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.

2. Text of Proposed Amendments, GAP Report, and Summary of Comments Relating to Particular Rules.

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 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).

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., 958 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); Kelley 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.

Public Comments on Rule 407.

(1) Judge Martin L.C. Feldman of the Eastern District of Louisiana, in his letter of November 6, 1995, expressed concern that the impeachment exception to Rule 407 might be applied too broadly.

(2) Frank E. Tolbert of Miller, Tolbert, Muehlhausen, Muehlhausen & Groff, P.C., Logansport, Ind., in a

letter dated November 1, 1995, agreed that Rule 407 should be extended to product liability actions as to changes made after the occurrence that produced the injury.

(3) Richard C. Watters, Esq., of Miles, Sears & Eanni, Fresno, CA, in a letter dated November 9, 1995, supported the proposed amendment.

(4) Joseph D. Jamil, Esq., of Jamil & Kolius, Houston, Tex., in a letter dated November 6, 1995, wrote that "the rule should, if anything, be amended to ***permit*** proof of subsequent remedial measures in products liability cases."

(5) Professor Michael H. Hoffheimer, University of Mississippi Law Center, in a letter dated December 1, 1995, objected to a stylistic change that substituted a "that" for a "which."

(6) Brent W. Coon, Esq., of Provost, Umphrey, Beaumont, Tex., in a letter dated November 27, 1995, recommended amending the rule "to specifically exclude claims grounded in products liability as opposed to expressly including such claims. The public would be much better served."

(7) John A.K. Grunert, Esq., of Campbell & Associates, Boston, MA., in a letter dated January 4, 1996, urges reconsideration of some of the proposed changes. He suggests that "the rule should apply only to remedial measures taken after the alleged tortfeasor knew or should have known of the 'injury or harm.'" As drafted, he fears the rule will produce "the same uncertainty and factual difficulty that the so-called 'discovery rule' and 'successive harms' rule have created with respect to statute of limitations defenses." He proposes eliminating the words relating to "injury or harm" entirely as not needed due to judicial decisions, or if there is a need for clarification substituting instead: "When, after the first occurrence of

injury or harm for which damages or other forms of relief are sought in the litigation," etc. He also suggests adding "a breach of warranty" in order to fully accomplish the Committee's purpose and deleting "a defect in a product's design" as "a redundant source of possible confusion." Finally, he see no need to change the second sentence of the rule.

(8) Judge Edward R. Becker of the Third Circuit, in a letter dated January 17, 1996, "commend[s] the Committee for this proposal."

(9) Robert F. Wise, Jr., Esq., on behalf of the Federal Procedure Committee of the New York State Bar Association, in a letter dated February 28, 1996, writes that "the proposed amendments appear to codify the existing case law, and we support their adoption."

(10) Hugh F. Young, Jr., on behalf of the Product Liability Advisory Council (PLAC), in a letter dated February 29, 1996, comments extensively on the proposed amendments. He writes that PLAC "is a non-profit association whose corporate members include more than 110 major product manufacturers along with more than 300 attorneys in private practice who represent those manufacturers at trial and on appeal in cases involving products liability." PLAC supports the change extending Rule 407 to all product liability actions, but urges the Committee to revise the rule "to make clear that, in product liability cases, it applies not only to changes made in a product line after an accident occurs but also to any product line changes made after the sale of the product involved in the case." PLAC argues that the change is needed in order to encourage manufacturers to make changes that will avoid additional accidents.

(11) Thais L. Richardson, a student at American University Law School, submitted a Comment that will be published in volume 45 of The American

University Law Review. The Comment approves of extending the rule to products liability actions but objects that limiting the rule to measures taken after the event giving rise to the lawsuit is "inconsistent with both public policy and substantive products liability law." Ms. Richardson testified to the same effect at the public hearing on January 18, 1996.

(12) William B. Poff, Esq., on behalf of the National Association of Railroad Trial Counsel, in a letter dated March 1, 1996, approves the changes.

