
Cheryl Musselman-Brown

Abstract: In *Beech Aircraft Corp. v. Rainey*, the United States Supreme Court held that opinions and conclusions in evaluative reports are within the scope of the federal public records hearsay exception if trustworthy. Washington's public records hearsay exception excludes opinions and conclusions in evaluative reports. This Note analyzes the trustworthiness requirement under the federal rule and proposes that Washington adopt the federal rule.

The hearsay exception for public records and reports is based on a presumption that public officials preparing reports in the course of their employment will do so with accuracy and honesty. Evaluative reports are of particular concern to courts because they contain opinions and conclusions which may strongly influence a jury. In *Beech Aircraft Corp. v. Rainey*, the United States Supreme Court held that opinions and conclusions in evaluative reports are admissible under Federal Rule of Evidence ("FRE") 803(8)(C) if trustworthy. The trustworthiness inquiry will now be the focus of debate because it will be the primary means by which trial courts exclude opinions and conclusions that lack reliability. Courts evaluating trustworthiness will find guidance in the Advisory Committee's four factors and in cases which have applied the trustworthiness requirement.

The Washington Supreme Court did not adopt FRE 803(8)(C) when it adopted the other Federal Rules of Evidence because it determined that the subject was adequately covered by statutes and case law. Washington's current public records exception is unduly restrictive because it does not provide for the admission of opinions and conclusions. It is ambiguous because courts interpret Washington's law inconsistently. By adopting FRE 803(8)(C), the Washington Supreme Court could provide clarification and improve predictability in Washington Courts.

I. THE HISTORY OF THE FEDERAL PUBLIC RECORDS EXCEPTION

A. Hearsay Evidence and the Public Records Exception

Hearsay is a statement, other than one made by the person while testifying at the trial or hearing, which is offered into evidence to

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prove the truth of the matter asserted. Because hearsay evidence is not offered by the person who made the statement, it lacks reliability and is therefore inadmissible unless it meets the requirements of an exception.

Both the common law and evidence rules include numerous exceptions to the rule against admitting hearsay. The exceptions exist for situations in which circumstantial guarantees of trustworthiness and some measure of necessity or convenience are sufficient substitutes for the declarant's presence at trial.

The hearsay exception for public records provides that investigative reports authorized by law and prepared by public officials are admissible. The presumption that a public official's reports are trustworthy provides one basis for the public records exception. Officials normally prepare reports pursuant to a public duty and in connection with their employment. They have investigative experience and an incentive to be accurate. In most circumstances, neither the officials nor the officials' employers are parties to the lawsuit or have any other reason to be biased.

Necessity and convenience further justify admitting public records as evidence. Public officials are not likely to remember the details of...
reports prepared in the regular course of their employment; their testimony will therefore have little value.\textsuperscript{9} Officials also may be difficult to find years after the event occurred. Moreover, the limited information possibly gained by requiring the testimony of public officials does not justify the inconvenience and cost of calling such officials to testify.\textsuperscript{10} Finally, requiring a plaintiff to duplicate an investigation because the official is not available to testify is not cost-effective, and may even discriminate against low-income plaintiffs.\textsuperscript{11}

### B. The Controversy Concerning Evaluative Reports

Evaluative reports are public records containing opinions or conclusions resulting from public officials' investigations. The admissibility of the opinions and conclusions contained in these reports is a continuing source of disagreement among courts.\textsuperscript{12}

Opponents of the admission of opinions and conclusions express several concerns. First, they are disturbed by the possibility that unqualified officials might form faulty opinions or conclusions which are admitted into evidence without challenge.\textsuperscript{13} One purpose for cross-examination is to give a party opposing the testimony a chance to challenge the witness' perceptions and bases for the opinion.\textsuperscript{14} Admitting a report under a hearsay exception deprives the opposing party of that opportunity. Courts find this argument especially compelling when the official who prepared the report would not qualify as an expert under the expert witness rules.\textsuperscript{15}

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\textsuperscript{9} "There is a great likelihood that a public official would have no memory at all respecting his actions in hundreds of entries that are little more than mechanical." Wong Wing Foo v. McGrath, 196 F.2d 120, 123 (9th Cir. 1952).

\textsuperscript{10} Id.

\textsuperscript{11} See Note, The Trustworthiness of Government Evaluative Reports under Federal Rule of Evidence 803(8)(C), 96 HARV. L. REV. 492, 505–06 (1982) for an argument that the undue exclusion of evaluative reports discriminates against less wealthy litigants who cannot afford to hire their own experts.

\textsuperscript{12} In Beech Aircraft Corp. v. Rainey, 109 S. Ct. 439, 442–43 (1988), the Court described the issue as a "longstanding conflict." Rainey has resolved the issue for federal courts, but state courts which have not adopted the federal rules may decide the issue differently. See, e.g., the discussion of Washington law, infra, notes 90–115 and accompanying text.

\textsuperscript{13} See, e.g., Ellsworth v. Sherne Lingerie, Inc., 303 Md. 581, 495 A.2d 348, 364 (1985) (opinions “ordinarily ought to be received only after full opportunity for examination of the witness’ credentials and full opportunity for cross examination”).

\textsuperscript{14} MCCORMICK, supra note 2, § 245.

