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## EXPANDING (OR JUST FIXING) THE RESIDUAL EXCEPTION TO THE HEARSAY RULE

*Daniel J. Capra\**

The Judicial Conference Advisory Committee on Evidence Rules (“the Committee”) has been considering whether to amend Federal Rule of Evidence 807 (known as the residual exception to the hearsay rule) to improve the way the Rule functions—and also to allow the admission of more hearsay if it is reliable. At the conference sponsored by the Committee in October, 2016—transcribed in this *Fordham Law Review* issue—the Committee submitted a working draft of an amendment that was vetted by the experts at the conference and reviewed favorably by most. This Article analyzes the arguments in favor of and against the reform of the residual exception and will set forth and explain the Advisory Committee’s approach to a possible amendment.

In its current form, Rule 807 provides as follows:

**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.<sup>1</sup>

The residual exception contains several limitations that tend to make it useful only in unusual cases. Congress made several changes to the Advisory Committee proposal, all with the intent to narrow the scope of the exception.<sup>2</sup>

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1. FED. R. EVID. 807.

2. The original Advisory Committee proposal was pretty simple. It provided that statements “not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness” would be admissible over a hearsay objection. Congress made the following changes: (1) changing the word “comparable” to “equivalent,”

The legislative history indicates an intent that the residual exception be used “very rarely, and only in exceptional circumstances.”<sup>3</sup> Congress was concerned that an unfettered residual exception would provide courts with too much discretion, thereby “injecting too much uncertainty into the law of evidence and impairing the ability of practitioners to prepare for trial.”<sup>4</sup> There was also a concern that a broad residual exception would erode the limitations provided in the standard hearsay exceptions—allowing courts and litigants to evade those limitations by simply using the residual exception.<sup>5</sup>

Congress, however, recognized two important reasons for needing a residual exception: (1) there will be trustworthy statements that do not fit under the standard exceptions, and it would compromise the search for truth to exclude a reliable statement simply because it did not fall within a standard exception<sup>6</sup> and (2) without a residual exception, courts might seek to shoehorn reliable statements into standard exceptions where they do not really fit—a process that would improperly change the meaning and breadth of those exceptions.<sup>7</sup>

The question of “rules v. discretion” received an airing at the Advisory Committee’s “Symposium on Hearsay Reform” in the fall of 2015.<sup>8</sup> In discussion after the symposium, the Committee expressed some interest in considering a compromise approach that would add a little bit more flexibility to the categorical hearsay exceptions, without going to a completely discretionary system that would allow the judge to determine whether hearsay is sufficiently reliable to be admissible in every case. One

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(2) adding the requirement that the hearsay be more probative than any other evidence reasonably available, (3) adding the requirement that the statement be proof of a material fact, (4) adding the requirement that admitting the statement will serve the purposes of the rules and the interests of justice, and (5) adding the pretrial notice requirement. *See* H.R. REP. NO. 93-1597, at 11 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 7098, 7105.

Originally there were two identically worded residual exceptions: Rule 803(24), which covered situations in which the declarant was available, and Rule 804(b)(5), which covered situations in which the declarant was unavailable. In 1997, the two exceptions were combined into a single exception, codified in Rule 807. No change in meaning was intended. *See* FED. R. EVID. 807 advisory committee’s note to 1997 amendment. In fact, however, a substantive change was made because the necessary “equivalence” comparison was extended to both Rule 803 and 804 exceptions for every statement offered as residual hearsay. *See infra* text accompanying notes 16–28.

3. S. REP. NO. 93-1277, at 18 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 7051, 7065.

4. H.R. REP. NO. 93-650, at 5 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 7075, 7079.

5. *See generally* David A. Sonenshein & Ben Fabens-Lassen, *Has the Residual Exception Swallowed the Hearsay Rule?*, 64 U. KAN. L. REV. 715 (2016) (discussing the concern in Congress and elsewhere that the residual exception will be used as a way to evade limitations set forth in the standard exceptions).

6. *See* FED. R. EVID. 803(24) advisory committee’s note (“It would, however, be presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued and to pass the hearsay rule to oncoming generations as a closed system.”).

7. *See* *United States v. Popenas*, 780 F.2d 545, 547 (6th Cir. 1985) (discussing how Congress ultimately included the residual exceptions, “fearing that without these provisions the more established exceptions would be unduly expanded in order to allow otherwise reliable evidence to be introduced”).

8. *See generally* *Symposium on Hearsay Reform*, 84 FORDHAM L. REV. 1323 (2016).

of the possibilities focused on expanding Rule 807, as described by the minutes of the meeting:

Committee members agreed that it would be worthwhile to explore possible compromise alternatives for hearsay reform—i.e., something not as radical as removing all the exceptions in favor of [discretionary] balancing, and yet something more than retaining the current system of categorical rules. One possibility is to expand the applicability of Rule 807, the residual exception. This might be accomplished by removing the “more probative” requirement of that rule, so that it could be invoked without the showing of necessity that is currently required. The trustworthiness requirement might also be changed from one requiring “equivalence” with the other exceptions to something more freestanding and discretionary.<sup>9</sup>

This Article considers various possibilities for fixing or expanding the applicability of the residual exception, including the two described above. Before discussing how Rule 807 could be improved and expanded (or simply improved), the following points should be emphasized: First, the discussion is focused on a possible *freestanding* expansion of Rule 807; but it is apparent that an expansion of the residual exception (if deemed a good idea) could also be part of broader revisions of the hearsay system. For example, an expansion of the residual exception might make limitations on or eliminations of other hearsay exceptions more viable. Thus, the Advisory Committee’s proposed elimination of the ancient documents hearsay exception—Rule 803(16)—was premised on the argument that ancient documents should be admissible only if reliable and that reliability could be established for qualified ancient documents under the residual exception.<sup>10</sup> But the substantial pushback in the public comment was in part based on the perceived difficulty of trying to fit ancient documents into the existing, limited residual exception.<sup>11</sup>

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9. Advisory Comm. on Evidence Rules, Minutes of the Meeting of October 9, 2015, at 4, [http://www.uscourts.gov/sites/default/files/minutes\\_fall\\_2015\\_meeting\\_0.pdf](http://www.uscourts.gov/sites/default/files/minutes_fall_2015_meeting_0.pdf) [https://perma.cc/W9Q2-JVHJ].

10. See Advisory Comm. on Evidence Rules, Minutes of the Meeting of April 17, 2015, at 3–5, [http://www.uscourts.gov/sites/default/files/2015-04-evidence-minutes\\_0.pdf](http://www.uscourts.gov/sites/default/files/2015-04-evidence-minutes_0.pdf) [https://perma.cc/Q3WJ-2YB2].

11. For public comments to the Proposed Abrogation of Rule 803(16), see *Proposed Amendments to the Federal Rules of Evidence*, REGULATIONS.GOV, <https://www.regulations.gov/docketBrowser?rpp=25&so=ASC&sb=docId&po=0&dct=PS&D=USC-RULES-EV-2015-0003> (last visited Feb. 16, 2017) [https://perma.cc/J9FH-JKFS]. Comments highlighting the narrow coverage of the residual exception include comments 0049, 0164, and 0174. Comment 0143 provides a different critique: that substituting the residual exception for the ancient documents exception will lead to inconsistent determinations and too much discretion for district judges. See Roger Park, Comment Letter on Proposed Amendments to the Federal Rules of Evidence (Feb. 12, 2016), <https://www.regulations.gov/document?D=USC-RULES-EV-2015-0003-0143> [https://perma.cc/EQW5-NHFF].

As to the ancient documents exception, the Advisory Committee, in response to public comment, proposed an amendment that would narrow, rather than eliminate, Rule 803(16). The current proposal is to limit the ancient documents exception to documents prepared before 1998. That proposal was approved by the Judicial Conference and is being considered by the U.S. Supreme Court. See *Pending Rules and Forms Amendments*, U.S. CTS., <http://www.uscourts.gov/rules-policies/pending-rules-and-forms-amendments> (last visited Feb. 16, 2017) [https://perma.cc/9KSD-D92W].

Second, Judge Richard Posner's proposal to eliminate the exceptions for excited utterances, present sense impressions, and dying declarations—on the ground that these exceptions allow admission of unreliable hearsay—is dependent on an expanded residual exception to take up the slack for reliable statements currently covered by those exceptions.<sup>12</sup> Also, an expanded residual exception would have an important role to play if the hearsay system were changed from categorical rules to guidelines—the residual exception could be the vehicle by which a court would “depart” when the guidelines do not cover the proffered hearsay.

The goal of this Article is not the broader one of thinking of multiple amendments as an integrated whole—that is, to say the least, a long-term project for the Advisory Committee. Rather, the primary goal is to explore ways in which the text of the residual exception might be changed so that it will cover more statements and provide more flexibility. The secondary goal is to determine whether certain amendments to the residual exception would improve the Rule, even if its coverage were not to be expanded.

Additionally, this Article takes the position that broadening the residual exception—and thereby allowing for more judicial discretion—is a good thing. The benefits of expanding the residual exception include (1) allowing more flexibility from the categorical constraints of the current system, thereby reducing arguments about whether a statement fits within those constraints; (2) alleviating the pressure on a court to distort the contours of a standard exception by admitting ill-fitting but reliable hearsay that should instead be admissible under a flexible residual exception; (3) alleviating pressure on the existing exceptions to the extent they can be critiqued (as Judge Posner has done); and (4) admitting more hearsay statements that are in fact reliable, which will serve as at least some response to the arguments that the hearsay rule keeps too much evidence away from the jury, even though the jury is able to discount hearsay.

The cost of expanding the residual exception, however, is often noted. Any move from a rules-based to a discretion-based system may lead to unpredictability that will cloud the prospects of settlement, prevent summary judgment, increase the costs of litigation, and create the need for more pretrial in limine rulings. Many lawyers believe that any increase in reliable hearsay that might be admitted by an expansion of the residual exception is far outweighed by the costs that would be raised by injecting more judicial discretion into the hearsay system.

This Article contends that the residual exception should be mildly expanded to provide more flexibility in the system and avoid the exclusion of reliable hearsay that currently occurs because the residual exception is said to be limited to “rare and exceptional”<sup>13</sup> circumstances—whatever that

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12. See Richard A. Posner, *On Hearsay*, 84 FORDHAM L. REV. 1465, 1467 (2016).

13. See Memorandum Regarding Report of the Advisory Committee on Evidence Rules from William K. Sessions, III, Chair, Advisory Comm. on Evidence Rules, to Jeffrey S. Sutton, Chair, Comm. on Rules of Practice & Procedure 16 (May 7, 2016) [hereinafter May 7, 2016, Memorandum], [http://www.uscourts.gov/sites/default/files/2016-05-07-evidence\\_rules\\_report\\_to\\_the\\_standing\\_committee\\_0.pdf](http://www.uscourts.gov/sites/default/files/2016-05-07-evidence_rules_report_to_the_standing_committee_0.pdf) [<https://perma.cc/GD8U-Z4QX>].

means. Today the residual exception is too limited to cover reliable statements that do not fit under the categorical exceptions. That conclusion is supported by an analysis of the extensive case law over the past ten years of its application, as discussed later in this Article. But even if the residual exception is set just about right in its breadth, a number of amendments can be justified simply as good rulemaking.

Part I makes the case for amending the “trustworthiness clause” (Rule 807(a)(1)) in various respects. Part II makes the case for amending or eliminating the “more probative” clause (Rule 807(a)(3)). Next, Part III argues for deleting the superfluous standards of “materiality” and “interests of justice” (Rule 802(a)(2) and (4)). Part IV discusses the changes that are necessary to the notice provision (Rule 807(b)). Then, Part V discusses why the current rule needs to be amended to expand the coverage of the residual exception. Part VI sets forth the Advisory Committee’s working draft of an amendment to Rule 807. Finally, Part VII discusses how that proposal can in large part be justified as good rulemaking independent of any need to expand the residual exception.

### I. THE TRUSTWORTHINESS CLAUSE

Rule 807(a)(1) requires the trial court to find that the proffered statement “has equivalent circumstantial guarantees of trustworthiness”<sup>14</sup>—equivalent to those guarantees found in Rule 803 and 804. This standard is problematic not only in imposing a requirement of “equivalence” that cannot reliably be implemented but also in ignoring other factors that should be relevant to any trustworthiness inquiry. Thus, it is defective in what it includes and what it does not include. These points—bad language included and pertinent factors not included—will be discussed in turn.

