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TRIAL TECHNIQUES AND TACTICS

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The ancient document exception to the hearsay rule can be a valuable tool for admitting documents into evidence when you lack (or decide not to use) a sponsoring witness to authenticate them.

Don't Forget About the "Ancient Documents" Hearsay Exception

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Trying *any* case is challenging these days, but cases involving stale or missing evidence present special obstacles. In the product liability context, difficulties abound when the product at issue has been discontinued for some time and many of the key witnesses are gone. But let's take it a step further. Suppose the product you're defending ceased production *decades* ago – maybe as much as 50 or 60 or more years ago. This is not as far-fetched as it sounds, at least in latent disease cases in states that have no statute of repose. Under this scenario, *none* of the employees who were involved in the design, development or manufacture of the product are still with the company. In fact, none of them are even *alive*. Miraculously, your client still has some contemporaneous documents that would support your defenses at trial, but no one alive can authenticate them from personal knowledge. How do you get them into evidence?

One potential avenue is the hearsay exception for "records of a regularly conducted activity," also known as the "business records" exception. In federal court it is FRE 803(6). But Rule 803(6) has some fairly rigid requirements and you may have difficulty establishing the necessary foundation. You might not have a witness who can establish that the document was made at or near the time of the act or event at issue by someone with knowledge, or that the document was kept in the course of the company's regularly conducted activity, or that making the document was a regular practice of that activity. Subpart (D) of the rule states that "all of these conditions" must be shown by the testimony of a qualified witness or by certification. Even if you can find a custodian or other witness to provide the testimony or certification, he or she may be subjected to cross-examination (either at trial or in deposition) that could diminish the value of the document in the jury's eyes.

What you really need is a hearsay exception that will allow the document to be admitted without the need for testimony of a sponsoring witness.

Don't forget about the hearsay exception for statements in ancient documents. In federal court it is FRE 803(16) and it does not require an unavailable declarant. The rule provides a hearsay exception for: "A statement in a document that is at least 20 years old and whose authenticity is established." This rule existed at common law and is now codified in one form or fashion in virtually every jurisdiction. It exists as a hearsay exception because of necessity as well as the inherent credibility of statements made in documents written long ago. Trustworthiness is assumed because the document was prepared long before the present dispute, and since the rule applies only to written statements, the danger of miscommunication is minimized.

The rule is particularly useful for two reasons. First, a document is considered "ancient" after only 20 years.[1] Second, the foundation requirements are more flexible for ancient documents than business records, and you may be able to admit the

[1] One may wonder how documents only 20 years old can be considered ancient. To most of us, developments such as the federal initial disclosures enacted in 1993 still seem new, yet the documents that actually enacted those rules are now ancient. The author, who refuses to consider himself ancient, might suggest that the exception be renamed "venerable documents" or even "distinguished documents."

document without any need for a sponsoring witness.

Ancient documents have their own authentication rule which overlaps the hearsay exception. FRE 901(b)(8), titled "Evidence About Ancient Documents or Data Compilations," requires the proponent to show that the document:

> (A) is in a condition that creates no suspicion about its authenticity;
>
> (B) was in a place where, if authentic, it would likely be; and
>
> (C) is at least 20 years old when offered.

The element of "suspiciousness" should seldom be a problem, absent some indication that the document is a phony or has been tampered with. The courts have consistently held that "suspicion" does not go to the content of the document – i.e., whether statements in the document are factually accurate or not – but simply whether the document is what it purports to be. *See U.S. v. Kalymon*, 541 F.3d 624, 632-33 (6th Cir. 2008). If the document was produced by the company during discovery, that by itself should normally establish that it came from files or depositories over which the company has "possession, custody or control," meaning it came from the place it would likely be. *See Dartez v. Fibreboard Corp.*, 765 F.2d 456, 464 (5th Cir. 1985) (ancient document excluded where company correspondence not produced from company files).

But what if the document contains "hearsay within hearsay?" Does that mean an ancient document can be admitted only if a separate hearsay exception is proven for each layer? The court in *Hicks v. Charles Pfizer & Co., Inc.*, 466 F.Supp.2d 799 (E.D. Tex. 2005), answered this question in the affirmative. However, the author of a leading treatise disagrees, noting that FRE 803(16) simply says "statements in a document," not "statements in a document made on personal knowledge of the document's creator." 4 Michael H. Graham, *Handbook of Federal Evidence*, §803:16 (6th ed., 2009-2010 supp.). This is why a newspaper article more than 20 years old is admissible as an ancient document even if the article contains information received from third parties who provided the information to the author of the article. *Id.* The court in *Langbord v. U.S. Dept. of the Treasury*, 2011 U.S. Dist. LEXIS 71779 (E.D. Pa. 2011), sided with Professor Graham, holding squarely that "Rule 803(16) provides a broad hearsay exception that applies to *any* level of hearsay within an ancient document." *Id.* at *57 (emphasis added).

Thus, Rule 803(16) has the added benefit of being (at least in many courts) an exception to Rule 805, which otherwise requires a hearsay exception for each level of hearsay in the document. Returning to the comparison between the business records exception and the ancient documents exception, the advantage once again goes to the ancient documents exception. If a document is more than 20 years old and there is sufficient evidence of its authenticity, you may be able to admit multiple lawyers of hearsay originating from multiple declarants, all without calling a sponsoring witness.

A recent case illustrates the effective use of Rule 803(16). In *McGuire v. Lorillard Tobacco Co.*, 2014 Ky. App. LEXIS 25

(Feb. 14, 2014),[2] the Kentucky Court of Appeals affirmed the trial court's decision to admit into evidence numerous documents from the 1950s, without a sponsoring witness. *Id.* at *71-78. The documents included trade journal articles, articles from consumer publications, and letters, memoranda and reports from company files. Plaintiff argued that testimony from a sponsoring witness was a necessary prerequisite to admitting the documents into evidence. The court disagreed, holding that because they qualified as ancient documents, and because there were no authenticity objections, extrinsic testimonial evidence was unnecessary to support them. Plaintiff was not improperly deprived of her right to cross-examine a witness about the documents. The court noted that Plaintiff's counsel had the opportunity, and took the opportunity, to argue the meaning and significance of the documents during closing argument. *Id.* at *78.

In order to achieve a similar result and admit your company's ancient documents without a sponsoring witness, be proactive. Consider crafting your discovery responses or disclosures to affirmatively state that the documents you are producing were produced from a location where they would normally be located. Also consider a pretrial agreement, stipulation or *quid pro quo* arrangement under which both parties admit ancient documents without a witness. It is likely that the judge will appreciate the streamlined approach of "publishing" documents to the jury. This allows counsel to argue what the documents mean during closing arguments rather than during examination of a custodian who has no real knowledge of them anyway. Finally, to the extent the ancient documents are articles from newspapers or periodicals, they are self-authenticating under Rule 902(6) and do not require a witness. *See Brumley v. Albert E. Brumley & Sons, Inc.*, 727 F.3d 574, 579-80 (6th Cir. 2013) (ancient articles should have been admitted despite question as to how authors acquired information reported); *Rehm v. Ford Motor Co.*, 365 S.W.3d 570, 574 (Ky. App. 2011) (28-year old newspaper articles admitted).

[2] The *McGuire* opinion was not yet final at the time this article was submitted.

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