are admissible under rule 32, statement contained therein must be admissible under Federal Rules of Evidence); *see also* S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 659 (1982 ed.) (sound logic dictates that testimony admitted pursuant to rule 32 also satisfy evidentiary rules as to statements contained therein).

12. FED. R. CIV. P. 32(a)(1).

13. *See* FED. R. EVID. 801(d) (permitting use of prior inconsistent statement of witness as substantive evidence); 4A J. MOORE, *supra* note 5, ¶ 32.03, at 32-16 ("contradicting" in rule 32(a)(1) is synonymous with "impeaching" in rule 32(a)(1)).

14. *See* FED. R. EVID. 801 advisory committee note (1980 amendments) (adding phrase "or for any other purpose permitted by the Federal Rules of Evidence" intended to reflect broader use of former testimony permitted by evidence rules).

15. FED. R. CIV. P. 32(a)(2).

use the deposition of an adverse party for any purpose, even though that adverse party is present at a subsequent trial.[16] Thus, depositions are admissible under the provisions of rule 32(a)(1) or rule 32(a)(2) irrespective of whether a court finds that the declarant is available.[17]

While rule 32(a)(2) allows a party to use substantively an adverse party's deposition,[18] rule 32(a)(3)[19] permits any party to use the deposition of a witness, whether or not that witness is a party, for any purpose if the party asserting use of the deposition demonstrates to the court the witness' unavailability within the meaning of rule 32(a)(3).[20] Unavailability under rule 32(a)(3) includes death of a witness,[21] absence of more than 100 miles from the trial or hearing[22] age, illness, infirmity or imprisonment,[23] inability to procure attendance of a witness by subpoena,[24] and other "exceptional circumstances."[25] By requiring the satisfaction of one of the conditions in rule 32(a)(3) to admit the deposi-

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16. *Id.*; *See* Coughlin v. Capitol Cement Co., 571 F.2d 290, 308 (5th Cir. 1978) (refusal to allow introduction of corporate officers deposition as substantive evidence under rule 32(a)(2) error but harmless when jury received substance of testimony from another source); Zimmerman v. Safeway Stores, Inc., 410 F.2d 1041, 1044-45 n.5 (D.C. Cir. 1969) (party may introduce deposition of opposing party as substantive evidence under rule 32(a)(2) subject to exclusion of irrelevant or repetitious parts); Community Counseling Serv., Inc. v. Reilly, 317 F.2d 239, 243 (4th Cir. 1963) (deposition of adversary admissible as substantive proof under rule 26(d) [now rule 32(a)] regardless of availability of adversary). Rule 32(a)(2) also permits the use of a deposition of an officer, director, or managing agent of a public or private corporation for any purpose by an adverse party. *See* FED. R. CIV. P. 32(a)(2).

17. *See* 4A J. MOORE, *supra* note 5, ¶ 32.05; at 32-25 (declarant need not be available for court to allow use of deposition under rule 32(a)(1) or rule 32(a)(2)).

18. *See supra* notes 16-17 and accompanying text (court allowed substantive use of adverse party's deposition under rule 32(a)(2)).

19. FED. R. CIV. P. 32(a)(3).

20. *Id.* A party may use former testimony in a subsequent action for any purpose, as a matter of right, if the court finds the existence of any one of the five unavailability criteria in rule 32(a)(3) of the Federal Rules of Civil Procedure. *See* Wright Root Beer Co. of New Orleans v. Dr. Pepper Co., 414 F.2d 887, 889 (5th Cir. 1969). The court in *Wright Root Beer Co. of New Orleans v. Dr. Pepper Co.* indicated that a trail court has no discretion to admit depositions conditionally once a party makes a showing of unavailability under rule 32(a)(3)(A). *Id.* The *Wright Root Beer* court's rationale admitting depositions as a matter of right once a party demonstrates a witness' unavailability presumably would apply to the other provisions under rule 32(a)(3). *See* Derewecki v. Pennsylvania R.R., 353 F.2d 436, 441 n.7 (3d Cir. 1965) (deposition freely admissible when party satisfies any unavailability provision of rule 26(d) [now rule 32(a)]).

21. FED. R. CIV. P. 32(a)(3)(A).

22. *Id.* 32(a)(3)(B).

23. *Id.* 32(a)(3)(C).

24. *Id.* 32(a)(3)(D).

25. *Id.* 32(a)(3)(E). Rule 32(a)(3)(E) of the Federal Rules of Civil Procedure requires a party to apply to the court and give notice to other parties to use a deposition when "exceptional circumstances" exist. *Id.* The phrase "with due regard to the importance of presenting the testimony of witnesses orally in open court" in rule 32(a)(3)(E) serves as a warning that rule 32 does not condone the practice of trying cases on depositions, such as under the former equity practice. *Id.* advisory committee note; *see* 4A J. MOORE, *supra* note 5, ¶ 32.05, at 32-30. Courts of law and of equity merged when the Supreme Court adopted the Federal Rules of Civil Procedure in 1938. *See* FED. R. CIV. P. 1.

tion of a witness in a subsequent action,[26] rule 32(a)(3) retains the common-law requirement of unavailability of a witness as a prerequisite for the substantive use of hearsay testimony.[27] Furthermore, courts consistently have held that a party may not use a declarant's deposition as substantive evidence under rule 32(a)(3) if the witness is available to testify in person.[28] Accordingly, the unavailability requirement of rule 32(a)(3) is merely a means of implementing the court's preference for live testimony.[29]

The Supreme Court amended rule 32 in 1980 to clarify that depositions also are admissible under any provision of the Federal Rules of Evidence.[30] The Advisory Committee Notes to the 1980 amendments of rule 32 indicate that the Committee found that rule 32 needed additional language clarifying the relationship between rule 32 and the Federal Rules of Evidence.[31] The Advisory Committee stated that the Court amended rule 32 to reflect the broader use of depositions that the Federal Rules of Evidence permit under certain circumstances and to indicate that the Federal Rules of Evidence are not limitations on the admissibility of depositions under rule 32 of the Federal Rules of Civil Procedure.[32] Since rule 804 of the Federal Rules of Evidence also creates a hearsay exception for former testimony, the provisions of rule 32 and rule 804 are therefore cumulative.[33] Thus, former testimony, including depositions, is admissible as an exception to the hearsay rule if the testimony satisfies rule 804, even though such testimony falls outside the ambit of rule 32.[34] Concomitantly, deposition testimony also is admissible if that testimony meets the provisions of rule 32 but not the provisions of rule 804.[35]

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26. *See supra* note 20 and accompanying text (former testimony admissible for any purpose when party satisfies rule 32(a)(3)).

27. *See* C. MCCORMICK, *supra* note 1, § 253, at 608 n.20.

28. *See, e.g.*, G.E.J. Corp. v. Uranium Aire, Inc., 311 F.2d 749, 755 (9th Cir. 1962) (depositions only admissible under rule 26(d) [currently rule 32(a)] when witness is unavailable or under "exceptional circumstances"); Hertz v. Graham, 292 F.2d 443, 447-48 (2d Cir.) (prior action depositions admissible upon showing of unavailability), *cert. denied*, 368 U.S. 929 (1961); In re Gilchrist Co., 410 F. Supp. 1070, 1073 (E.D. Pa. 1976) (court properly excluded deposition absent showing of unavailability); United States v. Empire Gas Corp., 393 F. Supp. 902, 912 (W.D. Md. 1975) (no attempt to make appropriate showing concerning lack of availability); *see also* United States v. International Business Mach. Corp., 90 F.R.D. 377, 383 (S.D.N.Y. 1981) (court determines availability at time of trial rather than at time declarant gave testimony) 8 C. WRIGHT & A. MILLER, *supra* note 10, § 2146, at 458 n.50 (court decides unavailability at time party offers testimony into evidence).

29. *See* FED. R. EVID. 804(b) advisory committee note; *see also* Salsman v. Witt, 466 F.2d 76, 79 (10th Cir. 1972) (deposition testimony less desirable than oral testimony); Arnstein v. Porter, 154 F.2d 464, 470 (2d Cir. 1946) (courts favor presence of witness if available rather than use of depositions); Napier v. Bossard, 102 F.2d 467, 469 (2d Cir. 1939) (deposition is second-best when live testimony is available).

30. *See* FED. R. CIV. P. 32(a)(1), (4); *id.* advisory committee note.

31. FED. R. CIV. P. 32 advisory committee note.

32. *Id.*

33. *See* 4A J. MOORE, *supra* note 5, ¶ 32.02[1], at 32-11 (provisions of rule 32 and rule 804 are independent bases for admission of depositions or former testimony).

34. *Id.*

35. *Id.*

Rule 804 of the Federal Rules of Evidence applies only when the witness is "unavailable" within the meaning of rule 804(a).[36] Rule 804(a) defines unavailability as, in addition to death and absence in rule 32(a)(3), claim of privilege,[37] refusal to testify,[38] and lack of memory,[39] although rule 804(a) contains no "exceptional circumstances" provision such as that of rule 32(a)(3).[40] Rule 803 of the Federal Rules of Evidence, however, provides for the admissibility of hearsay statements, irrespective of the availability of the witness, on the basis of the statements' circumstantial guarantees of trustworthiness.[41] On the other hand, rule 804 allows admission of certain hearsay statements that are not of equal quality as the live testimony of a declarant when the witness is unavailable and his statement satisfies one of the provisions of rule 804(b).[42]

Since former testimony fulfills both the oath and opportunity for cross-examination criteria of the three ideal testimonial conditions,[43] the reliability

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

37. *Id.* 804(a)(1).

38. *Id.* 804(a)(2).

39. *Id.* 804(a)(3). The House Judiciary Committee Report on the Federal Rules of Evidence stated that the Committee intended no change in existing federal law under rule 804(a)(3), but instead, intended to continue the practice of allowing a court to believe or disbelieve a declarant's testimony regarding his lack of memory. *See* United States v. Insana, 423 F.2d 1165, 1169-70 (2d Cir.), *cert. denied*, 400 U.S. 841 (1970) (court has "discretionary latitude" to admit or deny prior statements when witness claims lack of memory); H.R. REP. No. 650, 93d Cong., 1st Sess. 13, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7075, 7089 [hereinafter cited as H.R. REP. No. 650].