#### A. *Equivalent Circumstantial Guarantees of Trustworthiness*

As stated above, the current exception requires the court to find that the proffered hearsay has “equivalent circumstantial guarantees of trustworthiness.”<sup>15</sup> “Equivalent” is intended to require the court, in evaluating the hearsay, to find that it has reliability guarantees that are at an equal level to those found in the categorical exceptions.<sup>16</sup> But the term “equivalent” is nonsensical because the trustworthiness guarantees of the categorical exceptions vary widely. For example, the reason we admit business records (regularity) is completely different from the reason we admit excited utterances (because startlement stills the reflective capacity).<sup>17</sup> Moreover, it is common ground that the reliability guarantees of Rule 804’s

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14. FED. R. EVID. 807(a)(1).

15. *Id.*

16. *See, e.g.,* Conoco, Inc., v. Dep’t of Energy, 99 F.3d 387, 392–93 (Fed. Cir. 1996) (holding that the district court erred in admitting summaries under Rule 807, in part because they did not possess guarantees of trustworthiness that were “equivalent” to those of market reports or commercial tabulations).

17. *See* FED. R. EVID. 803(2), (6) advisory committee’s notes.

exceptions are weaker than those for Rule 803's exceptions<sup>18</sup>—yet the equivalence language requires the court to compare the proffered hearsay to both the Rule 803 and 804 exceptions. “Equivalence” in this regard might have had more meaning when the Federal Rules of Evidence (“the Evidence Rules” or “the Rules”) were enacted because at that time there were two residual exceptions, one for Rule 803 and one for Rule 804. By combining the two into one exception in 1996, the Advisory Committee made the “equivalence” standard more opaque and difficult to apply because it expanded the range of exceptions for comparison. Moreover, the 1996 addition of Rule 804(b)(6) further muddies the waters because that exception—for forfeiture—is not based on any circumstantial guarantees of reliability at all.<sup>19</sup> Yet Rule 807 still, at least on its face, requires the court to compare the proffered hearsay with the reliability requirements in *all* of the Rule 804 exceptions.

Case law indicates that the equivalence standard can cause inconsistency in the application of Rule 807. The major problem is that, given the wide range of options for comparison, a court can use “equivalence” as a result-oriented device. So if the court wants to admit the hearsay, it can rely on comparison with exceptions that are at the bottom of the reliability barrel. For example, in *Virola v. XO Communications, Inc.*,<sup>20</sup> an employment action, the plaintiffs sought to testify to offers of employment and salary quotes they obtained from other employers. The court held that the offers and quotes were admissible as residual hearsay to prove what the plaintiffs could really make in other positions.<sup>21</sup> As to trustworthiness, the court reasoned the trustworthiness of an offer of employment was supported by “market pressures” that are “equivalent to the assurances of reliability afforded by” Rule 803(16), the hearsay exception for ancient documents.<sup>22</sup> But the hearsay exception for ancient documents simply equates age with reliability; it is not supported by any circumstantial guarantees of trustworthiness and has operated as an open door for unreliable hearsay.<sup>23</sup> Perhaps the offers

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18. *See id.* 804(b) advisory committee's note (noting that while the Rule 803 exceptions cover hearsay that is admissible even if the declarant is unavailable, the Rule 804 exceptions cover hearsay “which admittedly is not equal in quality to testimony of the declarant on the stand”).

19. *See id.* 804(b)(6) (providing for forfeiture of a hearsay objection—regardless of the reliability of the hearsay statement—when the opponent has wrongfully caused the unavailability of the declarant with the intent to prevent the declarant from testifying).

20. No. 05-CV-5056(JG)(RER), 2008 WL 1766601 (E.D.N.Y. Apr. 15, 2008).

21. *See id.* at \*15–16.

22. *Id.* at \*16.

23. *See, e.g.,* Threadgill v. Armstrong World Indus. Inc., 928 F.2d 1366, 1375 (3d Cir. 1991) (reversing the trial court's ruling excluding an ancient document upon a finding that it was untrustworthy: “Once a document qualifies as an ancient document, it is automatically excepted from the hearsay rule under [Rule] 803(16)”). For a further critique of the ancient documents hearsay exception, see Daniel J. Capra, *Electronically Stored Information and the Ancient Documents Exception to the Hearsay Rule: Fix It Before People Find Out About It*, 17 YALE J.L. & TECH. 1 (2015).

were trustworthy,<sup>24</sup> but if not, they could easily be admitted under the low bar of equivalence that the court chose.

By contrast, if a court is inclined to exclude the hearsay, it can rely on some of the more reliable hearsay exceptions for the equivalence test. This can include a finding that the hearsay statement is *unlike* any of the statements admissible under these exceptions—which should hardly be surprising because if it were like those statements, it would be admissible under a categorical hearsay exception. An example of this misdirection occurred in *FTC v. E.M.A. Nationwide, Inc.*,<sup>25</sup> in which the court held that consumer complaints were insufficiently trustworthy to be admissible as residual hearsay to prove the fact complained about. The court argued that “other exceptions have greater guarantees of trustworthiness than the consumer complaints”—specifically Rule 803(4), which, the court explained, “allows for a statement made for medical diagnosis, because it is unlikely a declarant would lie about her health in order to gain an advantage in litigation.”<sup>26</sup> A couple of things can be said about this analysis. First, the court chose an exception for comparison that was nothing like the statement being evaluated and that is generally thought to be among the more reliable of the hearsay exceptions. Second, the court actually misstated the contours of Rule 803(4), as that exception actually *does* allow statements made by a patient in anticipation of litigation to be admitted—so long as the statement is pertinent to treatment or diagnosis.<sup>27</sup> So the risk of the equivalence standard is not only cherry-picking but also misconstruing the exception that is picked as a comparable.<sup>28</sup>

In sum, the “equivalence” standard provides no meaningful control on judicial discretion, invites judicial error, and can end up with a comparison of apples and oranges. It should be replaced with a standard that focuses directly on whether the proffered statement is trustworthy. For all these

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24. Though maybe not, because offers are not always honored—as some law students who received offers of law employment around 2009 can attest.

25. No. 1:12-CV-2394, 2013 WL 4545143 (N.D. Ohio Aug. 27, 2013).

26. *Id.* at \*2.

27. *See, e.g., United States v. Whitted*, 11 F.3d 782 (8th Cir. 1993) (holding that statements were admissible even where a doctor was consulted only for the purpose of providing expert testimony); *see also* 4 STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL § 803.02 (11th ed. 2015) (“A doctor consulted for litigation purposes is retained for ‘diagnosis,’ and the rule abolishes all distinctions between doctors consulted for treatment and those consulted for diagnosis.”).

28. Another possibility for error under the “equivalence” standard is that a court might use a comparable that is not even permitted by the Rule. For example, in *Auto-Owners Insurance v. Newsome*, No. 4:12-cv-00447-RBH, 2013 WL 3148334 (D.S.C. June 19, 2013), the court found that a statement to police officers by one of the parties to an accident was trustworthy. In assessing equivalence, the court concluded that the statement “at least has as much trustworthiness as a statement of a party opponent.” *Id.* at \*6. But that exception is found in Rule 801(d)(2). Rule 807 provides only the Rule 803 and 804 exceptions as comparables. Moreover, that exception is not even based on reliability—it is based on the theory that if the party makes a statement, they have to live with it. As the Advisory Committee put it, admissibility of party-opponent statements “is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule.” FED. R. EVID. 801(d)(2) advisory committee’s note.



reasons, the Advisory Committee's working draft of an amendment to Rule 807 deletes the equivalence requirement. Discussion at the symposium on this change was largely favorable.

*B. The Role of Corroborating Evidence*

The trustworthiness clause of Rule 807 does not include any reference to the existence or lack of corroborating evidence that would support the truth of the declarant's account. This absence has led to disputes about whether a court, in evaluating the trustworthiness of residual hearsay, can consider the presence or absence of corroborating evidence.<sup>29</sup> Any amendment to Rule 807 should address the relevance of corroborating evidence in order to end this conflict.

The better rule on the merits is to allow consideration of corroborating evidence. The ultimate inquiry is whether the declarant is telling the truth, and reference to corroborating evidence is a typical and time-tested means of helping to establish that a person is telling the truth. It is used in trials every day, and there is no good reason to prevent consideration of corroboration (or its absence) when it comes to residual hearsay.

It has been argued that relying on corroboration to find a statement trustworthy is nonsensical because if the hearsay is corroborated it is unlikely to be more probative than any other evidence reasonably available, as is required by Rule 807(a)(3)—the argument is that the corroborating evidence would be equally probative as the hearsay.<sup>30</sup> But surely this is too simplistic. It is more likely to be the case that the hearsay statement is *fortified* by the corroboration, and the corroboration becomes stronger because of the hearsay statement. That is precisely what occurred in *Bourjaily v. United States*,<sup>31</sup>

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29. Compare *United States v. Bailey*, 581 F.2d 341, 349 (3d Cir. 1978) (noting that trustworthiness analysis must focus on “the facts corroborating the veracity of the statement” as well as “the circumstances in which the declarant made the statement”), and *FTC v. Ross*, No. RDB-08-3233, 2012 WL 4018037, at \*3 (D. Md. Sept. 11, 2012) (holding that statements made in an unrelated litigation were admitted as residual hearsay, in part because “unchallenged evidence in this case substantially corroborates the contents of the challenged evidence and therefore affords the challenged evidence the ‘ring of reliability’”), with *Huff v. White Motor Corp.*, 609 F.2d 286, 293 (7th Cir. 1979) (“[T]he probability that the statement is true, as shown by corroborative evidence, is not, we think, a consideration relevant to its admissibility under the residual exception to the hearsay rule.”), and *United States v. Stoney End of Horn*, 829 F.3d 681, 686 (8th Cir. 2016) (“According to the theory of the hearsay rule . . . trustworthiness must be gleaned from circumstances that ‘surround the making of the statement and that render the declarant particularly worthy of belief,’ not by ‘bootstrapping on the trustworthiness of other evidence at trial.’”). It should be noted that in *Stoney End of Horn*, the court ignores the fact that some of the *existing* hearsay exceptions rely on corroborating evidence to establish admissibility. See, e.g., FED. R. EVID. 804(b)(3) (declarations against penal interest in a criminal case are admissible if the proponent shows corroborating circumstances clearly indicating the trustworthiness of the statement).

30. See *Sonenshein & Fabens-Lassen*, *supra* note 5, at 728 (“[I]f there is corroboration, then there is no significant need for the purported residual hearsay since there is other evidence available on point”). Note that this argument becomes irrelevant if the “more probative” requirement is deleted and diminished if the “more probative” requirement is limited to comparing the hearsay with other evidence from the declarant. The deletion or narrowing of the “more probative” requirement is discussed below.

31. 483 U.S. 171 (1987).

the U.S. Supreme Court case interpreting Rule 801(d)(2)(E), the coconspirator exception to the hearsay rule. In *Bourjaily*, the challenged hearsay implicating the defendant in a conspiracy statement gave color to corroborating evidence, and the corroborating evidence supported the reliability of the hearsay statement. As the Court put it: “The sum of an evidentiary presentation may well be greater than its constituent parts.”<sup>32</sup> Moreover, it could well be that, while corroborating evidence exists, the hearsay is in fact more probative. For example, assume a child reports an act of sexual abuse and identifies her father as the perpetrator. This statement is corroborated by medical evidence indicating that the child was abused. The medical evidence supports the truthfulness of the child’s statement, but the child’s statement is more probative on the point for which it is offered: that the father sexually abused the child. The corroboration is only partial; in that situation it is just silly to say that because you have corroboration, you do not need the residual hearsay. And it is equally wrong to say that the corroboration should not be considered in the reliability inquiry—if she is right about one fact, it makes it more likely that she is right about other asserted facts.

Finally, courts should be allowed to consider that no corroborating evidence has been presented. If there is no corroborating evidence, then, just as in real life, a factfinder needs to be more wary about accepting the conclusion. Relying on the absence of corroboration is not explicitly permitted by the Rule—but courts have so relied, and the Rule should be amended to codify that result.<sup>33</sup>

## II. MORE PROBATIVE THAN ANY OTHER EVIDENCE REASONABLY AVAILABLE

Rule 807 requires not only that the proffered hearsay be trustworthy but also that it must be “more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.”<sup>34</sup> This provision, added by Congress, is intended to add a “necessity” provision to the Rule, thus limiting the instances in which the Rule can be invoked—Congress made the residual exception one of “last resort.”

What is being compared in the “more probative” analysis? The proffered statement is compared to other evidence that could be used to prove the point for which the hearsay is offered. The other evidence might be other witness testimony<sup>35</sup> or some kind of document. Often it is the possibility of in-court

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32. *Id.* at 181.

