MEMORANDUM

To: Texas Supreme Court Advisory Committee (SCAC)

From: Evidence Subcommittee

Re: Recommendation to amend TRE 803(16) on ancient documents

Date: May 11, 2022

Summary

Texas Rules of Evidence 803(16) provides an exception to the hearsay rule: "A statement in a document that is "at least 20 years old" and whose authenticity is established." Tex. R. Evid. 803(16).

In 2017 Rule 803(16) of the Federal Rules of Evidence was amended. The prior rule used the same at least 20 years old requirement as the Texas Rule. The 2017 amendment changed this to a date certain:

> 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 (a) was prepared prior to January 1, 1998** and whose authenticity is established.

Fed. R. Evid. 803(6) (emphasis added to show new language). The State Bar of Texas Administration of Rules of Evidence Committee (AREC) recommends that the Texas Supreme Court adopt this amended rule.

The Federal Rule of Evidence change was made to address the risk that the hearsay exception for ancient documents could be used as a vehicle for admitting unreliable electronically stored information (ESI). *See* Comm. Note to 2017 Amendment of Fed. R. Evid. 803. The impetus for the rule change, and the reason the January 1998 date was selected, is that Google began in 1998 and resulted in a variety of new forms of ESI. Some commentators feared that "ancient" emails, tweets, texts, blogs, web postings, and Facebook posts contain unreliable factual assertions but nevertheless would be admissible under the ancient documents exception. For example, concern was raised that web postings created by someone at their home could be admissible under this rule if they are at least 20 years old.

In view of these concerns, some public comments were received suggesting that the rule should be completely abolished. But others noted that the rule was often utilized in asbestos and insurance cases, and in those cases, it is sometimes a necessity to have the ancient documents exception to prove acts or omissions that occurred decades ago, particularly when witnesses are no longer available. This committee agreed that abolishment went too far.

The comments to the 2017 Amendments state that, despite this rule change, “ancient” hard copy documents–that is a document prepared after January 1, 1998 and more than twenty years ago—can still be admitted, but under two different rules. First, documents created after 1997 may still fall within the business records exception of Rule 803(6).

Second, the comments state that records created after January 1, 1998 may be admissible under the federal residual hearsay exception, Rule 807, “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.”

Recommendation

The Evidence Subcommittee unanimously recommends accepting AREC’s recommendation to amend TRE 803 (16) to conform with FRE 803(16).

The proposed new rule, as suggested by AREC and which follows the revised federal rule (with the changes in bold and underlined), is as follows:

> (16) Statements in Ancient Documents. A statement in a document **that (a) was prepared prior to January 1, 1998** and whose authenticity is established.

The Evidence Subcommittee unanimously recommends that the Court adopt FRE 807. New 803 (16) is based in part on the existence of that rule. AREC under Professor Goode’s prior leadership, this subcommittee, and SCAC previously recommended adoption of FRE 807.

If the Court elects to not adopt Rule 807, the Subcommittee also recommends, by a 4 to 2 vote, an additional amendment to Rule 803(16) to create a hearsay exception for ancient documents that are created after January 1, 1998 and satisfy the existing age requirement (i.e. are 20 years or older) and have further indicia of reliability comparable to those in FRE 807 if.

The majority of the committee concluded that an additional exception tracks Rule 807 is necessary because Texas has not adopted FRE 807 and some ancient documents do not have ESI issues. Our additional exception, which follows Rule 807, is in italics below:

> (16) Statements in Ancient Documents. A statement in a document **that (A) was prepared prior to January 1, 1998** and whose authenticity is established; *or (B) is at least 20 years old whose authenticity is established and the offering party demonstrates (i) the statement is supported by sufficient guarantees of trustworthiness–after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and (ii) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.*

The committee notes for the federal rules also make it clear that the date is determined when the document was originally written and not when it is electronically scanned. The committee explains:

> 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—that 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 cutoff date, then the hearsay exception will not apply to statements that were added in the alteration.

While AREC did not suggest adding this comment, we do. This comment is worth considering.

