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# Saving an Old Friend from Extinction: A Proposal to Amend Rather Than to Abrogate the Ancient Documents Hearsay Exception

Peter Nicolas

*University of Washington School of Law*

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## Saving an Old Friend From Extinction: A Proposal to Amend Rather Than to Abrogate the Ancient Documents Hearsay Exception

Peter Nicolas

### ABSTRACT

This Essay critically assesses a pending, proposed amendment to the Federal Rules of Evidence—slated to take effect in December 2017—that would abrogate Federal Rule of Evidence 803(16), the hearsay exception for ancient documents. The proposed amendment was motivated largely by a fear that large quantities of potentially unreliable, stockpiled, electronically stored information (ESI) are approaching the threshold age for being deemed “ancient” and could thus be swept into evidence via the exception.

In Part I of this Essay, I provide an overview of the proposed amendment. In Part II, I contend that although the proposal is a well-intentioned effort to deal with a potential problem, abrogating rather than amending the hearsay exception is unduly strong medicine. I argue that in proposing abrogation, the drafters of the proposed amendment have overstated the risks associated with Rule 803(16) and understated its utility, and that such a move would put the Federal Rules of Evidence out of sync with those of all but one of the fifty states. Finally, in Part III, I propose a set of amendments that would remedy what the drafters of the proposed amendment identified as Rule 803(16)’s deficiencies, while at the same time allowing its continued use in those rare cases where it may serve as the only gateway to admitting evidence necessary to prove ancient wrongs deserving of vindication.

### AUTHOR

William L. Dwyer Endowed Chair in Law and Adjunct Professor of Gender, Women & Sexuality Studies, University of Washington. Copyright © 2015 Peter Nicolas.

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## INTRODUCTION

Under the Federal Rules of Evidence, hearsay—defined as a person’s oral or written assertion or nonverbal conduct intended as an assertion, offered into evidence to prove the truth of the matter asserted therein<sup>1</sup>—is inadmissible unless it falls within an exception to the hearsay rule.<sup>2</sup> Among the dozens of such exceptions is one set forth in Federal Rule of Evidence 803(16) for statements contained in so-called ancient documents, defined as those “at least 20 years old and whose authenticity is established.”<sup>3</sup> In turn, Federal Rule of Evidence 901(b)(8) sets forth a method for authenticating such documents, providing that they must be in a condition that creates no suspicion about their authenticity; be in a place where, if authentic, they would likely be; and be at least twenty years old when offered.<sup>4</sup>

In April 2015, the Advisory Committee on Evidence Rules approved a proposed amendment to the Federal Rules of Evidence that would abrogate Rule 803(16) while leaving Rule 901(b)(8) intact.<sup>5</sup> In August 2015, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States published the proposed amendment for public comment.<sup>6</sup> Thus, under the proposal, meeting the criteria for an ancient document set forth in Rule 901(b)(8) would satisfy the authentication requirements of the Federal Rules of Evidence but would be insufficient to overcome a hearsay objection. Unless the Advisory Committee is persuaded by public comments to reconsider the amendment, abrogation of the hearsay exception is set to take effect on December 1, 2017.<sup>7</sup>

In recommending abrogation of the hearsay exception for ancient documents, the Advisory Committee appeared to be primarily concerned with the theoretical possibility that we are on the cusp of having the exception invoked to sweep in large quantities of potentially unreliable, stockpiled, electronically stored

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1. FED. R. EVID. 801(a), (c).
  2. FED. R. EVID. 802.
  3. FED. R. EVID. 803(16).
  4. FED. R. EVID. 901(b)(8).
  5. ADVISORY COMM. ON EVIDENCE RULES, AGENDA BOOK 13, 55–72 (Apr. 17, 2015) [hereinafter AGENDA BOOK 2015].
  6. *See* COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONF. OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE AND THE FEDERAL RULES OF EVIDENCE 17–20, 25–26 (Aug. 2015) [hereinafter PRELIMINARY DRAFT].
  7. *Id.* at 25.

information (ESI).<sup>8</sup> Because the exception defines ancient as twenty years, and because much ESI is on the verge of reaching that threshold age, the Advisory Committee believed that it was necessary to act with some immediacy.<sup>9</sup>

In Part I of this Essay, I provide an overview of the Advisory Committee's proposal, including its rejection of possible amendments in lieu of abrogation. In Part II, I conclude that although the Advisory Committee's proposal is a well-intentioned effort to deal with a potential problem, abrogating rather than amending the hearsay exception is unduly strong medicine, akin to using a sledgehammer to kill a gnat. I demonstrate that in proposing abrogation, the Advisory Committee has overstated the risks associated with Rule 803(16) and understated its utility, and that such a move would put the Federal Rules of Evidence out of sync with those of all but one of the fifty states. Finally, in Part III, I propose a set of amendments—different from those considered and rejected by the Advisory Committee—that would remedy what the Advisory Committee identified as Rule 803(16)'s deficiencies.

