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Impact of New FRE 807 on Hearsay Evidence: New Residual Exception

TUESDAY, MAY 12, 2020

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Impact of New FRE 807 on Hearsay Evidence: New Residual Exception

Tuesday, May 12, 2020 1-2:30 pm EDT

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FRE 807

Current Version (2019)

(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 of the court, for good cause, excuses a lack of earlier notice.

Prior Version (2011)

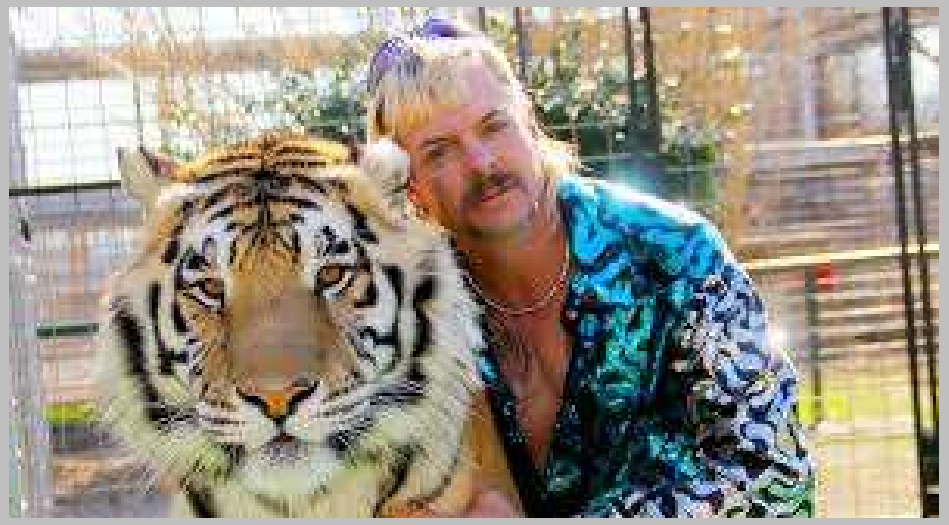
(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

- **(1)** the statement has equivalent circumstantial guarantees of trustworthiness;
- **(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.

(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, so that the party has a fair opportunity to meet it.

Introduction

What Does the Tiger King Have To Do With FRE 807?



Refresher

What is FRE 807?

The Residual Hearsay Exception

The residual hearsay exception allows a judge to admit hearsay even if it does not fall within the other listed hearsay exceptions, provided that 1) the hearsay is deemed sufficiently trustworthy; 2) the hearsay is deemed sufficiently necessary; and 3) proper notice is given.

Legislative History

The Start of FRE 807

- Rule 807 became effective on December 1, 1997.
- Rule 807 consolidated two identical "catchall" or "residual" exceptions: former Rules 803(24) and 804(b)(5). These two rules were transferred verbatim to Rule 807.
- Even before Rule 807 took effect, courts were admitting hearsay under a residual exception category.

Original Congressional Intent

- Congress recognized that the residual hearsay exception fulfilled two important purposes:
  - There are trustworthy statements that do not fall under the standard hearsay exceptions and yet should be admitted. See FED. R. EVID. 803(24) advisory committee's note ("It would, however, be presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued and to pass the hearsay rule to oncoming generations as a closed system.").

  - Without a residual exception, courts might attempt to wrestle trustworthy statements into a standard hearsay exception where the statements do not actually fit, resulting in improper changes to the meaning and breadth of the standard exceptions. See United States v. Popenas, 780 F.2d 545, 547 (6th Cir. 1985) (Congress included the residual exceptions, "fearing that without these provisions the more established exceptions would be unduly expanded in order to allow otherwise reliable evidence to be introduced.").

Congress intended FRE 807 to be used narrowly.

