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Strangulating Hearsay: The Residual Exceptions to the Hearsay Rule

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STRANGULATING HEARSAY:[1] THE RESIDUAL EXCEPTIONS TO THE HEARSAY RULE

by
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I. INTRODUCTION

The residual or "catch-all" hearsay exceptions contained in the Federal Rules of Evidence[2] permit a trial judge, under certain circumstances, to admit hearsay that does not fit within a specific exception to the hearsay rule. The courts continue to vary widely in their construction and implementation of these new exceptions. This article explores the history and background of the Federal Rules of Evidence, particularly the residual exceptions, catalogs the relevant cases, and concludes with suggestions for the proper scope of the exceptions.[3]

II. HISTORY AND BACKGROUND OF THE FEDERAL RULES OF EVIDENCE[4]

The American Law Institute (ALI) made the first major effort to revise, modernize, and structure the law of evidence, including the rules on the use of hearsay. Out of its work, begun in 1936, emerged the 1942 draft of the Model Code of Evidence. Unlike its approach in other areas of the law, the ALI made no attempt to "restate" the law of evidence, apparently believing that a recapitulation would not be as useful as a thoughtful revision.

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1. Professor Tribe has already "triangulated" hearsay. *See* Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957 (1974). It is now time for hearsay to be strangulated.

2. FED. R. EVID. 803 and 804.

3. The Federal Rules of Evidence became effective on July 1, 1975. Act of January 2, 1975, Pub. L. No. 93-595, § 1, 88 Stat. 1926.

4. Much of the discussion that follows is from the unpublished notes of Dean Frank T. Read, currently Dean of Indiana University School of Law at Indianapolis and formerly Dean of The University of Tulsa College of Law. Some of the history is documented in a letter from Albert Jenner, Chairman, Advisory Committee on Rules of Evidence to Judge Albert B. Maris, Chairman, Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, reprinted in 46 F.R.D. 173-81 (1969).

The drafters of the Model Code of Evidence departed from the common law in their approach to hearsay. They drafted a sweeping new exception to the hearsay rule that provided for admission of hearsay that did not fit any specific exception. This catch-all exception was qualified and safeguarded by other provisions that limited its application to declarations by persons with personal knowledge and empowered the trial judge to exclude hearsay whenever its probative value was outweighed by the likelihood of waste of time, prejudice, confusion, or unfair surprise. The traditional exceptions were retained but liberalized.

In 1949, the ALI referred its Model Code to the National Conference of Commissioners on Uniform State Laws for study and redrafting. Their hope was that the Model Code could serve as a basis for a uniform code of evidence for all states. The National Conference of Commissioners on Uniform State Laws drafted the Uniform Rules of Evidence based upon the Model Code. The Uniform Rules did not go quite as far in its treatment of hearsay as the Model Code. The drafters of the Uniform Rules retained the traditional exceptions, but liberalized them by giving power to judges to exclude hearsay when its value was outweighed by the dangers of wasted time, prejudice, confusion, or surprise. This treatment of hearsay, while narrower than that in the Model Code, nevertheless did empower judges to admit much needed and highly reliable evidence.

Although the Uniform Rules received widespread favorable comment from the bench, the bar, and the academic community, there was little legislative response. In the first decade after its drafting, the Uniform Rules were approved by the American Bar Association and the American Law Institute, but adopted only by the Virgin Islands. The Uniform Rules did, however, provoke discussion of the need for a modern code or law of evidence and demonstrated the feasibility of codifying workable rules.

Even though it became apparent that the Uniform Rules had no chance of being enacted as uniform legislation in all states, strong pressure still existed for the adoption of uniform rules. Those in favor of reforming the rules of evidence felt that the vast improvement in the federal courts from the use of the Federal Rules of Civil Procedure and the Rules of Admiralty was still incomplete because of the courts' inconsistent evidentiary rules. Many felt that the Federal Rules of Civil Procedure needed to be supplemented with companion rules of evidence that would be an

essential part of the trial procedure.

In 1941, Professor Thomas Green of Harvard suggested that the Supreme Court should promulgate rules of evidence for all federal court trials under The Rulemaking Act of 1934, as it had done with the Federal Rules of Civil Procedure. In 1957, sixteen years after Professor Green's suggestion, the judicial conferences of both the Third and Sixth Circuits recommended that uniform rules of evidence for all federal courts be drafted and propounded. In 1958, the House of Delegates of the American Bar Association adopted a resolution calling for uniform federal rules of evidence.

Responding to this strong desire for reform, Chief Justice Warren appointed a special committee on evidence in 1961. With Professor Green appointed as reporter, the committee unanimously concluded that, (1) the rules of evidence of federal courts should be improved, and (2) uniform rules for the entire federal system were both feasible and advisable. Based on the conclusions of the committee, Chief Justice Warren appointed a new drafting committee to provide a draft of the uniform rules by 1968. The committee began work in 1965 and made its first preliminary report in 1968. After reworking, the report was first published as a "Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates."[5]

On Monday, November 20, 1972,[6] the Federal Rules of Evidence were approved by the Supreme Court, with Justice Douglas dissenting, and authorized for transmittal to Congress. Congress, rather than allowing the Proposed Rules to become law, passed an act on March 30, 1973[7] requiring specific Congressional approval. After one and a half years of debate, Congress gave its approval and the rules took effect on July 1, 1975.[8]

III. The Debate Over the Residual Exceptions

The 1969 Preliminary Draft of the Proposed Rules of Evidence contained a general provision that: "A statement is not excluded by the hearsay rule if its nature and the special circumstances

5. Preliminary draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161 (1969).

6. Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183 (1972).

7. Act of March 30, 1973, Pub. L. No. 93-12, 87 Stat 9. *See* H.R. Rep. No. 650, 93d Cong., 1st Sess. 4 (1973).

8. Act of January 2, 1975, Pub. L. No. 93-595, § 1, 88 Stat. 1926.

under which it was made offer assurances of accuracy. . . ."[9] Subsequently, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States modified the 1969 draft in an attempt to more appropriately balance the need for predictability of evidentiary rules with the need for flexibility. The Committee recognized the dangers of unbridled judicial discretion and the need for definite rules, but also understood and appreciated that trial judges must have broad discretion. The Committee finally formulated a residual exception that provided, in pertinent part, that statements not specifically covered by an articulated exception to the hearsay rule were admissible if they had "comparable circumstantial guarantees of trustworthiness."[10] It was this residual exception that provided the grist for the congressional debates.

