2021 SUPPLEMENT TO

to

LEARNING EVIDENCE

FROM THE FEDERAL RULES TO THE COURTROOM

Fourth Edition

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LEARNING SERIES
Summer 2021 Updates

Learning Evidence: From the Federal Rules to the Courtroom (fourth edition)

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The fourth edition, published in early 2018, contains up-to-date rule language and judicial interpretations for most of the Federal Rules of Evidence. Since that edition was published, the Supreme Court has approved amendments to Rule 807 (the Residual Exception to the Rule Against Hearsay) and Rule 404(b) (Crimes, Wrongs, and Other Acts). The amendments to Rule 807 took effect on December 1, 2019, and the amendments to Rule 404(b) took effect on December 1, 2020.

The amendments to Rule 807 affect several aspects of that rule, so we have rewritten Chapter 56 to reflect those changes. The amendments to Rule 404(b) are relatively minor: The Advisory Committee restored the Rule’s title to the language used before the 2011 restyling of the rules and modified the notice provisions. None of those changes affect our textual discussion of the Rule, so we simply updated the text of the Rule as presented in Chapter 30.
Chapter 30 – Crimes, Wrongs, or Other Acts

On page 362, replace the blue box containing the rule text with the following:

Rule 404. Character Evidence; Other Crimes, Wrongs or Acts.

(b) Other Crimes, Wrongs, or Acts.

(1) Prohibited Uses. Evidence of any other crime, wrong, or act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

(3) Notice in a Criminal Case. In a criminal case, the prosecutor must:

   (A) provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;

   (B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and

   (C) do so in writing before trial—or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

Chapter 56 – Residual Exception

Starting on page 711, replace the entire chapter with the following material:
A. Introduction and Policy. Although the Rules of Evidence define thirty
different hearsay exceptions, the drafters wanted to give judges flexibility to handle
statements not covered by those exceptions. The Advisory Committee concluded:
“It would . . . be presumptuous to assume that all possible desirable exceptions to
the hearsay rule have been catalogued and to pass the hearsay rule on to oncoming
generations as a closed system.”¹

Rule 807 gives judges that flexibility by allowing them to admit hearsay that falls
outside the standing exceptions, as long as the evidence has “sufficient guarantees
of trustworthiness” and is the best available way to prove a needed fact. In practice,
judges use Rule 807 sparingly; they share the view of the Advisory Committee that
“the residual hearsay exceptions will be used very rarely, and only in exceptional
circumstances.”² Judges are reluctant to second-guess the existing exceptions by
finding that other statements are sufficiently reliable to give to a jury.

¹ Fed. R. Evid. 803(24) advisory committee’s note (now codified as Rule 807).
² Id.
When Congress first adopted the Rules of Evidence, the “residual exception” appeared in Rules 803(24) and 804(b)(5). In 1997, the Advisory Committee combined these two exceptions into a new Rule 807. More recently, the Committee revised Rule 807 to simplify its requirements; these changes took effect at the end of 2019.

This chapter focuses on the newly revised rule, with some references to the previous version. Be aware that cases decided before December 1, 2019, may not be relevant to the revised rule.

B. The Rule.

### 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 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.

As the underlined phrases suggest, hearsay must satisfy four conditions to gain admission under Rule 807. First, the statement must **not be** “admissible under a hearsay exception in Rule 803 or 804.” If a statement qualifies for admission under an existing exception, the court will rely upon that provision.
Second, a statement admitted under Rule 807 must have “sufficient guarantees of trustworthiness.” This condition reflects the policy justifying most of the hearsay exceptions, that some out-of-court statements are more reliable than others. Under Rule 807, the trial judge decides whether a statement meets the trustworthiness requirement. In the Courtroom section, we will examine some of the factors judges consider.

Third, the proffered hearsay must be “more probative” of the information it conveys “than any other evidence that the proponent can obtain through reasonable efforts.” If the declarant is available, the judge will force the party to call that declarant rather than rely upon Rule 807. Similarly, if the party can reasonably obtain other, equally probative evidence of the information contained in the hearsay statement, the judge will require the party to present that other evidence. The residual exception is a rule of last resort.

Finally, Rule 807 contains a notice requirement: The proponent of a statement must inform the opposing party of her intent to use the statement, the substance of the statement, and the declarant’s name. The proponent must give “reasonable notice” so that the opposing party may prepare a response.

