

# TRANSCRIPT OF PROCEEDINGS

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IN THE MATTER OF: )  
 )  
PUBLIC HEARING ON PROPOSED )  
AMENDMENTS TO THE FEDERAL RULES )  
OF EVIDENCE, JUDICIAL CONFERENCE )  
ADVISORY COMMITTEE ON EVIDENCE )  
RULES )

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BEFORE THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS

IN THE MATTER OF: )  
 )  
 PUBLIC HEARING ON PROPOSED )  
 AMENDMENTS TO THE FEDERAL RULES )  
 OF EVIDENCE, JUDICIAL CONFERENCE )  
 ADVISORY COMMITTEE ON EVIDENCE )  
 RULES )

Suite 206  
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Friday,  
 February 12, 2016

The parties met, pursuant to the notice, at  
 10:01 a.m.

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(10:01 a.m.)

JUDGE LIVINGSTON: All right. Well, my name is Debra Livingston, and I'm a Judge on the Second Circuit and a member of the Advisory Committee. Thank you all for being here today. As you know, the Committee published for comment proposed amendments to Rules 803 and 902, and we are here today to hear testimony principally concerning the proposed abrogation of Rule 803.16, the exception to the hearsay rule for ancient documents.

Judge Sessions is the Chair of our Committee and he is unable to be here today, so I'm going to be standing in for him.

As I understand how we're going to proceed, we have about 10 witnesses this morning. Most have provided the Committee with written submissions, and those submissions have been provided to all the Committee members. Each will be providing testimony for up to 15 minutes, including questions.

We have a court reporter online to take the testimony, and that's Ms. Hester?

THE COURT REPORTER: Yes.

JUDGE LIVINGSTON: Yes. So we have the court reporter. The transcript of today's hearing

1 will be available for the committee members who aren't  
2 able to be present in person. The committee members,  
3 as I mentioned, have all received copies of the  
4 written submissions.

5 Let me just say at the start to thank  
6 everyone who's on the line today, particularly all the  
7 witnesses who are here. I understand some of you may  
8 be departing over the course of the proceedings as we  
9 go on, so let me take the opportunity at the beginning  
10 while everyone is here to thank you for your time and  
11 for the very thoughtful submissions we received and  
12 for your input here today.

13 This is an opportunity for the Committee to  
14 learn from and benefit from public comments, so let me  
15 also just encourage any members with questions, you  
16 may jump in. You need not wait until the conclusion  
17 of each witness's testimony.

18 As for the witnesses, if a witness preceding  
19 you has already made a point that you want to second,  
20 you shouldn't feel obligated to repeat it. You can  
21 associate yourself with the prior remarks and refer us  
22 to your written submission. We take this project very  
23 seriously and we will be pondering all the testimony,  
24 both written and oral, that we receive today.

25 Before we begin I think I should note just

1 for the record the members that are here, so could I  
2 ask the members of the Advisory Committee just to  
3 identify themselves for the record. As I said, I'm  
4 Debra Livingston and a member of the committee.

5 JUDGE WESLEY: Hi. I'm Richard Wesley,  
6 liaison from the Rules Committee.

7 JUDGE APPEL: Brent Appel, the Iowa Supreme  
8 Court and member.

9 MR. COLLINS: Daniel Collins, a lawyer at  
10 Munger Tolles & Olson and member of the committee.

11 JUDGE MARTEN: I'm Tom Marten, a federal  
12 district judge in Wichita, Kansas, member of the  
13 committee.

14 MS. SHAPIRO: Elizabeth Shapiro from the  
15 Department of Justice.

16 MR. KRAMER: I am A.J. Kramer from the  
17 Federal Public Defender in D.C., a member of the  
18 committee.

19 JUDGE LIVINGSTON: And we had a couple of  
20 additional liaison members here. Judge Oliver?

21 JUDGE OLIVER: Solomon Oliver, liaison  
22 member from the Civil Rules Committee.

23 JUDGE DEVER: And this Jim Dever, a district  
24 judge in the Eastern District of North Carolina. I'm  
25 a liaison from the Criminal Rules Committee.

1 JUDGE LIVINGSTON: And we have a -- I'm  
2 sorry. Dan?

3 PROFESSOR CAPRA: Dan Capra, the Reporter.

4 JUDGE LIVINGSTON: And we have a  
5 representative from the Federal Judicial Center.

6 MR. LAU: Oh, this is Timothy Lau.

7 JUDGE LIVINGSTON: I think those are our  
8 attendees, unless I'm missing anyone.

9 (No response.)

10 JUDGE LIVINGSTON: Okay. Let me turn it  
11 over to our Reporter, our wonderful Reporter.

12 PROFESSOR CAPRA: That's for the record.  
13 For the record, that is noted.

14 JUDGE LIVINGSTON: It is, it's on the  
15 record. To Professor Capra, who is going to queue up  
16 our witnesses, and I think we're ready to begin.

17 PROFESSOR CAPRA: Thank you, Judge  
18 Livingston, and thanks very much for chairing today,  
19 and I want to especially thank Dan Collins for waking  
20 up today as it's 7:00 in the morning out there, so  
21 appreciate that, Dan.

22 And as we go to our first witness of the  
23 day, we wanted to -- and we appreciate all the  
24 witnesses. We had to make a quick change overnight.  
25 Jonathan Redgrave had some travel schedules. We'd



1 like to thank everybody for accommodating that. So  
2 I'm going to call on Jonathan Redgrave for testimony.

3 MR. REDGRAVE: Thank you. This is Jonathan  
4 Redgrave. For the record, I am a partner in Redgrave  
5 LLP in our Chantilly, Virginia, office, and I  
6 appreciate the opportunity to appear before the  
7 Committee to provide my testimony. I will be  
8 remarkably brief both because I submitted written  
9 comments and I am in an airport at the moment, and so  
10 I don't want to extend the time I'm testifying here.  
11 But I did want to ask that my written testimony, and  
12 in doing so I want to note for the record that, of  
13 course, these are my personal views, not necessarily  
14 those of my firm or any of its clients.

15 But my background in working on issues of  
16 electronically stored information and their  
17 implications for litigation, criminal and civil, spans  
18 more than a decade, far more than a decade in my  
19 experience as a lawyer, and when I saw these rules  
20 being submitted, it touched on something that I had  
21 long mused about and that was the abrogation of the  
22 ancient documents exception to the hearsay rule. I  
23 also looked with interest at the amended or the  
24 amendments to Rule 902 as they related to providing a  
25 streamlined way to allow for evidence to be introduced

1 into our court system. I commend the members of the  
2 Committee who proposed such changes.

3 Obviously, in looking at the public comments  
4 submitted to date, there have been a number of issues  
5 raised with respect to the proposed abrogation of the  
6 exception for ancient documents, and that's really  
7 what I just wanted to touch upon briefly in oral  
8 testimony today.

9 In particular, and I think Professor Capra  
10 in his article aptly identified both the genesis of  
11 the exception and how its application in today's world  
12 could, quite frankly, bring unintended consequences in  
13 allowing substantial amounts of information into  
14 evidence that were never contemplated in a world in  
15 which people are looking at paper records.

16 But more importantly and what struck me in  
17 looking at the number of comments was a serious  
18 concern and I'm sure the committee members are taking  
19 it seriously where individuals are concerned about a  
20 change that would have the effect of eliminating the  
21 availability of evidence coming into the courtroom for  
22 older documents of any genesis.

23 A number of comments was that business --  
24 information that certain businesses might have, but  
25 the same could be applied to government entities or to

1 individuals, I assume. I think the Committee in its  
2 proposed rule and the comments that I have read aptly  
3 identified the fact that there are alternative means  
4 by which reliable evidence, evidence that really has  
5 the indicia of reliability, there are other vehicles  
6 by which that information can and would walk into  
7 court. Evidence should have that reliability to be  
8 able to get through the hearsay rule, and there are a  
9 number of exceptions, and I know it's been developed  
10 by the Committee and I also reflected that in my  
11 written submission.

12 So while I think the concerns should be  
13 heard from all the people that have raised them, I  
14 think that the other avenues to allow evidence to come  
15 in do provide those ways in such a way that the  
16 abrogation of this rule will not impair the ability of  
17 individuals or corporations or anyone who seeks to be  
18 the proponent of evidence from being able to get that  
19 evidence into court as needed.

20 Again, I applaud kind of the sensibility of  
21 this because I do not believe that just because a  
22 piece of electronic information has been sitting  
23 around in a computer 20 years and a day it suddenly  
24 has a greater level of reliability as a piece of  
25 evidence from the standpoint of the hearsay rule such

1 that it should now walk into court without that date  
2 that it has to come over, and this is increasingly  
3 important when we think about the volumes of  
4 information that are sitting around in computers today  
5 everywhere. The legacy systems, in fact, President  
6 Obama was just talking about on the executive side for  
7 the government, the need for security purposes to  
8 start looking at legacy systems, legacy information  
9 because there's a lot of it around.

10 Well, that just reflects a reality of I  
11 think anyone who's been involved in small business,  
12 large business, or even our own personal lives. We  
13 have a lot of information that's electronically stored  
14 that is still around.

15 I think that Professor Capra's article  
16 really touched on the crux of this. The volumes here  
17 are so great that we just can't say let's wait several  
18 years down the road and see if a problem arises. I  
19 think the foresight of the Committee in addressing the  
20 problem now that I think is going to arise and I think  
21 is in front of us is smart, and I also believe, as I  
22 said before, I don't believe that there is a  
23 preclusive effect by abrogating this exception to the  
24 hearsay rule that would preclude individuals or  
25 corporations or whoever needs to use the evidence from

1 using the other hearsay exceptions, including the  
2 catchall exception, to be able to get evidence into a  
3 proceeding.

4 With that, I don't want to say anymore. I  
5 know there are other witnesses here who have their  
6 testimony to present. I'd be happy to address any  
7 questions the Committee has for me, but in closing, I  
8 again thank you for the opportunity. I greatly  
9 appreciate the entire way in which the Federal Court  
10 System runs and has for decades with respect to the  
11 Rules Enabling Act and how rules are promulgated and  
12 this opportunity for any individual to make a  
13 submission to you and provide you with comments on  
14 proposed rules. So, again, thank you for the  
15 opportunity.

16 PROFESSOR CAPRA: Jonathan, this is Dan  
17 Capra. I just have a couple questions that you  
18 haven't talked about that were in your submission if I  
19 could.

20 MR. REDGRAVE: Yes.

21 PROFESSOR CAPRA: Okay. So about the 902  
22 provisions, you think they are useful. I mean, would  
23 you use them in your practice? Is it going to help  
24 streamline litigation? Do you think that that's a  
25 real possibility?

1                   MR. REDGRAVE: I do, and I said in my  
2 written submission in August and October I focused on  
3 the issues of the tensions, but the 902 additions on  
4 13 and 14 I think will be available and will be used  
5 because of the fact that maybe people haven't actually  
6 walked through all of this yet. They haven't had a  
7 lot of ESI where they're trying to get it into  
8 evidence.

9                   PROFESSOR CAPRA: Yeah.

10                  MR. REDGRAVE: But you're actually really  
11 streamlining some processes that I've seen other  
12 people start thinking about and they're locked up.  
13 They're like, well, how are we actually going to get  
14 over this? You know, can we self-authenticate? How  
15 would this actually work? There's a lot of wasting.  
16 What do we actually do? So it's I think a valuable  
17 addition to add these subsections.

18                  PROFESSOR CAPRA: Okay. And then the other  
19 thing you had was about business records. Did you  
20 want to just speak a minute for that while we have you  
21 on the phone and before you take a plane?

22                  MR. REDGRAVE: Sure, I'd be happy to do that  
23 and I realize it's out of scope for this particular  
24 rule change.

25                  PROFESSOR CAPRA: Right. It's just for the

1 future and since we have you here I thought it would  
2 be useful, and you still have a few minutes.

3 MR. REDGRAVE: Sure, I appreciate that. And  
4 what I really wanted to do is highlight a concern that  
5 I think the Committee looking at the evidence rules  
6 should think about in terms of the business records  
7 because that exception to the hearsay rule, as Judge  
8 Grimm noted in the Lorraine case, has had inconsistent  
9 application, and by that, in my personal experience,  
10 I've had some courts that have walked through the  
11 actual predicate to the rule and they ask that they  
12 actually be met, and others have just assumed  
13 everything that was on a computer that was run by the  
14 company seemingly ought to be one big business record.

15 And if we go back to even the touchstone for  
16 this discussion on the ancient documents rule, we're  
17 looking for these indicia of reliability, and we're  
18 using the business records exception really loosely as  
19 a, you know, regularly conducted activities exception,  
20 but that really gets to the fact that I think just  
21 because something was recorded regularly on a computer  
22 because the computer software, whether it's Microsoft,  
23 Google or whatever, actually is recording a keystroke,  
24 that's not providing the indicia necessarily of the  
25 fact that the person entering it or, you know, the

1 system entering it, that that data necessarily was  
2 data that meets the other references of the business  
3 records concept that's embedded in the regular  
4 activity exception in 803(6).

5 And so what I'm suggesting is it's an area  
6 that should receive study. I think there's a great  
7 need for that because there's going to be questions  
8 that come up in time as time passes where you might  
9 very well need to have a better understanding of both  
10 how a proponent could walk into court for a business  
11 to establish it or how someone who needs to establish  
12 that something is a business record would do it, and  
13 you've also, you know, you've got in the rule the  
14 ability of qualified witnesses to provide that  
15 foundational layer to get through and establish  
16 something is properly within the scope of the  
17 exception.

18 I could discuss this all day, but I think  
19 the point that I raised in my submission was I think  
20 this is an important area because for the, again,  
21 extensive amount of electronically stored information  
22 that we generate and how it just proliferates in  
23 different ways that we can't even imagine today what  
24 we're going to see down the road, we should think of  
25 technology diagnostic ways to ensure that the rule



1 works as intended so we have the proper gatekeeping  
2 function, so to speak, to make sure that things that  
3 are coming in are what the rules makers, this body,  
4 actually intends to be the right way for the  
5 information to get through and be a proper exception  
6 to the hearsay rule. So that's really why I wanted to  
7 highlight that, but I appreciate that question.

