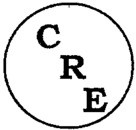
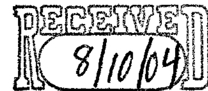


Center for Regulatory Effectiveness



Suite 700
11 Dupont Circle, N.W.
Washington, D.C. 20036-1231
Tel: (202) 265-2383 Fax: (202) 939-6969
www.TheCRE.com

04-EV-A

August 9, 2004

Peter G. McCabe
Secretary, Committee on Rules
of Practice and Procedures
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Bldg.
1 Columbus Circle, NE – Rm. 4-170
Washington, DC 20544

Dear Mr. McCabe:

Re: Suggestion for an amendment to the "trustworthiness" proviso of Federal Rule of Evidence 803(8)(C), Hearsay Exceptions, Availability of Declarant Immaterial, Public Records and Reports (findings from an investigation)

On behalf of the Center for Regulatory Effectiveness ("CRE"), I am submitting the attached memorandum which suggests an amendment to the "trustworthiness" proviso of evidence rule 803(8)(C).[1] The amendment is suggested for the purposes of (1) resolving conflicts and inconsistencies in federal case law interpreting and applying the Rule's "trustworthiness" proviso, including a circuit split; and (2) achieving consistency between federal case law interpreting the proviso and the recent federal information quality legislation and the agency rules promulgated in 2002 to implement that legislation. The information quality legislation and agency rules have now established basic quality standards which must be met by all information disseminated to the public by federal agencies.

We request that this suggestion be considered for distribution with a request for comments to the bench, bar, Congress, the legal academic community, and other interested parties by the Advisory Committee on Evidence Rules at its Fall meeting, currently scheduled for November 15, 2004 in Washington, D.C.

---

[1] CRE addresses not only issues concerning federal regulations, but also issues concerning federal "regulation by information" and "regulation by litigation". CRE, Congress, and others have recognized that dissemination of information by government agencies can affect the private sector to an extent similar to direct regulation. That recognition was the impetus for the information quality legislation.

We understand that the Committee recently decided, at its April 2004 meeting, to defer consideration of certain potential proposed amendments to Rules 803(8), 803(3) and 804(b)(3); however, those proposed amendments were not related to the ones suggested here, which, we believe, deserve, and require, more immediate attention. We are fully aware of the situation with regard to the U.S. Supreme Court's March 2004 decision in *Crawford v. Washington*, and the Advisory Committee's subsequent statements of reluctance to address amendments to the hearsay exceptions in view of that decision. We believe that such reluctance should not extend to the suggestion we are submitting.

The *Crawford* decision did not address the trustworthiness or reliability of information sought to be introduced into evidence under one of the hearsay exceptions; it turned on whether law enforcement reports proffered in criminal cases against the accused under a hearsay exception are "testimonial" in nature, <u>regardless of reliability</u>. Allowing the case law on what constitutes "testimonial" evidence to evolve and mature before addressing issues concerning the use of law enforcement records and reports in criminal cases under 803(8) or other hearsay exceptions – the rationale for deferring consideration of the amendments to 803(8) that were under consideration in April 2004 -- will not assist in addressing the need to resolve circuit conflicts and inconsistences in interpreting the trustworthiness proviso, nor ensure that the trustworthiness provision is consistent with Congressional intent regarding the reliability of public records and reports. While the case law on "testimonial"public records or reports is evolving, the courts will still need to confront issues of trustworthiness and reliability which were not in any way addressed in *Crawford*, and which were explicitly avoided. Congressional primacy with regard to the Rules appears to require that the issues raised here, and the suggested amendment, be addressed expeditiously. Even if deferral of a Committee recommendation on the suggested amendment were desirable, it would be appropriate to begin the process of soliciting comments from the bench, bar, Congress, and others, and Committee consideration of the issues, especially given the extended period often required for consideration of a rules amendment.

The federal legislation on information quality was enacted in 1995 and 2000, and government-wide final rules implementing the legislation were promulgated in 2002. Rule 803(8) was enacted in 1975; therefore, the supersession provisions of 28 U.S.C. § 2072 do not apply, and the later Congressional directives on information quality and the rules implementing the legislation control.

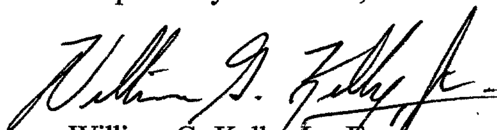
An amendment is necessary because some federal circuit and district courts have interpreted the "trustworthiness" proviso of 803(8)(C) in a manner that is inconsistent with other circuits, and is now inconsistent with the information quality legislation and rules, by disallowing consideration of accuracy, bias, reliability of methodology and underlying data, and reproducibility when ruling on trustworthiness for the purpose of admissibility. An amendment, and explanatory notes, would also increase the awareness of the legal community concerning these new information quality requirements in those circuits and districts that do not have such inconsistent case law. Furthermore, the amendment would provide an opportunity to revise the Advisory Committee's Note on 803(8)(C) to reflect other important developments since 1975, such as the Supreme Court's decision in *Beech Aircraft Corp v. Rainey*, 488 U.S. 153 (1988), which resolved the split among the circuits as to

whether 803(8)(C) covers "evaluative" reports by governmental entities. The current Note was prepared and issued prior to 1973 and is now inaccurate in reflecting an unresolved conflict.

We believe it is particularly important to circulate this suggested amendment for comment because it appears that many pertinent court decisions on admissibility under 803(8)(C) are unpublished, and many more might never have been the subject of a written opinion, and might not have been appealed in view of the highly deferential review standard of "abuse of discretion" observed in all circuits. Even in the case of published or unpublished opinions available for review, the opinions often do not contain sufficient detail to ascertain the exact nature of the objection(s) to admission. It therefore appears that circulation of the suggestion with an explanation of the issues it would address is the only way to gauge fully the seriousness of the current inconsistencies in interpretation of the trustworthiness proviso of 803(8)(C) and the need for clarification. In addition, our suggestion and supporting memorandum address only federal case law, and it would be valuable to obtain some idea of the extent to which inconsistent federal case law has influenced state case law. We have information indicating that federal agency reports – particularly reports relating to potential health hazards – are frequently used in personal injury litigation in state courts. We also have received anecdotal information that inconsistencies in interpreting the trustworthiness proviso have given rise to considerable forum shopping. It does not appear that comments on these subjects in connection with a suggested amendment have ever been solicited by the Standing Committee.[2]

If you or others have questions regarding the attached memorandum or subject matter, or requests for additional information, please address them to me, using the contact information below, with a copy to the Center for Regulatory Effectiveness at the address shown in the letterhead. I will plan to attend the Fall meeting of the Advisory Committee.

Respectfully submitted,



William G. Kelly, Jr., Esq.
General Counsel
184 Mt. Owen Dr.
Driggs, ID 83422
(208) 354-3050
wgkelly@tetontel.com

Attachment

[2] There is precedent for the Advisory Committee and Standing Committee soliciting comment even on a tentative decision not to propose an amendment, as in the case of the Standing Committee's September 1995 Request for Comment, which included a tentative decision not to amend rule 803(8).

Center for Regulatory Effectiveness

Memorandum in Support of a Suggestion for an Amendment to the "Trustworthiness" Proviso in Rule 803(8) of the Federal Rules of Evidence

August 9, 2004

Submitted by:
William G. Kelly, Jr., Esq.
General Counsel, Center for
Regulatory Effectiveness
D.C. Bar # 411594

Table of Contents

I. The Suggested Amendment 1

II. Explanation of the Suggested Amendment 1

III. Previous Suggestions for Amendment of Rule 803(8), and Advisory Committee Action 4

IV. The Information Quality Legislation and Rules 5

A. The Information Quality Legislation 5

B. The Information Quality Rules 8

C. Congressional Primacy 12

V. Pertinent Background on the Derivation of Rule 803(8) 13

VI. Federal Case Law Interpreting Rule 803(8)(C) Which Is in Conflict with the Information Quality Legislation and Rules 14

A. Accuracy: Cases ruling that accuracy (including expertise of the investigator and reliability of underlying data or sources) cannot be considered in deciding on admissibility, but, rather, must be considered a matter of credibility and weight 16

B. Completeness: Cases ruling that completeness cannot be considered in deciding on admissibility, but rather is a matter of credibility and weight 17

C. Bias (Lack of Objectivity): Cases ruling that bias cannot be considered in deciding on admissibility, but rather is a matter of credibility and weight 17

D. Transparency and Reproducibility: Cases ruling that lack of transparency as to data, methods, or sources cannot be considered in deciding on admissibility, but rather is a matter of credibility and weight 18

VII. The Split Among the Federal Circuits in Interpreting the Trustworthiness Proviso of Rule 803(8) 18

VIII. Case Law Interpreting "Trustworthiness" in Conflict with the Information Quality Legislation and Rules Prohibition Against Bias and the Intent of 803(8)(C) 19

IX. Inconsistency Between 803(8)(C) Case Law and Rule 702 (Testimony by Experts) and the Information Quality Legislation and Rules 21

X. Scholarly Commentary 24

XI. The Need to Obtain Comments from the Bench, Bar, Congress and Others 25

APPENDIX A: History of Consideration of Possible Amendments to Federal Evidence Rule 803(8) 27

APPENDIX B: Federal Circuit and District Court Decisions on Evidence Rule 803(8)(C)Which Distinguish between Admissibility and Weight 33

Table of Cases and Other Authorities

I. Cases

Allen v. Pennsylvania Eng'g Corp., 102 F.3d 194 (5th Cir. 1996) 22, 24

American Equities Group v. Ahava Dairy Products Corp., slip op. (S.D.N.Y., April 23, 2004, WL 870260) 15

Amorgianos v. Nat'l R. Passenger Corp., 303 F.3d 256 (2d Cir. 2002) 22

Avondale Indus., Inc. v. Bd. of Comm'rs of the Port of New Orleans (E.D. La. 1996, unpublished, WL 280787) 16, 23, 24, 40

Baker v. Elcona Homes Corp., 588 F.2d 551 (6th Cir. 1978) 42, 46

Baker v. Firestone Tire & Rubber Co., 793 F.2d 1196 (11th Cir. 1986) 6, 46

Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988) 27, 40

Blake v. Pellegrino, 329 F.3d 43 (1st Cir. 2003) 16, 23, 33

Bourne v. E.I. Dupont De Nemours and Co., 189 F.Supp.2d 482 (S.D. W.Va. 2002) 22

Bradford Trust Co. of Boston v. Merrill Lynch, Pierce, Fenner and Smith, Inc., 805 F.2d 49 (2d Cir. 1986) 6, 35, 37

Bridgeway Corp. v. Citibank, 201 F.3d 134 (2d Cir. 2000) 19

Bright v. Firestone Tire & Rubber Co., 756 F.2d 19 (6th Cir. 1984) 43, 46

Chesapeake & Delaware Canal Co. v. United States, 250 U.S. 123 (1919) 19

City of New York v. Pullman Inc., 662 F.2d 910 (2d Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982) 2

Coates v. AC and S, Inc., 844 F.Supp. 1126 (E.D. La. 1994) 16, 18, 20, 24, 40

Coleman v. Home Depot, 306 F.2d 1333 (3d Cir. 2002) 19

Complaint of Nautilus Motor Tanker Co., 862 F.Supp. 1251
(D.N.J. 1994) 17, 24, 37

Crawford v. Washington. ___ U.S. ___, 124 S.Ct. 1354 (2004) 4, 30-32

Crompton Richmond Co., Factors v. Briggs, 560 F.2d 1196
(5th Cir. 1977) 13, 39

Dallas & Mavis Forwarding Co. v. Stegall, 659 F.2d 721
(6th Cir. 1981) 42

Daubert v. Merrell Dow Pharmaceuticals, Inc.
509 U.S. 579 (1993) 21-23, 33, 38

Desrosiers v. Flight Int'l of Fla., Inc., 156 F.3d 952 (9th Cir.),
cert. dismissed, 525 U.S. 1062 (1998) 21

Eason v. Fleming Cos., Inc., (5th Cir. 1993, unpublished,
WL 13015208) 16, 17, 23, 39

Ebenhoech v. Koppers Indus., Inc., 239 F.Supp.2d 455 (D.N.J. 2002) 7

Ellis v. Int'l Playtex, 745 F.2d 292, 300
(4th Cir. 1984) 2, 7, 16, 18, 23, 38, 44

Erickson v. Baxter Healthcare, Inc., 151 F.Supp.2d 952
(N.D.Ill. 2001) 18, 23, 24, 43

Fraley v. Rockwell Int'l Corp., 470 F.Supp. 1264
(S.D. Ohio 1979) 34, 42

General Elec. Co. v. Joiner, 522 U.S. 136 (1997) 21-23

Gentile v. County of Suffolk, 129 F.R.D.
435 (E.D.N.Y. 1990) 17, 18, 19, 21, 23, 35

Harris v. Birmingham Bd. of Educ., 537 F.Supp. 716 (W.D. Ala. 1982),
aff'd in part, rev'd on other grounds, 712 F.2d 1377 (11th Cir. 1983) 46

Hartzog v. United States, 217 F.2d 706 (4th Cir. 1954) 7

Hedgepeth v. Kaiser Found. Health Plan of the Northwest (9th Cir. 1996, unpublished, WL 29252) 45

Hines v. Brandon Steel Decks, 886 F.2d 299 (11th Cir. 1989) 46

In re Air Crash Disaster at Stapleton International Airport, Denver, Colo., 720 F.Supp. 1493, 1498 (D.Colo. 1989) 45

In re Korean Air Lines Disaster of Sept. 1, 1983, 932 F.2d 1475 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991) 17, 21, 23, 46

Kay v. United States, 255 F.2d 476 (4th Cir.1958) 13

Kehm v. Procter & Gamble Mfg. Co., 724 F.2d 613 (8th Cir. 1983) 16, 18, 23, 24, 44

King Fisher Marine Serv., Inc. v. M/V SOCOL (S.D. Tex. 2001, unreported, WL 1911437) 16, 23, 41

Kumho Tire v. Carmichael, 526 U.S. 137 (1999) 21-23

Lantec, Inc. v. Novell, Inc., 306 F.3d 1003 (10th Cir. 2002) 22

Lewis v. Valez, 149 F.R.D. 474 (S.D.N.Y. 1993) 19

Lohrenz v. Donnelly, 223 F.Supp.2d 25 (D.D.C. 2002), *aff'd on other grounds*, 350 F.3d 1272 (D.C. Cir. 2003), *cert. denied*, 124 S.Ct. 2167 (2004) 17, 18, 23, 47

Marsh v. W.R. Grace & Co., slip op. (4th Cir. 2003, unpublished, WL 22718177) 23

Matador Drilling Co. v. Post, 662 F.2d 1190, 1199 (5th Cir. 1981) 13, 39, 41

Miller v. Caterpillar Tractor Co., 697 F.2d 141 (6th Cir. 1983) 2, 42

Montgomery County v. Microvote, Corp., 320 F.3d 440, 448-49 (3d Cir. 2003) 22

Moore v. Ashland Chem. Co., 151 F.3d 269 (5th Cir. 1998), *cert. denied*, 526 U.S. 1064 (1999) 22

Moran v. Pittsburgh-Des Moines Steel Co. 183 F.2d 467 (3d Cir. 1950) 13, 16, 23, 36, 42

Moss v. Ole South Real Estate, Inc., 933 F.2d 1300 (5th Cir. 1991) 16-18, 24, 37-41, 45

Muncie Aviation Corp. v. Party Doll Fleet, Inc., 519 F.2d 1178 (5th Cir. 1975) 19

Nakijima v. General Motors Corp., 857 F.Supp. 100 (D.D.C. 1994) 17, 23, 47

Palmer v. Hoffman, 318 U.S. 109 (1943) 19

Paolitto v. John Brown E & C, Inc., 151 F.3d 60 (2d Cir. 1998) 6

Perrin v. Anderson, 784 F.2d 1040 (10th Cir. 1986) 45

Professional Mobile Home Brokers, Inc. v. Security Pacific Housing Serv. (4th Cir. 1995, unpublished, WL 255937) 6

Pugliano v. United States, 315 F.Supp.2d 197 (D.Conn. 2004) 23

Richmond Medical Center v. Hicks, 301 F.Supp. 499 (E.D. Va. 2004) 19

Robbins v. Whelan, 653 F.2d 47 (1st Cir. 1981) 7

Rosario v. Amalgamated Ladies' Garment Cutters' Union, 605 F.2d 1228 (2d Cir. 1979), *cert. denied*, 446 U.S. 919 (1980) 18, 35

Sage v. Rockwell Int'l Corp., 477 F.Supp. 1205 (D.N.H. 1979) 16, 24, 34

Shreve v. Sears, Roebuck & Co., 166 F.Supp.2d 378 (D. Md. 2001) 22

Smith v. BMW North America, Inc., 308 F.3d 913 (8th Cir. 2002) 22

Smith v. Ithica Corp., 612 F.2d 215 (5th Cir. 1980) 6

Union Pacific R. Co. v. Kirby Inland Marine, Inc. of Miss., 296 F.3d 671 (8th Cir. 2002) 17, 23, 44

United States ex rel. Collins v. Welborn, 49 F.Supp. 597 (N.D. Ill. 1999), *aff'd in part, rev'd in part sub nom Bracy v.*