\textsuperscript{15} See, e.g., Jenkins v. Whittaker Corp., 785 F.2d 720, 727 n.18 (9th Cir. 1986) (if the witness would not be permitted to testify as to opinions or conclusions when under oath and subject to cross-examination, it makes no sense to permit the witness to testify as to opinions or conclusions in a hearsay form), cert. denied, 479 U.S. 918 (1986).
Biased reporting is a second important concern. Although part of the justification for the public records exception is that public officials are disinterested, this may not always be the case. For example, government agencies customarily prepare a report after an accident occurs involving agency personnel or equipment. This report would qualify under the public records exception. Clearly the agency has an interest in the outcome of the investigation. This interest weakens the presumption of unbiased reporting, one of the justifications for the public records hearsay exception.

A third concern is that an official report may unduly influence a jury because it is in writing and appears to be endorsed by the government. The jury may adopt without examination the opinions and conclusions in the report instead of assessing the facts themselves. The report will then have usurped the function of the fact-finder.

Proponents of the admission of opinions and conclusions argue that trustworthiness, necessity, and convenience justify the admission of evaluative reports. They assert that judicial discretion in determining admissibility can address and mitigate problems of investigator incompetence, bias, and jury misuse. Specifically, a court may exclude the report or portions of it for undue prejudice or lack of trustworthiness, or restrict the report’s use by issuing a limiting instruction to the jury.

16. For example, an agency official may be reluctant to conclude that the government was at fault if he or she knows that the report and its conclusions may later be used against the government at trial.

17. See United States v. MacDonald, 688 F.2d 224, 229–30 (4th Cir. 1982) (trial court did not abuse its discretion when it refused to admit a public record into evidence because it determined that the report would distract the jury from its task), cert. denied, 459 U.S. 1103 (1983); Comment, The Public Documents Hearsay Exception for Evaluative Reports: Fact or Fiction?, 63 Tul. L. Rev. 121, 141 (1988).

18. An additional concern about the admissibility of opinions and conclusions is that the admission of these reports is unfair to a criminal defendant who cannot cross-examine his or her accusers. See, e.g., Ellsworth v. Sherne Lingerie, Inc., 303 Md. 581, 495 A.2d 348, 364 (1985). The lack of cross-examination presents a serious problem in criminal cases where the confrontation clause of the United States Constitution grants defendants the right to confront witnesses used against them. U.S. CONST. amend. VI. See McCORMICK, supra note 2, § 252. FRE 803(8)(C) solves this problem by excluding from its scope reports offered against a criminal defendant. Fed. R. Evid. 803(8)(C). Washington courts do not make this distinction. See infra note 113 and accompanying text for a discussion of the problems with Washington’s approach.

19. See, e.g., Perrin v. Anderson, 784 F.2d 1040, 1047 (10th Cir. 1986) (jury instruction that report was to have no “determinative effect on any issue in the case” mitigated any prejudice from the report).
C. Federal Law

Before the adoption of the Federal Rules of Evidence, circuit courts were split over whether opinions and conclusions in evaluative reports were admissible. FRE 803(8)(C) purported to resolve this split by providing a hearsay exception for:

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . (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 a lack of trustworthiness.

Federal courts found the language of the rule, which permits the admission of evaluative reports containing "factual findings," unclear because the rule does not define the term "factual findings." Courts also found the Advisory Committee Notes ambiguous. The Advisory Committee accepts evaluative reports as falling within the scope of FRE 803(8)(C), but does not specifically allow or disallow opinions and conclusions. Analysis of legislative intent did not resolve the ambiguity. The House Judiciary Committee advocated a narrow interpretation that excludes opinions and conclusions. The Senate Judiciary Committee, expressing strong disagreement with the House Committee's approach, advocated a broad interpretation that includes the entire report. The two views were never reconciled. The split among the circuits remained unresolved.

21. See MCCORMICK, supra note 2, § 316 n.5.
22. FED. R. EVID. 803(8)(C).
24. FED. R. EVID. 803(8)(C) advisory committee's note.
25. "The [House] Committee intends that the phrase 'factual findings' be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this Rule." H.R. REP. No. 650, 93d Cong., 2d Sess. 14, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7051, 7088.
26. The Senate Committee noted:

The Senate Committee takes strong exception to [the House Committee's] limiting understanding of the application of the rule. We do not think it reflects an understanding of the intended operation of the rule as explained in the Advisory Committee notes to this subsection. . . . We think the restrictive interpretation of the House overlooks the fact that while the Advisory Committee assumes admissibility in the first instance of evaluative reports, they are not admissible if, as the rule states, 'the sources of information or other circumstances indicate a lack of trustworthiness'.

