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**Practice Note**
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# *44 THE NEW AND IMPROVED RESIDUAL HEARSAY EXCEPTION

**T**he residual hearsay exception offers a unique, oft-misunderstood route to overcoming the ubiquitous and dreaded hearsay objection from opposing counsel. Making its original appearance in the Federal Rules of Evidence (FRE) in 1975, the residual hearsay exception was adopted for courts-martial practice as part of the 1980 amendments to the Military Rules of Evidence (MRE).[1] In the decades that followed, amendments to the Federal rule were mirrored in the military rule,[2] a reflection of the explicit desire for common evidentiary standards in these separate and distinct judicial fora.[3] The most recent amendments to the Federal residual hearsay exception--FRE 807--were, by operation of law, incorporated into its military counterpart, MRE 807, effective 1 June 2021.[4] Given the frequency with which residual hearsay is litigated,[5] exploring the amendment of MRE 807 is a fruitful exercise for military justice practitioners, particularly because several aspects of the amendment could meaningfully impact court-martial practice. A refresher on the history and text of this rule will lay the groundwork for a detailed discussion of the potential impact of its recent amendment.

## The Residual Hearsay Exception: A Brief History

The residual hearsay exception is commonly considered the "catch-all" exception--an avenue of last resort for litigants to admit a hearsay statement when no other exception applies. Generally, litigants in this position are standing on shaky ground, because the legislative history evinces a clear intent for use as a narrow exception:

> ***45** 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. Such major revisions are best accomplished by legislative action. It is intended that in any case in which evidence is sought to be admitted under these subsections, the trial judge will exercise no less care, reflection, and caution than the courts did under the common law in establishing the now-recognized exceptions to the hearsay rule.[6]

Federal courts have cited this cautionary language from Congress regarding the Federal residual hearsay exception ad nauseam over the course of the past four-plus decades.[7] The residual hearsay exception applicable to courts-martial[8] was adopted "without change" from the FRE and was intended to "be employed in the same manner as it is generally applied in the Article III courts."[9] Not surprisingly, military courts quickly latched on to the legislative history of the exception and

closely scrutinized residual hearsay offers.[10] With one notable exception--out-of-court statements from child victims of sexual abuse[11]--military courts have continually demonstrated skepticism toward residual hearsay offers.[12]

## Military Rule of Evidence 807

In order to facilitate a detailed discussion of the recent amendment, a review of the text of the residual hearsay exception is necessary. The 2021 amendment to MRE 807 resulted in the following changes:[13]

> (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 [MRE] 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~~
>
> ~~(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 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.[14]

The 2021 amendment thus changed three aspects of the residual hearsay exception that could meaningfully impact court-martial practice: (1) the elimination of the "material fact" prong; (2) changes to the "trustworthiness" prong; and (3) modifications to the notice requirement.[15] The congressional committee that analyzed and recommended amending FRE 807 articulated the rationale for each of these changes.[16] Because these changes were subsequently applied to MRE 807 by operation of law rather than by the President's affirmative action, there is no corresponding executive branch rationale for the changes to MRE 807.

### *Elimination of "Material Fact" Prong*

Residual hearsay proponents are no longer required to demonstrate that the evidence at issue is being "offered as evidence of a material fact."[17] A military appellate court described the former materiality prong as "a multi-factored test looking at the importance of the issue for which the evidence was offered in relation to the other issues in [the] case; the extent to which the

  

issue is in dispute; and the nature of the other evidence in the case pertaining to that issue."[18] The elimination of a requirement that entails a "multi-faceted" analysis should, of course, be welcome news to residual hearsay proponents, as it removes a potential barrier to admission.

The materiality prong was removed from the Federal rule based on a congressional determination that it was superfluous; a basic relevance objection, Congress reasoned, affords residual hearsay opponents the same basis for objection.[19] While residual hearsay opponents can certainly raise this argument in the court-martial context, two points of distinction are worth noting: (i) the amendment to MRE 807 was not supplemented with the same (or any) rationale; and (ii) military courts have long recognized that "relevant" and "material" are terms with different meanings,[20] so a relevance objection pursuant to MRE 401 may not necessarily yield the same result as a proponent's failure to adequately demonstrate materiality under the pre-amendment version of MRE 807.

