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The Admissibility of Former Testimony Under Rule 804(b)(1): Defining a Predecessor in Interest

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The Admissibility of Former Testimony Under Rule 804(b)(1): Defining a Predecessor in Interest

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I. INTRODUCTION

During a trial, a party may, under certain circumstances, offer the testimony of a witness taken during an earlier stage of the same proceeding, or in a prior proceeding.¹ Although the adverse party could otherwise object to such evidence as hearsay, Rule 804(b)(1) of the Federal Rules of Evidence recognizes a hearsay exception for former testimony² if the witness is "unavailable,"³ because such testimony does not suffer from most of the defects traditionally associated with hearsay.⁴ If, as the Rule requires, the now unavailable witness had testified under oath subject to the penalty of perjury, and his testimony was tested, or at least could have been tested, by cross-examina-

1. Former testimony includes statements made at a deposition, hearing, or trial in an earlier stage of the same or a prior proceeding. See FED. R. EVID. 804(b)(1).

2. Rule 804(b)(1) defines former testimony as follows:

Testimony given as a witness at another hearing of, the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

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

3. Under Rule 804(a), a witness is "unavailable" if the witness (1) claims a privilege; (2) refuses to testify; (3) claims a lack of memory; (4) dies or is suffering from a then existing physical or mental illness; or (5) fails to attend and his attendance cannot be procured by process or other reasonable means. FED. R. EVID. 804(a).

4. See FED. R. EVID. 804(b)(1) advisory committee's note, 56 F.R.D. 183, 323; C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 245, at 581 (2d ed. 1972).

tion in the prior proceeding, then the concerns regarding lack of trustworthiness are obviated. Former testimony, however, does suffer from the third defect traditionally associated with hearsay: the inability to observe the witness' demeanor.⁵ Nonetheless, efficiency concerns often dictate that courts admit former testimony, which is usually trustworthy and probative.

In civil cases,⁶ Rule 804(b)(1) permits the proponent to offer former testimony against a party to the prior proceeding, or against a party whose "predecessor in interest"⁷ had an opportunity and similar motive to examine the witness in the prior proceeding.⁸ The legislative history indicates that Congress adopted the predecessor-in-interest requirement as a means of protecting the fairness interests of the party opposing admission of the former testimony in the subsequent proceeding.⁹ Congress apparently believed that it was fair to bind a party in a subsequent proceeding if the trustworthiness of the former testimony had been established by a witness taking an oath, and the party or his predecessor challenged the testimony during direct, cross, or redirect examination. If these two conditions were satisfied, the court could admit the former testimony, and thereby preclude the factfinder from observing the witness' demeanor in the subsequent proceeding.

5. FED. R. EVID. 804(b)(1) advisory committee's note, 56 F.R.D. 183, 323.

6. The predecessor-in-interest exception is inapplicable in criminal proceedings because the confrontation clause of the Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. The predecessor-in-interest exception, however, applies in a civil proceeding that is based on a prior criminal proceeding. *E.g.*, *Pacelli v. Nassau County Police Dep't*, 639 F. Supp. 1382 (E.D.N.Y. 1986); *Carpenter v. Dizio*, 506 F. Supp. 1117 (E.D. Pa.), *aff'd*, 673 F.2d 1298 (3d Cir. 1981); *Travelers Fire Ins. Co. v. Wright*, 322 P.2d 417 (Okla. 1958). *But see In re Screws Antitrust Litig.*, 526 F. Supp. 1316 (D. Mass. 1981) (Testimony in criminal antitrust proceeding is not admissible against subsequent civil defendants who were not defendants in the prior criminal proceeding.).

7. The term "predecessor" is defined as the "correlative of successor." BLACK'S LAW DICTIONARY 1060 (5th ed. 1979). The term "successor in interest" is defined as "[o]ne who follows another in ownership or control of property." *Id.* at 1283 (emphasis added). Rule 32(a)(4) of the Federal Rules of Civil Procedure permits a deposition from a prior action to be offered in a subsequent action involving the "same parties or their representatives or successors in interest." FED. R. CIV. P. 32(a)(4). Rule 32(a)(4) permits a party to offer deposition testimony from a prior action in a subsequent action; hence the term "successor in interest." Rule 804(b)(1), in contrast, permits the admission of testimony from a prior proceeding against a party who was represented by a party in a *prior* proceeding; hence the term "predecessor in interest." One author has suggested an "amendment of Rule 32(a)(4) to reflect the language of Rule 804(b)(1)." Comment, *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*, 41 WASH. & LEE L. REV. 155, 183 n.234 (1984).

8. *See* FED. R. EVID. 804(b)(1). The examination of the witness in the prior proceeding may have been by direct, cross, or redirect examination. *See* FED. R. EVID. 804(b)(1).

9. *See infra* notes 59-62 and accompanying text.

Despite the term "predecessor in interest" in Rule 804(b)(1) and the Rule's legislative history, most federal courts employ analytical approaches that in effect ignore the predecessor-in-interest requirement.¹⁰ These courts rely instead on the trustworthy nature of the former testimony itself; i.e., because the witness was under oath and cross-examined by a person whose motive in developing the testimony was similar to that of the person against whom the testimony is being offered, these courts will admit the former testimony. Such an approach demonstrates that these courts are singularly concerning themselves with efficiency at the expense of the evidentiary concern of fairness. Consequently, the term "predecessor in interest," which appears in the rule's text, has become a dead letter.

Neither Rule 804(b)(1) nor its legislative history defines the term "predecessor in interest." Furthermore, the term had little, if any, meaning at common law. Courts applying the rule have therefore had to construe its meaning. Rule 102 of the Federal Rules of Evidence requires courts to construe all of the Rules, including Rule 804(b)(1), in a manner that promotes efficiency and secures fairness in the administration of justice.¹¹ The legislative history, however, indicates that Congress intended fairness to be of primary importance in determining whether Rule 804(b)(1)'s predecessor-in-interest requirement is satisfied. To the extent that courts disregard the fairness considerations underlying Rule 804(b)(1), they are violating the intent of the rule.

This Comment focuses upon the federal courts' neglect of the predecessor-in-interest requirement for the admission of former testimony. Section II explores the common law requirements for the admission of former testimony. At common law, former testimony could be admitted against a party to the prior proceeding or his privy, representative, or successor in interest. Section III of this Comment analyzes Rule 804(b)(1)'s legislative history and, more particularly, the role that fairness should play in determining whether the predecessor-in-interest requirement is satisfied. Section III also argues that

10. Although some federal courts have employed analytical approaches that give meaning to the predecessor-in-interest language, most have held that the predecessor-in-interest requirement is satisfied if any person possessing a similar motive developed the testimony in a prior proceeding. See *infra* notes 85-86. Rule 804(b)(1), however, permits former testimony to be offered against a party who was not a party to the prior proceeding only if a predecessor in interest possessed a similar motive to develop the testimony. FED. R. EVID. 804(b)(1). Most federal courts, therefore, have rendered the predecessor-in-interest language meaningless.

11. FED. R. EVID. 102. Rule 102 provides: "These rules shall be construed to secure *fairness* in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." *Id.* (emphasis added).

the legislative history indicates that Rule 804(b)(1) should parallel the use of prior action depositions under Rule 32 of the Federal Rules of Civil Procedure. Section IV analyzes the current interpretations of the term "predecessor in interest." Most federal courts either disregard the requirement altogether or employ an analytical approach that purports to give meaning to the requirement, but in fact ignores it. Section V explores the sufficiently-close-relationship requirement that is found in the res judicata area. It argues that the sufficiently-close-relationship analysis is applicable in the former testimony context. Finally, this Comment proposes that courts admit former testimony against a party who was not a party to the prior proceeding only if that party and his predecessor in interest enjoy a sufficiently close relationship.

II. THE COMMON LAW APPROACH TO FORMER TESTIMONY

Until the late 1800's, the case law employed a "mutuality of the parties" requirement. Under this approach, both the party offering the former testimony and the party against whom this testimony was offered in the subsequent proceeding had to have been parties to the prior proceeding—or at least in privity¹² with a party to the prior proceeding.¹³ In *Metropolitan Street Railway v. Gumby*,¹⁴ for example, an infant was injured in an automobile accident.¹⁵ The infant's

12. The Second Circuit has defined privity as follows:

Mutual or successive relationships to the same rights of property, and privies are distributed into several classes, according to the manner of this relationship. Thus, there are privies in estate, as donor and donee, lessor and lessee, and joint tenants; privies in blood, as heir and ancestor, and co-parceners; privies in representation, as executor and testator, administrator and intestate; privies in law, where the law, without privity of blood or estate, casts the land upon another, as by escheat.

Metropolitan St. Ry. v. Gumby, 99 F. 192, 198 (2d Cir. 1900).

13. See, e.g., *Atlanta & West Point R.R. v. Venable*, 67 Ga. 697, 697-700 (1881) (allowing a child to offer interrogatories that were taken in a prior proceeding brought by his mother against the same defendant). The English rule was similar. See, e.g., *Morgan v. Nicholl*, 15 L.R. 184 (C.P. 1866) (holding that testimony from a prior proceeding brought by a son could not be offered by his father in a subsequent proceeding against same defendant because the same parties were not offering the testimony). Until the mid 1800's, it was universally accepted that it was against natural justice to admit former testimony unless both the proponent and opponent of the former testimony were parties to the prior proceeding. See F. BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS 239-40 (1775); G. GILBERT, THE LAW OF EVIDENCE 47-48 (1795). After the mid 1800's, the "first principles of justice" dictated that former testimony be admitted if both the proponent and opponent were parties to the prior proceeding, or in privity with such a party. *Lane v. Brainerd*, 30 Conn. 565, 579 (1862), cited with approval in Note, *Fairness v. Trustworthiness: The Predecessor in Interest Controversy of Rule 804(b)(1)*, 1 B.Y.U. L. REV. 79, 92 n.79 (1984).

14. 99 F. 192 (2d Cir. 1900).

15. *Id.* at 193.

grandmother, his guardian, brought an action on her own behalf for loss of the infant's services and pain and suffering.¹⁶ The infant's grandmother sought to offer an eyewitness' testimony taken in a prior proceeding brought on the infant's behalf by his previous guardian.¹⁷ The Second Circuit reversed, holding that the grandmother could not offer the testimony.¹⁸ The court reasoned that it should not permit the grandmother to offer the testimony against the defendant because the defendant could not have offered the testimony against the grandmother,¹⁹ who was not in privity with the infant.²⁰

In *Rumford Chemical Works v. Hygienic Chemical Company of New Jersey*,²¹ the Supreme Court of the United States implicitly rejected the mutuality-of-the-parties requirement in favor of permitting a party to offer former testimony against a party to a prior proceeding, or those in privity²² with a party to a prior proceeding.²³ The plaintiff in *Rumford Chemical* had established the validity of its baking powder patent in a prior suit.²⁴ In the subsequent proceeding, Rumford Chemical sought to use the prior finding of patent validity to estop collaterally two alleged infringers from contesting the patent's validity.²⁵ Although the two alleged infringers were not parties to the prior suit that established the patent's validity,²⁶ Rumford Chemical sought to use the deposition of the deceased president of a

16. *Id.*

17. *Id.* at 199.

18. *Id.*

19. *Id.*

20. *Id.*

21. 215 U.S. 156 (1909).

22. For a definition of privity, see *supra* note 12.

23. See, e.g., *Tappan v. Beardsley*, 77 U.S. (10 Wall.) 427, 435 (1870) (holding that depositions from a prior proceeding were not admissible against one who was neither a party nor in privity with a party to the prior proceeding); *Rutherford v. Geddes*, 71 U.S. (4 Wall.) 220, 224 (1866) (holding that depositions from a prior proceeding were not admissible against one who was neither a party nor in privity with a party to the prior proceeding); see also J. APPLETON, RULES OF EVIDENCE 214 (1860) (A deposition from a prior proceeding is admissible against a party to the prior proceeding, or against those whose interests were represented in the prior proceeding.).

24. *Rumford Chem.*, 215 U.S. at 159. Rumford Chemical sought to collaterally estop two alleged infringers: Hygienic Chemical Co. of New Jersey and Hygienic Chemical Co. of New York. *Id.* at 158.

