

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES  
WASHINGTON, D.C. 20544

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**MEMORANDUM**

**TO:** Hon. Jeffrey S. Sutton, Chair  
Committee on Rules of Practice and Procedure

**FROM:** Hon. William K. Sessions, III, Chair  
Advisory Committee on Evidence Rules

**RE:** Report of the Advisory Committee on Evidence Rules

**DATE:** May 7, 2016

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**I. Introduction**

The Advisory Committee on Evidence Rules (the “Committee”) met on April 29, 2016 in Alexandria, Virginia.

The Committee seeks final approval of two proposed amendments for submission to the Judicial Conference:

1. Amendment to Rule 803(16), the ancient documents exception to the hearsay rule, to limit its application to documents prepared before 1998; and
2. Amendment to Rule 902 to add two subdivisions that would allow authentication of certain electronic evidence by way of certification by a qualified person.

The Committee also seeks approval of a Manual on best practices for authenticating electronic evidence, to be published by the Federal Judicial Center.

## II. Action Items

### A. Amendment Limiting the Coverage of Rule 803(16)

Rule 803(16) provides a hearsay exception for “ancient documents.” If a document is more than 20 years old and appears authentic, it is admissible for the truth of its contents. The Committee has considered whether Rule 803(16) should be eliminated or amended because of the development of electronically stored information. The 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. The Committee concluded that the exception has been tolerated because it has been used relatively infrequently, and usually because there is no other evidence on point. But because electronically stored information can be retained for more than 20 years, there is a strong likelihood that the ancient documents exception will be used much more frequently in the coming years. And it could be used as a receptacle for unreliable hearsay, because if the hearsay is in fact reliable it will probably be admissible under other reliability-based exceptions, such as the business records exception or the residual exception. Moreover, the need for an ancient documents exception is questionable as applied to ESI, for the very reason that there may well be a great deal of *reliable* electronic data available to prove any dispute of fact.

The proposed amendment that was issued for public comment would have eliminated the ancient documents exception. The public comment on that proposed elimination was largely negative, however. Most of the comments asserted that without the ancient documents exception, important documents in certain specific types of litigation would no longer be admissible—or would be admissible only through expending resources that are currently not necessary under Rule 803(16). Examples of litigation cited by the public comment include cases involving latent diseases; disputes over the existence of insurance; suits against churches alleged to condone sexual abuse by their clergy; cases involving environmental cleanups; and title disputes. Many of the comments concluded that the business records exception and the residual exception are not workable alternatives for ancient documents. The comments contended that the business records exception requires a foundation witness that may be hard to find, and that the residual exception is supposed to be narrowly construed. Moreover, both these exceptions would require a statement-by-statement analysis, which is not necessary under Rule 803(16), thus leading to more costs for proponents. Much of the comment was about the amendment’s leading to extra costs of qualifying old documents.

In light of the public comment, the Committee abandoned the proposal to eliminate the ancient documents exception. But it also rejected the option of doing nothing. The Committee strongly believes that the ESI problem as related to Rule 803(16) is real. 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. Computer storage costs have dropped dramatically—that greatly expands

the universe of information that could be potentially offered under the ancient documents exception. Moreover, the presumption of the ancient documents exception was that a hardcopy document kept around for 20 years must have been thought to have some importance; but that presumption is no longer the case with easily stored ESI. The Committee remains convinced that it is appropriate and necessary to get out ahead of this problem—especially because the use of the ancient documents exception is so difficult to monitor. There are few reported cases about Rule 803(16) because no objection can be made to admitting the content of the document once it has been authenticated—essentially there is nothing to report. So tracking reported cases would not be a good way to determine whether ESI is being offered under the exception. Finally, the Committee adheres to its position that Rule 803(16) is simply a flawed rule; it is based on the fallacy that because a document is old and authentic, its contents are reliable. Therefore something must be done, at least, to limit the exception as to ESI.

The Committee considered a number of alternatives for amending Rule 803(16) to limit its impact. The alternatives of adding reliability requirements, or necessity requirements, were rejected. These alternatives were likely to lead to the increased costs of qualification of old documents, and extensive motion practice, that were opposed in the public comment. Ultimately, the Committee returned to where it started—the ESI problem. The Committee determined that the best result was to limit the ancient documents exception to documents prepared before 1998. That amendment will have no effect on any of the cases raised in the public comments, because the concerns were about cases involving records prepared well before 1998. And 1998 was found to be a fair date for addressing the rise of ESI. The Committee recognizes, of course, that any cutoff date will have a degree of arbitrariness, but it also notes that the ancient documents exception itself set an arbitrary time period for its applicability.

The Committee has considered the possibility that in the future, cases involving latent diseases, CERCLA, etc. will arise. But the Committee has concluded that in such future cases, the ancient documents exception is unlikely to be necessary because, going forward from 1998, there is likely to be preserved, reliable ESI that can be used to prove the facts that are currently proved by scarce hardcopy. If the ESI is generated by a business, then it is likely to be easier to find a qualified witness who is familiar with the electronic recordkeeping than it is under current practice to find a records custodian familiar with hardcopy practices from the 1960's and earlier. Moreover, the Committee has emphasized in the Committee Note that the residual exception remains available to qualify old documents that are reliable; the 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.

***The Committee unanimously recommends that the Standing Committee approve the following amendment to Rule 803(16), and the Committee Note, for submission to the Judicial Conference:***

**Rule 803. Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness**

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

\* \* \*

(16) *Statements in Ancient Documents*. A statement in a document ~~that is at least 20 years old~~ that was prepared before January 1, 1998 and whose authenticity is established.

**Committee Note**

The ancient documents exception to the rule against hearsay has been limited to statements in documents prepared before January 1, 1998. The Committee has determined that the ancient documents exception should be limited due to the risk that it will be used as a vehicle to admit vast amounts of unreliable electronically stored information (ESI). Given the exponential development and growth of electronic information around the year 1998, the hearsay exception for ancient documents has now become a possible open door for large amounts of unreliable ESI, as no showing of reliability needs to be made to qualify under the exception.

The Committee is aware that in certain cases—such as cases involving latent diseases and environmental damage—parties must rely on hardcopy documents from the past. The ancient documents exception remains available for such cases for documents prepared before 1998. Going forward, it is anticipated that any need to admit old hardcopy documents produced after January 1, 1998 will decrease, because reliable ESI is likely to be available and can be offered under a reliability-based hearsay exception. Rule 803(6) may be used for many of these ESI documents, especially given its flexible standards on which witnesses might be qualified to provide an adequate foundation. And Rule 807 can be used to admit old documents upon a showing of reliability—which will often (though not always) be found by circumstances such as that the document was prepared with no litigation motive in mind, close in time to the relevant events. The limitation of the ancient documents exception 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. Finally, many old documents can be admitted for the non-hearsay purpose of proving notice, or as party-opponent statements.

The limitation of the ancient documents hearsay exception is not intended to have any effect on authentication of ancient documents. The possibility of authenticating an

old document under Rule 901(b)(8)—or under any ground available for any other document—remains unchanged.

The Committee carefully considered, but ultimately rejected, an amendment that would preserve the ancient documents exception for hardcopy evidence only. A party will often offer hardcopy that is derived from ESI. Moreover, a good deal of old information in hardcopy has been digitized or will be so in the future. Thus, the line between ESI and hardcopy was determined to be one that could not be drawn usefully.

The Committee understands that the choice of a cut-off date has a degree of arbitrariness. But January 1, 1998 is a rational date for treating concerns about old and unreliable ESI. And the date is no more arbitrary than the 20-year cutoff date in the original rule. See Committee Note to Rule 901(b)(8) (“Any time period selected is bound to be arbitrary.”).

Under the amendment, a document is “prepared” when the statement proffered was recorded in that document. For example, if a hardcopy document is prepared in 1995, and a party seeks to admit a scanned copy of that document, the date of preparation is 1995 even though the scan was made long after that—the subsequent scan does not alter the document. The relevant point is the date on which the information is recorded, not when the information is prepared for trial. However, if the content of the document is *itself* altered after the cut-off date, then the hearsay exception will not apply to statements that were added in the alteration.

The formatted amendment and Committee Note, together with the GAP report and the summary of public comment, is set forth in an appendix to this report.

## **B. Proposed Amendment to Evidence Rule 902**

At its Spring 2015 meeting, the Committee unanimously approved a proposal to add two new subdivisions to Rule 902, the rule on self-authentication. The first provision would allow self-authentication of machine-generated information, upon a submission of a certification prepared by a qualified person. The second proposal would provide a similar certification procedure for a copy of data taken from an electronic device, medium or file. These proposals are analogous to Rules 902(11) and (12) of the Federal Rules of Evidence, which permit a foundation witness to establish the authenticity of business records by way of certification.

The proposals have a common goal of making authentication easier for certain kinds of electronic evidence that are, under current law, likely to be authenticated under Rule 901 but only by calling a witness to testify to authenticity. The Committee has concluded that the types of electronic evidence covered by the two proposed rules are rarely the subject of a legitimate authenticity dispute, but it is often the case that the proponent is nonetheless forced to produce an

authentication witness, incurring expense and inconvenience—and often, at the last minute, opposing counsel ends up stipulating to authenticity in any event.

The self-authentication proposals, by following the approach taken in Rule 902(11) and (12) regarding business records, essentially leave the burden of going forward on authenticity questions to the opponent of the evidence. Under those rules a business record is authenticated by a certificate, but the opponent is given “a fair opportunity” to challenge both the certificate and the underlying record. The proposals for new Rules 902(13) and 902(14) would have the same effect of shifting to the opponent the burden of going forward (not the burden of proof) on authenticity disputes regarding the described electronic evidence.

### *Applications of Rules 902(13) and (14)*

At the Standing Committee meeting in Spring 2015, Committee members inquired as to what kind of information might be authenticated under these new provisions. The Committee (with the substantial assistance of John Haried, who initially proposed these amendments) has prepared the following examples to illustrate how Rules 902(13) and (14) may be used:

#### **Examples of how Rule 902(13) can be used:**

**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.

**Without Rule 902(13):** Without Rule 902(13), the proponent of the evidence would need to call the forensic technician who obtained the printout as a witness, in order to establish the authenticity of the evidence. During his or her testimony, the forensic technician would typically be asked to testify about his or her background and qualifications; the process by which digital forensic examinations are conducted in general; the steps taken by the forensic technician during the examination of Ms. Hall’s computer in particular; the process by which the Windows operating system maintains information in the Windows registry, including information about USB devices connected to the computer; and the steps taken by the forensic examiner to examine the Windows registry and to produce the printout identifying the USB device.

**Impact of Rule 902(13):** With Rule 902(13), the proponent of the evidence could obtain a written certification from the forensic technician, stating that the Windows operating system regularly records information in the Windows registry about USB devices connected to a computer; that the process by which such information is recorded produces an accurate result; and that the printout accurately reflected information stored in the Windows registry of Ms. Hall's computer. The proponent would be required to provide reasonable written notice of its intent to offer the printout as an exhibit and to make the written certification and proposed exhibit available for inspection. If the opposing party did not dispute the accuracy or reliability of the process that produced the exhibit, the proponent would not need to call the forensic technician as a witness to establish the authenticity of the exhibit. (There are many other examples of the same types of machine-generated information on computers, for example, internet browser histories and wifi access logs.)

**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.

**Without Rule 902(13):** The proponent would have to call a website expert to testify about the mechanics of the server's operating system; his search of the IIS log; how the IIS log works; and that the exhibit is an accurate record of the IIS log.

**With Rule 902(13):** The proponent would obtain the website expert's certification of the facts establishing authenticity of the exhibit and provide the certification and exhibit to the opposing party with reasonable notice that it intends to offer the exhibit at trial. If the opposing party does not timely dispute the reliability of the process that produced the registry key, then the proponent would not need to call the website expert to establish authenticity.

**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.

**Without Rule 902(13):** The proponent would have to call the forensic technician to testify about Mr. Jackson’s iPhone’s operating system; his search of the phone; how the metadata was created and stored with each photograph; and that the exhibit is an accurate record of the photographs.

**With Rule 902(13):** The proponent would obtain the forensic technician’s certification of the facts establishing authenticity of the exhibits and provide the certification and exhibit to the opposing party with reasonable notice that it intends to offer the exhibit at trial. If the opposing party does not timely dispute the reliability of the process that produced the iPhone’s logs, then the proponent would not have to call the technician to establish authenticity.

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

**Without Rule 902(13):** The proponent would have to call the forensic technician to testify about Dain’s phone’s operating system; his search of the phone’s text message log; how logs are created; and that the exhibit is an accurate record of the iPhone’s logs.

**With Rule 902(13):** The proponent would obtain the forensic technician’s certification of the facts establishing authenticity of the exhibit and provide the certification and exhibit to the opposing party with reasonable notice that it intends to offer the exhibit at trial. If the opposing party does not timely dispute the reliability of the process that produced the iPhone’s logs, then the court would make the Rule 104 threshold authenticity finding and admit the exhibits, absent other proper objection.

*Hearsay Objection Retained:* Under Rule 902(13), the opponent – here, criminal defendant Ian—would retain his hearsay objections to the text messages found on Dain’s phone. For example, the judge would evaluate the text “Sheri says you have some blow” under F.R.E. 801(d)(2)(E) to determine whether it was a coconspirator’s statement during and in furtherance of a conspiracy, and under F.R.E. 805, to assess the hearsay within hearsay. The court might exclude the text “Sheri says you have some blow” under either rule or both.



### **Example of how Rule 902(14) can be used**

In the armed robbery hypothetical, above, forensic technician Smith made a forensic copy of Dain's Samsung Galaxy phone in the field. Smith verified that the forensic copy was identical to the original phone's text logs using an industry standard methodology (*e.g.*, hash value or other means). Smith gave the copy to forensic technician Jones, who performed his examination at his lab. Jones used the copy to conduct his entire forensic examination so that he would not inadvertently alter the data on the phone. Jones found the text messages. The government wants to offer the copy into evidence as part of the basis of Jones's testimony about the text messages he found.

**Without Rule 902(14):** The government would have to call two witnesses. First, forensic technician Smith would need to testify about making the forensic copy of information from Dain's phone, and about the methodology that he used to verify that the copy was an exact copy of information inside the phone. Second, the government would have to call Jones to testify about his examination.

**With Rule 902(14):** The proponent would obtain Smith's certification of the facts establishing how he copied the phone's information and then verified the copy was true and accurate. Before trial the government would provide the certification and exhibit to the opposing party—here defendant Ian—with reasonable notice that it intends to offer the exhibit at trial. If Ian's attorney does not timely dispute the reliability of the process that produced the Samsung Galaxy's text message logs, then the proponent would only call Jones.

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The Committee has carefully considered whether the self-authentication proposals would raise a Confrontation Clause concern when the certificate of authenticity is offered against a criminal defendant. 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*. The Committee determined that the problem with the affidavit found testimonial in *Melendez-Diaz* was that it certified the accuracy of a drug test that was itself prepared for purposes of litigation—a certification cannot render constitutional an underlying report that itself violates the Confrontation Clause. 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.

In this regard, the Note approved by 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. The Note makes clear that these are authentication-only rules and that the opponent retains all objections to the item other than authenticity --- most importantly that the item is hearsay or that admitting the item would violate a criminal defendant's right to confrontation.

*The Committee unanimously recommends that the proposed amendment to Rule 902, adding new subdivisions (13) and (14), and their Committee Notes, be approved by the Standing Committee and submitted to the Judicial Conference. The proposed amendment, together with Committee Notes, provides as follows:*

**Rule 902. Evidence That Is Self-Authenticating**

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

\* \* \*

(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).

**Committee Note**

The amendment sets forth a procedure by which parties can authenticate certain electronic evidence other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing a witness to authenticate an item of electronic evidence is often unnecessary. It 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. The amendment

provides a procedure under which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule. 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.

The reference to the “certification requirements of Rule 902(11) or (12)” is only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this rule to prove the requirements of Rule 803(6). Rule 902(13) is solely limited to authentication and any attempt to satisfy a hearsay exception must be made independently.

A certification under this Rule can establish only that the proffered item has satisfied the admissibility requirements for authenticity. The opponent remains free to object to admissibility of the proffered item on other grounds—including hearsay, relevance, or in criminal cases the right to confrontation. For example, assume that a plaintiff in a defamation case offers what purports to be a printout of a webpage on which a defamatory statement was made. Plaintiff offers a certification under this Rule in which a qualified person describes the process by which the webpage was retrieved. Even if that certification sufficiently establishes that the webpage is authentic, defendant remains free to object that the statement on the webpage was not placed there by defendant. Similarly, a certification authenticating a computer output, such as a spreadsheet, does not preclude an objection that the information produced is unreliable—the authentication establishes only that the output came from the computer.

A challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic technical expert; such factors will effect whether the opponent has a fair opportunity to challenge the evidence given the notice provided.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

\* \* \*

**(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).

**Committee Note**

The amendment sets forth a procedure by which parties can authenticate data copied from an electronic device, storage medium, or an electronic file, other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing an authenticating witness for this evidence is often unnecessary. It 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. The amendment provides a procedure in which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Today, data copied from electronic devices, storage media, and electronic files 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. If the hash values for the original and copy are different, then the copy is not identical to the original. If the hash values for the original and copy are the same, it is highly improbable that the original and copy are not identical. Thus, identical hash values for the original and copy reliably attest to the fact that they are exact duplicates. This amendment allows self-authentication by a certification of a qualified person that she checked the hash value of the proffered item and that it was identical to the original. The rule is flexible enough to allow certifications through processes other than comparison of hash value, including by other reliable means of identification provided by future technology.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule.

The reference to the “certification requirements of Rule 902(11) or (12)” is only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this rule to prove the requirements of Rule 803(6). Rule 902(14) is solely limited to authentication and any attempt to satisfy a hearsay exception must be made independently.

A certification under this Rule can only establish that the proffered item is authentic. The opponent remains free to object to admissibility of the proffered item on other grounds—including hearsay, relevance, or in criminal cases the right to confrontation. For example, in a criminal case in which data copied from a hard drive is proffered, the defendant can still challenge hearsay found in the hard drive, and can still challenge whether the information on the hard drive was placed there by the defendant.

A challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic technical expert; such factors will effect whether the opponent has a fair opportunity to challenge the evidence given the notice provided.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

The formatted amendment and Committee Notes, together with the GAP reports and the summaries of public comments, are all set forth in an appendix to this report.

### **C. Best Practices Manual on Authentication of Electronic Evidence**

There are dozens of reported cases that set forth standards for authenticating electronic evidence. These cases apply the existing, flexible provisions on authenticity currently found in Federal Rules 901 and 902 and their state counterparts. The Committee has considered whether to draft new rules to govern authentication of electronic evidence. The Committee has decided that it will not do so at this time. The Committee concluded that amendments regulating authenticity of electronic evidence would end up being too detailed for the text of a rule; they could not account for how a court can and should balance all the factors relevant to authenticating electronic evidence in every case; and there was a risk that any factors listed would become outmoded by technological advances.

The Committee unanimously concluded, however, that publication of a best practices manual on authenticating electronic evidence would be of great use to the bench and bar. A best practices manual can be amended as necessary, avoiding the problem of having to amend rules to keep up with technological changes. It can include copious citations, which a rule or Committee Note could not.

The Reporter to the Committee has worked with Greg Joseph and Judge Paul Grimm on a best practices manual that will be published by the Federal Judicial Center. The Committee has reviewed and approves of the final draft of the manual. The Committee believes that the manual will provide substantial assistance and guidance to courts and litigants in solving many of the problems of authenticating electronic evidence.

The Best Practices Manual, as reviewed by the Committee, is set forth in an appendix to this report. The Committee seeks guidance from the Standing Committee on how the Committee's input should be described for purposes of the publication. Currently, the Committee is listed as a co-author. Other possibilities include a statement that the pamphlet was prepared with the assistance and approval of the Committee, or under the Committee's auspices; or there might be no mention of the Committee at all. The pamphlet will be submitted to the FJC as soon as the Standing Committee determines the question of proper attribution.

### **III. Information Items**

#### **A. Proposal to Amend Certain Notice Provisions in the Federal Rules of Evidence**

For the past two meetings, the Committee has considered a project that would provide more uniformity to the notice provisions of the Evidence Rules, and that would also make relatively minor substantive changes to two of those rules.

The Committee has agreed upon the following points:

1) The Rule 807 notice provision is problematic because it contains no language to excuse lack of timely notice upon good cause. This omission has led to a dispute in the courts about whether a good cause exception exists under the rule. A good cause exception is particularly necessary in Rule 807 for cases where a witness becomes unavailable after the trial starts and the proponent may need to introduce a hearsay statement from that witness. And it is especially important to allow for a good cause exception when it is a criminal defendant who fails to provide pretrial notice. Thus the Committee has agreed in principle to propose amending Rule 807 to add good cause language to the notice provision.

2) The request requirement in Rule 404(b)—that the criminal defendant must request notice before the government is obligated to give it—is an unnecessary limitation that serves as a trap for the unwary. Thus the Committee has agreed in principle to propose amending the Rule 404(b) notice provision to eliminate the request requirement.

3) The notice provisions in Rules 412-415 should not be changed. These rules could be justifiably excluded from a uniformity project because they were all

congressionally-enacted, are rarely used, and raise policy questions on what procedural requirements should apply in cases involving sexual assaults.

The Committee has considered other suggestions for amendment to the notice provisions of Rules 404(b), 609(b), 807 and 902(11). One possibility was a template that would require a proponent to provide “reasonable written notice of an intent to offer evidence under” the specific rule, and to “make the substance of the evidence available to the party—so that the party has a fair opportunity to meet it.” For a number of reasons, however, the Committee concluded that such a template would not work as applied to all four rules. The rules operate differently, they cover different information, and uniformity for uniformity’s sake would end up making substantive changes that might be controversial.

After discarding the template, the Committee has moved to consideration of individual changes that might be made to improve one or more of the notice provisions. Committee members have agreed that a requirement that the notice be in writing should be added to Rule 807—as the writing requirement limits disputes on whether notice was actually provided. The Committee has also agreed that the Rule 807 requirement that the notice provide “particulars, including the declarant’s name and address,” should be modified. The requirement of disclosing an address is nonsensical when the declarant is unavailable, and superfluous when the address can be easily obtained by the opponent. Moreover the term “particulars” has given rise to petty disputes about the details of the required notice.

As discussed below, the Committee has on its agenda the possibility of modest changes to Rule 807 that would make it somewhat easier to invoke. The Committee has agreed that it would not be prudent to propose changes to the notice provisions of Rule 807 until the Committee has decided whether other changes to the rule, if any, should be proposed. That is, it would be appropriate to propose all amendments to Rule 807 at one time. The Committee has further agreed that the proposed amendment to Rule 404(b)—to delete the requirement that the defendant request notice—should be held back until other amendments are ready for proposal. Holding off on that amendment is consistent with the intent of the Standing Committee—that amendments should be packaged, in order to minimize disruption to the bench and bar. The change that would be made to Rule 404(b) is not so significant that it must be made immediately without regard to packaging.

**The working proposal for amendment to the Rule 807 notice requirement, approved by the Committee, reads as follows:**

**(b) Notice.** The statement is admissible only if, ~~before the trial or hearing~~ the proponent gives an adverse party reasonable written 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 before the trial or hearing—or during trial or hearing if the court, for good cause, excuses a lack of earlier notice.

## **B. Proposal to Expand the Residual Exception**

The Committee is considering whether Rule 807—the residual exception to the hearsay rule—should be expanded to allow the admission of more hearsay, if it is reliable. Expansion of the residual exception might have the effect of providing more flexibility in the use of hearsay exceptions, and it might also be part of an effort to reassess some of the more controversial categorical hearsay exceptions, such as those for ancient documents, excited utterances and dying declarations. Limitations on those exceptions could be easier to implement if it could be assured that reliable hearsay currently fitting under those exceptions could be admitted under the residual exception. But currently, the residual exception is, by design, to be applied only in rare and exceptional circumstances.

The Committee recognizes the challenge involved in expanding the residual exception: the goal would be to allow the exception to be used somewhat more frequently, without broadening it so far that it would overtake the categorical exceptions entirely and lead to a hearsay system controlled by court discretion, with unpredictable outcomes.

Within these constraints, the Committee, after substantial discussion, preliminarily agreed on the following principles regarding Rule 807:

- The requirement that the court find trustworthiness “equivalent” to the circumstantial guarantees in the Rule 803 and 804 exceptions should be deleted, as it is difficult to apply, because there is no unitary standard of trustworthiness in the Rule 803 and 804 exceptions. Given the difficulty of the “equivalence” standard, a better approach is simply to require the judge to find that the hearsay offered under Rule 807 is trustworthy.
- Trustworthiness can best be defined as a consideration of both circumstantial guarantees and corroborating evidence. Most courts find corroborating evidence to be relevant to the reliability enquiry, but some do not. An amendment would be useful to provide uniformity in the approach to evaluating trustworthiness under the residual exception—and substantively, that amendment should specifically allow the court to consider corroborating evidence, as corroboration is a typical source for assuring that a statement is reliable.



- The requirements in Rule 807 that the residual hearsay must be proof of a “material fact” and that admission of residual hearsay be in “the interests of justice” have not served any purpose. They add nothing to what is already in the rules. These provisions were added to the residual exception to emphasize that it was to be used only rarely and in truly exceptional situations. The Committee believes that deleting these provisions might constitute a change of tone—to signal that while hearsay must still be reliable to be admitted under Rule 807, there is no longer a requirement that the use must be rare and exceptional.

- The requirement in the residual exception that the hearsay statement must be “more probative than any other evidence that the proponent can obtain through reasonable efforts” should be retained. This will preserve the rule that proponents cannot use the residual exception unless they need it. And it will send a signal that the changes proposed are modest—there is no attempt to allow the residual exception to swallow the categorical exceptions, or to make use of the residual exception a commonplace event.

**What follows is the working draft of an amendment to Rule 807 that the Committee has tentatively approved and will be considered further at the next meeting (including the amendment to the notice provision discussed above).**

**Rule 807. Residual Exception**

**(a) In General.** Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

~~(1) the statement has equivalent circumstantial guarantees of trustworthiness~~  
the court determines, after considering the pertinent circumstances and any corroborating evidence, that the statement is trustworthy; 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 written 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 before the trial or hearing—or during trial or hearing if the court, for good cause, excuses a lack of earlier notice.

\* \* \*

Finally, the Committee has decided that it would be useful to convene a miniconference on the morning of the Fall 2016 meeting, to have judges, lawyers and academics provide commentary on the proposed changes to Rule 807.

### **C. Proposal to Amend Rule 801(d)(1)(A)**

Over the last few meetings, the Committee has been considering the possibility of expanding substantive admissibility of certain prior statements of testifying witnesses—the rationale of that expansion being that unlike other forms of hearsay, the declarant is subject to cross-examination about the statement. At the Symposium on Hearsay in October, 2015, a panel was devoted to treatment of prior witness statements.

The Committee's discussions are now focused on whether Rule 801(d)(1)(A) should be amended to provide for greater substantive admissibility of prior inconsistent statements. Currently the rule is very narrow—prior inconsistent statements are admissible substantively only if they were made under oath at a formal proceeding. The two possibilities for expansion presented were: 1) allowing for substantive admissibility of *all* prior inconsistent statements, as is the case in California, Wisconsin, and a number of other states; and 2) allowing substantive admissibility only when there is proof—other than a witness's statement—that the prior statement was ever made, as is the procedure in Connecticut, Illinois, and several other states.

The Committee has concluded that it will not propose an amendment that would provide for substantive admissibility of all prior inconsistent statements. The Committee is concerned about the possibility that a prior inconsistent statement could be used as critical substantive proof even if the witness denied ever making it and there is a substantial dispute that it was ever made. It might well be costly and distracting to take evidence and to determine whether a prior inconsistent statement was made, if there is no reliable record of it.

The Committee will be debating whether to allow for substantive admissibility if the prior inconsistent statement has been video recorded. If the statement is video recorded, any denial that it was made becomes implausible, and the proof of its making is a fact easily determined. Any dispute about the circumstances under which it is made—for example, whether police officers induced the statement—probably can be straightforwardly evaluated by the

factfinder. Moreover, allowing substantive admissibility of videotaped inconsistent statements could lead to more statements being videotaped in the expectation that they might be useful substantively—which is a good result even beyond its evidentiary consequences.

The Committee will continue the debate over expanding substantive admissibility of prior inconsistent statements at its next meeting.

#### **D. Proposals to Amend Rule 803(2)**

The Committee has received four separate proposals for amending Rule 803(2), the hearsay exception for excited utterances (in addition to Judge Posner’s suggestion that the exception be eliminated, which the Committee has previously considered and rejected). The Committee considered all four proposals at the Spring meeting.

One proposal was to add the word “continuous” to the rule—requiring the declarant to be in a continuous state of excitement for the period between the startling event and the statement. The Committee found no need to make this change. The text and the case law already require the statement to be made while under the continuous influence of the startling event. The single case cited as problematic by the professor who suggested the change is one in which the declarant is severely assaulted, and then months after the event saw the defendant’s picture in the newspaper; she got upset and identified him as the perpetrator. The court held that seeing the defendant in the newspaper was a startling event, and that the identification related to both startling events (the assault and the newspaper viewing). The Committee has concluded that adding the word “continuous” would not change the result in that case—because the declarant *was* under a continuous state of excitement in the time between she viewed the newspaper and her statement. Moreover, the result in the case is sound—reliability is guaranteed by the condition of startlement. And even if the case were problematic, the fact that it is the only federal case cited as raising the so-called problem, in 40 years of litigation under Federal Rule 803(2), is indicative that there is no serious problem worth addressing.

