105th Congress, 1st Session – – – – – – – – – – – – – – – House Document 105–69

AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

COMMUNICATION

FROM

THE CHIEF JUSTICE, THE SUPREME COURT OF THE UNITED STATES

TRANSMITTING

AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE THAT HAVE BEEN ADOPTED BY THE COURT, PURSUANT TO 28 U.S.C. 2074

APRIL 15, 1997.—Referred to the Committee on the Judiciary and ordered to be printed

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 11, 1997

Honorable Newt Gingrich
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress the amendments to the Federal Rules of Evidence that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Advisory Committee notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

William H. Rehnquist

SUPREME COURT OF THE UNITED STATES

April 11, 1997

ORDERED:

1. That the Federal Rules of Evidence be, and they hereby are, amended by including therein amendments to Evidence Rules 407, 801, 803(24), 804(b)(5), and 806, and new Rules 804(b)(6) and 807.

[See infra., pp. ___ ___ ___.]

2. That the foregoing amendments to the Federal Rules of Evidence shall take effect on December 1, 1997, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Evidence in accordance with the provisions of Section 2072 of Title 28, United States Code.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

Rule 407. Subsequent Remedial Measures

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction.

* * * * *

Rule 801. Definitions

* * * * *

(d) Statements which are not hearsay.

* * * * *

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B)

a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the

declarant and the party against whom the statement is offered under subdivision (E).

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

* * * * *

(24) [Transferred to Rule 807]

Rule 804. Hearsay Exceptions; Declarant Unavailable

* * * * *

(b) Hearsay exceptions.

* * * * *

(5) [Transferred to Rule 807]

(6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in

Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Rule 807. Residual Exception

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence

of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

October 10, 1996

MEMORANDUM TO THE CHIEF JUSTICE OF THE UNITED STATES
AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for the consideration of the Court proposed new Rules 804(b)(6) and 807, and proposed amendments to Rules 407, 801, 803(24), 804(b)(5), and 806 of the Federal Rules of Evidence. The Judicial Conference recommends that these amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering these proposed amendments, I am also transmitting an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference and the Report of the Advisory Committee on the Federal Rules of Evidence.

Leonidas Ralph Mecham

Attachments

EXCERPT FROM THE
REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

* * * * *

AMENDMENTS TO THE
FEDERAL RULES OF EVIDENCE

Rules Recommended for Approval and Transmission

The Advisory Committee on Evidence Rules submitted to your committee proposed amendments to Federal Rules of Evidence **407, 801(d)(2), 803(24), 804(b)(5), 806,** and **807,** and **new Rule 804(b)(6)** together with Committee Notes explaining their purpose and intent. The proposed amendments were circulated to the bench and bar for comment in September 1995. A public hearing was held in New York, New York in January 1996.

Rule 407 (*Subsequent Remedial Measures*) would be amended to extend the exclusionary principle expressly to product liability actions and to clarify that the rule applies only to remedial measures made after the occurrence that produced the damages giving rise to the action.

Rule 801 (*Definitions*) would be amended to address the issues raised by the Supreme Court in Bourjaily v. United States, 483 U.S. 171 (1987). It would codify the holding in Bourjaily by stating expressly that a court must consider the contents of a coconspirator's statement in determining "the existence of the conspiracy and the

participation therein of the declarant and the party against whom the statement is offered." The amendment also provides that the content of the declarant's statement does not alone suffice to establish a conspiracy in which the declarant and the defendant participated. The amendments also treat analogously preliminary questions relating to the declarant's authority and the agency or employment relationship.

The contents of **Rule 803(24)** (*Other Hearsay Exceptions; Availability of Declarant Immaterial*) and Rule **804(b)(5)** (*Other Hearsay Exceptions; Declarant Unavailable*) would be combined and transferred to a **new Rule 807** (*Residual Exception*) under the proposed amendments. The changes would facilitate future additions to Rules 803 and 804. No change in meaning was intended.