At the very least, elimination of the materiality prong creates an avenue for residual hearsay proponents to argue that their required showing is less onerous than that under the pre-amendment version of MRE 807.

***Modifications to the Trustworthiness Analysis***

Most residual hearsay determinations hinge on whether the proffered statement is sufficiently trustworthy.[21] Military Rule of Evidence 807 now expressly (i) states that the trustworthiness inquiry should be assessed by considering the totality of the circumstances under which the statement was made, and (ii) permits the military judge to consider evidence corroborating the statement as part of the trustworthiness inquiry.[22] Although military courts have generally applied a totality of the circumstances analysis despite the absence of such language in the pre-amendment version of MRE 807, they have inconsistently ***46** considered corroborating evidence.[23] The express inclusion of corroborating evidence as a permissible consideration is crucial because proponents often cite corroborating evidence as a primary basis for concluding that the offered residual hearsay evidence is sufficiently trustworthy. The codification of the totality of the circumstances standard and corroborating evidence as a relevant factor in the residual hearsay analysis is a critical step forward in providing rule-based clarity to both court-martial litigants and military judges.

***Notice Requirement Modification***

A unique aspect of the residual hearsay exception is the requirement that the proponent provide pretrial notice to the adverse party. The pretrial notice requirement has been amended in three important respects: (i) to require that notice be provided "in writing";[24] (ii) to require that the notice include the "substance" of the hearsay statement; and (iii) to create a good-cause exception in cases where pretrial notice is impracticable.[25] The Court of Appeals for the Armed Forces highlighted the ambiguity regarding the content of the notice under the pre-amendment version of MRE 807. In *United States v. Czachorowski*, the court concluded that defense counsel's awareness of both the hearsay statement and trial counsel's intent to offer it into evidence was all that MRE 807 required; notice to the defense of "the means by which [trial counsel intended] to seek admission" was not required.[26]

The recent amendment dictates a different result because it requires the notice to include the substance of the statement. Under the amended rule, counsel must now be vigilant to timely provide this detailed notice of the substance of residual hearsay statements in advance of trial. In practice, the requirement for more detailed notice should lead to more efficient (and, ideally, pretrial) resolution of residual hearsay admissibility disputes.

In contrast with many other rules of evidence,[27] the pre-amendment text of MRE 807 did not include a good-cause exception,[28] and no military appellate court read such an exception into the rule. In the absence of such an exception, the occurrence of either of two events was problematic for residual hearsay proponents: (i) a witness who was expected to testify suddenly became unavailable, thereby rendering the residual hearsay exception the only viable means of admitting the unavailable witness's hearsay statement; or (ii) mid-trial disclosure of a hearsay statement previously unknown to counsel. In either event, the proponent would have previously been left in the unenviable position of arguing policy in the absence of support in the law. The addition of a good-cause exception to MRE 807 now equips residual hearsay proponents with a rule-based argument for admission under these circumstances.

  

**Takeaways**

Effective June 2021, MRE 807 was amended in three ways that could meaningfully impact residual hearsay litigation before courts-martial. The elimination of the "material fact" prong potentially opens the aperture for the type of evidence that may be admitted under the rule. The express inclusion of the nature of the analysis--totality of the circumstances--and a critical factor that may be considered--corroborating evidence--provides clarity for litigants in weighing the likelihood of success of their potential residual hearsay arguments and for judges in ruling on residual hearsay offers. Additionally, the requirement for a more robust, written pretrial notice dictates that proponents must be vigilant in ***47** apprising the opposing party of the precise substance of the statement to be offered under the residual hearsay exception. Finally, the addition of a good-cause exception to the notice requirement provides proponents with a rule-based argument for admission that was previously unavailable. Given the frequency with which residual hearsay issues are litigated, these amendments should be expected to have wide-ranging implications in court-martial practice.

## Footnotes

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1 *See* Exec. Order No. 12198, 45 Fed. Reg. 16932 (Mar 12, 1980).

