Hasouris v. Sorour, 92 Mass. App. Ct. 607 (2018)

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This case provides a good overview of the prior recorded testimony hearsay exception and discusses how to navigate asserting the privilege against self-incrimination. The Appeals Court held that a witness’ prior recorded testimony (here, a deposition transcript) can be used at trial where the judge determines that the witness is unavailable. This may be relevant in cases where a witness testifies under oath and is cross-examined in one proceeding (e.g. a 72 or other evidentiary hearing) and is unavailable to testify at a subsequent proceeding (e.g. trial).

Prior recorded testimony hearsay exception: The prior recorded testimony of a person may be admitted where the person is now unavailable, the testimony was given in a proceeding addressing substantially the same issues as in the current proceeding, and the party against whom the testimony is offered had a reasonable opportunity and similar motivation for cross-examination of the person during the prior proceeding. The exception applies equally in criminal and civil actions.

Unavailable: There are a number of bases for finding that a witness is unavailable. For example, a witness may be physically unavailable because they are deceased, missing, or out of state and cannot be secured for trial. A witness who is considered incompetent is likewise unavailable. A witness who validly invokes the privilege against self-incrimination is unavailable.

Opposing counsel may challenge whether the witness is unavailable in the sense required, and then the judge must decide.

Invoking the privilege against self-incrimination: When a witness declares his intent to invoke the privilege against self-incrimination and the party intending to call the witness challenges whether the privilege has been properly invoked, the trial judge must determine whether the witness has established “a real risk that his answers to questions will tend to indicate his involvement in illegal activity, and not a mere imaginary, remote, or speculative possibility of prosecution.” The witness must assert the privilege in response to particular questions, and the possible incriminatory potential of each question, or area which the prosecution might wish to explore, must be considered. A witness may not make a blanket assertion of the privilege (unless the court determines that the privilege extends to the entire testimony).

Here, the witness invoked his privilege against self-incrimination. In pretrial motions and hearings, he “unequivocally indicated” his intent to assert the privilege if called to testify. Then, when he did not appear for trial as subpoenaed, counsel reported that the witness was “gravely ill” and in any event, would assert the privilege. The trial judge subsequently found the witness unavailable and admitted the deposition transcript in evidence. The Appeals Court said that was okay. However, the Appeals Court did not determine whether the witness *validly* invoked the privilege because his deposition testimony was independently admissible pursuant to Mass. R. Civ. P. 32(a)(3)(D).

If you have a case that sounds like this, you should read the full opinion, available [here](https://www.mass.gov/files/documents/2018/01/08/16P1269.pdf).