In the leading case following the narrow interpretation, Smith v. Ithaca Corp.,\textsuperscript{27} the widow of a deceased sailor offered into evidence a Coast Guard report containing a conclusion that the decedent was exposed to harmful levels of benzene vapors.\textsuperscript{28} The Fifth Circuit Court of Appeals held that the conclusion in the report was inadmissible under FRE 803(8)(C).\textsuperscript{29} The court emphasized the difference between the language in FRE 803(8)(C) and the language in FRE 803(6), the business records exception, which expressly allows opinion testimony.\textsuperscript{30} The court concluded that the use of the term “factual findings” in FRE 803(8)(C) instead of the term “opinions” as used in FRE 803(6) indicated that Congress did not intend for opinions to be admissible under FRE 803(8)(C).\textsuperscript{31}

The majority of the circuits adopted a broader interpretation of the term “factual findings.”\textsuperscript{32} In Baker v. Elcona Homes Corp.,\textsuperscript{33} the Sixth Circuit upheld the admission of a police accident report in a civil case, including the investigator’s finding that one of the cars ran a red light.\textsuperscript{34} The court agreed with the Senate Judiciary Committee’s conclusion that the purpose of the statute as defined by the Advisory Committee was to admit entire reports, including opinions and conclusions, unless they are untrustworthy.\textsuperscript{35}

II. BEECH AIRCRAFT CORP. V. RAINNEY

A. Facts and Disposition

In Beech Aircraft Corp. v. Rainey,\textsuperscript{36} the United States Supreme Court held that FRE 803(8)(C)’s exception for evaluative reports extends to opinions and conclusions contained in such reports. The case arose after a Navy flight instructor and her student were killed

\textsuperscript{27} 612 F.2d 215 (5th Cir. 1980).
\textsuperscript{28} Id. at 223 n.20.
\textsuperscript{29} Id. at 223.
\textsuperscript{30} Id. at 221–222. FRE 803(6) provides a hearsay exception for “[a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, . . . if kept in the course of a regularly conducted business activity.” FED. R. EVID. 803(6).
\textsuperscript{31} 612 F.2d at 221–22. The Ithaca court also relied on the Coast Guard’s own regulations, which expressly state that such investigations are not intended to fix civil or criminal liability. The court reasoned that such a restriction is a sufficient negative factor weighing against the evidentiary use of the opinions or conclusions contained in a report. Id. at 222.
\textsuperscript{32} See, e.g., Perrin v. Anderson, 784 F.2d 1040, 1046–47 (10th Cir. 1986).
\textsuperscript{33} 588 F.2d 551 (6th Cir. 1978).
\textsuperscript{34} The finding was based on a physical investigation and an interview with one of the drivers. Id. at 554.
\textsuperscript{35} Id. at 557.
\textsuperscript{36} 109 S. Ct. 439 (1988).
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when their Navy aircraft crashed during training exercises. The pilots' surviving spouses filed suit against the companies that manufactured and serviced the aircraft, claiming that equipment malfunction caused the accident. As part of their defense, the defendants offered into evidence an Air Force Judge Advocate General Report which contained the investigator's conclusion that pilot error was the most probable cause of the accident. The trial court held that the report, including the investigator's conclusion, was admissible.

A panel of the Eleventh Circuit, considering itself bound by Smith v. Ithaca Corp., held that the conclusions contained in the report should not have been admitted, and reversed the trial court holding. On rehearing en banc, the Eleventh Circuit reaffirmed the panel decision. The United States Supreme Court reversed, holding that FRE 803(8)(C) does not call for a distinction between facts and opinions or conclusions contained in evaluative reports.

B. Reasoning of the Court

The Court's analysis began with an interpretation of the statutory language. The Court found that a common definition of "factual findings" includes conclusions reasonably inferred from the evidence. Furthermore, the rule states that "reports...setting forth...factual findings" are admissible, not that "factual findings" are admissible. This language authorizes a court to admit entire reports that contain factual findings, not just factual findings contained in the reports. No language in the text justifies creating a distinction between facts and opinions contained in evaluative reports.

37. Id. at 441.
38. Id.
39. Id. at 444. Because of the extensive damage to the plane and the lack of any survivors, the cause of the accident could not be determined with certainty. Id. at 443.
40. Id.
41. 612 F.2d 215 (5th Cir. 1980). The Eleventh Circuit, in Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981), adopted as precedent decisions of the Fifth Circuit rendered prior to October 1, 1981. See discussion of Ithaca, supra notes 27-33 and accompanying text.
42. Rainey v. Beech Aircraft Corp., 784 F.2d 1523, 1528 (11th Cir. 1986).
43. Rainey v. Beech Aircraft Corp., 827 F.2d 1498, 1500 (11th Cir. 1987). The rehearing was held for the purpose of reconsidering the precedent in the circuit. The en banc court was evenly divided on the issue, however, so the Eleventh Circuit law remained unchanged. Id. A strong concurrence urged the Eleventh Circuit to reconsider its interpretation of FRE 803(8)(C). Id. at 1501-16.
45. Id. at 447 (citing Black's Law Dictionary).
46. Id.
47. Id.
The Court did not agree with the analysis in *Smith v. Ithaca Corp.* that emphasizes the difference between the language in FRE 803(8)(C) and the language in FRE 803(6) which specifically includes opinions. The Court noted that the legislative history of FRE 803(6) explains the difference—the Advisory Committee wanted to expand the traditional business records exception to include medical diagnoses and opinions.

The Court determined that, although the legislative history is ambiguous, the broad interpretation advocated by the Senate Committee is more in accord with the wording of the rule and with the Advisory Committee's comments. The Court noted that the Advisory Committee's comments made no mention of a dichotomy in the treatment of facts and opinions or conclusions.