- The changes that Congress made to the Advisory Committee proposal for the original residual exception rules were intended to narrow the scope of the residual exception. *See* H.R. REP. NO. 93-1597, at 11 (1974), as reprinted in 1974 U.S.C.C.A.N. 7098, 7105. For example:

- Congress changed the proposed text requiring that statements have "comparable circumstantial guarantees of trustworthiness" to "equivalent circumstantial guarantees of trustworthiness." *See id.*

- Congress added the additional requirements that 1) the statement be proof of a material fact; 2) the hearsay be more probative than any other evidence reasonably available; 3) admitting the statement will serve the purposes of the rules and the interests of justice; and 4) the pretrial notice requirement. *See id.*

Congress intended FRE 807 to be used narrowly.

- The legislative history indicates that Congress wanted the residual exception to be used "very rarely, and only in exceptional circumstances." S. REP. NO. 93-1277, at 18 (1974), as reprinted in 1974 U.S.C.C.A.N. 7051, 7065.
- Congress was concerned that an overly broad residual exception would grant the courts too much discretion and "inject[] too much uncertainty into the law of evidence." H.R. REP. NO. 93-650, at 5 (1973), as reprinted in 1974 U.S.C.C.A.N. 7075, 7079.
- Congress was also apprehensive about enacting too broad of a residual exception because it might allow courts and litigants to circumvent the limitations of the existing standard hearsay exceptions by using the residual exception instead. *See* David A. Sonenshein & Ben Fabens-Lassen, Has the Residual Exception Swallowed the Hearsay Rule?, 64 U. KAN. L. REV. 715 (2016).

So, what kind of evidence was admitted under the old rule?

- **Survey and poll evidence (if they are sufficiently trustworthy).** *See Keith v. Volpe*, 858 F.2d 467 (9th Cir. 1988) (finding that a survey asking respondents about their race, income, and housing preferences was admissible); *Debra P. v. Turlington*, 730 F.2d 1405 (11th Cir. 1984) (finding that a survey asking teachers about their instruction and student performance was admissible); *Schering Corp. v. Pfizer Inc.*, 189 F.3d 218 (2d Cir. 1999) (remanding for reevaluation of whether the survey at issue was admissible based on the survey's methodological strengths and susceptibilities to faulty memory and perception).

- **Industry and safety codes.** *See Frazier v. Continental Oil Co.*, 568 F.2d 378 (5th Cir. 1978) (finding that the National Fire Protection Association industry code was admissible); *Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178 (5th Cir. 1975) (finding that advisory materials issued by the Federal Aviation Administration were admissible).

So, what kind of evidence was admitted under the old rule?

- **Grand jury testimony.** *See United States v. Panzardi-Lespier*, 918 F.2d 313 (1st Cir. 1990) (finding that grand jury testimony of the deceased declarant was admissible where it was corroborated, based on personal knowledge, given without the protection of immunity, unimpeached, and where co-defendant had been charged with the deceased declarant's murder); *United States v. Earles*, 113 F.3d 796 (8th Cir. 1997) (finding that a father's grand jury testimony was admissible where the father took responsibility for his son's alleged fraud, related facts based on personal knowledge, did not recant his testimony, and where extrinsic evidence did not cast doubt upon the accuracy of his testimony).

- **Statements of child victims to adults.** *See United States v. Rouse*, 111 F.3d 561 (8th Cir. 1997) (finding that a child victim's statements to an FBI agent during an investigation were admissible); *United States v. Wandahsega*, 924 F.3d 868 (6th Cir. 2019) (finding that a child victim's statements to two adults were admissible).

So, what kind of evidence was admitted under the old rule?

- **Corporate documents that almost qualified as business records.** *See United States v. Am. Tel. & Tel. Co.*, 516 F. Supp. 1237 (D.D.C. 1981) (finding that the following corporate documents were admissible: contemporaneous memoranda reflecting meeting or telephone discussion; internal memoranda of adverse third parties; diaries and calendars of adverse third parties; correspondence; public statements made by third parties; and deposition testimony by employees of adverse third parties).