33. *See, e.g.*, *Batoh v. McNeil-PPC, Inc.*, No. 3:14-cv-01462 (MPS), 2016 WL 922779 (D. Conn. Mar. 10, 2016) (finding a statement inadmissible under Rule 807 in part because it was uncorroborated).

34. FED. R. EVID. 807(a)(3).

35. *See, e.g.*, *United States v. Welsh*, 774 F.2d 670, 672 (4th Cir. 1985) (finding that a hearsay statement was not more probative than the in-court testimony of another eyewitness, and so it was not admissible under the residual exception—even though the hearsay declarant was a trustworthy person and the in-court witness’s credibility was subject to attack).

testimony by the declarant of the hearsay being offered. Thus, in *Larez v. City of Los Angeles*,<sup>36</sup> the plaintiff offered newspaper accounts of a city official's statements. The court found that the newspaper accounts were sufficiently trustworthy to be admitted as residual hearsay (to prove the statements were made) largely because the newspaper accounts cross-corroborated each other.<sup>37</sup> But the newspaper accounts were found erroneously admitted as residual hearsay because the reporters were available to testify.<sup>38</sup>

The "more probative" requirement is, essentially, a best evidence requirement. As the court in *Larez* stated, the newspaper quotations were not "the best available evidence."<sup>39</sup> That best evidence requirement imposes a substantial limitation on the use of the residual exception. The rationale supporting this best evidence requirement was taken to task by the Montana Rules Commission, which recommended that Montana adopt (as it did) the simple version of the residual exception proposed by the Federal Advisory Committee.<sup>40</sup> The Montana Rules Commission argued that the "more probative" requirement added by Congress was misguided because the restriction "would have the effect of severely limiting the instances in which the exception would be used and would be impractical in the sense that a party would generally offer the strongest evidence available regardless of the existence of the requirement."<sup>41</sup> There is much to be said for that comment. It is odd to allow a court under an evidence rule to tell the litigant, "there is other evidence that is as strong or stronger than what you have presented to me, so go and get that."<sup>42</sup> Shouldn't the litigant have the autonomy to figure out what evidence it wants to put in, so long as it is probative and reliable?

The "more probative" standard, as explained below, has led to all sorts of weird outcomes, allowing some courts to exclude the hearsay if there is any evidence from any reasonably available source that might prove the point, even if the evidence is different in character and even if it has not yet been obtained and so cannot really be assessed for trustworthiness or "probativeness."<sup>43</sup> The "more probative" language allows the court to wrest

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36. 946 F.2d 630 (9th Cir. 1991).

37. *See id.* at 642-44.

38. *See id.* at 641-42.

39. *Id.* at 644.

40. *See* MONT. R. EVID. 803(24), 804(b)(5) (providing hearsay exceptions for "[a] statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness").

41. *Id.* 803(24) Montana rules commission comment.

42. *Id.*

43. *See, e.g.,* *Madison Inv. Tr. v. Bank of N.Y. Mellon Tr. Co.*, No. 08-CV-02204-MJW-KAM, 2010 WL 1529436 (D. Colo. Apr. 2, 2010). Here, a hearsay statement made by a witness in a foreign country was found inadmissible under Rule 807 because the proponent made no attempt to obtain testimony from the witness pursuant to letters rogatory. *See id.* at \*1. In coming to this conclusion, the court implicitly made the findings that (1) use of a letters rogatory procedure is within the scope of "reasonable efforts" that a proponent must try under Rule 807 and (2) the testimony obtained by letters rogatory from the witness would be at least as probative as the witness's hearsay statement. *See id.* Neither of those findings is sound. The letters rogatory procedure is cumbersome and lengthy. More importantly, this procedure

control from the party, who should have the autonomy to decide which of two pieces of reliable evidence it should present—or whether to present both.<sup>44</sup> Besides this transfer of power to pick among sources of valid evidence, the more probative language allows the court to tell the party when she has enough other evidence to prove a point—and that point is *not* when the other evidence becomes cumulative but rather when one piece of evidence is as probative as the other.<sup>45</sup> The more probative requirement cannot be justified as grounded in necessity, because counsel will often need the so-called less probative hearsay to submit it together with the more probative evidence to make an evidentiary whole that is greater than the sum of its parts. The presumptuousness of the more probative analysis is remarkable in some of the cases.<sup>46</sup>

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calls for answers to interrogatories—why would that be better evidence than an informal statement made closer in time to the event?

44. *See, e.g.,* *Flournoy v. City of Chicago*, 829 F.3d 869, 876 (7th Cir. 2016). Here, the plaintiff alleged that officers used excessive force in executing a search warrant. *See id.* at 872. Among other things, he contended that two flashbang devices were deployed. *See id.* at 876. As proof on this point, the plaintiffs offered a handwritten notation found on one of the copies of an officer’s typed report: the notation was that two flashbangs deployed. *See id.* The court found that this notation was properly found not admissible under the residual exception. *See id.* at 876–77. The court stated that the notation was not more probative than other evidence reasonably available, because “Flournoy’s two sons and the remaining occupant of the apartment all testified that they heard multiple explosions during the search.” *Id.* at 876. The court’s analysis shows the fallacy of the “more probative” requirement. The notation would have been quite useful to the plaintiff because it corroborated the testimony of witnesses who the jury may have found biased. Even if the witness statements were equally probative (which is arguable) the point is that the notation *added* to the probative value of those statements. The plaintiff should not have to choose among sources of evidence when the whole of the evidentiary presentation is greater than the sum of its parts.

45. *See, e.g.,* *Nationwide Agribusiness Ins. v. Meller Poultry Equip., Inc.*, No. 12-C-1227, 2016 WL 2593935 (E.D. Wis. May 5, 2016). Here, an employee fell from a catwalk. *See id.* at \*1. Two employees made hearsay statements that the employer, Meller, had weakened the steel on the catwalk. *See id.* at \*9. One of the employees, Kreyer, made his statement while still employed so it was admissible against Meller under Rule 801(d)(2)(D). *See id.* The other was made by a former employee, Schmidt—so not admissible under Rule 801(d)(2)(D)—and the plaintiff offered it under Rule 807. *See id.* But the court excluded the statement, reasoning that “Schmidt’s statements about steel quality are not more probative than Kreyer’s statements about the same subject. Therefore, Schmidt’s hearsay statements are not admissible under Rule 807.” *Id.* at \*10. This is an unfortunate result of the more probative test. The hearsay statement from one declarant is inadmissible simply because the hearsay statement of another is found admissible. Surely it is appropriate to try to admit statements from multiple declarants, in the same way as it is appropriate to call more than one eyewitness to an event. The limits on cumulative testimony imposed by Rule 403 are sufficient to protect against overkill. The more probative requirement is more rigid. It says “you do not need the hearsay statement if you have another statement from anyone else.” But that seems cold comfort to anyone trying a case.

46. *See, e.g.,* *Haynes v. White County*, No. 4:10CV00529 JLH, 2012 WL 460263 (E.D. Ark. Feb. 13, 2012). Here, the plaintiff claimed that a prison was deliberately indifferent to her husband’s medical needs and that he died as a result. *See id.* at \*1. To prove that he had not been treated, the plaintiff offered the grievances that the decedent filed with the prison, which indicated that he had not been seen by a doctor. *See id.* at \*4. The court held that these filed grievances were not admissible under Rule 807, in part because “the plaintiff could through reasonable efforts obtain testimony on the issue of whether Dr. Killough came to the jail from other inmates or from Dr. Killough himself.” *Id.* at \*5. It goes without saying that the decedent’s statements should not be excluded whenever he could get a statement from a

Many problematic cases can be found excluding hearsay for failure to meet the more probative requirement. For example, in *Draper v. Rosario*,<sup>47</sup> a prisoner alleged that he had been beaten up by a prison guard. A witness to the event refused to testify because he feared reprisal.<sup>48</sup> Counsel moved for the witness's prior sworn statement to be admitted under the residual exception. The Ninth Circuit found no error in its exclusion.<sup>49</sup> It concluded that the district court properly found that the witness's statement was not more probative than the testimony that would be provided by two *other* prisoners.<sup>50</sup> The defendant argued that the residual hearsay was more probative because the prisoner who made the hearsay statement had a better vantage point than the other two prisoners.<sup>51</sup> The court explained and responded as follows:

Draper's counsel argued that Doe's testimony was unique because he "saw Mr. Draper put his foot against the bars to try to prevent his head and body from hitting the bars, [and] the witness was distinct that the foot move was defensive." While the other prisoner witnesses (Shepard and Thompson) did not provide this exact account, they both testified that Draper was at no time resisting Rosario and that Rosario was the aggressor. On this record, the district court reasonably concluded that Doe's statement about Draper's defensive foot move was not significantly more probative than the testimony already presented.<sup>52</sup>

Let us pass by the court's holding that the residual hearsay was not *significantly* more probative than the statements from the other prisoners—the word "significantly" is not in the Rule, and the more probative requirement is hard enough to satisfy as written. The fundamental flaw is that the court is holding that the residual hearsay is not more probative even though the statement is more detailed and the declarant had a better vantage point. Assuming the hearsay is reliable, the more probative requirement is being used to deprive the plaintiff of the opportunity of proving the point with what appears to be better evidence. But more importantly, he is deprived of the opportunity to make a full and effective submission by offering the hearsay *together with* the statements of the available eyewitnesses.<sup>53</sup>

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hostile witness (in this case the doctor). Moreover it is presumptuous to conclude that other prisoners would know whether the doctor came to the jail. Who are these other witnesses, anyway?

47. 836 F.3d 1072 (9th Cir. 2016).

48. *See id.* at 1080.

49. *See id.* at 1082.

50. *See id.*

51. *See id.*

52. *Id.* at 1080.

53. *See Rosenbaum v. Freight, Lime & Sand Hauling, Inc.*, No. 2:10-CV-287, 2013 WL 785481 (N.D. Ind. Mar. 1, 2013). Here, a witness named Grecco was stopped at a light when he was rear ended by a truck. *See id.* at \*1. The dispute was over whether a truck behind that truck was responsible for the accident. *See id.* Grecco made a taped statement to a representative of the defendant, and the defendant sought to admit it as residual hearsay. *See id.* The court found that the statement was trustworthy because Grecco was an innocent party with no motive to falsify; also, he stated that he knew he was being recorded and that his statement could be used at trial. *See id.* at \*2. But the court found that Grecco's statement was inadmissible under Rule 807 because it was not more probative than other evidence available.

The more probative requirement has even led courts to send the proponent on a quest for evidence that has not yet been obtained or validated. That problem was shown in *Nance v. Ingram*,<sup>54</sup> a case in which the plaintiff alleged that a sheriff interfered with the plaintiffs' business after the plaintiffs contributed to the sheriff's opponent in a campaign. The plaintiffs offered a hearsay statement from an official (now deceased) who attended a department meeting and told one of the plaintiffs about a directive issued by the sheriff that would harm their business.<sup>55</sup> The court held that the hearsay statement was not admissible under Rule 807, because

there are a number of other witnesses from whom plaintiffs could obtain similar evidence with reasonable efforts. For example, plaintiffs could have deposed or sought affidavits from other attendees of the BCSO department meeting or from any one of the former patients who allegedly left plaintiffs' healthcare practice due to defendant Ingram's directive.<sup>56</sup>

The problem with the more probative requirement in *Nance* is that the court is allowed to *hypothesize* other sources of evidence that can be used to prove the point. Who is to say that these witnesses, if they even exist, would have the same account of that directive when interviewed years later? Who is to say that the people affected by the directive—who did not even hear the statement—would provide useful information in proving the sheriff's culpability? It is as if the more probative requirement allows the court to tell the lawyer how to try her case.

All this is not to challenge the point that the residual exception should contain a necessity requirement. But the question is, to what should the residual hearsay be compared in order to assess necessity? Surely the most straightforward test is the one used in the necessity-based hearsay exceptions found in Rule 804: Is the *declarant* available to give testimony that is better evidence than his or her hearsay statement? It gets complicated, intrusive, and harsh when the inquiry is taken further—as it is in Rule 807—and necessity is based not only on declarant availability but also on availability of any other evidence from any source, even a hypothetical one.

