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# ANCIENT DOCUMENTS AND THE RULE AGAINST MULTIPLE HEARSAY

**Gregg Kettles***

## I. INTRODUCTION

This article analyzes whether statements in a document properly authenticated as "ancient" pursuant to Federal Rule of Evidence 901(b)(8) are subject to the rule against multiple hearsay. I conclude that the rule against multiple hearsay applies to such statements in ancient documents. In order for a given statement in an ancient document to be admissible to prove the truth of the matter asserted, the statement must either be within the personal knowledge of the author or qualify under a separate exception to the hearsay rule. For each level of hearsay present within the document, the party offering the hearsay evidence must demonstrate that an exception to the hearsay rule applies.

Federal Rule of Evidence 802 provides that "[h]earsay[1] is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."[2] Rule 803 sets out a number of exceptions to this rule, including the following: "(16) [s]tatements in ancient documents" and "[s]tatements in a document in existence twenty years or more the authenticity of which is established."[3] Authenticating a document as "ancient" is accomplished by satisfying the straightforward

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1. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c). "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion." FED. R. EVID. 801(a).

2. FED. R. EVID. 802.

3. FED. R. EVID. 803(16).

standards of Rule 901, including 901(b)(8)."[4] The legal question is thus presented: does authenticating a document as "ancient" mean that every statement contained in it is automatically excepted from the hearsay rule by operation of Rule 803(16)?

Rooted in Rule 805 is a general rule against hearsay within hearsay.[5] "Hearsay within hearsay, or multiple hearsay, occurs when a witness, W, attempts to testify that A told W what B said."[6] Multiple hearsay is "wholly inadmissible when any single out-of-court statement fails to qualify under an exclusion from or exception to the hearsay rule. In other words, the testimony is inadmissible if A's statement is admissible but B's is not or if B's statement is admissible but A's is not."[7]

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4. Federal Rule of Evidence 901(a) states: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." FED. R. EVID. 901(a). One of the "examples of authentication or identification conforming with the requirements of this rule" is found in subpart (b)(8) of Rule 901:

> (8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

FED. R. EVID. 901(b)(8).

5. "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." FED. R. EVID. 805.

6. 5 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE, § 805.04, at 805-6 (Joseph M. McLaughlin ed., Matthew Bender 2d ed. 1998).

7. *Id. See, e.g.*, United States v. Chu Kong Yin, 935 F.2d 990, 998 (9th Cir. 1991) (holding that second level of hearsay was excluded because there was no indication that the document preparer "was a percipient witness to the facts set forth therein, or that he recorded information transmitted to him by a person with first hand knowledge"); Parsons v. Honeywell, Inc., 929 F.2d 901, 907-08 (2d Cir. 1991) (holding that while police report was by itself admissible, statement within the police report was hearsay not falling within any exception, and was therefore inadmissible); United States v. Pendas-Martinez, 845 F.2d 938, 942-43 (11th Cir. 1988) (holding coast guard officer's report inadmissible because it contained multiple levels of hearsay, not all of which were admissible); United States v. Dotson, 821 F.2d 1034, 1035 (5th Cir. 1987) (holding police report containing statement by police sergeant relating admission by defendant's agent inadmissible, even though admission itself was within hearsay exception, because statement by sergeant was hearsay not within any exception); United States v. De Peri, 778 F.2d 963, 976-77 (3d Cir. 1985) (stating that FBI agent's report was by itself admissible, but statement in report repeating the out of court statements of others was hearsay not subject to any exception).

Courts confronted with this issue have used divergent and conflicting methods of analysis. Some decisions have held that statements within documents authenticated as ancient are subject to the rules against multiple hearsay.[8] A number of these cases have, as a result, held certain statements in ancient documents inadmissible.[9] Other decisions, however, have admitted statements in ancient documents without considering the multiple layers of hearsay present.[10] Thus, statements that would otherwise constitute multiple hearsay have been admitted to prove the truth of the matter asserted.[11]

Some commentators have explored the issue of multiple hearsay in ancient documents in the context of the common law.[12] None, however, have comprehensively analyzed the issue with respect to the version of the rule codified in the Federal Rules of Evidence.[13] The few commentators that have touched on the issue suggest or imply, without thorough analysis, that some "showing" that the drafter of the ancient document had personal knowledge of matters stated in the document "may be required."[14] Precisely what level of proof

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8. *See* United States v. Hajda, 135 F.3d 439, 444 (7th Cir. 1997); United States v. Stelmokas, No. 92-3440, 1995 WL 464264, at *5-6 (E.D. Pa. Aug. 2, 1995); Estate of Cole v. Commissioner, 58 T.C.M. (CCH) 715, 722-23 (T.C. Nov. 20, 1989), *rev'd on other grounds,* 963 F.2d 280 (9th Cir. 1992); *In re* Rhode Island Asbestos Cases, 11 Fed. R. Evid. Serv. (CBC) 444, 447-48 (D.R.I. 1982).

9. *See* United States v. Stelmokas, No. 92-3440, 1995 WL 464264, at *5-6 (E.D. Pa. Aug. 2, 1995); Estate of Cole v. Commissioner, 58 T.C.M. (CCH) 715, 722-23 (T.C. Nov. 20, 1989), *rev'd on other grounds,* 963 F.2d 280 (9th Cir. 1992); *In re* Rhode Island Asbestos Cases, 11 Fed. R. Evid. Serv. (CBC) 444, 447-48 (D.R.I. 1982).

10. *See, e.g.,* Gonzales v. North Township of Lake County, 800 F. Supp. 676, 681 (N.D. Ind. 1992), *rev'd on other grounds,* 4 F.3d 1412 (7th Cir. 1993); Columbus-America Discovery Group, Inc. v. Sailing Vessel, 742 F. Supp. 1327, 1343 (E.D. Va. 1990), *rev'd on other grounds,* 974 F.2d 446 (4th Cir. 1992); Fulmer v. Connors, 665 F. Supp. 1472, 1490 (N.D. Ala. 1987); Ammons v. Dade City, Fla., 594 F. Supp. 1274, 1280 n.8 (M.D. Fla. 1984).

11. *See* cases cited *supra* note 10.

12. *See* Joseph A. Wickes, *Ancient Documents and Hearsay,* 8 TEX. L. REV. 451 (1930); Comment, *Ancient Documents as an Exception to the Hearsay Rule,* 33 YALE L.J. 412 (1924); Note, *Recitals in Ancient Documents,* 46 IOWA L. REV. 448 (1961). *See also* JOHN W. STRONG, MCCORMICK ON EVIDENCE, § 323, at 537 (4th ed. 1992) (stating, without thorough analysis, that "the writing [in the ancient document] is inadmissible if the declarant lacked the opportunity for firsthand observation of the facts asserted").

13. *See* sources cited *supra* note 12.

14. *See* STRONG, *supra* note 12, § 323, at 537; CHARLES E. WAGNER, FEDERAL RULES OF EVIDENCE CASE LAW COMMENTARY 548 (1994) ("[An

constitutes a satisfactory "showing" of personal knowledge is not explained.[15] For example, is it necessary to prove by admissible evidence other than the ancient document that the author had personal knowledge, or is it enough that this fact may be inferred from the ancient document itself? Nor does any article explain what happens if this showing is not made.[16] And most significantly, no article discusses the application of the rule against multiple hearsay to statements within ancient documents.[17]

A review of the case law and statements by commentators identified above may lead one to conclude that, when determining the admissibility of statements in ancient documents, one must choose between two competing approaches. Each of these two approaches is equally extreme. Restated succinctly, one approach implied by a number of decisions, is that all statements in ancient documents are admissible, no matter how many levels of hearsay are involved.[18] The other approach, implied by a number of commentators, is that statements in ancient documents are admissible only if they are within the personal knowledge of the author.[19] If they are not within the personal knowledge of the author the statements are excluded, regardless of whether such statements might otherwise fall under another exception to the rule against multiple hearsay.[20] Neither of these two extreme approaches is satisfactory from a policy perspective. As will be demonstrated below, an analysis of the text, legislative history, and common law origin of the ancient document rule all demonstrate that the admissibility of statements in ancient

authenticated ancient] document is reliable if the drafter had firsthand knowledge of the events to which the document relates."); 5 WEINSTEIN & BERGER, *supra* note 6, § 803.21[3], at 803-114 to 115 ("[A] showing from the circumstances that declarant could have had the requisite knowledge may be required.").

15. *See* sources cited *supra* note 14.

16. *See* sources cited *supra* note 14.

17. *See* sources cited *supra* note 14.

18. *See, e.g.*, Gonzales v. North Township of Lake County, 800 F. Supp. 676, 681 (N.D. Ind. 1992), *rev'd on other grounds*, 4 F.3d 1412 (7th Cir. 1993); Columbus-America Discovery Group, Inc. v. Sailing Vessel, 742 F. Supp. 1327, 1343 (E.D. Va. 1990), *rev'd on other grounds*, 974 F.2d 446 (4th Cir. 1992); Fulmer v. Connors, 665 F. Supp. 1472, 1490 (N.D. Ala 1987); Ammons v. Dade City, 594 F. Supp. 1274, 1280 n.8 (M.D. Fla. 1984).

19. *See* STRONG, *supra* note 12, § 323, at 537; WAGNER, *supra* note 14, at 548; 5 WEINSTEIN & BERGER, *supra* note 6, § 803.21[3], at 803-114 to 115.

20. *See* sources cited *supra* note 19.

documents should be resolved by a third approach.

The legal question presented in this article is not simply theoretical. "The phenomenon of docket delays as well as the frequent litigation of liability arising from health detriments that may take decades to come about may be giving new life to the neglected 'ancient documents' hearsay exception."[21] This is particularly true under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), which makes liable, among others, anyone who deposited hazardous materials at a place covered by the statute.[22] The statute of limitations for a cost recovery action under CERCLA runs from the date the plaintiff performed certain acts to clean up the contamination.[23] Because this date may be many decades after the materials were deposited, the plaintiff may try to use "ancient" documents to prove that the materials were deposited by a particular defendant.[24]

The availability of potentially "ancient" documents is also greater than ever before. Advances in computer technology have dramatically increased the amount of information that can be stored in a given amount of space.[25] These same advances have also substantially eased the burden of searching, retrieving, and organizing information. Attempts to use ancient documents, along with the concomitant disputes over admissibility, are likely to become much more frequent.[26] Therefore, courts must be clear as to the application

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21. *Rule 803(16): Ancient Documents*, 15 FEDERAL RULES OF EVIDENCE NEWS 90-177, 90-189 (1990).

22. CERCLA § 107, 42 U.S.C. § 9607 (1995).

23. CERCLA § 113(g)(2), 42 U.S.C. § 9613(g)(2) (1995) ("An initial action for recovery of the costs referred to in § 9607 of this title must be commenced . . . for a removal action, within three years after completion of the removal action[;] . . . for a remedial action, within six years after initiation of physical on-site construction of the remedial action.").

24. *Cf.* Reichhold Chem., Inc. v. Textron, Inc., 888 F. Supp. 1116, 1130 n.15 (N.D. Fla. 1995) (offering ancient documents to counter affirmative defense to CERCLA liability); Catellus Dev. Corp. v. L.D. McFarland Co., 23 ENVTL. L. REP. (Envtl. L. Inst.) 21487, 21492-93 (D. Or. July 27, 1993) (premising claim of CERCLA liability on newspaper article offered as ancient document).

25. *See* FED. R. EVID. 901(b)(8) advisory committee's note ("The familiar ancient document rule of the common law is extended to include data stored electronically or by other similar means . . . . This expansion is necessary in view of the widespread use of methods of storing data in forms other than conventional written records.").

26. *See* G. Michael Fenner, *Law Professor Reveals Shocking Truth About Hearsay*, 62 U.M.K.C. L. REV. 1, 30 (1993) ("[The ancient document exception to the hearsay rule] will be applied more frequently and more frequently it will be

of the rules relating to multiple hearsay within ancient documents. This article analyzes this issue and concludes that the rules relating to multiple hearsay apply to statements within an authenticated "ancient document."

## II. THE LANGUAGE AND STRUCTURE OF THE RULES OF EVIDENCE ARE AMBIGUOUS AS TO WHETHER OR NOT STATEMENTS IN ANCIENT DOCUMENTS MAY BE EXCLUDED AS HEARSAY

Although the approach has been criticized by some commentators,[27] the United States Supreme Court has made clear that the Federal Rules of Evidence are to be interpreted as one would interpret any statute.[28] Familiar canons of statutory interpretation require that legal analysis begin with the language of the statute.[29] The general rule is that a statute should be interpreted according to its clear and plain meaning.[30] The statute's legislative history may be considered only when the statute is unclear or when a literal construction would lead to an absurd result.[31] However, some decisions have examined legislative history even in the absence of these conditions.[32]

The language and structure of the Federal Rules of Evidence are unclear as to whether statements in authentic an-

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applied to prove essential elements of the case.").

