Summer 2018

Something Old and Something New: Exploring the Recent Amendments to the Federal Rules of Evidence

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New amendments to the Federal Rules of Evidence became effective on December 1, 2017.[1] The amendments change Federal Rule of Evidence 803(16), the hearsay exception for ancient documents,[2] and add Federal Rules of Evidence 902(13) and (14), providing for self-authentication by certified record for information generated by an electronic process or system and for copied data.[3] These changes are largely a reflection of the digital world in which we live, where documents existing on the internet may no longer be regarded as trustworthy merely due to their lengthy existence, and in which authenticating digital information can be costly and expensive. Additionally, the Judicial Conference Advisory Committee for the Federal Rules of Evidence proposed a revision of Federal Rule of Evidence 807, which has been published for notice and comment.[4] If approved without modification, the amendments to Rule 807 could take effect on December 1, 2019.[5]

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1. Letter from the Supreme Court to Congress submitting amendments to the Federal Rules of Evidence as adopted by the Supreme Court (April 27, 2017), https://www.supremecourt.gov/orders/courtorders/frev17_d186.pdf [https://perma.cc/ZU5M-4DS4]; FED. R. EVID. 803(16) advisory committee's note to 2017 amendment; FED. R. EVID. 902(13)–(14) advisory committee's note to 2017 amendment.

2. FED. R. EVID. 803(16) (2017).

3. FED. R. EVID. 902(13), 902(14) (2017).

4. Preliminary Draft of Proposed Amendments to the Federal Rules of Evidence, at 1, https://www.regulations.gov/docket?D=USC-RULES-EV-2017-0005 [https://perma.cc/5RLE-TFXP]. The comment period for the proposed amendment to Federal Rule of Evidence 807 closed on February 15, 2018.

5. *Id.* at 4.

This article provides a practical, nuts and bolts approach to understanding the new amendments to the Federal Rules of Evidence and the proposed changes to Rule 807, with a focus on the policy rationale behind the new rules and pointers for how the new rules can affect evidentiary foundations. The article first addresses the amendment to Rule 803(16), providing the policy reasons prompting the change and offering alternative means of assessing hearsay issues for documents that will not meet the new threshold requirements. In Part II, this article analyzes the new self-authentication Rules 902 (13)–(14). The section begins with a discussion of the problems prompting the adoption of the new rules, then breaks down the requirements to satisfy the elements of the rules. This section then provides examples of the new rules' application, and concludes with an analysis of potential Confrontation Clause issues raised by the amendments. Finally, this article sets forth the proposed amendments to Rule 807, the residual hearsay exception provision, and discusses the policy rationale behind the proposed changes.

I. THE HEARSAY EXCEPTION FOR STATEMENTS IN ANCIENT DOCUMENTS—RULE 803(16)

The text of Federal Rule of Evidence 803(16) now provides:

> (16) Statements in Ancient Documents. A statement in a document that was prepared before January 1, 1998, and whose authenticity is established.[6]

The rule provides an exception to the general rule barring hearsay evidence. It was amended on December 1, 2017 to change the requirement that the document be "at least 20 years old" to now require that it "was prepared before January 1, 1998."[7] Thus, as time continues to go by, the fact that a document is twenty years old or more will no longer be sufficient to meet the foundation for this hearsay exception.

The change was in large part due to the vast amount of electronically stored information ("ESI") that now accumulates on the internet, company servers, and other media that does not bear the indicia of reliability that so-called ancient documents once held.[8] The Advisory Committee for the Federal Rules determined that the exception should "be limited due to the

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6. FED. R. EVID. 803(16).

7. *Id.*

8. Report to Standing Committee by Advisory Committee on Evidence Rules, at 46 (May 7, 2016), http://www.uscourts.gov/sites/default/files/2016-05-07-evidence_rules_report_to_the_standing_committee_0.pdf [https://perma.cc/4G3C-VYE2] (noting that "[t]he rationale for the exception has always been questionable, because a document does not magically become reliable enough to escape the rule against hearsay on the day it turns 20," but concluding the exception had been tolerated because of its infrequent use, and because usually there is no other evidence on point).

risk that it will be used as a vehicle to admit vast amounts of unreliable electronically stored information."[9]

Under the amendment, a document is "prepared" when the proffered statement was recorded in the document.[10] Thus, scanning in a hardcopy of a document does not change the original date of its preparation, provided the scan does not alter the text of the document. The relevant point for preparation is the date the information was recorded.[11] But if the document is altered in trial preparation or otherwise after 1998, the exception will not apply to the alterations.[12]

The hearsay exception for "ancient documents" in Rule 803(16) is grounded on several purported, but questionable, assurances of reliability. First, the document is in writing, is found in an appropriate location for such documents, and appears unaltered.[13] These circumstances tend to support the conclusion that the statements in the document were true. Second, the fact that the document was written before January 1, 1998, guarantees, in many cases, that it was prepared before the current case arose and thus tends to negate any motive to falsify. Third, for items generated before 1998, there is an element of necessity. An old writing is thought to be more reliable than the memory of a witness who executed the document, assuming that person can even be located.[14]

The original proposed amendment, interestingly, would have eliminated the ancient documents exception entirely, because the Advisory Committee found the rationale for the hearsay exception questionable: "[A] document does not magically become reliable enough to escape the rule against hearsay on the day it turns 20."[15] But that proposal sparked significant negative public comment based on the premise that in certain types of litigation important documents may no longer be admissible, or would be admissible only after expending significant time and resources. Examples of litigation cited by the public commentary in favor of retaining the ancient documents exception were cases involving latent diseases, insurance disputes, clergy sexual abuse cases, environmental cleanup cases, and title disputes.[16] In light of the negative public reaction, the Advisory

9. FED. R. EVID. 803(16) advisory committee's note to 2017 amendment. *See also* Report to Standing Committee, *supra* note 8, at 151–52 ("Because ESI can be easily and permanently stored, there is a substantial risk that the terabytes of emails, web pages, and texts generated in the last 20 or so years could inundate the courts by way of the ancient documents exception.").

10. FED. R. EVID. 803(16) advisory committee's note to 2017 amendment.

11. *Id.*

12. *Id.*

13. EDWARD J. IMWINKELRIED & RAMONA L. LAMPLEY, FEDERAL EVIDENCE TACTICS § 8.03[21] (LexisNexis 2018).

14. *Id.*

15. Report to Standing Committee, *supra* note 8, at 46.

16. *Id.*

Committee elected to narrow, rather than abandon, the ancient documents exception.[17]

The ancient documents exception remains available for documents prepared before 1998,[18] recognizing that some cases involving latent diseases or environmental damage, for example, may necessitate hardcopy documents from the past. For documents prepared after 1998, reliable ESI admissible under some other hearsay exception, such as the exception under Rule 803(6) for records of regularly conducted activities, likely exists. The advisory note points out that Rule 807 should be used to admit such documents upon a showing of reliability, "which will often (though not always) be found by circumstances as that the document was prepared with no litigation motive in mind, close in time to the relevant events."[19] The note also states that the new limitation "is not intended to raise an inference that 20-year-old documents are, as a class, unreliable, or that they should somehow not qualify for admissibility under Rule 807."[20] But, as discussed below, Rule 807 is the subject of a proposed amendment that may take effect later in 2019.[21] If no other hearsay exception exists, there may be a non-hearsay purpose for admitting the document, such as notice.