Other proposals were made in response to the oft-stated allegation that the excited utterance exception does not provide a sufficient guarantee that evidence admitted under the exception will be reliable. One proposal was to add language—derived from the 2014 amendment to Rule 803(6)—that would allow the court to exclude an excited utterance if the opponent could show that it was in fact untrustworthy. Another proposal was to add language—derived from Rule 804(b)(3)—that would require the proponent to show corroborating circumstances clearly indicating that the excited utterance was trustworthy. And a third proposal was to transfer the exception to Rule 804, so that excited utterances would not be admissible unless the declarant is shown to be unavailable to testify.

The Committee has decided not to proceed on any of these proposals. For one thing, the proposals would have consequences beyond Rule 803(2)—consideration would have to be given to whether there should be similar treatment for other exceptions that have been found

controversial, such as the exceptions for present sense impressions and state of mind. Thus, proposing an amendment to Rule 803(2) at this point would be contrary to a systematic approach to amending the Federal Rules of Evidence. Second, and more importantly, the Committee relied on a lengthy report prepared by the FJC representative, who analyzed the social science studies that have been conducted regarding the premises of Rules 803(1) (the present sense impression exception) and 803(2)—specifically whether there is empirical support for the propositions that immediacy and excitedness tend to guarantee reliability. The FJC representative concluded that there is significant empirical data to support the premises that: 1) it takes time to make up a good lie, and 2) startlement makes it more difficult to make up a good lie. Consequently, the Committee determined that there was no need at this point to amend Rule 803(2)—or Rule 803(1), for that matter—due to any reliability concerns.

#### **E. Consideration of a Change from Categorical Hearsay Exceptions to Guidelines**

At the Hearsay Symposium in Fall 2015, Judge Shadur argued that the hearsay rule might be usefully changed to parallel the Sentencing Guidelines—i.e., a list of factors, which guide discretion, but which allow the judge to depart in various circumstances. The existing hearsay exceptions might be reconstituted as standards or guidelines rather than hard rules. At its Spring meeting, the Committee considered the viability of replacing the current rule-based system with a system of guided discretion that would include a list of standards or illustrations taken from the existing exceptions.

The Committee has determined that at this point, 40 years into the Federal Rules of Evidence, any perceived advantages in switching to a guidelines system (in terms of adding flexibility) would be outweighed by the costs (including substantial disruption; the uncertainty created by greater judicial discretion in ruling on hearsay; increased motion practice; and increased discovery cost because virtually any hearsay statement would be potentially admissible).

The Committee also rejected an alternative designed to provide significantly more flexibility and discretion within the current Federal Rules structure. That alternative would 1) add a safety valve applicable to all the exceptions, allowing a judge to exclude otherwise admissible hearsay if the opponent could show that it was untrustworthy; and 2) amend Rule 807 to allow for more frequent and easier use. The Committee determined that this provision for two-way judicial departures from the categorical exceptions would inject too much discretion and unpredictability into the system. At the Hearsay Symposium, the Committee heard from the lawyers that rules were needed to provide guidance, stability and consistency. The Committee concluded that allowing more discretion for the court to admit or exclude hearsay which it happened to find reliable or unreliable would add substantial uncertainty and inconsistency—making it more difficult to settle, obtain summary judgment, and prepare for trial. Moreover, adding so much more discretion would provide a “home team advantage” in that local counsel would learn over time the personal inclinations of a local judge in treating a hearsay problem.

Instead of an across-the-board increase of discretion to exclude and admit hearsay, the Committee has opted to consider modest changes to the residual exception, discussed above—with the goal being to make that exception somewhat more useful, without injecting too much discretion into the system. The Committee recognizes the challenge of adding a little flexibility, but not too much—which is one of the reasons why a miniconference on the possible change to Rule 807 will be so useful.

#### **F. Consideration of a Possible Amendment to Rule 803(22)**

Rule 803(22) is a hearsay exception that allows judgments of conviction to be offered to prove the truth of the facts essential to the conviction. The exception carves out two kinds of convictions that are not covered: 1) convictions resulting from a *nolo contendere* plea; and 2) misdemeanor convictions. Judge Graber asked the Evidence Rules Committee to consider whether these two limitations on the exception were justified. The Committee has determined that both these carve-outs are justified.

The Committee found that the *nolo contendere* carve-out is necessary to preserve the protection provided in Rule 410 for *nolo pleas*. Rule 410's exclusion of a *nolo contendere* plea—and the underlying policy of encouraging compromise—would be undermined if the conviction itself were admissible to prove the essential facts.

The reason for the misdemeanor carve-out is that misdemeanors, as a class, are less likely to be contested than felonies, and therefore there is less likely to be a reliable determination (or concession) that would justify admitting the underlying facts for their truth. The Committee noted that in many jurisdictions, indigent defendants plead guilty to misdemeanors simply because they cannot make cash bail; also, if the defendant is indigent and a misdemeanor does not lead to jail time, the state is not required to provide counsel. These factors counsel against admitting misdemeanor convictions to prove the underlying facts. Committee members recognized of course that some misdemeanor convictions might be highly contested, but noted that when that is so, courts have employed the residual exception to allow admission of the underlying facts for their truth. Thus, adding misdemeanor convictions to Rule 803(22) was found not necessary to cover cases where the facts were truly contested, and would on the other hand lead to admission of facts that have clearly not been contested.

For these reasons the Committee voted unanimously not to proceed with an amendment to Rule 803(22).

#### **G. Consideration of a Suggestion That Rule 704(b) Be Eliminated**

The Committee has received a law review article that advocates elimination of Rule 704(b), which provides that in a criminal case, an expert may not testify that the defendant did or did not have the requisite mental state to commit the crime charged. The Committee

determined that it would not proceed with any effort to eliminate Rule 704(b). Rule 704(b) was part of the Insanity Defense Reform Act—a broad statutory overhaul of the insanity defense. Because Rule 704(b) was part of an integrated approach by Congress, it is possible that deleting the provision would have an effect on Congressional objectives beyond the Federal Rules of Evidence. While amendments to *improve* the Rule are not necessarily ruled out, deference to the Congressional scheme cautioned strongly against an amendment that would eliminate the Rule.

#### **H. Possible eHearsay (Recent Perceptions) Exception**

At a previous meeting, the Committee decided not to approve a proposal that would add a hearsay exception intended to address the phenomenon of electronic communication by way of text message, tweet, Facebook post, etc. The primary reason stated for the proposed exception is that these kinds of electronic communications are an ill-fit for the standard hearsay exceptions, and that without the exception reliable electronic communications will be either be 1) excluded, or 2) admitted but only by improper application of the existing exceptions. The exception proposed was for “recent perceptions” of an unavailable declarant.

The Committee’s decision not to proceed with the exception was mainly grounded in the concern that it would lead to the admission of unreliable evidence. The Committee has, however, continued to monitor the practice and case law on electronic evidence and the hearsay rule, in order to determine whether there is a real problem of reliable eHearsay either being excluded or improperly admitted by misapplying the existing exceptions.

The review on recent federal case law involving eHearsay indicates that there are few if any instances of reliable eHearsay being excluded, nor is it being improperly admitted under misinterpretations of other exceptions. Most eHearsay seems to be properly admitted as party-opponent statements, excited utterances, or state of mind statements. And many statements that are texted or tweeted are properly found to be not hearsay at all. Moreover, the study conducted by the Committee’s FJC representative on social science research counsels caution in adopting an eHearsay exception. The social science studies indicate that lies are more likely to be made when outside another person’s presence—for example, by a tweet or Facebook post.

The Committee will continue to monitor the treatment of eHearsay in the federal courts, and will also continue to review the practice in the states that employ a recent perception exception.

#### **I. *Crawford v. Washington* and the Hearsay Exceptions in the Evidence Rules**

As previous reports have noted, the Committee continues to monitor case law developments after the Supreme Court’s decision in *Crawford v. Washington*, in which the Court held that the admission of “testimonial” hearsay violates the accused’s right to confrontation unless the accused has an opportunity to confront and cross-examine the declarant.

The Reporter regularly provides the Committee a case digest of all federal circuit cases discussing *Crawford* and its progeny. The goal of the digest is to enable the Committee to keep current on developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions. If the Committee determines that it is appropriate to propose amendments to prevent one or more of the Evidence Rules from being applied in violation of the Confrontation Clause, it will propose them for the Standing Committee's consideration.

#### **IV. Minutes of the Spring 2016 Meeting**

The draft of the minutes of the Committee's Spring 2016 meeting is attached to this report. These minutes have not yet been approved by the Committee.

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## Appendix

### PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE\*

#### Rule 803. Exceptions to the Rule Against Hearsay— Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

\* \* \* \* \*

- (16) *Statements in Ancient Documents.* A statement in a document ~~that is at least 20 years old~~that was prepared before January 1, 1998 and whose authenticity is established.

\* \* \* \* \*

#### Committee Note

The ancient documents exception to the rule against hearsay has been limited to statements in documents prepared before January 1, 1998. The Committee has determined that the ancient documents exception should be

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\* New material is underlined in red; matter to be omitted is lined through.

limited due to the risk that it will be used as a vehicle to admit vast amounts of unreliable electronically stored information (ESI). Given the exponential development and growth of electronic information around the year 1998, the hearsay exception for ancient documents has now become a possible open door for large amounts of unreliable ESI, as no showing of reliability needs to be made to qualify under the exception.

The Committee is aware that in certain cases—such as cases involving latent diseases and environmental damage—parties must rely on hardcopy documents from the past. The ancient documents exception remains available for such cases for documents prepared before 1998. Going forward, it is anticipated that any need to admit old hardcopy documents produced after January 1, 1998 will decrease, because reliable ESI is likely to be available and can be offered under a reliability-based hearsay exception. Rule 803(6) may be used for many of these ESI documents, especially given its flexible standards on which witnesses might be qualified to provide an adequate foundation. And Rule 807 can be used to admit old documents upon a showing of reliability—which will often (though not always) be found by circumstances such as that the document was prepared with no litigation motive in mind, close in time to the relevant events. The limitation of the ancient documents exception 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. Finally, many old documents can be admitted for the non-hearsay purpose of proving notice, or as party-opponent statements.

The limitation of the ancient documents hearsay exception is not intended to have any effect on authentication of ancient documents. The possibility of

authenticating an old document under Rule 901(b)(8)—or under any ground available for any other document—remains unchanged.

The Committee carefully considered, but ultimately rejected, an amendment that would preserve the ancient documents exception for hardcopy evidence only. A party will often offer hardcopy that is derived from ESI. Moreover, a good deal of old information in hardcopy has been digitized or will be so in the future. Thus, the line between ESI and hardcopy was determined to be one that could not be drawn usefully.

The Committee understands that the choice of a cut-off date has a degree of arbitrariness. But January 1, 1998 is a rational date for treating concerns about old and unreliable ESI. And the date is no more arbitrary than the 20-year cutoff date in the original rule. See Committee Note to Rule 901(b)(8) (“Any time period selected is bound to be arbitrary.”).

Under the amendment, a document is “prepared” when the statement proffered was recorded in that document. For example, if a hardcopy document is prepared in 1995, and a party seeks to admit a scanned copy of that document, the date of preparation is 1995 even though the scan was made long after that—the subsequent scan does not alter the document. The relevant point is the date on which the information is recorded, not when the information is prepared for trial. However, if the content of the document is *itself* altered after the cut-off date, then the hearsay exception will not apply to statements that were added in the alteration.

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## **Changes Made After Publication and Comment**

The amendment as issued for public comment would have eliminated the ancient documents exception to the hearsay rule. In response to the public comment, the amendment was changed to limit the coverage of the ancient documents exception to those documents prepared before January 1, 1998.

### **Summary of Public Comment**

**David Hird (EV-20015-0003-0003)**, is opposed to the elimination of the ancient documents exception to the hearsay rule, on the ground that it “could have a substantial negative effect in environmental cases by excluding significant evidence that is only available from older documents.”

**Erin Campbell (EV-2015-0003-0004)**, is opposed to the elimination of Rule 803(16). She states that the deletion of the hearsay exception will “suggest to trial court judges that ancient documents should never be admitted under the residual exception” and suggests that “if you still intend to delete Rule 803(16), you advise that ancient documents remain admissible if Rule 807 is satisfied.”

**Nathan Schachtman (EV-2015-0003-005)**, states that “[t]he proposed abrogation of this exception to the rule against hearsay is welcomed and overdue.” He states that “[t]he fact that a document is old may perhaps add to its authenticity, but in many technical, scientific, and medical contexts, the ‘ancient’ provenance actually makes the content unlikely to be true. As such, the rule as now in effect is capable of much mischief and undermines accurate fact finding.” He notes that “the statements in authenticated ancient documents remain relevant to the declarant's state of mind, and nothing in the proposed amendment would affect this use of the document” because such statements would not be hearsay.

**Thomas Flaskamp (EV-2015-0003-007)**, states that eliminating the ancient documents hearsay exception “would restrict the use of valuable evidence and benefit corporations over people.”

**Kim Johannessen (EV-2015-0003-008)**, is opposed to the elimination of Rule 803(16). She states that the elimination will “undermine efforts to prove the existence of historical

insurance coverage, particularly in cases involving environmental claims, toxic tort claims, and real property disputes.” She contends that “[t]he result will be to make it impossible for individuals and small businesses to fund Superfund cleanups or respond to environmental claims, the end result of which will be to hinder cleanups of contaminated sites and place an ever increasing risk that the burden to do so will fall on the general public.”

**Paul Bovarnick (EV-2015-0003-009)**, declares that much of the evidence that can be used against corporations is old paper documents and that the elimination of Rule 803(16) “would create obstacles, some impossible to overcome, to the admission of this ancient evidence.”

**Florence Murray (EV-2015-0003-0010)**, is opposed to the elimination of Rule 803(16). She states that “there has never been a complaint or inequity in this rule” and suggests that a more equitable alternative is “to grandfather all documents before a current date.” She is concerned that the deletion of the hearsay exception will “suggest to trial court judges that ancient documents should never be admitted under the residual exception.”

**Conard Metcalf (EV-2015-0003-0011)**, argues that the elimination of Rule 803(16) will have a negative impact on plaintiffs’ claims in toxic torts cases where injuries have long latency periods.

**William Kohlburn (EV-2015-0003-0012)**, states that eliminating the ancient documents exception will “impede, not further, the search for the truth” in toxic tort cases “where long past events are in issue.” He argues that ancient documents are reliable because they are old and thus probably not made in anticipation of the litigation in which they are offered.

**Richard N. Shapiro (EV-2015-0003-0013)**, argues that if any change to the ancient documents exception is required due to a concern about the advent of electronic information, it should be “a modification or addition to the rule that will only apply to documents that were capable of being electronically stored, created on or after January 1, 2000.”

**David McCormick (EV-2015-0003-0013)**, is opposed to the elimination of the ancient documents exception to the hearsay rule.

**Cynthia Brooks (EV-2015-0003-0015)**, opposes the elimination of Rule 803(16). She argues that it will have a negative impact on actions involving cleanup of contaminated facilities. In such cases, historic documents are necessary “to identify liable persons responsible for cleanup.”

**Peter Nicolas (EV-2015-0003-0016)**, suggests several ways in which Rule 803(16) can be amended to prevent the admission of old and unreliable ESI, short of eliminating the rule: 1) Increase the necessary age for ancient documents from 20 years to 30 years; 2) Amend Rule 803(16) to provide that the only form of authentication is through the authentication rule for ancient documents (Rule 901(b)(8)); 3) Amend the rule to provide that hearsay embedded in an ancient document is not admissible; or 4) Require that the ancient document be prepared before the controversy arose and that the document was subsequently acted upon by those with an interest in the matter set forth.

**Michael Gatto (EV-2015-0003-0017)**, believes that “the proposed rule change unfairly inures to the benefit of the defense” and that “it is the rare case when the defense wants to avail itself of this rule.”

**William Harty (EV-2015-0003-0018)**, is opposed to the elimination of the ancient documents exception to the hearsay rule. He states that there is no evidence of a problem that is occurring with unreliable electronic information being offered under the exception. He argues that “[b]y singling out only the ancient document exception for abrogation . . . the committee's action may convey to courts and litigants a blanket, unwarranted disapproval of ancient documents themselves” making it unlikely that even reliable ancient documents will be admissible under the residual exception.

**Steve Rineberg (EV-2015-0003-0019)**, opposes the elimination of the ancient documents hearsay exception, on the ground that it will unfairly affect plaintiffs in toxic tort cases involving latent diseases. He states that “[a]ncient documents relating to property ownership, sales, decision-making, and state of the art are extremely important for purposes of litigation in cases such as this, and such documents are often the only evidence available. The individuals responsible for drafting these documents, however, are usually unable to be located or are deceased, given the amount of time that has passed.”

**Amy Heins (EV-2015-0003-0020)**, contends that “[e]liminating the ancient document exception will unilaterally eliminate the best evidence both sides have in cases of latent disease such as mesothelioma.”

**Michael Mudd (EV-2015-0003-0021)**, is opposed to the elimination of the ancient documents exception. His comment is identical to the comment submitted by Steve Rineberg, (EV-2015-0003-0019).

**Robert Paul (EV-2015-0003-0022)**, opposes the proposed change, on the ground that ancient documents are necessary in asbestos litigation. He concludes that the elimination of the “would certainly increase cost and multiply motion practice before judges on . . . ancient documents and prevent relevant and important evidence from reaching juries.”

**Frederick Jekel (EV-2015-0003-0023)**, opposes the elimination of the hearsay exception for ancient documents. He states that in “asbestos, lead paint and tobacco litigation . . . most of the knowledge based liability document are more than 20 years old.”

**Henry Bullard (EV-2015-0003-0024)**, states that the proposal to eliminate Rule 803(16) “is a solution in search of a problem, and there is no problem.”

**Devin Robinson (EV-2015-0003-0025)**, is opposed to the elimination of Rule 803(16), on the ground that the change “is not needed and will radically effect many injured peoples' ability to seek compensation from at fault parties” especially in cases of latent injury, where often “no one exists to authenticate the documents.”

**Robert Beatty-Walters (EV-2015-0003-0026)**, states that “[e]liminating this rule simply makes the burden on the plaintiff unnecessarily higher when conduct by nefarious manufacturers is documented in older records.”



**Benno Ashrafi (EV-2015-0003-0027)**, is opposed to the elimination of the hearsay exception for ancient documents.

**Darron Berquist (EV-2015-0003-0028)**, states that elimination of the ancient documents exception has a potential to impede access to justice in cases involving latent diseases. He contends that “plaintiffs in asbestos litigation often must rely upon ancient documents to prove their cases (e.g., asbestos content of products, a company’s knowledge of the hazards of asbestos, a company’s recommendation of the use of asbestos replacement parts, etc.).”

**Thomas Melville (EV-2015-0003-0029)**, asserts that “[h]istoric documents are impossible to authenticate, unlike a modern document, because the author is likely long since retired from institutional employment or dead.” He concludes that the proposed elimination of Rule 803(16) “will favor large corporations and tortious wrongdoers at the expense of future victims.”

**J.D. McMullen (EV-2015-0003-0030)**, states that eliminating Rule 803(16) “would allow companies to shield decades of knowledge as it relates to the hazards associated with the products they manufacture and sell to workers and consumers.”

**Patrick O’Hara (EV-2015-0003-0031)**, contends that “[i]t would be a mistake to delete . . . Rule of Evidence 803(16)” because “[m]any of these documents which are important to cases dealing with issues that happened decades ago will not be admissible without this rule.”

**Avery Waterman (EV-2015-0003-0032)**, opposes the elimination of Rule 803(16), because “sheer passage of time should not shield potentially dispositive evidence.”

**Gary Berne (EV-2015-0003-0033)**, states that the ancient documents hearsay exception “can be helpful in leading to a fair result in those rare instances where it is needed. In fact, it very well may be that the best reason to keep the rule is that it could be crucial in a rare instance.”

**Jared Placitella (EV-2015-0003-0034)**, states that the elimination of the ancient documents exception “will have a significant impact on toxic tort plaintiffs, leaving many people who have been harmed by corporate negligence uncompensated for their losses.” He contends that a change is not yet necessary to prevent admission of old, unreliable ESI, because “we are at most only 10-15 years into the digital ESI age [and] many relevant documents and other evidence material to toxic tort and other litigation are largely still in paper-form.”

**Chris Placitella (EV-2015-0003-0035)**, opposes the elimination of Rule 803(16), because the exception “is particularly important in latent disease cases where the injury does not manifest for many years after exposure. The need for this exception is further accentuated by the fact that defendants who have destroyed original documents often object to the introduction of fraud based evidence arguing that because there is no one to testify how documents were created the documents are not admissible.”

**James Bedortha (EV-2015-0003-0036)**, opposes eliminating the ancient documents exception to the hearsay rule, on the ground that “numerous parties would be deprived of their ability to offer relevant, compelling and in most cases dispositive evidence of activities, knowledge or awareness of other parties reflected in documents subject to this rule.”

**James Pettit (EV-2015-0003-0037)**, states that eliminating the ancient documents exception “means that the search for truth in the courtroom will be reduced to allowing current corporate personnel testifying about their memories of speaking with now-deceased persons, or testifying about their belief about corporate practices decades ago.”

**Scott Frost (EV-2015-0003-0038)**, opposes elimination of the ancient documents exception to the hearsay rule, concluding that the rationale of the rule is sound and there have been “no real changes in practice or procedure” that would require elimination of the rule.

**Scott Marshall (EV-2015-0003-0039)**, declares that “[t]he elimination of F.R.E. 803(16) will not advance justice; instead it will impede it by allowing corporate defendants the ability to deny juries the opportunity to see important evidence that is rightfully admissible.”

**David Aubrey (EV-2015-0003-0040)**, argues that the elimination of Rule 803(16) will prevent plaintiffs with mesothelioma and lung cancer from the evidence necessary to prove that defendants had knowledge of the dangerousness of asbestos.

**Jason Steinmeyer (EV-2015-0003-0041)**, filed a comment identical to that of David Aubrey (EV-2015-0003-0040).

**Robert Jacobs (EV-2015-0003-0042)**, states that the ancient documents hearsay exception “is invaluable” in litigation seeking to prove the existence or value of an old insurance policy. He argues that “the continued use of paper regardless of computer storage warrants this rule to remain.”

**Shawn Acton (EV-2015-0003-0043)**, concludes that “[t]he abrogation of FRE 803(16) would have a devastating effect on Plaintiffs and Defendants who have to prove or defend their claims using documents that are decades old” because with old documents “there is often not a witness that can qualify an authentic document under a hearsay exception other than FRE 803(16).”

**Susannah Chester (EV-2015-0003-0044)**, opposes the elimination of Rule 803(16). She states that the exception is needed for property records and that it is unlikely such records will be admissible under other exceptions such as for business records or the residual exception.

**Perry Browder (EV-2015-0003-0045)**, opposes the elimination of Rule 803(16) on the ground that it will be “harmful to any litigation that involves older cases.”

**Tina Bradley (EV-2015-0003-0046)**, states that Rule 803(16) is “used frequently as too often, no other proof is available because parties are defunct and no longer in existence.” She also states that “even if the opportunity exists to authenticate ancient documents, it is often a very expensive process.” Accordingly she opposes the elimination of Rule 803(16).

**Lillian Talbot (EV-2015-0003-0047)**, states that in litigation involving latent diseases, “[a]ncient documents relating to property ownership, sales, decision-making, and state of the art are extremely important [and] are often the only evidence available. The individuals responsible for drafting these documents, however, are usually unable to be located or deceased, given the amount of time that has passed.” Accordingly, she opposes the elimination of Rule 803(16).

**Margaret Samadi (EV-2015-0003-0048)**, argues that “[e]liminating Rule 803(16) would result in grave injustice for latent disease sufferers.”

**Andrew Balcer (EV-2015-0003-0049)**, opposes the elimination of Rule 803(16) because it would have a negative effect on plaintiffs who are “victims of latent disease, which only now manifest, despite their exposures to dangerous products occurring many decades ago.” He states that the residual exception is not an adequate substitute because it is designed to be only rarely invoked, and that the business records exception is not an adequate substitute because it is often not possible to find a custodian for old documents.

**John Kerley (EV-2015-0003-0050)**, opposes the elimination of the ancient documents exception to the hearsay rule because “[i]n many cases, the exception is the only way to prove or disprove material facts in dispute. The exception helps both sides of litigation and needs to be left in place.”

**Steven Perbix (EV-2015-0003-0051)**, urges retention of the ancient documents exception to the hearsay rule, because it is still necessary for documents that are not electronically stored, “especially as to documents stored at sites in rural areas that have not availed themselves of technology for documents that date back into the 1970s, 1980s, and even early 1990s.”

**Christopher Madeksho (EV-2015-0003-0052)**, states that “[a]brogating the historical document hearsay exception would take away the chance for cancer-stricken Americans like my clients to seek justice for having been wrongfully exposed to carcinogens that take decades to cause their cancer.”

**Mark Bratt (EV-2015-0003-0053)**, is opposed to the elimination of Rule 803(16), arguing that the result would be “a huge windfall for large corporations and insurance companies as they will be able to use the passing of time as a sword in defending themselves in lawsuits.”

**Michael Patronella (EV-2015-0003-0054)**, argues that “[a]uthentication of ancient documents is very costly and expensive” and that the proposed change “benefits large multi-million and billion dollar defendants.” He concludes that “[p]laintiffs already have an uphill battle when it comes to finding and authenticating evidence, and this amendment will make many colorable claims even more difficult to prove.”

**Brent Zadorozny (EV-2015-0003-0055)**, opposes the amendment on the ground that it would have a negative impact on plaintiffs’ claims in asbestos litigation, “in which the latency period for the asbestos diseases range from up to 40 to even 80 years.”

**Leonard Sandoval (EV-2015-0003-0056)**, opposes the elimination of Rule 803(16) on the ground that the result would be to “deprive victims of latent injuries (e.g. lung cancer, mesothelioma, etc.) of a significant source of evidence in cases related to asbestos exposure.”

**Marc Willick (EV-2015-0003-0057)**, states that “[e]liminating the ancient records exception will destroy proof necessary for prosecution and defense in thousands of cases across the country that turn on long held evidence.” He therefore opposes the proposed amendment.

**Jon Neumann (EV-2015-0003-0058)**, states: “Without the ancient document exception to the hearsay rule, evidence that may presently be admissible to support a victim’s case will no longer be available for consideration by the trier of fact.”

**Ari Friedman (EV-2015-0003-0059)**, argues that the proposed elimination of Rule 803(16) “is advanced under theoretical and hypothetical concerns that may (or may not) arise in the future.” He concludes that Rule 803(16) should not be abrogated because “more often than not the only thing to have survived the passage of time are the documents subject to this exception, as the people who can speak to the issues in the documents tend to move away, have faded memories, or worst of all, pass away.”

**Thomas Plouff (EV-2015-0003-0060)**, opposes the elimination of Rule 803(16) on the ground that “[t]here are some cases, particularly involving minors or others under a disability, where ancient documents may be necessary proof.”

**Matthew McLeod (EV-2015-0003-0061)**, states that the ancient documents exception to the hearsay rule “is a well-reasoned and important exception that provides a measure of fairness for victims of negligence to make their cases that would not otherwise be possible simply due to the passage of time.”

**Brian Wendler (EV-2015-0003-0062)**, opposes the elimination of the ancient documents hearsay exception because it “would be a travesty to scores of attorneys who have relied on its existence to forego depositions to save client costs.”

**Barrett Naman (EV-2015-0003-0063)**, states that “[t]his unnecessary rule change would detrimentally affect thousands of cases that rely upon these documents to prove events that occurred decades ago.”

**Nicholas Cronauer (EV-2015-0003-0064)**, opposes elimination of the hearsay exception for ancient documents. He argues that the exception “preserves evidence and permits evidence to be admitted at trial that otherwise would be barred due to incompetence of a party or the passage of time.”

**Thomas Bevan (EV-2015-0003-0065)**, opposes the proposed elimination of Rule 803(16) on the ground that asbestos victims’ claims “are often admitted at trial pursuant to the ancient document rule. The elimination of the rule will further victimize these people and provide cover for the corporations who injured them.”

**Scott Britton-Mehlich (EV-2015-0003-0066)**, states that eliminating the hearsay exception for ancient documents “will disproportionately impact plaintiffs who will have to expend substantial amounts of resources in order to authenticate and prove up these valuable documents in order to use them at trial.”

**Jonathan Forbes (EV-2015-0003-0067)**, opposes the elimination of the ancient documents exception, in a comment identical to that provided by Jason Steinmeyer, (EV-2015-0003-0041) and David Aubrey (EV-2015-0003-0040).

**Barry Castleman (EV-2015-0003-0068)**, opposes the elimination of the ancient documents hearsay exception. He states that “[j]uries have the ability to give appropriate weight to [ancient] documents, once admitted, for their consistency with other evidence, their importance and truthfulness.”

**Valerie Farwell (EV-2015-0003-0069)**, states that the elimination of the ancient documents hearsay exception would have a negative impact on plaintiffs in asbestos litigation. The result would be “more delay and expense in the litigation process when these large corporations seek to prevent the admission of ancient documents without additional authentication.”

**Alexandra Caggiano (EV-2015-0003-0070)**, states that in cases involving latent injuries, the ancient documents hearsay exception “is a tremendous help in bringing in evidence that is obviously authentic but cannot be admitted into evidence via another exception.”