27. *See, e.g.*, Glen Weissenberger, *Are the Federal Rules of Evidence a Statute?*, 55 OHIO ST. L. J. 393 (1994); Glen Weissenberger, *The Supreme Court and the Interpretation of the Federal Rules of Evidence*, 53 OHIO ST. L. J. 1307 (1992).

28. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 587 (1993) (stating that the Supreme Court will "interpret the legislatively enacted Federal Rules of Evidence as [the Court] would any statute"). *See also* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 511 (1989); Huddleston v. United States, 485 U.S. 681, 687 (1988); Bourjaily v. United States, 483 U.S. 171, 178 (1987); Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years—The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857 (1992); Edward J. Imwinkelried, *A Brief Defense of the Supreme Court's Approach to the Interpretation of the Federal Rules of Evidence*, 27 IND. L. REV. 267 (1993); Randolf N. Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence*, 68 TEX. L. REV. 745 (1990).

29. *See* Nugget Hydroelectric, L.P. v. Pacific Gas and Elec. Co., 981 F.2d 429, 433 (9th Cir. 1992).

30. *See id.*

31. *See id.*; Sullivan v. C.I.A., 992 F.2d 1249, 1252 (1st Cir. 1993); United States v. Sheek, 990 F.2d 150, 152-53 (4th Cir. 1993).

32. *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 588-89 (1993) (examining legislative history of Federal Rule of Evidence 702).

cient documents are subject to the rules against hearsay—including multiple hearsay. Based on the text of the Rules of Evidence and the plain language of Rule 803(16), a compelling argument can be made that statements in ancient documents are *not* subject to the rule against multiple hearsay.[33] Rule 803(16) is not limited to non-hearsay statements or statements about which the author has personal knowledge. Because Rule 803(16) does not contain additional qualifications, it suggests that all statements in ancient documents are admissible for the truth of the matters asserted, regardless of the number of levels of hearsay present.

However, consider Rule 805.[34] The "plain" language of Rule 803(16) is inconsistent with Rule 805, which operates to exclude multiple hearsay unless each level of hearsay qualifies under an exception. Nonetheless, it is a familiar cannon of statutory interpretation that, "however inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment. Specific terms prevail over the general in the same or another statute which otherwise might be controlling."[35] It can be argued that Rule 805's exclusion of double hearsay is a rule of general applicability that cannot be interpreted to apply to statements in ancient documents. The admissibility of such statements would be specifically addressed by Rule 803(16).[36]

The argument that statements in authenticated ancient documents are not subject to the rule against multiple hearsay is further supported by comparing it with other hearsay exceptions. The language of other exceptions to the hearsay rule that pertain to documents demonstrates that the drafters knew how to restrict hearsay exceptions to only one or two levels of hearsay. When they wanted to restrict them in

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33. *See* FED. R. EVID. 803, 803(16). The full text of the ancient document exception to the hearsay rule is as follows: "(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established." *Id.*

34. "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." FED. R. EVID. 805.

35. Maiatico v. United States, 302 F.2d 880, 886 (D.C. Cir. 1962) (internal quotation marks omitted). *See also In re* Hynson, 66 B.R. 246, 249 (Bankr. D.N.J. 1986).

36. *See supra* text accompanying note 33.

this way, the drafters expressly stated the restriction in the language of the particular exception. For example, Rule 803(6)'s exception for "[r]ecords of regularly conducted activity"[37] specifically addresses the issue of multiple hearsay. In order for a statement to be excepted from the hearsay rule under Rule 803(6), it must be shown, among other things, that the statement was "made at or near the time by, or from information transmitted by, a person with knowledge."[38] Stated another way, the statements in the document are not hearsay if the author has personal knowledge or received the information from someone with personal knowledge.[39] The number of levels of hearsay excepted by Rule 803(6) is two, and no more.[40] If the author received the information from someone without personal knowledge, for example, if W wrote what A told W about what B said to A, then it does not qualify under Rule 803(6) as an exception to the hearsay rule.

This point is also illustrated by examining the language of the "recorded recollection" hearsay exception at Rule 803(5).[41] This rule provides that a "memorandum or record

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37. FED. R. EVID. 803(6). This rule provides:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

38. *Id.*

39. *See, e.g.*, United States v. David, 96 F.3d 1477, 1481-82 (D.C. Cir. 1996) (stating that a record under Rule 803(6) may be admitted to show truth of the statement made to author of record if the author verified information provided to him by declarant).

40. The statements of the author constitute one level of hearsay, while the statements of the person with knowledge who transmitted the information to the author constitute a second level of hearsay.

41. *See* FED. R. EVID. 803(5). This rule states:

> A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

concerning a matter" is not hearsay only if, among other things, the matter is something about which the "witness once had knowledge" and the memorandum or record was "made or adopted by the witness."[42] In other words, only if the memorandum or record was created by someone with personal knowledge of the matters stated can the document be excepted from the hearsay rule. Rule 803(5) excepts just one level of hearsay. If the witness who created the memorandum or record lacks personal knowledge, for example, W attempts to repeat what A told W, then Rule 803(5)'s exception to the hearsay rule does not apply.

In contrast, a number of other hearsay exceptions do not limit the number of levels of hearsay that are excluded from the rule against hearsay. Subsections (13), (19), (20), and (21) of Rule 803 except statements of "personal or family history" contained in "family records,"[43] "reputation concerning personal or family history,"[44] "reputation concerning boundaries or general history,"[45] and "reputation as to character."[46] None of these exceptions identifies any limit on the number of levels of hearsay that are excepted from the rule. Statements of this type routinely involve multiple hearsay, since the underlying information is rarely within the personal knowledge of the declarant.

Consistent with this, a number of courts have held that

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42. *Id.*

43. Federal Rule of Evidence 803(13) excepts from the hearsay rule: "Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like." FED. R. EVID. 803(13).

44. Federal Rule of Evidence 803(19) excepts from the rule against hearsay:

> (19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

FED. R. EVID. 803(19).

45. Federal Rule of Evidence 803(20) excepts from the hearsay rule: "Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located." FED. R. EVID. 803(20).

46. Federal Rule of Evidence 803(21) excepts from the rule against hearsay: "Reputation as to character. Reputation of a person's character among associates or in the community." FED. R. EVID. 803(21).

statements coming within these exceptions were admissible, without first determining whether the declarant had personal knowledge of the matters stated. For example, in *United States v. Duke*,[47] the court stated that "[t]he defendant may introduce evidence of his reputation ("character"), and *such a witness not only may but must base his testimony upon hearsay*, in effect summarizing what he has heard in the community."[48] In *Walley v. United*,[49] the court explained the rationale for the hearsay exception for reputation of boundaries in a way that strongly suggests that the rule against multiple hearsay has no application:

> Of course, this parol testimony was hearsay, since most of the witnesses did not know these facts personally, but the plaintiffs say that this evidence is admissible as an exception to the hearsay rule. We agree. The reason for this rule is not only caused by the perishable nature of boundary markers, but also because general reputation about facts of community interest are generally trustworthy. It is unlikely that a falsehood could become generally accepted in the community as the truth. The prolonged and constant exposure of these facts to observation and discussion by the community sifts out the possible errors and gives to the residual facts which are generally accepted by the locality a trustworthiness which allows these facts to

47. 492 F.2d 693 (5th Cir. 1974).

48. *Id.* at 695 (emphasis added). *Cf.* 5 WEINSTEIN & BERGER, *supra* note 6, § 803.24[2], at 803-124 ("Repute in the community has always been allowed to show evidence of marriage, and some courts extend this to prove other aspects of family history.") (citations omitted). While there are some limitations on *who* can testify as to reputation concerning family pedigree, personal knowledge is clearly not required. For example, in *Young Ah Chor v. Dulles*, 270 F.2d 338 (9th Cir. 1959), the court stated the following about laying a foundation for testimony about reputation:

> As a general rule proof of such reputation and tradition should be limited to reputation and tradition *in the family*, the genealogy of which is under inquiry. The testimony of the witness in the instant case did not purport to be based upon the reputation and tradition in the Young Yick family, the genealogy of which was under inquiry. While we recognize, as stated in the last cited case, that under exceptional circumstances testimony relating to pedigree and family tradition based upon neighbor or community reputation has been held to be admissible as an exception to the hearsay rule, the testimonial foundation for the application of such rule is completely lacking in this case.

270 F.2d at 345 (internal citations omitted).

49. 148 Ct. Cl. 371, 373-74 (Ct. Cl. 1960).

be presented as evidence in a court of law.[50]

Just like these exceptions, the ancient document rule at Rule 803(16) contains no express limitation on the number of levels of hearsay excepted from the rule against hearsay. This suggests that, just as the rule against multiple hearsay appears not to apply to the exceptions for "family history" and "reputation," it does not apply to the ancient document rule.

This conclusion is further reinforced by the language of the exceptions contained in subsections (5) and (6) to Rule 803. These exceptions expressly limit the number of levels of hearsay excepted from the rule against hearsay. The omission of a similar limitation in the ancient document rule at Rule 803(16) and in the "family history" and "reputation" exceptions appears to have been deliberate. It can be argued that this reflects the intention of the drafters that *all* statements in authenticated ancient documents, regardless of how many levels of hearsay they contain, would be admissible to prove the truth of the matter asserted.

There is, on the other hand, ample basis in the language and structure of the Rules of Evidence to conclude that statements in ancient documents *are* subject to the rule against multiple hearsay. First, the language of Rule 803 itself, as informed by Rule 602, supports this proposition.[51] The ancient document rule is one of twenty-four hearsay exceptions listed in Rule 803.[52] In its preface to this list of exceptions, Rule 803 states: "The following are not excluded by the hearsay rule, even though *the declarant is available as a witness*."[53] Thus, for *each* of the hearsay exceptions identified in Rule 803, Rule 803 presumes the existence of a "declarant"—a witness who, although he or she will not actually testify, *could* testify about the out-of-court statement.[54] Not everyone is allowed to testify as a witness. Rule 602 provides that one may not testify as a witness unless he or she has personal knowledge of the matters about which he or she testifies.[55] Because it assumes the existence of a competent wit-

50. *Id.* at 373-74.
51. *See* FED. R. EVID. 601, 602.
52. FED. R. EVID. 803.
53. *Id.* (emphasis added).
54. *Id.*
55. "A witness may not testify to a matter unless evidence is introduced suf-

ness, Rule 803 implicitly requires that in order for a statement to be admissible under *any* of the listed exceptions, the statement must have been made by someone with personal knowledge. Applying this requirement to the exception at issue here, a statement in an ancient document is not excepted from the rule against hearsay unless the person making the statement, that is, the author, had personal knowledge of the matter stated.

This interpretation is also supported by Rule 805. A statute should not be interpreted to render any part of it superfluous.[56] When confronted with arguably inconsistent statutory provisions, the court should reconcile them in order to give effect to both.[57] Rule 805 provides: "[h]earsay included within hearsay is not excluded under the hearsay rule if each part of the combined statement conforms with an exception to the hearsay rule provided in these rules."[58] Rule 805's prohibition against multiple hearsay can apply, if at all, only in conjunction with the various exceptions to the hearsay rule. Without exceptions to the hearsay rule, there is no need for a rule concerning multiple hearsay at all. The logic that suggests the rule against multiple hearsay does *not* apply to statements in ancient documents would also suggest the rule against multiple hearsay does *not* apply to any of the other exceptions to the hearsay rule as well. None of the other exceptions expressly refers to the rule against multiple hearsay. Nevertheless, the multiple hearsay rule has been held to apply to some of these other hearsay exceptions.[59] Therefore,

ficient to support a finding that the witness has personal knowledge of the matter." FED. R. EVID. 602.

56. *See* Smith v. Babcock, 19 F.3d 257, 263 (6th Cir. 1994) (stating that courts should avoid statutory interpretations that create internal inconsistencies or render a portion of the statute superfluous).

57. *See In re* Colonial Realty Co., 980 F.2d 125, 132 (2d Cir. 1992) (explaining that a statute must be read so that two arguably inconsistent provisions of a statute are both given effect where possible); United States v. Gordon, 961 F.2d 426, 431 (3d Cir. 1992) ("Courts should attempt to reconcile two seemingly conflicting statutory provisions whenever possible, instead of allowing one provision effectively to nullify the other provision").

