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The Three Commandments of Amending the Federal Rules of Evidence

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THE THREE COMMANDMENTS OF AMENDING THE FEDERAL RULES OF EVIDENCE

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INTRODUCTION

The Advisory Committee on the Federal Rules of Evidence ("the Rules") is considering an amendment to Rule 807, the residual exception to the rule against hearsay. One aspect of the proposed amendment would permit admission of hearsay not already covered by an exception in Rules 803 or 804 so long as the statement is "trustworthy" as established by circumstances relating to the statement and corroborating evidence. This would expand the scope of the residual exception in two ways. First, it would eliminate language in the existing Rule that describes the degree of trustworthiness required; the Rule currently requires that the proffered hearsay have a level of trustworthiness "equivalent" to the exceptions in Rules 803 and 804. Second, the proposed amendment would permit trustworthiness to be established, at least in part, by corroborating evidence. In contrast, the exceptions in Rules 803 and 804 make admissibility dependent on only the circumstances surrounding the hearsay statement in question.

The Rules have been amended many times in the forty years since they were enacted. Unlike the original drafting process, which necessarily involved consideration of the Rules as a whole, each round of amendments was limited to a specific Rule or set of Rules.[1] This particularized focus is not myopic, but unavoidable; the Rules are numerous and complex, and the time of the Advisory Committee and Congress is limited. But after more than forty years, a broader perspective is possible. The purpose of this Article is to provide a small bit of that perspective, which this Article distills into three "commandments" for amending the Rules.[2] After a brief history of the residual exception and a description of the proposed

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1. The only semiexception to this occurred in 2011, when all the Rules were amended for style. FED. R. EVID. 101 advisory committee's note to 2011 amendment. The amendments purported to make no substantive changes. *Id.*

2. Of course, when first enacted, there were Ten Commandments. *Exodus* 20:1–:17. They were reduced in number as part of the general restyling of the Commandments to make them more easily understood. The changes were intended to be stylistic only. *See Matthew* 5:17–:22.

amendment, this Article considers the extent to which that proposal complies with these commandments.

I. HISTORY OF THE RESIDUAL EXCEPTION

Both Rules 803 and 804 contained versions of the residual exception when the Rules were enacted in 1975.[3] The redundancy and placement were purposeful. Upon creating the residual exception, the Advisory Committee made it clear that its intent was not the unfettered exercise of judicial discretion. Instead, the purpose of this innovation was to leave some room for admitting hearsay that was "within the spirit of the specifically stated exceptions."[4] Thus, the residual exception was made a part of both Rules 803 and 804 to show that the traditional exceptions and the residual exception were complementary, not at odds.[5] To reinforce this connection to the traditional exceptions in Rules 803 and 804, the Advisory Committee proposed a residual exception that made explicit reference to those provisions and required "comparable circumstantial guarantees of trustworthiness."[6]

This formulation was insufficient for the House Committee on the Judiciary, which deleted the residual exception on the grounds that it "inject[ed] too much uncertainty into the law of evidence and impair[ed] the ability of practitioners to prepare for trial."[7] The Senate Judiciary Committee agreed that an overly broad residual exception was dangerous[8] but disagreed that deletion was appropriate.[9] Instead, the Senate Committee toughened the language of the exception to connect it even more closely to the traditional exceptions in Rules 803 and 804, requiring that hearsay admitted under the residual exception have "equivalent [not just comparable] circumstantial guarantees of trustworthiness."[10] The Senate Committee intended that "the residual hearsay exceptions [would] be used

3. *See* FED. R. EVID. 807 advisory committee's note.

4. Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 315 (1973).

5. S. REP. NO. 93-1277, at 20 (1974) ("It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances. The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in rules 803 and 804(b). The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions."). *See generally* People v. Katt, 662 N.W.2d 12, 28 (Mich. 2003) ("Against the nearly four hundred-year-old historical development of our hearsay rules, it is clear that the drafters of the rules did not intend a wholesale trampling of the enumerated hearsay exceptions when the federal residual hearsay exceptions were enacted.").