### I. THE ADVISORY COMMITTEE'S PROPOSAL

The Advisory Committee first focused its attention on the potential problem of unreliable ESI being swept into evidence via Federal Rule of Evidence 803(16) at its April 2014 meeting, prompted by a memo drafted by Professor Daniel J. Capra, the Advisory Committee's official reporter.<sup>10</sup> At its October 2014 meeting, the Advisory Committee—concerned that the exception could be invoked to sweep in archived web pages, personal emails, text messages, social media postings, and the like—unanimously agreed that this rendered Rule 803(16) problematic.<sup>11</sup> Yet, the Advisory Committee was split both on whether to wait for such developments to occur or to act proactively, and on how to amend the rule to remedy the problem.<sup>12</sup> Ultimately, the Advisory Committee decided to act proactively and voted at its April 2015 meeting to abrogate the hearsay exception.<sup>13</sup>

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8. *See id.* at 18, 26.

9. *See id.*

10. *See* ADVISORY COMM. ON EVIDENCE RULES, AGENDA BOOK 5, 101–13 (Apr. 4, 2014). In addition to his official work as the Advisory Committee's reporter, Professor Capra has also advocated for reforming Rule 803(16) to prevent the admission of unreliable ESI in his published scholarship. *See* Daniel J. Capra, *Electronically Stored Information and the Ancient Documents Exception to the Hearsay Rule: Fix It Before People Find out About It*, 17 *YALE J.L. & TECH.* 1 (2015).

11. *See* AGENDA BOOK 2015, *supra* note 5, at 21–23.

12. *See id.*

13. *See id.* at 13, 55–72; PRELIMINARY DRAFT, *supra* note 6, at 17–20, 25–26.

The Advisory Committee's decision to abrogate the hearsay exception was bolstered by several considerations. First, the Advisory Committee questioned the underlying rationale for the ancient documents exception to the hearsay rule, noting that a document does not magically become reliable by virtue of its age, and that at best it has been justified on the ground of necessity, namely, the unavailability of other proof for old disputes.<sup>14</sup> Second, the Advisory Committee noted that the hearsay exception lacked a historical pedigree, contrasting the longstanding common law practice of authenticating documents by demonstrating that they qualify as ancient documents with the relatively recent recognition of a hearsay exception for ancient documents, with the hearsay exception originally applying only to property-related documents.<sup>15</sup> Moreover, the Advisory Committee found it problematic that under Rule 803(16), documents may be authenticated using any method, and not necessarily in accordance with the strictures of Rule 901(b)(8).<sup>16</sup> Furthermore, the Advisory Committee concluded that eliminating the exception would have a minimal impact on the exclusion of otherwise reliable hearsay, noting that it is only seldom invoked and that in any event other avenues to admissibility—in particular the hearsay exception for business records (Rule 803(6)) and the residual hearsay exception (Rule 807)—would pave the way to admitting reliable evidence that heretofore was admitted as an ancient document.<sup>17</sup>

Professor Capra's memo to the committee also raised two additional criticisms of the ancient documents hearsay exception. First, he discussed its sweeping nature: If an ancient document is authenticated, he wrote, "every statement in that document can be admitted for its truth."<sup>18</sup> And second, he disliked its arbitrary, brightline nature: A document that is nineteen years and 364 days old is inadmissible under the exception, but another document that is one day older would be admissible.<sup>19</sup>

The Advisory Committee considered and rejected three alternatives to abrogation of the hearsay exception: limiting the exception to hardcopy documents; adding a requirement—akin to that found in Rule 803(6)—that the document would be excluded if the opponent could show a lack of trustworthiness; or adding a requirement—akin to that found in the residual exception—that it could be

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14. See PRELIMINARY DRAFT, *supra* note 6, at 18, 25–26.

15. *Id.* at 18.

