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THE ADMISSIBILITY OF EVALUATIVE REPORTS UNDER FEDERAL RULE OF EVIDENCE 803(8)

INTRODUCTION

On June 7, 1973, an automobile carrying five high school students collided with a semi-tractor truck. Following normal procedure in the aftermath of such accidents, the state highway patrol compiled a police accident report. In a negligence action brought against the truck driver, the defense attempted to introduce the police report as evidence on the issue of responsibility and the plaintiff objected on hearsay grounds. Specifically at issue was the admissibility of the portions of the report containing the statement of the defendant truck driver and the officer's conclusions concerning fault for the accident—that the plaintiff's car had "entered the intersection against a red light." The district court admitted the report, and in Baker v. Elcona Homes Corporation the Sixth Circuit Court of Appeals affirmed this ruling.

In affirming the district court ruling the Sixth Circuit concluded that the police accident report was admissible in its

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2 The truck driver was unable to provide viable testimony on the issue of fault because he was blinded by the sun at the moment of impact. The only surviving plaintiff had no recollection of the collision. Id.

Both parties extensively questioned the highway patrolman about the factual data contained in his report (e.g., the physical conditions at the scene of the accident and the patrolman's use of vector analysis to ascertain the point of impact). The parties did not question the patrolman as to his opinion on the issue of who had the right of way. After the patrolman left the stand, the defense introduced the report. Id. at 554-55.

3 Id. at 555 n.3. The defendant testified that he could not see the color of the traffic light because the sun was in his eyes. He further testified that traffic opposite him on the same highway had not stopped and that he did not see any cross traffic other than the plaintiff's car.

4 Id.
5 Id. at 555-56. The district court admitted the report as a recorded recollection under Fed. R. Evid. 803(5). The Sixth Circuit held that reliance on Rule 803(5) was inappropriate, id. at 555 n.4, and ruled that the report was "more properly admissible as a public record under Fed. R. Evid. 803(8)." Id. at 556.
6 Kentucky law does not comport with the Sixth Circuit ruling, at least to the extent that Kentucky does not recognize the admissibility of police reports. See Campbell v. Markham, 426 S.W.2d 431 (Ky. 1968); Hodge v. Commonwealth, 287 S.W.2d 426 (Ky. 1956); R. Lawson, KENTUCKY EVIDENCE LAW HANDBOOK 173 (1976).
entirety under Federal Rule of Evidence (FRE) 803(8), the public records and reports exception to the hearsay rule. The court reasoned that the officer’s conclusion on the issue of who ran the red light was a “factual finding” within the meaning of FRE 803(8)(C), even though his conclusion was based solely on subsequent observation of the scene and on the comments of the defendant. This interpretation of FRE 803(8)(C), however, does not meet with unanimous agreement. Others have defined the phrase “factual findings” more narrowly so as to include only the statements made on the official’s personal knowledge and observation.

Should opinions and conclusions contained in reports of official investigations be admissible in civil proceedings regardless of the absence of personal observation by the official who conducted the investigation and submitted the report? Should such conclusions be excised from the reports before they are admitted? Or should the court require the presence of the reporting official to afford the jury both the opportunity to observe the official’s demeanor during questioning and to scrutinize his explanation of the report’s contents? This comment will explore arguments on both sides of these issues and will ultimately suggest a compromise. In order to balance the public’s interest in protecting the rights of the party opposing admission of the report and the public’s concomitant interest in the efficient use of both relevant evidence and public officials’ time, stringent safeguards must be established for the determination of admissibility of evaluative reports. While admissibil-

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7 Fed. R. Evid. 803(8) provides for the admissibility of the following:
Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness (emphasis added).
The rule is referred to, interchangeably, as the official statements, the official records and reports, or the public records and reports exception to the hearsay rule.

8 588 F.2d at 556.

ity should not be presumed, the proponents of evaluative reports should be able to gain admissibility by satisfying certain procedural safeguards discussed in this comment.

I. THE OFFICIAL WRITTEN STATEMENTS EXCEPTION TO THE HEARSAY RULE

The hearsay rule generally prohibits the use in court of an out-of-court statement to prove the truth of the fact asserted, but certain exceptions have developed. The official statements exception recognizes the inconvenience and disruption of official functions that would result if reporting officials were uniformly required to testify to the authenticity and accuracy of routine reports. Since such reports generally contain nothing questionable or controversial it has been deemed reasonable to dispense with a cross-examination requirement in favor of preventing disruption of official duties. Similarly, the business records exception prevents disruption of business affairs when routine and regularly kept records are at issue.