The House considered the rules first and referred them to the House Committee on the Judiciary, which in turn referred them to the Subcommittee on Criminal Justice.[11] The Committee report recommended that the residual exceptions be deleted.[12] The Committee pointed out that proposed Rule 102, which provided that all rules should be construed "to secure fairness in administration, elimination of unjustifiable expense and delay, promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined,"[13] was a sufficient grant of judicial discretion to innovate should the need arise.[14] Moreover, the Committee noted, the residual exceptions would inject an undesirable amount of uncertainty into the law of evidence and would consequently impair the ability of practitioners to predict trial court rulings.[15] The House approved the

9. Preliminary draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 345 (1969). *See* 4 J. WEINSTEIN AND M. BERGER, WEINSTEIN'S EVIDENCE ¶ 803 (2d ed. 1979).

10. Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315 (1971).

11. K. REDDEN AND S. SALTZBURG, FEDERAL RULES OF EVIDENCE MANUAL 307 (1975).

12. H.R. REP. No. 650, 93d Cong., 1st Sess. 6 (1973), *quoted in* FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES, at 134 (West 1975) [hereinafter cited as FEDERAL RULES].

13. FED. R. EVID. 102.

14. H.R. REP. No. 650, 93d Cong., 1st Sess. 6 (1973), *quoted in* FEDERAL RULES, *supra* note 12, at 134.

15. *Id.*

Committee report and deleted the residual exceptions.[16]

The Senate Committee on the Judiciary, in its own report, disagreed with the "total rejection of a residual hearsay exception."[17] The Committee agreed with the House that Rule 102 could be utilized to broaden and liberalize the specifically enumerated exceptions, but felt that it did not give trial judges sufficient discretion to admit hearsay which could not be pigeon-holed under a recognized exception. The Senate Committee felt that without a residual exception, trial judges would be confronted with the necessity of rejecting reliable and necessary evidence. The Committee believed that "there are certain exceptional circumstances where evidence which is found by a court to have guarantees of trustworthiness equivalent to or exceeding the guarantees reflected by the presently listed exceptions, and to have a high degree of probativeness and necessity could properly be admissible."[18] As illustrative of its position, the Committee cited *Dallas County v. Commercial Union Assurance Co.*[19]

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16. S. REP. No. 1277, 93d Cong. 2d Sess. 6 (1974), *quoted in* FEDERAL RULES, *supra* note 12, at 134.

17. *Id.*

18. *Id.*, FEDERAL RULES, at 135.

19. 286 F.2d 388 (5th Cir. 1961). *Dallas County* is perhaps the leading case supporting the view that trustworthy and reliable hearsay should be admitted even if it can not be pigeon-holed. Another oft-cited case is United States v. Barbati, 284 F. Supp. 409 (E.D.N.Y. 1968). Barbati was convicted for passing a counterfeit $10 bill. At his trial, a barmaid and a policeman were the chief witnesses for the prosecution. The barmaid testified that she received the bill, called the police, and identified the defendant to the policeman. She was unable to recognize the defendant at the trial because of the lapse of time. Her testimony at trial, therefore, was about her out-of-court statement. The policeman testified that Barbati was indeed the person that the barmaid pointed out. Objections were made that the testimony of the barmaid and the policeman was hearsay. Since the barmaid's testimony was indeed about an out-of-court statement and was offered to prove the truth of the matter asserted in the statement, it was hearsay. Similarly, the policeman's testimony concerned out-of-court assertive conduct which was offered to prove the truth of the assertion and it too was properly regarded as hearsay. Judge Weinstein admitted the testimony on the theory that it was necessary and trustworthy. In so doing, the court in essence accepted the so-called McCormick exception which provided that "a hearsay statement will be received if the judge finds that the need for and the probative value of the statement render it a fair means of proof under the circumstances." McCormick, *Law and the Future: Evidence*, 51 Nw. U.L. REV. 218, 219 (1956). McCormick's exception was not, at the time he wrote about it in 1956, a new idea. Wigmore had espoused the need for the recognition of a similar catch-all exception grounded upon necessity and reliability. *See* 5 WIGMORE ON EVIDENCE § 1420 (3d ed. 1940).

Although *Dallas County* and *Barbati* are the two leading cases recognizing the need for what can be called a residual exception, they are by no means the only cases so holding. *See, e.g.*, Chestnut v. Ford Motor Co., 445 F.2d 967 (4th Cir. 1971); United States v. Kearney,

In *Dallas County*, a question arose concerning the cause of the collapse of the Dallas County Courthouse clock tower in Selma, Alabama. County officials argued that the disaster was caused by a bolt of lightning, and brought suit to recover on an insurance contract for loss caused by fire or lightning. The insurance company argued that a bolt of lightning could not possibly have caused the tower to collapse and that the fault lay, rather, in structural flaws caused partially at least by a previous fire. At trial, the defendant sought to introduce a copy of a Selma newspaper dated June 9, 1901, fifty-six years before the collapse of the tower. The paper reported a fire in the unfinished dome of the courthouse. The trial court admitted the evidence, and was upheld on appeal. The appellate court held that:

> in matters of local interest, when the fact in question is of such a public nature it would be generally known throughout the community, and when the questioned fact occurred so long ago that the testimony of an eye witness would probably be less trustworthy than a contemporary newspaper account, a federal court . . . may relax the exclusionary rules to the extent of admitting the newspaper article in evidence. We do not characterize this newspaper as a "business record," nor as an "ancient document," nor as any other readily identifiable and happily tagged species of hearsay exception. It is admissible because it is necessary and trustworthy . . . and its admission is within the trial judge's exercise of discretion. . . .[20]

The court of appeals was careful to make clear that this newspaper report was not made admissible by an established exception to the hearsay rule. The evidence was admissible because it was necessary and trustworthy, and not because it fit neatly into any well-recognized exception to the hearsay rule.

The Senate Committee noted that "[b]ecause exceptional cases like the *Dallas County* case may arise in the future, the Committee has decided to reinstate a residual exception for rules 803

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420 F.2d 170 (D.C. Cir. 1969); Sabatino v. Curtiss Nat'l Bank, 415 F.2d 632 (5th Cir. 1969); United States v. Brown, 411 F.2d 1134 (10th Cir. 1969); Fleury v. Edwards, 14 N.Y.2d 334, 200 N.E.2d 550, 251 N.Y.S.2d 647 (1964); Perry v. Parker, 101 N.H. 295, 141 A.2d 883 (1958); Gagnon v. Pronovost, 97 N.H. 500, 92 A.2d 904 (1952). *See generally* 4 J. WEINSTEIN AND M. BERGER, WEINSTEIN'S EVIDENCE ¶ 803 (2d. ed 1979).