The amendment continues the requirement that the document's authenticity be established.[22] Thus the authentication requirements under Rule 901(b)(8) remain unchanged. To authenticate a document under Rule 901(b)(8), one must satisfy these foundational elements:

> (8) Evidence About Ancient Documents or Data Compilations. For a document or data compilation, evidence that it:
>
> (A) is in a condition that creates no suspicion about its authenticity;
>
> (B) was in a place where, if authentic, it would likely be; and
>
> (C) is at least 20 years old when offered.[23]

Of course, that is not the only method for authenticating a document that pre-dates 1998. Rule 901(a) provides the general rule for authentication that is satisfied if the proponent "produce[s] evidence sufficient to support a finding that the item is what the proponent claims it is;"[24] a threshold

17. *Id.*
18. FED. R. EVID. 803(16) advisory committee's note to 2017 amendment.
19. *Id. See also* Report to Standing Committee, *supra* note 8, at 47 (observing that the Advisory Committee Note "states the Committee's expectation that the residual exception not only can, but *should* be used by courts to admit reliable documents prepared after January 1, 1998 that would have previously been offered under the ancient documents exception") (emphasis in original).
20. FED. R. EVID. 803(16) advisory committee's note to 2017 amendment.
21. *See infra* Part II.
22. FED. R. EVID. 803(16).
23. FED. R. EVID. 901(b)(8).
24. FED. R. EVID. 901(a).

showing that has been repeatedly observed as not extraordinarily difficult to satisfy.[25]

Although the amendment to Rule 803(16)'s ancient documents hearsay exception will be a significant change for lawyers and academics for whom the "older than twenty year" rule has become engrained, it likely will not have a significant impact on the admissibility of critical evidence because much evidence will be admissible either under a different hearsay exception or because it is not hearsay at all. Nonetheless, given the proliferation of unreliable evidence on the internet, and the fact that there is no clearinghouse operation for unreliable or factually untrue information on the internet or servers, the amendment reflects a necessity of our modern reality. No longer can one make the claim that a document's existence for longer than twenty years bears such high guarantees of its trustworthiness that its age and authenticity should pave the road to admissibility even if there is an otherwise valid hearsay.

II. NEWLY ADDED SELF-AUTHENTICATION PROCEDURES FOR RECORDS GENERATED BY AN ELECTRONIC PROCESS OR SYSTEM AND DATA COPIED FROM AN ELECTRONIC DEVICE—RULES 902(13) AND (14)

Rules 902(13) and 902(14) are new additions to the self-authentication procedures under the Federal Rules. They became effective December 1, 2017. The new amendments provide:

> (13) Certified Records Generated by an Electronic Process or System. A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).
>
> (14) Certified Data Copied from an Electronic Device, Storage Medium, or File. Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11).[26]

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25. *See, e.g.*, United States v. Williams, 865 F.3d 1328, 1343 (11th Cir. 2017), *cert. denied*, 138 S.Ct. 1282 (Mar. 19, 2018) (Federal Rule of Evidence 901 "require[s] only enough evidence that a jury could have reasonably concluded that a document was authentic.") (citing In re Int'l Mgmt. Assocs., LLC, 781 F.3d 1262, 1267 (11th Cir. 2015)); United States v. Cornell, 780 F.3d 616, 629 (4th Cir. 2015) ("[T]he burden to authenticate under Rule 901 is not high—only a prima facie showing is required, and a district court's role is to serve as gatekeeper in assessing whether the proponent has offered a satisfactory foundation from which the jury could reasonably find that the evidence is authentic.") (citing United States v. Hassan, 742 F.3d 104, 133 (4th Cir. 2014)) (internal quotation marks omitted).

26. FED. R. EVID. 902(13)–(14).

The new rules allow for authentication through a certification of records generated by an electronic process or system and data copied from an electronic device. Before the enactment of Rules 902(13) and (14), such evidence had to be authenticated under Rule 901, which required a sponsoring witness to testify in court. For example, under Rule 901, a witness could authenticate evidence about a process or system by "describing a process or system and showing that it produces an accurate result."[27] Under new Rule 902(13), the proponent may authenticate information generated by an electronic process or system by presenting a certification, in lieu of a live witness, that would be sufficient if the witness were testifying at trial.[28]

The Advisory Committee notes explaining the new amendment provide that "the Rule specifically allows the authenticity foundation that satisfies Rule 901(b)(9) to be established by a certification rather than the testimony of a live witness."[29] Similarly, Rule 902(14) permits a party to authenticate data copied digitally from an electronic device, storage medium, or file by written certification of a qualified person, instead of calling that witness at trial.[30]

The authentication provided in the certification must be sufficient to establish authenticity if that testimony were provided by a witness at trial.[31] A "qualified person," such as a forensic technical analyst, information technology expert, or an eDiscovery expert must certify the authenticity of the data.[32] The proponent should ensure that the certification, through the qualified person, accurately describes the process or system that generated the records, and why that process is a reliable means of transmission.[33] For Rule 902(14), the qualified person should certify that the electronic copy is identical to the original by means of comparing hash value or other reliable means for digital identification.[34]

The Advisory Committee intended the new rules to save on trial expenses by reducing the times a live witness must be called at trial to authenticate electronic evidence. The Advisory Committee observed, "[i]t

27. FED. R. EVID. 901(b)(9).
28. FED. R. EVID. 902(13).
29. FED. R. EVID. 902(13) advisory committee's note to 2017 amendment.
30. There is some overlap in the new rules. Much evidence proffered under Rule 902(14) could be offered under Rule 902(13) because the copy is generated by an electronic process. But Rule 902(14) provides for a specific use of the new certification provisions, the process of authenticating a copy through use of hash values, which is specific and unique. Thus, application of Rule 902(14) is a narrow and specific one, whereas 902(13) will reach more broad applications. *See* Paul W. Grimm, Daniel J. Capra, Gregory P. Joseph, *Authenticating Digital Evidence*, 69 BAYLOR L. REV. 1, 40–41 (Winter 2017).
31. FED. R. EVID. 902(13)–(14) advisory committee's note to 2017 amendment.
32. FED. R. EVID. 902(13)–(14).
33. *Id.*; *accord* FED. R. EVID. 901(b)(9).
34. FED. R. EVID. 902(14) advisory committee's note to 2017 amendment.

is often the case that a party goes to the expense of producing an authentication witness, and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented."[35] This amendment provides a procedure through which the parties can determine before trial whether a real challenge to authenticity will be made, saving time and expense if the opposing party poses no objection to the certification of authenticity.