25. *Id.* at 158-59.

26. *Id.* at 159-60. Hygienic Chemical Co. of New York contributed to the expenses of defending the prior suit. *Id.* at 160. Rumford Chemical argued that both of the *Hygienic* defendants were in privity with the defendant in the prior suit because Hygienic of New York had contributed to the expenses of defending the prior suit. *Id.* The Supreme Court, however, rejected this argument because, although the *Hygienic* defendants had a business interest in the prior suit's outcome, neither of the *Hygienic* defendants had any control over the conduct of the prior case. *Id.*

company involved in the prior suit.²⁷ The Supreme Court affirmed the trial court's exclusion of the former testimony because neither of the corporate defendants against whom the testimony was offered were parties or privies of parties to the prior proceeding.²⁸

After *Rumford Chemical*, courts no longer examined who was offering the testimony because, as illustrated in *Metropolitan Street Railway v. Gumby*,²⁹ that approach unfairly precluded a party from offering testimony admitted against the same defendant in a prior proceeding.³⁰ If *Gumby* had arisen after the Court rejected the mutuality requirement in *Rumford Chemical*, the deceased witness' testimony presumably would have been admitted in the subsequent proceeding brought by the grandmother because the proponent offered it against the same party in both proceedings.³¹

A decade later, courts began to ease these requirements and a proponent could offer former testimony not only against a party to the prior proceeding, but also against a party who was "substantially the same" as a party in the prior proceeding.³² This approach was illustrated in *Virginia & West Virginia Coal Co. v. Charles*,³³ in which the plaintiff sought to eject the defendant from a tract of land claimed by the defendant.³⁴ The plaintiff attempted to introduce two depositions that supported its chain of title.³⁵ The depositions had been taken in a previous ejectment action concerning the same parcel of land, but involving different parties.³⁶ The United States District Court for the Western District of Virginia admitted the former testimony even though the party against whom it was being offered, the defendant, was unrelated to the parties in the prior proceeding.³⁷ The

27. *Id.* at 159.

28. *Id.* at 160.

29. 99 F. at 192. For a discussion of this case, see *supra* notes 13-19 and accompanying text.

30. C. MCCORMICK, *supra* note 4, at 488.

31. *Gumby*, 99 F. at 190.

32. *E.g.*, *Metropolitan St. Ry. v. Gumby*, 99 F. 192 (2d Cir. 1900); see *Anderson v. Hultberg*, 247 F. 273, 278 (8th Cir.), *cert. denied*, 248 U.S. 581 (1918); 1 W. BEST, A TREATISE ON THE PRINCIPLES OF EVIDENCE § 32, at 42 (1849); 2 C. CHAMBERLAYNE, A TREATISE ON THE MODERN LAW OF EVIDENCE §§ 1672-1675, at 2145-48 (1911); 2 B. ELLIOTT & W. ELLIOTT, THE LAW OF EVIDENCE § 508, at 594-95 (1904) [hereinafter B. ELLIOTT]; S. GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 163a, at 278-79 (J. Wigmore 16th ed. 1899); 1 T. HUGHES, AN ILLUSTRATED TREATISE ON THE LAW OF EVIDENCE § 5, at 59 (1907); 1 B. JONES, THE LAW OF EVIDENCE IN CIVIL CASES §§ 337-338, at 618-19 (1938).

33. 251 F. 83 (W.D. Va. 1917).

34. *Id.* at 99.

35. *Id.* at 116-17.

36. *Id.*

37. *Id.*

court held that the substantially-the-same parties requirement was satisfied because it could not "summon [the] witnesses from the grave."³⁸ From this questionable premise, the court stated that this was consequently "a time when the rules of evidence must be relaxed."³⁹

Other courts did not construe the substantially-the-same-parties standard as broadly as *Virginia & West Virginia Coal Co. v. Charles*.⁴⁰ The commentators agreed, however, that the standard encompassed privies,⁴¹ representatives,⁴² and successors in interest.⁴³ Former testimony, therefore, was admissible against a person who was not a party to the prior proceeding, if his legal relationship with the person who previously had cross-examined the now unavailable witness satisfied the substantially-the-same-parties standard.

III. THE ADMISSIBILITY OF FORMER TESTIMONY UNDER THE FEDERAL RULES OF EVIDENCE

The Supreme Court of the United States originally proposed a version of Rule 804(b)(1) that adopted the "similar motive and inter-

38. *Id.* (citation omitted). The court stated that the substantially-the-same-parties rule prevailed in Virginia, whose law controlled the case. *Id.*

39. *Id.* (citation omitted).

40. *See, e.g., Metropolitan St. Ry. v. Gumby*, 99 F. 192, 199 (An infant and his grandmother are not in privity, therefore they are not substantially the same parties.); *Anderson v. Hultberg*, 247 F. 273, 278 (8th Cir.) (holding that former testimony from husband's proceeding was not admissible against his wife in a subsequent proceeding because a husband and wife are not in privity), *cert. denied*, 248 U.S. 581 (1918).

41. *See, e.g., S. GREENLEAF, supra* note 32, at 278-79. For a definition of privity, *see supra* note 12.

42. *See, e.g., T. HUGHES, supra* note 32, § 5, at 59. A representative is "[o]ne who represents or stands in the place of another." Examples include a "receiver, liquidator, executor, administrator, guardian or tutor, but not an agent." BLACK'S LAW DICTIONARY 1466 (rev. 4th ed. 1968) (quoting *Husers v. Papania*, 22 So. 2d 755, 757 (La. Ct. App. 1945)).

43. *See, e.g., C. CHAMBERLAYNE, supra* note 32, at 2130. A successor in interest is "[o]ne who follows another in ownership or control of property." BLACK'S LAW DICTIONARY 1283 (5th ed. 1979). The term "successor in interest" has also been defined in the following manner:

In order to be a "successor in interest", a party must continue to retain the same rights as the original owner without change in ownership and there must be change in form only and not in substance, and transferee is not a "successor in interest." In the case of corporations, the term ordinarily indicates statutory succession as, for instance, when corporation changes its name but retains same property.

BLACK'S LAW DICTIONARY 746 (abrid. 5th ed. 1983) (citations omitted). Arguably, a family member may also qualify as a successor in interest. *See, e.g., Briggs v. Briggs*, 80 Cal. 253, 22 P. 334 (1889) (holding that sons were successors in interest of their father and were therefore permitted to offer the father's deposition in a subsequent proceeding). A representative, on the other hand, often denotes an executor or a wrongful death plaintiff. *See infra* notes 93 & 95.

est" test.⁴⁴ Dean Wigmore⁴⁵ first advanced this test, which a few courts and commentators adopted prior to the enactment of the Federal Rules of Evidence.⁴⁶ Under this test, a judge could admit testimony from a prior proceeding if any party possessing a similar interest and motive had an opportunity to cross-examine the now unavailable witness in the prior proceeding.⁴⁷

Prior to the Federal Rules of Evidence, courts generally employed the similar-interest-and-motive test only if the proponent offered former testimony against a party to the prior proceeding.⁴⁸ The admission of former testimony against a nonparty and the related fairness concerns were rarely at issue. In *Insul-Wool Insulation Corp. v. Home Insulation*,⁴⁹ for example, Insul-Wool had failed in a prior suit to establish the validity of its patent concerning a packing and insulation material.⁵⁰ In the prior suit, the trial court had sustained the defendants' affirmative defense that they had known of and used the product for two years before the plaintiff patented it.⁵¹ In the subsequent proceeding, Insul-Wool again sought an injunction and damages for an alleged infringement of its patent.⁵² Although the alleged infringer, Home Insulation, was not a party to the prior suit,⁵³ Home Insulation sought to use depositions that the defendants had taken and which the district court admitted in the prior proceeding.⁵⁴ The United States Court of Appeals for the Tenth Circuit affirmed, admitting the depositions because Insul-Wool had the same interest and motive for cross-examining the deponents as it had in the prior proceeding.⁵⁵

The similar-interest-and-motive test focuses solely on the cross-examination in the prior proceeding, and therefore, is largely predicated upon the similarity of legal issues and facts between the prior and subsequent proceedings.⁵⁶ Similar legal issues and facts presuma-

44. COMMUNICATION FROM THE CHIEF JUSTICE OF THE UNITED STATES, H.R. DOC. No. 46, 93d Cong., 1st Sess. 33 (1973).

45. 2 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1388, at 1733 (1904).

46. See, e.g., *Insul-Wool Insulation Corp. v. Home Insulation, Inc.*, 176 F.2d 502, 503 (10th Cir. 1949); see C. MCCORMICK, *supra* note 4, § 256, at 620.

47. See C. MCCORMICK, *supra* note 4, § 256, at 620; J. WIGMORE, *supra* note 45, at 1733.

48. *Insul-Wool*, 176 F.2d at 502.

49. *Id.*

50. *Id.* at 503.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 504.

56. See, e.g., *Mid-City Bank & Trust Co. v. Reading Co.*, 3 F.R.D. 320, 322-23 (D.N.J. 1944) (holding that a prior action deposition was admissible in a subsequent proceeding

bly make the former testimony sufficiently trustworthy. Moreover, efficiency concerns dictate that such testimony be admitted to avoid duplicative litigation.⁵⁷ This test consequently ignores the parties involved in each proceeding. In cases such as *Insul-Wool*,⁵⁸ however, in which a party offers testimony against a party to the prior proceeding, this does not present a problem because the opportunity-for-cross-examination requirement is satisfied.

Although the Supreme Court proposed a liberal test under which former testimony would be admissible against a party if another party with a similar interest and motive had examined the witness in a prior proceeding, the House Committee on the Judiciary added the more stringent requirement that the party to the prior proceeding must have been a predecessor in interest.⁵⁹ The committee noted that it was "generally unfair to impose upon the party against whom the hearsay evidence is being offered responsibility for the manner in which the witness was previously handled by another party."⁶⁰ The committee recognized the unfairness of "impos[ing] the examination of another, and with it the quality of the attorney selected, tactical decisions, access to information, and state of preparation upon a non-party to the litigation."⁶¹ To protect this panoply of interests, the committee limited the admission of former testimony to that of a party to the prior proceeding, or of a party whose predecessor in

because the issues were identical, and thus the prior party had a similar interest and motive to cross-examine). Even after Congress explicitly rejected a similar interest and motive test, many courts and commentators have continued to rely on the similarity of issues and facts in both proceedings as the sole basis for admitting former testimony. See *infra* notes 59-62 and accompanying text; see also *Oberlin v. Marlin Am. Corp.*, 596 F.2d 1322, 1329 (7th Cir. 1979) (holding that a prior action deposition was inadmissible under Rule 804(b)(1) because the issues were different and thus the prior party did not have a similar interest and motive to cross-examine); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1190, 1252 (E.D. Pa. 1980) (stating that Rule 804(b)(1)'s similar interest and motive requirement is predicated largely upon the similarity of issues in the prior and subsequent proceedings); C. MCCORMICK, *supra* note 4, § 257, at 620-22 (arguing that the issues in the prior proceeding must have been similar to the issues in the subsequent proceeding to ensure similar motive for cross-examination in the prior proceeding); 11 J. MOORE, *MOORE'S FEDERAL PRACTICE* § 804.04(3), at 266-67 (2d ed. 1985) (arguing that courts should focus on the issues involved in both proceedings to determine if the prior party had a similar motive to cross-examine).

57. See C. MCCORMICK, *supra* note 4, § 256, at 620; J. WIGMORE, *supra* note 45, § 1388, at 1733-35; Note, *Affidavits, Depositions, and Prior Testimony*, 46 IOWA L. REV. 356, 363-64 (1961).

58. *Insul-Wool Insulation Corp. v. Home Insulation Inc.*, 176 F.2d 502, 503 (10th Cir. 1949).

59. *Federal Rules of Evidence: Hearings on H.R. No. 650 Before the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 15 (1973), reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7075, 7088.