A. Development of the Official Written Statements Exception

The official written statements exception to the hearsay rule exists in common law and has been codified in both state and federal statutes. The development of the exception has paralleled the development of the business records excep-

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10 5 WIGMORE ON EVIDENCE § 1361 (3d ed. 1940) [hereinafter 5 WIGMORE].
11 Exceptions have developed to "accommodate between the tribunal's desire to use all information that has probative worth . . . and its desire to receive evidence under the ideal condition of cross-examinations." R. LAWSON, KENTUCKY EVIDENCE LAW HANDBOOK 120 (1976).
12 5 WIGMORE, supra note 10, at § 1631.
13 Fed. R. Evid. 803(6).
14 See, e.g., Tomlin v. Beto, 377 F.2d 276, 277 (5th Cir. 1967); Vanadium Corp. v. Fidelity & Deposit Co., 159 F.2d 105, 109 (2d Cir. 1947); Commonwealth v. Slavski, 140 N.E. 465, 468 (Mass. 1923).
15 E.g., TENN. CODE ANN. § 16-1134 (1972); OHIO REV. CODE ANN. § 2317.42 (Page 1971); W.VA. CODE § 57-1-7b (1957).
16 28 U.S.C. § 1733(a) (Supp. 1979). This section was amended in 1975 to clarify that it "does not apply to cases, actions, and proceedings to which the Federal Rules of Evidence apply."
tion" and both are premised on the principles of necessity and trustworthiness. In the case of the official written statements exception, i.e., public records and reports, expediency provides the element of necessity. Testimony from official sources is so regularly required in trials that, without such an exception, countless officials would spend more time testifying in court than performing the functions of their offices, and the public would suffer as a result. In addition, official statements are considered inherently trustworthy because they are kept systematically and routinely. Further evidence of their trustworthiness rests in the declarant's official duty to make the record or report and in the "presumption" that public officials accurately and competently perform their duties. It is further

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17 Fed. R. Evid. 803(6). See also 28 U.S.C. § 1732 (Supp. 1979), which is the business records counterpart to § 1733, the codification of the official records exception. The two exceptions share common law origins but are not completely parallel. Specifically, four common law elements of the regularly kept records exception have been incorporated and adapted in the evolution of the official statements exception. First, to be admissible, a business record must have been made in the "regular course of business" by an entrant having a "duty" to record the information correctly. 5 Wigmore § 1523; 4 I. Weinstein & M. Burger, Weinstein's Evidence 803-144 (1977) [hereinafter 4 Weinstein]. Similarly, an official report must have been made by one under a duty to record or report certain information. 5 Wigmore § 1633(4). Second, at common law, both the business and official records exceptions required that the entrant have personal knowledge of the fact chronicled. McCormick, Law of Evidence §§ 310, 315 (2d ed. 1972) [hereinafter McCormick]. Personal knowledge of the entrant is no longer necessary under either exception; the requirement is satisfied if the person supplying the information has personal knowledge and a duty to report such information to the entrant. 4 Weinstein at 803-148, 803-162. The third common law element under both exceptions was that either the informant or the entrant be available as a witness. 5 Wigmore § 1521. Fed. R. Evid. 803(6) and 803(8) make unavailability immaterial—necessity for admitting the records or reports is premised on other considerations. The fourth common law element, contemporaneity, is still a viable requirement for admissibility of business records. Business entries must be made at or near the time of the event or transaction recorded. 5 Wigmore § 1526. The official statement exception differs on this point. With the expansion of the official statements exception by adoption of Fed. R. Evid. 803(8), the need for contemporaneity was removed. See 4 Weinstein at 803-173.

18 5 Wigmore, supra note 10, at §§ 1521 & 1631.
19 Id. at § 1631. See also Wallace, Official Written Statements, 46 Iowa L. Rev. 256, 258 (1961).
20 Id. at § 1631. See also Wallace, Official Written Statements, 46 Iowa L. Rev. 256, 258 (1961).
21 5 Wigmore § 1632. See also McCormick, supra note 17, at § 315.

