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## **Admissibility of Investigatory Reports in § 1983 Civil Rights Actions - A User's Manual**

Martin A. Schwartz

*Touro Law Center*, [mschwartz@tourolaw.edu](mailto:mschwartz@tourolaw.edu)

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# ADMISSIBILITY OF INVESTIGATORY REPORTS IN § 1983 CIVIL RIGHTS ACTIONS—A USER'S MANUAL

MARTIN A. SCHWARTZ\*

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\* Professor of Law, Touro College—Jacob D. Fuchsberg Law Center; BBA, City College of New York, 1965; J.D., Brooklyn Law School, 1968, LL.M., New York University School of Law, 1973. Professor Schwartz is the author of Schwartz and Kirklin, *Section 1983 Litigation: Claims, Defenses and Fees* (2d ed. 1991 and 1996 Cum. Supp. No. 1), *Section 1983 Litigation: Federal Evidence* (2d ed. 1995), and the monthly "Public Interest Law" column in the New York Law Journal, and is Co-Chair of the Practicing Law Institute Program on § 1983 Litigation.

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## I. INTRODUCTION

In many parts of the nation, tense relations between the police and private citizenry have placed law enforcement operations under intense public scrutiny. From coast to coast, commissions and internal affairs units are being employed to investigate allegations of law enforcement misconduct and corruption. These investigations typically culminate in the issuance of an investigatory report. In some instances these reports have been highly critical of law enforcement agencies and, not surprisingly, well-publicized by the media.

In New York, the Mollen Commission found the New York City Police Department rampant with corruption throughout its ranks, a complete collapse of command responsibility, and a powerful "code of silence."<sup>1</sup> The New York Temporary Commission of Investigation found that the Suffolk County District Attorney's Office and Police Department tolerated and ratified serious incidents of police misconduct.<sup>2</sup> In California, the Christopher Commission, created in response to the Rodney King beating, found the Los Angeles Police Department guilty of widespread use of excessive force, racism, and inadequate supervision, and found a seriously flawed civilian complaint review system resulting primarily from the officers' code of silence.<sup>3</sup>

Not all law enforcement investigatory reports are of such a grand scale. Investigatory reports of law enforcement activities may concern particular incidents,<sup>4</sup> systemic problems,<sup>5</sup> or both. A particularly well-

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1. City of New York, COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT (July 7, 1994). See C. Krauss, *2-Year Corruption Inquiry Finds a 'Willful Blindness' In New York's Police Department*, N.Y. TIMES, July 7, 1994, at 1.

2. Temporary Commission of Investigation of the State of New York, AN INVESTIGATION OF THE SUFFOLK COUNTY DISTRICT ATTORNEY'S OFFICE AND POLICE DEPARTMENT (1989). See *Gentile v. County of Suffolk*, 129 F.R.D. 435 (E.D.N.Y. 1990), *aff'd*, 926 F.2d 142 (2d Cir. 1991).

3. REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT (July 7, 1991). See *Montiel v. City of Los Angeles*, 2 F.3d 335 (9th Cir. 1993).

4. For decisions involving investigatory reports of particular incidents, see, e.g., *Kinan v. City of Brockton*, 876 F.2d 1029 (1st Cir. 1989); *McQuaig v. McCoy*, 806 F.2d 1298 (5th Cir. 1987); *Perrin v. Anderson*, 784 F.2d 1040 (10th Cir. 1986); *Wilson v. Beebe*, 743 F.2d 342 (6th Cir. 1984), *vacated on other grounds*, 770 F.2d 578 (6th Cir. 1985) (en banc); *Swietlowich v. County of Bucks*, 610 F.2d 1157 (3d Cir. 1979).

5. For decisions involving investigatory reports of systemic problems, see, e.g., *Falk v. County of Suffolk*, 781 F. Supp. 146 (E.D.N.Y. 1991); *Gentile v. County of Suffolk*, 926 F.2d 142 (2d Cir. 1991), *aff'g* 129 F.R.D. 435 (E.D.N.Y. 1990); *Anderson v. City of N.Y.*, 657 F. Supp. 1571 (S.D.N.Y. 1987).

publicized incident, such as that involving Rodney King, may be symptomatic of what is thought to be a systemic problem and, thus, trigger a broad-based investigation.

Are investigatory reports of law enforcement activities admissible in federal civil rights actions brought under 42 U.S.C. § 1983, challenging the constitutionality of the conduct of law enforcement officers?<sup>6</sup> Reports of a particular incident are relevant to the issue of the individual liability of the particular officer or officers charged with constitutional wrongdoing.<sup>7</sup> Reports on systemic issues may be highly probative on the issue of municipal liability.<sup>8</sup> Whether of an individual incident, systemic problem, or both, because these reports carry the imprimatur of government, they may be given great weight by the trier-of-fact.<sup>9</sup> However, because the reliability of investigatory reports can and does vary greatly from case to case, this weight may or may not be deserved.<sup>10</sup>

The admissibility of governmental investigatory reports typically raises difficult contentious issues. As a starting point, the report itself, when offered for its truth, is hearsay.<sup>11</sup> Moreover, investigatory reports frequently contain findings and conclusions that are not based upon the investigating officer's personal knowledge. An investigation may involve not only an analysis of the scene of the incident, but also the investigator's interviews and discussions with individuals who themselves may, or may not, have personal knowledge. A hearing may or may not be held. If a hearing is held, the reliability of the testimony given can vary

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6. For an overview of the law pertinent to § 1983 actions contesting law enforcement activities, see *infra* notes 26-35 and accompanying text.

§ 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1988).

7. See *infra* notes 28-32 and accompanying text.

8. See, e.g., *Gentile*, 129 F.R.D. at 459-60. See *infra* notes 33-35 and accompanying text.

9. See *infra* notes 229-37 and accompanying text.

10. See *infra* notes 144-86 and accompanying text.

11. Rule 801(c) of the Federal Rules of Evidence defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." A "statement" is defined in part as "an oral or written assertion . . . intended by the person as an assertion." FED. R. EVID. 801(a).

greatly from case to case, and indeed, from witness to witness. Investigations may also rely upon written documents, including studies and reports, which are themselves hearsay. Other variables may significantly impact upon the report's reliability. The time when the investigation was carried out in relation to the pertinent events, the procedures used in conducting the investigation, the thoroughness of the investigation, whether a public hearing was held, and the skills, experience, motivations, and biases of the investigating officers can and do differ greatly from case to case.<sup>12</sup> It is thus not difficult to see how the reliability of investigatory reports can vary greatly from case to case.

Nevertheless, Congress found overall that governmental investigatory reports are sufficiently reliable to justify the creation of a specific hearsay exception for them. Rule 803(8)(C) of the Federal Rules of Evidence creates a hearsay exception "in civil actions and proceedings and against the Government in criminal cases" for public records containing "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."<sup>13</sup> Under this rule, investigatory reports may be admitted into evidence even though the investigators, the preparers of the report, and the suppliers of information are not subject to cross-examination at trial.<sup>14</sup>

The Rule 803(8)(C) hearsay exception goes far beyond the common law exception for public records,<sup>15</sup> is controversial and complex, raises

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12. See *infra* notes 146-63 and accompanying text.

13. Federal Rule of Evidence 803(8)(C) provides a hearsay exception for: "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."

14. Rule 803 does not require the opportunity for such cross-examination. See Steven P. Grossman & Stephen J. Shapiro, *The Admission of Government Fact Findings Under Federal Rule of Evidence 803(8)(C): Limiting the Dangers of Unreliable Hearsay*, 38 KAN. L. REV. 767, 773 (1990).