The new self-authentication rules will be particularly efficient in authenticating digital evidence duplicated for litigation or trial purposes. As explained by the notes following the amendment, data copied from electronic files, devices, or storage media are ordinarily authenticated by "hash value." "A hash value is a number that is often represented as a sequence of characters and is produced by an algorithm based upon the digital contents of a drive, medium, or file."[36] If the hash values for both the original and copy are identical, it is highly unlikely that the original and copy themselves are not identical, thus "identical hash values for the original and copy reliably attest to the fact that they are exact duplicates."[37] Rule 902(14) permits certification through a qualified person that she compared the hash value of the proffered copy to the original and they were identical. But the rule is not confined to hash values; it permits certification through "other reliable means of identification provided by future technology."[38]

A. Satisfying the Foundation of the Certification Requirement.

First and foremost, one must understand that Rules 902(13) and (14) do not permit a proffering party to circumvent the authentication requirement. They simply permit the proponent to do by certification, as a cost-saving measure, what the proponent would have formerly done by witness testimony. This means that the evidence must still be authenticated, whether that is by a written certification that satisfies Rule 901(b)(9), (b)(4), (b)(3), or the more general 901(a) standard.[39] In addition to substantive

35. FED. R. EVID. 902(13) advisory committee's note to 2017 amendment.
36. FED. R. EVID. 902(14) advisory committee's note to 2017 amendment.
37. *Id.*
38. *Id.*
39. FED. R. EVID. 901(b)(4) permits authentication through "Distinctive Characteristics and the Like," such as "[t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances." Under Rule 901(b)(3), authentication is allowed via "[a] comparison with an authenticated specimen by an expert witness or the trier of fact." One can envision authentication of electronic information, particularly digital copies, under either of these provisions, although other provisions would certainly suffice. The Honorable Paul W. Grimm, Professor Daniel J. Capra, and Gregory P. Joseph have published a useful and extensive manual on authenticating digital evidence that addresses authentication requirements for common types of digital evidence, including emails, text messages, chatroom and other social media conversations,

authentication requirements, the proponent must also satisfy procedural requirements under the Rules.

Rules 902(13) and (14) incorporate the procedural requirements for certification found in Rules 902(11) and (12).[40] Rules 902(11) and (12) permit self-authentication through certification of domestic or foreign records of regularly conducted activity if the certification sets forth the elements of Rule 803(6). This procedural reference in newly added Rules 902(13) and (14) is not intended to require, or even permit, a certification under these rules to prove the requirements of Rule 803(6), which provides a hearsay exception for records of regularly conducted activity, commonly known as the "business records exception."[41] Rules 902(13) and (14) are solely limited to authentication. The proponent must attempt to satisfy any anticipated hearsay objection(s) separately, through use of a hearsay exception or by offering it for some non-hearsay purpose.[42] In other words, satisfying the procedural requirements of 902(11) and (12) in terms of notice and certification will not automatically render a piece of evidence immune to an otherwise valid hearsay objection.

Instead, the reference to Rules 902(11) and (12) is to incorporate the procedural and notice requirements of the certification. Rule 902(11) requires for certification that a "custodian or another qualified person [provide a certification] that complies with a federal statute or a rule prescribed by the Supreme Court."[43] The reference to Rule 902(12) covers certifications made in foreign countries in a civil case.[44] It "must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed."[45] Satisfying these requirements for certification will, in turn, satisfy the certification requirements for 902(13) and (14).

The rules do not impose an absolute oath requirement for the certification to be valid. The Advisory Committee note to Rule 902(11) advises that a statement complying with 28 U.S.C. § 1746 will satisfy the declaration requirement of Rule 902(11), as would any comparable certification made under oath.[46] Section 1746 permits the use of unsworn declarations to authenticate evidence, if the declarant states that the

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websites and internet information, and social media postings. *See generally* Grimm et al., *supra* note 30.

40. FED. R. EVID. 902(13)–(14).
41. FED. R. EVID. 803(6), 902(13) advisory committee's note to 2017 amendment.
42. FED. R. EVID. 902(13) advisory committee's note to 2017 amendment.
43. FED. R. EVID. 902(11).
44. FED. R. EVID. 902(13) advisory committee's note to 2017 amendment.
45. FED. R. EVID. 902(12).
46. FED. R. EVID. 902(11) advisory committee's note to 2000 amendment.

information is true and correct and subject to the penalties of perjury.[47] Rules 902 (11)–(14) do not prohibit the use of a sworn statement, if that is preferred.

The offering party must also provide notice as required under Rule 902(11): "[b]efore the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record—and must make the record and certification available for inspection—so that the party has a fair opportunity to challenge them."[48] This means the party seeking to use the authentication-through-certification rule must provide reasonable written notice to the opponent of its intent to offer the certification, and must make the record and certification available for inspection, such that the opponent has an opportunity to consult his own experts and challenge them, if appropriate. The burden of going forward regarding questions of authenticity will be on the opponent, while the burden of proof remains with the proponent.[49]

A proponent may utilize the self-authentication method under Rule 902(13) and (14) if the following are satisfied:

- [A] qualified person or custodian (likely a forensic technician or an expert otherwise familiar with information technology) must make a written declaration under penalty of perjury regarding the facts which establish the authenticity of the exhibit.[50]
- [T]he proponent must provide reasonable written notice of its intent to use the certification and provide the opponent with the record and certification for inspection and a fair opportunity to challenge the authenticity of the record.[51]
- The certification must meet the authentication requirements necessary should a live witness have been presented to authenticate the item.[52]

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47. 28 U.S.C. § 1746. Section 1746 permits the following forms for unsworn declarations:
(1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).
(Signature)".
(2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).
(Signature)".
Id.

48. FED. R. EVID. 902(11).

49. Grimm et al., *supra* note 30, at 39–40.

50. IMWINKELRIED & LAMPLEY, *supra* note 13, at § 9.02[4][h][i].

51. *Id.*

52. *Id.* For a step-by-step tutorial as to the foundational elements for authenticating digital evidence under Rule 902(13), see EDWARD J. IMWINKELRIED, EVIDENTIARY FOUNDATIONS § 4.03[8] (10th ed. 2018) (setting forth foundational requirements for expert testimony and chain of custody for handling of the digital evidence necessary to satisfy authentication requirements for digital evidence). Additionally, the Federal Judicial Center has produced a short (approximately 7 minutes) video tutorial

- For Rule 902(13), the certification must, at a minimum, describe the process or system used by the machine generating the data and show it produces an accurate result.[53]
- For Rule 902(14), the certification must describe the process of identification, establish it is a reliable means of confirming the authenticity of the copy, such as describing the system of hash value comparison, and state the declarant performed the process of electronic comparison to confirm that the copy is identical to the original.[54]

Meeting the *procedural* requirements for certification of authenticity does not mean the evidence is trial admissible.[55] The certification must establish the proffered record's authenticity.[56] The opposing party can still challenge the electronic process producing the output as unreliable, or the information as inaccurate. If the offering party fails to give advance notice, or if the opponent lodges a viable objection to the certification, one can still call a foundation witness at trial, likely the expert who prepared the certificate, to establish the authenticity of the records.

