

AMENDMENT TO THE FEDERAL RULES OF EVIDENCE

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COMMUNICATION

FROM

THE CHIEF JUSTICE, THE SUPREME COURT  
OF THE UNITED STATES

TRANSMITTING

AMENDMENT TO THE FEDERAL RULES OF EVIDENCE THAT HAS  
BEEN ADOPTED, PURSUANT TO 2072 U.S.C. 28



SEPTEMBER 20, 2019.—Referred to the Committee on the Judiciary and  
ordered to be printed

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U.S. GOVERNMENT PUBLISHING OFFICE



SUPREME COURT OF THE UNITED STATES,  
*Washington, DC, April 25, 2019.*

Hon. NANCY PELOSI,  
*Speaker of the House of Representatives,*  
*Washington, DC.*

DEAR MADAM SPEAKER: I have the honor to submit to the Congress the amendment to the Federal Rules of Evidence that has been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying this rule are the following materials that were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 24, 2018; a redline version of the rule with committee note; an excerpt from the September 2018 report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 2018 report of the Advisory Committee on Evidence Rules.

Sincerely,

JOHN G. ROBERTS, Jr.,  
*Chief Justice.*

April 25, 2019

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. The Federal Rules of Evidence are amended to include an amendment to Rule 807.

[*See infra* pp. \_\_\_\_\_.]

2. The foregoing amendment to the Federal Rules of Evidence shall take effect on December 1, 2019, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. THE CHIEF JUSTICE is authorized to transmit to the Congress the foregoing amendment to the Federal Rules of Evidence in accordance with the provisions of Section 2074 of Title 28, United States Code.

**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF EVIDENCE**

**Rule 807. Residual Exception**

(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:

- (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
- (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.

(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

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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.



THE CHIEF JUSTICE  
OF THE UNITED STATES  
*Presiding*

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

JAMES C. DUFF  
*Secretary*

October 24, 2018

MEMORANDUM

To: Chief Justice of the United States  
Associate Justices of the Supreme Court

From: James C. Duff *James C. Duff*

RE: TRANSMITTAL OF PROPOSED AMENDMENT TO THE FEDERAL RULES OF  
EVIDENCE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court the proposed amendment to Rule 807 of the Federal Rules of Evidence, which was approved by the Judicial Conference at its September 2018 session. The Judicial Conference recommends that the amendment be adopted by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendment, I am transmitting: (i) a copy of the affected rule incorporating the proposed amendment and accompanying Committee Note; (ii) a redline version of the same; (iii) an excerpt from the September 2018 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iv) an excerpt from the May 2018 Report of the Advisory Committee on Evidence Rules.

Attachments



**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF EVIDENCE<sup>1</sup>**

1 **Rule 807. Residual Exception**

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

- 7 **(1)** ~~the statement has equivalent circumstantialis~~  
8 supported by sufficient guarantees of  
9 trustworthiness—after considering the totality of  
10 circumstances under which it was made and  
11 evidence, if any, corroborating the statement; and  
12 **(2)** ~~it is offered as evidence of a material fact;~~

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<sup>1</sup> New material is underlined; matter to be omitted is lined through.

## 2 FEDERAL RULES OF EVIDENCE

13 ~~(32)~~ it is more probative on the point for which it is  
14 offered than any other evidence that the proponent  
15 can obtain through reasonable efforts; ~~and~~  
16 ~~(4) admitting it will best serve the purposes of these~~  
17 ~~rules and the interests of justice.~~

18 (b) **Notice.** The statement is admissible only if, ~~before the~~  
19 ~~trial or hearing,~~ the proponent gives an adverse party  
20 reasonable notice of the intent to offer the statement  
21 ~~and its particulars, including the declarant's name and~~  
22 ~~address, —including its substance and the declarant's~~  
23 ~~name—~~ so that the party has a fair opportunity to meet  
24 it. The notice must be provided in writing before the  
25 trial or hearing—or in any form during the trial or  
26 hearing if the court, for good cause,  
27 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.

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)

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(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.



Excerpt from the September 2018 Report of the Committee on Rules of Practice and Procedure

**REPORT OF THE JUDICIAL CONFERENCE  
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES:**

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**FEDERAL RULES OF EVIDENCE**

*Rule Recommended for Approval and Transmission*

The Advisory Committee on Rules of Evidence submitted proposed amendments to Rule 807, with a recommendation that they be approved and transmitted to the Judicial Conference.

