NEW YORK CITY BAR

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January 14, 2016

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, DC 20544

RE: Proposed Amendments to the Federal Rules of Evidence

At the request of Ira Feinberg, Chair of the Committee on Federal Courts of the Association of the Bar of the City of New York, I am submitting for consideration by the Advisory Committee on Evidence Rules a copy of the Association's report on the proposed amendments to the Federal Rules of Evidence. A copy of this report has been submitted electronically using the "Submit a Comment" link made available on the United States Courts website.

Sincerely,

Peter C. Hein, Member
Committee on Federal Courts

cc: Ira Feinberg, Chair, Committee on Federal Courts

NEW YORK CITY BAR

REPORT OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

The Association of the Bar of the City of New York, through its Committee on Federal Courts (the "Federal Courts Committee"), greatly appreciates the opportunity for public comment that the Judicial Conference's Committee on Rules of Practice and Procedure has provided with respect to the amendments to the Federal Rules of Evidence proposed by the Advisory Committee on Evidence Rules. The Association, founded in 1870, has over 24,000 members practicing throughout the nation and in more than fifty foreign jurisdictions. The Association includes among its membership many lawyers in every area of law practice, including lawyers generally representing plaintiffs and those generally representing defendants; lawyers in large firms, in small firms, and in solo practice; and lawyers in private practice, government service, public defender organizations, and in-house counsel at corporations.

The Association's Federal Courts Committee is charged with responsibility for studying and making recommendations regarding proposed amendments to the Federal Rules of Evidence. The Federal Courts Committee respectfully submits the following comments on the proposed amendments:

I Opposition to Proposed Abrogation of the Exception to the Rule against Hearsay for "Ancient Documents"

The Committee opposes the proposed abrogation of the exception to the rule against hearsay for "ancient documents" (*i.e.*, the proposed abrogation of Federal Rule of Evidence 803(16)). 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. However, there has been no concrete indication of problems to date with Rule 803(16), notwithstanding that voluminous records have long been retained in hardcopy, microfilm and microfiche form for more than twenty years. It is unclear why old electronic records will pose materially different issues or concerns as compared to old paper, microfilm or microfiche records.

Indeed, when Rule 803(16) of the Federal Rules of Evidence was adopted in the 1970s, the Advisory Committee was even then aware of the advent of the era of electronically stored data and factored the increasing use of electronic data into its thinking. *See* Advisory Committee Note to 1972 Proposed Rules, Rule 901(b)(8) (stating that the "familiar ancient document rule of the common law is extended to include data stored electronically or by other similar means. ... This expansion is necessary in view of the widespread use of methods of storing data in forms other than conventional written records"). Because the application to electronic records in at least some form of the "ancient documents" exception to the rule against hearsay was anticipated in the 1970s when Rule 803(16) was adopted, we do not believe that the increased use of electronic records can justify abrogation of the "ancient documents" exception, at least absent a concrete showing that unanticipated problems have arisen.*

In addition, before any ancient document or data compilation is admitted, it must be authenticated pursuant to Rule 901(b)(8), *i.e.*, it must be (A) in a condition that creates no

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* The report of the Advisory Committee on Evidence Rules, dated May 7, 2015, states that "the only real 'use' for the exception is to admit unreliable hearsay – as has happened in several reported cases". Comm. on Rules of Practice and Procedure, Preliminary Draft, Request for Comment, dated August 2015, p.18. However, the cases alluded to are not cited, making it difficult to evaluate whether the cases in question represent a significant problem that requires complete abrogation of Rule 803(16), or whether any problem presented in those cases could have been addressed by, *e.g.,* Rule 403 or by a more targeted amendment to the Federal Rules of Evidence.

suspicion about its authenticity, and (B) in a place where, if authentic, it would likely be. Thus, age alone is not the only requirement for admitting an ancient document.

