

EVIDENCE

Weeks 7 and 8

- I. Unit 13: Hearsay, Former testimony
 - a. How do you call an unavailable witness?
 - i. Establish grounds under 801 a, then an exception under 801 b
 - ii. This person is unavailable due to a now-existing infirmity (Alzheimer's) under 801 a 4 and they gave testimony under oath at the prior trial, therefore the testimony falls under the exception under 801 b 1.
 - iii. Opposing lawyer has the opportunity to contest any and all of these grounds for getting the evidence in. We have to prove the existence of each of the elements here...
 1. Cannot be present due to then existing mental infirmity - expert witness, guardian...
 - a. We have a letter from the guardian who says "Mr. Witness is incompetent and will be unable to testify at the re-trial."
 - b. This is hearsay. Will cause problems...but honestly in these scenarios the other party will stipulate to incapacity and argue on other grounds below, particularly 3.
 2. Former testimony was given at a trial (fact pattern dependent)
 3. Is offered against a party who had an opportunity and similar motive to develop testimony through cross, direct, etc.
 - iv. This is a 104 a question - the admissibility depends on the existence of some facts. The judge will decide whether those facts exist at a preliminary hearing where the judge will have an opportunity to hear and review all of the evidence, not subject to the rules of evidence, and will make a decision as to whether the jury can use the testimony (without instructing them that the testimony is dispositive of anything).
 - b. 804 b 1: requirements
 - i. Unavailability
 - ii. Same party
 - iii. Prior motive and opportunity to develop the testimony by direct cross or re-direct examinations.
 1. Ohio v. Roberts
 - a. Criminal defendant is accused of having used his girlfriend (Anita's) parents checks/credit cards without permission.
 - b. Pre-trial, the public defender saw Anita in the hallway, called her, and tried to get her to admit that she told the defendant that he could use the checks/credit cards. She refused to make that admission.
 - c. Later, she disappears. She is subpoenaed but does not show up.
 - d. At trial, the state tries to offer this former testimony from Anita: "I did not tell him he could use the cards." Defendant objects based on not having the same motive/opportunity to develop her testimony through cross/redirect as he did at the preliminary hearing.

- e. Held: yes he did, he questioned her at length.
- 2. U.S. v. Salerno
 - a. US attorney called a witness to the stand at the grand jury proceeding who testified in a way that was not helpful to the US attorney.
 - b. At trial, the criminal defense attorney wants to enter that testimony. US Attorney claimed they didn't have the similar opportunity and motive to develop the testimony...
 - c. Held: US Attorney may have lacked sufficient opportunity and motive at grand jury proceeding. Why the different result? For one, grand jury proceedings are very different from preliminary trials. But more likely, the goal is to make it easier for prosecutors.
- 3. Hypothetical
 - a. Ms. Jones is suing Dr. Warren for medical malpractice at trial 2. At trial 1, two psychiatrists testified against Dr. Warren in an emergency commitment hearing, which resulted in his being confined to an institution.
 - b. At trial 2, Ms. Jones wants to enter the testimony of the two psychiatrists who testified against Dr. Warren in trial 1. Her malpractice claim is based on his insanity.
 - c. Same party requirement: Ms. Jones wants to offer the evidence, and it is being offered against Dr. Warren. He had an incentive to develop that testimony in the first case...Ms. Jones can use the testimony against him, but he can't use it against her (although there really wouldn't be a reason for him to do so).
 - d. Did Dr. Warren have the opportunity and motive to develop the testimony in the prior case?
 - i. We need to know that his attorney was there and that he was doing his job (arguing that he should not be committed).
 - ii. We can assume that in most cases of this type.
 - e. We also need to know that the witnesses are unavailable! (can't forget 804 a).

II. Unit 14

a. Dying Declarations 804 b 2

i. Soles v. State

1. Clifford, a young boy, told his dad "Oh Daddy. Carl Soles shot me with a 22 rifle. I have got to die." These statements are attempted to be brought in through the dad in the trial against Soles.
2. Are these words hearsay?
 - a. We have an assertion
 - b. A declarant
 - c. Out of court
 - d. Being offered for the truth, that Carl Soles actually shot the boy
3. Is there an exception? Witness is dead, go to 804

- a. 804 a 4: cannot be present because he is dead
 - b. 804 b2: dying declaration: a statement that the declarant, while believing the declarant's death to be imminent, made about its (death) cause or circumstances.
- 4. After this evidence gets in, what should you object to to keep it out?
 - a. Lack of personal knowledge - he was shot in the back of the head, how does he know unless someone else told him?
 - b. Note: 602 only applies to witnesses on the stand...BUT, the advisory committee notes following 803 says that for the purposes of these exceptions, the declarant IS a witness, and the advisory committee does not dispense with the requirements of personal knowledge (with the exception of OPS).
- 5. How do you deal with above objection?
 - a. Personal knowledge requires a showing that there is "evidence sufficient to support a finding." 104 b.
 - b. Judge will decide whether there is enough evidence to support a finding of personal knowledge, jury will decide how much weight to give the testimony based on the evidence that comes in on personal knowledge.
 - c. Personal knowledge may appear in the statement of the dying declarant or it may be inferable from the circumstances.
- ii. Although we tend to believe this evidence is sincere, we still question the other 3 testimonial capacities
 - a. Perception may be significantly impaired, as may be memory
 - b. Narration can be difficult, ambiguous.
- iii. What if the declarant does not believe they are about to die, or does not know?
 - a. At common law, the declarant must have abandoned all hope and concluded that death was certain and unavoidable
 - i. Kaplan on evidence: "obviously, the jury will not be prepared to enforce the policy of the law to exclude such statements that were not made under a sense of impending death...as a result, if anyone is going to enforce the policy of the hearsay exception it will have to be the judge."
 - b. Federal rules: "while believing the declarant's death to be imminent."
 - c. There will usually be very little evidence to go on here...
 - d. Admissibility (not relevance) depends on the existence of a fact, therefore it is a 104 a question for the judge to decide. Judge will listen to the whole story and the jury will not be asked to re-decide. The statement can come in, and the jury can use it/give it whatever weight they think it is worth in their decision making.
 - i. Evidence: Carl Soles Shot me.