6. S. REP. NO. 93-1277, at 18. The word "comparable" was used in the 1971 Revised Draft of the Rules and the 1972 Supreme Court Draft. *See* Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. at 303, 322; Revised Draft of Proposed Rules of Evidence for United States Courts and Magistrates, 51 F.R.D. 315, 437, 439 (1971).

7. H.R. REP. NO. 93-650, at 6 (1973).

8. *See* S. REP. NO. 93-1277, at 19.

9. *Id.* at 20.

10. *Id.* at 19.

very rarely, and only in exceptional circumstances."[11] The Senate Committee's version was eventually enacted.

In 1997, by amendment, the residual exceptions in Rules 803 and 804 were deleted in favor of a single provision, Rule 807. The Advisory Committee stated that the amendment's purpose was simply to "facilitate additions to Rules 803 and 804."[12] The requirement that hearsay admitted under the residual exception have "equivalent circumstantial guarantees of trustworthiness" was unchanged.[13] Thus, while the residual exception was no longer a part of Rules 803 and 804, the connection to those provisions, as established by the text of Rule 807, remained in place.

In the more than forty years since the enactment of the Rules, courts have been cautious when considering evidence under the residual exception. But it is not accurate to say that the exception has been used "very rarely."[14] The Advisory Committee's Reporter collected all reported cases in the past ten years in which a court reviewed a claim that hearsay was admissible under Rule 807.[15] He informed the Advisory Committee that he found 114 cases in which the court seriously addressed a Rule 807 question and excluded the evidence.[16] He also found seventy-one cases in which the hearsay was found admissible under Rule 807.[17] While admitting that this data provides an imprecise picture of how the residual exception has been applied, the Reporter drew two conclusions: (1) the residual exception is being invoked with surprising frequency and (2) courts are excluding the proffered evidence more often than they are admitting it.[18]

II. THE PROPOSED AMENDMENT

The Advisory Committee has tentatively approved a working draft of an amendment to Rule 807.[19] The proposal would make several changes to the provision, but this Article focuses on only one aspect of those changes. The Rule currently reads, in part:

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11. *Id.*
12. FED. R. EVID. 807 advisory committee's note to 1997 amendment.
13. As amended in 1997, Rule 807 reads, in pertinent part, "[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: [if] (1) the statement has equivalent circumstantial guarantees of trustworthiness . . . ." FED. R. EVID. 807. The Advisory Committee's note to the amendment stated, "The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to a new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended." FED. R. EVID. 807 advisory committee's note to 1997 amendment.
14. *See supra* note 11 and accompanying text.
15. *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, 125 (2016), http://www.uscourts.gov/sites/default/files/2016-10-evidence-agenda-book.pdf [https://perma.cc/T9GH-DHXD].
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 109.

> **(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*.[20]

The "working draft" of the proposed amendment would revise subsection (a)(1) to read:

> **(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 court determines, after considering the pertinent circumstances and any corroborating evidence, that the statement is trustworthy*.[21]

The Reporter offered to the Advisory Committee the following rationale for eliminating the reference to "equivalent" circumstantial guarantees of trustworthiness:

> The requirement that the court find trustworthiness "equivalent" to the circumstantial guarantees in the Rule 803 and 804 exceptions should be deleted. That standard is exceedingly difficult to apply, because there is no unitary standard of trustworthiness in the Rule 803 and 804 exceptions. It is common ground that statements falling within the Rule 804 exceptions are not as reliable as those admissible under Rule 803; and it is also clear that the bases of reliability differ from exception to exception. Moreover, one of the exceptions subject to "equivalence" review—Rule 804(b)(6) forfeiture—is not based on reliability at all. Given the difficulty of the "equivalence" standard, a better approach is simply to require the judge to find that the hearsay offered under Rule 807 is trustworthy.[22]

The Reporter also explained the reasons for amending Rule 807 to permit corroborating evidence to help establish trustworthiness:

> Trustworthiness can best be defined as a consideration of both circumstantial guarantees and corroborating evidence. Most courts find corroborating evidence to be relevant to the reliability enquiry, but some do not. An amendment would be useful to provide uniformity in the approach to evaluating trustworthiness under the residual exception—and substantively, that amendment should specifically allow the court to consider corroborating evidence, as corroboration is a typical source for assuring that a statement is reliable.[23]

III. THE THREE COMMANDMENTS

The Advisory Committee's proposed changes to Rule 807 are intended to expand the application of the residual exception.[24] Viewed from the perspective of Congress's original intent and the more than forty-year history of amendment to the Rules, the proposal violates three "commandments" that should guide the amendment process.

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20. *Id.* (emphasis added).
21. *Id.* at 8 (emphasis added).
22. *Id.* at 5.
23. *Id.* at 6.
24. *Id.* at 2.

A. Commandment I: If It Ain't Broke, Don't Fix It

The Rules should be amended only when there is a compelling case for making the change. This is because there is almost always a cost to amending established evidence rules. The case should be especially compelling when the amendment contradicts the original congressional intent.

There is not a compelling case for changing the "equivalent circumstantial guarantees of trustworthiness" language of Rule 807. The Reporter notes that this language is illogical because there is significant variation in the circumstantial guarantees of trustworthiness associated with the traditional hearsay exceptions in Rules 803 and 804.[25] This would be a reason for amendment if the logical problem actually impacted how courts apply the Rule, as would be the case if courts thought that the Rule required that a given item of hearsay have guarantees of trustworthiness "equivalent" to all of the traditional exceptions.[26] Not surprisingly, the Reporter points to no case that applies Rule 807 in this fashion.[27] This logical problem is avoided if "equivalent circumstantial guarantees of trustworthiness" is interpreted to mean that a court should compare the reliability of the hearsay in question only to the circumstantial guarantees of trustworthiness demanded by the traditional exception or exceptions that deal with analogous evidence or situations.[28] This appears to be how courts actually apply the residual exception.

Apart from the logic of the current Rule, the case for an amendment might still be compelling if the extent of judicial discretion to admit evidence under Rule 807 was unduly constrained by the requirement of "equivalent circumstantial guarantees of trustworthiness." Of course, reasonable minds can disagree over what is a proper level of discretion to admit evidence under the residual exception. But it should be noted that some thirty years after the Rule was enacted, the Ninth Circuit stated, "Our research has disclosed only one instance where a circuit court reversed a

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25. *Id.* at 5.

26. If there is a logical problem posed by the language in Rule 807 that refers to Rules 803 and 804, the solution might be to revise the language rather than simply delete the reference. This appears to be what was behind the amendment to the residual exception in the Uniform Rules of Evidence. Uniform Rule 808 now reads, in part, "In exceptional circumstances a statement not covered by Rules 803, 804, or 807 but possessing equivalent, though not identical, circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule." UNIF. R. EVID. 808(a).

27. *See* Memorandum Regarding Expanding the Residual Exception to the Hearsay Rule from Daniel J. Capra, *supra* note 15.

28. For example, documentary hearsay seems more trustworthy if the document was created at a point in time near when the author of the document perceived the facts described, as illustrated in Rules 803(5) and 803(6). *See* FED. R. EVID. 803(5)–(6). This is especially important for written hearsay because there usually is a time gap between the moment a person perceives certain facts and the time at which that person sets down those facts in writing. If the gap is too long, the potential for memory to erode is significant. *See, e.g.*, Daniel L. Schacter, *The Seven Sins of Memory: Insights from Psychology and Cognitive Neuroscience*, 54 AM. PSYCHOLOGIST 182, 184 (1999) (discussing the "transience" of memory and the process of gradual forgetting over time).

district court to require admission of a statement under FRE 807."[29] Given the proclivity of appellate courts to use the harmless error doctrine to avoid reversing because of an error under evidence law, it is hard to believe that trial courts feel unduly constrained by the current level of discretion to admit evidence granted by the residual exception.

