

TRANSCRIPT OF PROCEEDINGS

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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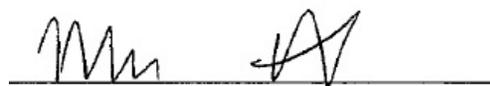
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REPORTER'S CERTIFICATE

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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 A', is written over a horizontal line.

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