Schomig, 286 F.2d 406 (7th Cir. 2002) 18, 43

United States v. Davis, 826 F.Supp. 617 (D.R.I. 1993) 34

United States v. 478.34 Acres of Land, 578 F.2d 156 (6th Cir. 1978) 7, 41

United States v. Fredette, 315 F.3d 1235 (10th Cir. 2003) 22

United States v. Jackson-Randolph, 282 F.3d 369 (6th Cir. 2002) 43

United States v. Rincon, 28 F.3d 921 (9th Cir.), *cert. denied*, 513 U.S.1029 (1994) 23

United States. v. School Dist. of Ferndale, Mich., 577 F.2d 1339 (6th Cir. 1978) 17, 24, 41, 42

United States v. Versaint, 849 F.2d 827, 832 (3d Cir. 1988) 6

United States v. Williams, 571 F.2d 344, 350 (6th Cir. 1978) 7

Vanderpoel v. A-P-A Transport Co., 36 Fed. R. Evid. Serv. 247 (E.D. Pa. 1992, WL 158426) 16, 17, 23, 24, 37

Walker v. Fairchild Indus., Inc., 554 F.Supp. 650 (D.Nev. 1982) 17, 23, 24, 45

White v. Godinez, 301 F.3d 796 (7th Cir. 2002) 17, 44

Wolf v. Procter & Gamble Co., 555 F.Supp. 613 (D.N.J. 1982) 16, 23, 36, 44

II. Statutes and Regulations

28 U.S.C. § 2071(a) 2

28 U.S.C. § 2074 2

44 U.S.C. § 3501 5

44 U.S.C. 3506(a)(1)(B) 5

44 U.S.C. chapter 35, Pub. L. No. 104-13, Sec. 2, May 22, 1995, 109 Stat. 163. 5

44 U.S.C. § 3502(12). 5

44 U.S.C. § 3504(d)(1) 5, 8

44 U.S.C. § 3516 note, Pub. L. No. 106-554, Sec. 1(a)(3)
[title V, Sec. 515], Dec. 21, 2000, 114 Stat. 2763, 2763A-153 7

44 U.S.C. § 3516. . . . . 5, 8

5 U.S.C. § 551(4) 1

66 FR 49718, Sept. 28, 2001 9

67 FR 8452, Feb. 22, 2002 9

OMB Circular A-130. . . . . 5, 7

Pub. L. No. 93-12, Mar. 30, 1973, 87 Stat. 9 3

28 U.S.C. § 1732 . . . . 13, 19, 36, 39, 41, 43

28 U.S.C. § 2071(a) 2

28 U.S.C. § 2074 2

44 U.S.C. 3506(a)(1)(B). 5

44 U.S.C. chapter 35, Pub. L. No. 104-13, Sec. 2, May 22, 1995,
109 Stat. 163. 5

44 U.S.C. § 3502(12). 5

44 U.S.C. § 3504(d)(1) 5

44 U.S.C. § 3516 note, Pub. L. No. 106-554, Sec. 1(a)(3) [title V,
Sec. 515], Dec. 21, 2000, 114 Stat. 2763, 2763A-153 7

44 U.S.C. § 3516. 5

5 U.S.C. § 551(4) 1

66 FR 49718, Sept. 28, 2001 9

67 FR 8452, Feb. 22, 2002 9

Evidence Rules 402 and 403 9

Evidence Rule 702 . . . . 3, 21, 22, 23, 24, 33, 38

Evidence Rule 803(6) 7, 13, 14, 19, 27, 41

Pub. L. No. 93-12, Mar. 30, 1973, 87 Stat. 9 3

III. Other Authorities

Bennett, *Federal Rule of Evidence 803(8): The Use of Public Records in Civil and Criminal Cases*, 21 Am. J. Trial Advocacy 229 (1997) 24

C.B. Mueller and L.C. Kirkpatrick, FEDERAL EVIDENCE, § 458(f) ("Trustworthiness Factor") (2d ed. 1994) 25

Comment, *The Trustworthiness of Government Evaluation Reports under Federal Rule of Evidence 803(8)(C)*, 96 Harv. L. Rev.492, 499-500 (1982) 25

Conference Report Joint Explanatory Statement, Cong. Rec. Oct.19, 1998, H11508. 6

EPA Science Policy Council Handbook, Risk Characterization (EPA 100-B-00-002, December 2000) 20

H.R. Rep. No. 592, 105th Cong., 2d Sess. 6, 7

R.C. Park, D.P. Leonard, and S. H. Goldberg, EVIDENCE LAW, 294 (1998) 25

United States General Accounting Office, *Chemical Risk Assessment: Selected Federal Agencies' Procedures, Assumptions, and Policies* (August 2001, GAO-01-810) 20

www.thecre.com⇒Data Quality⇒Data Quality Guidelines 8

Center for Regulatory Effectiveness

I. The Suggested Amendment

The suggested amendment is to add the underlined language and delete the stricken language:

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . .

(8) Public records and reports.–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~~ indicia, including noncompliance with duly promulgated quality standards for information disseminated by federal agencies, indicate lack of ~~trustworthiness~~ reliability.

II. Explanation of the Suggested Amendment

The language "duly promulgated quality standards for information disseminated by federal agencies" refers to the 1995 and 2000 federal legislation on information quality, the government-wide "guidelines"[1] promulgated by the federal Office of Management and Budget in 2002 pursuant to the directives in that legislation, and the "guidelines" promulgated by each federal agency in conformance with the OMB guidelines and pursuant to the legislative directives. The legislative and rulemaking background is discussed below. An explanation that the amendatory language refers to those particular legislative enactments and rules would be contained in a revised Advisory Committee Note, since detailed reference to the relevant provisions of the legislative enactments, the OMB implementing rules, and the numerous agency implementing rules within the text of the rule itself would be unwieldy.

While Rule 803(8) covers public records and reports regardless of whether they are prepared by a federal, State, local, foreign, or international government agency, the suggested amendment would pertain only to records or reports currently "disseminated" (as that term is defined in the information quality rules) to the public by a U.S. federal agency.

---

[1] Although labeled "guidelines", all of the OMB and agency "guidelines" come within the definition of "rules" under the Administrative Procedure Act, 5 U.S.C. § 551(4). A "rule" is defined as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ." All of the guidelines/rules clearly implement and interpret the information quality legislative directives, as discussed below. The APA does not employ or define the term "guidelines".

Deletion of the word "circumstances", and substitution of the word "indicia", would clarify that factors such as the accuracy, completeness, bias, and reproducibility of the information are to be considered in ruling on admissibility; whereas the term "circumstances" could be read (and apparently has been read) as allowing only consideration of factors which do not pertain to the reliability of the actual contents of the record or report, such as whether it appears that a report was prepared in anticipation of use in litigation.

Substitution of the word "reliability" for "trustworthiness" would more accurately reflect the case law. The case law interpreting 803(8)(C) uniformly equates trustworthiness with reliability. On the other hand, some cases, discussed below, appear to interpret lack of trustworthiness as indicating a motive to falsify or fabricate. As also discussed below, and as recognized in case law, trustworthiness and reliability have been interpreted in the great majority of cases to pertain to factors beyond possible falsification or fabrication. In addition, it is the articulated policy of some federal agencies to insert policy bias into their reports, and compliance with such an agency policy by its personnel would not be considered an act of falsification or fabrication, nor would it bear any relation to a "motive" to falsify or fabricate.[2]

The basic purpose of the amendment would be to clarify that factors such as objectivity (or bias), accuracy, completeness, and reproducibility (*i.e.*, adequate disclosure of methodology and underlying data) specified in the information quality legislation and rules, in addition to the four factors currently outlined in the Advisory Committee Note (timeliness, special skill or experience, conduct of a hearing, and motivation), should be regarded as circumstances (indicia) bearing on trustworthiness (reliability) when a trial court considers whether a federal record or report should be admitted into evidence under Rule 803(8)(C).

Those additional factors have now been established through federal legislation and rulemaking as basic standards of quality for federal information disseminated to the public. Therefore, Congressional primacy with regard to judicial rules and related issues[3] requires that any significant

---

[2] The terminology "indicia of reliability" has been used, for example, in *Ellis v. Int'l Playtex*, 745 F.2d 292, 300 (4th Cir. 1984); *Miller v. Caterpillar Tractor Co.*, 697 F.2d 141, 144 (6th Cir. 1983); *City of New York v. Pullman Inc.*, 662 F.2d 910, 914 (2d Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982), in discussing a ruling under 803(8)(C).

[3] Congressional primacy with regard to the rules is reflected, for example, in 28 U.S.C. §§ 2071(a) and 2074, as well as by the many occasions on which Congress has either intervened in the judicial rulemaking process (as it did with regard to promulgation of the original Federal Rules of Evidence when they were originally proposed in 1973, and eventually enacted the Rules legislatively) and the many occasions on which it has enacted supplementary rules (some of which are referenced, for example, in the Advisory Committee Note to evidence rule 803(8)(C)). 28 U.S.C. § 2071(a) provides that any rules prescribed by the Supreme Court or other federal courts "shall be consistent with Acts of Congress." 28 U.S.C. § 2074 requires that Congress be given an opportunity to review, and amend or reject, rules prescribed by the Supreme Court under

inconsistency between federal legislation and the evidence rules be resolved as soon as possible. A substantial number of cases in many, but not all, federal circuits and their district courts have held that such factors should not be considered by the trial court in ruling on "trustworthiness" and admissibility under 803(8)(C), but, rather, should be considered as factors that are only appropriate for consideration by the trier of fact in judging the weight to be given to the record or report once it has been admitted. Many of those cases are summarized in Appendix B to this memorandum, which also shows that there is a circuit split on what factors can be considered by the trial court in ruling on trustworthiness and admissibility under 803(8)(C). The cases which have ruled that factors such as accuracy, completeness, bias, reliability of underlying data, and reproducibility do not bear on admissibility, but only bear on the weight to be given the record or report by the trier of fact, appear to have resulted from a failure to recognize that precedents containing such a distinction were originally based on the federal business records legislation, which contained an explicit provision on the matter, but that provision was abrogated when the Federal Rules of Evidence were enacted in 1975. The suggested amendment would ensure that, contrary to those cases, the rule is consistent with Congressional intent regarding the importance of such factors in judging the quality of federal records and reports.

Such an amendment would also achieve greater consistency with the intent behind Rule 702, as revised following the Supreme Court's decisions in *Daubert*, *Joiner*, and *Kumho Tire*, by ensuring that the trial court acts as a thorough "gatekeeper" with regard to the reliability of scientific, technical, and other specialized information disseminated by federal agencies. Reports issued by federal agencies and potentially admissible under 803(8)(C) are often the equivalent of expert testimony under Rule 702, which governs "scientific, technical, or other specialized knowledge", because the agency which issues the report will be generally viewed as "expert" in its field. However, as we discuss below, many federal courts do not apply the same degree of "gatekeeper" rigor in ruling on admissibility under 803(8)(C) as is required under 702, instead admitting the report and leaving it to the jury to determine the "weight" to be given to the report. Evidence concerning scientific, technical, or other specialized information admissible under 803(8)(C) should be consistent in quality with expert evidence of that sort admissible under 702.

In addition, apart from incorporating the new federal information quality standards, the amendment and an accompanying revised Note would resolve inconsistencies among the circuits and districts as to whether consideration of such factors is appropriate when ruling on admissibility. The Committee might view it desirable to clarify that consideration of such factors applies to all public records and reports, not just federal information disseminated to the public which is subject to the new information quality standards.

At the same time, the suggested amendment would preserve the broad discretion that has been accorded to trial courts (under the "abuse of discretion" standard of review) in judging

---

the Rules Enabling Act. See, *e.g.*, Pub. L. No. 93-12, Mar. 30, 1973, 87 Stat. 9, which provided that the rules approved by the Supreme Court on Nov. 28 and Dec. 18, 1972, would have "no force or effect except to the extent, and with such amendments, as they may be expressly approved by the Act of Congress."

trustworthiness and reliability, as well as preserving the principle, consistently enunciated by the federal courts and implied by the language of the rule, that the burden is on the party opposing admission to convince the trial court that the record or report lacks trustworthiness (reliability). Indeed, the overall impact of the suggested amendment would be to remove restrictions on the trial judge's discretion in determining "trustworthiness" for purposes of admissibility which have been imposed in some circuits.

III. Previous Suggestions for Amendment of Rule 803(8), and Advisory Committee Action

Since 1995, the Advisory Committee has considered, or has begun consideration, of a number of issues relating to the use of police records or reports against criminal defendants under the several subdivisions of 803(8); however, it has not previously raised or considered the issues presented herein or similar issues. The Committee did receive, in 1996, one suggestion pertaining to the need to revise the trustworthiness proviso of 803(8)(C) that raised some aspects of the issues presented here, but a report was never prepared and there is no recorded discussion of how to resolve the suggestion.[4]

A detailed account of Committee consideration of 803(8) issues is provided in Appendix A. Such an account appears necessary in view of the Reporter's recent recommendation, and the Committee's apparent decision, to defer for an indefinite time consideration of amendments to 803(8) that would address certain issues pertaining to use police records and reports as evidence in criminal trials. That decision could – unjustifiably, we believe -- potentially affect Committee consideration of the amendment suggested here.

As noted in the transmittal cover letter for this suggested amendment, the Supreme Court's March 2004 decision in *Crawford v. Washington* (discussed in Appendix A) did not address a trustworthiness proviso to a hearsay exception. *Crawford* held that an exception to the hearsay rule, in particular Rule 804(b)(3), could not be applied to allow admission of a hearsay statement that was "testimonial" in nature because admission would deprive the accused of his right to confrontation under the Sixth Amendment. The Court declined to define "testimonial", and also declined to address whether the hearsay statement at issue was reliable; and it held that "testimonial" hearsay was not admissible in a criminal trial even if it were determined to be "reliable" by the trial court.

What is important to recognize is that the Supreme Court did not dispense with the reliability (or trustworthiness) requirement for hearsay exceptions. Even if hearsay which would come within an existing exception is non-testimonial, if is found unreliable or untrustworthy by a trial court it will still be inadmissible. And a finding that the evidence is unreliable could avoid the necessity to make a finding regarding "testimonial" or non-testimonial nature of the evidence. In addition, *Crawford* does not apply to civil cases. Thus, reliability or trustworthiness remains an important qualification

---

[4] The Advisory Committee on Evidence dockets, minutes, and reports which we have reviewed are those posted on the website of the Administrative Office of the U.S. Courts (www.uscourts.gov/rules). Since those posted records go back only to 1992, it is possible that there was some Committee consideration of amendments to Rule 803(8) prior to then.

on application of the hearsay exception in Rule 803(8)(C), and it is important that the integrity of that reliability constraint on use of the exception be carefully guarded in a manner consistent with both the original intent of the Rule and Congressional intent as expressed recently through the information quality legislation and rules.

IV. The Information Quality Legislation and Rules

A. The Information Quality Legislation

The information quality legislation consists of two statutes: The original information quality directives were contained in provisions of the Paperwork Reduction Act of 1995, and supplemental Congressional directives were enacted as part of OMB's appropriations legislation in 2000.

In 1995, Congress passed legislation to re-authorize and revise the Paperwork Reduction Act, which governs the collection of information from the public by federal agencies. 44 U.S.C. chapter 35, Pub. L. No. 104-13, Sec. 2, May 22, 1995, 109 Stat. 163. At that time, Congress also decided that provisions were needed in the Paperwork Reduction Act to ensure that information disseminated by federal agencies met certain standards for quality.

Congress stated that a purpose of the 1995 legislation was to "improve the quality and use of Federal information to strengthen decisionmaking, accountability, and openness in Government and society". 44 U.S.C. § 3501 (emphasis added.) Congress thus indicated its intention to ensure the quality of information used not only within the government, but also elsewhere throughout society.

The 1995 legislation made the Director of the Office of Management and Budget responsible for developing government-wide standards on information quality. The law provided that "[w]ith respect to information dissemination, the Director shall develop and oversee the implementation of policies, principles, standards, and guidelines to--(1) apply to Federal agency dissemination of public information, regardless of the form or format in which such information is disseminated . . . ." 44 U.S.C. § 3504(d)(1). The legislation also stated that "[t]he Director shall promulgate rules, regulations, or procedures necessary to exercise the authority provided by this subchapter." 44 U.S.C. § 3516.

The term "public information" was defined in the legislation as "any information, regardless of form or format, that an agency discloses, disseminates, or makes available to the public." 44 U.S.C. § 3502(12).

Each federal agency, in turn, was made responsible for "complying with the requirements of this subchapter and related policies established by the Director [of OMB]." 44 U.S.C. 3506(a)(1)(B).

Subsequent to the 1995 legislation, OMB promulgated Paperwork Reduction Act guidance through an OMB "circular", Circular A-130. This circular was unfamiliar to the public and barely

made mention of requirements for federal information disseminated to the public. Consequently, in October 1998, Congress urged OMB, in its report on FY 1999 appropriations[5], to issue specific rules on information quality, with public involvement, as previously mandated by the Paperwork Reduction Act. The report stated:

> *Reliability and Dissemination of Information*
>
> The committee urges the Office of Management and Budget (OMB) to develop, with public and Federal agency involvement, rules providing policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies, and information disseminated by non-Federal entities with financial support from the Federal government, in fulfillment of the purposes and provisions of the Paperwork Reduction Act of 1995 (P.L. 104-13). The Committee expects issuance of these rules by September 30, 1999. The OMB rules shall also cover the sharing of, and access to, the aforementioned data and information, by members of the public. Such OMB rules shall require Federal agencies to develop, within one year and with public participation, their own rules consistent with the OMB rules. The OMB and agency rules shall contain administrative mechanisms allowing affected persons to petition for correction of information which does not comply with such rules; and the OMB rules shall contain provisions requiring the agencies to report to OMB periodically regarding the number and nature of petitions or complaints regarding Federal, or Federally-supported, information dissemination, and how such petitions and complaints were handled. OMB shall report to the Committee on the status of implementation of these directives no later than September 30, 1999.