16. See AGENDA BOOK 2015, *supra* note 5, at 58.

17. PRELIMINARY DRAFT, *supra* note 6, at 18, 26; AGENDA BOOK 2015, *supra* note 5, at 60.

18. AGENDA BOOK 2015, *supra* note 5, at 58 (emphasis omitted).

19. *Id.* at 60.

invoked only as a last resort when necessary.<sup>20</sup> The Advisory Committee rejected the first alternative both on the ground that there would be definitional ambiguities in some instances when distinguishing hardcopy from ESI and that the Federal Rules of Evidence generally eschew drawing such a distinction, and it rejected the latter two alternatives on the ground that they would make the exception much more akin to the residual exception, raising questions about why it should exist as a freestanding hearsay exception.<sup>21</sup>

## II. CRITIQUE OF THE ADVISORY COMMITTEE'S PROPOSAL TO ABROGATE RULE 803(16)

The Advisory Committee is surely correct that the ancient documents hearsay exception has only been infrequently invoked in reported cases, and thus that the impact of its abrogation would not be widespread. Rule 803(16)'s focused impact, however, should not diminish the fact that abrogation may make it difficult for litigants successfully to obtain redress for egregious past harms.

The ancient documents exception has been most frequently invoked in the federal courts in proceedings related to Nazi-era wrongdoing, including proceedings to revoke U.S. citizenship or to repatriate stolen property.<sup>22</sup> The exception has also been invoked in at least one case involving child sexual abuse in the Catholic Church.<sup>23</sup> Moreover, in at least some of these cases, it seems doubtful that the evidence would have been admissible under another codified hearsay exception such as the business records exception.<sup>24</sup> Although it is true,

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20. PRELIMINARY DRAFT, *supra* note 6, at 18. One state—Maryland—includes a trustworthiness proviso in its analogue to Federal Rule of Evidence 803(16). MD. R. 5-803(16).

21. PRELIMINARY DRAFT, *supra* note 6, at 19.

22. *See, e.g.*, *United States v. Kalymon*, 541 F.3d 624, 632–33 (6th Cir. 2008); *United States v. Firishchak*, 468 F.3d 1015, 1022 (7th Cir. 2006); *United States v. Mandycz*, 447 F.3d 951, 966 (6th Cir. 2006); *United States v. Demjanjuk*, 367 F.3d 623, 630–31 (6th Cir. 2004); *United States v. Hajda*, 135 F.3d 439, 443–44 (7th Cir. 1998); *United States v. Stelmokas*, 100 F.3d 302, 311–12 (3d Cir. 1996); *United States v. Tittjung*, 948 F.2d 1292 (7th Cir. 1991); *United States v. Kairys*, 782 F.2d 1374, 1379–80 (7th Cir. 1986); *United States v. Koziy*, 728 F.2d 1314, 1321–22 (11th Cir. 1984); *United States v. Portrait of Wally*, 663 F. Supp. 2d 232, 253–56 (S.D.N.Y. 2009); *United States v. Szehinskyj*, 104 F. Supp. 2d 480, 488–92 (E.D. Pa. 2000); *United States v. Lileikis*, 929 F. Supp. 31, 38 (D. Mass. 1996).

23. *See In re Archdiocese of Milwaukee*, No. 11-20059-svk, 2015 WL 1396628, at \*6–7 (E.D. Wis. Mar. 24, 2015).

24. *See, e.g., Kalymon*, 541 F.3d at 632–33 (document at issue a purely personal document that bears none of the hallmarks of a business record); *Firishchak*, 468 F.3d at 1022 (noting defendant's argument that documents at issue would not be admissible as business records because they do not satisfy that exception's "in the ordinary course" requirement); *Portrait of Wally*, 663 F. Supp. 2d at 253–56 (documents at issue purely personal documents that bear none of the hallmarks of business

as the Advisory Committee indicated, that the residual hearsay exception could serve as a safety valve post-abrogation for admitting reliable non-ESI documents that would have been admissible under the ancient documents exception, the vague contours of that exception create an unduly high degree of litigation uncertainty.<sup>25</sup> In addition, relying on the residual hearsay exception as a means of admitting into evidence a specific and established category of hearsay evidence such as ancient documents seems inconsistent with the design and purpose of the residual hearsay exception, which is to deal with “new and presently unanticipated situations.”<sup>26</sup> Thus, abrogating the exception would not be without some cost in some very sympathetic cases in which the age of the offenses makes proof by other means difficult, and this real cost needs to be balanced against the theoretical problem of admitting large quantities of unreliable ESI.