Background

The Ancient Documents Exception Rationale

The primary rationale for Rule 803(16) is need:

> Need is the main justification. The lapse of 20 years since the acts, events or conditions described almost guarantees a shortage of evidence. Witnesses will have died or disappeared. Written statements that might fit other exceptions (business records, past recollection) are typically thrown out or lost or destroyed ....
>
> Naturally, statements in ancient documents are affected by risks of misperception, faulty memory, ambiguity, and lack of candor (they are not intrinsically more reliable than oral statements), and a written statement unreliable when made is unreliable forever. Ancient documents do, however, bring fewer risks of misreporting (because the document is in writing), and they bring at least some assurance against negative influences: When authenticated, an ancient document leaves little doubt that the statement was made; there is little risk of errors in transmission; because of its age, the document is not likely to have suffered from the forces generating the suit, so there is less reason to fear distortion or lack of candor.

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) (quoting CHRISTOPHER MUELLER & LAIRD KIRKPATRICK, 4 FEDERAL EVIDENCE § 8:100 (4th ed. 2013). One court focused more on the reliability rationale for the rule:

> The ancient documents exception "is based on a rationale that authenticated ancient documents bear certain indicia of trustworthiness," namely: (1) a lack of motive to fabricate due to the document's age; (2) the writing requirement "minimizes the danger of mistransmission"; and (3) "the document is more likely to be accurate than the oral testimony of the declarant based on his memory of events of twenty or more years ago."

United States v. Stelmokas, 1995 WL 464264, at *5 (E.D. Pa. Aug. 2, 1995) (citing 2 John W.

Strong et al., *McCormick on Evidence* § 322 (4th ed. 1992); Charles E. Wagner, *Federal Rules of Evidence Commentary* 452 (1993); 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* ¶ 803(16)(1) (1994)); *see also* FED. R. EVID. 803(16) advisory committee's note (arguing that "age affords assurance that the writing antedates the present controversy").

Calls for Reform

In 2015, Professor Daniel Capra published an article asserting that Rule 803(16) needed to be abolished or amended because of the potential for its misuse in the internet age. The article was written in advance of (but published after) a Judicial Conference Advisory Committee on the Federal Rules of Evidence (the Federal Rules Committee) meeting scheduled in April 2014 to consider the rule. The April 2014 meeting considered a memorandum written by Capra that asked whether the committee wanted to consider abolishing the rule.

Capra argued in his published article that the internet contains factual assertions that are easily retrievable and potentially admissible under this rule. *Id*. at 1. Anyone can write on anything, so age alone is no indicator of reliability. He cites as examples retrievable web pages from the National Enquirer surrounding various celebrities, which potentially are admissible under the ancient documents exception. *Id*. at 5. He further observes that "ancient" personal assertions made in Facebook posts "without any verification at all" would satisfy the existing rule, a concern that "is not at all alleviated by the fact that the assertion is old." *Id*. at 24. And the number of potentially unreliable documents posted on the internet is enormous. Indeed,

> ten million static web pages are added to the Internet every day. In 2006 alone, the world produced electronic information that was equal to three million times the amount of information stored in every book ever written. . . . As electronic communications continue to age, all of the factual assertions in terabytes of easily retrievable data will be potentially admissible for their truth simply because they are old.

Id. at 1. Capra explains:

> Up until now, the ancient documents rule has been a sleepy little exception applied to hardcopy information. . . . But that can change now that much ESI has reached, if not surpassed, the twenty-year mark. It has been said that ESI "surrounds us like an ever-deepening fog or an overwhelming flood." The question is whether anything should be done about the ancient documents exception before that exception—and its applicability to ESI—are discovered by lawyers and judges. The potential problem is that ESI might be stored without much trouble for twenty years, and the sheer volume of it could end up flooding the courts with unreliable hearsay, through an exception that would be applied much more broadly than the drafters (or the common law) saw coming in the days of paper. Examples include self-serving emails from a business, tweets and texts about events from people who were not at the event, web postings accusing individuals of misconduct, and anonymous blog posts. . . . But now that terabytes and zettabytes of information are reaching or have already reached a twentieth birthday, the committee should rethink the ancient documents exception. In other words, data overload is already, or soon will be, a real problem worth fixing.

Id. at 3-4, 12 (footnotes omitted). Capara also argued that the necessity rationale for Rule 803(16) is diminished in the internet age: "Because ESI is prevalent and easily preserved, whatever

reliable evidence existed at the time of a twenty-year old event *probably* still exists. Indeed, the probability that most or all ESI records (emails, text messages, receipts, scanned documents, etc.) will be available is certainly higher than the probability that hardcopy documents or eyewitnesses will still be available and useful several decades after a contested event." *Id*. at 15 (footnotes omitted).