H.R. Rep. No.592, 105th Cong., 2d Sess., at 49-50. The conference report adopted this language.[6]

Congressional use of the term "Reliability" in its report directive is particularly noteworthy in view of the consistent use of that term as a synonym for "trustworthiness" in cases applying Rule 803(8). There are also statements in the case law equating the "trustworthiness" and reliability of information under 803(8)(C) and other hearsay exception with its "quality", "accuracy", or "objectivity". *See Paolitto v. John Brown E & C, Inc.*, 151 F.3d 60, 65 (2d Cir. 1998) ("quality"); *Professional Mobile Home Brokers, Inc. v. Security Pacific Housing Serv.* (4th Cir. 1995, unpublished, WL 255937) (803(6) case, "accuracy"); *Smith v. Ithica Corp.*, 612 F.2d 215, 222 (5th Cir. 1980) ("objective"); *United States v. Versaint*, 849 F.2d 827, 832 (3d Cir. 1988) ("accurate"); *Bradford Trust Co. of Boston v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 805 F.2d 49, 54 (2d Cir. 1986) ("accurate"); *Baker v. Firestone Tire & Rubber Co.*, 793 F.2d 1196, 1199 (11th Cir. 1986)

---

[5] The federal fiscal year ("FY") runs from October 1 to September 30. The 1999 fiscal year ran from October1, 1998 to September 30, 1999.

[6] Conference Report Joint Explanatory Statement, Cong. Rec. Oct.19, 1998, H11508.

("objective"); *Ellis v. Int'l Platex, Inc.*, 745 F.2d 292, 301 (4th Cir. 1984) ("inform the public . . . accurately"); *Robbins v. Whelan*, 653 F.2d 47, 52 (1st Cir. 1981) ("quality"); *United States v. 478.34 Acres of Land*, 578 F.2d 156, 159 (6th Cir. 1978) ("accuracy");*United States v. Williams*, 571 F.2d 344, 350 (6th Cir. 1978) (803(5) case, "accuracy"); *Hartzog v. United States*, 217 F.2d 706, 710 (4th Cir. 1954) (pre-FRE case involving IRS agent's worksheets; "accuracy"); *Ebenhoech v. Koppers Indus., Inc.*, 239 F.Supp.2d 455, 463 (D.N.J. 2002) (803(6) case, "accuracy"). And see generally the Advisory Committee Note to 803(6) (multiple references to "accurate" and "accuracy").

In a May 20, 1999 letter to OMB's Director, Hon. Jacob Lew, Representative Tom Bliley, Chair of the House Commerce Committee, expressed concern over whether OMB was carrying out its responsibilities under the 1995 legislation to issue regulations on information quality, and complying with the directives in House Report 105-592.[7]

When OMB did not issue regulations to implement the 1995 Paperwork Reduction Act information quality provisions by the end of September 1999, as directed by the appropriations committees, Representative Jo Ann Emerson of the House Appropriations Committee wrote to the Administrator of OMB's Office of Information and Regulatory Affairs, Mr. John Spotila. Representative Emerson noted OMB's failure to issue the regulations, requested a progress report, and indicated her intention to bring up the issue at OMB's next budget hearing before the House appropriations subcommittee.[8]

In an April 18, 2000 letter responding to Representative Emerson, Mr. Spotila indicated that OMB was "sensitive to the possibility that OMB Circular A-130 might need to be updated or supplemented to deal with concerns in this area [of "ensuring the quality of federally-disseminated information"]; however, he also indicated that OMB was "reluctant to issue more regulations without a clear sense that they would be useful in promoting data quality."

This reluctant OMB attitude towards its responsibilities under the 1995 legislation clearly was not viewed as satisfactory by Congress, and consequently it enacted a supplementary implementing directive in the appropriations legislation for Fiscal Year 2001.[9] This new legislative directive, stated:

> (a) In General.--The Director of the Office of Management and Budget shall, by not later than September 30, 2001, and with public and Federal agency involvement, issue guidelines under sections 3504(d)(1) and 3516 of title 44, United States Code, that

[7] Rep. Bliley's letter indicated copies to the Chair of the House Committee on Appropriations and the Chair of the House appropriations Subcommittee on Treasury, Postal Service, and General Government Appropriations (which has jurisdiction over OMB appropriations).

[8] Letter dated March 20, 2000. The OMB budget hearing was scheduled for March 28, 2000.

[9] 44 U.S.C. § 3516 note, Pub. L. No. 106-554, Sec. 1(a)(3) [title V, Sec. 515], Dec. 21, 2000, 114 Stat. 2763, 2763A-153.

provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies in fulfillment of the purposes and provisions of chapter 35 of title 44, United States Code, commonly referred to as the Paperwork Reduction Act.

(b) Content of Guidelines.--The guidelines under subsection (a) shall--
(1) apply to the sharing by Federal agencies of, and access to, information disseminated by Federal agencies; and
(2) require that each Federal agency to which the guidelines apply--
(A) issue guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by the agency, by not later than 1 year after the date of issuance of the guidelines under subsection (a);
(B) establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines issued under subsection (a); and
(C) report periodically to the Director--
(i) the number and nature of complaints received by the agency regarding the accuracy of information disseminated by the agency; and
(ii) how such complaints were handled by the agency.

Hereafter in this memorandum, the 1995 and 2000 legislation are referred to together as the information quality legislation.

B. The Information Quality Rules

As explained above, under the information quality legislation the Office of Management and Budget of the Executive Office of the President ("OMB") was made responsible for issuing the "rules, regulations, or procedures" to provide guidance to all federal agencies for ensuring the "quality, objectivity, utility, and integrity" of information disseminated to the public. 44 U.S.C. §§ 3504 and 3516. Each federal agency was then responsible for issuing guidelines complying with the OMB rules, regulations, or procedures. Thus, it is not necessary in this memorandum to discuss or reference the rules of the many individual federal agencies, since they conform to the OMB guidelines with regard to the issues pertinent to this discussion.[10] The individual agency guidelines differ from the OMB rules mainly in describing the individual agency programs to which the rules apply, the

---

[10] The guidelines of individual agencies can be found at www.thecre.com⇒Data Quality⇒Data Quality Guidelines.

various administrative measures the agency has put in place to ensure quality, and the specifics of how affected members of the public can petition the agency for correction of information.[11]

For purposes of this memorandum, the most relevant provisions of the OMB rules are those defining "quality" and "objectivity". The term "utility" might, in some cases, be significant for considering possible exclusion of otherwise admissible evidence under Rules 402 and 403.[12] The term "integrity" is not pertinent to the present discussion.[13]

OMB first issued final rules on information quality on September 28, 2001[14], and requested comment on possible revisions. On February 22, 2002, OMB issued the supplemental final rules that currently control.[15] All federal agencies issued their own conforming rules by approximately October 1, 2002.

The OMB rules define "quality" as a term embracing the other terms of "objectivity, utility, and integrity." Through the definition of "objectivity", and the related definitions of "influential scientific, financial, or statistical information" and "reproducibility", the OMB rules specify a "basic standard of quality" which all agency information must meet, while "influential scientific, financial, and statistical information" must also include "a high degree of transparency about data and methods to facilitate the reproducibility of such information by qualified third parties."

The definitions of "objectivity", "influential" and "reproducibility" are set out in full below due to their importance:

> 3. "Objectivity involves two distinct elements, presentation and substance.
> (a) "Objectivity" includes whether disseminated information is being **presented in an accurate, clear, complete, and unbiased manner**. This involves whether the information is presented within a **proper context**. Sometimes, in disseminating certain types of information to the public, other information must also be disseminated in order to ensure an accurate, clear, complete, and unbiased presentation. Also, the agency needs to **identify the sources** of the disseminated information (to the extent possible, consistent with confidentiality protections) and,

---

[11] The individual agency guidelines typically provide for some response (which may be interim) within 90 days. If the petition is denied, the petitioner can appeal to other reviewers within the agency. It can take several months to a year or more for an agency to issue a final decision, which then might still be disputed by the petitioner.

[12] Rules 402 and 403 concern relevancy.

[13] "Utility" refers to the usefulness of the information, which might take into consideration its transparency and reproducibility. "Integrity" refers to the security of the information.

[14] 66 FR 49718, Sept. 28, 2001.

[15] 67 FR 8452, Feb. 22, 2002.

in a scientific, financial, or statistical context, **the supporting data and models**, so that the public can assess for itself whether there may be some reason to question the objectivity of the sources. **Where appropriate, data should have full, accurate, transparent documentation, and error sources affecting data quality should be identified and disclosed to users.**

(b) In addition, "objectivity" involves a focus on ensuring **accurate, reliable, and unbiased information**. In a scientific, financial, or statistical context, the original and supporting data shall be generated, and the analytic results shall be developed, using **sound statistical and research methods.**

(i) If data and analytic results have been subjected to formal, independent, external peer review, the information may generally be presumed to be of acceptable objectivity. However, this presumption is rebuttable based on a persuasive showing by the petitioner in a particular instance. If agency-sponsored peer review is employed to help satisfy the objectivity standard, the review process employed shall meet the general criteria for competent and credible peer review recommended by OMB-OIRA to the President's Management Council (9/20/01) (http://www.whitehouse.gov/omb/inforeg/oira_review-process.html), namely, "that (a) peer reviewers be selected primarily on the basis of necessary technical expertise, (b) peer reviewers be expected to disclose to agencies prior technical/policy positions they may have taken on the issues at hand, (c) peer reviewers be expected to disclose to agencies their sources of personal and institutional funding (private or public sector), and (d) peer reviews be conducted in an open and rigorous manner.

(ii) If an agency is responsible for disseminating **influential** scientific, financial, or statistical information, agency guidelines shall include a high degree of **transparency about data and methods** to facilitate the **reproducibility** of such information by qualified third parties.

A. With regard to original and supporting data related thereto, agency guidelines shall not require that all disseminated data be subjected to a reproducibility requirement. Agencies may identify, in consultation with the relevant scientific and technical communities, those particular types of data that can practicable [sic] be subjected to a reproducibility requirement, given ethical, feasibility, or confidentiality constraints. It is understood that reproducibility of data is an indication of **transparency about research design and methods** and thus a replication exercise (i.e., a new experiment, test, or sample) shall not be required prior to each dissemination.

B. With regard to analytic results related thereto, agency guidelines shall generally require sufficient **transparency about data and methods** that an independent reanalysis could be undertaken by a qualified member of the public. These transparency standards apply to agency analysis of data from a single study as well as to analyses that combine information from multiple studies.

i. Making the data and methods publicly available will assist in determining whether analytic results are reproducible. However, the objectivity standard does not override other compelling interests such as privacy, trade secrets, intellectual property, and other confidentiality protections.

ii. In situations where public access to data and methods will not occur due to other compelling interests, agencies shall apply especially rigorous robustness checks to analytic results and document what checks were undertaken. Agency guidelines shall, however, in all cases, require a disclosure of the specific data sources that have been used and the specific quantitative methods and assumptions that have ben employed. Each agency is authorized to define the type of robustness checks, and the level of detail for documentation thereof, in ways appropriate for it given the nature and multiplicity of issues for which the agency is responsible.

C. **With regard to analysis of risks to human health, safety and the environment maintained or disseminated by the agencies, agencies shall either adopt or adapt the quality principles applied by Congress to risk information used and disseminated pursuant to the Safe Drinking Water Act Amendments of 1996** (42 U.S.C. 300g-1(b)(3)(A) & (B). Agencies responsible for dissemination of vital health and medical information shall interpret the reproducibility and peer-review standards in a manner appropriate to assuring the timely flow of vital information from agencies to medical providers, patients, health agencies, and the public. Information quality standards may be waived temporarily by agencies under urgent situations (*e.g.,* imminent threats to public health or homeland security) in accordance with the latitude specified in agency-specific guidelines.

. . .

9. "Influential", when used in the phrase "influential scientific, financial, or statistical information", means that the agency can reasonably determine that dissemination of the information will have or does have a clear and substantial impact on important public policies or important private sector policies or important private sector decisions. Each agency is authorized to define "influential" in ways appropriate for it given the nature and multiplicity of issues for which the agency is responsible.

10. "**Reproducibility**" means that the **information is capable of being substantially reproduced, subject to an acceptable degree of imprecision**. For information judged to have more (less) important impacts, the degree of imprecision that is tolerated is reduced (increased). If agencies apply the reproducibility test to specific types of original or supporting data, the associated guidelines shall provide relevant definitions of reproducibility (*e.g.,* standards for replication of laboratory data). With respect to analytic results, "capable of being substantially reproduced" means that independent analysis of the original or supporting data using identical methods would generate similar analytic results, subject to an acceptable degree of imprecision or error.

67 FR at 8459-60, Feb. 22, 2002 (emphasis added). The referenced sections of the Safe Drinking Water Act Amendments of 1996 (SDWAA) are described and quoted in the preamble to the rules. Subsection (A) of the SDWAA directs agencies to use "(i) the best available, peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific practices; and (ii) data collected by accepted methods or best available methods (if the reliability of the method and the

nature of the decision justifies use of the data)." Subsection (B) directs agencies "to ensure that the presentation of information [risk] effects [sic] is comprehensive, informative, and understandable" and that "in a document made available to the public in support of a regulation [to] specify, to the extent practicable–(i) each population addressed by any estimate [of applicable risk effects]; (ii) the expected risk or central estimate of risk for the specific population [affected]; (iii) each appropriate upper-bound or lower-bound estimate of risk; (iv) each significant uncertainty identified in the process of the assessment of [risk] effects and the studies that would assist in resolving the uncertainty; and (v) peer-reviewed studies known to the [agency] that support, are directly relevant to, or fail to support any estimate of [risk] effects and the methodology used to reconcile inconsistencies in the scientific data."[16]

With regard to the evidence rules amendment proposed herein, and for purposes of considering the federal case law discussed below and in Appendix B, the key terms from the legislation and the OMB rules to keep in mind are:

objective
accurate
clear (overlaps with transparency)
complete
unbiased (overlaps with objective)
transparent (with regard to supporting data, models, and methods)
capable of being substantially reproduced (a type of transparency)

It is important to note that the suggested amendment would not require the trial court to <u>apply</u> these legislative, OMB, and agency information quality standards when making an admissibility ruling under 803(8)(C); what it would require is that the trial court <u>consider</u> those standards in ruling on admissibility. Thus, minor non-compliance with the standards would be unlikely to justify exclusion, while significant non-compliance could be expected to result in exclusion.

C. Congressional Primacy

With regard to the issue of Congressional primacy, it should be noted that all of the above standards – which appear to be the only ones pertinent to the suggested amendment – are within the definition of "objectivity", and that the information quality legislation itself, as well as the implementing rules, requires that agency information be "objective".

The basic intent of the legislation and rules is to prohibit any dissemination of agency information that is not objective and does not otherwise meet the quality standards promulgated by OMB. The 1995 legislation stated that its provisions regarding information quality were broadly

---

[16] Because the OMB rules state that "agencies shall either adopt or adapt the quality principles applied by Congress" in those statutory provisions, this is one area in which there are some differences among agency rules implementing the OMB rules. Otherwise, as in the case of the definition of "objectivity", all agency rules follow closely or merely repeat the definitions provided in the OMB rules.

aimed at use of such information in "society", not just in government. Presentation of federal agency information to a jury in a public judicial forum surely comes within the Congressional intent to prohibit all dissemination of information by federal agencies that does not meet federal information quality standards.

V. Pertinent Background on the Derivation of Rule 803(8)

As explained at the start of the Advisory Committee Notes to Rule 803(8), the hearsay exception for public records and reports is generally regarded as derived from the common law on business records, and, in federal courts, from federal legislation establishing business records as a hearsay exception, 28 U.S.C. § 1732. *Kay v. United States*, 255 F.2d 476 (4th Cir.1958), which is cited for this point in the Note to 803(8), involved admissibility of State blood alcohol results under 28 U.S.C. § 1732. 255 F.2d at 480.[17] In other words, the work of government agencies in keeping records and preparing reports was regarded as a type of business. In addition, in the case of reports later termed "evaluative", it was presumed that civil servants would carry out their duties carefully and in a fair, accurate, and impartial manner.

What is important to note in reviewing the case law under 803(8)(C), however, is that the Rules diverged significantly from the provisions of the 28 U.S.C. § 1732 when enacted in 1975. Rule 803(6) repealed the provision of 28 U.S.C. § 1732 which stated that "**All other circumstances** of the making of such writing or record, including lack of personal knowledge by the entrant or maker, **may be shown to affects its weight, but such circumstances shall not affect its admissibility**" (emphasis added) and substituted the language that such records and reports are not excluded by the hearsay exception "unless the sources of information or the method or circumstances of preparation indicate lack of trustworthiness." In other words, the distinction between weight and admissibility was abandoned, with exclusion depending on an evaluation by the trial court of whether "the sources of information or the method or circumstances of preparation" "indicate lack of trustworthiness". It is also noteworthy, especially when examining the case law discussed below and in Appendix B, that the "lack of trustworthiness" provision in 803(8) differs from that in 803(6) in referring broadly to "sources of information or other circumstances", without qualification, rather than referring to "or the method of circumstance of preparation" instead of "other circumstances". Many of the cases reviewed below and in Appendix B as inconsistent with the information quality legislation and rules focus on the "circumstances of preparation" even though they are 803(8)(C) cases.

