

court. But the credibility of the witness who relates the statement is not a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the witness's credibility would usurp the jury's role of determining the credibility of testifying witnesses.

*Changes Made After Publication and Comments.* The rule, as submitted for public comment, was restyled in accordance with the style conventions of the Style Subcommittee of the Committee on Rules of Practice and Procedure. As restyled, the proposed amendment addresses the style suggestions made in public comments.

The proposed Committee Note was amended to add a short discussion on applying the corroborating circumstances requirement.

#### COMMITTEE NOTES ON RULES—2011 AMENDMENT

The language of Rule 804 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

No style changes were made to Rule 804(b)(3), because it was already restyled in conjunction with a substantive amendment, effective December 1, 2010.

#### AMENDMENT BY PUBLIC LAW

1988—Subd. (a)(5). Pub. L. 100-690 substituted “subdivision” for “subdivisions”.

1975—Pub. L. 94-149, §1(12), substituted a semicolon for the colon in catchline.

Subd. (b)(3). Pub. L. 94-149, §1(13), substituted “admissible” for “admissable”.

### Rule 805. Hearsay Within Hearsay

Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

(Pub. L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1943; Apr. 26, 2011, eff. Dec. 1, 2011.)

#### NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

On principle it scarcely seems open to doubt that the hearsay rule should not call for exclusion of a hearsay statement which includes a further hearsay statement when both conform to the requirements of a hearsay exception. Thus a hospital record might contain an entry of the patient's age based on information furnished by his wife. The hospital record would qualify as a regular entry except that the person who furnished the information was not acting in the routine of the business. However, her statement independently qualifies as a statement of pedigree (if she is unavailable) or as a statement made for purposes of diagnosis or treatment, and hence each link in the chain falls under sufficient assurances. Or, further to illustrate, a dying declaration may incorporate a declaration against interest by another declarant. See McCormick §290, p. 611.

#### COMMITTEE NOTES ON RULES—2011 AMENDMENT

The language of Rule 805 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

### Rule 806. Attacking and Supporting the Declarant's Credibility

When a hearsay statement—or a statement described in Rule 801(d)(2)(C), (D), or (E)—has been

admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

(Pub. L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1943; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 11, 1997, eff. Dec. 1, 1997; Apr. 26, 2011, eff. Dec. 1, 2011.)

#### NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment and support as though he had in fact testified. See Rules 608 and 609. There are however, some special aspects of the impeaching of a hearsay declarant which require consideration. These special aspects center upon impeachment by inconsistent statement, arise from factual differences which exist between the use of hearsay and an actual witness and also between various kinds of hearsay, and involve the question of applying to declarants the general rule disallowing evidence of an inconsistent statement to impeach a witness unless he is afforded an opportunity to deny or explain. See Rule 613(b).

The principle difference between using hearsay and an actual witness is that the inconsistent statement will in the case of the witness almost inevitably of necessity in the nature of things be a *prior* statement, which it is entirely possible and feasible to call to his attention, while in the case of hearsay the inconsistent statement may well be a *subsequent* one, which practically precludes calling it to the attention of the declarant. The result of insisting upon observation of this impossible requirement in the hearsay situation is to deny the opponent, already barred from cross-examination, any benefit of this important technique of impeachment. The writers favor allowing the subsequent statement. McCormick §37, p. 69; 3 Wigmore §1033. The cases, however, are divided. Cases allowing the impeachment include *People v. Collup*, 27 Cal.2d 829, 167 P.2d 714 (1946); *People v. Rosoto*, 58 Cal.2d 304, 23 Cal.Rptr. 779, 373 P.2d 867 (1962); *Carver v. United States*, 164 U.S. 694, 17 S.Ct. 228, 41 L.Ed. 602 (1897). *Contra*, *Mattox v. United States*, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895); *People v. Hines*, 284 N.Y. 93, 29 N.E.2d 483 (1940). The force of *Mattox*, where the hearsay was the former testimony of a deceased witness and the denial of use of a subsequent inconsistent statement was upheld, is much diminished by *Carver*, where the hearsay was a dying declaration and denial of use of a subsequent inconsistent statement resulted in reversal. The difference in the particular brand of hearsay seems unimportant when the inconsistent statement is a *subsequent* one. True, the opponent is not totally deprived of cross-examination when the hearsay is former testimony or a deposition but he is deprived of cross-examining on the statement or along lines suggested by it. Mr. Justice Shiras, with two justices joining him, dissented vigorously in *Mattox*.