The hearsay rule is concerned about live testimony from the *declarant*, not testimony from alternative sources on the same subject matter.<sup>57</sup> Thus, if the available alternative evidence comes from other witnesses or documents, there is much to be said for a rule allowing the proponent to elect whether to offer reliable hearsay in lieu of (or together with) that other evidence. Forcing the proponent to seek out that other evidence, or to establish that it

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*See id.* at \*4. That was because the drivers of the two trucks could testify to what happened. *See id.* That conclusion shows the basic problem with the more probative requirement. Grecco's statement would be quite useful because the two drivers involved in the accident would likely have conflicting accounts. The more probative requirement could be more usefully and predictably applied if the hearsay were compared only to other evidence available from the declarant—as opposed to a comparison with all other evidence in the case.

54. No. 7:14-CV-9-FL, 2015 WL 5719590 (E.D.N.C. Sept. 29, 2015).

55. *See id.* at \*6–7.

56. *Id.* at \*7.

57. For example, an excited utterance is not excluded whenever there is other evidence that can be presented to prove the point.

is not as probative as the residual hearsay, is outside the concerns of the hearsay rule and runs contrary to the basic principle that the parties get to choose which admissible evidence to present.

Consequently, the more probative requirement of Rule 807 should either be deleted (following the lead of Montana) or modified. The rational modification would be to focus on whether there is any other evidence that can be obtained *from the declarant*. That would mean that Rule 807 could be used if the declarant were unavailable, even though there are other alternatives to proving the point for which the hearsay is offered. It would also mean that the hearsay could be introduced even if the declarant were available but, for some reason, the residual hearsay would be better evidence than the declarant's in-court testimony. A possible example would be a residual hearsay statement from a child; the child's trustworthy out-of-court statement concerning sexual abuse, for example, is often considered to be more probative under current law because the child may not be able to communicate as well on the stand as he or she did out of court.<sup>58</sup>

An amendment that would focus on the declarant, rather than all other available evidence, might look like this:

- (3) it is more probative on the point for which it is offered than any other ~~evidence~~ *testimony from the declarant* that the proponent can obtain through reasonable efforts.

But the Advisory Committee has decided to retain the existing more probative requirement out of a concern that without it, the residual exception would be subject to widespread use.<sup>59</sup> The Committee determined that the more probative requirement will preserve the congressional determinations that proponents should not be able to use the residual exception unless they really need it.<sup>60</sup> The Committee also determined that retaining the more probative requirement will send a signal that any changes that are proposed are intended to be modest—there would be no attempt to allow the residual exception to swallow the categorical exceptions or even to permit the use of the residual exception if the categorical exceptions are available.<sup>61</sup> Consequently, the above change to the more probative requirement is not included in the Advisory Committee's working draft.<sup>62</sup>

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58. *See, e.g.*, *United States v. St. John*, 851 F.2d 1096, 1099 (8th Cir. 1988) (finding that where a child-witness was hampered by developmental problems and his verbal abilities were overcome by the courtroom setting and the delicate nature of the material to which he was attesting, “[u]nder these circumstances, we are unwilling to hold that a child victim’s testimony is always more probative than the prior hearsay statements he or she may have made in the more relaxed environs of a doctor’s or social worker’s office”).

59. May 7, 2016, Memorandum, *supra* note 13, at 17.

60. *See id.*

61. *See id.*

62. *See infra* Part VI.

### III. DELETING THE SUPERFLUOUS REQUIREMENTS OF “MATERIALITY” AND “INTERESTS OF JUSTICE”

In addition to the “more probative” requirement, Congress added two further admissibility requirements to the residual exception: (1) the statement must be offered as evidence of a material fact and (2) admitting it will serve the purposes of the rules and the interests of justice.<sup>63</sup>

Neither of these admissibility requirements have much content. Apparently they were intended to set the tone for the mantra that the residual exception was only to be used in “rare and exceptional” cases.<sup>64</sup> The end result has been either (1) they are harmless checkoffs, mentioned only after a court has already determined that the hearsay is admissible or inadmissible or (2) they are used as fake excuses for a court to come to its result of excluding proffered hearsay.

#### A. Materiality

It is ironic that the word “material,” which found its way into the residual exception, was studiously avoided in the definition of relevance set forth in Rule 401. The Advisory Committee believed that the word should not be used, because it has many different legal meanings.<sup>65</sup> Congress, in inserting the word “materiality,” appears to have intended to limit the use of the residual exception to *important* evidence—evidence highly likely to affect the outcome of a case. But courts have essentially read “material” to mean “relevant”; thus, the addition of materiality to Rule 807 is superfluous because it adds nothing to that which has already been accomplished by Rule 401 (the definition of relevance) and 402 (the Rule providing that irrelevant evidence is inadmissible).<sup>66</sup>

A good discussion of the weirdness of the materiality requirement is found in *United States v. Gotti*,<sup>67</sup> in which the court assessed whether statements about threats were admissible as residual hearsay. The court noted that the term “material fact” was “not defined in the Federal Rules of Evidence.”<sup>68</sup> If it was intended to be part of a relevance standard, then “the qualification adds nothing to the sentence in Rule 402 excluding irrelevant evidence.”<sup>69</sup> It further noted that “Congress and not the Advisory Committee drafted [the residual exception] and nothing in the legislative history throws light on the question of whether the drafters sought to make a distinction

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63. See FED. R. EVID. 807(a)(2), (a)(4).

64. May 7, 2016, Memorandum, *supra* note 13, at 16.

65. See FED. R. EVID. 401 advisory committee’s note to 2011 amendment (language chosen to define relevance “has the advantage of avoiding the loosely used and ambiguous word ‘material’”).

66. See 5 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 807.03 (Mark S. Brodin ed., Matthew Bender 2d ed. 2016) (observing that the material fact requirement of Rule 807 “would be imposed in any event, however, by Rules 401 and 402”).

67. 641 F. Supp. 283 (E.D.N.Y. 1986).

68. *Id.* at 287.

69. *Id.*



between ‘material’ and ‘relevant.’”<sup>70</sup> Under these circumstances the court concluded that “[a]t least the evidence must be relevant.”<sup>71</sup>

The most that can be said is that the term “material” is a mild guideline to treat the question of relevance and cumulativeness with some care. One treatise tries to squeeze out some independent meaning for the materiality requirement with this explanation:

Perhaps the purpose was to say the catchall should be invoked only if the point to be proved is important rather than minor. Understood this way, the material fact requirement means that the decision whether to apply the catchall should take special note of the factors set out in FRE 403. If the point to be proved is already strongly supported and the proffered hearsay would add little to what is already there, or if it would waste or consume time out of the proportion to its apparent value, it does not satisfy the material fact requirement.<sup>72</sup>

The bottom line from all this appears to be that the material fact requirement of Rule 807 at best helps to set the tone that the residual exception is only to be used in cases of necessity. But other than tone, it has little practical effect because its concept is already embraced in Rule 401. This means that if the residual exception is going to be expanded, eliminating the materiality requirement would be sensible because the whole enterprise would be to lighten the tone—i.e., to change the idea that the residual exception is to be left to very narrow circumstances and is to be rarely invoked. Deleting the requirement that the residual hearsay must be material could be considered a useful change in tone.

But even apart from any expansion, there is good cause for deleting the materiality provision, as it imposes upon the court a useless, clerical obligation to check it off as a requirement even though it has no independent meaning. The cases are legion in which a court engages in an evaluation of the statement’s trustworthiness and necessity and then, if it finds those factors met, feels compelled to declare that the statement is offered for a material fact.<sup>73</sup>

### *B. Purpose of the Rules and Interests of Justice*

Rule 807(a)(4) requires the court to find that admitting the proffered hearsay will best serve the purposes of the Evidence Rules and the interests of justice. Like the material fact requirement, this language was added by Congress apparently to provide a signal that the residual exception was to be rarely employed; but in practical effect it adds nothing to what is already set

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70. *Id.*

71. *Id.*

72. CHRISTOPHER B. MUELLER, LAIRD C. KIRKPATRICK & CHARLES H. ROSE III, EVIDENCE: PRACTICE UNDER THE RULES § 8.81, at 1121 (4th ed. 2012).

73. *See, e.g.* United States v. Norwood, No. 12-CR-20287, 2015 WL 2250481 (E.D. Mich. May 13, 2015) (noting that the hearsay statement was relevant in running through the admissibility requirements of Rule 807); ADT Sec. Servs. v. Sec. One Int’l, Inc., No. 11-CV-5149YGR, 2013 WL 4766401 (N.D. Cal. Sept. 5, 2013) (same); Auto-Owners Ins. v. Newsome, No. 4:12-cv-00447-RBH, 2013 WL 3148334 (D.S.C. June 19, 2013) (same).

forth in Rule 102. Rule 102 provides that *all* the Rules should be construed to comport with the end of “ascertaining the truth and securing a just determination.”<sup>74</sup> As such, this requirement is usually just another checkoff—if the court finds the functional requirements of the Rule are met, it automatically finds that admission is in accord with the interests of justice.<sup>75</sup> And, likewise, if the court finds that the functional requirements are not met, then admission is contrary to the interests of justice.<sup>76</sup>

Like the materiality requirement, the interest of justice requirement is largely one of tone—it sends the message that the residual exception is to be rarely used. And as with the materiality requirement, any effort to change that tone should include deletion of the admissibility requirement—it will not make much of a difference, but it will send the signal that the residual exception can be used more frequently than previously.

But also like the materiality requirement, deleting the interests of justice requirement makes sense as good rulemaking independent of any expansion of the residual exception. At best the provision presents a useless bureaucratic chore. But it has also, in some cases, been used as an empty vessel for courts that want to avoid a serious analysis of trustworthiness. For

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74. FED. R. EVID. 102. Commentators agree that Rule 807(a)(4) has little if any independent content. *See* 5 WEINSTEIN & BERGER, *supra* note 66, § 807.03 (noting that the provision is “largely a restatement of Rule 102.”); *see also* MUELLER, KIRKPATRICK & ROSE III, *supra* note 72, § 8.81, at 1121.

75. *See, e.g.*, *Thompson v. Prop. & Cas. Ins. of Hartford*, No. CV-13-02437-PHX-JAT, 2015 WL 9009964 (D. Ariz. Dec. 16, 2015) (finding that the interests of justice requirement was met because the hearsay statement was trustworthy and more probative than any other evidence reasonably available); *FTC v. Instant Response Sys., LLC*, No. 13 Civ. 00976(ILG)(VMS), 2015 WL 1650914 (E.D.N.Y. Apr. 14, 2015) (finding that the interests of justice requirement was met because the hearsay statements were more probative than any other evidence reasonably available); *Sievert v. City of Sparks*, No. 3:12-cv-0526-LRH-WGC, 2014 WL 358698 (D. Nev. Jan. 31, 2014) (finding that the interests of justice requirement was met because the evidence was relevant); *ADT Sec. Servs.*, 2013 WL 4766401, at \*6 (“Admitting the recordings furthers the federal rules’ paramount goal of making relevant evidence admissible.” (quoting *FTC v. Figgie Int’l, Inc.*, 999 F.2d 595, 609 (9th Cir. 1993))); *Auto-Owners Ins.*, 2013 WL 3148334, at \*6 (after finding the other admissibility requirements of Rule 807 to be met, the court concluded that “[f]or these reasons, admitting the statement would also serve the purposes of the Rules of Evidence and the interests of justice”); *Levinson v. Westport Nat’l Bank*, Nos. 3:09cv269(VLB), 3:09-cv-1955(VLB), 3:10cv261(VLB), 2013 WL 2181042 (D. Conn. May 20, 2013) (“Lastly, admission of the plea allocutions would facilitate the interests of justice in this case as it bears on material facts in dispute.”). The analysis in *Levinson* is especially strange because one superfluous factor (interests of justice) is found satisfied by another superfluous factor (material fact).

76. *Flournoy v. City of Chicago*, 829 F.3d 869, 876 (7th Cir. 2016) (finding the interests of justice requirement not met because hearsay was found insufficiently trustworthy); *United States v. Cohen*, No. 08-3282, 2012 WL 289769, at \*8 (C.D. Ill. Jan. 31, 2012) (“The Court concludes that Kolzoff’s statement does not have ‘equivalent circumstantial guarantees of trustworthiness,’ as other testimony which is admitted pursuant to hearsay exceptions. Accordingly, it would not serve the interests of justice to admit the testimony.”); *United States v. Manfredi*, No. 07-352, 2009 WL 3823230 (W.D. Pa. Nov. 13, 2009) (holding the interests of justice requirement was not met because the statement was not sufficiently trustworthy); *United States v. Cubie*, No. 05-CR-146, 2007 WL 3223299, at \*1 (E.D. Wis. Oct. 26, 2007) (“That Benion may have been shot in connection with a drug debt enhances the unreliability of his statements against the defendants. As such, ‘the general purposes of the[] Rules [of Evidence] and the interests of justice’ are not best served by the admission of the statements.”).

example, in *Lakah v. UBS AG*,<sup>77</sup> the court held that foreign bank records were not admissible under Rule 807.<sup>78</sup> The proponents could not qualify the records under Rule 803(6) (the business records exception), because they could not obtain a foundation witness or a certificate.<sup>79</sup> The court held that it would be against “the interests of justice” for the court to use the residual exception to “end-run” the foundation requirements of Rule 803(6).<sup>80</sup> Here we see the interests of justice language being used as a means to explain an exclusion without the court having to resort to an actual investigation of whether the hearsay is trustworthy. This led the court to a different result than other courts that have admitted foreign bank records under Rule 807.<sup>81</sup> “Interests of justice” should not be an excuse for judge-dependent predilections either opposed to or in favor of a residual exception.

