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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Proposed Amendment to Rule 803(8)
Date: December 15, 2004

At its Spring 2004 meeting the Evidence Rules Committee resolved unanimously to defer any consideration of a proposed amendment to Rule 803(8)—the hearsay exception for public reports. One version of a proposed amendment would have streamlined the rule to provide essentially that public reports are admissible unless the court finds that they are prepared in an untrustworthy manner. Another version would have narrowed the exclusionary language that currently applies in criminal cases.

The Committee voted to defer consideration of any amendment to Rule 803(8) because of the Supreme Court's decision in *Crawford v. Washington*. The Court in *Crawford* radically revised its Confrontation Clause jurisprudence. The question of whether a statement falling within a hearsay exception satisfies the accused's right to confrontation is now subject to a completely new and somewhat indeterminate set of standards. The constitutional law is in flux after *Crawford*. This uncertainty has a direct bearing on the proper scope of Rule 803(8), because most of the problems in using the Rule have arisen when the government offers a public report in a criminal case. This means that any amendment of Rule 803(8) that would apply to criminal cases is almost surely premature and unwise so shortly after *Crawford*.

In August 2004, the Committee received a request from a member of the public to consider an amendment to Rule 803(8). That request, from the Center for Regulatory Effectiveness (the "Center"), together with the extensive supporting documentation, is attached to this memorandum. The Evidence Rules Committee is required to consider a proposed amendment from a member of the public. The Reporter will report the Committee's resolution to the Center.

The amendment proposed by the Center is set forth in exhausting detail in the attached materials. This Reporter's memorandum is intended to inform the Committee on whether there is

a real need to amend the Rule in the manner suggested by the Center. It concludes that there is no such need.

Rule 803(8) currently provides as follows:

> **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 indicate lack of trustworthiness.

Reporter's Background Discussion of Rule 803(8)

Rule 803(8) is one of the most complex of all the Federal Rules of Evidence. The exception is divided into three parts and each is slightly different in its reach. Part (A) permits any record, report, etc., setting forth the activities of an office or agency to be admitted. It applies in both civil and criminal cases and allows *any* party to take advantage of it. *See, e.g., United States v. Hardin*, 710 F.2d 1231 (7th Cir. 1983) (DEA statistical report showing the average retail price and purity of cocaine purchased by DEA undercover agents, offered to prove the defendant's intent to distribute the large amount of cocaine he was arrested with, was admissible under Rule 803(8)(A)). Part (B) covers matters observed by public officials pursuant to duty imposed by law when there is also a duty to report these matters; this Part does not on its face appear to allow anyone to use this exception in a criminal case to admit reports of matters observed by police officers and law enforcement personnel. Thus, (B) appears to apply to both sides equally in civil and criminal cases. In criminal cases it permits both the government and the accused to utilize the exception for some

public reports–specifically reports of matters observed by someone who is a public official but not a law enforcement officer– but would seem to limit *both* sides by barring law enforcement reports from admission into evidence. Part (C) covers findings resulting from an investigation made pursuant to legal authority. It applies in *both* civil and criminal cases, but appears to state that *only* the defendant can utilize it in a criminal case. This is apparently a judgment that the government should be bound by its own findings, but that the defendant is protected by confrontation principles from being similarly bound—though of course the constitutional basis of the exclusionary language must be revisited in light of *Crawford*.

Because of the strong presumption of reliability accorded to public reports, the burden of proving untrustworthiness is borne by the party seeking exclusion. The Fourth Circuit explained the rationale for placing the burden on the objecting party:

> Placing the burden on the opposing party makes considerable practical sense. Most government-sponsored investigations employ well-accepted methodological means of gathering and analyzing data. It is unfair to put the party seeking admission to the test of "re-inventing the wheel" each time a report is offered. * * * [I]t is far more equitable to place that burden on the party seeking to demonstrate why a time tested and carefully considered presumption is not appropriate.

Ellis v. International Playtex, Inc., 745 F.2d 292, 301 (4th Cir. 1981).

Suggestions for Amendment Deferred at the Spring 2004 Meeting:

At the Spring 2004 meeting the Reporter set forth, for discussion purposes, two possible versions of a proposed amendment to Rule 803(8). Both proposals were deferred because of the uncertainty in criminal cases created by *Crawford*. The two versions follow.

Model One–Rectifying the Textual Anomalies

The most obvious textual anomalies in the existing Rule 803(8) are: 1) confusing placement of the trustworthiness clause; 2) apparent exclusion of exculpatory law enforcement reports offered by the accused under Rule 803(8)(B); 3) overbroad exclusion of law enforcement reports when offered by the government under Rules 803(8)(B) and (C) (subject of course to *Crawford*).