Capra conceded that there are no cases reflecting that ESI is currently causing a problem under Rule 803(16) and therefore an argument exists that amending the rule "due to a projected but not-yet-existing onslaught of old ESI is inappropriate." *Id*. at 30. He responds:

> The counterargument is that technology and the use of technology at trials develop very quickly. Trying to keep up with these changes is very difficult in the context of the deliberate nature of the rulemaking process. Enacting an amendment to the national rules of procedure takes a minimum of three years. Given all the ESI that will become potentially admissible without regard to reliability under Rule 803(16) in the next three or four years, it behooves the rulemakers to get out ahead of the curve. It would of course not be completely unreasonable to wait for the problem to rear its head in the courts. The consequence of waiting is not that the rule would lag behind emerging technology, but simply that unreliable hearsay may well be admitted en masse for a few years.

Id. at 30-31 (footnote omitted).

In August 2015, the Judicial Conference Advisory Committee on the Federal Rules of Evidence (the Federal Rules Committee) recommended the abolishment of Rule 803(16). *See* PRELIMINARY DRAFT OF Proposed Amendments to the Federal Rules of Bankruptcy Procedure and the Federal Rules of Evidence at *25. It rejected the rationale for the then-existing rule:

> The ancient documents exception could once have been thought tolerable out of necessity (unavailability of other proof for old disputes) and by the fact that the exception has been so rarely invoked. But given the development and growth of electronically stored information, the exception has become even less justifiable and more subject to abuse. The need for an ancient document that does not qualify under any other hearsay exception has been diminished by the fact that reliable electronic information is likely to be available and will likely satisfy a reliability-based hearsay exception—such as Rule 807 or Rule 803(6). Thus the ancient documents exception is not necessary to qualify dated information that is reliable. And abuse of the ancient document exception is possible because unreliable electronic information could be easily accessible, and would be admissible under the exception simply because it has been preserved electronically for 20 years.

On October 9, 2015, the Symposium on Hearsay Reform was held in Chicago. A number of speakers advocated the complete elimination of the hearsay rules and adoption of a rule granting judges "greater discretion" on deciding whether to admit such evidence. *See* January 2016 report of the Judicial Conference Advisory Committee on the Federal Rules of Evidence (the Federal Rules Committee). *See also* October 2015 report of the Federal Rules Committee at *5. Participants debated the advantages and disadvantages of various potential amendments to the rule. *Id*.

That afternoon, the Federal Rules Committee met and agreed that the rule should be eliminated and released to the public that proposal for comment. "[P]laintiffs' lawyers in environmental, insurance and asbestos cases" objected to the proposal. *See* October 2015 report of the Federal Rules Committee at *6. The committee reported that it believed the objections were misplaced.

In 2015, Professor Peter Nicolas wrote a critique of the proposal to abolish the rule. First, he argued that Professor Capra had overstated the problems with the rule and identified other evidence rules that could be utilized to exclude unreliable ancient documents. *Id*. at 178-179. But he agreed that Professor Capra and the committee had raised a number of valid concerns, concerns he argued could be addressed by an amendment to the rule rather than abrogation. *Id*. at 180-81

In January 2016, the federal rules committee promulgated a suggested amendment to the federal rules that would have eliminated the hearsay rule for ancient documents and issued it for public comment. The committee observed that since its November 2015 meeting it had "received more than 100 letters on the first rule governing the ancient documents exception, principally from lawyers in asbestos and environmental toxic litigation criticizing the proposed amendment. Most expressed concern that the proposed rule would prevent the admission of documents over 20 years old."

<u>The 2017 Amendment Rejects Abolishment But Adopts Other Revisions</u>

By its April 2016 meeting, the committee had received over 200 public comments on the proposal to eliminate Rule 803(16), almost all negative. Advisory Committing on Evidence Rules, Minutes of April 29, 2016, at *2. The committee agreed

> it was not appropriate to continue with the proposal to eliminate Rule 803(16)—the public comments did raise concerns about the effect of the amendments and the costs of prosecuting certain important claims that currently rely on ancient documents. (The public comments 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 tails" litigation—and that elimination of the ancient documents excerption 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.

Id. at *3. The committee then unanimously recommended that the ancient documents exception be amended because of concerns about ESI. *Id*. at *5. Its recommended rule was subsequently adopted.

AREC's Memo and Our Comments

AREC and its subcommittee researched four issues. We quote its answers with our additions in italics.

