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Challenging Public Investigative Reports

How to Fight the Hearsay Exception

Steven P. Grossman and Stephen J. Shapiro

You represent a party in a personal-injury case involving a collision between two cars. The major factual issue in the case is which driver was at fault. The police officer who arrived at the scene after the accident interviewed both drivers and other eyewitnesses and filled out an accident report. The report concludes that your client was at fault. Your opponent moves for admission of the report as "a factual finding resulting from an investigation made pursuant to authority granted by law" under Federal Rule of Evidence 803(8)(C) or its state-law equivalent. Do you know how to keep this harmful evidence from consideration by the jury?

Maybe you represent the plaintiff in a civil-rights action against a police officer for excessive use of force. In this case, the police review board, headed by the precinct captain, held a hearing concerning the incident. After the hearing, the captain issued a report finding that the officer had not used excessive force. Again, the report is offered under Rule 803(8)(C). What can you do to keep this finding from the jury?

These are not simply hypothetical situations. They are based on actual cases where federal judges have admitted reports by government officials.[1] The admission of the reports was affirmed on appeal, even though in both cases the authors of the reports had no first-hand knowledge of the facts but relied on out-of-court statements made by others. This lack would probably have prevented both officials from stating their conclusions had they been called to the stand. But in both cases, the conclusions were admitted as part of a public record or report under Rule 803(8)(C).

Your natural response in these situations might be to claim that the evidence does not satisfy the rule because the rule allows for the admission of "factual findings." You argue that the reports contain not factual findings but conclusions or opinions of the report writers.

This argument would not succeed. The U.S. Supreme Court, in *Beech Aircraft v. Rainey Corp.*, interpreted the factual findings provision broadly to include conclusions and opinions of the government investigator.[2] *Beech Aircraft* involved the crash of a Navy training jet. A judge advocate general (JAG) investigative report concluded that the most likely cause of the accident was pilot error. The Court held that the conclusion should have been admitted at trial.[3]

In spite of the broad interpretation given the rule in *Beech Aircraft*, it is possible to challenge admission of factual findings in public reports. Rule 803(8)(C) states that the findings will not be admitted if "the sources of information or other circumstances indicate lack of trustworthiness." Most courts have held that conclusions found in public reports will be presumed reliable and that the party opposing admission has the burden of proving the report is not trustworthy.[4]

This is no easy task. First, many courts have imposed a difficult standard of proof. Second, since the proponent of the report need not produce the author, this showing will often have to be made without cross-examination to challenge the author's credentials or methodology.

Still, keeping a public report out of evidence is not impossible. The note of the advisory committee that drafted the rule lists four "trustworthiness" factors that can help you challenge admission. They are—

- the timeliness of the investigation,
- the special skill or experience of the official,
- the issue of whether a hearing was held and the level at which it was conducted, and
- possible motivational problems suggested by *Palmer v. Hoffman*.[5]

Timeliness

A prompt on-the-scene investigation is usually more valuable than one conducted weeks or months later. The results of an earlier investigation are more helpful to the trier of fact because they

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are based on fresh evidence that may no longer be available. You can argue that an investigation conducted months after the incident usually is based on the same evidence available to the jury and that the investigator's conclusion may be no more reliable than the jury's.

One problem in challenging a later report is that it is often the product of a hearing. While the lack of timeliness may favor exclusion under the advisory committee's first factor, the fact that a hearing has been held may favor admission under the third factor.

Skill and Experience

The Supreme Court alluded to the skill and experience factor in *Beech Aircraft*. The Court contrasted a similar JAG report of another Navy airplane accident that was denied admission in a separate case because it "was prepared by an inexperienced investigator in a highly complex field of investigation."[6] You should try to investigate the qualifications of the author of any public report just as thoroughly as you would those of opposing expert witnesses. You should be prepared to argue that the author did not have the requisite skill or experience to render the opinion or conclusion in the report.