20. Dallas County v. Commercial Union Assurance Co., 286 F.2d 388, 397-98 (5th Cir. 1961).

and 804(b)."[21] The Senate Committee did agree with the House Committee that "an overly broad residual hearsay exception could emasculate the hearsay rule and the recognized exceptions or vitiate the rationale behind codification of the rules."[22] The Senate Committee thus reported that it had adopted a residual exception "of much narrower scope and applicability than the Supreme Court version,"[23] and offered the following language:

> 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 (i) the statement is offered as evidence of a material fact; (ii) 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 (iii) the general purposes of these rules and the interest of justice will best be served by admission of the statement into evidence.[24]

Moreover, the Committee indicated that it "intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances,"[25] and that no "broad license for trial judges"[26] was granted. The Senate adopted the Committee report, along with the proposed language, in late 1974.[27]

Since there was such profound disagreement between the House and Senate, the Rules were referred to a Conference Committee.[28] The Conference Committee went along with the Senate concerning the desirability of a residual exception but added an amendment providing that the use of a statement under the residual exception had to be preceded by full and fair notification of the adverse party.[29] Ultimately, Congress adopted the Conference Committee's recommendation, and the following residual ex-

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21. S. REP. No. 1277, 93d Cong., 2d Sess. (1974), *quoted in* FEDERAL RULES, *supra* note 12, at 135.
22. *Id.*
23. *Id.*
24. *Id.* at 3, FEDERAL RULES at 136.
25. *Id.* at 20, FEDERAL RULES at 135.
26. *Id.*
27. S. REP. No. 1277, 93d Cong., 2d Sess. (1974).
28. CONF. REP. 1597, 93d Cong., 2d Sess. 11 (1974), *quoted in* FEDERAL RULES, *supra* note 12, at 136.
29. *Id.*

ceptions, along with the Federal Rules, took effect on July 1, 1975:[30]

> 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, his intention to offer the statement and the particulars of it, including the name and address of the declarant.[31]

Thus, in order for evidence to be admitted pursuant to the residual exceptions, five conditions must be met: (1) The proponent of the evidence must give the adverse party the notice specified within the rule; (2) The statement must have circumstantial guarantees of trustworthiness equivalent to the specified exceptions listed in Rules 803 and 804; (3) The statement must be offered as evidence of a material fact; (4) The statement must be more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable efforts; and (5) The general purposes of the Federal Rules and the interests of justice must best be served by admission of the statement into evidence.

IV. APPLICATION OF THE RESIDUAL EXCEPTIONS BY THE FEDERAL COURTS

Since the effective date of the Federal Rules, a plethora of cases have construed the meaning of the residual exceptions.[32]

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30. Act of January 2, 1975, Pub. L. No. 93-595, § 1, 88 Stat. 1926, *quoted in* FEDERAL RULES, *supra* note 12, at 136.

31. FED. R. EVID. 803(24) and 804(b)(5). Identical wording appears in two rules by virtue of the taxonomy adopted by the Federal Rules concerning hearsay exceptions—which are divided into those which require an unavailable declarant (Rule 804) and those for which the availability of the declarant is immaterial (Rule 803).

32. *See, e.g.*, United States v. Ruffin, 575 F.2d 346 (2d Cir. 1978); United States v. Garner, 574 F.2d 1141 (4th Cir. 1978); United States v. West, 574 F.2d 1131 (4th Cir. 1978); United States v. Williams, 573 F.2d 284 (5th Cir. 1978); United States v. Hoyos, 573 F.2d

Thus, a substantial amount of judicial gloss has been placed upon the residual exceptions and the time is ripe for a thorough evaluation of their scope.

A. The Case For Exclusion: A Look at the Cases

The so-called exclusion cases involve the failure of the proponent to provide adequate notice, the lack of equivalent circumstantial guarantees of trustworthiness, and the failure of the proponent to use reasonable efforts to secure more probative evidence. The fact that the offered testimony was either not evidence of a material fact or that the interests of justice would not best be served by admission are not found to be recurring justifications for exclusion in these cases.

1. Inadequate Notice to the Adverse Party

In unequivocal terms, the residual exceptions state:

> 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, his intention to offer the statement and the particulars of it, including the name and address of the declarant.[33]

1111 (9th Cir. 1978); United States v. Davis, 571 F.2d 1354 (5th Cir. 1978); Frazier v. Continental Oil Co., 568 F.2d 378 (5th Cir. 1978); United States v. Oates, 560 F.2d 45 (2d Cir. 1977); United States v. Gonzalez, 559 F.2d 1271 (5th Cir. 1977); United States v. Mathis, 559 F.2d 294 (5th Cir. 1977); United States v. Medico, 557 F.2d 309 (2d Cir.), *cert. denied*, 434 U.S. 986 (1977); NLRB v. McClure Assocs., Inc., 556 F.2d 725 (4th Cir. 1977); United States v. Ward, 552 F.2d 1080 (5th Cir.), *cert denied*, 434 U.S. 850 (1977); United States v. Grasso, 552 F.2d 46 (2d Cir. 1977); United States v. Carlson, 547 F.2d 1346 (8th Cir.), *cert. denied*, 431 U.S. 914 (1976); United States v. Homer, 545 F.2d 864 (3d Cir.), *cert. denied*, 431 U.S. 954 (1976); United States v. Leslie, 542 F.2d 285 (5th Cir. 1976); United States v. Iaconetti, 540 F.2d 574 (2d Cir.), *cert. denied*, 429 U.S. 1041 (1976); United States v. Pfeiffer, 539 F.2d 668 (8th Cir. 1976); United States v. Gomez, 529 F.2d 412 (5th Cir. 1976); United States v. Yates, 524 F.2d 1282 (D.C. Cir. 1975); Muncie Aviation Corp. v. Party Doll Fleet, Inc., 519 F.2d 1178 (5th Cir. 1975); United States v. Napier, 518 F.2d 316 (9th Cir.), *cert. denied*, 423 U.S. 895 (1975); Matter of Sterling Navigation Co., 444 F. Supp. 1043 (S.D.N.Y. 1977); United States v. Bailey, 439 F. Supp. 1303 (W.D. Pa. 1977); Keyes v. School Dist. No. 1, 439 F. Supp. 393 (D. Colo. 1977); United States v. American Cyanamid Co., 427 F. Supp. 859 (S.D.N.Y. 1977); Grimes v. Employers Mut. Liab. Ins. Co., 73 F.R.D. 607 (D. Alaska 1977); Arrow-Hart, Inc. v. Covert Hills, Inc., 71 F.R.D. 346 (E.D. Ky. 1976); United States v. Iaconetti, 406 F. Supp. 554 (E.D.N.Y. 1976); Lowery v. Maryland, 401 F. Supp. 604 (D.Md. 1975); Workman v. Cleveland Cliffs Iron Co., 68 F.R.D. 562 (N.D. Ohio 1975); Ark-Mo Farms, Inc. v. United States, 530 F.2d 1384 (Ct. Cl. 1976).