Some English judges have suggested that the fact that an official record is open to public scrutiny adds to the probability of reliability and is an essential element in the exception. Wigmore, however, considers this circumstance as "merely a casual
believed that a written statement will be more reliable than an official's memory given the volume and repetitiveness of the business he conducts for the public.²²

B. The Evaluative Reports Controversy

Three types of official statements are admissible under the public records and reports exception as embodied in FRE 803(8). First, records of "the activities of the office or agency"²³ are admissible under subsection A. Subsection B allows official reports entered pursuant to a legal duty to observe and report such matters.²⁴ Subsections A and B apply to routine official reports; the controversy arises with the third type of official statement as defined in subsection C. Subsection C allows as evidence in some cases "factual findings resulting from an investigation made pursuant to authority granted by law . . . ."²⁵

The term "factual findings" is subject to varying interpretations which have resulted in the controversy concerning the admissibility of evaluative reports. If a "factual finding" is nothing more than the reporting official's observation of physical conditions, there is little objection to the production of his notation in evidence. However, if, as some contend, subsection C also embraces evaluations of the statements and observations of bystanders or the official's own conclusions, it is possible that evidence will be admitted which "could present an opportunity for a miscarriage of justice"²⁶ in that an inaccurate advantage, and not an essential limitation" on the admissibility of official statements. 5 Wigmore, supra note 10, at § 1632.
²² McCormick, supra note 17, at § 315.
²³ This is an embodiment of the common law rule. E.g., Howard v. Perrin, 200 U.S. 71 (1906) (General Land Office records); Chesapeake and Delaware Canal Co. v. United States, 250 U.S. 123 (1919) (Treasury records of miscellaneous receipts and disbursements).
²⁴ Subsection B also codifies the common law rule and carries forward the important concepts of 28 U.S.C. § 1733(a) (Supp. 1979). For the text of this statute see note 26 infra.
²⁵ FED. R. EVID. 803(8)(C).
²⁶ Wallace, supra note 20, at 265. 28 U.S.C. § 1733(a) (Supp. 1979), which governed admissibility of official records prior to the enactment of the Federal Rules of Evidence, circumvented this potential problem because it was much narrower in scope and was limited exclusively to factual records. It provides: "Books or records of accounts or minutes of proceedings of any department or agency of the United States
or erroneous conclusion or opinion could seriously mislead the jury.  

1. **Advisory Committee Note: “Negative Factors”**

The Advisory Committee’s Note recognized the controversy surrounding the evaluative report and suggested it might be caused not only by differences in interpretation and principle but also by the wide variety of situations involved. While the Advisory Committee stated that the rule “assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present,” it also acknowledged the difficulty in attempting to pinpoint an effective procedure for determining when “negative factors” would require a report to be ruled inadmissible.

2. **Legislative History: Inconclusive Conference Report**

An examination of the legislative history is illuminating, but it does not clarify Congress’ underlying intent in promulgating 803(8)(C). The House of Representatives Judiciary Committee reported that the term “factual findings” was to be “strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this Rule.” The concurrent Senate Judiciary Committee Report disagreed with the House version, contending that such a narrow reading would contravene the intent of the Rule as stated in the Advisory Committee’s Note. The Senate Judiciary Committee

shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept.”

27 See generally Johnson v. Lutz, 170 N.E. 517 (N.Y. 1930) for the proposition that no opinions, conclusions or hearsay are admissible. In Johnson, a police accident report containing opinions based on the observations of bystanders was excluded from evidence. Accord, Gilbert v. Gulf Oil Corp., 175 F.2d 705 (4th Cir. 1949); Gencarella v. Fyfe, 171 F.2d 419 (1st Cir. 1948); Davis' Admrs. v. Gordon, 216 S.W.2d 409 (Ky. 1948).

28 Id. at 590.

29 Id. For a discussion of the safeguards outlined in the Advisory Committee’s Note see notes 80-83 infra and accompanying text.


argued that the intent was to assume admissibility of evaluative reports unless "the sources of information or other circumstances indicate a lack of trustworthiness." The Judiciary Committee believed that the Advisory Committee's Note furnished sufficient guidance for determining whether trustworthiness was so lacking that the report should not be admitted.

The Congressional Conference Committee Report, usually intended to be conclusive, does not resolve this dispute. The Conference Committee rejected the Senate interpretation of FRE 803(8)(C) on unrelated grounds and accepted the House version containing the narrow interpretation of "factual findings." The Conference Committee did not, however, explicitly treat the "factual findings" issue. One inference that might be drawn from this incomplete resolution is that the House version of the Rule prevails on all aspects. However, one commentator has suggested that elimination of the Senate version does not imply that the Conference Committee disagreed with the Senate's liberal interpretation since no reference was made to that issue in the report. Proponents of both interpretations can derive no greater support from the legislative history than that which may be gleaned by implication.