Amending Rule 807 also might be appropriate if problems in applying the Rule are now apparent but were unanticipated when the Rule was enacted. As noted above, in assessing ten years of cases applying the residual exception, the Reporter found that the residual exception is invoked with surprising frequency and that courts are excluding the proffered evidence more often than admitting it.[30] However, because the residual exception is frequently invoked, this frequency can only increase if the standard for admissibility is loosened.[31] Additionally, if courts are excluding evidence offered under the residual exception more often than admitting it, then the residual exception is producing precisely the result intended by Congress.[32]

The proposal to amend Rule 807 might be best explained as an effort to address deeper problems presented by hearsay law that the Advisory Committee is not yet prepared to address. The Advisory Committee has been concerned with some established hearsay exceptions that are based on questionable grounds and the exclusion of reliable hearsay because of an unjustifiably negative view of a jury's ability to weigh such evidence.[33] But a broader review of the Rules regarding hearsay apparently has been deferred by the Advisory Committee.[34] If larger parts of hearsay law are "broke" and need fixing, the Advisory Committee should undertake that project. The assumption that a dose of judicial discretion is acceptable, even as just an interim solution, disregards the potential costs of such an approach, as described in the following section.

B. Commandment II: First, Do No Harm

When a patient has a problem, the first rule of the medical profession is to proceed with caution. There are both practical and political reasons to take a similarly conservative approach to amending the Federal Rules of Evidence.

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29. United States v. Bonds, 608 F.3d 495, 501 (9th Cir. 2010).

30. *See* Memorandum Regarding Expanding the Residual Exception to the Hearsay Rule from Daniel J. Capra, *supra* note 15, at 125.

31. This is the intended result of the proposal to amend Rule 807. *See id.* at 5 (quoting the minutes of the spring 2016 meeting of the Advisory Committee). Similarly, the draft Advisory Committee's Note states that one of the goals of the proposal is "somewhat greater use of the residual exception." *Id.* at 9.

32. *See supra* notes 4–11.

33. *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 3 (Apr. 1, 2016) [hereinafter Reporter's April Memorandum] (on file with the *Fordham Law Review*).

34. *Id.* at 2 (describing the fall 2015 symposium on hearsay reform, and the related meeting of the Advisory Committee, at which changes to various aspects of the rules regarding hearsay, including Rule 807, were discussed).

From a practical standpoint, amendments to the Rules create uncertainty. Changes in law necessarily undermine the clarifying effect of precedent based on the old standard. Of course, some Rule amendments make the language of a Rule more precise and thereby enhance certainty, but amendments making admissibility dependent on vague concepts like "trustworthiness" are unlikely to have such an effect. While Rule 807 already employs this term, the proposed amendment would eliminate the one aspect of the current Rule that provides some clarification as to its meaning: requiring a level of trustworthiness "equivalent" to the exceptions in Rules 803 and 804.[35] Absent any reference to the level of required trustworthiness, the degree of uncertainty and the risk of inconsistent application increases.

Certainty is a key value in the law of admissibility. As House and Senate committees emphasized when considering the residual exception,[36] the ability to predict admissibility is essential to the trial lawyer. Predictability influences how the lawyer will conduct discovery and prepare for trial, assess an offer to settle or plea bargain, and decide what witnesses to call and arguments to make. Certainty and predictability also are important for the trial judge. The use of in limine rulings to streamline a trial is constrained when standards are vague and require, as the proposed amendment would, consideration of corroborating evidence heard during trial.[37] Precise admissibility rules can be applied quickly and do not disturb the flow of a trial. However, when the Rules turn on broad concepts like trustworthiness, the trial judge typically must interrupt the flow of the trial to make a record of the reasons for her ruling or even hold a hearing on the issue.[38]

The amendment to Rule 702 adopted in 2000 is illustrative of the effect of vague admissibility standards on courts. That amendment was passed in response to the U.S. Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[39] which established that expert scientific evidence must be both relevant and reliable. Mindful that such general standards would be of little help to lower courts, the Supreme Court in *Daubert* went on to identify a handful of specific factors that indicate the reliability of

35. *See supra* note 21 and accompanying text.

