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Hearsay: An Expanded Residual Exception or More of the Same?

The Federal Rules of Evidence were recently amended to change the criteria under the residual exception. In this article, we describe the new requirements of the residual exception and explore its potential relevance.

By Syed S. Ahmad and Yaniel Abreu
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The general inadmissibility of hearsay is something that has been around for some time, just like various exceptions that allow hearsay to be admitted in certain situations. The residual exception is an example of those nuances and serves as a “catch-all” exception by allowing hearsay to be admitted if the statement is considered trustworthy, among other requirements. The Federal Rules of Evidence were recently amended to change the criteria under the residual exception. In this article, we describe the new requirements of the residual exception and explore its potential relevance.

The Federal Rules of Evidence provide that an out-of-court statement offered for the truth of the matter asserted is hearsay, and hearsay is generally inadmissible. However, there are many exceptions allowing hearsay to be admitted under certain specified circumstances. There are exceptions for excited utterances, present sense impressions, statements under the belief of imminent death and many more. But, even if the specified exceptions do not apply, hearsay may be admissible if it meets the requirements of the “catch-all” residual exception.

Attorneys typically rely on the residual exception as a matter of last resort when hearsay evidence does not satisfy the requirements of any of the categorical exceptions. The new version of the residual exception, which became effective Dec. 1, 2019, is significantly different from its predecessor.

Under the old residual exception, hearsay was admissible if four requirements were satisfied. First, the statement needed to have “equivalent circumstantial guarantees of trustworthiness” to a statement admitted under one of the categorical exceptions. Second, the statement must have been offered as “evidence of a material fact.” Third, the statement was more probative on the point for which it was offered than any other evidence that the proponent could obtain through reasonable efforts. Finally, admitting the statement served the purposes of the rules of evidence and justice.

The exception, as amended, does away with some of those factors. Under the new residual exception, there are two requirements. First, hearsay is admissible if it 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.” Second, the statement “is more probative ... than any other evidence that the proponent can obtain through reasonable efforts.”

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Importantly, under the new rule, in determining whether a hearsay statement is sufficiently trustworthy, courts must consider the “totality of circumstances” under which the hearsay statement was made. The commentary surrounding the change suggests that the new totality of the circumstances standard is broader and will, therefore, capture more hearsay statements than the old version of the exception. Indeed, under the old residual exception, the proponent of the hearsay statement had to show that the statement had “equivalent” guarantees of trustworthiness as statements admitted into evidence under one of the categorical exceptions.

The shift away from the “equivalence” standard to the totality of the circumstances standard is expected to create more consistency and predictability for litigants. The committee notes for the 2019 amendment describe the difficulty courts have had applying the “equivalence” standard because they are free to choose among a spectrum of exceptions for comparison, all of which have different types of guarantees of reliability that differ in strength. Beyond that, the committee explained that some statements offered under the residual hearsay exception cannot be compared usefully to any of the categorical exceptions but might well be trustworthy. The amendments to the exception are intended to address these issues.

The new version of the residual exception will allow courts to analyze the reliability of a hearsay statement without the need to rely on any other exception to determine whether the statement is trustworthy enough for admission under the residual exception. It eliminates the requirement of an equivalence analysis by the court. In other words, courts will no longer have to analyze whether the hearsay statement is, for example, sufficiently trustworthy for admissibility under the excited utterance exception to conclude that the statement is admissible under the residual exception.

Under the new version of the exception, courts should proceed directly to determine whether the hearsay statement is sufficiently trustworthy based on the totality of the circumstances. The new version of the exception also clarifies that, in evaluating the trustworthiness of a hearsay statement, courts should consider any other evidence that corroborates the reliability of the statement. To be clear, however, in assessing the trustworthiness of the hearsay statement, courts must consider not only the existence of corroborative evidence, but also the strength and quality of that evidence. Accordingly, even though the amended residual exception instructs the courts to consider evidence corroborating the reliability of a hearsay statement, if courts determine that the corroborative evidence is of low credibility, they must account for that when weighing whether the statement is sufficiently trustworthy for admissibility.

In sum, the amended residual exception will likely benefit litigants and courts. Aside from creating more predictability, parties in litigation will have the ability to introduce evidence that may not have been otherwise admissible under the old version of the exception. Courts, on the other hand, now have a framework that should allow them to rule on the admissibility of evidence with increasing uniformity. Though the full extent of the amendment’s ramifications cannot be fully anticipated, the development of case law interpreting the new residual exception is something worth tracking for any litigator, as it can affect the scope of the evidence that litigants can introduce to prove their cases.

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