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Ancient ESI: A Survey of the Ancient Documents Exception

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Should *Titanic*'s Box Office release or the debut of *Harry Potter* already be described as events from the *ancient* past? It would hardly seem so. But, the amendment to the ancient documents exception to the rule against hearsay contained in Fed. R. Evid. 803 (16) suggests otherwise. Fed. R. Evid. 803 (16) provides that statements in an ancient document are not excluded by the rule against hearsay (Fed. R. Evid. 802) if the document's authenticity can be established. *See Rule 803 of the Federal Rules of Evidence.* Prior to the recent amendment, Rule 803 (16) described ancient documents as documents "at least 20 years old." As amended, Rule 803(16) limits the ancient documents exception "to statements in documents prepared before January 1, 1998." *Id*. The use of a January 1, 1998 cut-off avoids having the identification of what is an "ancient document" be a moving target. The Judicial Conference Advisory Committee on Evidence Rules ("the Committee") recognized that Fed. R. Evid. 803, left as is, soon could have become "a vehicle to admit vast amounts of unreliable electronically stored information (ESI)," as the twenty year lookback period crept forward into the age of electronic documents. The Committee was specifically concerned about the risks created by the unreliability of older ESI, in combination with the "exponential development and growth of electronic information since 1998."

The Committee further recognized, however, that distinct issues regarding authenticity emerge when dealing with ESI. Thus, these changes to Fed. R. Evid. 803 should be viewed in conjunction with concurrent edits made to the evidentiary rule governing the authenticity of documents, Fed R. Evid. 902, which now outlines the types of electronic documents that are "self-authenticating." Because self-authenticating documents "require no extrinsic evidence of authenticity in order to be admitted," parties can now authenticate older ESI without the expense and inconvenience of procuring a foundation witness. The Committee hopes that parties can instead "determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly." Our recent blog post on this rule change describes these "self-authenticating" documents in greater detail: Federal practitioners should bear these amendments in mind when seeking to authenticate ancient documents and ESI.

State rules, at least for the time being, deviate in varying degrees from their newly-updated federal counterparts. For example, New York parallels the prior version of Fed. R. Evid. 803. New York's ancient document hearsay exception applies to statements "in a document in existence 20 years or more the authenticity of which is established." CRR-NY 517.8(16). Although New York's evidence rules are silent on what types of ESI should be self-authenticating, the state's courts have already been deciding these issues for the last couple years. *See* *People v. Johnson* (discussing the self-authentication "required to admit Internet postings and text message or chat room content.").

In contrast, California's ancient document hearsay exception requires that the statement be "contained in a writing more than 30 years old and that the statement has been since generally acted upon as true by persons having an interest in the matter." *See* Cal. Evid. Code § 1331. The California Evidence Code also makes no reference to electronic documents that can be self-authenticating. This omission makes sense. California's ancient documents exception currently applies to statements that are older than January 1, 1988—a time without omnipresent electronic data.

It remains to be seen whether New York and California will follow the federal rules' lead and set a cut-off date for their ancient document exceptions, like Fed. R. Evid. 803. It also remains to be seen whether they will parallel the recent amendment of Fed. R. Evid. 902 to recognize self-authentication for some forms of ESI. Stay tuned for possible updates to state laws. And, upon further reflection, perhaps the ancient documents nickname is no misnomer.

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