The Notes to 803(8) and 803(6) do not discuss elimination of the weight v. admissibility distinction from 28 U.S.C. § 1732. A review of the legislative history of the 1975 enactment of the evidence rules, and a review of the Rules Committee's public archives (at its offices in Washington, DC) has not uncovered any articulation of the reasoning behind the above change. Even though an

---

[17] See also *Moran v. Pittsburgh-Des Moines Steel Co.*183 F.2d 467, 472-73 & n.6 (3d Cir. 1950), which is also cited in the Note in its discussion of the circuit split over admissibility of "evaluative" reports. *Moran* is discussed in Appendix B to this memorandum. And see, *e.g.*, *Matador Drilling v. Post*, 662 F.2d 1190, 1191 (5th Cir. 1981), and *Crompton Richmond Co., Factors v. Briggs*, 560 F.2d 1196, 1202 n.12 (5th Cir. 1977), which are also discussed in Appendix B. Also see the first paragraph of the Note to 803(6).

articulation has not been uncovered, there appears to be a clear basis for inferring that it was thought that such a categorical distinction between weight and admissibility was unwarranted.[18]

VI. Federal Case Law Interpreting Rule 803(8)(C) Which Is in Conflict with the Information Quality Legislation and Rules

Under the plain wording of Rule 803(8), public records and reports are excluded by the hearsay rule if "the sources of information or other circumstances indicate lack of trustworthiness." The rule does not permit such evidence to be admitted and presented to the jury so that it might be weighed. There is no distinction in the Rule between admissibility and weight as there was in the federal business records statute prior to 1975.

Nevertheless, there is substantial federal case law which has developed since the Rule was enacted in 1975 which has held that factors such as accuracy, completeness, and bias go to weight rather than admissibility under Rule 803(8)(C). In other words, despite indications that a public record is, for example, inaccurate, incomplete, or biased, some courts have ruled that the evidence must be admitted and left to the jury to weigh.

Federal courts (as well as the Advisory Committee) have consistently equated trustworthiness with reliability. The focus of the information quality legislation and rules is also clearly on reliability, with dissemination to the public prohibited unless the information meets certain basic standards of "quality" which clearly encompass "reliability".

In the case of federal records and reports, admission of information disseminated by a federal agency despite the presence of such factors which indicate lack of reliability is inconsistent with an Act of Congress, and therefore prohibited by the Rules Enabling Act. Such an inconsistency requires expeditious attention.

Appendix B to this memorandum contains a detailed summary of many of the federal cases which are inconsistent with the information quality legislation and rules. The focus of Appendix B is on cases which are contrary to the information quality legislation and rules in continuing to allow, and to require, dissemination to a jury of federal agency information which does not meet the legislatively mandated standard of "objectivity", as further defined through the OMB rules. Nevertheless, for the sake of completeness, the case law on this issue in all of the federal circuits has been examined, and is summarized circuit-by-circuit in Appendix B in order to show that apparently not all circuits have case law distinguishing between weight and admissibility in conflict with the

[18] The review of the archives indicates that the change to what is now Rule 803(6) was proposed by the Standing Committee as early as 1967. It appears that the change might have been derived from language recommended in 1936 by the Commissioners on Uniform State Laws in its Uniform Business Records as Evidence Act, from the Uniform Rules of Evidence recommended by the National Conference of Commissions on Uniform State Laws in 1953, or from the American Law Institute's Model Code of Evidence, or from more than one of these.

information quality legislation, and that the 6th Circuit in particular is in opposition to many of the other federal circuits on this point.

As can be seen by reviewing Appendix B, many of the cases which have admitted public records or reports based on a distinction between weight and admissibility justify that distinction by characterizing factors such as bias, accuracy, and completeness as issues of "credibility" which must therefore be submitted to the jury. This raises the issue of what is the distinction between credibility and reliability. Factors which are routinely considered as bearing on reliability, and which are given as examples in the Note to 803(8) -- such as "motivational problems" and lack of "special skill or experience"-- clearly bear on both the reliability and credibility of a record or report, and have been given as examples of circumstances justifying exclusion in the Advisory Committee Note. It appears that the appropriate distinction between credibility and reliability lies in whether the proffered evidence is evaluated according to subjective impressions or according to objective indicia of reliability. The suggested amendment takes into account that even objective indicia of unreliability may justifiably be considered by the trial court to be so minor as to be insufficient to support exclusion, but the jury or trier of fact should nevertheless be able to take those minor factors into consideration in weighing the evidence.

The position taken by some federal courts that rulings on accuracy, completeness, an adequate basis, or bias are issues of "credibility" rather than "reliability" is puzzling and unfounded. Evidence which is not credible is not reliable. A report which is incomplete because it failed to consider important facts, studies, or alternative explanations cannot be considered "accurate". A conclusion which is not based on adequate and reliable facts or data cannot be considered accurate and reliable.[19] A study which has significant methodological flaws cannot be considered accurate and reliable. A report which contains significant bias cannot be regarded as factually based, objective, and accurate. Trial courts should have substantial discretion to exclude public records and reports that are suspect with regard to reliability for any sound reason; they should not be restricted from considering certain aspects of reliability, as has happened in many federal cases discussed herein, based on a distinction between weight and admissibility or credibility and reliability. Amending 803(8)(C) to make it consistent with the information quality legislation and rules would restore a trial court's ability to consider all reliability factors in ruling on admissibility.

In the following sections, we have broken down the cases discussed in Appendix B according to the specific aspect of "objectivity" on which they are in conflict with the information quality legislation and rules.[20]

---

[19] For example, a report on levels of chemical emissions and human exposure to those emissions which is based on data obtained with a test method or sampling technique which has since been shown to be inaccurate and unreliable should cause the report to be considered unreliable and untrustworthy.

[20] These are all cases ruling on admissibility under 803(8)(C). There are similar cases under 803(6). See, *e.g.*, *American Equities Group v. Ahava Dairy Products Corp.*, slip op. at 10, and cases cited therein (S.D.N.Y., April 23, 2004, WL 870260).

A. **<u>Accuracy</u>: Cases ruling that accuracy (including expertise of the investigator and reliability of underlying data or sources) cannot be considered in deciding on admissibility, but, rather, must be considered a matter of credibility and weight**

Blake v. Pellegrino (1st Cir. 2003) (inaccuracy of cause of death on death certificate)

Sage v. Rockwell Int'l Corp. (D.N.H. 1979)) (alleged lack of special skill or experience of JAG investigator of aircraft accident)

Moran v. Pittsburgh-Des Moines Steel Co. (3d Cir. 1950) (report on cause of gas tank failure allegedly based on hearsay; pre-FRE case)

Wolf v. Procter & Gamble Co. (D.N.J. 1982) (allegations of serious methodological flaws)

Vanderpoel v. A-P-A Transp. Co. (E.D.Pa. 1992) (police accident report by investigator allegedly lacking expertise and based on inaccurate measurements)

Ellis v. Int'l Playtex, Inc. (4th Cir. 1984) (allegedly flawed methodology in CDC and State studies on toxic shock syndrome)

Moss v. Ole South Real Estate, Inc. (5th Cir. 1991) (allegedly incomplete, biased, misleading, and inaccurate Air Force and HUD housing discrimination reports)

Eason v. Fleming Cos., Inc. (5th Cir. 1993) (allegedly flawed methodology, lack of credible sources, incompleteness, and preparation by non-investigative personnel of EEOC employment discrimination report)

Coates v. AC and S, Inc., (E.D. La. 1995) (EPA and OSHA position papers on asbestos health effects allegedly inaccurate and exaggerated)

Avondale Indus., Inc. v. Bd. of Comm'rs of the Port of New Orleans (E.D. La. 1996) (alleged failure of Coast Guard to interview key witnesses and analyze conflicting accounts in preparing report on collision of vessel with bridge)

King Fisher Marine Servs., Inc. v. M/V SOCOL (S.D. Tex. 2001) (State report on collision of vessel with dredging equipment alleged to be inaccurate and based on non-credible witnesses)

Kehm v Procter & Gamble Mfg. Co. (8th Cir. 1983) (CDC and State studies on toxic shock syndrome alleged to contain numerous statistical biases)

Union Pacific R. v. Kirby Inland Marine, Inc. of Miss. (8th Cir. 2002) (Coast Guard report on collision of vessel with bridge allegedly based on hearsay)

Walker v. Fairchild Indus., Inc. (D. Nev. 1982) (alleged lack of qualifications of investigators and lack of scientific basis for tests involved in Air Force aircraft accident report)

In re Korean Air Lines Disaster of Sept. 1, 1983 (D.D.C. 1991) (trial court commented that although jury might find that governmental report on aircraft disaster might "not [be] worth the paper it is printed on", it should nevertheless be submitted to the jury)

Nakijima v. General Motors Corp. (D.D.C. 1994) (allegedly flawed methodology in NHTSA report on incidents of failure of bus doors)

Lohrenz v. Donnelly (D.D.C. 2002) (alleged inaccuracies and inconsistencies in Navy report on qualifications of fighter pilot)

B. Completeness: Cases ruling that completeness cannot be considered in deciding on admissibility, but rather is a matter of credibility and weight

Gentile v. County of Suffolk (E.D.N.Y. 1990) (alleged failure to address contradictory evidence in State report on police misconduct)

Vanderpoel v. A-P-A Transp. Co. (E.D.Pa. 1992) (allegedly inaccurate measurements in police accident report interpreted by court as allegations that basis for report was incomplete)

Complaint of Nautilus Motor Tanker Co. (D.N.J. 1994) (Coast Guard investigator allegedly left out various piece of relevant information from report on vessel collision)

Moss v. Ole South Real Estate, Inc.(5th Cir. 1991) (alleged lack of completeness in Air Force and HUD housing discrimination reports)

Eason v. Fleming Cos., Inc. (5th Cir. 1993) (alleged incompleteness of EEOC employment discrimination report)

United States. v. School Dist. of Ferndale, Mich. (6th Cir. 1978) (alleged incompleteness of HEW report on school discrimination)

White v. Godinez (7th Cir. 2002) (alleged incompleteness of county jail visitation records)

C. Bias (Lack of Objectivity): Cases ruling that bias cannot be considered in deciding on admissibility, but rather is a matter of credibility and weight

Gentile v. County of Suffolk (E.D.N.Y. 1990) (alleged bias in State investigation of handling of allegations of police misconduct)

Rosario v. Amalgamated Ladies Garment Cutters' Union (2d Cir. 1980) (alleged bias in citizen complaint filed with police)

Moss v. Ole South Real Estate, Inc. (5th Cir. 1991) (alleged reliance on biased witnesses in preparation of Air Force and HUD reports on housing discrimination)

Coates v. AC and S, Inc. (E.D. La. 1994) (alleged bias – exaggeration – in OSHA and EPA reports on health hazards of asbestos)

United States. ex rel. Collins v. Welborn (N.D. Ill. 1999) (alleged bias in government summary of offenses prepared for sentencing purposes offered by defendant in habeas corpus proceeding)

Erickson v. Baxter Healthcare, Inc. (N.D. Ill. 2001) (potential bias in National Academy of Sciences report on contaminated blood products)

Kehm v. Procter & Gamble Mfg. Co. (8th Cir. 1983) (alleged statistical biases in CDC and State epidemiologic investigations of toxic shock syndrome)

Lohrenz v. Donnelly (D.D.C. 2002) (alleged bias in Navy report on qualifications of fighter pilot, characterized by court as "possible motivational problems")

D. Transparency and Reproducibility: Cases ruling that lack of transparency as to data, methods, or sources cannot be considered in deciding on admissibility, but rather is a matter of credibility and weight

Ellis v. Int'l Playtex, Inc. (4th Cir. 1984) (alleged lack of information on methodology employed by CDC and States in conducting investigations into toxic shock syndrome)

Erickson v. Baxter Healthcare, Inc. (N.D. Ill. 2001) (refusal by National Academy of Sciences to disclose authors of report on contaminated blood products and how it was prepared)

VII. The Split Among the Federal Circuits in Interpreting the Trustworthiness Proviso of Rule 803(8)

It can be seen from a review of Appendix B that there is a split between the 6th Circuit (and possibly the 9th, 10th, and 11th circuits) and a number of other circuits on the issue of whether factors such as apparently biased witnesses, lack of investigator qualifications, and inability to verify underlying data can, and should, be considered in determining admissibility under Rule 803(8)(C). The 6th Circuit has held such factors should be considered in ruling on admissibility under 803(8)(C), while a number of other circuits, and district courts within those circuits, including the 1st, 2d, 3d, 4th,

5th (particularly), 7th, 8th, and the D.C. circuits have held that factors such as accuracy, completeness, witness bias, underlying data bias, possible motivational problems, and lack of transparency are not to be considered in ruling on admissibility under 803(8)(C), but only go to the weight that might be given to the evidence once it is admitted. The positions of the 9th, 10th, and 11th circuits are less clear.

We believe the 6th Circuit's position is correct, both considering the information quality legislation and rules, or apart from such consideration, and interpreting the intent of Rule 803(8)(C). We believe that the 6th Circuit has accurately indicated the problem in the positions of those circuits in conflict with its position as incorrectly probably derived from the distinction between admissibility and weight which was contained in the provision of the federal business records statute, 28 U.S.C. § 1732, before that provision was superseded and repealed by evidence rules 803(6) and 803(8) in 1975, and from case precedents which relied on that distinction prior to 1975.

VIII. Case Law Interpreting "Trustworthiness" in Conflict with the Information Quality Legislation and Rules Prohibition Against Bias and the Intent of 803(8)(C)

As indicated in the suggested amendment and the explanation which follows, the term "trustworthiness" would be changed to "reliability" as a more accurate term.

The information quality legislation and rules prohibit "bias" (as an aspect "objectivity") without restriction on the meaning of the term. However, a number of courts have interpreted "lack of trustworthiness" in 803(8)(C) as pertaining to bias only in the sense of a motive to falsify. Indeed, this is the sense in which it appears to be explained in the Note to 803(8)(C), which refers to the "possible motivational problems suggested by *Palmer v. Hoffman*, 318 U.S. 109 (1943)". The "motivational problem" suggested in *Palmer* was that the report at issue had very arguably been prepared for the purpose of being used in litigation to support the preparing party.

Other cases have also considered "lack of trustworthiness" or "bias" to mean either motive, on the part of the preparer, to falsify or distort for purposes of litigation, or for other purposes. See *Coleman v. Home Depot*, 306 F.2d 1333, 1342 (3d Cir. 2002); *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 143-44 (2d Cir. 2000); *Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178, 1182 (5th Cir. 1975); *Richmond Medical Center v. Hicks*, 301 F.Supp. 499, 512 (E.D. Va. 2004); *Lewis v. Valez*, 149 F.R.D. 474, 488 (S.D.N.Y. 1993); *Gentile v. County of Suffolk*, 129 F.R.D. 435, 457 (E.D.N.Y. 1990); *Chesapeake & Delaware Canal Co. v. United States*, 250 U.S. 123, 129 (1919) (cited in Note on 803(8)).

Other cases have interpreted "trustworthiness" in the sense of "bias", yet, as discussed in Appendix B and above in section VI, they have considered potential bias, including institutional bias, as a factor going to weight rather than admissibility.

Restricting "bias" to a weight of the evidence issue, or to indicating only a motive to falsify, does not adequately cover all types of bias which are covered by the information quality legislation and rules, and which impugn reliability in the sense intended in Rule 803(8)(C). For example, some

federal agencies have adopted clear policies of evaluating scientific information on potential health or safety risks in a biased manner. This is not a matter of falsification or fabrication; it is a policy position well-intentioned to protect the general public, including its most vulnerable members, by interpreting uncertain scientific information in such a way that recommended safety levels or measures are likely to be more stringent than supported by the scientific data, or so that quantitative estimates of risk which will form the basis for potential regulatory measures are more likely to be overstated. Although not involving any motive to falsify or mislead, the information provided by such investigative reports is, nevertheless, "biased" and should not be viewed as "reliable" for purposes of evidence in litigation. This type of bias appears to be exactly the type of bias that was raised as a challenge to trustworthiness, but rejected, in *Coates v. AC and S, Inc.*, 844 F.Supp. 1126, 1132-33 (E.D. La. 1994).

In the case of health risk assessments as currently prepared by the U.S. Environmental Protection Agency, for example, such assessments contain a summary "risk characterization" section. The conclusions stated in the risk characterization section are derived from a risk assessment process that makes use of influential policy-driven "default assumptions", or which incorporate multiple "uncertainty factors".[21] EPA is very frank about how its risk characterizations therefore incorporate "bias". The Agency's handbook on risk characterization states:

> There is an understood, inherent, EPA bias that in the light of uncertainty and default choices the Agency will decide in the direction of more public health protection than [sic] in the direction of less protection. However, it is not always clear where such bias enters into EPA risk assessments. To the extent it may make a difference in the outcome of your assessment, highlight the relevant areas so the impact will not be overlooked or misinterpreted by the risk manager.