The suggested amendment that might take care of these three textual anomalies provided as follows :

(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 made under adversarial circumstances and offered against the accused, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made under adversarial circumstances pursuant to authority granted by law~~, unless~~. This exception is inapplicable if the sources of information or other circumstances indicate lack of trustworthiness in the preparation of the record, report, statement or data compilation.

Model Two: Deleting Overlapping Categories

The textual problems of Rule 803(8) arguably result from the unnecessary complexity of the three overlapping categories of public records. The suggested amendment for streamlining the amendment and making it less confusing provides as follows:

(8) Public records and reports.—Records, reports, statements, or data compilations, in any form, of public offices or agencies made pursuant to a duty imposed by law , ~~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.

The Basics of the Center's Proposed Amendment to Rule 803(8):

The Center proposes the following amendment to Rule 803(8):

(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.

The Center's Justifications for the Proposed Amendment:

The Center argues that the amendment will fulfill at least four functions:

1) First, it will impose the reliability requirements that have been promulgated by federal legislation and OMB guidelines to guarantee the quality of information in reports issued by the Federal Government.

2) Second, it will expand the kinds of factors that courts can use to determine whether a public report is sufficiently reliable to be admissible; specifically, the court will now be allowed to consider characteristics of the report (e.g., accuracy and completeness) as distinct from the methods of its preparation.

3) Third, it will apply the gatekeeper function of *Daubert* to the review of public reports.

4) Fourth, it will make clear that concerns about the reliability of a public report are questions of admissibility, not weight.

The four justifications are given substantial elaboration in the Center's report, attached to this memo.

Questions and Concerns for the Evidence Rules Committee:

There are a number of questions and concerns that the Evidence Committee might wish to address in considering the advisability of the Center's proposed amendment to Rule 803(8). Among these questions are:

1. Does the proposed amendment make any more sense than the amendments previously deferred in light of *Crawford*?

2. Is there a need for Rule 803(8) to reference the quality control standards of federal legislation and OMB guidelines?

3. Is there a need to expand the factors that are currently considered by the courts in determining the reliability of public reports? And if so, does the amendatory language accomplish that expansion?

4. Assuming the proposal is meritorious, does it justify an amendment to the Rule during the time that another package of amendments is working its way through the rulemaking process?

Each of these questions will be evaluated in turn.

1. Does the proposed amendment make any more sense than the amendments previously deferred in light of *Crawford*?

The Center's proposal is different in some respects from the proposals deferred by the Committee at its last meeting. However, the proposals share a basic goal: to admit reliable public reports and to exclude unreliable ones. This common goal, however, runs straight into the change wrought by *Crawford* in criminal cases. *Crawford* holds that if hearsay is testimonial, it doesn't matter how reliable it might be — the only way it can be admitted is if the declarant is subject to cross-examination.

This is not to say that law enforcement reports are going to be more or less admissible after *Crawford*. The question will be whether a particular law enforcement report is or is not testimonial. An argument could be made that routine tabulations of unexceptional data (e.g., border patrol records of vehicle crossings) are not in fact testimonial within the meaning of *Crawford*, because such reports are not prepared with a view to producing them as accusatory statements in a criminal case. Thus, there is an argument that only those law enforcement reports prepared with an eye toward prosecuting a particular accused will be found to be testimonial after *Crawford*. If that is the case, then the admissibility of law enforcement reports will end up in about the same place as it is in most courts today, i.e., tempering the absolute exclusionary rule in the text, and excluding only those reports prepared under adversarial circumstances.

On the other hand, it could be argued that *every* law enforcement report is testimonial when offered against an accused. The Court in *Crawford*, in compiling its list of clearly testimonial statements, seemed to focus on the participation of law enforcement in the production of the hearsay. The examples included accomplice confessions to law enforcement, grand jury testimony, and plea allocutions of accomplices. If the listing of these examples is intended to mean that law enforcement participation in preparing the statement *is* what makes a hearsay statement testimonial, then the result of *Crawford* would be that Rule 803(8)(B) and (C) are to be applied the way they are written, i.e., no law enforcement report can be admitted against a criminal defendant.

Of course, there 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. So far, there has been no published decision that I am aware of that has evaluated a law enforcement report under *Crawford*.

It is notable that there is nothing in the Center's proposed amendment that makes it less susceptible to *Crawford* uncertainties than are the proposals deferred by the Committee at its last meeting. The Center's proposal applies to those public reports that are admitted by the courts in criminal cases ---- i.e., the routine, nonadversarial reports.

So with respect to the Center's proposal, there is the same risk that concerned the Committee

at its last meeting: the amended Rule could be unconstitutional as applied after *Crawford*. This could happen in one of two ways: 1) the amended rule could be construed to cover public records that are testimonial, and the reliability requirement of the amended rule would not satisfy the *Crawford* requirement of cross-examination for such reports; or 2) the amended rule could be construed to cover public records that are *not* testimonial, and yet the standards set forth by the amendment may not match the requirements for non-testimonial hearsay that are left for further development by the Court in *Crawford*.