II. THE ADMISSIBILITY OF EVALUATIVE REPORTS

A. The Argument Against Admission

Opponents of the admissibility of evaluative reports present four arguments in support of their position. First, they propose that interpretation of opinions and conclusions in evaluative reports is essential to well-founded jury decisions and a

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23 Id. at 7054.
24 Id.
26 Id. at 7104. The Senate Judiciary Committee had amended 803(8) to refer to 804(b)(5), a rule which was not enacted. Rule 804(b)(5) would have allowed reports containing observations by law enforcement personnel against a criminal defendant when the officer was "unavailable because of death, then existing physical or mental illness or infirmity, or not being successfully subject to legal process." SEN. REP. No. 1277, supra note 32, at 7104.
fair adjudication of issues. Second, they argue that an examination of judicial precedent reveals that inadmissibility of evaluative reports is the norm. Third, opponents claim that the fact-opinion distinction is no more difficult to draw than other differentiations jurists are continually required to make. Finally, opponents contend that liberal admissibility of evaluative reports misplaces the burden of proof and permits unwarranted reliance on presumption of the official’s competence.

1. Interpretation is Essential

Those opposing the admissibility of evaluative reports contend that interpretation of opinion, conjecture and conclusions contained in evaluative reports must be provided by the report’s proponent. This need for interpretation is particularly important “where opinion in the report is based not upon scientific tests, but upon a multitude of facts, as in a report made by a . . . policeman.” The most effective method of providing this interpretation is to question the reporting official on the witness stand at trial. The party opposing introduction of the

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38 See notes 42-46 infra for a discussion of the need for interpretation.
39 See notes 47-50 infra and accompanying text for a discussion of the prevailing case law.
40 See notes 54-59 infra and accompanying text for a discussion of the fact-opinion distinction.
41 See notes 60-62 infra and accompanying text for this discussion.
42 One commentator has suggested that interpretation of evaluative reports is essential since:

> [E]qually qualified experts in the field will often reach conflicting opinions on the very same facts. Precedent and principle compel the conclusion that there is too great a likelihood that a lay trier of fact will generally be unable to determine the proper weight to assign to an evaluative opinion in a police laboratory report if they do not have the opportunity to have the expert cross-examined.

Imwinkelried, The Constitutionality of Introducing Evaluative Laboratory Reports Against Criminal Defendants, 30 Hastings L.J. 621, 639 (1979). See also Phillips v. Neal, 452 F.2d 337 (6th Cir. 1971), where the court indicated that opinions and conclusions based on hearsay especially require interpretation when they could be outcome determinative. See also Skogen v. Dow Chemical Co., 375 F.2d 692, 705 (8th Cir. 1967) where the court called for interpretation of conclusions regarding “the highly controversial ultimate issue” of the case.

43 Comment, Evaluative Reports by Public Officials—Admissible As Official Statements? 30 Tex. L. Rev. 112 (1951). But see Imwinkelried, supra note 42, who argues that even scientific tests lack the requisite certainty and reliability. He advocates limited admissibility of such test results, particularly in criminal trials.
report would then be able to cross-examine the official about his methods of observation and recordation, about the conditions under which he received and recorded the statements of bystanders or parties to the incident and his basis for evaluating them, and about the basis for any inferences and conclusions drawn. The cross-examination would give the jury the opportunity to observe the demeanor of the official as he describes his investigatory technique and responds to probing inquiries about the efficacy of that technique. Opponents argue that the testimony of the reporting witness will provide a more comprehensive foundation of knowledge upon which the jury can make its decisions, and that providing such a basis for well-founded jury decisions is the only effective way to allay the danger of the jury's giving too much weight to the official written documents when presented alone. The opponents argue that it is insufficient to allow the adverse party to rebut the document later since a prima facie case has been made against him and since juror opinions likely will be formed before he can offer any rebuttal.

2. Prevailing Case Law

As indicated in the Advisory Committee's Note, many cases have reviewed the admissibility of evaluative reports. While a few types of these reports are statutorily singled out for admission, the prevailing case law indicates that rejection of evaluative reports is the norm, evincing a judicial distrust of such reports.

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44 It has been suggested that allowing the opposing party to call and examine the official as his own witness would be an adequate solution to this problem. Comment, supra note 43, at 177. This solution is neither adequate nor equitable. The burden should be on the proponent to establish the validity of the report. See also Metropolitan Life Ins. Co. v. Cleveland's Adm'r., 11 S.W.2d 434, 435-36 (Ky. 1928) which also discusses the possibility of calling the official to impeach the report.


46 Id. at 348.

47 Advisory Committee's Note, supra note 28, at 589. See Comment, supra note 43, for a discussion of the types of evaluative reports which have been the subject of controversy.

48 Advisory Committee's Note, supra note 28, at 590. Fed. R. Evid. 802 ensures that these statutes will be unaffected by a narrow interpretation of 803(8)(C).