2 In 1997, the Federal residual hearsay exception was relocated to Federal Rule of Evidence 807. Fed. R. Evid. 807 advisory committee's note (1997 Amendment). In 1999, the military residual hearsay exception was similarly relocated to Military Rule of Evidence (MRE) 807. Manual for Courts-Martial, United States, M.R.E. 807 (2000). Similar stylistic changes were made to the Federal rule and the military rule in 2011 and 2013, respectively. *See* Fed. R. Evid. 807 advisory committee's note (2011 Amendment); Exec. Order No. 13643, 78 Fed. Reg. 29559 (May 21, 2013) (2013 Amendments to the Manual for Courts-Martial, United States); Manual for Courts-Martial, United States, app. 22, at A22-67 (2013) (Residual exception).

3 Not only were the Federal Rules of Evidence (FRE) the model for the modern MRE, but their interpretation and application by Federal courts is persuasive authority in court-martial practice. *See* Manual for Courts-Martial, United States, M.R.E. 101(b) (2019) ("In the absence of guidance in [the Manual for Courts-Martial] or these rules, courts-martial will apply ... the Federal Rules of Evidence and the case law interpreting them.").

4 *See id.* M.R.E. 1102(a) ("Amendments to the Federal Rules of Evidence--other than Articles III and V--will amend parallel provisions of the [MRE] by operation of law 18 months after the effective date of such amendments, unless action to the contrary is taken by the President."). Because the President took no such contrary action, the amendments to the Federal rule, which took effect on 1 December 2019, were applied to the military rule on 1 June 2021.

5 Based on the author's caselaw research and review, since 1980, military appellate courts have substantively addressed the residual hearsay exception in approximately 150 cases. While obtaining an accurate count of trial-level residual hearsay litigation is impracticable, common sense dictates that it is a significantly higher number.

6 S. Rep. No. 93-1277, at 20 (1974). The Senate Committee on the Judiciary drafted this passage after approving a residual hearsay exception. *See id.* at 19. Its companion committee in the House of Representatives rejected a similar residual hearsay exception altogether. *See* H.R. Rep. No. 93-1597 (1974) (Conf. Rep.). The residual exception was ultimately adopted by the conference committee after the addition of a provision requiring a proponent of such evidence to provide pretrial notice to an adverse party. *See* An Act to Establish Rules of Evidence for Certain Courts and Proceedings, Pub. L. No. 93-595, r. 804(b)(5), 88 Stat. 1926, 1943 (1975).

  

7 *See, e.g.*, United States v. Cain, 587 F.2d 678, 682 (5th Cir. 1979); United States v. Heyward, 729 F.2d 297, 299-300 (4th Cir. 1984); Fryar v. Bissonette, 185 F. Supp. 2d 87, 93 (D. Mass. 2002). Originally, separate but identical residual hearsay exceptions existed under FRE 803 (exceptions applicable regardless of the declarant's availability) and FRE 804 (exceptions applicable only if the declarant is unavailable). *See* 88 Stat. at 1941-43. In 1997, the residual hearsay exceptions were removed from Rules 803 and 804 and merged into the newly created FRE 807 as a purely administrative measure. *See* Fed. R. Evid. 807 advisory committee's note (1997 Amendment).

8 Similar to the FRE, the MRE originally contained two residual hearsay exceptions--MRE 803(24) and MRE 804(b)(5); the two exceptions, however, were merged into the newly created MRE 807 as part of the June 1999 amendments to the MRE. United States v. Donaldson, 58 M.J. 477, 479 n.* (C.A.A.F. 2003). The merger "did not alter the meaning or application of the residual hearsay exception." *Id.*

9 United States v. Pollard, 38 M.J. 41, 49 (C.M.A. 1993) (quoting Manual for Courts-Martial, United States, M.R.E. 804 analysis, at A22-51 (1984)); *see also* United States v. McGrath, 39 M.J. 158, 165 (C.M.A. 1994) ("The military 'residual hearsay' rules, after all, are but verbatim copies of their [FRE] counterparts ....").

10 *See, e.g.*, United States v. Ruffin, 12 M.J. 952, 955 (A.F.C.M.R. 1982).