The Court explained that the rule's requirements and other evidence rules provide the necessary safeguards. Opinions, to be admissible under FRE 803(8)(C), must be based on factual findings. The trial judge has the discretion to exclude an entire report or any portion of it if the judge determines that it is untrustworthy. This trustworthiness inquiry is a more logical basis for determining the admissibility of evidence than the analytically difficult distinction between fact and opinion.

The Court pointed out that the traditional rules limiting the admissibility of evidence continue to apply to evaluative reports. Evidence may be excluded under FRE 402 if not relevant, or under Rule 403 if unduly prejudicial. Furthermore, the opponent always has the right to present contradictory evidence or otherwise challenge a report or its

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48. *Id.* See supra notes 29–31 and accompanying text for the Ithaca court's analysis.
49. 109 S. Ct. at 446 n.8.
50. *Id.* at 448. The Advisory Committee's solution is found in the final paragraph of its report: Admissibility is assumed unless "sufficient negative factors are present." *Id.* (citing FED. R. EVID. 803(8)(C) advisory committee's note).
51. "What was on the Committee's mind was simply whether what it called 'evaluative reports' should be admissible." *Id.*
52. *Id.* at 448–49.
53. *Id.* at 449.
54. *Id.*
55. "Evidence which is not relevant is not admissible." FED. R. EVID. 402. Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.
56. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.
findings in the presence of the trier of fact. Finally, the Court stated that this broad approach is consistent with the Federal Rules' general trend of relaxing the barriers to opinion testimony.

III. FEDERAL LAW AFTER RAINEY: THE TRUSTWORTHINESS INQUIRY DETERMINES ADMISSIBILITY OF OPINIONS AND CONCLUSIONS IN EVALUATIVE REPORTS

The Rainey decision resolved the conflict among the circuits about whether opinions and conclusions are admissible under FRE 803(8)(C). The Court held that opinions and conclusions based on factual findings are admissible if trustworthy, and that the burden is on the party opposing admission to prove untrustworthiness. The Court did not define trustworthiness, and instead supported the Advisory Committee's intention to make the trustworthiness inquiry a matter of the trial court's discretion. Because the outcome of the trustworthiness inquiry will determine the admissibility of evaluative reports, future controversy over the application of FRE 803(8)(C) will focus on the trustworthiness requirement.

57. Rainey, 109 S. Ct. at 449.
58. Id. at 450.
59. The Rainey Court expressly declined to address whether legal conclusions contained in evaluative reports are admissible under FRE 803(8)(C). Id. at 450 n.13. However, if the Court were to apply the same statutory analysis to legal conclusions that it applied to factual opinions and conclusions, legal conclusions would not be admissible. The court relied on the definition of “findings of fact” in Black's Law Dictionary. Id. at 447. Black's definition of “findings of fact” includes opinions and conclusions based on facts, but does not include, and is defined separately from, “findings of law.” Black's Law Dictionary 324 (5th ed. 1983).

Furthermore, legal conclusions, even if admissible under the language of the rule, would not be admissible in court because they would be outside an investigator’s area of expertise and therefore untrustworthy. Legal conclusions require legal expertise, and most investigators will not be qualified to render such conclusions. See the discussion of the importance of an investigator’s expertise, infra, notes 72-81 and accompanying text.

The expert witness rules provide guidance here as well. FRE 704 provides that experts may give opinions as to ultimate facts, but cannot give opinions as to matters of law or mixed law and fact. Fed. R. Evid. 704 comment.

60. 109 S. Ct. at 450. Placing the burden on the opposing party makes sense. The hearsay exception is based on the presumption that investigations performed by public officials are reliable. To require the party seeking admission to prove reliability each time a report is offered would be unfair. “[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. 1984).

61. Rainey, 109 S. Ct. at 448-49.
A. The Trustworthiness Inquiry

An analysis of trustworthiness must begin with the Advisory Committee's notes. The Committee provided guidance by listing four factors which it felt would help courts in assessing trustworthiness.62 These factors are: (1) the timeliness of the investigation; (2) the special skill or experience of the official; (3) the level of any hearing conducted; and (4) the possibility of investigator bias.63 The Advisory Committee's factors broadly define the nature of a court's inquiry. The list is not specific, nor is it exclusive. The Advisory Committee merely provided a starting point for the analysis.64

A court applying the trustworthiness inquiry could also benefit from the court's analysis in Zenith Radio Corp. v. Matsushita Electric Industrial Co.65 In Zenith, the trial court applied the trustworthiness inquiry to public records and reports from several agencies.66 The court began its analysis with the four Advisory Committee factors and then added seven more specific factors.67 Zenith's factors build upon the Advisory Committee's factors; they are not independent. Zenith's factors define specific areas which should be addressed by courts when determining the trustworthiness of public reports.