15. At common law there was "disagreement among the decisions" over the admissibility of investigatory reports. FED. R. EVID. 803(8)(c) advisory committee's note. The disagreement was "due in part, no doubt, to the variety of situations encountered, as well as to differences in principle." *Id.* The prevailing view was that investigatory reports were admissible only insofar as they reflected the officer's first-hand knowledge and not for their evaluative conclusions. Charles T. McCormick, *Can The Courts Make Wider Use of Reports of Official Investigations?*, 42 IOWA L. REV. 363 (1957). Professor McCormick's article advocated broader admissibility of investigatory reports, including those containing opinions. *Id.* at 365. The Supreme Court has referred to Professor McCormick's "influential article relied upon by the [Advisory] Committee . . ." *Beech Aircraft v. Rainey*, 488 U.S. 153, 166 n.10 (1988).

numerous difficult evidentiary issues, and has generated a great deal of scholarly commentary.<sup>16</sup> As one federal district court observed:

Section (C) . . . is quite complex, and represents a major change from common law principles. For, quite contrary to what was generally permitted at common law, under the aegis of 803(8)(C), materials representing the distillation of a process that may have involved years of investigation and the taking of thousands of pages of testimony may be presented to the trier of fact in one fell swoop.<sup>17</sup>

Because it is "such a potent litigation tool, the parties are prone to skirmish mightily over the trustworthiness *vel non* of public records and reports."<sup>18</sup>

The admissibility of investigatory reports raises an unusually broad range of potentially significant evidentiary issues. To begin with, a number of important issues are raised by Rule 803(8)(C) itself, including: (1) what is encompassed within the rule's reference to "factual findings resulting from an investigation?";<sup>19</sup> (2) how should an investigatory report's "trustworthiness" be evaluated?;<sup>20</sup> and (3) does the Rule 803(8)(C) hearsay exception encompass the accompanying data and information upon which the findings are based?<sup>21</sup> Of these Rule 803(8)(C) issues, trustworthiness is by far the most frequently and sharply contested issue.

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16. See Grossman & Shapiro, *supra* note 14, at 767; Jonathon E. Grant, *The Trustworthiness Standard for the Public Records and Reports Hearsay Exception*, 12 W. ST. L. REV. 53 (1984); Kevin F. Bruen, Comment, *Evidence Opinions and Conclusions Admissible Under Federal Rule of Evidence 803(8)(C)* Beech Aircraft Corp. v. Rainey, 109 S. Ct. 439 (1988), 23 SUFFOLK U. L. REV. 929 (1989); James M. Garner, Comment, *The Public Documents Hearsay Exception for Evaluative Reports: Fact or Fiction?* 63 TUL. L. REV. 121 (1988); Kimberly K. Greene, Comment, *The Admissibility of Evaluative Reports Under Federal Rule of Evidence 803(8)*, 68 KY. L.J. 197 (1979-80); Ross P. Masler, Comment, *The Towering Inferno: Trustworthiness of the Tower Report Under Federal Rule of Evidence 803(8)(C)*, 55 BROOK. L. REV. 625 (1989); Comment, *The Admissibility of Police Reports Under the Federal Rules of Evidence*, 71 NW. U. L. REV. 691 (1976); Cheryl Musselman-Brown, Note, *Admitting Opinions and Conclusions in Evaluative Reports: The Trustworthiness Inquiry—Beech Aircraft v. Rainey*, 64 WASH. L. REV. 975 (1989); Penelope E. Nicholson, Note, *The Scope of Federal Rule of Evidence 803(8)(C)*, 59 TEX. L. REV. 155 (1980); Note, *The Trustworthiness of Government Evaluative Reports under Federal Rule of Evidence 803(8)(C)*, 96 HARV. L. REV. 492 (1982).

17. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1125, 1143 (E.D. Pa. 1980), *rev'd in part on other grounds*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574 (1986).

18. *Zenith*, 505 F. Supp. at 1146.

19. See *infra* notes 78-119 and accompanying text.

20. See *infra* notes 144-63 and accompanying text.

21. See *infra* notes 120-43 and accompanying text.

But that is not all. In addition to the issues raised by Rule 803(8)(C), other significant evidentiary issues may be contested; namely, relevance and Rule 403 balancing,<sup>22</sup> the Rule 407 exclusionary rule for subsequent remedial measures,<sup>23</sup> and the invocation of a governmental privilege.<sup>24</sup>

At this point in time, twenty years after the adoption of the Federal Rules of Evidence, a somewhat specialized and extensive body of decisional law has developed governing the admissibility of investigatory reports in federal § 1983 actions. Decisions concerning the admissibility of investigatory reports in non-§ 1983 cases can, of course, be quite pertinent in § 1983 actions. Nevertheless, it stands to reason that the evidentiary decisions in § 1983 actions are likely to be the most relevant, persuasive precedents when the admissibility issue arises in a § 1983 action. Experienced attorneys who prosecute and defend § 1983 actions, when interviewed, generally agreed that an investigatory report is typically very powerful evidence in these cases.<sup>25</sup> My primary purpose, then, is to analyze the various evidentiary issues pertaining to the admissibility of investigatory reports in § 1983 actions.

Substantial background must be laid in order to place the admissibility of investigatory reports in § 1983 actions in its proper context. Thus, Part II commences with an overview of the law governing § 1983 claims arising out of encounters with law enforcement officers. Part III in turn provides an overview of the Rule 803(6) business records rule, the Rule 803(8) public records rule, and the relationship between these two rules. The Article then turns to the heart of the matter. Part IV analyzes the various facets of the Rule 803(8)(C) hearsay exception for investigatory

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22. See *infra* notes 211-37 and accompanying text.

23. See *infra* notes 238-57 and accompanying text.

24. See *infra* notes 258-311 and accompanying text. Authentication is not a serious problem because "[o]fficial records frequently are admissible without a foundation witness because the self-authentication provisions of Rule 902 obviate the need for live foundation testimony." GLEN WEISSENBERGER, *FEDERAL RULES OF EVIDENCE* § 803.41, at 427 (1987). See FED. R. EVID. 902(1) (public documents under seal); (2) (public documents not under seal); (3) (certified copies of public documents); (5) (official publications); (8) (acknowledged documents). See also CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE*, § 8.47, at 997 (1995).

25. Telephone Interview with Lawrence J. Brennan, Chief, Bureau of Tort and Civil Rights Litigation, Nassau County Attorney, Sept. 14, 1994 (reports may be given "very strong weight"); Personal Interview with Frederick K. Brewington (experienced plaintiffs' lawyer) Oct. 27, 1994 (reports are "very important"); Telephone Interview with William Gibney, Managing Attorney, Prisoners' Legal Services, Sept. 22, 1994 (weight may depend upon sophistication of the jury); Telephone Interview with John Williams (experienced plaintiffs' lawyer), Sept. 22, 1994 (report can be "very powerful").

reports, with special attention given to the critical issues of “trustworthiness.” Part V discusses aspects of relevance, including Rule 403 balancing and the Rule 407 exclusionary rule for subsequent remedial measures. Finally, Part VI analyzes the potentially pertinent governmental privileges.

