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The Admission of Government Fact Findings Under Federal Rule of Evidence 803(8)(C): Limiting the Dangers of Unreliable Hearsay

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I. INTRODUCTION

Federal Rule of Evidence 803(8)(C), an exception to the rule against admission of hearsay, permits introduction of public records or reports containing the fact findings of the reporter without requiring the reporter to appear at trial.[1] These fact findings can

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1. Rule 803(8) provides a hearsay exception for:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

FED. R. EVID. 803(8).

An exception was recognized under the common law "for written records and reports of public officials under a duty to make them, made upon firsthand knowledge of the facts." MCCORMICK ON EVIDENCE 888 (E. Cleary 3d ed. 1984) [hereinafter MCCORMICK] (footnotes omitted). Before adoption of the federal rules, admissibility of public reports in the federal courts was governed by 28 U.S.C. § 1733(a), which provides: "Books or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept." Rule 803(8), which was modeled after Uniform Rule of Evidence 63(15), expanded the existing statute by allowing admission of the report of *any* public agency, not just those of federal agencies. Sections A and B of the rule "found ample support in previous law . . . ." *See* 4 J. WEINSTEIN & M. BERGER, EVIDENCE ¶ 803(8)(01), at 803-235 (1988). It is section C, allowing admission of investigative reports, which constitutes a significant expansion of the exception and has created the most controversy and difficulty in interpretation. *See* Beech Aircraft v. Rainey, 109 S. Ct. 439, 445-46 (1988); MCCORMICK SUPRA, at 890.

Rule 803(8)(C) does not allow the use of investigative reports by the government in criminal cases. This restriction was inserted to avoid "the almost certain collision with confrontation rights which would result." FED. R. EVID. 803 advisory committee's note. This Article, therefore, focuses on the use of such evidence in civil proceedings only.

be based upon the reporter's own observations and calculations[2] or information imparted to the reporter from sources having no connection to any public agency whatsoever.[3] Rule 803(8)(C) has also been used as the vehicle for presenting juries with fact findings from hearings conducted by public officials.[4] The rule would seem to allow these fact findings even though the opponent had no opportunity to challenge either the finding or any of the witnesses whose testimony led to it.[5] This Article contends that admitting

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2. Such observations and calculations would also be covered under Rule 803(8)(B) which allows for the admission of:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel . . . .

FED. R. EVID. 803(8)(B).

3. Cases that have admitted public records or reports including fact findings based in whole or in part on the information supplied by nongovernment sources under Rule 803(8)(C) include: Kehm v. Proctor & Gamble Mfg. Co., 724 F.2d 613, 617-20 (8th Cir. 1983) (victims of toxic shock syndrome); *In re* Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238, 263-75 (3d Cir. 1983) (manufacturers), *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); Robbins v. Whelan, 653 F.2d 47, 50-52 (1st Cir.) (automobile manufacturers and others regarding the stopping distance of vehicles), *cert. denied*, 454 U.S. 1123 (1981); Baker v. Elcona Homes Corp., 588 F.2d 551, 556-59 (6th Cir. 1978) (eyewitness to automobile accident), *cert. denied*, 441 U.S. 933 (1979); Diaz v. United States, 655 F. Supp. 411, 416 (E.D. Va. 1987) (witnesses to accident on ship); Sage v. Rockwell Int'l Corp., 477 F. Supp. 1205, 1206-07 (D.N.H. 1979) (eyewitnesses to air crash).

4. Perrin v. Anderson, 784 F.2d 1040, 1046-47 (10th Cir. 1986); *see In re* Paducah Towing Co., 692 F.2d 412, 419-21 (6th Cir. 1982); Lloyd v. American Export Lines, 580 F.2d 1179, 1182-83 (3d Cir.), *cert. denied,* 439 U.S. 969 (1978); United States v. School Dist. of Ferndale, 577 F.2d 1339, 1354-55 (6th Cir. 1978), *vacated*, 616 F.2d 895 (6th Cir. 1980); William v. Housing Auth. of Sanford, 709 F. Supp. 1554, 1562 (M.D. Fla. 1988), *aff'd without opinion*, 872 F.2d 434 (11th Cir. 1989); *In re* Gulph Woods Corp., 82 Bankr. 373, 375-77 (Bankr. E.D. Pa. 1988); United States v. American Tel. & Tel. Co., 498 F. Supp. 353, 363-65 (D.D.C. 1980).

Although one of the factors listed by the advisory committee for determining admissibility of evaluative reports is "whether a hearing was held," courts have generally ignored this as either a positive or negative factor. FED. R. EVID. 803(8)(C) advisory committee's note; *see infra* note 55 and accompanying text. On the one hand, courts have held that lack of a hearing does not preclude admissibility. *See Baker*, 588 F.2d at 558. *American Tel. & Tel. Co.*, 498 F. Supp. at 365. On the other hand, courts have rejected arguments that quasi-judicial hearing results are not the results of an "investigation" and are therefore not admissible under Rule 803(8)(C). *See* Litton Sys. v. American Tel. & Tel. Co., 700 F.2d 785, 818 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984); *School Dist. of Ferndale*, 577 F.2d at 1354; Revlon, Inc. v. Carson Prod. Co., 602 F. Supp. 1071, 1080 (S.D.N.Y. 1985), *rev'd*, 803 F.2d 676 (Fed. Cir.), *cert. denied*, 479 U.S. 1018 (1986).

5. *See Perrin*, 784 F.2d at 1046-47. Fact findings reached following hearings with limited procedural protections have also been allowed in under Rule 803(8)(C). *Paducah*

many of the fact findings discussed above without demonstrable need or strong assurances of their reliability undercuts the bases for the hearsay rules[6] and can result in jury consideration of highly prejudicial evidence.[7]

Towing Co., 692 F.2d at 419-21 (improperly curtailed examination of key witness and unreliable source testimony upon which it was based led to conclusion of the administrative law judge ("ALJ") which was "striking" in its similarity to unreliable key witness, yet deemed admissible under Rule 803(8)(C)); *In re* Gulph Woods Corp., 82 Bankr. at 377 (key witness had no counsel or opportunity to cross-examine); *American Tel. & Tel. Co.*, 498 F. Supp. at 365-66 ("paper hearing").

Reports compiled by government officials that are essentially investigative in nature, such as accident reports or evaluative reports that analyze existing data or collate research into such matters as the danger of a new product, are customarily completed without a hearing and accordingly without the ability to challenge the resulting fact findings. When the fact finding determined after a hearing is introduced during a trial the party opposing the fact finding is prejudiced, often significantly more than the opponent of the above described reports. *See infra* notes 40-41 and accompanying text. Therefore, before admitting such a fact finding at trial, courts should be particularly scrupulous in ensuring that the opponent of the fact finding has had adequate opportunity to challenge it at the hearing.

6. Information supplied by third-party sources that finds its way into government reports and fact findings based upon such third-party sources should be inadmissible at trial unless such statements "possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial." FED. R. EVID. 803 advisory committee's note; *see also* FED. R. EVID. 805. The guarantee of trustworthiness for public records is the assumption that the public official will "perform his duty properly." FED. R. EVID. 803(8) advisory committee's note. This duty has been interpreted to include "the duty to make an accurate report . . . ." MCCORMICK *supra* note 1, § 315 at 889.

It is one thing to presume a public official has made his report accurately because of the nature of his position; it is quite another, however, for courts to rely upon the fact findings of public officials when those findings are based upon information supplied by third-party sources. This gap is bridged by the further assumption that public officials "will be careful and discriminating in selecting the factual data upon which to rely in reaching their findings." LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 7.19 (2d ed. 1987). The presumption that a reporter, because he is a public official, can accurately distinguish the credibility of various informants upon whom his fact findings are based (to dispense with the need for the jury to hear from either the reporter or his informants) is dubious. See the discussion of differences between Rules 803(8)(C) and 803(6) *infra* note 15.

7. For cases admitting reports containing highly prejudicial fact findings based in part or in whole upon third-party sources, see *Perrin*, 784 F.2d at 1046-47 (police officer acted in accordance with department policies with respect to firing his weapon); *Paducah Towing Co.*, 692 F.2d at 421 (ALJ's findings relating to reasonableness of ship captain's actions); *Baker*, 588 F.2d at 555 ("apparently unit #2 entered the intersection against a red light"); *School Dist. of Ferndale*, 577 F.2d at 1354-55 (hearing examiner's finding that school district had segregated schools); *In re Gulph Woods Corp.*, 82 Bankr. at 375-77 (State Ethics Commission finding regarding misappropriation of funds); Theobald v. Botein, 493 F. Supp. 1, 2 (S.D.N.Y. 1979) (State Division of Human Rights finding that there was no probable cause to believe that defendant had discriminated in firing plaintiff-employee); *Sage*, 477 F. Supp. at 1206-10 (evaluative reports regarding the circumstances behind and causes of air crash); Fraley v. Rockwell Int'l Corp., 470 F. Supp. 1264, 1265-67 (S.D.

In *Beech Aircraft Corporation v. Rainey*,[8] the Supreme Court interpreted the "factual findings" provision of 803(8)(C) broadly to include "conclusions" and "opinions" of the investigator.[9] While the decision in *Beech Aircraft* is sensible in its recognition of the difficulty in distinguishing "factual findings" from "opinions" and "conclusions,"[10] it will result in an expansion of the type of hearsay-based evidence that will be admitted under Rule 803(8)(C).[11] Where a hearsay exception expands both the allowable sources of hearsay information and the type of hearsay-based evidence admitted, extreme care should be taken to ensure that questionably reliable or prejudicial evidence is not submitted to a jury without the opportunity to test the evidence through cross-examination. Rule 803(8)(C) was not drafted nor has it been generally applied with such caution.

First, this Article explores some of the problems encountered by courts in applying Rule 803(8)(C) and explains some of the unfairness that can result if it is not applied carefully. Second, it describes the Supreme Court's *Beech Aircraft* decision allowing opinions and conclusions into evidence under Rule 803(8)(C). Third, the Article describes a suggested reading of Rule 803(8)(C) in conjunction with the rules on expert witnesses that should help

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Ohio 1979) (causes of air crash); *see also* Hess v. Arbogast, 376 S.E.2d 333, 338-40 (W. Va. 1988) (applying state statute identical to Federal Rule of Evidence 803(8)(C) to allow finding of county commissioner that testator was incompetent to manage his funds eight days before he signed his will).

8. 109 S. Ct. 439 (1988).

9. *Id.* at 445-50. For a full discussion of the reasoning of *Beech Aircraft*, see text accompanying *infra* notes 101-18.

10. Although the House and Senate were divided on this issue at the time of passage of the Federal Rules, *see infra* note 111, most courts and commentators had taken the broader view adopted by the Supreme Court. *See* Jenkins v. Whittaker Corp., 785 F.2d 720, 727 (9th Cir.), *cert. denied*, 479 U.S. 918 (1986); *Perrin*, 784 F.2d at 1046-47; Ellis v. International Playtex, 745 F.2d 292, 300-04 (4th Cir. 1984); Kehm v. Proctor & Gamble Mfg. Co., 724 F.2d 613, 618-20 (8th Cir. 1983); *Baker*, 588 F.2d at 558-59; Melville v. American Home Assurance Co., 584 F.2d 1306, 1316 (3d Cir. 1978); J. WEINSTEIN & M. BERGER, *supra* note 1 ¶ 803(8)[03]; MCCORMICK, *supra* note 1, at 890-91 n.7; Grant, *The Trustworthiness Standard for Public Records and Reports Hearsay Exception*, 12 W. ST. U. L. REV. 53, 85 (1984); Note, *The Scope of Federal Rule of Evidence 803(8)(C)*, 59 TEX. L. REV. 155, 157-59 (1980). *But see* Smith v. Ithaca Corp., 612 F.2d 215, 220-23 (5th Cir. 1980).

11. Taking the example of a police accident report, if the narrow view had been accepted, only specific findings of fact (for example, the speed of the automobiles and the point of impact) could have been admitted. Under the broad approach adopted by the Court, the investigator's conclusions regarding who was at fault in the accident might also be admitted. Not only will more findings be admissible under this standard, but because the investigator's conclusions often approach the ultimate issue to be decided by the jury, their admission will have a greater impact on the jury and a greater possibility of prejudice.

courts determine which opinions and conclusions should be admissible. Finally, the Article offers additional suggestions to insure the fair application of Rule 803(8)(C).

II. THE PROBLEMS WITH RULE 803(8)(C)

Rule 803(8)(C) has the capacity to expand significantly the amount and manner of hearsay and hearsay-based conclusions made available to juries in civil cases. Under Rule 803(8)(C), reports or records of public officials are admissible without the presence of the reporting officer, even though the reports contain hearsay and conclusions based upon hearsay.

A. Lack of Cross-Examination

The first danger posed by Rule 803(8)(C) is the use of a fact finding in a public report without an opportunity for the opponent to cross-examine the reporter to determine the basis for the finding. One justification for the use of such fact findings is that public officials are objective and sufficiently responsible to include fact findings in their reports only if based on reliable information.[12] In our adversary system, however, this assertion should be tested. For example, it is reasonable to expect that jurors could more effectively assess the reliability of a fact finding if they knew the background, training, and experience of the fact finder.[13] Such information is unlikely to appear in a public report and would certainly not be revealed to the extent that it could be through cross-examination. Juries are likely to benefit even more from knowing specifically how the public reporter arrived at the finding.

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12. Justification for the exception is the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record. FED. R. EVID. 803(8) advisory committee's note.

> The principal basis for the presumption of trustworthiness of public records is the assumption that public officials will properly perform their duties with accuracy and fidelity. Officials have the duty to make accurate statements, and this special duty will usually suffice as a motive to incite the officer to its fulfillment.

Grant, *supra* note 10, at 56 (footnotes omitted); *see also supra* note 6.

13. Courts have recognized the importance of having the jury hear the qualifications, including background and training, of expert witnesses. Murphy v. National R.R. Passenger Corp. 547 F.2d 816, 817 (4th Cir. 1977) ("Moreover, a jury can better assess the weight to be accorded an expert's opinion if the witness is permitted to explain his qualifications.") (citation omitted); *see also* Scharfenberger v. Wingo, 542 F.2d 328, 337 (6th Cir. 1976) (cross-examination concerning expert's qualifications is appropriate). There is no reason to believe that there is any less need for the jury to have information about the qualifications of the author of an opinion expressed in an investigative report than of an expert at trial.

Even if such an explanation appears in the report, without cross-examination the opponent would have little or no opportunity to demonstrate weaknesses in the fact finder's methodology or to suggest better procedures that could have been employed.[14]

An even greater problem arises when reports are admitted containing conclusions based in whole or in part upon the observation or information of third parties. Such information may not possess any guarantees of trustworthiness that customarily underlie the hearsay exceptions, yet still form the basis for a fact finding admitted under Rule 803(8)(C).[15] In fact, Rule 803(8)(C) has been

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14. The jury in such a situation would be deprived of several pieces of important information that could have been uncovered during cross-examination of the public fact finder. The witness's attention, for example, might have been drawn to material facts in the case not utilized by the fact finder in reaching his conclusion, and during cross-examination the fact finder could be asked whether his conclusion would be modified by those additional facts. R. GIVENS, ADVOCACY: THE ART OF PLEADING A CAUSE 39 (1985); T. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 226 (2d ed. 1988). If the fact finder used certain techniques of investigation, the cross-examiner can point to other techniques that might have been equally or more effective. *See* T. MAUET, SUPRA, at 267.