40. FED. R. EVID. 804(a); *see* FED. R. CIV. P. 32(a)(3)(E) ("exceptional circumstances" provision). *But see* FED. R. EVID. 804(b)(5). Rule 804(b)(5) of the Federal Rules of Evidence allows admission of a hearsay statement into evidence that the specific exceptions to the hearsay rule under rule 804(b) do not cover when a statement has "equivalent circumstantial guarantees of trustworthiness." *Id.* Congress amended the Supreme Court's proposed version of rule 804(b)(5) by adding a notice requirement to allow a party adequate time before trial to prepare objections to the use of hearsay statements that a party offers under the residual exception in rule 804(b)(5). *See* ABA Section of Litigation,*Emerging Problems Under the Federal Rules of Evidence* 291 & n.226 (1983); *see also* H.R. REP. No. 1597, 93d Cong., 2d Sess. 11-12, 13 (1974). Congress also was concerned that some courts might use the residual exception under rule 804(b)(5) to admit hearsay that falls under one of the specific hearsay exceptions but that does not meet the requirements for admission under rule 804(b). *See* 120 Cong. Rec. H12255-57 (Dec. 18, 1974); *see also* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190, 1262-63 (E.D. Pa. 1980). In *Zenith*, the United States District Court for the Eastern District of Pennsylvania determined that Congress intended the residual exception in rule 804(b)(5) to apply only to hearsay that did not fall within a type of hearsay for which the Federal Rules of Evidence provided a specific exception under rule 804(b). 505 F. Supp. at 1262-63. The court in *Zenith* found that a court should not admit evidence that falls within one of the specific rule 804(b) exceptions but fails to satisfy the requirements of a specific exception. *Id.* at 1263. *But see* In re Screws Antitrust Litig., 526 F. Supp. 1316, 1319 (D. Mass. 1981) (court admitted former testimony under rule 804(b)(5) because testimony inadmissible under rule 804(b)(1)); *see also* Rossi, *The Silent Revolution*, 9 LITIGATION 13, 17 (Winter 1983) (courts routinely admit hearsay under rule 804(b)(5) when not within other rule 804(b) exceptions).

41. FED. R. EVID. 803.

42. *See id.* 804 advisory committee note.

43. *See supra* note 1 (ideal testimonial conditions of oath, opportunity to cross-examine, and presence of witness).

of former testimony would suggest inclusion of a hearsay exception for former testimony under rule 803 rather than under rule 804.[44] The Advisory Committee Note to rule 804, however, stated that because the opportunity to observe the demeanor of the witness is a significant aspect of assessing the reliability of testimony and because demeanor evidence is less important under the hearsay exceptions in rule 803 than under the hearsay exceptions in rule 804, rule 804 should include any exception to the hearsay rule for former testimony.[45] The inclusion of former testimony under rule 804 serves to perpetuate the common-law requirement of unavailability of a witness as a prerequisite for the admission into evidence of such testimony under the Federal Rules of Evidence.[46]

Unlike rule 32, rule 804(b)((1) requires that the party against whom the former testimony now is offered, or a "predecessor in interest"[47] to that party, had an "opportunity and similar motive"[48] to develop the previous testimony by examination of the witness.[49] Direct, cross, or redirect examination satisfies rule 804(b)(1).[50] The Advisory Committee Note to rule 804(b)(1) adopted the view that direct or redirect examination of a witness is the equivalent of cross-examination.[51] The Committee justified this view on the ground that the Federal Rules of Evidence allow a party to develop adequately the prior testimony of a witness on direct or redirect examination, even if the witness is "hostile, double-crossing, forgetful, [or] mentally deficient."[52] Therefore, according to rule 804(b)(1), if a party or a predecessor in interest fails to develop a witness' testimony by deliberate choice that party's interests will have been protected.[53]

The version of rule 804(b)(1) that Congress passed differs from the ver-

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44. *See* FED. R. EVID. 804 advisory committee note.

45. *Id.*

46. *Id.*

47. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190, 1253 n.79 (E.D.Pa. 1980) (courts traditionally define "predecessor," as correlative of "successor," in terms of privity); *see also infra* notes 110-137 and accompanying text (discussing meaning of term "predecessor in interest" in rule 804(b)(1)).

48. *See infra* notes 138-195 and accompanying text (discussing what constitutes "opportunity and similar motive" to develop previous testimony under rule 804(b)(1)).

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

50. *See id.* C. MCCORMICK, *supra* note 1, § 255, at 617 (sensible to include direct examination as equivalent of cross-examination); Falknor, *Former Testimony and the Uniform Rules: A Comment*, 38 N.Y.U. L. REV. 651 & n.1 (1963) (direct examination equivalent of cross-examination as adequate satisfication of hearsay rule).

51. *See* FED. R. EVID. 804(b)(1) advisory committee note; *see also supra* note 50. The Advisory Committee to the Federal Rules of Evidence considered the treatment of direct or redirect examination as the equivalent of cross-examination by reasoning that the primary purpose of cross-examination is to allow a party to question the statements of an opponent's witness. FED. R. EVID. 804(b)(1) advisory committee note; *see* 5 J. WIGMORE, *supra* note 1, § 1389, at 121. If a party calls and examines a witness, that party's interest already has received adequate protection for the purposes of the hearsay rule and therefore the witness' deposition is admissible against that party. 5 J. WIGMORE, *supra* note 1, at 121; *see* FED. R. EVID. 804 advisory committee note.

52. FED. R. EVID. 804(b)(1) advisory committee note.

53. *Id.*

sion of the rule that the Supreme Court originally submitted to Congress.[54] The Court's version of rule 804(b)(1) relaxed the common-law requirement of complete identity of issues and parties,[55] and required that the witness have given the testimony under oath and subject to cross-examination.[56] The Court's version of rule 804(b)(1) expanded the common-law definition of an opportunity for cross-examination to include the direct or redirect examination of a witness by a party against whom that witness' testimony now is offered.[57] The Court's proposed version of rule 804(b)(1) also rejected strict identity, or privity,[58] as a prerequisite to the use of prior action testimony against that party,[59] and allowed instead the use of former testimony against a party when another party in the previous action had a "similar motive and interest" to develop the testimony of the declarant.[60] The "similar motive and interest" language in the Court's proposed version of rule 804(b)(1) comports with the modern interpretation many courts have given to rule 32(a)(4), which allows the use of prior-action depositions against a party who was neither present in the previous action nor a "successor in interest" in the strict meaning of the term.[61]

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54. *See* 11 J. MOORE, *supra* note 5, § 804.01[7]-[9], at VIII-223-27. The Supreme Court's proposed version of rule 804(b)(1) of the Federal Rules of Evidence allowed the use of former testimony against a party if a previous party had an opportunity to develop the testimony with motive and interest similar to those of the present party. *See id.* § 804.01[1.—1], at VIII-216.

Under the Rules Enabling Act, the Supreme Court has the power to "prescribe by general rules . . . the practice and procedure of the district courts and courts of appeals of the Untied States in civil actions. . ." subject to congressional approval within 90 days. 28 U.S.C. § 2072 (1976). Pursuant to the Rules Enabling Act, the Supreme Court in 1973 submitted a proposed version of the Federal Rules of Evidence to Congress over the dissent of Justice Douglas. *See* 10 J. MOORE, *supra* note 5, Introduction § 40[1], at 63-6. Congress, however, opposed the proposed Federal Rules of Evidence on the ground that the Court did not have the power to prescribe such rules under the terms of the Act. *Id.* § 46, at 77. Consequently, Congress passed and the President signed an act requiring affirmative congressional approval of the Federal Rules of Evidence. Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9 (1973). After significant debate and revision of the Supreme Court's proposed version of the Federal Rules of Evidence, Congress enacted the Federal Rules of Evidence and the President signed the Act into law on January 2, 1975. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (1975); *see* 10 J. MOORE, *supra* note 5, Introduction § 45, at 74-5.

55. *See* Rumford Chem. Works v. Hygienic Chem. Co., 215 U.S. 156, 159 (1909) (privity is required for parties or predecessor in interest); C. MCCORMICK, *supra* note 1, §§ 256, 257 (identity of parties and issues requirement); 11 J. MOORE, *supra* note 5, § 804.04[2], at VIII-264.65 (Court relaxed common-law identity of parties requirement under proposed version of rule 804(b)(1)).

56. *See* Tappan v. Beardsley, 77 U.S. (10 Wall.) 427, 435 (1870) (use of former testimony requires that testimony was under oath and subject to cross-examination in addition to privity of parties).

57. *See* FED. R. EVID. 804(b)(1); *supra* notes 50-51 and accompanying text (direct and cross-examination are equivalent under rule 804(b)(1)).

58. *See supra* note 8 (discussion of privity).

59. *See* FED. R. EVID. 804(b)(1) advisory committee note.

60. *Id.* 804(b)(1); *see id.* advisory committee note; *infra* notes 228-232 and accompanying text (commentary on "similar motive and interest" language in rule 804(b)(1)). The satisfaction of "similar motive and interest" under rule 804(b)(1) of the Federal Rules of Evidence is dependent upon whether fairness allows imposing the earlier handling of the witness upon the party against whom that testimony now is offered. *See* FED. R. EVID. 804 advisory committee note.

Although Congress adopted the Supreme Court's broader definition of cross-examination to include the direct or redirect examination of a witness by a party,[62] Congress rejected the Court's expansion of the identity of parties requirement.[63] In addressing the identity of parties issue, the House Judiciary Committee determined that it would be unfair to impose responsibility for the manner in which another party handled a witness in a previous setting upon the party against whom the hearsay evidence now is being offered.[64]

Although the House Judiciary Committee determined that allowing the admission of prior testimony in a subsequent action when another party with a similar motive and interest was present in the earlier action was too broad in scope,[65] the Committee relaxed the common-law requirement of complete identity between parties to allow introduction of deposition testimony provided that the party against whom the testimony is being offered had a predecessor in interest who had an opportunity and similar motive to examine the witness in the earlier proceeding.[66] Accordingly, the version of rule 804(b)(1) that Congress adopted includes an identity of parties requirement under which a party may assert the use of former testimony only against a party, or a successor in interest to a party, in the proceeding in which the declarant gave the testimony.[67] Rule 804(b)(1),however, imposes no limitation on who may offer the previous testimony.[68] In this respect, rule 804(b)(1) is substantially more liberal than rule 32(a)(4), which purports to require the "same parties" or their representatives or successors in interest in the second action as were in the previous action.[69] The "same parties" language of rule 32(a)(4) thus apparently should prohibit the use of a deposition from an earlier action by one who was not a party to the earlier action,[70] whereas rule 804(b)(1) permits

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61. *See* Rule v. International Ass'n of Bridge, Structural and Ornamental Ironworkers, Local Union No. 396, 568 F.2d 558, 569 (8th Cir. 1977) (prior opponent with interest to cross-examine as thoroughly as present opponent satisfies rule 32(a)(4)); Fullerform Continuous Pipe Corp. v. American Pipe & Constr. Co., 44 F.R.D. 453, 455-56 (D. Ariz. 1968) (substantial identity of issues and common questions of law or fact allow use of prior action depositions in subsequent action under rule 32(a)(4) when defendants, common to both actions, adequately represented interests of defendant not a party to first action).