1. **Is Rule 803(16) used often enough to keep, or should we abrogate it?**

   A quick review of Texas cases shows this rule is still used quite often for trespass to try title cases, wills, products liability, mineral rights cases, and even an occasional criminal case. The case law extends from the time of the common law rule to 2020. Thus, AREC does not recommend removing the rule. The Federal Rule Committee reached the same conclusion after receiving more than 200 comments against abrogation of the rule. In some instances, it is the only way to prove a fact. "As a practical matter, there is usually no other way to prove heirship of a person who died in 1836 than by the recitations in ancient documents." *Zobel v. Slim,* 576 S.W.2d 362, 365 (Tex. 1978).

   A majority of our committee have concerns that there are other specific examples of "ancient" documents that are not ESI and have indicia of reliability. Thus, we believe the date of January 1998 may be reasonable for ESI but the 20 year criteria should be used for other documents that satisfy FRE 807.

2. **Should the rule remain unchanged to allow ESI over 20 years old to be exempted as ancient documents?**

   AREC considered whether ESI would actually pose an issue if admitted under a hearsay exception.

   While the condition of traditionally ancient documents such as deeds or wills can be examined to analyze authenticity, that type of review is not available for ESI, which by its nature is electronically stored. Other problems with ESI include the fact that the *content* of a computer-created document can be easily modified, even unintentionally (for example, moving a file from one location to another could alter an electronic document's metadata). Thus, situations could arise where ESI was created more than 20 years ago, but arguments could ensue over whether it has been modified in such a way as to remove it from the ancient documents exception. Additionally, a traditional written document is generally limited to several sheets of paper, while ESI can include a much greater quantity of information, making it more difficult to ascertain whether all parts of proffered ESI may meet the ancient documents exception.

   Finally, it is advisable to have similar application of this rule in federal and Texas state courts. A few states that have adopted the federal version have mentioned the avoidance of forum shopping as a reason for being in harmony with federal courts.

   The Capra article focuses on a different concern with ESI: factual assertions that are prevalent on the internet and are made by persons without any personal knowledge and are often the result of rampant hearsay, ill-will, or financial gain. We agree with Capra's concerns as well as AREC's comments and therefore agree with the amendment as it pertains to ESI.

3. Could we change the language of Rule 803(16) to exempt "hardcopy" documents that are 20 years or older?

The Federal Rules Advisory Committee considered this idea and rejected it. The Committee noted that the distinction between ESI and hardcopy would be fraught with questions and difficult to ascertain. Scanned copies of old documents? Digitized versions of an old book? *See* Comm. Note to 2017 Amendment of Fed. R. Evid. 803 (explaining "A party will often offer hardcopy that is derived from ESL 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.").[1]

Professor Capra noted that this was a potential problem and even proposed a rule for addressing this problem. 17 Yale. J.L. & Tech. at 36. He argued that it should not be adopted, however, because FRE 101(b)(6) "equates electronic evidence with hardcopy." Id.[2] *He stated that if a carve-out for handwritten documents is created, the following comment, or a similar comment, should be added:*

> *The amendment provides an exception to the general definition in Rule 101(b)(6), under which a reference to any kind of writing includes electronically stored information. Nothing in the amendment is intended to undermine any other use of electronically stored information under these Rules.*

Id. at 38. The SCAC Evidence Subcommittee did not believe a special rule for handwritten notes is necessary because of its recommendation to include a provision modeled on FRE 807. However, it is worth noting that the impetus to the FRE 803(16) revision is concerns about ESI, and that concern is inapplicable to handwritten documents.

Assuming FRE 807 is not adopted, our proposal would treat an ancient handwritten document as an exception to the hearsay rule and admissible if it satisfied the same criteria as set forth in Rule 807. In other words, if Rule 807 is not adopted—and we believe it should be—we recommend adopting a version of it into Rule 803(16) for documents at least 20 years old. As a practical matter, that would create a vehicle to admit, at this time, some 20 year-old documents written after January 1, 1998 and before today's date if they satisfy FRE 807's requirements.

Of course, revising the Texas rule from the FRE undermines the value of harmonization and presents the opportunity for forum shopping. And having a Texas-unique rule also creates other burdens, burdens described well by Professor Capra:

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[1] The federal rules committee stated:

> *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.*

[2] FRE 101(b)(6) provides: "a reference to any kind of written material or any other medium includes electronically stored information."