At p. 41 of the Handbook.[22] It is not yet clear how this aspect of EPA's information policy will be reconciled with the new information quality legislation and rules; however, the conceded bias should clearly indicate lack of reliability of EPA risk characterizations for use in litigation under 803(8)(C). The use of the term "reliability" in 803(8)(C) in place of "trustworthiness" would make this clearer.

Other federal agencies which produce health and safety assessments employ similar policy-driven "precautionary" or "conservative" biases in the form of assumptions, margins of safety, and uncertainty factors.[23] State health and safety agencies have adopted similar policies. Thus, the

---

[21] The use of "uncertainty factors" or "safety factors" can often reduce an adverse effect exposure level observed experimentally by a thousand-fold.

[22] *EPA Science Policy Council Handbook, Risk Characterization* (EPA 100-B-00-002, December 2000, available on the EPA website at http://epa.gov/osa/spc/htm/rchandbk.pdf, accessed July 27, 2004).

[23] See, e.g., United States General Accounting Office, *Chemical Risk Assessment: Selected Federal Agencies' Procedures, Assumptions, and Policies*, especially p. 32 (August 2001, GAO-01-810) (covering practices of EPA, FDA, OSHA, and DOT's Office of Research and Special Projects Administration).

recommendation to substitute "reliability" for "trustworthiness" in order to clarify that significant policy bias can justify exclusion is broadly supported.

IX. Inconsistency Between 803(8)(C) Case Law and Rule 702 (Testimony by Experts) and the Information Quality Legislation and Rules

Federal agencies are generally regarded by the public as experts in the field they have been assigned by Congress. In the case of reports purporting to convey scientific, technical, or otherwise specialized knowledge, their reports or statements can be considered the equivalent of expert testimony subject to Rule 702, which establishes a standard of evidentiary reliability. This point has been noted by a number of federal courts. *See Desrosiers v. Flight Int'l of Fla., Inc.*, 156 F.3d 952, 962 (9th Cir.), *cert. dismissed*, 525 U.S. 1062 (1998) (exclusion of portion of JAG report was consistent with its role as a "gatekeeper" under *Daubert* and Rule 702); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1483 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991) (expert testimony was admissible under Rule 702 because based on government report admitted under Rule 803(8)(C)); *Gentile v. County of Suffolk*, 129 F.R.D. 435, 453 (E.D.N.Y. 1990) (State investigatory commission, in issuing report admitted under 803(8)(C), "as a whole qualified as an expert under Rules 702 and 703"). Therefore, an 803(8)(C) proffer of a report purporting to contain scientific, technical, or other specialized knowledge should be reviewed by the trial court as carefully as expert testimony under Rule 702, and perhaps even more carefully because the "experts" are not required to be, and often are not, available for cross-examination, and juries are likely to give even more credence to a seemingly authoritative government report.

In revising Rule 702 in 2000, the Judicial Conference, the Supreme Court, and Congress indicated an intent to achieve consistency between the Rule and the Supreme Court's decisions interpreting the 1975 version of Rule 702. The Advisory Committee Note (there is no significant legislative history) refers only to *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993) and *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999), although portions of *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997) are also pertinent.

The Supreme Court's trilogy of decisions, as well as the Note, establish "a standard of evidentiary reliability". *Daubert* at 590; *Kumho Tire* at 149. This standard of "reliability"should, therefore, place Rules 702 and 803(8))(C) on essentially equal footing with regard to the type of "gatekeeper" scrutiny that public reports containing scientific, technical, or other specialized information must undergo. Consequently, the indicia of reliability that the Supreme Court and the Committee (and Congress, through approval of the revisions to Rule 702 in 2000) have found pertinent for establishing admissibility (as opposed to weight) under 702 should be compared with the standards in the information quality legislation and rules, and then contrasted with the case law on 803(8)(C) discussed above in section VI and Appendix B, which has held that certain of such factors or standards should <u>not</u> be considered in determining admissibility, but should only be

considered by the trier of fact in weighing the evidence.[24] Most of those cases either clearly or very arguably involved reports containing, or requiring for their preparation, scientific, technical, or other specialized knowledge.

Among the non-exclusive factors that the Court specified and applied in *Daubert*, *Joiner*, or *Kumho Tire* in order to determine reliability and admissibility were the following:

4. In general, the expert's opinion "must be supported by appropriate validation – *i.e.*, 'good grounds,' based on what is known." *Daubert* at 590 (emphasis added). This requires a sound, objective basis for opinion – "a reliable foundation". *Id.* at 597; *Joiner* at 145-46; Committee Note. *And see Montgomery County v. Microvote, Corp.*, 320 F.3d 440, 448-49 (3d Cir. 2003); *United States v. Fredette*, 315 F.3d 1235, 1239 (10th Cir. 2003); *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1026 (10th Cir. 2002); *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 269 (2d Cir. 2002); *Moore v. Ashland Chem. Co.*, 151 F.3d 269, 278-79 (5th Cir. 1998), *cert. denied*, 526 U.S. 1064 (1999); *Allen v. Pennsylvania Eng'g Corp.*, 102 F.3d 194, 198, 199 (5th Cir. 1996); *Bourne v. E.I. Dupont De Nemours and Co.*, 189 F.Supp.2d 482, 493-501 (S.D. W.Va. 2002); *Smith v. BMW North America, Inc.*, 308 F.3d 913, 921 (8th Cir. 2002); *Shreve v. Sears, Roebuck & Co.*, 166 F.Supp.2d 378, 395 (D. Md. 2001).

5. A key factor is whether the conclusions in the report "can be (and has been) tested". *Daubert* at 593 (emphasis added); Committee Note. This is equivalent to the reproducibility standard of the information quality rules, which requires that influential scientific and technical information be sufficiently transparent in its methodology and data that a qualified third party would be capable of attempting to substantially reproduce it.

6. At the outset, the trial judge must determine "whether the reasoning or scientific methodology underlying the testimony is scientifically valid" and whether it can be properly applied to the facts of the case. *Daubert* at 580 (emphasis added). It is reasonable for the trial judge to consider the reliability of 'the methodology employed by the expert in analyzing the data . . . and the scientific basis, if any, for such an analysis." *Kumho Tire* at 153.

7. Peer review will increase the likelihood that "substantive flaws in methodology will be detected". *Daubert* at 593 (emphasis added). This again depends to a large degree on the

[24] While Rule 702 uses the term "knowledge", which does not appear in 803(8), it is that term which the Court interpreted as establishing the standard of evidentiary "reliability" reflected in its decisions and the Note; and thus that difference in wording is not significant, since the case law on 803(8) consistently interprets "trustworthiness" as a term equivalent to "reliability". Rule 803(8)(C) also differs from 702 in that, under 803(8)(C), the burden is on the party opposing admission to raise a specific challenge based on lack of trustworthiness (reliability), whereas under 702, the burden is on the party offering the expert testimony. For purposes of this memorandum, however, that difference does not appear to matter; the principal issue is what factors the trial judge may, and should, consider, in considering whether the evidence is sufficiently reliable to go to the jury.

transparency and reproducibility required of influential scientific and technical information by the information quality rules.

8. "A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Joiner* at 146. This goes to whether there is an adequate factual basis for the opinion. This is essentially the same factor as number 1, *supra.*

9. The facts in *Kumho Tire* regarding the expert testimony which was excluded show that one of the reasons for exclusion of the expert opinion (which was upheld) was that the tire expert failed to reconcile conflicting data. At 154; Committee Note ("[w]hether the expert has accounted for obvious alternative explanations.")

Federal cases discussed in section VI, *supra*, and Appendix B, which are in conflict with the specific factors for determining reliability under Rule 702 which are indicated in the Supreme Court's decisions, include the following:

Lack of a sound factual or scientific basis for opinion: *Blake* (1st Cir., cause of death on death certificate); *Moran* (3d Cir., opinion based on hearsay); *Vanderpoel* (E.D.Pa.), allegedly inaccurate accident measurements); *Eason* (5th Cir., lack of credible sources); *King Fisher Marine* (S.D. Tex., opinion allegedly based on non-credible witnesses); *Kehm* (8th Cir., report based in part on alleged statistical biases – could also be considered a methodological flaw); *Union Pacific R.* (8th Cir., report allegedly based on hearsay); *Walker* (D. Nev., alleged lack of scientific basis for tests used in aircraft accident report); *In re Korean Air Lines Disaster* (D.D.C., judge commented that report "might not be worth the paper it is printed on").

Lack of transparency as to methods and data to allow for testability/reproducibility: *Ellis* (4th Cir.); *Erickson* (N.D. Ill.). *Cf. Marsh v. W.R. Grace & Co.*, slip op. at 4 (4th Cir. 2003, unpublished, WL 22718177); *United States v. Rincon*, 28 F.3d 921, 924-25 (9th Cir.), *cert. denied*, 513 U.S.1029 (1994); *Pugliano v. United States*, 315 F.Supp.2d 197, 200-01 (D.Conn. 2004)

Methodological flaws: *Wolf* (D.N.J.); *Eason* (5th Cir.); *Kehm* (8th Cir.); *Nakijima* (D.D.C.).

Failure to analyze conflicting data and account for obvious alternative explanations: *Avondale* (E.D. La., failure to analyze conflicting accounts of incident); *Lohrenz* (D.D.C., alleged inconsistencies not addressed); *Gentile* (E.D.N.Y., alleged failure to address contradictory evidence).

In addition, there are a number of factors which have not been specifically articulated by the Supreme Court or Rule 702 as bearing on reliability, but which appear related to those which have been specified:

Lack of skill or experience on the part of the investigator, which appears obviously relevant to the reliability of an opinion on a scientific, technical, or otherwise specialized matter: *Sage* (D.N.H.); *Vanderpoel* (E.D. Pa.); *Walker* (D. Nev.).

Bias, which is relevant to whether there is a sound and objective foundation for an opinion: *Moss* (5th Cir.); *Coates* (E.D. La.); *Kehm* (8th Cir.); *Erickson* (N.D. Ill.). *Cf. Allen v. Pennsylvania Eng'g Corp, supra*, at 198 (commenting on the "preventive perspective" of health risk evaluations conducted by IARC [the International Agency for Research on Cancer], OSHA, and EPA).

Incompleteness, which is relevant to whether there is a sound foundation for the opinion: *Avondale* (E.D. La.); *Vanderpoel* (E.D. Pa.); *Complaint of Nautilus* (D.N.J.); *Moss* (5th Cir.); *School Dist. of Ferndale* (6th Cir.).

In summary, many federal courts have not scrutinized (upon challenge by an opponent) evidence proffered under 803(8)(C) in the manner of a "gatekeeper" for the reliability of scientific, technical, and other specialized information as is required for expert testimony under Rule 702. This appears inconsistent with the need to ensure the reliability of "expert" government reports under 803(8)(C) and the information quality legislation and rules.

X. Scholarly Commentary

We have not located any scholarly commentary addressing the specific subject matter of this memorandum. Some commentaries and digests have noted cases under 803(8)(C) distinguishing between admissibility and weight, but have not attempted to collect them in an organized fashion or comment on their validity. The information quality legislation and rules appear to be of too recent origin to have generated any commentary in connection with evidence rules.

It has been observed in general, however, that FRE 803(8)(C) "is probably the most controversial and widely used clause of the public records exception." Bennett, *Federal Rule of Evidence 803(8): The Use of Public Records in Civil and Criminal Cases*, 21 Am. J. Trial Advocacy 229, 242 (1997). The extent of case law under 803(8)(C) attests to its wide use, and also to the fact that it is routine for an opponent to challenge a proffer of a public record or report under that Rule as lacking trustworthiness.

Early on, it was also observed:

> Although judges must continue to exercise broad discretion to admit or exclude evidence under rule 803(8)(C), supplementary guidelines to direct that discretion should increase the consistency with which the rule is applied. Given the virtual absence of appellate review of evidentiary rulings, efforts to achieve consistency are particularly important in this context. It is therefore useful to consider some of the criteria that have been suggested and to evaluate the degree to which those criteria

> further the purposes of rule 803(8)(C) and conform to the overall design of the Federal Rules of Evidence. [Footnote omitted.]

Comment, *The Trustworthiness of Government Evaluation Reports under Federal Rule of Evidence 803(8)(C)*, 96 Harv. L. Rev.492, 499-500 (1982). The same article expressed the view that government reports should be treated like expert testimony under the Rules. *Id.* at 492-93.

On the subject of what factors can be considered, and should warrant exclusion of reports under 803(8)(C), some commentators have expressed the view that government reports can and should be excluded for lack of accuracy and other indicia of untrustworthiness which some federal courts have rejected as going only to the weight of the evidence, as discussed above:

- "The opponent of a party offering a public record should be prepared to demonstrate lack of trustworthiness, and the offering party should be prepared to defend the report's accuracy." R.C. Park, D.P. Leonard, and S. H. Goldberg, EVIDENCE LAW, 294 (1998).

- "For the objecting party to carry its burden of showing a record is untrustworthy, it must demonstrate that there is 'a particular serious risk that the record is inaccurate in an important way.' Thus, it is not necessary for the objecting party to prove that the record is wrong or inaccurate." Bennett, *supra*, at 253 (citing Mueller & Kirkpatrick, *infra*, § 458, at 600).

- "Methodological shortcomings, including serious failures to investigate leads, talk to witnesses or consider evidence, can show a report is untrustworthy. C.B. Mueller and L.C. Kirkpatrick, FEDERAL EVIDENCE, § 458(f) ("Trustworthiness Factor"), at 600 (2d ed. 1994).

XI. The Need to Obtain Comments from the Bench, Bar, Congress and Others

Rule 803(8)(C) is clearly a very frequently used hearsay exception, with potentially great impacts on important litigation, and the federal case law on application of the trustworthiness proviso is extensive. Presumably, state case law on a similar exception is even more extensive.

As demonstrated, there is a substantial degree on inconsistency among federal courts as to what factors they will allow to be considered in determining admissibility under 803(8)(C), as opposed to weight, and there is a conflict among the circuits on this matter. Many federal cases limiting the trial judge's discretion as to the factors that can be determined in ruling on admissibility, as opposed to weight, are clearly in conflict with the standards contained in the information quality legislation and rules regarding "objectivity".

The new legislation and rules on federal information quality have generated substantial and continuing interest from Members of Congress, the bar, and federal agencies. The suggested amendment proposed herein raises issues of Congressional primacy and the need to make a federal evidence rule consistent with an Act of Congress and government-wide federal rules implementing the specific directives in that legislation.

We believe it is also important to circulate this suggested amendment to the bench and bar because it is apparent that many pertinent court decisions on admissibility under 803(8)(C) are unpublished, and many more might never have been the subject of a written opinion, and might not have been appealed in view of the highly deferential review standard of "abuse of discretion" observed in all circuits. Even in the case of published or unpublished opinions available for review, the opinions often do not contain sufficient detail to ascertain the exact nature of the objection(s) to admission. It therefore appears that circulation of the suggestion with an explanation of the issue it would address is the only way to gauge fully the seriousness of the current inconsistencies in interpretation of the trustworthiness proviso of 803(8)(C) and the need for clarification.

In addition, this suggestion and supporting memorandum address only federal case law, and it would be valuable to obtain some idea of the extent to which inconsistent federal case law has influenced state case law. We have information indicating that federal agency reports – particularly reports relating to potential health hazards – are frequently used in personal injury litigation in state courts.

It does not appear that comments from the bench and bar on these subjects have ever been solicited by the Standing Committee. Indeed, when a suggestion to examine some related issues was received in 1996 (from Runnert, Esq. – see Appendix A), it appears that the issues were never researched and carefully explored.

We recommend that this suggestion be circulated for comment not only to the bench and bar and the legal academic community, but also to the Senate and House Committees on the Judiciary, the Senate Committee on Governmental Affairs, and the House Committee on Government Reform.

APPENDIX A

History of Consideration of Possible Amendments to Federal Evidence Rule 803(8)

Note: The following history is based on the dockets, minutes, and reports of the Advisory Committee since 1992, as posted on the Judicial Conference website at www.uscourts.gov/rules.

The first suggestion for possible amendment of 803(8)(C) occurred at the Advisory Committee meeting September 30-October 2, 1993 in response to a Department of Justice suggestion for a rules amendment to facilitate admission of an expert's report of an analysis of a substance, object, or writing. An alternative suggestion was made to limit the amendment to DEA and ballistics reports and add it to Rule 803(8). There was no action taken on either suggestion.

At its January 9-10, 1995 meeting, the Advisory Committee first began formal consideration of possible amendments to clarify 803(8) with regard to the use of routine law enforcement records against defendants in criminal trials. The meeting minutes state in pertinent part:

> Rule 803(8). Members of the Committee commented that the difference in wording between subdivisions (B) and (C) was unintended and that subdivision (B) should be amended. The rule was not intended to keep accused from offering business records [sic] of matters observed, and the government should not be prevented from offering records about routine matters. The Committee agreed that governmental findings should be admissible as held by the Supreme Court in Beach Aircraft v. Rainey [sic, 488 U.S. 153 (1988)].
>
> The overlap between Rule 803(5), 803(6) and 803(8). The Committee asked the Reporter to clarify at the next meeting the extent to which circuits admit evidence against an accused pursuant to Rules 803(5) or (6) that is barred by the specific provisions in Rule 803(8)(B), (C). The Committee wished to know if there was a split in the circuits. Judge Shadur was also concerned with possible motivational problems in §1983 cases in which law enforcement personnel have been charged.