62. *See supra* note 51 (equivalence of direct and cross-examination).

63. *See* H.R. REP. No. 650, *supra* note 39, at 7088 (congressional rejection of Supreme Court's proposed version of rule 804(b)(1) "similar interest and motive" language).

64. *Id.*

65. *Id.*

66. *Id.* In addressing the "similar interest and motive" language in rule 804(b)(1) of the Federal Rules of Evidence, the Senate concurred in the change the House made to the identity of parties requirement in rule 804(b)(1). *See* S. REP. No. 1277, 93d Cong., 2d Sess. 28, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051, 7074 [hereinafter cited as S. REP. No. 1277]. The Senate Judiciary Committee determined that the difference between the House and Supreme Court versions of rule 804(b)(1) "was not great." *Id.*

67. *See* 11 J. MOORE, *supra* note 5, § 804.4[2], at VIII-265.

68. *Id.*

69. *Compare* FED. R. CIV. P. 32(a)(4) *with* FED. R. EVID. 804(b)(1) ("same parties" standard of rule 32 is stricter than rule 804(b)(1) with respect to who may offer previous testimony).

70. FED. R. CIV. P. 32(a)(4).

a party not present in the prior action to assert the use of testimony from the prior action against a party who was present or who had a predecessor in interest that was present at the earlier action.[71] Nevertheless, several courts have permitted parties not present in the earlier action to use prior action depositions in the subsequent action under a liberal interpretation of rule 32(a)(4).[72]

Rule 804(b)(1) also differs from rule 32(a)(4) to the extent that rule 804(b)(1) does not include specifically a substantial identity of issues or subject matter requirement for the admissibility of former testimony.[73] Courts interpreting rule 804(b)(1), however, have indicated that the appropriate inquiry concerning whether a party or his predecessor in interest had an "opportunity and similar motive" to develop the testimony of the witness depends upon whether the issues in the prior action, from which the testimony derives, are sufficiently similar to the issues in the subsequent action to protect the interest of the later party.[74]

Although rule 32(a)(4) requires that the previous and subsequent actions involve "the same subject matter" and the "same parties or their representatives or successors in interest" for a party to use prior action depositions, the courts have interpreted this language in different ways.[75] Several courts

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

72. *See* Rule v. International Ass'n of Bridge, Structural and Ornamental Ironworkers, Local Union No. 396, 568 F.2d 558, 569 (8th Cir. 1977) (class action plaintiffs not parties to prior government action); Hertz v. Graham, 292 F.2d 443, 447 (2d Cir.) (new plaintiff in subsequent action arising out of same accident), *cert. denied*, 368 U.S. 929 (1961); Fullerform Continuous Pipe Corp. v. American Pipe & Constr. Co., 44 F.R.D. 453, 455 (D. Ariz. 1968) (new plaintiffs in second antitrust suit arising out of same conspiracy).

73. *See* FED. R. EVID. 804(b)(1).

74. *See* Oberlin v. Marlin Am. Corp., 596 F.2d 1322, 1329 (7th Cir. 1979) (court held prior action deposition inadmissible under rule 804(b)(1) since main issues in two actions were different in nature and thus prior party did not have similar motive to cross-examine); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190, 1252 (E.D.Pa. 1980) (court noted that similar motive requirement under rule 804(b)(1) is predicated at least in part upon substantial similarity of issues between prior and subsequent actions); 11 J. MOORE, *supra* note 5, § 804.04[3], at VIII-266-67 (court should focus on issues in two proceedings to determine if party had similar motive to cross-examine in prior action); *see also* C. MCCORMICK, *supra* note 1, § 257, at 622 (issues in prior action must have been sufficiently similar to issues in subsequent proceeding to insure adequate motive for cross-examination).

75. *See* Rule v. International Ass'n of Bridge, Structural and Ornamental Ironworkers, Local Union No. 396, 568 F.2d 558, 568-69 (8th Cir. 1977) (substantial identity of issues and prior opponent with interest to cross-examine as thoroughly as present opponent required to admit prior action deposition); Ikerd v. Lapworth, 435 F.2d 197, 205 (7th Cir. 1970) (presence of adversary with same motive to cross-examine and substantial identity of issues in previous case required to admit deposition in subsequent action); Insul-Wool Insulation Corp. v. Home Insulation, Inc., 176 F.2d 502, 504 (10th Cir. 1949) (party asserting use of former testimony not required as party to previous suit when issues identical); George R. Whitten, Jr., Inc. v. State Univ. Constr. Fund, 359 F. Supp. 1037, 1039 (D. Mass. 1973) (only substantial identity of issues and same motive to cross-examine necessary to use prior-action testimony), *aff'd*, 493 F.2d 177 (1st Cir. 1974); Fullerform Continuous Pipe Corp. v. American Pipe & Constr. Co., 44 F.R.D. 453, 455-56 (D. Ariz. 1968) (same); Baldwin-Montrose Chem. Co. v. Rothberg, 37 F.R.D. 354, 356 (S.D.N.Y. 1964) (common question of law or fact and substantial identity of issues); Copeland

have interpreted the language in rule 32(a)(4) requiring identity of issues and parties strictly and have denied the admissibility of earlier depositions in a subsequent action if the issues were neither identical nor substantially identical and if the parties were not the same in both actions.[76] For example, in *Fouke Fur Co. v. Bookwalter*,[77] the plaintiff company instituted a suit for a refund of income taxes that the plaintiff paid as a result of a deficiency assessment after the Internal Revenue Service (IRS) disallowed an amount the plaintiff previously had deducted as a business expense.[78] In 1956, the plaintiff paid $25,000 to the widow of a deceased president and director of the plaintiff company in consideration of her husband's service to the company.[79] The IRS made an additional income tax assessment in 1961 against the widow for a part of the $25,000 payment and after disallowance of the widow's refund claim, the widow filed suit against the IRS.[80] The widow contended that the $25,000 payment was a gift from the company and that therefore the payment was not taxable income.[81]

The IRS did not assess the plaintiff company in *Fouke Fur* for additional taxes until after the widow successfully had settled her refund suit against the Service.[82] During the course of the widow's suit contesting the validity of the disallowance, the Service deposed three directors of the plaintiff company and subsequently sought to admit these depositions into evidence in the action the plaintiff brought for an income tax refund.[83] The United States District Court for the Eastern District of Missouri noted several jurisdictions that would admit the depositions in the current case into evidence[84] but stated

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v. Petroleum Transit Co., 32 F.R.D. 445, 447 (E.D.S.C. 1963) (same); Hertz v. Graham, 23 F.R.D. 17, 22 (S.D.N.Y. 1958) (identity of interest rather than identity of parties), *aff'd*, 292 F.2d 443, 447 (2d Cir.), *cert. denied*, 368 U.S. 929 (1961); First Nat'l Bank in Greenwich v. National Airlines, 22 F.R.D. 46, 51 (S.D.N.Y. 1958) (same); Rivera v. American Export Lines, 13 F.R.D. 27, 28 (S.D.N.Y. 1952) (same); Mid-City Bank & Trust Co. v. Reading Co., 3 F.R.D. 320, 323 (D.N.J. 1944) (same). *But see* Alamo v. Pueblo Int'l, Inc., 58 F.R.D. 193, 194 (D.P.R. 1972) (use of former testimony requires same parties and substantially same issues); Fouke Fur Co. v. Bookwalter, 261 F. Supp. 367, 370 (E.D.Mo. 1966) (unless previous action involved same parties, lack of notice of deposition taking prevents use of deposition in subsequent action); Wolf v. United Air Lines, 12 F.R.D. 1, 4 (M.D. Pa. 1951) (issues and parties not identical to previous action and therefore depositions not admissible).

76. Alamo v. Pueblo Int'l. Inc., 58 F.R.D. 193, 194 (D.P.R. 1972) (use of former testimony requires same parties and substantially same issues); Fouke Fur Co. v. Bookwalter, 261 F. Supp. 367, 370 (E.D. Mo. 1966) (unless previous action involved same parties, lack of notice of deposition taking prevents use of deposition in subsequent action); Wolf v. United Air Lines, 12 F.R.D. 1, 4 (M.D.Pa. 1951) (issues and parties not identical to previous action and therefore depositions not admissible).

77. 261 F. Supp. 367 (E.D. Mo. 1966).

78. *Id.*

79. *Id.* at 368. The plaintiff company in *Fouke Fur Co. v. Bookwalter* listed its payment to the widow of a deceased president under "other expenses" rather than as a salary or pension payment. *Id.*

80. *Id.* at 369.

81. *Id.*

82. *Id.*

83. *Id.*

84. *See id.* at 369-70.

that it would not permit the introduction of the depositions unless the plaintiff met the requirements of rule 26(d), the predecessor to rule 32(a).[85] The court found that the depositions were not admissible because the plaintiff was not a party to the widow's suit, and neither received notice of, nor was present or represented at, the taking of the depositions in the earlier action.[86]

Although a strict interpretation of rule 32(a)(4) allowing the use of a prior action deposition only against a party who was present or represented in the previous action seems to comport with the language contained therein, the objectives of fairness and efficiency embodied in the Federal Rules of Civil Procedure raise questions regarding the desirability of such a strict approach.[87] The predominant view among federal courts requires only a substantial identity of issues and the presence of an adversary with the same or a similar motive to cross-examine the witness in order to admit prior action depositions in a subsequent action.[88] The identity of issues in the context of prior action depositions is important only to determine whether the party-opponent in the previous case had the same interest and motive to cross-examine the witness as the party-opponent in the subsequent case.[89]

In *Hertz v. Graham*,[90] the United States District Court for the Southern

85. *Id.* at 370.

86. *Id.; see* Alamo v. Pueblo Int'l, Inc., 58 F.R.D. 193, 194 (D.P.R. 1972) (use of depositions from former action requires same parties and substantially same issues in subsequent action); Wolf v. United Air Lines, 12 F.R.D. 1, 3-4 (M.D. Pa. 1951) (court found that issues arising from cross-claim in previous action "infected" atmosphere of depositions from that action to preclude admission in subsequent action).