- **Communications from the government.** *See United States v. Doe*, 860 F.2d 488 (1st Cir. 1988) (finding that communications from the Honduran government and Navy regarding the Coast Guard's permission to board a boat were admissible).

So, what kind of evidence was admitted under the old rule?

- **Alcohol, Tobacco, and Firearm purchase forms.** *See United States v. Banks*, 514 F.3d 769 (8th Cir. 2008) (finding that ATF purchase form from a pawn shop that sold a firearm to defendant was admissible).

- **Plea agreement from an earlier criminal case.** *In re Slatkin*, 525 F.3d 805 (9th Cir. 2008) (finding that a plea agreement entered into by a Chapter 11 debtor in an earlier criminal case was admissible in a bankruptcy trustee's avoidance proceeding).

Textual Changes to FRE 807

(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 the 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.

What was the purpose of the recent amendment?

- "Part of the original motivation for an amendment **was to consider expanding its coverage, because a comprehensive review of the case law over the last ten years provides some indication that reliable hearsay has been excluded**. But another reason for an amendment was the Committee's determination that the Rule could be **improved to make the court's task of assessing trustworthiness easier and more uniform; to eliminate confusion and unnecessary effort by deleting superfluous language; and to provide improvements to the notice provision**."

  --Advisory Committee on Evidence Rules, Meeting Minutes (Apr. 21, 2017), at 3.

What was the purpose of the recent amendment?

- Eliminate the equivalence standard: "[A] review of the case law indicates that the 'equivalence' standard has not fulfilled the intent of the drafters to limit the discretion of the trial court. Given the wide spectrum of reliability found in the hearsay exceptions, it is not difficult to find a statement reliable by comparing it to a weak exception, or to find it unreliable by comparing it to a strong one."

- Provide uniformity in approach by tasking court to look at circumstantial guarantees of trustworthiness and corroborating evidence, if any exists.

- Retain language that the hearsay statement must be "more probative than any other evidence that the proponent can obtain through reasonable efforts."

--Advisory Committee on Evidence Rules, Meeting Minutes (Apr. 21, 2017), at 3-4.

What was the purpose of the recent amendment?

- Preserve the distinction that residual exception is one of last resort:
  - "[T]he changes proposed are modest --- there is no attempt to allow the residual exception to swallow the categorical exceptions, or even to permit the use of the residual exception if the categorical exceptions are available."
  - "[T]he trial judge should focus on whether the hearsay is trustworthy enough to be admitted more than on his or her own view of the evidence."
  - "Committee members all agreed that requiring the court to consider corroborating evidence was useful to resolve a split in the courts, and that it was important to include corroboration in the trustworthiness inquiry because its presence or absence is highly relevant to a consideration of whether the hearsay statement is accurate."
    --Advisory Committee on Evidence Rules, Meeting Minutes (Apr. 21, 2017), at 4, 7-8.

What was the purpose of the recent amendment?

- The change to FRE 807 was not intended to force trial judges to make threshold determinations of whether the proffered evidence fit into each of the Rule 803 and 804 exceptions before applying the residual exception.

- The near-miss test used by courts may be part of the inquiry into the guarantees of trustworthiness of the proffered evidence, but it is not a replacement of the inquiry.

  --Advisory Committee on Evidence Rules, Meeting Minutes (Apr. 26-27, 2018), at 9-10.

What was the purpose of the recent amendment?

- "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."

--Report of the Judicial Conference (Sept. 2018), at 25.

What was the purpose of the recent amendment?

- "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 requirement was amended in 4 ways: (1) requiring the disclosure of the substance of the statement; (2) deleting the requirement for the declarant's address; (3) requiring notice to be in writing; and (4) "the pretrial notice provision has been amended to provide for a good cause exception."
  --Fed. R. Evid. 807 advisory committee's note to 2019 amendment.

What did practitioners expect from the rule change?