The Committee disposed of this issue at its next meeting, May 4-5, 1995. Prior to the meeting, the Reporter had provided an analysis of the case law and the Rule and a potential amendment for consideration The minutes state:

> Rule 803(8). The Committee first discussed whether to amend the rule to state explicitly that evidence which would be barred by subdivisions (B) and (C) when offered against an accused may be admissible pursuant to another hearsay exception, or whether to adopt the reasoning of a Second Circuit opinion, United States v.

Oates, 560 F.2d 45 (2d Cir. 1977), that barred such evidence absolutely. The Committee discussed the Reporter's memorandum about how the Circuits are handling this issue. It appears that routine evidence of governmental activity, such as recording license plate numbers, that falls literally within the prohibitions of subdivisions (B) and (C) is admitted by most circuits pursuant to Rule 803(5). Furthermore, the circuits also admit some evidence barred by Rule 803(8) pursuant to Rule 803(6) when the declarant is available to testify. These cases do not suggest that the courts are permitting the government to put in crucial aspects of its case through hearsay testimony. The Committee concluded that there was no need to amend the rule.

The Committee then discussed whether Rule 803(8)(B) should be amended to permit a criminal defendant to offer against the government evidence which falls within the scope of the exception. Rule 803(8)(C) specifically provides that the evidence made admissible by that provision is admissible "against the Government in criminal cases." The omission in Rule 803(8)(B) may have occurred as a drafting error when Congress revised the rule. The few cases that have considered the issue have allowed the defendant to introduce evidence that otherwise satisfies subdivision (B). Consequently, the Committee saw no need to amend the provision.

Following the above meeting, the Advisory Committee advised the Standing Committee that it had tentatively decided not to propose amendments to a number of Rules, including all sections of Rule 803 except exception (24), and recommended that the Standing Committee circulate those tentative negative decisions for publication and comment.[25]

The Advisory Committee's docket shows that its tentative decisions not to amend the various Rules, including 803(8), were published for public comment in September 1995, with a comment deadline of March 1, 1996.

On January 4, 1996, attorney John A. K. Grunert wrote to the Advisory Committee on Evidence Rules to comment on certain of the above recommendations to the Standing Committee, apparently in response to the solicitation of comments by the Standing Committee on the tentative decision not to proceed with certain amendments to the hearsay exceptions.[26] Mr. Grunert's letter contained a detailed commentary on the practical difficulties in utilizing the trustworthiness proviso in 803(8)(C). He asserted that "a presumption that government officials will issue only accurate,

---

[25] Memorandum dated June 7, 1995, from Hon. Ralph K. Winter, Chair of the Advisory Committee on Evidence Rules, to Hon. Alicemarie H. Stotler, Chair, and Members of the Standing Committee on Rules of Practice and Procedure.

[26] Letter dated January 4, 1996 from John A. K. Grunert of the law firm of Campbell & Associates, Boston, Mass., to Hon. Ralph K. Winter, Chair, Advisory Committee on Evidence Rules. Designated as document 95-EV-14 and EV 1604-24.

objective documents is an obvious fiction", and that it was time to consider amending Rule 803(8)(C) to take account of the practical impossibility in many cases of developing evidence to support a showing of lack of trustworthiness. He noted that government officials who prepared reports submitted under 803(8)(C) were often unavailable for discovery purposes in order for an opposing party to learn whether they had the proper qualifications, what analytical methodology was used, and what political or other concerns might have influenced the wording or conclusions of the report. He also noted that in his experience this was a serious and growing problem, "permitting a great deal of facially persuasive but very poor quality evidence to go un-cross-examined to juries." Mr. Grunert did not propose specific amendatory language to correct the problem; he did, however, suggest the alternatives of either shifting the burden of proof on trustworthiness to the offering party or excluding the report upon a showing that the party opposing its admission "could not with due diligence obtain information reasonably necessary to evaluate its trustworthiness."

At its April 22, 1996 meeting, the Advisory Committee discussed the Grunert letter as a suggested amendment. The minutes state:

> Rules 803(8)(C), 801(d)(1)(A) and 804(b)(1). John A. K. Grunert, Esq. of Boston, Mass had suggesting [sic] amending Rule 803(8)(C) because practical obstacles make it impossible for an opponent to meet the burden of showing that a proffered official report is untrustworthy. He had suggested either shifting to the proponent the burden of proving trustworthiness, or providing that the report is not admissible upon a showing that the opponent "could not with due diligence obtain information reasonably necessary to evaluate its trustworthiness."
>
> The Committee discussed this proposal in light of police accident reports and administrative reports from agencies such as the National Transportation Safety Board and directed the Reporter to advise the Committee about the functioning of the trustworthiness requirement. . . .

Subsequent Advisory Committee minutes and reports do not reflect further consideration of the Grunert comments and suggestion or any Committee action. We requested the Rules support staff to search to see whether the Reporter had prepared a memorandum for the committee, and they reported that they were unable to locate such a memorandum. The Advisory Committee's docket shows that at its November 1996 meeting it "declined to take action" on a suggestion for amendment of Rule 803(8), and that the matter was regarded as completed.

At its November 12, 1996 meeting, the Advisory Committee advised the Standing Committee that it had concluded that 803(8)(B) as presently written did not pose any problems in cases where a criminal defendant sought to introduce a law enforcement report favorable to his defense.[27]

[27] Memorandum dated December 1, 1996 from Hon. Fern M. Smith, Chair of the Advisory Committee on Evidence Rules, to Hon. Alicemarie H. Stotler, Chair of the Standing Committee on Rules of Practice and Procedure.

At its April 19, 2002 meeting, the Advisory Committee again began consideration of possible amendments to Rule 803(8). This was done as part of the Committee's regular, systematic review of the Rules, and not in response to a specific suggestion for amendment. The minutes state:

> 26. *Rule 803(8):* Rule 803(8) provides a hearsay exception for public reports. Courts and commentator alike have noted that the Rule has several drafting problems. It is divided into three subdivisions, each defining admissible public reports, but the subdivisions are overlapping. Subdivisions (B) and (C) exclude law enforcement reports in criminal cases from the exception, but courts have held that these exclusions are not to be applied as broadly as they are written. The exceptions are intended to protect against the admission of unreliable public reports, but this concern might be better stated if the exception were written simply to admit a public report unless the court finds it to be untrustworthy under the circumstances. The Reporter informed the Committee that the Uniform Rules have departed from the Federal model, as have many States.
>
> The Committee directed the Reporter to prepare a report on Rule 803(8), to determine whether the Rule should be amended to clarify that a public report is admissible unless the court finds it to be untrustworthy under the circumstances.

The minutes of the Fall 2002 and Spring 2003 meetings of the Advisory Committee do not indicate any consideration of Rule 803(8). The minutes of the November 13, 2003 meeting contain essentially the same statement as quoted above with the addition of one sentence: "The Reporter stated that the report would be ready for the Spring 2004 meeting so that if the Committee did find it necessary to propose an amendment, the proposal could be placed with the rest of the package that would be submitted to the Standing Committee."

On March 8, 2004, The U.S. Supreme Court issued its decision in *Crawford v. Washington.* ___ U.S. ___, 124 S.Ct. 1354 (2004). The Court held that the introduction of evidence against an accused in a criminal trial (in this case, an out-of-court statement to the police by his wife), even though it came within an existing exception to the hearsay rule and appeared reliable, violated the Confrontation Clause of the Sixth Amendment if it was "testimonial" in nature, which the Court determined it to be. The Court stated in concluding its opinion:

> [W]e decline to mine the record in search of indicia of reliability. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.

In view of its decision in *Crawford,* the Supreme Court returned to the Judicial Conference and the Advisory Committee for further consideration a recommended amendment to the hearsay exception in Rule 804(b)(3) ("Statement against interest") concerning indicia of reliability.[28]

[28] Letter dated March 23, 2004 from Chief Justice William H. Rehnquist to Hon. Leonidas Ralph Mecham, Secretary of the Judicial Conference of the United States.

The Supreme Court's action was perfectly understandable. The proposed amendment would have allowed admission, as an exception to the hearsay rule, of a statement against penal interest if the statement were found to have "particularized guarantees of trustworthiness". The proposal was based on an earlier Supreme Court decision which was abrogated by *Crawford*, with *Crawford* holding that admission of the type of "testimonial" statement at issue would be a violation of the Confrontation Clause of the Sixth Amendment, regardless of the reliability of the statement.

The materials prepared by the Reporter for the Advisory Committee's April 29-30, 2004 meeting contained extensive discussion of the *Crawford* decision and its impact on potential proposed amendments to hearsay exceptions 804(b)(3), 803(3), and 803(8). The gist of the Reporter's commentary and recommendations was that any further amendments to hearsay exceptions should await the development of case law which should clarify the meaning of "testimonial" hearsay. The Reporter's comments on potential amendments to Rule 803(3) in which he addressed the implications of the *Crawford* decision stated:

> The bottom line from *Crawford* is that "testimonial" hearsay statements cannot be admitted against an accused unless the declarant is unavailable *and* the accused has or had the opportunity to cross-examine the declarant. Unless these two requirements are met, the "testimonial" hearsay statement must be excluded *even if it is clearly reliable and even if it fits into a standard hearsay exception.* [Original emphasis.][29]

The Reporter's memorandum on proposed amendments to Rule 803(8) stated in part:

> [T]here is no way to predict with certainty how law enforcement reports will fare after *Crawford.* This is because the Court specifically declined to define the term "testimonial." The definition of that term must await a good deal of case law and perhaps an eventual resolution in the Supreme Court. Thus, even if admissibility of law enforcement reports ends up in exactly the same place as it is today, that will only occur after a few years of case law.[30]

On May 15, 2004, the Advisory Committee informed the Standing Committee of its views on the impact of the *Crawford* decision on potential amendments to clarify Rule 803(8)(C).[31] The Advisory Committee's Chair stated in the memorandum to the Standing Committee:

---

[29] Reporter's memorandum to the Advisory Committee dated April 2, 2004 regarding a proposed amendment to Rule 803(3), at 11.

[30] Reporter's memorandum to the Advisory Committee dated April 2, 2004 regarding a proposed amendment to Rule 803(8), at 9.

[31] Memorandum dated May 15, 2004 from Hon. Jerry E. Smith, Chair of Advisory Committee on Evidence Rules, to Hon. David F. Levi, Chair of Standing Committee on Rules of Practice.

4. *Rule 803(8):* The Committee considered a proposed amendment on Rule 803(8)--the hearsay exception for public reports. The possible need for amendment of Rule 803(8) arises from several textual anomalies in the Rule and a dispute in the courts about the scope of the Rule. The Committee noted (as with Rule 803(3)) that any amendment to a hearsay exception is premature in light of the Supreme Court's recent decision in *Crawford v. Washington.* The problem that the courts have had with the public records exception arises almost exclusively when a public record is offered against a criminal defendant. This is the very situation addressed by the Court in *Crawford.* The Committee resolved unanimously to defer consideration of any amendment to Rule 803(8).

APPENDIX B

Federal Circuit and District Court Decisions on Evidence Rule 803(8)(C) Which Distinguish between Admissibility and Weight

Notes: (1) These cases are arranged according to the numerical order of the circuits (with the D.C. Circuit at the end). Nothing should be implied from this arrangement regarding the relative importance of the case law in a particular circuit. (2) Due to the extensive case law under Rule 803(8)(C), the following summary does not purport to be exhaustive, although it is presented as reasonably comprehensive and representative.

1st Circuit

The recent decision in *Blake v. Pellegrino*, 329 F.3d 43 (1st Cir. 2003) stands for the proposition that a trial court cannot exclude from evidence on the basis of lack of trustworthiness a governmental report which the court concludes, based on hearing extensive evidence, is fundamentally inaccurate. In *Blake*, the district court initially admitted into evidence a death certificate prepared by a State medical examiner which stated the cause of death as "complications of asphyxia by choking"; however, the court, after almost 17 days of trial, then decided that the stated cause was clearly inaccurate and unreliable under 803(8), and redacted the cause of death from the certificate and instructed the jury to disregard it. The circuit court reversed and remanded. The circuit court evaluated the issue, not in terms of accuracy and reliability, but in terms of whether a trial judge can exclude evidence based on his opinion of its "persuasiveness" or "credibility". The circuit court stated:

> The question reduces, therefore, to whether, in the absence of special circumstances, see *supra* note 3, a trial judge has the authority to exclude evidence on the basis of his own belief as to the persuasiveness of that evidence. We conclude that, in a jury trial, no such authority exists. After all, the jury is the factfinder, and "the ultimate arbiter of the persuasiveness of the proof must be the factfinder, not the lawgiver." . . . In arrogating unto itself the power to evaluate the persuasiveness of the medical examiner's conclusion about the cause of death, memorialized in the death certificate, the district court adverted to Fed. R. Evid. 104(a) and Fed. R. Evid. 803(8) as the wellsprings of its authority. Neither of these rules adequately underpins the court's action.

329 F.3d at 47-48. The court's reference to its note 3, and the contents of that note, are particularly interesting. In that note, the court distinguished the death certificate situation from a situation in which a trial court could exclude expert testimony due to lack of credibility or lack of a "reliable foundation" under *Daubert* and Rule 702. As we observe in the accompanying memorandum in support of the suggestion for revision of Rule 803(8), although Rules 702 and 803(8) are technically separate, in a case such as this they both involve supposedly expert testimony regarding "scientific, technical, or other specialized knowledge", and both also allow exclusion of evidence based on the

trial court's determination of lack of reliability. In the case of 803(8)(C), however, a trial court's authority to determine reliability is even more important because the additional safeguard of cross-examination is often not available.

In *United States v. Davis,* 826 F.Supp. 617 (D.R.I. 1993), the district court appears to have taken a more supportable position on weight vs. admissibility. Essentially, that position is that in any given case under 803(8)(C) the facts might indicate sufficient trustworthiness to justify admissibility, but that factors bearing on lack of trustworthiness which the court assesses as "minor"are points that can be argued to the jury regarding the weight to be given the information. In *Davis,* the U.S. Environmental Protection Agency took remedial action against a company for contamination at a Superfund site. The action was based on a remedial investigation report (a "RI Report"). The defendants challenged the trustworthiness of the RI Report on a number of grounds, including alleged lack of quality control, conflicting results for identical soil samples, and an inadequate showing of chain of custody of soil samples. The district court held the RI Report was admissible under 803(8)(C), explaining:

> After careful review of the defendants' criticisms and the United States' responses, I find no one factor or combination of factors which indicate that the entire document is untrustworthy. The criticisms of the defendants as to **minor** errors and methodology do not impugn the overall reliability of the RI Report. In an investigation of the magnitude of the RI Report for the Davis Site, it was inevitable that some **minor** mistakes would be made. **Defendants may adequately address their concern about these mistakes at trial to attack the weight given to the Report.**

826 F.Supp. at 823-24 (emphasis added). The court did not state that matters bearing on overall accuracy such as the methodology employed could not be considered in ruling on trustworthiness.

Another district court case from the 1st Circuit appears to be in clear conflict with the intent of 803(8)(C). In *Sage v. Rockwell Int'l Corp.*, 477 F.Supp. 1205 (D.N.H. 1979), the district court declined to exclude from evidence a Judge Advocate General ("JAG") report on an aircraft accident on the basis that the investigator lacked special skill or experience. The court reasoned that "it [the lack of special skill or experience on the part of the investigator] **goes to the weight of his testimony, without denying the admissibility of the evidence**." 477 F.Supp. at 1209 (emphasis added). The court specifically noted that its opinion on this point was in conflict with an opinion on the same JAG report in a related case brought in the Southern District of Ohio (within the 6th Cir.), *Fraley v. Rockwell Int'l Corp.*, 470 F.Supp. 1264 (S.D. Ohio 1979). In *Fraley*, the court found that the JAG investigator was inexperienced and the matter investigated was highly complex, and the court therefore excluded the JAG report. The Ohio district court cited the special skill or experience of the official who conducted the investigation as a factor to be considered in making a decision on <u>admissibility</u> explicitly recommended by the Committee Notes on Rule 803(8)(C). 470 F.Supp. at 1267.

2d Circuit

There is some indication of confusion about the weight v. admissibility issue in the 2d Circuit. In *Rosario v. Amalgamated Ladies' Garment Cutters' Union*, 605 F.2d 1228 (2d Cir. 1979), *cert. denied*, 446 U.S. 919 (1980), the court ruled admissible as a business record under Rule 803(6) a citizen complaint report made out at a police station. Admission was objected to on grounds of lack of reliability. The court stated that the complaint was admissible because it was prepared in the regular course of the business of the police department, and that "[i]ts weight and the credibility to be extended to it were matters for the jury, which might be (and were) explored on cross-examination." 605 F.2d at 1250-51. No case law precedent was cited by the circuit court and no express finding of trustworthiness or reliability was made. Rule 803(6) contains language somewhat similar to 803(8) permitting exclusion for lack of trustworthiness.[32]

In *Bradford Trust Co. v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 805 F.2d 49 (2d Cir. 1986), the court cited *Rosario* (with a "See") in stating (in what is apparently a dictum) that the trial court, in a bench trial, erred in according no weight to FBI fingerprint reports after admitting them under 803(8)(6). The court stated that "weight and credibility extended to government reports admitted as exceptions to the hearsay rule are to be determined by the trier of fact." 805 F.2d at 54.