## II. SECTION 1983 ACTIONS INVOLVING LAW ENFORCEMENT ACTIVITIES: AN OVERVIEW

Section 1983 provides a cause of action against those who, under color of state or local law, violated the plaintiff’s federally protected rights.<sup>26</sup> It does not itself establish or create federally protected rights, but only “gives a remedy” when the claimant demonstrates a violation of rights protected by the federal Constitution or, in some instances, by a federal statute other than § 1983.<sup>27</sup>

Large numbers of § 1983 actions arise out of encounters with law enforcement officers. These claims may challenge, *inter alia*, the constitutionality of an investigatory stop, arrest, detention, search, or prosecution. A large proportion of the claims assert the use of excessive force by the police in the course of making an arrest.<sup>28</sup> Excessive force-arrest claims are litigated under a Fourth Amendment objective reasonableness standard.<sup>29</sup> Under this standard, the constitutionality of the officer’s use of force must be evaluated in light of the particular circumstances known to the officer “from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight,” and “must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense,

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26. See, e.g., *West v. Atkins*, 487 U.S. 42, 48 (1988); *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *Flagg Bros. v. Brooks*, 436 U.S. 149, 155 (1978).

27. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979). Accord *Albright v. Oliver*, 114 S. Ct. 807 (1994); *Graham v. Connor*, 490 U.S. 386 (1989); *Wilson v. Garcia*, 471 U.S. 261, 278 (1985); *Oklahoma City v. Tuttle*, 471 U.S. 808, 816, *reh’g denied*, 473 U.S. 925 (1985); *Baker v. McCollan*, 443 U.S. 137, 140 n.3 (1979).

The federal statutes that are enforceable under § 1983 raise an issue of some complexity. See 1 MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES ch. 4 (2d ed. 1991 & 1996 Cum. Supp. No.1). Section 1983 claims arising out of encounters with law enforcement officers are typically premised upon alleged federal constitutional, not federal statutory, violations.

28. See Schwartz & Kirklin, *supra* note 27, § 3.6, at 137 & n.238.

29. *Graham v. Connor*, 490 U.S. 386 (1989). See also *Tennessee v. Garner*, 471 U.S. 1 (1985) (deadly force).



uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”<sup>30</sup>

The § 1983 claim may be asserted against the officer involved in the encounter in the officer’s personal capacity, against the municipal entity, or, as is common, against both the officer and the entity.<sup>31</sup> Law enforcement officers sued in their personal capacities may assert the qualified immunity defense, which raises the issue of whether the officer violated clearly established federal law.<sup>32</sup> Because there is no respondeat superior liability under § 1983, a municipal entity may be found liable only if it is shown that the enforcement of a municipal policy or practice, or the final decision of a policymaker, caused the violation of the plaintiff’s federally protected rights.<sup>33</sup> The Supreme Court has ruled that a municipality’s deliberately indifferent training that caused the deprivation of the claimant’s federally protected rights may give rise to § 1983 municipal liability.<sup>34</sup> By logical extension the lower federal courts have applied this ruling to claims arising out of failures to supervise, discipline, and take remedial action.<sup>35</sup> Investigatory reports may contain especially important information and evidence when the municipal liability claim is premised upon an alleged custom or practice

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30. *Graham*, 490 U.S. at 396-97. See also *Sherrod v. Berry*, 856 F.2d 802 (7th Cir. 1988) (en banc).

31. Suing an official in an official capacity is tantamount to suing the entity. *Kentucky PBA Bureau of State Police v. Graham*, 473 U.S. 159 (1985); *Brandon v. Holt*, 469 U.S. 464, 471-72 (1985); *Monell v. Department of Social Servs. of the City of N. Y.*, 436 U.S. 658, 690 n.55 (1978). On the distinctions between individual and official-capacity claims, see *Graham*, 473 U.S. at 165-66. See also *Hafer v. Melo*, 112 S. Ct. 358 (1991). On the relationship between individual and municipal liability, see SCHWARTZ & KIRKLIN, *supra* note 27.

The text refers to “municipal” entities, as opposed to state entities, because the great percentage of claims arising out of encounters with law enforcement officers involve municipal, not state, officials. States, state agencies, and state officials in their official capacities are not “persons” who may be sued under § 1983 for monetary relief. *Will v. Michigan State Police*, 491 U.S. 58 (1989).

32. See, e.g., *Hunter v. Bryant*, 112 S. Ct. 534 (1991) (*Bivens* action; warrantless arrest); *Anderson v. Creighton*, 483 U.S. 635 (1987) (*Bivens* action; warrantless search); *Malley v. Briggs*, 475 U.S. 335 (1986) (arrest warrant application). See generally *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (establishing objectively reasonable qualified immunity standard). The lower courts are in conflict over whether qualified immunity may be asserted as a defense to a Fourth Amendment excessive force claim or whether, in this context, the qualified immunity defense is superfluous. See SCHWARTZ & KIRKLIN, *supra* note 27, § 9.21 & 1996 Cum. Supp. No. 1 (collecting decisions under subheading “Excessive Force”).

33. *Monell v. Department of Social Servs. of the City of N. Y.*, 436 U.S. 658 (1978). See also *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988); *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986).

34. *City of Canton v. Harris*, 489 U.S. 378 (1989).

35. SCHWARTZ & KIRKLIN, *supra* note 27, § 7.10 & 1996 Cum. Supp. No. 1.

of official wrongdoing or upon inadequate training, supervision, discipline, and remedial actions.

### III. THE BUSINESS AND PUBLIC RECORDS EXCEPTIONS UNDER THE FEDERAL RULES OF EVIDENCE

#### A. *Business Records*

Federal Rule of Evidence 803(6) establishes the familiar hearsay exception for regularly kept "business" records.<sup>36</sup> Although commonly

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36. The advisory committee's note to Rule 803(6) explains that regularly kept business records are thought to be unusually reliable because of the regularity with which they are prepared and maintained, their systematic checking by auditors and others, the business duty to make accurate records, and the reliance on these records by the business in making decisions. An analysis of Rule 803(6) and its interpretive decisional law reveals that the following requirements must be established in order to satisfy the business record rule:

1. The record must be "kept in the course of a regularly conducted business activity." FED. R. EVID. 803(6).
2. It must be "the regular practice of that business activity to make the . . . record." *See, e.g., Wheeler v. Sims*, 951 F.2d 796 (7th Cir.), *cert. denied*, 113 S. Ct. 320 (1992) (§ 1983 action).
3. The record must be made by an employee with personal knowledge, or from information transmitted by a person who has personal knowledge and a business duty to transmit the information. All other intermediaries must also be under a business duty to transmit. The advisory committee's note to Rule 803(6), citing what it describes as the "leading case" of *Johnson v. Lutz*, 170 N.E. 517 (N.Y. 1930), explains that when the supplier of the information, such as a bystander, or any other participant in the record-making process does not act in the regular course of business, an "essential link" of reliability is broken. FED. R. EVID. 803(6) advisory committee's note.
4. If the person supplying the information does not have a business duty to transmit the information, this requirement alternatively can be satisfied by showing that the transmittal of the information meets some other hearsay exemption or exception, such as an admission, excited utterance, or declaration against interest. 2 JOHN W. STRONG, ET AL., MCCORMICK ON EVIDENCE § 290, at 275 (4th ed. 1992); 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE § 803(6)[04] (1987).
5. The record must be "made at or near the time" of the transaction. FED. R. EVID. 803(6).

These "foundation" requirements must be substantiated by the "testimony of the custodian [of the records] or other qualified witness . . ." FED. R. EVID. 803(6). This foundation testimony can be given by anyone who has personal knowledge of the organization's record-keeping procedures. "[T]here is no requirement that this witness must have firsthand knowledge of the matter reported or actually have prepared the report or observed its preparation." WEINSTEIN & BERGER, *supra* § 803(6)[04].