8 PROFESSOR CAPRA: All right. Any other  
9 questions from the Committee?

10 JUDGE APPEL: Yes. Brent Appel. I'd just  
11 like to ask one question. You pointed out rightly and  
12 the Committee is well aware, of course, of Rule 807,  
13 which potentially at least would allow some of the  
14 ancient documents where there's really a demonstrated  
15 need to come in and not have some of the serious  
16 problems we've seen, but are you worried about  
17 inconsistent application of 807? 807 will tend to be  
18 a discretionary call, and there's some suggestion in  
19 the submissions that Judges are sometimes reluctant to  
20 use 807. So I'm just curious to hear your comments on  
21 how you think 807 would operate.

22 And then, secondly, briefly could you  
23 discuss Professor Capra's second alternative, which is  
24 to use the necessity language? Could you express some  
25 views on that, please?

1                   MR. REDGRAVE: Sure. On the first point,  
2 with respect to 807 and potential inconsistent  
3 application, I suppose I'm on dangerously thin ice in  
4 front of a few Judges to suggest that Judges would be  
5 inconsistent, but, of course, I think our experience  
6 bears out that Judges may have different views on the  
7 ways in which they're going to apply and interpret the  
8 rule.

9                   I don't think we can ever avoid that. I do  
10 think there are ways in which the Federal Judicial  
11 Center through education can ensure if there's a real  
12 concern about greater level of inconsistency about the  
13 application as well as other ways to educate, I would  
14 suggest that perhaps even with the rule amendment  
15 itself additional language in the comment could be  
16 added to reflect the need for Judges to provide  
17 serious consideration of 807 as a means by which  
18 documents that may have previously qualified under a  
19 now abrogated rule should at least be considered with  
20 the 807 factors.

21                   With respect to the second question you  
22 raised, and I think this is going back to what  
23 Professor Capra suggested in terms of additional ways  
24 in which the evidence might be introduced. I think  
25 when I looked at that I also thought of ways --

1                   PROFESSOR CAPRA: It was basically to take  
2 the necessity given from the residual exception and  
3 put it into 803(16).

4                   MR. REDGRAVE: Right.

5                   PROFESSOR CAPRA: So you had to show that it  
6 was necessary.

7                   MR. REDGRAVE: Right. As an alternative,  
8 right?

9                   PROFESSOR CAPRA: Yes, an alternative.

10                  MR. REDGRAVE: Yeah, I thought that, you  
11 know, thinking about it on the fly, the clean  
12 abrogation is, I think, the better way to approach the  
13 rule if I'm understanding the question correctly  
14 because I just believe you're going to be able to get  
15 through other means appropriately the evidence that is  
16 appropriate into the courthouse.

17                  PROFESSOR CAPRA: Okay. Any further  
18 questions?

19                  (No response.)

20                  PROFESSOR CAPRA: So, Judge Livingston,  
21 should I just call on the next witness?

22                  JUDGE LIVINGSTON: Yes. And let me thank  
23 Mr. Redgrave. This is very helpful, and thank you for  
24 taking the time this morning, particularly when you're  
25 in an airport.

1                   MR. REDGRAVE: No problem. I appreciate  
2 that. I will actually put this on mute for the  
3 remainder of time that I can stay right now. There  
4 are a number of other witnesses here that I'm  
5 interested, all the witnesses, hearing their testimony  
6 and appreciate that opportunity as well. Thank you.

7                   JUDGE LIVINGSTON: Thank you.

8                   PROFESSOR CAPRA: Thank the gentleman.

9                   Is Robert J. Gordon on the line?

10                  MR. GORDON: Yes, I am.

11                  PROFESSOR CAPRA: Okay. So you are next.

12                  MR. GORDON: Thank you very much, members of  
13 the committee and Professor Capra. I appreciate it.  
14 I'm actually out here in Phoenix where I've been  
15 waiting since January to speak with you, but I  
16 appreciate the opportunity when that was canceled to  
17 speak with you today. I will make my comments very  
18 brief as I have another appointment right now that  
19 initially 'til yesterday was actually supposed to be  
20 first, but that's no problem. I was happy to hear Mr.  
21 Redgrave's comments, and I have others behind me on  
22 the plaintiffs' side of the V who can speak better  
23 than I can on this, and as a litigator, I never like  
24 to say that, but I admit that here.

25                  I've been a litigator for 36 years. I was

1 an assistant district attorney in Philadelphia trying  
2 criminal cases under Ed Rendell from '80 to '84.  
3 During that time I was an adjunct professor at Temple  
4 University teaching the American jury system.

5 I then from 1984 began working with people  
6 who were building ships during World War II, and they  
7 were exposed to asbestos. They were dying of  
8 mesothelioma and lung cancer, and I had cases where,  
9 although they say the average latency -- sorry -- the  
10 minimal latency is 20 years, certainly the more  
11 average latency for these types of occupations related  
12 to diseases for asbestos was more commonly 30, 40, 50  
13 years. I had one who was 70 years post his initial  
14 exposure to asbestos who developed mesothelioma  
15 eventually.

16 And, of course, we then need to go back in  
17 all of those cases, and I've done this with other  
18 sources of chemicals that have long latency periods,  
19 where we would have to establish what was known and  
20 when it was known, whether the manufacturer knew or  
21 should have known of the dangers of placing that  
22 product in the stream of commerce at the time that  
23 they placed it in the stream of commerce, which is  
24 always, you know, in those cases always 20-plus years.

25 So, to accomplish that, we always rely on

1 ancient documents, and finding anyone who can go back  
2 and authenticate those documents is exceedingly  
3 difficult, if not impossible.

4 PROFESSOR CAPRA: Could you give us an --  
5 I'm sorry. Could you give us an example of the kind  
6 of document you would have to use in a situation like  
7 that?

8 MR. GORDON: Well, for example, some of the  
9 most famous documents involve the communications  
10 between the heads of a company called Raybestos-  
11 Manhattan and Johns Manville, other documents, and  
12 those were found in the attic of, I believe, Sumner  
13 Simpson's home in New Jersey many years later, and  
14 they were exactly documents about what testing was  
15 done, what they knew, what they wanted to do, what  
16 they wanted to hide, what they wouldn't let out in the  
17 public. It's the most critical smoking gun documents  
18 you could find.

19 PROFESSOR CAPRA: Why wouldn't they be party  
20 opponent statements?

21 MR. GORDON: They may not necessarily be  
22 party opponents. Oftentimes what we need to show is  
23 not what was known but what was knowable, and in order  
24 to prove what was knowable under cases like the  
25 progeny of George case out of the Second Circuit

1 was --

2 PROFESSOR CAPRA: Uh-huh.

3 MR. GORDON: -- that what was known at the  
4 time by others who were similarly situated.

5 So Johns Manville, who did the work to know  
6 that asbestos was going to kill people --

7 PROFESSOR CAPRA: Right.

8 MR. GORDON: -- did the work, and there was  
9 another company, and they're not part of it. Just a  
10 moment.

11 PROFESSOR CAPRA: Sorry?

12 MR. GORDON: Pardon me one moment. I was  
13 just thinking that I was due in court and I knocked my  
14 phone off.

15 The point was that it may not be a party to  
16 that actual litigation but what was known by other  
17 similarly situated manufacturers at the time because  
18 of Rule 803(16), and these documents were considered  
19 able to be self-authenticating.

20 In all my years of practice, in 36 years of  
21 practicing in many different types of courts, I have  
22 never heard of anyone attempting to defraud the Court.

23 Now I may be very limited there and the experts could  
24 prove me wrong, but I know a lot of people in the  
25 business for many, many, many years, almost four

1 decades, and I have not seen any allegations that  
2 there's been any increasing widespread fraud that's so  
3 great about this that we need to go, oh, my God, we  
4 have to come up with some other solution.

5 I am concerned and I appreciate that the  
6 role of these committees is to see problems before  
7 they arise, but I don't really understand. Mr.  
8 Redgrave's comments seem to be academic musings at  
9 this point and a concern for what may arise. But I  
10 believe at this time that this is a proposed solution  
11 in search of a nonexistent problem.

12 If indeed the electronic recordkeeping going  
13 forward means that this will eventually mean that it's  
14 not necessary to rely on these documents, great.  
15 That'll happen naturally. But not all documents are  
16 saved electronically and not all documents are  
17 discovered in electronic form.

18 Now, if there's been an explosion of 803(16)  
19 motion practice where federal judges are coming and  
20 saying we've got to get rid of this because they would  
21 have all this motion practice, I'd get it. My concern  
22 is exactly what was just raised by the Judge, the  
23 inconsistent application, the opportunity for  
24 inconsistent applications under Rule 807, which  
25 require "the rarest of circumstances" for that



1 residual exception.

2           They're very fact-sensitive regarding  
3 notice, necessity, materiality, and what that means is  
4 a guy in my position on my side of the V who has not  
5 just one case but potentially in mass tort litigation  
6 whole bunches of them, I need to know what I think is  
7 going to get into evidence before I get a decision so  
8 that I can get a realistic evaluation of the case, the  
9 defendant can get a realistic evaluation of the case,  
10 and we can settle these cases out of court, as 99.9  
11 percent of all tort cases do.

12           When you start to do this, I see this change  
13 to defense attorneys going to say, oh, let's fight  
14 this, let's fight that, let's not let this in, let's  
15 see how the Judges rule on that. You'll get different  
16 applications of 807 for the same documents in  
17 different Circuits, and it's going to result in more  
18 motion practice, exactly what I think the Judges would  
19 not want to be putting on their plates, and there will  
20 be more business records. We'll still have to try to  
21 search for business record custodians under the  
22 business records rule. It's going to be difficult,  
23 expensive, unnecessary, unnecessarily expensive when  
24 there's not been any claims for fraud.

25           So, in my view, let it die a natural course,

1 the ancient document rule, if it's not going to be  
2 reliable, but right now there is a clear need for the  
3 ancient document rule among my brethren who will speak  
4 after me, I'm sure, and there's no allegation of  
5 widespread or growing abuse of the rule. So, to me,  
6 if there's a need that we're telling you is critical  
7 to us and there's no problem out there that needs to  
8 be cured presently, I'm one of the guys that says "if  
9 it ain't broke, don't fix it" because I believe what  
10 you'll do is create more problems going forward for  
11 the federal bench.

12 PROFESSOR CAPRA: Thanks.

13 Questions from the Committee?

14 JUDGE APPEL: Brent Appel. The same  
15 question I asked the prior witness. So what about  
16 Professor Capra's alternative of adding a necessity  
17 requirement to the ancient document rule?

18 MR. GORDON: Again, unless I'm seeing what  
19 the problem is that you are trying to address, the  
20 current problem, if we're letting in documents that  
21 shouldn't be let in, that's a big problem. I agree as  
22 a litigator it's about the search for truth. I  
23 haven't seen that allegation on any sort of widespread  
24 basis.

25 PROFESSOR CAPRA: But you wouldn't have

1 trouble showing necessity for the documents you've  
2 referred to.

3 MR. GORDON: I don't believe so.

4 PROFESSOR CAPRA: But you need them and they  
5 can't be gotten in any other source, right?

6 MR. GORDON: I, of course, would never want  
7 to put in anything I didn't need or want, but I've got  
8 somebody on the other side of the V who's going to be  
9 saying, "Oh, no, it's not necessary. They can do  
10 this. They can do that." All that's going to do is  
11 say to me and to them we're going to have to go to  
12 court. We're going to have to go to court and we're  
13 not going to resolve this case until you know whether  
14 this what I consider to be very necessary document is  
15 coming in, and you don't want to settle on your side,  
16 Mr. Defendant, until you know whether that's going to  
17 be evidence that is not admitted into court and  
18 therefore you could knock out a whole tranche of  
19 evidence that flows from that and perhaps a whole  
20 tranche of cases and a whole litigation, and next  
21 thing you know we're going to be trying to resolve  
22 what is necessary, you know, between the people who --

23 JUDGE LIVINGSTON: So from your perspective,  
24 so from your perspective, adding a discretionary  
25 element that puts discretion in the hands of the

1 District Court is problematic for the reasons you've  
2 already stated. It makes it hard to know what proof  
3 you're going to be permitted to put into evidence,  
4 harder to settle cases beforehand.

5 MR. GORDON: Exactly, and more motion  
6 practice. Exactly.

7 PROFESSOR CAPRA: What do you think, Mr.  
8 Gordon, about some kind of grandfathering clause? In  
9 other words, going forward abrogating the exception  
10 but somehow seeking to retain the documents that are  
11 old as of today.

12 MR. GORDON: I understand where you're going  
13 with that and I appreciate it. Again, this Committee  
14 serves an important purpose, and the academic  
15 evaluation is necessary to make sure we don't get  
16 swept behind something. I'm not sure we're already at  
17 a point where we have the problem existing. Now could  
18 you just remind me again the question, again?

19 PROFESSOR CAPRA: Well, my question is let's  
20 just -- in other words, anything that's today --

21 MR. GORDON: Oh, oh, grandfather. My point  
22 being that I don't know how long my grandfather is  
23 going to live. When you have sunset provisions, I  
24 don't know are we talking summer, are we talking  
25 Daylight Savings Time. My point is I don't know when

1 those documents will -- when this need is going to  
2 end, but I think that there's always going to be one  
3 thing, this Committee, and this Committee can address  
4 that as we go forward, but, you know, this really is  
5 something no one is even using this anymore. Why  
6 don't we just now grandfather in? Let it die slowly  
7 rather than to try to euthanize this.

8 PROFESSOR CAPRA: Okay. Any --

9 MR. GORDON: That --

10 PROFESSOR CAPRA: Sorry, go ahead.

11 MR. GORDON: That's it. I'm sorry.

12 PROFESSOR CAPRA: Okay. Any further  
13 questions?

14 MR. KRAMER: This is A.J. Kramer. Could I  
15 ask you two -- they're kind of related -- in your  
16 submission you talk about that the basis for the  
17 admission are that they are considered trustworthy,  
18 and I'm curious why that is in 20 years a document  
19 becomes trustworthy?