87. *See* FED. R. CIV. P. 1; Rivera v. American Export Lines, 13 F.R.D. 27, 29 (S.D.N.Y. 1952) (many courts have held that courts must construe Federal Rules of Civil Procedure liberally).

88. *See* Rule v. International Ass'n of Bridge, Structural and Ornamental Ironworkers, Local Union No. 396, 568 F.2d 558, 568-69 (8th Cir. 1977) (court requires presence of adversary with same motive to cross-examine and substantial identity of issues in previous case to admit deposition in subsequent action); Ikerd v. Lapworth, 435 F.2d 197, 205 (7th Cir. 1970) (same); Insul-Wool Insulation Corp. v. Home Insulation, Inc., 176 F.2d 502, 504 (10th Cir. 1949) (party asserting use of former testimony is not required as party to previous suit when issues are identical); George R. Whitten, Jr., Inc. v. State Univ. Constr. Fund, 359 F. Supp. 1037, 1039 (D. Mass. 1973)(court requires only substantial identity of issues and same motive to cross-examine to use prior-action testimony), *aff'd*, 493 F.2d 177 (1st Cir. 1974); Fullerform Continuous Pipe Co. v. American Pipe & Constr. Co., 44 F.R.D. 453, 455-56 (D. Ariz. 1968) (same); Baldwin-Montrose Chem. Co. v. Rothberg, 37 F.R.D. 354, 356 (S.D.N.Y. 1964) (common question of law or fact and substantial identity of issue); Copeland v. Petroleum Transit Co., 32 F.R.D. 445, 447 (E.D.S.C. 1963) (same); Hertz v. Graham, 23 F.R.D. 17, 22 (S.D.N.Y. 1958) (identity of interest rather than identity of parties), *aff'd*, 292 F.2d 443, 447 (2d Cir.), *cert. denied*, 368 U.S. 929 (1961); First Nat'l Bank in Greenwich v. National Airlines, 22 F.R.D. 46, 51 (S.D.N.Y. 1958) (same); Rivera v. American Export Lines, 13 F.R.D. 27, 28 (S.D.N.Y. 1952) (same); Mid-City Bank & Trust Co. v. Reading Co., 3 F.R.D. 320, 323 (D.N.J. 1944) (same); *see also* 5 J. WIGMORE, *supra* note 1, §1388 (admission of former testimony requires prior party-opponent with same interest and motive to cross-examine).

89. *See* First Nat'l Bank in Greenwich v. National Airlines, 22 F.R.D. 46, 51 (S.D.N.Y. 1958) (identity of issues important only as it bears on identify of interest); *see also* 5 J. WIGMORE, *supra* note 1, § 1388, at 91 (substantial identity of issues requirement insures testing of statements on cross-examination). *But see* Hub v. Sun Valley Co., 682 F.2d 776, 778* (9th Cir. 1982) (questioning "same interest and motive" test).

90. 23 F.R.D. 17 (S.D.N.Y. 1958), *aff'd*, 292 F.2d 443 (2d Cir.), *cert. denied*, 368 U.S. 929 (1961).

District of New York held that depositions from a prior action were admissible in a subsequent action under the language of rule 26(d)(4) (now rule 32(a)(4)), despite the fact that the parties in a previous action were not the same.[91] Both actions in *Hertz* arose out of a collision between the plaintiff's and the defendant's race horses on a training track, resulting in the loss of both horses and serious injury to the plaintiff's jockey.[92] The jockey brought the first action against the defendant for injuries that he sustained in the collision.[93] The horse owner brought the second action against the defendant for the loss of her race horse.[94] The district court held that depositions from the jockey's suit against the defendant were admissible in the horse owner's subsequent action against the defendant because the issues were substantially the same.[95] Furthermore, the *Hertz* court found that the defendant's interest in the prior action induced a cross-examination of the witnesses that was equally as thorough as any cross-examination that the defendant's interest would have induced in the later action.[96]

In contrast, the Ninth Circuit in *Hub v. Sun Valley Co.*[97] expressed reservations about the "same motive to cross-examine" test the *Hertz* court used to admit prior action depositions under rule 32(a)(4).[98] The plaintiff in *Hub* filed suit against the defendant company, alleging that the defendant discriminated against him on the basis of his national origin and retaliated against him because of a complaint the plaintiff filed with the Equal Employment Opportunity Commission (EEOC).[99] The plaintiff contended that the United States District Court for the District of Idaho erred in excluding a deposition from a prior state action involving the plaintiff and the defendant company's predecessor in interest.[100] Although the *Hub* court stated that two lawsuits need not have identical issues and parties for the admission of a prior action deposition under rule 32(a)(4), the court found no similarity of issues between the two cases because the prior action did not involve the issue of retaliation against the plaintiff for filing the EEOC complaint.[101] The court in *Hub*, therefore, affirmed the trial court decision excluding the prior action deposition.[102]

In considering whether the presence of an adversary in the previous action with the "same motive" to cross-examine was sufficient to admit a deposition from that action under rule 32(a)(4), the Ninth Circuit in *Hub* noted that the focus of a court on similarity of "interest" between a previous and a cur-

91. *Id.* at 22-23.
92. *Id.* at 19.
93. *Id.*
94. *Id.*
95. *Id.* at 22.
96. *Id.*
97. 682 F.2d 776 (9th Cir. 1982).
98. *Id.* at 778.
99. *Id.* at 777.
100. *Id.*
101. *Id.* at 778.
102. *Id.*

rent party disregards the "same parties" requirement in rule 32(a) and also fails to account for the possibility that the prior opponent mishandled the cross-examination.[103] The *Hub* court questioned whether testimony in which a previous party mishandled the cross-examination of a witness should be admissible against a party who was not present at the prior proceedings.[104]

In addressing the subsequent action admissibility of depositions from a previous action under rule 32(a)(4), the approach of the *Hertz* court rests on sound logic, particularly when a party asserts use of testimony against a party who was also a party to the former action or proceedings.[105] By placing reliance on the similarity of motive and interest between a party in a prior action and a party in a subsequent action to cross-examine a witness, courts serve the purpose of efficiency embodied in the Federal Rules of Civil Procedure by saving the time, effort and money of litigants and by expediting trials.[106] As the *Hub* court observed, however, the potential for unfairness exists when a party asserts the use of a prior action deposition against a party not present in the previous action if the previous party mishandled the cross-examination of the declarant.[107] In such a case, the courts should exclude prior action depositions to prevent any prejudice to the party in the later action.[108] The exclusion of prior action depositions when a previous party has mishandled a witness also serves the interest of the Federal Rules of Civil Procedure by promoting fairness to all parties.[109]

As in the case of rule 32(a)(4), courts have interpreted rule 804(b)(1) in an inconsistent manner.[110] For example, some courts have given an expansive reading to the term "predecessor in interest" under rule 804(b)(1),[111] whereas other courts have adhered to a narrower interpretation of the term.[112] In *Lloyd*

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103. *Id.* at 778*.

104. *Id.*

105. *See infra* notes 196-226 and accompanying text (posture of parties may affect fairness of allowing use of prior action depositions).

106. *See* Baldwin-Montrose Chem. Co. v. Rothberg, 37 F.R.D. 354, 356 (S.D.N.Y. 1964) (courts avoid needless waste of time, money, and effort and expedite litigation by focusing on similarity of interest between prior and subsequent party under rule 32(a)(4)).

107. *See* 682 F.2d 776, 778* (9th Cir. 1982).

108. *See infra* notes 215-222 & 224 and accompanying text (court should exclude prior action depositions to prevent prejudice to subsequent party).

109. *See* FED. R. CIV. P. 1 (courts should construe Federal Rules of Civil Procedure to secure just determination of every action).

110. *See infra* notes 111-112 and accompanying text.

111. *See, e.g.*, Lloyd v. American Export Lines, Inc., 580 F.2d 1179, 1185-86 (3d Cir.) (court determined that Coast Guard was predecessor in interest of subsequent private plaintiff), *cert. denied*, 439 U.S. 969 (1978); In re Johns-Manville/Asbestosis Cases, 93 F.R.D. 853, 856 (N.D. Ill. 1982) (subsidiaries in previous case were predecessors in interest of primary building products manufacturer in subsequent case); Standard Oil Co. v. Montedison, 494 F. Supp. 370, 421 n.462 (D. Del. 1980) (subsidiary was predecessor in interest of primary corporation even though corporation did not participate in previous litigation), *aff'd*, 664 F.2d 356 (3d Cir. 1981); In re Master Key Antitrust Litig., 72 F.R.D. 108, 109 (D. Conn.) (United States was predecessor in interest of subsequent plaintiffs in private antitrust enforcement suit), *aff'd*, 551 F.2d 300 (2d Cir. 1976).

112. *See* Government of Canal Zone v. Pinto, 590 F.2d 1344, 1354 (5th Cir. 1979) (cross-examination in prior proceeding by party with similar motive and interest was insufficient under

v. American Export Lines,[113] a plaintiff seaman brought a personal injury action in the United States District Court for the Eastern District of Pennsylvania against American Export Lines after sustaining injuries in a violent encounter with another seaman, Roland Alvarez.[114] The plaintiff alleged that the ship's owner was negligent under the Jones Act[115] and that the vessel was unseaworthy.[116] American Export Lines impleaded Alvarez as a third-party defendant and thereafter Alvarez counterclaimed against American Export Lines, alleging negligence and unseaworthiness of American Export Lines' vessel.[117] The Coast Guard conducted a hearing, prior to the federal trial, during which both the plaintiff and Alvarez testified under oath.[118] At the Coast Guard hearing both the plaintiff and Alvarez were subject to direct and cross-examination.[119] At trial, only Alvarez testified because the plaintiff failed to appear.[120] The trial judge refused to admit a transcript of the plaintiff's testimony at the Coast Guard hearing and the jury awarded Alvarez damages against American Export Lines on the basis of negligence.[121] American Export Lines appealed, arguing that excerpts of the plaintiffs' testimony from the prior Coast Guard hearing were admissible under rule 804(b)(1).[122]

The Third Circuit in *Lloyd* reversed the trial court and held the plaintiff's prior testimony admissible under rule 804(b)(1) by determining that Alvarez and the Coast Guard shared a "sufficient community of interest" to justify considering the Coast Guard as Alvarez's predecessor in interest.[123] The *Lloyd*

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rule 804(b)(1)); Lloyd v. American Export Lines, Inc., 580 F.2d 1179, 1190-91 (3d Cir.) (Stern, J., concurring) (court precluded from finding Coast Guard was later private plaintiff's "predecessor in interest" by legislative history of rule 804(b)(1), *cert. denied*, 439 U.S. 969 (1978); In re Screws Antitrust Litig., 526 F. Supp. 1316, 1318-19 (D. Mass. 1981) (defendants in criminal proceeding were not "predecessors in interest" to unrelated defendants in subsequent civil action arising out of same occurrence); In re IBM Peripheral EDP Devices Antitrust Litig., 444 F. Supp. 110, 113 (N.D. Cal. 1978) (plaintiff from previous antitrust case was not "predecessor in interest" of plaintiff in subsequent action despite having a similar motive to examine witnesses in prior action); *see also* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190, 1254 (E.D. Pa. 1980) (discussing *Lloyd*, court considered it significant that "predecessor in interest" in *Lloyd* was government investigator who was presumably impartial and had no role in subsequent legal action).