(13) Professor David P. Leonard of Loyola Law School, Los Angeles, CA, in a letter dated March 1, 1996, finds that the Committee's clarification of the meaning of "after an event" is "ill-advised." "[T]he goal of promoting safety would be thwarted by admitting evidence of subsequent remedial measure taken before the accident in question had occurred." Accordingly he recommends applying "the exclusionary principle to all cases in which admission might materially affect the decision whether to repair, regardless of whether the measure was taken before or after the accident in question. While a rule requiring the judge to make such a factual finding would not be perfect, it would reach results more in accordance with the rule's purpose in a greater number of cases than would the current proposal."

(14) Pamela Anagnos Liapakis, on behalf of the Association of Trial Lawyers of America (ATLA), in a letter dated March 1, 1996, opposed the revision principally on the grounds that disagreements among circuits ought to be resolved by the Supreme Court, and that excluding evidence of subsequent measures is a bad rule for products liability cases as no empirical evidence exists that anybody has ever made a safety-related change because of the rule. She states that subsequent repair evidence is often the only evidence available to a

plaintiff to prove feasibility since other evidence resides in defendants' file cabinets. She also states that the amended rule is outcome-determinative because it would make plaintiffs susceptible to summary judgment motions long before a litigation would reach the stage where feasibility might be controverted so that the exception in the second sentence of Rule 407 would apply.

GAP Report on Rule 407. The words "injury or harm" were substituted for the word "event" in line 4. 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

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(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).

Public Comments on Rule 801.

(1) Judge Edward R. Becker of the Third Circuit, in a letter dated January 17, 1996, finds the proposed rule an improvement over the current state of the law, but urges the Committee to restore the old evidence aliunde principle that predated the Bourjaily opinion. Judge Becker notes that Bourjaily was an exercise in the jurisprudence of "plain meaning" rather than a "jurisprudential declaration" about the law of evidence by the Supreme Court; that he knows of no evidence that the drafters of the rules intended to abolish the independent evidence requirement; and that coconspirators' statements are suspect in terms of trustworthiness so that bootstrapping is "particularly dangerous." Abandonment of the independent evidence requirement eliminates one of the few safeguards of reliability.

(2) Daniel E. Monnat, on behalf of the Kansas Association of Criminal Defense Lawyers, in a letter dated January 22, 1996, opposes allowing the contents of a hearsay statement to be used in determining the admissibility of a hearsay statement, but "absolutely support[s] that part of the amendment which clarifies that the contents of the hearsay statement are not alone sufficient to establish the existence of a conspiracy."

(3) Paul W. Mollica, on behalf of the Chicago Council of Layers, in a letter dated February 7, 1996, urges additional study before the rule is extended to civil cases. He argues that the per se rule established by the proposal requiring corroboration before a statement is admitted into evidence "could unreasonably deprive a party of important evidence, especially where the party opposing admission of the statement proffers no evidence to rebut it."

(4) Robert F. Wise, Jr., on behalf of the Commercial and Federal Litigation Section of the New York State Bar Association, in a letter dated February 28, 1996, characterizes the proposed amendment as "a net gain for those resisting admission of co-conspirator statements," although he notes that some, particularly criminal defense lawyers will question whether "some independent evidence" is sufficient protection. He also observes that the "quality of the independent evidence required has not been defined." Treating authorized and vicarious admissions consistently with coconspirators' statements makes sense as all rest on an agency theory. On balance he terms the proposed amendment an improvement that helps to clarify the law.

(5) Professor James J. Duane of Regent University Law School, in a letter dated February 29, 1996, submitted lengthy comments that he hopes to have published. He objects to the proposed amendment as codifying pure dictum, predicts that the amendment will have no impact on any cases, and "if adopted, will instantly become the most frivolous and trivial of the all the Federal Rules of Evidence." He suggests that something should have been done about the quantity or quality of the additional independent evidence, the source of the independent evidence, and the need for each of the three required findings to be supported by independent evidence. He also proposed substituting "conspirator" for

"coconspirator," and rewriting the rule to substitute "conspirator of the party" for "conspirator of a party" because the provision's plain-meaning is that a statement may be offered against any defendant in a multi-party criminal case (even one who was not a member of the conspiracy), if it was made by someone who was in a conspiracy with at least one of the other defendants.