20 And second of all, you say later on in your  
21 submission the documents are obviously reliable agent  
22 documents, and I wondering how that's determined.

23 MR. GORDON: Well, first of all, that goes  
24 back to a discussion about whether there should be an  
25 ancient documents rule ever in history. I mean, that

1 was a decision public policy wise that it was  
2 considered that people were not going to have the  
3 prescience to be knowing that they should be  
4 falsifying a document 20-plus years before that would  
5 be showing something that would be relevant in a  
6 lawsuit I guess in terms of liability, knowledge,  
7 causation, et cetera.

8           So, you know, and I recognize that you're  
9 with a federal public defender and this probably  
10 doesn't come up as much in your type litigations. I  
11 know it didn't when I was an assistant district  
12 attorney. But I think when you see these documents,  
13 you recognize that they're on their face self-  
14 authenticating. They still may be not relevant, et  
15 cetera, but if you see the type of documents I'm  
16 talking about, their relevance and authenticity to me  
17 is obviously clear.

18           JUDGE LIVINGSTON: This is Debra Livingston.  
19 Mr. Gordon, let me just ask. I understand you could  
20 say that with regard to ancient documents found in an  
21 attic that there are circumstantial guarantees and the  
22 fact that they were kept so long, that they're very  
23 much needed in the litigation. Do you have a concern  
24 about in an era of electronic-stored information where  
25 it's said commonly today that no one ever deletes

1 anything anymore because storage is so vast and so  
2 easy that we are permeated with electronic information  
3 that will age very quickly, and it will not be of the  
4 same sort of information, the same sort of  
5 circumstantial guarantees of reliability that sort of  
6 surround the ancient document exception when it was  
7 referring to hard copy documents? Is that a concern  
8 of yours?

9 MR. GORDON: I think that may be a concern  
10 going forward in terms of the Committee, and I am not  
11 an expert in electronic data saving. I am concerned  
12 that there may be hard copies of documents that exist,  
13 though, ultimately after electronic documents are not  
14 saved, and I don't believe necessarily that all  
15 documents will ultimately be saved in electronic form  
16 in a way that will be retrievable by plaintiffs,  
17 plaintiffs' attorneys.

18 JUDGE LIVINGSTON: Mm-hmm.

19 MR. GORDON: So I'm not saying that more  
20 study isn't needed. I'm saying I believe at this time  
21 with regard to this particular proposal to abrogate  
22 that it is premature at best.

23 PROFESSOR CAPRA: Anything further?

24 MR. COLLINS: This is Dan Collins. I had a  
25 quick question. The Advisory Committee notes that go

1 back to the adoption of this requirement note that it  
2 was similar in many respects to the California  
3 evidence code rule, but it noted that the California  
4 evidence code rule imposes an additional requirement  
5 that wasn't adopted, and that is that the statement  
6 has been since generally acted upon as true, having an  
7 interest in the matter. And the comments for that in  
8 California say the age of the document alone is not a  
9 sufficient guarantee of the trustworthiness that may  
10 be contained therein to warrant the admission of the  
11 statement into evidence. Accordingly, Section 1331  
12 makes it clear that the statement itself must have  
13 been generally acted as true for at least 30 years by  
14 persons having an interest in the matter.

15 What do you think of that kind of a  
16 requirement, and to your knowledge has that been a  
17 problem in the six years that that's been the law in  
18 California?

19 MR. GORDON: I do not practice in  
20 California. Are there others on the call who are from  
21 the plaintiff's side? I'm not sure.

22 PROFESSOR CAPRA: We can ask that as we go  
23 through it.

24 MR. GORDON: Yeah, yeah, yeah. I would just  
25 ask. I unfortunately am sort of at the end of my



1 timeline. I'm so sorry, but I thought I'd be done by  
2 8:15 or thereabouts.

3 PROFESSOR CAPRA: All right. We didn't mean  
4 to grill you. You're the first one from your side to  
5 speak, though.

6 JUDGE LIVINGSTON: Yes.

7 MR. GORDON: Right, exactly, and I have  
8 wonderful people behind me. I thank you so much for  
9 taking my testimony. If it would be all right for me  
10 to sign off at this point, I'll let them address that,  
11 especially with regards to the California question  
12 that was just asked by the committee member.

13 JUDGE LIVINGSTON: Thank you so much for  
14 your time this morning.

15 MR. GORDON: Thank you very much. I  
16 appreciate it.

17 PROFESSOR CAPRA: So we'll proceed to our  
18 next witness, William Rossbach.

19 MR. ROSSBACH: Thank you very much. Can you  
20 hear me? Am I coming through okay on my speakerphone?

21 PROFESSOR CAPRA: From my end you are.

22 JUDGE LIVINGSTON: Yes, you are.

23 PROFESSOR CAPRA: Yeah.

24 MR. ROSSBACH: Great. Thank you very much.  
25 Good morning, Judge Livingston and all of the other

1 members of the Committee. I greatly appreciate the  
2 opportunity to provide my comments here from Montana.

3 I'm a graduate of Yale and the University of  
4 Montana. I'm a member of the Board of Governors of  
5 the American Association of Justice and Public  
6 Justice, but these are my comments.

7 I live in Montana, but my practice is  
8 regional or even national. I've been counsel in  
9 litigation in eight or nine states, five federal  
10 districts, four Circuits and the U.S. Supreme Court.  
11 My practice has always been limited to science and  
12 medicine, environmental and technical-based  
13 litigation.

14 I submitted my comments and I was planning  
15 to kind of go through them, but because of the two  
16 prior comments and lots of questions being raised, I  
17 thought I might just kind of cut to the chase a little  
18 bit and try to address some of the things that have  
19 been brought up in the prior testimony, see how it  
20 matches up with my own sense of this.

21 First of all, as I submitted, I provided two  
22 examples out of my own practice which I think show the  
23 nature of the kind of documents that we're talking  
24 about, the importance to the litigation, the need for  
25 the litigation, and I think I kind of will segue from

1 that on the assumption that you've read my testimony.  
2 There's the Globeville ASARCO litigation and the  
3 Remington documents.

4 PROFESSOR CAPRA: I've got a question about  
5 the ASARCO. Those are being offered to show that  
6 ASARCO knew about a danger, isn't that correct? Is  
7 that correct?

8 MR. ROSSBACH: That's correct, and the point  
9 that I think you might be making is whether these were  
10 about admissions of a party opponent.

11 PROFESSOR CAPRA: No. No, I'm not. I'm  
12 making a different point. I'm saying that if they're  
13 offered for that ASARCO knew about a condition,  
14 they're not hearsay at all because they're offered for  
15 knowledge.

16 MR. ROSSBACH: But here they are because  
17 they were not all ASARCO documents. They were  
18 documents that were submitted by accountants, outside  
19 accountants, outside auditors.

20 PROFESSOR CAPRA: I understand that. That's  
21 why they might not be party opponent statements. But  
22 if you're offering it to prove knowledge of a  
23 condition, it's not hearsay at all.

24 MR. ROSSBACH: Well, it's also knowledge of  
25 the condition but also failure to act on the

1 condition.

2 PROFESSOR CAPRA: Well, but that follows  
3 from the first. In other words, they knew it and they  
4 failed to act, but the failed to act is just the  
5 inferences derived from other evidence. The fact that  
6 they -- well, I just wanted to know what you thought,  
7 whether that would be an argument that somebody could  
8 make, that you don't have to worry about the ancient  
9 documents exception because if you're offering it as  
10 evidence for knowledge it's not hearsay at all.

11 MR. ROSSBACH: Okay. Then that sort of  
12 brings me to another point, and I understand the  
13 concern that Mr. Redgrave raised, is that there are  
14 other, and this is something that comes out of the  
15 Reporter's comments, is that there may be other ways  
16 of getting these in, and I think I'll follow up with  
17 what Mr. Gordon says, is that the riff is that there  
18 will be inconsistent application. There will be  
19 differences of opinions among courts.

20 The current rule provides certainty and  
21 security to be sure that you get these documents in.  
22 They're not disputed. And the point I think that I  
23 made in my presentation is that all this is is a rule  
24 of admissibility. The credibility of it, the jury's  
25 acceptance of these documents are all items that can

1 be argued in front of the jury.

2 There's a recent case in fact interestingly  
3 enough that comes out of the International Association  
4 of Defense Counsel. I've been doing some additional  
5 research. And there's a David Schaeffer article in  
6 August of 2014 that references a Kentucky Appellate  
7 Court case, McGuire v. Lorillard. I can provide the  
8 cite. That basically allowed the documents in, and  
9 the Court said, well, and this was submitted by  
10 defense counsel, and the Court specifically said the  
11 plaintiff had ample opportunity to contest the  
12 documents, to argue about their reliability, to argue  
13 about who said what, when, and where, and how credible  
14 those documents could be.

15 PROFESSOR CAPRA: But that's true of any  
16 hearsay that's ever admitted. I mean, if you were to  
17 admit every hearsay document in the world --

18 MR. ROSSBACH: I agree, but that's --

19 PROFESSOR CAPRA: -- the other side can make  
20 an argument about it.

21 MR. ROSSBACH: I agree, but if you go to --  
22 this is where I harken back, and I think I addressed  
23 it in my comments, is that the Rule 803 exceptions,  
24 every single one of them has sort of a blend of  
25 necessity and circumstantial evidence, and the

1 circumstances indicate trustworthiness, and this goes  
2 back to Wigmore. I went back since the time that I  
3 submitted these comments, Wigmore, McCormick, et  
4 cetera. There's also an interesting article in 1930  
5 from a Texas Law Review that says each one of those  
6 exceptions to 803, and it's not just (16), is some  
7 combination of necessity and circumstances. In some  
8 cases the necessity is stronger, in other cases the  
9 necessity is less, but the circumstances of  
10 reliability are more.

11 And what I said in my comments is is that if  
12 you wanted to drill down and go through all of those  
13 hearsay exceptions in 803, each one of them has some  
14 question about them, but they've all been relied on.  
15 They're venerable. Courts have used them. They're  
16 not disputable in terms of inconsistent application.

17 I guess then I wanted to address the  
18 grandfather issue and basically come down to my bottom  
19 line point. I totally agree with the Reporter and the  
20 Advisory Committee memorandum. ESI is a problem. ESI  
21 needs to be dealt with. We have the Sedona  
22 Conference. There's many experts in the field of ESI.  
23 But I don't think that a total abrogation of Rule  
24 803(16) is the answer to dealing with the ESI problem.  
25 ESI and ancient documents, they're not just apples and

1 oranges, it's animals and fruit. ESI are essentially  
2 malleable, mutable. There's no such thing as a hard  
3 copy. Every time you open a document or move a  
4 document you've added something to the metadata.

5           Again, I'm not an expert in this, but, to  
6 me, trying to -- I think it's, and as I said in my  
7 notes, I think what we need to do is find a way, and I  
8 think you used the term "carveout", basically say this  
9 rule does not apply to ESI.

10           Now I understand the Reporter, you've raised  
11 some issues about how do we deal with ESI. Well, it  
12 seems to me that we have many experts in this area,  
13 the Sedona Conference, for example. If we sat down  
14 and put together a subcommittee to deal with ESI and  
15 focus on the evidentiary issues of ESI that we would  
16 be able to come up with language which would be able  
17 to carve it out, you know, whether it's -- I'm  
18 uncomfortable talking about hard copy and printouts  
19 and all of that. Certainly those are issues, but  
20 those are drafting issues.

21           I don't believe that we need to abrogate a  
22 rule that's been in existence for more than 100 years,  
23 that has been widely accepted, that is rarely used,  
24 and that provides consistency and certainty in  
25 litigation, and that it has the attributes of

1       trustworthiness because of its age, because at the  
2       time these documents were made there was no reason to  
3       fabricate or prevaricate about what the declarant was  
4       saying.

5               And so, in that case, they are really no  
6       different from many of the other -- many of the  
7       excited utterance, present sense impression, all of  
8       those are things that we are making certain value  
9       judgments about their reliability based upon the  
10      circumstances of when they were set. I think it's the  
11      same here.

12             In terms of, let's see, what other -- oh,  
13      the California. Judge Collins raised the issue of the  
14      California -- whether the California language about  
15      proof that it had been acted on. The problem with  
16      that is this. For example, in my ASARCO case, these  
17      documents were 80 years old. Some of them were --  
18      yeah, basically 80 years old at the time, now they're  
19      almost 100 years old. Those documents were found in  
20      boxes from ASARCO, addressed to ASARCO from outside  
21      accountants and auditors, and then some internal  
22      documents. Whether or not they were acted on would be  
23      very, very difficult to prove.

24             PROFESSOR CAPRA: Well, isn't the whole  
25      point that they weren't acted upon? I mean, isn't



1       that your whole point?

2                   MR. ROSSBACH: Well, presumably they may  
3       have been. There was some response to it, but what we  
4       were trying to show is that the cadmium, arsenic, et  
5       cetera, was coming from them and that they knew that  
6       there was a problem, and how much they had acted on  
7       it, it was less important because the fact of the  
8       matter was that in our neighborhoods we had cadmium  
9       arsenic at elevated levels, and one of the issues was  
10      where it came from, and ASARCO was actually even  
11      arguing that some of it was baseline.

12                   So, you know, there's different reasons that  
13      those documents were used, but the point I'm making is  
14      is that how they were acted on creates maybe even a  
15      more insurmountable problem than some of the other  
16      issues.

17                   You know, I don't have a problem with  
18      drafting a rule that's appropriate to ESI. I think  
19      it's a problem that's coming. I think I would agree  
20      that in some ways it may be a ticking time bomb, but  
21      the problem for me is is that total abrogation of  
22      803(16) without substantial justification at this  
23      point and not finding a way of dealing with ESI on a  
24      separate basis I think is in fact, as the quote comes  
25      from the Reporter, is it's a radical departure. It's

1 a radical solution. I think there are other ways of  
2 doing it, and I strongly urge the panel to keep  
3 803(16) exactly the way it is. I don't think you need  
4 to add the necessity component to it because that's  
5 part of the rule. Every one of the 803 exceptions  
6 essentially implies need.