Unfortunately, you may not be granted access to depose the author of a public report as easily as you would to depose an opposing party's expert witness. You should point out to the judge that the author of a report functions much like an expert witness; the only difference is that the testimony is written rather than oral. If the report is important enough, consider issuing a deposition subpoena to the author. You can then ask about the author's qualifications and the procedures used to conduct the investigation. At least one court has enforced such a deposition subpoena.[7]

Your opponent will probably argue that one purpose of Rule 803 is to allow admission of a public report to spare the investigator—a government employee—the time needed to attend a trial or deposition.[8] The answer to this argument is that the rule is a hearsay exception, which allows admission without producing the declarant (author). It is not a rule of privilege that shields a witness who knows of relevant evidence from testifying.

In comparing the author with an expert witness, argue that the conclusion in the report should not be admitted unless the author would have been allowed to state it while testifying as an expert in court. If the conclusion goes beyond the author's area of expertise, it should not be admitted.

For example, an investigator for a federal agency may be an expert in a certain field. If the report relies on the investigator's expertise in that field, it should be admitted, just as expert testimony would be. However, if the conclusions are based on the testimony of conflicting witnesses and simply determine that one witness is more credible than another, they should not be admitted into evidence. Credibility determinations should be made by jurors, not by experts or government investigators.[9]

Some courts have accepted the argument that public reports based on hearsay, rather than personal knowledge, may never be admitted.

Similarly, legal conclusions should not be allowed. The rule allows for the admission of "factual findings." The Supreme Court in *Beech Aircraft* interpreted this to include conclusions and opinions. Although the Court did not explicitly say so, at least one post-*Beech* appellate court has held that these should be limited to factual—not legal—conclusions.[10]

Comparing the author of the report to an expert witness can help answer another question: When can you challenge a government fact-finding because it was not based solely on the personal observations of the investigator but largely on the statements of third parties?

Take, for example, the scenario of the police officer who did not witness an accident but based the conclusions in the report on the statements of eyewitnesses. Some courts have accepted the argument that public reports based on hearsay, rather than personal knowledge, may never be admitted.[11]

This argument has some merit, since Rule 803(8) is a hearsay exception and not a rule of admissibility. The purpose of most hearsay exceptions is to allow the declarant's out-of-court statement to take the place of in-court testimony. The evidence must, however, still be based on the declarant's personal knowledge. The advisory committee's notes to Rule 803 state that "in a hearsay situation, the declarant is, of course, a witness, and neither this rule nor Rule 804 dispenses with the requirement of firsthand knowledge."

Rule 803(8) does not explicitly require the admission of hearsay-based conclusions. Further, the rule exempts reports that are not trustworthy, and some courts seem to view hearsay within hearsay that is not covered by its own exception to be inherently untrustworthy.

Rule 803(8)(C), however, clearly envisions the admissibility of some findings not based on personal knowledge. Otherwise, section C would be largely superfluous because section B already applies to any "matter observed pursuant to duty" and would apply in most situations where the investigator's findings are based on personal knowledge.

Here is where the rules on expert witnesses can help your argument again. Rule 703 requires that the facts or data used by experts in forming their opinions if not admissible in evidence must be "of a type reasonably relied upon by experts in the particular field."

The advisory committee's note to Rule 703 mentions that the opinion of an "accidentologist" about "the point of impact in an automobile collision based on statements of bystanders" would not meet this requirement and would not be admissible. You should argue that if an "accidentologist's" opinion would not be allowed in such a situation, neither should a police officer's opinion in a police report.

You must persuade the judge that the public report is being substituted for the live testimony of the author. If the author would be barred from giving an opinion in court for whatever reason (such as insufficient expertise or reliance on materials not ordinarily used by experts in the field), then that opinion should not reach the jury through a public report.

Significance of a Hearing

Presumably, the implication of the hearing factor is that a report is more reliable and more likely to be admitted in court if the finding in the report emerged from a hearing. The absence of a hearing, however, does not always keep the report out. Courts have quite reasonably held that where a hearing would not normally have been a part of the investigation, the factor is irrelevant.[12]

For example, it will do little good to argue that a police accident report should be kept out because it was issued with-

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out a hearing. The admissibility of a finding by the Equal Employment Opportunity Commission that discrimination has taken place may, however, turn on whether a hearing was held.