If the fact finder relied upon her expertise in a certain area, cross-examination may reveal that this area has not yet developed into an area of expertise commonly accepted by courts or others in the field. *See* M. BERGER, J. MITCHELL & R. CLARK, TRIAL ADVOCACY: PLANNING, ANALYSIS AND STRATEGY 421 (1989) [hereinafter BERGER]. Cross-examination may also reveal that her conclusion is not beyond challenge, and therefore others in the field may arrive at different conclusions using the same data. *See* BERGER, *supra* at 422; R. KEETON, TRIAL TACTICS AND METHODS 157 (2d ed. 1973). Further, the expert fact finder can be confronted on cross-examination with learned treatises that may reveal opinions contradictory to those of the witness. *See* R. KEETON, *supra* at 158; J. Jeans, Trial Advocacy 335 (1975); *see also* FED. R. EVID. 803(18).

15. Most of the hearsay exceptions involve situations in which the firsthand observer is also the declarant, and the exception is based on the reliability of the observer-declarant. For example, the excited utterance exception, Rule 803(2), is based on the assumption that "a condition of excitement . . . temporarily stills the capacity of reflection and produces utterances free of conscious fabrication." FED. R. EVID. 803(2) advisory committee's note. The observer's statement about what he has witnessed is deemed reliable by the circumstances. Under Rule 803(8)(C), where the investigator has based her report on the statement of firsthand observers, nothing inherent in the situation guarantees the reliability or truthfulness of the original observer. The only other exception that allows admission of information obtained from the statement of others is Rule 803(6), the business records exception, which allows admission of records made "by, or from information transmitted by, a person with knowledge . . . ." FED. R. EVID. 803(6). This has been interpreted, however, to require not only the declarant, but also the supplier of the information to be acting in the regular course of business and therefore acting with a duty of accuracy. "If, however, the supplier of the information does not act in the regular course, an essential link is broken; the assurance of accuracy does not extend to the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail." FED. R. EVID. 803(6) advisory committee's note. *See,e.g.*, United States v. Baker, 693 F.2d 183, 188 (D.C. Cir. 1982); United States v. Lieberman, 637 F.2d 95 (2d Cir. 1980). Under Rule 803(8)(C) nothing guarantees the accuracy of the original observer. There are, however, some situations (for example, where there has been a hearing with witnesses testifying under oath subject to cross-examination) falling under that subsection that may contain such a guarantee.

used to admit fact findings that have affirmative indicia of untrustworthiness. In *In re Paducah Towing Co.*,[16] for example, the trial court used Rule 803(8)(C) to admit the findings of an administrative law judge ("ALJ") following a license revocation hearing regarding the reasonableness of a ship captain's actions. The United States Court of Appeals for the Sixth Circuit observed that the judge's findings appeared to be based largely on hearsay and unreliable testimony, yet the court approved of their admission because the opponent could not demonstrate explicitly the extent to which the ALJ relied upon the untrustworthy testimony.[17]

In *Paducah*, therefore, the findings were admitted without an opportunity to examine the witness or the fact finder to determine either the basis for the decision or to what extent the fact finder relied upon the "unreliable" witness. Hearsay proscriptions and first-hand knowledge requirements were created to avoid such scenarios.[18]

Rule 803(8)(C) permits the use of such a fact finding without the presence of either the public reporter-fact finder or the third-party informant. The opponent of the fact finding loses the opportunity to cross-examine both of these important witnesses. The jury, therefore, is likely to learn either directly or indirectly the observations of a third-party informant not examined for credibility or accuracy.

B. Fact Findings Based upon Third-Party Informants

Hearsay documents that contain additional hearsay are subject to the general rule that even though the document itself may constitute an exception to the hearsay rule (for example, a business record), hearsay statements within the document are inadmissible unless covered by their own exception.[19] Rule 803(6) does allow such double hearsay in business records, but only if the informant and the reporter are acting in the regular course of business.[20] If the informant is not within the business chain of information, the

16. 692 F.2d 412 (6th Cir. 1982).

17. *Id.* at 421. In addition, the court noted that the cross-examination of the unreliable witness, upon whom the judge apparently relied, was improperly curtailed at the hearing. *Id.*

18. *See infra* note 31.

19. "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.

20. FED. R. EVID. 803(6) advisory committee's note. *See supra* note 15.

reliability of the hearsay contained in the record is substantially diminished, and the basis for the exception eroded.[21]

By contrast, Rule 803(8)(C), as interpreted by some courts, places no restriction on the source of the information in a public record, provided that there is no demonstrable lack of trustworthiness in the source.[22] The source of the information and the hearsay statement itself are presumed reliable because the public official has deemed the information sufficiently trustworthy to have based a factual finding upon it and it has been included in the public record.[23] In essence, the statute delegates the responsibility for deciding the admissibility of such hearsay and hearsay-based conclusions to the government reporter, with the court retaining ultimate veto power if the opponent can demonstrate a lack of trustworthiness.[24]

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21. *See supra* note 15.

22. The advisory committee's note to Rule 803(8)(C) says that the statute "assumes admissibility in the first instance." Not surprisingly, courts interpret this to place the burden on the opponent of the report to demonstrate a lack of trustworthiness. *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); *In re* Paducah Towing Co., 692 F.2d 412, 421 (6th Cir. 1982); Baker v. Elcona Homes Corp., 588 F.2d 551, 558 (6th Cir. 1978), *cert. denied*, 441 U.S. 933 (1979); Sage v. Rockwell Int'l Corp., 477 F. Supp 1205, 1207 (D.N.H. 1979).

23. *See supra* note 6.

24. The government reporter is deemed to be fair and to prepare accurate reports based on reliable information. *See supra* note 6. Because the burden of proof is on the opponent to show indicia of a lack of trustworthiness, an absence of information on the trustworthiness of the report or its sources is customarily no bar to admissibility under Rule 803(8)(C). Additionally, because a government reporter need not appear before the court to explain why his report and its sources are trustworthy, the court is, in effect, deferring to the judgment of the reporter. The combined effect of the burden of proof and the inclination to defer to the judgment of the government fact finder may lead to the admission of highly questionable evidence under Rule 803(8)(C).

In *Paducah Towing Co.*, 692 F.2d 412, the finding of an ALJ regarding the reasonableness of a ship captain's actions was admitted at trial under Rule 803(8)(C), despite the court's finding that the key source was unreliable. Although it could not be determined precisely to what extent the finding was based on this source, "[t]he similarity between the ALJ's findings and Cole's [the source's] testimony is striking." *Id.* at 421. The court in *Paducah* asserted that the opponent of the fact finding had not met its burden of proving a lack of trustworthiness. *Id.*

In Wolf *ex rel.* Wolf v. Procter & Gamble Co., 555 F. Supp. 613 (D.N.J. 1982), the court admitted into evidence a study undertaken by the Center for Disease Control ("CDC") regarding toxic shock syndrome, discounting allegations that the study was "hasty" and "methodologically flawed." The court admitted the study because the expertise of those conducting it was "assumed," and the above noted flaws, according to the court, went to the weight rather than the admissibility of the report. *Wolf*, 555 F. Supp. at 625; *see also* Walker v. Fairchild Indus., 554 F. Supp. 650, 654-55 (D. Nev. 1982) (finding of aircraft investigation based in part upon tests done by investigator who admitted there was no

The conclusions of expert witnesses, like those of Rule 803(8)(C) public reporters, are generally admissible, although these conclusions may be based to some degree on what was learned from others.[25] Such witnesses, however, must be established as experts on the witness stand, and the use of third-party information must be of a type customarily used by experts in the field before their hearsay-based conclusions are admissible.[26] While the advisory committee note to Rule 803(8) includes the skill and experience of the public fact finder as one element used to assess the trustworthiness of a report, neither expertise nor customary usage is a *sine qua non* for admissibility, as it is for live expert testimony.[27] This Article argues that they should be.

More fundamental distinctions between the admission of the hearsay-based conclusion of an expert witness and one that appears in a public report admitted under Rule 803(8)(C) can be seen through consideration of the cross-examination of such a witness. In addition to challenging the expertise of the witness and the methodology used, the expert witness can be cross-examined regarding the reasons for relying upon third-party information and the guarantees of the informant's credibility and accuracy.[28] Thus,

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scientific basis for the tests and that he was not an expert in the area); Hess v. Arbogast, 376 S.E.2d 333, 338-39 (W. Va. 1988) (loss of transcript upon which finding based no bar to admission of finding, using state statute identical to Federal Rule of Evidence 803(8)(C)).

25. "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing." FED. R. EVID. 703. *See infra* notes 151-62 and accompanying text.

26. "If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." FED. R. EVID. 703. *See infra* notes 151-62 and accompanying text.

27. *See infra* notes 136-39, 160 and accompanying text.

28. The importance of cross-examining an expert witness concerning the information that she has relied upon in reaching her opinion is recognized by Rule 705. "The expert may in any event be required to disclose the underlying facts or data on cross-examination." FED. R. EVID. 705; *see also* S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 483 (3d ed. 1982) ("Our view is that it is very important for the cross-examiner to be able to probe the basis for an expert opinion and that great leeway should be given to the cross-examiner to test the opinion by asking about its data base."); United States v. R.J. Reynolds Tobacco Co., 416 F. Supp. 316, 325 (D.N.J. 1976).

The district court in Melville v. American Home Assurance Co., 443 F. Supp. 1064 (E.D. Pa. 1977), *rev'd on other grounds*, 584 F.2d 1306 (3d Cir. 1978), recognized that the same need to examine the expert about his sources exists when the expert's opinion appears in a written report:

> However, where the foundation of an opinion would be discredited under Rule 705 cross-examination, the presumptive trustworthiness of the opinion might well be sufficiently impugned to disqualify the report under 803(8)(C), thus requiring the proponent of the report either to produce the declarant for purposes of cross-

although the opponent may not be able to challenge the informant, the expert can be challenged on matters relating directly to the informant's credibility and accuracy. Rule 803(8)(C), in contrast, dispenses with this crucial guarantee of reliability and undercuts traditional hearsay rules.

Perhaps the danger of admitting Rule 803(8)(C) fact findings can be seen best through the following illustration. Police officers responding to the scenes of automobile accidents customarily write reports based on their observances and on eyewitness accounts.[29] These reports often contain fact findings that are vital to the outcome of a lawsuit, such as which vehicle had the right-of-way or whether a pedestrian was walking in the crosswalk.[30] Should juries be allowed to consider these conclusions without the opponent having had the opportunity to challenge either the officer or the eyewitness on this crucial, often subjective piece of testimony? If so, certainly there should be either strong guarantees of their trustworthiness or a compelling need to dispense with our system's time-tested method of determining accuracy and truthfulness—cross-examination.[31] As often applied, Rule 803(8)(C) contains neither of these.

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examination or to forego use of the evidence.

Id. at 1115. The court refused to hold, however, that all official reports were inadmissible merely because there was no opportunity to cross-examine the author of the report, because this would "drain the vitality of Rule 803(8)." *Id.*

One technique for probing the expert's opinion is for the cross-examiner to pose his own hypothetical question to the expert using facts different or in addition to those used in forming the opinion in the report. *See, e.g.*, J. JEANS, *supra* note 14, at 334; R. KEETON, *supra* note 14, at 163-64.

It is noteworthy that an expert may testify under Rule 703 to conclusions based on information that would not otherwise be admissible. The possible unreliability of that information may not be discovered without cross-examination. J. MCELHANEY, MCELHANEY'S TRIAL NOTEBOOK 369 (2d ed. 1987). Although Rule 803(8)(C) has the "escape clause" requirement of trustworthiness, it is often impossible for the opponent to know whether untrustworthy information was relied upon before the report is offered into evidence. Comment, *supra* note 10, at 167. Given that the burden of proving the untrustworthiness of the report under Rule 803(8)(C) is on the opponent, *see supra* note 22, the statute places the opponent in a particularly difficult position by depriving him of the opportunity to cross-examine the expert regarding the basis of his opinion.

29. *See, e.g.*, Dallas & Mavis Forwarding Co. v. Stegall, 659 F.2d 721, 722 (6th Cir. 1981); Baker v. Elcona Homes Corp., 588 F.2d 551, 555-59 (6th Cir. 1978), *cert. denied*, 441 U.S. 933 (1979); Ramrattan v. Burger King Corp., 656 F. Supp. 522, 529 (D. Md. 1987). The same is true for police reports involving other types of accidents. *See, e.g.*, Meder v. Everest & Jennings, Inc., 637 F.2d 1182, 1187-88 (8th Cir. 1981) (wheelchair accident); Victory Park Apts., Inc. v. Axelson, 367 N.W.2d 155, 161 (N.D. 1985) (fire).

30. *See, e.g.*, *Dallas & Mavis Forwarding Co.*, 659 F.2d at 722 (exact location of the accident); *Baker*, 588 F.2d at 555 (which vehicle ran the red light); *Ramrattan*, 656 F. Supp. at 525-26 (who ran the red light).

31. Wigmore called cross-examination "beyond any doubt the greatest legal engine

C. *Fact Findings Resulting from Hearings*

The admission of public officials' fact findings from a hearing present special problems under the rule. The admission of such findings may be significantly more prejudicial than those in a public official's own report, yet less probative of the issues to be determined at trial.

The report of a public official who conducts an on-the-scene investigation and makes a subsequent fact finding based largely on personal knowledge may be an important piece of evidence because it is contemporaneous with the event, its inclusion of empirical observations, and especially because of its inability to be replicated at trial.[32] The fact finding reached after a hearing adds nothing to the jury's deliberation, other than the conclusion of another fact finder arrived at through a process similar to the one that the trial jury is undergoing.[33] This similarity in the process, basing a conclusion upon the testimony of witnesses, not only makes the determination by the hearing officer superfluous, but also creates undue prejudice for the opponent of the fact finding.

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ever invented for the discovery of truth." 5 WIGMORE ON EVIDENCE § 1367, at 29 (3d ed. 1940). The advisory committee's note to the Federal Rules of Evidence on hearsay observes that the "belief, or perhaps hope, that cross-examination, is effective in exposing imperfections of perception, memory, and narration is fundamental," FED. R. EVID. 801-06 advisory committee's introductory note (citing E. MORGAN, FORWARD TO MODEL CODE OF EVIDENCE 37 (1942)).

32. McCormick, in his influential article concerning investigative reports, argued:

> The following are some of the reasons for receiving the investigative report as evidence so far as the report is within the duty of the officer making it, including those portions based on what he is told by those who claim to know and including his conclusions. The most important reason is time. The officer comes on the scene usually as early as it is feasible to get there. Usually the investigators of the parties come later and the statements are frequently partial and one-sided. The witnesses at the trial have often only a dim recollection of the event, and their testimony rests mostly on their pre-trial refreshment of memory by these statements. The officer is often able to interview witnesses before they have been pulled one way or the other by the parties. The officer, too, is frequently a specialist—a doctor reporting death, a fire marshal investigating a fire—or at least experienced in like investigations, such as a highway patrolman reporting on a collision.

McCormick, *Can the Courts Make Wider Use of Reports of Official Investigation?*, 42 IOWA L. REV. 363, 364-65 (1957).