7 If you look at Wigmore, if you look at  
8 McCormick, if you look at Wicks, if you look at the  
9 Advisory Committee notes themselves, Professor Mueller  
10 and Kirpatrick's notes from the report, every one of  
11 them say there's two essential elements of every  
12 single one of these 803 exceptions: lead, one, and  
13 circumstances indicating trustworthiness.

14 So I think that, you know, tinkering with  
15 803(16) is not the solution. Finding a solution to  
16 ESI, a separate, entirely distinct solution for ESI  
17 because it is different. ESI aren't documents. ESI  
18 are basically collections of digital, you know, X's  
19 and O's basically in combination to create digital  
20 information. I think they need to be dealt with  
21 separately, and I think we're smart enough, I think  
22 the members of this panel or creating a separate  
23 subcommittee, a task force to look into what do we do  
24 with ESI in terms of an evidentiary rule, I think we  
25 can come up with that. I'm confident that there is a

1 solution to ESI that doesn't entail abrogation of  
2 803(16).

3 PROFESSOR CAPRA: Thank you.

4 JUDGE LIVINGSTON: Thank you, Mr. Rossbach.

5 PROFESSOR CAPRA: Questions from the  
6 Committee?

7 (No response.)

8 PROFESSOR CAPRA: Okay.

9 MR. ROSSBACH: I don't know if that's good  
10 or bad.

11 JUDGE LIVINGSTON: No, your testimony is  
12 very helpful, and the explanation in the written  
13 submission was very clear on the stand of Mueller and  
14 Kirpatrick.

15 MR. ROSSBACH: Okay. Thank you. You know,  
16 and I made some comments somewhat denigrating  
17 Professor Capra, but it's not the issue.

18 PROFESSOR CAPRA: I don't feel denigrated.

19 MR. ROSSBACH: To me, the issue is that --

20 PROFESSOR CAPRA: Not at all.

21 MR. ROSSBACH: Okay. I don't think they  
22 were -- I mean, we could argue that every single one  
23 of the 803 exceptions was wrong or based on a false  
24 premise. I just think that 803(16) is really no  
25 different at bottom from many of the other 803

1 exceptions. And so why start radically abrogating one  
2 rule when we have a separate and distinct problem with  
3 ESI? I concede that. We need to deal with ESI on its  
4 own merits. Thank you.

5 PROFESSOR CAPRA: Thank you.

6 JUDGE LIVINGSTON: Thank you.

7 PROFESSOR CAPRA: Judge, shall we proceed to  
8 the next witness?

9 JUDGE LIVINGSTON: Yes.

10 MR. ROSSBACH: Excuse me, but I'm also  
11 suffering from travel constraints, so I may not be  
12 able to stay on very long myself. Thank you again for  
13 giving me the opportunity.

14 PROFESSOR CAPRA: Thank you.

15 JUDGE LIVINGSTON: Thank you very much.

16 PROFESSOR CAPRA: We now go to Lance  
17 Pomerantz.

18 MR. POMERANTZ: Yes. Hello?

19 PROFESSOR CAPRA: Hello.

20 MR. POMERANTZ: Hello, can you hear me?

21 PROFESSOR CAPRA: I can hear you.

22 JUDGE LIVINGSTON: Yes.

23 PROFESSOR CAPRA: You're good.

24 MR. POMERANTZ: Okay. I'm a little unsure  
25 about the mute button on my phone. I apologize.

1           My name is Lance Pomerantz. I'd like to  
2           thank the Chair and the Committee for the opportunity  
3           to testify today. My perspective on this is a little  
4           different, in fact, I think significantly different  
5           than any other of the submitted comments. I did, by  
6           the way, submit comments to the Committee. I hope the  
7           Committee has had the opportunity to read through  
8           them.

9           First, a little bit about my background.  
10          I'm an attorney in private practice up in New York. I  
11          focus entirely on land title law, and I've been  
12          litigating in both state and federal courts for about  
13          35 years as an advocate but also as an expert witness,  
14          again, in land title cases. I also maintain a  
15          litigation consulting practice which is nationwide in  
16          scope both on the federal and state levels.

17          I currently hold committee appointments with  
18          the New York State Bar Association, Suffolk County Bar  
19          Association, American Land Title Association, and the  
20          New York State Land Title Association, but I want to  
21          stress that my comments today are entirely my own and  
22          do not reflect, necessarily reflect any of those  
23          organizations or any of my clients.

24          My perspective on this is from the viewpoint  
25          of someone who is concerned about proof of title in

1 land title cases, and as I pointed out in my written  
2 comments and echoes the Committee's findings, one  
3 uncontroversial point about the 803(16) exception was  
4 that it was originally intended to cover property-  
5 related cases to ease proof of title and that in fact  
6 it was expanded over time both through the rulemaking  
7 process as well as through court rulings to apply to  
8 other forms of evidence in cases having nothing to do  
9 with land title litigation. And I'm very concerned  
10 that a complete abrogation which does not take into  
11 account the traditional role of the rule in these  
12 kinds of cases could have many unintended consequences  
13 that would really hobble litigators who are involved  
14 in trials of these kinds of matters.

15 I did point out in my written comments,  
16 which I will just quickly echo here, which is the fact  
17 that the fact that there isn't a flood of reported  
18 cases or even obvious motion practice concerning the  
19 applicability of this rule in these kinds of cases  
20 should not be taken as evidence of its invalidity or  
21 lack of vitality. I think it is something that comes  
22 up so regularly and basically passes without remark by  
23 either party because it is so firmly embedded into the  
24 trial of land title matters. I don't know if you  
25 would like me to continue.

1                   PROFESSOR CAPRA: No. I mean, whatever you  
2 want.

3                   MR. POMERANTZ: My written comments really  
4 summarize my position on this, and I'm happy to take  
5 questions from the Committee.

6                   PROFESSOR CAPRA: Okay. Thank you.

7                   Any questions from the committee members?

8                   JUDGE APPEL: Yes. Brent Appel here. Tell  
9 us your view about 807 and how that would relate to  
10 what are currently ancient documents. I can tell you  
11 I've looked through our Iowa cases. We do have a  
12 couple that deal with land titles. One allowed an  
13 ancient plat into evidence, but wouldn't that come in  
14 under 807 or what are your concerns?

15                   MR. POMERANTZ: Well, that's very possible.

16 I've seen both from my perspective and from the wider  
17 perspective involving the toxic torts and the various  
18 other matters that many of the other witnesses are  
19 concerned about this approach of, well, what about  
20 other exceptions? Couldn't things come in under other  
21 exceptions? And in many, many cases, even focusing  
22 only on land title disputes, yes, obviously there are  
23 many situations where other exceptions to the hearsay  
24 rule might allow a particular piece of evidence to be  
25 admitted.

1           The real discussion I think, the real debate  
2 here only really focuses on those marginal cases where  
3 no other hearsay exceptions are applicable or other,  
4 you know, non-hearsay determinations are applicable.  
5 The only time the ancient document rule really matters  
6 is when there is no other way to get it in.

7           And as far as your question specifically  
8 about 807, I'm concerned that using 807 in these sort  
9 of marginal cases could be perceived by trial court  
10 judges, and probably rightly so, as imposing a higher  
11 standard of reliability than 803(16) requires, and I  
12 think it would lead to a lot of needless motion  
13 practice and, quite frankly, maybe even the rejection  
14 of otherwise reliable and irreplaceable evidence that  
15 we don't have to deal with under the currently  
16 existing regime.

17           PROFESSOR CAPRA: Well, you know, I guess  
18 the easiest hearsay exception would be all hearsay is  
19 admissible. Then you wouldn't have any motion  
20 practice, right?

21           MR. POMERANTZ: Well, if the --

22           PROFESSOR CAPRA: The question is where you  
23 draw the line.

24           MR. POMERANTZ: No, I understand that. I  
25 mean, if the Committee, you know, feels that it should



1 go in that direction, that's another debate that we  
2 would have. But I think that the history of the  
3 ancient documents exception within the context of land  
4 title litigation is very firmly established. I mean,  
5 there are cases that go back to the 1600s in England  
6 that talk about the reliability of various ancient  
7 documents.

8 Now, to be fair, many of those cases do  
9 involve documents that would come in under other  
10 exceptions within the current modern-day regime, but  
11 my underlying point is that the need for ancient  
12 documents to come in in land title disputes has been  
13 recognized literally since ancient times and has been  
14 continually recognized over time both subsequent in  
15 the everyday context and even in the more formal  
16 context, such as the Federal Rules of Evidence, such  
17 as the changes made to the Uniform Rules of Evidence,  
18 you know, to bring them in line with the Federal Rules  
19 in the early '70s.

20 I am expressing no opinion as to the policy  
21 choices that pertain to the toxic tort and the other  
22 cases that I realize people are very concerned about.

23 PROFESSOR CAPRA: It would be very useful to  
24 get your comment because, you know, the land title I  
25 guess part of this is one that is an interesting thing

1 to think of and how to deal with that as a part of it,  
2 and it's the only comment that I think we received  
3 that focuses on that problem, so it's been very  
4 useful.

5 MR. POMERANTZ: Right. Well, I'm glad to  
6 hear you say that because that was my primary point,  
7 to get the Committee to focus on, in fact, its own  
8 observations and its own conclusions concerning the  
9 origin --

10 PROFESSOR CAPRA: Yeah.

11 MR. POMERANTZ: -- of the rule and the need  
12 for the rule in these kind of cases. And I would  
13 conclude by saying that regardless of what the  
14 Committee decides concerning the rule in connection  
15 with ESI and these other types of cases, I think  
16 whatever the final result is, whether it's doing  
17 nothing or whether it's some sort of modification of  
18 the rule, that the Committee's final determination  
19 should take into account the fact that this is  
20 critical from the land title perspective and its use  
21 in that context should be preserved.

22 PROFESSOR CAPRA: Thank you.

23 MR. POMERANTZ: Thank you.

24 JUDGE LIVINGSTON: Thank you very much.

25 PROFESSOR CAPRA: Any further questions?

1                   MR. COLLINS: Mr. Pomerantz, this is Dan  
2 Collins. I'd be curious to get your reactions to the  
3 suggestion that Professor Capra raised earlier about  
4 grandfathering. Would the concerns that you have be  
5 satisfied if the abrogation were made prospective only  
6 to documents created after today?

7                   MR. POMERANTZ: That's something that I was  
8 sort of intrigued by when Professor Capra mentioned it  
9 a few minutes ago. I haven't really been able to  
10 digest it in the context of this call. It's something  
11 that I might consider. I think that this is less of  
12 an issue now from my perspective for going forward  
13 from here, but at this point I can't sign off, you  
14 know, one way or the other, but I think it's something  
15 that's worthy of consideration.

16                  PROFESSOR CAPRA: Could you say why? I'm  
17 sorry. Could you say why it's less of an issue? Is  
18 there something electronic or something that's going  
19 to change going forward in your practice?

20                  MR. POMERANTZ: Well, I think that many  
21 of -- I can only speak from experience and, again, the  
22 extreme marginal cases where the only exception is the  
23 ancient documents exception have tended to be really  
24 unusual matters.

25                  PROFESSOR CAPRA: Uh-huh.

1           MR. POMERANTZ: In fact, in my written  
2           comments, I specifically talk about a captain's log  
3           from a 19th century whaling vessel that proved to be  
4           the critical link in the chain that would otherwise  
5           have been inadmissible.

6           PROFESSOR CAPRA: You're probably not going  
7           to see much more of that, I assume, right?

8           MR. POMERANTZ: I'm sorry?

9           PROFESSOR CAPRA: You're probably not going  
10          to see many more cases like that, the captain's log.

11          MR. POMERANTZ: Well, I think part of where  
12          I'm going with this, and I'm sort of thinking as I'm  
13          speaking, is that so many more things nowadays and  
14          let's just say within the last, I don't know, several  
15          decades have become so much more routinized. Things  
16          like captains' logs now are clearly kept in a much  
17          more routine way and a much more formalized way so  
18          that they would clearly be things like business  
19          records, et cetera.

20          PROFESSOR CAPRA: Right.

21          MR. POMERANTZ: Things like family Bibles  
22          are clearly admissible under other exceptions. That's  
23          another area that pops up quite a bit in my practice.

24          I freely admit that the number of situations even now  
25          where this particular exception is critical are very

1        few and far between, but as I point out in my written  
2        comments, one of the issues that I am constantly  
3        dealing with from a strategic perspective is the so-  
4        called known/unknown where there's always going to be  
5        something that's going to pop up of a certain vintage,  
6        but we can't predict what it is.

7                    I think that the chance of that happening  
8        going forward is probably even less than it's been  
9        historically, which is why a grandfathering might be  
10       something I would consider, but again, I have to  
11       reserve my final comment on that until I've had a  
12       chance to digest the implications.

13                    PROFESSOR CAPRA: Thank you.

14                    JUDGE LIVINGSTON: Thank you so much for  
15       your testimony.

16                    MR. POMERANTZ: You're quite welcome. Thank  
17       you.

18                    PROFESSOR CAPRA: The next speaker is David,  
19       do I have this right, Romine?

20                    MR. ROMINE: Yes, you do, Professor. Thank  
21       you.

22                    PROFESSOR CAPRA: Okay, thanks. Go ahead,  
23       David.

24                    MR. ROMINE: Sure. Thank you to the  
25       committee members and Professor Capra. I think I'm

1 not going to go through my written submission which I  
2 hope you've had a chance to look at.

3 I agree with Professor Capra's article that  
4 the first witness talked about. I guess in terms of  
5 the facts, I disagree with the conclusions that  
6 Professor Capra comes to. I think that the ancient  
7 documents exception to the hearsay rule is good. We  
8 need it. We shouldn't eliminate it absent a showing  
9 that it's causing problems now.

10 The preliminary draft shows no cases where  
11 there was obviously unreliable evidence that was  
12 admitted because the Judge's hands are tied by an  
13 unnecessarily lax rule of admission, and we can't  
14 extrapolate from that that there will be unreliable  
15 evidence admitted under the ancient documents  
16 exception even for ESI.