(6) William J. Genego and Peter Goldberger as Co-Chairs of the National Association of Criminal Defense Lawyers' Committee on Rules of Procedure (NACDL), in a letter dated February 29, 1996, write that NACDL would prefer to reject Bourjaily and does not support the extension of that holding to other agents' statements, particularly in criminal cases. But if these suggestions are rejected, NACDL states that "we certainly support the creation of a specific rule of insufficiency for bootstrapped offers of co-conspirator statements." NACDL points out that concerns about the reliability of coconspirator statements have been exacerbated by the Sentencing Guidelines' harsh penalties and incentives for cooperation. NACDL also states that the extension of the bootstrapping rule to other forms of admissions makes matters worse in "white collar crime" cases arising in a business setting.

(7) Professor Myrna S. Raeder of Southwestern Law School, in a letter dated March 1, 1996, objects to the proposed amendment as "fall[ing] short of any meaningful assurance of reliability. . . Some type of additional reliability check is warranted, whether by independent evidence or . . . by additional foundational requirements." She enclosed a 1990 report prepared by the American Bar Association Criminal Justice Section's Committee on Rules of Criminal Procedure and Evidence.

(8) Professor Richard D. Friedman of the University of Michigan Law School

testified at the public hearing held on Janurary 18, 1996. He does not think the amendment should be adopted because it is not needed and will increase confusion. "When we talk about some evidence, I think it is very, very hard to put your fingers on what that means and I don't even think -- I don't really think it is possible." In his view there almost always is other evidence, and in cases in which there really was no conspiracy one should trust the district trial courts to make the appropriate judgment.

GAP Report on Rule 801. The word "shall" was substituted for the word "may" in line 26. The second sentence of the committee note was changed accordingly.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

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(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 rule 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.

Public Comments on Rule 803.

(1) Professor Bruce Comely French of Ohio Northern University Law School, in a letter dated January 16, 1996, noted his opposition to the residual provisions on principle. He also opposed combining the exceptions, if they are to be retained, into the proposed Rule 807. He believes that a designation system such as (24a) or (5a) would aid historical research.

(2) All other comments approved combining the two residual exceptions into a new Rule 807.

(3) Comments addressed to the substance of the residual exception are discussed in connection with Rule 807.

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

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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 rule 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 intented.

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.

Public Comments on Rule 804(b)(5). See Public Comments on Rule 803.

Public Comments on Rule 804(b)(6).

(1) Robert F. Wise, Jr., Esq. on behalf of the Commercial and Federal Litigation Section of the New York State Bar Association, in a letter dated February 28, 1996, states that the proposed amendment raises "two potential

concerns." First, a higher clear and convincing standard would be more appropriate than the preponderance of the evidence standard because a penalty or punishment is at stake and because the consequences of admission may be severe. He also believes that a higher standard may cut down on time consuming satellite litigation. Second, he finds that the words "'wrongdoing' and 'acquiesced' are somewhat nebulous and are likely to engender dispute." He asks whether the rule would apply to a corporation in civil litigation that refused to produce its employees in a foreign jurisdiction? Finally, he finds no presing need for a rule since the courts have been able to deal with these situation, and fears that more litigation and a more mechanical approach may ensue if the amendment is adopted.

(2) William B. Poff, Esq. on behalf of the National Association of Railroad Trial Counsel, in a letter dated March 1, 1996, comments that the word "acquiesce" is too vague and suggests substituting "who has engaged, directly or indirectly, in wrongdoing."

(3) Professor Myrna S. Raeder of Southwestern University School of Law, on behalf of ten professors of evidence and individuals interested in evidentiary policy, in a letter dated March 1, 1996, made a number of suggestions. "Forfeiture" should be substituted for "waiver" because the concept of knowing waiver in this context is a fiction. The rule should be rewritten so that it would apply only when the defendant is aware that the victim is likely to be a witness in a proceeding. If the defendant is accused of murdering an individual, and there is no connection to witness tampering, a traditional hearsay exception should be required so as to ensure trustworthy evidence and to discourage persons from manufacturing inculpatory statements from victims in murder cases. Therefore the words "obstruct justice" should be added at

line 34 after the words "intended to" and the phrase "in a pending proceeding should be added after the word "witness" at line 36. The phrase "acquiesced in wrongdoing" is too broad a standard; mere knowledge by the party should not suffice. She suggests substituting "engaged in or directed wrongdoing" at lines 33-34, and amending the committee note to indicate that the exception will not apply "unless a plausible possibility existed that had the accused opposed the conduct it would not have occurred." She also endorses substituting the more stringent "clear and convincing" standard and adding an advance notice provision because the proposed rule resembles the residual rules and Rule 404(b) in dealing with evidence whose presentation is not necessarily self-evident.