33. None of the reasons advanced by McCormick for allowing admission of investigative reports, *see supra* note 32, apply when the fact finding is not the result of a timely, on-the-scene investigation, but rather made pursuant to a testimonial hearing. The hearing will likely involve the same witnesses testifying about the same matters as the present trial. Nothing important is added by knowing the hearing officer's reaction to the same evidence now being presented to the jury.

In *Lloyd v. American Export Lines*,[34] the United States Court of Appeals for the Third Circuit found error in a trial court's exclusion of the "professional hearing examiner's" findings following a hearing concerning a shipboard fight.[35] The court held that the jury should be permitted to learn the hearing examiner's conclusion that there was insufficient credible evidence to determine that Lloyd was the aggressor,[36] a crucial issue in Lloyd's lawsuit against the ship company for negligence. The court's explanation for admission was that "the hearing examiner did no more than summarize the evidence and point out inconsistencies."[37] Such a finding necessarily involves a determination of credibility, and as such should be left to the jury alone to make the independent assessment that our system requires.[38] Even if the court's description of the conclusions was correct, however, there is little benefit and real danger in the jury's receiving a summary of witnesses' statements.[39]

Jurors learning that a presumably objective public official has reached a certain conclusion after hearing evidence similar to what they have heard may have difficulty reaching an opposite conclusion.[40] Further, the jury is likely to deliberate on the correctness of the previous fact finding, rather than retaining the open-minded,

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34. 580 F.2d 1179 (3d Cir.), *cert. denied*, 439 U.S. 969 (1978).

35. *Id.* at 1181.

36. *Id.* at 1182.

37. *Id.* at 1183.

38. *But see* United States v. MacDonald, 688 F.2d 224, 230 (4th Cir. 1982), *cert. denied*, 459 U.S. 1103 (1983); Coffin v. South Carolina Dept. of Social Servs., 562 F. Supp. 579, 591 (D.S.C. 1983) (upholding exclusion because investigator's report is unduly prejudicial).

39. If the witnesses are present in court to be examined, then the examiner's summary of their previous testimony is unnecessary. Swietlowich v. County of Bucks, 610 F.2d 1157, 1165 (3d Cir. 1979). If the witnesses are not present, admitting a summary of their previous testimony with no opportunity for cross-examination at trial possesses all of the dangers of hearsay. *See* Ramrattan v. Burger King Corp., 656 F. Supp. 522, 529 (D. Md. 1987); Victory Park Apts. Inc. v. Axelson, 367 N.W.2d 155, 161-62 (N.D. 1985).

40. Although reports of government officials are generally presented to the jury in an "aura of special reliability," City of New York v. Pullman Inc., 662 F.2d 910, 915 (2d Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982), the fact finding reached after an evidentiary hearing before a public hearing examiner carries even greater weight with juries. *See MacDonald*, 688 F.2d at 230. The court in *Coffin*, 562 F. Supp. 579, excluded a report prepared after a hearing before a state human affairs commission because:

> the report may unduly prejudice the jury whose responsibility is to make a *de novo* determination of plaintiffs' claims and its conclusions are based in part on credibility determinations concerning the witnesses appearing at the hearing which undermine the exclusive province of the jury.

Id. at 591.

first impression approach to the issues our system prefers.[41] The emphasis likely to be placed on this fact finding by the jury is especially unfair where the opponent of the fact finding has had little or no opportunity to cross-examine the witnesses who testified at the hearing.

In *Perrin v. Anderson*,[42] for example, Rule 803(8)(C) was used to admit the conclusion of a police department shooting review board that the defendant police officers acted in accord with department policy during a shooting incident. The board, composed entirely of police personnel, held nonadversarial hearings that consisted solely of questioning the defendants and their superiors.[43] Although the trial judge gave a limiting instruction regarding the finding, certainly the truth-finding process would have been better served by the jury's drawing its own conclusion regarding the propriety of the officer's actions after hearing the testimony of all of the witnesses and seeing them challenged through cross-examination. Then, if it is determined that it would be helpful to the jury to present expert testimony as to the propriety of the officer's actions, that expert should be called and cross-examined in the presence of the jury.[44] When (as in *Perrin)* Rule 803(8)(C) is used to present to a jury a police board's fact finding based solely on police witnesses testifying without cross-examination, real prejudice will be done to the opponent of the fact finding.

D. Insufficiency of Trustworthiness Factors

The language of Rule 803(8)(C)—especially as interpreted by the Supreme Court in *Beech Aircraft*—is broad enough to encompass a variety of reports, fact findings, and conclusions from different

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41. In *MacDonald*, 688 F.2d at 230, the court stated that "admission [of a preliminary army finding following a hearing] would have tended to perplex, in that it likely would have distracted the jury's attention from its task of ascertaining guilt or innocence to a second-guessing of the Government's conduct of the murder investigation." *Id. See also Pullman*, 662 F.2d at 915; *Coffin*, 562 F. Supp. at 591; United States v. American Tel. & Tel. Co., 498 F. Supp. 353, 368 (D.D.C. 1980); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1125, 1161 (E.D. Pa. 1980), *aff'd in part and rev'd in part sub nom. In re* Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238 (3d Cir. 1983), *rev'd sub nom.* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), *cert. denied*, 481 U.S. 1029 (1987).

42. 784 F.2d 1040 (10th Cir. 1986).

43. *Id.* at 1046-47.

44. See *supra* note 28 and accompanying text regarding the cross-examination of an expert witness.

types of public officials.[45] The procedure used by the public fact finder and the manner in which the finding is used vary, among other things, according to the nature of the official's job and the specific prerequisites sometimes mandated for using the finding.[46] Different types of fact findings reached in different manners by investigators with different credentials deserve different treatment regarding their admissibility at trial. This is especially true, both because such variations can result in differences in reliability, and because under Rule 803(8)(C) the admission of certain types of government fact findings without cross-examination of either the fact finder or the informant can be extremely prejudicial.[47]

Social workers, for example, who visit a family's home to investigate a report of suspected child abuse may determine whether abuse has taken place based upon personal observations and from the statements of the child and neighbors.[48] Their findings are issued in an official Department of Human Resources report. The

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45. For examples of different types of fact findings admissible under Rule 803(8)(C), *see Perrin*, 784 F.2d at 1046-47 (finding of police shooting board regarding propriety of officer's actions); McClure v. Mexia Indep. School Dist., 750 F.2d 396, 400 (5th Cir. 1985) (Equal Employment Opportunity Commission ("EEOC") determination of reasonable cause to believe plaintiff had been discharged because of sex discrimination); *In re* Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238, 267-68 (3d Cir. 1983), *rev'd sub nom.* Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574 (1986), *cert. denied*, 481 U.S. 1029 (1987) (Department of Treasury finding following fair-market-value investigation); Kehm v. Procter & Gamble Mfg. Co., 724 F.2d 613, 619 (8th Cir. 1983) (CDC studies of victims of toxic shock syndrome); *In re* Paducah Towing Co., 692 F.2d 412, 420 (6th Cir. 1982) (license revocation hearing finding regarding reasonableness of ship captain's actions); Robbins v. Whelan, 653 F.2d 47, 50 (1st Cir.), *cert. denied*, 454 U.S. 1123 (1981) (National Health & Safety Board ("NHSB") report regarding stopping distances for automobiles); Baker v. Elcona Homes Corp., 588 F.2d 551, 558 (6th Cir. 1978), *cert. denied*, 441 U.S. 933 (1979) (police report of automobile accident); Lloyd v. American Export Lines, 580 F.2d 1179, 1183 (3d Cir. 1978), *cert. denied*, Alvarez v. American Export Lines, 439 U.S. 969 (1978) (hearing examiner's finding regarding assault charges); Melville v. American Home Assurance Co., 584 F.2d 1306, 1316 (3d Cir. 1978) (Federal Aviation Administration Airworthiness Directive); United States v. School Dist. of Ferndale, 577 F.2d 1339, 1354-55 (6th Cir. 1978) (Health, Education & Welfare hearing examiner's findings regarding segregation presence in school system); Diaz v. United States, 655 F. Supp. 411, 416 (E.D. Va. 1987) (judge advocate general ("JAG") report of shipboard fall).

46. *See, e.g.*, *Perrin*, 784 F.2d at 1046-47 (hearing without cross-examination before shooting review board composed of police personnel); Ellis v. International Playtex, Inc., 745 F.2d 292, 301 (4th Cir. 1984); *Japanese Elec. Prods.*, 723 F.2d at 267-68; *Paducah Towing Co.*, 692 F.2d at 420; *Robbins*, 653 F.2d at 50 (NHSB report regarding stopping distances for automobiles including information provided by automobile manufacturers); *Baker*, 588 F.2d at 558 (police accident report fact finding based on officer's own observations and statement of eyewitness); *Diaz*, 655 F. Supp. at 416 (E.D. Va. 1987) (summary of interviews with witnesses to accident).

47. *See supra* notes 12-18 and accompanying text.

48. *See, e.g.*, MD. FAM. LAW CODE ANN. § 5-706 (1989 & Supp. 1989).

Consumer Product Safety Commission officials who are investigating the danger of a new toy may base their reports on statistical studies and tests performed on the toy.[49] The panel established in many states to examine medical malpractice claims makes its findings in part on the sworn testimony of witnesses in a quasi-trial that includes cross-examination.[50] There may not be cross-examination at the coroner's inquest, but sworn testimony will lead to a "verdict," including a conclusion as to the cause of death.[51] Each of these factual findings result "from an investigation made pursuant to authority granted by law" and should be admissible in civil trials under Rule 803(8)(C), absent a showing of untrustworthiness.[52] Each finding, however, has been reached by a different procedure that contains greater or lesser assurances of trustworthiness, and therefore different risks of prejudice if admitted at trial. Thus, it is important that the admission of such findings at trial without cross-examination of the fact finder or the informant should occur only after carefully assessing the trustworthiness of the fact finders, their sources, and the process employed to reach the fact finding. Unfortunately, the factors provided by the advisory committee for Rule 803(8) for determining trustworthiness, as interpreted by many courts, are insufficient; moreover, they fail to recognize the differences discussed above.[53] Further, no government fact finding should be admitted at trial without examination of the possible prejudice resulting from submitting such a fact finding to the jury through cross-examination of the fact finders or their sources.[54]

The only limitation found in Rule 803(8)(C) on the admission of fact findings within public reports which meet the general criteria of Rule 803(8), is that the report must not be untrustworthy.[55] It is most important, therefore, to determine whether the following trustworthiness factors found in the advisory committee note to the rule provide realistic assurances of reliability for fact findings based upon hearsay sources: (1) the timeliness of the investigation; (2) the special skill or experience of the official; (3) whether a

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49. *See* 16 C.F.R. § § 1118.1, 1501 (1989).

50. *See, e.g.*, MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-05 (1989); N.Y. JUDICIARY LAW § 148-a (McKinney 1983 & Supp. 1990).

51. *See, e.g.*, Cal. Gov't Code § 27502-04 (West 1988); Ill. Ann. Stat. ch. 31, § § 10, 15 (Smith-Hurd 1969 & Supp. 1989); OHIO REV. CODE ANN. § § 313.17, .19 (Anderson 1987 & Supp. 1989).

52. FED. R. EVID. 803(8)(C).

53. See discussion of trustworthiness factors *infra* notes 56-75 and accompanying text.

54. See discussion of prejudice *infra* notes 187-91 and accompanying text.

55. FED. R. EVID. 803(8)(C).

hearing was held and the level at which conducted; and (4) possible motivation problems suggested by *Palmer v. Hoffman*.[56] Each of these factors may be useful in determining the trustworthiness of certain public reports. In evaluating other public reports, however, even reliance upon all of the factors can be unhelpful and may result in the admission of hearsay-based fact findings without adequate assurances of reliability. Perhaps the following example will demonstrate this.

One common public report likely to contain fact findings based at least in part upon third-party statements is the standard police report compiled after an automobile accident. Assume an officer responds immediately to the scene of an accident and compiles a report expeditiously. Further assume that the officer is an experienced and able accident investigator, perhaps qualifying as an "expert accidentologist" in those jurisdictions that recognize such an expertise.[57] Many courts apparently find it irrelevant when evaluating reports where no hearing is customarily held, that no hearing is held prior to the officer's fact findings.[58] Thus, three of the advisory committee's factors have been removed as obstacles to the trustworthiness of the report, and the final criteria may be explored—"motivation problems suggested by *Palmer v. Hoffman*."[59]

Palmer,[60] a railroad accident case, discussed the admissibility of a report prepared by the defendant railroad company that included a statement by the main engineer as to the cause of the accident. The Supreme Court affirmed the decision of the trial judge that the report could not qualify as a business record under a predecessor statute to Rule 803(6).[61] The Court held that although a

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56. FED. R. EVID. 803(8) advisory committee's note.

57. *See, e.g.*, Baker v. Elcona Homes Corp., 588 F.2d 551, 557 (6th Cir. 1978), *cert. denied*, 441 U. S. 933 (1979); *see also infra* note 152 and accompanying text. *But see* FED. R. EVID. 703 advisory committee's note (disallowing use of such an "accidentologist's" opinion regarding the point of impact based on statements of bystanders, apparently because the committee concluded that such statements are not normally relied upon by experts in the field).

58. *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); *Baker*, 588 F.2d at 558; United States v. American Tel. & Tel. Co., 498 F. Supp. 353, 365-66 (D.D.C. 1980); State v. Manke, 328 N.W.2d 799, 803 (N.D. 1988) (interpreting state equivalent of Federal Rule of Evidence 803(8)(C)).

59. FED. R. EVID. 803(8) advisory committee's note.

60. Palmer v. Hoffman, 318 U.S. 109 (1943).

61. *Id.* at 111, 113-15 (interpreting Act of June 20, 1936, ch. 640, § 1, 49 Stat. 1561 (current version at 28 U.S.C. § 1732 (1988))).

report prepared by the railroad company regarding an accident caused by one of its trains "may have some relationship" to its business, it is not within the regular course of its business to prepare such reports.[62] Thus, fundamentally, the use of such a self-serving report, prepared in part for litigation, would ignore the nonobjective character of the records and would result in questionable reliability because of "their source and origin and the nature of their compilation."[63]

Therefore, if the officer in our automobile accident bases the fact finding upon a statement of a witness who happens to be the spouse of the defendant driver, the lack of objectivity of such a source might result in the exclusion of the report.[64] Nonetheless, in at least one frequently cited Rule 803(8)(C) case, *Baker v. Elcona Homes*,[65] the court admitted a police accident report containing a fact finding based in part on the self-serving statement of a truck driver who worked for the defendant.[66] The court achieved this result by interpreting the advisory committee's caution concerning motivation problems as applying only to the preparer of the report and not to the source of the information.[67] This approach ignores both the thrust of the Supreme Court's opinion in *Palmer*[68] and the actual language of Rule 803(8)(C).[69] However,

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62. *Id.* at 114.

63. *Id.*

64. *See, e.g.*, Dallas & Mavis Forwarding Co. v. Stegall, 659 F.2d 721, 722 (6th Cir. 1981); Escrow Disbursements Ins. Agency v. American Title & Ins. Co., 551 F. Supp. 302, 304-05 (S.D. Fla. 1982); Wetherill v. University of Chicago, 518 F. Supp. 1387, 1390-91 (N.D. Ill. 1981).