Even if all of the requisites of the business record hearsay exception are met, Rule 803(6) authorizes exclusion of the record if "the source of information or the method or circumstances of preparation indicate lack of trustworthiness." FED. R. EVID. 803(6). This encompasses the so-called motivational problems that arise when reports are prepared for purposes of litigation, that is, the *Palmer v. Hoffman*, 318 U.S. 109 (1943) problem. *See, e.g., Wheeler v. Sims*, 951 F.2d 796 (7th Cir.), *cert. denied*, 488 U.S. 1008 (1992) (§ 1983 action); *Dorsey v. City of Detroit*, 858 F.2d 338 (6th Cir. 1988) (§ 1983 action); *Stone v. Morris*, 546 F.2d 730 (7th Cir.

referred to as the "business" records rule, it is actually broader in scope. Rule 803(6) broadly defines "business" to "include business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit."<sup>37</sup> Thus, it is broad enough to include the records of governmental entities.<sup>38</sup>

A business record may consist of "[a] memorandum, report, record, or data compilation, in any form . . ."<sup>39</sup> The reference to "data compilation" is intended to cover computer-generated records.<sup>40</sup> The record may include opinions and diagnoses, such as those contained in medical records<sup>41</sup> and police reports.<sup>42</sup> The fact that the business record rule encompasses governmental records raises the issue, discussed

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1976) (§ 1983 action).

When a record meets the requirements of the business record rule, Federal Rule of Evidence 803(7) provides that the failure of the record to include a transaction, which would ordinarily be expected to be in a record of a regularly conducted business activity, is admissible to prove the nonoccurrence of the event. The same 803(6) proviso appears in Rule 803(7): "unless the sources of information or other circumstances indicate lack of trustworthiness." A hypothetical example in the § 1983 setting would be a prison hospital record's failure to show the admission of a particular prisoner on a particular occasion that is introduced into evidence to show that the prisoner did not receive medical care on that date. There are few reported decisions under Rule 803(7). See STEPHEN A. SALTZBURG ET AL., *FEDERAL RULES OF EVIDENCE MANUAL* 1504-05 (6th ed. 1994) (annotating four cases). Rule 803(7) is a potentially very useful tool for accomplishing the frequently difficult task of proving a negative. Although the absence of an entry in a business record is probably not even hearsay because there is simply no out-of-court statement being introduced, there were some pre-rule decisions to the contrary, and Rule 803(7) sought "to set the question at rest in favor of admissibility." FED. R. EVID. 803(7) advisory committee's note.

37. FED. R. EVID. 803(6).

38. See *Malek v. Federal Ins. Co.*, 994 F.2d 49 (2d Cir. 1993) (department of social services worker's notes within business records rule); *Wheeler v. Sims*, 951 F.2d 796 (7th Cir.) (prisoner's file), *cert. denied*, 488 U.S. 1008 (1989); *Dorsey v. City of Detroit*, 858 F.2d 338 (6th Cir. 1988) (police report); *Ward v. Arkansas State Police*, 714 F.2d 62 (8th Cir. 1983) (police department investigatory report); *Stone v. Morris*, 546 F.2d 730 (7th Cir. 1976) (a prison is a "business" under the business record rule). But see *Garcia v. Gloor*, 618 F.2d 264, 272 (5th Cir. 1980) ("The admissibility of such official documents under the Federal Rules of Evidence is not determined by business records rules standards, but by Rule 803(8), which provides for the admissibility of the reports of public agencies."), *cert. denied*, 449 U.S. 1113 (1981); *United States v. American Cyanamid Co.*, 427 F. Supp. 859 (S.D.N.Y. 1977).

39. FED. R. EVID. 803(6).

40. FED. R. EVID. 803(6) advisory committee's note. On the admissibility of computer-generated records, see 2 STRONG, *supra* note 36, § 294; MICHAEL H. GRAHAM, *HANDBOOK OF FEDERAL EVIDENCE* § 803.6 (3d ed. 1991).

41. 2 STRONG, *supra* note 36, § 293.

42. See, e.g., *Dorsey v. City of Detroit*, 858 F.2d 338 (6th Cir. 1988) (§ 1983 action: police report containing officer's opinion of nature and severity of plaintiff's injuries was within the business records rule; report should have been excluded, however, because of defendants' failure to produce it during discovery).

below, concerning the relationship between the business and public records hearsay exceptions.<sup>43</sup> Before pursuing that issue, however, we turn first to the Federal Rule of Evidence 803(8) exception for public records.

### B. Public Records

Like hearsay exceptions generally, the public records exception is based upon the general trustworthiness of public records. Public records are generally believed to be sufficiently trustworthy because it is assumed that public officials will prepare accurate reports.<sup>44</sup> The public records exception is also justified by the public interest in avoiding having public officials testify in court about the subject matter of governmental reports.<sup>45</sup> Further, there is great likelihood that the record will be more reliable than the official's present testimony reflecting memory of events that may have occurred many years ago.<sup>46</sup>

Public records may be utilized at trial for several purposes: to refresh a witness's recollection, to memorialize an event under the doctrine of past recollection recorded, to impeach with a prior inconsistent statement, and to rehabilitate by showing a prior consistent statement.<sup>47</sup> Rule 803(8), however, creates an independent hearsay exception for public records, allowing them to be introduced for their truth. Of course, like the other hearsay exceptions, Rule 803(8) only removes the bar of the exclusionary rule against hearsay. Public records and reports that satisfy Rule 803(8) must still clear other hurdles of admissibility, such as relevance, Rule 403, specific exclusionary rules such as that for remedial measures under Rule 407, authentication, and the various privileges.

The Rule 803(8) hearsay exception is limited to records prepared by governmental entities. In *Lamphere v. Brown University*,<sup>48</sup> a Title VII gender discrimination suit, the First Circuit ruled that the opinions of a hearing panel comprised of university faculty members did not come within Rule 803(8) because "the panels are not public agencies, and its members are not public officials."<sup>49</sup>

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43. See *infra* notes 59-77 and accompanying text.

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

45. 2 STRONG, *supra* note 36, § 296.

46. *Id.*; FED. R. EVID. 803(8) advisory committee's note.

47. GRAHAM, *supra* note 40, § 803.8, at 892 n.3.

48. 685 F.2d 743, 749 (1st Cir. 1982).

49. *Id.* See also *Marsee v. United States Tobacco Co.*, 866 F.2d 319 (10th Cir. 1989) (Rule 803(8)(C) inapplicable because report not prepared by public officials); *In re Japanese*

Rule 803(8) establishes three categories of public records and reports. It "has extraordinary breadth."<sup>50</sup> Subdivision (A) provides an exception for public records of "the activities of the office or agency." This covers records of the agency's internal affairs, that is, of its functions and activities, such as employment, inventory, and disbursement records.<sup>51</sup> There is no requirement that the record be based upon personal knowledge or even upon a governmental duty to transmit the information. If the record is not sufficiently trustworthy, however, it can be excluded under Rule 403.

Subdivision (B) provides a hearsay exception for public records setting forth "matters observed pursuant to duty imposed by law as to which matters there was a duty to report . . . ."<sup>52</sup> Thus, for example, in civil cases, a police officer's report of an accident or other law enforcement matter based upon the officer's personal knowledge comes within subdivision (B).<sup>53</sup>

The public records and reports covered by subdivisions (A) and (B) are fairly straightforward and noncontroversial. The same cannot be said of the subdivision (C) hearsay exception for investigatory reports. Rule 803(8)(C) provides a hearsay exception in civil cases for public records setting forth "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."<sup>54</sup>

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*Elecs. Prods. Antitrust Litig.*, 723 F.2d 238, 272 (3d Cir. 1983) (documents "authored by Matsushita rather than by a 'public office or agency' [not within] Rule 803(8)(C)"), *rev'd on other grounds*, 475 U.S. 574 (1986); *John McShain, Inc. v. Cessna Aircraft Co.*, 563 F.2d 632 (3d Cir. 1977) (Rule 803(8) exempts from hearsay rule only reports by public officials).

