

MEMORANDUM

TO: CRE Committee

FROM: Luke W. McConnell & Rick Lee

DATE: November 4, 2025

RE: CRE 807 – the residual hearsay exception

At the last meeting of the committee on February 7, 2025, we voted in favor of recommending changes to CRE 804(b)(3)(B) (statements against interest offered in a criminal case). The recommended changes to CRE 804 mirrored those made to FRE 804(b)(3)(B) in 2024. As part of the discussion regarding the changes to CRE 804, members of the committee wondered if CRE 807 should be amended in light of the proposed changes to CRE 804. A subcommittee was formed to look into this question. The proposed changes to CRE 804 were submitted for public comment and then adopted by the Colorado Supreme Court on June 18, 2025. Thus, CRE 804(b)(3)(B) has been officially amended consistent with the committee's recommendation and in alignment with the federal rules of evidence.

Short Answer

Although there doesn't appear to be a distinct issue with CRE 807 that necessitates reform, there are some good reasons for reformulating the rule to make it better and to align it with the recent changes to CRE 804. FRE 807 was amended and improved in 2019 after a significant period of study by the federal rules committee. It would probably be an improvement to the Colorado rules if we were to adopt the language of the current federal rule.

As it turns out, federal rules 804 and 807 were amended in the opposite order compared to how we are taking them up, with FRE 807 being revised first in 2019 followed by FRE 804 in 2024. One of the goals in selecting the final language of the 2024 revisions to FRE 804 was to conform the rule to the prior changes made to FRE 807, a fact which was referenced in the memo from Judge Freyre to Justice Samour recommending the changes to CRE 804. Even though we are taking these rules up in a different order, most of the rationales behind the revisions to FRE 807 apply with equal

force to the Colorado rules and our rules and trial courts could benefit from amending CRE 807 to mirror FRE 807.

Relevant Background

When the federal rules committee voted to approve the changes to FRE 804(b)(3)(B) in 2024, which we have now adopted in Colorado, one reason why the federal rules committee settled on the final language was to bring FRE 804 into alignment with changes they had previously made to FRE 807 in 2019. Thus, while we are considering whether to amend CRE 807 in light of the amendments to CRE 804, the federal rules were amended in the opposite order, with FRE 807 being amended before FRE 804.

Apart from a few very minor differences, CRE 807 is essentially the same as the older version of FRE 807 that the federal rules committee sought to improve in 2018-2019.

The Committee Notes pertaining to the 2019 changes to FRE 807 summarize the reasons behind the change to the federal rules:

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

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 different types of guarantees of reliability, of varying strength, 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). The “equivalence” standard has not served to guide a court’s discretion to admit hearsay, because the court is free to choose among a spectrum of exceptions for comparison. Moreover, experience has shown that some statements offered as residual hearsay 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 eliminated. Under the amendment, the court should proceed directly to a determination of whether the hearsay is supported by guarantees of trustworthiness. See Rule 104(a). As with any hearsay statement offered under an exception, the court’s threshold finding that admissibility

requirements are met merely means that the jury may consider the statement and not that it must assume the statement to be true.

The amendment specifically requires the court to consider corroborating evidence in the trustworthiness enquiry. Most courts have required the consideration of corroborating evidence, though some courts have disagreed. The rule now provides for a uniform approach, and recognizes that the existence or absence of corroboration is relevant to, but not dispositive of, whether a statement should be admissible under this exception. Of course, the court must consider not only the existence of corroborating evidence but also the strength and quality of that evidence.

The amendment does not alter the case law prohibiting parties from proceeding directly to the residual exception, without considering the admissibility of the hearsay under Rules 803 and 804. A court is not required to make a finding that no other hearsay exception is applicable. But the opponent cannot seek admission under Rule 807 if it is apparent that the hearsay could be admitted under another exception.