58. FED. R. EVID. 805.

59. *See, e.g.,* United States v. Chu Kong Yin, 935 F.2d 990, 997-98 (9th Cir. 1991) (concluding that statements in documents otherwise falling within hearsay exceptions at Rule 803(6) and 803(8) are excluded because there was no indication that the preparer of the document "was a percipient witness to the facts set forth therein, or that he recorded information transmitted to him by a person with first hand knowledge"); Parsons v. Honeywell, Inc., 929 F.2d 901, 907-08 (2d Cir. 1991) (finding that while police report was by itself admissible

statements in authenticated ancient documents must be subject to the rules against multiple hearsay. An interpretation to the contrary would read Rule 805 out of existence.

If the "reputation" exceptions from the hearsay rule are not subject to the rule against multiple hearsay, this does not mean that statements in ancient documents must also be free from its constraints. Distinctions can be made between the two types of exceptions. Each of the exceptions at subsections (19), (20), and (21) is framed in terms of "reputation," rather than, for example, "statements."[60] Unlike a statement, reputation is something that *exists* among a group of people. The reputation exceptions define these groups as "members of [a] family,"[61] "a community,"[62] or "associates."[63] Application of the rule against multiple hearsay to "reputation" is meaningless, since reputation by its very nature consists solely of multiple hearsay. In contrast to "reputation," a "statement" is an assertion that can be *made* by any number of persons, including just one. Even if the rule against multiple hearsay cannot apply to the "reputation" exceptions, it can still be logically applied to "statements." This includes statements in business records and public records, which have been held to be subject to the rule against multiple hearsay.[64] Therefore, it should also include "statements in ancient documents."[65]

Compelling arguments can be made both for and against the proposition that statements in ancient documents are subject to the rule against multiple hearsay when basing the arguments on the language of the rules. Because of this am-

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pursuant to Rule 803(8), statement within the police report was hearsay not falling within any exception, and was therefore inadmissible); United States v. Pendas-Martinez, 845 F.2d 938, 942-43 (11th Cir. 1988) (concluding that the coast guard officer's report was inadmissible under Rule 805 because it contained hearsay within hearsay, and no exception applied); United States v. Dotson, 821 F.2d 1034, 1035 (5th Cir. 1987) (finding that the police report containing a statement by the police sergeant relating the admission by defendant's agent inadmissible under Rule 805 even though the admission itself was nonhearsay, because statement by sergeant was hearsay not within any exception); United States v. De Peri, 778 F.2d 963, 976-77 (3d Cir. 1985) (holding that the FBI agent's report was by itself admissible under Rule 803(8), but the statement in the report repeating the out of court statements of others was hearsay not subject to any exception).

60. FED. R. EVID. 803(19), (20), (21).

61. FED. R. EVID. 803(19).

62. FED. R. EVID. 803(20).

63. FED. R. EVID. 803(21).

64. *See* cases cited *supra* note 59.

65. FED. R. EVID. 803(16).

biguity, it is necessary and appropriate to examine the legislative history and common law predecessor to Rule 803(16).

## III. THE LEGISLATIVE HISTORY OF FEDERAL RULE OF EVIDENCE 803(16) CONFIRMS THAT STATEMENTS WITHIN DOCUMENTS AUTHENTICATED AS ANCIENT ARE SUBJECT TO THE RULES AGAINST MULTIPLE HEARSAY

The Federal Rules of Evidence, enacted in 1975, specifically address the treatment of ancient documents in two separate rules, 803(16) and 901(b)(8). The Advisory Committee notes on Rule 901[66] confirm that this rule is an extension of the common law rule concerning ancient documents and explain some of the elements of authentication of ancient documents.[67] The treatment of multiple hearsay within ancient documents under the common law is discussed in Part IV below. The notes to Rule 901 do not otherwise provide any guidance as to application of the rule against multiple hearsay to statements within ancient documents.

The Advisory Committee Note to Rule 803(16) discusses the relationship between the rules against hearsay and ancient documents.[68] The discussion, however, is less than

66. Act of Jan. 2, 1975, Pub. L. 93-595, § 1, 88 Stat. 1939, 1943; Act of Dec. 12, 1975, Pub. L. 94-149, § 1(11), 89 Stat. 805.

67. *See* FED. R. EVID. 901 advisory committee's notes. The notes state:

> The familiar ancient document rule of the common law is extended to include data stored electronically or by other similar means. Since the importance of appearance diminishes in this situation, the importance of custody or place where found increases correspondingly. This expansion is necessary in view of the widespread use of methods of storing data in forms other than conventional written records.

*Id.*

68. The Notes of Advisory Committee on Proposed Rules for Federal Rule of Evidence 803(16) provide:

> Authenticating a document as ancient, essentially in the pattern of common law, as provided in Rule 901(b)(8), leaves open as a separate question the admissibility of assertive statements contained therein as against a hearsay objection. 7 WIGMORE § 2145a. Wigmore further states that the ancient document technique of authentication is universally conceded to apply to all sorts of documents, including letters, records, contracts, maps, and certificate, in addition to tile documents, citing numerous decisions. *Id.* § 145. Since most of these items are significant evidentially only insofar as they are assertive, their admission in evidence must be as a hearsay exception. *But see* 5 *id.* § 1573, at 429, referring to recitals in ancient deeds as a "limited" hearsay exception. The former position is believed to be the correct one in reason and authority. As pointed out in MCCORMICK § 298, danger of mistake is minimized by authentication requirements, and age affords assur-

clear. The Note begins by citing *Wigmore on Evidence*: "[a]uthenticating a document as ancient, essentially in the pattern of the common law, as provided in Rule 901(b)(8), leaves open as a separate question the admissibility of assertive statements contained therein as against a hearsay objection."[69] After further citing Wigmore for the proposition that all types of documents may be authenticated as ancient, the Note to Rule 803(16) continues:

> Since most of these items are significant evidentially only insofar as they are assertive, their admission in evidence must be as a hearsay exception. [However, in section 1573 Wigmore] refer[s] to recitals in ancient deeds as a limited hearsay exception. The former position is believed to be the correct one in reason and authority.[70]

*Wigmore on Evidence* draws a distinction between authenticating a document as ancient and having statements within that document be admitted into evidence.[71] "The present principle [concerning ancient documents] deals only with the authentication of the document. Whether the contents are material, or whether any statements of assertion contained in them are admissible for any purpose, should depend on different principles."[72] This is the same distinction endorsed by the Advisory Committee Note to Rule 803(16). Wigmore also, however, draws a distinction between the admissibility of statements in authenticated ancient deeds and the admissibility of statements in other types of authenticated ancient documents. While there is a hearsay exception for statements in ancient deeds, there is no hearsay exception for statements in other types of ancient documents.[73] "Such statements may or may not be admissible under some exception to the hearsay rule, and their admissibility must of

ance that the writing antedates the present controversy. *See* Dallas County v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 1961), upholding [the] admissibility of 58-year-old newspaper story. *Cf.* MORGAN, BASIC PROBLEMS OF EVIDENCE 364 (1962), *but see id.* 254.
FED. R. EVID. 803(16) advisory committee's note.

69. FED. R. EVID. 803(16) advisory committee's note (*citing* 7 JOHN H. WIGMORE, WIGMORE ON EVIDENCE, § 2145a, at 744 (James H. Chadbourn ed., 1978)).

70. *Id.*

71. 7 JOHN H. WIGMORE, WIGMORE ON EVIDENCE, § 2145a, at 744 (James H. Chadbourn ed., 1978).

72. *Id.*

73. *Compare id.*, *with* 5 *id.* § 1573, at 520.

course depend upon the appropriate principle."[74] This is the distinction that the Note to Rule 803(16) rejects when it states that, "[s]ince most of these items are significant evidentially only insofar as they are assertive, their admission in evidence must be as a hearsay exception."[75]

The Note to Rule 803(16) goes on to state the rationale for creating a hearsay exception for statements in *all* ancient documents: "[a]s pointed out in McCormick section 298, danger of mistake is minimized by authentication requirements, and age affords assurance that the writing antedates the present controversy."[76] Thus, ancient documents are an exception to the federal hearsay rule for two reasons: (1) the minimization of the risk of "mistake" and (2) the document's "age." What is the impact of these twin rationales for purposes of determining whether statements in authenticated ancient documents are subject to the rule against multiple hearsay?

The Note to Rule 803(16) refers to the minimization of mistake in terms of "authentication requirements," with a citation to section 298 of McCormick, addressing "Recitals in Ancient Writings."[77] McCormick acknowledges that under the common law, statements in documents authenticated as ancient have frequently been held to be exceptions to the rule against hearsay.[78] He goes on to recount the arguments advanced by the supporters of the rule, including that "the danger of fabrication, or mistransmission, so apparent in all cases of oral declarations, are here reduced to a minimum by the requirements for authentication."[79] Whose authentication requirements are referred to and what are their requirements? There is no material difference in the authentication requirements of the common law from the federal rules except for how old a document must be in order to be authenti-

74. 7 *id.* § 2145a, at 744 (citations omitted).

75. Fed. R. Evid. 803(16) advisory committee's note.

76. FED. R. EVID. 803(16) advisory committee's note (citing Dallas County v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 1961) which upheld the admissibility of a 58-year-old newspaper story).

77. CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 298, at 623 (1st ed. 1954).

78. *Id.* "American courts have frequently held, as if it were merely an application of the rule about authentication, that the statements in an ancient document or record, authenticated as such, come in as evidence of the truth of the recitals." *Id.*

79. *Id.*

cated as ancient. Under common law, "[t]he requirements for authentication are that the writing must be shown to be thirty years old, and to have come from proper custody, and it must be free from suspicion in appearance."[80] A document is authenticated under the federal rules if there is "evidence sufficient to support a finding that the matter in question is what its proponent claims."[81] One of the "examples of authentication or identification conforming with the requirements of this rule" is found in subpart (b)(8) of Rule 901, which deals specifically with ancient documents. It states:

> Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where, if authentic, would likely be, and (C) has been in existence [twenty] years or more at the time it is offered.[82]

Ignoring the age requirement, which will be dealt with separately below, authentication rules of neither the common law nor the federal rules minimize the risk of "mistake" in an ancient document as opposed to any other type of document. When the author of a document, W, attempts to write down what A told him, the risk that W will mistranscribe what A said is the same whether the document is authenticated as an ancient document or as, for example, a business record. Likewise, the risk of mistake is increased when the author, W, attempts to write down what A claims B stated. Like the game of "telephone," each added level of hearsay increases the risk of mistake. Business records have been repeatedly held subject to the rule against multiple hearsay.[83] The minimization of mistake rationale behind the ancient document exception to the hearsay rule cannot be used to justify making statements in ancient documents exempt from the rule against multiple hearsay.

The other rationale for the ancient document exception to the hearsay rule offered by the Note to Rule 803(16) is that the document's "age affords assurance that the writing ante-

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80. *Id.*
81. FED. R. EVID. 901(a).
82. FED. R. EVID. 901(b)(8).
83. United States v. Chu Kong Yin, 935 F.2d 990, 998-99 (9th Cir. 1991); Osterneck v. E.T. Barwick Indus., Inc., 106 F.R.D. 327 (N.D. Ga. 1984); United States v. Knudsen, 320 F. Supp. 878 (D. Wis. 1971).

dates the present controversy."[84] McCormick's first edition of the *Handbook on the Law of Evidence* was in print at the time the Note to Rule 803(16) was written.[85] Section 298 of the handbook observes that advocates of the ancient document exception to the hearsay rule under the common law argued that statements in ancient documents should qualify as an exception to the ancient document rule because they were sufficiently reliable.[86] The common law required that the ancient document be thirty years old.[87] It would be unlikely that the author would have a motive to lie, especially in a way calculated to influence the resolution of controversy that would not be litigated for at least three decades.[88] However, this rationale for the existence of the hearsay rule does not necessarily support the proposition that statements in ancient documents are not subject to the rule against multiple hearsay. Instead, the opposite may be inferred.

For any document authenticated as ancient, there is some chance that the author made an intentional misrepresentation. There is also some chance, albeit slight, that the author foresaw the dispute that has arisen some decades later, and made the misrepresentation in a calculated attempt to influence the dispute's outcome.[89] Where the author of an ancient document, W, attempts to record what another person, A, has told her, the same risks of misrepresentation exist with respect to A. There is a chance that A is lying and a slight chance that A is lying in order to influence a latent dispute. With each level of hearsay added to the ancient document, the chance that someone in the chain of declarants reflected in the document is lying (or at best not completely accurate) will increase. Application of the rule against multiple hearsay to statements in ancient documents would

84. FED. R. EVID. 803(16), Notes of Advisory Committee on Proposed Rules.

85. The first edition of the HANDBOOK ON THE LAW OF EVIDENCE by Charles T. McCormick was first published in 1954. The Notes of Advisory Committee on Proposed Rules, including Federal Rule of Evidence 803(16), was published with the enactment of the Federal Rules of Evidence in 1975. *See* Act of Jan. 2, 1975, Pub. L. No. 93-595, § 1, 88 Stat. 1939; Act of Dec. 12, 1975, Pub. L. No. 94-149, § 1(11), 89 Stat. 805.