The opponent can also still lodge valid objections on other grounds such as hearsay, relevance, or that the output is not what it purports to be. For example, one could object that the defendant was not the author, owner, or poster of the proffered digital evidence. The self-authentication method simply proves that the record came from a specific electronic system or that the cloned hard drive is identical to the original.

B. Examples of Typical Uses of New Rules 902(13) and (14).

The new authentication-by-certification procedures provided for in Rules 902(13) and (14) will have a number of cost-saving applications for authenticating digital evidence. For example, under Rule 902(13), a certification could provide the medium in which a qualified person describes the process in which a webpage printout was retrieved, authenticating it as a printout of X's social media page, or that a computer output, such as a database report or spreadsheet, was produced by an electronic process.[57] The Advisory Committee on Evidence Rules May 7,

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on self-authenticating electronic evidence under the new rules. *Amendments to the Federal Rules of Practice and Procedure: Evidence 2017—Self-Authenticating Electronic Evidence*, FEDERAL JUDICIAL CENTER (Dec. 1, 2017), https://www.fjc.gov/content/325216/rules-amendments-2017-self-authenticating-electronic-evidence [https://perma.cc/NTV5-S998].

53. IMWINKELRIED & LAMPLEY, *supra* note 13, at § 9.02[h][i]. *See* FED. R. EVID. 901(b)(9).

54. FED. R. EVID. 902(13)–(14) advisory committee's note to 2017 amendment.

55. *Id.*

56. *Id.*

57. FED. R. EVID. 902(13) advisory committee's note to 2017 amendment.

2016 Report to the Standing Committee detailed the following examples of useful applications of new Rules 902(13) and (14).

1. Rule 902(13)

> **1. Proving that a USB device was connected to (i.e., plugged into) a computer:**
>
> In a hypothetical civil or criminal case in Chicago, a disputed issue is whether Devera Hall used her computer to access files stored on a USB thumb drive owned by a co-worker. Ms. Hall's computer uses the Windows operating system, which automatically records information about every USB device connected to her computer in a database known as the "Windows registry." The Windows registry database is maintained on the computer by the Windows operating system in order to facilitate the computer's operations. A forensic technician, located in Dallas, Texas, has provided a printout from the Windows registry that indicates that a USB thumb drive, identified by manufacturer, model, and serial number, was last connected to Ms. Hall's computer at a specific date and time.[58]

Without the benefit of Rule 902(13), the proponent would have to call a live witness, a forensic technician, who would testify as to his background and qualifications, the process by which digital forensic examinations are conducted, the steps taken during his examination of the Hall computer, a description of the Windows registry system and how it maintains USB information, and the steps he took to verify that the Windows registry information matched the information on the USB.

With 902(13), the proponent could provide this testimony through a certification. The certification would still provide the forensic expert's background and qualifications. It would still describe the process of digital forensic examinations, including a description of how the Windows registry maintains identifying information for every USB inserted into the computer. The technician would verify that the Windows registry produces an accurate result and that the printout of the registry information matches the USB by manufacturer, model, and serial number. If the proponent satisfies the notice requirement and the opponent does not dispute the accuracy or reliability of the process used to produce the registry printout, the proponent would not need to call the forensic technician for authentication.

Other examples of such machine-generated information include internet browser histories and Wi-Fi access logs.[59] Consider this example given by the Advisory Committee:

58. Report to Standing Committee, *supra* note 8, at 50.
59. *Id.*

2. Proving that a server was used to connect to a particular webpage:

Hypothetically, a malicious hacker executed a denial-of-service attack against Acme's website. Acme's server maintained an Internet Information Services (IIS) log that automatically records information about every internet connection routed to the web server to view a web page, including the IP address, webpage, user agent string and what was requested from the website. The IIS logs reflected repeated access to Acme's website from an IP address known to be used by the hacker. The proponent wants to introduce the IIS log to prove that the hacker's IP address was an instrument of the attack.[60]

With Rule 902(13), the proponent can have an appropriately trained website expert certify a description of the mechanics of the server's operating system, his search of the IIS log, how the log works and retains information, and that the exhibit to be introduced is an accurate reflection of the IIS log. If the opponent does not object to the accuracy of the log, the proponent would not need to call the witness at trial.[61]

Another example of a potential use of the Rule 902(13) certification is to prove GPS location through digital information:

3. Proving that a person was or was not near the scene of an event:

Hypothetically, Robert Jackson is a defendant in a civil (or criminal) action alleging that he was the driver in a hit-and-run collision with a U.S. Postal Service mail carrier in Atlanta at 2:15 p.m. on March 6, 2015. Mr. Jackson owns an iPhone, which has software that records machine-generated dates, times, and GPS coordinates of each picture he takes with his iPhone. Mr. Jackson's iPhone contains two pictures of his home in an Atlanta suburb at about 1 p.m. on March 6. He wants to introduce into evidence the photos together with the metadata, including the date, time, and GPS coordinates, recovered forensically from his iPhone to corroborate his alibi that he was at home several miles from the scene at the time of the collision.[62]

By using Rule 902(13), the proponent could rely on a forensic technician, who would certify facts regarding the iPhone operating system, including that it records machine-generated dates, times, and GPS coordinates of the photographs. The technician would also certify his process of searching the iPhone, the results of the metadata found, and that the exhibit is an accurate reflection of the photographs.[63]

Rule 902(13) can also be used to prove information gathered in a text message log:

4. Proving association and activity between alleged co-conspirators:

60. *Id.*
61. *Id.* at 51.
62. *Id.*
63. *Id.* at 52.

> Hypothetically, Ian Nichols is charged with conspiracy to commit the robbery of First National Bank that occurred in San Diego on January 30, 2015. Two robbers drove away in a silver Ford Taurus. The alleged co-conspirator was Dain Miller. Dain was arrested on an outstanding warrant on February 1, 2015, and in his pocket was his Samsung Galaxy phone. The Samsung phone's software automatically maintains a log of text messages that includes the text content, date, time, and number of the other phone involved. Pursuant to a warrant, forensic technicians examined Dain's phone and located four text messages to Ian's phone from January 29: "Meet my house @9"; "Is Taurus the Bull out of shop?"; "Sheri says you have some blow"; and "see ya tomorrow." In the separate trial of Ian, the government wants to offer the four text messages to prove the conspiracy.[64]

By using Rule 902(13), the proponent would provide notice of and a copy of the forensic technician's certification regarding Dain's phone operating system, his search of the phone's text message logs, how logs are created, and that the exhibit is an accurate reflection of Dain's phone's log. If the opposing party does not dispute the reliability or accuracy of the process that produced the log, or the text message log itself, the proponent would not need to call the expert at trial.[65]