- "The amendment, which includes four noteworthy changes that will undoubtedly broaden this hearsay exception and allow more hearsay statements into evidence than previously available, has the potential to substantially change the course of a trial."
- "Although the advisory committee notes about these amendments state that the changes are not meant to broaden the scope of admissible evidence under the rule, the new language will undoubtedly serve to broaden the scope of admissible hearsay evidence."
- Any relevant hearsay evidence could be admissible if it is considered trustworthy and is the most probative evidence, regardless of whether it concerns a "material fact" (requirement having been removed).
- Under the new rule, what a witness understands to be a fact (including gossip and rumors) may be permitted into evidence.

What did practitioners expect from the rule change?

- Whether the new rule will allow more evidence in under FRE 807 will be determined on the courts' usage of the new rule.
- "Now comes a revised Rule 807, seemingly more muscular than the old rule, and perhaps vesting more discretion in judges to weigh surrounding trustworthiness circumstances. Now, plug in the digital era's explosion of email and social media communications with many billions of hearsay statements. Given this mix, Rule 807 may indeed go from rare use and obscurity to a thriving battlefront of its own."

What did practitioners expect from the rule change?

- "The changes to Rule 807 are likely to lead to many more out of court statements being admitted to evidence. This means information that once stood no change of being admitted may not be considered by a judge or jury. It also means that out of court statements regarding issues that aren't essential to the case may still be admitted."

- "These changes may lead to less predictable outcomes and more appeals."

What did practitioners expect from the rule change?

- "These amendments significantly broaden the scope of the exception, which may lead to the admission of more hearsay statements under this rule."
- "This precedent [that FRE 807 was used in only rare, exceptional cases] could change under the new, more relaxed version of the Rule. Litigators should be aware of the possibility that more hearsay, even that which falls outside the scope of the familiar exceptions will be admitted, and should accordingly pay attention to how the changes in this Rule are being implemented."

What did the ABA think would happen with the rule change?

- The rule change will give trial courts greater discretion over which hearsay statements are admitted into evidence.

- The notice changes are significant, and allow a trial court to admit hearsay during the trial for good cause even without earlier notice.

What did the ABA think would happen with the rule change?

- "The new changes to Rule 807 are expansive and will lead to the admission of more hearsay evidence. More importantly, the new Rule 807 allows courts to admit such evidence during trial for good cause, in comparison to the old Rule 807 which allowed admission only when notice of an intent to use was made before trial." - John S. Austin (vice-chair of ABA Section of Litigation's Trial Practice Committee).

- "While the new Rule 807 might not significantly change the way the rule is applied, the new rule cleans up the text and places a greater emphasis on the trial judge as the gatekeeper." - Steven Finell (cochair of ABA Section of Appellate Practice Committee's Appellate Rules Subcommittee)

The Split in the Circuits

The Role of Corroborating Evidence

The Rule before 2019 Amendments

- (1) the statement has equivalent *circumstantial guarantees of trustworthiness*;

Some courts held corroborating evidence had no role under the Rule.

- "According to the theory of the hearsay rule, this trustworthiness must be gleaned from circumstances that 'surround the making of the statement and that render the declarant particularly worthy of belief,' not by 'bootstrapping on the trustworthiness of other evidence at trial.'" *United States v. Stoney End of Horn*, 829 F.3d 681, 685-86 (8th Cir. 2016) (internal citations omitted).

Other courts, if not the majority of courts, held that corroborating evidence was to be considered.

- *United States v. Moore*, 824 F.3d 620, 623-24 (7th Cir. 2016) (finding hearsay statement admissible under Rule 807 because, among other reasons, it was corroborated by evidence)
- *Larez v. City of Los Angeles*, 946 F.2d 630, 643 n.6 (9th Cir. 1991) (in trustworthiness analysis, court observed that the declarants' out-of-court statements were "especially reliable" because they corroborated one another).