113. 580 F.2d 1179 (3d Cir.), *cert. denied*, 439 U.S. 969 (1978).

114. *Id.* at 1181.

115. 46 U.S.C. § 688 (1976). The Jones Act provides a cause of action for any seaman injured in the course of his employment. *See id.*

116. 580 F.2d at 1181.

117. *Id.*

118. *Id.* at 1182.

119. *Id.* at 1182-83.

120. *Id.* at 1181. In *Lloyd v. American Export Lines*, the United States District Court for the Eastern District of Pennsylvania dismissed the plaintiff's negligence and unseaworthiness claim for failure to prosecute and the court held trial only on Alvarez's counterclaim against the shipping line. *Id.*

121. *Id.* at 1181-82.

122. *Id.* at 1182.

123. *Id.* at 1185-86; *see* In re Master Key Antitrust Litig., 72 F.R.D. 108, 109-10 (D. Conn.), *aff'd*, 551 F.2d 300 (2d Cir. 1976). In *In re Master Key Antitrust Litig.*, the United States District Court for the District of Connecticut found that the United States was the "predecessor in interest" under rule 804(b)(1) of a later private plaintiff in an antitrust action. *Id.* at 109. The

court reasoned that both Alvarez and the Coast Guard's investigating officer were attempting to determine culpability and exact a penalty for the same proscribed behavior and therefore had similar motives for developing the testimony concerning the same material facts.[124] The Third Circuit relied on the Senate Judiciary Committee's report on rule 804,[125] in which the Committee acquiesced to the House of Representatives' amendment to the Supreme Court's version of rule 804(b)(1).[126] The House version reinstated the traditional identity of parties requirement in place of the Court's proposed rule allowing a party to introduce former testimony provided a party in the previous action had a "similar motive and interest" to develop that testimony.[127] The Senate Committee report stated, however, that the difference between the Court and House versions of rule 804(b)(1) "was not great."[128] By removing the language of the Committee report from context, the *Lloyd* court determined that a party to a previous proceeding was a predecessor in interest to a subsequent party when there was an adequate opportunity and similar motive to develop the unavailable witness' testimony.[129] The *Lloyd* court's interpretation of "predecessor in interest" effectively rendered the congressional modification of rule 804(b)(1) nugatory by abrogating the House reinstatement of the identity of parties requirement with respect to whom a party may assert former testimony against.[130]

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district court, relying on the Senate Report to rule 804(b)(1), determined that a unique relationship exists between federal antitrust enforcement suits and subsequent private antitrust actions. *Id.; see infra* notes 125-128 and accompanying text (Senate determined that difference between House and Court versions of rule 804(b)(1) "was not great"). The *Master Key* court concluded that it was not unfair to allow the defendants in a private antitrust enforcement suit to use the testimony from the prior federal antitrust action of unavailable witnesses in the subsequent private proceeding because of the special relationship between federal and private antitrust actions. 72 F.R.D. at 109-10. *But see* In re IBM Peripheral EDP Devices Antitrust Litig., 444 F. Supp. 110, 113 (N.D. Cal. 1978) (courts should limit *Master Key* opinion to antitrust area because such broad interpretation of "predecessor in interest" generally is inconsistent with legislative history of rule 804(b)(1)); *cf.* Lloyd v. American Export Lines, Inc., 580 F.2d 1179, 1191 (3d Cir.) (Stern, J., concurring) (Congress intended "predecessor in interest" in narrow, substantive law sense of privity relationship), *cert. denied*, 439 U.S. 969 (1978).

124. 580 F.2d 1179, 1186 (3d Cir.), *cert. denied*, 439 U.S. 969 (1978). In comparing the interests of Alvarez and the Coast Guard to determine whether the Coast Guard was Alvarez' "predecessor in interest" under rule 804(b)(1), the *Lloyd* court asserted that one significant similarity was Alvarez' desire "to vindicate his individual interest in recovering for his injuries" while the Coast Guard wanted "to vindicate the public interest in safe and unimpeded merchant marine service." *Id.*

125. *See id.; see also* In re Johns-Manville/Asbestosis Cases, 93 F.R.D. 853, 856 (N.D. Ill. 1982) (Congress did not intend to use "predecessor in interest" in strict sense of corporate privity); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190, 1253 (E.D. Pa. 1980) (Senate and House of Representatives had different meanings for term "predecessor in interest").

126. *See supra* notes 54-68 & 125 and accompanying text (legislative history of rule 804(b)(1)); *infra* notes 127-28 and accompanying text (same).

127. *See id.*

128. *See* S. REP. No. 1277, *supra* note 66, at 7074.

129. 580 F.2d 1179, 1186-87 (3d Cir.), *cert. denied*, 439 U.S. 969 (1978).

130. *See* H.R. REP. No. 650, *supra* note 39, at 7088; 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 804(b)(1)[03], at 804-64 (1982) (prior action testimony unlikely to satisfy rule 804(b)(1) unless offering party's opponent was party to previous action).

Although the concurring opinion agreed with the result in *Lloyd*, the concurrence did not approve of the basis for the majority's decision.[131] More specifically, the concurrence considered that the legislative history of rule 804 precluded the *Lloyd* court's interpretation of the term "predecessor in interest."[132] The concurrence determined that Congress used the term "predecessor in interest" in the narrow, substantive law sense of a privity relationship.[133] The *Lloyd* court's concept of "community of interest," the concurrence noted, is nothing more than "similar motive."[134] The concurrence observed that similar motive is a distinct requirement under rule 804(b)(1) and that the majority's construction of the term "predecessor in interest" as nothing more than "similar motive" effectively eliminated the predecessor in interest requirement.[135] Instead, the concurrence would have allowed admission of the prior testimony in *Lloyd* under rule 804(b)(5),[136] governing residual exceptions to the hearsay rule, because of concern about the scope and potential unfairness of the *Lloyd* court's ruling.[137]

Even when a party or a predecessor in interest was present in a previous action, the court also must find that the party in the previous action had an "opportunity and similar motive" to examine a declarant to satisfy rule 804(b)(1).[138] The determination of whether a party had an opportunity and similar motive to examine a witness in a prior action depends largely upon the nature of the proceeding in which the witness gave the testimony and the similarity of the issues in the prior and subsequent actions.[139] For example, in *In re Paducah Towing*,[140] the United States and several barge owners sued Paducah Towing Company (Company) for damages to a dam on the Ohio

131. 580 F.2d 1179, 1190 (3d Cir.) (Stern, J., concurring), *cert. denied*, 439 U.S. 969 (1978).

132. *Id.* at 1190-91. Court should construe a statute to give effect to each provision of that statute and not to render any word or phrase superfluous. E. CRAWFORD, THE CONSTRUCTION OF STATUTES § 165, at 260-61 (1940); 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 46.06, at 63 (4th ed. 1973). Since rule 804(b)(1) does not define the term "predecessor in interest," however, the judicial definition of predecessor in interest in previous cases is relevant. *See* 11 J. MOORE, *supra* note 5, § 804.04[2], at VIII-265. Predecessor in interest is defined at common law in the narrow, substantive law sense of privity. *See supra* note 8 (privity at common law).

133. *Id.* at 1191; *see* 4 J. WEINSTEIN & M. BERGER, *supra* note 130, § 804(b)(1)[04], at 804-65-66 (Congress necessarily used "predecessor in interest" in its narrow, substantive law sense of privity); *supra* note 8 (discussion of privity at common law).

134. 580 F.2d 1179, 1191 (3d Cir.) (Stern, J., concurring), *cert. denied*, 439 U.S. 969 (1978).

135. *Id.*

136. *Id.* at 1192; *see supra* note 40 (residual exception for hearsay under rule 804(b)(5)).

137. *See* S. SALTZBURG & K. REDDEN, *supra* note 11, at 659 (legislative history of rule 804(b)(1) indicates that *Lloyd* concurrence represents sound thinking).

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

139. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190, 1252 (E.D. Pa. 1980) (similar motive depends, at least in part, upon substantial similarity of issues); S. SALTZBURG & K. REDDEN, *supra* note 11, at 652 (determination of similar motive based upon similarity of issues and context in which opportunity to examine witness previously arose); 4 J. WEINSTEIN & M. BERGER *supra* note 130, § 804(b)(1)[04], at 804-66 (all issues in previous and subsequent proceeding need not be same but additional issues may affect motive to examine).

140. 692 F.2d 412 (6th Cir. 1982).