Moreover, Professor Capra’s memos to the Advisory Committee somewhat overstate the potentially sweeping scope of the ancient documents hearsay exception so far as any evidence, ESI or otherwise, is concerned. As indicated above, Professor Capra wrote that if an ancient document is authenticated, “every statement in that document can be admitted for its truth.”<sup>27</sup> Among the examples he has identified are every outrageous statement ever published in the National Enquirer in either print or electronic form—such as an article attributing an assertion to Hillary Clinton that she “shared Monica with Bill”—as well as the rantings of a psychotic person in a personal diary.<sup>28</sup>

Yet two other evidentiary principles, common across all hearsay exceptions and specifically held by courts and commentators to be applicable to the ancient documents hearsay exception, guard against such a potentially broad sweep. First, as with all other hearsay exceptions, the ancient documents exception is only applicable if the declarant spoke from personal knowledge as required by Federal Rule of Evidence 602.<sup>29</sup> Thus, if it does not appear from the statement itself that

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records); *In re Archdiocese of Milwaukee*, 2015 WL 1396628, at \*6–7 (document at issue would not satisfy business record exception, even if the letter was treated as part of the church’s business records, since the document was written by someone not employed by the church but rather an outsider).

25. See, e.g., FED. R. EVID. 807; see also James E. Beaver, *The Residual Hearsay Exception Revisited*, 20 FLA. ST. U. L. REV. 787, 794–802 (1993).

26. See FED. R. EVID. 807 Notes of Advisory Committee on Rules (transferred from FED. R. EVID. 803(24)).

27. AGENDA BOOK 2015, *supra* note 5, at 58 (emphasis in original).

28. ADVISORY COMM. ON EVIDENCE RULES, AGENDA BOOK, 78–79, 89 (Oct. 24, 2014) [hereinafter AGENDA BOOK 2014]. See also Capra, *supra* note 10, at 2–3.

29. See FED. R. EVID. 803 Notes of Advisory Committee on Proposed Rules (“In a hearsay situation, the declarant is, of course, a witness, and neither this rule nor Rule 804 dispenses with the requirement of firsthand knowledge. It may appear from his statement or be inferable from

the author of the document was recounting her own firsthand observations, the document would be excluded on the ground that the declarant lacked personal knowledge.<sup>30</sup> And second, despite some precedent to the contrary so far as the ancient documents hearsay exception is concerned,<sup>31</sup> the overwhelming majority view is that the exception—like nearly all other hearsay exceptions—does not encompass hearsay within hearsay.<sup>32</sup> Rather, if an ancient document recounts a statement that the author heard another person make, the statement contained in the ancient document but attributable to the other person would be admissible only if it fell within a separate exception to the hearsay rule.<sup>33</sup> Thus, in most jurisdictions, a National Enquirer story containing a statement by an unnamed source that Hillary Clinton said something would be hearsay within hearsay within hearsay, and thus would not be admitted into evidence based on the ancient documents exception alone.<sup>34</sup>

Finally, abrogation would put the Federal Rules of Evidence out of sync with their state law counterparts. Although there is some variation amongst the states, forty-nine of the fifty states recognize a hearsay exception for ancient documents

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circumstances. See Rule 602.”); *Columbia First Bank, FSB v. United States*, 58 Fed. Cl. 333, 337–38 (Fed. Cl. 2003); *Ultratec, Inc. v. Sorenson Communications, Inc.*, No. 13-cv-346-bbc, 2014 WL 4829173, at \*7 (W.D. Wisc. Sept. 29, 2014); *Howard Hughes Medical Inst. v. Neff*, 640 S.W.2d 942, 948–49 (Tex. Ct. App. 1982); *Sherrill v. Plumley’s Estate*, 514 S.W.2d 286, 290–91 (Tex. Ct. App. 1974); 5 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 1573 n.a (3d ed. 1940); 5 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 803.18, at 803–128 (Mark S. Brodin ed., 2d ed. 2015).