New Rule 804(b)(6) (*Hearsay Exceptions; Declarant Unavailable*) would provide that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement when the party's deliberate wrongdoing or acquiescence therein was intended to procure the unavailability of the declarant as a witness. The rule would apply in civil as well as criminal cases and would apply to any party, including the government. The amendment would apply only to actions taken after the event to prevent a witness from testifying at trial.

The proposed amendment of **Rule 806** (*Attacking and Supporting Credibility of Declarant)* corrects a misplaced comma in a citation.

Proposed new **Rule 807** (*Residual Exception*) consists of old Rules 803(24) and 804(b)(5).

The proposed amendments to the Federal Rules of Evidence, as recommended by your committee, are in Appendix G together with an excerpt from the advisory committee report.

Recommendation: That the Judicial Conference approve the proposed amendments to Evidence Rules 407, 801, 803(24), 804(b)(5), 806, and proposed new Rules 804(b)(6) and 807 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

To: Honorable Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice and Procedure

From: Ralph K. Winter, Jr., Chair
Advisory Committee on Federal Rules of Evidence

Date: May 15, 1996

Re: Report of the Advisory Committee on Evidence Rules

Introduction

The Advisory Committee on Evidence Rules met on April 22, 1996, in Washington, D.C. The Committee considered public comments regarding the proposed amendments to the Evidence Rules that were published in September 1995. After deferring action on a proposed amendment to Rule 103(e) and making several changes to other proposed amendments, the Committee approved the amendments discussed below for presentation to the Standing Committee for final approval.

Rule 103(e). Although a majority of the Committee agreed that a uniform default rule ought to be codified as to whether a pretrial objection to, or a proffer of, evidence must be renewed at trial, neither the rule that was published for comment nor the alternative formulation commanded a majority. Comments received in connection with the proposed amendment were unanimously in favor of a rule, but split on the proper formulation. Nine comments supported the published rule while eleven supported the reverse formulation.

I. Action Items

A. **Proposed Amendments to Evidence Rules 407, 801(d)(2), 803(24), 804(b)(5), 804(b)(6), 806, and 807 Submitted for Approval by the Standing Committee and Transmittal to the Judicial Conference.**

These proposed amendments were published for comment by the bench and bar in September 1995. Letters were received from thirty-nine commentators. (Two of the comments are identical but were submitted by different members of the Federal Magistrate Judges Association.) The following letters contain only general statements regarding published rules submitted for Standing Committee approval:

(1) Leon Karelitz, Esq. of Raton, N.M., in a letter dated November 7, 1995, "supported the Advisory Committee's proposed amendments" and also "commend[ed] that Committee's reasoning and decision not to amend the rules listed on pp. 160-161."

(2) Senior Judge Prentice H. Marshall of the Northern District of Illinois, approves of the proposed amendments and the Advisory Committee's tentative decision not to propose amendments to the listed rules.

(3) J. Houston Gordon, Esq., Covington, Tenn., supports the changes in Rules 407 and 801(d)(2).

(4) Magistrate Judge Virginia M. Morgan, on behalf of the Federal Magistrate Judges Association, in a letter dated January 23, 1996, supports the proposed changes.

(5) Carolyn B. Witherspoon, Esq., on behalf of the Arkansas Bar Association, in a letter dated January 31, 1996, wrote that the Committee had no objection to the proposed changes to Rules 801, 803, 804, new Rule 807, and Rule 804(b)(6) and 806, and pointed out that the proposed change to Rule 407 would change the law in the Eighth Circuit.

(6) James A. Strain, Esq., on behalf of The Seventh Circuit Bar Association, characterized the proposed amendments as "appropriate."

(7) Harriet L. Turney, Esq., on behalf of the State Bar of Arizona, in a letter dated February 27, 1996, writes that the State Bar "supports the proposed amendments to Rules 801, 803, 804, 806, and 807."