Note that in the preceding example, the opponent may still have a hearsay objection to the text messages found on Dain's phone. The court would need to evaluate the statement, "Sheri says you have some blow," to determine whether it is an admissible co-conspirator statement during and in furtherance of the conspiracy under Rule 801(d)(2)(E) and under Rule 805 to assess hearsay within hearsay.[66]

2. Rule 902(14)

Under Rule 902(14), a forensic technician could make a copy of a phone, using hash values or other reliable means, and the proponent could authenticate the copy through a certification that describes the process used and verifies the copy.[67] This would allow the proponent to forego calling the witness at trial, absent an objection from the opponent regarding the reliability of the process. Note, authentication in this manner requires meticulous observation and preservation of the digital evidence in collection and duplication that preserves hash values, which are presently the most accepted way of establishing identical duplication.[68]

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64. Report to Standing Committee, *supra* note 8, at 52.
65. *Id.*
66. *Id.*
67. FED. R. EVID. 902(14) advisory committee's note to 2017 amendment.
68. IMWINKELRIED, *supra* note 52, at § 4.03 [9] (10th ed. 2018).

However, the rules do not eliminate the need for the proponent to establish authorship, relevance, or avoid any other objections an opponent may have.[69] The new rules simply provide a procedure for affirmation that an output came from a certain electronic process or that an electronic copy is the equivalent of the original. Challenges to authenticity of electronic evidence may require technical information about the system or process at issue. Thus, the proponent should be prepared to answer additional challenges an opponent may have. Additionally, if the authenticity of the digital evidence will be interjected at trial or pose a question in a juror's mind, the offering party may elect, for strategic reasons, to call the foundation witness at trial.

C. Criminal Trial—The Defendant's Sixth Amendment Right to Confrontation.

In a criminal trial, self-authentication through certification of electronic output or data may present a somewhat nuanced confrontation issue, which may lead a criminal defendant to object to the certification of authentication itself as violating the defendant's right to confrontation in a criminal trial. In *Crawford v. Washington*,[70] the Supreme Court held that if the prosecution is offering into evidence "testimonial" hearsay, it must show that the declarant is unavailable to testify and that at the time the statement was made, the defendant had an opportunity to cross-examine the declarant.[71] In *Melendez-Diaz v. Massachusetts*,[72] the Supreme Court held that sworn "certificates of analysis," stating the results of lab tests on suspected drugs, were testimonial hearsay, and hence, required that the defendant have the opportunity to cross-examine the declarant.[73] The Supreme Court noted that although the documents at issue were called certificates, they were definitively affidavits, prepared specifically for the purpose of identifying the drugs for the criminal trial.[74] Justice Thomas provided the fifth vote, noting that the statements were "sworn."[75] For him that was apparently critical, but it leaves open the question on how he might vote if the lab reports were not submitted under oath.

Because the certificate of authenticity under Rules 902(13) and (14) is *prepared for trial,* it seems to fall within the *Melendez-Diaz* scope of

69. *Id.*
70. 541 U.S. 36 (2004).
71. *Crawford*, 541 U.S. at 53, 59.
72. 557 U.S. 305 (2009).
73. *Melendez-Diaz*, 557 U.S. at 311.
74. *Id.*
75. *Id.* at 329.

"testimonial," presenting a potential Confrontation Clause issue.[76] The purpose behind Rules 902(13) and (14) is to avoid the expense of calling a live witness at trial. With no declarant to cross-examine at trial, and no opportunity to do so prior to trial, a potential Confrontation Clause issue exists, but only if the certification is testimonial. In *Melendez-Diaz*, the Court "carved out" certain authentication certificates from the core class of testimonial hearsay:

> The dissent identifies a single class of evidence which, though prepared for use at trial, was traditionally admissible: a clerk's certificate authenticating an official record—or a copy thereof—for use as evidence. But a clerk's authority in that regard was narrowly circumscribed. He was permitted "to certify to the correctness of a copy of a record kept in his office," but had "no authority to furnish, as evidence for the trial of a lawsuit, his interpretation of what the record contains or shows, or to certify to its substance or effect." . . . . The dissent suggests that the fact that this exception was "narrowly circumscribed" makes no difference. To the contrary, it makes all the difference in the world. It shows that even the line of cases establishing the one narrow exception the dissent has been able to identify simultaneously vindicates the general rule applicable to the present case. A clerk could by affidavit *authenticate* or provide a copy of an otherwise admissible record, but could not do what the analysts did here: *create* a record for the sole purpose of providing evidence against a defendant.[77]

The *Melendez-Diaz* carve-out recognizes a narrow exception from the constitutionally protected category of "testimonial" evidence when the certification is that the proffered exhibit is a *copy* of an "otherwise admissible record." But the exception will not apply when the record that is being certified was *created* for the purpose of providing evidence at trial.[78]

A number of circuit courts have addressed this issue in the context of Rule 902(11) (authentication of domestics records of regularly conducted activity). Each court has held that the certification of Rule 803(6) elements was not testimonial, and hence, its admission did not violate the Confrontation Clause because the certificate authenticated business records that were *already existing*, not ones created specifically for trial.[79] Because

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76. *Id.* at 311.

77. *Id.* at 322–23 (internal citations omitted) (emphasis in original).

78. *Id. See also* IMWINKELRIED & LAMPLEY, *supra* note 13, at § 9.02[h][iii]; Grimm et al., *supra* note 30, at 46–51.

79. *See, e.g.*, United States v. Brown, 822 F.3d 966, 974 (7th Cir. 2016) (holding records "were routine and prepared in the ordinary course of business, not in anticipation of prosecution;" thus they were not testimonial and did not violate the Confrontation Clause); United States v. Albino-Loe, 747 F.3d 1206, 1211 (9th Cir. 2014) ("[A] routine certification by the custodian of a domestic public record . . . and a routine attestation to authority and signature . . . are not testimonial in nature."); United States v. Brinson, 772 F.3d 1314, 1323 (10th Cir. 2014) (authentication certification of debit card records

Rule 902(14) deals specifically with duplication of electronic information, a certification that copied information has been verified as identical through hash values or other reliable processes should not be testimonial under the reasoning of the cases applying the *Melendez-Diaz* clerical exception to Rule 902(11) certifications.

The same analysis may pertain to a certification under Rule 902(13) for records purely derived from a webpage or other electronic source. The laboratory certification at issue in *Melendez-Diaz* purportedly interpreted test results that were conducted with human input in anticipation of litigation, making them testimonial.[80] Thus, there is some room to distinguish *Melendez-Diaz* and argue that certifications under Rule 902(13) are not testimonial. But Rule 902(13) also includes information that is electronically generated. A certification that such information is produced by a reliable process, or is accurate, would arguably be closer to the type of certification held testimonial in *Melendez-Diaz*. Take, for example, a certification that a computer reliably produced an analysis of a statistical probability of DNA. The machine-generated analysis could have been *created* for trial purposes. This is the scenario the *Melendez-Diaz* court held would be within the testimonial class.