65. 588 F.2d 551 (6th Cir. 1978), *cert. denied*, 441 U.S. 933 (1979).

66. *Id.* at 556-59. The driver's statement itself was not admitted under Rule 803(8)(C) because it was not a "factual finding." It was, however, determined to be admissible to rebut an allegation of recent fabrication under Rule 801(d)(1)(B).

67. *Id.* at 558. *But see Dallas & Mavis Forwarding Co.*, 659 F.2d 721 (court disallowed a similar police accident report because it was based in part on the story of a "biased eyewitness"). The court stated, "[t]he trial process is better served when a biased eyewitness declarant is required to testify directly and to be subject to cross-examination. To permit his opinion to be heard through the testimony of an official would cloak it with undeserved authority that could unduly sway a jury." *Id.* at 722.

68. *See infra* note 158.

69. The *Baker* court quoted the statute denying admissibility when the "sources of the information or the circumstances" lack trustworthiness. *Baker*, 588 F.2d at 558 (quoting FED. R. EVID. 803(8)(C) advisory committee's note). When applying the advisory committee's factors of trustworthiness to the facts of the present case with respect to motivation, however, the court noted only that "there is no indication that the report was made with improper motive. Sgt. Hendrickson was completely independent of both parties" and impartial. *Id.* Thus, the court never considered the motivation of one important and likely biased source of information, the driver. *See also* Anaya v. New Mexico State Personnel

the rationale for Rule 803(8)(C), apparently relied upon by the *Baker* court, is that public officials will consider the possible bias of the source before using it in arriving at their fact finding because of their objectivity and appreciation of the need for accuracy in public documents.[70] Thus, there is some support for admitting a police report under Rule 803(8)(C), even where the fact finding is based in part on the hearsay statement of a biased source, as long as the officer's objectivity is clear.

If the eyewitness to the accident upon whom the officer bases the fact finding has no relationship to either of the parties, there would seem to be no motivation problem, and thus no barrier to the admission of the report. Although the admission of such a document could be construed as a faithful application of Rule 803(8)(C), such a ruling would constitute an unwarranted and perhaps dangerous expansion of the existing hearsay exceptions for several reasons.

First, if the officer were to testify orally to the hearsay-based conclusion, it would be admissible only if the officer were recognized as an expert by the court and if the officer relied upon the type of information customarily relied upon by experts in the field. Unlike the ambiguity of the Rule 803(8)(C) factors, both of these are clear prerequisites to receiving the officer's conclusion under Rules 702 and 703, and they could be tested by cross-examination.[71] Including the findings in a report should not constitute a license for overcoming hearsay and first-hand knowledge proscriptions.[72]

Second, when hearsay-based fact findings in a police report are admitted, the officer becomes the real judge of the credibility and accuracy of the eyewitness. Without the opportunity to hear cross-examination of either the officer or the eyewitness, the jury would be deprived of the ability to assess the accuracy of the eyewitness's account or even to hear why the officer regarded the witness as reliable enough to base opinions upon. The judge also would not be able to make a meaningful determination of the trustworthiness of the report as required by Rule 803(8)(C).[73] Additionally, in civil cases, a police report carries the imprimatur of government objec-

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Bd., 107 N.M. 622, 628, 762 P.2d 909, 914 (N.M. Ct. App. 1988), in which a report concerning the causes of a prison escape was admitted against a corrections officer under a state statute identical to Rule 803(8)(C), although the sources of the information for the report were accomplices to the escapee and other inmates. In response to the officer's claim that these sources were untrustworthy, the court stated, "it is the trustworthiness of the *report* that is relevant." *Id.* at 914 (emphasis in original).

70. *See supra* note 6.

71. *See* FED. R. EVID. 702-03; *see also infra* notes 121-58 and accompanying text.

72. *See infra* notes 125-29 and accompanying text.

73. The impetus for dispensing with the appearance of the public official at trial under

tivity and reliability, thus making its use by the jury extremely prejudicial.[74] Given the questionable value of receiving such reports without the police or eyewitness testifying, it is hardly surprising that a number of states that have enacted statutes based upon the Federal Rules of Evidence have excluded police reports from coverage under Rule 803(8)(C) or its equivalent.[75]

E. Lack of Consistent Application

Finally, Rule 803(8)(C) effectively contradicts one stated purpose of the Federal Rules of Evidence: increasing the consistency of

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Rule 803(8)(C) is stated as the following:

> the inconvenience of requiring public officials to . . . testify concerning the subject matter of their records and reports. Not only would this disrupt the administration of public affairs, but it almost certainly would create a class of official witnesses. Moreover, given the volume of business in public offices, the official written statement will usually be more reliable than the official's present memory.

MCCORMICK, *supra* note 1, at 889 (footnotes omitted).

Although such rationales may apply to certain types of government documents when the public official's connection to the document is largely ministerial, these justifications are largely misplaced when applied to police accident reports. Police officers are so frequently called upon as witnesses in a variety of proceedings that testifying in court is a regular part of their job. Additionally, while the preparer is likely to forget certain information in a public document, an officer's fact findings (for example, his determination of the cause of an accident) is more likely to be remembered, especially after having his recollection refreshed by the document.

In any event, when a document contains the subjective opinion of a public official regarding perhaps the crucial issue, such as who caused the accident, should the inconvenience to the public official justify receipt of his opinion without cross-examination?

74. *See infra* note 188.

75. Oklahoma adopted Rule 803(8)(C) but specifically excluded police investigative reports from coverage under the statute. J. WEINSTEIN, *supra* note 1, at 272. North Dakota's statutory equivalent of Rule 803(8)(C) does not contain such an exclusion, but in Victory Park Apts. v. Axelson, 367 N.W.2d 155 (N.D. 1985), the state's highest court disallowed a police report containing a summary of the statements of witnesses to a fire. The court referred to *Baker* as a "liberal" interpretation of Rule 803(8)(C) and distinguished *Baker* because the officer in that case relied in large part on his own observations and calculations. *Id.* at 161-62.

Arkansas, Maine, Montana, and Vermont have chosen to adopt the Revised Uniform Rule of Evidence 803(8), which specifically excludes "investigative reports by police and other law enforcement personnel." *See* J. WEINSTEIN, *supra* note 1, at 273-74. In the advisory note to Maine's equivalent of Rule 803(8), the commentators assert that such a limitation "expressed better policy . . . in requiring the official to testify, rather than admitting his report as a hearsay exception." *Id.* at 274.

Similarly the prevailing view expressed by courts in states that have not adopted the Federal Rules of Evidence is to disallow police investigative reports containing conclusions or findings of fact, especially if based on more than the investigator's own observations and calculations. *See* Annotation, *Admissibility in State Court Proceedings of Police Reports Under Official Record Exception to Hearsay Rule*, 31 A.L.R. 4th 913 (1984).

evidentiary rulings in the federal courts.[76] Rule 803(8)(C) invites disparate treatment of the admissibility of public reports and fact findings through its broad language, its multifactored approach, and its controversial expansion of the amount and type of hearsay admitted at trial. Not surprisingly, the federal courts have differed widely in their approach to hearsay-based public fact findings admitted under Rule 803(8)(C). Although the Supreme Court's holding in *Beech Aircraft* resolved one cause for inconsistent 803(8)(C) rulings,[77] many remain.

For a public report to be admissible under Rule 803(8)(C), it must not lack trustworthiness. Some courts, however, apparently view all hearsay not subject to one of the Rule 803 or 804 exceptions as inherently untrustworthy, and thus exclude reports containing findings based on third party observations.[78] While such an approach would avoid many of the problems addressed above, it seems to conflict with one of the purposes of Rule 803(8)(C).[79]

Other courts and commentators seem to suggest that Rule 803(8)(C) admits all public reports unless the opponent can demonstrate untrustworthiness.[80] The courts presume reliability in the

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76. Hungate, *An Introduction to the Proposed Rules of Evidence*, 32 FED. B.J. 225, 228-29 (1974); Message of President Ford to Congress, Nov. 1974, *cited in* J. WEINSTEIN, *supra* note 1, at preface p. X.

77. *See infra* note 108 and accompanying text.

78. *See* Miller v. Caterpillar Tractor Co., 697 F.2d 141, 144 (6th Cir. 1983); McKinnon v. Skil Corp., 638 F.2d 270, 278 (1st Cir. 1980); John McShain, Inc. v. Cessna Aircraft Co., 563 F.2d 632, 636 (3d Cir. 1977); *see also* Bright v. Firestone Tire & Rubber Co., 756 F.2d 19, 22 (6th Cir. 1984) ("unverified" hearsay in public report is untrustworthy).

79. J. WEINSTEIN, *supra* note 1, at 240-41 (noting that investigative reports covered under Rule 803(8)(C) necessarily include more than the public official's own observations). Weinstein concludes that while the introductory notes to Rule 803 explicitly retain the firsthand knowledge requirement, the requirement must be "liberally construed" and "interpreted flexibly" when applied to Rule 803(8)(C). *Id. See also* United States v. American Tel. & Tel. Co., 498 F. Supp. 353, 364 (D.D.C. 1980) (holding that if public reports are not untrustworthy, Rule 803(8)(C) dispenses with the ban on double hearsay); *In re* Gulph Woods Corp., 82 Bankr. 373, 377 (Bankr. E.D. Pa. 1988); *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. v. Zenith Radio Corp., 475 U.S. 574 (1986), *cert. denied*, 481 U.S. 1029 (1987).

Rule 803(8)(C) is itself silent on the firsthand knowledge requirement, J. WEINSTEIN, *supra* note 1, at 240, and this silence has led to judicial attempts to harmonize the two. One novel judicial approach to the firsthand knowledge requirement motivated by Rule 803(8)(C) is the notion that the requirement is satisfied in a public report if the author had firsthand knowledge "of the statements made by declarants who did have firsthand knowledge of the facts." Fraley v. Rockwell Int'l Corp., 470 F. Supp. 1264, 1266-67 (S.D. Ohio 1979); *see also* Walker v. Fairchild Indus., 554 F. Supp. 650, 652 (D. Nev. 1982).

80. *See* Melville v. American Home Assurance, 584 F.2d 1306, 1316 (3d Cir. 1978); United States v. School Dist. of Ferndale, 577 F.2d 1339, 1354-55 (6th Cir. 1978); Wolf

absence of positive or negative indicia of the reliability of the report, the reporter, or the sources of the information in the report.[81] This may be due to the importance attached to the presumably objective public official having chosen to rely on the informant and having put his findings in an official record.[82]

A primary reason for inconsistent 803(8)(C) rulings is that the courts have taken different approaches in applying the trustworthiness factors. Some courts pay only lip service to the advisory committee's factors,[83] some courts add to them,[84] and every court

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ex. rel. Wolf v. Procter & Gamble Co., 555 F. Supp. 613, 625 (D.N.J. 1982); Sage v. Rockwell, 477 F. Supp. 1205, 1206-07 (D.N.H. 1979); J. WEINSTEIN, *supra* note 1, at 248-49.

81. *See* Kehm v. Procter & Gamble Mfg. Co., 724 F.2d 613, 618 (8th Cir. 1983); *In re* Paducah Towing Co., 692 F.2d 412, 421 (6th Cir. 1982); *Melville*, 584 F.2d at 1315; *Wolf*, 555 F. Supp. at 625.

82. *See supra* note 6.

83. *Paducah Towing Co.*, 692 F.2d at 421 (court admitted the transcript and the fact findings of a Coast Guard administrative hearing even though apparent key source was "unreliable"); Diaz v. United States, 655 F. Supp. 411, 416 (E.D. Va. 1987) (report admitted although investigator had neither legal nor investigative skills); Revlon, Inc. v. Carson Prods. Co., 602 F. Supp. 1071, 1080 (S.D.N.Y. 1985) (two-year delay in preparing report does not result in exclusion based on timeliness factor) *rev'd*, 803 F.2d 676 (Fed. Cir.), *cert. denied*, 479 U.S. 1018 (1986); *see also* Anaya v. New Mexico State Personnel Bd., 762 P.2d 909, 914 (N.M. Ct. App. 1988) (The Court reached the same result in state adopting equivalent of Rule 803(8)(C). Trustworthiness of report, not source, matters.).

One way in which courts minimize the limiting effect on admissibility of the advisory committee's factors is to claim that problems respecting the factors go to the weight and not the admissibility of the document. *Wolf*, 555 F. Supp. at 625 (study described as "hasty" and "methodologically flawed"); *Walker*, 554 F. Supp. 650, 654-55 (investigator who performed tests had no expertise in that area and no scientific bases for the tests); *Sage*, 477 F. Supp. at 1209 (inexperience of investigator).

84. The advisory committee's note to Rule 803(8) explicitly allows courts to use additional criteria. In Zenith Radio Corp. v. Matsushita Electronic Industrial, 505 F. Supp. 1125, 1147 (E.D. Pa. 1980), *aff'd in part and rev'd in part sub nom. In re* Japanese Electronic Products Antitrust Litigation, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds sub nom.* Matsushita Electric Industrial v. Zenith Radio Corp., 475 U.S. 574 (1986), *cert. denied*, 481 U.S. 1029 (1987), Judge Becker developed seven new factors for determining trustworthiness under Rule 803(8)(C). The Third Circuit, noting the presumption of reliability that attaches to public records, either rejected or placed only minimal emphasis on the majority of Judge Becker's factors. *In re* Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238, 268-69 (3d Cir. 1983), *rev'd on other grounds sub nom.* Matsushita Elec. Indus. v. Zenith Radio Corp., 474 U.S. 574 (1986), *cert. denied*, 481 U.S. 1029 (1987).

For a list of other courts that have added factors of trustworthiness to those listed by the advisory committee or otherwise amplified the definition of "factual findings," see Pierce, *Admission of Expert Testimony in Hearsay Form: Federal Rules of Evidence 803(6), 803(8)(C) and 803(18)*, 17 FORUM 500, 503 (1982); *see also* Bright v. Firestone Tire & Rubber Co., 756 F.2d 19, 22 (6th Cir. 1984) (unverified hearsay untrustworthy); New York v. Pullman Inc., 662 F.2d 910, 914 (2d Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982) (interim report not "findings"); McKinnon v. Skil Corp., 638 F.2d 270, 278 (1st Cir. 1981)

seems to have its own understanding of what the factors mean. For example, some courts have discounted the factor dealing with whether a hearing was held, often reasoning that certain types of fact findings are generally arrived at without hearings.[85] When a hearing has been held, some courts weigh heavily whether cross-examination occurred at the hearing,[86] while others seem satisfied merely that there was no overt bias displayed by the hearing examiner.[87]

The disparate treatment accorded to the factor involving the special skill of the investigator is even more pronounced. Some courts graft Article VII of the Federal Rules onto Rule 803(8)(C) and weigh heavily whether the fact finding was performed by an expert prior to its admission.[88] Others view the skill and experience of the investigator as bearing primarily on the weight to be given the report, rather than its admissibility.[89]

In one recent case, *Diaz v. United States*,[90] the report of a Judge Advocate General ("JAG") officer containing "summaries" of his interviews with witnesses to an accident was admitted even though the officer "did not have any particular legal or investigative skills," because "the scope of the informal investigation was sufficiently narrow so that special skill or experience was not essential."[91] Such a cursory dismissal of the skill factor by the court raises several questions. Is such lack of credentials to be

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(double hearsay makes report untrustworthy); United States v. American Tel. & Tel. Co., 498 F. Supp. 353, 360 (D.D.C. 1980) (prospective, policy-oriented, rule-making procedure "used primarily for predictive purposes" not a fact finding).