The Advisory Committee's factors, refined by Zenith, and applied in other federal cases, provide guidance to courts. The following analysis

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62. FED. R. EVID. 803(8)(C) advisory committee's note.
63. Id.
64. "The formulation of an approach which would give appropriate weight to all possible factors in every situation is an obvious impossibility." Id.
66. In this pretrial hearing on Japanese electronic products antitrust litigation, the court had to rule on several types of evaluative reports, including documents from the U.S. Treasury Department and the U.S. Tariff Commission, findings arising out of proceedings under the Trade Expansion Act and Trade Act, records and findings of the Japanese Fair Trade Commission, and a report from the Organization for Economic Cooperation and Development. 505 F. Supp. at 1138.
67. The seven additional factors are as follows: (1) the finality of the agency findings and the likelihood of their modification or reversal; (2) the extent to which the agency findings are based upon proceedings relying on material which would be inadmissible evidence, and the extent to which such material is supplied by persons with an interest in the outcome of the proceeding; (3) the extent to which any hearings used appropriate safeguards and the extent to which any investigations complied with all applicable agency regulations and procedures; (4) the extent to which an ascertainable record exists on which the findings are based; (5) the extent to which the findings are a function of executive, administrative, or legislative policy judgment or implementation; (6) the extent to which the findings are based upon findings of another investigative body or tribunal which is itself untrustworthy; and (7) the extent to which any facts or data relied on by an expert are of a type reasonably relied upon by experts in the particular field. Id. at 1147.
includes the Zenith factors and the analysis from other relevant federal cases in the discussion of the Advisory Committee’s factors.

B. Applying the Trustworthiness Inquiry

1. The Timeliness of the Investigation

The first Advisory Committee factor is the timeliness of the investigation. A timely investigation is important because it can make use of fresh information. For example, when the subject of the investigation is an accident, an investigator who arrives quickly at the scene of an accident is more likely to be able to gather physical evidence and find witnesses. In addition, an investigator who speaks to witnesses early is more likely to receive accounts of the accident that are untainted by the influence of parties to the litigation.\(^68\)

Timeliness will be more important to investigations of accidents than to other types of investigations where evidence is not as likely to disappear or become tainted.\(^69\) If the report is the result of a study, or is based on information contained in documents, timeliness is less critical.\(^70\) In fact, time taken to complete the study or evaluate the information contained in documents may be an indication of thoroughness. Timeliness also may be less relevant when the report is a result of hearings, in which case the focus should be on the reliability of the hearings.\(^71\)

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68. The Advisory Committee Notes refer to Professor McCormick who supports the greater admissibility of investigative reports with the following:

The most important reason is time. The officer comes on the scene usually as early as it is feasible to get there. Usually the investigators of the parties come later and the statements they take are frequently partial and one-sided. . . . The officer is often able to interview witnesses before they have been pulled one way or the other by the parties.


69. Compare Baker v. Elcona Homes Corp., 588 F.2d 551, 554 (6th Cir. 1978) (investigation of car accident found trustworthy, in part, because the investigator arrived at the accident scene within six minutes), cert. denied, 441 U.S. 933 (1979) with Jenkins v. Whittaker Corp., 785 F.2d 720, 726 (9th Cir. 1986) (investigation of atomic simulator accident found untrustworthy, in part, because the investigator arrived at the accident scene over a week after the accident), cert. denied, 479 U.S. 918 (1986).

70. See, e.g., Ellis v. International Playtex, Inc., 745 F.2d 292, 303 (4th Cir. 1984) (epidemiological study was considered timely for purposes of FRE 803(8)(C) despite the fact that interviews with those affected with toxic shock syndrome occurred several months after the alleged occurrence of the illness).

71. See the discussion of hearings, infra text accompanying notes 82–84.
2. **Special Skill or Experience of the Official**

The second Advisory Committee factor is the special skill or experience of the investigating official. Part of the justification for the public records hearsay exception is the presumption that public officials who perform investigations in the course of their employment have the experience needed to form accurate conclusions from the evidence.\(^7\) Investigators who lack the necessary experience fail to meet this presumption. Their opinions and conclusions should therefore not be admitted.\(^7\)

Investigators should, at a minimum, meet the standards provided under the expert witness rules before a court finds the opinions and conclusions contained in their reports trustworthy. It would be anomalous to admit a report under a hearsay exception when the preparer of the report would not be permitted to give the same testimony in court as an expert witness.\(^7\) Under the FRE, a witness may testify as an expert if that witness' scientific, technical, or other specialized knowledge will be helpful to the jury.\(^7\) An expert may give an opinion based on facts and data not admissible at trial if the data relied on are "of a type reasonably relied upon by experts in the particular field."\(^7\)

Under the broad standards for specialized knowledge, an experienced investigator probably will qualify as an expert in his or her field of investigation, while an inexperienced or untrained investigator will not. Of course, the level of required experience will vary depending on the difficulty of the field of investigation. If an investigator does not qualify under the expert witness standards, then the opinions and conclusions contained in that investigator's report should not be admitted at trial.\(^7\)

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\(^7\) The Advisory Committee cites Professor McCormick, who describes the presumption of expertise: "The officer, too, is frequently a specialist—a doctor reporting a death, a fire marshal investigating a fire—or at least experienced in like investigations, such as a highway patrolman reporting on a collision." *Wider Use of Reports*, supra note 68, at 365.


\(^7\) *Jenkins v. Whittaker Corp.*, 785 F.2d 720, 727 n.18. (9th Cir. 1986), cert. denied, 479 U.S. 918 (1986).

\(^7\) *Fed. R. Evid.* 702.

\(^7\) *Fed. R. Evid.* 703.