The rule in its current form applies to hearsay “not specifically covered” by a Rule 803 or 804 exception. The amendment makes the rule applicable to hearsay “not admissible under” those exceptions. This clarifies that a court assessing guarantees of trustworthiness may consider whether the statement is a “near-miss” of one of the Rule 803 or 804 exceptions. If the court employs a “near-miss” analysis it should—in addition to evaluating all relevant guarantees of trustworthiness—take into account the reasons that the hearsay misses the admissibility requirements of the standard exception.

In deciding whether the statement is supported by sufficient guarantees of trustworthiness, the court should not consider the credibility of any 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. The rule provides that the focus for trustworthiness is on circumstantial guarantees surrounding the making of the statement itself, as well as any independent evidence corroborating the statement. The credibility of the witness relating the statement is not a part of either enquiry.

Of course, even if the court finds sufficient guarantees of trustworthiness, the independent requirements of the Confrontation Clause must be satisfied if the hearsay statement is offered against a defendant in a criminal case.

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

The requirements that residual hearsay must be evidence of a material fact and that its admission will best serve the purposes of these rules and the interests of justice have been deleted. These requirements have proved to be superfluous in that they are already found in other rules. See Rules 102, 401.

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

- First, the amendment 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. See Rule 103(a)(2) (requiring the party making an offer of proof to inform the court of the “substance” of the evidence).
- 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 amendment requires that the pretrial notice be in writing—which is satisfied by notice in electronic form. See Rule 101(b)(6). 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. Most courts have applied a good cause exception under Rule 807 even though the rule in its current form does not provide for it, while some courts have read the rule as it was written. 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 might then need to resort to residual hearsay.

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 is not prejudiced

In the May 2018 memorandum to the Committee on Rules of Practice and Procedure, attached, the Advisory Committee on Evidence Rules further explained the issues with the prior version of FRE 807 they meant to fix with the 2019 re-formulation. In summary, the committee sought to remove the “equivalency” standard because it is unworkable in several respects, explicitly allow corroborating evidence, remove the material fact relevance requirement and the interests of justice requirements as superfluous and redundant, and to improve and clarify the notice provision.

CRE 807 was created in 1999 by combining the identical residual exceptions in 803(24) and 804(b)(5) into a stand-alone rule. *See* Rule 803 and 804 (committee comments); *People v. Fuller*, 788 P.2d 741,744 (1990) (noting that CRE 803(24) for available witnesses and CRE 804(b)(5) for unavailable witnesses were identical). While CRE 807 does not mirror precisely the pre-2019 version of FRE 807, it does contain most of the provisions addressed by the 2019 changes to FRE 807.

In examining decisions of the Colorado Supreme Court from the past 35 years which address CRE 807 or one of its predecessors, there does not appear to be any significant difficulty in interpreting or applying the rule. Recent and well settled decisions from the Colorado Court of Appeals do not note any issues with understanding or applying CRE 807 either. *See e.g. People v. Bivens*, 2025WL1663229 (June 12, 2025) (unpublished); *People v. Landrock*, 2025WL943280 (March 27, 2025) (unpublished); *People v. Jensen*, 55 P.3d 135

(Colo. App. 2001). The Colorado Practice Series evidence treatise also does not note any major issues with the application of rule 807. *See* 23 Colo. Prac., Evidence Law § 807. Thus, any change that is made to CRE 807 would be done with the goal of improving the rule not to address some specific problem in the courts with its application.