49 Wallace, supra note 20, at 265. See, e.g., Teng v. Dulles, 229 F.2d 244, 246 (2d Cir. 1956); Franklin v. Skelly Oil Co., 141 F.2d 568 (10th Cir. 1944).
Decisions holding inadmissible reports containing statements about the cause of or responsibility for an incident are generally premised on one of two lines of reasoning. Courts ruling such reports inadmissible do so either because the lack of personal knowledge defeats admissibility of the report or because opinions and conclusions of non-expert witnesses are usually inadmissible as invasions of the province of the jury. Testimony of non-experts is confined to factual statements unless it can only be presented to the jury in opinion form. In that instance, testimony must be based on the witness' personal observation and must be essential to the jury's clear understanding of the total testimony.

3. *The Fact-Opinion Distinction*

Opponents of the admissibility of evaluative reports dismiss the proponents' argument that all evaluative reports should be admitted since fact and opinion are too often difficult to distinguish. Opponents' counter argument is that the "difference between a 'fact'... and an 'opinion' is one of the fundamental differences in the law of evidence." While proponents have suggested that the fact-opinion distinction is nothing more than an intellectual debate since the same reports could be admitted under FRE 803(6), opponents to admiss-

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50 E.g., American Airlines, Inc. v. United States, 418 F.2d 180, 196 (5th Cir. 1969); Skogen v. Dow Chemical Co., 375 F.2d 692, 704-05 (8th Cir. 1967); Gencarella v. Fyfe, 171 F.2d 419, 421-22 (1st Cir. 1948).

51 E.g., Skogen v. Dow Chemical Co., 375 F.2d 692, 705 (8th Cir. 1967); Hoel v. City of Los Angeles, 288 P.2d 989, 997-98 (Cal. App. 2d 1955); Davis' Adm'rxx. v. Gordon, 216 S.W.2d 409, 412 (Ky. 1948).

52 E.g., Hadley v. Ross, 154 P.2d 939, 942 (Okla. 1944).

53 FED. R. EVID. 701. See, e.g., Padgett v. Buxton-Smith Mercantile Co., 262 F.2d 39, 41 (10th Cir. 1958); Lewis v. W.T. Grant Co., 129 F. Supp. 805, 812 (S.D. W. Va. 1955). Should the official qualify as an expert in his field, FED. R. EVID. 702 allows opinion testimony if it will assist the trier of fact. This situation existed in Baker v. Elcona Homes Corp., 558 F.2d 551 (6th Cir. 1978), where the highway patrolman qualified to testify as an expert. The problem of opinion testimony is accentuated when the opinion is presented to the jury in written form and there is no opportunity for cross-examination.


55 FRE 803(6) expressly includes statements of opinion:

- Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or
bility point out a judicial rejection of this argument. One court has stated that even though there is an overlap of subject matter between 803(6) and 803(8),

the United States Supreme Court has admonished us to read statutes addressed to judicial specialists with appropriate technical discrimination, . . . and to interpret a statutory scheme with due respect to the whole and each of its provisions as it manifests legislative purpose. . . . This Court, therefore, will not ascribe to Congress a willingness to add mere surplusage to the Federal Rules of Evidence in the form of 803(8), even though much of the matter admissible under that provision may also be subsumed under 803(6). Thus, since (8) deals explicitly with reports based on public investigations, . . . this Court will look exclusively to (8) in determining the admissibility of the [public] report.

Finally, opponents contend that where factual statements based on personal knowledge can be severed from conclusions and opinions, this separation should be effected to allow admission of the factual portion into evidence. In fact, courts have held it reversible error to admit the entire report when it contained statements as to cause or responsibility for the acci-

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5 Complaint of American Export Lines, Inc., 73 F.R.D. 454, 456 n.2 (S.D.N.Y. 1977). The court outlined two considerations for choosing between the conflicting interpretations of FRE 803(8)(C). First, while FRE 803(8) and FRE 803(6) are similar, FRE 803(8) omits the terms "opinions" and "diagnoses" and uses "factual findings." Since these different terms are used in separate but similar contexts within the same rule, the court assumed they have separate and distinct meanings. Second, the report in question was written pursuant to a Coast Guard regulation which stipulated that such reports were not to be used in litigation. The court deemed this to be the kind of negative factor which the Advisory Committee suggested should weigh against the evidentiary use of conclusions or opinions contained in an official report. Id. at 457-58.

5"E.g., Gencarella v. Fyfe, 171 F.2d 419, 422 (1st Cir. 1948).
dent. This separation is often easily accomplished and permits jury contemplation of the factual evidence free of contamination from inadmissible hearsay and opinion.