**Jeffrey Simon (EV-2015-0003-0071)**, concludes that “[t]he ancient documents exception to the hearsay rule provides a crucial basis to offer and authenticate documents where no sponsoring witness can be found, yet there is no genuine reason to believe the document has been fabricated.”

**Christian Hartley (EV-2015-0003-0072)**, argues that for cases involving conduct that occurred many years earlier, elimination of the ancient documents hearsay exception “would create a de facto statute of limitations by allowing the passage of time to extinguish the evidence.”

**Michael Shepard (EV-2015-0003-0073)**, opposes the elimination of the ancient documents hearsay exception. He states that the exception “is used more often than realized, and when it is needed, it is often crucial to either proving a plaintiff’s claim, or proving a defendant’s defense.”

**Shane Hampton (EV-2015-0003-0074)**, opposes the elimination of Rule 803(16). He argues that in cases involving latent injuries, “older documents are provided by parties to the case, and it would frustrate the search for truth if they became inadmissible.” He also states that “[t]here are circumstances when older documents may vindicate a defendant, who was not negligent, or who did not cause the alleged injury, and this amendment would hurt those defendants rights to defend themselves.” Thus the elimination of the exception is “not a plaintiff v. defendant issue.”

**David Norris (EV-2015-0003-0075)**, believes that “all of the good reasons for the creation of FRE 803(16) still exist” and that it is “an important tool for both plaintiffs and defendants.” Thus he opposes elimination of the ancient documents hearsay exception.

**Jason Beale (EV-2015-0003-0076)**, states that “abrogating the ancient document exception to the hearsay rule, outright, would directly and severely prejudice” victims of mesothelioma “and unfairly allow a negligent party to have an unnecessary, unfair, and prejudicial advantage.”

**Angela Bullock (EV-2015-0003-0077)**, states that if not for the ancient documents hearsay exception, a defendant corporation in a case involving a latent disease “would unfairly benefit” from a plaintiff being barred from introducing relevant records. She concludes that “[m]any of

the sources of these ancient documents are companies of bad actors—most of which are defunct and therefore, cannot be deposed and otherwise examined on the documents.” She therefore opposes elimination of the hearsay exception for ancient documents.

**Samuel Elswick (EV-2015-0003-0078)**, opposes the elimination of Rule 803(16). He states that the ancient documents exception is necessary in asbestos cases to qualify documents showing knowledge of the dangers of asbestos, as well as documents indicating the defendants' choice to utilize asbestos rather than some other material.

**Jonathan Ruckdeschel (EV-2015-0003-0079)**, opposes the proposed elimination of Rule 803(16) on the ground that it would prevent recovery for victims of mesothelioma. In the alternative, he urges “that any alteration act only prospectively. That is, that it only apply to documents created after the amendment of the rule. To do otherwise will result in the denial of compensation to terminally ill Americans.”

**Bruce Carter (EV-2015-0003-0080)**, opposes the elimination of the ancient documents exception to the hearsay rule. He states that “[t]he rule has substantial safeguards to assure authenticity of the documents” and that “[d]epriving the parties of the ability to use historic documents will deny both parties the ability to be adequately represented.”

**Christopher Meisenkothen (EV-2015-0003-0081)**, states that “[t]he ancient document exception to the hearsay rule should not be eliminated. It is a vital part of many cases involving long-latent injuries where ancient documents are often important pieces of evidence.”

**Michelle Whitman (EV-2015-0003-0082)**, states that “[a]bolishing the ancient document exception to the hearsay rule would no doubt be detrimental to so many on both sides of the bar who rely on these documents in proving their cases.”

**Carla Guttilla (EV-2015-0003-0083)**, opposes the elimination of the ancient documents exception to the hearsay rule, on the ground that the change “would preclude parties on both sides of litigation from utilizing ancient documents for which no other form of authentication exists due to the passage of time and death of the authors. These documents are paramount in latent disease cases to show what actually happened and what was known or not known during the relevant periods for these cases, where exposure or injury occurred decades ago.”

**Marc Weingarten (EV-2015-0003-0084)**—who provided written comment and testimony at the public hearing—is opposed to the elimination of Rule 803(16). He argues that it will impose new costs on the proponent to establish the admissibility of an ancient document, which he maintains runs contrary to recent Rules Committee projects designed to make federal litigation less expensive. He contends that any amendment to Rule 803(16) short of abrogation should be opposed, because an amendment would add more reliability and/or necessity requirements, requiring additional expenditure to meet those requirements. He states that ancient documents are necessary to prosecute claims against asbestos manufacturers, and that many of these documents have been found “in garages, musty warehouses, in other out of the way, and decidedly non-corporate places, and often in old file cabinets, folders and boxes” and they “cannot be authenticated in a traditional manner because there is no one from the company who is capable of doing so.”

**Mark Wintering (EV-2015-0003-0085)**, opposes the elimination of Rule 803(16), on the ground that “[t]he ancient document exception to the hearsay rule has been crucial to the full and fair presentation of evidence in asbestos and other toxic tort cases, where key documents were not electronically preserved.”

**Charles Soechting, Jr. (EV-2015-0003-0086)**, opposes the elimination of the ancient documents hearsay exception. He asserts that “more often than not given their age there are no longer individuals able to provide the necessary testimony to authenticate [such] documents, despite their importance to the underlying litigation.”

**Mike Bilbrey (EV-2015-0003-0087)**, states that abrogation of the ancient documents exception would have an unfair impact on plaintiffs’ claims of latent disease, where “[a]ncient documents are routinely used to provide evidence of the Defendant’s knowledge of the dangers from these poisons, toxins and harmful substances.”

**Rachel Moussa (EV-2015-0003-0088)**, opposes the elimination of the ancient documents hearsay exception. She concludes that without the exception “[v]ictims who have suffered injuries from latent defects will be unable to prove their claims.”

**William Minkin (EV-2015-0003-0089)**, states that the ancient document exception “has been instrumental in holding wrongdoers accountable in civil litigation, particularly in cases of latent diseases, such as asbestos, lead and tobacco” because Rule 803(16) “is very often the only way” to admit the critical documents.

**Michael Burnworth (EV-2015-0003-0090)**, opposes the elimination of the ancient documents exception to the hearsay rule, in a written comment that is identical to that provided by Jonathan Forbes, (EV-2015-0003-0067), Jason Steinmeyer, (EV-2015-0003-0041) and David Aubrey (EV-2015-0003-0040).

**Lamont McClure (EV-2015-0003-0091)**, opposes the elimination of the ancient documents hearsay exception on the ground that the authentication requirements for ancient documents “already provide[] sufficient safeguards to the possibility of the use of fraudulent documents.”

**Beth Gori (EV-2015-0003-0092)**, opposes the elimination of the ancient documents exception to the hearsay rule, in a written comment that is identical to that provided by Michael Burnworth, (EV-2015-0003-0090), Jonathan Forbes, (EV-2015-0003-0067), Jason Steinmeyer, (EV-2015-0003-0041) and David Aubrey (EV-2015-0003-0040).

**Kenneth Wilson (EV-2015-0003-0093)**, states that the ancient documents exception should be retained, because “[a]s time passes, witnesses become unavailable or pass away, memories fade, companies get sold or go out of business” and “oftentimes the only available evidence is in the form of ancient documents.”

**Mike Riley (EV-2015-0003-0094)**, states that in toxic tort cases, “[l]egitimate and relevant documents are often admitted at trial pursuant to the ancient document rule, and the elimination of the rule would not serve the interests of justice.”

**David Layton (EV-2015-0003-0095)**, states that the ancient documents hearsay exception “is particularly important for cases with injuries that have long latency periods.” He concludes that the exception “is neutral and is often relied upon by both parties” and that without the exception, “the finder of fact will be deprived of key information.”

**Taylor Kerns (EV-2015-0003-0096)**, opposes the elimination of the ancient documents hearsay exception, on the ground that it “has been, and will continue to be, necessary to protect the rights of plaintiffs and defendants alike in areas of litigation in which information is located only in hardcopy.” He states that “[t]o the extent the Committee believes ESI must be addressed, there are mechanisms by which this can be accomplished without the radical remedy of total abrogation, such as limiting the exception for hardcopy documents.”

**Dimitri Nichols (EV-2015-0003-0097)**, opposes the elimination of the hearsay exception for ancient documents, on the ground that it will “injure the rights” of plaintiffs in asbestos litigation, “whom already face a deck stacked against them when they seek justice.”

**Chris Romanelli (EV-2015-0003-0098)**, argues that “[o]lder documents are noteworthy for their truth and reliability” and that eliminating the hearsay exception for ancient documents “frustrates the search for the truth.”

**Christopher Hickey (EV-2015-0003-0099)**, argues that the elimination of the ancient documents exception “will adversely affect Americans suffering from latent disease, including our military veterans.”

**John Kane (EV-2015-0003-0100)**, objects to the elimination of the hearsay exception for ancient documents. He argues that Rule 803(16) “is a practical rule that understands that after several decades the original author of an ancient document may not be available to testify but the contents of the document are still relevant and typically critical to the case.”

**Holly Peterson (EV-2015-0003-0101)**, opposes the elimination of the ancient documents exception, emphasizing its impact on plaintiffs in latent disease cases. “Abrogation of this rule will mean I must argue [the hearsay] issue to judges in every single case—a colossal waste of attorney time and judicial resources.”

**Justin Shrader (EV-2015-0003-0102)**, contends that the ancient documents exception to the hearsay rule “has an important place in modern practice, despite the growing prevalence of ESI.” He argues that the exception is especially important in cases involving toxic torts and latent injuries: “Every asbestos trial our firm has been involved in has relied on FRE 803(16) to enter into evidence key historical documents to impute knowledge to a defendant that may otherwise be inadmissible.” He therefore opposes any amendment that would limit the ancient documents hearsay exception.

**Keith Patton (EV-2015-0003-0103)**, states that “[t]he ancient documents exception is necessary in cases that require the use of documents that pre-date modern technology, such as latent injury cases.” He declares that “by eliminating the exception, the proposal will prevent trial judges from exercising their discretion in determining the admissibility of these documents—a role judges are well-equipped to handle.”



**Bradley Evetts (EV-2015-0003-0104)**, opposes the elimination of the ancient documents hearsay exception, in a written comment that is identical to that provided by Beth Gori, (EV-2015-0003-0092), Michael Burnworth, (EV-2015-0003-0090), Jonathan Forbes, (EV-2015-0003-0067), Jason Steinmeyer, (EV-2015-0003-0041) and David Aubrey (EV-2015-0003-0040).

**Erin Jewell (EV-2015-0003-0105)**, states that “[a]ncient documents often form a quintessential part of the proof in latent disease cases, where the plaintiff is forced to prove that the defendant companies knew, had reason to know or should have known about the dangers of asbestos in the 1940s, 1950s, 1960s and 1970s, long before documents were stored electronically.” She concludes that “[e]liminating the ancient document exception will only benefit corporations, at the expense of innocent victims.”

**Todd Neilson (EV-2015-0003-0106)**, asserts that Rule 803(16) “is in fact invoked frequently” and that eliminating the hearsay exception “will ultimately increase the time and expense of litigation.”

**John Kopesky (EV-2015-0003-0107)**, contends that without the ancient documents hearsay exception “individuals who suffer injuries from latent defects will be unable to prove their claims” because “[i]f the company that originated the [ancient] document no longer exists, there may be no way to authenticate the document.”

**Amy Gabriel (EV-2015-0003-0108)**, opposes the elimination of the ancient documents hearsay exception, in a written comment that is identical to that provided by Bradley Evetts, (EV-2015-0003-0104), Beth Gori, (EV-2015-0003-0092), Michael Burnworth, (EV-2015-0003-0090), Jonathan Forbes, (EV-2015-0003-0067), Jason Steinmeyer, (EV-2015-0003-0041) and David Aubrey (EV-2015-0003-0040).

**Laurel Halbany (EV-2015-0003-0109)**, opposes the elimination of the ancient documents hearsay exception, arguing as follows: “The existence of electronically stored information for newer documents does not change the value of existing ancient documents, nor render them hearsay.”

**Lance Pomerantz (EV-2015-0003-0110)**—in a written comment and in testimony at the public hearing—contends that the ancient documents exception has continuing vitality in land title litigation, and notes that the exception originated in land title cases under the common law. Thus any proposal to limit the ancient documents hearsay exception should leave some way for old documents to be admitted in land title litigation. One possibility might be to “grandfather” old documents and allow the abrogation to apply only to those documents generated after a certain date.

**Nathaniel Mudd (EV-2015-0003-0111)**, is “deeply concerned about the proposed rule to abrogate FRE 803(16) regarding the admissibility of ancient documents.” He states that without the ancient documents hearsay exception, many asbestos claims could not be brought.

**Stacey Kurich (EV-2015-0003-0112)**, argues that without the ancient documents hearsay exception, many asbestos claims could not be brought because the authors of the relevant documents are long deceased.

**Kelly Battley (EV-2015-0003-0113)**, states that “[t]here are many kinds of litigation in which the only available and admissible evidence may be the ancient documents exception to hearsay. The rule continues to work in those situations.”

**Peter Janci (EV-2015-0003-0114)**, opposes the elimination of the ancient documents exception to the hearsay rule, on the ground that it will have a negative effect on plaintiffs’ claims of sexual abuse when that abuse occurred many years before the action is brought. He states that the ancient documents exception is essential because it allows “a corporation’s own internal documents to be admitted as evidence of what it knew about a danger and how it responded.”

**Clayton Thompson (EV-2015-0003-0115)**, opposes the proposal to eliminate the ancient documents hearsay exception, emphasizing its negative effect on the claims of victims of mesothelioma. He states the plaintiff must put on evidence “of what the defendant knew about the hazards of asbestos, when it used asbestos, and in which products or at which jobsites.” He contends that these facts ordinarily must be proved through ancient documents.

**John Harp (EV-2015-0003-0116)**, contends that eliminating the hearsay exception for ancient documents “would harm a substantial number of workers in fields such as the railroad industry.”

**Anthony Petru (EV-2015-0003-0117)**, opposes the elimination of the ancient documents hearsay exception, based on his experience in representing clients “who have illnesses and injuries as a result of various forms of cumulative trauma and exposure.” He states that “[f]requently the only way to prove that the entities are responsible for the exposure and injury is through the use of ancient documents.” The documents “often either are explicit admissions, or evidence of available information which would make a reasonable person take notice and act to protect the users.”

**Kristoffer Mayfield (EV-2015-0003-0118)**, argues that the consequence of eliminating the ancient documents exception to the hearsay rule will be that “many types of cases, where people have been very badly injured, killed, or made very sick, will not be adequately prepared and presented on the merits.” He states that “[t]he issue is that corporate knowledge is extremely important to prove notice and culpability and to deter bad conduct by the world’s most powerful corporations.”

**Victor Russo (EV-2015-0003-0119)**, argues that the ancient documents exception to the hearsay rule must be retained, because defendants destroy their relevant documents; “in response to this, attorneys and some expert witnesses have developed and maintain libraries of documents obtained through diligent work. As time passes those documents become ‘ancient’, as we use that term of art.” He concludes that Rule 803(16) is necessary to qualify design guides, internal memoranda, safety suggestions, risk management assessments, and “all manner of documents that existed some years ago [and] cannot be found now, in a current litigation, because a defendant has decided to destroy them.”

**Christina Stephenson (EV-2015-0003-0120)**, opposes the elimination of the hearsay exception for ancient documents, stating: “I don’t believe that developments in technology are sufficient at this time to justify the change.”

**The Association of the Bar of the City of New York (EV-2016-0121)**, through its Committee on Federal Courts, opposes the elimination of the ancient documents exception to the hearsay rule. The Committee “appreciates the Advisory Committee’s desire to be proactive to preempt any possible problem that might arise in the future with electronically stored information that survives for more than twenty years.” But it states that no such problem has arisen to date. It also contends that there is a guarantee of reliability in the fact that ancient documents “must be authenticated pursuant to Rule 901(b)(8).” The Committee further opines that “Rule 403 could be used to exclude ancient documents in cases when a problem actually arises.” Finally, the Committee concludes that the abrogation could lead to “unintended consequences” because other hearsay exceptions (such as Rules 803(6) and 807) may not be sufficient to qualify reliable ancient documents.

**Gilion Dumas (EV-2015-0003-0122)**, opposes the elimination of the ancient documents hearsay exception, arguing that it is necessary for the prosecution of claims of sexual abuse that occurred many years ago. Old documents “show what the defendants knew about child molesters in their ranks, when they knew it, and what these defendants did with that knowledge.” Mr. Dumas recognizes that many of the documents offered under the ancient documents exception “are arguably admissible as non-hearsay ‘notice’ evidence, excluded from the hearsay rule as admissions of a party opponent, or are admissible under other exceptions to the hearsay rule such as the business records exception or the (always risky) catch-all exception.” But he states that “the effort and inefficiency of arguing the admissibility of every page - and every secondary or tertiary hearsay statement within each page - would make the battle almost impossible for most plaintiffs.” He concludes that “[o]nly the ancient documents rule can cut through all these irrelevant, time-wasting, side arguments to allow in relevant, authentic evidence to prove these claims.”

**James Campbell (EV-2015-0003-0123)**, opposes the elimination of the ancient documents rule on the ground that it will have a negative effect on the prosecution of cases involving latent diseases. He states that “[t]he elimination of the ancient document exception to the hearsay rule would effectively bar such suits from being brought in federal court, foreclosing a significant avenue of relief for cancer patients and victims of other diseases that were wrongfully caused by exposure to toxic substances.”

**Gregg Meyers (EV-2015-0003-0124)**, urges retention of the ancient documents exception to the hearsay rule, claiming that it is “[v]ital in work involving sexual abuse cases . . . where records were kept but are hidden.”

**James Stang (EV-2015-0003-0125)**, contends that the ancient documents exception to the hearsay rule is necessary in cases involving “institutional cover-up of sexual abuse and the efforts to put assets beyond the reach of abuse survivors.” He concludes that “[e]limination of the exception will perpetuate the historical wrong these children suffered.”

**Will Nefzger (EV-2015-0003-0126)**, opposes the elimination of the ancient documents hearsay exception. He states that “[p]erhaps in another generation, it might make sense, but not now.”

**Raeann Warner (EV-2015-0003-0127)**, argues that the ancient documents exception to the hearsay rule should be retained because of its importance in cases involving asbestos contamination, as well as cases alleging sexual abuse allegedly condoned by institutions. She states that “[i]t is in the instances of the greatest cover-ups or latent diseases that don’t develop for many years that these documents are the most critical to victims of corporate negligence.”

**Michele Betti (EV-2015-0003-0128)**, opposes the elimination of the ancient documents exception to the hearsay rule. She argues that the exception is essential for the admission of evidence indicating that institutions were aware of sexual abuse perpetrated by agents and employees many years before the litigation is brought.

**Edward Cook (EV-2015-0003-0129)**, argues that the ancient documents exception should be retained because of its importance in proving liability for injuries suffered by rail workers.

**Lori Watson (EV-2015-0003-0130)**, argues that the ancient documents hearsay exception should be retained due to its importance in proving cases involving past sexual abuse. She states that “[m]any of these cases include significant claims of fraudulent concealment and conspiracy against large institutional defendants that permitted or ratified the abuse. These defendants often have records dating back decades that are the evidence to establish these claims, and make these cases viable. Often the authors of the documents and/or witnesses referred to in the documents are deceased, therefore making the document unusable if the ancient document rule is eliminated.”

**Peter Kraus (EV-2015-0003-0131)**, states that “[f]or attorneys representing the victims of toxic injuries, Rule 803(16) is a key tool to prove liability in these already very difficult cases.” He notes that “[a]lthough other exceptions to the hearsay rules may be available in some instances, the best and clearest path to the admissibility of relevant evidence from industry trade groups and other companies similarly situated to the defendant is Rule 803(16), the ancient documents exception.”

**Jonathan Redgrave (EV-2015-0003-0132)**—in written comment and in testimony at the public hearing—supports the proposal to eliminate the ancient documents exception to the hearsay rule. He observes that “a document does not become more reliable from one day to the next by having a birthday.” He states that if the rule is not abrogated, “litigants may seek to admit ESI that contains unreliable hearsay into evidence simply because the ESI is old enough to come within the ancient documents exception to the hearsay rule. The initial trickle will turn into a flood as the universe of ESI that reaches the magical 20 year milestone grows at an exponential rate.” He concludes that “[u]nreliable evidence should not be admitted, whether it is in hardcopy or ESI regardless of age” and that “the only practical effects of abrogating Rule 803(16) will be to require litigants to establish the reliability of ESI before offering it for the truth of its contents, and to prevent abuses of the ancient documents exception to the hearsay rule. Both results are desirable.” Finally, he finds the concerns expressed in other comments about the inapplicability of the business records exception to ancient documents “overstated

because there are ways to meet the requisites of Rule 803(6) without a contemporaneous witness who had personal knowledge of the records being created.”

**Tahira Merritt (EV-2015-0003-0133)**, states that the ancient documents hearsay exception is “a vital tool to hold institutions accountable in cases involving alleged sexual abuses that were caused or suppressed by institutions” because “the institution’s pattern and practice is often found in the institution's ancient documents.” Therefore she opposes the elimination of the ancient documents hearsay exception.

**Ashley Vaughn (EV-2015-0003-0134)**, states that the ancient documents hearsay exception “is invaluable in cases with extended statutes of limitation, such as child sexual abuse cases, and advances in technology do not dispense with the need for the rule.” She argues that “[t]he evidence necessary to prove claims for child sexual abuse that occurred many years ago is often found in ‘ancient documents’ such as magazines, newspaper articles, and documents published by the organization at fault” and “the articles may be otherwise difficult to authenticate except through FRE 803(16).”

**Mark Gallagher (EV-2015-0003-0135)**, states that “Federal Rule of Evidence 803(16) is absolutely necessary to parties seeking to hold accountable individuals and institutions for offenses which occurred years ago” including acts of sexual abuse. He therefore opposes elimination of the ancient documents hearsay exception.

**Richard S. Walinski (EV-2015-0003-0136)**, supports the proposed amendment to eliminate the ancient documents exception to the hearsay rule. He reasons that “Rule 803(16) simply sets an unprincipled, 20-year expiration date for all hearsay considerations based on the bland happenstance that a statement was reduced to writing long ago, regardless of whether the author’s purpose was to record fact, fiction, malice, poetic insight, or pure fancy.” He states that Rule 803(16) “transfers the burden of producing the percipient witness to the opposing party without any showing or reason to presume that the opposing party is in any better position to produce the percipient-but-absent witness than is the party who would ordinary bear that burden.” He concludes that “[a]brogation of Rule 803(16) will merely reinstate the same criteria for the admissibility of ancient statements that have been applied to other kinds of out-of-court declarations.”

**David Romine (EV-2015-0003-0137)**—in a written submission and in testimony at the public hearing—opposes elimination of the ancient documents exception to the hearsay rule. He argues that the exception is critical in proving cases brought under CERCLA and in denaturalization cases. He concludes that the business records exception is not a substitute because no custodian will be found for ancient documents; and the residual exception is not a substitute because it is disfavored by the courts. Finally, he expresses concern that abrogation of Rule 803(16) “will lead to increased tangential litigation as the question of admissibility of ancient documents is pushed from the ancient documents exception to the residual exception, resulting in increased expense for litigants and increased burdens for judges.”

**Randy Reagan (EV-2015-0003-0138)**, opposes the elimination of the ancient documents exception to the hearsay rule, on the ground that it would have “an extremely negative impact” on the ability of plaintiffs in toxic tort cases to prove critical facts. He argues that “[t]here is

already an uneven playing field between the injured parties that we represent and the corporations that are responsible for their injuries” and that the abrogation of Rule 803(16) would accentuate that imbalance.

**Ross Stomel (EV-2015-0003-0139)**, opposes the elimination of the ancient documents hearsay exception, on the ground that it will have a negative impact on plaintiffs’ claims in asbestos litigation. He states that “[d]iscovery in litigation over the past 40 years has resulted in the production of millions of pages of corporate and trade organization documents from these past decades that demonstrate widespread knowledge of the dangers of asbestos” and he fears that these documents, “admissible for their truth prior to the amendment (and not seriously challenged), would become inadmissible overnight and unavailable as proof, allowing the companies to deny the undeniable.”

**Christopher Paulos (EV-2015-0003-0140)**, opposes the elimination of the ancient documents exception to the hearsay rule. He contends that the exception should not be altered in response to electronically stored information because “in an age when everything can be created or deleted with just one click, if something can survive long enough to be considered ‘ancient’ then it is more reliable than not, and the truth of its contents, likely created when the case at bar had not yet been set in motion, should be presumed.”

**Michael Blanchard (EV-2015-0003-0141)**, states that “[d]oing away with the ancient document exception to the hearsay rule would be a great injustice to many claimants who must rely on ancient documents that are clearly acceptable but cannot get into evidence any other way.”

**Richard Cook (EV-2015-0003-0142)**, states that the ancient document exception to the hearsay rule “is essential in a number of cases” and eliminating the exception “will increase the cost and difficulty of establishing the truth and satisfying one's burden of proof.”

**Professor Roger Park (EV-2015-0003-0143)**, opposes the elimination of the ancient documents exception to the hearsay rule. He contends that “[t]he strongest ground for excluding hearsay is the danger of adversarial abuse. Were there no rule excluding it, adversaries might create hearsay as a substitute for live testimony, hoping that dubious witnesses will make themselves scarce so that the hearsay can take their place. The notion that this machination might occur 20 years before the evidence is needed is so fanciful as not to be worth considering.” He argues that the fact that the business records exception and the residual exception would be available for admission of reliable ancient documents, “is a reason for fear, not comfort. It’s an invitation to partisan judges to screen out reliable evidence on grounds of untrustworthiness. It’s a destroyer of predictability because the outcome of that screening cannot be known beforehand.”

**Allyson Romani (EV-2015-0003-0144)**, objects to “the proposed amendment to FRE 901(8) [sic].” She notes the difficulty of authenticating documents in mesothelioma cases due to the passage of time.

**Sidney Cominsky (EV-2015-0003-0145)**, is opposed to the elimination of the ancient documents hearsay exception on the ground that it would “hurt ordinary citizens.”

**Nathan Finch (EV-2015-0003-0146)**, states that “the ancient document rule is often the only way to get an important and reliable old piece of information before a jury, because frequently the company that made and kept the record no longer has any living employees who can testify to its creation.” He suggests that “[i]f any editing is done to the rule, at most it should be clear that documents created prior to 1990—when electronic data storage first became widely available—are still subject to the rule in its current form.”

**Joseph Rice, together with the members of Motley Rice LLP (EV-2015-0003-0147)**, is opposed to the elimination of the ancient documents exception to the hearsay rule. He notes that the firm has “recently used the ancient documents rule to have evidence admitted in Court for situations where there is no longer a living witness to call upon who could lay a foundation to meet the business records exception to the hearsay rule. Therefore, ancient documents are vital even in litigation today.” He concludes that “if a document has been preserved for more than 30 years in hard copy, and in some cases 50, 60, 70 or 80 years, it is likely there is a reason for that preservation and highly probable that the document is significant, relevant and reliable.”

**Ben DuBose (EV-2015-0003-0148)**, states that elimination of the ancient documents hearsay exception, “would create an undue burden on the parties and increase the costs of litigation”—especially in cases involving latent diseases.

**Jackalyn Olinger (EV-2015-0003-0149)**, states that elimination of the ancient documents hearsay exception “would prolong the discovery process, and would often make it impossible to track down the information needed for victims of latent diseases like mesothelioma. It would also increase the cost of litigation, as companies, businesses, and municipalities would be required to put their ancient documents in electronic form. That cost would then likely be transferred to the victims.”

**Jeffrey Kaiser (2015-EV-0003-0150)**, opposes eliminating the ancient documents hearsay exception on the ground that it “would have a negative impact on victims of asbestos diseases—a process the typically takes decades and often 50 or more years to manifest.” He argues that “[h]istorical documents are often the only evidence in these cases as those who have authored them are deceased.”

**Dan Brown (2015-EV-0003-0151)**, states that the ancient documents is necessary to allow admission of documents that “may serve as a critical basis for establishing liability and provide an important historical context for the jury in many asbestos cases.”

**Bart French (2015-0003-0152)**, states that “[m]any of the documents showing knowledge of the dangers of asbestos date back several decades. These ‘ancient documents’ are well known and accepted by all parties.” To eliminate the ancient documents hearsay exception “would be to promote inefficiency and increase costs for all parties, both plaintiffs and defendants.”

**Sarah Gilson (2015-0003-0153)**, opposes the elimination of the ancient documents hearsay exception, stating as follows: “Ancient documents are regularly critical in establishing liability, finding proof for the material content of defective products, and showing corporate knowledge and failure to act on hazards to the public. These documents are essential to the basic needs of the practice of an asbestos litigator.”

**Trusha Goffe (2015-EV-0003-0154)**, opposes the elimination of the ancient documents exception, stating that the exception “is vital in litigation of child sexual abuse cases involving conduct decades ago” because “documents from the 1960s, 1970s and 1980s are key to both plaintiff and defense lawyers in prosecuting and defending claims.” She concludes that “[t]he exception continues to be relevant even with the development of ESI and will continue to be very valuable for this type of litigation.”

**Brett Powers (2015-EV-0003-0155)**, objects to the elimination of the ancient documents hearsay exception, arguing that “the burden required for a sick and injured worker, or his widow and orphans to prove their case is difficult enough under the current civil justice system.” He concludes that “[t]his amendment will simply lead to prolonged and increased litigation if not increase corporate immunity for bad acts.”

