

The New and Improved Residual Hearsay Exception

Casey Keppler, Maj, USAF

History & Background

- Federal Rules of Evidence (1975)
 - Legislative history
 - “...will be used very rarely, and only in exceptional circumstances”
 - Not intended as “broad license for trial judges to admit hearsay statements” not falling within an enumerated exception
 - Practical result: narrow interpretation by federal courts
- Military Rules of Evidence (1980)
 - Modeled after Federal Rules of Evidence

Federal Rules – Military Rules Relationship

- Interpretation & Application
 - Federal court rulings serve as persuasive authority for courts-martial – Mil. R. Evid. 101(b)
- Amendments
 - Amendment to Federal Rules of Evidence amends parallel provision in Military Rules of Evidence by operation of law – Mil. R. Evid. 1102(a)
 - 18 months after effective date
 - Absent contrary action taken by POTUS
 - Fed. R. Evid. 807 amendments effective 1 December 2019
 - No Presidential action to impede amendments to Mil. R. Evid. 807

Rule 807 Amendments – Part I

(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 Mil. R. Evid. 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) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and~~

~~—(4) admitting it will best serve the purposes of these rules and the interests of justice.~~

Rule 807 Amendments – Part II

(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 its substance and the declarant’s name and address,~~ 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.

Trustworthiness

(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

- Textual change
 - Expressly requires totality of circumstances analysis
 - Expressly considers corroborating evidence
- Practical impact
 - Definitively establishes mode of analysis
 - Resolves ambiguity regarding consideration of corroborating evidence

Materiality

~~(2) it is offered as evidence of a material fact~~

- Textual change
 - Materiality prong eliminated
- Practical impact
 - Elimination of “multi-faceted test”
 - Presumably benefits proponent

Notice

(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 its substance and the declarant's name and address,~~—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.

- Textual change
 - Must be written (includes e-mails)
 - Substantive description required
 - Good cause exception
- Practical impact
 - Should reduce courtroom confusion/surprise
 - Potential relief for blindsided counsel

Post-Amendment Litigation

- Fed. R. Evid. 807
 - [summary of post-amendment litigation to be added]
 - [summary of post-amendment litigation to be added]
 - [summary of post-amendment litigation to be added]
 - [summary of post-amendment litigation to be added]
- Mil. R. Evid. 807
 - [summary of post-amendment litigation to be added]
 - [summary of post-amendment litigation to be added]
 - [summary of post-amendment litigation to be added]

Questions?