\(^7\) If the investigator is not sufficiently qualified, the court must then decide whether to exclude the entire report or to exclude only those parts that contain opinions or conclusions. The decision will be a matter of judicial discretion. If parts of a report would be helpful to the jury
The expert witness rules permit an expert to rely on anything reasonably relied upon by experts in the field. This standard is reasonable for evaluative reports, and is one of the factors added by Zenith. If an investigator has enough specialized knowledge to qualify under the expert witness rules, then any opinions or conclusions formed by that investigator may be admissible, even if the expert bases the opinion in part on hearsay. To require a party to prove that each piece of information relied upon by the investigator was otherwise admissible would be impractical. There is no evidence that the drafters of the FRE contemplated such a requirement.

Zenith added two additional factors addressing the credibility of the underlying facts or data: Whether the information relied on would be admissible in court, and the extent to which any findings are based on findings of another investigation which itself might be untrustworthy. Although a report may be trustworthy even if it is based on evidence that would be inadmissible in court, a court has the discretion to decide that a predominance of evidence that is highly unreliable renders a report untrustworthy. The court must consider the data as a whole by evaluating the nature and source of the inadmissible evidence relied on as well as the other evidence supporting the conclusion.

The use of the expert witness rules when determining trustworthiness effectively addresses the concern about incompetent or unqualified investigators. Courts will exclude opinions and conclusions contained in reports that are prepared by investigators with no specialized knowledge or are based on unreliable facts or data.

and those parts appear reliable, either because they are in the preparer's area of expertise or because they do not include matters of judgment or discretion on the part of the preparer, then those parts of a report should be admitted.

78. FED. R. EVID. 703.
80. 505 F. Supp. at 1147.
81. See, e.g., Baker v. Elcona Homes Corp., 588 F.2d 551, 554 (6th Cir. 1978) (police accident report based on physical circumstances, vector analysis, and interviews with witnesses held admissible), cert. denied, 441 U.S. 933 (1979); Miller v. Caterpillar Tractor Co., 697 F.2d 141, 144 (6th Cir. 1983) (police accident report based solely on interviews with witnesses held inadmissible). The Miller court distinguished Baker in two important ways: the conclusions in Baker were based on independently verifiable facts, and the investigator was qualified as an expert in accident reconstruction. Miller, 697 F.2d at 143.
3. A Hearing and the Level at Which Conducted

The third Advisory Committee factor is whether a hearing was held and, if so, the level at which it was conducted. The Committee cites *Franklin v. Skelly Oil*, a case which supports the proposition that the lack of a hearing is a factor weighing against trustworthiness. In *Skelly Oil*, the trial court held inadmissible a letter written by an inspector to the fire marshall expressing the inspector's opinion as to the cause of the fire. The appeals court reasoned that given all the circumstances surrounding the letter, including the fact that there was no hearing, the trial court did not abuse its discretion when it denied admissibility.

The *Zenith* court, faced with numerous documents resulting from investigations including hearings, added to the analysis the finality of the hearings, the procedural safeguards used, and the existence of an ascertainable record. If the findings are made in the beginning of a protracted process which provides for review or reversal, then the findings should be considered less trustworthy than findings which are final and adopted by the agency. The extent to which the hearing includes procedural safeguards and includes an ascertainable record also should affect the credibility of the findings. A hearing does not guarantee trustworthiness. The quality of the hearing must be assessed, along with all other trustworthiness criteria.

4. The Possibility of Biased Reporting

The fourth Advisory Committee factor is possible bias of the investigator. The Committee cites the case of *Palmer v. Hoffman* for guidance. In *Palmer*, the Court held that an accident report prepared by an engineer involved in the accident was inadmissible under the business records hearsay exception because he prepared his report in the course of litigation, not in the course of business. The court reasoned that a report prepared for litigation purposes is not presumptively reliable.

Both the business records and the public records exceptions assume that people in the course of employment have an incentive to perform their jobs with accuracy and honesty. When an employee preparing
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either type of record has a reason to be biased, such as upcoming litigation, a court should find the employee's opinions and conclusions untrustworthy.

*Zenith* takes this analysis further by focusing on agency bias. Not only is a report untrustworthy if the preparer is biased, or if the report uses information received from biased witnesses, but the report is untrustworthy if its conclusions are a result of the agency's policy judgment or implementation.\(^8\) This extension of the inquiry into potential bias makes sense. If an agency has goals that will be either met or undermined by the conclusions reached in a report, the employee will have the incentive to be biased that the Advisory Committee cautioned against when it referred to *Palmer*.\(^9\) An employee's bias should weigh against the admission of a report containing self-serving opinions and conclusions by that employee.

5. *Other Indicia of Unreliability*

The hearsay exception for public records and reports is based on the presumption that such reports are prepared by experienced public officials who have incentive to be accurate and no reason to be biased. The trustworthiness inquiry requires that courts compare this presumption to the circumstances of a particular report. When the circumstances of a report do not justify the presumption, the report should not be admitted under the hearsay exception.

The Advisory Committee's four factors provide a foundation for the trustworthiness analysis. Because the factors are broad, however, courts will want to look elsewhere for further guidance. *Zenith*'s factors define specific areas which should be addressed in most public records. Other federal cases help to identify the issues. But because courts will have to examine a diverse range of evaluative reports, no checklist will suffice. Courts may start with the Advisory Committee's factors, but they will not finish until they carefully consider all of the indicia of reliability or unreliability contained in any particular report.