60. *Id.*

61. M. GRAHAM, *EVIDENCE TEXT, RULES, ILLUSTRATIONS AND PROBLEMS* 257 (1981).

interest had an opportunity and similar motive to develop the testimony in a prior proceeding.⁶²

In approving the House's version of the proposed Rule, the Senate report stated that "there was not much difference" between the version proposed by the Supreme Court of the United States and that adopted by the House of Representatives.⁶³ Although Congress did not define the term "predecessor in interest," its inclusion of the term suggests that it intended that a sufficiently close relationship exist between the parties before a court may admit former testimony. Moreover, this relationship should satisfy the fairness concerns underlying Rule 804(b)(1).

The "markup sessions" of the House Subcommittee on Criminal Justice⁶⁴ reveal that Rule 804(b)(1), which governs the use of former testimony, should parallel the use of prior action depositions under Rule 32 of the Federal Rules of Civil Procedure.⁶⁵ Representative William L. Hungate, chairman of the subcommittee, in particular espoused this view.⁶⁶ Because courts often rely on the explanations of authoritative persons, especially chairpersons, who were closely involved in developing and drafting legislation,⁶⁷ courts have cited Representative Hungate as an authoritative source regarding the leg-

62. See *supra* note 59.

63. *Federal Rules of Evidence: Hearings on S. Rep. No. 1277 Before the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 28 (1974) reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7051, 7074. The resulting confusion among the courts and commentators illustrates that there is a substantial difference between the version proposed by the Supreme Court and that adopted by the House.

64. *Rules of Evidence (Supplemental): Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 388 (1973). During these hearings, the subcommittee listened to testimony and read into the record letters from individuals and associations offering recommendations for amending Rule 804(b)(1). Unfortunately, no written record of these debates exists. Professor Weissenberger, however, obtained tapes of the markup sessions held by the subcommittee on Rule 804(b)(1) and transcribed the tapes. See Weissenberger, *The Admissibility of Grand Jury Transcripts: Avoiding the Constitutional Issue*, 59 TUL. L. REV. 335, 353-65 (1984). The actual markup on legislation performed by a congressional subcommittee is a primary source of authoritative legislative history. See, e.g., *United States v. Oates*, 560 F.2d 45, 69-80 (2d Cir. 1977) (The court explicitly deferred to the House Subcommittee on Criminal Justice's views on the intended effect of Rule 803(8)(b) and (c).); see also G. FOLSOM, LEGISLATIVE HISTORY 27 (1979) (A committee report is a primary source of authoritative legislative history.).

65. See Weissenberger, *supra* note 64, at 360-63. In a forthcoming article, Professor Weissenberger persuasively argues that courts must focus on the subcommittee's version of Rule 804(b)(1) in order to reconcile seemingly substantial differences between the House and Senate reports. See Weissenberger, *The Former Testimony Hearsay Exception: A Study in Rulemaking, Judicial Revisionism, and the Separation of Powers*, 67 N.C.L. REV. — (1989).

66. See Weissenberger, *supra* note 64, at 362-63.

67. See, e.g., *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 66 (1964); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951); see also Weissenberger, *supra* note 64, at 348 n.40.

islative history of the Federal Rules of Evidence.⁶⁸

Rule 32(a)(4) permits a party to offer depositions⁶⁹ in a subsequent action involving the "same parties or their representatives or successors in interest."⁷⁰ Despite the express language of the Rule, most courts do not require identical parties; rather, courts often allow "substantially the same" parties to invoke Rule 32(a)(4).⁷¹ Under Rule 32(a)(4), courts have construed the substantially-the-same-parties requirement to encompass a plethora of factual situations. A party may offer a prior action deposition, however, only if there is a sufficiently close relationship between the party against whom the deposition is being offered and a party in the prior proceeding in which the deposition was taken. Examples of a sufficiently close relationship include a parent corporation and its subsidiary,⁷² and a private plaintiff and private corporations intricately involved in a shipping accident.⁷³

In addition, a sufficiently close relationship may exist between an

68. *Oates*, 560 F.2d at 69-71.

69. Rule 32 of the Federal Rules of Civil Procedure provides for the use of a deposition in a subsequent proceeding. Many courts, however, have treated the term "deposition" as including both deposition testimony and former testimony, including testimony from a prior proceeding. *See, e.g., Arrow-Hart, Inc. v. Philip Carey Co.*, 552 F.2d 711, 713 (6th Cir. 1977) (holding that a trial transcript was admissible as a deposition under Rule 32); 5 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1401, at 201-02 (J. Chadbourn rev. 1974).

70. Rule 804 and Rule 32(a)(4) provide independent bases for admitting deposition or former testimony. 4A J. MOORE, MOORE'S FEDERAL PRACTICE § 32.02[1], at 32-11 (2d ed. 1987). The Supreme Court amended Rule 32(a)(4) in 1980. *See* FED. R. CIV. P. 32(a)(4) advisory committee's note, 85 F.R.D. 521, 530. In amending Rule 32(a)(4), the advisory committee stated that the Federal Rules of Evidence do not limit the admissibility of depositions under Rule 32(a)(4). *See* FED. R. CIV. P. 32(a)(4) advisory committee's note, 85 F.R.D. 521, 530. Former testimony, including depositions, may be admissible under Rule 804(b)(1) even if the deposition does not satisfy Rule 32(a)(4). Similarly, deposition testimony, and arguably former testimony, may be admissible under Rule 32(a)(4) even if it does not satisfy Rule 804(b)(1).

In determining the admissibility of a prior action deposition, it is unclear whether Rule 804(b)(1) or Rule 32(a)(4) controls if one rule is satisfied but the other is not. *See, e.g., Hub v. Sun Valley Co.*, 682 F.2d 776, 778 (9th Cir. 1982) (declining to decide whether a prior action deposition is admissible under Rule 32(a)(4) if the similar-interest-and-motive test adopted by some courts in the Rule 804(b)(1) context is satisfied because any such decision would be dicta). For an analysis of this issue, see Comment, *supra* note 7.

71. *See, e.g., Rule v. International Ass'n of Bridge, Structural and Ornamental Ironworkers, Local Union No. 396*, 568 F.2d 558, 568-69 (8th Cir. 1977); *Ikerd v. Lapworth*, 435 F.2d 197, 205-06 (7th Cir. 1970); *Alamo v. Pueblo Int'l, Inc.*, 58 F.R.D. 193, 194 (D.P.R. 1972); *Fouke Fur Co. v. Bookwalter*, 261 F. Supp. 367, 368-70 (E.D. Mo. 1966); *Hertz v. Graham*, 23 F.R.D. 17, 19-23 (S.D.N.Y. 1958), *aff'd*, 292 F.2d 443, 444-47 (2d Cir. 1961).

72. *Ornamental Ironworkers*, 568 F.2d at 569; *Miwon, U.S.A., Inc. v. Crawford*, 629 F. Supp. 153, 154 n.3 (S.D.N.Y. 1985).

73. *Tug Raven v. Crown Central Petroleum Corp.*, 419 F.2d 536, 542-43 (4th Cir. 1969), *cert. denied*, 398 U.S. 938 (1970).

automobile driver and a passenger. In *Ikerd v. Lapworth*,⁷⁴ the United States Court of Appeals for the Seventh Circuit upheld the district court's admission of depositions taken before the driver had filed suit against the defendant because of the sufficiently close relationship between the parties. The court reached this holding despite the fact that only counsel for the passenger was present at the deposition.⁷⁵ The court noted that the driver had agreed to allow the passenger's counsel to "assume almost complete charge of both cases" at trial.⁷⁶ Moreover, the relationship between the driver and his passenger ensured that the passenger's counsel would prepare equally and make the same tactical decisions for both parties. Because the court had consolidated discovery in each of the lawsuits, the parties had almost identical access to information concerning the accident.⁷⁷ The court concluded that the cross-examination during the deposition on behalf of the driver would not have differed from that conducted on behalf of the passenger.⁷⁸ The fairness concerns underlying Rule 32(a)(4), as well as Rule 804(b)(1), were therefore satisfied.

At common law, former testimony, including depositions, was admissible if substantially the same parties were involved in both proceedings.⁷⁹ Unlike Rule 32(a)(4),⁸⁰ however, the substantially-the-same-parties requirement of the former testimony exception was narrowly construed at common law. The common law former testimony exception encompassed only parties in privity, representatives, and successors in interest.⁸¹ The substantially-the-same-parties requirement, however, is likely to be both overinclusive and underinclusive with regard to the fairness concerns underlying Rule 804(b)(1). The standard is overinclusive because, as construed under the former testimony exception, the requirement strictly encompasses legal relationships only, which seldom satisfy the fairness concerns of Rule 804(b)(1). The standard is underinclusive, however, because many relationships that are not substantially the same, such as family relationships,⁸² satisfy the fairness concerns of Rule 804(b)(1). Consequently, the substantially-the-same-parties requirement seldom pro-

74. 435 F.2d 197 (7th Cir. 1970).

75. *Id.* at 204.

76. *Id.* at 206.

77. *Id.*

78. *Id.*

79. See *supra* notes 32-43 and accompanying text.

80. See *supra* note 71.

81. See *supra* notes 41-43 and accompanying text.

82. *Briggs v. Briggs*, 80 Cal. 253, 22 P. 334 (1889) (holding that sons were successors in interest of their father and were therefore permitted to offer the father's deposition in a subsequent proceeding).

vides adequate security against the admission of unreliable hearsay. Whether the parties are substantially the same, therefore, should constitute only one factor in determining whether former testimony is admissible.

IV. CURRENT INTERPRETATIONS OF THE TERM "PREDECESSOR IN INTEREST"

Courts have produced four different interpretations of the term "predecessor in interest." First, some courts have construed the term to mean common law privity.⁸³ Second, under certain circumstances, courts have treated the United States government as the predecessor in interest of an individual bringing a related private action.⁸⁴ Third, courts have determined that a governmental unit sharing a "community of interest" with a party in a subsequent proceeding is a predecessor in interest of that party.⁸⁵ Finally, some courts have viewed any party sharing a "similar interest and motive" with a party in a subsequent proceeding as a predecessor in interest.⁸⁶ Except for the inter-

83. *E.g.*, *In re Screws Antitrust Litig.*, 526 F. Supp. 1316, 1318-19 (D. Mass. 1981) (holding that defendants in a criminal action were not the predecessors in interest of unrelated defendants in a subsequent antitrust proceeding); *ILC Peripherals Leasing Corp. v. International Business Machines (In re IBM Peripheral EDP Devices Antitrust Litig.)*, 444 F. Supp. 110, 111-13 (N.D. Cal. 1978) (holding that corporations from a prior antitrust proceeding were not the predecessors in interest of an unrelated corporation in a subsequent proceeding); *Lloyd v. American Export Lines*, 580 F.2d 1179, 1190-91 (3d Cir.) (Stern, J., concurring) (arguing that the Coast Guard was not the predecessor in interest of a private plaintiff), *cert. denied*, 439 U.S. 969 (1978); *Maxwell v. City of Springfield*, 705 S.W.2d 90, 97-98 (Mo. Ct. App. 1986) (Maus, J., dissenting) (arguing that a master was not the predecessor in interest of his nonparty servant).

84. *In re Master Key Litig.*, 72 F.R.D. 108, (D. Conn. 1976) (holding that the United States was the predecessor in interest of the private plaintiffs in a subsequent antitrust action), *aff'd*, 551 F.2d 300 (2d Cir. 1976).

85. *E.g.*, *Lloyd*, 580 F.2d at 1185-87 (The Coast Guard was the predecessor in interest of a private plaintiff.); *Pacelli v. Nassau County Police Dep't*, 639 F. Supp. 1382, 1385-86 (E.D.N.Y. 1986) (The United States, as a party in a criminal action, was the predecessor in interest of a municipality and its police officers in a subsequent civil rights action.); *Carpenter v. Dizio*, 506 F. Supp. 1117, 1124 (E.D. Pa.) (The state, as a party in a criminal action, was the predecessor in interest of a municipality and its police officers in a subsequent civil rights action.), *aff'd*, 673 F.2d 1298 (3d Cir. 1981). *But see Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1190, 1252-55 (E.D. Pa. 1980) (Codefendants in a prior antitrust proceeding were not predecessors in interest of codefendants in a subsequent antitrust proceeding.).