That does not mean that a Confrontation Clause violation occurs with certification of machine-generated information, however, because such information *is not hearsay*.[81] With machine-generated data, there is no statement and no declarant to cross-examine. Instead, the likely challenge would be to the reliability of the process or method of computation

held not testimonial); United States v. Thompson, 686 F.3d 575, 581 (8th Cir. 2012) (certificate of authenticity of copies of employment records held not testimonial); United States v. Johnson, 688 F.3d 494, 505 (8th Cir. 2012) (certificate of authenticity under Rule 902(11) certifying lab report exhibit as true copy held not testimonial); United States v. Mallory, 461 F. App'x 352, 357 (4th Cir. 2012) ("Consequently, *Melendez-Diaz* makes clear that the Sixth Amendment right to confront witnesses does not include the right to confront a records custodian who submits a Rule 902(11) certification of a record that was created in the course of a regularly conducted business activity."); United States v. Yeley-Davis, 632 F.3d 673, 680–81 (10th Cir. 2011) (Rule 902(11) certificate that cell phone records meet business records exception held not testimonial because the purpose was to authenticate business records already existing, not to establish evidence at trial); United States v. Green, 396 F. App'x 573, 575 (11th Cir. 2010) (concluding cell phone records that were created in the ordinary course of business and "not for the purpose of proving a fact at a criminal trial" were non-testimonial and did not violate the Confrontation Clause); United States v. Schwartz, 315 F. App'x 412, 417 (3d Cir. 2009) ("Business records admitted pursuant to a hearsay exception, however, are not 'testimonial' and therefore do not implicate the Confrontation Clause."); United States v. Ellis, 460 F.3d 920, 927 (7th Cir. 2006) (foundational evidence to authenticate medical records under Rule 902(11) held not testimonial because the statements conveyed no information about the defendant, but merely the process and procedure necessary to create a business record).

80. *Melendez-Diaz*, 557 U.S. at 308–11.

81. *See* United States v. Moon, 512 F.3d 359, 362 (7th Cir. 2008) ("[D]ata are not 'statements' in any useful sense. Nor is a machine a 'witness against' anyone."). For a robust discussion of the Confrontation Clause objections to proposed Rules 902(13)–(14) and a response, *see* Grimm et al., *supra* note 30, at 46–51.

producing the results. If the reliability or accuracy of the process, computation, or system is in question, the opponent should object to its admissibility and argue that the declarant should be subject to cross-examination because the item has not been authenticated.[82]

Many Rule 902(13) certifications will fall within the "narrow exception" held not testimonial by *Melendez-Diaz*, in that they certify solely that the evidence existed before the litigation arose and the evidence was not created for purpose of providing testimony against an accused. But there is no one size fits all approach for Rule 902(13) certifications, which are not limited to duplicate digital evidence. Future cases will develop whether a *Crawford* objection may be successfully maintained against a Rule 902(13) certification that the data was generated through a reliable and accurate electronic process.[83]

The Advisory Committee for the Rules of Evidence opined that Rules 902(13) and (14) would present no Confrontation Clause issue, stating:

> The Committee is satisfied that no constitutional issue is presented, because the Supreme Court has stated in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 322 (2009), that even when a certificate is prepared for litigation, the admission of that certificate is consistent with the right to confrontation if it does nothing more than authenticate another document or item of evidence. That is all that these certificates would be doing under the Rule 902(13) and (14) proposals. The Committee also relied on the fact that the lower courts have uniformly held that certificates prepared under Rule 902(11) do not violate the right to confrontation; those courts have relied on the Supreme Court's statement in *Melendez-Diaz* . . . . There is of course no intention or implication from the amendment that a certification could somehow be a means of bringing otherwise testimonial reports into court. But the Committee concluded that if the underlying report is not testimonial, the certification of authenticity will not raise a constitutional issue under the current state of the law.[84]

Whether that view remains true for the majority of issues in which the new rules are applied will be an issue to be developed by the parties and courts. In sum, Rules 902(13) and (14) present an opportunity to streamline authentication issues in advance of trial and to save time and expense by

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82. *But see* Grimm et al., *supra* note 30, at 51 (opining that the Confrontation Clause objection to certifying accuracy is overstated because, in part, it is no different from objections to Rule 902(11) certifications as to reliability).

83. *But see id.* at 49–50 (arguing that even when generated in anticipation, machine generated evidence authenticated under Rule 902(13) is generally not testimonial because it is not hearsay, since machines do not make statements and cannot be cross-examined).

84. Report to Standing Committee, *supra* note 8, at 53–54 (noting that "the Committee emphasizes that the goal of the amendment is a narrow one: to allow authentication of electronic information that would otherwise be established by a witness, instead to be established through a certification by that same witness.").

avoiding the need to call a witness to authenticate evidence when the authenticity is not in dispute. For cases in which the accuracy, reliability, or authenticity is in dispute, the proponent can still call the foundational witness. In civil cases and in many applications of the certification procedure in criminal cases, there will be no Confrontation Clause issue for the reasons discussed above. However, the language of Rule 902(13) is sufficiently broad, such that if a record is created for the purpose of using it in a criminal trial against a defendant, there may be a meritorious argument that the defendant must have an opportunity to cross-examine the declarant who would testify as to the process and accuracy of the result. The contours of this limited situation will have to be developed by later cases.

III. PROPOSED AMENDMENT TO FEDERAL RULE OF EVIDENCE 807

The Judicial Conference Advisory Committee on Practice and Procedure ("the committee") approved publication of proposed amendments to the Federal Rule of Evidence 807 for a public comment period that ended February 15, 2018. Rule 807, commonly called the residual hearsay exception, allows, in some scenarios, the admission of hearsay statements that are not covered under Rule 803 (Exceptions to the Rule Against Hearsay) and Rule 804 (Hearsay Exceptions; Declarant Unavailable). Currently, Rule 807 is only applied in rare cases, but the proposed language of the amendments may allow for a wider application of the exception in some instances, and a more limited use in others. Scholars and members of the committee argue that the proposed amendments will increase flexibility of the exception, prevent distortion of other exceptions, reduce the interdependence between the exceptions, and broaden the exception to allow more reliable hearsay to be admitted.[85]

A. Rule 807 and Proposed Changes.

The proposed changes are as follows:

Rule 807. Residual Exception

(a) In General. Under the following ~~circumstances~~ conditions, a hearsay statement is not excluded by the rule against hearsay: ~~even if~~

(1) the statement is not specifically covered by a hearsay exception in Rule 803 or 804~~:~~;

(~~1~~ 2) ~~the statement has equivalent circumstantial guarantees of trustworthiness~~ the court determines that it is supported by sufficient guarantees of trustworthiness—after considering the totality of

85. *See* Daniel J. Capra, *Expanding (Or Just Fixing) The Residual Exception to the Hearsay Rule*, 85 FORDHAM L. REV. 1577, 1581–94 (2017) (discussing the purpose of amending the current rule).

circumstances under which it was made and any evidence 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~~.