The Rule as amended

- (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

Statements "not specifically covered" by a hearsay exception

The Rule before the 2019 Amendment

- Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the *statement is not specifically covered by a hearsay exception* in Rule 803 or 804 [. . .]

"Near misses" should be excluded.

- *United States v. Dent*, 984 F.2d 1453 (7th Cir. 1993) (Easterbrook, J., concurring) (arguing that the exception "reads more naturally if we understand the introductory clause to mean that evidence of a kind specifically addressed ('covered') by one of the four other subsections must satisfy the conditions laid down for its admission, and that other kinds of evidence not covered (because the drafters could not be exhaustive) are admissible if the evidence is approximately as reliable as evidence that would be admissible under the specific subsections").
- *Glowczenski v. Taser Int'l, Inc.*, 928 F. Supp. 2d 564, 573 (E.D.N.Y. 2013) (finding that because articles were "specifically covered by another hearsay exception, Rule 803(18)," "Rule 807 is inapplicable" to admit a treatise that did not satisfy 803(18)'s requirements).

Other courts interpreted to mean statements not admissible under another exception.

- *United States v. Fernandez*, 892 F.2d 976, 981 (11th Cir. 1989) (concluding that a statement is "not specifically covered" by another hearsay exception when it is not admissible under any hearsay exception)
- *United States v. Valdez-Soto*, 31 F.3d 1467, 1471 (9th Cir. 1994) ("And the reference to guarantees of trustworthiness equivalent to those in the enumerated exceptions strongly suggests that almost fitting within one of these exceptions *cuts in favor of admission*, not against") (emphasis added).

The Rule as Amended

- 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:*

The notice requirement

The Rule before the 2019 Amendment

- (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, so that the party has a fair opportunity to meet it.

Strict interpretation

- *United States v. Oates*, 560 F.2d 45, 73 n.30 (2d Cir. 1977) (citing legislative history and concluding that "there [must] be undeviating adherence to the requirement that notice be given in advance of trial.");
- *United States v. Ruffin*, 575 F.2d 346 (2d Cir. 1978) (similar).

The flexible approach

- *Furtado v. Bishop*, 604 F.2d 80, 92 (1st Cir. 1979) (observing that "[m]ost courts have interpreted the pre-trial notice requirement somewhat flexibly" and finding that "lack of pretrial notice was not fatal");
- *United States v. Baker*, 985 F.2d 1248 (4th Cir. 1993) (affirming the district court's conclusion that "notice [in that case] was wholly impracticable and thus, under the exceptional circumstances of this case, we uphold its grant of notice flexibility.

The Rule as amended

- **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 of the court, for good cause, excuses a lack of earlier notice.*

The Current Landscape

FRE 807 – "Rare and Exceptional"

12/1/2011-11/30/2019

- 501* Federal Cases addressing FRE 807
  - 384 unreported
  - 117 reported
- Majority of cases (reported and unreported) are within the courts of the 2nd Circuit (82)
- 61 Circuit Court decisions

*Case numbers are estimates. Any case that mentions FRE 807, even in passing, is included in these numbers.

12/1/2019-Present

- 32* Federal Cases addressing FRE 807
  - All unreported
- 2 Circuit Court decisions
  - 1 unreported

*Case numbers are estimates. Any case that mentions FRE 807, even in passing, is included in these numbers.

Cases & Takeaways

***Zeng v. Marshall Univ.*, No. 3:17-cv-03008, S.D. W.Va. (1/22/2020)**

- Subject evidence: Transcripts from grievance hearings
- Rule 807(a)(1): "Here, the accuracy of the transcripts has not been challenged; the witnesses were under oath at the time of their testimony; and the testimony was given in a formal proceeding before an ALJ. Therefore, the statements in the transcripts are supported by sufficient guarantees of trustworthiness."*
- Rule 807(a)(2) and "reasonable efforts": "While Plaintiff could have deposed all of the witnesses who appeared at the hearings, his resources were limited, making it unreasonable to require Plaintiff to re-depose the witnesses; particularly, as they participated in the grievance process largely on behalf of Marshall University. Forcing Plaintiff to unnecessarily incur such expense would not further the ends of justice."