86. *E.g.*, *Dykes v. Raymark Indus.*, 801 F.2d 810, 815-16 (6th Cir. 1986) (A corporation was the predecessor in interest of an unrelated corporation.), *cert. denied*, 107 S. Ct. 1975 (1987); *In re Paducah Towing*, 692 F.2d 412, 418 (6th Cir. 1982) (The United States Coast Guard, which originally held a license revocation hearing for a ship captain involved in an accident, was the predecessor in interest of a third party corporation that owned a ship that was also involved in the accident.); *In re Related Asbestos Cases*, 543 F. Supp. 1142, 1147-48 (N.D. Cal. 1982) (A factory worker was the predecessor in interest of a shipyard worker employed by an unrelated company involved in the subsequent proceeding.); *Houten v.*

pretation involving the federal government in related private actions, all of these interpretations are irreconcilable with Rule 804(b)(1)'s legislative history, which indicates that fairness was of primary importance.

A. *The Privity Interpretation*

Some courts have interpreted the term "predecessor in interest" to mean a party in privity.⁸⁷ Privity is a concurrent or successive relationship to the same property right.⁸⁸ At common law, it was sufficient if the parties were privies in law or estate.⁸⁹

In the context of former testimony, privity exists between parties in the following relationships: Grantor and grantee;⁹⁰ assignor and assignee;⁹¹ trustee and beneficiary;⁹² administrator or executor and heirs or estate creditors;⁹³ lessor and lessee;⁹⁴ decedent and wrongful

Robison (*In re Van Houten*), 56 Bankr. 891, 894-95 (W.D. Mich. 1986) (A creditor was the predecessor in interest of a debtor's trustee.); *Standard Oil Co. v. Montedison*, 494 F. Supp. 370, 421 n.462 (D. Del. 1980) (A corporation was the predecessor in interest of two unrelated corporations.), *aff'd*, 664 F.2d 356 (3d Cir. 1981); *Hewitt v. Hunter*, 432 F. Supp. 795, 799 (W.D. Va. 1977) (A purchaser was not the predecessor in interest of his vendor.), *aff'd*, 574 F.2d 182 (4th Cir. 1982); *Maxwell v. City of Springfield*, 705 S.W.2d 90, 92-94 (Mo. Ct. App. 1986) (A master was the predecessor in interest of his nonparty servant.).

87. See *supra* note 83. Despite widespread rejection by the courts, most commentators have argued in favor of the privity interpretation. See M. GRAHAM, *HANDBOOK OF FEDERAL EVIDENCE* § 804.1, at 948-49 (1986); 4 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* § 804(b)(1)[04], at 804-67 (1976); see also Weissenberger, *supra* note 65 (Although it is not clear that Congress intended a privity interpretation, a "formal succession of interests" was contemplated.). But see E. CLEARY, *MCCORMICK ON EVIDENCE* § 257, at 766-67 (3d ed. 1984).

88. See *BLACK'S LAW DICTIONARY* 1079 (5th ed. 1979) (defining privity as "[a] mutual or successive relationship").

89. Jones, *supra* note 32, at 594. Most common law commentators argued that former testimony should be admitted if the parties were privies by blood. See, e.g., B. ELLIOTT, *supra* note 31, § 508, at 594. Privity by blood is defined as that which "existed between an heir and his ancestor . . . and between coparceners." *BLACK'S LAW DICTIONARY* 1079 (5th ed. 1979). These commentators, however, never cited case law, apparently because courts refused to admit former testimony solely on the basis of privity by blood. For a discussion of the problems involved in admitting former testimony on the basis of privity by blood, which would permit testimony to be offered against a coparcener, see Turner, *Federal Rule of Evidence 804: Will the Real Predecessor-in-Interest Please Stand Up*, 19 AKRON L. REV. 251, 261 (1985).

90. E.g., *Yale v. Comstock*, 112 Mass. 267, 268 (1873). For an analysis of the problems involved in admitting former testimony in the grantor-grantee context, see *infra* notes 101-03 and accompanying text.

91. E.g., *Atkins v. Anderson*, 63 Iowa 739, 743, 19 N.W. 323, 324-25 (1884).

92. See *Kerrison v. Stewart*, 93 U.S. 155, 162 (1876) (holding that beneficiaries were bound by a judgment entered in a prior proceeding to which their trustee was a party because the trustee was privy to their interests and adequately represented their interests).

93. E.g., *Strickland v. Hudson*, 55 Miss. 235, 239-41 (1877) (Testimony of deceased in prior proceeding was offered against the administrator of deceased's estate in a subsequent proceeding.).

94. E.g., *Shaw v. New York Elevated R.R.*, 187 N.Y. 186, 193, 79 N.E. 984, 987 (1907).

death plaintiff;⁹⁵ and parent corporation and subsidiary.⁹⁶

Traditionally, few safeguards have surrounded the privity relationship.⁹⁷ The privity in the subsequent proceeding "stands in the shoes" of his predecessor apparently because he can receive no more than his predecessor possessed.⁹⁸ A privity usually cannot relitigate rights that his predecessor had settled in a prior proceeding when he possessed those rights.⁹⁹ Efficiency, absent any other considerations, therefore dictates that a privity be bound with his predecessor's cross-examination.

At common law, the proffered former testimony usually concerned the property forming the privity relationship.¹⁰⁰ A grantee, for example, would often offer former testimony concerning the property conveyed to him by his grantor.¹⁰¹ But simply because a party succeeds to a property right does not mean that a sufficiently close relationship exists between that person and the predecessor in interest. A predecessor, for example, may have placed a lower value on the property than would his successor.¹⁰² If so, the predecessor's degree of

For an analysis of the problems involved in admitting former testimony in the lessor-lessee context, see *infra* notes 112-13 and accompanying text.

95. *E.g.*, *Atlanta & West Point R.R. v. Venable*, 67 Ga. 697, 699-700 (1881). *But see* *Arsnow v. Red Top Cab Co.*, 159 Wash. 137, 144-45, 292 P. 436, 438 (1930) (In a subsequent proceeding, an administratrix was not permitted to offer the former testimony of her deceased husband as to the issue of his sanity because the issue of his sanity was not a continuation of her husband's original suit, and therefore the same parties were not involved.)

96. In *In re IBM Peripheral EDP Devices Antitrust Litigation*, IBM sought to use trial transcripts from prior proceedings to which it had been a party. 444 F. Supp. 110, 111-12 (N.D. Cal. 1978). Memorex, the defendant, objected to IBM's use of the former testimony because Memorex had not been a party to any of the prior proceedings and because none of the parties to the prior proceedings was a predecessor in interest of Memorex. *Id.* The district court refused to admit the former testimony because the parties in the prior proceedings and Memorex were not corporate privies. *Id.* at 113.

Rule 804(b)(1)'s fairness concerns are usually satisfied if a parent corporation and its subsidiary are involved. Both a parent corporation and its subsidiary would probably actively prepare for a lawsuit. Because discovery would be consolidated, both parties would enjoy similar access to information. Further, there may be an overlap of attorneys employed during various stages of the litigation. If so, different tactical decisions would be less likely than if there were different attorneys at each stage of the litigation.

97. *See* *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 126-29 (1912). A judgment entered in a prior proceeding binds a party in privity with a party to the prior proceeding because their relationship ensures identical interests.

98. *See, e.g.* *Guy v. Hall*, 7 N.C. (3 Mur.) 118, 119 (1819).

99. *Id.*

100. *See* *E. CLEARY*, *supra* note 87, § 268, at 795-96. *See generally* *S. GREENLEAF*, *supra* note 32, at 278-79 (Former testimony is admissible "where the parties, though not the same, are so privity in interest—as where one was an executor or perhaps a grantor—that the same motive and need for cross-examination existed.")

101. *See supra* note 90.

102. Collateral estoppel or "issue preclusion" occurs "where a question of fact essential to the judgment is actually litigated and determined by a valid and final [prior] judgment,

preparation for the prior proceeding and his tactical decisions during that proceeding could differ substantially from his successor. Furthermore, a successor may gain better information concerning the property's disposition if he placed a higher value on it than his predecessor had. The successor has the benefit of hindsight and may examine the previous litigation to refute or impeach the predecessor's testimony.¹⁰³ On the other hand, much time may have passed since the original litigation and the successor's access to information may be impaired by the unavailability of witnesses or by their fading recollection of past events.

Nothing in the legislative history of Rule 804(b)(1) indicates, however, that Congress intended to limit the term "predecessor in interest" to parties in prior proceedings or their privies. If Congress had intended to reinstate the outmoded concept of privity employed in the law of property, it could have done so easily.¹⁰⁴ Moreover, privity is narrower than the common law's restrictive substantially-the-same requirement, which also encompasses representatives and

[because] the determination [is then] conclusive between the parties in a subsequent action on a different cause of action." RESTATEMENT OF JUDGMENTS § 68 (1942). In the offensive collateral estoppel context, a plaintiff seeks to preclude a defendant from relitigating issues that that defendant previously and unsuccessfully litigated against another plaintiff. Whether the defendant is estopped is left to the court's discretion. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979). *Parklane* specifically states, however, that offensive collateral estoppel is not permitted if the defendant had little economic incentive to litigate the prior action vigorously. *Id.* at 330. The markup sessions on Rule 804(b)(1) reveal that key subcommittee members believed it was unfair to bind a party if his predecessor in interest had had an insufficient economic incentive to cross-examine in the prior proceeding. See Weissenberger, *supra* note 64, at 354-55 (statements of Rep. William L. Hungate and Rep. Wiley Mayne). Admittedly, courts would find it difficult to gauge how much a predecessor in interest valued the property. Such difficulty would result in the court expending more time to determine whether the former testimony should be admitted. Turner, *supra* note 89, at 263. Fairness concerns, however, compel a closer examination of a predecessor in interest's motivation to protect his interests in the 804(b)(1) context than a litigant's motivation to protect his interests in the collateral estoppel context because the former testimony is being offered against a person who was not a party to the prior proceeding. Therefore, unlike offensive collateral estoppel, the opponent of the hearsay, even if a privy of a party to the prior proceeding, never has his day in court.

103. See FED. R. EVID. 804(b)(1). Refuting or impeaching the grantor's testimony, however, is not an effective trial technique, even if the property he conveyed is unrelated to the present litigation. See Turner, *supra* note 89, at 263 n.63. Refuting or impeaching a predecessor in interest's testimony is likely to be ineffective because the jury will believe that the party in the subsequent proceeding is trying to "sandbag" them by discrediting a person who gratuitously transferred property to him. Consequently, the party in a subsequent proceeding will often forego refuting or impeaching the predecessor in interest's testimony. If so, untrustworthy evidence would once again be admitted. This is an undesirable result of the privity interpretation of the "predecessor in interest" language—an interpretation that ignores the cross-examination conducted in the prior proceeding and the cross-examination to be conducted in the subsequent proceeding.

104. See E. CLEARY, *supra* note 87, at 766.

successors in interest.¹⁰⁵ Although these concepts often overlap, in the context of former testimony, the privity concept does not include a successor in interest, such as a close family member.¹⁰⁶ The available information indicates that Congress must have intended an interpretation that is less restrictive than privity.¹⁰⁷ A less restrictive interpretation of the term "predecessor in interest" is consistent with the steady broadening of the common law parties requirement of the exception for former testimony.¹⁰⁸

Congress clearly intended to adopt a rule that would be fair to any party who did not have an opportunity to examine a witness in a prior proceeding.¹⁰⁹ The privity interpretation does not always promote this policy objective because it assumes that it is fair to bind a party solely because the party and the predecessor have a common interest in the disputed property.¹¹⁰ Consequently, a privity relationship seldom provides adequate security against the admission of unreliable hearsay.¹¹¹ In contrast, many relationships involving nonprivity parties may satisfy the fairness concerns underlying Rule 804(b)(1). A privity interpretation, therefore, would unnecessarily restrict the admission of former testimony in some cases in which it would be fair to admit that testimony.