Attacking Fairness

Attacking the fairness of the hearing is one approach that may help keep out findings based on a hearing. If the proceeding was ex parte or the party against whom the finding is being used did not have the opportunity to cross-examine witnesses, you have a strong argument against the trustworthiness of the hearing. Why should the jury—which hears both sides of the evidence, including cross-examination—need the hearing examiner's conclusion, which was based on a more limited inquiry?

In fact, some courts have accepted the novel argument that holding a hearing weighs against admission of the findings.[13] This is because the result of a government proceeding can be highly prejudicial evidence. Jurors who learn that a presumably objective public official has reached a certain conclusion from evidence similar to what they have heard may find it difficult to conclude differently. Further, the jury is likely to deliberate about the correctness of the previous fact-finding rather than keep an open mind on the facts of the case.[14] This argument is especially strong when there is conflicting evidence and the hearing examiner decides which is credible. This is the jury's role.

Rule 403

It may be helpful to use Rule 403 to challenge admission of a public report issued after a hearing. This rule requires the court to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." You can argue that the jury may overestimate the probative value of official government reports. Courts have held that juries might believe that there is "an aura of special reliability and trustworthiness" to the report because it is prepared by a government official.[15] This danger is greatest when the report is issued after a hearing.

You may also convince the court that government reports can be excluded under Rule 403 because of "considerations of undue delay, waste of time, or needless presentation of cumulative evidence." One court kept out a public report because it would have protracted "an already prolonged trial with an inquiry into collateral issues regarding the accuracy of the report and the methods used in its compilation."[16]

However, any arguments against admission of the results of a hearing (under either Rule 803 or Rule 403) will probably come to naught if the statute under which the hearing was held explicitly directs or implies that the results should be admissible. For example, many states have statutes that require medical negligence or malpractice cases to be tried before a panel of experts before they can be brought to court. Some require that the results be admitted in any later suit. Even without a law requiring it, courts generally admit these findings to further the policy reasons behind the panels; that is, to encourage settlement of medical negligence and malpractice cases.[17] These are special situations, however, and the policy reasons do not apply to most government fact-findings.

Motivational Problems

The issue of possible motivational problems behind a report's conclusions arose in *Palmer v. Hoffman*, a 1943 Supreme Court case.[18] It involved the admissibility of a report by the defendant railroad company that included a statement by the train engineer about the cause of a railroad accident. The Court held that the report was not admissible as a business record because it was prepared for litigation.[19] There was too much motivation for the railroad to be self-serving in preparing the report.

How this translates to public reports is less than clear. Most are not prepared for litigation. When they are, however, and the suit is against the government body that prepared the report, you have a powerful argument to keep it out. For instance, in the previously cited suit against the police officer for use of excessive force, you could argue that a police-officer report clearing the officer is untrustworthy because of possible bias. However, courts are loath to assume bias by government officials and may require you to prove it.[20] This, of course, may be difficult to do.

Some courts have limited their review of the motivation factor to possible bias by the author. They have ignored any possible bias held by the sources that the author consulted or interviewed.[21] The rationale is that public officials will consider the possible bias of the source before using it in their fact-finding.[22]

If faced with a report based on infor-

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mation from hostile sources, you have support for challenging their motivation. First, Rule 803 clearly states that lack of trustworthiness can be shown by "*the sources of information* or other circumstances." Second, in *Palmer*, the Supreme Court was concerned not only with the motivation of the railroad employee who prepared the report but also with that of the engineer who supplied the information and had something to gain by blaming the accident on someone else.

The advisory committee noted that other trustworthiness factors "no doubt could be added" to its list. A number of courts recognize the finality of the report as one additional factor.[23] If the report is the product of a staff investigator but was not approved by the employing board or commission or incorporated into a final report, some courts may withhold it from the jury.