Of course it is true that the *current* Rule 803(8) is susceptible to the same unconstitutional application after *Crawford*. But it is one thing to have the Supreme Court create constitutional questions about existing rules. It is another thing to pay the costs of amendment and yet end up with a rule that *still* raises the same constitutional questions.

The Center argues that its amendment can be construed to apply only to civil cases, and therefore no *Crawford* problems are presented. Yet the amendment does not say that it is only limited to civil cases. It does amend a subdivision that seems to exclude law enforcement reports, but the subdivision has not been read as it is written. That subdivision has been read to admit public reports that are routine and nonadversarial, such as records of border crossings. So if the language that has not been read literally is retained — as it is in the Center's proposal — there is no reason to think that courts would read it any differently than they had previously.

But even if the Center's amendment were to specify that it was only intended to affect civil cases, the problem then would be the possible need for serial amendments to the Rule. It may well become necessary at some point to amend Rule 803(8) to accommodate the changes wrought by *Crawford* in criminal cases. However, the need for or specifics of such an amendment will have to await judicial clarification of the meaning of *Crawford* —i.e., what exactly does "testimonial" mean, and what constitutional standards, if any, are applicable to non-testimonial hearsay? If the Center's amendment were to be proposed now, this could create the undesirable situation of having to amend the same rule twice in a relatively short period of time.

It would seem that Rule 803(8) would have to be creating extremely serious problems in civil cases before the Committee would wish to impose the costs of a sequential amendment to the Rule. As will be seen in the sections below, it does not appear that the Center has made the case that the problems are serious, if indeed there is any problem at all.

2. Is there a need for Rule 803(8) to reference the quality control standards of federal legislation and OMB guidelines?

The Center's memorandum sets forth the provenance and intent of the federal legislation on information quality and the corresponding OMB Guidelines. The memorandum appears to imply that the current Rule 803(8) is somehow inconsistent or in conflict with the legislation and guidelines. The complaint does not appear to be that the current Rule *precludes* a court from using the legislation and guidelines as a reference point for determining whether a proffered public report is admissible under Rule 803(8). Rule 803(8) requires a court to consider whether a public report is trustworthy, and certainly the information quality standards for public reports can be considered relevant to trustworthiness. An amendment would not seem necessary to *permit* a court to rely upon the information quality standards.

Instead, the complaint seems to be that courts are admitting public reports that do not satisfy the information quality standards, by holding those reports sufficiently trustworthy and ignoring the federal standards. The argument therefore goes that Rule 803(8) is in conflict with the information quality standards because it does not require courts to use them, even though the standards are applicable to the proffered reports. So the goal of the amendment is to *require* courts to employ the information quality standards in reviewing the admissibility of a public record. The failure of a proffered report to comply with the information quality standards is, by the terms of the amendment, a factor supporting exclusion.

The problem with this analysis is that there is nothing at all in the federal legislation, nor in the OMB standards, that purports to govern evidentiary admissibility. Simply put, these are not rules of evidence. Nothing in the legislation or standards suggests that failure to comply will render a report inadmissible in a federal trial. The Center makes a passing argument that Congress was concerned about disseminating unreliable reports, and dissemination to a jury "surely comes within Congressional intent." But there is nothing sure about that at all. Ordinarily, when Congress passes a statute outside the Federal Rules of Evidence that purports to govern evidentiary admissibility, it makes that point clearly. The federal courts have held that statutes are not to be used to exclude relevant evidence unless the statute clearly expresses its intent to exclude evidence from a federal trial. See, e.g., *United States v. Lowery,* 166 F.3d 1119 (11th Cir. 1999) (holding that relevant evidence obtained in violation of the McDade Act could not be excluded; noting that if Congress wants a statute to require exclusion of evidence, "it will have to tell us that in plain language using clear terms."). The fact is that the legislation and standards on information quality are designed to guarantee that a public report is reliable; there is no design to exclude non-complying reports from a federal trial.

Beyond the lack of any conflict between Rule 803(8) and the information quality standards, it bears noting that requiring a court to use those standards may result in problems of application. It seems certain that many of the public reports that are offered in federal courts are not even subject to the information quality standards. Examples include reports of ad hoc commissions, state agencies, and law enforcement bodies. (Put another way, not every report admitted under Rule

803(8) is a report by a federal agency subject to the information quality standards.) How are those reports to be treated? The Center's proposed amendment seems to indicate that the court might have to apply the information quality standards to those reports. Under the amendment the court must factor in "noncompliance" with the information quality standards. The term "noncompliance" can certainly mean a failure to meet the standards even if not bound by them—just as easily as it can mean that the report is bound by the standards and fails to meet them. Yet a different and equally serious problem will be created if the amendment is construed not to cover reports that are exempt from the information quality standards. In that case, there will be two sets of reliability standards in the same rule—one for reports subject to the information quality standards, and a lesser one for reports not so subject. It makes no sense to apply two different reliability standards to comparable reports offered under the same rule. Nor does it make sense to apply stricter reliability standards to the reports of federal agencies, as it would seem that these reports are likely to be more trustworthy than any other kind.