11 Based on the author's caselaw research and review, approximately 80 percent of the military appellate opinions that have ruled in favor of admitting residual hearsay since 1980 have involved statements of a child. As an appellate court astutely observed, "many, if not nearly all" residual hearsay cases involve statements of a child. *See* United States v. Zamora, 80 M.J. 614, 627 (N-M. Ct. Crim. App. 2020).

12 In fact, excluding statements from children, the author's research reveals that only twenty military appellate court opinions have ruled in favor of admitting residual hearsay since the exception was adopted more than forty years ago.

13 Additions to the rule are represented by underlined text; deletions are represented by strikethrough text.

14 Manual for Courts-Martial, United States, M.R.E. 807 (2023) [hereinafter MCM]; Manual for Courts-Martial, United States, M.R.E. 807 (2019).

15 The elimination of the rarely litigated "interests of justice" prong should not impact court-martial practice because MRE 102 essentially sets forth the same basis for objection. *See* Fed. R. Evid. 807 advisory committee's note (2019 Amendment) (providing that the "interests of justice" prong was removed from the Federal rule because FRE 102 offers the same basis for objection); United States v. Hines, 23 M.J. 125, 134 (C.M.A. 1986) (providing that this requirement "has not proved significant" in residual hearsay litigation). The slight phrasing change in paragraph (a)--from "specifically covered by" to "admissible under"--should similarly not impact court-martial practice; that change was directed at a limited Federal court practice that never took root in military jurisprudence. *See* Fed. R. Evid. 807 advisory committee's note (2019 amendment) (providing that a minority of Federal courts construed the exception too narrowly so as to prohibit admission under the residual exception of types of evidence specifically covered by an enumerated exception); *compare* Glowczenski v. Taser Int'l, Inc., 928 F. Supp. 2d 564, 573 (E.D.N.Y. 2013) (denying the admission of a scholarly article under the residual exception on the grounds that an enumerated exception specifically addresses this form of evidence), *with* United States v. Grant, 42 M.J. 340, 343 (C.A.A.F. 1995) (providing that "[e]vidence which fails to meet a particular requirement of the enumerated exceptions may qualify as residual hearsay under [MRE 807]").

16 *See generally* Fed. R. Evid. 807 advisory committee's note (2019 amendment).

17 This was commonly referred to as the "materiality" prong of the analysis. *See, e.g.*, United States v. Kelley, 45 M.J.

275, 280 (C.A.A.F. 1996); *see supra* note 14 and accompanying text.

18 United States v. Dominguez, 81 M.J. 800, 811 (N-M. Ct. Crim. App. 2021) (quoting United States v. Ellerbrock, 70 M.J. 314, 318 (C.A.A.F. 2011)).

19 Fed. R. Evid. 807 advisory committee's note (2019 amendment).

20 *See, e.g.*, *Ellerbrock*, 70 M.J. at 318-19 (providing that evidence must be both relevant and material to be constitutionally required under MRE 412); J.M. v. Payton-O'Brien, 76 M.J. 782, 790-91 (N-M. Ct. Crim. App. 2017) (providing that the Government's failure to disclose classified evidence that is "relevant and material" warrants relief in favor of the defense).

21 Courts commonly refer to this as the "reliability" prong of the analysis. *See, e.g.*, *Kelley*, 45 M.J. at 280.

22 *See supra* note 14 and accompanying text.

23 *Compare* United States v. Valdez, 35 M.J. 555, 563 (A.C.M.R. 1992) (criticizing the military judge's consideration of corroborating evidence), *with* United States v. McGrath, 39 M.J. 158, 166 (C.M.A. 1994) (concluding that "corroboration by other evidence is one of the means by which hearsay evidence can be tested for trustworthiness").

24 Military Rule of Evidence 101 includes electronic communications as proper means of "written" notice. *See* MCM, *supra* note 14, M.R.E. 101(c)(2).

25 *See supra* note 14 and accompanying text.

26 United States v. Czachorowski, 66 M.J. 432, 435 (C.A.A.F. 2008).

27 *See, e.g.*, MCM, *supra* note 14, M.R.E. 404(b), 412(c), 413(b), 414(b), 513(e), 514(e).

28 *See* Manual for Courts-Martial, United States, M.R.E. 807 (2019).

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