(b) Notice. The statement is admissible only if~~, before the trial or hearing,~~ the proponent gives an adverse party reasonable notice of ~~the~~an intent to offer the statement ~~and its particulars, including the declarant's name and address,~~ 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.[86]

B. Deletion of "Equivalency of Trustworthiness."

The Advisory Committee's proposed removal of the equivalence of trustworthiness standard is intended to provide an easier application of the trustworthiness requirement and to ameliorate varying discretionary assessments of the "equivalence" standard.[87] The current version of the Rule requires courts to compare the trustworthiness guarantees of proffered hearsay to those in Rules 803 and 804.[88] This requirement often results in varied decisions among the courts because the trustworthiness guarantees found in Rules 803 and 804 differ in scope.[89] As the Advisory Committee noted, "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."[90] The Committee continued, "Given the difficulty and disutility of the 'equivalence' standard, the Committee has determined that a better, more user-friendly approach is

86. Preliminary Draft of Proposed Federal Rule of Evidence 807, 82 Fed. Reg. 37610, at 69–70 (proposed Aug. 11, 2017) (to be codified at Fed. R. Evid. 807), https://www.regulations.gov/document?D=USC-RULES-EV-2017-0005-0001 [https://perma.cc/668J-BSG5] (new material is underlined, matter to be omitted is lined through) [hereinafter Proposed Rule 807].

87. *Id.* at 68 (quoting excerpt from Memorandum Regarding Report of the Advisory Committee on Evidence Rules from William K. Sessions, III, Chair, Advisory Comm. on Evidence Rules, to Jeffrey S. Sutton, Chair, Comm. on Rules of Practice & Procedure 16 (May 7, 2016)).

88. *See* FED. R. EVID. 807.

89. Proposed Rule 807, *supra* note 86, at 68. *See also* Capra, *supra* note 85, at 1581–82 (noting, for example, that "it is common ground that the reliability guarantees of Rule 804's exceptions are weaker than those for Rule 803's exceptions—yet the equivalence language requires the court to compare the proffered hearsay to both the Rule 803 and 804 exceptions.").

90. Proposed Rule 807, *supra* note 86, at 68.

simply to require the judge to find that the hearsay offered under Rule 807 is trustworthy."[91]

Proponents of this change to remove the "equivalent" guarantees of trustworthiness standard in favor of a straightforward trustworthiness standard posit that removal of the standard will prevent erroneous comparisons to the measures set forth in Rules 803 and 804 and remove the interdependence between the hearsay exceptions that would then allow the Rules to be evaluated individually.[92] Note that the proposed Rule takes a somewhat opposite view; the proposed Rule would require the proponent "to establish that the proffered hearsay is a statement that 'is not specifically covered by a hearsay exception in Rule 803 or 804.'"[93] Thus, the proposed rule limits the circumstances in which Rule 807 can be invoked to those not already covered, and excludes evidence that fails an already existing exception. It "remains an exception to be invoked only when necessary."[94]

Opponents of the amendment to the equivalency of trustworthiness standard cite a lack of case law and the rare reversal of cases when arguing against changing the standard.[95] They also point to the intended application of the exception as a limited one and view the exclusion of evidence under this Rule as a result in line with the original intent of Congress.[96] Additionally, opponents raise concerns over possible uncertainty that could result from amendment. Those opposed to amendment on this issue state that the proposal to broaden the trustworthiness consideration could interrupt the predictability of evidentiary considerations during trial.[97]

C. Defining "Trustworthiness" through Consideration of Corroborating

91. *Id.*

92. *See id.* (discussing the wide discretionary standard that has developed contrary to the intent of the drafters); *see also* The National Association of Criminal Defense Lawyers, *Comments on the Proposed Changes to Rule 807 of the Federal Rules of Evidence* (Feb. 15, 2018), https://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=50318&libID=50290 [https://perma.cc/G2FD-SQEM].

93. Proposed Rule 807, *supra* note 86, proposed advisory committee note at 71.

94. *Id.*

95. *See* Victor Gold, *The Three Commandments of Amending the Federal Rules of Evidence*, 85 FORDHAM L. REV. 1615, 1619–20 (2017) (stating that a majority of courts engage in consideration of reliability in light of traditional exceptions).

96. *See id.* (arguing that amendment would undermine the intent of the rule). Note that the proposed amendments to Rule 807 have changed somewhat since the publication of Professor Gold's article. The proposal now requires, as an element of Rule 807, that the statement not be covered by a hearsay exception in Rule 803 or 804, which will limit the expansion of the rule. *Compare id.* at 1617–18 *with* Proposed Rule 807(a)(1).

97. *See* Gold, *supra* note 95, at 1621 (comparing consequences of the proposed amendments to the 2000 amendment of Rule 702).

Evidence.

The Advisory Committee's proposed amendment would allow courts to consider corroborating evidence in determining the validity of statements under the residual hearsay exception.[98] The proposed Advisory Committee note reflects, "Most courts have required the consideration of corroborating evidence, though some courts have disagreed."[99] The amendment would provide a uniform approach, recognizing that the existence or absence of corroboration is relevant to the accuracy of the statement.[100] Proponents of this change opine that this amendment would strengthen the determination of validity in hearsay statements.[101]

Commentators, such as the Federal Magistrate Judges Association ("FMJA"), expressed concern regarding the language used in this proposed amendment.[102] The FMJA argued that the language could be clearer and expressed concern that the current language might result in more persuasive evidence being admitted because it is corroborated with weaker evidence, therefore expanding the scope of the exception.[103] However, proponents of the rule contend, "The ultimate inquiry is whether the declarant is telling the truth, and reference to corroborating evidence is a typical and time-tested means of helping to establish that a person is telling the truth" and consideration of corroborating evidence is used in trials every day.[104]

D. Removal of Materiality/Interest of Justice Requirements.

The Advisory Committee voted to delete the requirement that the evidence proffered under Rule 807 be evidence of a material fact and that its admission would serve the purposes of the Federal Rules and interests of justice. According to the proposed Committee note, "These requirements have proved to be superfluous in that they are already found in other rules (*see* Rules 102, 401)."[105] Specifically, the Advisory Committee observed that the language "material fact" is in conflict with the avoidance of the term

98. *See* Proposed Rule 807, *supra* note 86, at 71, Proposed Advisory Committee Note to Rule 807 ("The amendment specifically allows the court to consider corroborating evidence in the trustworthiness enquiry.").

99. *Id.*

100. *Id. See also* Capra, *supra* note 85, at 1585 ("Finally, courts should be allowed to consider that no corroborating evidence has been presented. If there is no corroborating evidence, then, just as in real life, a factfinder needs to be more wary about accepting the conclusion.")

101. *See* Capra, *supra* note 85, at 1584.

102. Federal Magistrate Judges Association, *Comments on the Proposed Amendments to the Federal Rules of Civil and Criminal Procedure Set Forth in the Preliminary Draft of August 2017* (Jan. 25, 2018).