C. In the Courtroom.

1. The “Near Miss” Problem. What happens if a hearsay statement narrowly misses admission under an existing exception? The exception for present sense impressions, for example, admits statements that are “made while or immediately after” perceiving an event. Suppose Jenna texts a friend: “Malik left 5 minutes ago.”

Five minutes is a little long to qualify as “immediately after” an event, especially if Jenna had her phone available throughout that time. But if Jenna’s text seems trustworthy and contains vital information unavailable from any other source, should the judge admit the text under Rule 807’s residual exception?

The federal courts have held that Rule 807 gives judges discretion to admit “near miss” statements like Jenna’s text. The statement must satisfy Rule 807’s trustworthiness, probative value, and notice requirements, but a statement’s near-miss status poses no independent bar to admission.

To review the exception for present sense impressions, see Chapter 40.
Before 2019, a few courts took a contrary position, holding that near-miss statements were inadmissible under the residual exception. This dissenting view focused on language in the prior version of Rule 807, which limited the residual exception to statements that were “not specifically covered by a hearsay exception in Rule 803 or 804.” To erase this dissenting view, the Advisory Committee eliminated the “specifically covered” language from Rule 807 in 2019. The new language, referring to statements that are “not admissible” under another exception, is intended to clarify that near-miss statements are eligible for admission under Rule 807—as long as they satisfy the other elements of that rule.

This example illustrates the proper approach to near-miss statements:

Example: Donovan, the former CEO of a major chemical company, was dying of cancer. On his deathbed he called for his wife. “I have something I need to tell you,” he said. “My company illegally dumped thousands of gallons of toxic waste into the town watershed over the last ten years.” The wife reported the statement to the proper authorities after Donovan’s death. When the information became public, town residents sued the chemical company, claiming that the dumped chemicals caused an unusually high level of birth defects. At trial, the plaintiffs call Donovan’s widow to report Donovan’s deathbed statement.

Analysis: Donovan’s statement is hearsay, and it does not quite fit any existing exception. The statement was not a dying declaration, because it did not concern the cause of Donovan’s own death. A court might also reject application of the “against interest” exception, because Donovan knew he was about to die. Therefore, he would not suffer any pecuniary loss or liability from his statement.

The policy rationales behind both of these established exceptions, however, support admission of Donovan’s statement. The plaintiffs, moreover, have no other way to introduce this evidence because Donovan is dead. Under Rule 807, the trial judge has discretion to admit Donovan’s statement if she finds the statement sufficiently trustworthy.

2. Trustworthiness. Rule 807 directs courts to consider “the totality of circumstances,” along with any corroborating evidence, when deciding whether a statement is sufficiently trustworthy. Courts have considered factors such as:

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4 See, e.g., United States v. Clarke, 2 F.3d 81, 84 (4th Cir. 1993).
5 Before 2019, the rule did not require courts to consider corroborating evidence, but most courts did.
Here is one example of a case in which factors like these supported admission of hearsay statements under the residual exception:

**Example:** Amy Travel Services used aggressive telemarketing techniques to sell thousands of “vacation passports” to consumers. The buyers each paid about $300 for the passports, believing that the single payment would cover their full vacation cost. In fact, many buyers had to pay over a thousand dollars more in order to take the vacation. The Federal Trade Commission (“FTC”) sued Amy Travel after receiving numerous complaints. As part of its case, the FTC submitted several affidavits from dissatisfied customers who described their experiences with the travel agency. Amy Travel objected to these affidavits as hearsay.

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6. Whether other evidence undermines or contradicts the out-of-court statement.
7. Whether the declarant had any incentive to lie when making the out-of-court statement.6

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6 See United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976); United States v. West, 574 F.2d 1131 (4th Cir. 1978); United States v. Barlow, 693 F.2d 954, 962 (6th Cir. 1982); United States v. Donlon, 909 F.2d 650, 654 (1st Cir. 1990).
Decisions admitting evidence under the residual hearsay exception, however, remain rare. When courts examine hearsay under Rule 807, they usually find the proffered statements lacking in trustworthiness.

**Example:** Conoco, a large oil drilling company, operated a number of oil fields on behalf of several “working interest” owners. Conoco extracted oil from the field and delivered it to the working interest owners, who resold the oil. The Department of Energy (“DOE”) sued Conoco, claiming that some of its working interest owners were violating Department price controls when they resold the oil on the open market.