On the specific point of whether CRE 807 conflicts with the newly amended CRE 804(b)(3)(B), there is one potentially conflicting case. The new version of CRE 804 specifically allows for the consideration of corroborating evidence, if available, when determining the reliability of a statement against interest offered in a criminal case. *See* CRE 804(b)(3)(B) (“if offered in a criminal case as one that tends to expose the declarant to criminal liability, is supported by corroborating circumstances that clearly indicate its trustworthiness after considering the totality of the circumstances under which it was made and any evidence that supports or undermines it”). However, in *Vasquez v. People*, the Colorado Supreme Court held that “[c]orroborating evidence is not an appropriate ‘circumstantial guarantee’” for the purposes of analyzing admissibility of a statement under CRE 807. 173 P.3d 1099, 1107 (Colo. 2007). Instead, “[t]he reliability of a statement should be determined by the circumstances that existed at the time the statement was made.” *Id.* (citing *Idaho v. Wright*, 497 U.S. 805, 822 (1990)). The *Vasquez* court’s citation to *Idaho v. Wright* is interesting since *Vasquez* applied *Crawford* and *Idaho* is a pre-*Crawford* Confrontation Clause decision. In *Idaho*, the Supreme Court held that “[t]o be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial.” 497 U.S. at 822. Although it seems that this inherent trustworthiness is what *Vasquez* was aiming for related to CRE 807, the *Vasquez* decision notably does not rely on the text of CRE 807 or other Colorado cases to support its holding that corroborating evidence should not be considered. Instead, the *Vasquez* court grafts a pre-*Crawford* standard onto CRE 807 without much explanation. This holding also seems somewhat at odds with the observation made in *Vasquez* that the Confrontation Clause provides “more expansive protections than a court-promulgated hearsay rule.” 173 P.3d at 1106 (citation omitted).

Ultimately, it wouldn’t necessarily make sense to allow corroborating evidence to analyze a statement under CRE 804, but not under CRE 807. And there isn’t really any justification to preserve the holding in *Vasquez* because it does not conform to the FRE, our now amended rule 804, or post-*Crawford* jurisprudence.

Should CRE 807 be changed?

Most of the rationales for the changes made to FRE 807 are persuasive. The current version of FRE 807 appears to be a much better rule and is more in alignment with the other modern formulation of the rules, including FRE 804. The only real argument in favor of keeping CRE 807 in its current form is that it doesn't appear to be a problem in application for Colorado courts. However, the *Vasquez* decision does seem to conflict with the changes we recently made to CRE 804. If the committee decided to change CRE 807, it would be for the purpose of improving the rule and to some extent aligning it with the recent changes to CRE 804. Because trial courts have wide discretion in applying the residual exception, their decision making is improved with a better rule.

Side-by-side Chart of CRE 807 and FRE 807

CRE 807	FRE 807
<p>A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.</p> <p>However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.</p>	<p>(a) In General. Under the following conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in Rule 803 or 804:</p> <p>(1) the statement is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and</p> <p>(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.</p> <p>(b) Notice. The statement is admissible only if the proponent gives an adverse party reasonable notice of the intent to offer the statement—including its substance and the declarant's name— so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing—or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.</p>

Proposed Colorado Rule 807. Residual Exception

Currentness

A hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in Rule 803 or 804~~not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule~~, if the court determines that (A) the statement is supported by corroborating circumstances that clearly indicate its trustworthiness after considering the totality of the circumstances under which it was made and any evidence corroborating the statement~~the statement is offered as evidence of a material fact; and~~ (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts. ~~;~~ and (C) ~~the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a~~The statement may not be admitted under this exception unless is admissible only if the proponent ~~of it makes known to the~~gives the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, ~~the proponent's intention~~reasonable notice of the proponent's intent to offer the statement ~~and the particulars of it, including the its substance and the declarant's name and address of the declarant, so that the adverse party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing—or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.~~

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Side-by-side Chart of Current CRE 807 and Proposed CRE 807

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

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EVIDENCE RULES

MEMORANDUM

TO: Hon. David G. Campbell, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Debra Ann Livingston, Chair
Advisory Committee on Evidence Rules

RE: Report of the Advisory Committee on Evidence Rules

DATE: May 14, 2018

I. Introduction

The Advisory Committee on Evidence Rules (the “Committee”) met on April 26-27, 2018 in Washington, D.C. At the meeting the Committee discussed ongoing projects involving matters such as possible amendments to Rules 404(b), 606(b), 702, 801(d)(1)(A) and 807. It also considered proposals submitted to the Committee suggesting changes to Rules 106 and 609(a)(1), as well as a proposal to adopt a rule governing illustrative aids.