86. MCCORMICK, *supra* note 77, § 298, at 623.

87. *See id.*

88. *See id.*

89. For example, a company engaged in illegal dumping of hazardous waste may falsify documents today in order to avoid liability in litigation it fears may be brought at any time, even more than twenty years from now.

minimize these risks.

The Note to Rule 803(16) also cites *Dallas County v. Commercial Union Assurance Co.*[90] One might be tempted to interpret its citation as proof that the ancient document rule should be applied flexibly, so that where statements in an ancient document fail to comply with the rule against multiple hearsay, they are not automatically excluded. The better interpretation, however, is that *Dallas County* is cited by Rule 803(16) only to show the twin principles of necessity and circumstantial guarantees of trustworthiness that underlie all exceptions to the hearsay rule.

In *Dallas County*, the plaintiff county brought an action against its insurers for damages resulting from the collapse of a courthouse tower.[91] The county contended that the collapse was caused by lightning, pointing to the presence of charcoal and charred timbers in the tower debris.[92] The defendant insurers, however, claimed that the tower's collapse was caused by a number of other factors.[93] They contended that lightning had not struck the courthouse and that the presence of charcoal and charred timbers was caused instead by a fire that occurred half a century before.[94] In support of this claim, the defendants offered a fifty-eight-year-old newspaper article that had been written at the time of the fire, which was admitted by the trial court over a hearsay objection.[95]

Plaintiff appealed. The Court of Appeal for the Fifth Circuit affirmed.[96] For purposes of determining why *Dallas County* is cited by the Advisory Committee Note to Rule 803(16), a number of things about the opinion are significant. First, the decision was rendered within the framework of former Federal Rule of Civil Procedure 43.[97] Rule 43 stated

90. 286 F.2d 388 (5th Cir. 1961).

91. Dallas County v. Commercial Union Assurance Co., 286 F.2d 388, 390 (5th Cir. 1961).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 390-91. "The plaintiff objected that the newspaper article was hearsay; that is was not a business record nor an ancient document, nor was it admissible under any recognized exception to the hearsay doctrine." *Id.* at 391.

96. *Dallas*, 286 F.2d at 398.

97. Dallas County v. Commercial Union Assurance Co., 286 F.2d 388, 394 (5th Cir. 1961). Former Federal Rule of Civil Procedure 43(a) provided:

All evidence shall be admitted which is admissible under the statutes

that a given piece of evidence was admissible if it was admissible under any one of the following: federal statute, rules of evidence of courts of equity, and rules of evidence of the forum state.[98] The court found that this rule provided for liberal rules of admissibility. Rule 43 did "not purport to prohibit the admission of other relevant material probative evidence which, in the considered exercise of judicial wisdom, is trustworthy."[99] Instead, the rule enabled "federal courts to apply a liberal, flexible rule for the admissibility of evidence, unencumbered by common law archaisms."[100] The portion of Rule 43 cited by *Dallas County* has since been deleted and replaced with the Federal Rules of Evidence, of which Rule 803(16) is a part.[101] Rather than providing a regime under which evidence would be admitted under any of three sets of rules, the Rules of Evidence are now more restrictive. "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by act of Congress."[102]

Another significant fact about *Dallas County* is that it held the newspaper article was admissible not because it was an ancient document, but rather because it was "necessary and trustworthy."[103] The facts reported in the opinion suggest

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> of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the states of rules to which reference is herein made.

*Id.*

98. *See id.*

99. *Dallas County*, 286 F.2d at 394.

100. *Id.* at 395.

101. *See* FED. R. CIV. PROC. 43(a) advisory committee notes.

> Rule 43, entitled Evidence, has heretofore served as the basic rule of evidence for civil cases in federal courts. Its very general provisions are superseded by the detailed provisions of the new Rules of Evidence.
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> . . . .
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> . . . Those [provisions of subpart (a)] dealing with admissibility of evidence and competency of witnesses, however, are no longer needed or appropriate since those topics are covered at large in the Rules of Evidence. They are accordingly deleted.

*Id.*

102. FED. R. EVID. 802.

103. Dallas County v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 1961).

that the article could have been properly authenticated as an ancient document under the common law.[104] Nevertheless, while the court stated that the plaintiff objected to the document on grounds that it was hearsay not subject to the "ancient document" exception, the court refused to rest its holding on a finding that the article was an ancient document per se.[105] Instead the court found that the newspaper article satisfied the twin rationales behind every exception to the hearsay rule, that is, necessity and circumstantial guarantees of trustworthiness.[106] Admitting the article was in some sense necessary because the passage of a half-century since the underlying event made it all but impossible to find a witness who could recollect the event with any accuracy.[107]

*Dallas County* went on to explain how the newspaper article satisfied the second rationale behind all exceptions to the hearsay rule, namely, circumstantial guarantees of trustworthiness.

> In 1901[,] Selma, Alabama was a small town. Taking a common sense view of this case, it is inconceivable to us

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104. *Id.* at 391 n.1.

> As a predicate for introducing the newspaper in evidence, the defendants called to the stand the editor of the *Selma Times-Journal* who testified that his publishing company maintains archives of the published issues of the *Times-Journal* and of the *Morning Times*, its predecessor, and that the archives contain the issue of the Morning *Times of Selma* for June 9, 1901, offered in evidence.

*Id.* at 391. *See also* Recent Case, *Evidence—Hearsay—Old Newspaper Article Admitted as Evidence of Facts Contained on Grounds of Necessity and Trustworthiness*, 15 VAND. L. REV. 288, 291 (1961) ("The Fifth Circuit Court of Appeals [in *Dallas County*] might have upheld the district court on the basis of the "ancient documents" exception, but, instead, it chose to base its holding on a broader rule.").

105. *Dallas*, 286 F.2d at 395. "We do not characterize this newspaper as a 'business record', nor as an 'ancient document,' nor as any other readily identifiable and happily tagged species of hearsay exceptions." *Id.* at 397-98.

106. *Id.* at 395.

107. *Id.* at 396.

> The rationale behind the 'ancient documents' exception is applicable here: after a long lapse of time, ordinary evidence regarding signatures or handwriting is virtually unavailable, and it is therefore permissible to resort to circumstantial evidence . . . . The ancient documents rule applies to documents a generation or more in age. Here, the *Selma Times-Journal* article is almost two generations old. The principle of necessity, not requiring absolute impossibility or total inaccessibility of first-hand knowledge, is satisfied by the practicalities of the situation before us.

*Id.* at 397.

> that a newspaper reporter in a small town would report there was a fire in the dome of the new courthouse—if there had been no fire. He is without motive to falsify, and a false report would have subjected the newspaper and him to embarrassment in the community. The usual dangers inherent in hearsay evidence, such as lack of memory, faulty narration, intent to influence the court proceedings, and plain lack of truthfulness are not present here.[108]

What is the significance of the citation of *Dallas County* by the Note to the ancient document exception at Rule 803(16)? One might argue that it was cited by the Advisory Committee to reflect an intention that Rule 803(16) be applied flexibly. Under this interpretation, when one is confronted by an authenticated ancient document that contains multiple levels of hearsay, one should not mechanically exclude those statements that do not separately meet exceptions to the rule. Instead, one should return to the twin policies of necessity and trustworthiness to determine whether each statement should be admitted into evidence for the truth of the matter asserted. One problem with this interpretation is that *Dallas County* did not expressly address the issue of multiple hearsay.[109]

A better interpretation of the Note's citation to *Dallas County* is that it was cited only to provide case authority for the Note's assertions of the policies behind the ancient document rule, along with the other exceptions to the hearsay rule. Statements within ancient documents are still subject to the rules against multiple hearsay. *Dallas County* is not an ancient document opinion and was decided under a more

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108. *Id.*

109. One commentator has observed that the newspaper article

> technically may have involved multiple hearsay [because] there was no way of knowing whether the reporter wrote the story from his own personal knowledge or from information obtained from eyewitnesses .... Under the approach taken in the *Dallas County* case, however, it would seem that admissibility on the grounds of necessity and trustworthiness either simultaneously satisfies or eliminates this requirement.

*Evidence: Admissibility of Newspapers Under the Hearsay Rule,* 1961 DUKE L.J. 460, 465 & n.26 (1961) [hereinafter *Evidence*]. *See also* Nino E. Green, *Evidence—Hearsay Evidence—A New Exception to the Rule?*, 8 WAYNE L. REV. 332, 334 (1962) ("The newspaper account may well have been hearsay upon hearsay since the article could easily consist of assertions made to the declarant by another.").

liberal evidentiary regime. The citation is not an invitation to use Rule 803(16) to create new exceptions to the hearsay rule. This interpretation is supported by the existence of the catch-all exception to the hearsay rule, Rule 807.[110] This rule provides that an out of court statement not specifically covered by an exception to the hearsay rule, "but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule," if it satisfies three requirements.[111] These are: (1) "the statement is offered as evidence of a material fact;" (2) "the statement is more probative on the point for which it is offered than any other evidence" that can reasonably be obtained; and (3) the "general purposes" of the Rules of Evidence and the "interests of justice will best be served" by admitting the evidence.[112] This is the rule that *Dallas County* presaged. The ancient document rule need not be construed liberally, because Rule 807 serves as a release valve for those statements that satisfy the policy reasons behind the hearsay exceptions, but fail to satisfy the letter of any of them. The catchall exception to the hearsay rule would be unnecessary if the ancient document rule, along with the other exceptions to the hearsay rule, were construed to flexibly apply to statements that did not quite satisfy their requirements.

This interpretation is consistent with the views of commentators about the *Dallas County* opinion.[113] At the time the opinion was handed down it attracted a great deal of attention. Commentators consistently characterized the opinion as rooted *not* in the ancient document rule, but rather in first principles of all the hearsay exceptions.[114] One commentator explained:

> The court accepted Wigmore's contention that all the well-known hearsay exceptions are essentially based on the

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110. FED. R. EVID. 807.

111. *Id.*

112. *Id.*

113. *See Evidence, supra* note 109, at 465; David K. Kroll, *Evidence—Hearsay—Scope of Federal Rule 43(a)*, 60 MICH. L. REV. 105, 107 (1961); Allen P. Miller, *Evidence: Hearsay: Admissibility of Ancient Newspaper to Prove Matter of Local Interest:* Dallas County v. Commercial Union Assur. Co., 286 F.2d 388 (5th Cir. 1961), 46 CORNELL L. Q. 645, 649 (1961).

114. *See e.g., Evidence, supra* note 109, at 465 (1961) ("Refusing to resort to traditional hearsay labels, the Court of Appeals in the *Dallas County* decision employed basic analysis . . . .").

> same two principles, i.e., necessity and circumstantial guaranty of trustworthiness, and adopted these two criteria as the test for admissibility of hearsay in the federal courts. In thus refusing to be confined by the instructions of the orthodox hearsay exceptions, and in adopting instead the principles upon which they are based as a *new and complete exception*, *Dallas County* has charted a liberal course for the federal courts in the treatment of hearsay evidence.[115]

Other commentators echoed the view that *Dallas County* created a "new" hearsay rule.[116] The new rule was a flexible rule that was premised on the same principles of "necessity" and "circumstantial guarantees of trustworthiness" that formed the basis of every exception to the hearsay rule. The basic thrust of this new rule has since become embodied in the catchall exception to the hearsay rule. The citation in the Advisory Committee Notes to *Dallas County* appears to be for no other purpose than to illustrate the fundamental principles behind all exceptions to the hearsay rule, including the ancient document rule.

That the rule against multiple hearsay should be applied to statements in ancient documents is further demonstrated by the Advisory Committee Notes to Rule 803 as a whole. The Preface to Rule 803 Notes of Advisory Committee on Proposed Rules states: "[i]n a hearsay situation, the declarant is, of course, a witness, and neither this rule [Federal Rule of Evidence 803] nor Rule 804 dispenses with the requirement of first hand knowledge. It may appear from his statement or be inferable from circumstances."[117] This statement lends further support to the textual argument that the language and structure of the Federal Rules of Evidence make statements in ancient documents subject to the rule against multiple hearsay. For each out of court statement that is excepted from the rules against hearsay, the speaker or author must have personal, or "first hand," knowledge of

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115. Miller, *supra* note 113, at 649 (emphasis added, citations omitted).