\(^8\) 505 F. Supp. at 1149.

IV. WASHINGTON LAW: AN ARGUMENT FOR ADOPTING THE FEDERAL RULES OF EVIDENCE

A. Washington’s Public Records Hearsay Exception

In 1978, the Washington Supreme Court adopted a new evidence code which incorporated most of the Federal Rules of Evidence.\(^{90}\) The court declined to adopt FRE 803(8), not because of any disagreement with it, but because the drafters determined that the subject matter was adequately covered by statutory and case law.\(^{91}\) Washington Rule of Evidence ("ER") 803(a)(8)\(^{92}\) refers to Revised Code of Washington ("RCW") section 5.44.040,\(^{93}\) which reflects the drafters’ intent to retain the statute as the public records hearsay exception.\(^{94}\)

Courts found the language of RCW section 5.44.040 ambiguous and did not apply the statute in a consistent manner before the adoption of the federal rules. Some courts interpreted the statute as the public records hearsay exception,\(^{95}\) while others ignored the statute and applied a common law public records hearsay exception.\(^{96}\) Furthermore, some later cases considered RCW section 5.44.040 merely an authentication statute.\(^{97}\)

In contrast, courts were consistent in their treatment of opinions and conclusions contained in evaluative reports. They interpreted both the statute and the common law rule to provide only for admission of facts, not opinions or conclusions.\(^{98}\)

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90. WASH. R. EVID. 101-1103.
91. WASH. R. EVID. 803 comment.
92. This would have been the equivalent of FRE 803(8) if Washington had adopted it.
93. WASH. REV. CODE § 5.44.040 (1987) provides:
   Certified copies of public records as evidence. Copies of all records and documents on record or on file in the offices of the various departments of the United States and of this state, when duly certified by the respective officers having by law the custody thereof, under their respective seals where such officers have official seals, shall be admitted in evidence in the courts of this state.
98. See, e.g., Steel v. Johnson, 9 Wash. 2d 347, 358, 115 P.2d 145, 150 (1941). Opinions are also excluded from admission under Washington's business records hearsay exception. Young v. Liddington, 50 Wash. 2d 78, 84, 309 P.2d 761, 764 (1957). The federal courts and most other state courts now permit the admission of opinions in business records. See FED. RULE EVID. 803(6); FED. RULE EVID. 803(6) advisory committee's notes; discussion of FRE 803(6) supra notes 30-31 and accompanying text.
B. Recent Cases Interpreting the Public Records Hearsay Exception

Several recent appeals court cases have addressed the public records exception using varied reasoning.\(^9\) In *Kaye v. State Department of Licensing*,\(^10\) the court of appeals held that a police officer's report, which stated that the driver refused to take a breathalyzer test, was inadmissible in a drivers license revocation proceeding because it contained conclusions.\(^101\) The court explained that although RCW section 5.44.040 had been interpreted as the public records exception, for a document to fit within this exception it must contain facts and not conclusions or the expression of opinion.\(^102\) The officer's report was inadmissible because it consisted of merely a printed form setting forth conclusory language.\(^103\)

In *State v. Dibley*,\(^104\) the court of appeals refused to admit a third party's plea bargain against a criminal defendant under RCW section 5.44.040 on the basis that the statute only provides for authentication.\(^105\) The court acknowledged that RCW section 5.44.040 had been recognized in the past as the public records hearsay exception, but questioned whether that interpretation still would apply after the adoption of the ER.\(^106\) The court did not explain how it concluded that the hearsay exception was no longer valid.

In *Cantu v. Seattle*,\(^107\) the court of appeals looked to federal cases for guidance when it upheld the trial court's decision not to admit Equal Employment Opportunity Commission ("EEOC") determinations in a civil employment discrimination case.\(^108\) The court relied on federal Title VII cases and stated that the admissibility of EEOC determinations is based on FRE 803(8)(C).\(^109\) The court adopted a

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101. *Id.* at 133, 659 P.2d at 549.
102. *Id.* at 133–134, 659 P.2d at 549.
103. *Id.* at 134, 659 P.2d at 549.
105. *Id.* at 826, 691 P.2d at 212. "A document can be what it purports to be and still be unreliable hearsay." *Id.* at 828–29, 691 P.2d at 212.
108. *Id.* at 100, 752 P.2d at 392.
109. *Id.* at 99, 752 P.2d at 392.
discretionary standard which allows for the admission of EEOC findings, including opinions and conclusions, if trustworthy. The court did not mention RCW section 5.44.040.

C. Washington’s Public Records Hearsay Exception Is Unduly Restrictive and Confusing

Washington’s public records exception, by excluding opinions and conclusions in evaluative reports, excludes evidence that would be helpful to the trier of fact. Under Washington’s rule, any opinions or conclusions, regardless of their trustworthiness and importance to the case, will be excluded. For example, consider the following scenario: An experienced police officer arrives at the scene of an accident immediately, observes the accident scene, interviews witnesses, and concludes that one of the cars was speeding. In Washington, the conclusion in this report would not be admissible even though the information is trustworthy and could be critical to the disposition of the case. This blanket exclusion of valuable evidence hinders the jury’s fact-finding effort.