33. FED. R. EVID. 803(24) and 804(b)(5).

A recurring rationale for exclusion is that the proponent has failed to adequately notify the adverse party.

In *United States v. Oates*,[34] the defendant Paul Oates was convicted, after a six day jury trial, of possession of heroin with intent to distribute and conspiracy. At his trial, the official report sheet of the chemist who analyzed the seized substance was admitted as evidence. On appeal, Oates contended that this report was inadmissible hearsay under the Federal Rules of Evidence. The court of appeals agreed with Oates that the document was inadmissible and accordingly reversed and remanded to the district court for a new trial.

The court looked at the circumstances surrounding the admission of the report and pointed out that it was "eminently clear" that the report was hearsay as defined by the Federal Rules.[35] Moreover, the court concluded that the report was neither admissible as a public record[36] nor as a record of regularly conducted activity.[37] In response to the argument made by the Government at trial, but dropped on appeal, that the report was admissible under the residual exceptions, the court pointed out that the requirement of advance notice was intended to be "[r]igidly enforced."[38] Therefore, any reliance on the residual exceptions "would be a mistaken reliance."[39]

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34. 560 F.2d 45 (2d Cir. 1977).

35. *Id.* at 65.

36. *Id.* at 66-68.

37. *Id.* at 68-80.

38. *Id.* at 73 n.30.

39. *Id.* at 72 n.30. In an extended footnote, the court viewed the legislative history and observed that "the advance notice requirement leaves no doubt that it was the intention of Congress that the requirement be read strictly." *Id.* at 73 n.30. Representative Hungate, a Conference Committee member, stated:

> The party requesting the court to make the statement under this provision must notify the adverse party of this fact, and the notice must be given sufficiently in advance of trial and hearing to provide any adverse party a fair opportunity to object or contest the use of the statement.

Id. Representative Dennis, another member of the Conference Committee stated:

> We took this [hearsay exception] out completely, and I would like to have left it out, frankly. . . . What the Senators did was put it back in and then they added this language about (A), (B), (C) that the gentleman from California (Mr. Danielson) referred to, and said that this principle would apply only where the statement is offered as evidence of a material fact, where it is more probative on the point for which it is offered than anything else the proponent can procure, and, again, where the general purposes of these rules and the interests of justice will best be served.
>
> We still did not like it very well, so we then wrote in the conference a provision which said that even so, one cannot do it, even with all of this language,

In similar fashion, the court in *United States v. Davis*[40] reversed a conviction of the defendant, a previously convicted felon, for receiving a firearm through interstate commerce under a statute prohibiting such receipt by convicted felons. At trial, the district court admitted a document prepared by an agent of the Bureau of Alcohol, Tobacco and Firearms that helped establish that the firearms traveled through interstate commerce. On appeal, the defendant argued that the document was inadmissible hearsay. The court of appeals agreed with the defendant and accordingly reversed and remanded for a new trial. As in *Oates*, the court first determined that the document was hearsay and that it was not admissible under any specific exception. The court observed that the "only other hearsay exception conceivably applicable is that found in Fed. R. Evid. 803(24) and its counterpart Fed. R. Evid. 804(b)(5)."[41] After quoting the residual exceptions, the court pointed out that "the record discloses that the Government made no attempt to invoke the exception by giving the defense the required advance notice of the hearsay evidence to be offered at trial."[42] Thus, the document could not be admitted under the residual exceptions.

2. Lack of Equivalent Circumstantial Guarantees of Trustworthiness

Another recurring rationale for exclusion is that the proponent failed to show that the offered evidence possesses "equivalent circumstantial guarantees of trustworthiness," as required by the residual exceptions. In *United States v. Gonzalez*,[43] the defendant

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> which includes the Court's language and the Senate's language, without giving the other side notice before trial so that counsel knows such an attempt is going to be made, and he can get ready for it.

Id. Since it was "difficult to imagine anyone more qualified to comment" (*Id.* at 70 n.26.) than Representatives Hungate, and since "Representative Dennis' remarks are also entitled to great weight" (*Id.* at 71 n.28.), the Congressional intent was clear: "undeviating adherence to the requirement that notice be given in advance of trial" (*Id.* at 73 n.30) was what Congress desired. The Second Circuit reaffirmed its intention to construe the notice requirement rigorously in United States v. Ruffin, 575 F.2d 346 (2d Cir. 1978). In *Ruffin*, the court, citing *Oates* at length, pointed out that the trial court erred in admitting documents under the residual exception absent advance notice.

40. 571 F.2d 1354 (5th Cir. 1978).

41. *Id.* at 1360 n.11.

42. *Id.*

43. 559 F.2d 1271 (5th Cir. 1977).

was convicted of possession of over a ton of marijuana in connection with a marijuana importation scheme. At his trial, the prosecution called Rogelio Guerrero to the stand. Guerrero refused to testify, even though he had already been convicted for his role in the marijuana importation caper and had been granted immunity. The trial court cited him for contempt, concluded that he was unavailable as a witness, and thereupon permitted the prosecution to introduce his grand jury testimony into evidence. That testimony identified the defendant Gonzalez as the man who had employed Guerrero to drive the truck involved in the scheme.