116. "In the principle case [*Dallas County*], the court refused to rest its decision on the "business record" or "ancient document" exceptions to the hearsay rule. Accepting the *Monarch* [*Ins. Co. v. Spach*, 281 F.2d 401 (5th Cir. 1960)] dictum, the *court went on to state its own test* for governing admission of hearsay evidence." Kroll, *supra* note 113, at 107 (emphasis added).

117. FED. R. EVID. 803 advisory committee's note (referring to FED. R. EVID 602).

the matters stated. This follows from the competency requirements for the testimony of a witness under Rule 602. If the author does not have personal knowledge of those things, then the statement must constitute speculation or hearsay. The Preface makes clear that such speculation or hearsay should be excluded.

It does not follow from this, however, that everything about which the author of the ancient document lacks personal knowledge is excluded *conclusively*. The author's lack of personal knowledge does not end the inquiry. The Preface does not address the rule against multiple hearsay explicitly. Rule 805 provides that "[h]earsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."[118] Nothing in the Preface is inconsistent with the literal application of this rule to statements in ancient documents. The multiple hearsay rule is a sword as well as a shield. That is, if each level of hearsay in an ancient document falls within an exception to the hearsay rule, the statement is admissible. For example, if an ancient document states that the author, A, saw B steal a loaf of bread, then the statement would be admissible under Rule 803(16) by itself. This is because the author has personal knowledge of the matter stated. If, however, an ancient document states that the author, A, *heard B say* that B stole a loaf of bread, then two levels of hearsay are present: A's statement of what A heard, and B's statement of what B did. A's lack of personal knowledge of what B did does not end the inquiry. If B's statement satisfies an exception to the rule against hearsay—such as the statement against interest exception at Rule 804(b)(3)[119]—then the statement is admissible. Pursuant to Rule 805, each level of hearsay would have come within an exception to the hearsay rule and be admissible, even though the author of the ancient document lacked personal knowledge of the matter stated.

118. FED. R. EVID. 805.
119. FED. R. EVID. 804(b)(3).

## IV. STATEMENTS IN ANCIENT DOCUMENTS WERE SUBJECT TO THE RULE AGAINST MULTIPLE HEARSAY UNDER THE COMMON LAW

The Supreme Court has stated that courts may look to a Federal Rule of Evidence's common law antecedent to help interpret it.[120] Prior to the enactment of Rule 803(16) in 1975, the rules concerning the admissibility of statements in ancient documents under the common law was an issue as to which there was no uniformity of opinion. This subject was addressed in an article published in 1930 by Professor Joseph Wickes.[121] He argued that "although some of the courts have flatly rejected such evidence, in most of the cases in which recitals in ancient instruments have been offered in evidence testimonially in American courts and the issue has been squarely presented to the appellate court, the evidence has been held to be admissible."[122] As for the conditions under which "recitals," or statements, in ancient documents had been admitted up to that time, Professor Wickes contended the following:

> in most of the cases . . . the recitals were of such a nature as to render it clear that the facts recited were within the personal knowledge of the declarant; and in the few cases where the question has been squarely presented for decision the recitals have been rejected in most instances where they were not clearly made on personal knowledge.[123]

There is a better way to characterize the common law before and after Professor Wickes' article, up to the enactment of Rule 803(16): statements in an authenticated ancient document are admissible only where it can be reasonably inferred from the document itself, or from independent evidence, that the author would be competent to testify to those facts. Essentially, the matters stated would have to be within the author's personal knowledge, be covered by a hearsay exception, or otherwise contain circumstantial guarantees of trustworthiness. An examination of a number of decisions under the common law ancient document rule—in-

120. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).
121. Wickes, *supra* note 12, at 451.
122. *Id.* at 457-58 (citations omitted).
123. *Id.* at 469 (citations omitted).

cluding a number cited by Professor Wickes—reveals how this is so.[124]

Where common law decisions have addressed the issue expressly, they have conditioned admissibility of statements in the ancient document to be matters about which the author would be competent to testify. In *Kirkpatrick v. Tapo Oil Co.*,[125] the California District Court of Appeal held that a statement in an ancient document referring to the author's purchase of certificates of stock was admissible over an objection that the ancient document rule was a rule of authentication only and the document was hearsay.[126] The court explained that "an ancient document is admitted in evidence as proof of the facts recited therein, *provided the writer would have been competent to testify as to such facts*."[127] The author's apparent personal knowledge of his purchase of stock recorded in the document demonstrated his competence.[128]

Similar reasoning has been used in decisions under the common law to exclude statements in ancient documents. In *Brig Juno v. United States*,[129] the United States Court of Claims excluded from evidence statements in an ancient newspaper article, which were offered to prove that the French government had engaged in certain acts.[130] The court reasoned: "[w]ho furnished the information to the newspaper and whence it came we do not know. How much truth there is in it we cannot say .... [A]s proof of the illegal acts of the

124. A number of common law decisions have held that authenticating a document as ancient does not automatically result in any statements in the document being admitted into evidence, whether made on personal knowledge or not. *See, e.g.*, Town of Ninety-Six v. Southern Railway Co., 267 F.2d 579, 583 (4th Cir. 1959) ("The fact that an instrument is an ancient document does not affect its admissibility in evidence further than to dispense with proof of its genuineness."); King v. Watkins, 98 F. 913, 917 (W.D. Va. 1899) ("[Q]uestions of its [the authenticated ancient document] relevancy and admissibility as evidence cannot be affected by the fact that it is an ancient document."), *rev'd on other grounds*, 118 F. 524 (4th Cir. 1902); Gwin v. Calegaris, 73 P. 851 (Cal. 1903) (dictum) ("The rule as to ancient documents, as we understand it, does not import any verity to the recitals contained in these instruments.").

125. 301 P.2d 274 (Cal. Ct. App. 1956).

126. Kirkpatrick v. Tapo Oil Co., 301 P.2d 274, 278-79 (Cal. Dist. Ct. App. 1956).

127. *Id.* at 279 (emphasis added).

128. *See id.*

129. 41 Ct. Cl. 106 (Ct. Cl. 1906).

130. Brig Juno v. United States, 41 Ct. Cl. 106,109 (Ct. Cl. 1906).

French it is absolutely worthless."[131] Statements of family relationships in an ancient family prayer book were excluded for like reasons in an intestacy proceeding in *In re* Whalen.[132] The Surrogate's Court of New York stated the rule that the author of the ancient document "must be related by blood or affinity to the family concerning which he speaks, and moreover his relationship by blood or affinity must be established by evidence of other than his own declarations."[133] The court held that there was no independent evidence demonstrating that the author of the statements of family relationships in the ancient prayer book was in fact related to the family written about and, therefore, excluded those statements from evidence.[134] Also, in *In re* Barney,[135] the Appellate Division of the Supreme Court of New York faced a challenge to the admissibility of statements in otherwise authentic ancient hospital records. The court surveyed the law on ancient documents:

> so far as drawn to our attention or we have found, the records and entries, which have been received in evidence under this rule, related not to opinions but to facts presumably within the knowledge of the party making the record or entry [in the ancient document], whose death after [thirty] years is presumed, and *concerning which it would have been competent for him to have given testimony if living.*[136]

The court excluded the statements on the ground that they were not statements of fact or opinion by someone shown competent to make them.[137] Instead, the objectionable statements "constitute[d] narratives of past events and conclusions" and "opinions" without any demonstrated competent basis.[138]

Thus, in each of *Brig Juno, In re* Whalen, and *In re* Barney, the court excluded statements in what would have otherwise been an authentic ancient document. They did this *not* simply because the author lacked personal knowledge of

131. *Id.*
132. 261 N.Y.S. 761 (Sur. Ct. 1932).
133. *In re* Whalen, 261 N.Y.S. 761, 775 (Sur. Ct. 1932).
134. *Id.* at 776-77.
135. 174 N.Y.S. 242 (App. Div. 1919).
136. *In re* Barney, 174 N.Y.S. 242, 254 (App. Div. 1919) (emphasis added).
137. *Id.* at 255-56.
138. *Id.*

the matters written, but rather because he would have lacked competence to testify about them. In *Brig Juno* the court assumed that the author of the newspaper article lacked personal knowledge about the things written about and stated that there was no evidence as to who provided the information to the author. Implicit in this denial of admissibility was the idea that even though the newspaper author lacked personal knowledge of the matters written, he might nonetheless be competent to testify about them if the statements bore other circumstantial guarantees of trustworthiness so that they were excepted from the rule against hearsay.[139]

Likewise, *In re* Whelan excluded the family relationship statements in the prayer book not because the author lacked personal knowledge of what was stated, but because there was no independent evidence that the author was *related to* the individuals about whom he wrote. An individual's knowledge about *anyone's* family tree—even his own—is rarely completely within that individual's personal knowledge, but is instead often based on hearsay.[140] The court implicitly reasoned that an author's statements in an ancient document about *his own* family tree bear circumstantial guarantees of trustworthiness that make them admissible.[141]

Finally, in *In re* Barney, the court made clear that it was excluding statements of medical opinion in the ancient document not because the author lacked personal knowledge, but because there was no evidence that those opinions were rendered by someone qualified to make them, such as a doctor. "It does not appear who made these entries or who made the

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139. For a list of the exceptions to the hearsay rule recognized by the Federal Rules of Evidence, see FED. R. EVID. 803(1)-(23), 804, 807.

140. *See Evidence, supra* note 109, at 464 n.25 ("Upon analysis exceptions admitting reputation as to family pedigree and local history will all involve, on occasion, multiple hearsay, for all of these exceptions are based upon the passing of 'word-of-mouth' assertions from generation to generation.").

141. Two hearsay exceptions recognized by the Federal Rules of Evidence are relevant to the facts stated in *In re* Whelan. Rule 803(13) excepts from the hearsay rule: "Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like." FED. R. EVID. 803(13). Rule 803(19) excepts from the hearsay rule: "Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history." FED. R. EVID. 803(19).

diagnosis or whether they were made by competent medical experts."[142] "[M]edical experts on mental diseases may . . . give their opinions on acts and conditions observed and found and stated by them, *or on other facts assumed to be true*, with respect to the precise mental state of the person."[143] Thus in *Brig Juno, In re* Whalen, and *In re* Barney, the test for determining the admissibility of statements in ancient documents turned on whether the document's author would have been competent to testify about the matters stated—whether by personal knowledge, as a qualified expert, or by an exception to the rule against hearsay.

A number of other decisions under the common law have held that statements in ancient documents were admissible.[144] While none of these decisions expressly conditions admissibility of statements on it being shown that the author would be competent to testify about them, in each decision these facts were present. In some of these decisions it may reasonably be inferred from the circumstances that the author of the ancient document had personal knowledge of the matters stated. Examples of statements admitted by these decisions include statements by a person claiming ownership to show such a claim was made,[145] and a map made by "a surveyor of acknowledged skill and accuracy"[146] or by the

142. *See In re* Barney, 174 N.Y.S. at 256.

143. *Id.* (emphasis added).

144. *See, e.g.*, Wilson v. Snow, 228 U.S. 217, 220-21 (1913); McClaskey v. Barr, 47 F. 154, 169 (C.C.S.D. Ohio 1891), *rev'd on other grounds*, 70 F. 529 (6th Cir. 1895); Basch v. United States, 52 Ct. Cl. 134, 157-59 (Ct. Cl. 1917); Walker v. Town of Fruithurst, 130 So.2d 12, 14 (Ala. 1961); *In re* Nidever's Estate, 5 Cal. Rptr. 343, 349 (Dist. Ct. App. 1960); Geary St., Park and Ocean R.R. v. Campbell, 179 P. 453, 454 (Cal. Dist. Ct. App. 1919); Whitman v. Shaw, 44 N.E. 333, 335-36 (Mass. 1896); Layton v. Kraft, 98 N.Y.S. 72, 75-76 (App. Div. 1906); Burgan v. Siegman, 9 Ohio App. 84, 89 (1917); Schultz v. Shatto, 237 S.W.2d 609, 613 (Tex. 1951); Bruni v. Vidaurri, 166 S.W.2d 81, 90-91 (Tex. 1942); Magee v. Paul, 221 S.W. 254, 257 (Tex.1920); Howard v. Russell, 12 S.W. 525, 527 (Tex. 1889); Keppler v. City of Richmond, 98 S.E. 747, 751-52 (Va. 1919); City of Spokane v. Catholic Bishop, 206 P.2d 277, 281 (Wash. 1949); Barrows v. Kenosha County, 98 N.W.2d 461, 464-65 (Wis. 1959).

145. *See* Magee v. Paul, 221 S.W. 254, 257 (Tex. 1920).