Furthermore, Washington’s current public records exception is confusing. Courts inconsistently interpret RCW section 5.44.040, and the Dibley court openly questioned the statute’s validity as a public records hearsay exception after the adoption of the FRE. The fact that the Cantu court relied on federal law, rather than Washington law, for guidance in formulating a new rule for EEOC reports further demonstrates the state of confusion.

D. Washington Could Improve its Public Records Exception by Following Rainey

The admission of trustworthy opinions and conclusions as provided under FRE 803(8)(C) would significantly improve Washington’s public records hearsay exception. Juries would be better equipped to perform their fact-finding function with all trustworthy information at their disposal. The safeguards built into the Rule, such as the requirement that the report be based on facts, the trustworthiness inquiry, the lack of admissibility against criminal defendants, and the continued

110. Id. at 99, 752 P.2d at 392; cf. Plummer v. Western Int’l Hotels Co., 656 F.2d 502, 505 (9th Cir. 1981) (EEOC reports brought under Title VII actions are per se admissible).
use of the other Rules of Evidence that limit the admission of evidence, reduce the risks associated with admitting opinions and conclusions.111

By adopting FRE 803(8)(C), the Washington Supreme Court also would resolve the confusion that follows from the inconsistent interpretations of RCW section 5.44.040. Washington courts would have a definitive public records exception and federal case law for guidance.

The three recent Washington cases could have been decided on a principled basis under FRE 803(8)(C). The Kaye court followed Washington's traditional approach of excluding opinions and conclusions when it held a conclusory police report inadmissible under RCW 5.44.040. Under FRE 803(8)(C), however, the report would be considered presumptively reliable and admissible in a civil proceeding.112 This is a better result. A police report indicating that a driver refused to take a breathalyzer test provides important evidence to the trier of fact. If there were any indication that the report was not trustworthy, such as police misconduct or bias, the court could prevent the report's admission. Absent these indicia of unreliability, the report would be admitted for the trier of fact to evaluate.

Perhaps the court did not apply the public records exception in Dibley because the report was a third party's plea bargain offered against a criminal defendant. Washington courts, when applying the public records hearsay exception, have never distinguished between reports used against civil litigants and those used against criminal defendants. Part of Washington's reluctance to admit opinions and conclusions contained in public reports may be due to concerns that an expansion of the rule might violate criminal defendants' constitutional rights.113

Dibley would have come out the same under FRE 803(8)(C), but the analysis would have been clear and predictable. Under FRE 803(8)(C) this report would have been inadmissible, but solely because the evidence was being offered against a criminal defendant. The

111. For many of the same reasons, Washington could also consider changing the business records exception to admit opinions.


113. See R. ARONSON, supra note 97, at 803-43. In State v. Dibley, the court held that the document was admissible under ER 804(b)(3), which provides a hearsay exception for statements against interest when the declarant is unavailable. 38 Wash. App. 824, 829, 691 P.2d 209, 212 (1984). Because use of this rule is restricted to cases where the declarant is unavailable, it is less intrusive on criminal defendants' rights than the public records exception which does not have that restriction.
FRE's exclusion of reports offered against criminal defendants decisively solves the confrontation clause problem.

Both the holding and the analysis in *Cantu* would be unchanged under the FRE because the *Cantu* court used the FRE for guidance. If Washington had adopted FRE 803(8)(C), the holding would have been predictable. The rule developed by *Cantu* for EEOC findings is the same rule used under FRE 803(8)(C): A trustworthy report is admissible, and an untrustworthy report is not.

E. Implementing the Change

The Washington Supreme Court has the power to promulgate rules of evidence that will supercede any conflicting statute. The court could, therefore, adopt FRE 803(8)(C) and provide lower courts with the guidance of *Rainey*, *Zenith*, and other federal cases. Washington courts would then admit trustworthy opinions and conclusions in evaluative reports unless the presumptions on which the hearsay exception is based are undermined by indicia of unreliability in a particular report.

The adoption of FRE 803(8)(C) in Washington would allow Washington fact finders access to trustworthy and relevant opinions and conclusions. The new rule would further the interests of clarity, reliability, and predictability which the Washington Supreme Court supported when it adopted the other Washington Rules of Evidence.

V. CONCLUSION

*Rainey* held that opinions and conclusions contained in evaluative reports are admissible in federal courts if trustworthy. The safeguards provided by the trustworthiness inquiry ensure that reports which are biased, misleading, or inaccurate are not presented to the jury. Moreover, the other federal rules limiting the admissibility of evidence will prevent the admission of reports which are unduly prejudicial or irrelevant.

Washington could improve its public records hearsay exception by adopting FRE 803(8)(C) and following *Rainey*. The federal rule would change Washington's law to include the admission of opinions


115. If the Supreme Court were to adopt FRE 803(8)(C), then *WASH. REV. CODE* § 5.44.040 could be applied as an authentication statute consistent with some courts' current interpretations. The statute would have no effect as a hearsay exception. *WASH. REV. CODE* § 2.04.200 (1987).
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and conclusions contained in evaluative reports and would provide coherent precedent for Washington courts to follow.

Cheryl Musselman-Brown