**Brian Kelley (2015-EV-0003-0156)**, asserts that the ancient document exception to the hearsay rule “is an essential rule that is necessary for several claims to be heard fairly” and that eliminating the rule “would exclude relevant evidence and provide no additional benefits to any cases.”

**Greg Lisemby (2015-EV-0003-0157)**, opposes the elimination of the ancient documents exception on the ground that it would result in the exclusion of important documentary evidence in asbestos cases. He states that “[i]t is typical in such cases to acquire documents from third-party repositories that identify a defendant's asbestos-containing products and/or a defendant's knowledge regarding the dangers of asbestos. Documents of this nature are typically not in electronic format, and defendants typically will not agree to the authenticity or admissibility of such documents.”

**Lin Thunder (2015-EV-0003-0158)**, opposes the elimination of the ancient documents hearsay exception on the ground that it would negatively impact plaintiffs in asbestos litigation. She concludes that “[t]he ancient document exception to the hearsay rule helps those whose cases involve actions that stretch back decades and has no negative impact.”

**Mary Nold Lattimore (2015-EV-0003-0159)**—in written comment and in testimony at the public hearing— supports the elimination of the ancient documents exception to the hearsay rule. She states that “[t]he proposition that a document should be considered reliable, probative, admissible evidence based solely on the age and authenticity of the document is unsupportable.” She asserts that “[i]t is frightening to think that personal assertions by non-parties in the form of personal emails, blogs, Tweets, Facebook posts, text messages, chat room dialog, voicemails, will become admissible ‘evidence’ once they are twenty years old.” She concludes that “[t]he Committee’s proposal is sound and well-reasoned. I very much appreciate that the Committee is acting in a proactive manner to ensure the integrity of the evidence presented at trials.”

**William A. Rossbach (2015-EV-0003-0160)**—in written comment and in testimony at the public hearing—is opposed to the elimination of the ancient documents hearsay exception. He states that ancient documents are critical evidence in many cases, not only those involving asbestos, and that any concern about old unreliable ESI being admitted under the exception should not result in abrogation of the exception; he states that the concern should be “addressed with targeted and specific standards, appropriate to that unique type of evidence.” Finally, he



argues that there are many hearsay exceptions that are questionable in allowing potentially unreliable evidence to be admitted, so there is no call for singling out the ancient documents exception.

**Robert J. Gordon (2015-EV-0003-0161)**—in written comment and in testimony at the public hearing—is opposed to the elimination of the ancient documents hearsay exception. He states that ancient documents are critical in asbestos litigation. He is also concerned that elimination of the exception will result in more motion practice and costs for the litigants, who will have to establish that the ancient document is reliable under another exception, and that there will be inconsistent application of admissibility standards to these documents under the other exceptions.

**Annesley DeGaris (2015-EV-0003-0162)**—in written comment and in testimony at the public hearing—is opposed to eliminating the ancient documents hearsay exception, on the ground that “[i]t places those injured by products with long latency periods at a disadvantage.” He suggests consideration of amending the rule rather than eliminating it, and adopts the suggestions for amendment made by Peter Nicolas (2015-EV-0003-0016).

**Marc P. Weingarten (2015-EV-0003-0163)**—in written comment and in testimony at the public hearing—opposes the elimination of the ancient documents hearsay exception. He argues that ancient documents are critical in many cases, such as asbestos cases, and that without the ancient documents exception “[w]hat will happen is an entirely new series of motions, briefing, oral arguments and court decisions concerning documents which were once routinely deemed admissible.” He is also concerned that “if the rule is abrogated, documents which were once routinely admitted into evidence would then become the subject of rulings by different judges in different jurisdictions, coming to different results.” For these reasons, he also opposes any amendment to Rule 803(16) that would add any further admissibility requirement to the rule.

**Tracy Saxe (2015-EV-0003-0164)**—in written comment and in testimony at the public hearing—is opposed to eliminating the ancient documents exception to the hearsay rule. He states that the exception “is incredibly important for insurance policyholders seeking coverage” because “occurrence-based liability insurance policies offer coverage that frequently lasts indefinitely, and activate when a claim is made based on something that occurred during that long ago policy term” and so in many instances very old policies are implicated in coverage disputes between insurers and policyholders. He concludes that “in a case involving a missing policy from multiple decades ago, the only reliable way to establish the contents of a policy is through use of the Ancient Documents hearsay exception” because “[o]nly rarely will a person with knowledge of the policy still be around to testify and fulfill the requirements of the business records exception.” He asserts that the residual hearsay exception is not a good substitute because courts hold that it is to be rarely applied.

**James Begley (2015-EV-0003-0165)**, contends that the elimination of the ancient documents hearsay exception “would essentially be the end of toxic torts.” He explains that elimination of the exception would “increase the costs and expense to all parties in attempting to authenticate” the necessary documents “and, even with the added cost and expenses, authentication would likely be unsuccessful, as the author and recipient(s) of those documents will not be found or have passed away.”

**Gregory Lynam (EV-2015-0003-0166)**, opposes the elimination of the ancient documents exception to the hearsay rule. He states that “the abrogation of Rule 803(16) is unnecessary and will do significant harm to those who are attempting to receive redress for acts that occurred decades prior, but the injury did not become evident until later.”

**The Federal Magistrate Judges Association (EV-2015-0003-0167)**, endorses the proposed elimination of the ancient documents hearsay exception “for the reasons stated in the Advisory Committee Report.”

**Joseph Whyte (EV-2015-0003-0168)**, opposes the elimination of the ancient documents exception to the hearsay rule, on the ground that it would lead to “unjust results” for plaintiffs in asbestos litigation.

**John Camillus (EV-2015-0003-0169)**, states that Rule 803(16) “is an important rule that is critical to permitting the admissibility of relevant evidence that otherwise would not be admissible.” He suggests that “[a]nother possibility, which I would oppose but which would make a lot more sense than removing the rule altogether, would be to change the definition of ancient records as, for instance, records created prior to the year 2000.”

**Jose Becerra (EV-2015-0003-0170)**, opposes the elimination of the hearsay exception for ancient documents, in a written statement that is identical to that of Gregory Lynam (EV-2015-0003-0166).

**Mike Finnegan (EV-2015-0003-0171)**, states that without the ancient documents exception “child sex offenders and the institutions that protect them might escape justice.” He explains that “[t]hese survivors have to rely on paper documents. Often the writers of the documents are dead and without the ancient document exception juries and judges would never be able to consider this evidence.”

**Molly Burke (EV-2015-0003-0172)**, opposes the elimination of the ancient documents hearsay exception, on the ground that it will prejudice plaintiffs suing for childhood sexual abuse. She states that without the exception, critical documents “although relevant and highly probative to show what an institution knew about problem actors and the risk of sexual abuse of children, would be inadmissible.”

**Tim Hale (EV-2015-0003-0173)**, states that the ancient documents exception to the hearsay rule is essential for plaintiffs who are survivors of childhood sexual abuse. He asserts that eliminating the exception “will decrease abuse survivors’ opportunities for justice, and decrease the likelihood of success of litigation that forces institutional transparency and makes today’s children safer.”

**Marc Pearlman (EV-2015-0003-0174)**, states that the ancient document exception to the hearsay rule “is of paramount importance to survivors of childhood sexual abuse” in which the documents regarding institutional knowledge are often “the key to proving the survivors case.” He contends that “[n]one of the other hearsay exceptions or the residual rule are sufficient to ensure these documents’ admission.”

**Anonymous (EV-2015-0003-0175)**, opposes the elimination of the ancient documents exception to the hearsay rule, on the ground that in cases brought by adult survivors of childhood sexual abuse, cases often turn on ancient documents, because “[o]rganizations and individuals in these cases keep ancient documents which become critical to the case” and “Rule 803(16) is one of the most important ways that these documents get into evidence.”

**Erica Brady (EV-2015-0003-0176)**, opposes the elimination of the ancient documents hearsay exception, in a written comment that is identical to that of Jose Becerra (EV-2015-0003-0170), and Gregory Lynam (EV-2015-0003-0166).

**Lance Pomerantz (EV-2015-0003-0177)**, posted a comment that is a follow-up to a question that was raised during his testimony at the public hearing—whether instead of eliminating the ancient document exception completely, the amendment would provide a “grandfathering” provision. He states: “I believe a grandfathering approach would be preferable to abrogation, but that the better approach (short of status quo) would be to leave the bright-line hearsay exception in place while limiting the rule’s applicability to evidence involving proof of title.”

**Michael Dunlavy (EV-2015-0003-0178)**, opposes the elimination of the ancient documents hearsay exception, in a written comment that is identical to that of Erica Brady (EV-2015-0003-0176), Jose Becerra (EV-2015-0003-0170), and Gregory Lynam (EV-2015-0003-0166).

**Michael Reck (EV-2015-0003-0179)**, opposes eliminating the ancient documents hearsay exception on the ground that it will have a negative effect on cases brought by adult survivors of sexual abuse. He explains that “[i]n cases against large institutions, plaintiffs’ lawyers rely heavily on the exception to be able to shed light on decades of knowledge possessed by” those institutions.

**Daniel Monahan (EV-2015-0003-0180)**, states that “[v]ictims of childhood sexual abuse often don’t understand the harm caused by sexual abuse until years later. Documentary evidence is often the only evidence available to prove up cases due to the passage of time. The ancient document exception continues to be necessary in the litigation of these types of cases.” Accordingly he opposes the elimination of the ancient documents exception to the hearsay rule.

**Jeff Anderson (EV-2015-0003-0181)**, states that Rule 803(16) “is one of the most important evidentiary rules for survivors of childhood sexual abuse.” He explains that “documents indicating the facts of abuse as well as institutional knowledge about it go back decades, often times with all of the individuals involved deceased except for the survivor. In some cases, these documents may be the only way that the survivor can prove their case, making Rule 803 (16) critical.” Accordingly he opposes the elimination of the ancient documents exception to the hearsay rule.

**Troy Chandler (EV-2015-0003-0182)**, would retain the ancient documents exception to the hearsay rule, arguing that it is critical for plaintiffs in toxic tort cases involving latent injuries. He states that in such cases the ancient documents exception is necessary to qualify documents that establish the state of mind of defendants.

**Ben Snipes (EV-2015-0003-0183)**, argues that “[t]he use of historical documents could not be more imperative to the fair litigation of asbestos claims.” He concludes that “[i]n the context of a disease with latency periods consisting of several decades, such as asbestos related disease, abolishing the ancient documents exception would substantially impair justice.”

**Joshua Grunda (EV-2015-0003-0184)**, states that in cases brought by plaintiffs for injuries from toxic substances, “the proposed change to FRE 803(16) would have a dramatic negative impact on my clients' ability to present critical evidence in court.” Therefore he opposes the elimination of the hearsay exception for ancient documents.

**Mickey Landry (EV-2015-0003-0185)**, states that the proposal to eliminate Rule 803(16) “purports to fix a problem that does not exist and will or could exclude extremely important documents.” Therefore he opposes the proposed amendment.

**Gary Brayton (EV-2015-0003-0186)**, believes that “the concerns intended to be addressed by the proposed amendment to Rule 803 can be successfully addressed with outright abrogation of Rule 803(16).” He states, however, that Rule 807 is unlikely to be an easy means of admitting ancient documents, because abrogation of the ancient documents exception “could reasonably be interpreted by trial judges as a repudiation of its underlying policy considerations, or, at a minimum, as a demotion of their importance.” He concludes that “any judge already viewing Rule 807 with a jaundiced eye would almost certainly regard proffered ancient document evidence as bearing additional stigma on account of being stripped of a previously existing specific exception.”

**Glenn Draper (EV-2015-0003-0187)**, would retain the ancient documents hearsay exception. He emphasizes that in mesothelioma cases, Rule 803(16) “allows juries a window into what the corporations knew and when they knew it.” He recognizes that “[i]n some instances, these documents may be admissible under another rule” but states that “often showing another hearsay exception applies is impossible or cumbersome.”

**Mark Berry (EV-2015-0003-0188)**, opposes the elimination of the ancient documents exception to the hearsay rule, noting its importance in asbestos cases. He states that “[w]ithout this rule, it is literally impossible to find a witness to prove up a document that was written 40 years ago. Obviously, the document is of great importance because it shows the state of mind of the defendant at the time of the alleged wrongdoing.”

**Shelby Reed (EV-2015-0003-0189)**, is opposed to the elimination of the ancient documents exception to the hearsay rule, concluding that “[a]brogation of this long-standing rule of evidence without justification would constitute radical activism.”

**Anthony Carr (EV-2015-0003-0190)**, states that in cases involving asbestos-related diseases, elimination of the ancient documents exception to the hearsay rule “would significantly increase the time and costs associated with our litigation of these cases, reducing the amount that should rightfully go to Plaintiffs.”

**Alyssa Segawa (EV-2015-0003-0191)**, states that in toxic tort cases, “the ancient document rule is essential in demonstrating individuals were exposed to certain products” and that

“[e]limination of this rule would prevent countless individuals who have been harmed by toxic substances from obtaining any compensation for their injuries.”

**United Policyholders (EV-2015-0003-0192)**, is opposed to the elimination of the ancient documents exception to the hearsay rule, on the ground that it will have a negative impact in cases involving insurance coverage. It states that “[p]erhaps there is a manner in which the concerns about electronic documents can be addressed without abrogating the rule in its entirety by limiting FRE 803(16) to hard copies.”

**Senators Edward Markey, Sheldon Whitehouse, Jeff Merkley, Barbara Boxer, Richard Durbin, Patrick Leahy, and Al Franken (EV-2015-0003-0193)**, oppose the elimination of the ancient documents exception to the hearsay rule. They state that the proposal “is especially troublesome because, in latent-injury, toxic-tort, products-liability, and other cases alleging corporate misconduct, abrogating Rule 803(16) could make it more difficult for plaintiffs—including the Federal Government—to prove their claims.” The Senators assert that it is “premature” to eliminate Rule 803(16) out of concern that it will be used as a vehicle to introduce unreliable ESI. They conclude that eliminating the ancient documents exception “would place a significant hurdle in the way of litigants seeking to pursue . . . congressionally created federal claims in cases in which the misconduct occurred long ago, and would thereby undermine Congress’s desire for injured parties to be able to seek a remedy.”

**The Thornton Law Firm, LLP (EV-2015-0003-0194)**, states that “[t]he abrogation of FRE 803(16), or the ancient documents exception to the hearsay rule, would deeply impact and diminish the likelihood of plaintiff success in toxic torts cases, particularly those filed against defunct, bankrupt or otherwise wholly acquired entities” because Rule 803(16) is necessary “for authenticating ‘smoking gun’ ancient documents and records that are vital in the successful litigation.” The firm asserts that the other hearsay exceptions are not an alternative because “a representative of a bankrupt, defunct, or otherwise wholly acquired corporation rarely exists for authentication purposes.”

**Certain Members of the American Bar Association Criminal Procedure Committee (EV-2015-0003-0195)**, oppose the elimination of the ancient documents exception to the hearsay rule. The members “agree with the Advisory Committee that the exception has not been used much, and that many statements that fit within the exception would fit within other hearsay exceptions as well.” They “also recognize that just because a document is old does not necessarily mean that it is reliable. Nevertheless, we believe that the exception has value and that eliminating it at this time would be a mistake.” The members state that “Rule 803(16) is crisp and categorical in nature; it is easily applied, and its application is easy for lawyers to predict” whereas “the residual exception is necessarily open-ended.” The members conclude that “the most prudent course for now is to adopt a policy of watchful waiting, perhaps with a commitment to re-examine the matter in five years” and that if “change now is necessary, it would be better to amend the Rule rather than abrogate it.”

**Kathy Byrne (EV-2015-0003-0196)**, opposes the elimination of the ancient documents exception, on the ground that it will have a negative impact in cases involving latent diseases. She states that ancient documents in such cases “provide essential evidence of what was known of toxic hazards before and at the times of exposure.”

**Clarisse Kobashigawa (EV-2015-0003-0198)**, states that “the current Ancient Documents exception makes practical sense legally and most importantly, it prevents corporations from conveniently hiding from documents that shine a magnifying glass on their knowledge and intent in continuing to use harmful products to the detriment of their unknowing victims so many years ago.”

**David Barrett (EV-2015-0003-0199)**, states that in cases involving latent diseases, eliminating the ancient documents exception to the hearsay rule “will divest the prosecuting attorney of a critical evidentiary tool, and will deprive the trier of fact of an important piece of evidence in the pursuit of truth and justice.”

**The American Association for Justice (EV-2015-0003-0200)**, opposes the elimination of the ancient documents exception to the hearsay rule. It states that “[t]he use of this straightforward, century-old exception to the hearsay rule is well-established. It has served as a means to provide fairness and protect the public interest in a variety of cases. By limiting significant, relevant and necessary evidence on the speculative premise that it could be admitted through another avenue is an insufficient protection that will lead to uncertainty, unnecessary utilization of court resources and an unfair impediment to victims’ legal rights.”

**The Academy of Rail Labor Attorneys (EV-2015-0003-0201)**, opposes the elimination of the ancient documents exception to the hearsay rule. The Academy states that ancient documents are critical in cases involving latent injuries, and that “the proposed amendment would increase the cost of litigation because of the necessity to have the documents authenticated.”

**Iana Waxman (EV-2015-0003-0202)**, opposes the elimination of the ancient documents exception to the hearsay rule, on the ground that it would deprive plaintiffs of evidence in environmental and toxic-tort litigation. She states that “[w]hile some amendment of the rule might be appropriate to address the Committee’s concerns regarding ESI, a complete abrogation would only serve to make it even more difficult for litigants to address old wrongs.”

**Samantha Flores (EV-2015-0003-0203)**, objects to the elimination of the ancient documents exception to the hearsay rule, “as this would adversely affect the type of clients . . . who were exposed to toxic substances 40, 50, 60 or 70 years ago and developed diseases that have taken their lives.”

**J. Kirkland Sammons (EV-2015-0003-0204)**, states that “abrogating the ancient documents exception would serve to further encourage ‘corporate amnesia.’” He asserts that without the ancient documents exception, evidence about what corporations knew about the dangers of asbestos and other substances would be inadmissible. Therefore he opposes its elimination.

**Sherilyn Pastor (EV-2015-0003-0205)**, urges the Committee “to reconsider its proposal abrogating the ancient documents exception set forth in Federal Rule of Evidence 803(16) given the adverse, and likely unintended, impact it will have on policyholders and insureds pursuing coverage under insurance policies issued twenty or more years ago, but nonetheless covering bodily injury and property damage claims asserted by claimants against them today.” She

concludes that the ancient documents exception “is an important rule for policyholders seeking to prove their right to insurance coverage” and that “[w]ithout it, insureds face increased difficulty and expense proving the existence and terms of their incomplete or missing insurance policies.”

**Professor Jeffrey Stempel (EV-2015-0003-0206)**, opposes the elimination of the ancient documents hearsay exception. He contends that the problem of old unreliable ESI being admitted under the exception will not be serious because “separating the wheat from the chaff has always been the task of adjudication.” He concedes that “the Rule 807 residual exception is perhaps available to fill some of the void that would be created by abrogation of Rule 803(16)” but argues that Rule 807 “contains additional requirements that place a substantially higher burden on the party seeking to introduce evidence than does Rule 803(16), including a requirement of advance notice of intended use.”

**David Donadio (EV-2015-0003-0207)**, opposes the elimination of the ancient documents exception to the hearsay rule, stating it is commonplace in asbestos litigation “to encounter reliable ancient documents that cannot qualify under any other exception” because “the foundational witnesses necessary to establish the requisite elements for a business record exception even if living are impossible to identify or locate.”

**Amanda Kessler (EV-2015-0003-0208)**, opposes the elimination of the ancient documents hearsay exception, stating as follows: “Frequently in toxic tort litigation, the corporate officers, directors and employees with knowledge of a product that was manufactured over 40 years ago are deceased or incapacitated and unable to testify. Plaintiffs are forced to rely on company documents from many years ago, and must invoke the ancient document rule to do so.”

**Joseph Cirilano (EV-2015-0003-0209)**, objects to the elimination of the ancient documents exception, stating that the rule is needed to allow asbestos victims to prove their exposure.

**Robert Buck (EV-2015-0003-0210)**, is opposed to the elimination of the ancient documents exception to the hearsay rule, noting that in product liability cases, “important facts relevant to both the claims and defenses being asserted in a case can only be established through introduction into evidence, as a hearsay exception, various engineering drawings, product specifications, internal corporate communications, product catalogs and brochures, as well as other forms of ancient documents because there are no living witnesses or other mechanisms to prove the facts contained in the ancient documents.”

**David Rancilio (EV-2015-0003-0211)**, opposes the elimination of the ancient documents hearsay exception. He states that in asbestos cases, “[d]efendants have consistently avoided placing documents in paper form and microfiche into an electronic format to frustrate and burden the plaintiffs bar. Now, defendants seek to be awarded for their intransigence by continuing to avoid the incorporation of these ancient documents into their electronic files, and simply wipe the relevance of these ancient documents from the record.”

**David Butler (EV-2015-0003-0212)**, opposes the elimination of the ancient documents exception, stating that in cases involving latent diseases, “[t]he abrogation of FRE 803(16) will do serious harm to the ability of innocent victims to hold those responsible accountable for their actions.”

**The Evangelical Lutheran Church of America (EV-2015-0003-0213)**, opposes the elimination of the ancient documents exception to the hearsay rule, expressing concern that it “is likely to prejudice churches and similar organizations in identifying and proving historical insurance coverage.” It elaborates as follows: “By recommending the abrogation of Fed. R. Evid. 803(16), the Committee gives insurers a powerful weapon to deny coverage under policies purchased and paid for years ago. Even when a local congregation finds documents referencing a policy of insurance, the insurers can simply interpose a hearsay objection that will be almost impossible for a local congregation to overcome in a coverage action. Who will be able to testify as to the reliability of the contents of a letter from 1972? Given that most local congregations lack the wherewithal to litigate an insurance coverage action, the proposed abrogation will tilt the playing field in favor of insurance carriers and against the insureds. In addition, by facilitating the denial of coverage, the proposed abrogation will deny plaintiffs and other claimants the most likely and substantial source of possible compensation.”

**Kay Gundersen Reeves (EV-2015-0003-0214)**, states that “[t]he abrogation of FRE 803(16) will significantly diminish the ability of the victims of toxic exposure to prove their cases, people suffering from cancer that develops after a latency period that is measured in decades.” She states that “[o]ne alternative might be to limit the exception to documents prepared before a particular date, say, January 1, 1996.”

**John Cooney (EV-2015-0003-0215)**, opposes the elimination of the ancient documents hearsay exception, noting that it is especially needed “in cases which involve conduct from decades ago that was accurately memorialized for non-litigation purposes at the time and the authors have since passed away.”

**N. Dean Nasser (EV-2015-0003-0216)**, opposes the elimination of the ancient documents hearsay exception, stating that “there is simply no good reason to require ancient evidence of the reliability of an ancient document when the dispute (99% of the time) did not even exist and was not even envisioned when the ancient (but authenticated) document was created.”

**Richard Grant (EV-2015-0003-0217)**, opposes the elimination of the ancient documents hearsay exception, arguing that in cases involving latent diseases, “crucial evidence such as packing slips, purchase orders, inter-office memos and reports, shipping invoices, and bills of lading, amongst many other documents that cannot be properly authenticated under other hearsay exceptions play a significant part in litigation.” He suggests that any concerns about ESI being admitted under Rule 803(16) “can be addressed by prospective amendments specifically limited to those concerns.”

**Bart Baumstark (EV-2015-0003-0218)**, states that “[t]he ancient document rule is crucial in cases where toxic exposures cause cancer and other diseases decades after the exposures occurred” and that “[i]n many cases, old corporate knowledge documents would not otherwise be admissible if not for this well accepted, well grounded rule of evidence.”



**Gerson Smoger (EV-2015-0003-0219 and 0220)**, opposes the elimination of the ancient documents exception, arguing that the exception guarantees that evidence admitted under it is reliable, and that in his experience, parties never object to admissibility of documents offered under Rule 803(16).

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1 **Rule 902. Evidence That Is Self-Authenticating**

2 The following items of evidence are self-  
3 authenticating; they require no extrinsic evidence of  
4 authenticity in order to be admitted:

5 \* \* \* \* \*

6 **(13) Certified Records Generated by an Electronic**

7 **Process or System.** A record generated by an

8 electronic process or system that produces an

9 accurate result, as shown by a certification of a

10 qualified person that complies with the

11 certification requirements of Rule 902(11) or

12 (12). The proponent must also meet the notice

13 requirements of Rule 902(11).

**Committee Note**

The amendment sets forth a procedure by which parties can authenticate certain electronic evidence other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing a witness to authenticate an item of electronic evidence is often unnecessary. It 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. The amendment provides a procedure under which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule. 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.

The reference to the “certification requirements of Rule 902(11) or (12)” is only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this rule to prove the requirements of Rule 803(6). Rule 902(13) is solely limited to authentication and any attempt to satisfy a hearsay exception must be made independently.

A certification under this Rule can establish only that the proffered item has satisfied the admissibility requirements for authenticity. The opponent remains free to object to admissibility of the proffered item on other grounds—including hearsay, relevance, or in criminal cases

the right to confrontation. For example, assume that a plaintiff in a defamation case offers what purports to be a printout of a webpage on which a defamatory statement was made. Plaintiff offers a certification under this Rule in which a qualified person describes the process by which the webpage was retrieved. Even if that certification sufficiently establishes that the webpage is authentic, defendant remains free to object that the statement on the webpage was not placed there by defendant. Similarly, a certification authenticating a computer output, such as a spreadsheet, does not preclude an objection that the information produced is unreliable—the authentication establishes only that the output came from the computer.

A challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic technical expert; such factors will effect whether the opponent has a fair opportunity to challenge the evidence given the notice provided.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

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### **Changes Made After Publication and Comment**

Minor adjustments were made to the Committee Note to clarify the meaning of the certification requirement and to emphasize the importance of reasonable notice.

### **Summary of Public Comment**

**James Lundeen (2015-EV-0003-0002)**, argues that authentication of foreign records cannot be authorized by the Evidence Rules.

**The Committee on Federal Courts of the Association of the Bar of the City of New York (2015-EV-0003-0121)**, supports the proposed addition of Rule 902(13), stating that the rule “should avoid the need to call authentication witnesses in many cases where there is no real dispute about authenticity.”

**Jonathan Redgrave (2015-EV-0003-0132)**, supports the proposed addition of Rule 902(13). He states that “[s]hifting the burden of questioning the authenticity of such records to the opponent of the evidence (who will have a fair opportunity to challenge both the certification and the records themselves) will streamline the process by which these items can be authenticated, reducing the time, cost, and inconvenience of presenting this evidence at trial or on summary judgment.” He concludes that the proposed amendment “will lead to increased efficiency without sacrificing the integrity of the Rules of Evidence.”

**The Federal Magistrate Judges Association (2015-EV-0003-0167)**, supports the proposed addition of Rule 902(13). The Association notes that the notice provided by the rule “should not come so shortly before the trial or hearing that the adverse party cannot realistically do the investigation required for a challenge.” It suggests that “judges specify a date for serving the notification in the initial scheduling order.” It further states that some electronic information might be authenticated under either Rule 902(13) or (14), but that “[a]s a practical matter, the distinction may not make a difference because both types are handled in the same way.”

**Certain Members of the American Bar Association Criminal Procedure and Evidence Committee (2015-EV-0003-0197)**, oppose the proposed addition of Rule 902(13) insofar as it would allow a certification to authenticate electronic information that was prepared in anticipation of a criminal prosecution. The members state that in criminal cases the Confrontation Clause does not permit authentication by a certificate where that certificate is “used to leverage into evidence documents that have been created for the purpose of the litigation.”

1 **Rule 902. Evidence That Is Self-Authenticating**

2 The following items of evidence are self-  
3 authenticating; they require no extrinsic evidence of  
4 authenticity in order to be admitted:

5 \* \* \* \* \*

6 (14) Certified Data Copied from an Electronic  
7 Device, Storage Medium, or File. Data copied  
8 from an electronic device, storage medium, or  
9 file, if authenticated by a process of digital  
10 identification, as shown by a certification of a  
11 qualified person that complies with the  
12 certification requirements of Rule 902(11) or  
13 (12). The proponent also must meet the notice  
14 requirements of Rule 902(11).

**Committee Note**

The amendment sets forth a procedure by which  
parties can authenticate data copied from an electronic  
device, storage medium, or an electronic file, other than  
through the testimony of a foundation witness. As with the  
provisions on business records in Rules 902(11) and (12),  
the Committee has found that the expense and

inconvenience of producing an authenticating witness for this evidence is often unnecessary. It 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. The amendment provides a procedure in which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Today, data copied from electronic devices, storage media, and electronic files 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. If the hash values for the original and copy are different, then the copy is not identical to the original. If the hash values for the original and copy are the same, it is highly improbable that the original and copy are not identical. Thus, identical hash values for the original and copy reliably attest to the fact that they are exact duplicates. This amendment allows self-authentication by a certification of a qualified person that she checked the hash value of the proffered item and that it was identical to the original. The rule is flexible enough to allow certifications through processes other than comparison of hash value, including by other reliable means of identification provided by future technology.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that



would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule.

The reference to the “certification requirements of Rule 902(11) or (12)” is only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this rule to prove the requirements of Rule 803(6). Rule 902(14) is solely limited to authentication and any attempt to satisfy a hearsay exception must be made independently.

A certification under this Rule can only establish that the proffered item is authentic. The opponent remains free to object to admissibility of the proffered item on other grounds—including hearsay, relevance, or in criminal cases the right to confrontation. For example, in a criminal case in which data copied from a hard drive is proffered, the defendant can still challenge hearsay found in the hard drive, and can still challenge whether the information on the hard drive was placed there by the defendant.

A challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic technical expert; such factors will effect whether the opponent has a fair opportunity to challenge the evidence given the notice provided.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

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## **Changes Made After Publication and Comment**

Minor adjustments were made to the Committee Note to clarify the meaning of the certification requirement and the definition of hash values, and to emphasize the importance of reasonable notice, and to address the relationship between Rules 902(13) and (14).

### **Summary of Public Comment**

**James Lundeen (2015-EV-0003-0002)**, argues that authentication of foreign records cannot be authorized by the Evidence Rules.

**The Committee on Federal Courts of the Association of the Bar of the City of New York (2015-EV-0003-0121)**, supports the proposed addition of Rule 902(14), stating that the rule “should avoid the need to call authentication witnesses in many cases where there is no real dispute about authenticity.”

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# TAB 2C

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# **Best Practices for Authenticating Digital Evidence**

**Hon. Paul W. Grimm**

**Gregory P. Joseph, Esq.**

## **The Judicial Conference Advisory Committee on Evidence Rules**

### **I. Introduction**

Digital evidence is now offered commonly at trial. Examples include emails, spreadsheets, evidence from websites, digitally-enhanced photographs, PowerPoint presentations, texts, tweets, Facebook posts, and computerized versions of disputed events. Does the fact that an item is electronic raise any special challenges in authenticating that item?

In Federal Courts, authenticity is governed by Rule 901(a), which requires that to establish that an item is authentic, a proponent must produce admissible evidence “sufficient to support a finding that the item is what the proponent claims it is.”<sup>1</sup> Rule 901(b) provides many examples of evidence that satisfies the standard of proof for establishing authenticity, including testimony of a witness with knowledge,<sup>2</sup> circumstantial evidence,<sup>3</sup> and evidence describing a process or system that shows that it produces an accurate result.<sup>4</sup> The standards and examples provided by Rule 901(a) and (b) are flexible enough to adapt to all forms of electronic evidence.

That does not mean that authenticating digital evidence is automatic. There are a large number cases dealing with authentication of digital evidence over the last 15 years; and such evidence can present challenges in establishing that it has not been altered and that it comes from a certain source. The Judicial Conference Advisory Committee on Evidence Rules, surveying this case law, considered whether to propose an amendment to Rule 901(b) that would provide for a list of relevant factors for establishing the authenticity of the new types of digital evidence encountered by the courts --- such as email, text, chats, internet postings, and social media communications. The Advisory Committee decided not to proceed with a proposal, for a number of reasons: 1) there would be a problematic interface between any new rule and the existing, flexible rules that are currently being used to govern authentication of electronic evidence; 2) listing factors relevant to authentication would run the risk of misleading courts and litigators

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<sup>1</sup> Evidence proffered to support authenticity of a challenged item must itself be admissible. See, e.g., *United States v. Bonds*, 608 F.3d 495 (9th Cir. 2010) (records could not be authenticated where the only basis for authentication was a hearsay statement not admissible under any exception).

<sup>2</sup> Fed. R. Evid. 901(b)(1).

<sup>3</sup> Fed. R. Evid. 901(b)(4).

<sup>4</sup> Fed. R. Evid. 901(b)(9).

into thinking that all of the listed factors can or should be weighed equally; 3) no existing evidence rule is structured as a list of relevant factors; and 4) given the deliberate nature of the rulemaking process—with a minimum of three years between formal consideration of an amendment and its adoption—it would be possible that authentication rules on electronic evidence would be outmoded by the time they became law.

The Advisory Committee decided that a better alternative for providing guidance to courts and litigants on authentication of digital evidence would be to prepare and publish a “Best Practices Manual” for each of the major new forms of digital evidence that are being offered in the courts. The Advisory Committee has collaborated with Hon. Paul Grimm and Gregory P. Joseph, Esq. to prepare this Best Practices Manual, to be distributed by the Federal Judicial Center.

This Manual begins with an analysis by Judge Grimm of the basic rules on authenticating evidence, with a focus on digital evidence and the interplay between Evidence Rules 104(a) (providing that the judge is to decide admissibility factors by a preponderance of the evidence) and Rule 104(b) (providing that for questions of conditional relevance --- such as authenticity --- the standard of proof for admissibility is enough evidence sufficient to support a finding).

Following Judge Grimm’s introduction, this Manual sets forth some guidelines on authentication of the kinds of electronic evidence that are most frequently offered in litigation today: 1) emails; 2) texts; 3) chatroom conversations; 4) web postings; and 5) social media postings.<sup>5</sup> Finally, the Manual considers whether and when the proponent might argue that the court can take judicial notice of the authenticity of certain digital evidence.

At the outset it is important to emphasize that the standard for establishing authenticity of digital evidence is the same mild standard as for traditional forms of evidence. None of the checklists set forth below are going to be required to be met in toto before digital evidence is found authentic. They are just relevant factors, and usually satisfying one or two of any of the listed factors will be enough to convince the court that a juror could find the digital evidence to be authentic. But the factors will need to be applied case-by-case.

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<sup>5</sup> This Best Practices Manual covers the relatively new forms of electronic communications. Parties have been authenticating more traditional forms of electronic evidence for many years --- examples include telephone conversations, audiotapes, and video recordings. See, e.g., *United States v. Taylor*, 530 F.2d 639 (5th Cir. 1976). (video evidence from a bank security camera was properly authenticated where testimony revealed the camera was present on the day in question and was facing the events of an armed robbery, and was functioning properly). This pamphlet does not cover such traditional forms of electronic communication. For more on authentication of such information, see Saltzburg, Martin & Capra, *Federal Rules of Evidence Manual* §901 (11<sup>th</sup> ed. 2015), which provides relevant case law and commentary.

## II. An Introduction to the Principles of Authentication for Electronic Evidence: The Relationship Between Rule 104(a) and 104(b).

This Manual is designed to provide answers to the fundamental evidentiary questions of how to authenticate digital evidence. But before turning to the authentication rules themselves, there are two preliminary rules that must be discussed and understood, because without them, authentication decisions are apt to be erroneous. These rules are Fed. R. Evid. 104(a) (which states the general rule governing preliminary questions about the admissibility of evidence) and Fed. R. Evid. 104(b) (the so-called “conditional relevance” rule<sup>6</sup>). Understanding these two rules is essential to making correct decisions about the authentication of digital evidence.

We start with Rule 104(a). Its text is deceptively straightforward: “[t]he court must decide any preliminary question about whether a witness is qualified, a privilege exists, *or evidence is admissible*. In so deciding, the court is not bound by evidence rules, except those on privilege.” (emphasis added). Most decisions about admissibility of evidence, whether digital or otherwise, are made by the judge alone. They include decisions about whether evidence is relevant, constitutes hearsay (or fits within one of the many hearsay exceptions), or is excessively prejudicial when compared to its probative value, whether experts are qualified and the extent of opinion testimony that will be allowed, and most questions regarding application of the original writing rule. When the judge makes a ruling under Rule 104(a) he or she is the sole decision maker as to whether the evidence may be heard by the jury. If admitted, of course, the jury is free to give the evidence whatever weight (if any) they think it deserves. This is familiar turf to trial judges, but with digital evidence, there is a greater likelihood that the judge alone may not be the final decision maker regarding admissibility. The jury also may have a part to play in the admissibility decision, and this is where Rule 104(b) comes in.

Rule 104(b) qualifies Rule 104(a). It provides “[w]hen the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.” Read in isolation, Rule 104(b) seems too abstract to be helpful. But, in the case of disputes over the authenticity of digital evidence, it can be an important qualifier to the general rule of 104(a) that the trial judge decides questions about the admissibility of evidence. An illustration will help bring things into focus. Imagine the following variations of a common theme. In an employment discrimination case the plaintiff, a woman, alleges that her supervisor, a man, intentionally discriminated against her in deciding to promote a lesser qualified man to a position that the plaintiff sought. As evidence of intentional discrimination, the plaintiff wants to introduce an email that she asserts her supervisor sent to her that says: “Jane, stop bugging me about the sales supervisor position. Your track record compared to the men in our sales group is terrible, and confirms what I always have suspected. Women just don’t have the stuff it takes to get out there and sell our products. You should be glad you still have your sales job, and quit trying to be something you can never do well. Bob.” The email is from the company email account ([Bob@company.com](mailto:Bob@company.com)), addressed to the plaintiff ([Jane@company.com](mailto:Jane@company.com)), apparently signed by the supervisor (Bob), discusses a subject matter about which the supervisor has knowledge, and is dated on a day and time the supervisor was known to be at the office. Plaintiff

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<sup>6</sup> Fed. R. Evid. 104(b) (1972) Advisory Note.

contends that the email is “smoking gun” evidence of intentional gender discrimination.

Imagine further the following scenarios when the plaintiff offers the email into evidence at trial. One: the defense attorney objects to the introduction of the email, the judge asks for the basis of the objection, and the defense attorney says “inadequate foundation”. Two: the defense attorney objects, the judge asks for the basis of the objection, and the defense attorney says “Judge, this is an email, there is no evidence that the supervisor was the one who actually wrote it. It was found on a company computer, anyone in the company had access to that computer, including the plaintiff herself, whose office was right next to his, and my client is often away from his desk during the day, and he does not log out of his computer. Plaintiff hasn’t shown that someone else didn’t send that email pretending to be my client, and everyone knows how easy it is to fake an email.” Three: the defense attorney objects, the judge asks for the basis of the objection, and the defense attorney says “Judge, my client will testify that on the day and time stated on the email he was at a sales meeting with the other supervisors and the president of the company. Five other people saw him there at that day and time and will testify that they did. During those meetings, no one is allowed to use their smart phone or to send or receive emails, on pain of being fired if the president sees them looking at their phones. The location of the meeting was on a different floor from where my client and the plaintiff work. He will testify that he did not send the email, and that when he leaves his office he does not log out, his computer stays on, and anyone can access it without a password and use his office email account. He also will testify that when he came back from the meeting, the plaintiff looked at him in a strange way, and said “I wouldn’t look so smug if I were you. You might not be that way for very long.”

With these scenarios in mind, what is the interplay between Rule 104(a) and 104(b) in determining whether the email may be admitted at trial and considered by the jury? In the first scenario, no explanation was given by the defense attorney for excluding the email other than the conclusory statement that the plaintiff had not laid a sufficient foundation. Here, the trial judge alone decides, under Rule 104(a), whether an adequate foundation has been established. If the foundation was deficient, the judge will require the plaintiff’s lawyer to make a fuller showing, and allow or exclude the email accordingly. Rule 104(b) is not implicated.

In the second scenario, the defense attorney has made a conclusory legal argument that provides no facts showing that the supervisor did not author the email, but rather speculates that it *could have* been written by someone else. The argument invites the trial judge to require the plaintiff’s lawyer to “prove a negative”—that no one but the supervisor was the author. But this is not the burden that the plaintiff must meet under Rule 104(a) to establish the admissibility of the email. Rather, all that plaintiff must do is to meet the obligation imposed by Rule 901(a), which is to “produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Certainty is not required. All that is needed is evidence sufficient to convince a reasonable juror that, more likely than not, the email is what the plaintiff claims it is—an email her supervisor drafted. And, under the hypothetical facts of the second scenario, the defense counsel is wrong in saying the plaintiff has offered no evidence that the email came from the supervisor. She has shown that the email came from the supervisor’s email address, on the company email server, on a day when the supervisor was at the office, discussing a topic about which the supervisor had knowledge, and is signed with his name. Certainly this would be an example of authentication under Rule 901(b)(4), where the “appearance, contents, substance . . .



or other distinctive characteristics of the item, taken together with all the circumstances” tend to show that the supervisor authored the email.

The second scenario also raises only Rule 104(a) issues for the trial judge alone to determine admissibility. The facts, under which admissibility must be judged, are undisputed. If the trial judge concludes (as she should under these facts) that a reasonable juror *could* find from the foundation presented that it is more likely than not that the supervisor wrote the email, it is admissible. Defense counsel’s speculation about what “could” have happened is reserved for argument to the jury about how much weight (if any) to give to the email. Absent from scenario two is evidence that the supervisor in fact did not author the email, to contradict the undisputed facts introduced by the plaintiff regarding the distinctive characteristics of the email that associate it with the supervisor.

Scenario three does introduce facts contradicting the evidence the plaintiff introduced about the distinctive characteristics of the email tying it to the supervisor. The defense attorney has proffered that he will introduce evidence (the supervisor, the five witnesses who corroborate that he was with them at the time the email was sent, the policy prohibiting use of cell phones during meetings with the company president, the meeting’s location on a different floor of the building). Now the trial judge is presented with competing evidence that the supervisor did, and did not, author the email. If the plaintiff’s evidence is accepted over that of the defendant, then it is more likely than not that the supervisor is the author, and the email is relevant to show his discriminatory intent. But, if the defendant’s version of the facts is accepted over those offered by the plaintiff, then the supervisor did not author the email, and it is irrelevant to prove his state of mind. The relevance of the email turns on whether the plaintiff’s version or the defendant’s version is accepted, and this falls squarely within the scope of Rule 104(b). The relevance of the email depends on the existence of a disputed fact—authorship of the email. Who decides between the competing versions? If the case is tried before a jury, it is the jury, not the judge, who must resolve the dispute.<sup>7</sup> The judge’s role under Rule 104(a) is to evaluate whether a reasonable jury *could* find (more likely than not) either that the supervisor did, or did not, author the email. If either version is plausible, then the judge conditionally admits the email, but at the time it is introduced instructs the jury that if they find that the plaintiff has shown that the supervisor more likely than not authored the email, they may consider it as evidence and give it the weight that they feel it is entitled to. Contrastingly, if they find that the defendant has persuaded them that, more likely than not, he did not author the email, they must disregard it entirely, and give it no weight in their deliberations. The final decision about whether the email has been admitted (and can be considered by the jury) or excluded (and disregarded by the jury) must await the jury’s deliberation on the merits of the case. The judge makes a preliminary assessment of whether the evidence is one-sided or two, and if the latter, submits it to the jury for

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<sup>7</sup> Fed. R. Evid. 104(b) (1972) Advisory Note (“If preliminary questions of conditional relevancy were determined solely by the judge, as provided in subdivision (a), the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed. These are appropriate questions for juries. Accepted treatment, as provided in the rule, is consistent with that given fact questions generally. The judge makes a preliminary determination whether the foundation evidence is sufficient to support a finding of fulfillment of the condition. If so, the item is admitted. If after all the evidence on the issue is in, pro and con, the jury could reasonably conclude that fulfillment of the condition is not established, the issue is for them. If the evidence is not such as to allow a finding, the judge withdraws the matter from their consideration.”).

their decision. The issue of conditional relevance generated by disputed facts regarding the authenticity (and hence, relevance) of evidence is especially prevalent with digital evidence.

It is important for judges to distinguish between which of the scenarios listed above is presented to them when ruling on admissibility of digital evidence. For scenario one situations, the judge alone decides whether the proponent has laid a proper foundation to authenticate the digital evidence. Most often, the judge will consider whether one or more of the illustrations of how to authenticate found at Fed. R. Evid. 901(b)<sup>8</sup> or 902<sup>9</sup> has been shown.

For scenario two situations, the judge alone makes the decision whether to admit or exclude. In doing so, he must be careful not to let unparticularized and conclusory argument by the party objecting to the introduction of the digital evidence about what “might” or “could have happened” lead him to impose on the proponent of the evidence a burden of proof greater than that ordinarily required by Rule 104(a)—a showing that the evidence more likely than not is what it purports to be. It is a mistake for a judge to require the party introducing digital evidence to prove that no one other than the purported maker could have created the evidence if the introducing party has shown that, more likely than not, it was created by a particular person, unless there is evidence (not argument) that some other person could have done so.<sup>10</sup> Finally, for scenario three situations, where the judge is faced with competing facts plausibly showing that the digital evidence was, and was not, created by the person claimed by the proponent, then she should allow the evidence to be admitted “conditionally” under Rule 104(b), and instruct the jury that if they find that the evidence that the person claimed to have created the evidence did not do so is more believable than the evidence that he did, they must disregard it and give it no weight in their deliberations.

Careful attention to the interplay between Rule 104(a) and 104(b), as well as consideration of the abundant authentication tools identified in Rules 901(b) and 902, will go a

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<sup>8</sup> For digital evidence, the most useful authentication rules within Rule 901(b) are: 901(b)(1) (a witness with personal knowledge that the evidence is what it purports to be); 901(b)(3) (comparison of the evidence with an authenticated specimen by an expert witness or the finder of fact); 901(b)(4) (the appearance, contents, substance, internal patterns or other distinctive characteristics of the item, taken together with all the circumstances); 901(b)(5) (for audio recordings, an opinion identifying a person’s voice, whether heard firsthand or through electronic transmission or recording, based on having heard that voice in the past); and 901(b)(9) (evidence describing a process or system of showing that it produces an accurate result).

<sup>9</sup> Fed. R. Evid. 902 provides examples of self-authentication, where no extrinsic evidence or testimony is needed to authenticate. The following self-authentication rules may be helpful for digital evidence; 902(5) (A book, pamphlet, or other publication purporting to be issued by a public authority. Most public authorities have web sites and post publications relating to their fields of jurisdiction.); 902(6) (Printed material purporting to be a newspaper or periodical. Most newspapers and periodicals have “on line editions”, and this rule potentially is available to self-authenticate.); 902(11) and (12) (certified copy of domestic and foreign records of regularly conducted activities); proposed Rule 902(13) (certified copy of machine-generated information); and proposed Rule 902(14) (certified copy of computer generated or stored information).

<sup>10</sup> Grimm, et al, *Authentication of Social Media Evidence*, 36 American Journal of Trial Advocacy 433, 459 (2013) (“A trial judge should admit the evidence if there is plausible evidence of authenticity produced by the proponent of the evidence and only speculation or conjecture—not facts—by the opponent of the evidence about how, or by whom, it ‘might’ have been created.”).

long way towards removing the mystery about authenticating digital evidence, even when the technology at play is unfamiliar to the judge. In the end, technical expertise is not needed. Rather, an awareness of the fundamental evidence rules governing admissibility and authentication of any evidence, whether digital or not, is all that is needed. And this Manual aims to provide illustrations to make the effort even easier.

### III. Relevant Factors for Authenticating Digital Evidence

What follows are general guidelines and lists of relevant factors for authenticating the basic forms of digital evidence that have developed over the last 20 years. The lists of relevant factors do not purport to be exclusive. There is no attempt to weigh the factors, or to take a cumulative approach, as the importance of any factor will be case-dependent. And there is no intent to imply that all of the factors listed must be met before the proffered digital evidence can be found authentic.

In evaluating all the factors below, it is important to remember that the threshold for the court's determination of authenticity under Rule 901 is not high: "the court need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the jury ultimately might do so."<sup>11</sup> The possibility of alteration "does not and cannot be the basis for excluding ESI as unauthenticated as a matter of course, any more that it can be the rationale for excluding paper documents."<sup>12</sup>

Generally speaking, it will be a rare case in which an item of digital evidence *cannot* be authenticated. The question is whether the proponent is willing and able to expend the resources necessary to do so.<sup>13</sup> The factors set forth below are intended to direct litigants to ways in which resources can be usefully spent on authenticating digital evidence --- and on ways to avoid such costs in certain situations.

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<sup>11</sup> United States v. Safavian, 435 F. Supp. 2d 36, 38 (D.D.C. 2006).

<sup>12</sup> *Id.* at 40.

<sup>13</sup> See Jeffrey Bellin and Andrew Guthrie Ferguson, *Judicial Notice in the Information Age*, 108 Nw. U. L.Rev. 1137, 1157 (2014) ("Although much is made of [the authentication] hurdle in the Information Age, it is \* \* \* an easy one to surmount. Success generally depends not on legal or factual arguments, but rather the amount of time and resources a litigant devotes to the problem.")

## ***A. Emails***

The authentication questions for email most commonly focus on whether the email was sent or received by the person whom the party claims sent or received it. There are a number of factors that will assist the proponent in establishing authenticity for either or both of these purposes. Among them are:

**1. A witness with personal knowledge may testify to authenticity.**<sup>14</sup> Possibilities include:

- The author of the email in question testifies to its authenticity.<sup>15</sup>
- A witness testifies that s/he saw the email in question being authored/received by the person who the proponent claims authored/received it.<sup>16</sup>

**2. Business Records.** The custodian of records of a regularly conducted activity testifies to a foundation, or certifies, in accordance with Fed. R. Evid. 902(11) or (12), that an email satisfies the criteria of Fed. R. Evid. 803(6). It should be noted, however, that emails --- even of a business, do not automatically qualify as business records.<sup>17</sup>

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<sup>14</sup> See Fed. R.Evid. 901(b)(1).

<sup>15</sup> See, e.g., *Anderson v. United States*, 2014 U.S. Dist. LEXIS 166799, at \*13 (N.D. Ga. Dec, 2, 2014) (defendant-witness acknowledged that the documents in question contained emails he sent to an undercover agent, the emails were sent from his email address, and the document contained the entirety of his email exchange with the undercover agent; this was a sufficient showing of authenticity). See also *Citizens Bank & Trust v. LPS Nat'l Flood, LLC*, 2014 U.S. Dist. LEXIS 134933, at \*12 (N.D. Ala. Sept. 25, 2014) (witness's personal knowledge of email contents and her affidavit authenticating emails as the ones she sent sufficient for admissibility).

<sup>16</sup> *United States v. Fluker*, 698 F.3d 988 (7th Cir. 2012) (the court, in outlining the variety of ways in which an email could be authenticated, stated that testimony from a witness who purports to have seen the declarant create the email in question was sufficient for authenticity under Rule 901(b)(1)).

<sup>17</sup> See, e.g., *United States v. Cone*, 714 F.3d 197, 220 (4th Cir. 2013):  
While properly authenticated e-mails may be admitted into evidence under the business records exception, it would be insufficient to survive a hearsay challenge simply to say that since a business keeps and receives e-mails, then ergo all those e-mails are business records falling within the ambit of Rule 803(6)(B). "An e-mail created within a business entity does not, for that reason alone, satisfy the business records exception of the hearsay rule." *Morisseau v. DLA Piper*, 532 F. Supp. 2d 595, 621 n. 163 (S.D.N.Y. 2008).

It is probably fair to state that emails and social media postings will often be prepared too casually and irregularly to be admissible as business records. But this is not inevitably so, and again if the electronic communication does fit the admissibility requirements it is just as admissible as a hardcopy record.

### 3. Jury comparison with other authenticated emails.<sup>18</sup>

The authenticity of an email can be determined by the trier of fact by comparing the email in question with emails already authenticated and in evidence.<sup>19</sup>

**4. Production in discovery.** If a document request is sufficiently descriptive, production in response to that request may serve in itself to authenticate the email, as the act of production may be a concession that the document is what the party asked for --- and thus is what the party says it is. The act of production can constitute a statement of a party-opponent and consequently admissible evidence of authenticity. See Fed.R.Evid. 801(d)(2).<sup>20</sup> Authentication has also been found when an adversary produces in discovery a third party's email received by the producing party in the ordinary course of business, and the email is offered against the adversary.<sup>21</sup>

### 5. Circumstantial Evidence.<sup>22</sup>

Applying Rule 901(b)(4) --- covering authentication on the basis of “appearance, contents, substance, internal patterns, or other distinctive characteristics of the item” --- requires consideration of the “totality of circumstantial evidence.”<sup>23</sup> While any one factor *may* be insufficient to determine admissibility, when weighed together, authenticity may be established. “This rule is one of the most frequently used to authenticate e-mail and other electronic records.”<sup>24</sup>

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<sup>18</sup> Fed.R.Evid. 901(b)(3).

<sup>19</sup> *United States v. Safavian*, 435 F. Supp. 2d 36, 40 (D.D.C. 2006)(“Those emails that are not clearly identifiable on their own can be authenticated under Rule 901(b)(3), which states that evidence may be authenticated by the trier of fact with ‘specimens which have been authenticated’—in this case those emails that have been independently authenticated.”).

<sup>20</sup> See, e.g., *AT Engine Controls Ltd. v. Goodrich Pump & Engine Control Sys., Inc.*, 2014 U.S. Dist. LEXIS 174535 (D. Conn. Dec. 18, 2014) (collecting cases holding that production of emails in discovery constitutes a concession of authenticity); *Nola Fine Art, Inc. v. Ducks Unlimited, Inc.*, 2015 U.S. Dist. LEXIS 17450 (E.D. La. Feb. 12, 2015) (“[Defendant] produced the email to plaintiffs in discovery and therefore cannot seriously dispute the email’s authenticity”).

<sup>21</sup> *Broadspring, Inc. v. Congoo, LLC*, 2014 U.S. Dist. LEXIS 177838 (S.D.N.Y. Dec. 29, 2014) (third party emails sent to a party in the ordinary course of business and produced by the party in litigation are sufficiently authenticated by the act of production when offered by an opponent, but hearsay and other admissibility objections as to the third parties’ statements must separately be satisfied).

<sup>22</sup> Fed.R.Evid. 901(b)(4).

<sup>23</sup> *United States v. Henry*, 164 F.3d 1304, 1305 (10th Cir. 1999).

<sup>24</sup> *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 546 (D. Md. 2007).

Set forth below are factors that can, alone or in conjunction (depending on the case), establish authenticity. Different circumstantial factors may be relevant depend on whether the authenticity dispute is over whether a person sent or received the email.

**a. Authenticating Authorship Circumstantially**

*The inclusion of some or all of the following in an email can be sufficient to authenticate the email as having been sent by a particular person:*

- the purported author’s known email address;<sup>25</sup>
- the author’s electronic signature;
- the author’s name;<sup>26</sup>
- the author’s nickname;<sup>27</sup>
- the author’s screen name;
- the author’s initials;
- the author’s moniker;<sup>28</sup>
- the author’s customary use of emoji or emoticons;
- the author’s use of the same email address elsewhere;
- a writing style similar or identical to the purported author’s manner of writing;
- reference to facts only the purported author or a small subset of individuals including

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<sup>25</sup> See, e.g., *United States v. Siddiqui*, 235 F.3d 1318, 1322 (11th Cir. 2000) (an email identified as originating from the defendant’s email address and that automatically included the defendant’s address when the reply function was selected was considered sufficiently authenticated).

<sup>26</sup> See, e.g., *United States v. Fluker*, 698 F.3d 988, 999–1000 (7th Cir. 2012) (emails sent from a “More Than Enough, LLC” (MTE) email address were sufficiently authenticated when the purported author was an MTE board member and “[i]t would be reasonable for one to assume that an MTE Board member would possess an email address bearing the MTE acronym.”); *Safavian*, 435 F. Supp. 2d at 40 (email messages held properly authenticated when containing distinctive characteristics, including email addresses and name of the person connected to the address).

<sup>27</sup> *United States v. Brinson*, 772 F.3d 1314 (10th Cir. 2014) (use of fake name commonly used by defendant).

<sup>28</sup> See *United States v. Simpson*, 152 F.3d 1241 (10th Cir. 1998) (chatroom log where user “Stavron” identified himself as the defendant and shared his email address was used to authenticate subsequent emails from that email address).

the purported author would know;<sup>29</sup>

- reference to facts uniquely tied to the author—*e.g.*, contact information for relatives or loved ones; photos of the author or items of importance to the author (*e.g.*, car, pet); the author’s personal information, such as a cell phone number, social security number, etc.<sup>30</sup>

***Factors outside the content of the email itself can establish authenticity of authorship circumstantially. For example:***

- a witness testifies that the author told him to expect an email prior to its arrival;<sup>31</sup>
- the purported author acts in accordance with, and in response to, an email exchange with the witness;
- the author orally repeats the contents soon after the email is sent;
- the author discusses the contents of the email with a third party;
- the author leaves a voicemail with substantially the same content.

***Forensic information may be used to support a circumstantial showing that the email was sent by the purported author. Forensic sources include:***

- an email’s hash values;<sup>32</sup>

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<sup>29</sup> See *United States v. Siddiqui*, 235 F.3d 1318, 1322 (11th Cir. 2000) (messages that referred to facts only the defendant was familiar with were ruled admissible).

<sup>30</sup> *Commonwealth v. Amaral*, 78 Mass. App. Ct. 671, 674–675, 941 N.E.2d 1143, 1147 (2011) (“In other e-mails, Jeremy provided his telephone number and photograph. When the trooper called that number, the defendant immediately answered his telephone, and the photograph was a picture of the defendant. These actions served to confirm that the author of the e-mails and the defendant were one and the same”) (citing Mass. G. Evid. § 901(b)(6)).

<sup>31</sup> *State v. Ruiz*, 2014 Mich. App. LEXIS 855 (Mich. Ct. App. May 15, 2014) (interpreting MRE 901) (witness testified to knowing the defendant authored an email because the defendant told him to expect an email relating to arson—the contents of the email subsequently received).

<sup>32</sup> A hash value is “[a] unique numerical identifier that can be assigned to a file, a group of files, or a portion of a file, based on a standard mathematical algorithm applied to the characteristics of the data set. The most commonly used algorithms, known as MD5 and SHA, will generate numerical values so distinctive that the chance that any two data sets will have the same hash value, no matter how similar they appear, is less than one in one billion. ‘Hashing’ is used to guarantee the authenticity of an original data set and can be used as a digital equivalent of the Bates stamp



- testimony from a forensic witness that an email issued from a particular device at a particular time.<sup>33</sup>

### **b. Authenticating Receipt Circumstantially**

*The following factors can be probative in authenticating an email as having been received by a particular person:*

- a reply to the email was received by the sender from the email address of the purported recipient;
- the subsequent conduct of the recipient reflects his or her knowledge of the contents of the sent email;
- subsequent communications from the recipient reflects his or her knowledge of the contents of the sent email;
- the email was received and accessed on a device in the possession and control of the alleged recipient.