4. Burden of Proof and Presumption of Competency

The liberal view of FRE 803(8)(C) impliedly places the burden of showing a lack of trustworthiness on the adverse party. This view not only shifts the burden to the party with less access to evidence on the issue, but it also permits the proponent of the report to gain admission on the presumption that the official was properly qualified to make such conclusions. Opponents argue that this presumption of trustworthiness of official reports is valid only to the extent that the reporter is competent. Without direct questioning of his qualifications to apply the requisite skills of his job and of his ability to analyze all factors, the fact finder will be unable to make the most cogent determinations possible.

B. The Argument in Favor of Admissibility

Proponents of the admissibility of evaluative reports base their argument on three primary contentions. First, evaluative reports comply with the requirements of necessity and trustworthiness, as do routine official reports. Second, the very nature of a given report is difficult to determine since it is impossible to draw a clear distinction between fact and opin-

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59 Id. The court in Gencarella also held that cross-examination of the reporting official as to portions of the report does not make the entire report admissible. Id. at 421-23.

60 Application of this principle in Baker v. Elcona Homes Corp., 588 F.2d 551 (6th Cir. 1978), would have produced a much more satisfactory result. The court struggled to justify its admission of conclusions based on the self-serving statements of the defendant by declaring that such data was admissible under Fed. R. Evid. 801(d)(1)(B) as a prior consistent statement which rehabilitated the witness after an accusation of recent fabrication. The record fails to reveal any such accusation. Id. at 559. Since the patrolman who had prepared the report had testified personally prior to the introduction of the report for its conclusion as to responsibility for the accident, a more reasonable approach would have been to recall the official to the stand to deliver his opinion and conclusion testimony personally.

61 Advisory Committee’s Note, supra note 28, at 590.


63 Comment, supra note 43, at 118.

64 See notes 68-74 infra and accompanying text for a discussion of these factors.
Finally, the evidence contained in the reports is not conclusive. In addition to compelling policy arguments favoring admissibility, proponents argue that an examination of the Federal Rules of Evidence and the accompanying Advisory Committee's Note suggests that admissibility of evaluative reports is the intention underlying the Rule.

1. Necessity and Trustworthiness

The special need for admission of evaluative reports, like that for routine official statements, is the expediency of getting the evidence before the fact finder without disrupting the functions of the public official. The jury must hear all available evidence with probative value if it is to arrive at a knowledgeable decision. At the same time, the public is entitled to efficient productivity from its elected and appointed officials. Allowing evaluative reports into evidence would alleviate the problem of repeatedly calling officials away from their official duties.

According to advocates of their admissibility, several factors assure the trustworthiness of evaluative reports. Salient among the factors is timeliness. The official generally reaches the accident or occurrence quickly and can, therefore, observe physical evidence and interview participants and witnesses before conditions change and perceptions dim. The importance of timeliness is emphasized by studies showing that one's memory of events declines rapidly. An important consideration is the need to preserve the memories of public officials; because they prepare so many reports in the course of their duties, it is probable an official will not remember a particular incident in detail, if at all, by the time it reaches trial. In that situation,
not only would the report be more accurate and reliable, but calling the official to the witness stand would be a waste of time. Additionally, the alacrity with which an official report is made minimizes the opportunity for fabrication by parties, the tendency of parties to rationalize the facts favorably to themselves and the opportunity for parties to try to persuade witnesses of their version of the story. So far as hearsay is concerned, it is presumed that a skilled investigator would include information which was not based on personal knowledge only after investigating sufficiently to convince himself of its reliability. Finally, proponents contend that “[t]he jury’s function should not be reduced by excluding relevant evidence unless the court is reasonably assured that the result of the litigation will be less reliable if the evidence is revealed to the jury.”

2. The Fact-Opinion Distinction

Those favoring admission of evaluative reports argue that, since distinction between fact and opinion is so elusive, evaluative reports should be admitted into evidence regardless of the presence of opinion or conclusion lest valuable evidence be lost to the finder of fact.

While the Tenth Circuit Court of Appeals has indicated that admissibility of a report to prove the opinion of an official investigator is a matter of judicial discretion, the Third Circuit has declared unequivocally that official reports containing

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71 Wallace, supra note 20, at 264. To Wallace “[t]hese considerations seem overwhelmingly to support admissibility of the official statements involved.” Id.

72 Part of the police report to which the plaintiff objected in Baker v. Elcona Homes Corp., 588 F.2d 551 (6th Cir. 1978), was the statement of the defendant regarding his inference that he had the green light.

73 McCormick, supra note 17, at 727-37. See also 4 Weinstein at 803-204, who argues: “[I]f the trial judge finds that the particular expert in question would not have relied upon facts not directly observed by him unless he, in light of his experience, knew them to be trustworthy, the investigative report should not be rejected on the ground of lack of personal knowledge.”