103. *Id.*

104. Capra, *supra* note 85, at 1584.

105. Proposed Rule 807, *supra* note 86, at 71, Proposed Advisory Committee note to Rule 807.

"materiality" in Rule 403.[106] Additionally, because courts have analogized material for Rule 807 purposes to relevance under Rule 403, it is superfluous. Similarly, nothing is added by including an element to serve "the interests of justice and the purpose of the rules" because that guidance is already provided by Rule 102.[107]

Scholars, such as Victor Gold, express concern over the potential effects that this change might have in terms of a trial and rulings on the evidence considered under this Rule.[108] Gold points to the amendment of Rule 702 that was adopted in 2000 in comparing the potential effect that a broader standard might have on the courts.[109] Gold argues that amendment to this standard will result in a vague standard that might then lead to uncertain consequences in evidentiary rulings.[110]

E. Retention of "More Probative" Requirement.

The Advisory Committee on the Evidence Rules left intact the language requiring that a hearsay statement must be "more probative than any other evidence that the proponent can obtain through reasonable efforts."[111] Through preservation of this language, the Committee expressed a desire to leave the residual hearsay exception a limited one.[112]

Proponents of change in this area of the Rule expressed concern that the more probative requirement has been interpreted by courts in a manner that precludes the party from presenting the best evidence *it finds persuasive*, or worse, the cumulative persuasive value of the proffered evidence in addition to other evidence.[113] As Professor Daniel J. Capra has argued,

> It is odd to allow a court under an evidence rule to tell the litigant, "there is other evidence that is as strong or stronger than what you have

106. *Id.* at 68. Rule 403 provides, "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." FED. R. EVID. 403.

107. Proposed Rule 807, *supra* note 86, at 68. Rule 102 provides, "[t]hese rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination." FED. R. EVID. 102.

108. *See* Gold, *supra* note 95, at 1621 (arguing that this change would result in a constrained standard which may delay courts in ruling on evidentiary matters).

109. *Id.* at 1621–22.

110. *See id.*

111. Proposed Rule 807, *supra* note 86, at 69.

112. *See id.* ("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.").

113. *See* Capra, *supra* note 85, at 1586–87 ("The 'more probative' language allows the court to wrest control from the party, who should have the autonomy to decide which of two pieces of reliable evidence it should present—or whether to present both.").

> presented to me, so go and get that." Shouldn't the litigant have the autonomy to figure out what evidence it wants to put in, so long as it is probative and reliable?[114]

F. Notice Requirement.

The Advisory Committee also proposed amendments to the notice requirement for Rule 807. The amendments to the notice provision allow a court to excuse lack of notice for good cause. Other changes include: (1) the word "particulars" has been removed; (2) notice in writing is now required; and (3) the requirement that a declarant's address be listed has been removed.[115] In amending the notice requirements, the Advisory Committee expressed a desire to delete superfluous language, and prevent disputes on whether notice has actually been given.[116] Furthermore, amending Rule 807 to add a good cause requirement would resolve a conflict between courts, as many courts have interpreted the Rule as containing a good cause requirement already, while others have disagreed.[117] Additionally, proponents in favor of removing "particulars" and replacing it with "substance" have noted that substance is found in Rule 103(a)(2), which will allow courts and attorneys to determine the scope of notice required.[118]

The Advisory Committee did not elect to add an additional layer to the notice requirement of intent to offer the statement under the residual hearsay exception (the notice requirement pertains to the intent to offer the statement, not the applicable exception).[119] The rationale is that the proponent may not know at the time he provides notice that he or she will need to resort to the residual hearsay exception, resulting in a wide net approach where the proponent provides notice of intent to use the residual hearsay exception for all hearsay evidence, in case it becomes necessary to invoke the rule.[120] Thus, the notice requirement pertains to intent to offer

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114. *See id.* at 1586 (discussing the position of the Montana Rules Commission, which recommended that Montana adopt a version of Rule 807 without the "more probative requirement" because the restriction "would have the effect of severely limiting the instances in which the exception would be used and would be impractical in the sense that a party would generally offer the strongest evidence available regardless of the existence of the requirement.") (quoting Montana Rule of Evidence 803(24) Montana rules commission comment).

115. *See* Proposed Rule 807, *supra* note 86, at 69.

116. *See id.* at 72.

117. Capra, *supra* note 85, at 1595. Professor Capra offers the following examples of when an exception to the pretrial notice requirements seems justified and necessary: "(1) statements from declarants that, despite diligent efforts, are only discovered once trial has begun and (2) hearsay statements of people who are scheduled to be called as witnesses but who, without warning, become unavailable at the time of trial." *Id.*

118. *Id.* at 1598.

119. *Id.* at 1599.

120. *Id.*

the particular statement, and does not necessarily require the proponent to articulate the grounds for doing so. However, some courts have imposed a requirement under current Rule 807 of notice of intent to proffer the statement and use the residual hearsay exception.[121]

Commentators seem to look favorably upon the amended notice requirements. However, specific associations, such as The National Association of Criminal Defense Lawyers, commented seeking to add a caveat to the notice requirement that would make clear the different notice standards in criminal law in consideration of constitutional guarantees and protections given to the accused.[122]

Comments for the proposed amendments to Rule 807 closed on February 15, 2018. The Advisory Committee for the Federal Rules of Evidence will review the public comments, make any changes necessitated by public comment, and either republish a revised rule for public comment or submit the final rule to the Standing Committee for approval.[123]

IV. CONCLUSION

The reality of our increasingly digital life necessitated significant changes to the Federal Rules of Evidence effective December 1, 2017. The "ancient documents" hearsay exception no longer applies to documents that are more than twenty years old; instead the document must have been in existence prior to 1998, reflecting the reality that much evidence retained or published on the internet does not meet a threshold showing of reliability simply because of its continued existence. Additionally, new Rules 902(13) and (14) permitting self-authentication through a certification satisfying the authentication requirements for electronically-generated evidence or digital copies of electronic evidence should save the time and expense of authenticating such evidence through live witness testimony in many cases. Finally, the Advisory Committee to the Federal Rules of Evidence has proposed significant changes to the residual exception for hearsay, Rule 807, designed to promote uniformity in its application, reduce the ambiguous standards some courts used in determining equivalent guarantees of trustworthiness, remove superfluous standards such as material fact and serving the interest of justice, and improve the notice requirements.

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121. *See id.* at 1599 n.110 (collecting cases). *See also* United States. v. Ruffin, 575 F.2d 346, 358 (2d Cir. 1978) ("Rule 803(24) [now Rule 807] clearly requires . . . that provision can be utilized *only* if notice of an intention to rely upon it is given in advance of trial.") (emphasis in original).

122. The National Association of Criminal Defense Lawyers, *supra* note 92.

123. Proposed Rule 807, *supra* note 86, at 81–82 (describing procedures for advisory committee and Standing Committee after the period for public comment closes).