River and to barges attached to the Company's tow boat.[141] The Company's tow boat broke loose from its mooring and went over the dam, causing the damages to the dam and barges.[142] The Company petitioned the United States District Court for the Western District of Kentucky for limitation of or exoneration from liability for the damages resulting from the accident and impleaded the Exxon Corporation, alleging that because an Exxon tug boat had caused the accident, Exxon should indemnify the Company for any damages that the Company might have to pay.[143]

Before the trial, the Coast Guard investigated the circumstances surrounding the accident and brought license revocation proceedings against the captain of the Company's vessel before an administrative law judge.[144] At the subsequent trial, the Company offered the testimony of a pilot of another vessel, who was an eyewitness to the accident and who previously had testified at the license revocation proceeding.[145] Although the Coast Guard called the pilot as a witness during the license revocation proceeding, the captain's counsel treated the pilot as an expert witness during cross-examination and asked hypothetical questions concerning the reasonableness of the captain's actions.[146] The administrative law judge refused to allow the Coast Guard representative to impeach the pilot's credibility with the result that the testimony was very favorable to the captain of the Company's vessel.[147] Nevertheless, the district court admitted the pilot's testimony in the subsequent trial.[148]

The Sixth Circuit held that the trial court erred in admitting the pilot's testimony pursuant to rule 804(b)(1).[149] The *Paducah* court determined that the Coast Guard, as Exxon's predecessor in interest,[150] did not have an adequate opportunity to examine the witness because the Coast Guard representative at the license revocation proceeding was not an attorney and because the administrative law judge refused to allow the Coast Guard to impeach the pilot's testimony on redirect examination.[151] The Sixth Circuit concluded that under these circumstances, the Coast Guard did not have a "meaningful opportunity" to examine the witness and therefore the reliability of the witness' testimony was insufficient under rule 804(b)(1).[152]

The *Paducah* court's analysis provides a sound framework for determin-

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141. *Id.* at 417.
142. *Id.* at 416-17.
143. *Id.* at 417.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.* at 418.
150. *See id.* For purposes of determining whether the pilot's testimony from the Coast Guard hearing was admissible under rule 804(b)(1) in the subsequent action, the *In re Paducah Towing Co.* court treated the Coast Guard as the Exxon Corporation's predecessor in interest. *Id.*
151. *Id.* at 419.
152. *Id.; see* C. McCORMICK, *supra* note 1, § 255, at 616 (opportunity to examine witness must have been meaningful in light of conditions existing when witness gave former testimony).

ing whether a party or a predecessor in interest of that party had an adequate opportunity to examine a witness. Since rule 804(b)(1) requires only that a party have an opportunity to examine a witness, a court may admit former testimony when a party to a previous proceeding had an opportunity to examine a witness but did not exercise that right.[153] However, if the nature of the proceeding at which a witness gave testimony was such that no meaningful opportunity to examine that witness existed, a court should exclude the former testimony under rule 804(b)(1).[154] As the *Paducah* court correctly observed, the purpose of the rule 804(b)(1) requirement that a party or his predecessor have had an opportunity to examine a witness is to provide adequate assurances of the reliability of that witness' testimony.[155]

The question of whether a party had an adequate opportunity to examine a witness necessarily is intertwined with the question of whether that party or his predecessor in interest had a similar motive to develop the testimony of the witness as required by rule 804(b)(1).[156] In examining whether a similar motive to develop the testimony of a witness existed in a previous proceeding, a court should focus on the issues to which the witness testified.[157] While additional or slightly different issues in either the prior or subsequent proceeding will not disqualify a witness' testimony under rule 804(b)(1), the presence of additional or different issues may affect the motive of a party or a predecessor in interest to conduct an examination of a witness, particularly when an addi-

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153. FED. R. EVID. 804(b)(1); *see* DeLuryea v. Winthrop Laboratories, 697 F.2d 222, 226 (8th Cir. 1983) (trial court improperly excluded deposition from previous action even though party asked only one question on cross-examination because opportunity was present to examine witness); 5 J. WIGMORE, *supra* note 1, § 1371, at 55 (opportunity to cross-examine is equivalent of actual cross-examination because failure to exercise opportunity to cross-examine indicates party could not or did not need to dispute witness' testimony).

154. *See* In re Sterling Navigation Co., 444 F. Supp. 1043, 1046 (S.D.N.Y. 1977) (testimony from bankruptcy proceeding inadmissible under rule 804(b)(1) since hearings under local bankruptcy rules were non-adversarial); 4 J. WEINSTEIN & M. BERGER, *supra* note 130, § 804(b)(1)[02], at 804-57-8 (court must exclude former testimony under rule 804(b)(1) if opportunity to cross-examine is absent); Note, *Affidavits, Depositions and Prior Testimony*, 46 IOWA L. REV. 356, 358 (1961) (former testimony inadmissible in subsequent action unless previous tribunal had power to compel cross-examination); *see also* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190, 1252 (E.D. Pa. 1980) (type of proceeding, trial strategy, potential penalties or monetary stakes, and number of issues and parties may influence motive to develop testimony); 4 J. WEINSTEIN & M. BERGER, *supra* note 130, § 804(b)(1)[02], at 804-58-9 (if opportunity to cross-examine would not have resulted in testing reliability of witness' statement, court should exclude prior testimony).

155. 692 F.2d 412, 419 (6th Cir. 1982). In addressing the admissibility of testimony from a prior Coast Guard hearing, the *Paducah* court noted that the examination of the witness was inadequate to assure reliability of the testimony both because an attorney did not conduct the examination and because of an erroneous evidentiary ruling by the administrative law judge. *Id.*

156. *See* 4 J. WEINSTEIN & M. BERGER, *supra* note 130, § 804(b) (1)[02], at 804-62 (whether party had adequate opportunity for cross-examination depends at least in part on interwined question of motive and interest and is matter for court's discretion).

157. *See* 11 J. MOORE, *supra* note 5, § 804.04[3], at VIII-267 (ultimate issues may be different but if issue to which witness testified is substantially same, similar motive test is satisfied); 4 J. WEINSTEIN & M. BERGER, *supra* note 130, § 804(b)(1)[04], at 804-66 (additional issues in either prior or subsequent case are permissible as long as motive to examine witness is similar).

tional party or parties also were present in the previous action or when an additional party or parties are present in the subsequent action.[158] If the issues to which a witness testified in a prior action are substantially the same as the issues in the subsequent action, "similar motive" to develop the testimony under rule 804(b)(1) probably exists.[159] For instance, in *Bailey v. Southern Pacific Transportation*,[160] the plaintiffs filed a wrongful death action in the United States District Court for the Eastern District of Texas after the defendant's train hit and killed the plaintiffs' decedent at a railroad crossing.[161] The plaintiffs claimed that as a result of the defendant's negligence the warning signal at the railroad crossing did not function at the time of the accident.[162] The trial judge admitted into evidence testimony from a previous trial concerning a collision at the same crossing to the effect that the warning devices at the crossing were not operational at the time of the previous accident.[163] The defendant appealed, claiming that the admission of the prior testimony under rule 804(b)(1) was erroneous because the defendant had a different motive to examine the witness in the previous case, apparently on the basis that the two accidents occurred on different dates and involved different parties.[164]

The Fifth Circuit, in affirming the trial court, reasoned that because the dispute in both cases involved whether the warning signals operated properly, the defendant would have virtually the same motive to examine a witness in both actions, namely, to show that the witnesses were mistaken that the signals did not work.[165] Thus, the *Bailey* court concluded that the witness' former testimony satisfied the "similar motive" requirement of rule 804(b)(1).[166] Although the *Bailey* court did not state explicitly the basis for its finding of similar motive, the court's assertion that the defendant's natural interest was to examine the witness as to the operation of the signal indicates that the court found the issues in the two cases substantially the same.[167]

In *DeLuryea v. Winthrop Laboratories*,[168] the Eighth Circuit also found a similar motive to examine a witness between a previous and subsequent action.[169] In *DeLuryea*, the plaintiff sued the defendant on the basis of strict liability, negligence and breach of express warranty for damages resulting from

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158. *See* 4 J. WEINSTEIN & M. BERGER *supra* note 130, § 804(b)(1)[04], at 804-66 (presence of additional issues may affect motive to cross-examine, especially when additional parties also are present).

159. 11 J. MOORE, *supra* note 5, § 804.04[03], at VIII-267.

160. 613 F.2d 1385 (5th Cir.), *cert. denied*, 449 U.S. 836 (1980).

161. *Id.* at 1387.

162. *Id.*

163. *Id.* at 1389.

164. *Id.* at 1390.

165. *Id.*

166. *Id.* at 1390 & n.4; *see also* Murray v. Toyota Motor Distrib., 664 F.2d 1377, 1379 (9th Cir.) (similar and not identical motive required under rule 804(b)(1)), *cert. denied*, 457 U.S. 1106 (1982).

167. *See* 613 F.2d 1385, 1390 (5th Cir.), *cert. denied*, 449 U.S. 836 (1980).

168. 697 F.2d 222 (8th Cir. 1983).

169. *Id.* at 223.

drug dependence on a product the defendant manufactured.[170] The trial court excluded the deposition testimony from a previous workers' compensation proceeding of a physician who had treated the plaintiff after the plaintiff's injury in an industrial accident.[171] The physician testified that he withdrew the drug that the defendant manufactured from the plaintiff and advised the plaintiff to stop taking the drug because she was abusing the drug.[172] The plaintiff's counsel in the prior proceeding only asked the physician whether the plaintiff's problem with drug abuse was a result of her accident.[173] Consequently, the plaintiff contended that she restricted her cross-examination of the physician because the only issue in the workers' compensation case was whether her condition was a result of a job-related injury.[174]

The Eighth Circuit, however, reversed the trial court after determining that the physician's testimony was relevant to the issue of misuse of the drug in both the prior and subsequent actions.[175] The court reasoned, therefore, that the plaintiff had a similar motive in both actions to disprove the allegations of her misuse of the drug.[176] The *DeLuryea* court concluded that because the issues and parties in both actions were substantially the same, the deposition testimony was admissible against the plaintiff under rule 804(b)(1).[177]

Although the court in *DeLuryea* admitted the physician's deposition under rule 804(b)(1), the court also observed that the physician was dead and that the physician's testimony in the deposition directly impeached the testimony of the plaintiff in the subsequent trial.[178] Thus, the Eight Circuit might have concluded more appropriately that the doctor's deposition from the prior action was admissible under the provisions of rule 32(a).[179] Since the *DeLuryea* court chose to admit the deposition from the previous action under rule 804(b)(1), however, the court should have considered several factors, including the type of proceeding in the prior action, the parties to the previous action, trial strategy and the financial stakes, in determining whether the plaintiff had a similar motive to examine the witness in the prior action.[180] While the plaintiff clearly

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170. *Id.*
171. *Id.* at 226.
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.* at 227.
178. *Id.* The court in *DeLuryea v. Winthrop Laboratories* stated that the doctor's prior testimony contained direct impeachment of the plaintiff's testimony that the doctor had not instructed the plaintiff to discontinue the use of the drug. *Id.* The *DeLuryea* court reasoned that the trial court's exclusion of the physician's prior action deposition was prejudicial to the defendant and therefore constituted an abuse of the trial court's discretion. *Id.*
179. *See* FED. R. CIV. P. 32(a)(3) (party may use witness' deposition for any purpose if witness is dead).
180. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190, 1252 (E.D. Pa. 1980) (court should evaluate opportunity to cross-examine witness in light of type of proceeding, trial strategy, potential stakes, and number of issues and parties); S. SALTZBURG & K. REDDEN, *supra* note 11, at 652 (context in which opportunity to examine witness arose may affect

had ample opportunity to cross-examine the doctor, the presence of additional issues in the subsequent action and the nature of the prior proceeding were factors the court should have considered but which do not appear in the text of the opinion.[181] For example, the tenuous relation of the physician's testimony to the issue of strict liability and the relatively nonadversarial setting of a workers' compensation proceeding would suggest that the *DeLuryea* court might have held the deposition inadmissible under rule 804(b)(1), despite the common issue of whether the plaintiff abused the drug that the defendant manufactured.[182] In particular, the nature of the prior proceeding and the potential effect of that proceeding on trial strategy indicates that the court might have found that the plaintiff did not have the requisite "similar motive" to cross-examine the witness in the prior action.[183]