Furthermore, neither Rule 804(b)(1) nor its legislative history require that the proffered former testimony involve the property previously owned by the predecessor and now owned by his privity.¹¹² In such situations, it is not likely that a concurrent or successive relationship to the same property right will ensure that Rule 804(b)(1)'s fairness concerns are satisfied. In a concurrent relationship context, for example, suppose a lessor and a lessee each bring a claim for personal injuries resulting from an automobile accident.¹¹³ If testimony

105. See *supra* notes 41-43 and accompanying text.

106. See *supra* note 43 and accompanying text.

107. See *supra* notes 59-62 and accompanying text.

108. See *supra* notes 12-43 and accompanying text.

109. See *supra* notes 59-62 and accompanying text.

110. See, e.g., *Mid-City Bank & Trust Co. v. Reading Co.*, 3 F.R.D. 320, 322 (D.N.J. 1944).

111. Professor Graham has stated: "At common law, statements by a person in privity with a party are receivable in evidence as an admission of the party." M. GRAHAM, *supra* note 61, at 148. The Federal Rules of Evidence dispensed with privity-based admissions and adopted Professor Morgan's position that "considerations of privity [do not] furnish criteria of trustworthiness nor aid in the evaluation of testimony." *Id.* at 149 (citing Morgan, *Admissions*, 12 WASH. L. REV. 181 (1937)). For a further discussion of the trustworthiness problems involved in admitting former testimony solely on the basis of privity, see Turner, *supra* note 89, at 261-62.

112. See Turner, *supra* note 89, at 261.

113. Joint tenants are another example of how concurrent privity relationships do not satisfy fairness concerns of Rule 804(b)(1). *Id.*

is introduced in the lessee's case, this testimony is subsequently admissible against the lessor solely because the lessor and lessee are privies. The parties' common interest, however, does not arise from their respective property rights. Rather, the parties' common interest arises, if at all, by virtue of their relationship. In any event, the lessor-lessee relationship is usually not sufficiently close. Assuming the lessor possesses superior resources, his tactical decisions, state of preparation, and access to information will more likely be superior to the lessee's. It would usually be unfair, therefore, to bind a lessor with his lessee's cross-examination.

If the Rule were interpreted so that privity constituted only one factor in determining whether former testimony should be admitted, the interpretation would be consistent with the fairness concerns described in the legislative history of Rule 804(b)(1).¹¹⁴ Such an interpretation would satisfy the intent of the House Subcommittee on Criminal Justice that Rule 804(b)(1) parallel the use of prior action depositions under Rule 32(a)(4) of the Federal Rules of Civil Procedure.¹¹⁵ Rule 32(a)(4) has a substantially-the-same-parties requirement, rather than a privity requirement.¹¹⁶ This approach is also consistent with the common law's substantially-the-same-parties requirement of the former testimony exception, which encompasses privity.¹¹⁷

Rule 804(b)(1)'s legislative history indicates that Congress was not concerned with the possibility that a party could receive more than his predecessor in a subsequent proceeding.¹¹⁸ At the expense of relitigating rights, Congress wanted to bind the party in the subsequent proceeding only if it was fair to do so.¹¹⁹ A party in privity, therefore, should stand in his predecessor's shoes only if the parties have overlapping interests.

B. *The Government Agency—Private Plaintiff Interpretation*

Courts have interpreted the term "predecessor in interest" to include the United States Government as the predecessor in interest of individuals bringing related private actions. In *In re Master Key*

114. See *supra* notes 59-62 and accompanying text. In amending Rule 804(b)(1), the advisory committee stated that privity is merely "further assurance" that it is fair to bind a party with his predecessor's cross-examination of the witness who had proffered the testimony. See FED. R. EVID. 804(b)(1) advisory committee's note, 56 F.R.D. 183, 324.

115. See *supra* notes 65-66 and accompanying text.

116. See *supra* note 71 and accompanying text.

117. S. GREENLEAF, *supra* note 32, at 278-79.

118. See *supra* notes 59-62 and accompanying text.

119. *Id.*

Litigation,¹²⁰ for example, Eaton, a defendant corporation, sought to offer trial testimony from an earlier federal antitrust action.¹²¹ The federal antitrust action had spawned numerous private class actions, one of which was the subject of the *Master Key* dispute.¹²² The private plaintiffs objected to Eaton's use of the former testimony because none of the plaintiffs had been a party to the prior proceeding between the United States Government and Eaton.¹²³ The court admitted the former testimony, however, finding that there were special considerations that supported a finding that the United States Government was the predecessor in interest of these private individuals bringing a related private action.¹²⁴

In *Master Key*, the court examined the "unique relationship" between the government antitrust enforcement agency and injured competitors.¹²⁵ The court, however, did not analyze how this unique relationship made it fair to bind the private plaintiffs with the cross-examination conducted by the government.¹²⁶ Nonetheless, this approach is apparently based on the premise that when the government brings suit, it sues on behalf of itself and the public interest. Cross-examination by a particular governmental unit, therefore, binds that unit and all citizens protected by the statute.

The approach of binding private plaintiffs with the government's cross-examination has not gained wide acceptance.¹²⁷ Professor Martin has argued that in the antitrust context, this practice "appear[s] to be inconsistent with relatively specific statutory language" delineating the relationship between the government and private plaintiffs.¹²⁸ To achieve the purpose of the antitrust legislation, however, it must be implemented beyond its text.¹²⁹ Congress intended "to minimize the burdens of litigation for injured private suitors by making available to

120. 72 F.R.D. 108 (D. Conn. 1976).

121. *Id.* at 109; see also *State v. New Orleans Waterworks*, 107 La. 1, 39, 31 So. 395, 411 (allowing the state to offer testimony from a prior proceeding involving private individuals suing the same defendant), *denying application for reh'g*, 107 La. 1, 45, 31 So. 395, 414 (1901).

122. *Master Key*, 72 F.R.D. at 109.

123. *Id.*

124. *Id.* at 110. Because Rule 804(b)(1) requires that the witness be unavailable, only the testimony of a witness who had died since the prior proceeding was admitted. *Id.*

125. *Id.* at 109.

126. The court explained that the government's antitrust suit provided special benefits to the private plaintiffs bringing the subsequent civil suit. One benefit was that the government's suit tolled the statute of limitations, thereby extending the period of recovery for the private plaintiffs. *Id.*

127. Martin, *Inherent Judicial Power: Flexibility Congress Did Not Write into the Federal Rules of Evidence*, 57 TEX. L. REV. 167, 201 n.198 (1979).

128. *Id.*

129. See generally K. Llewellyn, *THE COMMON LAW TRADITION* 522 app. c. (1960) (discussing the general canons of construction for statutes).

them all matters previously established by the [g]overnment in anti-trust actions."¹³⁰ To promote parallel government and private action, therefore, the government should be treated as the predecessor in interest of private plaintiffs bringing subsequent antitrust actions.

The fairness concern embodied in Rule 804(b)(1), which is a primary factor in interpreting the term "predecessor in interest," is usually satisfied in the antitrust enforcement context because a sufficiently close relationship is generally involved between a government agency actively carrying out its statutory duty, and sophisticated corporations that the legislation was designed to benefit. Both the government and the corporations actively prepare for litigation and enjoy similar access to information. Furthermore, corporations derive many benefits from the government's antitrust enforcement. If Rule 804(b)(1)'s fairness concern is met, a corporation should "take the bitter with the sweet,"¹³¹ i.e., courts should permit parties to offer former testimony from a government suit against a corporation in a subsequent private antitrust action because the corporation can often offer former testimony from government suits under Rule 32(a)(4) of the Federal Rules of Civil Procedure, or under Rule 804(b)(1).¹³²

C. *The "Community of Interest" Interpretation*

Some courts have applied the community-of-interest test in interpreting the term "predecessor in interest"¹³³ if a governmental unit has cross-examined a witness and the testimony is subsequently offered against a private plaintiff,¹³⁴ or against police officers in a civil

130. *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 568 (1951) (construing Clayton Act, ch. 323, § 5, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. § 16(a) (1982)). *Emich* involved the effect a judgment in an action brought by the government has on a subsequent private antitrust action. *Id.* Since 1980, private plaintiffs have been able to use judgments against nonparties to the government's enforcement action. See Motomura, *Using Judgments as Evidence*, 70 MINN. L. REV. 979, 994 (1986) (construing 15 U.S.C. § 16(a) (1982)). For an analysis of why the nature and limits of a judgment are similar to that of former testimony, see *infra* notes 193-202 and accompanying text.

131. *Cf. Arnett v. Kennedy*, 416 U.S. 134, 153-54 (1973) (The state can give a substantive right and at the same time limit that right procedurally; therefore, a litigant must "take the bitter [procedure limiting the right] with the sweet [the right itself]."). This trend is also evidenced by the fact that parties to the government's enforcement action may now assert judgments from the enforcement action as *res judicata* in later private antitrust litigation and nonparties to the enforcement action may assert judgments against parties to the government's enforcement action. See Motomura, *supra* note 130, at 992-94.

132. See *supra* notes 64-65 and accompanying text.

133. See *supra* note 85 and accompanying text. At common law, a mere "community of interest" between the parties did not warrant admitting the former testimony. See C. CHAMBERLAYNE, *supra* note 32, § 1672, at 2146.

134. See *Lloyd v. American Export Lines*, 580 F.2d 1179, 1181 (3d Cir.), *cert. denied*, 439 U.S. 969 (1978).

rights action.¹³⁵ Although this approach is apparently based on a radically expanded version of the governmental-unit/protected-private-plaintiff approach,¹³⁶ it is not based upon any statutorily defined relationship.

The most widely cited case utilizing the community-of-interest approach is *Lloyd v. American Export Lines, Inc.*¹³⁷ Lloyd, an injured crewman, filed a negligence action and unseaworthiness claim against his employer, a shipowner, for injuries he suffered in an altercation with Alvarez, a fellow crewman.¹³⁸ Lloyd joined Alvarez as a third-party defendant, and Alvarez cross-claimed against the shipowner.¹³⁹ The shipowner sought to use testimony from a prior Coast Guard proceeding that had investigated the incident.¹⁴⁰ Alvarez objected to the admission of that testimony, arguing that the Coast Guard was not his predecessor in interest.¹⁴¹ The district court agreed with Alvarez and excluded the evidence.¹⁴²

The United States Court of Appeals for the Third Circuit reversed, holding that a community of interest existed between the Coast Guard and the crewman, and that the former testimony was therefore admissible.¹⁴³ The court reasoned that Alvarez sought to vindicate his individual interests by recovering for his injuries.¹⁴⁴ Alternatively, the Coast Guard was acting to protect its interest and that of the public by ensuring a safe merchant marine service.¹⁴⁵ Nevertheless, both the Coast Guard and Alvarez were interested in determining Lloyd's culpability.¹⁴⁶

135. See *Pacelli v. Nassau County Police Dep't*, 639 F. Supp. 1382, 1383 (E.D.N.Y. 1986); *Carpenter v. Dizio*, 506 F. Supp. 1117, 1120 (E.D. Pa.), *aff'd*, 673 F.2d 1298 (3d Cir. 1981).

136. See *supra* notes 125-26 and accompanying text.

137. *Id.*

138. *Id.* at 1181. Lloyd's complaint was dismissed by the district court because he failed to appear for a pretrial deposition or the trial. Trial was had, however, on the officer's suit against the shipowner. *Id.*

139. *Id.*

140. *Id.* at 1182-83.

141. *Id.* at 1184.

142. *Id.* at 1181.

143. *Id.* at 1185-87. *But see* *Federal Deposit Ins. Corp. v. Glickman*, 450 F.2d 416, 418 (9th Cir. 1971). The United States Government and the FDIC are not the "same party" for purposes of former testimony exception. In the subsequent proceeding, the FDIC "stood in the shoes" of the insolvent bank involved in the subsequent proceeding, not the United States Government who originally brought a criminal action against the president and an alleged agent of the bank. *Id.*

144. *Lloyd*, 580 F.2d at 1186.