> *The Advisory Committee on Evidence Rules has always taken a conservative approach to proposing amendments to the Evidence Rules. Amendments are costly because experienced litigators and judges need to know the rules that exist, often without having the luxury of referring to a book. Any change to those rules imposes dislocation costs on litigators, judges, and the legal system as a whole--so the change had better be worth it.*

17 Yale J.L. & Tech. at 12. *Nevertheless, we believe ancient handwritten documents have sufficient indicia of reliability to remain admissible.*

4. Will excluding non-ESI documents written after 1998 be a problem?

In many cases, documents produced after January 1, 1998 will be preserved electronically and typically will not face the same issues of admitting a rare hardcopy document. For hardcopy documents created after January 1, 1998, their statements could still be admitted under other exceptions to the hearsay rule, such as for records kept in the course of a regularly conducted business activity under TRE 803(6). As our contemporary medium of communication is largely electronic, as opposed to written letters, AREC recommends this amendment, and that it conform to the federal rule's January 1, 1998 date. *See, e.g., id.* ("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 ESL. And the date is no more arbitrary than the 20-year cutoff date in the original rule.").

The SCAC Evidence Subcommittee, by a 4 to 2 vote, disagreed because unlike the federal rules, Texas does not have a residual hearsay rule comparable to FRE 807 for the admittance of handwritten documents, which the Federal Rules committee specifically relied on in its recommendation.

Thus, a majority of the Subcommittee believes that Texas at a minimum should adopt the federal residual hearsay rule if it adopts FRE 803(16). There are many strong policy arguments for Rule 807. The Fifth Circuit explained the rationale for the residual exception:

> *This provision was added because Congress recognized that the specifically defined exceptions would not encompass every situation wherein a particular piece of hearsay demonstrated such reliability and appropriateness that it should be considered by the finder of fact. Congress believed that the residual exception was necessary to avoid the distortion of the specific exceptions beyond the reasonable circumstances they were intended to include. This exception was designed to protect the integrity of the specifically enumerated exceptions by providing the courts with the flexibility necessary to address unanticipated situations and to facilitate the basic purpose of the Rules: ascertainment of the truth and fair adjudication of controversies.*

Dartez v. Fibreboard Corp., 765 F.2d 456, 462 (5th Cir. 1985). AREC, our committee, and SCAC have previously suggested that the Texas Supreme Court adopt FRE 807. It has not done so. We still believe it would be helpful. Professor Goode informs us that he knows of no efforts to repeal or amend FRE 807 since its 2019 amendment. It provides a

narrow, but sometimes needed, additional exception to the hearsay rules.

Our Recommendations

First. We unanimously recommend Texas Rule of Evidence 803(16), the ancient documents hearsay exception, be amended in conformity with the Federal Rules.

Second. We also unanimously recommend the adoption of the federal residual hearsay rule, Rule 807.[3]

Third. If FRE 807 is not adopted, we recommend, by a 4-2 vote, that Texas Rule of Evidence 803(16), be amended to include as subpart B language from FRE 807 because part of the rationale for the amendment to FRE 803(16) is the availability of that Rule as a method for introducing documents that are older than 20 years old but are more recent than January 1, 1998. The proposed amendment is as follows with the additions in italics:

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 **(A)** ~~is at least 20 years old~~ **was prepared prior to January 1, 1998** and whose authenticity is established; *or* (B) *is at least 20 years old and whose authenticity is established and the offering party demonstrates that (i) the statement is supported by sufficient guarantees of trustworthiness–after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and (ii) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.*

Commented [HB1]: This language comes directly from the existing TRE 803(16)

Commented [HB2]: This language comes directly from FRE 807.

Fourth. The author of this report recommends that a comment be adopted that quotes from the federal comments to the new rule and explains when a document is created. That comment states:

> Under the amendment, a document is "prepared" when the statement proffered was recorded in that document. If a hardcopy document is prepared in 1995 and a party seeks

[3] FRE 807(a) provides:

> a) **In General**. Under the following conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in Rule 803 or 804:
>
> > (1) the statement is supported by sufficient guarantees of trustworthiness–after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and
> >
> > (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.

Subpart b requires notice to be "provided in writing before the trial or hearing"

> to admit a scanned copy of that document, the date of preparation is 1995, even if the scan was made long after that. 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 cutoff date, then the hearsay exception will not apply to statements that were added in the alteration.

The committee ran out of time and never discussed this comment.