In reversing Gonzalez' conviction, the court of appeals first found that Guerrero's testimony was not admissible as a statement against interest under Rule 804(b)(3) because it did not meet the "against interest" guarantee of reliability.[44] It then analyzed the admissibility of Guerrero's grand jury testimony under the residual exception of Rule 804(b)(5). The court concluded that the statement failed "to pass the test of 'having equivalent guarantees of trustworthiness,' "[45] and was therefore inadmissible under the residual exception. As indicia of the lack of requisite trustworthiness, the court pointed out that: (1) Guerrero was under pressure at the grand jury hearing to answer, whether his answers were true or not; (2) The questions asked were leading and thus may have distorted Guerrero's testimony; (3) The fact that Guerrero was under oath was not significant in view of the prosecutor's threats that if Guerrero remained silent he could be given repeated six month contempt citations; (4) Guerrero feared that if he told the truth about who hired him, members of his family might be harmed, and this provided some incentive not to tell the truth; and (5) His testimony was not subject to cross-examination.[46]

In *United States v. Hoyos,*[47] the defendant was convicted of possession with intent to distribute methaqualone tablets, conspiracy to possess with intent to distribute, and distribution of the tablets. The defendant Hoyos' convictions resulted from the sale of methaqualone tablets to an undercover agent. At trial, the defense called Mrs. Cesar Castro to testify concerning a conversation she had with her husband in which her husband made statements

44. *Id.* at 1273.
45. *Id.*
46. *Id.*
47. 573 F.2d 1111 (9th Cir. 1978).

tending to exculpate Hoyos. Cesar Castro did not appear although he was subpoenaed by Hoyos to testify. The court sustained the Government's objection to Mrs. Castro's testimony on the ground that it was hearsay. Hoyos claimed that the trial court prejudicially erred when it excluded the testimony of Castro's wife concerning the conversation she had with her husband. Hoyos admitted that the offered testimony was hearsay but argued that it fell within either Rule 804(b)(3) or 804(b)(5).

On appeal, the court of appeals first considered whether the testimony should have been admitted as a statement against interest under Rule 804(b)(3). After quoting the rule, and stressing the fact that such statements were admissible only when corroborating circumstances clearly indicated trustworthiness, the court concluded that it was "satisfied that the trial court here properly exercised its discretion in excluding the offered testimony."[48] The court also rejected Hoyos' claim that Rule 804(b)(5) was available as a ground for admission of the offered testimony. The court dispensed with that argument entirely by stating: "By its plain language, the quoted section requires 'equivalent circumstantial guarantees of trustworthiness.' For the same reasons that the trial court properly refused the admission of the testimony under Rule 804(b)(3), it also ruled correctly in refusing to admit the testimony under Rule 804(b)(5)."[49]

3. Failure to Use Reasonable Efforts to Secure More Probative Evidence

Some courts have seized upon the failure of the proponent to use reasonable efforts to secure more probative evidence as a rationale for exclusion. In *United States v. Mathis*,[50] the defendant was convicted of violating a federal statute making it a crime to receive a stolen firearm. At trial, the Government called Wanda McPeters Mathis, the putative wife of the defendant, to testify against him. A hearing was conducted to determine whether Mrs. Mathis possessed the spousal privilege not to testify against her husband. The

48. *Id.* at 1115.

49. *Id.* at 1116. A remarkably similar analysis was used in Lowery v. Maryland, 401 F. Supp. 604 (D. Md. 1975). In *Lowery*, the court concluded that a statement which did not qualify as a statement against interest could not be admitted under the residual exception. *Id.* at 608. *See also*, NLRB v. McClure Assocs., Inc., 556 F.2d 725 (4th Cir. 1977).

50. 559 F.2d 294 (5th Cir. 1977).

trial judge decided that the marriage was a sham and that the spousal privilege was technically not available. The trial judge permitted the Government to introduce into evidence statements made by Mrs. Mathis to Alcohol, Tobacco and Firearms agents prior to trial, and Mrs. Mathis did not testify. On appeal, the defendant argued that the court prejudicially erred in admitting Mrs. Mathis' statements. The Government, in response, argued that her statements were admissible under the residual exceptions to the hearsay rule. The court concluded that the statements were improperly admitted and reversed on that basis.[51]

The court first noted that the statements were hearsay,[52] and that Rule 804(b)(5) was inapposite because Mrs. Mathis was "available," enjoying no valid privilege allowing her to avoid taking the stand.[53] The court then stated the conditions that had to be met before evidence could be admitted pursuant to the Rule 803(24) exception.[54] Since the live testimony of the available Mrs. Mathis would have been of more probative value than her reported statements, the hearsay was improperly admitted.[55] In short, the statement did not qualify because it was not, as the rule requires, more probative than other evidence that could have been procured through reasonable efforts: "The live testimony of the available witness, whose demeanor the jury would have been able to observe and whose testimony would have been subject to cross-examination, would have been of more probative value in establishing the truth than the bare statements transcribed by the ATF agents."[56]

Similarly, in *Council Commerce Corp. v. Sterling Navigation Co.*,[57] plaintiff Council Commerce Corporation (Council), a secured creditor, appealed from an order of a bankruptcy judge who had denied the relief sought against the bankrupt Sterling Navigation Co. (Sterling). At the bankruptcy trial, Council unsuccessfully sought to admit a transcript of testimony of a Sterling official given in the course of a non-adversary pretrial hearing as either former

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51. *Id.* at 297.
52. *Id.*
53. *Id.* at 298.
54. *Id.*
55. *Id.*
56. *Id.* The court added that " 'the purposes of these rules and the interests of justice were not served by the admission of the statements into evidence." *Id.* at 299. It appears however, that the gist of the holding is that the statements were inadmissible because they were not the most probative evidence the Government could procure.
57. 444 F. Supp. 1043 (S.D.N.Y. 1977).

testimony under Rule 804(b)(1) or as falling within the residual exception of Rule 804(b)(5). The court affirmed the bankruptcy judge's refusal to admit the testimony. It found the transcript inadmissible under Rule 804(b)(1) because of the lack of similar motive to develop testimony.[58] In regard to the residual exception, the court found that Council had failed to demonstrate that the evidence was " 'more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts.' "[59] The court felt that Council offered the transcript without making a reasonable effort to obtain other evidence. Thus, the court concluded that the interests of justice would not be served by admitting the evidence.[60] The "requisite necessity was lacking"[61] because Council made no effort to depose or produce others who might have been able to offer evidence more probative than that of the now unavailable Sterling official.[62]

B. The Case For Admission: Strangulating Hearsay

In a number of cases where evidence is admitted under the residual exceptions, the courts have sidestepped the advance notice requirement and have given little more than lip service to the other requirements of the rules. This perhaps is symptomatic of the judicial proclivity to admit evidence fairly regarded as necessary and reliable, technical requirements to the contrary notwithstanding.