85. *Japanese Elec. Prods.*, 723 F.2d at 268; Baker v. Elcona Homes Corp., 588 F.2d 551, 558 (6th Cir. 1978), *cert. denied*, 441 U.S. 933 (1979); Cohen v. General Motors Corp., 534 F. Supp. 509, 513 (W.D. Mo. 1982); State v. Manke, 328 N.W.2d 799, 803 (N.D. 1982) (applying equivalent of Rule 803(8)(C)).

86. Denny v. Hutchinson Sales Corp., 649 F.2d 816, 821 (10th Cir. 1981); Coffin v. South Carolina Dep't of Social Servs., 562 F. Supp. 579, 591 n.5 (D.S.C. 1983); *Zenith Radio Corp.*, 505 F. Supp. at 1147, 1155-56; Fowler v. Firestone Tire & Rubber Co., 92 F.R.D. 1, 2 (N.D. Miss. 1980).

87. Perrin v. Anderson, 784 F.2d 1040, 1046-47 (10th Cir. 1986); *Japanese Elec. Prods.*, 723 F.2d at 268; *In re* Gulph Woods Corp., 82 Bankr. 373, 377 (Bankr. E.D. Pa. 1988).

88. *See infra* note 137 and accompanying text; *see also* Matthews v. Ashland Chem. Inc., 770 F.2d 1303, 1309-10 (5th Cir. 1985); *Baker*, 588 F.2d at 558; Fraley v. Rockwell Int'l Corp., 470 F. Supp. 1264, 1267 (S.D. Ohio 1979) (court allowed one naval airplane crash report, but disallowed another because of the experience level of individual investigators).

89. Walker v. Fairchild Indus., 554 F. Supp. 650, 654-55 (D. Nev. 1982); Sage v. Rockwell, 477 F. Supp. 1205, 1209 (D.N.H. 1979).

90. 655 F. Supp. 411 (E.D. Va. 1987).

91. *Id.* at 416.

overcome by the "informal" nature of the investigation? If so, how does this impact on the factor that suggests that the holding of a hearing should raise the likelihood of admission? More fundamentally, what benefit exists to submitting the report of a nonexpert fact finder that is nothing more than a collection of third party statements, merely because the fact finder or reporter is a public official? Surely whatever benefit is achieved by admission of such a document is outweighed by the inability of the opponent to cross-examine the unchallenged versions of the witnesses that have been summarized by the government reporter.[92] Clearly, if the reporter had been a witness, the reporter would not have been permitted to give summaries of the witnesses' statements.[93]

The last advisory committee factor concerns motivation problems. As discussed earlier, some courts have ignored the apparent bias of the source of the information because of the objectivity of the public investigator, who presumably takes the source's bias into consideration.[94] In *Diaz*, the court reasoned that although the JAG officer was a representative of a party litigant, the report was unbiased because it was prepared primarily for nonlitigation purposes.[95]

In addition to the enumerated factors, the advisory committee invited courts to develop other factors for evaluating trustworthiness. In *Zenith Radio Corp. v. Matsushita*,[96] for example, Judge Becker added seven factors to those of the committee.[97] These

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92. *See supra* notes 13-18 and accompanying text.

93. *See infra* text accompanying note 127.

94. *See supra* notes 65-70 and accompanying text.

95. *Diaz*, 655 F. Supp. at 416. Interestingly, the notion that an accident report is prepared primarily for nonlitigation purposes and therefore presumptively not biased is similar to the position rejected by the Supreme Court in Palmer v. Hoffman, 318 U.S. 109, 113 (1943). *Palmer*, it should be remembered, is the case cited by the advisory committee regarding the trustworthiness criteria of motivation. FED. R. EVID. 803(8)(C) advisory committee's note.

96. 505 F. Supp. 1125 (E.D. Pa. 1980), *aff'd in part and rev'd in part sub nom. In re* Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds sub nom.* Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574 (1986), *cert. denied*, 481 U.S. 1029 (1987).

97. *Id.* at 1147. These factors are as follows:

1) The finality of the fact finding.

2) Was the finding based upon largely inadmissible evidence, for example, hearsay?

3) If the result of a hearing, were there procedural safeguards?

4) Is there an ascertainable record?

5) Was the finding actually more of a statement of policy?

6) Is the finding based upon another finding which is of questionable accuracy?

factors, while leading to a more thorough assessment of trustworthiness, will obviously result in a markedly different approach to Rule 803(8)(C) in this particular courtroom from approaches taken in others.

Courts have also disagreed about what type of information within a report is admissible under Rule 803(8)(C). Some would admit the fact findings but not the hearsay upon which they are based.[98] Other courts allow the third-party statements as well.[99] Still other courts permit the statements not for their truth, but only to demonstrate their impact upon the factual findings reached within the report.[100]

III. THE *BEECH AIRCRAFT* DECISION

In *Beech Aircraft v. Rainey Corp.*,[101] the spouses of two Navy pilots killed in an airplane crash brought suit against the manufacturer and the company that serviced the plane.[102] At trial, the defendants attempted to introduce portions of a report prepared

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7) If the finding includes the opinion of an expert, is it based upon the type of information customarily used by experts in the field?

The Third Circuit, partially affirming and partially reversing Judge Becker's decision, stated: "The trial court gave undue weight to considerations either legally irrelevant under Rule 803(8)(C) or of only slight relevance, and too little weight to the fact that the investigation was conducted by officials charged with a legal duty to conduct it, for an important governmental purpose." *In re* Japanese Elec. Prods Antitrust Litig., 723 F.2d 238, 269 (3d Cir. 1982), *rev'd on other grounds sub nom.* Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574 (1986), *cert. denied*, 481 U.S. 1029 (1987).

The reasoning of the appellate court in *Zenith Radio* diminishes the protections against admitting hearsay that may be both unreliable and prejudicial. The justification offered for obviating the need for these protections is that the fact finding involved was conducted by public officials in a proper manner for important reasons. Such a justification in essence delegates to the public officials the determination of trustworthiness required by Rule 803(8)(C) prior to the admission of a fact finding in a public record. *See supra* note 24.

98. *See In re* Paducah Towing Co., 692 F.2d 412, 415-21 (6th Cir. 1982); Baker v. Elcona Homes Corp., 588 F.2d 551, 558-59 (6th Cir. 1978), *cert. denied*, 441 U.S. 933 (1979); Ramrattan v. Burger King Corp., 656 F. Supp. 522, 530 (D. Md. 1987); Victory Park Apts. v. Axelson, 367 N.W.2d 155, 161-62 (N.D. 1985) (state equivalent of Rule 803(8)(C)).

Some courts have not allowed the double hearsay or the fact finding based upon it. *See, e.g.*, 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).

99. Ellis v. International Playtex, 745 F.2d 292, 300-01 (4th Cir. 1984); Robbins v. Whelan, 653 F.2d 47, 50-52 (1st Cir. 1981), *cert. denied*, 454 U.S. 1123 (1981); Diaz v. United States, 655 F. Supp. 411, 415-17 (E.D. Va. 1987) (summary of witness's statements).

100. Fowler v. Blue Bell, Inc., 737 F.2d 1007, 1013-14 (11th Cir. 1984).

101. 109 S. Ct. 439 (1988).

102. *Id.* at 443.

by a Navy investigator pursuant to authority granted in the Manual of the Judge Advocate General. This JAG Report, written after a six-week investigation, attempted to fix the cause of the crash and contained "findings of fact," "opinions," and "recommendations."[103] The trial judge found the report sufficiently trustworthy to be admitted under Rule 803(8)(C), but originally held that it "'would be admissible only on its factual findings and would not be admissible insofar as any opinions or conclusions are concerned.'"[104] The day before trial the court reversed itself and held that most of the conclusions and opinions, including those as to the cause of the crash, could be admitted.[105]

After a jury verdict for the defendants, the plaintiffs appealed. An Eleventh Circuit panel reversed on the basis of a Fifth Circuit precedent that held that Rule 803(8)(C) did not encompass evaluative conclusions or opinions.[106] This decision was upheld after rehearing en banc by an equally divided court.[107] The Supreme Court granted certiorari to "address a longstanding conflict among the federal courts of appeal over whether Federal Rule of Evidence 803(8)(C), which provides an exception to the hearsay rule for public investigatory reports containing 'factual findings,' extends to conclusions and opinions contained in such reports."[108]

The Court first turned to the statutory language and refused to read the term "factual findings" as meaning only "facts." It

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103. *Id.*

104. *Id.* at 444.

105. The two most important conclusions admitted concerned "the impossibility of determining exactly what happened" to the aircraft and the "failure to maintain a proper interval as '[t]he most probable cause of the accident.'" *Id.*

106. Rainey v. Beech Aircraft Corp., 784 F.2d 1523, 1527-28 (llth Cir. 1986) (following Smith v. Ithaca Corp., 612 F.2d 215 (5th Cir. 1980)), *aff'd in part and rev'd in part*, 109 S. Ct. 439 (1988). The court also held that the case should be reversed because the district court had improperly restricted cross-examination of the plaintiff by his own attorney concerning a letter he had written to the Navy. *Id.* at 1529-30. This portion of the court's holding was eventually affirmed by the Supreme Court. *Beech Aircraft*, 109 S. Ct. at 450-53.

107. Rainey v. Beech Aircraft Corp., 827 F.2d 1498 (11th Cir. 1987), *aff'd in part and rev'd in part*, 109 S. Ct. 439 (1988).

108. *Beech Aircraft*, 109 S. Ct. at 442-43. The Court noted that except for the Fifth and Eleventh Circuits, all other courts of appeal that had faced the question had taken the "broader" view admitting opinions and conclusions contained in an investigative report. *Id.* at 446 (citing Jenkins v. Whittaker Corp., 785 F.2d 720, 726 (9th Cir.), *cert. denied*, 479 U.S. 918 (1986); Perrin v. Anderson, 784 F.2d 1040, 1046-47 (10th Cir. 1986); Ellis v. International Playtex, 745 F.2d 292, 300-01 (4th Cir. 1984); Kehm v. Proctor & Gamble Mfg. Co., 724 F.2d 613, 618 (8th Cir. 1983); Melville v. American Home Assurance Co., 584 F.2d 1306, 1315-16 (3d Cir. 1978); Baker v. Elcona Homes Corp., 588 F.2d 551, 557-58 (6th Cir. 1978), *cert. denied*, 441 U.S. 933 (1979)).

determined that "finding of fact" was a broader term, often meaning "'[a] conclusion by way of reasonable inference from the evidence.'"[109] Further, the Court noted that the rule does not allow for the admission of only "factual findings" in a report, but rather for the admission of "'*reports* . . . setting forth . . . factual findings.'"[110]

The Court next turned to the legislative history, but found no clear answer because House and Senate committees took "diametrically opposite positions" on this issue, and Congress made no effort to reconcile their differences.[111] The Court found the broader Senate view allowing admission of conclusions and opinions more in accord not only with the language of the rule, but also with the comments of the advisory committee. The Court noted that the advisory committee made no mention of any distinction between statements of fact and opinions and conclusions. Furthermore, the committee's examples of when reports had been admitted either by the courts or by federal statute were all reports that stated conclusions.[112] The Court found that the committee intended the trustworthiness requirement to be the major safeguard of the rule and not "an arbitrary distinction" between fact and opinion.[113]

The Court also noted the difficulty in trying to distinguish between fact and opinion, citing a number of commentators who have found this a false distinction which is "at best, one of degree."[114] Finally, the Court found the broad approach consistent with the federal rules' general approach of relaxing the traditional barriers to opinion testimony.[115]

The Court found, therefore, "that portions of investigatory reports otherwise admissible under Rule 803(8)(C) are not inadmissible merely because they state a conclusion or opinion."[116] This result is reasonable and consistent with the determinations of

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109. *Beech Aircraft*, 109 S. Ct. at 447 (quoting BLACK'S LAW DICTIONARY 569 (5th ed. 1979)).

110. *Id.* (emphasis in original) (quoting FED. R. EVID. 803(8)(B)).

111. *Id.* The House Judiciary Committee took the narrower view that conclusions and opinions should not be admitted, H.R. REP. No. 650, 93d Cong., 2d Sess., at 14 (1973), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7051, 7088, while the Senate took the broader view favoring admissibility, S. REP. No. 1277, 93d Cong., 2d Sess., at 18, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7051, 7064.

112. *Beech Aircraft*, 109 S. Ct. at 448.

113. *Id.*

114. *Id.* at 449 (citing W. KING & D. PILLINGER, OPINION EVIDENCE IN ILLINOIS 4 (1942); MCCORMICK, *supra* note 1, at 27; McCormick, *Opinion Evidence in Iowa*, 19 DRAKE L. REV. 245, 246 (1970)).

115. *Beech Aircraft*, 109 S. Ct. at 450.

116. *Id.*

most courts[117] and commentators[118] who have addressed the question. It does not address the question, however, of what conclusions and opinions contained in evaluative reports should be admissible. The next section sets forth some criteria by using the expert opinion rules in conjunction with Rule 803(8)(C).

IV. READING RULE 803(8)(C) IN CONJUNCTION WITH THE RULES ON EXPERT WITNESSES

A. General Guideline

Federal Rule of Evidence 803(8)(C) allows admission of factual findings in a government report resulting from an investigation made pursuant to law. The Supreme Court, in *Beech Aircraft*, has given a broad interpretation to "factual findings" to include "conclusions and opinions" of the investigator.[119] It is important to recognize, however, that merely because such a conclusion or opinion fits within the parameters of Rule 803(8)(C), it is not automatically admissible into evidence. Rather, it is merely "not excluded by the hearsay rule."[120] The opinion or conclusion may still be inadmissible for other reasons, such as lack of personal knowledge of the declarant,[121] as an improper opinion,[122] or because its probative value is outweighed by its prejudicial effect.[123]

The purpose of Rule 803(8)(C), like all hearsay exceptions, is to allow admission of an out-of-court statement by declarant, rather than requiring that the statement be given live in court. No hearsay exception, including Rule 803(8)(C), should be extended to allow admission of an out-of-court statement that would not be admissible if the declarant were to make the same statement in court under oath. Therefore, Rule 803(8)(C) should be interpreted in

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117. *See supra* note 108.

118. *See* MCCORMICK, *supra* note 1, at 890-91 n.7; J. WEINSTEIN & M. BERGER, *supra* note 1, at 803(8)[03]; Grant, *The Trustworthiness Standard for the Public Records and Reports Hearsay Exception*, 12 W. ST. L. REV. 53, 81 (1984); Note, *supra* note 10, at 157-59.

119. 109 S. Ct. at 450. For a discussion of this case, see *supra* text accompanying notes 101-18.

120. FED. R. EVID. 803. Rules 803 and 804 are exceptions to Rule 802, which provides: "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." FED. R. EVID. 802. Rule 803 does not provide that the listed exceptions be automatically admissible in evidence but merely that they "are not excluded by the hearsay rule." FED. R. EVID. 803.

121. *See infra* text accompanying notes 124-29.

122. *See infra* text accompanying notes 130-39.