17 And my third and final point absent  
18 questions is I do have confidence in the ability of  
19 federal Judges to determine what's reliable and what's  
20 unreliable. I couldn't find any cases where ESI was  
21 proffered as an ancient document. I'm sure there will  
22 be, as Professor Capra predicts. But, you know, the  
23 Judges are smart and they can distinguish between  
24 reliable and unreliable evidence. I can't predict  
25 what the doctrinal basis will be from case to case,

1 but our Judges will succeed in letting in reliable ESI  
2 evidence as ancient documents, and they will exclude  
3 unreliable ESI evidence not in spite of the ancient  
4 documents rule but because.

5 The looming problem, and I agree there's a  
6 problem, but the looming problem is not like a natural  
7 disaster that we have to build a wall or take  
8 emergency measures for an earthquake. These decisions  
9 are all decisions made by federal Judges, and their  
10 hands are not tied and they can make the right  
11 decision with or without ESI.

12 So, with that, you know, not to belabor any  
13 points that were made well by the previous witnesses,  
14 I'll stop and, you know, invite questions from the  
15 Committee.

16 PROFESSOR CAPRA: Any questions from the  
17 Committee?

18 JUDGE LIVINGSTON: This is Debra Livingston.  
19 Given your comments, I mean, what would be the  
20 particular concerns with reliance on the residual  
21 exception? It's history, inconsistent application,  
22 what we've heard before this morning.

23 MR. ROMINE: Right. I guess the main  
24 concern that I have with the residual exception is  
25 that Judges don't like it, and I think I put in my

1        comments that I could find only one case where a  
2        member of the Committee, you know, proved or admitted  
3        evidence on it, and Judges just don't like the  
4        residual exception. And even where a document or a  
5        piece of ESI I suppose is reliable, I think that some  
6        Judges and many litigators kind of roll their eyes  
7        when something's proffered under the residual  
8        exception, and rightfully so, because it's viewed as a  
9        last resort.

10                    And so I think with the residual exception  
11        things that are reliable aren't going to get in just  
12        because it's such a high standard. And the other  
13        thing that was, I think, raised by Judge Appel  
14        earlier, I can't remember, is that there will be  
15        inconsistent application of ancient documents under  
16        the -- if the -- I'm sorry. There will be  
17        inconsistent application under the residual exception  
18        if the ancient documents exception is abrogated. I  
19        don't see that as quite a big problem as the fact that  
20        it's such a high standard.

21                    JUDGE LIVINGSTON: Mm-hmm.

22                    PROFESSOR CAPRA: Any other questions?

23                    (No response.)

24                    PROFESSOR CAPRA: Are we ready to move on,  
25        Judge Livingston?



1 JUDGE LIVINGSTON: I think so. Thank you  
2 very much for your testimony.

3 MR. ROMINE: Thank you very much, and with  
4 your permission I'll sign off.

5 PROFESSOR CAPRA: Thank you.

6 JUDGE LIVINGSTON: Thank you.

7 MR. ROMINE: Thank you.

8 PROFESSOR CAPRA: The next witness is  
9 Annesley DeGaris. Is that pronounced correctly?  
10 Annesley DeGaris? Have we lost him?

11 MR. DeGARIS: No, I'm sorry. I had my  
12 button on mute.

13 PROFESSOR CAPRA: Oh, okay.

14 MR. DeGARIS: And I was trying to take the  
15 mute button off. I am actually traveling towards  
16 Virginia. So, if there's any residual noise,  
17 background noise, I apologize.

18 PROFESSOR CAPRA: You're saying you're in a  
19 car right now? Is that where you are?

20 MR. DeGARIS: I am in a car right now and  
21 I'm taking my two older children to explore the  
22 advantages of schools in Virginia.

23 PROFESSOR CAPRA: Oh, that's great.

24 MR. DeGARIS: And so we're heading to  
25 beautiful Richmond.

1           PROFESSOR CAPRA: Well, you're the first  
2 person in the history of Evidence Rules Committee  
3 testimony that's testified from a car, so you should  
4 be very proud of yourself.

5           MR. DeGARIS: Exactly, and I think, I don't  
6 know if this will be admissible in court, but maybe  
7 it's just my life I think is speeding right now.

8           But I'd like to thank Judge Livingston and  
9 other members of the Committee for the opportunity to  
10 testify. Probably a little bit different perspective  
11 than some. I was a District Court law clerk for a  
12 fine federal Judge down in Alabama, had the  
13 opportunity to clerk in the Eleventh Circuit Court of  
14 Appeals, and I have taught constitutional law for  
15 about 17 years in various places, and I'm also a -- I  
16 guess what would sometimes in search that is a  
17 derogatory term nowadays a mass tort lawyer, and the  
18 majority of my cases are mass torts, which, as you  
19 would expect and know, involve massive amounts of ESI  
20 information.

21           And in my comments, which were brief, and  
22 I'm not going to go through everything that I said  
23 earlier in the comments submitted, but I would, you  
24 know, ask Judge Livingston and the committee members  
25 to look at my comments if they have an opportunity and

1 realize that, in my opinion, the abrogation of the  
2 rule, the total abrogation is a mistake.

3 And so I approached my comments kind of in  
4 the vein that change was likely to occur and so rather  
5 than abrogation, I submit that all the problems that  
6 have been raised by Professor Capra and others could  
7 be addressed with very minor changes to the rule.  
8 And, of course, in my comments, I quote and rely  
9 heavily on the comments by Professor Peter Nicholas in  
10 the article that he published, and he again said that  
11 -- I quoted him in my comments again, that abrogating  
12 this rule is the equivalent of using a sledgehammer to  
13 kill a gnat.

14 Again, coming from the deep South, I like  
15 little common quotes like that, and I do think,  
16 though, it illustrates just how overreaching and I  
17 think unnecessary a complete abrogation of this rule  
18 is. And again, if all the people that will be  
19 considering what to do haven't read Professor  
20 Nicholas' article, it's called "Saving an Old Friend  
21 From Extinction: A Proposal to Amend Rather Than to  
22 Abrogate the Ancient Documents Hearsay Exception."

23 PROFESSOR CAPRA: It's been submitted. It's  
24 been submitted by the Professor as a public comment.  
25 We've read it.

1           MR. DeGARIS: I assumed it had, and I think  
2 also the comments of Professor Roger Park have also  
3 been submitted and I know the New York Bar letter has  
4 also been submitted.

5           I argue, and because I don't want to be  
6 duplicative of what's in the Professor's article, I  
7 argue against abrogation and for amendment and  
8 specifically point to the things that the Professor  
9 raised in his article. I just think that when we look  
10 to modify or reject or make changes to long-  
11 established rules, you know, again, coming from my  
12 background, working closely with Judges, does it  
13 fairly promote the administration and interest of  
14 justice, and I'm not sure that the abrogation of this  
15 rule does.

16           I, again considering my background, I trust  
17 Judges, as the previous commentator said on this call,  
18 to make the right decisions on the admissibility of  
19 evidence. I think they are the proper gatekeepers,  
20 and you're actually taking away, I think, some  
21 judicial discretion by completely abrogating these  
22 rules, and I'm concerned about, you know, what will  
23 happen to certain ESI documents at some point that may  
24 not be admissible or may be more difficult or will  
25 create a lot of, you know, additional motion practice,

1       which federal courts are inundated with it now and I  
2       know the Judges would acknowledge that.

3               And I would just argue that there are so  
4       many ways to shore up the trustworthiness  
5       requirements. I think Dr. Park, Professor Park  
6       suggested just adding a phrase, "unless it lacks  
7       trustworthiness", just add that to the rule, then you  
8       likely address it and given Judges definite direction  
9       on examining the rule and examining admissibility,  
10      which, you know, I think that would cover any  
11      questions or concerns that exist again as far as ESI  
12      goes.

13              And so again I guess in some of my comments,  
14      there's been so much said already I don't want to  
15      reiterate what other people have said, but my comments  
16      are basically in favor. If you're going to take some  
17      action on this, I would argue that there are plenty of  
18      amendments that can be made rather than just complete  
19      abrogation of the rule.

20              PROFESSOR CAPRA: Thank you.

21              Any questions from the committee members?  
22      Well, I should add, or liaisons, if there's any  
23      questions from anybody on the call.

24              JUDGE LIVINGSTON: This is Debra Livingston.

25      Let me thank you for your comments, which I have

1 reviewed, and they're very helpful, and for the  
2 endorsement of Professor Nicholas' article. I have to  
3 ask you, where are you from in the South?

4 MR. DeGARIS: I am from Birmingham, Alabama.

5 So for all the football fans on the call I've just  
6 got to say "roll tide", and it's probably a phrase  
7 that has also never been uttered, so I've got two  
8 firsts: from a car and injecting football into  
9 something that is otherwise considerably more  
10 important matters, but I am from Birmingham, Alabama.

11 That's my home, and after I worked several places,  
12 lived overseas for a year, ended up back down here.

13 JUDGE LIVINGSTON: Well, I had to say  
14 because I was born in Waycross, Georgia, and I went to  
15 fourth grade in Birmingham, Alabama.

16 MR. DeGARIS: Well, listen, I'm a very much  
17 -- I'm not a xenophobe, but I like the South. You  
18 know, I lived overseas, I lived here and there, and  
19 it's a good place, and every time my friends from up  
20 North, which is a lot of the lawyers that I deal with,  
21 come down here, they get a different perspective, and  
22 having recently spent some time in New Jersey, I have  
23 a different perspective on my own stereotyping of  
24 different regions of the country. I went to a little  
25 town outside of actually Newark of all places, and I

1 thought I was in a Norman Rockwell town, a southern  
2 town of the '50s the people were so nice. So it's  
3 glad to know that there's another southerner on the  
4 call.

5 MALE VOICE: More than one.

6 MR. DeGARIS: Oh, we got. Good. Good.

7 JUDGE LIVINGSTON: Thank you so much for the  
8 testimony.

9 MR. DeGARIS: Thank you for the opportunity.

10 PROFESSOR CAPRA: Drive safely.

11 MR. DeGARIS: Thank you.

12 JUDGE MARTEN: If I could for just a moment.

13 This is Tom Marten from Wichita, and I was wondering,  
14 what Judge did you clerk for in Alabama?

15 MR. DeGARIS: I clerked for the Honorable  
16 E.B. Holton. He was a candidate for lieutenant  
17 governor and very involved in Democratic politics, and  
18 a guy that people on this call probably know, Howell  
19 Heflin was a very powerful and influential Senator  
20 from Alabama. In fact, unfortunately, most people may  
21 know him, one time he was in a committee hearing and  
22 pulled out his handkerchief out of his coat pocket to  
23 wipe his nose and he had unfortunately grabbed a pair  
24 of his wife's undergarments instead of a handkerchief  
25 and was using it to wipe his nose. But he was a very

1 powerful Judge and appointed E.B. Holton, Jr. was his  
2 name, to the bench. He was a Carter appointee in the  
3 '80s.

4 JUDGE MARTEN: Well, the reason I ask is  
5 because my significant other is Judge Sharon Lovelace  
6 Blackburn of the Northern District.

7 MR. DeGARIS: Oh, I love Judge Blackburn.  
8 So that's interesting. Yes, I know her quite well.

9 JUDGE MARTEN: Well, it's a pleasure to hear  
10 from you. Thank you.

11 MR. DeGARIS: Yes, sir, thank you.

12 PROFESSOR CAPRA: Thank you. We'll proceed  
13 to the next witness, who is Mark Weingarten.

14 MR. WEINGARTEN: Yes. Good morning, Judge  
15 Livingston, members of the Committee. I appreciate  
16 this opportunity to offer these oral comments in  
17 supplementation of the written submission that I have  
18 already sent in.

19 I am a partner in the Locks Law Firm,  
20 primarily in our Philadelphia office. I represent  
21 injured men and women and only injured men and women  
22 and have been doing this for just a little bit shy of  
23 40 years. I also am privileged to serve on the Board  
24 of Governors of the American Association for Justice  
25 and also the Pennsylvania Association for Justice, but



1 I do need to clarify that the comments that I have  
2 both written and which I'm about to offer are really  
3 offered on behalf of myself and not on behalf of my  
4 firm or the organizations that I'm a member of.

5 I think one of the advantages perhaps of  
6 going a little bit later in the group is that it gives  
7 me an opportunity to maybe circle back and clarify a  
8 couple of questions or points that I think I might be  
9 able to help with that were asked of earlier  
10 witnesses, and the one that I wanted to mention, which  
11 is also discussed actually in my written submission,  
12 and I believe it was either Professor Capra or Judge  
13 Appel who asked my dear friend, Rob Gordon, earlier on  
14 about the Sumner Simpson papers, the asbestos letters  
15 that went back and forth between the president of the  
16 Raybestos-Manhattan Company and the General Counsel,  
17 Vandiver Brown, of the Johns Manville Corporation,  
18 both asbestos manufacturers after the turn of the  
19 century.

20 I think the question was whether or not  
21 these would not be admissible as party opponent  
22 statements, and to clarify, they almost by definition  
23 cannot be because the companies that were involved in  
24 the writing and the sending and the receiving of those  
25 letters and correspondence are in bankruptcy, and so

1       they can really never be a party opponent, they can  
2       never be part of a litigation lawsuit context, but  
3       rather, the documents are used against other parties  
4       who did not either -- were not signatories to the  
5       documents to show the state of the art, not so much  
6       what they knew, but the argument is that if Johns  
7       Manville knew and if Raybestos-Manhattan knew, then  
8       why doesn't Company ABC or Company XYZ know as well.

9               PROFESSOR CAPRA: Right. So if I could ask  
10       a question about that then. So why isn't that  
11       admissible because it's not hearsay? Because the  
12       substantive principle is if somebody knew and the  
13       other party is deemed to have known, that's like the  
14       state of the art thing, correct? But the documents  
15       are offered to prove what this Sumner knew, is that  
16       right?