The Committee made the following determinations at the meeting:

- It unanimously approved the proposed amendment to Rule 807, and is submitting it to the Standing Committee for final approval.
- It unanimously approved a proposed amendment to Rule 404(b), and is submitting it to the Standing Committee with the recommendation that it be released for public comment;

- It agreed to consider a possible amendment to Rule 106.
- It agreed to consider possible amendments to Rule 702 and also to explore ways to address problems regarding forensic expert evidence that might not involve rule amendments.
- It cleared agenda items regarding possible amendments to Rules 606(b), 609(a)(1), 611(a) (illustrative evidence), and 801(d)(1)(A).

A full description of all of these matters can be found in the draft minutes of the Committee meeting, attached to this Report. The amendments proposed as action items can also be found as attachments to this Report.

II. Action Items

A. Proposed Amendment to Rule 807, for Final Approval

At its June, 2017 meeting, the Standing Committee unanimously approved a proposed amendment to Rule 807 for release for public comment. The project to amend Rule 807 began with exploring the possibility of expanding it to admit more hearsay and to grant trial courts somewhat more discretion in admitting hearsay on a case-by-case basis. After extensive deliberation --- including discussion with a panel of experts at a Conference held at Pepperdine Law School --- the Advisory Committee determined that the risks of expanding the residual exception would outweigh the rewards. In particular, the Committee was cognizant of concerns in the practicing bar about increasing judicial discretion to admit hearsay that was not covered by existing exceptions, as well as concerns by academics that expanding the residual exception would result in undermining the standard exceptions.

But in conducting its review of cases decided under the residual exception, and in discussions with experts at the Pepperdine Conference, the Advisory Committee determined that there are a number of problems in the application of the exception that could be improved by rule amendment. The problems that are addressed by the proposed amendment to Rule 807 are as follows:

- The requirement that the court find trustworthiness “equivalent” to the circumstantial guarantees in the Rule 803 and 804 exceptions is exceedingly difficult to apply, because there is no unitary standard of trustworthiness in the Rule 803 and 804 exceptions. Statements falling within the Rule 804 exceptions are not as reliable as those admissible under Rule 803 and yet both sets are considered possible points of comparison for any statement offered as residual hearsay. And 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. “Equivalence” thus does little or nothing to guide a court’s discretion. Given the difficulty and disutility of the

“equivalence” standard, the Committee determined that a better, more user-friendly approach is simply to require the judge to find whether the statement is supported by sufficient guarantees of trustworthiness.

- Courts are in dispute about whether to consider corroborating evidence in determining whether a statement is trustworthy. The Committee determined that 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, because corroboration provides a guarantee of trustworthiness. Thus, trustworthiness can best be defined in the rule as requiring an evaluation of two factors: 1) circumstantial guarantees surrounding the making of the statement, and 2) corroborating evidence. Adding a requirement that the court consider corroboration --- or the lack thereof --- is an improvement to the rule independent of any decision to expand the residual exception.

- The requirements in Rule 807 that the residual hearsay must be proof of a “material fact” and that admission of residual hearsay be in “the interests of justice” and consistent with the “purpose of the rules” have not served any good purpose. The inclusion of the language “material fact” is in conflict with the drafters’ avoidance of the term “materiality” in Rule 403 --- and that avoidance was well-reasoned, because the term “material” is used in so many different contexts. The courts have essentially held that “material” means “relevant” --- and so nothing is added to Rule 807 by including it there. Likewise nothing is added to Rule 807 by referring to the interests of justice and the purpose of the rules because that guidance is already provided by Rule 102. Moreover, the interests of justice language could be --- and has been --- used as an invitation to judicial discretion to admit or exclude hearsay under Rule 807 simply because it leads to a “just” result. The Committee has determined that the rule will be improved by deleting the references to “material fact” and “interest of justice” and “purpose of the rules.”

- The current notice requirement is problematic in at least four respects:

- 1) Most importantly, there is no provision for allowing untimely notice upon a showing of good cause. This absence has led to a conflict in the courts on whether a court even has the power to excuse notice no matter how good the cause. Other notice provisions in the Evidence Rules (e.g., Rule 404(b)) contain good cause provisions, so adding such a provision to Rule 807 will promote uniformity.