74 4 Weinstein at 803-167.

75 Id. at 803-185. See McCormick, supra note 17, at § 317, who suggests that limiting admissibility of a report to the portions based on first hand observation is inappropriate.

76 Franklin v. Skelly Oil Co., 141 F.2d 568, 572 (10th Cir. 1944).
opinions will be admitted into evidence. The Third Circuit held that an official report is "no less admissible because it contains conclusions of experts which are based on hearsay evidence as well as upon observation. These conclusions, by virtue of express statutory provision, go to weight rather than to admissibility."77

3. The Report is Not Irrebuttable

Another point advanced by proponents is that an official report does not, upon admission into evidence, become irrebuttible; the evidence contained therein is in no way conclusive, but is only considered prima facie evidence subject to rebuttal.78 Proponents also argue that there is no substance to the argument that a jury would be unduly influenced by the authoritative impact of the report of a public official since juries have long been considered capable of making fine distinctions and affording certain evidence more or less weight. Furthermore, those in favor of the admissibility of such reports assert that in most cases, the problem of undue influence is not significant.79

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77 Moran v. Pittsburgh-Des Moines Steel Co., 183 F.2d 467, 473 (3d Cir. 1950). The report in question was the result of a statutorily mandated investigation of a gas tank explosion. The court noted: "[T]his Court has several times held that hospital records are admissible under the statute and certainly medical diagnosis is no less a matter of opinion based upon observation and perhaps hearsay than this report of the Bureau's investigation." Id. Other decisions reinforce this position. See, e.g., Miller v. New York Produce Exchange, 550 F.2d 762 (2d Cir. 1977), which pointed to the difficulty of distinguishing fact from opinion when the opponent of official documents claimed they were conclusory. The court found no error in the admission of the documents, stating that "conclusory statements in an official or business report do not render it ipso facto inadmissible ..." Id. at 769. See also United States v. Beasley, 438 F.2d 1279 (6th Cir.), cert. denied, 404 U.S. 866 (1971), which illustrates the complex justifications courts are forced to make in this area. The court found no error in the failure to call as a witness the lab technician who processed the latent palm print which was used as evidence against the defendant. His report, according to the court, contained no opinion because it was not an assertion offered to prove its truth. This finding was contrasted with the report of the fingerprint expert who had identified the print as the defendant's. That report contained a material assertion of the defendant's guilt, and admission of the report without the expert's presence in court would have been error.

78 Wallace, supra note 20, at 265.

4. Intent Underlying the Exception

The Advisory Committee’s Note to FRE 803(8)(C) states that the Rule “assumes admissibility [of evaluative reports] in the first instance but with ample provision for escape if sufficient negative factors are present.” 80 The Committee provides four factors to guide in determining trustworthiness of evaluative reports: “(1) the timeliness of the investigation, . . . (2) the special skill or experience of the official, . . . (3) whether a hearing was held and the level at which conducted, . . . [and] (4) possible motivation problems suggested by Palmer v. Hoffman.” 81 The first three factors are self-explanatory and the fourth refers to reports tainted by ulterior motives, such as preparation of a report in anticipation of litigation, as occurred in Hoffman. 82 Aside from these factors, other criteria could apply in specific situations. 83 Proponents argue that these guidelines provide ample protection against indiscriminate use of untrustworthy evidence.

Those favoring admissibility argue that the refusal to admit evaluative reports under 803(8)(C) would be completely inconsistent with the similar business records exception, 803(6). That subsection specifically lists opinions as admissible, and courts have found that 803(8) “appears to overlap rather than to diminish 803(6).” 84 Proponents contend that

803(8)(C) even though it contained the examiner’s conclusions that certain of the defendant’s actions constituted racial discrimination. Upon remand for trial on the merits the examiner’s conclusion was found to be “untenable.” The expert opinion in this case was not unduly influential.

80 Advisory Committee’s Note, supra note 28, at 590.
81 Id.
82 318 U.S. 109 (1943). In Hoffman a railroad accident report was filed in accordance with railroad company regulations by the employee responsible for filing it. The report was found inadmissible nevertheless, since it was made with a view toward litigation. It lacked circumstances of apparent trustworthiness. This case provides one of the criteria for assuring the evidentiary validity of evaluative reports.
83 E.g., Florida Canal Indus., Inc. v. Rambo, 537 F.2d 200, 202-03 (5th Cir. 1976).
84 The court enunciated its own conditions for admissibility of evaluative reports: (1) the records must be kept pursuant to some routine procedure designed to assure their accuracy, (2) they must be created for motives that would tend to assure accuracy (preparation for litigation for example, is not such a motive), and (3) they must not themselves be mere culminations of hearsay or uninformed opinion.