Although the investigation must be carried out by governmental officials, the information may be obtained from individuals having no involvement "whatsoever" with government. *Grossman & Shapiro*, *supra* note 14, at 768 & n.3 (citing numerous cases).

50. *MUELLER & KIRKPATRICK*, *supra* note 24, § 847, at 975.

51. *See* 2 *STRONG*, *supra* note 36, § 296; *FED. R. EVID.* 803(8)(A) advisory committee's note.

52. The subdivision (B) hearsay exception does not encompass "in criminal cases matters observed by police officers and other law enforcement personnel." *FED. R. EVID.* 803(8)(B) (emphasis omitted). This clause has been interpreted as barring the prosecution, but not the defense, from introducing these reports in criminal cases. *See* 2 *STRONG*, *supra* note 36, § 296, at 508.

53. *See, e.g., Baker v. Elcona Homes Corp.*, 588 F.2d 551 (6th Cir. 1978), *cert. denied*, 441 U.S. 933 (1979).

54. *FED. R. EVID.* 803(8)(C). In addition to civil cases, Rule 803(8)(C) authorizes the admission of investigatory reports "against the Government in criminal cases." *Id.* (emphasis added). This language makes clear that investigatory reports may not be introduced under this subdivision by the government against a criminal defendant. This limitation was included in Rule 803(8)(C) because of Confrontation Clause concerns. *See United States v. Oates*, 560

This “represents a tremendous expansion of the typical public records exception,”<sup>55</sup> is controversial, and raises multi-faceted and often highly contentious evidentiary issues. It is the only public records hearsay exception “that reaches material based on outside information,” potentially embracing “multiple layers of hearsay as information is passed among public officials before being finally recorded is [sic] what is offered at trial.”<sup>56</sup> Nevertheless, it is justified on the ground that “public officials have factfinding and evaluative expertise . . . .”<sup>57</sup>

Rule 803(8)(C) as written requires that (1) the report contain “factual findings,” (2) “resulting from an investigation made pursuant to authority granted by law,” and (3) is sufficiently trustworthy to justify its admission into evidence.<sup>58</sup> Before analyzing these issues, however, we pause to discuss the relationship between the Rule 803(6) business record rule and the Rule 803(8) public record rule.

### C. *Relationship Between Business and Public Records Rules*

A great deal of uncertainty surrounds the relationship between the Rule 803(6) business records and the Rule 803(8) public records hearsay exceptions. This issue has had its most significant, frequent, and difficult applications in criminal cases. This is because of the restrictions in Rules 803(8)(B) and (C) against introducing law enforcement and investigatory reports against criminal defendants, and because of

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F.2d 45 (2d Cir. 1977).

55. ABA SECTION ON LITIGATION, EMERGING PROBLEMS UNDER THE FEDERAL RULES OF EVIDENCE 237 (2d ed. 1991) (hereinafter EMERGING PROBLEMS).

56. MUELLER & KIRKPATRICK, *supra* note 24, § 8.47, at 976. *But see* Miller v. Field, 35 F.3d 1088 (6th Cir. 1994) (§ 1983 action: limiting Rule 803(8)(C) to cases in which the report is based upon the preparer’s personal knowledge). For an analysis of *Miller v. Field*, see *infra* notes 126-43 and accompanying text.

57. MUELLER & KIRKPATRICK, *supra* note 24, § 8.48, at 980. *See also id.* § 8.48, at 979-80 (Rule 803(8)(C) parallels the treatment the Federal Rules of Evidence affords expert witnesses). There is no requirement, however, that the investigators and authors of the report be qualified as experts. Clark v. Clabaugh, 20 F.3d 1290 (3d Cir. 1994).

58. FED. R. EVID. 803(8)(C). Rule 803(10) is the public records counterpart to Rule 803(7). *See supra* note 36. It provides that the nonoccurrence of an event may be shown by its absence in a “regularly made and preserved” public record. Rule 803(10) also allows the absence of a public report to be shown by “certification in accordance with Rule 902,” or testimony “that diligent search failed to disclose the record . . . .” The advisory committee’s note to Rule 803(10) states that it covers “situations in which absence of a record may itself be the ultimate focal point of inquiry . . . as well as cases where the absence of a record is offered as proof of the nonoccurrence of an event ordinarily recorded.”

Confrontation Clause concerns.<sup>59</sup> These are not pertinent factors in civil rights actions filed under § 1983.

In civil cases, two major questions are presented: (1) when a public record is sought to be introduced, which provision should the court look to in the first instance, 803(6) or 803(8), or is either permissible?; (2) are public records that do not meet the requirements of the public records rule potentially admissible under the business records rule? It would seem natural that the specific Rule 803(8) hearsay exception for public records would be the first rule to which a federal court would turn when a hearsay issue is raised regarding public records. In fact, "there is some tendency to rely upon Rule 803(8) instead of Rule 803(6) for governmental entities since the more particular rule usually controls."<sup>60</sup> A number of courts have taken this approach in § 1983 cases involving investigatory reports.<sup>61</sup> On the other hand, there are a surprising number of federal circuit court decisions in § 1983 cases that evaluate the admissibility of public records solely on the basis of the business records rule.<sup>62</sup> These decisions either explicitly or implicitly take the position that the broad definition of "business" in Rule 803(6) includes governmental entities.<sup>63</sup> Although this seems to be correct, it also

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59. See, e.g., *United States v. Hayes*, 861 F.2d 1225 (10th Cir. 1988); *United States v. King*, 613 F.2d 670 (7th Cir. 1980); *United States v. Sawyer*, 607 F.2d 1190 (7th Cir. 1979), *cert. denied*, 445 U.S. 943 (1980); *United States v. Oates*, 560 F.2d 45 (2d Cir. 1977); 2 STRONG, *supra* note 36, § 296, at 292-94. See also *United States v. Yakobov*, 712 F.2d 20 (2d Cir. 1983).

60. WEINSTEIN & BERGER, *supra* note 36, § 803(6)[03], at 803-209.

61. *Gentile v. County of Suffolk*, 926 F.2d 142 (2d Cir. 1991); *Perrin v. Anderson*, 784 F.2d 1040 (10th Cir. 1986); *Wilson v. Beebe*, 743 F.2d 342 (6th Cir. 1984); *Swietlowich v. County of Bucks*, 610 F.2d 1157 (3d Cir. 1979).

62. *Romano v. Howarth*, 998 F.2d 101 (2d Cir. 1993) (prison psychiatric progress notes); *Wheeler v. Sims*, 951 F.2d 796 (7th Cir.) (prison's record of plaintiff's medical condition), *cert. denied*, 488 U.S. 1008 (1992); *Dorsey v. City of Detroit*, 858 F.2d 338 (6th Cir. 1988) (police report); *Walker v. Wayne County, Iowa*, 850 F.2d 433 (8th Cir. 1988) (criminal investigation report), *cert. denied*, 488 U.S. 1008 (1989); *Stone v. Morris*, 546 F.2d 730 (7th Cir. 1976) (prison correctional counselor's account of incident).