#### IV. CHANGES TO THE NOTICE REQUIREMENT

The current notice provision in Rule 807 provides as follows:

**(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.<sup>82</sup>

This notice provision is arguably problematic in at least four ways: (1) it does not provide a good cause exception that would allow for late notice; (2) it does not require notice to be in writing; (3) the phrase “particulars, including the declarant’s name and address” is both too particular (requiring an address) and too general; and (4) it does not require the proponent to give notice of an intent to offer the statement as residual hearsay. These problems will be addressed in sequence.

The following discussion is colored by the fact that the Advisory Committee has tentatively approved changes to the notice provision that will solve some of the possible problems listed above—but no formal proposal has yet been made.<sup>83</sup> The Advisory Committee’s tentative solutions will be addressed in the following discussion.

##### A. A Good Cause Provision

Rule 807 is the only Evidence Rule with an “absolute” pretrial notice requirement. Other Rules with notice requirements provide more flexible time periods that might excuse lack of pretrial notice<sup>84</sup> or explicitly state that

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77. 996 F. Supp. 2d 250 (S.D.N.Y. 2014).

78. *Id.* at 258.

79. *See id.* at 257.

80. *Id.*

81. *See* *United States v. Turner*, 718 F.3d 226 (3d Cir. 2013) (finding foreign bank records admissible under Rule 807); *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362 (S.D.N.Y. 2014) (same).

82. FED. R. EVID. 807(b).

83. *See* May 7, 2016, Memorandum, *supra* note 13, at 14, 17–18.

84. *See, e.g.*, FED. R. EVID. 609(b)(2) (requiring notice to be provided in time for the party to have a fair opportunity to contest the evidence).

the pretrial notice requirement can be excused upon a finding of good cause.<sup>85</sup> It is not difficult to think of cases in which an exception to a pretrial notice requirement for residual hearsay is justified and necessary. Examples include (1) statements from declarants that, despite diligent efforts, are only discovered once trial has begun and (2) hearsay statements of people who are scheduled to be called as witnesses but who, without warning, become unavailable at the time of trial.

Because some exceptions to pretrial notice seem justified, it is probably unsurprising that most courts have simply read a “good cause” exception into Rule 807. As the court put it in *Furtado v. Bishop*<sup>86</sup>:

Most courts have interpreted the pretrial notice requirement somewhat flexibly, in light of its express policy of providing a party with a fair opportunity to meet the proffered evidence. Thus, the failure to give pretrial notice has been excused if the proffering party was not at fault (because he could not have anticipated the need to use the evidence) and if the adverse party was deemed to have had sufficient opportunity to prepare for and contest the use of the evidence (for example, because he was offered a continuance, did not request a continuance, or had the statement in advance).<sup>87</sup>

Yet because the language of the notice requirement is absolute, some courts have understandably applied it the way it was written. The leading proponent of a strict reading of the notice requirement is the Second Circuit, as indicated in *United States v. Ruffin*,<sup>88</sup> where the court concluded that the residual exception is to be strictly construed and that the failure of the proponent of the evidence to provide pretrial notice cannot be cured by giving the opponent a continuance.<sup>89</sup>

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85. See, e.g., *id.* 404(b)(2)(B) (requiring pretrial notice “before trial—or during trial if the court, for good cause, excuses lack of pretrial notice”).

86. 604 F.2d 80 (1st Cir. 1979).

87. *Id.* at 92; see also *United States v. Bachsian*, 4 F.3d 796, 799 (9th Cir. 1993) (“This court has held, however, that failure to give pretrial notice will be excused if the adverse party had an opportunity to attack the trustworthiness of the evidence.”); *United States v. Parker*, 749 F.2d 628, 633 (11th Cir. 1984) (“This Circuit holds that a failure to comply with the notice requirement is not controlling if defendant is not harmed and ‘had a fair opportunity to meet the statements.’” (quoting *United States v. Leslie* 542 F.2d 285, 291 (5th Cir. 1976))); *United States v. Mandel*, 591 F.2d 1347, 1385 (4th Cir. 1979) (noting that most courts “have dispensed with strict compliance when the defendant could not show that he had been prejudiced”); *United States v. Bailey*, 581 F.2d 341, 348 (3d Cir. 1978) (“We believe that the purpose of the rules and the requirement of fairness to an adversary contained in the advance notice requirement . . . are satisfied when, as here, the proponent of the evidence is without fault in failing to notify his adversary prior to trial and the trial judge has offered sufficient time, by means of granting a continuance, for the party against whom the evidence is to be offered to prepare to meet and contest its admission.”).

88. 575 F.2d 346 (2d Cir. 1978).

89. See *id.* at 358–59; see also *United States v. LaGrua*, Nos. 98-1323L, 98-1568, 1999 WL 385776, at \*3–4 (2d Cir. June 11, 1999) (relying on *Ruffin* to find no error in the exclusion of residual hearsay where the defendant failed to provide pretrial notice); *United States v. Oates*, 560 F.2d 45, 72 n.30 (2d Cir. 1977) (“There is absolutely no doubt that Congress intended that the requirement of advance notice be rigidly enforced [so there must be] undeviating adherence to the requirement that notice be given in advance of trial.”).

Thus, any amendment to the notice provisions to add something in the nature of a good cause exception will have the added benefit of resolving a conflict in the courts—traditionally that is a reason that the Advisory Committee has found sufficient on its own to justify an amendment.

It is notable, though, that there is case law under Rule 807 that allows notice to be excused but not necessarily in compliance with a good cause test. Good cause focuses on the proponent and whether there is a good excuse for noncompliance. Some of the Rule 807 cases appear to focus only on whether the opponent was prejudiced by noncompliance. Two cases present the contrasting approaches. In *United States v. Benavente Gomez*,<sup>90</sup> the court looks at culpability:

Although this court has adopted a flexible approach to pretrial notice, we have expressly noted that the approach, at least in criminal cases, “is warranted only when pretrial notice is wholly impractical.” Moreover, “[e]ven under a flexible approach, evidence should be admitted only when the *proponent is not responsible for the delay* and the adverse party has an adequate opportunity to examine and respond to the evidence.”<sup>91</sup>

In contrast is *United States v. Bachsian*,<sup>92</sup> where the court held that “failure to give pretrial notice will be excused if the adverse party had an opportunity to attack the trustworthiness of the evidence.”<sup>93</sup> In *Bachsian*, the prosecution did not provide pretrial notice because it decided only after the trial began to try the residual exception (which does not seem at all to be a good cause excuse).<sup>94</sup> But the defendant had notice of the documents two months prior to trial and so the court found no bar to admissibility.<sup>95</sup>

Presumably, adding good cause language to the Rule would—and should—require some showing that the proponent had some good excuse for failing to meet the notice requirement; there should be some consequences to a culpable failure to notify. The Rule 404(b) cases, for example, focus on whether the government had a good excuse for failing to comply.<sup>96</sup>

In the end there may be little practical difference between a test that focuses on the culpability of the proponent and a test that focuses solely on prejudice to the opponent. Assuming that the proponent has no good excuse for failing to give notice, an appellate court is likely to find failure harmless

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90. 921 F.2d 378 (1st Cir. 1990).

91. *Id.* at 384 (emphasis added) (citations omitted) (quoting *United States v. Doe*, 860 F.2d 488, 492 n.3 (1st Cir. 1988)).

92. 4 F.3d 796 (9th Cir. 1993).

93. *Id.* at 799.

94. *See id.*

95. *See id.*; *see also* *United States v. Brown*, 770 F.2d 768, 771 (9th Cir. 1985) (noting that although the government had no excuse at all for failing to give notice, the court saw no problem because the defendants had ample opportunity to challenge the trustworthiness of the evidence).

96. *See, e.g.*, *United States v. Smith*, 383 F.3d 700 (8th Cir. 2004) (finding that the government did not become aware of the Rule 404(b) evidence until the trial had begun); *United States v. Kravchuk*, 335 F.3d 1147 (10th Cir. 2003) (same).

error if there is no prejudice;<sup>97</sup> and at the trial level, a court may well decide that granting a continuance or other remedy is a preferable alternative to excluding evidence for failure to provide timely notice, even if there is no excuse for tardiness. Nonetheless, adding good cause language does have a signaling effect that it is important in all cases to provide timely notice—and that the proponent assumes the risk if there is no excuse. Therefore, it would appear that a provision requiring good cause will not only resolve a conflict in the courts under Rule 807, but it would also provide the proper approach for any excuse of pretrial notice.

For all these reasons, the Advisory Committee has approved a proposal that would add a good cause exception to the Rule 807 notice requirement.<sup>98</sup> The proposal rightly still retains the obligation of the proponent to provide notice in sufficient time for the proponent to have a fair opportunity to meet the evidence. Thus, good cause is added, but the Rule retains the concept that *in any event* the opponent should be given a fair opportunity to meet the evidence. Taking the “fair opportunity” language out of the rule would provide a bad signal and would be unjustified as it is useful (1) to govern the manner and timing of notice provided *before trial* and (2) to assure that the trial judge will grant a continuance where necessary when notice is given *at* (or just before) trial.

#### B. Written Notice

As stated above, Rule 807 does not currently require the notice to be in writing. The obvious virtue of a requirement of written notice is that it resolves disputes over whether the notice was actually provided. The downside of a written notice requirement is that it adds another procedural hurdle for a proponent to master—and where the opponent has received actual notice, the court is likely to find the written notice requirement to be simply a technicality. So for example, the court in *United States v. Komasa*,<sup>99</sup> encountered an instance where the government provided actual notice of intent to offer a certificate under Rule 902(11), but that Rule requires the notice to be in writing. The court held that the trial court did not abuse its discretion in admitting the records based on a finding that the defendants had actual notice and a full opportunity to challenge the authenticating certificates.<sup>100</sup>

Yet even if the written notice requirement is likely to be excused when actual notice is provided, there is a virtue in including a written notice requirement in the Rule. It establishes a practice that litigants should follow, a practice that will forestall arguments that notice was never received; and those who do not provide notice in writing assume the risk that a trial court

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97. See, e.g., *United States v. Parker*, 749 F.2d 628 (11th Cir. 1984) (pretrial notice requirement excused where the hearsay statement was the subject of a pretrial hearing, so the defendant was well aware of the evidence).

98. See May 7, 2016, Memorandum, *supra* note 13. For the working draft, see *infra* Part VI.

99. 767 F.3d 151 (2d Cir. 2014).

100. See *id.*

might not be merciful.<sup>101</sup> For these reasons, the Advisory Committee's working draft of the Rule 807 notice provision—set forth in Part VI—provides that notice must be in writing. Of course, the requirement of a “writing” includes electronic forms of communication—Rule 101(b)(6), a product of the 2011 restyling, provides that any reference in the Evidence Rules to a writing “includes electronically stored information.”<sup>102</sup>

### C. Particulars and Address

The term “particulars” is found nowhere else in any other notice requirement in the Evidence Rules. It is not an especially helpful term, and it is certainly susceptible to argument about the level of detail that would be required for proper notice. As applied to residual hearsay, the particulars could include the date and time of the statement, the person or persons to whom it was made, the surrounding circumstances, the location, et cetera. The Advisory Committee, after discussion, concluded that if the notice provision is to be amended, it would be useful to provide a more concrete term for the information provided in the notice—a term used in other Rules so that litigants could refer to those Rules for guidance. The Advisory Committee elected to substitute the word “substance” for “particulars”—the proponent must notify the opponent of the substance of the residual hearsay.<sup>103</sup> Under this term, the courts should apply the basic principle that the proponent must provide whatever information might be reasonably necessary to allow the opponent to fairly challenge the evidence. Notably, the word “substance” is found in another place in the Evidence Rules, which can be used by courts and litigants to inform the scope of a notice requirement: Rule 103(a)(2) requires a party making an offer of proof to inform the court of the “substance” of the evidence it seeks to admit.<sup>104</sup> The case law construing the term “substance” requires counsel to state “with specificity what he or she anticipates will be the witness's testimony.”<sup>105</sup>

Another improvement would be to delete the requirement that the declarant's address be provided. In the typical case in which residual hearsay is offered, the declarant is unavailable. This is because if the declarant is available, the hearsay is unlikely to satisfy the residual exception requirement that it be “more probative” than the declarant's testimony.<sup>106</sup> It is difficult to see the value of producing the address of a declarant who is unavailable—and the requirement is just an absurdity when the declarant is dead.