537 F.2d at 203.
The debate over the interpretation of the phrase "factual findings" in FRE 803(8)(C) is little more than an intellectual exercise.

**Conclusion**

Both the arguments for and against the admissibility of evaluative reports are premised on sound reasoning. A compromise must be reached to ensure the efficient use of relevant evidence and of public officials' time and to protect the party opposing admission of the report. In short, the standard for determination of admissibility must ensure fairness in both the process and the result of the adjudication. Since interpretation of evaluative reports is essential in many cases, the most equitable solution would be to admit the reports into evidence only if they satisfy stringent safeguards.¹⁸

First, the trial court judge must have broad discretion to deny admission of a report.¹⁹ The report, or any part of it, should be excluded if the trial judge finds that its probative value is substantially outweighed by the risk of undue prejudice to the opponent or of misleading the jury.²⁰ Additional cause for excluding the report would be a finding by the judge that "the officer's inspection of the objective facts and his interviews of the eyewitnesses were too hasty and partial, or that the data derived therefrom were too inconclusive to furnish an adequate footing for the findings."²¹

Second, the offering party should have the burden of prov-

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¹⁹ See Florida Canal Indus., Inc. v. Rambo, 537 F.2d 200, 202-03 (5th Cir. 1976). Some courts have devised their own conditions for admissibility of evaluative reports. In the interest of uniform application of the law, a national standard should be set.

²⁰ "The search is for truth and the trial court is the first and best judge of whether tendered evidence meets that standard of trustworthiness and reliability which will entitle it to stand as evidence of an issuable fact, absent the test of cross-examination." McCormick, supra note 69 at 367 (quoting Judge Murrah in Franklin v. Skelly Oil Co., 141 F.2d 588, 572 (10th Cir. 1944)).

²¹ Wallace, supra note 20, at 265.

²² McCormick, supra note 69, at 369.
ing the report's validity. Since the trustworthiness of an evaluative report is contingent upon the competence of the official who made the report, the proponent should have the affirmative duty of proving to the court, prior to the report's admission, that the reporting official possessed adequate qualifications and that this particular investigation was performed competently. To this end, the proponent should be required to submit documentary evidence or direct testimony to the judge to convince him of the official's competence.

Third, since there is no guarantee that a party will learn during discovery that his opponent plans to introduce an evaluative report at trial, the proponent's affirmative duty should extend to require delivery of a copy of the report, or notice that one exists, to the adversary. This requirement would preclude the problem of surprise at trial and would enable the opposing party to utilize discovery to prepare his rebuttal. The offering party should be required upon the opponent's request and showing of good cause to produce the official for direct and cross-examination at trial or to prove actual unavailability of the official. The adverse party should not have the burden of calling the official as a witness.

Another important safeguard will be the judge's instruction to the jury regarding the weight to be accorded the hearsay, opinion and conclusions in the report and his warning to the jury against substituting the official's conclusions for their own. In some cases even more might be necessary to emphasize the gravity of this evidentiary problem to the jury. At least one trial judge had the jurors sign statements that they understood the use for which the evidence had been admitted and the weight to be accorded it.

Utilization of these safeguards should result in fairness to

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90 Comment, supra note 43, at 117.
91 Id. at 118.
92 McCormick, supra note 69, at 365.
93 See Savikas, supra note 37, at 245. This author asserts that such a procedure for admitting evaluative reports would increase the importance of discovery in the preparation for trial.
94 Comment, supra note 43, at 119.
95 McCormick, supra note 69, at 369.
all involved. While the safeguards outlined above might not have changed the outcome in *Baker v. Elcona Homes Corporation*, the result would have been based on a more sensible application of FRE 803(8). Perhaps the patrolman’s conclusions in the *Elcona Homes* case would have been admitted anyway, but unless the proponent had complied with the necessary safeguards he would have been required to elicit the conclusions from the patrolman on the witness stand. In general, these safeguards will result in a more uniform application of FRE 803(8) and will make appellate review less of a speculative venture. The proponent of an evaluative report will have ample opportunity to introduce relevant evidence so long as standards of reliability are met, and the opponent would be protected against the introduction of unduly influential hearsay and opinion. The work of public officials would be disrupted by court appearances only when fairness so required.97

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97 McCormick, supra note 69, at 369. McCormick theorizes that liberalizing the admissibility of official reports would result in more proficient investigating and reporting techniques, since officials would realize the likelihood that their reports would be used in court.