17              MR. WEINGARTEN: Yes.

18              PROFESSOR CAPRA: So that's not hearsay.

19              MR. WEINGARTEN: Not against Sumner Simpson,  
20       it's not.

21              PROFESSOR CAPRA: Right. But then it's not  
22       even an evidentiary principle as to how it's used  
23       against the other party. It's a substantive principle  
24       then because if Sumner knew, then the industry is  
25       deemed to know. That's not even an evidentiary

1 principle. I was wondering why you need the ancient  
2 documents exception in this circumstance. It seems to  
3 me that a lot of the comments are about trying to  
4 prove that, you know, the manufacturer knew, but my  
5 understanding is that's not hearsay at all.

6 MR. WEINGARTEN: No, it's not what they  
7 knew, but it's what's knowable, which is a different  
8 branch of the state of the art. There is no way to  
9 show they had full knowledge.

10 PROFESSOR CAPRA: I understand that, but  
11 that still means it's not offered for its truth but  
12 for knowledge. So I'm sorry. I didn't mean to  
13 interrupt you. Please keep going.

14 MR. WEINGARTEN: Okay. Thank you.

15 One would think from the comments that I  
16 think are what, I think 140 or so of them that have  
17 been posted thus far, that this abrogation or proposed  
18 abrogation of 803(16) only affects litigation, which,  
19 of course, I have done a great deal of, but much to  
20 the contrary.

21 In flipping through the comments and in  
22 thinking about the abrogation of the rule, really the  
23 effect of it would be much more widespread than  
24 asbestos alone. It would affect virtually all latent  
25 disease cases where the diagnosis is many years after

1 the exposure. It would affect toxic tort cases,  
2 benzene litigation, silica litigation, lead  
3 litigation, vinyl fluoride litigation. It would even  
4 be outside the personal injury context.

5 We heard a speaker earlier, Mr. Pomerantz,  
6 talk about its effect on real estate litigation, land  
7 transactions. It would affect qui tam litigation,  
8 whistleblower litigation. It would affect insurance  
9 disputes where the policies go back many, many years.

10 It would affect institutional sexual abuse cases for  
11 minors where the events occurred very long ago and the  
12 documentation is in terms of the rules ancient.

13 So the context of it is much more broad and  
14 much more expansive than asbestos alone, although  
15 obviously it affects asbestos litigation a great deal  
16 as well.

17 But let me focus on something that I don't  
18 think has been discussed too much thus far, and that  
19 is if the rule is abrogated or changed what would  
20 happen in terms of the time we've spent on both the  
21 attorneys involved on both sides as well as the court  
22 system and the judiciary to deal with these previously  
23 admitted accepted hearsay documents.

24 Well, to begin with, we would have to start  
25 to try to take depositions to justify the

1 admissibility. We'd have to find a custodian or a  
2 signator or a declarant. We'd have to schedule the  
3 depositions. We'd have to travel to the depositions.

4 We'd have to take the depositions and incur the time  
5 and the cost and the expense in whatever is involved  
6 in that, including, of course, court reporters.

7 And then what happens after the depositions?

8 Well, then we start another round of satellite  
9 litigation on the admissibility of the documents,  
10 starting with motions, briefing, oral arguments, and  
11 then the necessity for judicial opinions, and then  
12 that brings us down to the bottom line, which is once  
13 we've had that satellite litigation we're going to  
14 then start to get rulings on documents, and this has  
15 been mentioned by some of the previous speakers, the  
16 rulings have the possibility of being inconsistent,  
17 which never helps litigants in any situation. I think  
18 that was the concern raised by Judge Appel earlier  
19 when he asked the question about Rule 807. So we have  
20 the risk of these inconsistencies, and then --

21 PROFESSOR CAPRA: Can I ask you a question  
22 about -- I'm sorry, I understand all these expenses,  
23 especially from the litigants. So just one question I  
24 had is we've been talking, the Committee has been  
25 talking about other possibilities of adding different

1 requirements rather than just an abrogation, but those  
2 would also require everything you're talking about,  
3 right? In other words, you'd still have to do all the  
4 workup and the motion practice and everything if you  
5 added, for example, a necessity requirement or a  
6 reliability requirement to the rule?

7 MR. WEINGARTEN: I think so. I think it  
8 would.

9 PROFESSOR CAPRA: Yes.

10 MR. WEINGARTEN: And actually that reminds  
11 me of, I think, a question that was asked about the  
12 residual exception. I think the question was, and,  
13 pardon me, I do not remember who posed the question.  
14 But wouldn't the residual exception help? And that's  
15 one of my problems with utilizing the residual  
16 exception, which is simply that it has a higher  
17 burden. It has just on its very face four criteria  
18 plus the notice criteria. So there are really five  
19 criteria depending upon how you count and how you read  
20 the criteria, whereas right now 803(16) is short, it's  
21 clear. You know, we're spending a lot of time and  
22 effort on 17 words. That's what 803(16) is. It's 17  
23 words that has engendered all of this comment and this  
24 work on behalf of all of us, the Committee and the  
25 lawyers involved and everyone else.

1           I think the fact that it is indeed  
2           engendering such a great deal of attention, this  
3           brevity, shows how important the rule is. It's short,  
4           it's clear, it's not subject to interpretation, and  
5           it's one of the -- well, I guess this brings me to  
6           another point, which is that to my knowledge it's  
7           never been accused of being abused or misinterpreted  
8           or in any way, it's not been a problem. So, if it's  
9           not a problem, I'm not sure why we need to fix it.

10           And then that kind of brings me to the other  
11           area that I wanted to comment on which I don't think  
12           is addressed in my written presentation, and that is  
13           back just a few months ago, in December, we had a  
14           fairly significant revamp of the Federal Rules of  
15           Civil Procedure with respect to discovery, and I think  
16           that the overall reason for the conceptual approach  
17           that was taken to the amendments of the discovery  
18           rules is to reduce the cost and the time of litigation  
19           and make the process more efficient and to get cases  
20           to trial with less expense and less time. And one of  
21           the other approaches taken by those amendments to the  
22           discovery rules was to in fact try and reduce  
23           satellite litigation over documents.

24           So now what this proposed abrogation would  
25           do really runs somewhat contra to the philosophy of

1 the civil rules amendments and would now start to  
2 complicate the process for something that heretofore  
3 has been extremely simple and extremely workable.

4 So those were the comments that I wanted to  
5 make in addition to, of course, incorporating the  
6 written submission that I made, and I would be glad to  
7 answer questions that the members of the Committee  
8 might have.

9 PROFESSOR CAPRA: Any questions from the  
10 Committee?

11 (No response.)

12 MR. WEINGARTEN: In that case, I think  
13 I'll --

14 PROFESSOR CAPRA: No, no. Sorry, I have  
15 one. Other witnesses have been asked about a  
16 grandfathering provision. Do you have an opinion on  
17 that?

18 MR. WEINGARTEN: As I understand it, is that  
19 with respect to prospective?

20 PROFESSOR CAPRA: No, no, the whole rule  
21 would be prospective. In other words, the change, the  
22 abrogation would be prospective. In other words, what  
23 could be qualified as an ancient document today could  
24 still be so, but after like a particular time then you  
25 couldn't use the ancient documents exception again.



1                   MR. WEINGARTEN: Yeah, I guess my problem  
2 with that, Professor, is why do it.

3                   PROFESSOR CAPRA: So that ESI doesn't get  
4 admitted in the future.

5                   MR. WEINGARTEN: Well, ESI is going to have  
6 to be treated differently, but I don't think that we  
7 have to throw the baby out with the bath water. In  
8 other words, the ancient document rule has worked fine  
9 for what it's intended to work for, which is, of  
10 course, written papers. The written papers are, and  
11 we've heard this before, I think, earlier this  
12 morning, that they're written at a time when there's  
13 no need for subterfuge, there's no litigation  
14 involved, there's no anticipation of litigation, so  
15 there they have the reliability factor. On their  
16 appearance, on their face, they've not been tinkered  
17 with or monkeyed with in any way, so they have, you  
18 know, the authenticity factor, the reliability factor.

19                   So I don't think that we need to change  
20 what's been working to date for a prospective change  
21 moving forward in the future to accommodate ESI.

22                   PROFESSOR CAPRA: Thank you.

23                   MR. WEINGARTEN: Thank you all. I  
24 appreciate this opportunity, and I will listen in for  
25 the remainder of this. I'll put my phone on mute.

1                   JUDGE LIVINGSTON: Thank you so much for  
2 your testimony.

3                   MR. WEINGARTEN: You're very welcome, Your  
4 Honor.

5                   PROFESSOR CAPRA: And our next witness is  
6 Tracy Saxe.

7                   MR. SAXE: I'm here. Yes, thank you. I  
8 thank the Committee and Professor Capra for this  
9 opportunity.

10                   It was mentioned in the previous person's  
11 testimony that among the different areas of law that  
12 might be relevant to this consideration is insurance  
13 coverage law, and that is my background. I've been  
14 practicing for 33 years, of which over 25 of those  
15 years I've been practicing exclusively on behalf of  
16 policyholders, mostly corporate policyholders, against  
17 insurance carriers on the issue of insurance coverage.

18                   And the issue that this really addresses  
19 most, and I've had the experience in my own practice,  
20 is the fact that in many instances, since we are  
21 dealing with what I'll refer to as occurrence-based  
22 policies, the policies that are at issue in a long  
23 tail claim, like an environmental claim, an asbestos  
24 claim, many of the other types of things that were  
25 talked about on the call today, those claims are from

1 a long time ago, and the occurrence that we're trying  
2 to cover is from a long time ago and therefore the  
3 policy itself is from a long time ago.

4 And often the corporation that's seeking  
5 coverage from an insurance company may not have the  
6 policy that was originally issued in the 1920s, '30s,  
7 '40s, '50s, whenever that relevant policy might be,  
8 and under these circumstances the burden of proof is  
9 on the policyholder to prove the existence of the  
10 coverage in the first instance before you get to  
11 anything else, and the background that is really a  
12 relevant fact, even though it's not an evidentiary  
13 issue, is that state law governs insurance policies  
14 and it governs insurance regulation, and there is no  
15 state, I think maybe an exception might be Washington  
16 State, is the only state that requires any period of  
17 time for insurance companies to retain their own  
18 policy.

19 So the insurance companies routinely do not  
20 have the policy that you're seeking coverage under,  
21 and what happens is we fall into an area that is  
22 sometimes referred to as policy archeology or better  
23 understood in the evidentiary world as secondary  
24 evidence as proof of the existence of a policy. If a  
25 policy itself is gone, you can try to prove the

1 existence of an old policy through secondary evidence,  
2 such as accounting records and check stubs, and we've  
3 had cases where there are accounting ledgers that show  
4 a policy number, shows the company name, and from some  
5 other information about the price of the premium that  
6 is paid, you can back into it with expert testimony to  
7 reconstruct the idea if this premium was being paid in  
8 1952 for this type of policy that has that type of  
9 policy number, we know that the policy limits would  
10 have been \$25,000 for that primary policy or X amount  
11 for an excess policy, and all of this can be figured  
12 out because the insurance company was not required to  
13 keep their own policy.

14           If it were the policy itself that were found  
15 and to be admitted, that would be actually a party  
16 opponent's document and would be admissible anyway.  
17 The difficulty is is when it's going to be secondary  
18 evidence and records and particularly accounting  
19 records of people who are long dead or retired and  
20 gone who are not a party to the suit themselves, which  
21 is necessary to prove the existence of the policy.

22           The policyholder who paid their full  
23 premiums and gotten nothing in return until a claim  
24 came in and now expects to get their end of the  
25 bargain, their entire substantive rights will

1 disappear if it turns out that you cannot prove the  
2 existence of the policy because this evidence would  
3 now be considered hearsay that does not fall into an  
4 exception for the statement of a party, and without  
5 the ancient documents rule, because we're missing all  
6 the custodians, we would essentially be losing our  
7 entire substantive rights.

8 We think that this has a major effect in  
9 this regard on insurance coverage. I don't know that  
10 there would be any inclination to make an exception  
11 for insurance coverage litigation in this regard, but  
12 certainly I don't think that's the intent of this rule  
13 is to give insurance companies a free ride and not  
14 have to live up to the benefit of the bargain that  
15 they made when they took the premiums.

16 PROFESSOR CAPRA: No, that is not the intent  
17 of the rule.

18 (Laughter.)

19 PROFESSOR CAPRA: I'm sorry, are you ready  
20 for questions or do you have anything further?

21 MR. SAXE: My paper talks in greater detail.  
22 It cites a particular case out of Massachusetts. I  
23 did note in my written comments that there really are  
24 very few cases on this subject. Oftentimes many of  
25 these cases, like most civil cases, do get settled

1 prior to trial. The evidentiary rulings that are  
2 going to take place are rarely documented, but that  
3 may be true for the evidentiary rules generally.

4 PROFESSOR CAPRA: Right.

5 MR. SAXE: There are many more cases that  
6 would be reflected, I think, in the actual case law  
7 out there on the subject that affect day-to-day  
8 practice and theory.

9 PROFESSOR CAPRA: Pardon my ignorance about  
10 this particular litigation, but doesn't the  
11 policyholder have evidence of payments or anything  
12 like that? Isn't that proper secondary evidence?

13 MR. SAXE: It is, but the question would be  
14 if I don't have -- if the custodian of records, say  
15 these are payments in the 1940s or '50s and I don't  
16 have the custodian of record of those payments, then I  
17 may not be able to get it in as a business record  
18 exception.

19 PROFESSOR CAPRA: But don't you have  
20 payments -- doesn't your client have payment records  
21 that they sent the payments or not?

22 MR. SAXE: That evidence would need to come  
23 in in order to prove the existence of the policy, yes.  
24 and I would have that information, but the question  
25 is, how would it be admissible?

1                   PROFESSOR CAPRA: Yeah, okay. Well, I'd  
2 have to think about that.

3                   MR. SAXE: You've got to talk about the  
4 abrogation of the rule and that is that at the time  
5 that the company in play was primarily responsible for  
6 the creation of that document who might testify to be  
7 a business record is long dead or retired or gone to  
8 show that. That is why the effect of the abrogation  
9 of this rule is so devastating for policyholders in a  
10 lost policy circumstance.