63. *Malek v. Federal Ins. Co.*, 994 F.2d 49 (2d Cir. 1993) (department of social services social worker's notes within business records rule); *Wheeler v. Sims*, 951 F.2d 796 (7th Cir.) (prisoner's file), *cert. denied*, 488 U.S. 1008 (1989); *Dorsey v. City of Detroit*, 858 F.2d 338 (6th Cir. 1988) (police report); *Ward v. Arkansas State Police*, 714 F.2d 62 (8th Cir. 1983) (police department investigatory report); *Stone v. Morris*, 546 F.2d 730 (7th Cir. 1976) (a prison is a "business" under the business record rule). *But see Garcia v. Gloor*, 618 F.2d 264, 272 (5th Cir. 1980) ("The admissibility of such official documents under the Federal Rules of Evidence is not determined by business records rules standard but by Rule 803(8), which provides for the admission of [the] reports of public agencies."), *cert. denied*, 449 U.S. 1113 (1981); *United States v. American Cyanamid Co.*, 427 F. Supp. 859 (S.D.N.Y. 1977).

seems unusual to evaluate a hearsay issue concerning a public record as if the public records hearsay exception does not exist.<sup>64</sup>

The Sixth Circuit decision in *Dorsey v. City of Detroit*<sup>65</sup> illustrates the Rule 803(6) approach to public records in a § 1983 setting. In that case, involving the alleged use of excessive force against a fleeing misdemeanant and the arrest of his mother, the plaintiffs on appeal urged that the district court erred in admitting Sergeant Graber's investigatory report of the incident. Sergeant Graber's report summarized information of the incident that had been provided to Graber by fellow officers, and contained the following conclusion:

The writer's investigation reveals that the officers were engaged in a lawful and proper police function. It is this writer's opinion that Officers Butucel and Robinson used no more than necessary force to effect the arrest of Mr. Dorsey. Officer Butucel appears to have been injured as a result of police action. The alleged injury to Robert Dorsey and the injury to Margaret Dorsey seem minimal under the circumstances. Investigation reveals that both parties were hostile and combative in their actions. The injuries occurred as a direct result of their hostilities towards the officers.<sup>66</sup>

The plaintiffs advanced three reasons why this report should not have been admitted under Rule 803(6). First, plaintiffs argued that a proper foundation for admitting the report had not been laid. The circuit court, however, found otherwise because "Officer Jones, who had worked under Sergeant Graber's supervision, testified that Sergeant Graber prepared such reports in the ordinary course of business, and Jones identified the signature on the report as Sergeant Graber's."<sup>67</sup> It was not necessary that Jones testify as to how Sergeant Graber prepared the report because, under Rule 803(6), the qualifying witness need only be familiar with the record-keeping system.<sup>68</sup> The plaintiffs' second argument was that the report contained information that was not within Sergeant Graber's personal knowledge. This argument was without merit because a business record can be prepared on the basis of information *supplied* by one with personal knowledge and a business

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64. In *Jenkins v. Whittaker Corp.*, 785 F.2d 720 (9th Cir.), *cert. denied*, 479 U.S. 918 (1986), the court evaluated the admissibility of a governmental report under Rule 803(6) and Rule 803(8)(C) jointly, that is, it engaged in one trustworthy evaluation under both rules.

65. 858 F.2d 338 (6th Cir. 1988).

66. *Id.* at 343.

67. *Id.* at 342.

68. WEINSTEIN & BERGER, *supra* note 36, § 803(6)[02]; 2 STRONG, *supra* note 36, § 292.



duty to transmit the information; it is not necessary that the recorder have personal knowledge.<sup>69</sup> Third, the plaintiffs argued that the report was not trustworthy because it contained Sergeant Graber's personal opinions. Rule 803(6), however, specifically permits opinions in business records. Although the Graber report did raise motivational problems because it appeared to have been prepared with an eye toward litigation, it was nevertheless within the district court's discretion to find the report sufficiently trustworthy.<sup>70</sup> Furthermore, although the circuit court in *Dorsey* found that the district court did not err in finding that the report met all of the requirements of the business records rule, it also found a significant reason why the report should have been excluded. The defendants' failure to produce the report during pretrial discovery deprived the plaintiffs of a fair opportunity to contest its trustworthiness at trial. For this reason the report should have been excluded.

What is most striking about the circuit court's decision in *Dorsey* is its failure even to mention the 803(8)(C) investigatory hearsay exception. After all, since the admissibility of Sergeant Graber's investigatory report was at issue, it seems reasonable to expect the court to make some reference to the specific hearsay exception that exists for governmental investigatory reports.

It is likely, however, that the court's evaluation and decision would have focused on substantially the same factors under Rule 803(8)(C) as it did under Rule 803(6). This is because trustworthiness is the most critical factor under both Rule 803(6) and Rule 803(8)(C). Further, the circuit court's reasoning that the defendants' failure to produce the report during pretrial discovery justified its exclusion, because it

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69. See *supra* note 36.

70. By contrast, in *Romano v. Howarth*, 998 F.2d 101 (2d Cir. 1993), a § 1983 action in which the plaintiff prisoner alleged that correction officers used excessive force in restraining him in order to allow a nurse to administer a sedative, the Second Circuit ruled that the district court erred in allowing defendants to introduce the plaintiff's psychiatric "Progress Notes," made by a nurse at the Mental Health Unit (MHU) the day after the incident in question. The notes recorded an unidentified corrections officer's statement that Romano admitted that he hurt his hand punching a wall. It was unclear whether the corrections officer had a business duty to transmit the information to the MHU staff. More importantly, the notes did not satisfy the trustworthy requirement of Rule 803(6). The officer in question was one of the defendants, and the plaintiff "had threatened to blame his injuries on the officers and . . . the officers were aware of Romano's threat." *Id.* at 108. Under these circumstances, the corrections officer had a motive to "judge" what happened to Romano. *Id.* Therefore, the officer's statement recorded on the notes did not carry "the requisite degree of trustworthiness essential to the business records exception." *Id.*

deprived the plaintiffs of a fair opportunity to contest its trustworthiness, should pertain equally under Rule 803(8)(C).

In *Dorsey*, the circuit court tested the admissibility of the public record solely under the business records rule. As noted above, however, when the admissibility of a public record is at issue, it is more likely that a federal court will turn at least initially to the specific Rule 803(8) hearsay exception for public records. Assuming that a court first tests the admissibility of a public record under the public records hearsay exception and finds it inadmissible, may the proponent then seek to admit it under the business records rule? Although the answer is not free from doubt, the business records rule, in theory, should be viewed as an alternative basis of admissibility. After all, the public record is hearsay because it is an out-of-court statement being offered for its truth. Thus, if the record meets *any* hearsay exception, it should be viewed as having overcome the hearsay hurdle. Because Rule 803(8) is a rule of admissibility, public records that do not meet the requirements of that rule should be admissible if they meet the requirements of some other hearsay exception.<sup>71</sup> Nevertheless, some federal court decisions hold that the specific Rule 803(8) hearsay exception is the exclusive hearsay exception for public records.<sup>72</sup>

Although the relationship between the business and public records rules is significant in criminal cases in which the government seeks to introduce either a law enforcement officer's report based upon personal knowledge, or an investigatory report, against the defendant,<sup>73</sup> the relationship between the two rules seems to arise relatively infrequently in civil cases. This may be because the public records rule is broader and generally easier to satisfy than the business records rule:

(1) Unlike the business records exception, the public records rule does not require the testimony of the custodian or other qualified witness,<sup>74</sup>

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71. EMERGING PROBLEMS, *supra* note 55, at 234.

72. *Garcia v. Gloor*, 618 F.2d 264, 272 (5th Cir. 1980) ("The admissibility of such official documents under the Federal Rules of Evidence is not determined by business records rules standards but by Rule 803(8), which provides for the admission of reports of public agencies."), *cert. denied*, 449 U.S. 1113 (1981); *United States v. American Cyanamid Co.*, 427 F. Supp. 859, 867 (S.D.N.Y. 1977) ("Rule 803(6) is simply not applicable to government records and reports, which are to be admitted in accordance with the standards of Rule 803(8).").