The project to amend Rule 807 (Residual Exception) 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, the Advisory Committee determined that it would not seek to expand the breadth of the exception. But in conducting its review of cases decided under the residual exception, and in discussions with experts at a conference at Pepperdine Law School, 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 addressed by the proposed amendment to Rule 807 are as follows:

1. 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.
2. Courts are in dispute about whether to consider corroborating evidence in determining whether a statement is trustworthy. The Advisory Committee determined that an amendment would be useful to provide uniformity in the approach to evaluating trustworthiness

**Excerpt from the September 2018 Report of the Committee on Rules of Practice and Procedure**

under the residual exception, and substantively, that amendment should specifically allow the court to consider corroborating evidence, because corroboration provides a guarantee of trustworthiness.

3. The requirements in Rule 807 that the hearsay must be proof of a “material fact” and that admission of the hearsay be in “the interests of justice” and consistent with the “purpose of the rules” have not served any good purpose. The Advisory Committee determined that the rule will be improved by deleting the references to “material fact” and “interest of justice” and “purpose of the rules.”

4. The notice requirement in current Rule 807 is problematic because it does not contain a good cause exception, it does not require the notice to be provided in writing, and its requirements of disclosure of the “particulars” of the statement and the name and address of the declarant are difficult to implement.

Proposed amendments to Rule 807 were published for comment in August 2017. The Advisory Committee received nine public comments. It carefully considered those comments, most of which were positive, and made some changes. The Advisory Committee also implemented some of the suggestions made by members of the Standing Committee at its June 2017 meeting, including adding references to Rule 104(a) and to the Confrontation Clause to the committee note. Finally, the Advisory 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.

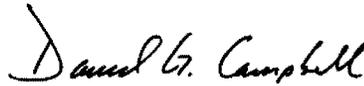
**Excerpt from the September 2018 Report of the Committee on Rules of Practice and Procedure**

The Standing Committee voted unanimously to adopt the recommendation of the Advisory Committee. The proposed amendments to the Federal Rules of Evidence and committee note are set forth in Appendix D, with an excerpt from the Advisory Committee's report.

**Recommendation:** That the Judicial Conference approve the proposed amendments to Evidence Rule 807 as set forth in Appendix D and transmit them to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

\* \* \* \* \*

Respectfully submitted,



David G. Campbell, Chair

|                       |                     |
|-----------------------|---------------------|
| Jesse M. Furman       | William K. Kelley   |
| Daniel C. Girard      | Carolyn B. Kuhl     |
| Robert J. Giuffra Jr. | Rod J. Rosenstein   |
| Susan P. Graber       | Amy J. St. Eve      |
| Frank M. Hull         | Srikanth Srinivasan |
| Peter D. Keisler      | Jack Zouhary        |



Excerpt from the May 14, 2018 Report of the Advisory Committee on Evidence Rules

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

DAVID G. CAMPBELL  
CHAIR  
REBECCA A. WOMELDORF  
SECRETARY

CHAIRS OF ADVISORY COMMITTEES  
MICHAEL A. CHAGARES  
APPELLATE RULES  
SANDRA SEGAL IKUTA  
BANKRUPTCY RULES  
JOHN D. BATES  
CIVIL RULES  
DONALD W. MOLLOY  
CRIMINAL RULES  
DEBRA ANN LIVINGSTON  
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 (revised July 16, 2018)

**I. Introduction**

The Advisory Committee on Evidence Rules (the "Committee") met on April 26-27, 2018 in Washington, D.C. \* \* \* \* \*

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.

\* \* \* \* \*

**Excerpt from the May 14, 2018 Report of the Advisory Committee on Evidence Rules**

Report to the Standing Committee  
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**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, the Advisory Committee determined that it would not seek to expand the breadth of the exception. 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 a Conference at Pepperdine Law School, 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

**Excerpt from the May 14, 2018 Report of the Advisory Committee on Evidence Rules**

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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.

**Excerpt from the May 14, 2018 Report of the Advisory Committee on Evidence Rules**

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***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.***

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