Actually, any argument that calls into question the reliability or accuracy of the findings is fair game. A great deal of discretion is granted to the trial judge in this area. Understandably, trial court rulings dealing with similar kinds of reports have been widely divergent.[24]

What should you do if a harmful report is admitted against your client? There are ways to mitigate the damage.

First, if the author's conclusions are admitted, you should question whether the entire report—including the sources on which the conclusions were based—also must be admitted. If the report contains additional hearsay—the statements of eyewitnesses—you have a strong argument for keeping them out. You should claim that they are "hearsay within hearsay" and thus can only be admitted if each hearsay statement conforms with an exception to the hearsay rule.[25] They are not admissible merely because they are enshrined in a public report. Some courts have kept witness statements in a public report out of evidence on this ground, especially when the report is not much more than a string of such statements.[26]

Other courts, however, have admitted hearsay statements.[27] They have reasoned that the statements are not really hearsay because they are not being admitted for their truth, but only to show the basis for the investigator's opinion. Before you accept this argument, be sure that—

- the report actually contains a conclusion and is not merely a series of hearsay witness statements,
- the author actually relied on the in-

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formation in reaching the conclusion, and

- the type of information is normally relied on by experts in the field.

If any of these conditions is not satisfied, the hearsay statements should not be admitted. Even if they are, you should be entitled to a limiting instruction indicating that they are not to be considered for their truth.[28]

If you find that you cannot keep a public report out of evidence entirely, the next best step may be to ask that certain particularly prejudicial parts be withheld from the jury. You may also wish to ask for a cautionary instruction from the judge.

Several courts have approved instructions to the jury that the findings in government reports are to be treated like other evidence and are not binding.[29] As with any limiting or cautionary instructions, however, you must balance the helpfulness of the instruction against the possibility that it may call undue attention to the evidence.

Another strategy question is whether you should call the author to the stand for cross-examination. The Federal Rules of Evidence say that "if the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination."[30] This may be an excellent way to expose weaknesses in the author's expertise, methodology, or use of sources that may have led to a faulty conclusion. For example, the author could be questioned about tests not performed and sources not consulted.

Several courts have approved instructions to the jury that the findings in government reports are to be treated like other evidence and are not binding.

You must balance this benefit against the risk that calling the author will increase the report's importance in jurors' eyes. You may choose instead to call your own expert witness to challenge the report's methodology and conclusion.

Investigative and evaluative reports by government officials can be convenient and powerful tools for presenting a case to the jury. For example, studies performed by skilled investigators in a professional manner by government agencies investigating the safety of products should generally be admissible into evidence.[31] Such studies, which could be necessary to prove critical elements of a case, may not easily be performed by a private party.

Most attorneys know of the hearsay exception for government reports and know how to use it. What they need to know is how to frame an argument opposing admission of these reports. Knowing how to do this should help them avoid the harm that unreliable and prejudicial reports can cause. □

Notes

1 Baker v. Elcona Homes Corp., 588 F.2d 551, 556-59 (6th Cir. 1978), *cert. denied*, 441 U.S. 933 (1979) (police accident report); Perrin v. Anderson, 784 F.2d 1040, 1046-47 (10th Cir. 1986) (police review board findings).
2 109 S. Ct. 439 (1988).
3 *Id.* at 445-50.
4 *See, e.g.*, Ellis v. International Playtex, Inc., 745 F.2d 292, 301 (4th Cir. 1984); Kehm v. Procter & Gamble Mfg. Co., 724 F.2d 613, 618 (8th Cir. 1983).
5 318 U.S. 109 (1943).
6 *Beech Aircraft*, 109 S. Ct. 439, 449 n.11 (quoting Fraley v. Rockwell Int'l Corp., 470 F. Supp. 1264, 1267 (S.D. Ohio 1979)).