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Finally, while it is true that an email may be sent by anyone who, with a password, gains access to another's email account, similar questions (of possible hacking) could be raised with traditional documents. Therefore, there is no need for separate rules of authenticity for emails. And importantly, the mere fact that hacking, etc., is possible is not enough to exclude an email or any other form of digital evidence. If the mere possibility of electronic alteration were enough to exclude the evidence, then no digital evidence could ever be authenticated.<sup>34</sup>

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used in paper document production.” Federal Judicial Center, *Managing Discovery of Electronic Information: A Pocket Guide for Judges*, Federal Judicial Center, 2007 at 24. See also *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534, 547 (D. Md. 2007) (noting that “[h]ash values can be inserted into original electronic documents when they are created to provide them with distinctive characteristics that will permit their authentication under Rule 901(b)(4).”).

<sup>33</sup> *Lorraine*, 241 F.R.D. 534 at 547–48 (because an electronic message's metadata (including an email's metadata) can reveal when, where, and by whom the message was authored, the court found it could be used to successfully authenticate a document under 901(b)(4)).

<sup>34</sup> See, e.g., *Interest of F.P.*, 878 A.2d 91 (Pa. Super. 2005) (just as an email can be faked, a “signature can be forged; a letter can be typed on another's typewriter; distinct letterhead stationary can be copied or stolen. We believe that e-mail messages and similar forms of electronic communication can be properly authenticated within the existing framework of Pa. R.E. 901 and Pennsylvania case law.”).

## ***B. Text Messages***

Text messages are not different in kind from email and so the rules and guidelines on authentication are similar. Here are some of the relevant factors for authenticating text messages:<sup>35</sup>

**1. A witness with personal knowledge may testify to authenticity.** Possibilities include:

- The author of the text in question testifies to its authenticity.
- A witness testifies that s/he saw the text in question being authored/received by the person who the proponent claims authored/received it.<sup>36</sup>

**2. Jury comparison with other authenticated texts.**

**3. Production in discovery.**

**4. Establishing that an electronic system of recordation records accurately.** This process of illustration, authorized by Fed.R.Evid. 901(b)(9), can be useful if the objection to authenticity is that the original text has been altered in some way. For example, in *United States v. Kilpatrick*, 2012 U.S. Dist. LEXIS 110166 (E.D. Mich. Aug. 7, 2012), the government sought to authenticate text messages sent from two SkyTel pages, each belonging to one of the defendants respectively. A SkyTel records-custodian verified that the text messages the government offered had not been and could not be edited in any way because when the messages are sent from the devices belonging to the defendants, they are automatically saved on SkyTel's server with no capacity for editing. The court ruled that this showing was sufficient, under Fed. R. Evid. 901(b)(9), to establish authenticity over a claim that the messages had been altered.

It should be noted that the showing as to the process or system in *Kilpatrick* will be able to be made by a certificate of the foundation witness --- substituting for live testimony --- under an amendment to the Evidence Rules that is scheduled to take effect on December 1, 2017.<sup>37</sup>

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<sup>35</sup> The case law cited under the various factors discussed in the section on emails should be equally useful as supportive citations for the similar (or identical) factors supporting authentication of texts.

<sup>36</sup> *United States v. Barnes*, 803 F.3d 209 (5<sup>th</sup> Cir. 2015) (government laid a proper foundation to authenticate Facebook and text messages as having been sent by the defendant; the defendant was a quadriplegic, but the witness who received the messages testified she had seen the defendant use Facebook, she recognized his Facebook account, and the Facebook messages matched the defendant's manner of communicating: "[a]lthough she was not certain that Hall [the defendant] authored the messages, conclusive proof of authenticity is not required for admission of disputed evidence").

<sup>37</sup> The proposed amendments would add two new subdivisions to Rule 902, which provides for various forms of self-authentication. The proposals read as follows:

## 5. Circumstantial evidence.

### a. Authenticating Authorship Circumstantially

*The inclusion of some or all of the following in a text can be sufficient to authenticate the text as having been sent by a particular person:*

- the purported author's ownership of the phone or other device from which the text was sent;<sup>38</sup>
- the author's possession of the phone;
- the author's known phone number;
- the author's name;
- the author's nickname;<sup>39</sup>
- the author's initials;
- the author's moniker;
- the author's name as stored on the recipient's phone;

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#### **Rule 902. Evidence That Is Self-Authenticating**

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

\* \* \*

**(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).

It is the proposed Rule 902(13) that would allow proof by certification in a case like *Kilpatrick*.

<sup>38</sup> United States v. Mebrtatu, 543 F. App'x 137, 140–141 (3d Cir. 2013) (phone was in the purported sender's possession; phone contains texts sent to and signed with the purported author's first name, including texts from her boyfriend professing love and other texts whose content links them to her; texts sufficiently authenticated as hers).

<sup>39</sup> United States v. Kilpatrick, 2012 U.S. Dist. LEXIS 110166, at \*11 (E.D. Mich. Aug. 7, 2012) (the court outlined a number of distinctive characteristics that established the authenticity of the pager and cellphone text messages at issue; among these factors were the defendants' use of their names (Kilpatrick) and nicknames ("Zeke" or "Zizwe") to sign the messages they sent).

- the author's customary use of emoji or emoticons;
- the author's use of the same phone number on other occasions;
- a writing style similar or identical to the purported author's manner of writing;
- reference to facts only the purported author or a small subset of individuals including the purported author would know;
- reference to facts uniquely tied to the author—*e.g.*, contact information for relatives or loved ones; photos of author or items of importance to author (*e.g.*, car, pet); author's personal information, such as contact information, social security number, etc.; receipt of messages addressed to the author by name or reference.<sup>40</sup>

***Factors outside the content of the text itself can establish authenticity of authorship circumstantially. For example:***

- a witness testifies that the author told him to expect a text message prior to its arrival;
- the purported author acts in accordance with a text exchange;
- the purported author orally repeats the contents soon after the text message is sent or discusses the contents with a third party.

#### **b. Authenticating Receipt Circumstantially**

***The following factors can be probative in authenticating a text as having been received by a particular person:***

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<sup>40</sup> United States v. Benford, 2015 U.S. Dist. LEXIS 17046, at \*16–\*17 (W.D. Okla. Feb. 12, 2015) (in establishing that text messages from a device were authored by the defendant, the prosecution pointed to evidence that contact information for the defendant's brother and girlfriend were saved on the phone and that incoming messages addressed the defendant by name); United States v. Ellis, 2013 U.S. Dist. LEXIS 73031, at \*3–\*4 (E.D. Mich. May 23, 2013) (the defendant's possession of a cellphone that received messages addressed to him by name or moniker was, among other circumstantial evidence (such as his possession of the device), sufficient to establish that he was the author of outgoing text messages from the same phone).

- a reply to the text message was received by the sender from the purported recipient's phone number;
- the subsequent conduct of the recipient reflects his or her knowledge of the sent message's contents;
- subsequent communications from the recipient reflect his or her knowledge of the contents of the sent text message;
- the text message was received and accessed on a device in the possession and control of the alleged recipient.

### *C. Chatroom and Other Social Media Conversations*

By definition, chatroom postings and other social media communications are made by third parties, not the owner of the site. Further, chatroom participants usually use screen names (pseudonyms) rather than their real names. Thus the authenticity challenge is to provide enough information for a juror to believe that the chatroom entry or other social media communication is made by a particular person.

Simply to show that a posting appears on a particular user's webpage is insufficient to authenticate the post as one written by the account holder. Third party posts, too, must be authenticated by more than the names of the purported authors reflected on the posts. Evidence sufficient to attribute a social media or chat room posting to a particular individual may include, for example:

- testimony from a witness who identifies the social media account as that of the alleged author, on the basis that the witness on other occasions communicated with the account holder;
- testimony from a participant in the conversation based on firsthand knowledge that the transcript fairly and accurately captures the conversation;<sup>41</sup>
- evidence that the purported author used the same screen name on other occasions;
- evidence that the purported author acted in accordance with the posting (*e.g.*, when a meeting with that person was arranged in a chat room conversation, he or she attended);
- evidence that the purported author identified himself or herself as the individual using the screen name;
- an admission that the computer account containing the chat is that of the purported author;<sup>42</sup>
- use in the conversation of the customary signature, nickname, or emoticon associated with the purported author;

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<sup>41</sup> See, e.g., *United States v. Lebowitz*, 676 F.3d 1000 (11th Cir. 2012) (internet chat authenticated by credible testimony of one participant); *United States v. Lundy*, 676 F.3d 444 (5th Cir. 2012) (testimony by one party to chat that the chats are as he recorded them is enough to meet the low threshold for authentication); *United States v. Barlow*, 568 F.3d 215, 220 (5th Cir. 2009) (“English, as the other participant in the year-long ‘relationship,’ had direct knowledge of the chats. Her testimony could sufficiently authenticate the chat log presented at trial”).

<sup>42</sup> *United States v. Manley*, 787 F.3d 937, 942 (8<sup>th</sup> Cir. 2014) (“the government presented testimony of a law enforcement officer who helped to execute the search warrant, and the officer testified that the defendant admitted adopting the username ‘mem659’ for his computer account. The username for his computer account was the same one used in some of the chats.”).

- disclosure in the conversation of particularized information that is either unique to the purported author or known only to a small group including the purported author;
- evidence that the purported author had in his or her possession information given to the person using the screen name;
- evidence from the hard drive of the purported author's computer reflecting that a user of the computer used the screen name in question;
- evidence that the chat appears on the computer or other device of the account owner and purported author;
- evidence that the purported author elsewhere discussed the same subject matter;

### ***D. Internet, Websites, etc.***

Websites present authenticity issues because they are dynamic. If the issue is what is on the website at the time the evidence is being proffered, then there are no authenticity issues because the court and the parties can simply access the site and see what the website says.<sup>43</sup> But proving up historic information on the website raises the issue of whether the information was actually posted as the proponent says it was.<sup>44</sup>

#### **1. Rule 901 authentication standards as applied to dynamic website information.**

In applying Rule 901 authentication standards to website evidence, there are three questions that must be answered:

- What was actually on the website?
- Does the exhibit or testimony accurately reflect it?
- If so, is it attributable to the owner of the site?

A sufficient showing of authenticity of dynamic website information is usually found if a witness testifies—or certifies in compliance with a statute or rule—that:

- the witness typed in the Internet address reflected on the exhibit on the date and at the time stated;
- the witness logged onto the website and reviewed its contents; and
- the exhibit fairly and accurately reflects what the witness perceived.<sup>45</sup>

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<sup>43</sup> Jeffrey Bellin & Andrew Guthrie Ferguson, *Trial by Google: Judicial Notice in the Information Age*, 108 Nw. U.L.Rev. 1137, 1157 (2014) (“It is hard to imagine many good faith disputes about whether proffered evidence really is a page from Google Maps or WebMD. Malfeasance would be foolish. The opposing party can simply go to the website to verify its authenticity, and if fraud is detected, the consequences for the offering party are dire.”). See also *Wells Fargo Bank, N.A. v. Wrights Mill Holdings, LLC*, 2015 U.S. Dist. LEXIS 115610, at\*21-22 (S.D.N.Y. Aug. 31, 2015) (confirming that authenticity of existing website information could be determined by conducting a “basic Internet search.”).

<sup>44</sup> See, e.g., *Adobe Sys. v. Christenson*, 2011 U.S. Dist. LEXIS 16977, at \*29 (D. Nev. Feb. 7, 2011) (“[a]lthough Defendants can probably determine, with little difficulty, whether a current Google search for the search terms ‘software surplus’ provides links on the first page [of a website], this would not prove that such a search would have resulted in such a link at a prior point in time.”).

<sup>45</sup> See, e.g., *Estate of Konell v. Allied Prop. & Cas. Ins. Co.*, 2014 U.S. Dist. LEXIS 10183 (D. Or. Jan. 28, 2014) (“To authenticate a printout of a web page, the proponent must offer evidence that: (1) the printout accurately



The exhibit should bear the Internet address and the date and time the webpage was accessed and the contents downloaded.<sup>46</sup>

***When evaluating the proffer, the court may consider the following factors as circumstantial indications that the information was posted by the owner of the site, under Rule 901(b)(4):***

- distinctive website design, logos, photos, or other images associated with the website or its owner;<sup>47</sup>
- the contents of the webpage are of a type ordinarily posted on that website or websites of similar people or entities;
- the owner of the website has elsewhere published the same contents, in whole or in part;
- the contents of the webpage have been republished elsewhere and attributed to the website; and
- the length of time the contents were posted on the website.

***Other possible means of authenticating website postings are as follows:***

- testimony of a witness who created or is in charge of maintaining the website. That witness may testify on the basis of personal knowledge that the printout of a webpage came from the site.<sup>48</sup>

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reflects the computer image of the web page as of a specified date; (2) the website where the posting appears is owned or controlled by a particular person or entity; and (3) the authorship of the web posting is reasonably attributable to that person or entity”); *Buzz Off Insect Shield, LLC v. S.C. Johnson & Son, Inc.*, 2009 U.S. Dist. LEXIS 17530 (M.D.N.C. Mar. 6, 2009) (“[defendant] could authenticate its printouts of various websites by calling witnesses who could testify that they viewed and printed the information, or supervised others in doing so, and that the printouts were accurate representations of what was displayed on the listed website on the listed day and time”); *Rivera v. Inc. Village of Farmingdale*, 29 F. Supp. 3d 121 (E.D.N.Y. 2013) (internet postings offered to show community bias in Fair Housing Act case; testimony that witness “personally downloaded all of the postings and confirmed the identities of the key posters ... [suffices to show] a ‘reasonable likelihood’ that they were actually posted on the internet by members of an online community comprised of the Village’s own residents”).

<sup>46</sup> See, e.g., *Foreword Magazine, Inc. v. OverDrive Inc.*, 2011 U.S. Dist. LEXIS 125373, at \*8–\*11 (W.D. Mich. Oct. 31, 2011) (admitting screenshots from websites, accompanied only by the sworn affidavit of an attorney, given “other indicia of reliability (such as the Internet domain address and the date of printout)”).

<sup>47</sup> See, e.g., *Metcalf v. Blue Cross Blue Shield of Mich.*, 2013 U.S. Dist. LEXIS 109641 (D. Or. Aug. 5, 2013). (authenticity of website information of an organization’s purported website was established by logos or headers matching those of the organization).

- a printout obtained from the Internet Archive’s “wayback machine.” The Internet Archive documents and stores all websites and the “wayback machine” can retrieve website information from any particular time.<sup>49</sup> Some courts require a witness from the Internet archive to testify to establish that the “wayback machine” employs a process that produces accurate results under Rule 901(b)(9).<sup>50</sup> Other courts, as discussed infra, take judicial notice of the reliability of the “wayback machine.”

The opponent of the evidence is free to challenge authenticity of dynamic website data by adducing facts showing that the exhibit does not accurately reflect the contents of a website, or that those contents are not attributable to the ostensible owner of the site. There may be legitimate questions concerning the ownership of the site or attribution of statements contained on the site to the ostensible owner.

## 2. Self-Authenticating Website Data

Under Fed. R. Evid. 902, three types of webpage exhibits are self-authenticating --- meaning that a presentation of the item itself is sufficient to withstand an authenticity objection from the opponent.

### a. Government Websites

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<sup>48</sup> *St. Luke's Cataract & Laser Inst., P.A. v. Sanderson*, 2006 U.S. Dist. LEXIS 28873 (M.D. Fla. May 12, 2006) (web master’s testimony can authenticate a printout).

<sup>49</sup> Another example of a website that allows users to access archival copies of webpages is [www.cachedpages.org](http://www.cachedpages.org), which allows users to employ one interface to search three different archival services—the Wayback Machine, Google Cache, and Coral Cache.

<sup>50</sup> See, e.g., *Telewizja Polska USA, Inc. v. EchoStar Satellite Corp.*, No. 02 C 3293, 2004 WL 2367740, at 6\* (N.D. Ill. Oct. 15, 2004) (approving the use of the Internet Archive’s “wayback machine” to authenticate websites as they appeared on various dates relevant to the litigation). Compare *Open Text S.A. v. Box, Inc.*, 2015 U.S. Dist. LEXIS 11312 (N.D. Cal. Jan. 30, 2015) (court was unwilling to accept a screenshot from the wayback machine into evidence without testimony from a representative of the Internet Archive confirming its authenticity).

Under a proposed amendment to the Federal Rules of Evidence, the reliability of the wayback machine process could be established by a certificate of the Internet Archive official, rather than in-court testimony). See Proposed Rule 902(13) (allowing proof of authenticity of electronic information produced by a process leading to an accurate result to be established by the certificate of a knowledgeable witness). That proposed amendment is scheduled to become effective on December 1, 2017.

Under Rule 902(5) data on governmental websites are self-authenticating.<sup>51</sup> As discussed below, courts regularly take judicial notice of these websites.

### **b. Newspaper & Periodical Websites**

Under Rule 902(6) (*Newspapers and Periodicals*), “[p]rinted material purporting to be a newspaper or periodical” is self-authenticating. This includes online newspaper and periodicals, because Rule 101(b)(6) provides that any reference in the Rules to printed material also includes comparable information in electronic form. Thus all newspaper and periodical material is self-authenticating whether or not it ever appeared in hard copy.<sup>52</sup>

### **c. Websites Certified as Business Records**

Rules 902(11) and (12) render self-authenticating business (organizational) records that are certified as satisfying Rule 803(6) by “the custodian or another qualified person.” Exhibits extracted from websites that are maintained by, for, and in the ordinary course of, a business or other regularly conducted activity can satisfy this rule.<sup>53</sup>

## **3. Authenticating the date of information posted on a website.**

In some cases, a party may need to show not only that a posting was made on a website, but also the date on which the information was generated --- this can be a distinct question from establishing what the website looked like at a particular time, which can be shown by the methods discussed above. Assume, for example, that a video is posted on YouTube on January 1, 2016. If the proponent wants to prove that it was posted on that day, this can be done by a person with knowledge, circumstantial evidence, etc. It is a different question if the proponent needs to show that the information itself was *generated* on a certain day. That will not be shown by proving it was posted on a certain date. For example, in *Sublime v. Sublime Remembered*, 2013 U.S. Dist. LEXIS 103813 (C.D. Cal. July 22, 2013), the plaintiffs brought suit against the defendant for violating a court order prohibiting defendant from performing songs belonging to the plaintiffs. As evidence, the plaintiffs sought to admit a YouTube video of the defendant

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<sup>51</sup> See, e.g., *Williams v. Long*, 585 F. Supp.2d 679, 686–88 & n. 4 (D. Md. 2008) (collecting cases indicating that postings on government websites are self-authenticating).

<sup>52</sup> See, e.g., *White v. City of Birmingham*, 2015 U.S. Dist. LEXIS 39187 (N.D. Ala. Mar. 27, 2015) (noting sua sponte that news articles from Huntsville Times website (AL.com) “could be found self-authenticating at trial”).

<sup>53</sup> See, e.g., *United States v. Hassan*, 742 F.3d 104, 132–134 (4th Cir. 2014) (Facebook posts, including YouTube videos were self-authenticating under Rule 902(11) where accompanied by certificates from Facebook and Google custodians “verifying that the Facebook pages and YouTube videos had been maintained as business records in the course of regularly conducted business activities”); *Randazza v. Cox*, 2014 U.S. Dist. LEXIS 49762 (D. Nev. April 10, 2014) (videos posted to YouTube “are self-authenticating as a certified domestic record of a regular conducted activity if their proponent satisfies the requirements of the business-records hearsay exception.”).

performing the prohibited music. The court ruled that the video was not properly authenticated without evidence that it was recorded *after* the court order was issued. The mere fact that it was *posted* after the court order was issued was not enough to establish that the video was what the proponent said it was --- performance of the music after the court order was entered.

Establishing that a video (or any other kind of information posted on a website) was *prepared* on --- or before or after --- a certain date thus presents a separate question of authenticity. But it is a question that can be addressed through the same factors discussed above: for example, by a person with personal knowledge, a forensic expert, and/or circumstantial evidence. Illustrative is *United States v. Bloomfield*, 591 Fed.Appx. 847, 848-49 (11<sup>th</sup> Cir. 2014), in which the defendant was convicted of felon-firearm possession. The government offered a YouTube video which showed the defendant discharging an AR-15 rifle in front of Fowler Firearms. The date that the video was made was obviously critical. If it was made before the defendant was a convicted felon, then it depicted no crime. The government was not required, necessarily, to prove that the video was taken on a specific day, but it was required to establish that the video was taken after the defendant was convicted of a felony. And the date that the video was posted on YouTube was not the relevant date. The court found the date was properly authenticated in the following passage:

- Fowler Firearms's manager testified that Broomfield was a Fowler Firearms member, that on January 21, 2011, Broomfield purchased two boxes of PMC .223 ammunition, and that he had not purchased that ammunition at any other time. Dezendorf stated that the only firearm Fowler Firearms rented to customers at the time that used PMC .223 ammunition was the AR-15 rifle.
- An employee who had worked at Fowler Firearms for ten years testified that he could discern the approximate date the video was taken. He explained that the video showed side deflectors and lights on the gun range, which Fowler Firearms had installed in late 2010 or early 2011. He also testified that Fowler Firearms paints its floors and walls at the beginning of the season, and the freshly-painted floor and walls seen in the video indicated that the footage was filmed close to the start of 2011.
- A witness who operated a maintenance business that provided repair and maintenance to Fowler Firearms testified that he installed the lighted baffles shown in the video, in late September or early October of 2010.

All this was more than enough to indicate that the video was taken around the beginning of 2011 --- post-dating the defendant's felony status --- and so depicted the crime of felon-firearm possession.

## *E. Social Media Postings*

“Social media” is defined as “forms of electronic communications (as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content.”<sup>54</sup> Parties have increasingly sought to use social media evidence to their advantage at trial. A common example would be a picture or entry posted on a person’s Facebook page, that could be relevant to contradict that person’s testimony at trial. If the entry is challenged for authenticity, the proponent must present a prima facie case that the evidence is what the party says it is—e.g., that it is in fact a posting on the person’s Facebook page. If the goal is to prove that the page or a post is that of a particular person, authenticity standards are not automatically satisfied by the fact that the post or the page is in that person’s name, or that the person is pictured on the post.<sup>55</sup> That is because someone can create a Facebook or other social media page in someone else’s name. Moreover, one person may also gain access to another’s account.

What more must be done to establish authenticity of a social media page? Most courts have found that it is enough for the proponent to show that the pages and accounts can be tracked through internet protocol addresses associated with the person who purportedly made the post.<sup>56</sup>

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<sup>54</sup> Definition of Social Media, Merriam-Webster, <http://www.merriam-webster.com/dictionary/social%20media#> (last visited January 16, 2016).

<sup>55</sup> See, e.g., *United States v. Vayner*, 769 F.3d 125, 132 (2d Cir. 2014), where the court held that a page on the Russian version of Facebook was not sufficiently authenticated simply by the fact that it bore the name and picture of the purported “owner” Zhylytsou:

It is uncontroverted that information about Zhylytsou appeared on the VK page: his name, photograph, and some details about his life consistent with Timku’s testimony about him. But there was no evidence that Zhylytsou himself had created the page or was responsible for its contents. Had the government sought to introduce, for instance, a flyer found on the street that contained Zhylytsou’s Skype address and was purportedly written or authorized by him, the district court surely would have required some evidence that the flyer did, in fact, emanate from Zhylytsou. Otherwise, how could the statements in the flyer be attributed to him?

Essentially the court in *Vayner* held that a Facebook page is not self-authenticating. Compare *United States v. Encarnacion-LaFontaine*, 2016 WL 611925 (2d Cir. Feb. 16, 2016)(threatening Facebook posts were properly authenticated where “the Government introduced evidence that (1) the Facebook accounts used to send the messages were accessed from IP addresses connected to computers near Encarnacion’s apartment; (2) patterns of access to the accounts show that they were controlled by the same person; (3) in addition to the Goris threats, the accounts were used to send messages to other individuals connected to Encarnacion; (4) Encarnacion had a motive to make the threats, and (5) a limited number of people, including Encarnacion, had information that was contained in the messages.”).

<sup>56</sup> *United States v. Hassan*, 742 F.3d 104, 133 (4th Cir. 2014) (the trial court did not abuse its discretion in admitting Facebook pages purportedly maintained by two of the defendants; the trial court properly determined that the prosecution had satisfied its burden under Rule 901(a) “by tracking the Facebook pages and Facebook accounts to Hassan’s and Yaghi’s email addresses via internet protocol addresses”); *United States v. Brinson*, 772 F.3d 1314 (10th Cir. 2014) (Facebook account linked to the defendant’s email).

*Other factors that can be relied upon to support authentication of social media postings include the following:*<sup>57</sup>

- testimony from the purported creator of the social network profile and related postings;
- testimony from persons who saw the purported creator establish or post to the page;
- testimony of a witness that she often communicated with the alleged creator of the page through that account;
- expert testimony concerning the results of a search of the social media account holder's computer hard drive;<sup>58</sup>
- testimony about the contextual clues and distinctive aspects in the messages themselves tending to reveal the identity of the purported author;
- testimony regarding the account holder's exclusive access to the originating computer and social media account;
- information from the social media network that links the page or post to the purported author;
- testimony directly from the social networking website that connects the establishment of the profile to the person who allegedly created it and also connects the posting sought to be introduced to the person who initiated it;
- expert testimony regarding how social network accounts are accessed and what methods are used to prevent unauthorized access;
- production pursuant to a document request;
- whether the purported author knows the password to the account, and how many others know it as well;
- that the page or post contains some of the factors previously discussed as circumstantial evidence of authenticity of texts, emails, etc., including:

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<sup>57</sup> See generally Honorable Paul W. Grimm, *Authentication of Social Media Evidence*, 36 AM. J. TRIAL ADVOC. 433 (2013); Richard Raysman and Peter Brown, *Authentication of Social Media Evidence*, New York Law Journal, November 11, 2011, p. 3.

<sup>58</sup> Honorable Paul W. Grimm, *Authentication of Social Media Evidence*, 36 AM. J. TRIAL ADVOC. 433, 468 (2013) ("A computer forensic expert can frequently authenticate the maker of social media content. Obviously, you will need to retain the proper expert and ensure that he or she has enough time and information to make the identification. Advance planning is essential, and be mindful of the potentially substantial cost.").

- ¾ nonpublic details of the purported author's life;
- ¾ other items known uniquely to the purported author or a small group including him or her;
- ¾ references or links to, or contact information about, loved ones, relatives, co-workers, others close to the purported author;
- ¾ photos and videos likely to be accessed by the purported author;
- ¾ biographical information, nicknames, not generally accessible;
- ¾ the structure or style of comments that are in the style of the purported author;
- ¾ that the purported author acts in accordance with the contents of the page or post.

Finally, a social media post meeting the foundational requirements of a business record under Fed. R. Evid. 803(6) may be self-authenticating under 902(11). While this may not be enough to authenticate the *identity* of the person posting, it will be enough to establish that the records were not altered in any way after they were posted.<sup>59</sup>

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<sup>59</sup> See, e.g., *United States v. Hassan*, 742 F.3d 104, 134 (4th Cir. 2014):

The government presented the certifications of records custodians of Facebook and Google, verifying that the Facebook pages and YouTube videos had been maintained as business records in the course of regularly conducted business activities. According to those certifications, Facebook and Google create and retain such pages and videos when (or soon after) their users post them through use of the Facebook or Google servers.

### III. Judicial Notice of Digital Evidence

This Best Practices Manual has discussed the many ways that new forms of digital evidence might be authenticated. Almost all of these methods require expenditure of resources. Courts and parties have begun to realize that some of this new digital evidence has reached the point of being an undisputed means of proving a fact. In these circumstances, judicial notice may be used to alleviate the expenditure of resources toward authentication.

Under Fed. R. Evid. 201(b) a court may judicially notice a fact if it is not subject to reasonable dispute. An example of a court taking judicial notice of a fact obtained through an electronic process is found in *United States v. Brooks*, 715 F.3d 1069, 1078 (8th Cir. 2013). The defendant in a bank robbery prosecution challenged the admissibility of GPS data that was obtained from a GPS tracker that the teller placed in the envelope of stolen money. The trial court took judicial notice of the accuracy and reliability of GPS technology. The court of appeals found no error:

We cannot conclude that the district court abused its discretion in taking judicial notice of the accuracy and reliability of GPS technology. Commercial GPS units are widely available, and most modern cell phones have GPS tracking capabilities. Courts routinely rely on GPS technology to supervise individuals on probation or supervised release, and, in assessing the Fourth Amendment constraints associated with GPS tracking, courts generally have assumed the technology's accuracy.

Another common example of judicial notice of digital information is that courts take judicial notice of distances, locations, and the physical contours of an area by reference to Google Maps.<sup>60</sup>

What follows are some examples of judicial notice of digital information.