In the district court decision in *Gentile v. County of Suffolk*, 129 F.R.D. 435 (E.D.N.Y. 1990), the defendants objected to admission under 803(8) of a State investigatory commission report on the County's practice of countenancing police misconduct. A jury trial was held. The objections were based on the Commission's alleged failure to address contradictory evidence in its report. The objections were apparently intended to allege bias and incompleteness in the Report for the purpose of challenging its trustworthiness. The district court found that the Commission's defense of its report (in court testimony, outside the report) was credible and persuasive, and stated that it would not credit contrary testimony. 129 F.R.D. at 454. Later in the same opinion, the district court held that "**[t]he credibility of a government report and the weight attached to it are matters to be decided by the trier of fact.**" 129 F.R.D. at 461 (emphasis added) (citing *Bradford Trust* and *Rosario*).

When the district court decision in *Gentile* was appealed, the 2d Circuit reiterated the position that there was a distinction in this case between trustworthiness and credibility. The defendants, who objected to admission of the State investigatory report, argued that the judge's statements that he would address trustworthiness at the close of the proceedings discouraged them from introducing evidence during the trial to contest trustworthiness. The court stated: "We find that defendants' argument is without merit both on conceptual and factual grounds. First, **defendants fail to distinguish between a trustworthiness determination, which is made by the trial court to decide whether certain evidence (e.g., a government report) is admissible, and a credibility determination, which is made by the trier of fact to decide exactly what weight to accord to evidence that has been admitted.**" 926 F.2d at 149 (emphasis added).

---

[32] But see the discussion of the differences in section V, *supra*.

3d Circuit

An early and influential case containing the distinction between weight and admissibility is *Moran v. Pittsburgh-Des Moines Steel Co.*, 183 F.2d 467 (3d Cir. 1950). Although decided before original enactment of the Federal Rules of Evidence in 1975, it is cited in the Advisory Committee Notes for 803(8)(C) as an example of cases holding that government "evaluative" reports are admissible as exceptions to the hearsay rule. The Advisory Committee's recognition of the relevance of *Moran* is significant, since the decision was based not on federal rules of evidence but on the federal business records statute, 28 U.S.C. § 1732, as it existed in 1950. As noted by the court in *Moran*, the federal statute at that time contained an express provision providing for admissibility of records prepared in the regular course of business, with all other circumstances going to weight rather than admissibility.[33] However, the Notes do not observe that the provision concerning admissibility v. weight which was relied on by the court to allow admissibility was repealed when the federal rules were promulgated, and the rules substituted the "lack of trustworthiness" language in both the business records hearsay exception in Rule 803(6) and the government records and reports exception in Rule 803(8)(C) (albeit with possibly significant differences between the provisos in the two rules). In *Moran*, the court held admissible a report by the federal Bureau of Mines on the cause of a gas tank failure. The court stated: "The report is no less admissible because it contains conclusions of experts which are based upon hearsay evidence as well as upon observation. **These circumstances, by virtue of express statutory provision [in 28 U.S.C. § 1732, as then in force], go to weight rather than to admissibility**." 183 F. 2d at 472-73 & n.6 (emphasis added.)

There is nothing in the Notes or the legislative history to indicate the reasoning for discarding the § 1732 distinction between admissibility and weight and substituting the "lack of trustworthiness" language of the Rules; however, the change appears to speak for itself: Such a distinction was no longer to be observed; rather, the court was to base its decision concerning admissibility on "trustworthiness", which apparently could now encompass circumstances other than how the record or report was prepared and which previously might have been regarded as "other circumstances" which bore on weight rather than admissibility.

In *Wolf v. Procter & Gamble Co.*, 555 F.Supp. 613 (D.N.J. 1982), the defendants objected to admission of epidemiologic studies concerning "toxic shock syndrome" ("TSS") conducted by the federal Centers for Disease Control and several State health departments. The defendants argued that the studies were not trustworthy because they were "hastily conducted and suffered from serious methodological flaws." The district court dismissed these arguments on the basis that "**these considerations bear on the weight to be given the evidence by the jury rather than on its admissibility**." 555 F.Supp. at 625 (emphasis added). The court characterized the defendants' arguments as going to the "accuracy" of the reports, and it indicated that it found the studies

[33] This statutory provision which was deleted when the Federal Rules of Evidence were enacted in 1975 stated: "All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility."

"persuasive" because they had been prepared by public health agencies, because they consistently found an association between tampon use and TSS, and because the studies had been published in respected journals.

In *Vanderpoel v. A-P-A Transport Co.*, 36 Fed. R. Evid. Serv. 247 (E.D. Pa. 1992, WL 158426), the court ruled that a police accident report was admissible under 803(8)(C). The defendant had challenged the trustworthiness of the report on a number of grounds, including alleged lack of expertise of the investigator and inaccurate skid measurements. In dismissing these allegations, the district court relied heavily on the 5th Circuit's decision in *Moss v. Ole South Real Estate, Inc.*, 933 F.2d 1300 (5th Cir. 1991), and focused on the issue of admissibility v. credibility or weight. The district court stated:

> **In determining the trustworthiness of a report, the court should not focus on the report's credibility, but on its reliability.** *Moss*, 933 F.2d at 1307. The Fifth Circuit explains, "**[C]ourts should not focus on questions regarding the accuracy or completeness of the document's conclusions.**" ***Id.*** "**Whether a conclusion is correct and whether the bases for that conclusion are complete and accurate are issues of credibility.**" Instead, the court should analyze the report's reliability, meaning that "the trial court is to determine primarily whether the report was compiled or prepared in a way that indicates that its conclusion can be relied upon. Id., In other words, "reliability focuses on the methodology behind the report." *Id.* at 1308.

At 2 (emphasis added.)[34]

In *Complaint of Nautilus Motor Tanker Co.*, 862 F.Supp. 1251 (D.N.J. 1994), the district court also relied on *Moss v. Ole South Real Estate, Inc.*, 933 F.2d 1300 (5th Cir. 1991), as well as the 2d Circuit's decision in *Bradford Trust v. Merrill Lynch, Pierce, Fenner, and Smith, Inc.*, 805 F.2d 49 (2d Cir. 1986), in disposing of factual assertions regarding untrustworthiness of a Coast Guard accident report. The plaintiff disputed the skill of the investigator and asserted that he left out various pieces of relevant information (*i.e.*, that the report was incomplete). To these arguments the court responded:

> In determining admissibility, the Court must **only** consider whether the report was compiled in a way that indicates that its conclusions could be relied upon, not whether the Court agrees with the conclusions. *Moss v. Ole South Real Estate Inc.*, 933 F.2d at 1307. In doing so, the Court should permit the conclusions to be used as evidence by the trier of fact in determining the ultimate weight and credibility which should be attached to them. *Bradford Trust*, 805 F.2d at 54.

862 F.Supp. at 1255 (emphasis added).

---

[34] The court had previously issued another version of its decision the day before. 1992 WL 158418. That opinion does not differ in substance on the point discussed here; it appears to differ mainly in its discussion of *Beech Aircraft v. Rainey* and the factual basis for the defendant's trustworthiness challenges.

4th Circuit

In *Ellis v. Int'l Playtex, Inc.*, 745 F.2d 292 (4th Cir. 1984), the defendant opposed introduction into evidence of studies by the federal Centers for Disease control and three State health agencies concerning toxic shock syndrome on grounds that the methodology was flawed. The court emphasized the presumption of government reliability under 803(8)(C) and stated that the defendant's concern with the methodology "should have been addressed to the relative weight accorded the evidence and not its admissibility." 745 F.2d at 303. The court reasoned that this approach – emphasizing the jury's role – "permits admission without sacrificing scrutiny" and "avoids many of the problems that have plagued courts which have adhered to the traditional rule that the judge sit [sic] in judgment on scientific data." *Id.* The defendant also objected to admission of the CDC and State studies because there was no information available, in the studies or through testimony, concerning the actual methodology used to gather the data. The court responded that the burden rested on defendant to show that the methodology was flawed, and whether the investigator was available to testify concerning the methodology, or whether the report stated its methodology, were not reasons to exclude the studies. 745 F.2d at 302. *Ellis* thus illustrates a disparity in treatment between "expert" government information considered for admission into evidence under 808(8)(C) and expert testimony under Rule 702 and *Daubert*, and conflict with the information quality legislation and rules, particularly in a situation where information is not capable of being substantially reproduced.

5th Circuit

The leading case on credibility and weight v. admissibility in the 5th Circuit is *Moss v. Ole South Real Estate, Inc.*, 933 F.2d 1300 (5th Cir. 1991). *Moss* has also been cited extensively in other circuits on this issue. *Moss* addressed admissibility under 803(8)(C) of two reports, one by the Air Force and one by HUD, on possible racial discrimination in housing. The district court found that the Air Force report should be denied admissibility due to reliance on biased witnesses, because there was no indication of the skill of the investigators, and because there were conflicts in the report. The district court also found that the HUD report should be excluded for lack of trustworthiness because of bias (lack of objectivity), and because the investigation was not thorough (was incomplete) and misleading. The circuit court reversed and remanded, holding that the district court abused its discretion in excluding both reports because it applied a flawed legal analysis by making determinations of credibility rather than trustworthiness. The circuit court explained:

> The magistrate did not limit himself to determining whether the reports were trustworthy. Instead he made several determinations that witnesses in the report were not credible, and as a result the reports were not *credible* and therefore were untrustworthy. Credibility is not the focus of the trustworthiness inquiry. The magistrate looked broadly at credibility in ruling on both reports. For example, the magistrate found that the HUD report's resolution of certain disputed facts was incorrect and that "many of the findings appear to be incomplete and misleading as they fail to consider all the relevant evidence." **Whether a conclusion is correct and**

> **whether the bases for that conclusion are complete and accurate are issues of credibility.** He also found that the Air Force and HUD relied on "biased" witness. Again, this is an issue of credibility–whether certain witnesses are believable and accurate. [Footnote omitted.] In making determinations of credibility, the magistrate overstepped his role. The court must allow the jury to make credibility decisions and to decide what weight to afford a report's findings. The magistrate's complaints are similar to the ones addressed in *Matador Drilling Co. v. Post*, 662 F.2d 1190, 1199 (5th Cir. 1981). In that case we noted that the appellant's "general complaint that the reports are incomplete and inaccurate are matters going to the weight of this evidence and not its admissibility." *See also Crompton Richmond Co., Factors v. Briggs*, 560 F.2d 1196, 1202 n.12 (5th Cir. 1977) . . . . **In making the trustworthiness determination required by Rule 803, courts should not focus on questions regarding the accuracy or completeness of the document's conclusions.** [Footnote omitted.] It follows that in determining trustworthiness under Rule 803(8)(C), credibility of the report itself or the testimony in the report are not the focus, instead the focus is the report's *reliability*.

933 F.2d at 1306-07 (italics as in original; bold emphasis added). It is noteworthy that *Matador Drilling Co.* and *Crompton Richmond Co.*, the two other 5th Circuit cases cited, were cases decided under 803(6), the business records exception. As we have noted, the line of 803(6) cases appear to be incorrectly influenced by reliance on the pre-1975 version of the federal business records statute, 28 U.S.C. § 1732, which expressly stated that circumstances other than whether the record was prepared in the ordinary course of business should be regarded as going to the weight of the evidence, not its admissibility. It should also be noted, however, that the 5th Circuit in *Moss* hedged the pertinent portions of its opinion to a minor extent with a number of qualifying footnotes. It stated, in note 3, that it did not suggest that bias may never render a report unreliable under 803(8)(C); and it stated in notes 4 and 5 that in unusual circumstances, where a report was so inaccurate that reasonable jurors could not accept its conclusions, it should not be admitted. After ruling that the HUD report was admissible under 803(8)(C) applying the above principles, the circuit court nevertheless held that the report should be excluded because it was not prepared in a timely manner and because a key witness had not been interviewed. The court did not explain why failure to interview a key witness was not a matter of completeness.

In *Eason v. Fleming Cos., Inc.*, (5th Cir. 1993, unpublished, WL 13015208), the court relied on *Moss* in upholding the district court's admission into evidence of an EEOC employment discrimination report.[35] The plaintiff challenged the report on the basis that it used an unreliable investigative methodology, was incomplete, lacked credible sources, and was compiled by non-investigative personnel. The circuit court held that these challenges were "not substantive enough", and that the challenges were based more upon the report's alleged lack of completeness rather than its trustworthiness. Citing *Moss*, the court stated that "the party opposing the admissibility of a

[35] The court's preface to its opinion states that it will not be published because it is "based upon well-settled principles of law".

government report must demonstrate that it was compiled utilizing methods that cannot be relied upon; general complaints that the report is incomplete or inaccurate go to the weight afforded the report rather than its admissibility." At 3.

In *Coates v. AC and S, Inc.*, 844 F.Supp. 1126 (E.D. La. 1994), the district court found admissible under 803(8)(C) EPA and OSHA published "position papers" on the health effects of asbestos. The defendants objected on the basis that "OSHA Position paper and EPA regulations are not required to be scientifically accurate and both OSHA and EPA are permitted to 'over protect' and thus, exaggerate their findings". 844 F.Supp at 1132. The court sidestepped the above issue, stating: "Defendants do not attack the skill of those making the investigations at issue, but rather, obliquely suggest that the studies are politically influenced and thus, not based upon objective and impartial scientific research." *Id.* The court then found that the reports were issued only after lengthy and thorough hearings and found the reports admissible. 844 F. Supp. at 1132-33.

In *Avondale Indus., Inc. v. Bd. of Comm'rs of the Port of New Orleans* (E.D. La. 1996, unpublished, WL 280787), the defendants challenged admissibility under 803(8)(C) of a Coast Guard investigatory report of an incident in which a vessel collided with a bridge. Much of the original investigative file had been lost, and the defendant's arguments included that the report lacked any critical analysis of conflicting factual accounts, that the Coast Guard failed to interview at least four impartial eyewitnesses; and that all notes, photographs, and other documentation referred to in the report were missing and could not be reviewed or challenged at trial. The court found the report admissible as trustworthy, relying principally on *Moss v. Ole South Real Estate, Inc.* It stated that trustworthiness is determined by applying the four non-exclusive factors set out in the Committee Notes and in *Beech Aircraft v. Rainey*, and declined to exclude the report on additional grounds, stating:

> [D]efendants' argument is not supported in law. Since the Supreme Court's decision in *Beech Aircraft Corp.*, the Fifth Circuit has made it clear that trustworthiness simply means "that the trial court is to determine whether the report was compiled or prepared in a way that indicated that its conclusions can be relied upon . . . ." *Moss*, 933 F.2d at 1307. **The trial court is not to focus on the accuracy or completeness of the document's conclusions or the credibility of witnesses involved.** *Id.* Other safeguards built into the Federal Rules of Evidence, such as those dealing with relevance and prejudice, provide the means to exclude inadmissible portions of reports covered by Rule 803(8)(C). *Beech Aircraft Corp.*, 488 U.S. at 167-68. And, as recognized by the Supreme Court, the ultimate safeguard to the admission of a report containing conclusions is "the opponent's right to present evidence tending to contradict or diminish the weight of those conclusions." *Id.* at 168. . . . It is hardly disputed that the Report was prepared in a manner that qualifies as trustworthy under 803(8)(C). However, defendants' right to object to specific portions of the Report on such grounds as provided by the Federal Rules of Evidence is specifically reserved for trial.

At 2-3 (emphasis added).

In *King Fisher Marine Serv., Inc. v. M/V SOCOL* (S.D. Tex. 2001, unreported, WL 1911437), the district court excluded a report by a State investigatory board on a collision between a vessel and dredging equipment. As in *Moss*, the circuit court, in reversing, relied on the 5th Circuit 803(6) business records case of *Matador Drilling Co. v. Post*, 662 F.2d 1190 (5th Cir. 1981). The court stated:

> In determining whether a record or report is trustworthy, a court must look to reliability rather than credibility. [Citing *Moss.*] Credibility speaks to the substance of the report's findings. For example, do the conclusions of the report appear accurate; were the witnesses credible? Such questions related to the weight of the evidence, not its admissibility. [Citing See *Matador.*] Reliability, on the other hand looks to the procedures employed in compiling the record or report.

At 4. As in *Moss*, however, the court excluded the report as unreliable and untrustworthy because it concluded that there was too much delay in conducting the investigation and because the State board failed to interview a key witness.

6th Circuit

The 6th Circuit diverges from the other circuits in its willingness to consider all factors – including accuracy, completeness, credibility of witnesses, reliability of underlying data, investigator expertise, and ability to verify findings – in determining lack of trustworthiness under 808(8)(C). While at least two opinions from the late 1970s mention a distinction between weight or credibility and admissibility, its later opinions do not contain such distinctions, and they recognize the likelihood that case law decided under the federal business records statute, 28 U.S.C. § 1732, when it contained the provision stating that circumstances outside preparation of the record go only to weight rather than admissibility, has incorrectly influenced some 803(8)(C) cases.