123. *See infra* text accompanying notes 187-200.

such a manner that "factual findings" contained in an investigative report should not be admissible unless the author of that report would have been permitted to testify as to those findings if present in court.

B. Findings Based on Hearsay: Experts Versus Nonexperts

A problem manifests itself when the investigator's findings are based, not only on his personal observations, but also on the hearsay statements of others. Because Rule 803 lists exceptions to the rule against hearsay and is not a rule of admissibility, such a finding would, at first blush, not appear admissible because it is not 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."[124]

Rule 803, however, clearly envisions the admissibility of at least some findings not based on personal knowledge under section C. Otherwise, section C would be largely superfluous, because section B already applies to any "matters observed pursuant to duty" and would therefore apply in most situations where the investigator's findings were based on personal knowledge.[125]

The most reasonable way to solve this apparent paradox is to read Rule 803(8)(C) in conjunction with the rules for expert witnesses.[126] To determine whether an investigator's findings would be admissible if the investigator were testifying in person, it must first be determined whether the investigator would qualify as an expert at trial.

Pursuant to Rule 602, a nonexpert witness may only testify as to facts which he has personally observed.[127] Therefore, if the investigators of the report would not qualify as expert witnesses, they would not be allowed to testify in person to facts that they had learned through hearsay sources. Their written report, if based on hearsay, should also not be admitted.

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124. FED. R. EVID. 803 advisory committee's note.

125. Section 803(8)(B) "matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel . . . ." FED. R. EVID. 803(8)(B).

126. FED. R. EVID. 701-06.

127. FED. R. EVID. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter . . . . This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.").

In contrast, expert witnesses may base their testimony on facts or data made known to them before the hearing, and as long as they are of the type normally relied on by experts in the field, they need not be admissible.[128] Therefore, if the investigators could be considered experts, then the factual findings in their reports would be admissible even if based on hearsay, as long as it was the kind of hearsay on which experts in their field would normally rely.[129]

To apply this distinction, consider again the example of a police officer who, based on interviews with witnesses at the scene of an accident, determines that the light was red for one driver and green for another. If testifying in person at trial, the officer could not give that evidence unless held to be an expert witness. This same standard should be held with regard to the admissibility of the report, which should not be given any greater credence than the officer's live testimony.

C. *Opinions of a Nonexpert*

An additional problem arises if the investigative report contains the conclusions and opinions of the investigator. Although the Supreme Court held in *Beech Aircraft* that factual findings admissible under Rule 803(8)(C) included opinions and conclusions, it again failed to draw the necessary distinction between the opinions of an expert and nonexpert investigator.

The opinions of expert witnesses are generally admissible.[130] The opinions of nonexperts, although more freely admitted under the federal rules than under the common law, are still more limited than the opinions of experts.[131] In addition, to meet the requirement of first-hand knowledge, the opinion or inference must be "helpful to a clear understanding of [the witness's] testimony or the deter-

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128. Rule 703 reads:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

FED. R. EVID. 703. Allowing experts to testify based on data not presented in court and not perceived by the expert personally constituted a broadening of the common-law rule. FED. R. EVID. 703 advisory committee's note.

129. *See infra* notes 151-62 and accompanying text.

130. FED. R. EVID. 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.").

131. *See* MCCORMICK, *supra* note 1, at 26-29.

mination of a fact in issue."[132] For example, a lay witness could testify that a person appeared drunk,[133] but probably could not give an opinion that the defendant was at fault in the accident.[134] An expert, on the other hand, might be able to give such an opinion.[135]

In *Beech Aircraft*, before holding that the investigator's conclusion that the accident was probably the result of pilot error was admissible under Rule 803(8)(C), the Supreme Court should have determined whether he would have been qualified as an expert witness to provide such an opinion. The Court did discuss the expertise of the investigator, as one of the advisory committee's "factors" in determining the admissibility of a report under Rule 803(8)(C) is the "special skill or experience of the official."[136] Rather than merely a "factor" to be considered, however, the expertise of the officials should be a *sine qua non* of admitting the written opinion in their report.[137]

Obviously, judges cannot gauge as accurately the expertise of an official who authored a government report offered into evidence as they can evaluate a proposed expert testifying in person, where an individual *voir dire* would normally be conducted.[138] Most judges seem to have shifted the burden of proof on the issue of

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132. FED. R. EVID. 701.

133. Singletary v. Secretary of HEW, 623 F.2d 217, 219 (2d Cir. 1980).

134. Such an opinion would probably not be considered "helpful" to the jury under Rule 701 and would be required to be stated in more concrete terms. *See generally* J. WEINSTEIN & M. BERGER, *supra* note 1, § 701[02].

135. Expert opinion testimony is not inadmissible "because it embraces an ultimate issue to be decided by the trier of fact." FED. R. EVID. 704(a).

136. FED. R. EVID. 803(8) advisory committee's note (discussed in Beech Aircraft Corp. v. Rainey, 109 S. Ct. 439, 449 n.11 (1988)). The Court compared another case involving a similar JAG report which was held inadmissible because prepared by an inexperienced investigator. Fraley v. Rockwell Int'l Corp., 470 F. Supp. 1264, 1267 (S.D. Ohio 1979).

137. In Melville v. American Home Assurance Co., 443 F. Supp. 1064 (1977), *rev'd*, 548 F.2d 1306 (3d Cir. 1978), the court accepted the proposition advanced that Rule 803(8)(C) must be harmonized with Rule 702 and that the author of the report must have sufficient expertise to render the opinion in the report.

> An initial finding that A.D.'s were admissible over a hearsay objection did not preclude defendant from raising an objection to the expertise of the F.A.A. . . . Thus under both 703 and 803(8)(C) the proper focus is on the *qualification* to express an opinion, not simply on the fact of *expression* itself.

Id. at 1114 (emphasis in original).

Whether the author of the report has sufficient expertise to render the opinion expressed in the report is clearly an issue of admissibility to be decided by the judge, not, as some courts have ruled, an issue of credibility to be decided by the jury. *See, e.g.*, Walker v. Fairchild Indus., 554 F. Supp. 650, 654 (D. Nev. 1982) ("the issue of qualifications of the investigators goes more to the weight and credibility of the evidence than its admissibility").

138. *See supra* note 13.

expertise by requiring the party opposing the admission of the report to show that the expert was not qualified to render the opinion stated in the report.[139] Although on an individual level this may be appropriate, there are whole categories of officials whose opinions should not be admissible whether provided as live testimony or in a public record.

The test here should be whether the authors of the report would have been allowed to give their opinions if they had heard all of the information that they used to form their opinions through listening to witnesses at the actual trial. Take, for example, the report of a government doctor, who after examining a party's medical records writes a report indicating an opinion that the party is permanently disabled. If the doctor had attended the trial and listened to live testimony concerning the party's condition, rather than examining the party's medical records, the doctor would be allowed to testify as to an opinion of whether the party was permanently disabled. Therefore, under this standard, assuming that the other conditions of Rule 803(8)(C) are met, the doctor's opinion given in the written report would also be admissible.

The result should be different, however, if the author of the report had not been a medical doctor, but instead a worker's compensation hearing officer, who, after conducting a hearing at which expert medical testimony was presented, had authored a report stating the conclusion that a party was permanently disabled. The report should not be admissible because a worker's compensation hearing officer would not be deemed qualified to give that opinion live at trial after having heard that same testimony while sitting through the trial. If not qualified to give an opinion live based on testimony presented at the trial, the officer's written opinion, which is less reliable because not subject to cross-examination and not based on evidence heard by the jury, should certainly not be admitted. Although the hearing examiner is an expert of sorts, this expertise is not as a medical doctor, but in worker's compensation law and fact finding. At the worker's compensation hearing, the officer must weigh the medical testimony, applying the law to those facts, and reach a conclusion. At the trial, however, this is the jury's function.

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139. The *Melville* court, 443 F. Supp. at 1114, accepted the proposition that the author of the report must have sufficient expertise to have rendered the opinion if called as an expert at trial, *see supra* note 137. The court, however, required the party opposing admission to mount a "specific challenge" to the expertise of the reporter. *Melville*, 443 F. Supp. at 1114; *see also* United States v. School Dist. of Ferndale, 577 F.2d 1339, 1355 (6th Cir. 1978), *vacated*, 616 F.2d 895 (6th Cir. 1980) (in which the court would not accept a "bald assertion" that a hearing examiner was not an expert); *supra* note 22.

This is not to say that all conclusions reached by nonexpert hearing examiners should be excluded. Rather, their admission should not be based on Rule 803(8)(C), but on either the statutory requirements or policy behind the act that created them initially. For example, some federal courts in Title VII employment discrimination lawsuits admit, under Rule 803, the conclusions of Equal Employment Opportunity Commission ("EEOC") investigators and hearing examiners regarding whether there is reasonable cause to believe that discrimination took place.[140] It is clear, however, that under the standard set out above, these conclusions should not be admissible under the rule. If a person normally employed as an EEOC hearing examiner were to sit through a Title VII trial and be asked on the stand for an opinion as to whether discrimination had taken place, that person would most likely not be allowed to give it. Why then, should that opinion be considered more reliable and admissible under Rule 803 if the person heard the same testimony, not at the trial, but at an earlier hearing?

Those opinions admitting EEOC findings rely on two Supreme Court cases, *Alexander v. Gardner-Denver Co.*[141] and *Chandler v. Roudebush*.[142] In *Alexander* the Court rejected an employer's argument that a labor arbitration finding of no discrimination precluded an employee's Title VII lawsuit, holding that "the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII."[143] Although the arbitration decision would not bar the employee's suit, the Court indicated, without explanation, that it "may be admitted as evidence and accorded such weight as the court deems appropriate."[144]

This dictum in *Alexander* can best be explained not as an evidentiary ruling, but as part of the "accommodation" the Court was trying to reach between two federal substantive policies. The

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140. McLure v. Mexia Indep. School Dist., 750 F.2d 396 (5th Cir. 1985); Plummer v. Western Int'l Hotels Co., 656 F.2d 502 (9th Cir. 1981); Bradshaw v. Zoological Soc'y, 569 F.2d 1066 (9th Cir. 1978); Easley v. Anheuser-Busch, Inc., 572 F. Supp. 402 (E.D. Mo. 1983), *aff'd in part and rev'd in part on other grounds*, 758 F.2d 251 (8th Cir. 1985). *But see* Walton v. Eaton Corp., 563 F.2d 66 (3d Cir. 1977); Cox v. Babcock & Wilcox Co., 471 F.2d 13 (4th Cir. 1972).

141. 415 U.S. 36 (1974).

142. 425 U.S. 840 (1976).

143. *Alexander*, 415 U.S. at 59-60.

144. *Id.* at 60.

employee argued that the negative arbitration decision should have no effect on the Title VII suit, while the employer asserted that it should completely bar suit on a res judicata basis. The Court compromised by giving some, but not preclusive effect to the decision. The decision is admissible not because of any special reliability, but to give some effect to the arbitration and thereby further "the federal policy favoring arbitration of labor disputes . . . ."[145]

The issue became more clouded two years later with *Chandler v. Roudebush*,[146] which involved the Title VII claim of a federal employee. Federal employees are required to pursue an administrative complaint with the Civil Service Commission before bringing a Title VII lawsuit. In *Chandler*, the government defendant claimed that a finding of no discrimination by the commission should bar the employee's Title VII lawsuit. The Supreme Court held that such a finding should not bar the suit, but again compromised by noting in a footnote that "[p]rior administrative findings made with respect to an employment discrimination claim may, of course, be admitted as evidence at a federal-sector trial *de novo*. See Fed.Rule Evid. 803(8)(C). Cf. *Alexander v. Gardner-Denver Co.* . . ."[147] In spite of the passing reference to Rule 803(8)(C), *Chandler* should be viewed, not as an evidentiary decision, but as a substantive Title VII decision attempting to reach an accommodation between Congress's requiring an administrative proceeding and Congress's allowing a trial de novo.[148]

The opinions allowing admission of EEOC administrative findings are not wrong, but they should be based on an interpretation of congressional intent concerning the Title VII process and not on Rule 803(8)(C). In deciding whether to admit the conclusions of a hearing examiner or arbitrator in similar situations, the court should proceed as follows: If the hearing officer would not have been permitted to give an opinion in person as an expert, the

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145. *Id.* at 59.

146. 425 U.S. 840 (1976).

147. *Id.* at 863 n.39 (citing FED. R. EVID. 803(8)(C); *Alexander*, 415 U.S. at 60 n.21).

148. The courts are apparently laboring under some confusion regarding whether EEOC findings should be admitted on the basis of Rule 803(8)(C) or as part of the Title VII statutory scheme. There is a split of authority regarding whether the findings are per se admissible in Title VII cases, Bradshaw v. Zoological Soc'y, 569 F.2d 1066, 1069 (9th Cir. 1978); Smith v. Universal Servs., 454 F.2d 154, 156-58 (5th Cir. 1972), or whether they should be admitted or excluded based on the trial judge's discretion, Johnson v. Yellow Freight Sys., 734 F.2d 1304, 1309 (8th Cir.), *cert. denied*, 969 U.S. 1041 (1984); Walton v. Eaton Corp., 563 F.2d 66, 74-75 (3d Cir. 1977). Those courts taking the per se result cannot, or at least, should not rely on Rule 803(8)(C), which grants the judge discretion to deny admission of the report if found untrustworthy.

officer's written opinion should not be admitted under Rule 803(8)(C). In such cases, however, the court should examine the cause of action to determine whether there is either an explicit legislative directive or a strong policy reason for giving the administrative conclusions some evidentiary weight at trial.

An example of a fact finding that would be admissible under this approach is one that comes from the medical malpractice panels in several states. These findings are often determined to be admissible by the statutes creating the panels.[149] Even if the admissibility of these findings were not mandated by statute, courts should generally admit them because of the primary policy reasons behind the creation of the panels, that is, to encourage settlement and to avoid the necessity of trying medical malpractice cases.[150] Knowledge by both parties that the finding can be introduced at trial encourages settlement.

D. Source of Expert Opinion

If an investigator's opinion or conclusion is not based on personal knowledge, it should not automatically be admissible, even if the investigator would qualify as an expert. An opinion presented in an investigative report, like an expert's opinion presented live at trial, must be based on facts or data "reasonably relied upon by experts in the particular field."[151] The advisory committee's note to Rule 703 explicitly states that "The language would not warrant admitting in evidence the opinion of an 'accidentologist' as to the point of impact in an automobile collision based on statements of bystanders."[152] Yet in *Baker v. Elcona Homes*,[153]

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149. *See, e.g.*, MD. CTS. & JUD. PROC. CODE ANN., § 3-2a-06 (1989); N.Y. JUD. LAW § 148-a (McKinney 1983 & Supp. 1990).

150. Treyball v. Clark, 65 N.Y.2d 589, 590-91, 483 N.E.2d 1136, 1137, 493 N.Y.S.2d 1004, 1005 (1985); Attorney Gen. v. Johnson, 282 Md. 274, 288-89, 385 A.2d 57, 66, *appeal dismissed*, 439 U.S. 805 (1978); Eastin v. Broomfield, 116 Ariz. 576, 583, 570 P.2d 744, 751 (1977).