When the impeaching statement was made *prior* to the hearsay statement, differences in the kinds of hearsay appear which arguably may justify differences in treatment. If the hearsay consisted of a simple statement by the witness, e.g. a dying declaration or a declaration against interest, the feasibility of affording him an opportunity to deny or explain encounters the same practical impossibility as where the statement is a subsequent one, just discussed, although here the impossibility arises from the total absence of anything resembling a hearing at which the matter could be put to

him. The courts by a large majority have ruled in favor of allowing the statement to be used under these circumstances. McCormick §37, p. 69; 3 Wigmore §1033. If, however, the hearsay consists of former testimony or a deposition, the possibility of calling the prior statement to the attention of the witness or deponent is not ruled out, since the opportunity to cross-examine was available. It might thus be concluded that with former testimony or depositions the conventional foundation should be insisted upon. Most of the cases involve depositions, and Wigmore describes them as divided. 3 Wigmore §1031. Deposition procedures at best are cumbersome and expensive, and to require the laying of the foundation may impose an undue burden. Under the federal practice, there is no way of knowing with certainty at the time of taking a deposition whether it is merely for discovery or will ultimately end up in evidence. With respect to both former testimony and depositions the possibility exists that knowledge of the statement might not be acquired until after the time of the cross-examination. Moreover, the expanded admissibility of former testimony and depositions under Rule 804(b)(1) calls for a correspondingly expanded approach to impeachment. The rule dispenses with the requirement in all hearsay situations, which is readily administered and best calculated to lead to fair results.

Notice should be taken that Rule 26(f) of the Federal Rules of Civil Procedure, as originally submitted by the Advisory Committee, ended with the following:

“\* \* \* and, without having first called them to the deponent’s attention, may show statements contradictory thereto made at any time by the deponent.” This language did not appear in the rule as promulgated in December, 1937. See 4 Moore’s Federal Practice ¶¶26.01[9], 26.35 (2d ed. 1967). In 1951, Nebraska adopted a provision strongly resembling the one stricken from the federal rule:

“Any party may impeach any adverse deponent by self-contradiction without having laid foundation for such impeachment at the time such deposition was taken.” R.S.Neb. §25-1267.07.

For similar provisions, see Uniform Rule 65; California Evidence Code §1202; Kansas Code of Civil Procedure §60-462; New Jersey Evidence Rule 65.

The provision for cross-examination of a declarant upon his hearsay statement is a corollary of general principles of cross-examination. A similar provision is found in California Evidence Code §1203.

NOTES OF COMMITTEE ON THE JUDICIARY, SENATE  
REPORT NO. 93-1277

Rule 906, as passed by the House and as proposed by the Supreme Court provides that whenever a hearsay statement is admitted, the credibility of the declarant of the statement may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Rule 801 defines what is a hearsay statement. While statements by a person authorized by a party-opponent to make a statement concerning the subject, by the party-opponent’s agent or by a coconspirator of a party—see rule 801(d)(2)(c), (d) and (e)—are traditionally defined as exceptions to the hearsay rule, rule 801 defines such admission by a party-opponent as statements which are not hearsay. Consequently, rule 806 by referring exclusively to the admission of hearsay statements, does not appear to allow the credibility of the declarant to be attacked when the declarant is a co-conspirator, agent or authorized spokesman. The committee is of the view that such statements should open the declarant to attacks on his credibility. Indeed, the reason such statements are excluded from the operation of rule 806 is likely attributable to the drafting technique used to codify the hearsay rule, viz some statements, instead of being referred to as exceptions to the hearsay rule, are defined as statements which are not hearsay. The phrase “or a statement defined in rule 801(d)(2)(c), (d) and (e)” is added to the rule in order to subject the declarant of such statements, like the declarant of hearsay statements, to attacks on his

credibility. [The committee considered it unnecessary to include statements contained in rule 801(d)(2)(A) and (B)—the statement by the party-opponent himself or the statement of which he has manifested his adoption—because the credibility of the party-opponent is always subject to an attack on his credibility].

NOTES OF CONFERENCE COMMITTEE, HOUSE REPORT  
NO. 93-1597

The Senate amendment permits an attack upon the credibility of the declarant of a statement if the statement is one by a person authorized by a party-opponent to make a statement concerning the subject, one by an agent of a party-opponent, or one by a coconspirator of the party-opponent, as these statements are defined in Rules 801(d)(2)(C), (D) and (E). The House bill has no such provision.

The Conference adopts the Senate amendment. The Senate amendment conforms the rule to present practice.

NOTES OF ADVISORY COMMITTEE ON RULES—1987  
AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1997  
AMENDMENT

The amendment is technical. No substantive change is intended.

*GAP Report.* Restylization changes in the rule were eliminated.

COMMITTEE NOTES ON RULES—2011 AMENDMENT

The language of Rule 806 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

**Rule 807. Residual Exception**

(a) IN GENERAL. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

- (1) the statement has equivalent circumstantial guarantees of trustworthiness;
- (2) it is offered as evidence of a material fact;
- (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
- (4) admitting it will best serve the purposes of these rules and the interests of justice.

(b) NOTICE. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant’s name and address, so that the party has a fair opportunity to meet it.

(Added Apr. 11, 1997, eff. Dec. 1, 1997; Apr. 26, 2011, eff. Dec. 1, 2011.)

NOTES OF ADVISORY COMMITTEE ON RULES

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.

COMMITTEE NOTES ON RULES—2011 AMENDMENT

The language of Rule 807 has been amended as part of the restyling of the Evidence Rules to make them more