36. *See supra* notes 7–11.

37. *Cf.* Luce v. United States, 469 U.S. 38, 41 (1984) (holding that the defendant did not preserve for appeal the issue of admissibility of impeachment evidence where he sought an in limine ruling and did not testify at trial). The Court stated:

> A reviewing court is handicapped in any effort to rule on subtle evidentiary questions outside a factual context. This is particularly true under Rule 609(a)(1), which directs the court to weigh the probative value of a prior conviction against the prejudicial effect to the defendant. To perform this balancing, the court must know the precise nature of the defendant's testimony, which is unknowable when, as here, the defendant does not testify.

Id.

38. S. REP. NO. 93-1277, at 20 (1974) ("The special facts and circumstances which, in the court's judgment, indicate[] that the statement has a sufficiently high degree of trustworthiness . . . should be stated on the record.").

39. 509 U.S. 579 (1993).

scientific evidence.[40] The amendment to Rule 702 describes only the general standard, requiring that expert testimony be based on "reliable principles and methods . . . reliably applied . . . to the facts of the case."[41] More a general principle than a rule, "reliability" gives courts little guidance. Accordingly, when lower courts are confronted with expert testimony in disciplines outside of science, they follow *Daubert* but struggle to identify concrete factors indicative of reliability in the specific area of expertise at issue.[42] An enormous number of reported cases have undertaken this burden.[43] While this factor analysis dominates the cases, the broad language of the amended Rule is mentioned, if at all, only in passing. Given the complexity of the issues that courts must resolve in determining reliability, a "*Daubert* hearing," at which all the pertinent factors are weighed by the court on the record, is now a common procedure.[44] By removing the only aspect of the current Rule that attempts to guide courts in determining the factors pertinent to trustworthiness, the proposed amendment to Rule 807 points the law of hearsay down a similar road.

A conservative approach to amending the Rules is rooted in more than just practical concern for how amendments affect lawyers and judges. Such an approach shows an understanding of the differences between initial enactment and subsequent amendment. No work on an amendment can ever match the attention given by the Advisory Committee, the Supreme Court, and Congress when the Rules were initially proposed. A good example is the controversy over the residual exception, which generated conflicting House and Senate approaches and finally a compromise over language.[45] Moreover, only in the initial rulemaking process were the Rules considered in their entirety. This made possible a balancing and political compromise with a broad perspective. Subsequent amendments to individual Rules are likely to be blind to the trade-offs that only are visible through a holistic perspective.[46] Subsequent amendments are also often made without a full understanding of the impact those amendments will have on other Rules.[47] The Rules are a system, not a collection of unrelated

40. *Id.* at 593–94.

41. FED. R. EVID. 702(c)–(d). The Advisory Committee's Note to the 2000 amendment to Rule 702 observed, "No attempt has been made to 'codify' these specific factors." FED. R. EVID. 702 advisory committee's note to 2000 amendment.

42. *See* 29 CHARLES ALAN WRIGHT & VICTOR GOLD, FEDERAL PRACTICE & PROCEDURE §§ 6269.1–.10 (2d ed. 2016).

43. *Id.*

44. *Id.* § 6270.

45. *See supra* notes 7–11.

46. For a description of the extent to which Congress debated and revised the proposed Federal Rules of Evidence as a whole, see 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE § 5006 (2d ed. 2005).

47. An ironic example is the addition in 1997 of Rule 804(b)(6), currently entitled "Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability." The Reporter to the Advisory Committee cites this exception, which does not depend on reliability as a basis for admitting hearsay, as an example of the lack of logic behind Rule 807's "equivalent" trustworthiness requirement. Memorandum Regarding Expanding the Residual Exception to the Hearsay Rule from Daniel J. Capra, *supra* note 15,

laws;[48] changes in one Rule tend to produce unintended consequences in others.