146. Whitman v. Shaw, 44 N.E. 333, 335 (Mass. 1896). The map was admitted because there were additional circumstantial guarantees of trustworthiness as well: "It is apparent from an inspection of the plan [map] and the evidence that it related to actual transactions. It is not to be supposed that such a plan was made for amusement." *Id. See also* Skipper v. Yow, 81 S.E. 2d 200, 202 (N.C. 1954) (dictum) ("[Ancient document rule] has come to be considered an exception to the hearsay rule and *under certain conditions* renders recitals in

former owner of the property.[147] In many of the decisions admitting statements in ancient documents, however, personal knowledge cannot be inferred from the circumstances. Instead, there are circumstantial guarantees of trustworthiness—including many specifically recognized as hearsay exceptions—that support the admission of these statements. These include statements in a business' contemporaneous records of inventory[148] or stock subscriptions,[149] a map from the office of the county assessor,[150] or survey[151] or declaration concerning family relationships,[152] church records on baptisms,

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deeds admissible even against strangers.") (emphasis added).

147. *See* Burgan v. Siegman, 9 Ohio App. 84, 89 (1917).

148. *See* Basch v. United States, 52 Ct. Cl. 134, 157-59 (Ct. Cl. 1917). The court was careful to emphasize that these admitted records were not just narrative of past transactions, but instead were themselves contemporaneous or at least reflected other, since lost, contemporaneous records. *Id.* at 159. "[T]he ancient record of bills of sale or receipted invoices may themselves show that there were original bills of sale or receipted invoices in existence when the copies were made." *Id.* This brings these documents close to the business record exception now recognized by Federal Rule of Evidence 803(6).

149. *See* Geary St., Park and Ocean R.R. v. Campbell, 179 P. 453 (Cal. Dist. Ct. App. 1919).

> The books of the company received in evidence were more than thirty years old. The secretary of the plaintiff, who had occupied that position for many years, produced them, and testified that they were turned over to him in the ordinary course of business when he became such secretary, as the books of the corporation, and he identified them as such.

*Id.* These documents come close to qualifying under the business record exception now recognized by Federal Rule of Evidence 803(6). *See* FED. R. EVID. 803(6).

150. *See* Walker v. Town of Fruithurst, 130 So.2d 12, 17 (Ala. 1961).

> Maps, surveys, etc., purporting to be thirty years old or more are said to prove themselves and are admissible in evidence without the ordinary requirements as to proof of execution or handwriting if relevant to the inquiry, when produced from proper custody, on their face free from suspicion and *authorized or recognized as official documents.*

*Id.* The map came from the records of the county tax assessor. *Id.* These facts make the public records exception now recognized at Federal Rule of Evidence 803(8) close to being applicable. *See* FED. R. EVID. 803(8).

151. *See* Barrows v. Kenosha County, 98 N.W.2d 461, 464-65 (Wis. 1959). "An original map, over thirty years old, found in proper custody, *authorized or recognized as an official document*, and free on its face of suspicion, is admissible in evidence as an 'ancient document' to prove the location of a boundary line." *Id.* at 465 (internal quotation marks omitted). The map came from the records of the county surveyor. *Id.* The public records exception to the hearsay rule at Federal rule of Evidence 803(8) is close to being satisfied by this map. *See* FED. R. EVID. 803(8).

152. *See* McClaskey v. Barr, 47 F. 154, 169 (C.C.S.D. Ohio 1891), *rev'd on other grounds*, 70 F. 529 (6th Cir. 1895) (ancient will); *In re* Nidever's Estate, 5 Cal. Rptr. 343, 349 (Dist. Ct. App. 1960) ("Ancient documents may be admitted

marriages, and deaths of parishioners to show pedigree,[153] a sheriff's return on execution of a judgment and sheriff's deeds regarding existence of a street next to the subject properties,[154] an agreement of partition and a deed for real property on the claim that partition had been made,[155] "blueprints," or copies of plat maps from the files of a city engineer on a boundary,[156] a deed for the proposition that grantor has

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in evidence as proof of the facts recited therein, *provided the writers would have been competent to testify as to such facts*.") (internal quotation marks omitted) (emphasis added). Statements concerning family relationships may be admissible as exceptions to the hearsay rule under Federal Rule of Evidence 803(13) and 803(19). *See* FED. R. EVID. 803(13), 803(19).

153. *See* Layton v. Kraft, 98 N.Y.S. 72, 75 (1906). "[A] question of pedigree forms an exception to the general rule as to the proof of a particular fact by hearsay, reputation or tradition." *Id.*

> Notwithstanding the fact that proof of handwriting was not made, and that there was no evidence that the entries were in the handwriting of one who was then clerk of the [church], or that there was a rule requiring such records to be kept, we think the records of marriages, and baptisms and deaths kept by that church were competent evidence and should have been received upon trial.

*Id.* Statements concerning family relationships may be admissible as exceptions to the hearsay rule under Federal Rule of Evidence 803(13) and 803(19). *See* FED. R. EVID. 803(13), 803(19).

154. *See* Schultz v. Shatto, 237 S.W.2d 609, 613 (Tex. 1951). These documents may be admissible as exceptions to the hearsay rule under Federal Rule of Evidence 803(15), which applies to any

> statement contained in a document purporting to establish or affect an interest in property in the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

FED. R. EVID. 803(15).

155. *See* Bruni v. Vidaurri, 166 S.W.2d 81, 90-91 (Tex. 1942) ("It is of course recognized that, by exception to the hearsay rule, the recitals in the two ancient documents are admissible as evidence of the facts recited."). Statements in these documents, which affect an interest in property, may be admissible as exceptions to the hearsay rule under Federal Rule of Evidence 803(15). *See* FED. R. EVID. 803(15).

156. *See* City of Spokane v. Catholic Bishop, 206 P.2d 277, 281 (Wash. 1949). "[W]hether admitted as ancient documents or as properly authenticated copies of a lost or unobtainable ancient document, the recitals therein may properly be employed to evidence the truth of the facts recited." *Id.* (citing Wickes, *supra* note 12, in which it is demonstrated that the majority of courts correctly take a similar view).

The fact that the documents were ancient was not the sole basis for admitting them for the truth of the matters stated in them: "Further, and most important, the contents of the blueprints are thoroughly corroborated by other evidence in the case." *Id.* The copies of the plat maps, which were found in the files of the city engineer, contain words of dedication, and include a written acknowledgment by a notary public, come close to being admissible as an exception to the hearsay rule under Federal Rule of Evidence 803(8). *See* FED. R. EVID. 803(8).

authority to transfer property[157] and the width of an alley adjoining the property,[158] and records of a masonic temple to prove identity of member.[159] There are cases, however, where ancient documents have been admitted for the truth of the matters stated therein, without indicia of trustworthiness and reliability.[160] The majority of common law decisions, however, appears to be consistent with the proposition that statements in ancient documents are admissible only where the author of that document would be competent to testify to the matters stated. Such competency rests on the author's personal knowledge or a separate exception to the rule against hearsay.

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157. *See* Wilson v. Snow, 228 U.S. 217, 220-21 (1913). The deed's recital that it "had been executed under the power of sale conferred by the will was sufficient to show that the nominated executrix had taken the oath and qualified as such." *Id.* This statement, contained as it is in a document that affects an interest in property, may be admissible as exceptions to the hearsay rule under Federal Rule of Evidence 803(15). *See* FED. R. EVID. 803(15).

158. *See* Keppler v. City of Richmond, 98 S.E. 747, 751 (Va. 1919). "We are of the opinion that the Hirsh deed (being over thirty years old), was admissible in evidence against appellants, although they are not in privity therewith, under the exception which ancient deeds afford to the rule as to inadmissibility of hearsay evidence." *Id.* at 750.

159. *See* Howard v. Russell, 12 S.W. 525, 527 (Tex. 1889).

> [R]ecitals in ancient documents have been admitted in proof of facts therein stated even as to persons not parties to them. In this case the entry on the lodge minutes was more than thirty years old, and we think the presumption should be after such a lapse of time that the entry was correctly made. Copies of church registers have been admitted in cases of pedigree in courts of the highest authority in this country. It would seem therefore that in a case like this, in order to prove a fact occurring fifty years ago, the records of an ancient and well established society may be resorted to upon a question of pedigree.

*Id.* These recitals may qualify as hearsay exceptions under Federal Rule of Evidence 803(6) (business records) and 803(19) (reputation concerning family). *See* FED. R. EVID. 803(6), 803(19).

160. *See* Drake v. City of Fort Lauderdale, 227 So.2d 709, 711 (Fla. 1969). Map was held admissible as an ancient document to prove truth of boundary indicated in it, without any circumstantial guarantees of trustworthiness stated. *See id.* The map, however, did come from "the office of the defendant's City Engineer." *Id.; see also* Devereaux v. Frazier, 248 Cal. App. 2d 323, 331 (1967) (admitting ancient guaranty for truth of matters stated therein with no circumstantial guarantees of trustworthiness).

## V. THE FEW DECISIONS THAT HAVE ADDRESSED THE ISSUE UNDER THE FEDERAL RULES OF EVIDENCE HAVE HELD THAT STATEMENTS IN ANCIENT DOCUMENTS ARE SUBJECT TO THE RULE AGAINST MULTIPLE HEARSAY

A number of decisions have addressed the admissibility of ancient documents under Rule 803(16).[161] Most of these decisions have admitted statements in ancient documents into evidence over objection that they are inadmissible hearsay. In none of the decisions in which statements in ancient documents have been admitted over a double hearsay objection, however, was the issue of *multiple* hearsay or Rule 805 raised. The few decisions that have discussed the multiple hearsay rule in the context of statements in ancient documents have uniformly held that such statements are subject to the rule against multiple hearsay.[162] Many, though not all, of the decisions that have admitted statements in ancient documents for the truth of the matter asserted are consistent with the view that those statements must come within the personal knowledge of the author or fall within a separate exception to the hearsay rule.[163]

161. *See, e.g.*, United States v. Hajda, 135 F.3d 439, 442-44 (7th Cir. 1997); George v. Celotex Corp., 914 F.2d 26, 30 (2d Cir 1994); United States v. Koziy, 728 F.2d 1314, 1322 (11th Cir. 1984); Connecticut Light and Power Co. v. Federal Power Comm'n, 557 F.2d 349, 356 (2d Cir. 1977); United States v. Ilileikis, 929 F. Supp. 31, 38 (D. Mass. 1996); United States v. Stelmokas, No. 92-3440, 1995 WL 464264 at *5-6 (E.D. Pa. Aug. 2, 1995); Sokaogon Chippewa Community v. Exxon Corp., 805 F. Supp. 680, 710-11 & n.34 (E.D. Wis. 1992); Gonzales v. North Township of Lake County, 800 F. Supp. 676, 681 (N.D. Ind. 1992), *rev'd on other grounds*, 4 F.3d 1412 (7th Cir. 1993); Columbus-America Discovery Group, Inc. v. Sailing Vessel, 742 F. Supp. 1327, 1343 (E.D. Va. 1990), *rev'd on other grounds*, 974 F.2d 446 (4th Cir. 1992); Fulmer v. Connors, 665 F. Supp. 1472, 1490 (N.D. Ala. 1987); DeWeerth v. Baldinger, 658 F. Supp. 688, 695 n.12 (S.D.N.Y. 1987), *rev'd on other grounds*, 836 F.2d 103 (2d Cir. 1987); Baker v. City of Kissimee, 645 F. Supp. 571, 576 n.5 (M.D. Fla. 1986) (dicta); Compton v. Davis Oil Co., 607 F. Supp. 1221, 1228 (D. Wyo. 1985); Ammons v. Dade City, Fla, 594 F. Supp. 1274, 1280 n.8 (M.D. Fla. 1984); Bell v. Combined Registry Co., 397 F. Supp. 1274, 1280 n.8 (N.D. Ill. 1975); Estate of Cole v. Commissioner, 58 T.C.M. (CCH) 715, 720-23 (T.C. Nov. 20, 1989), *rev'd on other grounds*, 963 F.2d 280 (9th Cir. 1992); *In re* Rhode Island Asbestos Cases, 11 Fed. R. Evid. Serv. (CBC) 444, 447-48 (D.R.I. July 7,1982).

162. *Hajda*, 135 F.3d at 442-44; *Stelmokas*, No. 92-3440, 1995 WL 464264 at *5-6; Estate of Cole 58 T.C.M. at 720-23; *In re* Rhode Island Asbestos Cases, 11 Fed. R. Evid. Serv. at 447-48.