**1. Government Websites.** Judicial notice may be taken of postings on government websites,<sup>61</sup> including:

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<sup>60</sup> See, e.g., *United States v. Burroughs*, 810 F.3d 833, 835, n.1 (D.C.Cir. 2016) (“We grant the government’s motion to take judicial notice of a Google Map. It is a ‘source whose accuracy cannot be reasonably questioned,’ at least for the purpose of identifying the area where Burroughs was arrested and the general layout of the block.”); *McCormack v. Hiedeman*, 694 F.3d 1004, 1008 (9th Cir. 2012) (relying on Google Maps to determine the distance between two cities; the court held that Google Maps was a website whose accuracy could not reasonably be questioned under Fed. R. Evid. 201(b)(2).). See also *Cline v. City of Mansfield*, 745 F. Supp. 2d 773, 800 n.23 (N.D. Ohio 2010) (the court took judicial notice that the sun set at 7:47 pm on a particular date according to [www.timeanddate.com](http://www.timeanddate.com)).

<sup>61</sup> See, e.g., *United States v. Head*, 2013 U.S. Dist. LEXIS 151805, at \*7 n.2 (E.D. Cal. Oct. 22, 2013) (“The court may take judicial notice of information posted on government websites as it can be ‘accurately and readily determined from sources whose accuracy cannot reasonably be questioned.’”); *Puerto Rico v. Shell Oil Co. (In re MTBE Prods. Liab. Litig.)*, 2013 U.S. Dist. LEXIS 181837, at \*16 (S.D.N.Y. 2013) (“Courts routinely take judicial



- Federal, state, and local court websites.<sup>62</sup>
- Federal, state, and local agency, department and other entities' websites.<sup>63</sup>
- Foreign government websites.<sup>64</sup>
- International organization websites.<sup>65</sup>

**2. Non-Government Websites.** Generally, courts are reluctant to take judicial notice of non-governmental websites because the Internet “is an open source” permitting anyone to “purchas[e] an internet address and create a website” and so the information recorded is subject to dispute.<sup>66</sup> A few websites, however, as discussed above, have become a part of daily life — their accuracy is both objectively verifiable and actually verified millions of times a day. Other websites are the online versions of sources that courts have taken judicial notice of for years, and the courts find little reason to distinguish a reputable web equivalent from a reputable hard copy edition.

***Examples of Information Found Authentic on Non-Governmental Websites Through Judicial Notice.***

- Internet maps (*e.g.*, Google Maps, MapQuest).
- Calendar information.<sup>67</sup>

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notice of data on government websites because it is presumed authentic and reliable”).

<sup>62</sup> See, *e.g.*, *Feingold v. Graff*, 516 F. App'x 223, 226 (3d Cir. 2013).

<sup>63</sup> See, *e.g.*, *Lawrence v. Fed. Home Loan Mortg. Corp.*, 2015 U.S. Dist. LEXIS 40012 (W.D. Tex. Mar. 30, 2015) (federal government's agreement with national bank as posted on government website); *Flores v. City of Baldwin Park*, 2015 U.S. Dist. LEXIS 22149 (C.D. Cal. Feb. 23, 2015) (municipal police department website).

<sup>64</sup> See, *e.g.*, *United States v. Broxmeyer*, 699 F.3d 265, 296 (2d Cir. 2012) (websites of governments of Vietnam and Brazil).

<sup>65</sup> See, *e.g.*, *Kirtsang v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1367 (2013) (World Bank website).

<sup>66</sup> *United States v. Kane*, 2013 U.S. Dist. LEXIS 154248 (D. Nev. Oct. 28, 2013).

<sup>67</sup> See, *e.g.*, *Tyler v. United States*, 2012 U.S. Dist. LEXIS 184007, at \*9–\*10 n.6 (N.D. Ga. Dec. 6, 2012); *Local 282, Int'l Bhd. of Teamsters v. Pile Found. Constr. Co.*, 2011 U.S. Dist. LEXIS 86644, at \*17–\*18 n.5 (E.D.N.Y. Aug. 5, 2011).

- Newspaper and periodical articles.<sup>68</sup>
- Online versions of textbooks, dictionaries, rules, charters.<sup>69</sup>

Most non-Governmental websites, even if familiar, are of debatable authenticity and therefore not appropriately the object of judicial notice. Wikipedia is a prime example. Courts have declined requests to take judicial notice of the contents of Wikipedia entries,<sup>70</sup> except for the fact that the contents appear on the site as of a certain date of access.<sup>71</sup>

**3. Wayback Machine.** Archived versions of websites as displayed on the “wayback machine” (www.archive.org) are frequently the subject of judicial notice,<sup>72</sup> but this is not always the case.<sup>73</sup> Note that it is only the contents of the archived pages that may warrant judicial notice—the dates assigned to archived pages may not apply to images linked to them, and more generally, links on archived pages may direct to the live web if the object of the old link is no longer available.

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<sup>68</sup> See, e.g., *Ford v. Artiga*, 2013 U.S. Dist. LEXIS 106805, at \*19 n.5 (E.D. Cal. July 30, 2013); *HB v. Monroe Woodbury Cent. Sch. Dist.*, 2012 U.S. Dist. LEXIS 141252 (S.D.N.Y. Sept. 27, 2012).

<sup>69</sup> See, e.g., *United States v. Mosley*, 672 F.3d 586, 591 (8th Cir. 2012) (PHYSICIANS’ DESK REFERENCE); *Shuler v. Garrett*, 2014 U.S. App. LEXIS 2772, at \*7 (6th Cir. Feb. 14, 2014) (OXFORD ENGLISH DICTIONARY); *Dealer Computer Servs. v. Monarch Ford*, 2013 U.S. Dist. LEXIS 11237, at \*11 & n.3 (E.D. Cal. Jan. 25, 2013) (American Arbitration Association rules); *Morgan Stanley Smith Barney LLC v. Monaco*, 2014 U.S. Dist. LEXIS 149419 (D. Colo. Aug. 26, 2014) (FINRA rules); *Famous Music Corp. v. 716 Elmwood, Inc.*, 2007 U.S. Dist. LEXIS 96789, at \*12–\*13 n.7 (W.D.N.Y. Dec. 28, 2007) (Articles of Association of ASCAP).

<sup>70</sup> See, e.g., *Blanks v. Cate*, 2013 U.S. Dist. LEXIS 11233, at \*8 n.4 (E.D. Cal. Jan. 28, 2013) (refusing to take judicial notice of a Wikipedia entry “as such information is not sufficiently reliable”); *Stein v. Bennett*, 2013 U.S. Dist. LEXIS 126667, at \*20-21 n.10 (M.D. Ala. Sept. 5, 2013) (“Wikipedia is not a source that warrants judicial notice”); *Gonzales v. Unum Life Ins. Co. of Am.*, 861 F. Supp. 2d 1099, 1104 n.4 (S.D. Cal. 2012) (“The Court declines Plaintiff’s request to take judicial notice of the Wikipedia definition of Parkinson’s Disease because the internet is not typically a reliable source of information”).

<sup>71</sup> See, e.g., *McCrary v. Elations Co., LLC*, 2014 U.S. Dist. LEXIS 8443, at \*4-5 n.3 (C.D. Cal. Jan. 13, 2014) (“While the court may take judicial notice of the fact that the internet, Wikipedia, and journal articles are available to the public, it may not take judicial notice of the truth of the matters asserted therein”).

<sup>72</sup> See, e.g., *Under a Foot Plant Co. v. Exterior Design, Inc.*, 2015 U.S. Dist. LEXIS 38190 (D. Md. Mar. 25, 2015) (“District courts have routinely taken judicial notice of content from The Internet Archive”).

<sup>73</sup> See, e.g., *Open Text S.A. v. Box, Inc.*, 2015 U.S. Dist. LEXIS 11312 (N.D. Cal. Jan. 30, 2015) (proffered Wayback Machine printouts not authenticated absent certification from representative of InternetArchive.org).

## APPENDIX

### Federal Rules of Evidence Most Commonly Used to Establish Authenticity of Digital Evidence

#### Rule 901. Authenticating or Identifying Evidence

(a) **In General.** To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

(b) **Examples.** The following are examples only — not a complete list — of evidence that satisfies the requirement:

(1) ***Testimony of a Witness with Knowledge.*** Testimony that an item is what it is claimed to be.

\* \* \*

(3) ***Comparison by an Expert Witness or the Trier of Fact.*** A comparison with an authenticated specimen by an expert witness or the trier of fact.

(4) ***Distinctive Characteristics and the Like.*** The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

\* \* \*

(9) ***Evidence About a Process or System.*** Evidence describing a process or system and showing that it produces an accurate result.

**Rule 902. Evidence That Is Self-Authenticating**

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

\* \* \*

- (5) ***Official Publications.*** A book, pamphlet, or other publication purporting to be issued by a public authority.
- (6) ***Newspapers and Periodicals.*** Printed material purporting to be a newspaper or periodical.

\* \* \*

(11) ***Certified Domestic Records of a Regularly Conducted Activity.***

The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before 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.

(12) ***Certified Foreign Records of a Regularly Conducted Activity.*** In a

civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a federal statute or Supreme Court rule, 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. The proponent must also meet the notice requirements of Rule 902(11).

***Proposed Additions to Rule 902, Projected Effective Date December 1, 2017:***

***(13) Certified Records Generated by an Electronic Process or System.***

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).

**Rule 201. Judicial Notice of Adjudicative Facts**

- (a) **Scope.** This rule governs judicial notice of an adjudicative fact only, not a legislative fact.
- (b) **Kinds of Facts That May Be Judicially Noticed.** The court may judicially notice a fact that is not subject to reasonable dispute because it:
- (1) is generally known within the trial court's territorial jurisdiction; or
  - (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.
- (c) **Taking Notice.** The court:
- (1) may take judicial notice on its own; or
  - (2) must take judicial notice if a party requests it and the court is supplied with the necessary information.
- (d) **Timing.** The court may take judicial notice at any stage of the proceeding.

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## Advisory Committee on Evidence Rules

Minutes of the Meeting of April 29, 2016

Alexandria, Virginia

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the “Committee”) met on April 29, 2016 in Alexandria, Virginia.

*The following members of the Committee were present:*

Hon. William K. Sessions, Chair  
Hon. Brent R. Appel  
Hon. Debra Ann Livingston  
Hon. John T. Marten (by telephone)  
Hon. John A. Woodcock  
Daniel P. Collins, Esq.  
Paul Shechtman, Esq.  
Elizabeth J. Shapiro, Esq., Department of Justice  
A.J. Kramer, Esq., Public Defender

*Also present were:*

Hon. Jeffrey S. Sutton, Chair of the Committee on Rules of Practice and Procedure  
Hon. Richard Wesley, Liaison from the Standing Committee  
Hon. Solomon Oliver, Liaison from the Civil Rules Committee  
Hon. James Dever, Liaison from the Criminal Rules Committee  
Professor Daniel J. Capra, Reporter to the Committee  
Professor Kenneth S. Broun, Consultant to the Committee  
Professor Daniel Coquillette, Reporter to the Standing Committee  
Timothy Lau, Federal Judicial Center  
Rebecca A. Womeldorf, Chief, Rules Committee Support Office  
Shelley Duncan, Rules Committee Support Office  
Teresa Ohley, Esq., Liaison from the Joint Service Committee on Military Justice  
Zoe Oreck, American Association for Justice  
Susan Steinman, American Association for Justice  
Michael Shepard, Hogan Lovells, American College of Trial Lawyers  
Jayme Herschkopf, Supreme Court Fellow  
Derek Webb, Law Clerk to Judge Sutton

## **I. Opening Business**

### *Approval of Minutes*

The minutes of the Fall, 2015 Committee meeting were approved.

### *January Meeting of the Standing Committee*

Judge Sessions reported on the January, 2016 meeting of the Standing Committee. The Evidence Rules Committee had no action items at the meeting. Judge Sessions reported to the Standing Committee about the Hearsay Symposium that the Committee had sponsored in the Fall of 2015. Ideas from that Symposium will be part of the Committee's agenda for the near future.

### *Departure of Committee Members*

Judge Sessions and the entire Committee expressed regret that the terms of two valued Committee members --- Brent Appel and Paul Shechtman --- were ending. Both Brent and Paul were thanked for their stellar service to the Committee. Both stated their appreciation for the work of the Evidence Rules Committee, the quality of its decisionmaking, and the collegiality of the members.

## **II. Proposed Amendment to Rule 803(16)**

Rule 803(16) provides a hearsay exception for "ancient documents." If a document is more than 20 years old and appears authentic, a statement in the document is admissible under the exception for the truth of its contents. At the Spring, 2015 meeting, Committee members unanimously agreed that Rule 803(16) was problematic, as it was based on the false premise that authenticity of a document means that the assertions in the document are reliable. The Committee also unanimously agreed that an amendment would be necessary to prevent the ancient documents exception from providing a loophole to admit large amounts of old, unreliable ESI. The Committee proposed to eliminate Rule 803(16), with the expectation that old documents that are reliable could still be admitted as business records or under the residual exception, and also with the recognition that many documents currently offered under Rule 803(16) could be admitted as party-opponent statements or for the non-hearsay purpose of notice.

The Committee's proposal to abrogate Rule 803(16) was unanimously approved by the Standing Committee for release for public comment. Over 200 public comments were received, and a public hearing was held. Almost all the comment was negative. Most of the comments were to the effect that without the ancient documents exception, important documents in certain

specific types of litigation would no longer be admissible --- or would be admissible only by expending resources that are currently not necessary under Rule 803(16). Examples of litigation cited by the public comment included cases involving latent diseases; disputes over the existence of insurance; suits against churches alleged to condone sexual abuse by their clergy; cases involving environmental cleanups; and title disputes. Many of the comments concluded that the business records exception and the residual exception are not workable alternatives for ancient documents. The commenters contended that the business records exception requires a foundation witness that may be hard to find, and that the residual exception is supposed to be narrowly construed. Moreover, both these exceptions would require a statement-by-statement analysis, which is not necessary under Rule 803(16), and which would lead to more costs for proponents.

Many of the comments were duplicative, and some were mistaken about the consequences of the change proposed. For example, some of the commenters argued that the amendment would make it impossible to authenticate ancient documents --- but there is no proposal to amend the rules on authentication. Other commenters stated that the amendment would make it harder to prove that a defendant knew about the dangers of a product --- but if a document is offered for notice, it is not covered by the hearsay rule in the first place. Yet on the whole, the public comment established that the proposed amendment raises substantial concerns about the elimination of the ancient documents exception in certain important types of cases.

At the meeting, the Committee was presented with three basic alternatives for responding to the public comment: 1) continue to propose the elimination of Rule 803(16), while adding to the Committee Note the Committee's expectation that the reliable hearsay in ancient documents would be admissible under the business records exception or the residual exception; 2) propose a limitation on, rather than elimination of, Rule 803(16); or 3) withdraw the amendment and try to find some way to monitor whether and when ESI is being offered under the ancient documents exception.

The Committee first decided that it was not appropriate to continue with the proposal to eliminate Rule 803(16) --- the public comment did raise concerns about the effect of the amendment and the costs of prosecuting certain important claims that currently rely on ancient documents. (The public comment also showed that looking at the reported cases does not give a sense of how often the ancient documents exception is actually used --- in part because with ancient documents, there is nothing to report, because there is currently no basis for any objection to the admission of such documents.) The DOJ representative added that there are a number of types of actions in which the government routinely uses ancient documents --- such as CERCLA cases and cases involving title dispute in "rails to trails" litigation --- and that elimination of the ancient documents exception would impose substantial burdens in these cases, because the documents would be difficult to qualify under the residual exception, given the particularized notice requirements of Rule 807. The Committee was sympathetic to the concerns about the costs that would be imposed in particular kinds of existing cases if the ancient documents exception were eliminated.

The Committee next decided that the "do nothing" approach was not acceptable. The Committee unanimously believed that the ESI problem was real --- 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. Computer storage costs have dropped dramatically --- that greatly expands the universe of information that could be potentially offered under the ancient documents exception. Moreover, the presumption of the ancient documents exception was that a hardcopy document kept around for 20 years must have been thought to have some importance; but that presumption is no longer the case with easily stored ESI. The Committee remained convinced that it was appropriate and necessary to get out ahead of this problem --- especially because the use of the ancient documents exception is so difficult to monitor. (The FJC representative outlined to the Committee in detail how difficult it would be to conduct a targeted survey of judges and litigants on the use of ancient documents in litigation.) Moreover, the Committee adhered to its position that Rule 803(16) was simply a flawed rule; it is based on the fallacy that because a document is old and authentic, its contents are reliable.

The Committee then moved to drafting alternatives that would limit rather than eliminate Rule 803(16). The alternatives provided by the Reporter, in response to the public comment, were:

- 1) “Grandfathering” – limiting the ancient documents exception to documents prepared before a certain date;
- 2) Adding a necessity requirement --- applying the exception only if the proponent shows that there is no other equally probative evidence to prove the point for which the ancient document is offered;
- 3) Limiting the exception to hardcopy;
- 4) Adding a provision that ancient documents would not be admissible if the opponent could show they were untrustworthy;
- 5) Extending the time period for ancient documents from 20 to 30 years; and
- 6) Adding a requirement, as in the California rule, that a statement in an ancient document would be admissible only if it has been acted on as true by someone with an interest in the matter (often referred to as a “reliance” requirement).

The Committee thoroughly discussed these alternatives. Some were easily rejected. Thus, limiting the exception to hardcopy was rejected because hardcopy might well be derived from ESI, while on the other hand, an old hardcopy document might be digitized --- and it would be nonsensical to provide that the old hardcopy would be admissible while the same document in digitized form would not. Extending the time period for ancient documents from 20 to 30 years amounted to “kicking the can down the road” because it would simply delay the inevitable decision for ten years --- resulting in two amendments to the same rule (or more than two as the can gets kicked further) where one should do. And adding a reliance requirement would limit the use of ancient documents in the very cases where they are now found necessary, because in many of these cases the plaintiff is introducing an old document precisely to show that a party

*ignored* the document; moreover, in many cases, the fact of reliance might well have to be *shown* by ancient documents.

Most of the discussion was about the remaining alternatives --- grandfathering, necessity, and trustworthiness burden-shifting. Ultimately the Committee decided that adding either a necessity requirement or a trustworthiness burden-shifting requirement to the rule would not sufficiently address the public concerns about additional costs in proving up old hardcopy documents. Adding either of these requirements would lead to challenges, *in limine* hearings, and difficult factual determinations about documents that were prepared long ago. The Committee concluded that the best result would be to turn back to its original concern --- the explosion of ESI --- and to leave the current use of ancient documents where it found it. That could only be done by an amendment that would allow the use of hearsay in ancient documents in all the cases in which they were currently being used, but to eliminate the exception going forward in order to prevent the use of Rule 803(16) as a safe harbor for unreliable ESI.

In discussions about the appropriate date for ending the ancient documents exception, the Committee considered several alternatives, and finally --- and unanimously --- decided that 1998 was a fair date. The Committee recognized, of course, that any cutoff date would have a degree of arbitrariness, but it also recognized that the ancient documents exception itself set an arbitrary time period for its applicability. The Committee determined that the cut-off date of January 1, 1998 would mean that the rule would not affect the admissibility of ancient documents in any of the existing cases that were highlighted in the public comment; also, 1998 was a fair date for addressing the rise of ESI.

The Committee considered the possibility that in the future, cases involving latent diseases, CERCLA, etc. would arise. But the Committee concluded that in such future cases, the ancient documents exception was unlikely to be necessary because, going forward from 1998, there was likely to be preserved (reliable) ESI that could be used to prove the facts that are currently proved by scarce hardcopy. If the ESI is generated by a business, then it is likely to be easier to find a qualified witness who is familiar with the electronic recordkeeping than it is under current practice to find a records custodian familiar with hardcopy practices from the 1960's. Moreover, the Committee determined that it would be useful in the Committee Note to emphasize that the residual exception remains available to qualify old documents that are reliable, and to state the Committee's expectation that the residual exception not only could, 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.

**After extensive discussion, the Evidence Rules Committee unanimously approved the following amendment to Rule 803(16), to be submitted to the Standing Committee with the recommendation that it be forwarded to the Judicial Conference:**

**(16) *Statements in Ancient Documents.*** A statement in a document ~~that is at least 20 years old~~ that was prepared before January 1, 1998 and whose authenticity is established.

The Committee determined that it was not necessary to send out the proposed amendment for a new round of public comment, as the amendment would not affect the application of the ancient documents exception in any of the cases discussed in any of the public comments. Moreover, a number of the public comments specifically suggested that a grandfathering provision would properly address the Committee's ESI-related concerns while not affecting the use of the exception in the cases in which it is needed and is currently being used.

Finally, the Committee reviewed and approved the proposed Committee Note, which emphasizes the following points:

- The amendment addresses the concern about ESI, and there is no effect on the current use of the exception for documents prepared before 1998.
- In cases involving matters such as latent diseases going forward --- i.e., using records prepared after January 1, 1998 --- the ancient documents exception should not be necessary because of the existence of reliable ESI, and the ability to admit the evidence under reliability-based exceptions such as Rules 803(6) and 807.
- The limitation of the ancient documents exception is not intended to provide a signal that old documents are somehow not to be admitted under other exceptions, particularly Rule 807.
- A document prepared before 1998 might subsequently be altered; to the extent that is so, the alterations would not qualify for admissibility under Rule 803(16).

**The proposed Committee Note to the amendment to Rule 803(16), as unanimously approved by the Committee, reads as follows:**

The ancient documents exception to the rule against hearsay has been limited to statements in documents prepared before January 1, 1998. The Committee has determined that the ancient documents exception should be limited due to the risk that it will be used as a vehicle to admit vast amounts of unreliable electronically stored information (ESI). Given the exponential development and growth of electronic information around the year 1998, the hearsay exception for ancient documents has now become a possible open door for large amounts of unreliable ESI, as no showing of reliability needs to be made to qualify under the exception.

The Committee is aware that in certain cases --- such as cases involving latent diseases and environmental damage --- parties must rely on hardcopy documents from the past. The ancient documents exception remains available for such cases for documents prepared before 1998. Going forward, it is anticipated that any need to admit old hardcopy documents produced after January 1, 1998 will decrease, because reliable ESI is likely to be available and can be offered under a reliability-based hearsay exception. Rule 803(6) may be used for many of these ESI documents, especially given its flexible standards on which witnesses might be qualified to provide an adequate foundation. And Rule 807 can be used to admit old documents upon a showing of reliability --- which will often (though not always) be found by circumstances such as that the document was prepared with no litigation motive in mind, close in time to the relevant events. The limitation of the ancient documents exception 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. Finally, many old documents can be admitted for the non-hearsay purpose of proving notice, or as party-opponent statements.

The limitation of the ancient documents hearsay exception is not intended to have any effect on authentication of ancient documents. The possibility of authenticating an old document under Rule 901(b)(8) --- or under any ground available for any other document --- remains unchanged.

The Committee carefully considered, but ultimately rejected, an amendment that would preserve the ancient documents exception for hardcopy evidence only. A party will often offer hardcopy that is derived from ESI. Moreover, a good deal of old information in hardcopy has been digitized or will be so in the future. Thus, the line between ESI and hardcopy was determined to be one that could not be drawn usefully.

The Committee understands that the choice of a cut-off date has a degree of arbitrariness. But January 1, 1998 is a rational date for treating concerns about old and unreliable ESI. And the date is no more arbitrary than the 20-year cutoff date in the

original rule. See Committee Note to Rule 901(b)(8) (“Any time period selected is bound to be arbitrary.”).

Under the amendment, a document is “prepared” when the statement proffered was recorded in that document. For example, if a hardcopy document is prepared in 1995, and a party seeks to admit a scanned copy of that document, the date of preparation is 1995 even though the scan was made long after that --- the subsequent scan does not alter the document. The relevant point is the date on which the information is recorded, not when the information is prepared for trial. However, if the content of the document is *itself* altered after the cut-off date, then the hearsay exception will not apply to statements that were added in the alteration.

### **III. Proposed Amendments to Rule 902 to Allow Certification of Authenticity of Certain Electronic Evidence**

At its Spring 2015 meeting, the Committee approved changes that would allow certain electronic evidence to be authenticated by a certification of a qualified person --- in lieu of that person’s testimony at trial. The changes would be implemented by two new provisions added to Rule 902. The first provision would allow self-authentication of machine-generated information, upon a submission of a certificate prepared by a qualified person. The second proposal would provide a similar certification procedure for a copy of data taken from an electronic device, medium or file. These proposals are analogous to Rules 902(11) and (12) of the Federal Rules of Evidence, which permit a foundation witness to establish the authenticity of business records by way of certification.

The proposals have a common goal of making authentication easier for certain kinds of electronic evidence that are, under current law, likely to be authenticated under Rule 901 but only by calling a witness to testify to authenticity. The Committee found that the types of electronic evidence covered by the two proposed rules are rarely the subject of a legitimate authenticity dispute, but it is often the case that the proponent is nonetheless forced to produce an authentication witness, incurring expense and inconvenience --- and often, at the last minute, opposing counsel ends up stipulating to authenticity in any event. The self-authentication proposals, by following the approach taken in Rule 902(11) and (12) regarding business records, essentially leave the burden of going forward on authenticity questions to the opponent of the evidence.

The Committee’s proposal for an amendment adding new Rules 902(13) and (14) was unanimously approved at the June meeting of the Standing Committee, and the proposed



amendment was issued for public comment. The public comment was sparse, but generally favorable. A few of the comments provided suggestions for additions to the Committee Note. And one comment, by professors, made an argument that Rule 902(13) is in tension with the Confrontation Clause.

At the meeting, the Committee, in response to the public comments, unanimously agreed to three changes to the Committee Notes:

- A clarification, in both Committee Notes, that the reference to the certification requirements of Rule 902(11) was only to the procedural requirements for a valid certification, and not to the information being certified in that rule. Under Rule 902(11), the content of the certification is an attestation that the admissibility requirements of the business records exception have been met. But the new proposals do not require, or permit, the witness's certification to attest to any aspect of admissibility other than authenticity.

- A minor clarification of the description of "hash value" in the Committee Note to Rule 902(14).

- New language in both Committee Notes --- suggested by the Federal Magistrate Judges Association --- observing that a challenge to the authenticity of electronic evidence may require advance access to technical information and that the need for such access should inform the notice requirements.

The Committee then discussed the concern raised by some professors that a certification made pursuant to Rule 902(13) might violate the defendant's right to confrontation in criminal cases. The Committee was satisfied that there would be no constitutional issue, because the Supreme Court has stated in *Melendez-Diaz v. Massachusetts* 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*. The Committee determined that the problem with the affidavit found testimonial in *Melendez-Diaz* was that it certified the accuracy of a drug test that was itself prepared for purposes of litigation --- a certification cannot render constitutional an underlying report that itself violates the Confrontation Clause.

The Committee noted that even the professors agreed that Rule 902(14) presented no constitutional issue, because the certificate would state only that the electronic data is a true copy --- a process clearly permitted by *Melendez-Diaz*. As to Rule 902(13), the certification is a bit more complicated, because the witness may be attesting that the process leads to an accurate result; but that is no different than certifications under Rule 902(11), under which the affiant states that the record meets the reliability requirements of the business records exception. And these certificates have been uniformly held to be constitutional by the lower courts. 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.

**After full discussion, the Committee unanimously voted to approve proposed Rules 902(13) and (14), and their proposed Committee Notes, to be submitted to the Standing Committee with the recommendation that it be forwarded to the Judicial Conference. The proposed amendments and Committee Notes provide as follows:**

### **Rule 902. Evidence That Is Self-Authenticating**

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

\* \* \*

(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).

### **Committee Note**

The amendment sets forth a procedure by which parties can authenticate certain electronic evidence other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing a witness to authenticate an item of electronic evidence is often unnecessary. It 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. The amendment provides a procedure under which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule. 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.

The reference to the “certification requirements of Rule 902(11) or (12)” is only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this rule to prove the requirements of Rule 803(6). Rule 902(13) is solely limited to authentication and any attempt to satisfy a hearsay exception must be made independently.

A certification under this Rule can establish only that the proffered item has satisfied the admissibility requirements for authenticity. The opponent remains free to object to admissibility of the proffered item on other grounds --- including hearsay, relevance, or in criminal cases the right to confrontation. For example, assume that a plaintiff in a defamation case offers what purports to be a printout of a webpage on which a defamatory statement was made. Plaintiff offers a certification under this Rule in which a qualified person describes the process by which the webpage was retrieved. Even if that certification sufficiently establishes that the webpage is authentic, defendant remains free to object that the statement on the webpage was not placed there by defendant. Similarly, a certification authenticating a computer output, such as a spreadsheet, does not preclude an objection that the information produced is unreliable --- the authentication establishes only that the output came from the computer.

A challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic

technical expert; such factors will effect whether the opponent has a fair opportunity to challenge the evidence given the notice provided.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

## **Rule 902. Evidence That Is Self-Authenticating**

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

\* \* \*

(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).

### **Committee Note**

The amendment sets forth a procedure by which parties can authenticate data copied from an electronic device, storage medium, or an electronic file, other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing an authenticating witness for this evidence is often unnecessary. It 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. The amendment provides a procedure in which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Today, data copied from electronic devices, storage media, and electronic files 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. If the hash values for the original and copy are different, then the copy is not identical to the original. If the hash values for the original and copy are the same, it is highly improbable that the original and copy are not identical. Thus, identical hash values for the original and copy reliably attest to the fact that they are exact duplicates. This amendment allows self-authentication by a certification of a qualified person that she checked the hash value of the proffered item and that it was identical to the original. The rule is flexible enough to allow certifications through processes other than comparison of hash value, including by other reliable means of identification provided by future technology.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule.

The reference to the “certification requirements of Rule 902(11) or (12)” is only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this rule to prove the requirements of Rule 803(6). Rule 902(14) is solely limited to authentication and any attempt to satisfy a hearsay exception must be made independently.