In sum, it appears that there is little good and possibly some harm in specifying that federal courts are to consider information quality standards in assessing the trustworthiness of a public record offered under Rule 803(8). Federal courts are not currently prohibited from considering such standards, where appropriate, under the existing Rule; nothing in the legislation requires that evidence be excluded for failure to comply with the standards; and including specific language in the Rule will result in uncertain and perhaps nonsensical application of the standards. It seems preferable to leave the relevance of information quality standards to the discretion of the trial judge, as the current Rule 803(8) already does.

3. Is there a need to expand the factors that are currently considered by the courts in determining the reliability of public reports? And if so, does the amendatory language accomplish that expansion?

The Center states that an amendment to Rule 803(8) is necessary because "factors such as objectivity (or bias), accuracy, completeness, and reproducibility (i.e., adequate disclosure of methodology and underlying data)" are specified in the information quality standards and yet are allegedly ignored by many federal courts assessing the admissibility of public records. Thus, the Center suggests that the rule make clear that these factors must be taken into account by the court.

There are several problems with the Center's premise that the factors "such as" objectivity, accuracy, completeness and reproducibility" should be added to a list of relevant factors. The first problem is that there *is no list* in the existing Rule. There are several factors that are listed as relevant in the Committee Note (i.e., timeliness, special skill or experience, conduct of a hearing, and motivation), but there is nothing in the text of the Rule. It is therefore confusing at best to add some

factors relevant to trustworthiness to the text and leave others to the Note.

It should be noted that there are many references to trustworthiness and reliability in the Federal Rules of Evidence, and none of those Rules contain a list of factors in the text of the Rule. See, e.g., Rule 803(6) (referring generally, as does Rule 803(8), to the source of information and the method and circumstances of preparation, as bearing on lack of trustworthiness); Rule 804(b)(3) (referring generally to "corroborating circumstances" that must clearly indicate the trustworthiness of the statement); Rule 807 (referring generally to "circumstantial guarantees of trustworthiness" equivalent to the other hearsay exceptions). Even the amendment to Rule 702, whose major purpose was to guarantee the reliability of expert testimony, does not establish a list of relevant factors in the text of the Rule. The amendment simply requires in general terms that an expert's testimony be based on "reliable principles and methods."

There is good reason to avoid a list of reliability factors in the text of a rule. The risk is the factors in the list will be treated as exclusive even though they are not intended to be. Even if not seen as exclusive, there is a risk that the listed factors will be treated as more important than the relevant factors that are not listed. And there is no possible way to list all of the factors that might pertain to reliability, and so there is no chance of having an all-inclusive list. Thus, the prior history of the Evidence Rules, as well as good sense, cuts against listing the factors cited by the Center in the text of the Rule.

It might be argued that the Center does not in fact list any reliability factors in the text of its proposed amendment to Rule 803(8); rather it simply refers to noncompliance with information quality standards as a factor to be taken into account. But it is not that simple. First, the information quality standards are now a listed factor—no such other factor is listed nor is any like factor found in any other trustworthiness rule. Moreover, by referencing the information quality standards, the amendment would in fact incorporate trustworthiness factors into the text of the Rule. Indeed, it would so in a manner that is likely more problematic than listing the factors would be. Under the Center's amendment, the federal court would have no ready list of factors. It would have to plumb through OMB regulations to determine which information quality standards should apply to the proffered report. These factors may vary, at least in some degree, from agency to agency. This is hardly a user-friendly proposal.

All of this might be worth it if there is evidence that Federal courts have ignored "factors such as objectivity (or bias), accuracy, completeness, and reproducibility (i.e., adequate disclosure of methodology and underlying data)" in reviewing public reports under Rule 803(8). It does seem that factors such as bias, completeness, reliable methodology and sufficient basis should be considered relevant factors in determining the reliability of most public reports— though it is also probable that flexibility is required because public reports differ in provenance, subject matter, etc., so that a rigid list of factors appears unwarranted. At any rate, accepting that the Center's listed factors are important, it is by no means the case that federal courts are wholly ignoring these factors.