30. In the case of someone who has a mental impairment that prevents her from properly perceiving things—such as the psychotic author of a diary—courts have held that such a finding would demonstrate a lack of personal knowledge that would call for the exclusion of such evidence. See, e.g., *United States v. Ramirez*, 871 F.2d 582, 584 (6th Cir. 1989); *Behler v. Hanlon*, 199 F.R.D. 553, 558 n.8 (D. Md. 2001).
31. See *Langbord v. U.S. Dep’t of Treasury*, No. CIV.A.06-5315, 2011 WL 2623315, at \*16–17 (E.D. Pa. July 5, 2011).
32. See *United States v. Hajda*, 135 F.3d 439, 444 (7th Cir. 1998); *Columbia First Bank*, 58 Fed. Cl. at 338; *Northern States Power Co. v. City of Ashland, Wis.*, No. 12-cv-602-bbc, 2015 WL 1745880, at \*9 (W.D. Wis. Apr. 16, 2015); *Ultratec*, 2014 WL 4829173, at \*7; *State Financial Bank v. City of South Milwaukee*, No. 00-C-1530, 2006 WL 2691604, at \*6 (E.D. Pa. Sept. 20, 2006); *Ruth v. A.O. Smith Corp.*, 615 F. Supp. 2d 648, 651 n.2 (N.D. Ohio 2005); *Hicks v. Charles Pfizer & Co., Inc.*, 466 F. Supp. 2d 799, 806–07 (E.D. Tex. 2005); *United States v. Stelmokas*, 1995 WL 464264, at \*5–6 (E.D. Pa. Aug. 2, 1995); *People v. McCullough*, No. 2-12-1364, 2015 WL 630462, at \*22–23 (Ill. App. Feb. 11, 2015); *Rehm v. Ford Motor Co.*, 365 S.W.3d 570, 581–83 (Ky. App. 2011).
33. See FED. R. EVID. 805.
34. Professor Capra’s reference to such sensational examples in advocating for abrogation of Rule 803(16) is surprising given his acknowledgement that the ancient documents exception should not be interpreted to encompass hearsay within hearsay. See AGENDA BOOK 2014, *supra* note 28, at 77; Capra, *supra* note 10, at 9 n.32.

in some form.<sup>35</sup> Only the Kansas evidence code has in place what the proposed amendment to the Federal Rules of Evidence would embrace: a means to authenticate a document by showing that it qualifies as an ancient document,<sup>36</sup> but without a corresponding hearsay exception.<sup>37</sup> Given that the Federal Rules of Evidence apply even when state law claims are litigated in federal court,<sup>38</sup> creating such a widespread rift between federal and state evidence law by abrogating Rule 803(16) creates an undesirable potential forum shopping opportunity in diversity cases.<sup>39</sup>

### III. ALTERNATIVES TO ABROGATION

Despite my criticisms of the Advisory Committee's proposal to abrogate Rule 803(16), it has nonetheless raised some important questions regarding the

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35. *See* ALA. R. EVID. 803(16); ALASKA R. EVID. 803(16); ARIZ. R. EVID. 803(16); ARK. R. EVID. 803(16); CAL. EVID. CODE § 1331 (West 2015); COLO. R. EVID. 803(16); CONN. CODE EVID. § 8-3(9); DEL. R. EVID. 803(16); FLA. STAT. § 90.803(16) (2014); GA. CODE ANN. § 24-8-803(16) (2013); HAW. R. EVID. 803(b)(16); IDAHO R. EVID. 803(16); ILL. R. EVID. 803(16); IND. R. EVID. 803(16); IOWA R. EVID. 5-803(16); KY. R. EVID. 803(16); LA. R. EVID. 803(16); ME. R. EVID. 803(16); MD. R. 5-803(16); MICH. R. EVID. 803(16); MINN. R. EVID. 803(16); MISS. R. EVID. 803(16); MONT. R. EVID. 803(16); NEB. R. EVID. 803(15); NEV. REV. STAT. § 51.235 (2013); N.C. R. EVID. 803(16); N.D. R. EVID. 803(16); N.H. R. EVID. 803(16); N.J. R. EVID. 803(c)(16); N.M. R. EVID. 11-803(16); OHIO R. EVID. 803(16); OKLA. STAT. ANN. tit. 12, § 2803(16) (West 2011); OR. R. EVID. 803(16); PA. R. EVID. 803(16); R.I. R. EVID. 803(16); S.C. R. EVID. 803(16); S.D. R. EVID. 19-19-803(16); TENN. R. EVID. 803(16); TEX. EVID. CODE ANN. § 803(16) (West 2003); UTAH R. EVID. 803(16); VT. R. EVID. 803(16); VA. R. EVID. 2:803(16); WASH. R. EVID. 803(16); W.V. R. EVID. 803(16); WIS. STAT. § 908.03(16) (2014); WYO. R. EVID. 803(16); *Neles-Jamesbury, Inc. v. Liberty Mut. Ins. Co.*, No. CIV.A.WOCV2002-0982A, 2013 WL 6436948, at \*6 (Mass. Sup. Ct. Oct. 30, 2013); *Tillman v. Lincoln Warehouse Corp.*, 423 N.Y.S.2d 151, 153 (N.Y. App. Div. 1979); *Davis v. Wood*, 61 S.W. 695, 698 (Mo. 1901).