A certification under this Rule can only establish that the proffered item is authentic. The opponent remains free to object to admissibility of the proffered item on other grounds --- including hearsay, relevance, or in criminal cases the right to confrontation. For example, in a criminal case in which data copied from a hard drive is

proffered, the defendant can still challenge hearsay found in the hard drive, and can still challenge whether the information on the hard drive was placed there by the defendant.

A challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic technical expert; such factors will effect whether the opponent has a fair opportunity to challenge the evidence given the notice provided.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

#### **IV. Best Practices Manual on Authentication of Electronic Evidence**

The Committee has determined that it can provide significant assistance to courts and litigants in negotiating the difficulties of authenticating electronic evidence, by preparing and publishing a best practices manual. The Reporter has worked on preparing such a manual with Greg Joseph and Judge Paul Grimm. The pamphlet, in final form, was submitted to the Committee for its review and discussion.

The Committee reviewed the pamphlet and found that it would be very helpful to the bench and bar.

It was noted that there is still an issue as to whether the Advisory Committee should be listed as a co-author, or whether the attribution should be less direct --- such as some indication that it had been approved or supported by the Advisory Committee. Another possibility is that the Committee would not be referred to at all. The pamphlet will be submitted as an action item for the Standing Committee at its next meeting, so that the Standing Committee can determine how the Advisory Committee's role in the pamphlet should be described if at all.

#### **V. Possible Amendments to the Notice Provisions in the Federal Rules of Evidence**

For the past two meetings, the Committee has considered a project that would provide more uniformity to the notice provisions of the Evidence Rules, and that would also make relatively minor substantive changes to two of those rules.

The Committee at the Spring meeting agreed upon the following points:

1) The absence of a good cause exception in Rule 807 was problematic and had led to a dispute in the courts about whether that exception should be read into the rule. A good cause exception is particularly necessary in Rule 807 for cases where a witness becomes unavailable after the trial starts and the proponent may need to introduce a hearsay statement from that witness. And it is especially important to allow for a good cause exception when it is a criminal defendant who fails to provide pretrial notice.

2) The request requirement in Rule 404(b) --- that the criminal defendant must request notice before the government is obligated to give it --- is an unnecessary limitation that serves as a trap for the unwary. Most local rules require the government to provide notice as to Rule 404(b) material without regard to whether it has been requested. In many cases, notice is inevitably provided anyway when the government moves in limine for an advance ruling on admissibility of Rule 404(b) evidence. In other cases the request is little more than a boilerplate addition to a Rule 16 request. Committee members therefore determined that there was no compelling reason to retain the Rule 404(b) request requirement --- and that an amendment to Rule 404(b) to eliminate that requirement should be considered even independently of any effort to provide uniformity to the notice provisions.

3) The notice provisions in Rules 412-415 should not be changed. These rules could be justifiably excluded from a uniformity project because they were all congressionally-enacted, are rarely used, and raise policy questions on what procedural requirements should apply in cases involving sexual assaults.

With this much agreed upon, the Committee considered other suggestions for amendment to the notice provisions of Rules 404(b), 609(b), 807 and 902(11). One possibility was a template that would require a proponent to provide “reasonable written notice of an intent to offer evidence under” the specific rule, and to “make the substance of the evidence available to the party -- so that the party has a fair opportunity to meet it. The notice must be provided before trial -- or during trial if the court, for good cause, excuses lack of notice.” For a number of reasons, however, the Committee concluded that such a template would not work as applied to all four rules.

For one thing, the template would result in a change to Rule 404(b) that would require the defendant to provide notice for “reverse 404(b)” evidence in a criminal case --- such a change should not be made simply for uniformity’s sake. For another, the “substance” requirement would probably constitute a tightening of the government’s disclosure obligations under Rule 404(b), which currently requires a disclosure of the “general nature” of the evidence --- again, such a change should not be made purely for uniformity’s sake, especially given the fact that Rule 404(b) covers a different kind of evidence than Rule 807. Finally, two of the notice provisions (404(b) and 609(b)) require notice to be provided “before trial” while the other two (807 and 902(11)) require notice to be provided “before the trial or hearing.” That difference is justified because the notice provisions in Rules 404(b) and 609(b) are likely to be invoked only

in the context of a trial, whereas Rules 807 and 902(11) might be invoked on summary judgment as well. It would be counterproductive to change two of these rules simply to provide uniformity.

After discarding the template, the Committee moved to consideration of individual changes that might be made to improve one or more of the notice provisions. Committee members were in favor written notice requirements. Rules 404(b) and 807 currently do not provide for written notice. **Committee members unanimously agreed that a written notice requirement should be added to Rule 807.** But the DOJ representative argued that there was no need to add a requirement of written notice to Rule 404(b), because the Department (the only litigant subject to the Rule 404(b) notice requirement) routinely provides notice in writing. The Committee agreed that there was no need to amend Rule 404(b) if that amendment would have no effect.

The Committee next discussed the Rule 807 requirement that the proponent disclose “the statement and its particulars, including the declarant’s name and address.” After discussion, the Committee determined that --- independent of any uniformity project --- this phrase should be amended. For one thing, the term “particulars” has led in some cases to petty disputes about the details of the notice provided. For another, the requirement that the proponent disclose the address of the declarant is nonsensical when the declarant is unavailable; it is unnecessary when the declarant is a person or entity whose address is known or can easily be determined; and it is problematic in cases in which disclosure of the address might raise security or privacy issues. **The Committee concluded unanimously that the requirement of disclosing an address should be deleted from Rule 807, and that the term “substance” should replace “particulars.”**

The Chair then observed that the Committee has on its agenda the possibility of modest changes to Rule 807 that would make it somewhat easier to invoke. The Committee agreed that it would not be prudent to propose changes to the notice provisions of Rule 807 until the Committee has decided whether other changes to the rule, if any, should be proposed. In sum, it would be appropriate to propose all amendments to Rule 807 at one time.

The Committee further agreed that the proposed amendment to Rule 404(b) --- to delete the requirement that the defendant request notice --- should be held off until other amendments were ready for proposal. Holding off on that amendment is consistent with the intent of the Standing Committee --- that amendments should be packaged, in order to minimize disruption to the bench and bar. The change that would be made to Rule 404(b) is not so significant that it must be made immediately without regard to packaging.

**The working proposal for amendment to the Rule 807 notice requirement, approved by the Committee, reads as follows:**

(b) **Notice.** The statement is admissible only if, ~~before the trial or hearing~~ the proponent gives an adverse party reasonable written 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 before the trial or hearing -- or during trial or hearing if the court, for good cause, excuses a lack of earlier notice.

**The working draft of the Committee Note provides as follows:**

The notice provision has been amended to make three changes in the operation of the Rule.

First, the Rule requires the proponent to disclose the “substance” of the statement. This term is intended to require a description that is sufficiently specific under the circumstances to allow the opponent a fair opportunity to meet the evidence. Cf. Rule 103(a)(2) (requiring the party making an offer of proof to inform the court of the “substance” of the evidence). Prior case law on the obligation to disclose the “particulars” of the hearsay statement may be instructive, but not dispositive, of the proponent’s obligation to disclose the “substance” of the statement under the Rule as amended. The prior requirement that the declarant’s address must be disclosed has been deleted; that requirement was nonsensical when the declarant was unavailable, and unnecessary in the many cases in which the declarant’s address was known or easily obtainable. If prior disclosure of the declarant’s address is critical and cannot be otherwise obtained by the opponent, then the opponent can seek relief from the court.

Second, the Rule now requires that the notice be in writing --- which includes notice in electronic form. See Rule 101(b)(6). Requiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually made.

Finally, the pretrial notice provision has been amended to provide for a good cause exception --- the same exception found in Rule 404(b). Most courts have applied a good cause exception under Rule 807 even though it was not specifically provided in the original Rule, while some courts have not. Experience under the residual exception has

shown that a good cause exception is necessary in certain limited situations. For example, the proponent may not become aware of the existence of the hearsay statement until after the trial begins; or the proponent may plan to call a witness who without warning becomes unavailable during trial, and the proponent must then resort to residual hearsay. Where notice is made during the trial, the general requirement that notice must be in writing need not be met.

The Rule retains the requirement that the opponent receive notice in a way that provides a fair opportunity to meet the evidence. When notice is provided during trial after a finding of good cause, the court may need to consider protective measures, such as a continuance, to assure that the opponent has time to prepare for the particularized kind of argument that is necessary to counter hearsay offered under the residual exception.

## **VI. Proposal to Expand the Residual Exception**

At previous meetings the Committee has had some preliminary discussion on whether Rule 807 --- the residual exception to the hearsay rule --- should be expanded to allow the admission of more hearsay, if it is reliable. Expansion of the residual exception might have the effect of providing more flexibility, and it could also be part of an effort to reassess some of the more controversial categorical hearsay exceptions, such as those for ancient documents, excited utterances and dying declarations. Limitations on those exceptions could be easier to implement if it could be assured that reliable hearsay currently fitting under those exceptions could be admitted under the residual exception. But currently, the residual exception is, by design, to be applied only in rare and exceptional circumstances.

The Committee discussed the possibilities of expanding the residual exception at the Spring meeting. The Committee recognized the challenge: the goal would be to allow the residual exception to be used somewhat more frequently, without broadening it so far that it would overtake the categorical exceptions entirely and lead to a hearsay system that was controlled by court discretion, with unpredictable outcomes. At the Hearsay Symposium, the Committee heard repeatedly from lawyers that they wanted predictable hearsay exceptions --- judicial discretion would lead to inconsistent results and lack of predictability would raise the costs of litigation and would make it difficult to settle cases.

Within these constraints, the Committee, after substantial discussion, preliminarily agreed on the following principles regarding Rule 807:

- The requirement that the court find trustworthiness “equivalent” to the circumstantial guarantees in the Rule 803 and 804 exceptions should be deleted. That standard is exceedingly difficult to apply, because there is no unitary standard of trustworthiness in the Rule 803 and 804 exceptions. It is common ground that statements falling within the Rule 804 exceptions are not as reliable as those admissible under Rule 803; and it is also clear that the bases of reliability differ from exception to exception. Moreover, one of the exceptions subject to “equivalence” review --- Rule 804(b)(6) forfeiture --- is not based on reliability at all. Given the difficulty of the “equivalence” standard, a better approach is simply to require the judge to find that the hearsay offered under Rule 807 is trustworthy.

- Trustworthiness can best be defined as a consideration of both circumstantial guarantees and corroborating evidence. Most courts find corroborating evidence to be relevant to the reliability enquiry, but some do not. An amendment would be useful to provide uniformity in the approach to evaluating trustworthiness under the residual exception --- and substantively, that amendment should specifically allow the court to consider corroborating evidence, as corroboration is a typical source for assuring that a statement is reliable.

- The requirements in Rule 807 that the residual hearsay must be proof of a “material fact” and that admission of residual hearsay be in “the interests of justice” have not served any purpose. The inclusion of the language “material fact” is in conflict with the studious avoidance of the term “materiality” in Rule 403 --- and that avoidance was well-reasoned, because the term “material” is so fuzzy. The courts have essentially held that “material” means “relevant” --- and so nothing is added to Rule 807 by including it there. Likewise nothing is added to Rule 807 by referring to the interests of justice because that guidance is already provided by Rule 102. These provisions were added to the residual exception to emphasize that the exception was to be used only in truly exceptional situations. Deleting them might change the tone a bit, to signal that while hearsay must still be reliable to be admitted under Rule 807, there is no longer a requirement that the use must be rare and exceptional.

- The requirement in the residual exception that the hearsay statement must be “more probative than any other evidence that the proponent can obtain through reasonable efforts” should be retained. This will preserve the rule that proponents cannot use the residual exception unless they need it. And it will send a signal that the changes proposed are modest --- there is no attempt to allow the residual exception to swallow the categorical exceptions, or even to permit the use the residual exception if the categorical exceptions are available.

What follows is the working draft of an amendment to Rule 807 that the Committee has tentatively approved and will be considered further at the next meeting (including the amendment to the notice provision discussed above).

**Rule 807. Residual Exception**

(a) **In General.** Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

(1) ~~the statement has equivalent circumstantial guarantees of trustworthiness~~ the court determines, after considering the pertinent circumstances and any corroborating evidence, that the statement is trustworthy; and

~~(2) — it is offered as evidence of a material fact;~~

~~(3) 2) 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.** ~~(b) Notice.~~ The statement is admissible only if, ~~before the trial or hearing~~ the proponent gives an adverse party reasonable written 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 before the trial or hearing -- or during trial or hearing if the court, for good cause, excuses a lack of earlier notice.

Finally, the Committee decided that it would be useful to convene a miniconference on the morning of the Fall 2016 meeting, to have judges, lawyers and academics provide commentary on the proposed changes to Rule 807.

## VII. Proposal to Amend Rule 801(d)(1)(A)

Over the last few meetings, the Committee has been considering the possibility of expanding substantive admissibility of certain prior statements of testifying witnesses --- the rationale of that expansion being that unlike other forms of hearsay, the declarant is subject to cross-examination about the statement. At the Symposium on Hearsay in October, 2015, a panel was devoted to treatment of prior witness statements.

The Committee's discussions at the previous two meetings, and the presentations at the Symposium, have served to narrow the Committee's focus on any possible amendment that would expand admissibility of prior witness statements. Here is a synopsis of the Committee's prior determinations:

- While there is a good argument that prior witness statements should not be treated as hearsay at all, amending the hearsay rule itself (Rule 801(a)-(c)) is not justified. That rule is iconic, and amending it to exclude prior witness statements will be difficult and awkward. Therefore any amendment should focus on broadening the exemption provided by Rule 801(d)(1).

- The focus on Rule 801(d)(1) should be narrowed further to the subdivision on prior inconsistent statements: Rule 801(d)(1)(A). The current provision on prior consistent statements --- Rule 801(d)(1)(B) --- was only recently amended, and that amendment properly captures the statements that should be admissible for their truth. Any expansion of Rule 801(d)(1)(B) would untether the rule from its grounding in rehabilitating the witness, and would allow parties to strategically create evidence for trial. Likewise, the current provision of prior statements of identification --- Rule 801(d)(1)(C) --- has worked well and is not controversial; there is no reason, or even a supporting theory, to expand admissibility of such statements.

At the Spring meeting, the Committee considered two possible ways to amend Rule 801(d)(1)(A) to provide for broader substantive admissibility of prior inconsistent statements. The current provision provides substantive admissibility only in unusual cases --- where the declarant made the prior statement under oath at a formal proceeding. The two possibilities for expansion presented were: 1) allowing for substantive admissibility of *all* prior inconsistent statements, as is the case in California, Wisconsin, and a number of other states; and 2) allowing substantive admissibility only when there is proof --- other than a witness's statement --- that the prior statement was actually made, as is the procedure in Connecticut, Illinois, and several other states.

The Committee quickly determined that it would not propose an amendment that would provide for substantive admissibility of all prior inconsistent statements. The Committee was concerned about the possibility that a prior inconsistent statement could be used as critical substantive proof even if the witness denied ever making it and there was a substantial dispute that it was ever made. Several Committee members noted that it would often be costly and

distracting to seek to prove whether a prior inconsistent statement was made if there is no reliable record of it.

The Committee next turned its discussion to allowing substantive admissibility of prior inconsistent statements where there is in fact proof that it was made --- such as a statement that was recorded or was signed by the witness. Several members noted that where a statement is made at a police station, even if it is signed or audio recorded, the witness might have an argument that it was made under pressure --- and that many people who confess at the station do in fact repudiate their statements once they get a lawyer. Others responded that while audio recordings and signed statements are subject to argument as to how and perhaps even whether they were made, the same is not true for video recordings. A statement that is recorded on video might be explained away by the witness at trial --- which is perfectly suited to the trial context --- but it is all but impossible to deny that a statement was made when it has been video recorded. Moreover, any indication of police pressure or overreaching is likely to be presented in the video itself. Other members noted that allowing substantive admissibility of videotaped inconsistent statements could lead to more statements being videotaped in expectation that they might be useful substantively--- which is a good result even beyond its evidentiary consequences.

Finally, a number of Committee members noted that one of the major costs of the current rule is that a confounding limiting instruction must be given whenever a prior inconsistent statement is admissible for impeachment purposes but not for its substantive effect. That cost may be justified when there is doubt that a prior statement was fairly made, but it may well be unjustified when the prior statement is on video --- as there is easy proof of the statement and its circumstances if the witness denies making it or tries to explain it away.

**The Committee took a straw vote and five members of the Committee voted in favor of an amendment to Rule 801(d)(1)(A) that would provide for substantive admissibility of a prior inconsistent statement if it was video recorded. Three members were opposed. The Committee resolved to take up the matter in the next two meetings to determine whether an amendment would be formally proposed for issuance for public comment in the Fall of 2017.**

**The working draft of an amendment that would allow substantive admissibility for videotaped prior inconsistent statements provides as follows:**

**Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay**

\* \* \*

(d) **Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:

(1) ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and ~~was~~:

(i) was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition; or

(ii) was recorded on video and is available for presentation at trial;

or

(B) is consistent with the declarant's testimony and is offered:

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

(C) identifies a person as someone the declarant perceived earlier.

**A working draft of the Committee Note provides as follows:**

The amendment provides for greater substantive admissibility of inconsistent statements of a testifying witness, which is appropriate because the declarant is by definition testifying under oath and is subject to cross-examination about the statement. The requirement that the statement be made under oath at a former proceeding is unnecessarily narrow. That requirement stemmed mainly from a concern that it was necessary to regulate the possibility that the prior statement was never made. But as shown in the practice of some states, there are less onerous alternatives that can assure that what is introduced is exactly what the witness said. The best proof that the witness made the statement is that it is video recorded. That is the safeguard provided by the amendment.

While the amendment expands the substantive admissibility for prior inconsistent statements, it does not affect the use of any prior inconsistent statement for impeachment purposes. A party may wish to introduce an inconsistent statement not to show that the witness's testimony is false and prior statement is true, but rather to show that neither is true. Rule 801(d)(1)(A) does not apply if the proponent is not seeking to admit the prior inconsistent statement for its truth. If the proponent is offering the statement solely for impeachment, it does not fit the definition of hearsay under Rule 801(c), and so Rule 801(d)(1)(A) never comes into play.

## **VIII. Proposals to Amend Rule 803(2)**

Four separate proposals have been made by academics for amending Rule 803(2), the hearsay exception for excited utterances (in addition to Judge Posner's suggestion that the exception be eliminated, which the Committee has previously considered and rejected). The Committee considered all four proposals at the Spring meeting.

One proposal was to add the word "continuous" to the rule --- requiring the declarant to be in a continuous state of excitement for the period between the startling event and the statement. The Committee found no need to make this change. The text and the case law already requires the statement to be made while under the continuous influence of the startling event. The single case cited as problematic – *United States v. Napier* --- is one in which there is a new startling event, and the declarant made a statement that related not only to that new event but also to a previous startling event. Adding the word "continuous" would not change the result in that case. More importantly, the case is correctly decided because the statement was in fact made while the declarant was under the effect of the second startling event. Finally, even if the case were problematic, the fact that it is the only federal case cited as raising the so-called problem, in 40 years of litigation under Federal Rule 803(2), is indicative that there is no serious problem worth addressing.

Other proposals were made in response to the allegation that the excited utterance exception does not provide a sufficient guarantee that evidence admitted under the exception will be reliable. One proposal was to add language --- derived from the 2014 amendment to Rule 803(6) --- that would allow the court to exclude the statement if the opponent could show that the excited utterance was in fact untrustworthy. Another proposal was to add language --- derived from Rule 804(b)(3) --- that would require the proponent to show corroborating circumstances



clearly indicating that the excited utterance was trustworthy. And a third proposal was to transfer the exception to Rule 804, so that excited utterances would not be admissible unless the declarant is shown to be unavailable to testify.

The Committee decided not to proceed on any of these proposals. For one thing, the proposals would have consequences beyond Rule 803(2) --- consideration would have to be given to similar treatment for other exceptions that have been found controversial, such as the exceptions for present sense impressions and state of mind. Thus, proposing an amendment to Rule 803(2) at this point would be contrary to a systematic approach to amending the Federal Rules of Evidence. Second, and more importantly, the Committee relied on a lengthy report prepared by the FJC representative, who analyzed the social science studies that have been conducted regarding the premises of Rules 803(1) (the present sense impression exception) and 803(2) --- specifically whether there is support for the propositions that immediacy and excitedness tend to guarantee reliability. The FJC representative concluded that there is significant empirical data supporting both of these premises. That is, social science data support the premises that 1) it takes time to make up a good lie, and 2) startlement makes it more difficult to make up a good lie. Consequently, the Committee determined that there was no need at this point to amend Rule 803(2) --- or Rule 803(1), for that matter --- due to any reliability concerns.

## **IX. Consideration of a Change from Categorical Hearsay Exceptions to Guidelines**

At the Hearsay Symposium in Fall 2015, Judge Shadur argued that the hearsay rule might be usefully changed to parallel the sentencing guidelines --- i.e., a list of factors, which guide discretion, but which allow the judge to depart in various circumstances. The existing hearsay exceptions might be reconstituted as standards or guidelines rather than hard rules. Similarly, a Committee member suggested that the rule might be structured as allowing for discretion to admit hearsay, with the existing exceptions set forth as illustrations --- that is, it could be structured in the same way as Rule 901(a). The Committee directed the Reporter to prepare a memorandum for the Spring meeting that would evaluate the viability of replacing the current rule-based system with a system of guided discretion that would include a list of standards or illustrations taken from the existing exceptions.

The Reporter prepared the report for the Spring meeting. The report suggested that at this point, 40 years into the Federal Rules of Evidence, any perceived advantages in switching to a guidelines system (in terms of adding flexibility) would be outweighed by the costs (including substantial disruption; the uncertainty created by greater judicial discretion in ruling on hearsay; increased motion practice; and increased discovery cost because virtually any hearsay statement would be potentially admissible). The Committee, after deliberation, agreed with this assessment.

In the memorandum for the Committee, the Reporter raised as a lesser alternative a system in which the categorical hearsay exceptions were retained, but two changes could be made: 1) add a safety valve applicable to all the exceptions allowing a judge to exclude

otherwise admissible hearsay if the opponent could show that it was untrustworthy; and 2) amend Rule 807 to allow for more frequent and easier use. Such a system would attempt to address two oft-stated critiques about the hearsay exceptions: 1) that many of them admit unreliable evidence; and 2) that the categorical system does not adapt well to hearsay that is reliable but doesn't fit into exceptions.

But the Committee unanimously rejected the proposed alternative, on the ground that it would inject too much discretion into the system. At the Hearsay Symposium, the Committee heard loud and clear from the lawyers that rules were needed to provide guidance, stability and consistency. Allowing more discretion for the court to admit or exclude hearsay which it happened to find reliable or unreliable would add substantial uncertainty and inconsistency, making it more difficult to settle, obtain summary judgment, and prepare for trial. Moreover, adding so much more discretion would provide a "home team advantage" in that local counsel would learn over time the personal inclinations of a local judge in treating a hearsay problem.

Instead of an across-the-board increase of discretion to exclude and admit hearsay, the Committee opted to consider modest changes to the residual exception, discussed above --- with the goal being to make that exception somewhat more useful, without injecting too much discretion into the system. Committee members recognized that the change to the residual exception would be in the nature of a tightrope walk, which is one of the reasons that a miniconference on the possible change would be so useful.

## **X. Consideration of a Possible Amendment to Rule 803(22)**

Rule 803(22) is a hearsay exception that allows judgments of conviction to be offered to prove the truth of the facts essential to the conviction. The exception carves out two kinds of convictions that are not covered: 1) convictions resulting from a nolo contendere plea; and 2) misdemeanor convictions.

Judge Graber, a member of the Standing Committee, asked the Advisory Committee to consider whether these two limitations on the exception were justified --- if not, the proposal would be to eliminate those carve-outs and treat nolo contendere and misdemeanor convictions the same as other convictions under the Rule.

The Reporter prepared a memorandum, suggesting that the two limitations in Rule 803(22) were in fact justified. The Committee agreed with the Reporter's assessment as to both those limitations. The Committee's rationales were as follows:

1. The reason for the nolo contendere carve-out is that Rule 410 provides that evidence of a nolo *plea* is not admissible in a subsequent civil or criminal case. As the Ninth Circuit has stated, "Rule 410's exclusion of a nolo contendere plea would be meaningless if all it took to prove that the defendant committed the crime charged was a certified copy of the inevitable judgment of conviction resulting from the plea." *United States v. Nguyen*, 465 F.3d 1128, 1131 (9th Cir. 2006). It might be argued that allowing nolo pleas is bad policy, but consideration of that question is beyond the scope of

evidence rulemaking. Assuming that allowing nolo pleas is substantively correct, then the decision made to protect them as a means of encouraging compromise in Rule 410 is valid, and that policy should not be undermined by allowing admission of the facts supporting the conviction under Rule 803(22).

2. The reason for the misdemeanor carve-out is that misdemeanors, as a class, are less likely to be contested than felonies, and therefore there is less likely to be a reliable determination (or concession) that would justify admitting the underlying facts for their truth. One Committee member pointed out that in many jurisdictions, indigent defendants plead guilty to misdemeanors simply because they cannot make cash bail. Another member pointed out that if the defendant is indigent and a misdemeanor does not lead to jail time, the state is not required to provide counsel; thus a fair number of misdemeanor convictions are imposed without the defendant having a lawyer. Committee members recognized that some misdemeanor convictions might be highly contested, but noted that when that is so, courts have employed the residual exception to allow admission of the underlying facts for their truth. Thus, adding misdemeanor convictions to Rule 803(22) is not necessary to cover cases where the facts were truly contested, and would on the other hand lead to admission of facts that have clearly not been contested.

The Committee voted unanimously not to proceed with an amendment to Rule 803(22).

## **XI. Consideration of a Suggestion That Rule 704(b) Be Eliminated**

The Reporter informed the Committee of a law review article that advocated elimination of Rule 704(b), which provides that in a criminal case, an expert may not testify that the defendant did or did not have the requisite mental state to commit the crime charged. The Reporter stated that before writing up a memorandum on the subject for the next meeting, he wished to get the Committee's preliminary reaction to eliminating the subdivision, as it presented a question of process: because Rule 704(b) was directly enacted by Congress, would it be appropriate to propose its elimination?

The Committee determined that two special circumstances applied that should counsel caution: 1) The proposal was to eliminate the exception entirely, as opposed to making changes that might improve the rule; and 2) Rule 704(b) was part of the Insanity Defense Reform Act --- a broad statutory overhaul of the insanity defense; because Rule 704 (b) was part of an integrated approach, it is possible that deleting the provision would have an effect on Congressional objectives beyond the Federal Rules of Evidence.

Consequently, the Committee unanimously concluded that it would not proceed with the proposal to eliminate Rule 704(b).

## **XII. Recent Perceptions (eHearsay)**

The Committee has decided not to proceed on a proposal that would add a hearsay exception intended to address the phenomenon of electronic communication by way of text message, tweet, Facebook post, etc. The primary reason stated for the proposed exception is that these kinds of electronic communications are an ill-fit for the standard hearsay exceptions, and that without the exception reliable electronic communications will be either 1) excluded, or 2) admitted but only by improper application of the existing exceptions. The exception proposed was for “recent perceptions” of an unavailable declarant.

The Committee’s decision not to proceed with the recent perceptions exception was mainly out of the concern that the exception would lead to the admission of unreliable evidence. That decision received support from the study conducted by the FJC representative on social science research. The studies indicate that lies are more likely to be made when outside another person’s presence --- for example, by a tweet or Facebook post.

The Committee did, however, resolve to continue to monitor the practice and case law on electronic evidence and the hearsay rule, in order to determine whether there is a real problem of reliable hearsay either being excluded or improperly admitted by misapplying the existing exceptions.

For the Spring meeting, the Reporter submitted, for the Committee’s information, a short outline on federal case law involving eHearsay. Nothing in the outline to date indicates that reliable eHearsay is being routinely excluded, nor that it is being admitted by misapplying the existing exceptions. Most eHearsay seems to be properly admitted as party-opponent statements, excited utterances, or state of mind statements. And many statements that are texted or tweeted are properly found to be not hearsay at all. At most there was only one or two reported cases in which hearsay was excluded that might have been admitted under a recent perceptions exception.

The reporter will continue to monitor cases involving eHearsay and will keep the Committee apprised of developments.

## **XIII. Crawford Developments**

The Reporter provided the Committee with a case digest and commentary on all federal circuit cases discussing *Crawford v. Washington* and its progeny. The cases are grouped by subject matter. The goal of the digest is to allow the Committee to keep apprised of developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions.

The Reporter’s memorandum noted that the law of Confrontation continued to remain in flux. The Supreme Court has denied certiorari in a number of cases raising the question about the meaning of the Supreme Court’s muddled decision in *Williams v. Illinois*: meaning that courts

are still trying to work through how and when it is permissible for an expert to testify on the basis of testimonial hearsay. Moreover, the Supreme Court last term decided *Ohio v. Clark*, in which statements made by a child his teachers --- about a beating he received from the defendant --- were found not testimonial, even though the teacher was statutorily required to report such statements to law enforcement. The new decision in *Clark*, together with the uncertainty created by *Williams* and other decisions, suggests that it is not appropriate at this point to consider any amendment to the Evidence Rules to deal with Confrontation issues. And the fact that a new appointment to the Court might affect the development of the law of confrontation is another reason for adopting a wait-and-see approach. The Committee resolved to continue monitoring developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

#### **XIV. Next Meeting**

The location and date of the next meeting is yet to be determined.

Respectfully submitted,

Daniel J. Capra

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