The DOE attempted to prove some of these overcharges by submitting purchase summaries prepared by the crude oil buyers. The buyers prepared these summaries, long after the actual sales, in response to Conoco’s request for information during a DOE audit. Because the buyers did not complete the summaries as part of their regular course of business, the summaries did not qualify as business records under Rule 803(6). Nor did the summaries qualify as market reports under Rule 803(17) because members of the industry did not generally rely upon them. The DOE, however, argued that the summaries had sufficient indicia of reliability to be admitted under the residual exception.

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7 FTC v. Amy Travel Service, Inc., 875 F.2d 564, 576 (7th Cir. 1989).

8 Before 2019, Rule 807 directed courts to determine whether a proffered statement had “circumstantial guarantees of trustworthiness” that were “equivalent” to the guarantees incorporated in other hearsay exceptions. The Advisory Committee concluded that this “equivalence” standard was too difficult to apply; it eliminated that language in the 2019 amendments. Discussions of equivalence in older cases are no longer binding.
3. More Probative Than Other Available Evidence. In addition to showing that a statement is sufficiently trustworthy, advocates urging the admission of hearsay under Rule 807 must persuade the judge that it is “more probative . . . than any other evidence that the proponent can obtain through reasonable efforts.” In Conoco, the proffered statement failed this condition as well as the trustworthiness one; the court stressed that Conoco could have obtained readily admissible evidence from the buyers.

Conversely, the following case illustrates a hearsay statement that carried special indicia of trustworthiness and also offered information unavailable from any other source. Although decided before codification of the Federal Rules, this case remains a leading decision on application of the residual exception:

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Example: The clock tower of the Dallas County courthouse collapsed on July 7, 1957, causing $100,000 worth of damage. The county claimed that the collapse stemmed from a lightning strike on July 2 and sought reimbursement from its insurance company. The company refused to pay, claiming that lightning had not struck the tower. The company claimed that improper construction, not covered by the insurance policy, caused the collapse. The parties took their dispute to court.

At trial, several town residents testified for the county that they saw lightning strike the tower. The county also produced charred timbers from the roof of the courthouse building, claiming these resulted from the lightning strike.

The insurance company contested the county’s claims about the lightning strike. It also argued that the charred timbers originated from a fire on the courthouse roof more than 50 years earlier. To support this argument, the company offered an article printed in the local newspaper on June 9, 1901. The article reported that the county’s new courthouse roof had caught fire early that morning. Dallas County objected to the article as hearsay.

Analysis: The newspaper article was admissible as an ancient document, but the reporter had not witnessed the fire himself. His report incorporated statements from other sources, and those statements were hearsay that did not qualify for any known hearsay exception.

The appellate court, however, held that it was proper to admit the article. The information reported by the article had sufficient guarantees of trustworthiness, because it was “inconceivable . . . that a newspaper reporter in a small town would report there was a fire in the [roof] of the new courthouse—if there had been no fire.” The reporter had no motive to falsify; indeed, the newspaper would have been subject to ridicule if it had falsely reported such a dramatic event. Furthermore, since the alleged fire occurred so long ago, the insurance company had no other reasonable means to prove the event. By the time of the trial, eyewitnesses to the fire had died or the passage of 58 years had dimmed their memories.10

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10 Dallas County v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 1961).
The concepts of trustworthiness and unavailability of other equally probative evidence are fluid ones, so good advocacy may convince a judge to admit a hearsay statement under Rule 807. Even given the best advocacy, however, judges are reluctant to expand the hearsay exceptions. Courts admit statements under Rule 807 only rarely, when there is clear evidence of both trustworthiness and unavailability of other equally probative evidence.

To practice your knowledge of the hearsay exceptions, take the role of a defense attorney in *Ashton v. Apex Financial*. Click here or access the Evidence in Practice module from the eBook on your eProducts bookshelf.

### Quick Summary

**Rule 807** gives trial judges some flexibility to admit hearsay statements that are sufficiently reliable but do not fit any of the enumerated hearsay exceptions. The trial judge (1) must find that the statement has sufficient guarantees of trustworthiness, and (2) must determine that there is no other reasonable way for the proponent to get the information to the jury with the same probative effect. The party offering the statement must also (3) give reasonable notice to the opposing party. Although Rule 807 allows judges to admit hearsay that falls outside the 30 enumerated exceptions, judges exercise this discretion only under extraordinary circumstances.