(8) Kent S. Hofmeister, Esq., on behalf of the Federal Bar Association, in a letter dated February 29, 1996, endorses the proposed amendments.

(9) Donald R. Dunner, Esq., on behalf of the American Bar Association Section of Intellectual Property Law, in a letter dated March 1, 1990, writes that "this committee has no substantive comment" on the amendments proposed for Rules 407, 801(d)(2) or 804(b)(6). With regard to amendments to the latter two rules, the letter further states that the committee "finds the amendments to be reasonable."

(10) Nanci L. Clarence, Esq., on behalf of the Executive Committee of the Litigation Section of the State Bar of California, in a letter dated February 28, 1996, writes that the Section takes "no position" on the proposed amendments.

Judge Ralph K. Winter, Chair, presided over a public hearing in New York on January 18, 1996, which was also attended by the Hon. Jerry E. Smith and

Gregory P. Joseph, members of the Evidence Committee and Professor Margaret A. Berger, the Reporter. At the hearing, the Committee heard from Professor Richard D. Friedman of the Michigan Law School and Thais L. Richardson, a student at the American University Law School.

Bryan Garner, consultant on style, suggested certain stylistic improvements that were incorporated into the rules that were published for comment. The Advisory Committee voted, however, at its April, 1996 meeting to defer all restylization efforts. Consequently, any changes that had been made in the rules solely for stylistic reasons have been eliminated.

1. Synopsis of Proposed Amendments

(a) Rule 407 is amended to extend the exclusionary principle of the rule to product liability actions, and to clarify that the rule applies only to measures taken after an injury or harm caused by an event.

(b) Rule 801(d)(2) is amended to provide that a court shall consider the contents of the statement seeking admission when determining whether the proponent has established the preliminary facts that make a statement admissible as an authorized or vicarious admission or a coconspirator's statement. With regard to a coconspirator's statement this amendment codifies the holding in Bourjaily v. United States, 483 U.S. 171 (1987). The amendment also resolves an issue on which the Supreme Court had reserved decision by providing that the contents of the statement do not alone suffice to establish the preliminary facts.

(c) Rule 804(b)(6) is added to provide that a party forfeits the right to object on hearsay grounds to the admission of a statement made by a declarant whose unavailability as a witness was procured by the party's wrongdoing or acquiescence therein. This rule codifies a principle that has been recognized by every circuit that has addressed the issue, although the tests for finding waiver and the applicable standard of proof have not been uniform. The proposed rule adheres to the usual Rule 104(a) preponderance of the evidence standard for preliminary questions. The rule would apply in civil as well as criminal cases and would apply to wrongdoing by the government.

(d) The contents of Rules 803(24) and 804(b)(5) have been combined and transferred to a new Rule 807. Consequently, there will now be only one residual hearsay exception instead of two. This change was made to facilitate future additions to Rules 803 and 804. No change in meaning is intended.

(e) Rule 806 is amended to eliminate a comma that mistakenly appears in the current rule.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE*

Rule 407. Subsequent Remedial Measures

When, after an injury or harm allegedly caused by an event, measures are taken ~~which~~ that, if taken previously, would have made the ~~event~~ injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, ~~or~~ culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction ~~in connection with the event~~.

* * * * *

COMMITTEE NOTE

The amendment to Rule 407 makes two changes in the rule. First, the words "an injury or harm allegedly caused by" were added to clarify that the rule applies only to changes made after the occurrence that produced the damages giving rise to the action. Evidence of measures taken by the defendant prior to the "event" causing "injury or harm" do not fall within the exclusionary scope of Rule 407 even if they occurred after the manufacture or design of the product. See Chase v. General Motors Corp., 856 F.2d 17, 21-22 (4th Cir. 1988).

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* New matter is underlined; matter to be omitted is lined through.

