Judge Sessions and Members of the Advisory Committee on Evidence Rules,

My name is Marc Weingarten, and I am a senior partner at the Locks Law Firm in Philadelphia. I have been practicing law since 1976. After a two-year judicial clerkship for a trial court judge in Chester County, Pennsylvania, I joined my present law firm in August of 1978. For my entire legal career, I have exclusively represented plaintiffs in civil litigation involving personal injury, including asbestos, mass tort, medical devices, prescription drug injuries, and also class actions.

I. Basis of the Rule

The rule in question is a longstanding exception to the hearsay rule. The basis of the rule is twofold: necessity and reliability. The rule is necessary because after 20 years, the period of time required for the rule to become operative, many of the witnesses who could obviate the usual hearsay impediment are either deceased, infirm, or otherwise unavailable due to the passage of time.

Reliability of the evidence is safeguarded by the fact that the rule deals with written documents, and not oral statements, which because of their age will have preceded any controversy engendered by litigation. The documents were created when there was no need for strategy or subterfuge.

These twin rationale are best explained in the opinion of the United States District Court for the District of Wyoming in Compton v. Davis Oil Co., 607 F.Supp. 1221 (D.Wyo 1985). In this case, ancient documents were consulted to establish proof of a lawful marriage in a case dealing with a dispute over oil wells in an action to quiet title. The documents in question were two warranty deeds which had been executed by “husband and wife” and also a statement in a death certificate concerning the decedent’s marital status. In discussing these documents, the court noted as follows:

Statements in such ancient documents are admissible due to a rule of necessity as well as to the reliability of such evidence in comparison to any other form of available evidence. [Citations omitted]. Generally the declarant in such documents is not available to testify due to death, and even if not deceased, the declarant is practicably unavailable because of the inevitable loss of memory and confusion resulting from the passage of time. Generally, there will also be a scarcity of other available evidence probative of the matter asserted. Due to the lapse of time the rule reduces the preference for live testimony implicit in the hearsay rule. Eyewitness accounts of such events are likely to be less reliable than contemporaneous statements recorded in the ancient documents. [Citation omitted].

In addition, recitations in ancient documents remove the risks of error in transmission of information by oral statements. This consideration is especially important where the passage of time tolls the memory and removes the statements from the context in which they were made. Also, such evidence is less likely to be affected by the forces generated by the litigation since they are made in a context where there is less reason to fear a lack of candor, distortion, whether conscious or unconscious, or even deliberate falsehood affected the statements made [sic] [citations omitted] Compton, supra, 607 F. Supp. at 1229-1230.

II. Authenticity v. Admissibility

When discussing ancient documents, it is especially important to remember that authenticity and hearsay are two separate issues. Although FRE 803(16) can and should be read in conjunction with FRE 903, the rules are quite different in intent. Rule 903 is a rule of authenticity which provides for self- authentication of documents under certain circumstances. If 803(16) is abrogated, even if a document is authenticated, it will not overcome the fact that it is hearsay and inadmissible.

Many of these issues are contemplated in the Manual for Complex Litigation, Fourth, '11.445 (2004) Evidentiary Foundation for Documents:

The production of documents, either in the traditional manner or in a document depository, will not necessarily provide the foundation for admission of those documents into evidence at trial or for use in a motion for summary judgment. …the court should therefore also take into account the need for effective and efficient procedures to establish the foundation for admission, which can be accomplished by stipulation, requests for admission, interrogatories, or depositions (particularly Rule 31 depositions on written questions). [Footnote omitted] While admissions are only binding on the party making them, authenticity (as opposed to admissibility) may be established by the testimony of any person having personal knowledge that the proffered item is what the proponent claims it to be. [Footnote omitted].

III. Examples from Practice

In the course of my practice representing individuals against corporations, I have had numerous situations where critical documents were uncovered in out-of-the-way places, such as unheated, unlit warehouses, garages of retired corporate employees and other unlikely places. Many of those documents were ultimately found to be crucial to establishing liability in the litigation, yet there were no witnesses available who could testify concerning the creation of the document. Technically, these documents would be deemed inadmissible as hearsay. However, the ancient document rule would provide that link to admissibility and permit the plaintiffs to proceed with their cause of action.

An example of documents which might not have been admissible, were it not for this exception to the hearsay rule, is found in the early days of the asbestos litigation. The “Sumner Simpson Papers” were a large group of documents discovered by lawyers for the plaintiffs. The documents are a series of correspondence to and from Sumner Simpson, who was President of Raybestos-Manhattan, an asbestos manufacturer, in the 1930s and 1940s. Much of this correspondence consisted of letters to and from Vandiver Brown, Esquire, Corporate Counsel for Johns-Manville Corporation, another manufacturer of asbestos. The documents were critical in proving industry knowledge of the hazards of asbestos and in some cases are used for evidence of a conspiracy to cover up that knowledge. Although Johns-Manville and Raybestos-Manhattan would be hard pressed to contest the admissibility of those documents, the documents have also been utilized in cases against asbestos manufacturers who were not signatories to or in receipt of the documents for purposes of proving “state-of-the-art”. In other words, if the state-of-the-art is defined as information which is either known or knowable to a manufacturer, the Sumner Simpson Papers could be offered to show a jury that if this was knowledge known by Raybestos-Manhattan and Johns-Manville, it was also knowable by other companies as well. However, the barriers to admission of such evidence against these other companies would be difficult if not impossible, were it not for the ancient documents exception.

If this rule change is effectuated, it can be anticipated that litigation, at least from a plaintiff standpoint, would become more costly, time-consuming, and also increase the challenges to obtaining a just recovery for injured plaintiffs. The element of additional time comes into play because counsel will need to first negotiate with opposing counsel concerning the admissibility of documents, and barring an agreement, motion practice will ensue. This means that not only will the cases become more time-consuming for the lawyers involved, but also for the courts and the entire judicial system. What will happen is an entirely new series of motions, briefing, oral arguments and court decisions concerning documents which were once routinely deemed admissible. This does not work to anyone’s advantage. The costs associated with this new motion practice affects all parties. The challenges to recovery in a case are also artificially magnified given the fact 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. None of these results are beneficial to the litigants, their counsel, or the system itself.

The best way to conclude these comments is to go back to what was perhaps the foundational reason for the exception to the rule itself. Memories tend to fade over time. Memories can change due to illness or deterioration of the health of a witness but documents will always say what they said when originally created. If a witness should die, the memories die with him, but documents do not have a lifespan, do not become ill, and do not forget.

I strongly urge the Committee to leave the rule in its present format.