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February 15, 2018

Rebecca A. Womeldorf, Esq.  
Secretary, Committee on Practice & Procedure  
Judicial Conference of the United States

AMENDMENTS TO EVIDENCE RULES PROPOSED FOR  
COMMENT, Aug. 2017

Dear Ms. Womeldorf:

The National Association of Criminal Defense Lawyers is pleased to submit our comments on the proposed changes to Rule 807 of the Federal Rules of Evidence.

Our organization has nearly 10,000 direct members; in addition, NACDL's 94 state and local affiliates, in all 50 states, comprise a combined membership of some 40,000 private and public defenders. NACDL, founded in 1958, is the preeminent organization in the United States representing the views, rights and interests of the defense bar and its clients.

**EVIDENCE RULE 807 –RESIDUAL HEARSAY EXCEPTION**

The National Association of Criminal Defense Lawyers supports the proposed amendments to FRE 807. We agree that the existing requirement that residual hearsay have "circumstantial guarantees of trustworthiness" equivalent to those required for Rule 803 or 804 exceptions has not been a workable standard, given the differences in trustworthiness among the recognized hearsay exceptions themselves. The current rule provides no guidance about whether residual hearsay must equal the high level of trustworthiness of a public or business record, or the far lower standard of an excited utterance or declaration against interest.

The Association also agrees that the current rule's requirements that the evidence relate to a material fact and that it serve the interests of justice are superfluous and should therefore be deleted.

Finally, NACDL believes that the changes to the notice requirement are generally well-taken, with one caveat. While mandating disclosure of the substance of the statement before the trial or hearing promotes fairness, it must be kept in mind that the defense in a criminal case has no general obligation, as would the parties in a civil case or even to the same extent as the government when it functions as prosecutor of criminal charges, to disclose their evidence, witnesses, or theory before trial. Subject to a few independently justifiable exceptions set forth in the Criminal Rules, such as notice of alibi, the defense may ordinarily withhold its evidence (and even its theory of the case) until the government rests. The Advisory Committee Note should expressly recognize this structural asymmetry in criminal cases, which is constitutionally grounded.

On that basis the Note should make clear that disclosures by a criminal defendant under the amended Rule need not be detailed, need not include an explanation of the evidence's relevance if such information would reveal defense strategy that is otherwise not subject to pretrial disclosure, and may, in most cases, omit the proposed witness's name. Similarly, in expressly granting the trial court discretion to excuse a late disclosure for "good cause," such allowance should be routinely granted, absent exceptional circumstances, to the defendant in a criminal case. It should not be required that the defense establish that it did not know of the need for, or the existence of, the residual hearsay until the trial is underway. The judge should be allowed – and should ordinarily be expected – to admit the evidence, so long as the government, as opposing party, has sufficient opportunity to review and respond to it. And even then, a short continuance, rather than exclusion of the defense evidence, should be the preferred response.

We thank the Committee for its excellent work and for this opportunity to contribute our thoughts. NACDL looks forward to continuing our longstanding relationship with the advisory committee as a regular submitter of written comments.

Respectfully submitted,  
THE NATIONAL ASSOCIATION  
OF CRIMINAL DEFENSE LAWYERS

By: Peter Goldberger  
Ardmore, PA

*In Memoriam:*  
William J. Genego  
Santa Monica, CA  
*Late Co-Chair*

*Chair, Committee on  
Rules of Procedure*

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