73. See cases cited *supra* note 59.

74. WEISSENBERGER, *supra* 24, § 803.41. "Official records frequently are admissible without a foundation witness because the self-authentication provisions of Rule 902 obviate the need for live foundational testimony." *Id.* at 427.

(2) In contrast to the business record rule, Rule 803(8) does not require that a public record be created "contemporaneously" with the event in question;<sup>75</sup>

(3) "Also, subdivisions (A) and (C) have no requirement that the record be routinely maintained;"<sup>76</sup>

(4) In contrast to the business records rule, the investigatory reports exception has no requirement that the information be recorded or furnished by an individual with personal knowledge; and

(5) The most important requisite for admitting an investigatory report under Rule 803(8)(C) is its trustworthiness, a requirement of the Rule 803(6) business records exception as well. An investigatory report that is not trustworthy for purposes of Rule 803(8)(C) is also not trustworthy for purposes of Rule 803(6).

When all of these factors are considered together, it is apparent that both public records in general, and investigatory reports in particular, that do not satisfy the requirements of the public records rule are exceedingly unlikely to be able to meet the requirements of the business records rule. Thus, while there is uncertainty regarding the relationship between the business and public records rules, this issue is not of particular significance in § 1983 civil rights suits. Despite the unusual Rule 803(6) approach taken by the Sixth Circuit in *Dorsey*, federal courts in § 1983 actions normally have taken the sensible approach and analyzed the issue under the specific Rule 803(8)(C) exception for investigatory reports.<sup>77</sup>

#### IV. THE RULE 803(8)(C) HEARSAY EXCEPTION FOR INVESTIGATORY REPORTS

##### A. *Findings Resulting From Investigations*

The Rule 803(8)(C) hearsay exception for investigatory reports, by its terms, encompasses "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."

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75. *Id.*

76. *Id.*

77. See, e.g., *Montiel v. City of Los Angeles*, 2 F.3d 335 (9th Cir. 1993); *Gentile v. County of Suffolk*, 926 F.2d 142 (2d Cir. 1991); *McQuaig v. McCoy*, 806 F.2d 1298 (5th Cir. 1987); *Perrin v. Anderson*, 784 F.2d 1040 (10th Cir. 1986); *Wilson v. Beebe*, 743 F.2d 342 (6th Cir. 1984), *vacated on other grounds*, 770 F.2d 578 (6th Cir. 1985); *Swietlowich v. County of Bucks*, 610 F.2d 1157 (3d Cir. 1979); *Falk v. County of Suffolk*, 781 F. Supp. 146 (E.D.N.Y. 1991); *Anderson v. City of N.Y.*, 657 F. Supp. 1571 (S.D.N.Y. 1987).

Like Rule 803(8) generally, this hearsay exception pertains only to investigatory reports prepared by governmental officials.<sup>78</sup> Further, the investigation must be authorized by legal authority: "This requirement helps to ensure that the report is reliable."<sup>79</sup> The investigation, however, need only be authorized, not mandated, by law.<sup>80</sup>

In some cases, issues have been raised as to whether the governmental action was investigatory in nature. The issue has principally arisen with respect to (a) quasi-judicial administrative findings; (b) rulemaking; and (c) judicial findings. In *Chandler v. Roudebush*,<sup>81</sup> a Title VII suit, the Supreme Court, citing Rule 803(8)(C), stated that "[p]rior administrative findings made with respect to an employment discrimination claim may, of course, be admitted as evidence at a federal sector trial *de novo*." A recent study of the Federal Rules of Evidence concluded that "[w]ith respect to adjudicatory findings, the courts of appeals have uniformly followed *Chandler's* lead."<sup>82</sup>

The *Chandler* line of decisions is of potential significance in § 1983 actions. Although the Supreme Court has resolved that § 1983 claimants are not obligated to exhaust state administrative remedies,<sup>83</sup> they nevertheless may at their option choose to do so.<sup>84</sup> Then, too, in some instances a state or local agency may institute quasi-judicial administrative proceedings against a private party, such as a license revocation proceeding.<sup>85</sup> Whether the agency proceeding was instituted by the private party or by the government, the administrative findings may come within Rule 803(8)(C).

No reported § 1983 cases have been located, however, in which this evidentiary issue has arisen. This is presumably because quasi-judicial

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78. See *Marsee v. United States Tobacco Co.*, 866 F.2d 319 (10th Cir. 1989); *Lamphere v. Brown Univ.*, 685 F.2d 743 (1st Cir. 1982); *John McShain, Inc. v. Cessna Aircraft Co.*, 563 F.2d 632 (3d Cir. 1977).

79. *Perrin v. Anderson*, 784 F.2d 1040, 1046 (10th Cir. 1986). See also *Keith v. Volpe*, 858 F.2d 467 (9th Cir. 1988) (report was not used solely for litigation purposes), *cert. denied*, 493 U.S. 813 (1989).

80. *Jenkins v. Whittaker Corp.*, 785 F.2d 720, 726 n.15 (9th Cir.), *cert. denied*, 479 U.S. 918 (1986); *Fraley v. Rockwell Int'l Corp.*, 470 F. Supp. 1264 (S.D. Ohio 1979).

81. 425 U.S. 840, 863 n.39 (1976).

82. EMERGING PROBLEMS, *supra* note 55, at 236. See also WEINSTEIN & BERGER, *supra* note 36, § 803(8)[03]. See, e.g., *Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179 (3d Cir.), *cert. denied*, 439 U.S. 969 (1978); *United States v. School Dist. of Ferndale*, 577 F.2d 1339 (6th Cir. 1978); *Colston v. Pingree*, 498 F. Supp. 327 (N.D. Fla. 1980).

83. *Patsy v. Board of Regents*, 457 U.S. 496 (1982). See also *Felder v. Casey*, 487 U.S. 131 (1988).

84. See SCHWARTZ & KIRKLIN, *supra* note 27, § 10.4.

85. *Id.* §§ 10.4, 14.9.

administrative findings may be entitled to preclusive effect in federal court § 1983 actions as a matter of administrative *res judicata*.<sup>86</sup> Although it has been claimed in a large number of federal § 1983 actions that agency findings are entitled to preclusive effect, the issue has been uniformly handled as a straight issue of preclusion law, rather than as an evidentiary issue.<sup>87</sup>

There is authority that Rule 803(8)(C) does not cover rulemaking proceedings. The issue was analyzed carefully in *United States v. American Telephone & Telegraph Co.*<sup>88</sup> In that antitrust action, the court was asked to determine the admissibility of several decisions of the Federal Communications Commission. The court reasoned that proceedings that are clearly rulemaking because they are directed at the regulation of future conduct "with any fact-finding at most incidental and used primarily for predictive purposes . . . [are] not addressed to past facts . . . and . . . therefore cannot result [in] factual findings under Rule 803(8)(C)."<sup>89</sup> Rulemaking is thus distinguished from proceedings that are clearly adjudicatory, "that is, an investigation into disputed past acts with a view to determining whether those acts meet certain legal standards, with any prospective element being incidental—which certainly could yield 803(8)(C) findings."<sup>90</sup> The difficulty, however, was that most of the materials before the court involved a mixture of agency adjudication and rulemaking, so that it was not possible "to draw a hard-and-fast distinction between rule making and fact-oriented adjudication."<sup>91</sup> The court thus found it necessary to determine whether each agency decision was *predominantly* of a rulemaking or adjudicatory nature. An agency finding is not outside of Rule 803(8)(C) "merely because it resulted from a procedure containing rulemaking elements."<sup>92</sup> Although this issue can arise in § 1983 actions, no reported § 1983 decisions involving this issue have been located.