36. *See* KAN. STAT. ANN. § 60-464 (2005).

37. 7 BARBARA E. BERGMAN & NANCY HOLLANDER, *WHARTON'S CRIMINAL EVIDENCE* § 83:18 (15th ed. 2001).

38. 19 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4512 (2d ed. 1996).

39. Consider a document critical in litigation between two parties that would be admissible as an ancient document under a state law hearsay exception but that would no longer be admissible in federal court after abrogation of Rule 803(16) and that would be admissible under no other federal hearsay exception. If the document is favorable to the defendant, the plaintiff has an incentive to forum shop: By opting to file the diversity action in federal rather than state court, the plaintiff would benefit because the document could not be offered into evidence against him. If instead, the document is favorable to the plaintiff, the defendant has an incentive to forum shop: If the plaintiff files the diversity action in state court (in part to take advantage of the document's admissibility under the state hearsay exception), the defendant would benefit by removing the action to federal court, where the document would be inadmissible.

application and scope of the rule that merit attention. Yet I believe that the concerns raised can be remedied by amendments that fall well short of abrogation. I thus propose four amendments to the rule—different from those considered and rejected by the Advisory Committee—that could be adopted individually or in tandem.

First, and at the very least, if the Advisory Committee is concerned with an impending explosion of ESI that meets Rule 803(16)'s age threshold, one of the simplest ways to remedy that problem—at least in the short term—is to increase the threshold from twenty to thirty years. The selection of a thirty-year threshold is not an arbitrary one: It would align Federal Rule 803(16) with the preexisting common law threshold that had been in place since the mid-1700s<sup>40</sup> that the federal rule sharply broke from.<sup>41</sup> While this would put the federal rule slightly out of sync with the majority of states—which have adopted the federal definition of twenty years in their analogues to the ancient documents hearsay exception<sup>42</sup>—this would be a difference of degree and not kind. Moreover, the federal rule as amended would be aligned with the one-third of states that retained the common law threshold of thirty years in their hearsay exceptions for ancient documents.<sup>43</sup> Thus, even if the Advisory Committee is on the fence about whether to abrogate or consider other amendments to Rule 803(16), reverting to the common law period of thirty years could serve as a stopgap measure, allowing the Advisory Committee another decade to consider the possible effects of and remedies for

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40. See 7 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2138 (1978). Prior to the mid-1700s, the common law threshold was forty years. *Id.*

41. See FED. R. EVID. 901(b)(8) Notes of Advisory Committee on Proposed Rules.

42. See ALA. R. EVID. 803(16); ARIZ. R. EVID. 803(16); ARK. R. EVID. 803(16); COLO. R. EVID. 803(16); DEL. R. EVID. 803(16); FLA. STAT. ANN. § 90.803(16); GA. CODE ANN. § 24-8-803(16) (2013); HAW. R. EVID. 803(b)(16); ILL. R. EVID. 803(16); KY. R. EVID. 803(16); ME. R. EVID. 803(16); MD. R. EVID. 5-803(16); MICH. R. EVID. 803(16); MINN. R. EVID. 803(16); MISS. R. EVID. 803(16); MONT. R. EVID. 803(16); NEV. REV. STAT. § 51.235 (2013); N.C. R. EVID. 803(16); N.D. R. EVID. 803(16); N.H. R. EVID. 803(16); N.M. R. EVID. 11-803(16); OHIO R. EVID. 803(16); OKLA. STAT. ANN. tit. 12, § 2803(16) (WEST 2011); OR. R. REV. RULE 803(16); R.I. R. EVID. 803(16); S.C. R. EVID. 803(16); S.D. R. EVID. 19-19-803(16) (2015); TEX. EVID. CODE ANN. § 803(16) (West 2003); UTAH R. EVID. 803(16); VT. R. EVID. 803(16); WASH. R. EVID. 803(16); W.VA. R. EVID. 803(16); WIS. STAT. § 908.03(16) (2014); WYO. R. EVID. 803(16).