- 2) The requirement that the proponent disclose “particulars” has led to unproductive arguments and unnecessary case law.

- 3) There is no requirement that notice be in writing, which leads to disputes about whether notice was ever provided.

4) The requirement that the proponent disclose the declarant's address is nonsensical when the witness is unavailable --- which is usually the situation in which residual hearsay is offered.

The proposed amendments to the notice requirements solve all these problems.

Finally, it is important to note that the Committee has retained the requirement from the original rule that the proponent must establish that the proffered hearsay is more probative than any other evidence that the proponent can reasonably obtain to prove the point. Retaining the "more probative" requirement indicates that there is no intent to expand the residual exception, only to improve it. The "more probative" requirement ensures that the rule will only be invoked when it is necessary to do so.

Public Comment

The Committee received nine public comments on the Rule 807 proposal. It carefully considered those comments, most of which were positive, and made some changes as a result of the comments --- mainly style suggestions. The Committee also implemented some of the suggestions made by members of the Standing Committee at its June, 2017 meeting --- including adding a reference to Rule 104(a), and a reference to the Confrontation Clause, to the Committee Note. Finally, the Committee addressed a dispute in the courts about whether the residual exception could be used when the hearsay is a "near-miss" of a standard exception. A change to the text and Committee Note as issued for public comment provides that a statement that nearly misses a standard exception can be admissible under Rule 807 so long as the court finds that there are sufficient guarantees of trustworthiness.

The Committee unanimously recommends that the Standing Committee approve the proposed amendment to Rule 807 and the Committee Note, for referral to the Judicial Conference.

The amendment to Rule 807, and the Committee Note, are attached to this Report.

B. Proposed Amendment to Rule 404(b), for Release for Public Comment

The Committee has been monitoring significant developments in the case law on Rule 404(b), governing admissibility of other crimes, wrongs, or acts. Several Circuit courts have suggested that the rule needs to be more carefully applied, and have set forth criteria for that more careful application. The focus has been on three areas:

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE¹

Rule 807. Residual Exception

(a) **In General.** Under the following ~~circumstances~~conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not ~~specifically covered by~~admissible under a hearsay exception in Rule 803 or 804:

- (1) the statement ~~has equivalent circumstantial~~is supported by sufficient guarantees of trustworthiness~~—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; 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~~

¹ New material is underlined in red; matter to be omitted is lined through.

~~(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,~~ including its substance and the declarant's name—so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing—or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

Committee Note

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

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served to guide a court's discretion to admit hearsay, because the court is free to choose among a spectrum of exceptions for comparison. Moreover, experience has shown that some statements offered as residual hearsay 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 eliminated. Under the amendment, the court should proceed directly to a determination of whether the hearsay is supported by guarantees of trustworthiness. See Rule 104(a). As with any hearsay statement offered under an exception, the court's threshold finding that admissibility requirements are met merely means that the jury may consider the statement and not that it must assume the statement to be true.

The amendment specifically requires the court to consider corroborating evidence in the trustworthiness enquiry. Most courts have required the consideration of corroborating evidence, though some courts have disagreed. The rule now provides for a uniform approach, and recognizes that the existence or absence of corroboration is relevant to, but not dispositive of, whether a statement should be admissible under this exception. Of course, the court must consider not only the existence of corroborating evidence but also the strength and quality of that evidence.

The amendment does not alter the case law prohibiting parties from proceeding directly to the residual exception, without considering admissibility of the hearsay under Rules 803 and 804. A court is not required to make a finding that no other hearsay exception is applicable. But the opponent cannot seek admission under Rule 807 if it is apparent that the hearsay could be admitted under another exception.

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amendment makes the rule applicable to hearsay “not admissible under” those exceptions. This clarifies that a court assessing guarantees of trustworthiness may consider whether the statement is a “near-miss” of one of the Rule 803 or 804 exceptions. If the court employs a “near-miss” analysis it should—in addition to evaluating all relevant guarantees of trustworthiness—take into account the reasons that the hearsay misses the admissibility requirements of the standard exception.