This is not to say that amendments lack legitimacy or are always a bad idea. The world changes, we learn from experience, and the Rules should adapt. However, unless something significant changes, or unless experience proves that the judgments of the original rulemakers were wrong, the Advisory Committee should proceed with a healthy dose of caution.

C. Commandment III: Be Careful What You Wish For

The proposal to expand the scope of the residual exception is likely to produce a series of what may be unintended consequences. If the residual exception in its current form is used with surprising frequency,[49] we should expect that loosening the standards of that exception will make its invocation much more widespread. Eliminating the "equivalent" trustworthiness requirement implies that a lower level of trustworthiness is sufficient for the residual exception. Additionally, the proposed amendment would make it easier to establish trustworthiness, permitting the court to consider both the circumstances surrounding the hearsay statement and corroborating evidence. The exceptions in Rules 803 and 804 permit consideration of only the former.[50]

For the same reasons, the proposed amendment should trigger a significant expansion in the use of the "near miss doctrine,"[51] under which

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at 114. There is no indication that when Rule 804 was amended to add the forfeiture by wrongdoing to this exception, the drafters had any inkling that this would have implications for Rule 807.

48. For example, consider the manner in which Rule 602 (the personal knowledge requirement) and Rule 802 (the hearsay rule) work together. 27 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE & PROCEDURE § 6023 (2007).

49. Memorandum Regarding Expanding the Residual Exception to the Hearsay Rule from Daniel J. Capra, *supra* note 15, at 125.

50. The proposed amendment to Rule 807 raises a number of difficult issues by suggesting that the trustworthiness and admissibility of a given item of hearsay can be established, at least in part, by corroborating evidence. These issues include the following: Does the corroborating evidence itself have to be admissible? Can two items of otherwise inadmissible hearsay corroborate each other and, thus, bootstrap each into admissibility? The proposed amendment to Rule 807 would retain the aspect of the current version of Rule 807 that requires hearsay be more probative on the point for which it is offered than other evidence. *See* Memorandum Regarding Expanding the Residual Exception to the Hearsay Rule from Daniel J. Capra, *supra* note 15, at 113. But if corroborating evidence can establish admissibility of the hearsay, does that not mean that the probative value of the hearsay is diminished? *See* JOHN W. STRONG, MCCORMICK ON EVIDENCE 672–73 (5th ed. 1999) (noting that a need for evidence is a factor in assessing probative value under Rule 403). In that case, corroborating evidence is a mitigating factor in favor of admissibility under one part of the proposed Rule 807, while mitigating against admissibility under another part of that provision. How should a court resolve this conflict in exercising its discretion?

51. Under the "near miss" doctrine, Rule 807 can be used to admit hearsay that is covered by the exceptions in Rules 803 or 804 but fails to meet all the requirements of that exception. For example, a business record that meets most but not all of the requirements of Rule 803(6) might be admitted under Rule 807 on the theory that, so long as the

the residual exception can be employed to make admissible an item of hearsay that satisfies some but not all of the requirements of an exception in Rules 803 or 804.[52] In fact, the Reporter suggests this is an intended consequence of the proposed amendment to Rule 807.[53] While one can argue about the merits of the near miss doctrine, an amendment to Rule 807 should not pursue such an objective without acknowledging that it undermines congressional intent: Congress said that it connected the residual exception to the trustworthiness standards of Rules 803 and 804 for the purpose of preventing the emasculation of the traditional exceptions codified in those provisions.[54]

Moreover, we should not imagine that this expansion of the residual exception would be outcome neutral. If hearsay were a retail product, government and businesses would be Walmart, every day generating unfathomable numbers of documents concerning every aspect of their affairs. The government and businesses can be expected to take full advantage of the opportunity to use an expanded residual exception as a way to avoid the more limiting constraints of the business and public records exceptions to the hearsay rule. Individual litigants are less likely to plan for and enjoy the benefit of an expansive residual exception.