In fact such factors as bias, completeness, reliable methodology and sufficient basis are

routinely considered by courts in reviewing the trustworthiness of public reports. This is so despite the conclusions drawn by the Center on the basis of its review of the case law. The Center assumes that most courts are ignoring these factors whenever they declare that a factor such as bias is a question of "weight" rather than "admissibility". But a more careful look indicates that almost all of the cases cited by the Center consider the factors cited by the Center as relevant to reliability and thus admissibility. However, these courts have ruled that a minor flaw in any of these factors does not justify exclusion; rather, a minor flaw is to be addressed on cross-examination and argument and thus becomes a question of weight. And the reason that a minor flaw is not determinative is that public reports are presumed trustworthy; thus, the opponent must make a strong case of untrustworthiness before a report can be excluded. See *Beech Aircraft v. Rainey,* 488 U.S. 153, 167 (1988) (relying on Advisory Committee Note to the Rule indicating that with respect to public reports "admissibility is assumed in the first instance"). It therefore makes perfect sense that minor flaws in the reliability factors, whether singly or cumulatively, are ordinarily questions of weight. It is only when those flaws are serious and substantial that they become questions of admissibility. And the Center's proposal does not purport to change that presumption. In sum, the case law cited as problematic presents little if any problem.

The Center's Analysis of Case Law

It would not be worth the time to undertake a point by point critique of every case cited by the Center as problematic. But it is probably worth it to analyze a few of them, to illustrate the point that the courts have been getting it right in excluding only those public reports that are demonstrably untrustworthy.

1. *Blake v. Pellegrino,* 329 F.3d 43 (1st Cir. 2003): This was a malpractice action in which the decedent's cause of death was listed as "asphyxia by choking." The trial court excluded this part of the report because he was not persuaded that the decedent's death was in fact caused by choking. The Court reversed on the ground that the trial court had arrogated to itself the role of the jury in deciding whether to believe the conclusion in the report. The court held that the ultimate conclusion of the report was for the jury. The methodology used by the reporter was for the court.

The ruling in *Blake* is unexceptional and indeed eminently correct. In deciding admissibility, a judge does not decide whether evidence can be believed by the jury. The Supreme Court made this very point in *Daubert*, when it declared that the gatekeeper function applied to the expert's methodology, but that the expert's conclusion was for the jury. It is also consistent with the amendment to Rule 702, which provides in the Committee Note that

> When facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in the amendment on "sufficient facts or data" is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other.

Indeed, if what the Center means by "accuracy" is a determination that the judge agrees with the conclusion of the public report, then there is all the more reason to reject the proposed amendment. Allowing the judge to exclude a public report on the ground that he does not agree with it is completely contrary to the presumption of reliability that a public report carries, and is also completely inconsistent with the jury's role.

2. *Gentile v. County of Suffolk*, 926 F.2d 142 (2d Cir. 1991): The Center complains that the Court looked at the trustworthiness question as a matter of weight rather than admissibility. The report, about the County's negligence in police training, was found by Judge Weinstein to be reliable and was admitted at trial. The County complained that it was precluded from attacking the report at trial as a result of Judge Weinstein's ruling on trustworthiness. But the court held that the County was confusing the trustworthiness of the report (an admissibility question) with the weight it should be given by the jury; the County was free at trial to attack the report for bias, incompleteness, or any other flaw. The court noted that the judge properly refused to instruct the jury that he had found the report to be trustworthy, and instead instructed the jury that the report was admissible for whatever weight the jury chose to give it.

It is difficult to understand the Center's objection to the result and analysis in *Gentile*. It is clear that the question of trustworthiness is a threshold requirement for the judge, and then it is for the jury to determine how much credit to give to the report. In attacking the "credibility" of the report to the jury, the opponent may well make the same arguments at trial that it would make at an admissibility determination. But there is nothing remarkable or unusual about this. See, e.g., *Beech Aircraft, supra*, 488 U.S. at 168 ("it goes without saying that the admission of a report containing "conclusions" is subject to the ultimate safeguard -- the opponent's right to present evidence tending to contradict or diminish the weight of those conclusions").

For example, a criminal defendant who claims that a confession was involuntary will seek to exclude the confession by bringing to the judge's attention the fact that he was threatened by police officers. If the judge finds nonetheless that the confession was voluntary, the defendant can attack the weight of the confession by bringing to the jury's attention the fact that he was threatened by police officers. It is quite common for admissibility and weight factors to track each other. There is nothing at all in *Gentile* to indicate that Rule 803(8) is creating a problem in the courts. And note that the trial judge in *Gentile* was Judge Weinstein, who is unlikely to make an elementary gaffe in the application of an evidence rule.

3. *Complaint of Nautilus Motor Tanker Co.*, 862 F.Supp. 1251 (D.N.J. 1994): The Center complains that the court admitted a Coast Guard report under Rule 803(8) without considering, at the admissibility level, the charge that the Coast Guard investigator was unqualified and that the report was incomplete. In fact the court acted properly in reaching its decision to admit the report.

The court began its analysis with the well-accepted proposition that public reports are presumed reliable and that the opponent faced a "heavy burden" in challenging the trustworthiness of the report. The court recognized the fact that questions of the quality of the investigator and thoroughness of the investigation were pertinent to the admissibility of the report. It simply held that factual assertions of problems on these two counts were not "sufficiently convincing" to show the report was untrustworthy. The court found that the existence of other factors of trustworthiness (e.g., timeliness and lack of bias) outweighed the possible defects stressed by the opponent. Therefore, the defects became questions of weight.

