

## MEMORANDUM

**TO:** Judge Samuel A. Thumma

**FROM:** Kay Obray

**RE:** Federal Rule of Evidence 807 and Arizona Counterparts

**DATE:** August 4, 2010

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### I. INTRODUCTION

The residual exceptions to the hearsay rule found in Arizona Rules of Evidence (“ARE”) 803(24) and 804(b)(7) are identical to each other and to the text of Federal Rule of Evidence (“FRE”) 807. For many years, the FRE had two residual exceptions (like the current ARE). In 1997, the FRE were amended to (1) remove FRE 803(24) and 804(b)(5) and (2) add FRE 807. It would be appropriate for the ARE to be amended to adopt the language of FRE 807 and to remove ARE 803(24) and 804(b)(7).

### II. DISCUSSION

#### A. The FRE Residual Hearsay Exception.

When first enacted effective January 1, 1975, the FRE had two residual hearsay exceptions in FRE 803(24) and 804(b)(5). A 1997 amendment to the FRE (1) removed FRE 803(24) and 804(b)(5) and (2) added FRE 807. FRE 807 sets forth the following residual hearsay exception that applies for both FRE 803 and 804:

**Residual Exception.** A Statement not specifically covered by [FRE] 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can produce through reasonable efforts;

and (C) the general purposes of these rules and the interests of justice will best be served by admission, of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

The committee notes state that the 1997 amendments were to facilitate future “additions to [FRE] 803 and 804” and “[n]o change in meaning is intended” by the consolidation of the two residual FRE exceptions into FRE 807. Fed. R. Evid. 807 advisory committee's note (1997 Amendments). In essence, FRE 807 changed nothing of substance; it just eliminated the repetitive nature of having two FRE that read exactly the same. No cases located contradict this advisory committee note or imply any other purpose to the 1997 amendment.

### **B. The ARE Residual Hearsay Exceptions.**

The ARE were adopted effective September 1, 1977 and included ARE 803(24) and 804(b)(5). At that time, ARE 803(24) and 804(b)(5) were identical to their FRE counterparts. These ARE remain identical in substance, but currently are set forth in ARE 803(24) and ARE 804(b)(7).<sup>1</sup>

ARE 803 lists exceptions to the hearsay rule that apply regardless of whether the declarant is available as a witness. ARE 804 lists exceptions to the hearsay rule that apply when the declarant is not available to testify as a witness. ARE 803(24) and ARE 804(b)(7) provide the following exception to the hearsay rule:

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<sup>1</sup> The ARE were amended, effective January 1, 2010, to add ARE 804(b)(6) “Forfeiture by Wrongdoing.” See Order Adopting New ARE 804(b)(6) (9/3/2009). When adding that provision, ARE 804(b)(5) was renumbered as ARE 804(b)(7), without any substantive change, and ARE 804(b)(5) is now “reserved.” *Id.* There is no suggestion that these changes were intended to substantively change former ARE 804(b)(5) (currently ARE 804(b)(7)).

**“Other exceptions.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent’s intention to offer the statement and the particulars of it, including the name and address of the declarant.”

Although worded identically, the focus of ARE 803 (where the availability of the declarant as a witness is immaterial) and ARE 804 (where the declarant must be unavailable) differ. Given this different focus, it could be argued that the residual exceptions should be read differently—particularly given the focus on “guarantees of trustworthiness” and “interests of justice”—depending upon whether the declarant was available to testify. Indeed, the advisory committee notes for former FRE 803(24) provide that “the hearsay statement must possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available.” That said, I found no cases construing the two residual exceptions differently. The Arizona cases located referred to the two exceptions as being identical—aside from the issue of availability—with no additional analysis relevant here.<sup>2</sup> No Arizona case located suggests that combining the two residual exceptions into an ARE 807 would constitute a change in existing case law.

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<sup>2</sup> See, e.g., *State v. Allen*, 157 Ariz. 165, 755 P.2d 1153 (1988) (setting forth factors to determine trustworthiness under ARE 804(b)(5) (now ARE 804(b)(7)) when a declarant is unavailable); *State v. Just*, 138 Ariz. 534, 675 P.2d 1353 (1983) (stating exceptions are identical except for availability requirement); *State v. Tulipane*, 122 Ariz. 557, 596 P.2d 695 (1979) (similar).

### **III. RECOMMENDATION**

Arizona should follow the FRE and combine ARE 803(24) and 804(b)(7) into one Rule 807. As the committee notes for the amendments adding FRE 807 indicate, this would facilitate additions that may be made to Rules 803 and 804 without affecting the function of a residual exception. No change in meaning or application would result and the change would not run counter to any Arizona case law located. Finally, the change would bring this aspect of the ARE in line with the FRE.