1. Advance Notice Requirement

In sharp contrast to the strict enforcement of the notice requirement in cases discussed above,[63] there is a distinct line of cases that virtually ignore the requirement. In *United States v. Iaconetti*,[64] the defendant, Harry Iaconetti, was found guilty of soliciting and accepting a bribe and attempting to extort money. Iaconetti was a federal government contract inspector. The Government's chief witness, Mr. Lioi, an officer of a corporation seeking a

58. *Id.* at 1046.
59. *Id.*
60. *Id.* at 1047.
61. *Id.* at 1046.
62. *Id.* Similarly, in Workman v. Cleveland Cliffs Iron Co., 68 F.R.D. 562 (N.D. Ohio 1975), the court found inadmissible the written statement of an eyewitness, deceased by the time of trial, in light of the fact that other eyewitnesses were available.
63. *See* notes 33-42 *supra*, and accompanying text.
64. 406 F. Supp. 554 (E.D.N.Y.), *aff'd*, 540 F.2d 574 (2d Cir. 1976).

government contract, testified that Iaconetti solicited a bribe and attempted to extort money. As a defense, Iaconetti testified to the effect that he was only joking with Mr. Lioi. To rebut Iaconetti's testimony, the Government called Lioi's partner, Mr. Goldman, and the corporation's attorney, Mr. Stern. Stern testified concerning conversations he had with Lioi, which tended to substantiate Lioi's version. Iaconetti objected to Stern's testimony on the ground that it was inadmissible hearsay. The court held that the testimony of Stern was admissible under Rule 801(d)(1)(B)[65] as consistent testimony to rebut a charge of recent fabrication. Additionally, the court held that Stern's testimony was admissible as an admission under Rule 801(d)(2)(C).[66] Finally, the court held it admissible under the residual exception of Rule 803(24).[67] Concerning the residual exception, the court pointed out that although notice was not given until midway through the defendant's testimony (five days before Stern was called), it was nonetheless admissible. Judge Weinstein concluded:

> Although notice was not given in advance of trial, as required by the language of the Rule, allowance must be made for situations like this in which the need did not become apparent until after the trial had commenced. Since it was not the proponent's fault that notice could only be given after the trial began, and since the defendant was not prejudiced by the mid-trial notice, the evidence was properly admitted under Rule 803(24).[68]

Moreover, Judge Weinstein pointed out, Iaconetti "did not request a continuance or make any reference to an inability to prepare adequately to meet the testimony of the new witnesses."[69]

On appeal, the court of appeals[70] specifically agreed that Stern's testimony was properly admitted pursuant to Rule 803(24).[71] As far as the lack of advance notice was concerned, the court observed:

> Of course the defendant was not given notice prior to trial, of

65. *Id.* at 558.
66. *Id.*
67. *Id.* at 559-60.
68. *Id.* at 560.
69. *Id.* at 559-60.
70. 540 F.2d 574 (2d Cir. 1976).
71. *Id.* at 577.

> the Government's intention to offer the rebuttal testimony. . . . While strict compliance with the rule is thus lacking, we agree with Judge Weinstein that the defendant was given sufficient notice here, and that some latitude must be permitted in situations like this in which the need does not become apparent until after the trial has commenced. The fact that defendant did not request a continuance or in any way claim that he was unable adequately to prepare to meet the rebuttal testimony further militates against a finding that he was prejudiced by it. . . .[72]

The so-called *Iaconetti* approach has been adopted by a number of courts and has been used to largely vitiate the advance notice requirement.[73]

2. Circumstantial Guarantees of Trustworthiness

Two 1978 Fourth Circuit cases, *United States v. West*[74] and *United States v. Garner*,[75] when compared with the cases discussed above in which equivalent circumstantial guarantees of trustworthiness were found lacking,[76] illustrate a vast difference in approach

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72. *Id.* at 578.

73. In an extended footnote in *Iaconetti*, the court looked at the legislative history, observed that the notice requirement was a "compromise measure," and intoned:

> Our holding should in no way be construed as in general approving the waiver of Rule 803(24)'s notice requirements. Pre-trial notice should clearly be given if at all possible, and only in those situations where requiring pre-trial notice is wholly impracticable, as here, should flexibility be accorded.

540 F.2d at 578 n.6. The warning of footnote 6 has been largely ignored. In United States v. Leslie, 542 F.2d 285 (5th Cir. 1976), the Fifth Circuit expressly adopted the approach towards the advance notice requirement articulated by Judge Weinstein and the Second Circuit, quoting *Iaconetti* at length, but not mentioning or referring to footnote 6, which is appropriately viewed as restricting the court's ability to dispense with advance notice as a requirement. In United States v. Williams, 573 F.2d 284 (5th Cir. 1978), the Fifth Circuit took the ball it had picked up in *Leslie* and ran with it, admitting an affidavit under the residual exception without at all mentioning the lack of advance notice, thus perhaps doing away with it sub silentio.

In United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976), the Eighth Circuit expressly adopted the *Iaconetti* approach towards the advance notice requirement without mentioning the limitation of footnote 6. *Id.* at 1355. *See also* United States v. Lyon, 567 F.2d 777 (8th Cir. 1977); United States v. Medico, 557 F.2d 309 (2d Cir. 1977) (citing *Bailey* for proposition that a brief recess meets the requirement); Muncie Aviation Corp. v. Party Doll Fleet, Inc., 519 F.2d 1178 (5th Cir. 1975); United States v. Bailey, 439 F. Supp. 1303 (W.D. Pa. 1977) (although pre-trial notice was not afforded, the purpose of the requirement was met by allowing the defendant a three day recess to prepare to respond to the evidence).

74. 574 F.2d 1131 (4th Cir. 1978).

75. 574 F.2d 1141 (4th Cir. 1978).

76. *See* notes 43-49 *supra*, and accompanying text.

to the "equivalent circumstantial guarantees of trustworthiness" criterion for the residual exceptions.

In *West*, the defendants were convicted of distributing heroin and possession of heroin with intent to distribute. Grand jury testimony of a Michael Victor Brown, who was dead by the time of the trial, was admitted against the defendants pursuant to the residual exception of Rule 804. The facts revealed that Brown had volunteered to work with the Drug Enforcement Agency while in jail on a drug charge and had played a crucial role in making purchases from the defendants while under government surveillance.

The defendants maintained on appeal that the district judge prejudicially erred in admitting Brown's grand jury testimony under the residual exception contained in Rule 804. They focused their assignment of error upon the requirement that the statement have "equivalent circumstantial guarantees of trustworthiness," and contended that Brown's testimony at the grand jury was not trustworthy since Brown could not be cross-examined and did, after all, have a criminal record of his own.