145. *Id.*

146. *Id.* The *Lloyd* court reasoned that there was such a "great need for the excluded testimony that a new trial was essential." *Id.* at 1182. A "great need" for testimony, however, is not relevant in a sufficiently-close-relationship analysis. Rule 804(b)(1) requires an unavailable declarant. Any party who wants to admit former testimony obviously has a "great

The community-of-interest test employed in *Lloyd*, in effect, ignores Rule 804(b)(1)'s predecessor-in-interest requirement. After finding that the parties enjoyed a community-of-interest, the *Lloyd* court implied that *any* party having a like motive would be sufficient.¹⁴⁷ The court thus relied solely on the similar-interest-and-motive requirement, even though Congress had specifically rejected such a broad approach.¹⁴⁸ The *Lloyd* court failed to address how the parties' relationship fostered a community of interest that satisfied Rule 804(b)(1)'s predecessor-in-interest requirement.¹⁴⁹ This resulted in a decision that largely ignored Congress' desire to protect parties not represented in the prior proceeding.

The United States District Court for the Eastern District of New York recently utilized the community-of-interest test in *Pacelli v. Nassau County Police Department*.¹⁵⁰ Pacelli, a murder convict, brought a civil rights action against a municipal police department and three of its detectives.¹⁵¹ Pacelli alleged that the detectives had fabricated evidence to corroborate the confession of Pacelli's alleged accomplice that he and Pacelli murdered the deceased.¹⁵² To prove this allegation, Pacelli sought to use his accomplice's testimony from an unrelated criminal narcotics prosecution concerning the location of the murder weapon, which was a knife.¹⁵³ In that proceeding, the accomplice had testified that they threw the knife away in Nassau County. That testimony contradicted his earlier confession in which he stated that they threw the knife away in Westchester County.¹⁵⁴ Pacelli alleged that his accomplice's testimony at the narcotics prosecution was truthful, which cast doubts upon the signed confession and indi-

need" for it, or they would not attempt to admit the testimony of a witness whose unavailability will prevent the jury from gauging his demeanor. See generally Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 179 (1948) (arguing that a witness' presence provides an opportunity for the trier of fact to observe the witness' demeanor and judge the witness' veracity).

147. *Id.* at 1187; see Turner, *supra* note 89, at 255; Note, *supra* note 13, at 86.

148. *Lloyd*, 580 F.2d at 1187.

149. Some have argued that *Lloyd* is irreconcilable with Rule 804(b)(1)'s "predecessor in interest" language because the Coast Guard-crewman relationship existed before the occurrence of the events giving rise to the original litigation. See Turner, *supra* note 89, at 264. There is no support for this approach, however, in Rule 804(b)(1)'s legislative history. In any event, the point is not when the parties' relationship arose, but whether their relationship satisfies the fairness concerns of Rule 804(b)(1). Nevertheless, when the relationship arose may be a factor in determining whether the concerns are satisfied.

150. 639 F. Supp. 1382 (E.D.N.Y. 1986).

151. *Id.* at 1383.

152. *Id.* at 1384-85.

153. *Id.*

154. *Id.* at 1384.

cated the existence of a conspiracy to violate Pacelli's civil rights.¹⁵⁵

The district court refused to admit the testimony because the federal prosecutor in the prior criminal proceeding did not have a similar interest and motive to develop the accomplice's testimony.¹⁵⁶ The court stated that the federal prosecutor had no reason on redirect examination to inquire into the truth of the accomplice's statement concerning the location of the murder weapon.¹⁵⁷ The prosecution did not have any reason to conduct this inquiry because the statement did not comprise an element of the prosecution's case.¹⁵⁸

Before the *Pacelli* court reached the issue of whether the prosecutor possessed a similar motive to develop the testimony in the prior proceeding, it first had to dispose of Rule 804(b)(1)'s predecessor-in-interest requirement. It did so by adopting the community-of-interest test established in *Lloyd v. American Export Lines, Inc.*¹⁵⁹ *Pacelli* therefore stands for the proposition that a community of interest exists between the federal government and a municipality and its police officers.¹⁶⁰ Similar to *Lloyd*, the *Pacelli* decision failed to discuss how the community-of-interest approach fosters Rule 804(b)(1)'s fairness concern. A close reading of *Pacelli*, however, reveals that the court did not actually use the community-of-interest test to determine whether the predecessor-in-interest requirement was satisfied. Rather, the *Pacelli* court merely cited *Lloyd* and the community-of-interest test as precedent and avoided the predecessor-in-interest

155. *Id.* at 1384-85.

156. *Id.* at 1386.

157. *Id.* In the subsequent narcotics prosecution, the accomplice's statement concerning the location of the murder weapon was relevant only so far as rehabilitating the accomplice's credibility. Because the defense attorney never challenged the truth of the accomplice's statement, the prosecutor had no motive to inquire about the location of the murder weapon.

158. *Id.*

159. *Id.*

160. See *Carpenter v. Dizio*, 506 F. Supp. 1117 (E.D. Pa.), *aff'd*, 673 F.2d 1298 (3d Cir. 1981). In *Carpenter*, a civil rights action was initiated against the city of Philadelphia and seven of its police officers. *Id.* at 1120. *Carpenter* sought to use an eyewitness' testimony previously given in a criminal proceeding commenced against *Carpenter*. *Id.* In this proceeding, the defendants objected, claiming that the testimony given in a criminal proceeding cannot be admitted in a subsequent civil proceeding. *Id.* at 1190-20. The court held that a "community of interest" existed between the State of Pennsylvania and the municipal police officers. *Id.* at 1124. The court relied on the fact that the eyewitness' account of the confrontation between *Carpenter* and the police officers was essential for *Carpenter* to establish that he acted in self-defense. *Id.* This was *Carpenter's* defense in the criminal proceeding and in the civil rights action. *Id.* Therefore, the City Solicitor "would have had the same motive and addressed the identical issues" in the subsequent civil proceeding. *Id.* But see *Federal Deposit Ins. Corp. v. Glickman*, 450 F.2d 416, 418 (9th Cir. 1971); see also *Bolden v. Carter*, 269 Ark. 391, 395-96, 602 S.W.2d 640, 642-43 (1980) (holding that the state, which was a party in a criminal proceeding brought against defendant, was not the predecessor in interest of a police officer who sued for injuries resulting from the defendant's criminal act).

requirement.¹⁶¹ The court held that the testimony was inadmissible solely because the federal prosecutor in the prior criminal proceeding did not have a similar interest and motive to develop the testimony.¹⁶²

D. *The "Similar Interest and Motive" Interpretation*

The similar-motive-and-interest test interpretation allows admission of testimony from a prior proceeding if *any* party with a similar interest and motive cross-examined the now unavailable declarant.¹⁶³ Similar to the community-of-interest test, this approach promotes the preservation of all trustworthy evidence. Unfortunately, courts employing either approach impose an unrelated person's tactical decisions, access to information, and state of preparation upon a subsequent party merely because both parties shared an interest in establishing the same facts.

A widely cited case utilizing the similar-interest-and-motive approach is *United States v. Paducah Towing Co.*¹⁶⁴ In *Paducah*, the United States government sued the owner of a ship, Paducah, for injuries to a dam resulting from an accident involving Paducah's ship.¹⁶⁵ Paducah sought to introduce testimony from a Coast Guard proceeding that investigated whether the license of the captain of Paducah's ship should be revoked.¹⁶⁶ The third party defendant, Exxon, from which Paducah sought indemnification and whose ship was involved in the mishap, claimed that the district court improperly admitted hearsay testimony because the Coast Guard was not its predecessor in interest.¹⁶⁷ The United States Court of Appeals for the Sixth Circuit reversed, excluding the former testimony on grounds that the Coast Guard was not Exxon's predecessor in interest and that Exxon did not have an opportunity to develop the witness' testimony in the prior proceeding.¹⁶⁸

Exxon did not have an opportunity to develop the witness' testimony principally because the nonlawyer warrant officer who had represented the Coast Guard had inadequately developed the testimony of one of its own witnesses, a ship's captain who was an eyewitness to the accident.¹⁶⁹ After this witness' expert opinion was elicited on

161. *Pacelli*, 639 F. Supp. at 1386.

162. *Id.*

163. *See supra* notes 56-57 and accompanying text.

164. 692 F.2d 412 (6th Cir. 1982).

165. *Id.* at 417.

166. *Id.*

167. *Id.* at 418.

168. *Id.* at 419.

169. *Id.*

cross-examination by the attorney representing the captain of Paducah's ship, the Coast Guard's counsel did not challenge the witness' qualifications as an expert on redirect.¹⁷⁰ As a result, it was unclear whether the ship's captain was testifying from his personal knowledge or in the capacity of an expert.¹⁷¹ The jury, therefore, never knew whether the witness believed that the captain of the ship owned by Paducah acted reasonably or whether his expert opinion supported this conclusion.

In a similar case, *Maxwell v. City of Springfield*,¹⁷² an injured driver, Maxwell, sued the city for injuries she suffered in a collision with a bus owned by the city.¹⁷³ Maxwell subsequently took the deposition of an eyewitness to the accident.¹⁷⁴ She thereafter joined the bus driver as a party and sought to use the eyewitness' deposition against the bus driver. The trial court refused to admit the testimony and limited the use of the deposition to the city because the bus driver had not been a party to the lawsuit when Maxwell took the deposition.¹⁷⁵

The Missouri Court of Appeals reversed and held that the deposition was admissible against the bus driver because the city had the same interest and motive as the bus driver to develop the eyewitness' testimony.¹⁷⁶ Like its bus driver, the city needed to establish whether Maxwell or the bus driver had violated the traffic signal.¹⁷⁷ The Missouri Court of Appeals stated that "[t]here [was] no reason to believe that cross-examination and impeachment would have been more searching and thorough on behalf of the [bus driver] than it was on behalf of the [city]."¹⁷⁸ The *Maxwell* decision thus dispensed with the parties' requirement by limiting its inquiry to whether the master had a similar motive and interest to develop the testimony in the earlier proceeding.¹⁷⁹

170. *Id.*

171. *Id.*

172. 705 S.W.2d 90 (Mo. Ct. App. 1986).

173. *Id.* at 91.

174. *Id.* at 92.

175. *Id.*

176. *Id.* at 93 (citing 5 WIGMORE, *supra* note 69, § 1388, at 111).

177. *Maxwell*, 705 S.W.2d at 94.

178. *Id.* The city admitted the bus driver's agency. *Id.* at 92.

179. Missouri has not adopted a state version of Rule 804(b)(1). Moreover, Rule 57.07(a) of the Missouri Rules of Civil Procedure, which governs the use of depositions in a later stage of the same or subsequent proceeding, is simply a procedural rule. *Id.* Consequently, *Maxwell* rests heavily on the common law interpretation of the parties' requirement of the former testimony exception. The court relied primarily upon *Bartlett v. Kansas City Pub. Serv. Co.*, 349 Mo. 13, 160 S.W.2d 740 (1942). For a discussion of *Bartlett*, see *infra* notes 207-18 and accompanying text.

The United States Bankruptcy Court for the Western District of Michigan recently adopted similar-interest-and-motive approach in *In re Van Houten*,¹⁸⁰ in which a debtor's trustee sought to use a deposition taken of the debtor to establish the debtor's interest in real property.¹⁸¹ In a previous proceeding, a creditor had sought to establish that the debtor had concealed assets of his estate, including his aunt's home.¹⁸² The debtor's trustee objected, claiming that the testimony was hearsay because the creditor was not the predecessor in interest of the debtor's trustee.¹⁸³ Following the United States Court of Appeals for the Sixth Circuit,¹⁸⁴ the court stated that the creditor "like the trustee, needed to establish the debtor's ownership of [the] home in order to prevail."¹⁸⁵ The court therefore held that the creditor was the predecessor in interest of the debtor's trustee because both had a similar interest and motive in establishing the same facts.¹⁸⁶

V. THE "SUFFICIENTLY CLOSE RELATIONSHIP" ANALYSIS

The doctrine of *res judicata* is analogous to the former testimony exception and is helpful in determining the exception's parameters. Under the doctrine of *res judicata*, or "claim preclusion,"¹⁸⁷ a final judgment on the merits binds the parties and those in privity with them.¹⁸⁸ The term "parties" in the *res judicata* context, however, has been extended beyond the parties of record, to include those who have a "sufficiently close relationship" with the parties of record to be bound by the judgment.¹⁸⁹ Examples of a sufficiently close relation-

180. 56 Bankr. 891 (W.D. Mich. 1986).