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101. *Id.* at 156 (“[P]arties fail to comply with . . . written notice requirements at their own risk.”).

102. FED. R. EVID. 101(b)(6).

103. See May 7, 2016, Memorandum, *supra* note 13, at 14, 18.

104. FED. R. EVID. 103(a)(2).

105. *Porter-Cooper v. Dalkon Shield Claimants Tr.*, 49 F.3d 1285, 1287 (8th Cir. 1995). In *Porter-Cooper*, the offer of proof was found insufficient where the plaintiff stated simply that her expert would testify to “cause and effect.” *Id.*

106. See, e.g., *Larez v. City of Los Angeles*, 946 F.2d 630 (9th Cir. 1991) (finding that newspaper accounts were improperly admitted as residual hearsay where reporters who provided those accounts were available to testify—the newspaper accounts were not “more probative” than the testimony that the reporters could have provided).

Moreover, disclosing the address of a declarant is in tension with the e-government rules, which require redaction of the home address of an individual in any court filing.<sup>107</sup> And like other aspects of the notice requirement, the failure to provide an address has been found to be a needless technicality when the opponent either knows the address of the available declarant or can easily find it.<sup>108</sup> For these reasons, the Advisory Committee's working draft deletes the requirement that the address of the declarant must be provided in the notice.

*D. Adding a Requirement of Intent  
to Invoke the Residual Exception*

The notice requirement of Rule 807 requires the proponent to disclose “the intent to offer the statement”<sup>109</sup>—but it does not specifically require the proponent to disclose the intent to offer the statement *under the residual exception*. The courts are divided on whether specific disclosure of intent to offer the statement as residual hearsay is required.<sup>110</sup> Assuming that the Advisory Committee decides to proceed with an amendment to the Rule 807 notice provision, there is much to be said for resolving the conflict in the case law over whether notice must be given of the intent to invoke the residual exception.

Whether notice of that intent must be given can have important consequences not only at trial but also on appeal. One consequence of the more specific notice requirement is that an appellate court may be unable to admit a statement retroactively as residual hearsay if it was wrongly admitted under a different exception at trial. If the trial court admits a hearsay statement under the wrong exception, the appellate court ordinarily can still affirm the judgment so long as the statement could have been admitted at trial under a different exception. For example, if a hearsay statement is

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107. See FED. R. CRIM. P. 49.1. “Tension” and not “conflict” is the correct word because a Rule 807 notice is not necessarily going to be in a court filing.

108. See, e.g., *United States v. Burdulis*, 753 F.3d 255, 264 (1st Cir. 2014) (holding that even though the government did not provide the address of the declarant, the SanDisk Corporation, there was no error because the address could have easily been found by the defendant in a simple online search).

109. FED. R. EVID. 807(b).

110. See, e.g., *United States v. Munoz*, 16 F.3d 1116, 1122 (11th Cir. 1994) (“There is no particular form of notice required under the rule. As long as the party against whom the document is offered has notice of its existence and the proponent’s intention to introduce it—and thus has an opportunity to counter it and protect himself against surprise—the rule’s notice requirement is satisfied.”); *Limone v. United States*, 497 F. Supp. 2d 143, 162 n.31 (D. Mass. 2007) (noting that authorities are split on the issue, and concluding that “[p]arties are entitled only to notice that evidence will be offered; they do not need to be told all of the possible theories that the evidence may be admitted under”). Compare *United States v. Ruffin*, 575 F.2d 346, 358 (2d Cir. 1978) (noting that the rule “can be utilized *only* if notice of an intention to rely upon it is given in advance of trial”), with *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 167 (3d Cir. 1995) (“[W]e note that the plain language of the rule requires the proponent of the hearsay statement to put the adverse party on notice that the proponent intends to introduce the statement into evidence. We have interpreted this to mean that the proponent must give notice of the hearsay statement itself as well as the proponent’s intention specifically to rely on the rule as a grounds for admissibility of the hearsay statement.”).



erroneously admitted as an excited utterance, the court will affirm if the statement could have been admitted as a statement of a party-opponent under Rule 801(d)(2)(A). The reasoning is that the nonoffering party is not prejudiced, because the evidence could have been admitted anyway.<sup>111</sup> However, that rule of retroactive application of a different theory does not apply where it would deprive the opponent of some argument or protection that could have been used if the theory had been presented below. Such may be the case with the residual exception and its notice requirement. Pretrial notice that would meet the Rule may not have been given if the statement was not offered at trial as residual hearsay. Importantly, the chances of retroactive admission under the residual exception are significantly heightened if the court's view of the notice requirement is simply that the opponent receive notice only of the evidence itself before trial. However, if the Rule requires notice of specific intent to invoke the residual exception, then by definition, the appellate court will be unable to use the residual exception on appeal.<sup>112</sup>

There are several good reasons for requiring a party to notify the opponent of the intent to invoke the residual exception. First, limiting retroactive use of the residual exception on appeal appears to be consistent with Congress's requirement of a careful approach to the residual exception; Congress did not appear to intend the residual exception to be a "bailout," but rather to be an exception that would apply only upon careful consideration and in limited circumstances.<sup>113</sup> Second, requiring a specific invocation will also limit the cavalier treatment that might occur when, at trial, a party invokes standard exceptions and, when rebuffed, simply falls back on the residual exception. Third, and perhaps most important, the need for the opponent to prepare for residual hearsay is arguably unique. Statements potentially admissible as residual hearsay run the gamut, and the arguments for admitting or excluding a statement offered under Rule 807 will be case by case. To make such a particularized argument, the opponent surely needs time to prepare. And it would seem much more difficult for a proponent to prepare if it is unclear whether the residual exception is even in play. While it is surely true that an experienced counsel will have a hunch that certain statements are possibly candidates for the residual exception, the problem is that counsel does not know whether the proponent will invoke that exception. The result could be unfair surprise on the one hand and costly over preparation on the other. Moreover, the need for disclosure of intent to invoke becomes even greater

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111. See Daniel J. Capra, *Upholding Rulings on Grounds Not Used by Trial Court*, N.Y. L.J., Jan. 12, 1990, at 3.

112. See, e.g., *United States v. Pelullo*, 964 F.2d 193 (3d Cir. 1992) (holding that records were erroneously admitted as business records at trial; because the government never gave notice of specific intent to invoke the residual exception at trial, Rule 807 could not be satisfied retroactively); see also *United States v. Nivica*, 887 F.2d 1110 (1st Cir. 1989) (finding hearsay was incorrectly admitted under the business records exception, but there was no error because it could have been admitted as residual hearsay; defendant did not receive notice of the government's intent to invoke the residual exception but did receive pretrial notice of the evidence, and that is all that is required under the First Circuit's interpretation of Rule 807).

113. See *supra* note 3 and accompanying text.

if the scope of the residual exception is expanded. Expanding the exception puts more statements in play. It gives more call for arguments that must be prepared in advance because these will be case-dependent arguments with broader discretion.

It is true that requiring a notice of intent to invoke the residual exception imposes an extra burden on the proponent; and it will prevent proponents from adjusting on the fly at trial and on appeal. It should be remembered, however, that adding a good cause exception will ameliorate some of the pain of a more specific notice requirement and will allow some flexibility. Moreover, a number of circuits, as discussed above, already require the proponent to disclose an intent to invoke the exception; it does not appear, at least from the reported cases, that such a requirement has been particularly disruptive in those courts. It could be said that the end result is simply that proponents will be better prepared by focusing in advance on the possibility of using the residual exception, that opponents will be better prepared to meet the evidence, and that better preparation on both sides is a good thing.

Despite these arguments, the Advisory Committee has, at least at this point, decided not to impose the requirement that the proponent provide notice of intent to invoke the residual exception.<sup>114</sup> The concern is that a proponent may not know at the time notice is provided that he or she will need to use the residual exception—the result could be that in an overabundance of caution, the proponent would overnotify, i.e., provide notice of intent for virtually all hearsay in the case. The Committee has so far concluded that the value of the “intent-to-invoke” notice could end up being minimal despite all the trouble that an intent-to-invoke requirement would cause.

#### V. IS RELIABLE HEARSAY OFFERED UNDER RULE 807 BEING EXCLUDED?

When the Advisory Committee’s working draft of a possible expansion to Rule 807 was presented to the Standing Committee, a member asked, “Is this necessary?” The answer is “yes” if the courts are rejecting reliable hearsay offered under Rule 807—either because courts are setting too high a standard of trustworthiness or are applying some other requirement in Rule 807 that is getting in the way of admitting reliable and necessary hearsay. One way to try to figure out whether an expansion is needed is to review how courts in reported cases have treated hearsay proffered under Rule 807.

It must be recognized, though, that a review of reported cases provides a skewed database for determining whether the residual exception needs to be expanded. This is so for a number of reasons. Many if not most court exclusions of evidence at trial go unreported. Also, the issue might be decided in an unpublished order in response to a motion for summary judgment or a motion in limine. Appellate court decisions are a particularly skewed set, because they will not show instances in which the government in a criminal case offers evidence under Rule 807 and is rebuffed by the trial

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114. See May 7, 2016, Memorandum, *supra* note 13, at 15.

court. Moreover, even if the exclusion is reviewed in a reported appellate decision, the abuse of discretion standard skews the outcome because the appellate court is not holding that the evidence could not be admitted but only that the trial court was not egregiously wrong in excluding it.

Finally, it is often difficult to assess, in reading a case, whether the proffered hearsay is actually reliable or not. There will be easy cases showing *unreliability*, such as a diary prepared by a party once litigation has begun. But often the description of the hearsay in an opinion does not provide enough about the circumstances or the strength of the corroborating evidence to draw a sound conclusion on whether the hearsay was reliable enough to be admitted. It is also possible that the description of the evidence is itself result oriented: a court might underplay the reliability factors in its description if it has determined that the evidence should be excluded.

The fact that case law provides at best a fuzzy picture of how a Rule is operating is one of the most difficult challenges of rulemaking. Are there alternative sources of empirical data? Here are some possibilities:

- In some cases, it might be appropriate to resort to surveys of courts and litigants to determine how effective a Rule is and also to get some indication from survey participants how a proposed amendment might play out. The Advisory Committee did have the Federal Judicial Center conduct a survey before it proposed an amendment to Rule 801(d)(1)(B) (the rule on prior consistent statements). The intent of the survey was in part to determine whether an amendment to the Rule was necessary—but the survey questions and answers were pretty abstract and, frankly, the results were ambiguous enough so that they could have been (and were) used to support or attack the proposed amendment.<sup>115</sup> The Committee also heard from a number of judges informally, who complained about all the surveys they were asked to respond to. So there is doubt on whether the benefits of a survey outweigh the costs.
- Another source of empirical information comes from the public comment period once a Rule has been approved and submitted for that comment. But of course that public comment comes *after* the Rule is proposed; it would clearly be useful to obtain some data in advance of release to the general public on whether the Rule is necessary. More importantly, the public comment is often skewed by commenters whose focus is not good rulemaking but rather on how the amendment will affect their practice, client base, or interest group. And the volume of comment can be deceptive because much of it may consist of identical comment from a number of different individuals but proceeding from a single source.<sup>116</sup>

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115. See Advisory Comm. on Evidence Rules, Minutes of the Meeting of April 3, 2012, at 5, <http://www.uscourts.gov/sites/default/files/2016-10-evidence-agenda-book.pdf> [https://perma.cc/AX39-PK29].

116. For example, many of the public comments responding to the recent proposal to eliminate Rule 803(16), the ancient documents exception to the hearsay rule, were virtually

- Another source is the miniconference, which operates as a kind of focus group of experts, whose only agenda is to develop workable and useful rules. The Civil Rules Committee conducted many of these miniconferences as it worked to propose amendments to the discovery rules. That model as developed by the Civil Rules Committee has now been taken up by the Evidence Rules Committee and has proved very useful in helping the Committee determine when Rule amendments are warranted and when they are not. As seen in this volume, the miniconference of the Advisory Committee's current agenda items resulted in helpful comments and input on the necessity for amendment to Rule 807 and other Rules.