Second, Rule 407 has been amended to provide that evidence of subsequent remedial measures may not be used to prove "a defect in a product or its design, or that a warning or instruction should have accompanied a product." This amendment adopts the view of a majority of the circuits that have interpreted Rule 407 to apply to products liability actions. See Raymond v. Raymond Corp., 938 F.2d 1518, 1522 (1st Cir. 1991); In re Joint Eastern District and Southern District Asbestos Litigation v. Armstrong World Industries, Inc., 995 F.2d 343 (2d Cir. 1993); Cann v. Ford Motor Co., 658 F.2d 54, 60 (2d Cir. 1981), cert. denied, 456 U.S. 960 (1982); Kelly v. Crown Equipment Co., 970 F.2d 1273, 1275 (3d Cir. 1992); Werner v. Upjohn,Inc., 628 F.2d 848 (4th Cir. 1980), cert. denied, 449 U.S. 1080 (1981); Grenada Steel Industries, Inc. v. Alabama Oxygen Co., Inc., 695 F.2d 883 (5th Cir. 1983); Bauman v. Volkswagenwerk Aktiengesellschaft, 621 F.2d 230, 232 (6th Cir. 1980); Flaminio v. Honda Motor Company, Ltd., 733 F.2d 463, 469 (7th Cir. 1984); Gauthier v. AMF, Inc., 788 F.2d 634, 636-37 (9th Cir. 1986).

Although this amendment adopts a uniform federal rule, it should be noted that evidence of subsequent remedial measures may be admissible pursuant to the second sentence of Rule 407. Evidence of subsequent measures that is not barred by Rule 407 may still be subject to exclusion on Rule 403 grounds when the dangers of prejudice or confusion substantially outweigh the probative value of the evidence.

GAP Report on Rule 407. The words "injury or harm" were substituted for the word "event" in line 3. The stylization changes in the second sentence of the rule were eliminated. The words "causing 'injury or harm'" were added to the Committee Note.

Rule 801. Definitions

* * * * *

(d) Statements which are not hearsay.

* * * * *

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a

statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

COMMITTEE NOTE

Rule 801(d)(2) has been amended in order to respond to three issues raised by Bourjaily v. United States, 483 U.S. 171 (1987). First, the amendment codifies the holding in Bourjaily by stating expressly that a court shall consider the contents of a coconspirator's statement in determining "the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered." According to Bourjaily, Rule 104(a) requires these preliminary questions to be established by a preponderance of the evidence.

Second, the amendment resolves an issue on which the Court had reserved decision. It provides that the contents of the declarant's statement do not alone suffice to establish a conspiracy in which the declarant and the defendant participated. The court must consider in addition the circumstances surrounding the statement, such as the identity of the speaker, the context in which the statement was made, or evidence corroborating the contents of the statement in making its determination as to each preliminary question. This amendment is in accordance with existing practice. Every court of appeals that has resolved this issue requires some evidence in addition to the contents of the statement. See, e.g., United States v. Beckham, 968 F.2d 47, 51 (D.C.Cir. 1992); United States v. Sepulveda, 15 F.3d 1161, 1181-82 (1st Cir. 1993), cert. denied, 114 S.Ct. 2714 (1994); United States v. Daly, 842 F.2d 1380, 1386 (2d Cir.), cert. denied, 488 U.S. 821 (1988); United States v. Clark, 18 F.3d 1337, 1341-42 (6th Cir.), cert. denied, 115 S.Ct. 152 (1994); United States v. Zambrana, 841 F.2d 1320, 1344-45 (7th Cir. 1988); United States v. Silverman, 861 F.2d 571, 577 (9th Cir. 1988); United States v. Gordon, 844 F.2d 1397, 1402 (9th Cir. 1988); United States v. Hernandez, 829 F.2d 988, 993 (10th Cir. 1987), cert. denied, 485 U.S. 1013 (1988); United States v. Byrom, 910 F.2d 725, 736 (11th Cir. 1990).