In *Hewitt v. Hutter*,[184] the United States District Court for the Western District of Virginia denied the admission of a deposition from another action pending in California.[185] The plaintiff vendors brought a specific performance action on a contract for the sale of land in Virginia while the defendant buyers sought recission of the contract on the contention that the plaintiff fraudulently had misrepresented the earnings and profitability of the farming operation on the land.[186] The defendants' claim of fraud rested almost entirely upon the testimony of their agent who had negotiated the farm purchase.[187] The defendants offered into evidence a deposition of their buying agent that the defendants had taken in connection with the defendants' state court action against the agent for fraud.[188] In his deposition, the agent supported the buyers' claim that the vendors had made misleading statements about the value of the farm.[189] Statements in this deposition, however, were inconsistent with an earlier deposition of the agent taken in the *Hewitt* action.[190] The plaintiffs in *Hewitt* objected to the admission of the agent's deposition on the grounds that they were not parties to the state court action in which the agent gave his deposition and therefore were not present at the deposition and did not receive notice thereof.[191] The *Hewitt* court found that the requisite similar motive to examine the witness did not exist under rule 804(b)(1) because only the defendants' attorney in the current action questioned the agent on the

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motive of party to develop witness' testimony); 4 J. WEINSTEIN & M. BERGER, *supra* note 130, § 804(b)(1)[02], at 804-62 (trial judge should evaluate adequacy of cross-examination in prior proceeding in determining admissibility of former testimony under rule 804(b)(1)).

181. *See* 697 F.2d 222 (8th Cir. 1983); *supra* note 180.

182. *Cf. supra* note 180 and accompanying text (considerations affecting "similar motive" under rule 804(b)(1)).

183. *Id.*

184. 432 F. Supp. 795 (W.D. Va. 1977), *aff'd*, 568 F.2d 773 (4th Cir. 1978).

185. *Id.* at 799.

186. *Id.* at 796.

187. *Id.* at 798.

188. *Id.* at 797.

189. *Id.* at 798.

190. *Id.* at 799.

191. *Id.* at 797.

fraud issue during the deposition from the other proceeding.[192] The *Hewitt* court observed that the interests of the plaintiffs and the defendants in the present action could not be more dissimilar.[193] Furthermore, the court noted that neither the plaintiffs nor a predecessor in interest had questioned the agent.[194] Thus, although both actions involved the issue of fraud, the parties to the actions and the context in which the opportunity to examine the witness arose precluded the admission of the testimony under rule 804(b)(1).[195]

The cases under both rule 32(a)(4) and rule 804(b)(1) exhibit several patterns regarding the posture of the parties asserting use of depositions or other former testimony and that of the parties against whom the depositions or testimony are being asserted. Frequently, a plaintiff who was not a party to a prior action (P_2) attempts to assert the use of depositions from a previous action against a defendant in a subsequent action who was present or who is a successor in interest to a party that was present in the previous action (D_1).[196] Assuming a substantial identity of issues exists between a former and a subsequent action, no unfairness is apparent in allowing P_2 to use the former testimony against D_1.[197] Either D_1 or his predecessor in interest was present in the prior action and therefore D_1 had an opportunity to examine the witness whose testimony now is offered.[198] Similarly, when a defendant who was not

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192. *Id.* at 799. The court in *Hewitt v. Hutter*, in addition to analyzing the admissibility of the agent's deposition under rule 804(b)(1), also analyzed the admissibility of the deposition under rule 32(a)(4). *Id.* While the *Hewitt* court stated that the presence of an adversary at a prior deposition with the same motive to cross-examine the witness as the subsequent party and a substantial identity of issues would allow the use of the deposition, the court found that these conditions did not exist in the case before the court. *Id.* The *Hewitt* court also noted that the defendants failed to give the plaintiffs notice of the deposition taking in the other action. *Id.*

193. *Id.; cf.* Oberlin v. Marlin Am. Corp., 516 F.2d 1322, 1329 (7th Cir. 1979) (different theories of recovery in prior and subsequent action render prior action depositions inadmissible under rule 804(b)(1) because of lack of motivation to cross-examine witness when issues are different).

194. 432 F. Supp. 795, 799 (W.D. Va. 1977), *aff'd*, 568 F.2d 773 (4th Cir. 1978).

195. *Id.* at 799; *see* S. SALTZBURG & K. REDDEN, *supra* note 11, at 652 (similarity of issues and context of opportunity to examine witness determine admissibility of former testimony under rule 804(b)(1)).

196. *See, e.g.*, Murray v. Toyota Motor Distrib., 664 F.2d 1377 (9th Cir.), *cert. denied*, 457 U.S. 1106 (1982); Bailey v. Southern Pac. Transp. Co., 613 F.2d 1385 (5th Cir.), *cert. denied*, 449 U.S. 836 (1980); Lloyd v. American Export Lines, 580 F.2d 1179 (3d Cir.), *cert. denied*, 439 U.S. 969 (1978); Rule v. International Ass'n of Bridge, Structural and Ornamental Ironworkers, Local Union No. 396, 568 F.2d 558 (8th Cir. 1977); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190 (E.D. Pa. 1980); Alamo v. Pueblo Int'l., Inc., 58 F.R.D. 193 (D.P.R. 1972); Fullerform Continuous Pipe Corp. v. American Pipe & Constr. Co., 44 F.R.D. 453 (D. Ariz. 1968); Hertz v. Graham, 23 F.R.D. 17 (S.D.N.Y. 1958), *aff'd*, 292 F.2d 443 (2d Cir.), *cert. denied*, 368 U.S. 929 (1961); Rivera v. American Export Lines, 12 F.R.D. 1 (M.D. Pa. 1951); Mid-City Bank & Trust Co. v. Reading Co., 3 F.R.D. 320 (D.N.J. 1944).

197. *See* FED. R. EVID. 804 advisory committee note (not unfair to require party to accept his own prior conduct of cross-examination or direct examination); *see also* 5 J. WIGMORE, *supra* note 1, § 1389, at 121 (same); *Former Testimony Exception, supra* note 1, at 651 n.1 (same); *supra* notes 50-53 and accompanying text (direct and redirect examination equivalent to cross-examination under Federal Rules of Evidence).

198. *See* 5 J. WIGMORE, *supra* note 1, § 1388, at 111 (party's interest is protected if party or predecessor in interest had opportunity to examine witness).

a party to a prior action (D_2) attempts to enter into evidence a deposition or other former testimony from a prior action against a plaintiff in a subsequent action who was present or whose predecessor in interest was present in the previous suit (P_1), the interest of P_1 in the prior action would appear to prevent any undue prejudice or unfairness in allowing the admission of such evidence.[199] Courts have admitted almost uniformly depositions or other former testimony into evidence under rule 32(a)(4) and rule 804(b)(1) when the parties are situated in either a P_2 against D_1 or D_2 against P1 posture, and the issues between the former and subsequent actions are substantially the same.[200]

The question of whether to admit depositions or other former testimony from a previous action becomes more difficult conceptually when additional issues or parties are present in either the former or subsequent action.[201] For example, in *First National Bank in Greenwich v. National Airlines*,[202] the plaintiffs sued National Airlines and Douglas Aircraft Company on behalf of four passengers who died in the crash of a National Airlines passenger plane.[203] The plaintiffs moved for an order admitting into evidence depositions from another case involving the same accident and to which National Airlines was a party.[204] Thus, the posture of the parties regarding the depositions was a P_2 against D_1 configuration. The United States District Court for the Southern District of New York, however, denied the admission of the depositions pursuant to rule 26(d)(4), the predecessor to rule 32(a)(4).[205] The *National Airlines* court observed that Douglas was not a party to the previous action and did not receive notice of the taking of the depositions.[206] In addition, the court noted that the subsequent case also involved a theory of liability which the prior action did not contain and therefore excluded the depositions to prevent any possible prejudice to Douglas.[207]

The court in *National Airlines* cited with approval the same standard that the *Hertz* court adopted for the admission of prior action depositions, requiring a substantial identity of issues between the two actions and a party-opponent

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199. *See* DeLuryea v. Winthrop Labs., Inc., 697 F.2d 222 (8th Cir. 1983); In re Master Key Antitrust Litig., 72 F.R.D. 108 (D. Conn.), *aff'd*, 551 F.2d 300 (2d Cir. 1976). *But see* American Photocopy Equip. Co. v. Rovico, Inc., 384 F.2d 813, 816 (7th Cir.) (court refused to permit defendant to introduce depositions against plaintiff who was defendant in earlier action because plaintiff's interest was reverse of what it had been in first action), *cert. denied*, 390 U.S. 945 (1967).

200. *See supra* notes 196 & 199 (courts usually admit prior action depositions that party asserts against party to previous action).

201. *See* 4 J. WEINSTEIN & M. BERGER, *supra* note 130, § 804(b)(1)[04], at 804-66 (additional issues may affect motive to cross-examine, particularly when additional parties also are present).

202. 22 F.R.D. 46 (S.D.N.Y. 1958).

203. *Id.* at 47.

204. *Id.*

205. *Id.* at 49.

206. *Id.* at 48.

207. *Id.*; *cf.* FED. R. EVID. 403 (court may exclude relevant evidence if probative value "is substantially outweighed" by possible prejudice, confusion of issues, potential of misleading jury, or considerations of efficiency).

in the previous case with the same interest and motive to cross-examine the witness as the present opponent.[208] Despite the court's approval in *National Airlines* of the liberal standard that the *Hertz* court set forth, the court's analysis follows to a significant degree the restrictive interpretation of *Wolf v. United Airlines*,[209] a Middle District of Pennsylvania holding that preceded *Hertz*, and which required exactly the same issues and the same parties in both actions.[210] The *National Airlines* court, rather than focusing on whether National Airlines had the same interest and motive to cross-examine the witnesses in the previous action, noted that even if the additional issue in the subsequent action was not significant, the lack of identity of parties between the two actions would create a problem with respect to the admissibility of the depositions under rule 26(d).[211] If the *National Airlines* court had followed the *Hertz* standard, the court should have evaluated whether National Airlines had a similar motive to cross examine the witnesses in the previous action to that which Douglas would have had in the subsequent action.[212] Similarly, rather than analyzing whether the issues between the two actions were substantially the same, the *National Airlines* court only stated that the subsequent action contained an additional issue.[213] Since both actions involved the alleged negligence of the defendants, the mere addition of an issue is not necessarily sufficient to justify the exclusion of the prior action deposition absent some indication that the additional issue would have affected the manner in which National Airlines conducted the previous cross-examination.[214]

When a party present in both the former and subsequent actions asserts the use of a prior action deposition or other former testimony against a party present only in the subsequent action, a greater potential for unfairness arises with respect to the party who was not present when the witness gave his testimony than in the situation in which the party was present in the prior action.[215] Questions concerning the interest and motive of the adversary to examine a witness in the prior action and the adequacy of that examination

208. 22 F.R.D. 46, 51-52 (S.D.N.Y. 1958).