181. *Id.* at 894.

182. *Id.*

183. *Id.*

184. *Id.* The court primarily relied upon *Clay v. Johns-Manville*, 722 F.2d 1289 (6th Cir.), *cert. denied*, 467 U.S. 1253 (1984).

185. *In re Van Houten*, 56 Bankr. at 895.

186. *Id.* at 893-95; *see also* *Council Commerce Corp. v. Sterling Navigation Co.* (*In re Sterling Navigation Co.*) 444 F. Supp. 1043, 1046 (S.D.N.Y. 1977) (declining to decide whether an unofficial creditors' committee was the predecessor in interest of a corporation's trustee); *Southern White-Lead Co. v. Haas*, 73 Iowa 399, 408 (1887) (holding that the deposition of a partner taken in a prior action against him and another partner was not admissible against their partnership and creditors in a subsequent proceeding because none of the parties in the subsequent proceeding were in privity with either partner in the prior action).

187. For purposes of this Comment, *res judicata*, or "claim preclusion," does not encompass collateral estoppel. Collateral estoppel, or "issue preclusion," occurs if "a question of fact essential to the judgment is actually litigated and determined by a valid and final [prior] judgment, [because] the determination [is then] conclusive between the parties in a subsequent action on a different cause of action . . ." RESTATEMENT OF JUDGMENTS § 68 (1942).

188. *See* *Motomura*, *supra* note 130, at 1026 (citing *Blonder-Tongue Laboratories v. University of Ill. Found.*, 402 U.S. 313, 320 (1971)).

189. *See* Comment, *Nonparties and Preclusion by Judgment: The Privity Rule Reconsidered*, 56 CAL. L. REV. 1098, 1101 (1968); Note, *Developments in the Law: Res*

ship include that between a state government agency and a federal government agency,¹⁹⁰ that between a television station and the corporation and the shareholders that own the station,¹⁹¹ and that between spouses.¹⁹²

Adopting the sufficiently-close-relationship approach in the former testimony context is advantageous for two reasons. First, the nature and limits of the *res judicata* doctrine are similar to those of the former testimony exception.¹⁹³ The impact of *res judicata*, which may bind a party who has not actually appeared in court, is substantial, both upon the parties so bound and in terms of the fairness of the administration of justice. Consequently, courts closely scrutinize the relationship between the party who participated in the prior proceeding and the party who did not appear, but who may be bound by the judgment.¹⁹⁴ Former testimony, in contrast, does not bind a party that was not represented in the prior proceeding; rather, former testimony may be admitted into evidence against such a party. Moreover, the party adverse to the former testimony may offer rebuttal evidence in the subsequent proceeding.¹⁹⁵ Nonetheless, the now unavailable declarant's testimony usually has a substantial impact on the subsequent proceeding because the former testimony is often the only means of contradicting testimony by a witness in the subsequent proceeding.¹⁹⁶ In addition, former testimony often concerns the central issue in the subsequent proceeding, making it extremely probative

Judicata, 65 HARV. L. REV. 818, 855 (1952); Comment, *The Expanding Scope of the Res Judicata Bar*, 54 TEX. L. REV. 527, 530 (1976).

190. See *United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1003 (9th Cir. 1980) (holding that the Environmental Protection Agency was bound by a judgment entered in a prior proceeding in which a state agency enforced same permit).

191. See *Green v. American Broadcasting Co.*, 572 F.2d 628, 631 (8th Cir. 1978). *But see* *Lynch v. Glass*, 44 Cal. App. 3d 943, 947-50, 119 Cal. Rptr. 139, 141-43 (1975) (holding that the plaintiffs were not bound by a judgment entered in a prior proceeding in which the corporate developer of their properties was a party even though the developer urged plaintiffs to bring a subsequent proceeding).

192. See *Nemeth v. Aluminum Cooking Utensil Co.*, 146 Cal. App. 2d 405, 407-08, 304 P.2d 129, 129-31 (1956). *But see* *Freeman v. Lester Coggins Trucking Co.*, 771 F.2d 860, 864 (5th Cir. 1985) (holding that a wife and children were not bound by a judgment entered in a prior proceeding in which a husband sued for his own injuries, even though the husband brought the second suit as a wrongful death claimant, because the wife and children did not succeed to any property interest asserted in the prior proceeding, and the wife and children did not control the prior proceeding).

193. See *Motomura*, *supra* note 130, at 1013.

194. *Id.* at 1017.

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

196. *E.g.*, *Lloyd v. American Export Lines*, 580 F.2d 1179, 1192-93 (3d. Cir.) (Stern, J., concurring) (Former testimony was the "sole probative evidence on the point for which it was offered."), *cert. denied*, 439 U.S. 969 (1978).

evidence.¹⁹⁷

It is because of the enormous effect that *res judicata* and the former testimony exception may have upon subsequent proceedings that the underlying policies must go beyond mere reliability.¹⁹⁸ Each has a "parties" requirement that protects the fairness concerns of parties not represented in the prior proceeding. Courts must therefore strictly examine the relationship between the party in the prior proceeding and the party whom the judgment will bind, or against whom the proponent will offer the former testimony. In determining whether a party has a sufficiently close relationship with the party of record so that it may be bound by the prior judgment, courts often inquire whether the parties to the first action had the same or similar tactical decisions,¹⁹⁹ the same state of preparation,²⁰⁰ attorneys of comparable training and experience,²⁰¹ or the same access to information²⁰² as those in the subsequent action. These fairness concerns in the *res judicata* area often dictate whether a judgment will have a binding effect. These same concerns should affect whether former testimony is admissible against a party not represented in the prior proceeding.

Determining whether Rule 804(b)(1)'s predecessor-in-interest requirement has been satisfied is most easily accomplished if the legal relationship between the hearsay opponent and the party who previously cross-examined the witness necessarily links the interests of the parties. Suppose that a husband and wife, for example, are riding in an automobile that is struck by the defendant. The husband then brings a claim for his personal injuries that resulted from the accident. In that proceeding, the husband cross-examines a witness for the defendant, or at least had the opportunity to cross-examine him.²⁰³

197. *E.g.*, *Clay v. Johns-Manville Sales Corp.*, 722 F.2d 1289, 1294 (6th Cir.) (The physician's position in the company made his testimony in the prior proceeding "peculiarly relevant" in the subsequent proceeding.), *cert. denied*, 467 U.S. 1253 (1984); *Carpenter v. Dizio*, 506 F. Supp. 1117, 1124 (E.D. Pa.) (Eyewitness' testimony in the original criminal proceeding was essential to the self-defense issue in the criminal and subsequent civil proceedings.), *aff'd*, 673 F.2d 1298 (3d Cir. 1981).

198. *See Motomura*, *supra* note 130, at 1008.

199. *In re Air Crash Disaster*, 350 F. Supp. 757, 766-67 (S.D. Ohio 1972), *rev'd on other grounds sub nom. Humphreys v. Tann*, 487 F.2d 666 (6th Cir. 1973) (Strategy different from that in previous proceeding would not change the outcome of the subsequent proceeding.).

200. *International Tel. & Tel. Corp. v. General Tel. & Tel. Corp.*, 380 F. Supp. 976, 982-84 (M.D.N.C. 1974); *Boyd v. Jamaica Plain Co-Op Bank*, 7 Mass. App. Ct. 153, 157-59, 386 N.E.2d 775, 778-79 (1979).

201. *Proctor & Gamble Co. v. Byers Transportation Co.*, 355 F. Supp. 547, 557 (W.D. Mo. 1973) (The fact that the same attorneys represented the carriers in a similar prior suit was a factor in binding the carrier with the judgment from that suit.).

202. *In re Air Crash Disaster*, 350 F. Supp. at 766.

203. Rule 804(b)(1) requires that the party against whom the evidence is offered or a

The witness subsequently becomes unavailable.²⁰⁴ The wife then sues the defendant for loss of her husband's services. The following question arises in this situation: Is it fair to admit the unavailable witness' testimony against the wife in the subsequent proceeding?²⁰⁵ The fairness concerns of Rule 804(b)(1) would appear to have been satisfied in this case: The husband and wife probably would have retained the same attorney, who would have prepared equally diligently and have made the same tactical decisions for both parties. In addition, discovery would have been consolidated, and both parties would have had almost identical access to information concerning the accident. Furthermore, in most states today, the husband and wife would be in privity with each other.²⁰⁶ This result illustrates that a husband and wife enjoy a sufficiency close relationship such that it is fair to bind one with the other's cross-examination.

Courts have permitted a party to offer former testimony against a party whose spouse cross-examined the witness in a prior proceeding. In *Bartlett v. Kansas City Public Service Commission*,²⁰⁷ for example, a female passenger was injured as she descended from a city-owned bus, allegedly because of the bus' sudden forward movement.²⁰⁸ Her hus-

predecessor in interest of that party must have had an opportunity to develop the witness' testimony by direct, cross, or redirect examination. See FED. R. EVID. 804(b)(1) advisory committee's note, 56 F.R.D. 183, 324. *E.g.*, *United States v. Paducah Towing Co.* (*In re Paducah Towing*), 692 F.2d 412, 418 (6th Cir. 1982). The opportunity for cross-examination must be "meaningful in light of the circumstances which prevail when the former testimony is offered." C. McCORMICK, *supra* note 4, § 255, at 616. Generally, courts examine four factors in determining whether the opportunity for cross-examination was meaningful: (1) the nature of the proceeding or hearing; (2) notice to the opponent; (3) the nature of the parties and issues in the prior and subsequent proceedings; and (4) the cross-examination itself. See Note, *supra* note 57, at 358.

204. For a description of when a witness is "unavailable," see *supra* note 3.

205. Another example would be an action involving the wife's subrogated claim.

206. See, e.g., *Parsons v. Parsons*, 45 Mo. 265, 267 (1870); see also *Nemeth v. Aluminum Cooking Utensil Co.*, 146 Cal. App. 2d 405, 408, 304 P.2d 129, 130-31 (1956) (holding that wife was bound with a judgment from a prior proceeding to which her husband was a party because a wife is in privity with her husband). *But see Anderson v. Hultberg*, 247 F. 273, 278 (8th Cir.) (Former testimony taken in a proceeding to which husband was a party was not admissible against his wife in a subsequent proceeding because a husband and wife are not in privity with each other, and therefore, the wife was not a party or in privity with any party to the prior proceeding.), *cert. denied*, 248 U.S. 581 (1918); *Lord v. Boschert*, 47 Ohio App. 54, 55-56, 189 N.E. 863, 864 (1934) (Former testimony taken in a proceeding to which wife was a party was not admissible against her husband in a subsequent proceeding because the testimony was not offered against the same parties.); *Vail v. Craig*, 13 N.Y. Sup. Ct. 448, 450 (1888) (Former testimony taken in a proceeding to which wife was a party was not admissible against her husband in a subsequent proceeding because the testimony was not offered against the same parties.).

207. 349 Mo. 13, 160 S.W.2d 740 (1942) (reviewed by J. Falknor, *Former Testimony in the Uniform Rules: A Comment*, 38 N.Y.U. L. REV. 651, 654 (1963)).

208. *Id.* at 15, 160 S.W.2d at 742.

band filed a suit against the city that sought damages for the loss of his wife's services arising from her injuries sustained in this same accident.²⁰⁹ In preparation for that suit, the city took the depositions of two eyewitnesses. The trial court, however, dismissed the husband's suit.²¹⁰ After the dismissal, both eyewitnesses became unavailable.²¹¹ The wife then brought a negligence action for her injuries.²¹² The city sought to offer the former testimony concerning the bus' sudden movement against the wife.²¹³ The trial court admitted the former testimony over the wife's objections.²¹⁴ The Supreme Court of Missouri upheld the admission of deposition testimony against the wife because her husband had cross-examined the now unavailable witnesses.²¹⁵ The court stated that "not only [was there] an identity of issues, but there was a complete identity of interest between Mr. Bartlett and his wife."²¹⁶ The parties' identical access to information promoted their identity of interest.²¹⁷ Both parties were represented by the same attorney, and he apparently prepared equally well and made the same tactical decisions for both parties.²¹⁸

It is an open question whether the result would be the same if the parties were engaged or dating. In such situations, a sufficiently close relationship may not exist. The interests and desires of parties that are engaged or dating are unlikely to be as interdependent as those of a married couple.²¹⁹ Nonmarried couples are therefore more likely to make different decisions concerning arguments and strategy in litigation than are married couples. Also, the parties' state of preparation could differ, especially if they do not retain the same attorney.