In *United States. v. School Dist. of Ferndale, Mich.*, 577 F.2d 1339 (6th Cir. 1978), the circuit court reversed the district court's exclusion of an HEW report on education discrimination. The circuit court characterized the lower court's concerns with unavailability of certain procedural powers during the HEW investigation as ones which "only suggest a possible lack of completeness in the HEW proceedings which can be remedied by the school district in this proceeding . . . ." 577 F.2d at 1355. The party objecting to use of the HEW report also argued that there was no showing that the hearing examiner had special expertise, but the circuit court found that this factor (and apparently also the factor bearing on lack of completeness) "[p]erhaps . . . affect the weight given to the [HEW] findings, but not their admissibility." *Id.*

In *United States v. 478.34 Acres of Land*, 578 F.2d 156 (6th Cir. 1978), the court ruled that a Government statistical survey of the prices paid for land in the county was not admissible under 803(8)(C) because "[t]here was no way for the landowner to test the accuracy or reliability of the data." 578 F.2d at 159.

In *Baker v. Elcona Homes Corp.*, 588 F.2d 551 (6th Cir. 1978), the plaintiffs objected to admission of a police accident report. It appears that the only factor plaintiffs were able to raise as bearing on lack of trustworthiness was the lack of a formal hearing, which is a factor listed as relevant in the Committee Notes, but which the circuit court considered to be of marginal, if any, relevance in this case. The court stated that "plaintiffs' objections go not so much to admissibility as to weight and credibility, matters which are essentially for the jury to consider." 588 F.2d at 558-59.

In *Fraley v. Rockwell Int'l Corp.*, 470 F.Supp. 1264 (S.D. Ohio 1979), the district court held inadmissible under 803(8)(C) a Navy JAG report on the cause of an airplane crash. The court found that the JAG report was prepared by an inexperienced investigator in a highly complex field of investigation, and therefore lacked the necessary reliability. 470 F. Supp. at 1267.

In *Dallas & Mavis Forwarding Co. v. Stegall*, 659 F.2d 721 (6th Cir. 1981) the district court held that a police accident report lacked trustworthiness under 803(8)(C), and the circuit court agreed. The court found that the police report was not based on any physical evidence, but mainly on the eyewitness account of an employee of the plaintiff. The court therefore concluded that the report had "possible motivational problems" in relying on a biased witness, and therefore was rightly excluded. 659 F.2d at 722.

In *Miller v. Caterpillar Tractor Co.*, 697 F.2d 141 (6th Cir. 1983), the 6th Circuit upheld exclusion of an investigative report by a U.S. Bureau of Mines mining engineer on the cause of an injury which occurred when a truck rolled out of control at a mining site. The district court's finding of lack of trustworthiness was based on findings that (1) the sources of information relied on in the report were "suspect as to hearsay", (2) the investigator was "not facially qualified" in the subject matter, and (3) the report "included a conclusion as to the cause of the accident which was not independently verifiable". The circuit court held that these considerations were sufficient to exclude the report for lack of trustworthiness. Plaintiffs sought to rely on the decisions in *Baker* and *Moran v. Pittsburgh-Des Moines Steel Co.*, but the circuit court decided that the present case was more similar to *Dallas v. Mavis Forwarding Co.* (The court also examined its decision in *School District of Ferndale*, but did not comment on it.) With regard to *Moran* (a 3d Circuit case), the court expressly noted the problem with relying on a case decided under the federal business records statute before its weight v. admissibility provision was repealed by enactment of the evidence rules:

> Miller submits *Moran v. Pittsburg-Des Moines Steel Co*, 183 F.2d 467 (3d Cir. 1950) in support of admission of the Stanius Report [the mining engineer's report]. In *Moran*, the Third Circuit adjudged that a Bureau of Mines report which contained a conclusion as to the cause of a tank explosion (which was the ultimate jury issue) was admissible, stating:
>
> > The report is no less admissible because it contains conclusions of experts which are based upon hearsay evidence as well as upon observation. These circumstances, by virtue of express statutory provision, go to weight rather than to admissibility.

> *Id.* at 473. **The precedential value of *Moran* is suspect, however, since the Court was interpreting 28 U.S.C. § 1732, the business report statute and predecessor of FRE 803(8), which expressly stated at that time: "All other circumstances of the making of such writing or record including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility." *Id.* at 473. FRE 803(8) contains no such similar statement.**

697 F.2d. at 144 n.1 (emphasis added).

Subsequent decisions by the 6th Circuit have continued to uphold exclusion of public reports under 803(8)(C) due to lack of trustworthiness where there was good reason to suspect the reliability of the information underlying the report. In *Bright v. Firestone Tire & Rubber Co.*, 756 F.2d 19 (6th Cir. 1984), the circuit upheld exclusion of a Congressional subcommittee report which relied extensively on consumer complaint data to find that the tire which allegedly caused an accident was known to be a "problem tire". The court found that the "unverified nature of the evidence relied on by the [Congressional] Committee" was sufficient reason to exclude it as not trustworthy. 756 F.2d at 22-23. In *United States v. Jackson-Randolph*, 282 F.3d 369 (6th Cir. 2002), the circuit upheld exclusion of a report by the Michigan Department of Education on possible fraud in seeking reimbursements under a school food program. The court found that the principal witness relied on by the State's hearing examiner was not trustworthy because she was originally a co-defendant, and later accepted a plea bargain, and therefore "had a significant motive to lie about the falsity of food program claims." Since this witness' testimony was unreliable, the hearing examiner's report relying on it was likewise unreliable. 282 F.2d at 381.

7th Circuit

In *United States ex rel. Collins v. Welborn*, 49 F.Supp. 597 (N.D. Ill. 1999), *aff'd in part, rev'd in part sub nom Bracy v. Schomig*, 286 F.2d 406 (7th Cir. 2002), the district court held admissible under 803(8)(C) a government summary of a judge's bribery offenses and related conduct, prepared in connection with sentencing of the judge, (referred to as the "Government Version") in a habeas corpus proceeding brought by an inmate convicted by the judge. The Government Version was challenged as a biased, adversarial document. The court held that the report was admissible, stating: "It is an adversarial document, and therefore **may be slanted** to support the government's position. **But that goes to the weight to be accorded the document; it does not make it untrustworthy.**" 49 F.Supp. at 605 (emphasis added). The court did not cite any case authority.

In *Erickson v. Baxter Healthcare, Inc.*, 151 F.Supp.2d 952 (N.D.Ill. 2001), the widow of a hemophiliac brought suit against a medical equipment manufacturer after he died of liver disease allegedly brought on by a blood-borne virus. Plaintiff sought to introduce under 803(8)(C), and defendants opposed introduction of, a report on contaminated blood products prepared by the Institute of Medicine, a quasi-public entity operating under the National Academy of Sciences. Defendants submitted questions to the IOM on how the report was prepared, and the editors refused

to answer. However, the questions, the court said, went to the identity of those who prepared the report and their choice of language, rather than the methodology used. The court interpreted defendants' objection to the report as pertaining to political bias, and held the report admissible, stating that "[p]olitical bias goes to the weight of the report as evidence, not its admissibility, and it may be explored on cross-examination." [Citing *Ellis v. Int'l Playtex* (4th Cir. 1984) with a "*See*"] (It was not clear who would appear as a witness to be cross-examined.) Defendants also argued that a conclusion in the report concerning ability to develop safer alternatives had been rejected by experts in the field, and the court also concluded that "that is evidence a jury is entitled to weigh." 151 F.Supp.2d at 967.

Also worthy of note is *White v. Godinez*, 301 F.3d 796 (7th Cir. 2002), although it concerned evidence which the circuit court characterized as admissible as business records under 803(6). The case was an appeal from a grant of a writ of habeas corpus. The decision indicates that the State "questioned" the district court's reliance on certain county jail visitation records because they were incomplete. (Such records should, it appears, have been proffered under 803(8)(C)). The circuit court stated that "[w]e agree with the district court . . . that the state's arguments about incompleteness implicate the weight, and not the admissibility, of the records." 301 F.2d at 801.

<u>8th Circuit</u>

In *Kehm v. Procter & Gamble Mfg. Co.*, 724 F.2d 613 (8th Cir. 1983), the defendants sought to block admission of apparently the same CDC and State epidemiologic studies that were at issue in *Wolf v. Procter & Gamble Co.*, 555 F.Supp. 613 (D.N.J. 1982). The defendant argued that the studies were untrustworthy because they reflected numerous statistical biases. The court rejected the defendant's objection, observing that "Procter & Gamble . . . presented expert testimony of its own challenging the methodology of the government reports and evidence rebutting the conclusions of those reports. . . . The jury was therefore fully aware of the parties' conflicting assessments of the report and, we believe, fully capable of evaluating the evidence on both sides. 724 F.2d at 618-19.

In *Union Pacific R. Co. v. Kirby Inland Marine, Inc. of Mississippi*, 296 F.3d 671 (8th Cir. 2002), the circuit court upheld admission under 803(8)(C) of a Coast Guard report containing an evaluation on whether a bridge should be altered because it posed an unreasonable obstruction to navigation. The plaintiff opposed admission of the report as untrustworthy on grounds that the Coast Guard relied on hearsay to reach its conclusions. The circuit court, relying extensively on *Moss*, found that such a factor was not sufficient to call into question the report's trustworthiness because "in considering whether a report is trustworthy, the court should not consider whether the report is credible, but rather should consider whether the report is reliable." "The Rule 803 trustworthiness requirement", it stated, quoting *Moss*, "means that the trial court is to determine primarily whether the report was compiled or prepared in a way that indicates that its conclusions can be relied upon." There is no further analysis in the opinion as to whether reliance primarily on hearsay does not impugn reliability. 296 F.3d at 679-80.

9th Circuit

In *Walker v. Fairchild Indus., Inc.*, 554 F.Supp. 650 (D.Nev. 1982), the court upheld admission of an Air Force aircraft accident investigation report under 803(8)(C). The defendant objected that the report was untrustworthy because some of the simulation tests on which the report was based were performed by persons who were not qualified. The court noted that both persons who performed the tests "admitted that there was no scientific basis for the tests and that neither was an expert" in the subject of the tests. Nevertheless, the court found that the issue of qualifications of the investigators went more to the weight and credibility of the evidence than its admissibility. 554 F.Supp. at 654-55. The court did not specifically address the issue of lack of scientific basis.

In *Hedgepeth v. Kaiser Found. Health Plan of the Northwest* (9th Cir. 1996, unpublished, WL 29252) the court rejected as untrustworthy a State labor bureau report which found substantial evidence of age discrimination against the plaintiff. The court found that since the State investigator conceded that he was unable to fully investigate the claim, the report was untrustworthy. Surprisingly, the court cited *Moss* for the principle that "[t]he role of the court in determining untrustworthiness is not to assess the report's credibility, but to evaluate whether the report was compiled or prepared in a way that indicates its reliability." At 1. In *Moss*, the court determined that incompleteness was a matter of credibility rather than reliability.

10th Circuit

The 10th Circuit appears to have avoided generalities about credibility v. reliability, or weight v. admissibility, and has limited its rulings to the evidence in the individual case. *See Perrin v. Anderson*, 784 F.2d 1040, 1047 (10th Cir. 1986) (police internal investigation of shooting was not necessarily biased and report would not be excluded absent specific evidence of bias -- trial court is first and best judge of trustworthiness and reliability); *In re Air Crash Disaster at Stapleton International Airport, Denver, Colo.*, 720 F.Supp. 1493, 1498 (D.Colo. 1989) (fact that an agency preparing a report has an interest in its conclusions goes to weight, not admissibility, absent specific evidence of bias).

11th Circuit[36]

The 11th Circuit, much like the 10th Circuit, has not drawn a distinction between credibility, accuracy, and completeness v. reliability or trustworthiness, and has apparently given trial courts substantial discretion to decide whether a particular factor bearing on reliability should go to weight rather than admissibility.

---

[36] The 11th Circuit, encompassing the States of Georgia, Alabama, and Florida, was carved out of the 5th Circuit in 1980, leaving the Fifth Circuit to encompass Texas, Louisiana, and Mississippi. Fifth Circuit cases decided prior to October 1, 1981, are considered binding precedent within the 11th Circuit. Consequently, the 5th Circuit's leading case distinguishing between credibility (including accuracy and completeness) and reliability, *Moss v. Ole South Real Estate, Inc.*, decided in 1991, and its progeny, are not precedent in the 11th Circuit.

In *Harris v. Birmingham Bd. of Educ.*, 537 F.Supp. 716 (W.D. Ala. 1982), *aff'd in part, rev'd on other grounds*, 712 F.2d 1377 (11th Cir. 1983), an employment discrimination case, the court, sitting without a jury, initially admitted an EEOC report under 803(8)(C), but later decided that the report was prepared in disregard of certain evidence, contained numerous erroneous and slanted statements, and was prepared in contemplation of litigation, and therefore should not be given any weight.

In *Baker v. Firestone Tire & Rubber Co.*, 793 F.2d1196, 1199 (11th Cir. 1986), the circuit court excluded the same Congressional report that was excluded by the 6th Circuit in *Bright v. Firestone Tire & Rubber Co.* on the basis that it did not contain findings from an "objective" investigation.

In *Hines v. Brandon Steel Decks*, 886 F.2d 299 (11th Cir. 1989), the circuit court held that an OSHA investigator's lack of expertise in a particular area involved in a report sought to be admitted under 803(8)(C) might be considered by the district court to go either to admissibility or to weight. 886 F.2d at 303.

D.C. Circuit

The D.C. Circuit appears to take a position consistent with the majority of the other circuits in providing great latitude to district courts to admit reports under 803(8)(C) which admittedly have trustworthiness problems, although its position is not firmly articulated.

In the case of *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991), KAL objected to the introduction of portions of a governmental report (the ICAO [the International Civil Aviation Organization] report, with a Soviet report appended) on the incident, in which a civilian airliner was shot down by a Soviet fighter plane, but the court's opinion does not specify the objections that were ruled upon by the district court. The circuit court upheld the district court's admission of the report with the following commentary:

> **The district court decided that KAL's trustworthiness objections were more properly addressed to the jury for purposes of evaluating the weight to be accorded the Secretary General's conclusions: "[Y]ou might convince the jury that it is not worth the paper it is written on, but I am not going to throw the whole report out just because they might believe that in this particular case."** Not surprisingly, the transcript of the district court's decision from the bench lacks the clarity of a written opinion. In hindsight, we would rather the court had made explicit preliminary findings, preferably *in limine*, as to the trustworthiness of each challenged portion of the ICAO Report. But mindful that the burden was and is on KAL, we are not convinced that the court failed to carry through on its duties under Rules 104(a) and 803(8) or abused its discretion when it admitted the ICAO Report.

932 F.2d at 1483 (emphasis added). The court's opinion indicates a viewpoint that the trial court does not have a duty under 803(8) to examine the evidence carefully when trustworthiness objections are raised and act as a gatekeeper to keep from the jury material which it determines is not trustworthy. Instead, the trial court was apparently allowed to leave the matter to the jury. The decision also reflects how the "abuse of discretion" standard of review on appeal results in little scrutiny being given to dubious district court rulings under 803(8)(C).

The U.S. District Court for the District of Columbia made a similar ruling also lacking in detail and showing a preference for admissibility employing a weight-v.-admissibility distinction in *Nakijima v. General Motors Corp.*, 857 F.Supp. 100 (D.D.C. 1994). This was a products liability suit involving inadvertent opening of the rear doors of buses, and plaintiffs sought to exclude a National Highway Traffic Administration ("NHTSA") technical investigation report on such incidents which contained a statement indicating that prior incidents were technically dissimilar. The district court admitted the NHTSA report under 803(8)(C), ruling:

> Although the NHTSA did not consider all prior incidents involving passenger ejections from defendant's RTS-II rear door systems, the Court finds the Report sufficiently trustworthy. **Questions about the methodology by which prior incidents were selected as part of the investigation goes to its weight rather than its admissibility.**

857 F.Supp. at 102 n. 4 (emphasis added). No case precedents were cited for this ruling.

A recent decision by the U.S. District Court for the District of Columbia on weight v. admissibility contains more detail and indicates a more pronounced tendency to abdicate judicial responsibility for rulings on trustworthiness and leave such decisions to the jury. In *Lohrenz v. Donnelly*, 223 F.Supp.2d 25 (D.D.C. 2002), *aff'd on other grounds*, 350 F.3d 1272 (D.C. Cir. 2003), *cert. denied*, 124 S.Ct. 2167 (2004), the plaintiff, a female Navy fighter pilot, sued a public policy organization for libel and slander regarding statements that she was not qualified and had been given preferential treatment. Defendant submitted as evidence a Field Naval Aviators Evaluation Board ("FNAEB") Report under 803(8)(C), and plaintiff opposed use of the report on trustworthiness grounds. The plaintiff's trustworthiness objections were based on a subsequent report by the Navy Inspector General which concluded that the FNAEB report was tainted by "inconsistencies, inaccuracies and emotionalism". In addition, the FNAEB convening officer issued a statement admitting that he had not adequately reviewed the plaintiff's training records, and after reviewing such records, he wished to repudiate his approval of the FNAEB report. Despite these strong indications of untrustworthiness, the court admitted the FNAEB report into evidence. The court stated:

> Although the Court certainly notes that both the Navy Inspector General and the officer who approved the FNAEB have both criticized the FNAEB Report, **these concerns appear to ultimately drive more at the weight the FNAEB Report should be accorded, not its admissibility.**

The court decided that the parties could contest the validity of the FNAEB report before the jury. 223 F.Supp.2d at 38 (emphasis added). The court apparently considered the plaintiff's trustworthiness objections as presenting "possible motivational problems" within the meaning of the Committee Notes to 803(8). Despite apparently conceding that there were such motivational problems, it admitted the report. No case precedents were cited for this ruling.