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Of course, even if the court finds sufficient guarantees of trustworthiness, the independent requirements of the Confrontation Clause must be satisfied if the hearsay statement is offered against a defendant in a criminal case.

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

The requirements that residual hearsay must be evidence of a material fact and that its admission will best serve the purposes of these rules and the interests of justice have been deleted. These requirements have proved to be superfluous in that they are already found in other rules. See Rules 102, 401.

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- Finally, the pretrial notice provision has been amended to provide for a good cause exception. Most courts have applied a good cause exception under Rule 807 even though the rule in its current form does not provide for it, while some courts have read

the rule as it was written. 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 might then need to resort to residual hearsay.

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 is not prejudiced.

Changes Made After Publication and Comment

The provision on the relationship between the residual exception and Rules 803 and 804 was changed in two respects: 1) it was moved back from a subdivision to the preface, where it was initially; and 2) the phrase “not specifically covered” was changed to “not admissible under.”

The Committee Note was revised slightly to address such matters as the “near-miss” analysis, the applicability of Rule 104(a), and the relationship of Rule 807 to the Confrontation Clause.

Summary of Public Comment

Daniel Church of Morris, Wilnauer Church (EV-2017-003), supports the amendment because it “would reduce the

surprise element to an adversary and gives the court the discretion needed to make an informed ruling.”

Brian Roth (EV-2017-004), supports the amendment as being “more clearly worded” than the original.

Karl Romberger (EV-2017-005), supports the Committee's proposed changes, and “endorse[s] the observations about how best to assess the trustworthiness of residual hearsay.” He concludes that “[t]he Committee's efforts should improve legal practices in all fora where evidence is received.”

Aniello Ceretto (EV-2017-006), opposes the amendment insofar as it adds a good cause exception to the pretrial notice requirement. He states that it is “going to lead to many more adjournment requests or if not, then bad court decisions undermining public confidence in the reliability of court decisions based on hearsay.”

Sara Lessard (EV-2017-007), believes that the proposed amendment “is an amazing opportunity for ordinary people to understand the rule better.”

Julius King (EV-2017-009), states that “the current FRE 807 is problematic for several reasons and the new proposed FRE 807 properly addresses most of those issues.” He states that “the proposed change to the trustworthiness requirement of FRE 807 is satisfactory because it would clarify the rule by removing the ‘comparative trustworthiness’ standard and foster consistency among trial courts by requiring judges to consider, if any, corroborating evidence that strengthens the requirement.” Mr. King approves most of the changes to the notice requirement, but opposes the deletion of the declarant’s address from the notice requirement.

The American Association for Justice (EV-2017-011), “generally supports the proposed amendments to Federal Rule of Evidence 807” and suggests some stylistic changes to “help clarify the purpose and intent of the amendments. The Association generally supports the changes to the notice requirement, but states that the term “substance” is vague and that the Committee Note should provide more guidance on the meaning of the term.

The Federal Magistrate Judges’ Association (EV-2017-012), suggests that the trustworthiness requirement should be evaluated in comparison with testimony given under oath and subject to cross-examination. The Association also suggests that corroboration should not be singled out as a factor in the trustworthiness analysis, and if it is, the court should limit consideration to corroborating evidence that is reliable.

The National Association of Criminal Defense Lawyers (EV-2017-013), agrees that “the existing requirement that the residual hearsay have ‘circumstantial guarantees of trustworthiness’ equivalent to those required for Rule 803 or 804 exceptions has not been a workable standard, given the differences in trustworthiness among the recognized hearsay exceptions themselves.” The Association also states that the changes to the notice requirement “are generally well-taken” but it recommends that language be added to the Committee Note to make clear that disclosures by the defendant in a criminal case need not be detailed, and that the good cause exception should be liberally applied to protect a defendant in a criminal case who fails to give pre-trial notice.