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7 Fayson v. Shannon & Luchs, No. 88-0144 (E.D. Pa. May 27, 1988).
8 J. FRIEDENTHAL & M. SINGER, THE LAW OF EVIDENCE 127 (1885).
9 *See, e.g.*, United States v. MacDonald, 688 F.2d 224, 230 (4th Cir. 1982), *cert. denied*, 459 U.S. 1103 (1983); Coffin v. South Carolina Dep't of Soc. Servs., 562 F. Supp. 579, 591 (D.S.C. 1983).
10 Hines v. Brandon Steel Decks, Inc., 886 F.2d 299, 302-03 (11th Cir. 1989).
11 McKinnon v. Skil Corp., 638 F.2d 270, 278 (1st Cir. 1981); John McShain, Inc. v. Cessna Aircraft Co., 563 F.2d 632, 635-36 (3d Cir. 1977).
12 *In re* Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238, 268 (3d Cir. 1983), *rev'd on other grounds sub nom.* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), *cert. denied*, 481 U.S. 1029 (1987); United States v. American Tel. & Tel. Co., 498 F. Supp. 353, 365-66 (D.D.C. 1980).
13 *MacDonald*, 688 F.2d 224, 230; *Coffin*, 562 F. Supp. 579, 591.
14 New York v. Pullman, Inc., 662 F.2d 910, 915 (2d Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982); *American Tel. & Tel. Co.*, 498 F. Supp. 353, 368.
15 *Pullman*, 662 F.2d 910, 915; Bright v. Firestone Tire & Rubber Co., 756 F.2d 19, 23 (6th Cir. 1984).
16 *Pullman*, 662 F.2d 910, 915.
17 Treyball v. Clark, 493 N.Y.S.2d 1004, 1005 (N.Y. 1985); Attorney Gen. v. Johnson, 385 A.2d 57, 66 (Md.), *appeal dismissed*, 439 U.S. 805 (1978); Eastin v. Broomfield, 570 P.2d 744, 751 (Ariz. 1977).
18 318 U.S. 109.
19 *Id.* at 111-15.
20 Perrin v. Anderson, 784 F.2d 1040, 1047 (10th Cir. 1986); *In re* Agent Orange Prod. Liab. Litig., 611 F. Supp. 1223, 1241 (E.D.N.Y. 1985).
21 588 F.2d 551, 558; Anaya v. New Mexico State Personnel Bd., 762 P.2d 909, 914 (N.M. Ct. App.), *cert. denied*, 763 P.2d 689 (N.M. 1988).
22 McCORMICK ON EVIDENCE 889 (E. Cleary 3d ed. 1984).
23 *See, e.g.*, Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1125, 1147 (E.D. Pa. 1980); Gentile v. County of Suffolk, 129 F.R.D. 435, 458 (E.D.N.Y. 1990).
24 *See* Grossman & Shapiro, *The Admission of Government Fact Findings Under Federal Rule of Evidence 803(8)(C): Limiting the Dangers of Unreliable Hearsay*, 38 U. KAN. L. REV. 767, 785-90 (1990).
25 FED. REV. EVID. 805.
26 Hill v. Rolleri, 615 F.2d 886, 890 (9th Cir. 1980); Colvin v. United States, 479 F.2d 998 (9th Cir. 1973).
27 *See, e.g.*, Fowler v. Blue Bell, Inc., 737 F.2d 1007, 1013-14 (11th Cir. 1984).
28 SALTZBURG & REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 467 (3d ed. 1982).
29 *In re* Plywood Antitrust Litig., 655 F.2d 627, 637 (5th Cir. 1981), *cert. granted sub nom.* Weyerhaeuser Co. v. Lyman Lamb Co., 456 U.S. 971 (1982); *cert. dismissed*, 462 U.S. 1125 (1983); Cohen v. General Motors Corp., 534 F. Supp. 509, 512 n.3 (W.D. Mo. 1982).
30 FED. R. EVID. 806.
31 *See, e.g., Ellis*, 745 F.2d 292; *Kehm*, 724 F.2d 613 (epidemiological studies conducted by the Centers for Disease Control establishing a statistical link between tampons and toxic shock syndrome).

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