209. *Id.* at 16, 160 S.W.2d at 742.

210. *Id.* at 15-16, 160 S.W.2d at 742.

211. *Id.* at 16, 160 S.W.2d at 742.

212. *Id.* at 15, 160 S.W.2d at 741.

213. *Id.* at 15-16, 160 S.W.2d at 742.

214. *Id.* at 15, 160 S.W.2d at 741.

215. *Id.* at 21, 160 S.W.2d at 745.

216. *Id.*

217. *Id.*

218. *Id.*

219. See *Joiner v. Joiner*, 246 Ga. 77, 78, 268 S.E.2d 661, 663 (1980) (Marriage creates a symbiotic relationship.); cf. *Finn v. Drtina*, 30 Wash. 2d 814, 819, 194 P.2d 347, 351 (1948) (Guest/sister was not permitted to offer former testimony against her host/brother despite the fact that her brother was a party to the prior proceeding because her knowledge of the facts surrounding the case did not ensure an identity of interest.).

Courts have created entitlements and obligations for cohabitants. See, e.g., *Marvin v. Marvin*, 18 Cal. 3d 360, 134 Cal. Rptr. 815, 557 P.2d 106 (1976). It is unclear, however, whether the relationship between cohabitants is sufficiently close. The interests and desires of cohabitants appear to be much more interdependent than those of parties who are only dating. It is presumptuous, however, to say that the interests of cohabitants are any more interdependent than those of parties who are engaged, but not cohabitating.

Finally, the effectiveness of cross-examination often depends upon the information furnished to the examining counsel by his client. The nature and volatility of the engaged or dating relationships make it possible that the parties will not share a complete picture of the lawsuit with each other. And if they do not, each party's counsel may shape the course of the lawsuit in different ways because each has varying degrees of access to information concerning the litigation.

Based upon Rule 804(b)(1)'s fairness concerns,²²⁰ this Comment proposes a four-prong test to determine whether a sufficiently close relationship exists between the predecessor in interest and the opponent of the hearsay. First, courts should examine whether the parties made, or would have made, similar tactical decisions.²²¹ Second, courts should analyze whether the parties had similar states of preparation, including but not limited to, attorneys of similar quality.²²² Third, courts should determine whether the parties had similar access to information. Fourth, the courts should consider any factor that they deem just and proper, including but not limited to, whether the parties are substantially the same.²²³ This test would achieve Congress' primary objective of binding the opponent of the hearsay with another person's cross-examination only when it is fair to do so. Adhering to these fairness concerns will also help achieve Congress' secondary objective of admitting trustworthy evidence by circumstantially guaranteeing that the predecessor's cross-examination was sufficiently similar to that which would have been conducted by the opponent of the hearsay.²²⁴ Moreover, this test would further the effi-

220. See *supra* notes 59-62 and accompanying text.

221. See, e.g., *Charles H. Demarest, Inc. v. United States*, 174 F. Supp. 380, 389 (Cust. Ct. 1959) (The common law parties requirement of the former testimony exception ensures identical interests, and it is, therefore, fair to bind a party in a subsequent proceeding with his predecessor in interest's tactical decisions whether to cross-examine or not only if the requirement is satisfied.)

222. The Subcommittee on Criminal Justice believed that the predecessor in interest requirement should help ensure that the parties retained attorneys of comparable training and experience. See Weissenberger, *supra* note 64, at 354-55 (statements of Rep. William L. Hungate and Rep. Wiley Mayne).

223. See M. GRAHAM, *supra* note 61, at 257. Some commentators have contended that rules reflecting policies such as fairness, go beyond the basic evidentiary concern of reliability and therefore, should not affect the admissibility of former testimony. See E. CLEARY, *supra* note 87, § 318, at 765-66. Despite these assertions, Rule 102 of the Federal Rules of Evidence declares the need for fairness in applying the Rules. FED. R. EVID. 102.

224. Hearsay is excluded principally because it is less trustworthy than a witness' testimony that is subject to cross-examination. See 2 J. WIGMORE, *supra* note 45, § 1362, at 1674-78. In the 804(b)(1) context, the witness was subject to cross-examination, but his subsequent unavailability prevented cross-examination in the subsequent proceeding. If the cross-examination requirement is not met, the evidence is excluded unless the evidence is either necessary or has other circumstantial guarantees of trustworthiness. See Comment, *Hearsay Under the Proposed Federal Rules: A Discretionary Approach*, 15 WAYNE L. REV. 1079, 1201

ciency objective of the Federal Rules of Evidence embodied in Rule 102.²²⁵

(1969). The unavailability of the declarant creates a necessity for the former testimony. *Id.* Moreover, former testimony exhibits some traditional circumstantial guarantees of trustworthiness; i.e., the declarant was under oath and subject to the penalty of perjury when his testimony was tested by the predecessor in interest in the prior proceeding. Fairness, however, was Congress' primary concern in adopting Rule 804(b)(1). See Turner *supra* note 89, at 263 (Congress was concerned with fairly binding the opponent of the hearsay.); *supra* notes 59-62 and accompanying text. Because hearsay is usually excluded on the grounds that it is less trustworthy than other testimony, Congress' secondary objective must have been admitting trustworthy evidence.

225. FED. R. EVID. 102. It is interesting to analyze the effect that the sufficiently-close-relationship test would have had on the cases discussed in this Comment. In Lloyd v. American Export Lines, Inc., for example, it is unclear whether the parties enjoyed a sufficiently close relationship. 580 F.2d 1179 (3d Cir.), cert. denied, 439 U.S. 969 (1978); see *supra* notes 137-49 and accompanying text. The Coast Guard and Alvarez had retained different attorneys and the parties' respective degrees of preparation are not known. Both parties had a substantial interest in the controversy, but for different reasons. Through a presumably impartial government investigator, the Coast Guard wanted to determine whether it should revoke Lloyd's license. *Id.* at 1182. Alvarez, on the other hand, sought to recover damages for his injuries. Although both parties probably had similar access to information because each had been represented by counsel in the prior proceeding, Alvarez's counsel may have made very different tactical decisions in cross-examining Lloyd with regard to who initiated the altercation. *Id.*

In Pacelli v. Nassau County Police Department, a sufficiently close relationship existed between the federal government actively enforcing the criminal law and the municipality and its police officers doing the same. 639 F. Supp. 1382 (E.D.N.Y. 1986); see *supra* notes 150-62 and accompanying text. Each of the government-employed attorneys would be similarly prepared. Although different tactical decisions concerning the accomplice's testimony regarding the location of the murder weapon would be likely in the subsequent proceeding, the location of the murder weapon was not disputed in the prior proceeding. *Id.* at 1386. Thus, the prosecutor's decision not to inquire into the truth of the accomplice's statement as to the location of the murder weapon appears to have been strategically sound. This strategy might not have been sound in the subsequent civil rights action, however, which alleges that the detectives fabricated evidence and manufactured the accomplice's confession. Nonetheless, whether the prosecutor had a similar interest and motive to cross-examine the accomplice has no effect on whether the predecessor-in-interest exception to Rule 804(b)(1)'s opportunity requirement has been satisfied. The municipality and its officers were personally involved in the incident that spawned the litigation and therefore appear to have had sufficient access to information.

The parties in United States v. Paducah Towing Co. did not have a sufficiently close relationship. 692 F.2d 412 (6th Cir. 1982); see *supra* notes 164-71 and accompanying text. In the prior proceeding, a nonlawyer warrant officer had represented the Coast Guard, which was the alleged predecessor in interest of Exxon. *Id.* at 417. Exxon, the party opposing admission of the former testimony, probably would have made more skilled tactical decisions concerning the ship captain's testimony. As illustrated in *Paducah*, it is usually possible to identify from the record whether the predecessor's inadequate state of preparation resulted from his counsel "not possess[ing] the skills that one would expect of a marginally competent attorney." *Id.* at 419. See generally Holloway v. Arkansas, 435 U.S. 475, 490 (1978) (The record may reveal an attorney's failure to undertake specific trial tasks.). Moreover, Exxon's corporate counsel would not have prepared for litigation in the same manner as the warrant officer did.

In Maxwell v. City of Springfield, a sufficiently close relationship existed between the city and the bus driver. 705 S.W.2d 90 (Mo. Ct. App. 1986); see *supra* notes 172-79 and accompanying text. The same attorney represented both parties. *Id.* at 91. Presumably, this

VI. CONCLUSION

Establishing whether a sufficiently close relationship exists between the predecessor in interest and the opponent of the hearsay testimony adheres to Rule 804(b)(1)'s legislative history, which indicates that Congress was concerned with the quality of representation in the prior proceeding. Simply put, a sufficiently-close-relationship analysis fairly binds parties whose interests were adequately represented in the prior proceeding.

This analysis provides a necessary check upon the potential abuses of the current interpretations of the term "predecessor in interest." The two approaches that federal courts most often utilize, the community-of-interest approach and the similar-interest-and-motive approach, focus solely upon the existence of similar issues. Courts

attorney prepared equally well for each party. In fact, this arrangement arguably improved each party's state of preparation. Tactical decisions the attorney made on behalf of the city probably affected those he made on behalf of the bus driver. *Id.* The dissent argued that the parties' tactical decisions would differ because of the possibility of indemnification of the city by the servant. *Id.* at 97 (Maus, J. dissenting). Indemnification of the city by its bus driver, however, was highly unlikely in *Maxwell*. This is based on the fact that the city and its bus driver retained the same attorney. Counsel for the city would not involve himself in such an obvious conflict of interest by representing the city and its bus driver if he was going to seek indemnification from the bus driver. Because the bus driver knowingly accepted this situation, it is fair to bind him with his employer's tactical decisions. Moreover, discovery in the case had been consolidated and both parties therefore had almost identical access to information. A sufficiently close relationship between a master and servant usually does not exist, however, when a servant has previously cross-examined the witness. *But see Goodrich v. Hanson and Pearson*, 33 Ill. 499, 507-08 (1864) (Testimony from a prior proceeding brought by an agent could be offered by his principal against the same defendant, because the agent had been privy to the principal's interests and had represented those interests adequately.). The master's superior resources make it likely that his attorney and state of preparation would differ substantially from his servant's. Consequently, a master may possess much better access to information concerning a lawsuit. Moreover, a master and his servant are not privies. *But see Cumberland Coal & Iron Co. v. Jefferies*, 27 Md. 526, 534 (1867) (A master and its servants are the same parties, and therefore, former testimony was admissible against the servants in a subsequent proceeding.).

Under the facts of *In re Van Houten*, there may not have been a sufficiently close relationship between the debtor's trustee and the debtor's creditor. 56 Bankr. 891 (W.D. Mich. 1986); *see supra* notes 180-86 and accompanying text. The amount of money loaned to the debtor by the creditor was probably much less than the value of the assets involved in the subsequent bankruptcy proceeding. *Id.* at 893-94. The court's opinion states only that the creditor loaned the debtor "various sums of money." The creditor, therefore, had much less economic incentive to prepare actively for the prior proceeding. The court's opinion does not reveal what kind of relationship, if any, had existed between the debtor and the trustee. Prior to the original litigation, however, the creditor and the debtor were both business associates and friends. *Id.* Furthermore, the fact that the debtor was alive when his creditor conducted discovery indicates that the creditor possessed much better access to information as to whether the debtor actually owned the home. It is therefore unclear whether a sufficiently close relationship existed because although the debtor may have had less economic incentive in the prior proceeding, she possessed much better access to information than the trustee in bankruptcy.

seem somewhat reluctant to expend judicial resources on an intensive examination of the relationship between the parties. The mere presence of similar issues, however, does not insure that the subsequent party's interests were adequately represented by his predecessor. Only an exacting analysis of the parties' relationship will assure that it is fair to bind the present party with his predecessor's cross-examination of the proffered former testimony.

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