209. 12 F.R.D. 1 (M.D. Pa. 1951).

210. *See id.* at 48, 51-52.

211. *Id.* at 48.

212. *See* Hertz v. Graham, 23 F.R.D. 17, 20 (S.D.N.Y. 1958) (court should determine whether previous opponent had same interest and motive in cross-examination), *aff'd*, 292 F.2d 443, 447-48 (2d Cir.), *cert. denied*, 368 U.S. 929 (1961).

213. 22 F.R.D. 46, 48, 51 (S.D.N.Y. 1958).

214. *See supra* note 157 (additional issue(s) in prior or subsequent case permissible if motive to examine witness similar in both actions).

215. *Cf.* DeLuryea v. Winthrop Laboratories, Inc., 697 F.2d 222, 226 (8th Cir. 1983) (plaintiff present in both actions); Hub v. Sun Valley Co., 682 F.2d 776, 778 (9th Cir. 1982) (defendant not present in previous action); Insul-Wool Insulation Corp. v. Home Insulation, Inc., 176 F.2d 502, 503 (10th Cir. 1949) (plaintiff was party in both actions); Hewitt v. Hutter, 432 F. Supp. 795, 799 (W.D. Va. 1977) (plaintiff not present in action by defendant against defendant's agent), *aff'd*, 568 F2d 773 (4th Cir. 1978); In re Master Key Antitrust Litig., 72 F.R.D. 108, 109 (D. Conn.) (plaintiff not present in government's antitrust action against same defendant), *aff'd*, 551 F.2d 300 (2d Cir. 1976).

are particularly relevant in determining whether a court may justify admitting the former depositions or testimony when a party asserts the use of such depositions or testimony against a party who was not present in the previous action.[216]

For instance, in *Ikerd v. Lapworth*,[217] the plaintiff, a passenger in Richard Knoblett's car, filed suit in the United States District Court for the Southern District of Indiana against the defendant automobile dealer for injuries she sustained when the car allegedly crashed because of a stuck accelerator.[218] Subsequently, Knoblett filed a similar suit against the same defendant.[219] The defendant offered the deposition testimony of two individuals that the defendant deposed after the plaintiff filed her suit but prior to the filing of Knoblett's suit.[220] The Seventh Circuit held that identity of issues and "the presence of an adversary with the same motive" to examine the witnesses was sufficient to admit prior action depositions in a subsequent suit under the language currently in rule 32(a).[221] The *Ikerd* court indicated that Knoblett did not suffer any prejudice by not having his own counsel present at the deposition or that he would have asked any different questions of the deponents.[222]

Although both the *National Airlines* court and the *Ikerd* court focused on possible prejudice to a party against whom a deposition is asserted under rule 32(a)(4), the *Ikerd* court's analysis more accurately achieves the purpose of the rule in admitting only reliable evidence.[223] By using the concept of prejudice to exclude a prior action deposition without analyzing whether the additional issue and party in the subsequent action affected the motive of the prior party-opponent to cross-examine the witness, the *National Airlines* court seemed to equate prejudice with evidence not favorable to a party. The *Ikerd* court's inquiry, focusing on whether the party in the subsequent action would have asked different questions of the witness if that party had been present in the prior proceeding because of different issues or parties in the subsequent proceeding, relates to the adequacy of the examination of the witness and thus helps to assure the reliability of the testimony.[224] The approach of the *Ikerd* court under rule 32(a)(4) is in accord with the *Paducah* court's analysis under rule 804(b)(1), requiring that a party's opportunity to examine a witness was meaningful.[225] By assuring that a previous party had a meaningful oppor-

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216. *See* 4 J. WEINSTEIN & M. BERGER, *supra* note 130, § 804(b)(1)[04], at 804-66 (additional or different parties may affect motive to cross-examine witness).

217. 435 F.2d 197 (7th Cir. 1970).

218. *Id.* at 199.

219. *Id.* at 200.

220. *Id.* at 205.

221. *Id.*

222. *Id.* at 206.

223. *See* Hertz v. Graham, 23 F.R.D. 17, 22 (S.D.N.Y. 1958) (same motive and interest requirement is intended to ensure adequacy of cross-examination), *aff'd*, 292 F.2d 443, 447 (2d Cir.), *cert. denied*, 368 U.S. 929 (1961); *supra* note 1 (cross-examination provides assurance of trustworthy and reliable testimony).

224. *See supra* note 223.

225. *See supra* notes 138-152 and accompanying text (analysis of "opportunity" to examine witness under rule 804(b)(1)).

tunity to examine a witness, a court attempts to insure that the witness' testimony is thoroughly tested and therefore is reliable.[226]

By preventing the admission of prior action depositions when a party would be prejudiced or when a meaningful opportunity to examine the witness did not exist in the previous action, courts are able to protect both the interests of the judicial system and the interests of all parties in fairness and efficiency while retaining sufficient flexibility to admit reliable evidence.[227] The ability of the courts to meet these goals suggests the adoption of the more liberal language contained in the Supreme Court's proposed version of rule 804(b)(1), allowing the admission of former testimony when a party-opponent in the previous action had a "motive and interest similar to" the party-opponent in the subsequent suit.[228] Although Congress rejected the "motive and interest similar to" language when it adopted the Federal Rules of Evidence in 1975,[229] the courts have continued to use the similar motive and interest test both under rule 32(a)(4) and, to a more limited extent, under rule 804(b)(1).[230] The similar motive and interest test has been the majority approach under rule 32(a)(4) both before and after the adoption of the Federal Rules of Evidence.[231] Since rule 802 of the Federal Rules of Evidence allows for the admission of hearsay when the Federal Rules of Civil Procedure so provide, the goals of the Federal Rules of Evidence, to obtain uniformity in the law of evidence and the elimina-

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226. *See supra* note 152 and accompanying text (opportunity to cross-examine witness provides assurances of reliability of witness' testimony).

227. *Cf.* FED. R. CIV. P. 1 (courts should construe Federal Rules of Civil Procedure to achieve just, speedy, and inexpensive determination of all actions); FED. R. EVID. 102 (Federal Rules of Evidence designed to achieve fairness and efficiency); *see also* 4 J. WEINSTEIN & M. BERGER, *supra* note 130, § 804(b)(1)[03], at 804-63 (trial judge may exclude prejudicial evidence under rule 403 of the Federal Rules of Evidence although otherwise admissible pursuant to rule 804(b)(1)).

228. *See* FED. R. EVID. 804(b)(1) advisory committee note (relaxation of "parties" requirement under proposed version of rule 804(b)(1)).

229. *See* 11 J. MOORE, *supra* note 5, § 804.04[1], at VIII-261 (Congress rejected liberal parties requirement in Supreme Court's proposed version of rule 804(b)(1)).

230. *See, e.g.*, Rule v. International Ass'n of Bridge, Structural and Ornamental Ironworkers, Local Union No. 396, 568 F.2d 558, 569 (8th Cir. 1977) (prior opponent with interest to cross-examine as thoroughly as present opponent satisfies rule 32(a)(4)); Lloyd v. American Export Lines, Inc., 580 F.2d 1179, 1185-86 (3d Cir.) (former testimony admissible against party in subsequent suit under rule 804(b)(1) when party in previous action had "opportunity and similar motive" to examine witness), *cert. denied*, 439 U.S. 969 (1978); Ikerd v. Lapworth, 435 F.2d 192, 205 (7th Cir. 1970) (prior action deposition admissible under rule 32(a)(4) if prior opponent had same motive and interest to cross-examine witness and issues in both actions substantially same); In re Johns-Manville/Asbestosis Cases, 93 F.R.D. 853, 856 (N.D. Ill. 1982) (former testimony is admissible under rule 804(b)(1) when previous party had "like motive" for cross-examination); Fullerform Continuous Pipe Corp. v. American Pipe & Constr. Co., 44 F.R.D. 453, 456 (D. Ariz. 1968) (depositions are admissible under rule 26(d) [currently rule 32(a)] against defendant who was not present in prior action because defendant in earlier action shared same interest as defendant in subsequent action).

231. *See supra* note 88 and accompanying text (presence of adversary with same or similar motive to cross-examine witness and substantial identity of issues is predominant view of federal courts under rule 32(a)(4)).

tion of unjustifiable expense, would be furthered by amending both rule 32(a)(4) and rule 804(b)(1) to reflect the similar motive and interest test for admissibility of depositions or other former testimony.[232]

Alternatively, the Supreme Court should amend the language of rule 32(a)(4) to conform to the language in rule 804(b)(1), thus allowing the admission of former testimony only against a party who was present or had a predecessor in interest in a previous action when an "opportunity and similar motive" to develop that testimony existed.[233] An amendment of rule 32(a)(4) to mirror the language in rule 804(b)(1) would have the effect of creating a more uniform standard for the treatment of prior action depositions among the federal courts.[234]

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232. *See* FED. R. EVID. 802 (hearsay evidence is admissible under Federal Rules of Evidence when Federal Rules of Civil Procedure so permit); FED. R. EVID. 102 (purposes of Federal Rules of Evidence).

233. *See* H.R. REP. No. 650, *supra* note 39, at 7088 (congressional amendment of rule 804(b)(1) allowing admission of former testimony when party or his predecessor in interest had an "opportunity and similar motive" to develop witness' testimony).

234. *See supra* notes 61-64 (contrasting "similar motive and interest" test under rule 32(a)(4) with language of rule 804(b)(1)). While an admendment of rule 32(a)(4) to reflect the language of rule 804(b)(1) would suffer from the lack of a clear definition for the term "predecessor in interest," one commentary has suggested that the decisions interpreting the term "do not appear to present major problems." ABA Section of Litigation, *Emerging Problems Under the Federal Rules of Evidence* 302 (1983).