Cases & Takeaways

***Hobart Corp. v. Dayton*, No. 3:13-cv-115 (S.D. Ohio)**

- Subject evidence: EPA Investigative Activity Report
- Rule 807(a)(1) & "trustworthiness": Neither witness 1—retired employee of plaintiff with spotless record—nor witness 2—EPA scrivener had a motive to lie.

***Forde v. Salazar*, No. 13-23452-CIV-ALTONA/Louis (S.D. Fla.) 3/19/2020)**

- Subject evidence: Written statement of incarcerated, former cellmate
- Rule 807(a)(1) & "trustworthiness": Cellmate "not without motivation to disparage BOP treatment of his cellmate or exaggerate the severity of Plaintiff's condition for which Defendants failed to assist; or to aggrandize his own role in assisting Plaintiff."

Cases and Takeaways

***Sandhu v. United States*, No. 2:05-cr-00449-KJM, E.D. Ca. (1/27/2020)**

- Subject evidence: Declaration of *coram nobis* counsel and statements in court by immigration counsel regarding statements by trial counsel
- FRE 807(a)(1) and "trustworthiness": Declaring counsel "are licensed attorneys bound by a professional duty to make only well supported representations, and to not make false or misleading statements to the court."

In re Andry*, Misc. No. 15-2478, E.D. La. (1/23/2020)

- Subject evidence: Special Master report
- FRE 807(a)(a) and "trustworthiness": Met because the report "was prepared by a neutral, court-appointed Special Master conducting fact finding."

*Decided under prior FRE 807.

Cases & Takeaways

***United States v. Buckner*, No. 3:18-CR-00349, M.D. Pa. (1/13/2020)**

- Subject evidence: None.
- Rule 807(b): "Rule 807 specifically provides that, absent "good cause", the statement at issue under this residual exception is admissible only if the adverse party is provided with "reasonable notice" of the intent to offer the statement, including its substance and the declarant's name, before the trial or hearing. Thus, to the extent that the Government is aware of any information responsive to the defendant's request pursuant to Rule 807 which has not already been provided to the defendant, the Court will order the Government to provide written notice of the intent to offer any statement pursuant to 807 no later than 10 calendar days before trial."

Practice Pointers

Pretrial Evidentiary Stipulations

The Central District of California has entered several orders that include a general stipulation on authenticity along with a process for seeking stipulations on specific documents as authentic and admissible as business records **or under the residual exception of Rule 807**.

Reitman v. Champion Petfoods, No. 18-cv-1736 (C.D. Cal.), Nov. 28, 2018 Order (ECF 111).

Pretrial Motions

- Motion *in limine:* Used to determine whether a statement is admissible under FRE 807.

- Motion to disclose: Used in a criminal case to require the Government to give 10 days written notice in advance of trial of an intent to offer any statement pursuant to FRE 807.

Rule 104(a) Hearing

"The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege." FRE 104(a).

"The court must conduct any hearing on a preliminary question so that the jury cannot hear it if: (1) the hearing involves the admissibility of a confession; (2) a defendant in a criminal case is a witness and so requests; or (3) justice so requires." FRE 104(c).

Depositions

- The residual exception only comes into play if the statement is:
  - Hearsay;
  - Not admissible under a hearsay exception in FRE 803 or 804;
  - More probative than other evidence that the proponent can reasonably obtain; and
  - Reasonable notice is given (or good cause for not giving notice exists).
- Underscores the importance of laying a proper foundation at a deposition.
  - Who made the statement?
  - When was the statement made?
  - What were the circumstances surrounding the statement?
  - Can other people corroborate the statement or circumstances under which the statement was made?

Thank You

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