151. FED. R. EVID. 703. *See supra* note 128 for the full text of Rule 703.

152. FED. R. EVID. 703 advisory committee's note:

> If . . . enlargement of permissible data may tend to break down the rules of exclusion unduly, notice should be taken that the rule requires that the facts or data "be of a type reasonably relied upon by experts in the particular field." The language would not warrant admitting in evidence the opinion of an "accidentologist" as to the point of impact in an automobile collision based on statements of bystanders, since this requirement is not satisfied.

The clear import of this statement is that the advisory committee believed that an expert determining the cause of a particular accident would not reasonably rely on statements of bystanders. This conclusion seems questionable. Whether it is reasonable for an expert to rely on bystander statements is a factual matter that may vary from case to case based on

cited with approval by the Supreme Court in *Beech Aircraft*,[154] the Sixth Circuit did virtually that by admitting a police sergeant's accident report which was based in part on the statements of one of the parties.[155] Most courts, however, have refused to admit accident reports based on hearsay statements.[156]

As noted earlier, the advisory committee's note to 803(8)(C) lists as a factor to be considered the "possible motivation problems suggested by Palmer v. Hoffman."[157] If this refers to the motivation of the witnesses whom the investigator interviewed, in addition to the motivation of the investigator himself, it is a step in the right direction.[158] An expert's opinion based extensively on the hearsay statements of interested witnesses should be excluded as untrustworthy.[159]

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such matters as the reliability of the witnesses, the extent of corroborating physical evidence, and other factors.

It is critical that before admitting the live expert testimony under Rule 703, the court must determine that the expert's reliance on the source of information was reasonable. The court should also determine this before admitting an opinion under Rule 803(8)(C).

153. 588 F.2d 551 (6th Cir. 1978), *cert. denied*, 441 U.S. 933 (1979).

154. Beech Aircraft Corp. v. Rainey, 109 S. Ct. 439, 446 (1988). It is unclear whether the Court is approving only the holding that, under Rule 803(8)(C), "factual findings" encompass opinions and conclusions, or the specific application of that holding in *Baker* as well.

155. *Baker*, 588 F.2d at 555-56 (admissible on the ground that the report was a public record).

156. *See* Miller v. Caterpillar Tractor Co., 697 F.2d 141 (6th Cir. 1983); Dallas & Mavis Forwarding Co., v. Stegall, 659 F.2d 721 (6th Cir. 1981); Hill v. Rolleri, 615 F.2d 886 (9th Cir. 1980).

157. FED. R. EVID. 803(8) advisory committee's note (citation omitted).

158. In *Palmer v. Hoffman*, 318 U.S. 109 (1943), the Court did not explicitly refer to the motivation of either the railroad company that prepared the report or the engineer whose statement it contained. The actual holding of *Palmer* is that the report did not satisfy the requirement of the Business Records Act, ch. 640 § 1, 49 Stat. 1561 (codified as amended at 28 U.S.C. § 1732 (1982)) (the precursor to Rule 803(6)), that it must be prepared in the regular course of business, because its "primary utility is in litigating, not in railroading." *Palmer*, 318 U.S. at 114. Subsequently, most courts and commentators have agreed, however, that the Court was concerned about the motivation to lie which was present both as to the company and the engineer that made the report untrustworthy. *See,e.g.*, Lewis v. Baker, 526 F.2d 470, 473 (2d Cir. 1975); MCCORMICK, *supra* note 1, at 877.

In examining the police report for trustworthiness under Rule 803(8)(C), the *Baker* court looked only to the "possible motivational problems" of the police officer who prepared the report. Baker v. Elcona Homes Corp., 588 F.2d 551, 558 (6th Cir. 1978). To be faithful to the advisory committee's four factors and to *Palmer*, the court should also have examined the motives of the witness who gave the information to the officer. That witness was clearly an interested party, and his "motivational problems" should have been considered in determining whether the report's conclusion was trustworthy.

159. *See Dallas & Mavis Forwarding Co. v. Stegall*, 659 F.2d 721, 722 (6th Cir. 1981)

The standard, however, should be more explicit. If the expert would not be allowed to give an opinion at trial due to its reliance on improper or insufficient data, the opinion in the report should also not be admitted. If, on the other hand, the author of the report has based conclusions on the type of information normally relied on by experts in his field, the report should not be inadmissible merely because that information contained inadmissible hearsay.[160] Some courts have gone further by intimating that no conclusions based on hearsay evidence would be considered trustworthy, and all such reports would be inadmissible.[161] As previously noted, this probably goes too far, because a reading of Rule 803(8)(C) in conjunction with 803(8)(B) indicates that at least some findings based on hearsay sources would be admissible under subsection C.[162]

E. Hearsay Statements Contained Within the Report

A related problem is whether the hearsay statements of witnesses upon which the investigator based conclusions may also be admitted if included in a properly admitted report. Such statements may constitute "hearsay within hearsay" and thus can only be admitted if each part conforms with an exception to the hearsay rule.[163] They are not made admissible merely because they are enshrined in a government report.[164]

On the other hand, if such statements are admitted along with the investigator's findings, they are not really hearsay at all, as

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(court found a police accident report "derived primarily from the story of a biased eyewitness" inadmissible under Rule 803(8)(C) because of "possible motivational problems.").

160. This comports with one of the seven additional criteria developed by Judge Becker in *Zenith Radio*: "(7) Where the public report purports to offer expert opinion, the extent to which the facts or data upon which the opinion is based are of a type reasonably relied upon by experts in the particular field." Zenith Radio Corp. v. Matsushita Elec. Indus., 505 F. Supp. 1125, 1147 (E.D. Pa. 1980), *aff'd in part and rev'd in part sub nom. In re* Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238 (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).

161. *See supra* note 78.

162. *See supra* text accompanying note 125.

163. *See* FED. R. EVID. 805 ("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.").

164. Hill v. Rolleri, 615 F.2d 886, 890 (9th Cir. 1980) (following Colvin v. United States, 479 F.2d 998 (9th Cir. 1973)).

they are offered to show the basis for the investigator's opinion and not for the truth of the matter asserted.[165]

It is again reasonable to adopt the approach taken by the Federal Rules of Evidence for dealing with the admissibility of the basis of an expert's opinion. Unfortunately, Rule 705, which addresses this problem, does not specifically state whether the proponent of an expert's opinion may automatically introduce the facts and data upon which the expert relied.[166] It does, however, give the opposing party the right to *require* such disclosure on cross-examination.[167] The rule also states that the expert may testify "*without* prior disclosure of the underlying facts or data . . . ."[168] This, of course, leaves open whether the expert may disclose the underlying facts or data when those sources are inadmissible hearsay.

Most courts and commentators adopt the reasoning above and allow such disclosure, but merely to explain the basis of the expert's testimony.[169] It seems reasonable to treat hearsay statements contained in an investigative report in the same manner. They should

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165. *See* Fowler v. Blue Bell, Inc., 737 F.2d 1007, 1013-14 (11th Cir. 1984). The court stated:

> Fowler also claims that the district court erred in admitting affidavits that the EEOC collected during its field investigations. The appellant acknowledges that the actual report and findings of the commission's field investigation are admissible under Fed.R.Evid. 803(8)(C), which excepts from the hearsay exclusion the results of federal investigation, but he contends that the affidavits that support those findings do not fall within 803(8)(C) and are therefore inadmissible hearsay. The contention is without merit because the district court admitted the affidavits not as evidence of the truth of statements that they contained but only for the limited purpose of showing the basis for the EEOC's findings. Consequently, the affidavits were not hearsay.

166. FED. R. EVID. 705 ("The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.").

167. *Id.*

168. *Id.* (emphasis added).

169. *See* S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 467 (3d. ed. 1982):

> The Rule [703] does not indicate whether the expert can state for the jury the factual basis of an opinion if the facts are of a type generally excluded from evidence. Rule 705 is not helpful on this point either. The best reading of Rule 703 in our view is to read the word "otherwise" into the last sentence of the rule before the word "admissible." The result of this reading is that the expert can rely not only on facts reasonably relied upon by experts in his field, but also can give a full account to the jury, which is necessary to insure that the jury has a basis for properly assessing the testimony. Evidence not otherwise admissible is not admitted under this rule for its truth; it is admitted to explain the basis of the expert opinion.

be admissible, but only under the conditions set forth below.

First, the report must contain a conclusion by the investigator. It must be more than a series of transcriptions of eyewitness reports. Second, the facts and data must be of a type reasonably relied upon by an expert in the field.[170] Third, the author of the report must actually have relied on the information in reaching the conclusion.[171] Fourth, the opponent should be entitled to a limiting instruction that the statements may not be used for the truth of the matter asserted.[172] Additionally, the court should consider a Rule 403 objection to the evidence if the danger of prejudice, the likelihood that the jury will consider it as substantive evidence, outweighs its probative value, the need to show the investigator's basis for the conclusion.[173]

V. ADDITIONAL SUGGESTIONS FOR APPLYING RULE 803(8)(C)

A. Courts Should Scrutinize the Sources of Information upon Which a Public Report Is Based

Rule 803(8)(C) differs in one significant aspect from most other hearsay exceptions, because the declarant in an 803(8)(C) situation is not a first-hand observer of the event in question. The exceptions are grounded on the premise that the circumstances help to insure the truthfulness and accuracy—reliability—of the observer or declarant, so that cross-examination is not necessary.[174] Under Rule 803(8)(C), however, the author of the report, the declarant, will often not have been a first-hand observer. The declarant will have to rely on observers and other sources of information to make a factual finding. Nothing inherent in the rule guarantees the reliability of the original observers, thus precluding the need for cross-examination. This is one reason that the rule allows exclusion if "the sources of information or other circumstances indicate [a] lack of trustworthiness."[175] Too many courts, however, fail to examine thoroughly the "sources of information," concentrating

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170. *See supra* notes 151-62 and accompanying text.

171. O'Malley v. United States Fidelity & Guar. Co., 776 F.2d 494, 500 (5th Cir. 1985); Bobb v. Modern Prods., 648 F.2d 1051, 1056 (5th Cir. 1981).

172. S. SALTZBERG & K. REDDEN, *supra* note 169, at 467.

173. *Id.*

174. *See, e.g.*, FED. R. EVID. 803(1). Present sense impressions require a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." The requirement that the statement must be contemporaneous helps to insure both accuracy, because there is no problem with memory, and truthfulness, because there is no time to make up a falsehood.

175. FED. R. EVID. 803(8)(C).

instead on the "circumstances" of the investigation.[176] This is not surprising, as all four of the trustworthiness factors mentioned in the advisory committee note are based mainly on the reliability of the reporter and the circumstances of the report, rather than the sources of information.[177] The assumption behind concentrating on the reporter and the circumstances of the report is that the governmental fact finders will have judged the reliability of the observers on whose observations they relied to reach their findings. The wording of the rule, however, clearly indicates that the court must also examine the trustworthiness of the sources of information and not rely entirely on the governmental reporter for this determination. Although reliance on some hearsay should not render the report automatically inadmissible,[178] courts should exercise caution before admitting reports when the fact finder has relied, in significant measure, on hearsay evidence in reaching the findings. If an important hearsay source might have been biased or was in some other way unreliable, the court should consider excluding the report, even if the government fact finder found the source sufficiently reliable to base its conclusions upon.[179]

B. Courts Should Set a Reasonable Burden of Proof for the Party Opposing the Admission of the Report

Most courts have held that if a government report fulfills the basic requirements of Rule 803(8)(C), the report is assumed to be trustworthy and admissible. The burden has been placed on the party opposing admission to show a lack of trustworthiness.[180] The

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176. *See supra* notes 63-70 and accompanying text.

177. FED. R. EVID. 803(8)(C) advisory committee's note. Only the fourth factor, "possible motivation problems suggested by Palmer v. Hoffman," if interpreted broadly to include the motivation of the original observer as well as the reporter, goes to the trustworthiness of the source of information. *Id.*; see *supra* note 158 and accompanying text.

178. *See supra* note 125 and accompanying text.

179. This is similar to the second of the seven additional criteria for trustworthiness fashioned by Judge Becker in *Zenith Radio*:

> The extent to which the agency findings are based upon or are the product of proceedings pervaded by receipt of substantial amounts of material which would not be admissible in evidence (*e.g.*, hearsay, confidential communications, ex parte evidence), and the extent to which such material is supplied by persons with an interest in the outcome of the proceeding.

Zenith Radio Corp. v. Matsushita Elec. Indus., 505 F. Supp. 1125, 1147 (E.D. Pa. 1980), *aff'd in part and rev'd in part sub nom. In re* Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds sub nom.* Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574 (1986), *cert. denied*, 481 U.S. 1029 (1987).

180. *See supra* note 22.

standard for this burden, however, should not be a preponderance of the evidence. This standard is impossibly difficult, especially where direct access to the governmental fact finder has not been possible. Rather, the report should be excluded if there is any significant doubt regarding its trustworthiness, when the fact finder is absent and unavailable for cross-examination. For example, if the fact finder is in any way aligned with a party, or has any reason to be biased against a party, the court should seriously consider excluding the report without requiring the opposing party to actually demonstrate bias.[181] Also, in order for parties to meet their burden of exclusion, they must be given access to the author of the report during discovery.[182] One commentator has suggested that Rule 803(8)(C) should be treated as the residual exception, Rule 803(24), requiring that the party proposing admission submit a copy of the report to the court and opposing counsel before trial.[183] Moreover, when a court believes that sufficient doubts are raised about the trustworthiness of a report, this should warrant its total exclusion from jury consideration rather than allowing the jury to weigh its credibility, as some courts have stated.[184] This

181. In Perrin v. Anderson, 784 F.2d 1040, 1047 (10th Cir. 1986), a civil rights suit against the police for excessive use of force, the court refused to exclude the results of an internal investigation by the police themselves that cleared the officer in question, because the plaintiff had not provided "specific evidence" of bias. *See also In re* Agent Orange Prod. Liab. Litig., 611 F. Supp. 1223, 1241 (E.D.N.Y. 1985) (that government is defendant does not render government report untrustworthy), *rev'd*, 818 F.2d 216 (2d Cir.), *cert. denied*, 484 U.S. 926, *aff'd in part and rev'd in part*, 818 F.2d 179 (2d Cir. 1987).

182. *See* Fayson v. Shannon & Luchs, No. 88-0144 (E.D. Pa. May 27, 1988) (LEXIS, Genfed library, Dist. file) (allowing "deposition subpoenas to interrogate any person who contributed to the preparation and presentation of the factual recitations stated in the report"); State v. Manke, 328 N.W.2d 799, 801, 803-05 (N.D. 1982) (requiring proponent of factual findings to give opponent a copy of public report well in advance of offer in evidence, and allowing cross-examination of source and reporter, under state equivalent of Rule 803(8)(C)).

