COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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

From: Hon. Ralph K. Winter, Chair
Advisory Committee on Evidence Rules

Date: June 7, 1995

I. Proposed Amendments to the Rules of Evidence

The Advisory Committee has proposed amendments to Federal Rules of Evidence 801(d)(2), 803(24), 804(b) and Rule 806. It has also proposed a new Rule 807. The Advisory Committee requests the Standing Committee's approval of these amendments for publication and comment.

II. Tentative Decisions Not to Amend

The Advisory Committee has tentatively decided not to propose amendments to the following Rules of Evidence and asks the Standing Committee to submit these tentative decisions for publication and comment:

Rule 103(a), (b), (c), (d) (Rulings on Evidence)
Rule 104 (Preliminary Questions)
Rule 408 (Compromise or Offers to Compromise)

Rule 411 (Liability Insurance)
Rule 801(a), (b), (c), (d)(1) (Definitions)
Rule 802 (Hearsay Rule)
Rule 803(1) - (23) (Hearsay Exceptions; Availability of Declarant Immaterial)
Rule 804(a), (b) (1) - (4) (Hearsay Exceptions; Declarant Unavailable)
Rule 805 (Hearsay Within Hearsay)
Rule 806 (Attacking and Supporting Credibility of Declarant)
Rule 901 (Requirement of Authentication or Identification)
Rule 902 (Self-Authentication)
Rule 903 (Subscribing Witness' Testimony Unnecessary)
Rule 1001 (Definitions)
Rule 1002 (Requirement of Original)
Rule 1003 (Admissibility of Duplicates)
Rule 1004 (Admissibility of Other Evidence of Contents)
Rule 1005 (Public Records)
Rule 1006 (Summaries)
Rule 1007 (Testimony or Written Admission of Party)
Rule 1008 (Functions of Court and Jury)
Rule 1101 (Applicability of Rules)
Rule 1102 (Amendments)
Rule 1103 (Title)

The Advisory Committee requests that the Standing Committee submit for publication and comment these tentative decisions, utilizing the same procedure followed at previous Standing Committee meetings.

Rule 801. Definitions

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(d) Statements which are not hearsay.

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(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. <u>The contents of the statement may 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).</u>

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 may 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).

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

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~~(24) 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.

Rule 804. Hearsay Exceptions; Declarant Unavailable

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(b) Hearsay exceptions

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~~(5) 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) Waiver by misconduct. A statement offered against a party who 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).

Every circuit that has resolved the question has recognized the principle of waiver by misconduct, although the tests for determining whether there is a waiver 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.

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.

Rule 807. Other Exceptions

A statement not specifically covered by ~~any of the foregoing exceptions~~ Rule 803 or 804 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.

Rule 103. Rulings on Evidence

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(e) Effect of Pretrial Ruling. A pretrial objection to or proffer of evidence must be timely renewed at trial unless the court states on the record, or the context clearly demonstrates, that a ruling on the objection or proffer is final.

COMMITTEE NOTE

Since the Federal Rules of Evidence became effective, litigants have increasingly relied on pretrial motions to raise issues about the admissibility of evidence. As enacted, Rule 103 did not specifically address whether a losing party had to renew its objection or offer of proof at trial in order to preserve an issue for appeal.

Subdivison (e) has been added in order to clarify differing approaches that spell uncertainty for litigants and create unnecessary work for the appellate courts. See, e.g., United States v. Vest, 842 F.2d 1319, 1325 (1st Cir.) (absence of objection at trial is "fatal"), cert. denied, 488 U.S. 965 (1988); Allison v. Ticor Title Ins. Co., 979 F.2d 1187, 1200 (7th Cir. 1992) ("the law in this circuit is that an unsuccessful

motion in limine does preserve the issue for appeal"); American Home Assurance Co. v. Sunshine Supermarket, Inc., 753 F.2d 321, 324 (3d Cir. 1985) ("test is whether an objection at trial would have been more in the nature of a formal exception or in the nature of a timely objection calling the courts' attention to a matter it need consider."); Palmerin v. City of Riverside, 794 F.2d 1409, 1411 (9th Cir. 1986) (circuit's position is "unclear).

Subdivision (e) states as a default rule that counsel for the losing party must renew any pretrial objection or proffer at trial. Renewal is not required if "the court expressly states on the record, or the context clearly demonstrates," the finality of the pretrial ruling. Counsel bears the responsibility for obtaining the requisite ruling or renewing the objection and bears the risk of waiving an appealable issue if these procedures are not followed. The Committee considered but rejected an alternative general rule that would not require renewal of a motion at trial.

Rule 103(e) does not excuse a litigant from having to satisfy the requirements of Luce v. United States, 469 U.S. 28 (1984) to the extent applicable. In Luce, the Supreme Court held that an accused must testify at trial in order to preserve for appeal any Rule 609 objection to a trial court's ruling on the admissibility of the accused's prior convictions for impeachment. Some circuits have extended the Luce rule beyond the Rule 609 context. See United States v. Weichert, 783 F.2d 23, 25 (2d Cir. 1986) (Rule 608(b)), cert. denied, 479 U.S. 831 (1986); United States v. Sanderson,

966 F.2d 184, 189-90 (6th Cir. 1992) (same); United States v. DiMatteo, 759 F.2d 831, 832-33 (11th Cir. 1985) (per curiam) (same), cert. denied, 474 U.S. 860 (1985); United States v. Griffin, 818 F.2d 97, 105 (1st Cir. 1987) (Rule 403), cert. denied, 484 U.S. 844 (1987).

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 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. This rule does not require the exclusion of~~ Evidence of subsequent measures may be ~~when~~ offered for another purpose, such as impeachment or ~~if controverted, proving~~ proof of ownership, control, or feasibility of precautionary measures ~~if controverted, or impeachment~~. * * * * *

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" 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.