The *Nautilus* result is completely unremarkable given the presumption of reliability that attaches to public reports. Given this presumption, it cannot be the case (as the Center seems to assume) that a report should be excluded whenever the opponent raises a claim of lack of qualifications, incompleteness, or faulty methodology. As applied to admissibility, the claim of defect must be so serious as to substantially outweigh any positive trustworthiness factors that are found. If they are not that serious, then they become questions of weight. Far from excluding the factors of qualification and completeness as part of the admissibility question, the *Nautilus* court explicitly considered those factors before finding the report admissible. It simply held that the defects cited did not substantially outweigh the trustworthiness factors that it had found to exist. In other words, a public report does not have to be perfect to be admitted.

4. *Moss v. Ole South Real Estate, Inc.*, 933 F.2d 1300 (5th Cir. 1991): The Center declares that *Moss* is a "leading case on credibility and weight v. admissibility" and is relied upon in other circuits. It therefore is a worthy candidate for investigating the Center's premise that the courts have misapplied Rule 803(8) by treating factors pertinent to admissibility solely as questions of weight for the jury. The case involved two reports— one by the Air Force and one by HUD — investigating allegations of housing discrimination. The magistrate judge found that the reports were not admissible under Rule 803(8). He reasoned that the reports drew inaccurate conclusions from the information that had been obtained; that the reports were incomplete; and that the reports relied on biased witnesses. The court found that the magistrate judge had abused its discretion, in that he excluded the reports because he found them not credible. Essentially, the magistrate judge had disagreed with the conclusions in the reports. The court concluded 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. As the Supreme Court stated in *Beech Aircraft*, 'this trustworthiness inquiry -- and not an arbitrary distinction between 'fact' and 'opinion' -- was the Committee's primary safeguard against the admission of unreliable evidence.'"

Contrary to the conclusion of the Center, the court in *Moss* did not misinterpret admissibility factors as questions of weight. Rather, the court in *Moss* reaches the correct result: that a public report is not to be excluded simply because the court disagrees with its conclusions. As with expert testimony, conclusions are for the jury; in deciding admissibility, the trial court is to focus on the methodology employed by the public body in reaching its conclusion.

The Center takes specific exception to the *Moss* court's assertion that the following factors are pertinent only to weight: 1) the accuracy of the report; 2) the completeness of the report; and 3) the possibility that the report relies on information coming from biased witnesses. Taking each of these assertions in turn:

1) The accuracy of a report is indeed almost always a question of weight rather than admissibility. If the court excludes a report simply because it finds the conclusion inaccurate, this is a classic usurpation of the jury's role. Essentially, "inaccurate" is simply another word for "not credible". To take another example, assume that a trial judge excluded a dying declaration even though it was made by a person who had personal knowledge of the event and was under belief of impending death. Assume that the ground for exclusion is, "I think the victim's identification of the perpetrator was not accurate." That judge would be reversed for usurping the jury's role in determining the credibility of witness testimony (the witness in this case being a hearsay declarant). The same should be true when a trial judge excludes a public report, otherwise admissible, on the ground that it is "inaccurate."

It is true that in extreme cases, a report might be so inaccurate that it should not be admitted. It is at least conceivable that the report's conclusion is so patently incorrect that a court could conclude that there must be something wrong with the methodology employed by the public entity. This is the same principle applied to expert testimony under Rule 702, i.e., that conclusions are for the jury except in extreme cases where the conclusion is so patently wrong as to indicate some problem with the methodology. See the Advisory Committee Note to the 2000 amendment to Rule 702.

The Center omits a footnote by the *Moss* court recognizing that in extreme cases the inaccuracy of a report can be a question of admissibility. Note 5 of the opinion provides as follows:

> Of course, a court should not completely ignore an 803(8)(C) report's conclusions. If reasonable jurors could not accept the report's conclusions, then there would be no reason to admit the report. There must be, in other words, some reasonable basis for the conclusions. The absence of some reasonable basis will, however, be unusual because of the nature of the reports covered by Rule 803(8)(C). The two reports before us do not have such a problem. The conclusions are supported by reasonable factual findings and reasonable jurors could accept the conclusions.

2) The fact that a public report did not take into account all of the pertinent sources of information is properly considered a question of weight, again with the exception of extreme cases in which there was virtually no investigation. The reason for this is, once again, that public reports are presumed reliable. See *Moss* at 1308 ("while Rule 803 is concerned with hearsay and hearsay is excluded because of the general distrust of out-of-court declarants, Congress has ruled that there is a presumption that this distrust should generally not apply to public officials doing their legal duties. Evaluative reports generally do not have the four problems associated with most hearsay -- problems of memory, perception, ability to communicate, and sincerity. Whether evaluative reports do in fact have

these hearsay dangers is most often a question of methodology, not a question of credibility.")