The court found "very exceptional circumstances providing substantial guarantees of trustworthiness of Brown's grand jury testimony probably exceeding by far the substantial guarantees of trustworthiness of some of the other § 804(b) hearsay exceptions."[77] Among these exceptional circumstances, the court found "the most impressive assurance of trustworthiness" to be the extensive corroboration provided by the government agents.[78] Although Brown was not subject to cross-examination, the corroboration made the testimony trustworthy. The corroborative circumstances provided "a degree of trustworthiness probably substantially exceeding that inherent in dying declarations, statements against interest, and statements of personal or family history, all of which are routinely admitted under § 804(b)(2), (3) and (4)."[79] Since the agents were witnesses and subject to cross-examination, the inability to cross-examine Brown was "of considerable less significance than in those cases involving statement against interest, statements of family history, or dying declarations."[80] It was unnecessary to determine whether the circumstantial guarantees of trustworthiness were

77. United States v. West, 574 F.2d 1131, 1135 (4th Cir. 1978).
78. *Id.* at 1135.
79. *Id.*
80. *Id.* at 1135-36.

equivalent to those which arise under the former testimony exception of Rule 804(b)(1) since "the equivalent guarantee of trustworthiness requirement of § 804(b)(5) is met if there is equivalency of any one of the preceding § 804(b) exceptions."[81] The court concluded that Brown's testimony was as reliable as the typically admitted exceptions of paragraphs 2, 3, and 4 of Rule 804(b).[82]

In *Garner,* the defendants were convicted of a series of drug-related offenses involving the alleged importation of heroin. At trial, the Government called Warren Robinson as a witness. Robinson was also involved in the importation scheme but had entered into a plea agreement, the terms of which required him to testify at a grand jury and in any ensuing criminal proceedings. By the time of trial, Robinson had already appeared before a grand jury. At trial, however, he refused to testify concerning the drug importation scheme, and the trial court admitted his grand jury testimony. The defendants appealed, contending that the admission of the grand jury testimony was prejudicial error.

Relying heavily upon *West,* the court upheld the admission of the grand jury testimony, finding "strong indicators of reliability."[83] Chief among these indicators was evidence corroborating Robinson's grand jury testimony. In short, the *Garner* court effectively held that the residual exception permits the admission of probative evidence which is corroborated by other evidence.[84]

3. Other Requirements

A number of cases admitting evidence under the residual exception deal with the remaining requirements of the residual exception: that the proferred evidence be evidence of a material fact; that it be more probative than other evidence that can be procured through reasonable efforts; and that the interests of justice be

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81. *Id.* at 1136.

82. *Id.*

83. United States v. Garner, 574 F.2d 1141, 1144 (4th Cir. 1978).

84. This is the conclusion critically drawn by Weinstein. 4 J. WEINSTEIN AND M. BERGER, WEINSTEIN'S EVIDENCE ¶ 804(b)(5) [01], at 129 (2d ed. 1979). In United States v. Carlson 547 F.2d 1346 (8th Cir. 1976), which is cited in both *Garner* and *West,* the Eighth Circuit used Rule 804(b)(5) to admit the grand jury testimony of a reluctant witness. *See also* United States v. Williams, 573 F.2d 284 (5th Cir. 1978); United States v. Lyon, 567 F.2d 777 (8th Cir. 1977), *cert. denied,* 435 U.S. 918 (1978); United States v. Medico, 557 F.2d 309 (2d Cir.), *cert. denied,* 434 U.S. 986 (1977); United States v. Ward, 552 F.2d 1080 (5th Cir.), *cert. denied,* 434 U.S. 850 (1977); United States v. Pfeiffer, 539 F.2d 668 (1976); United States v. American Cyanamid Co., 427 F. Supp. 859 (S.D.N.Y. 1977).

served by admission. For the most part, analysis of these requirements in the cases admitting the evidence is perfunctory. *United States v. Carlson*[85] and *Keyes v. School District Number 1*[86] are illustrative.

In *Carlson,* the defendants Carlson, Hostad, and Dahl were convicted of conspiring to distribute, distributing, and possessing cocaine. At trial, the court admitted the grand jury testimony of James Tindall, which contained information indicating Carlson had been involved in a cocaine deal with him. The court admitted this testimony after Tindall was called as a witness but refused to testify, apparently fearing reprisals from Carlson. Tindall was cited for contempt. The court found Tindall unavailable and admitted the grand jury testimony pursuant to Rule 804(b)(5). On appeal of Hostad and Carlson, the court of appeals affirmed.

The court found that Tindall was in fact unavailable,[87] and proceeded to determine if Tindall's grand jury testimony possessed "equivalent circumstantial guarantees of trustworthiness."[88] The court found "a strong indication of reliability in Tindall's testimony"[89] because his grand jury testimony was given under oath, it related facts about which Tindall possessed first-hand knowledge, and because he had never recanted or otherwise cast doubt upon it.[90] Moreover, it was necessary since no one else was available to testify concerning it.[91] The court found that Tindall's grand jury testimony was offered as evidence of a material fact since it was "relevant and material in that it showed intent, knowledge, a common plan or scheme and the absence of mistake or accident."[92] Analyzing the residual exception's check list, the court next found that the statement was more probative than any other evidence that could be procured through reasonable efforts since "there is no indication in the record that the Government could have obtained the same or similar evidence . . . from another source."[93] In a sentence, the court dispensed with the requirement that the interests

85. 547 F.2d 1346 (8th Cir. 1976).
86. 439 F. Supp. 393 (D. Colo. 1977).
87. United States v. Carlson, 547 F.2d 1346, 1353-54 (8th Cir. 1976).
88. *Id.* at 1354.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 1355.

of justice be best served by admission, observing: "To deprive the jury of the substance of this testimony merely because Carlson caused Tindall not to testify at trial would be antithetical to the truth-seeking function of our judicial system and would not serve the interests of justice."[94] Finally, the court found that the failure to give formal pretrial notice was excusable[95] and concluded by affirming the district court's admission of Tindall's grand jury testimony.[96]

In a different context, but in very similar fashion, the trial court in *Keyes* admitted hearsay testimony under the residual exception of Rule 803. In *Keyes,* the plaintiffs sought fees, costs, and expenses after prevailing in a school desegregation case. The court admitted affidavits from lawyers in the NAACP Legal Defense Fund (LDF) cataloging time expended on the case although the affidavits were clearly not admissible under the federal "shopbook" rule of 803(6).