43. See ALA. R. EVID. 803(16); CONN. CODE EVID. § 8-3(9); CAL. EVID. CODE § 1331 (West 2015); IDAHO R. EVID. 803(16); IND. R. EVID. 803(16); IOWA R. EVID. 5-803(16); LA. R. EVID. 803(16); NEB. R. EVID. 803(15); N.J. R. EVID. 803(c)(16); PA. R. EVID. 803(16); TENN. R. EVID. 803(16); VA. R. EVID. 2-803(16); Neles-Jamesbury, Inc. v. Liberty Mut. Ins. Co., 2013 WL 6436948, at \*6 (Mass. 2013); Tillman v. Lincoln Warehouse Corp., 423 N.Y.S.2d 151, 153 (N.Y. App. Div. 1979); Davis v. Wood, 61 S.W. 695, 698 (Mo. 1901). Kansas does not have a hearsay exception for ancient documents, but its provision for authenticating ancient documents requires that they be a minimum of thirty years old. See KAN. STAT. ANN. § 60-464 (2005).

aging ESI. Such a change would maintain rough synchronicity between the federal and state versions of the hearsay exception, and would not negatively impact the utility of the exception in the many cases involving Nazi-era wrongdoings, since all documentary evidence offered in such cases now well exceeds the common law threshold in age.<sup>44</sup>

Second, the Advisory Committee should resolve the disconnect between the ancient document hearsay exception set forth in Rule 803(16) and the ancient documents authentication provision set forth in Rule 901(b)(8). As indicated above, Rule 901(b)(8) contains two prerequisites in addition to age to authenticate a document as ancient: The document must be in a condition that creates no suspicion about its authenticity, and it must be found in a place where, if authentic, it would likely be.<sup>45</sup> Yet as the Advisory Committee noted in its proposal to abrogate the hearsay exception, the plain language of Rule 803(16) does not require that the document be authenticated pursuant to the method set forth in Rule 901(b)(8);<sup>46</sup> it only refers to a document “whose authenticity is established,”<sup>47</sup> meaning that any method of authentication set forth in Federal Rules 901 or 902 evidently would suffice.

It is not clear that this disconnect between the two rules was intentional. The Advisory Committee Notes to Rule 803(16), as well as those of numerous states that modeled their evidence rules after Rule 803(16), seemed to assume that the documents would be authenticated in accordance with Rule 901(b)(8).<sup>48</sup> Yet in accordance with the plain language of the text of the rule, numerous courts have agreed that any method of authentication suffices to admit a document as ancient under Rule 803(16).<sup>49</sup> In any event, this disconnect is problematic because the two additional prerequisites contained in Rule 901(b)(8) in conjunction with age together are what bestow on ancient documents sufficient indicia of

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44. The thirty-year threshold, like the twenty-year threshold, is a brightline rule subject to the same criticisms raised by Professor Capra. The common law, however, experimented with a vague standard of ancient without specifying a particular threshold age prior to the 1700s but moved toward a brightline rule because the indefiniteness of the prior standard was found to be undesirable. See WIGMORE, *supra* note 40.

45. FED. R. EVID. 901(b)(8).

46. AGENDA BOOK 2015, *supra* note 5 at 58.

47. FED. R. EVID. 803(16).

48. See FED. R. EVID. 803(16) Notes of Advisory Committee on Proposed Rules; ALA. R. EVID. 803(16) Advisory Committee's Notes; HAW. R. EVID. 803(b)(16) Commentary; MINN. R. EVID. 803(16) Committee Comments.

49. See, e.g., *Milton H. Green Archives, Inc. v. BPI Communications, Inc.*, 320 Fed. Appx. 572, 573 (9th Cir. 2009); *Martha Graham Sch. & Dance Found. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624, 643 (2d Cir. 2004); *U.S. v. Atlas Lederer Co.*, 282 F. Supp. 2d 687, 697 (S.D. Ohio 2001).

trustworthiness to justify admitting them into evidence as an exception to the hearsay rule.<sup>50</sup> Indeed, the ancient documents hearsay exception recognized at common law included these three prerequisites as part of the definition of the hearsay exception itself.<sup>51</sup> Thus, by breaking with the common law and defining ancient documents for hearsay purposes as “a document that is at least twenty years old and whose authenticity is established,” Federal Rule 803(16) allowed mere age alone to suffice to admit something as an ancient document when the common law required greater assurances of trustworthiness. This could be remedied either by adding the words “in accordance with Federal Rule of Evidence 901(b)(8)” at the end of Rule 803(16), or—similar to what one state has done—by replacing the phrase “whose authenticity is established” with the phrase “if it is in a condition that creates no suspicion about its authenticity and it is found in a place where, if authentic, it would likely be.”<sup>52</sup>