In any case, while case law is not a perfect indicator of the need for a rule change, the reported cases are undeniably relevant to the enterprise. The Reporter therefore undertook to review and summarize all reported cases decided in the past ten years in which a court has reviewed, with some analysis, a claim that hearsay is admissible under Rule 807. The results of the Reporter's research are set forth in two lengthy case digests; one covering cases in which the proffered hearsay is admitted and the other covering cases excluding the hearsay.<sup>117</sup>

What are the takeaways from a review of all these cases?

(1) *That is a lot of cases.* It is surprising how many times Rule 807 has been invoked. There are 114 reported cases in which the court seriously addressed a Rule 807 question and excluded the evidence. There are 71 cases in which the hearsay was found admissible under Rule 807. The fairly high volume of cases in which Rule 807 has been invoked indicates that it is an important Rule and so raises the level of necessity for an amendment if the Rule is not operating properly. It is not like a backwater rule for which error might be tolerated.

(2) *Courts are excluding well more than admitting.* It is not a scientific sample, but the case digest does go through about 200 cases over a ten-year period—and the difference between numbers of exclusions versus admissions is notable. Obviously there are many possible causes for this disparity, but it provides at least relevant information that, by and large, (1) the residual exception is not being abused and (2) a good number of litigants with at least colorable claims that their hearsay is reliable are being rebuffed.

As the Reporter's notes to the cases indicate, there are a number of exclusions in which the courts impose very high standards: *clear trustworthiness, significantly more probative, truly exceptional, must*

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identical. See generally *Proposed Amendments to the Federal Rules of Evidence*, *supra* note 11.

117. These case digests are on file with the author and are also included in the Agenda Book for the fall 2016 meeting of the Advisory Committee. See Memorandum Regarding Expanding the Residual Exception to the Hearsay Rule from Daniel J. Capra, Reporter, Advisory Comm. on Evidence Rules, to Advisory Comm. on Evidence Rules (Oct. 1, 2016), in ADVISORY COMMITTEE ON RULES OF EVIDENCE OCTOBER 2016 AGENDA BOOK 109 apps. 1–2 (2016), <http://www.uscourts.gov/sites/default/files/2016-10-evidence-agenda-book.pdf> [<https://perma.cc/T9GH-DHXD>].

*compare favorably to a standard exception*, et cetera. There are a number of cases where the evidence as described looks quite trustworthy, and yet the court, applying these strict and sometimes indefinable standards, excludes the evidence. These heightened standards are not even found in the language of Rule 807 itself. And there are a number of cases in which the “more probative” requirement is used to exclude reliable hearsay that would actually be helpful and even necessary to the proponent’s case. So while more can be learned in public comment, it might be tentatively concluded that the residual exception in many courts is applied in such a way as to exclude reliable and necessary hearsay. There is no evidence, however, that the residual exception is being used widely to undermine the standard hearsay exceptions on a regular basis. Contrary to the belief of some law professors, the residual exception is not being applied broadly, and it is definitely not swallowing the hearsay rule.<sup>118</sup>

(3) *The equivalence standard is troublesome.* The cases indicate that the Advisory Committee was correct in tentatively agreeing to scrap the equivalence language in Rule 807. As seen in the case digest, the equivalence standard has resulted in serious problems of application and has taken many courts away from the task of determining whether the proffered hearsay is actually reliable. And as stated above, it is often outcome determinative. If the court wants to reject a statement, it compares the hearsay to an exception that is based on different guarantees of trustworthiness than those provided in the proffered hearsay and then holds that there is no equivalence. If the court wants to admit a statement, it compares the hearsay to the lamest exceptions and concludes that the hearsay is at the very least equivalent to that. Some courts have even compared the proffered hearsay to exceptions that the Rule does not itself list as a comparable because they are not located in Rules 803 or 804, such as an agency statement.<sup>119</sup> Thus, the equivalence test complicates and obfuscates the goal of the enterprise, which is to determine whether the proffered hearsay is actually reliable.

(4) *The more probative standard is troublesome.* As discussed above, the more probative standard has led to all sorts of weird outcomes, allowing some courts to exclude the hearsay if there is any evidence from any reasonably available source that might prove the point, even if the evidence is different in character and even if it has *not yet been obtained* and so cannot really be assessed for trustworthiness or “probativeness.” The more probative language has also allowed courts to take control from the party, who should have the autonomy to decide which of two pieces of reliable evidence it should present—or whether to present both.<sup>120</sup>

(5) *The “rare and exceptional” language from the legislative history is troublesome.* To a number of courts, the phrase “rare and exceptional” is part of the text of the Rule rather than just legislative history. The case digest shows a number of cases in which the court essentially ignored the language

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118. See generally Sonenshein & Fabens-Lassen, *supra* note 5.

119. See, e.g., *Auto-Owners Ins. v. Newsome*, No. 4:12-cv-00447-RBH, 2013 WL 3148334 (D.S.C. June 19, 2013).

120. See *supra* notes 44–58 and accompanying text.

of the Rule and proceeded to the question of whether the proffered hearsay was “exceptional”—whatever that means.<sup>121</sup> To say something like “a bystander’s statement about an event is not exceptional” totally misses the point—which is to determine whether the statement is trustworthy. “Exceptional” was never intended to be a substitute for a trustworthiness analysis.<sup>122</sup>

Is there a way to prevent courts from using an exceptionalist test instead of reviewing for trustworthiness as the Rule requires? It seems odd to amend the text of the Rule to solve this problem because the language is not even in the Rule. Perhaps the deletion of the equivalence language, together with the deletion of the superfluous tone setters of “materiality” and “interests of justice,” would be a sufficient signal that a court should not be limited to rare and exceptional circumstances in admitting residual hearsay. But it is probably useful to be more direct by adding language to the Committee Note that shows an intent to reject an exceptionalist review of the proffered hearsay. The draft Committee Note, set forth in Part VI, makes such an attempt.

(6) *There is a dispute about whether the trustworthiness of the in-court witness should be taken into account.* Assume that a witness is going to be called to relate a hearsay statement that the proponent proffers as residual hearsay. In the Third Circuit, the court will be required to consider whether the *witness* relating the statement is trustworthy. So for example, if the witness is a party, the court would consider if the witness has a motive to falsify and so might relate a statement different from what the declarant actually said—or might even make up the fact that the statement was even made.

An example of a focus on the reliability of the witness is found in *United States v. Manfredi*.<sup>123</sup> In a tax prosecution, the defendant sought to show that he had a tax-free source of income—monetary gifts from his father.<sup>124</sup> To prove this, he sought to introduce testimony from his aunt that she spoke to the father when he was hospitalized, and the father said that he had given his son and daughter-in-law “more money than they w[ould] ever need.”<sup>125</sup> The

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121. *See, e.g.*, *United States v. Wilson*, 281 F. App’x 96, 99 (3d Cir. 2008) (“Before the District Court, Wilson’s primary argument in favor of admission of the private investigator’s testimony was that Renee Russell had ‘no reason to lie,’ and he now argues that a person ‘speaking to a stranger about a matter in which they have no involvement or interest, will generally make truthful statements.’ This is not an ‘exceptional guarantee of trustworthiness.’” (citations omitted)); *S. Home Care Servs., Inc. v. Visiting Nurse Servs., Inc.* of S. Conn., No. 3:13-CV-00792(RNC), 2015 WL 4509425 (D. Conn. July 24, 2015) (excluding statements by hospital patients that were solicited for business even though they were made by declarants with no motive to lie because the circumstances were not “exceptional”).

122. Notably one state actually inserted language into its residual exception requiring the court to find “exceptional circumstances” before the proffered hearsay can be admitted. *See* OKLA. STAT. ANN. tit. 12, § 2804.1 (West 2016). While that provision can be criticized for imposing a fuzzy and distracting admissibility requirement, at least it can be said that it is placed in the text of the rule, rather than in some checkered legislative history.

123. No. 07-352, 2009 WL 3823230 (W.D. Pa. Nov. 13, 2009).

124. *See id.* at \*3.

125. *Id.* at \*1, \*4.

court found that the father's statement was not admissible as residual hearsay.<sup>126</sup> In so holding, the court stated that the trustworthiness evaluation requires consideration of who the *witness* is, and here the aunt was biased in favor of her nephew and so may have been lying about whether the statement was ever made.<sup>127</sup> The district court in *Manfredi* relied on *United States v. Bailey*,<sup>128</sup> in which the court directed district courts to consider "the reliability of the reporting of the hearsay by the witness" in determining trustworthiness under Rule 807.<sup>129</sup>

This focus on the witness is misguided when analyzing the trustworthiness of the hearsay statement. The testifying witness's credibility is a question for the jury, not the judge. The hearsay question is whether the out-of-court statement is reliable. The reliability of the in-court witness is not a hearsay problem because that witness is testifying under oath and subject to cross-examination about what she heard. That point has been recognized by most courts.<sup>130</sup> It appears that the Third Circuit is alone in requiring an assessment of the reliability of the in-court witness under Rule 807.

If Rule 807 were to be amended, it would be useful to address the conflict in the courts about whether the reliability of the witness should be considered in the trustworthiness inquiry. It would of course be best to have a uniform approach—and, on the merits, the best result would be to correct the Third Circuit's misconception that the trustworthiness of the witness is part of the hearsay analysis.

If such a change is to be made, it should probably be in the Committee Note. Adding a sentence of text (such as, "but the trustworthiness of a witness relating the hearsay statement is not to be considered") might be problematic because the same question arises under *any* hearsay exception, and the same answer is given for every one—the trustworthiness of the witness is a question for the jury, and the trustworthiness of the declarant is the hearsay question for the court. Addressing the reliability of the in-court witness in the text of one exception but not another may create confusion and lead to arguments that the reliability of the witness *is* relevant for exceptions as to which the text remains silent.

The Advisory Committee has previously encountered the "reliability of the witness" issue. When considering an amendment to Rule 804(b)(3) (the hearsay exception for declarations against interest), the Committee found that a few courts were evaluating the "corroborating circumstances" requirement under that Rule as requiring consideration of the reliability of the witness. The Committee concluded that this focus on the witness was misguided

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126. *Id.* at \*5.

127. *See id.* at \*3.

128. 581 F.2d 341 (3d Cir. 1978).

129. *Id.* at 349.

130. *See, e.g., Rivers v. United States*, 777 F.3d 1306, 1313 (11th Cir. 2015) ("The fundamental question [for residual hearsay] is not the trustworthiness of the witness reciting the statements in court, but of the declarant who originally made the statements."); *Huff v. White Motor Co.*, 609 F.2d 286, 293 (7th Cir. 1979) ("[The] witness can be cross-examined and his credibility thus tested in the same way as that of any other witness. It is the hearsay declarant, not the witness who reports the hearsay, who cannot be cross-examined.").

because the witness was testifying in court, and so her credibility was a question for the jury. The Committee decided that the problem of assessing the credibility of a witness relating a hearsay statement was best addressed in the Committee Note—because addressing it in the text would raise a negative inference as to other exceptions where such language is not included. The pertinent passage in the 2010 Committee Note reads as follows:

In assessing whether corroborating circumstances exist, some courts have focused on the credibility of the witness who relates the hearsay statement in 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.<sup>131</sup>

A similar provision should be included in a Committee Note to any amendment to the trustworthiness requirement of Rule 807. Such a provision is included in the working draft set forth in Part VI.

(7) *There is a dispute about using corroboration to determine trustworthiness.* The case digests bear out what was discussed in Part II: the courts dispute whether to consider corroborating evidence in the trustworthiness inquiry.<sup>132</sup> The cases show that most courts do rely on corroboration; and they also show that *no* courts hold that a hearsay statement is trustworthy *solely* because it is corroborated. This view, that corroboration is a factor but not the sole factor, is surely the correct result—we rely on corroboration to determine trustworthiness virtually every day, and there is no reason to disregard corroboration when it comes to residual hearsay. The Advisory Committee's working draft accordingly directs courts to consider the existence or absence of corroboration in assessing trustworthiness.

(8) *The materiality requirement is useless.* The case review validates the Committee's tentative decision to delete the materiality requirement of Rule 807. Out of the almost 200 cases reviewed, there was not a single one in which the materiality requirement made a difference. Rather, it is a bureaucratic checkoff and tracks the relevance requirement exactly. There is no reason at all why a court must write an opinion in which it analyzes two admissibility requirements in exactly the same way.