On appeal, after restating the elements of the residual exception, but curiously omitting the requirement that there be "equivalent circumstantial guarantees of trustworthiness," the court of appeals held that:

> All the requirements of Rule 803(24) are met. The evidence is offered on a material fact, the evidence is the best available, defendants had adequate notice well in advance of the hearings, and the interest of justice are served by their admission. There is no question that LDF attorneys spent a considerable amount of time on the *Keyes* litigation. To fail to compensate them would not be in the interests of justice in this case, or within the interest and intent of the civil rights fee award statutes. Therefore, we accept the affidavits of the LDF attorneys as admissible evidence.[97]

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94. *Id.*

95. *See* note 73 *supra,* and accompanying text.

96. United States v. Carlson, 547 F.2d 1346, 1355 (8th Cir. 1976).

97. Keyes v. School Dist. No. 1, 439 F. Supp. 393, 411 (D. Colo. 1977). For somewhat similar short and sweet treatment of some of the requirements of the residual exception, resulting in admission of hearsay under the catch-all exceptions, *see* United States v. Williams, 573 F.2d 284 (5th Cir. 1978); United States v. Lyon, 567 F.2d 777 (8th Cir. 1977); United States v. Leslie, 542 F.2d 285 (5th Cir. 1976); United States v. Pfeiffer, 539 F.2d 668 (8th Cir. 1976); Muncie Aviation Corp. v. Party Doll Fleet, Inc., 519 F.2d 1178 (5th Cir. 1975); United States v. Bailey, 439 F. Supp. 1303 (W.D. Pa. 1977); United States v. American Cyanamid Co., 427 F. Supp. 859 (S.D.N.Y. 1977); Grimes v. Employers Mut. Liab. Ins. Co., 73 F.R.D. 607 (D. Alaska 1977); Ark-Mo Farms, Inc. v. United States, 530 F.2d 1384 (Ct. Cl. 1976).

V. CONCLUSION

The courts continue to be widely divided in their approach to the residual exceptions to the hearsay rule. This is to be expected with a newly stated rule. The issue now becomes the construction that should emerge in light of the legislative history.

The advance notice requirement is so clearly stated that to sidestep it is to flirt with lawlessness. The decisions that adhere to the requirement are clearly more consistent with the rule and the legislative history. One might question the necessity for such a requirement; it is quite another thing, however, to virtually ignore its presence. It would appear that the farthest a court could honestly go, consistent with the requirement and its purposes, would be to grant a continuance to permit the adversary to prepare against the proferred evidence.[98] Thus, a relatively hard line on the advance notice requirement is appropriate.

On the other hand, the remaining requirements—that the offered evidence possess "equivalent circumstantial guarantees of trustworthiness," that it be evidence of a material fact, that it be more probative than other evidence which can reasonably be procured, and that the general purposes of the rules and the interests of justice best be served by admission—should be liberally construed. First, the "equivalency" requirement would not be difficult to meet, given the well-recognized fact of the unreliability of much of the traditionally admitted hearsay.[99] Since simple equivalency is all that is required, it should not be too difficult for a proponent to show that the proferred piece of evidence is as reliable as one of the less reliable specific exceptions. The requirement that evidence be of a material fact is redundant and unnecessary, because if not material, the evidence would not be relevant and would thus be inadmissible under Rules 401 and 402. What this requirement most likely means is that the residual exception is not a proper vehicle

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98. *See, e.g.*, cases discussed in note 73 *supra*.

99. The point has been made by many commentators that often the traditional hearsay rule, along with its exceptions, operates to exclude the more reliable and admit the less reliable evidence. In short, much evidence routinely admitted under a recognized exception is simply not too trustworthy. *See, e.g.*, E. MORGAN, BASIC PROBLEMS OF STATE AND FEDERAL EVIDENCE LAW 229 (5th ed. 1976); J. PRINCE, RICHARDSON ON EVIDENCE § 206 (10th ed. 1973); C. MCCORMACK, MCCORMACK'S HANDBOOK OF THE LAW OF EVIDENCE § 244-327 (2d ed. E. Cleary ed. 1972); Davis, *Evidence Reform: The Administrative Process Leads the Way*, 34 MINN. L. REV. 581 (1950).

for gaining admission of trivial or collateral items.[100] Thus, it is not a major obstacle to admission. The requirement that the offered statement be more probative than other evidence that can be procured through reasonable efforts is aimed at ensuring that the exception is used only when reasonably necessary. In this regard, the opponent should bear the burden of showing that the same or similar evidence could have been obtained from another source by reasonable efforts.[101] Finally, the requirement that the general purposes of the rules and the interests of justice best be served by admission must be construed liberally. The legislative history of the rules, though admittedly reflecting compromise, manifests a clear intent that all the rules be construed to promote "growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."[102] Since rigid unyielding application of the hearsay rules would ultimately operate to reject evidence that is reliable and trustworthy, it is destructive of the truth-seeking process.

In summary, the residual exceptions can and should eventually provide the statutory support for a broad and sweeping exception to the hearsay rule. Ultimately, with the guidance provided by the residual exceptions and the cases construing them, the dual ends that the truth be ascertained and that proceedings be fairly determined will be realized. In short, "a hearsay statement will be received if the judge finds that the need for and the probative value of the statement render it a fair means of proof under the circumstances."[103] Hearsay, then, will have been successfully triangulated, strangulated and left to twist slowly, slowly in the wind—a harsh result, but perhaps the only way to deal with a menace the magnitude of the hearsay rule and its exceptions.

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100. This observation was made with convincing clarity by Judge Weinstein in United States v. Iaconetti, 406 F. Supp. 554, 559 (E.D.N.Y. 1976) (mem.).

101. This is the approach taken in United States v. Carlson, 547 F.2d 1346, 1355 (8th Cir. 1976).

102. FED. R. EVID. 102. The commentators are pretty much in agreement that the prevailing intent of the Federal hearsay-related rules is to make Federal hearsay practice less onerous. *See, e.g.*, Imwinkelried, *The Scope of the Residual Hearsay Exceptions in the Federal Rules of Evidence*, 15 SAN DIEGO L. REV. 239 (1978); Evans, *Article Eight of the Federal Rules of Evidence: The Hearsay Rule*, 8 VAL. U.L. REV. 261 (1974); Stewart, *Perception, Memory, and Hearsay: A Criticism of Present Law and The Proposed Federal Rules of Evidence*, 1970 UTAH L. REV. 1; Comment, *A Practitioner's Guide to the Federal Rules of Evidence*, 10 U. RICH. L. REV. 169 (1975).

103. McCormick, *Law and the Future: Evidence*, 51 NW. U.L. REV. 218, 219 (1956).