While expanded use of the proposed amendment to the residual exception may often make the exceptions in Rules 803 and 804 superfluous, the greatest impact would be on the rule against hearsay itself, Rule 802. The

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requirements of the latter seem to have been met, the fact that the evidence fails to satisfy the specific exception for business records does not mean the evidence should be excluded. *See, e.g.*, United States v. Banks, 514 F.3d 769, 778 (8th Cir. 2008) (holding that where hearsay failed to satisfy the business records exception in Rule 803(6) because the party offering hearsay failed to call a foundation witness to qualify the records, Rule 807 could be used to admit the evidence on the ground that it was otherwise reliable). While a number of courts have adopted this approach, other courts have held that a near miss is simply a miss, and thus evidence that is of a type addressed by a specific hearsay exception like Rule 803(6), but which fails to satisfy all the requirements of that exception, cannot be admitted under Rule 807. *See, e.g.*, Bryndle v. Boulevard Towers, II, LLC, 132 F. Supp. 3d 486, 497 (W.D.N.Y. 2015) (holding that where hearsay failed to satisfy the business records exception in Rule 803(6) because the party offering hearsay failed to call a foundation witness to qualify the records, Rule 807 could not be used to admit the evidence on the ground that it was otherwise reliable). For a discussion of the near miss debate, see Elizabeth DeCoux, *Textual Limits on the Residual Exception to the Hearsay Rule: The "Near Miss" Debate and Beyond*, 35 S.U. L. REV. 99 (2007).

52. The Reporter notes that a majority of courts permit the residual exception to admit hearsay that falls under a category covered by a specific exception in Rules 803 or 804 but fails to meet all the requirements of that exception. Reporter's April Memorandum, *supra* note 33, at 8.

53. *Id.* at 3.

54. S. REP. NO. 93-1277, at 18–19 (1974). The Reporter suggests that the proposed amendment would not permit Rule 807 to "swallow the categorical exceptions," because the amendment would retain the requirement that the hearsay in question be more probative on the point for which it is offered than other evidence. Memorandum Regarding Expanding the Residual Exception to the Hearsay Rule from Daniel J. Capra, *supra* note 15, at 111–12. The logic behind this assertion is unclear. Retention of the "more probative" requirement has to do with whether there is other evidence on point, not whether the hearsay in question is admitted under Rule 807 even though it is not made admissible by the categorical exceptions of Rules 803 and 804.

proposed expansion of the residual exception would make Rule 802 the only general rule of exclusion subject to a broad judicial power to admit evidence on the ground that the reason for applying the exclusion seems weak.[55] There is no general exception to privileges where the court thinks that, under the circumstances, the policies underlying the privileges are weak. The limits on character evidence are not subject to a general exception creating discretion to admit evidence if the judge thinks the jury is unlikely to be improperly prejudiced. Similarly, the "best evidence rule"[56] does not contain a general exception allowing all secondary evidence to be admitted so long as the judge thinks that evidence is a "trustworthy" rendition of the contents of the original writing. Of course, Rule 403 gives courts discretion to exclude otherwise admissible evidence in an appropriate case. However, no Rule establishes discretion to admit evidence that is otherwise inadmissible. This is because such a Rule runs counter to the very notion of codifying rules of admissibility. The Senate Judiciary Committee made this very point when considering the residual exception: "an overly broad residual hearsay exception could . . . vitiate the rationale behind codification of the rules."[57]

CONCLUSION

Evidence law attempts to balance the benefits of specific admissibility standards against the need for discretion. These are complementary values, as when there are no standards the law is arbitrary, but without discretion the law is mindless. The trick is to avoid striking the balance too far in one direction or the other. One way to tell whether the balance is proper is to ask whether there are factors to guide discretion. Since Rule 807's inception, discretion to decide trustworthiness under the Rule has been anchored to the exceptions in Rules 803 and 804. Sever that anchor, and the residual exception is adrift.

55. The principal reason for excluding hearsay is, when a statement is given out of court, reliability cannot be tested through cross-examination before the trier of fact. *See* 30 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE § 6325 (1997).

56. *See* FED. R. EVID. 1002.

57. S. REP. NO. 93-1277, at 19.