11                  PROFESSOR CAPRA: Okay. Questions?

12                  JUDGE LIVINGSTON: This is Debra Livingston.  
13 Did you have an opinion about the grandfathering  
14 issue?

15                  MR. SAXE: I've heard the question each time  
16 and I kept thinking about it. I don't see how the  
17 grandfathering really changes anything except maybe  
18 saves some current cases that are out there from the  
19 same problem, but it doesn't seem to be any reason why  
20 there is a theoretical difference. It's just that  
21 randomly cases in the future are going to get heard  
22 and the ones already existing don't get heard. But I  
23 don't see how it changes the substance of the issue.

24                  Let me reflect on the idea that we deal with  
25 electronic evidence and ESI issues.

1 JUDGE LIVINGSTON: Mm-hmm.

2 MR. SAXE: But I'm not seeing this as a  
3 difference with ESI. At some point in the future if  
4 we're 70 years from now when all the accounting  
5 records that they'll look back to are going to be on  
6 an electronic basis, to me, it'll be the exact same  
7 problem we always had, which was when it was paper  
8 documents we still won't have a custodian of records  
9 who was actually the person who made that document to  
10 be able to testify, and it'll be the same problem  
11 whether it's ESI or paper documents. I haven't had  
12 the experience with lost policies dealing with ESI  
13 because we're still looking way back in the past  
14 before that time.

15 JUDGE LIVINGSTON: Mm-hmm.

16 MR. SAXE: But it will be a problem in the  
17 future. So I don't see the grandfathering as a  
18 solution here.

19 PROFESSOR CAPRA: Okay. Any further  
20 questions?

21 (No response.)

22 PROFESSOR CAPRA: Thank you very much.

23 Oh, I'm sorry. I didn't mean to end it.  
24 Judge, are we ready to move on?

25 JUDGE LIVINGSTON: No, I think so. Thank



1 you very much for your testimony.

2 MR. SAXE: I appreciate the opportunity.

3 Thank you.

4 PROFESSOR CAPRA: And our next witness I

5 believe -- it says Gary Brayton or Gil Purcell. I

6 thought it was Gary Brayton who weighed in earlier.

7 Is Gary Brayton here?

8 MR. BRAYTON: Yes, it is.

9 PROFESSOR CAPRA: Okay, Gary Brayton.

10 MR. BRAYTON: Thank you. I'd like to thank

11 the Chair and the Committee for the opportunity to

12 testify here this morning. I find myself being way

13 down near the bottom of the list having the advantage

14 and disadvantage of most of the points I wanted to

15 make have been covered.

16 Our firm represents plaintiffs in toxic

17 tort, primarily asbestos litigation. Our practice is

18 largely in the California state courts, but we

19 practice in other state courts and before the federal

20 courts as well.

21 There are a few points I want to make.

22 There's been the issue raised as to whether the kinds

23 of documents, ancient documents are largely admissible

24 under other provisions, and I should say that all of

25 the documents that our firm deals with are ancient

1 documents because of the nature of asbestos being a  
2 latent disease, and thankfully very few people have  
3 been getting exposed to asbestos in the last 20 years,  
4 and I don't think any of them have gotten sick given  
5 the latency issue.

6 All of the documents are ancient documents  
7 and many of the documents indeed are admissible under  
8 other provisions. Lots of documents, business records  
9 are admissible under the business records exceptions  
10 because we are able to locate the necessary custodians  
11 or other foundational witnesses to qualify them as  
12 business records. Many of the documents are, as has  
13 been pointed out, admissible under various party  
14 opponent exceptions to the hearsay rule, but there's a  
15 very substantial number that don't meet any of those  
16 exceptions. They are business records, but the  
17 custodians cannot be identified or located. They're  
18 deceased because we're dealing with events that  
19 happened 30, 40, 50 or more years ago. The companies  
20 are defunct either through bankruptcy or simple  
21 dissolution or they have, you know, through the  
22 acquisitions, mergers, spinoffs, reorganizations that  
23 occurred for a lot of companies through the '70s, '80s  
24 and '90s, it's impossible to track back and locate the  
25 appropriate people.

1                   And I can give several examples of  
2 situations where they are not admissible as party  
3 opponents. Oftentimes it's records of a plaintiff's  
4 employer. They're clearly not going to be a party  
5 given the workers' compensation rules, and yet the  
6 business records may clearly indicate what asbestos-  
7 containing products were being used by the business  
8 and by the plaintiff.

9                   There are circumstances where there were  
10 manufacturers of products that had records that showed  
11 who the fiber supplier for their product was by virtue  
12 of formulation cards. Those cards weren't created by  
13 the party opponent, the fiber supplier. They're not  
14 available there, and the company itself is defunct and  
15 the foundational witnesses are unavailable to qualify.

16                   There are circumstances where a manufacturer  
17 may have records and that is a fiber supplier. Johns  
18 Manville, as has already been commented, is long  
19 bankrupt, and yet evidence of to whom they shipped  
20 fiber is often of significance and again not available  
21 under any existing exception.

22                   807 has been raised as a possible safety  
23 valve. My concern echoes that of other people that  
24 have already spoken. It is not merely that there is  
25 inconsistency in its application and a general

1 disfavoring of admission of evidence by 807, but we  
2 would now have the circumstance that 807, which is  
3 already regarded as a stepchild by many Judges and  
4 disfavored, an ancient document would enter that arena  
5 with the additional stigma of having its own exception  
6 having been abrogated. It would sort of become an  
7 illegitimate child, a stepchild, if you will, and I  
8 think the prospects of that evidence getting a fair  
9 and consistent shake amongst Judges with a history of  
10 the ancient documents rule being abrogated, I think  
11 the prospects would be dim.

12           From a selfish perspective, the suggestion  
13 that the importation into the ancient documents  
14 exception of a necessity requirement akin to  
15 807(a)(3), that would likely pose no particular  
16 problem to our firm's interests because I can't think  
17 of an instance where the kinds of documents that we're  
18 talking about could not meet that necessity standard.

19           I have not given full consideration to the  
20 extent to which that might be an unnecessary  
21 impediment to otherwise reliable useful information in  
22 other contexts, so I don't want to give it a general  
23 endorsement, but I certainly think it would be  
24 preferable to the abrogation at least from our  
25 perspective.

1                   PROFESSOR CAPRA: Okay. I mean, the whole  
2 point from most of the public comment is how necessary  
3 this is, so that's what you're saying, right? The  
4 very necessity of it is what would satisfy that  
5 requirement.

6                   MR. BRAYTON: Yes. Right. And there was a  
7 question raised earlier about California's ancient  
8 documents provision --

9                   PROFESSOR CAPRA: Uh-huh.

10                  MR. BRAYTON: -- that has the additional  
11 requirement of -- that whatever it is that's being  
12 offered as an ancient document having been relied upon  
13 over the course of 30 years. That certainly provides  
14 an extraordinary level of reliability. I can't argue  
15 with that. But it's unnecessarily restrictive and,  
16 frankly, it serves to exclude very reliably a lot of  
17 the documents that we're talking about. Their  
18 reliability rests in the fact that the information  
19 being recorded is absolutely quotidian and mundane,  
20 and so the people have had no reason for anyone to be  
21 falsifying it.

22                  You know, a company's records of who  
23 supplied materials to them, there's no -- you know,  
24 once those records exist, they're created. They're  
25 maintained over time. They have the -- I suppose

1 they're created and maintained because it might be  
2 useful for the company to discern that information at  
3 some later time, but it can hardly be said that it's  
4 relied upon. In fact, many of these records are  
5 probably created, put in a file drawer, and later  
6 boxed up, never looked at or relied upon again, but it  
7 doesn't impact their actual reliability one wit.

8 PROFESSOR CAPRA: It seems to me you'd be  
9 better off with the residual exception from a  
10 plaintiff's perspective because at least you could use  
11 other grounds of reliability. I mean, if you just  
12 have that one ground of reliability that's a condition  
13 of admitting it, there's a lot of reliable ancient  
14 documents that aren't going to be admitted. I mean,  
15 you're better off with the residual.

16 MR. BRAYTON: But there's nothing that  
17 prevents you from relying on both.

18 PROFESSOR CAPRA: That's right I guess.  
19 Yes. So you'd have to go through that for those  
20 anyway, yeah.

21 MR. COLLINS: Mr. Brayton, this is Dan  
22 Collins. I had a question just following up on that  
23 because, you know, I couldn't find any case law that  
24 interprets the California rule since its enactment,  
25 and I just was curious. Is it your experience that in

1 practice that additional California requirement does  
2 operate to exclude documents that otherwise would be  
3 admissible under say the federal version of the rule?

4 MR. BRAYTON: Yes, and, you know, excludes  
5 them, you know, so clearly that there's nothing to  
6 take up and get an opinion on. I could give an  
7 example recently of documents that we were able to  
8 locate in the California State Architect's archives.

9 The state architect oversees or maintains  
10 documents of past recruit plans and so forth for  
11 various public buildings, and the issue was who had  
12 been a contractor. We had a plaintiff that identified  
13 having been exposed by the operation, the activities  
14 of a contractor at the building of a school, but he  
15 didn't know who the contractor was.

16 The records of the state architect's office  
17 clearly indicated who the contractor had been. The  
18 records were in the nature of the bids and documents  
19 showing that, reflecting that bids had been accepted,  
20 but the acceptance was not a document created by the  
21 bidder. We didn't have a contract itself which would  
22 have been subject to other exceptions, and we could  
23 not otherwise -- the architect was the repository but  
24 not the entity that had created the documents. We  
25 weren't able to use it as under a business records

1 exception or a public records exception as California  
2 has it. And, of course, no one had relied on that  
3 document. It sat, you know, from the time at least  
4 that the contract was completed. No one had relied on  
5 it in the intervening time, so what was from our  
6 perspective anyway highly reliable information  
7 intending to identify who the contractor was, culpable  
8 contractor, was not admissible and there was nothing  
9 to -- we thought about could we appeal that, and we  
10 couldn't figure out a way that we could do that  
11 successfully.

12 MR. COLLINS: Now, in the bulk of the  
13 situations in state court where the ancient documents  
14 rule isn't available because of this restriction, are  
15 you able to get them in generally under other  
16 exceptions? What sort of percentage of the time --  
17 I'm just trying to get a sense of what kind of the  
18 practical --

19 MR. BRAYTON: Well, there are, you know,  
20 there are circumstances where we, you know,  
21 desperately long to be operating under the Federal  
22 Rules because there are. We are as creative as we can  
23 be. We make efforts to -- you know, we go to  
24 extraordinary lengths sometimes to try to find -- the  
25 California rules don't require a custodian. There can



1 be, you know, another witness that -- so we try to --  
2 we go as far as we can to bring them in under business  
3 records. We, where appropriate, as has been talked  
4 about with respect to the Sumner Simpson papers, we  
5 make arguments that the information that we are asking  
6 to be admitted is not hearsay for one reason or  
7 another, but there are many categories of documents  
8 that under California law and the California ancient  
9 documents provisions fall through the cracks.

10 JUDGE LIVINGSTON: May I ask have you given  
11 thought to -- this is Debra Livingston -- to what  
12 litigation may look like with the advent of  
13 electronically stored information? So postulating  
14 into the future, but in a world in which all of us are  
15 recording so much of our lives and using the written  
16 word in different ways and the postulate is creating a  
17 lot of, frankly, unreliable stuff that will be stored  
18 forever because it is so cheap to store.

19 MR. BRAYTON: Well, you know, again,  
20 selfishly, our tunnel vision has -- there is --

21 JUDGE LIVINGSTON: No, you're helping us  
22 understand the cases that you deal with.

23 MR. BRAYTON: Right, no, and there, you  
24 know, I can't think of, you know, electronically  
25 stored information that -- other than, you know, we

1 occasionally run into the circumstance of, you know,  
2 the only thing that remains of records is something  
3 that has been converted from what was previously a  
4 hard copy into electronic data of some sort.

5 But as far as the application of the ancient  
6 documents rule as it relates to electronically stored  
7 information going forward, I hadn't given that any  
8 thought until the comments began this morning, and so  
9 I don't think my input with that limited time to  
10 reflect are very valuable.

11 JUDGE LIVINGSTON: Well, your testimony has  
12 been very valuable. Thank you for the time.

13 Are there other questions?

14 (No response.)

15 PROFESSOR CAPRA: And our last witness is  
16 Mary Nold Larimore.

17 MS. LARIMORE: Thank you very much for the  
18 opportunity to talk with the Committee today.

19 I have been practicing law for 35 years,  
20 which I believe makes me officially ancient were I a  
21 doctor. I am a lawyer that has a national practice in  
22 product liability. I'm a Fellow in the American  
23 College of Trial Lawyers, a member of the  
24 International Association of Defense Counsel, Defense  
25 Research Institute, a member of Lawyers for Civil

1 Justice, a member of National Center for State Courts.

2 I also had the privilege of serving the Chief Justice  
3 of the Indiana Supreme Court, Chief Justice Shepard,  
4 on the Rules Committee in Indiana for eight years and  
5 chaired that committee for four years. I very much  
6 appreciate the opportunity to present my comments  
7 which are my personal views relating to the ancient  
8 documents rules.

9 You know, I think I will just incorporate  
10 the letters that I previously sent to the Committee  
11 and really want to commend Professor Capra for what is  
12 a truly outstanding article addressing so many aspects  
13 of the issues that relate to the ancient document  
14 rule.

15 This first came upon my radar screen  
16 interestingly when I decided to take an afternoon and  
17 walk down and observe a trial that was getting a lot  
18 of notoriety in Marion County. It was the first  
19 premises liability asbestos case that had gone to  
20 trial in the state and had some well-known trial  
21 lawyers in it, and our firm had a couple clients in  
22 the first few days that settled out.