We also observe that the Advisory Committee notes to the 1972 Proposed Rules of Evidence included a reasoned discussion of proposed Rule 803(16). That Rule 803(16), as enacted in the 1970s, was the product of a reasoned analysis reinforces our view that it should not be abrogated, at least absent the specific articulation of a demonstrable problem. Furthermore, Rule 803(16) continues to find acceptance among various commentators. For example, Judge Weinstein's treatise states:

> Although it has been argued that the mere lapse of time does not afford any guarantee of veracity, the exception is justified by the need for such evidence when offered, because of the usual lack of other evidence on point. The age of the document virtually assures that the statement was made before the controversy resulting in litigation arose, and thus before any motivation to misrepresent was present. Additional assurances of reliability are provided by the requirements that the document be in writing, have been produced from proper custody, and be unsuspicious in condition. ... Even if the document is of the requisite age and meets authentication requirements, the judge may exclude it if, at the time the document was written, a motive for misrepresentation already existed, so that the possibility of prejudice or confusion outweighs any probative value the document may have.

5 Weinstein's Federal Evidence §803.18, at 803-130 to 803-131 (2d ed. 2015). *See also* 2 McCormick on Evidence §323 at 555-557 (7th ed. 2013); *but compare* 4 Saltzburg, Martin & Capra, Federal Rules of Evidence Manual §803.02[17] at 803-77 to 803-78 (10th ed. 2011).

We agree that it is appropriate to actively monitor developments so as to be in a position to react if and when a problem eventuates. However, Rule of Evidence 403 allows a district judge to exclude evidence if the potential for unfair prejudice or misleading the jury substantially outweighs the probative value of the evidence. Rule 403 could be used to exclude ancient

documents in cases when a problem actually arises. We are not persuaded that Rule 403 is not sufficient to deal with and contain problems that may arise in the future.

On the other hand, abrogating Rule 803(16) – which reflected principles sufficiently well accepted that they were incorporated into the Federal Rules of Evidence in the 1970s – could have unintended consequences. Establishing an appropriate foundation for admissibility of business records that meets the requirements of Rule 803(6) could be difficult where witnesses are dead or unavailable. And, while the residual exception to the hearsay rule may provide somewhat of a safety valve, Rule 807 has its own requirements and has seen limited application in the courts. Indeed, the 1974 Senate Report - explaining the Senate Judiciary Committee's inclusion of a residual exception, then included in Fed. R. Evid. 803(24), Rule 807's predecessor - stated that "[i]t is intended that the residual hearsay exception[ ] will be used very rarely, and only in exceptional circumstances." *See* Senate Report No. 93-1277, 93rd Congress, 2d Session, Oct. 11, 1974. Thus, in practice, judicial utilization of the residual exception may prove to be inconsistent and difficult to predict.

II Support for Proposed Additions to Rule 902

Currently, Federal Rule of Evidence 902 provides for 12 categories of evidence that are "self-authenticating" and thus "require no extrinsic evidence of authenticity in order to be admitted". The Advisory Committee notes to the 1972 proposed rule that became Rule 902 state that "[i]n no instance is the opposite party foreclosed from disputing authenticity". *See also* 5 Weinstein's Federal Evidence §902.02[2], at 902-8 (2d ed. 2015). In addition, categories 11 and 12, which were added pursuant to the 2000 amendments to Rule 902, provide a "notice requirement" that the Advisory Committee notes to the 2000 amendments state is "intended to give the opponent of the evidence a full opportunity to test the adequacy of the foundation".

The Advisory Committee now proposes to add two additional categories of records as self-authenticating: (i) a record generated by an electronic process or system that produces an accurate result, as shown by an appropriate certification, and (ii) data copied from an electronic device, storage medium, or electronic file, if authenticated by a process of digital identification, again, as demonstrated by an appropriate certification. In each case, the proponent must comply with notice requirements. The Advisory Committee, in recommending the addition of these two categories of records as self-authenticating, states that the practical effect will be to shift to the opponent the burden of going forward (but not the burden of proof) on authenticity disputes.

The Committee supports the proposed additions to Rule 902 for certified records generated by an electronic process or system, and certified data copied from an electronic device, storage medium or file. As indicated in the proposed Advisory Committee notes, these changes should avoid the need to call authentication witnesses in many cases where there is no real dispute about authenticity.

Dated: January 14, 2016
New York, New York

Respectfully submitted,

Committee on Federal Courts
Association of the Bar of the City of New York

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