Third, although the overwhelming weight of precedent supports the conclusion that Rule 803(16) encompasses only the hearsay statement of the person who wrote the ancient document and not hearsay statements of others recounted therein,<sup>53</sup> because at least some precedent interprets the phrase “statement in a document” contained in Rule 803(16) broadly to encompass any statement—including layered hearsay<sup>54</sup>—the Advisory Committee should take action to make sure that future courts follow the majority interpretation. This could be accomplished by adding a sentence within Rule 803(16) that reads, “Hearsay statements recounted within ancient documents are admissible only in accordance with Federal Rule of Evidence 805,” with the cross-referenced rule providing that “[h]earsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.”<sup>55</sup>

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50. See *Sherrill v. Plumley's Estate*, 514 S.W.2d 286, 290–91 (Tex. Civ. App. 1974); WEINSTEIN, *supra* note 29, at 803–128 (“Additional assurances of reliability are provided by the requirements that the document be in writing, have been produced from proper custody, and be unsuspecting in condition.”).

51. See, e.g., *Zobel v. Slim*, 576 S.W.2d 362, 365 (Tex. 1978); *San Antonio River Auth. v. Hunt*, 405 S.W.2d 700, 710 (Tex. Civ. App. 1966); *Barrows v. Kenosha Cty.*, 98 N.W.2d 461, 464–65 (Wis. 1959); *Perry v. Parker*, 141 A.2d 883, 884 (N.H. 1958); *City of Spokane v. Catholic Bishop of Spokane*, 206 P.2d 277, 281 (Wash. 1949).

52. Cf. CONN. CODE EVID. § 8-3(9) (including the phrase “if it is produced from proper custody and otherwise free from suspicion” in lieu of the phrase “whose authenticity is established” in the state analogue to Rule 803(16)).

53. See *supra* note 32.

54. See *supra* note 31.

55. FED. R. EVID. 805.

Finally, to the extent that the Advisory Committee finds any or all of the above suggestions to be insufficient to assure itself of the reliability of evidence offered pursuant to Rule 803(16), it could borrow two additional prerequisites from state counterparts to Rule 803(16) and from other exceptions to the hearsay rule that provide further assurances of trustworthiness. These include a requirement that the document must have been produced before the controversy at issue arose,<sup>56</sup> as well as a requirement that the statements contained in the document were subsequently acted upon as true by those having an interest in the matter set forth therein.<sup>57</sup> The first additional requirement would provide assurances of reliability by negating at least one motive to make untruthful statements in the document, while the second requirement would provide circumstantial evidence of the accuracy of the statements contained therein.

### CONCLUSION

The Advisory Committee should be applauded for its efforts to update the Federal Rules of Evidence to account for modern technological advances as well as to make certain that the rules are not misused in ways that undermine the policies that underlie them. The Advisory Committee's concern over the admissibility of unreliable ESI has raised important questions about the scope and application of the hearsay exception set forth in Rule 803(16) for ancient documents.

Yet rather than taking the drastic step of abrogating the exception, I propose instead that the Advisory Committee consider adopting four amendments to the rule. First, increase the age threshold for ancient documents from twenty to thirty years. Second, explicitly incorporate the reliability criteria set forth in Rule 901(b)(8) for authenticating a document as ancient into the hearsay exception itself. Third, include an explicit proviso indicating that Rule 803(16) encompasses only the hearsay statement of the person who wrote the ancient document and not hearsay statements of others recounted therein. And finally, consider adding additional prerequisites to admissibility, including a requirement that the document have been produced before the controversy at issue arose and that the statements contained in the document were subsequently acted upon as true by those having an interest in the matter set forth therein.

The first of these proposed amendments would, at least in the short term, dramatically reduce the quantity of ESI that would be potentially admissible as an-

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56. See FED. R. EVID. 803(20).

57. See FED. R. EVID. 803(15); CAL. EVID. CODE § 1331 (West 2015); VA. R. EVID. 2:803(16).

cient documents, and could serve as a stopgap measure while the Advisory Committee studied the matter in greater detail. The remaining three amendments, adopted either individually or in tandem, should be more than sufficient to serve as a long-term remedy for the hearsay exception's deficiencies, including but not limited to circumstances in which ESI is involved. At the same time, amending rather than abrogating the ancient documents hearsay exception will allow for its continued use in those rare cases when it may serve as the only gateway to admitting evidence necessary to prove ancient wrongs deserving of vindication.