Third, the amendment extends the reasoning of Bourjaily to statements offered under subdivisions (C) and (D) of Rule 801(d)(2). In Bourjaily, the Court rejected treating foundational facts pursuant to the law of agency in favor of an evidentiary approach governed by Rule 104(a). The Advisory Committee believes it appropriate to treat analogously preliminary questions relating to the declarant's authority under subdivision (C), and the agency or employment relationship and scope thereof under subdivision (D).

GAP Report on Rule 801. The word "shall" was substituted for the word "may" in line 19. The second sentence of the committee note was changed accordingly.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

* * * * *

(24) [Transferred to Rule 807] ~~Other exceptions. -- A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted~~

~~under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.~~

COMMITTEE NOTE

The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to a new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended.

GAP Report on Rule 803. The words "Transferred to Rule 807" were substituted for "Abrogated."

Rule 804. Hearsay Exceptions; Declarant Unavailable

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(b) Hearsay exceptions.

Federal Rules of Evidence

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(5) [Transferred to Rule 807] ~~Other exceptions. -- A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the~~

~~proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.~~

(6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

COMMITTEE NOTE

Subdivision (b)(5). The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to a new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended.

Subdivision (b)(6). Rule 804(b)(6) has been added to provide that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement when the party's deliberate wrongdoing or acquiescence therein procured the unavailability of the declarant as a witness. This recognizes the need for a prophylactic rule to deal with abhorrent behavior "which strikes at the heart of the system of justice itself." United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982), cert. denied, 467 U.S. 1204 (1984). The wrongdoing need not consist of a criminal act. The rule applies to all parties, including the government.

Every circuit that has resolved the question has recognized the principle of forfeiture by misconduct, although the tests for determining whether there is a forfeiture have varied. See, e.g., United States v. Aguiar, 975 F.2d 45, 47 (2d Cir. 1992); United States v. Potamitis, 739 F.2d 784, 789 (2d Cir.), cert. denied, 469 U.S. 918 (1984); Steele v. Taylor, 684 F.2d 1193, 1199 (6th Cir. 1982), cert. denied, 460 U.S. 1053 (1983); United States v. Balano, 618 F.2d 624, 629 (10th Cir. 1979), cert. denied, 449 U.S. 840 (1980); United States v. Carlson, 547 F.2d 1346, 1358-59 (8th Cir.), cert. denied, 431 U.S. 914 (1977). The foregoing cases apply a preponderance of the evidence standard. Contra United States v. Thevis, 665 F.2d 616, 631 (5th Cir.) (clear and convincing standard), cert. denied, 459 U.S. 825 (1982). The usual Rule 104(a) preponderance of the evidence standard has been adopted in light of the behavior the new Rule 804(b)(6) seeks to discourage.

GAP Report on Rule 804(b)(5). The words "Transferred to Rule 807" were substituted for "Abrogated."

GAP Report on Rule 804(b)(6). The title of the rule was changed to "Forfeiture by wrongdoing." The word "who" in line 24 was changed to "that" to indicate that the rule is potentially applicable against the government. Two sentences were added to the first paragraph of the committee note to clarify that the wrongdoing need not be criminal in nature, and to indicate the rule's potential applicability to the government. The word "forfeiture" was substituted for "waiver" in the note.

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in Rule 801(d)(2)~~,~~ (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

COMMITTEE NOTE

The amendment is technical. No substantive change is intended.

GAP Report. Restylization changes in the rule were eliminated.

Rule 807. ~~Other Exceptions~~ Residual Exception**

A statement not specifically covered by ~~any of the foregoing exceptions~~ Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be

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** Although Rule 807 is new, it consists of contents of former Rules 803(24) and 804(5). For comparison purpose, the matter underlined and lined through is based on the two former rules.

served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

COMMITTEE NOTE

The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to a new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended.

GAP Report on Rule 807. Restylization changes were eliminated.

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