183. Note, *The Trustworthiness of Government Evaluative Reports Under Federal Rule of Evidence 803(8)(C)*, 96 HARV. L. REV. 492, 507 n.82 (1982). The author would also require the party proposing admission to "include with this submission a statement indicating the source of the report, the qualifications of the individual or agency responsible for the report, the reasons that the report is needed . . . . Both the party opposing admission and the court will then be in a position to examine the report for possible bias." *Id.*

184. In Wolf *ex. rel.* Wolf v. Proctor & Gamble Co., 555 F. Supp. 613, 625 (D.N.J. 1982) the court stated, "Defendants assert that the research for the studies was hastily conducted and suffered from serious methodological flaws. However, these considerations bear on the weight to be given the evidence by the jury rather than its admissibility." *See also Perrin*, 784 F.2d at 1047 (any bias by the investigator "should affect the weight given the report, not its admissibility"); United States v. School Dist. of Ferndale, 577 F.2d 1339, 1355 (6th Cir. 1978) (factors suggesting incompleteness of fact finding perhaps "affect the weight given to the findings, but not their admissibility.").

result is not only mandated by Rules 803(8)(C) and 104(a),[185] but it also makes sense. Without hearing cross-examination of the reporters and their sources, the jury cannot adequately weigh the credibility of a questionable report.[186]

C. Courts Should Examine Evidence Potentially Admissible Under Rule 803(8)(C) in Light of Rule 403

Rule 403 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, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[187] Government reports should be examined carefully under Rule 403 because of their tendency to run afoul of many of the Rule 403 dangers, especially unfair prejudice.

Some courts have recognized the potential for unfair prejudice, because the jury may overestimate the probative value of official government reports. Juries might believe that there is "an aura of special reliability and trustworthiness" to the report because it is prepared by a government official.[188] This may be especially true when it is the report of a federal agency which "bears the imprimatur of the United States Government."[189]

The potential for unfair prejudice increases not only with the status of the agency issuing the report,[190] but also with the formality

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185. "Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b)." FED. R. EVID. 104(a). The exception of subdivision (b) involves "[r]elevancy conditioned on fact" and does not apply to whether a given set of facts fits a hearsay exception, a question that should be decided exclusively by the judge. *See, e.g.*, Kaplan, *Of Mabrus and Zorgs: An Essay in Honor of David Louisell*, 66 CALIF. L. REV. 987 (1978) (discussing issues involved in the distribution of functions between the judge and jury as to preliminary questions of fact).

186. *See supra* notes 13-18 and accompanying text.

187. FED. R. EVID. 403.

188. City of New York v. Pullman, Inc., 662 F.2d 910, 915 (2d Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982); *see also* Bright v. Firestone Tire & Rubber Co., 756 F.2d 19, 23 (6th Cir. 1984); Fowler v. Firestone Tire & Rubber Co., 92 F.R.D. 1, 2 (N.D. Miss. 1980); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1125, 1160-61 (E.D. Pa. 1980), *aff'd in part and rev'd in part sub nom. In re* Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds sub nom.* Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574 (1986), *cert. denied*, 481 U.S. 1029 (1987).

189. *In re* Multi-Piece Rims Prods. Liab. Litig., 545 F. Supp. 149, 152 (W.D. Mo. 1982).

190. Several courts have recognized the extra potential for the jury to attach undue weight to official reports of Congress. Bright v. Firestone Tire & Rubber Co., 756 F.2d at 23; Pearce v. E.F. Hutton Group, 653 F. Supp. 810, 816 (D.D.C. 1987).

of the circumstances under which it was prepared. The jury is less likely to attach undue weight to a police officer's on-the-scene accident report than they are to the findings of a hearing officer after a full evidentiary hearing. In the latter case, the jury may be tempted to think that an expert, having heard all the evidence, probably reached the correct conclusion and might feel pressured to affirm the expert's conclusion.[191] The danger of unfair prejudice is particularly high when the facts found by the hearing officer are exactly the facts that are to be determined by the jury.

In addition to the problem of undue prejudice, several courts have also recognized that Rule 803(8)(C) reports can be excluded under Rule 403 because of "considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[192] One court held that admission of a government report 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."[193] Not only does a dispute concerning the accuracy of an official report take time, it also tends to focus the jury's attention on whether the facts were correctly found in the government report, rather than on the factual issues in the case.[194] Another potential "waste of time" is the process of sifting through long government reports to separate the admissible from inadmissible sections.[195]

Rule 403 requires that the previously mentioned dangers of the evidence be balanced against its "probative value." In many cases, the probative value of a governmental report will vary with its trustworthiness: the greater the reliability, the greater the probative

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191. One court declined to admit an EEOC determination of discrimination, stating that consideration of the determination was "tantamount to saying 'this has already been decided and here is the decision.'" Tulloss v. Near N. Montessori School, 776 F.2d 150, 154 (7th Cir. 1985). *See also supra* note 40 and accompanying text.

192. FED. R. EVID. 403.

193. City of New York v. Pullman, Inc., 662 F.2d 910, 915 (2d Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982); *see also* John McShain, Inc. v. Cessna Aircraft Co., 563 F.2d 632, 636 (3d Cir. 1977); United States v. American Tel. & Tel. Co., 498 F. Supp. 353, 367 (D.D.C. 1980); Zenith Radio Corp. v. Matsushita Elec. Indus., 505 F. Supp. 1125, 1145-46, 1161 (E.D. Pa. 1980), *aff'd in part and rev'd in part sub nom. In re* Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds sub nom.* Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574 (1986), *cert. denied*, 481 U.S. 1029 (1987).

194. United States v. MacDonald, 688 F.2d 224, 230 (4th Cir. 1982), *cert. denied*, 459 U.S. 1103 (1983); *Pullman*, 662 F.2d at 915; Coffin v. South Carolina Dep't of Social Servs., 562 F. Supp. 579, 591 (D.S.C. 1983); *American Tel. & Tel. Co.*, 498 F. Supp. at 368.

195. *John McShain, Inc.*, 563 F.2d at 636 (probative value of National Transportation Safety Board report outweighed by waste of time in sifting out admissible hearsay).

value. Therefore, many of the same considerations that the courts used in determining the trustworthiness under Rule 803(8)(C) will also shape their determination of probative value under Rule 403.

However, probative value is not synonymous with trustworthiness or reliability. Probative value is also a measure of how important and helpful the evidence is to the trier of fact when considering all of the evidence available. When the government report is based on an on-the-scene investigation, or a study that would be impossible to replicate for the jury, the evidence is more important to the trier of fact and more probative.[196] On the other hand, if the report is nothing more than the conclusions of a government official who has heard testimony virtually identical to that of the jury, then the report does not have a particularly high probative value.[197]

The most dangerous governmental reports, in terms of Rule 403, are findings of fact and conclusions issued by hearing examiners.[198] Although they may not be untrustworthy, these findings are not particularly probative, in that they are merely the conclusions of another fact finder who has heard the same testimony as the jury (while often not in any better position than the jury to make such conclusions). This is especially true where the case involves disputed testimony, and the findings of the hearing officer involve a determination of the credibility of the witnesses. Such determinations are not only unhelpful to the jury, but they invade its responsibility. They are fraught with the danger of unfair prejudice in that the jury might hesitate to "overrule" the findings of the previous tribunal. Such reports should generally not be admitted unless

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196. *See, e.g.*, Ellis v. International Playtex, 745 F.2d 292 (4th Cir. 1984); Kehm v. Proctor & Gamble Mfg. Co., 724 F.2d 613 (8th Cir. 1983) (the court admitted epidemiological studies conducted by the CDC that established a statistical relationship between tampons and toxic shock. The studies involved hundreds of women and could not have been replicated for the jury. The findings and conclusions based on the study were valuable in that they made use of evidence which otherwise would not have been available to the jury.).

197. *See* Bright v. Firestone Tire & Rubber Co., 756 F.2d 19, 23 (6th Cir. 1984), excluding congressional report under Rule 403 because, among other reasons, many of the conclusions, "could really be argued on the basis of what's already in evidence and on reasonable inferences that might be drawn from those facts that are in evidence." *See also* Note, *supra* 10, at 164-65. By analogy to the rule on expert testimony, Rule 702, such evidence would not be admissible because it would not "assist the trier of fact to understand the evidence or to determine a fact in issue." FED. R. EVID. 702.

198. This is especially true when the finding issued by the hearing officer coincides with an issue of fact concerning the parties before the court that must be decided in the case at hand. It is less bothersome if the finding involves an issue that is only collateral to the issue at trial.

required by statute, or unless a strong substantive policy exists for admitting the finding.[199]

The most unfair situation results where the report is based on an *ex parte* or nonadversarial hearing, and the party opposing the report did not have the opportunity to participate fully in the earlier hearing. This creates the greatest danger that the jury may overestimate the reliability and trustworthiness of the governmental report. How can it be helpful for the jury, which is presented with both sides of the evidence including cross-examination, to hear the hearing examiner's conclusion based on a much less full or fair hearing? The jury can better reach its conclusion on the same issue, and the earlier, perhaps flawed, determination adds nothing of value to its determination. Therefore courts should virtually never admit the findings of hearing officers if those findings were issued after a hearing at which the party opposing admission of the findings did not have an opportunity to cross-examine the witnesses, unless this result is required by the statute under which the hearing was held.

Several courts, recognizing the potential prejudice in the admission of government reports, have approved the use of cautionary jury instructions. This clarifies that the findings contained in governmental reports are to be treated like other evidence and are not binding on the jury.[200] Although this is a step in the right direction, it is no substitute for exclusion in cases in which the danger of prejudice outweighs the probative value of the report.

D. Courts Should Allow the Party Opposing Admission To Examine Government Reporters As If They Were Under Cross-Examination

This Article has explained the unfairness that can result when the report of a government investigation is admitted into evidence without affording the party against whom the report is offered a chance to cross-examine the author of the report. This unfairness may be partially mitigated if the party opposing the report is allowed to call the reporter as a witness.

Rule 806 states that "[w]hen a hearsay statement . . . has been admitted in evidence, the credibility of the declarant may be

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199. *See supra* notes 149-50 and accompanying text.

200. *In re* Plywood Antitrust Litig., 655 F.2d 627, 637 (5th Cir. Unit A 1981), *cert. denied*, 456 U.S. 971, *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); *In re* Multi-Piece Rims Prods. Liab. Litig., 545 F. Supp. 149, 153 n.3 (W.D. Mo. 1982).

attacked . . . ."[201] Further, the rule specifically allows such a credibility attack by cross-examination: "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."[202] Because in a Rule 803(8) situation the author of the report is the declarant, the author should clearly be subject to cross-examination if called by the opposing party.

Although Rule 806 addresses only what will happen *if* the declarant is called by the opposing party and not *whether* the opposing party has the right to call the declarant, the clear implication of the rule is that the opposing party should be allowed to do so.[203] There is no good reason to treat a public official any differently from any other witness with knowledge of relevant matters.[204]

As a matter of trial strategy, it may be a difficult decision for the party against whom the report has been offered to decide whether to call the author of the report for cross-examination. On the one hand, such cross-examination may be the best method of exposing flaws in an investigation that may have led to an invalid conclusion. On the other hand, this strategy must be balanced with the risk that calling the author of the report will increase the importance of the report in the eyes of the jury.

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201. FED. R. EVID. 806.

202. *Id.*

203. *See* Note, *supra* note 183, at 507 n.79 ("Litigants can impeach a report by either attacking the report's logic or calling the officials who made the report as witness.").

This issue has arisen in one case, although not as to trial, but in whether the opposing party had the right to issue subpoenas for discovery depositions to the authors of government reports. The court in Fayson v. Shannon & Luchs, No. 88-0144 (E.D. Pa. May 27, 1988) (LEXIS, Genfed library, Dist. file), refused a request to quash subpoenas issued for Housing & Urban Development investigators, holding that the party opposing the admission of their reports had the right to take their depositions on the issue of their credibility.

204. There is, however, a contrary argument to this position. Although not mentioned as one of the reasons for Rule 803(8) in the advisory committee's notes, one possible reason for the exception "is to reflect a concern that the time of public officials should not be unduly wasted, since this could be disruptive of the agency involved." J. FRIEDENTHAL & M. SINGER, THE LAW OF EVIDENCE 127 (1985). Allowing the opposing party to call the public official would obviously interfere with this desire to protect the official from having to testify.

The simple answer to this argument is that Rule 803(8) is a hearsay exception, not a rule of privilege. As all hearsay exceptions, it merely exempts the party wishing to admit the hearsay statement from having to call the witness to the stand. It should not be used as a rule of privilege to shield a witness with knowledge of relevant facts from having to testify to those facts.

Weinstein takes an intermediate position, giving the trial judge the discretion "to insist upon the official being produced for examination as to his experience and training if he is available. Cf. Rule 614(a)." J. WEINSTEIN, *supra* note 1, at 250.

E. Congress Should Amend Rule 803(8)(C) by Including It As a Rule 804 "Declarant Unavailable" Exception

Hearsay exceptions under the Federal Rules are divided into two groups. The 803 exceptions apply "even though the declarant is available as a witness."[205] The 804 exceptions apply, however, only "if the declarant is unavailable as a witness."[206] According to McCormick:

> The theory of the first group is that the out-of-court statement is at least as reliable as would be his testimony in person, so that producing him would involve pointless delay and inconvenience. The theory of the second group is that, while it would be preferable to have live testimony, if the declarant is unavailable, the out-of-court statement will be accepted.[207]

This Article has described numerous reasons why, in many circumstances, the fact finding report of a government official is *not* "at least as reliable as would be his testimony in person."[208] Because cross-examination of the fact finder is often crucial, it would be more reasonable to change Rule 803(8)(C) to a Rule 804 exception, requiring production of the fact finder unless unavailable.

It has been argued that one of the reasons for the adoption of Rule 803 was "to reflect a concern that the time of public officials should not be unduly wasted, since this would be disruptive of the agency involved."[209] Requiring appearance of the official would obviously interfere with this concern. Authors of most reports admitted under Rule 803(8)(C), however, are not upper level policy-making employees whose temporary absence would be severely detrimental to an agency, but rather lower level employees such as police officers, investigators, and hearing examiners. The cost of requiring such officials to testify must be balanced against the unfairness and prejudice that results when their reports are admitted without their testimony. That balance should favor their testimony if they are available.

VI. CONCLUSION

Federal Rule of Evidence 803(8)(C), as recently interpreted by the Supreme Court, provides a hearsay exception for reports

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205. FED. R. EVID. 803.

206. *Id.*

207. *See* MCCORMICK, *supra* note 1, at 753.

208. For example, cross-examination of the official would be helpful in determining whether he had the necessary expertise to reach the conclusions that he did, whether the procedures followed in the investigation were fair and reasonable, and whether the sources relied upon were trustworthy.

209. J. FRIEDENTHAL & M. SINGER, *supra* note 204, at 127.

resulting from investigations by public officials, including the conclusions and opinions of the investigator. Because the report may be admitted without cross-examination of either the official who prepared it or by the witnesses the official may have interviewed as part of the investigation, this rule creates a great danger of presenting unfairly prejudicial evidence to the jury. Although the rule contains an escape clause denying admission where the report is not trustworthy, this has not always been carefully and consistently applied by the courts.

This Article suggests the following, which will help to insure that prejudicial evidence is not admitted under the rule. First, the rule should be read in conjunction with the expert opinion rules, treating the government reporter as an expert witness. The reporter must have the requisite expertise to render any opinions contained in the report. Also, if the reporter relied on any hearsay evidence in reaching conclusions, it must be the kind of evidence reasonably relied on by experts in that particular field. Additionally, courts should perform a more careful analysis of Rule 803(8)(C) evidence under Rule 403 to determine whether its probative value is outweighed by the danger of unfair prejudice, particularly where police accident reports and findings of hearing examiners are issued without a full hearing at which all parties were represented and had the opportunity to cross-examine the witnesses. These reports should generally not be admitted by the courts.