23 And so I had gone down expecting actually to  
24 see an expert testify and instead spent the entire  
25 afternoon watching stacks of documents go in under the

1 ancient document rule, and it was a very eye-opening  
2 experience for me because it was like literally  
3 anything that had been in the library. There would be  
4 like copies of the title of the book. There would be  
5 the copyright page as to when it was copyrighted and  
6 excerpts of books and articles and periodicals, and  
7 all sorts of things that went in, including, you know,  
8 unrelated documents that weren't necessarily, you  
9 know, in the library. And I had never seen  
10 documentary evidence despite, you know, pretty  
11 extensive trial history go in that way. They  
12 typically go in through witnesses who are able to  
13 testify as to their reliability, their authenticity.

14           You know, while the other speakers have been  
15 presenting I actually pulled up Rule 703 because I  
16 think that it's particularly relevant to many of the  
17 arguments that we've heard that these old documents  
18 are necessary to prove what was known or knowable, and  
19 I think that was knowable to a company at a particular  
20 point in time. And, you know, from my perspective,  
21 that would be something that an expert would testify  
22 upon, and, you know, the proponent of that opinion  
23 could show the jury, you know, the actual specific  
24 facts and data upon which they were relying only if  
25 their probative value in helping the jury evaluate the

1 opinions substantially outweighs the prejudicial  
2 effects.

3           And I think that that's where I was coming  
4 from when I was observing this and really trying to  
5 understand how it is that an author, you know, with no  
6 knowledge or admission as to their credentials or  
7 their background or, you know, what they were basing  
8 upon, but as long as it was in a Library of Congress,  
9 you know, or as long as it had a date, because many of  
10 these weren't actual publications, as long as it had a  
11 date that was 20 years before it just automatically  
12 went into evidence, and the content of that document  
13 was automatically reliable, and then, of course, the  
14 burden shifts to the defense to try to attack it  
15 because it's automatically considered I guess content  
16 truthful if it's 20 years old, and that was a real  
17 surprise to me.

18           And I ended up following up with the defense  
19 lawyers after the case ended to sort of, you know, ask  
20 questions about that just because I was very curious  
21 as to that process, and the defense firm had unleashed  
22 a whole army of paralegals into the Indianapolis  
23 Public Library, which was not very far from the  
24 courthouse, and it turned out that, you know, many of  
25 the documents, I don't know how many actually, but a

1 number of the documents actually weren't from books  
2 that they thought, that they said it was, et cetera,  
3 so they ended up sort of cleaning up the record as it  
4 relates to that.

5 But that was really kind of my initiation  
6 into somebody who was extensively using this  
7 particular rule, and it seems to me not be an  
8 appropriate way of introducing into evidence  
9 information that is reliable, probative, from an  
10 author who, you know, either had personal knowledge or  
11 from the business records that would indicate some  
12 sort of indicia of reliability other than, you know,  
13 just the dates.

14 So, you know, when I was listening to  
15 previous speakers talk about, you know, these mundane,  
16 you know, records that are kept in businesses, you  
17 know, those are all business records which would come  
18 in under the business exception and, you know, to my  
19 knowledge, the custodian of a business who produced  
20 this huge group of records does not have to be the  
21 custodian of the specific documents.

22 PROFESSOR CAPRA: Right.

23 MS. LARIMORE: Whether it's 50 or 80 years  
24 old, so that just doesn't make sense to me having  
25 tried, you know, lots of cases, including -- I've

1 never tried an asbestos case, but I've certainly tried  
2 toxic tort cases involving other chemicals, and I've  
3 just never seen that issue arise.

4 So, you know, from my perspective, you know,  
5 the particular abrogation, you know, proposal to do  
6 away with this rule couldn't come at a better time  
7 because I think when you look at the amount of  
8 information, I mean, I watched the afternoon of, you  
9 know, all of this information -- not all of it, but  
10 most of it was in the Library of Congress I guess.

11 Well, look at all of the information that's  
12 on the internet right now. Just because people are  
13 typing in information does not mean that they are  
14 reliable, that they are personal knowledge, that they  
15 have probative information that is admissible, you  
16 know, in a court of law. And I think, you know, when  
17 I was thinking about this in preparing my remarks and  
18 putting together the letter that I sent to the  
19 committee, I thought, well, you know, I could look and  
20 see, you know, what the Seventh Circuit, you know,  
21 when the Seventh Circuit has most recently addressed  
22 it, and I provided to the Court Mathin v. Kerry,  
23 actually, Secretary of State Kerry, I mean, it was an  
24 immigration case, and it was fascinating to me because  
25 in this particular case the State Department was able

1 to prove to the District Court that the documents  
2 which were dated more than 20 years old, you know,  
3 weren't reliable.

4 But the Seventh Circuit, you know, made it  
5 very clear that, you know, had they not been able to  
6 attack the authenticity of the documents, the content,  
7 you know, the ancient document rule assumes that once  
8 it's 20 years old it's authentic, that the content of  
9 that document is probative, and, you know, we don't  
10 all have a client with the resources of the State  
11 Department to address these issues, and it just seems  
12 to me that, as is the case with respect to the vast  
13 majority of evidence that's admitted at trial, it's  
14 the burden of the proponent of that evidence, you  
15 know, to lay a foundation and, you know, if the  
16 foundation is that it was, you know, found, you know,  
17 in an attic of a former, you know, employee who, you  
18 know, died X number of years ago, then, you know, I  
19 think that the federal rules already provide for, you  
20 know, establishing authenticity through those means.

21 But I think that when we look at what  
22 happens broadly with this rule, if any person, you  
23 know, that produces a document 20 years ago is  
24 presumed to have provided, you know, content, you  
25 know, probative, truthful, reliable information, and,



1 you know, I think that one doesn't have to spend but  
2 10 minutes on the internet to find out that that's  
3 just not -- that's an assumption that should not be  
4 made in a court of law.

5           And I think that with the coming of more and  
6 more electronic information that this is the  
7 appropriate time to do away with this rule, that if  
8 one wanted to do a grandfather, you know, I think one  
9 should change the 20 rule, 20-year rule to something  
10 that would be more like 50 or 60 or 70 because the  
11 reality is moving forward the vast majority of  
12 documents will be electronic, and I think that just  
13 being able to put in front of the Court the date of a  
14 document and then automatically presuming  
15 admissibility is not the way to go.

16           So I very much appreciate the opportunity to  
17 talk with the Committee. Again, I truly appreciate  
18 your forward thinking approach in terms of addressing  
19 this issue. I also wanted to say that I, you know,  
20 checked around with some lawyers and friends around  
21 the state to see if they had addressed this issue and  
22 if it had been a problem in litigation, and one of the  
23 lawyers that I work with in a different city, you  
24 know, immediately forwarded off to me a brief that  
25 reflected some of the exact same issues that I

1 witnessed and observed a number of years ago when I  
2 happened to walk into a courtroom to observe a trial.

3 PROFESSOR CAPRA: Any questions from the  
4 Committee?

5 MR. DeGARIS: Can a commentator make a  
6 comment? This is Annesley DeGaris again.

7 PROFESSOR CAPRA: Judge Livingston?

8 JUDGE LIVINGSTON: Yes, please.

9 MR. DeGARIS: I just have a question and  
10 it's just -- I mean, obviously I have a little bit  
11 different perspective having litigated toxic torts,  
12 especially in Anniston, Alabama, where Monsanto had a  
13 PCB plant having that perspective of some of the  
14 documents involved in that case, and it's just maybe a  
15 rhetorical question.

16 As far as the concerns that were just  
17 voiced, you know, all hearsay exceptions, you know,  
18 still have to have, including the ancient document  
19 exception, but the client still has to have spoken  
20 from personal knowledge at the time, and then also,  
21 you know, there's no allowances for hearsay within  
22 hearsay. Don't those two principles really provide  
23 limitations that basically limit the use of the  
24 ancient document exception that would address your  
25 concerns just raised?

1 JUDGE LIVINGSTON: We can take that as an  
2 addendum, an additional comment.

3 PROFESSOR CAPRA: Yes. We don't want to  
4 debate.

5 MR. DeGARIS: Okay.

6 JUDGE LIVINGSTON: And, Dan, if you want to  
7 address that comment, you're welcome to, but I think I  
8 understand, we understand the comment, and thank you  
9 for that addition.

10 MR. DeGARIS: Great.

11 JUDGE LIVINGSTON: Can I just ask one  
12 question of the witness? Have you had experience in  
13 your practice with the residual exception? I know  
14 you've been on the line and so you've heard testimony,  
15 concern that that exception is applied in a grudging  
16 fashion by many District Courts in the opinion of  
17 several of the witnesses this morning.

18 MR. DeGARIS: And I expressed their same  
19 concern about --

20 JUDGE LIVINGSTON: Oh, no, I'm sorry, that  
21 was -- I'm sorry, that was to the current witness.

22 MR. DeGARIS: Oh, okay, I'm sorry. I  
23 thought that was to me, Your Honor. I apologize.

24 JUDGE LIVINGSTON: I'm sorry, I wasn't  
25 clear. Thank you for your comment, though.

1 MS. LARIMORE: Yes, this is Mary. I have  
2 been thinking about that as I've been listening this  
3 morning and, you know, I can't honestly testify one  
4 way or the other on that.

5 JUDGE LIVINGSTON: Okay.

6 MS. LARIMORE: It seems like as I think  
7 through, you know, all of the different issues that  
8 arise with respect to admissibility, you know, I would  
9 say it's rare that I have, you know, been in a trial  
10 where I have seen a really crucial piece of evidence  
11 that one party or the other thought was extremely  
12 crucial that did not get admitted into evidence. So I  
13 really cannot say that there has been, you know, sort  
14 of that kind of disdain towards that particular  
15 exception, and I'd have to really look at the Seventh  
16 Circuit, you know, cases.

17 But one of the things I put in my letter is  
18 that just because you don't see a lot of cases coming  
19 up in a particular area doesn't necessarily mean that  
20 that, you know, hearsay exception isn't regularly  
21 used. What it means is that, you know, that isn't one  
22 of the issues that really was the focus of an appeal,  
23 and I think that this sort of automatic nature of this  
24 ancient document rule, you know, that's what I've  
25 observed was in my practice is it's automatic. If

1 it's 20 years old, it's automatic, and I think when  
2 you look at the case law that's what you see as well.

3 Twenty years old, unless you're going to be  
4 successful in attacking authenticity, it's automatic,  
5 and I don't think it should be automatic. I don't  
6 think anything should be automatic.

7 PROFESSOR CAPRA: Any other questions?

8 JUDGE APPEL: Yes, one more. This is Brent  
9 Appel speaking. We've talked about 807 quite a bit  
10 today, but we haven't raised 403, and Rule 403, of  
11 course, allows the Court to exclude relevant evidence  
12 if it substantially outweighed unfair prejudice and so  
13 forth and so on. What role might that have? I mean,  
14 you describe what seemed to be kind of a mass bulk  
15 admission of lots of things. Do you think 403 is an  
16 avenue to address some of your concerns?

17 MS. LARIMORE: Well, it's a good question,  
18 and the reality is then the burden ends up being on  
19 the defendant to, you know, attack the credibility of,  
20 you know, each of the authors and to attack, you know,  
21 the specific probative value of each piece of  
22 evidence. And, you know, from my perspective, you  
23 know, the initial burden should be on the proponent of  
24 any piece of evidence to prove to the Court a special  
25 level of both authenticity and, you know, reliability

1 of the contents. And so that makes it very difficult,  
2 especially when you're talking about things that, you  
3 know, essentially anything in the library or anything  
4 on the internet going forward.

5 PROFESSOR CAPRA: Any other questions or  
6 comments?

7 (No response.)

8 PROFESSOR CAPRA: Judge Livingston, I turn  
9 to you.

10 JUDGE LIVINGSTON: Well, thank you very much  
11 for your testimony here today, Ms. Larimore. And I  
12 think that's our final witness this morning, is it  
13 not?

14 PROFESSOR CAPRA: Yes, that's the last one  
15 on the list, Judge.

16 JUDGE LIVINGSTON: Okay. So I know that we  
17 have a number of witnesses who have made it to the  
18 end, so I get an opportunity to thank all of you.  
19 This has been an extremely helpful morning, I think,  
20 for the Committee, and I expect my fellow committee  
21 members would second me in that. Thank you for taking  
22 the time, and it is a great help, of course, to the  
23 litigation system and to the public interest to hear  
24 from people who are interested in the rules and our  
25 continued thoughts about their reform. And I think

1 with that I will conclude today's hearing.

2 MS. LARIMORE: Thank you very much.

3 PROFESSOR CAPRA: So the committee members  
4 and liaisons, if you have the time, can we please stay  
5 on the line for just a couple minutes and whoever has  
6 reactions can speak. We just want to make sure  
7 everybody is off the line, although it is a public  
8 meeting.

9 Bridget, is there a way to figure this out?

10 MS. HEALY: No, unfortunately. Ask if they  
11 can comply with what you --

12 PROFESSOR CAPRA: Can you just ask?

13 MS. HEALY: Sure. Professor Capra just said  
14 if everyone who is not a committee member or a  
15 liaison, if you could please exit the hearing now,  
16 that would be great.

17 THE COURT REPORTER: Sorry. This is the  
18 court reporter. Just to check if you'd like to go off  
19 the record now.

20 PROFESSOR CAPRA: Yes, there's no need for  
21 recording this.

22 THE COURT REPORTER: Okay.

23 PROFESSOR CAPRA: Right, Judge, Judge  
24 Livingston?

25 JUDGE LIVINGSTON: Right. This is right.

1 PROFESSOR CAPRA: Conversation among --

2 MS. HEALY: Yeah. Thank you for asking,  
3 Maya.

4 THE COURT REPORTER: Okay. Thank you. Have  
5 a great day.

6 (Whereupon, at 12:12 p.m., the hearing in  
7 the above-entitled matter concluded.)

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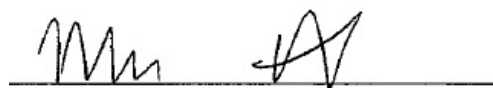


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I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Administrative Office of the U.S. Courts.

Date: February 12, 2016

A handwritten signature in black ink, appearing to read 'MH' followed by a stylized 'A', is written over a horizontal line.

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