163. *See* George v. Celotex Corp., 914 F.2d 26, 30 (2d Cir. 1994); Columbus-America Discovery Group, Inc. v. Sailing Vessel, 742 F. Supp. 1327, 1343 (E.D. Va. 1990), *rev'd on other grounds*, 974 F.2d 446 (4th Cir. 1992); Fulmer v. Connors, 665 F. Supp. 1472, 1479 (D. Wyo. 1985); Compton v. Davis Oil Company,

Of the few decisions addressing the applicability of the multiple hearsay rule to statements in ancient documents, the one with the most complete analysis is *United States v. Stelmokas*.[164] In that case, the government sought to admit into evidence a fifty year-old report in connection with a denaturalization action against an alleged World War II era Nazi collaborator.[165] Although the report was properly authenticated as an ancient document, Stelmokas objected on the grounds that the author of the report did not have personal knowledge of the matters stated in it, but rather recorded the statements of other witnesses, and those matters were therefore inadmissible as hearsay.[166] The government argued that the language of Federal Rule of Evidence 803(16) "is sufficiently broad to provide an exception for statements made by the author of the ancient document and for hearsay statements within the document, that the rationale underlying the ancient document hearsay exception applies equally to all such statements."[167]

The court rejected the government's argument and excluded the hearsay statements within the report. The court's analysis rested in part on the text and structure of Rules 803 and 805 and in part on the policies behind the ancient document exception to the hearsay rule:

> [a]s a general matter, evidence admitted under the hearsay exceptions in Rule 803 remains subject to the multiple hearsay requirement of Rule 805. If the law were otherwise, Rule 805 would be rendered superfluous. More important, the government's argument overlooks the fact that age is not the sole indicia of trustworthiness underlying the Rule 803(16) exception. The requirement that the ancient document be written generally guarantees the factfinder possesses the statement of the documents author made more than [twenty] years ago without risk of mistransmission. However, there is no guarantee that a hearsay statement contained in the document is accurate. The author of the ancient document may have misheard or misunderstood the hearsay statement or his written words may not convey the meaning intended by the hearsay de-

607 F. Supp. 1221, 1228 (D. Wyo. 1985); Bell v. Combined Registry Co., 397 F. Supp. 1241, 1246-47 (N.D. Ill. 1975).

164. No. 92-3440, 1995 WL 464264 (E.D. Pa. Aug. 2, 1995).

165. *Id.* at *5.

166. *Id.*

167. *Id.* at *6.

> clarant. These issues of perception and narration are not merely peripheral but are fundamental problems of hearsay evidence. Consequently, hearsay statements contained within an ancient document lack the same indicia of trustworthiness and reliability that provide the rationale for admitting statements where the declarant is the author of the ancient document. It is for these reasons that the court interprets Rule 803(16) as an exception to the hearsay rule only for statements where the declarant is the author of the ancient document. This ruling best gives effect to the combined purposes of Rules 803(16) and 805.[168]

The court went on to distinguish a number of cases cited by the government, including *Dallas County v. Commercial Union Assurance Co.*,[169] on the ground that none of those cases involved an ancient document with multiple levels of hearsay.[170]

Other decisions have also held that statements within authentic ancient documents are subject to the rule against multiple hearsay.[171] While the basis for these decisions is less than clear, it appears to be based on the language and structure of Rules 803 and 805. Like *United States v. Stelmokas*, the court in *United States v. Hajda*[172] faced the admissibility of statements in ancient documents in the context of a denaturalization action brought by the government against an individual who allegedly collaborated with the Nazis during World War II. The Court of Appeals for the Seventh Circuit treated the admissibility of ancient documents and the admissibility of statements within those ancient documents as two separate questions:

> These documents are more than [twenty] years old and they were properly authenticated, so they are exceptions to the hearsay rule admissible under Rule 803(16) of the Federal Rules of Evidence. However, this admissibility exception applies only to the document itself. If the docu-

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168. *Id.* at *6; *see* STRONG, *supra* note 12, § 245, at 93.

169. 286 F.2d 388 (5th Cir. 1961).

170. Dallas County v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 1961).

171. *See* United States v. Hajda, 135 F.3d 439, 442-44 (7th Cir. 1997); Estate of Cole v. Commissioner, 58 T.C.M. (CCH) 715, 720-23 (T.C. Nov. 20, 1989), *rev'd on other grounds*, 963 F.2d 280 (9th Cir. 1992); *In re* Rhode Island Asbestos Cases, 11 Fed. R. Evid. Serv. (CBC) 444, 447-48 (D.R.I. July 7, 1982).

172. 135 F.3d 439 (7th Cir. 1997).

ment contains more than one level of hearsay, an appropriate exception must be found for each level.[173]

The court went on to find that the statements within the ancient documents were admissible. Some of the statements were admissible because, although they were prepared by someone else, the "declarant signed and adopted them, so they contain only one level of hearsay."[174] Although not expressly stated by the court as a basis for its reasoning, it is clear from the facts recited in the opinion that it is reasonable to conclude that each declarant had personal knowledge of the matters stated in the ancient document. One set of statements were signed and adopted by Nazi prison camp guards who said that the defendant, who was also a guard, "beat and shot prisoners and took part in the massacre on the last day the camp was open."[175] Another set of statements were signed and adopted by the defendant's sister, and stated that her "brother served in the German military" and "was employed in the so-called 'Wachmannschaft' [guard forces]."[176] It is unlikely that the court would have found it significant, for purposes of the rule against multiple hearsay, that these declarants signed and adopted these statements unless the court believed that each declarant had personal knowledge of the matters stated. If the declarants had no competency whatsoever to testify as to those matters, the fact that they signed and adopted statements as to those matters should be irrelevant. Those statements would still be inadmissible.

By contrast, this rationale was unavailable to support the admission of another statement purportedly made by the defendant's father, Stanislaw, at a collaboration trial fifty years earlier. The record from the collaboration trial reported that Stanislaw said, "My son [the defendant] went to Germany to join in the SS."[177] The *Hajda* court explained that "Stanislaw's statement . . . isn't signed, so it contains two levels of hearsay. The document itself falls under Fed[eral] R[ule] [of] Evid[ence] 803(16), but Stanislaw's actual statement needs a separate exception in order to be ad-

173. *Hajda*, 135 F.3d at 444 (citing FED. R. EVID. 805).
174. *Id.*
175. *Id.* at 442.
176. *Id.* at 443.
177. United States v. Hajda, 135 F.3d 439, 443 (7th Cir. 1997) (internal quotation marks omitted).

missible. Here, the proper exception is a declaration against interest."[178] Unlike the statements in ancient documents attributed to other witnesses, because Stanislaw's statement was not signed by him, it was not his statement at all.[179] Rather, it was a statement by some official, the author of the ancient document, at the collaboration trial about what he thought he heard Stanislaw say.[180] This presented a second level of hearsay for which a separate exception to the hearsay rule must apply in order for the statement to be admissible. The court went on to hold that the declaration against interest exception at Rule 804(b)(3) applied to make the author's representation of what Stanislaw said admissible.[181]

In *In re* Rhode Island Asbestos Cases[182] the court excluded as hearsay, statements in documents that were themselves admissible as ancient documents.[183] The court explained that "some of the statements in the documents are hearsay within hearsay; that is, the writer of the document is, in some instances, making assertions on the basis of second-hand information."[184] To the extent the statements were offered for the truth of the matter asserted, the court held that "some statements are inadmissible hearsay within hearsay," citing Rule 805.[185] The court acknowledged that personal knowledge on the part of the author of the ancient document would result in the statement being admitted.[186]

The court engaged in similar analysis in *Estate of Cole v. Commissioner*.[187] There the estate of Nat "King" Cole sought to establish the tax deductibility of certain items by proving that legitimate claims were made against the estate.[188] The evidence offered by the estate consisted of "creditors' claim

178. *Id.* at 444 (citing FED. R. EVID. 804(b)(3)).

179. *See id.*

180. *See id.*

181. *Id.*

182. 11 Fed. R. Evid. Serv. (CBC) 444 (D.R.I. July 7,1982).

183. *In re* Rhode Island Asbestos Cases, 11 Fed. R. Evid. Serv. (CBC) 444, 447-48 (D.R.I. July 7,1982).

184. *Id.* at 447.

185. *Id.* at 448.

186. *Id.*

187. 58 T.C.M. (CCH) 715, 720-23 (T.C. Nov. 20, 1989), *rev'd on other grounds,* 963 F.2d 280 (9th Cir. 1992).

188. Estate of Cole v. Commissioner, 58 T.C.M. (CCH) 715, 720 (T.C. Nov. 20, 1989), *rev'd on other grounds,* 963 F.2d 280 (9th Cir. 1992).720.

forms" that had been filed in a separate action.[189] Each form was signed not by the claimant himself, but rather by the claimant's representative.[190] The IRS objected on the grounds that even if the claim forms were themselves admissible as an exception to the hearsay rule, the statements in the claim forms constituted a second level of hearsay for which no exception existed.[191] The court explained the applicability of the rule against multiple hearsay:

> Fed[eral] R[ule] [of] Evid[ence] 805 makes it clear that hearsay within hearsay is not admissible unless each of the hearsay components independently satisfies an exception to the hearsay rule. Thus, a statement on a claim form (e.g., the statement of the Superior Court that it approves the claim) based upon statements made by other persons (e.g., the claimant's statement that it has a legitimate claim) is multiple hearsay if offered to prove the truth of the matters asserted by such other person (e.g., that the claimant has a legitimate claim). Supporting affidavits, letters, and copies of notes in the claim forms are likewise subject to the restrictions of Fed[eral] R[ule] [of] Evid[ence] 805. Unless petitioner, as proponent of the claim forms in question, shows that the claims forms come within an exception to the hearsay rule at this second level, the matters asserted at this second level are not admissible.[192]

The court rejected the estate's argument that the ancient document rule allowed those statements to be admitted into evidence.

> [P]etitioner has not shown that the declarants of the second-level statements, specifically the claimant representatives who executed the claim forms, had first hand knowledge. "In a hearsay situation, the declarant is, of course, a witness, and neither this rule [Federal Rule of Evidence 803] nor [Federal Rule Evidence] Rule 804 dispenses with the requirement of first hand knowledge."[193]

A number of decisions have admitted into evidence

189. *Id.* at 722.
190. *Id.* at 723.
191. *Id.* at 722-23.
192. *Id.* at 723.
193. Estate of Cole v. Commissioner, 58 T.C.M. (CCH) 715, 720-23 (T.C. Nov. 20, 1989), *rev'd on other grounds,* 963 F.2d 280 (9th Cir. 1992) (citing FED. R. EVID. 803 advisory committee's notes).

statements in ancient documents without determining that either it is reasonably clear from the circumstances that the author has personal knowledge of the matters stated or that a separate exception to the hearsay rule applies.[194] Nevertheless, many of these decisions are consistent with the view that the author's personal knowledge or other circumstantial guarantees of trustworthiness must be shown in order for a statement within an ancient document to be admitted for the truth of the matter stated. In some of these decisions, it can be inferred from the circumstances that the author of the ancient document had personal knowledge. For example, in *Compton v. Davis Oil Co.*,[195] the court held that statements in two warranty deeds and a death certificate that two individuals were husband and wife were admissible.[196] The two warranty deeds were executed by the married couple, while the death certificate was executed by the brother of the husband, "with whom [the husband] was very close."[197] In *George v. Celotex Corp.*,[198] the court admitted statements in a report under the ancient document rule.[199] The report was a study of asbestos plants authored by an engineer for an asbestos institute, in which the engineer stated that the scientific evidence on the safety of asbestos was obscure, questioned the methods used, and urged additional studies.[200] Likewise, in

194. *See, e.g.,*, George v. Celotex Corp., 914 F.2d 26, 30 (2d Cir. 1994); United States v. Koziy, 728 F.2d 1314, 1322 (11th Cir. 1984); Connecticut Light and Power Co. v. Federal Power Comm'n, 557 F.2d 349, 356 (2d Cir. 1977); United States v. Ilileikis, 929 F. Supp. 31, 38 (D. Mass. 1996); Sokaogon Chippewa Community v. Exxon Corp., 805 F. Supp. 680, 710-11 & n. 34 (E.D. Wis. 1992); Gonzales v. North Township of Lake County, 800 F. Supp. 676, 681 (N.D. Ind. 1992), *rev'd on other grounds*, 4 F.3d 1412 (7th Cir. 1993); Columbus-America Discovery Group, Inc. v. Sailing Vessel, 742 F. Supp. 1327, 1343 (E.D. Va. 1990), *rev'd on other grounds*, 974 F.2d 446 (4th Cir. 1992); Fulmer v. Connors, 665 F. Supp. 1472, 1490 (N.D. Ala. 1987); DeWeerth v. Baldinger, 658 F. Supp. 688, 695 n.12 (S.D.N.Y. 1987), *rev'd on other grounds*, 836 F.2d 103 (2d Cir. 1987); Baker v. City of Kissimee, 645 F. Supp. 571, 576 n.5 (M.D. Fla. 1986) (dicta); Compton v. Davis Oil Co., 607 F. Supp. 1221, 1228 (D. Wyo. 1985); Ammons v. Dade City, Fla., 594 F. Supp. 1274, 1280 n.8 (M.D. Fla. 1984); Bell v. Combined Registry Co., 397 F. Supp. 1241, 1246-47 (N.D. Ill. 1975). *See also* Trustees of German Township v. Farmers and Citizens Savings Bank Co., 113 N.E. 2d 409 (Ohio C.P. 1953) (common law).