(4) William J. Genego and Peter Goldberger, Co-Chairs of the National Association of Criminal Defense Lawyers' Committee on Procedure, in a letter dated February 29, 1996, write that "NACDL strongly opposes the addition of proposed subparagraph (b)(6)." "A rule necessarily allowing the admissibility of untrustworthy, immaterial, inferior quality, and unjust evidence as a sanction for supposed misconduct is strong medicine, which should be more carefully formulated." It objects specifically that the terminology ("wrongdoing) is too vague; the preponderance standard of proof too low; that a notice requirement is needed; and that "forfeiture" should be substituted for "waiver.". NADCL further objects to "a party who" instead of "a party that" which would more clearly be potentially applicable to the government. NADCL suggests that a more appropriate remedy is to admit evidence of the wrongdoing as tending to show "consciousness of guilt" by the defendant or consciousness of doubt" by the government, accompanied by an "adverse inference" charge to the jury.

(5) Professor Richard D. Friedman of the University of Michigan Law School, at the public hearing on January 18, 1996, and in his submitted statement voiced a number of concerns. He prefers "forfeiture" to "waiver" and a "clear and convincing" standard. He approves of the rationale behind "acquiescence" but wishes the committee note to state that "knowledge of the conduct, and even satisfication concerning it, does not suffice unless there was at least a plausible possibility that if the accused had opposed the conduct the person engaged in it would not have done so." He suggested that absence ought not to equal unavailability unless "the prosecution has been unable by reasonable means to secure the attendance or testimony of the declarant." Professor Friedman would apply the rule even when the conduct that rendered a potential witness unable to testify is the same conduct with which the defendant is charged, as in a child abuse case if the defendant's conduct prevented the victim from testifying fully. He would also extend the rule to admit statements by declarants who were intimidated by the defendant before the particular crime with which defendant is now charged.

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 33 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.

Public Comments on Rule 806. No specific comments were received.

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 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.

Public Comments on Rule 807.

(1) Judge Edward R. Becker of the Third Circuit, in a letter dated January 17, 1996, applauded the combining of the residual exceptions but thought the Committee should also redraft the notice requirement "to unify the circuits and promote more flexibility."

(2) Professor Myrna S. Raeder, on behalf of ten evidence professors and individuals interested in evidentiary policy, in a letter dated March 1, 1996, argues that the residuals are being overused by prosecutors. She urges a tightening of the rule in criminal cases. She notes two additional reasons for revisiting the rule: 1. there is confusion about different standards of trustworthiness for evidentiary and confrontation clause purposes, and whether the evidentiary standard should be the same in civil and criminal cases; 2. the proposed forfeiture exception in Rule 804(b)(6) provides prosecutors with new flexibility when unavailability was caused by the defendant's wrongdoing; consequently the Committee should consider tightening Rule 807 in typical criminal cases.

(3) William J. Genego and Peter Goldberger, Co-Chairs of the National Association of Criminal Defense Lawyers' Committee on Procedure, in a letter dated February 29, 1996, propose a full study of "the excessive invocation of these residual exceptions by the courts." They suggest that the wording should be narrowed to make it less easy to invoke the rule as a vehicle for admitting "near miss" hearsay evidence that does not satisfy traditional hearsay exceptions.

(4) Professor Richard D. Friedman of the University of Michigan Law School, in a

statement submitted in connection with his appearance at the January 18, 1996 public hearing, objected that "to speak of the statement having 'circumstantial guarantees of trustworthiness' that are 'equivalent' to those of the aggregate of exceptions of Rules 803 and 804 is a meaningless standard."

GAP Report on Rule 807. Restylization changes were eliminated.