The *Moss* court does not say that an incomplete public report is always admissible, with the lack of completeness always a question of weight. Rather, it says that given the presumption of reliability attached to public reports, any defect in completeness is presumed to be a question of weight. Exclusion on admissibility grounds is reserved for those public reports in which the entity patently failed to use proper investigative methods (e.g., failed to consider any of the relevant sources of information).

3) The court in *Moss* does not say that reliance on biased sources is always a question of weight rather than admissibility. Rather, it says that given the presumption of reliability attached to public reports, any reliance on biased sources is presumed to be a question of weight. However, in extreme cases, a public report can be excluded for inappropriate reliance on biased sources. For example, if the public entity relies *solely* on sources that are clearly unreliable because they have a motive to falsify, the report may be excluded under the trustworthiness clause of Rule 803(8). The Center omits the footnote in *Moss* (note 3) that makes this point:

> We do not suggest that bias may never render a report unreliable under Rule 803(8)(C). In this case, however, from reading the magistrate's ruling, we are also left with the opinion that he either disagreed with the conclusions of the Air Force and HUD or did not think that evaluative reports should generally be admissible. Neither reason is within a court's discretion.

Indeed there are a number of cases — not cited by the Center — that exclude public reports relying predominantly or exclusively on sources of information that are biased or otherwise untrustworthy. See e.g., *Anderson v. City of New York*, 657 F.Supp. 1571 (S.D.N.Y. 1987) (report concerning police misconduct was excluded because only one side's evidence was heard); *Faries v. Atlas Truck Body Mfg. Co.*, 797 F.2d 619 (8th Cir. 1986) (accident report prepared by police officer was properly excluded because the officer prepared his report after talking to only one of the drivers).

As Judge Selya says, "we need go no further." The Center has simply not made the case that courts construing Rule 803(8) are improperly treating factors pertinent to admissibility as solely questions of weight. While it is not worth writing out all of the cases for the Committee, it appears that every one of the cases cited by the Center can be explained on the following terms: public reports are presumed reliable, and therefore the trial court only needs to determine whether the methods employed by the public entity are those that tend to guarantee trustworthiness. Questions of accuracy, completeness, bias, etc., are questions of weight except in extreme cases in which the report is so plainly defective that it makes no sense to give it to the jury.

Given the fact that the Center does not challenge the basic premise of Rule 803(8)—that public reports are presumed reliable because it is the government's job to make reliable reports — it is clear that any confusion over admissibility and weight with respect to public reports lies with the Center and not with the courts.

The alleged disparity between admissibility of public reports and admissibility of expert testimony

The Center contends that an amendment to Rule 803(8) is necessary to guarantee that the gatekeeper standards of Rule 702 are applied to scrutinize public reports. The Center is correct that the conclusions found in public reports will probably be treated by a jury as tantamount to expert testimony. The Center is also correct that if a report of a public entity will be treated as expert testimony, it should be scrutinized by the court in the same basic way as the court would review expert testimony for trial. But there are two major differences between review of expert testimony in a public report and review of an expert proffered for trial.

First, the conclusion of an expert in a public report may necessarily be more compressed and less tailored to litigation than the testimony of an expert preparing for trial. So in reviewing a public report the court acting as gatekeeper should not expect the kind of detailed explication of methodology, basis, etc., as would be expected from a witness preparing for trial. Second, and more importantly, a public report is presumed reliable—the burden is on the opponent to show unreliability, and therefore public reports are excluded only if the public "expert's" opinion is patently unreliable. In contrast, it is the proponent's burden to show that a trial expert's testimony is reliable.

Taking the differing presumption into account, the Center has simply not made the case that the cases concerning public "expert" conclusions under Rule 803(8) are somehow in conflict with or disparate from the case law involving trial experts under *Daubert* and Rule 702. The Center cites 13 cases as being "in conflict with the specific factors for determining reliability under Rule 702." (There are three other citations with a cf. reference, but each of those cases was decided on grounds other than reliability). It is notable that six of these cases were decided before *Daubert* imposed the gatekeeper function on expert testimony. (One cited case was decided 43 years before *Daubert*). It seems unwise to find an inconsistency between treatment of public "experts" and trial experts when the standards for trial experts had not even been set. Two of the post-*Daubert* cases cited are *Blake* and *Gentile*, discussed above. In both of those cases, the courts drew a distinction between conclusion and methodology—exactly the same distinction drawn by the *Daubert* Court. Nor was either case one in which the conclusion in the public report was so demonstrably unreliable that it should have been excluded because of some presumed flaw in the methodology.