(9) *The interests of justice requirement is either useless or pernicious.* The case digests indicate that for the most part, the interest of justice requirement is superfluous because it is found to be met when another requirement in the Rule is met: for instance, admission is found to be within the interests of justice because the hearsay is trustworthy or is more probative than any other evidence.<sup>133</sup> Or, admission is contrary to the interests of justice because the hearsay is unreliable and the opponent never got a chance to cross-examine.

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131. FED. R. EVID. 804(b)(3) advisory committee's note to 2010 amendment.

132. See *supra* notes 29–33 and accompanying text.

133. See, e.g., *Royal & Sun All. Ins. PLC v. UPS Supply Chain Sols.*, No. 09 C 5935, 2011 WL 3874878, at \*17 (S.D.N.Y. Aug. 31, 2011) (noting that “[t]he inclusion of the statement best serves the interest of justice, as the unfortunate fact that Crews succumbed to his injuries should not preclude IMSCO from introducing statements from the only available



If the interests of justice factor is simply superfluous, then it should be deleted for the same reason as the materiality requirement. But as discussed in Part III, it turns out that in some cases, courts have invoked the interests of justice language to exclude residual hearsay that might be trustworthy.<sup>134</sup> The interests of justice language might be used as a way for judges to apply their discretion independent of the reliability and necessity of the hearsay statement. All the more reason why the Advisory Committee's decision to delete the interests of justice requirement in its working draft appears to be justified.

## VI. THE WORKING DRAFT

The working draft of an amendment to Rule 807, together with a draft Committee Note, is produced below. The draft has been modified in light of comments received at the miniconference reproduced in this issue. Most importantly, a comment that it would be helpful to include a reference in the trustworthiness clause to "the totality of circumstances" has been implemented. "Totality of circumstances" is a well-known standard and emphasizes that the trial court's review of trustworthiness should not be artificially limited.<sup>135</sup>

It must be emphasized, however, that the Advisory Committee has not made a final decision to propose an amendment to Rule 807, other than the amendments to the notice provisions. Regarding the substantive provisions (trustworthiness, materiality, more probative, and interests of justice), some members of the Committee are concerned that any expansion that increases judicial discretion to admit or exclude hearsay will be poorly received by the practicing bar and may serve to undermine the categorical exceptions. It is for this reason that the Committee has refused at this point to make any change to the more probative requirement in the Rule. Whether the Committee will formally propose the changes to the trustworthiness, materiality, and interests of justice clauses set forth below remains to be seen.

### **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~~ *the court determines, after considering the totality of circumstances and any corroborating evidence, that the statement is trustworthy; and*
- ~~(2) it is offered as evidence of a material fact;~~
- ~~(3) 2) 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~~

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eyewitness"—but this is only to say that the statement is more probative than any other available evidence).

134. *See, e.g.,* *Lakah v. UBS AG*, 996 F. Supp. 2d 250 (S.D.N.Y. 2014); *see also supra* notes 77–81 and accompanying text.

135. *See* May 7, 2016, Memorandum, *supra* note 13, at 10.

~~—(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 *written* notice of ~~the an~~ intent to offer the statement ~~and its particulars, including the declarant's name and address,~~ *including its substance and the declarant's name*—so that the party has a fair opportunity to meet it. *The notice must be provided before the trial or hearing—or during trial or hearing if the court, for good cause, excuses a lack of earlier notice.*

#### **Committee Note**

The amendment has two goals: (1) to permit somewhat greater use of the residual exception than is currently the case in many courts; and (2) to amend the notice requirements to include a good cause exception and to improve some procedural details.

The amendment is not intended to replace the categorical hearsay exceptions with a case-by-case approach to hearsay. But it is intended to allow trial courts somewhat more discretion to admit hearsay that the court finds to be trustworthy and that is not admissible under other exceptions. This greater flexibility is found in the following changes:

- Untethering the reliability inquiry from the categorical exceptions that had been required by the original rule's reference to "equivalent" circumstantial guarantees of trustworthiness. The "equivalence" standard is unduly constraining, as well as difficult to apply, given the varied and different guarantees of reliability found among the categorical exceptions (and given the fact that some hearsay exceptions, e.g., Rule 804(b)(6), are not based on reliability at all). Experience has shown that residual hearsay often cannot be compared usefully to any of the categorical exceptions and yet might well be trustworthy.
- Specifically allowing the court to consider the presence or absence of corroborating evidence in the reliability inquiry. Most courts do allow consideration of corroborating circumstances, though some do not. The amendment provides for a more uniform and flexible approach and recognizes that the existence or absence of corroboration is relevant to whether the hearsay statement is accurate.
- Deleting the requirements that residual hearsay must be evidence of a material fact and that its admission will best serve the purposes of the rules and the interests of justice. These requirements are superfluous in that they are also found in other rules (e.g., 102, 401). They have served, if anything, as tone setters to indicate that the rule is to be employed only in rare and exceptional circumstances. The amendment is intended to allow the use of the exception somewhat more frequently.

The legislative history of the original rule indicated that use of the residual exception should be left for "rare and exceptional" cases. That phrase in the legislative history has led some courts to exclude proffered hearsay because it is not "exceptional." The word "exceptional" is not in the text of the rule, and it should not be a word that is used to exclude otherwise trustworthy and necessary hearsay. At any rate, the "rare and exceptional" language is no longer descriptive of the rule as amended.

The rule requires the court to determine whether the hearsay statement is trustworthy. In doing so, the court should not consider the credibility of a witness who relates the declarant's hearsay statement in court. The credibility of an in-court witness does not present a hearsay question. "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."<sup>136</sup>

The Committee decided to retain the requirement that the proponent must show that the hearsay statement is more probative than any other evidence that can be reasonably obtained. This necessity requirement will continue to serve to prevent the residual exception from being used as a device to erode the categorical exceptions.

The notice provision has been amended to make four changes in the operation of the rule:

- First, the rule requires the proponent to disclose the "substance" of the statement. This term is intended to require a description that is sufficiently specific under the circumstances to allow the opponent a fair opportunity to meet the evidence.<sup>137</sup> Prior case law on the obligation to disclose the "particulars" of the hearsay statement may be instructive, but not dispositive, of the proponent's obligation to disclose the "substance" of the statement under the rule as amended.
- Second, the prior requirement that the declarant's address must be disclosed has been deleted. That requirement was nonsensical when the declarant was unavailable and unnecessary in the many cases in which the declarant's address was known or easily obtainable. If prior disclosure of the declarant's address is critical and cannot be obtained by the opponent through other means, then the opponent can seek relief from the court.
- Third, the rule now requires that the notice be in writing—which includes notice in electronic form.<sup>138</sup> Requiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually provided.
- Finally, the pretrial notice provision has been amended to provide for a good cause exception—the same exception found in Rule 404(b). Most courts have applied a good cause exception under Rule 807 even though it was not specifically provided in the original rule, while some courts have not. Experience under the residual exception has shown that a good cause exception is necessary in certain limited situations. For example, the proponent may not become aware of the existence of the hearsay statement until after the trial begins; or the proponent may plan to call a witness who without warning becomes unavailable during trial, and the proponent must then resort to residual hearsay. Where notice is provided during the trial, the general requirement that notice must be in writing need not be met.

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136. FED. R. EVID. 804(b)(3) advisory committee's note to 2010 amendment.

137. *Cf. id.* 103(a)(2) (requiring the party making an offer of proof to inform the court of the "substance" of the evidence).

138. *See id.* 101(b)(6).

The rule retains the requirement that the opponent receive notice in a way that provides a fair opportunity to meet the evidence. When notice is provided during trial after a finding of good cause, the court may need to consider protective measures, such as a continuance, to assure that the opponent has time to prepare for the particularized argument that is necessary to counter hearsay offered under the residual exception.

VII. MIGHT AN AMENDMENT BE JUSTIFIED  
EVEN IN THE ABSENCE OF A DEFINITIVE EMPIRICAL SHOWING  
THAT RELIABLE HEARSAY IS BEING EXCLUDED?

As suggested above, the case digests can be read to support the proposition that the residual exception is being applied in such a way that reliable hearsay is being excluded—even though the goal of the exception was to admit reliable hearsay. But even if the case digests do not fully answer the question of whether an expansion of the residual exception is “necessary,” an amendment might well be supportable on the basic grounds of good rulemaking.

The following changes to the rule could be justified as improving the operation of the rule and providing uniformity:

(1) Deleting the equivalence requirement, for all the reasons stated above. That change does not necessarily result in an “expansion” of the exception. Rather it just allows courts to tackle the trustworthiness question head-on, without trying to compare what is often incomparable.

(2) Amending the trustworthiness requirement to specify that corroboration (as well as its absence) must be considered. This change would rectify a conflict among the courts and would not necessarily result in any expansion of the exception (especially since most courts already consider corroboration to be a relevant consideration).

(3) Deleting the requirements of materiality and interests of justice, for all the reasons stated above. Of course, one reason for deleting these requirements is that they were added by Congress to give a signal, so deleting them would probably give the opposite signal. But independent of the signaling effect, there is every justification for deleting these requirements because they are superfluous and, in the case of the interests of justice requirement, a possible invitation to unwarranted judicial discretion instead of a meaningful review of the hearsay’s trustworthiness.

(4) Adding a paragraph to the Committee Note to instruct that the credibility of the witness is not part of the reliability inquiry would promote uniformity and is not particularly related to any expansion of the residual exception.

(5) Adding a paragraph to the Committee Note instructing that the “rare and exceptional” language is not part of the Rule itself would help to prevent courts from trying to use “exceptional” as an admissibility requirement, when the test should be whether the hearsay is trustworthy (but unlike the other possible changes discussed, it must be admitted that a negative comment on this iconic phrase might be interpreted as a signal that the exception is expanded).

(6) Amending the notice provision has nothing to do with expanding the exception itself.<sup>139</sup>

In sum, it would be useful to go forward with most or all of the proposed amendments to Rule 807, even if the case for expanding the exception to cover more hearsay is still subject to argument. The difference would be in the Committee Note.

A “nonexpansion” “good rulemaking” Committee Note might look something like this<sup>140</sup>:

Rule 807 has been amended to fix a number of problems that the courts have encountered in applying the rule.

Courts have had difficulty with the requirement that the proffered hearsay carry “equivalent” circumstantial guarantees of trustworthiness. The “equivalence” standard is difficult to apply given the varied and different guarantees of reliability found among the categorical exceptions (as well as the fact that some hearsay exceptions, e.g., Rule 804(b)(6), are not based on reliability at all). Experience has shown that residual hearsay often cannot be compared usefully to any of the categorical exceptions and yet might well be trustworthy. Thus the requirement of an equivalence analysis has been abrogated. Under the amendment, the court is to proceed directly to a determination of whether the hearsay is trustworthy under the particular circumstances.

The amendment specifically allows the court to consider corroborating evidence in the reliability inquiry. Most courts do allow consideration of corroborating circumstances, though some do not. This provision provides for a more uniform approach and recognizes that the existence or absence of corroboration is relevant to whether a statement is true.

The legislative history of the original rule indicated that use of the residual exception should be left for “rare and exceptional” cases. That phrase in the legislative history has led some courts to exclude proffered hearsay because it is not “exceptional.” The word “exceptional” is not in the text of the rule, and it should not be used to exclude otherwise trustworthy hearsay.

The rule requires the court to determine whether the hearsay statement is trustworthy. In doing so, the court should not consider the credibility of a witness who relates the declarant’s hearsay statement in court. The credibility of an in-court witness does not present a hearsay question. 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.

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139. Amending the more probative requirement to focus on the declarant, not on all other evidence, could also be supported as good rulemaking because a focus on other available evidence ignores the fact that the proponent often needs the hearsay for an effective presentation despite (or together with) the available evidence from third parties. But it is also undeniable that amending the more probative requirement to allow in more hearsay would be an expansion of the exception, which some would find troubling.

140. The Note with respect to the notice provisions would be the same and so is not replicated here.

## CONCLUSION

The time has come to improve Rule 807. Currently it results in unjustified exclusions of reliable and necessary hearsay, while not doing a very good job of tethering judicial discretion or preventing inconsistent results. The most important change to be made is to allow the courts to proceed directly to an evaluation of trustworthiness, unimpeded by the distracting factors of “equivalence” to the standard exceptions or an inquiry into whether the hearsay is “exceptional.” The other changes proposed would make the Rule easier to apply and would resolve conflicts in the courts. Finally, while the extensive case law under Rule 807 supports a call for a limited expansion to the Rule, the changes proposed can, for the most part, be justified simply as good rulemaking.