195. 607 F. Supp. 1221 (D. Wyo. 1985).

196. Compton v. Davis Oil Co., 607 F. Supp. 1221, 1228 (D. Wyo. 1985).

197. *Id.* at 1223-24.

198. 914 F.2d 26 (2d Cir. 1990).

199. George v. Celotex Corp., 914 F.2d 26, 30 (2d Cir. 1990).

200. *Id.* at 29.

*Bell v. Combined Registry Co.*,[201] the court admitted into evidence pieces of correspondence as ancient documents.[202] The correspondence was discussed at length to support the court's holding that there was a forfeiture of a copyright in a poem because of its widespread distribution during World War II.[203] The court relied on such statements of personal knowledge as "I must have given away a thousand copies [of the poem] in the last few years," and "I shall have it multigraphed for distribution to the soldiers . . . ."[204]

In most of the ancient document cases in which statements were admitted without a finding that either the author had personal knowledge of the matters stated, or a separate exception to the hearsay rule applied, it appears highly unlikely that the author had personal knowledge.[205] Nor does it appear from these opinions that a separate exception to the hearsay rule was technically applicable to the statement that was admitted. Nevertheless, for many of these statements there existed circumstantial guarantees of trustworthiness to justify their admission into evidence to prove the truth of the matters asserted. For example, in *Columbus-America Discovery Group, Inc. v. Sailing Vessel*,[206] the court acknowledged that the admissibility of statements in ancient documents, in this case newspapers, is limited. "There are some restrictions on the admissibility of such articles to prove the truth of certain statements for the truth of their content."[207] *Columbus* addressed the admissibility of newspaper articles concerning the sinking of a passenger ship, the "Central

201. 397 F. Supp. 1241 (N.D. Ill.. 1975).

202. Bell v. Combined Registry Co., 397 F. Supp. 1241, 1246-47 (N.D. Ill.. 1975).

203. *Id.* at 1248-49.

204. *Id.* at 1247.

205. *See generally* Gonzales v. North Township of Lake County, 800 F. Supp. 676, 681 (N.D. Ind. 1992), *rev'd on other grounds,* 4 F.3d 1412 (7th Cir. 1993) (newspaper articles); Columbus-America Discovery Group, Inc. v. Sailing Vessel, 742 F. Supp. 1327, 1343 (E.D. Va. 1990), *rev'd on other grounds,* 974 F.2d 446 (4th Cir. 1992) (same); Fulmer v. Connors, 665 F. Supp. 1472, 1490 (N.D. Ala. 1987) (same); Ammons v. Dade City, 594 F. Supp. 1274, 1280 n.8 (M.D. Fla. 1984) (same). *See also* STRONG, *supra* note 12, § 323, at 360 n.15 ("[F]irst hand knowledge by news reporters will generally be the exception rather than the rule.").

206. 742 F. Supp. 1327 (E.D. Va. 1990).

207. Columbus-America Discovery Group, Inc. v. Sailing Vessel, 742 F. Supp. 1327, 1342 (E.D. Va. 1990).

America," in 1857 while sailing to New York City.[208] The notoriety of this tragedy formed the basis of the court's holding that it should be admitted. "Even if there be restrictions on the use of newspaper articles that are admitted in evidence, where they deal with such an event as the sinking of the Central America, they are admissible as an ancient document."[209] Circumstantial guarantees of trustworthiness were also present in *Fulmer v. Connors*.[210] There the court found that forty year-old payroll records of a mining company were admissible for the truth of the matters asserted under Rule 803(16). The court observed that the records were treated by others, including the parties opposing their admission, "as true and correct business entries of Daisy City Coal Co. made in the regular course of its coal mining business."[211] The documents all but qualified as business records under Rule 803(6).[212]

While a number of decisions have admitted statements in ancient documents without first finding that the author had personal knowledge of the matters stated or that a separate exception to the hearsay rule applied, *none* of these decisions addressed—let alone mentioned—the rule against multiple hearsay.[213] Because none of these decisions have reached the issue, they cannot be considered meaningfully to contradict the decisions discussed above that have reached the issue and concluded that statements in ancient documents are still subject to the rule against multiple hearsay.

## VI. MAKING STATEMENTS IN ANCIENT DOCUMENTS SUBJECT TO THE RULE AGAINST MULTIPLE HEARSAY IS GOOD POLICY

The foregoing analysis of the text, legislative history, and common law origins of Rule 803(16) suggests that, in order for a statement in an ancient document to be admissible to prove the truth of the matter asserted, the statement must be within the personal knowledge of the author or otherwise

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208. *Id.* at 1329, 1343.

209. *Id.* at 1343. Similar reasoning supported the admission of statements in a newspaper article in *Dallas County v. Commercial Union Assurance Co.*, 286 F.2d 388 (5th Cir. 1961).

210. 665 F. Supp. 1472, 1490 (N.D. Ala. 1987).

211. *Id.* at 1485-86.

212. *See* FED. R. EVID. 803(6).

213. *See* authorities cited *supra* note 193.

fall under a separate exception to the hearsay rule. For each level of hearsay it must be demonstrated that an exception to the hearsay rule applies. Objections may be raised that such rule is undesirable, for a number of reasons. Examination of these anticipated objections, however, demonstrates that the foregoing rule is good policy.

One objection that may be raised to the application of the rule against multiple hearsay to ancient documents is that such a rule is too impractical to apply. Given the requirement that a document must be at least twenty years old in order to qualify as an ancient document under Rule 803(16), it will likely be difficult to locate the author. There will be no opportunity to examine the author to ascertain what statements in the document are made on personal knowledge, which are hearsay, and which are speculation. The party seeking to introduce the statement into evidence bears the burden of demonstrating that an exception to the hearsay rule applies.[214] Because of this, it may be argued that it will be all but impossible to show that any statements in the ancient document are admissible to prove the truth of the matters asserted.

A rebuttal to this objection is that it rests on the false premise that the requisite personal knowledge on the part of the author may be demonstrated only by having the author testify live in court. At least one commentator has asserted that requiring the party seeking to introduce the document into evidence to prove firsthand knowledge by providing the sworn testimony of the author would be unreasonable.[215] The

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214. *See* Byrd v. Hunt Tool Shipyards, Inc., 650 F. 2d 44, 46 (5th Cir. 1981) (stating that the proponent of evidence sought to be admitted under Rule 803(6) bears burden of proving circumstantial guarantees of trustworthiness); Standard Oil Co. v. Moore, 251 F.2d 188, 215 (9th Cir.), *cert. denied*, 356 U.S. 975 (1957) (stating that the party seeking to introduce documents under Rule 803(6) bears burden of proving a systematic or routine procedure being followed in the preparation and filing of such documents).

215. *See* STRONG, *supra* note 12, § 323, at 360 n.15. A similar view was expressed by Professor Wickes in his article on the ancient document rule under the common law:

> Of course, in the case of such recitals [in ancient documents], as in the case of other hearsay exceptions, a strict showing as to the exact state of the declarant's knowledge is impossible, and cannot be rigorously insisted upon. After the lapse of so many years it would be unfair to require the proponent clearly to prove that the declarant actually knew from personal observation the facts with respect to which the declaration was made. Such a requirement would be unreasonable, and would

Advisory Committee Note to Rule 803 agrees. With respect to *any* hearsay declarant (including a document's author), his "firsthand knowledge" of a hearsay statement may be demonstrated in either of two ways: "[i]t may appear from his statement or be inferrable from circumstances."[216] Essentially the same approach was adopted by the court in *In re* Rhode Island Asbestos Cases.[217] After determining that the rule against multiple hearsay applied to statements in ancient documents, the court stated that it:

> does not intend, however, to apply a strict requirement of personal knowledge. That would be impossible considering the unavailability today of most of the declarants. Therefore, if the declarant could have been in a position to know the truth of the facts which he asserts, the statement will be admitted.[218]

This also appears consistent with the approach taken by the few other decisions that have expressly addressed the applicability of the rule against double hearsay to statements in ancient documents.[219] As these authorities demonstrate, under this approach it will by no means be impossible to have statements in ancient documents admitted to prove the truth of the matters asserted.

Another objection that may be raised to the application of the rule against multiple hearsay to ancient documents is that this approach is too rigid. With respect to events that occurred more than twenty years ago, statements in a document contemporaneous to those events will be much more

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result in the exclusion of much relevant evidence.

Wickes, *supra* note 12, at 473.

216. FED. R. EVID. 803 advisory committee's notes. *See also* STRONG, *supra* note 12, § 323, at 360. Professor Wickes advocated the same approach with respect to the ancient document rule under the common law: "All that can be practically required is that it appear from the circumstances that the declarant could have had personal knowledge of the matters recited. Where it clearly appears that the declarant could have no personal knowledge about such matters, the recital should be, and usually has been, excluded." Wickes, *supra* note 12, at 473.

217. 11 Fed. R. Evid. Serv. (CBC) 444, 448 (D.R.I. July 7, 1982).

218. *Id.* at 448 (citing 4 WEINSTEIN'S EVIDENCE § 803(16)[01], at 803-244 (1981)).

219. *See* United States v. Hajda, 135 F.3d 439 (7th Cir. 1997); United States v. Stelmokas, No. 92-3440, 1995 WL 464264 (E.D. Pa. Aug. 2, 1995); Estate of Cole v. Commissioner, 58 T.C.M. (CCH) 715 (T.C. Nov. 20, 1989), *rev'd on other grounds*, 963 F.2d 280 (9th Cir. 1992).

reliable than a witness' recollection of those events today.[220] It will be argued that this would be the case even where the author lacked personal knowledge of the matters stated and the statements failed to fit within the neat exceptions to the hearsay rule. Mechanical application of the rule against multiple hearsay to statements in ancient documents would result in relevant evidence being excluded. In many of these cases, this might be the only evidence available on the subject at all.[221] Some evidence, even if it contains nominally inadmissible hearsay, is better than no evidence at all.

This argument, however, overlooks the inherent flexibility of the hearsay rules. Exceptions to the hearsay rule do not consist only of a series of narrowly defined and rigid categories. The residual exception to the rule against hearsay, Rule 807, allows hearsay statements to be admitted to prove the truth of the matter asserted where no other hearsay exception applies, but the statement has circumstantial guarantees of trustworthiness.[222] Where a document admissible as an ancient document contains multiple hearsay statements, Rule 807 is available to have those statements admitted. This rule has been applied in conjunction with other exceptions to the hearsay rule to admit statements that would otherwise be excluded as multiple hearsay.[223] Through Rule 807, the potential harshness of the application of the rule against multiple hearsay to statements in ancient docu-

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220. *See* Dallas County v. Commercial Union Assurance Co., 286 F.2d 388, 396 (5th Cir. 1961) ("[I]t seems impossible that the testimony of any witness [to events occurring more than 50 years ago] would have been as accurate and as reliable as the statement of facts in the contemporary newspaper article.").

221. *Cf.* Wickes, *supra* note 12, at 475 ("That such [hearsay] evidence is often unreliable may be conceded . . . . But it does not follow from this that, where the only light that can be thrown upon a relevant fact of a case on trial is the faint and unsatisfactory light of a hearsay declaration, the proper remedy is to cut off that light entirely.").

222. Federal Rule of Evidence 807 provides, in relevant part:

> A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

FED. R. EVID. 807.

223. Herdman v. Smith, 707 F.2d 839, 841-42 (5th Cir. 1983).

ments is tempered. This will give litigants and courts some flexibility in applying the rule against multiple hearsay to statements within ancient documents.

## VII. CONCLUSION

The rule against multiple hearsay should apply to statements in ancient documents. While the language of the ancient document rule is ambiguous on this point, this conclusion is driven by the legislative history of Rule 803(16) and the treatment of multiple hearsay in ancient documents under the common law. In order for a statement in an ancient document to be admissible to prove the truth of the matter asserted, the party seeking to have the statement admitted must demonstrate that the statement is either: (1) within the personal knowledge of the author; or (2) falls under a separate exception to the hearsay rule. For each level of hearsay within the ancient document, the proponent of the admission of the statement must demonstrate that it falls within an exception to the hearsay rule. This conclusion is confirmed by the few cases that have addressed the issue expressly, and is also supported as good policy.