It bears noting that the Court in *Daubert* does not say that the reliability of an expert's opinion is purely a question of admissibility and never a question of weight. Rather, the trial court's

job is to exclude clearly unreliable evidence; the fact that the expert's testimony is not perfect is a question of weight rather than admissibility. For example, the fact that an expert's conclusion might be inaccurate is not a ground for exclusion, for the Court in *Daubert* declared that the "focus, of course, must be solely on principles and methodology, not on the conclusions they generate." Moreover, as the Committee Note to Rule 702 puts it:

> A review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule. *Daubert* did not work a "seachange over federal evidence law," and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi*, 80 F.3d 1074, 1078 (5th Cir. 1996). As the Court in *Daubert* stated: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." 509 U.S. at 595.

And all this goes double for public "expert" reports, where there is a heavy presumption of reliability. Thus, the five remaining post-*Daubert* cases cited by the Center for "disparity" can all be explained by the fact that the courts refuse to exclude the public reports simply because there is some flaw in the methodology or basis of the "expert's" opinion. These rulings would probably be within the court's discretion under *Daubert* even if the expert were to testify at trial. They are definitely within the court's discretion to admit given the presumption of reliability attendant to public reports.

To take one example cited by the Center: the court in *Union Pacific v. Kirby Inland Marine*, 296 F.3d 671 (8th Cir. 2002), held that a report by the Coast Guard concerning a bridge was properly admitted. The plaintiff opposed admission on the ground that the Coast Guard relied on hearsay to reach its conclusion. The court held that reliance on hearsay did not render the report inadmissible. The Center criticizes this result and argues that it is disparate with what a gatekeeper would do were the expert to testify at trial. But in fact this is not so. Experts who testify at trial can rely on hearsay, so long as it is the type of information relied upon by other experts in the field. See Rule 703. From what can be gleaned of the facts in *Union Pacific*, the hearsay relied upon the Coast Guard was precisely the kind on which engineers would rely in determining whether a bridge posed an obstruction to navigation, i.e., reports from those experienced with the river and knowledgeable about the bridge. As the court in *Moss* put it:

> Under Rule 703, experts are allowed to rely on evidence inadmissible in court in reaching their conclusions. There is no reason that government officials preparing reports do not have the same latitude.

Finally, it should be noted that there are a number of reported cases — none cited by the Center — that uphold exclusion of public reports when it is clear that the report would be excluded if coming from a trial expert. See, e.g., *Jenkins v. Whittaker Corp.*, 785 F.2d 720 (9th Cir. 1986) (report excluded where public official had little competence or experience and did little

investigation); *Matthews v. Ashland Chem., Inc.*, 770 F.2d 1303 (5th Cir. 1985) (public report on cause of a fire was properly excluded due to insufficient investigation and official's lack of qualifications).

In sum, there is no justification for amending Rule 803(8) to rectify a disparity between that Rule and Rule 702. The disparity, if any, is due to the presumption of reliability attendant to public reports, and there is no good argument for doing away with that presumption.

4. Assuming the Center's proposal is meritorious, does it justify an amendment to the Rule during the time that another package of amendments is working its way through the rulemaking process?

The long-term planning report adopted by the Standing Committee states that a Committee should try to "package" its amendments. The rationale for "packaging" is that a constant stream of piecemeal amendments to the rules is confusing to courts and litigants and is damaging to the integrity of the rulemaking process. The proposed amendments to the Evidence Rules that are currently out for public comment were packaged in compliance with the long-term planning report. The amendment to Rule 404(a), for example, was held for at least a year until the other amendments were discussed and approved.

The amendment to Rule 803(8) proposed by the Center cannot be packaged with any other current proposal, as the proposals to amend the other Evidence Rules are currently out for public comment. If the Center's amendment were approved, presumably it would be proposed to the Standing Committee for release for public comment at the Spring 2005 meeting. This would mean that one proposed amendment to the Evidence Rules would be out for public comment while others would be before the Judicial Conference and then the Supreme Court. That is a situation to be avoided, at least in the absence of exigent circumstances. And it is clear from the above analysis that the circumstances supporting the Center's proposal are not exigent, if indeed they exist at all. So even if the Committee is in favor of the Center's proposal, it may wish to defer any amendment to Rule 803(8) until at least the January 2006 meeting of the Standing Committee. By that time, the current package will have been enacted, if all goes well.

It may be that exigent circumstances might require the Committee to consider and propose some other amendment to the Evidence Rules before the current package is enacted. The obvious possibility is an amendment to Rule 1101 to provide that the Evidence Rules apply to sentencing proceedings — an amendment that might be made necessary by the Supreme Court's decisions in *Booker* and *Fanfan*. If that is the case, then the Committee may wish to consider whether to include an amendment to Rule 803(8) as part of a new package. But that assumes that the Center's proposal is indeed needed to solve a problem that the courts are having in applying Rule 803(8). While there might be a problem in applying 803(8) in criminal cases, it appears that the Center has found no problem worth addressing in civil cases.