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86. *University of Tenn. v. Elliott*, 478 U.S. 788 (1986). See SCHWARTZ & KIRKLIN, *supra* note 27, § 11.10. To be entitled to preclusive effect under *Elliott*, the agency must act in a quasi-judicial capacity and its findings must be entitled to preclusive effect under the state law of preclusion. See *Nelson v. Jefferson County*, 863 F.2d 18 (6th Cir. 1988), *cert. denied*, 493 U.S. 820 (1989).

87. See cases cited in SCHWARTZ AND KIRKLIN, *supra* note 27, § 11.10 & 1996 Cum. Supp. No. 1.

88. 498 F. Supp. 353 (D. D.C. 1980).

89. *Id.* at 360-61.

90. *Id.* at 360 n.19.

91. *Id.* at 361.

92. *Id.* at 367.

Several decisions hold that Rule 803(8)(C) does not cover judicial findings. In *Trustees of University of Pennsylvania v. Lexington Insurance Co.*,<sup>93</sup> the Third Circuit held that Rule 803(8)(C) is limited to administrative and executive findings and does not cover judicial findings. The court articulated several persuasive reasons to support this conclusion:

Rule 803(8)(C) specifically refers to factual findings resulting from 'an investigation made pursuant to authority granted by law,' and the advisory committee's note focuses specifically on the findings of officials and agencies within the executive branch. Neither the advisory note nor the leading treatises make even the remotest reference to judicial findings . . . . Furthermore, Rule 803(8)(C) requires the district court to determine if the 'source or other circumstances indicate lack of trustworthiness.' Because a trustworthiness evaluation might involve calling the author of the fact-finding or his staff members to permit parties to impeach their work, the need for judicial confidentiality makes judicial findings unsuitable for this scrutiny. Finally, the general rule is that judicial findings are inadmissible against a party not present in the prior litigation . . . .<sup>94</sup>

The Fourth Circuit has provided additional reasons to support the conclusion that Rule 803(8)(C) "applies to the findings of agencies and offices of the executive branch, but does not apply to the findings of judges."<sup>95</sup> Not only is a judge of a court of law not an investigator, but there is also the danger that judicial findings, if admitted as evidence,

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93. 815 F.2d 890 (3d Cir. 1987).

94. *Id.* at 905. *Accord* *Carter v. Burch*, 34 F.3d 257 (4th Cir. 1994); *United States v. Jones*, 29 F.3d 1549 (11th Cir. 1994); *Nipper v. Snipes*, 7 F.3d 415 (4th Cir. 1993); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1125, 1184-86 (E.D. Pa. 1980). *Contra* *La Marca v. Turner*, 662 F. Supp. 647 (S.D. Fla. 1987) (§ 1983 action: grand jury presentment concerning prison conditions admitted under Rule 803(8)(C)). It has been observed that although:

[i]t might seem odd that Rule 803(8)(C) does not appear to admit judge or jury findings, although it plainly allows admission of findings that are probably less reliable[.] . . . there is a good reason for excluding Judge and jury findings from the coverage of the Rule: Whenever Rule 803(8)(C) allows findings to be admitted, it leaves an opposing party free to challenge the reliability of the findings. Were Judge and jury verdicts to be similarly treated, Judges and juries would be subject to much more attack than at present. *See, e.g.*, Rule 606(b).

SALTZBURG ET. AL., *supra* note 36, at 1426.

95. *Carter v. Burch*, 34 F.3d 257, 265 (4th Cir. 1994). *Accord* *Nipper v. Snipes*, 7 F.3d 415 (4th Cir. 1993).

would likely be given undue weight by the jury, thereby creating a danger of unfair prejudice.<sup>96</sup>

As with administrative findings, in federal court § 1983 actions prior judicial findings have usually raised purely legal preclusion issues rather than evidentiary questions.<sup>97</sup>

### *B. Findings of Fact, Opinions, and Conclusions*

Rule 803(8)(C) refers to a public records setting for the "factual findings resulting from an investigation . . . ." Following the enactment of the Federal Rules of Evidence, a conflict developed in the circuit courts of appeals over whether Rule 803(8)(C) encompasses opinions and conclusions, so-called evaluative reports.<sup>98</sup> The United States Supreme Court resolved this conflict in *Beech Aircraft Corp. v. Rainey*<sup>99</sup> by unanimously ruling that investigatory reports that are otherwise admissible under Rule 803(8)(C) are not rendered inadmissible merely because they state a conclusion or opinion: "As long as the conclusion is based on a factual investigation and satisfies the Rule's trustworthiness requirement, it should be admissible along with other portions of the report."<sup>100</sup>

*Beech Aircraft Corp.* was a products liability suit that arose out of the crash of a naval training aircraft, which took the lives of both pilots on board. Following the accident, an investigatory report was prepared by a lieutenant commander. The report "was organized into sections labeled 'finding of fact,' 'opinions,' and 'recommendations.'"<sup>101</sup> The critical issue was the admissibility of those parts of the report containing opinions, for example, that the most "probable cause of the accident was the pilots [sic] failure to maintain proper interval."<sup>102</sup> The Supreme Court held that the report was admissible under Rule 803(8)(C).

In reaching this result, the Court relied upon such traditional indicia of Congressional intent as the Rule's language, legislative history, structure, and purpose. The language of Rule 803(8)(C) does not state that "factual findings are admissible" but that investigative "reports . . .

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96. *Carter*, 34 F.3d at 265; *Nipper*, 7 F.3d at 417-18.

97. See, e.g., *Migra v. Board of Educ.*, 465 U.S. 75 (1984); *Allen v. McCurry*, 449 U.S. 90 (1980); SCHWARTZ & KIRKLIN, *supra* note 27, ch. 11.

98. See *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 161-62 (1988) (describing conflicting circuit court decisional law).

99. 488 U.S. 153 (1988).

100. *Id.* at 170.

101. *Id.* at 157.

102. *Id.* at 158.

setting forth . . . factual findings” are admissible.<sup>103</sup> Under this literal reading of Rule 803(8)(C), an investigatory report containing findings of fact may be admissible and is not rendered inadmissible because it *also* contains opinions and conclusions. On the other hand, “the requirement that reports contain factual findings bars the admission of statements not based on factual investigation.”<sup>104</sup>

The Supreme Court found the legislative history of Rule 803(8)(C) inconclusive because the House and Senate committees took directly opposite positions concerning evaluative reports and made no effort to reconcile them.<sup>105</sup> The advisory committee’s note to the Rule, however, strongly supported the view that it encompasses “evaluative reports.”<sup>106</sup> Turning to the structure of the rules, the Court found several safeguards against unreliable reports containing opinions and conclusions. Rule 803(8)(C) itself has an escape clause for untrustworthy reports, and Rule 403 requires consideration of the report’s probative value and danger of unfair prejudice.<sup>107</sup> The “ultimate safeguard” is the opponent’s right to introduce evidence attacking the validity of the conclusions in the report.<sup>108</sup>

The Court in *Beech Aircraft* found that a broad reading of Rule 803(8)(C) was consistent with the liberal treatment the Federal Rules

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103. *Id.* at 164 (emphasis in original).

104. *Id.* at 169. The Court in *Beech Aircraft* specifically rejected the argument that because the business record rule, FED. R. EVID. 803(6), specifically authorizes “opinions” and “diagnoses,” while the Rule 803(8)(C) investigatory report exception does not, opinions are not within the scope of 803(8)(C). The advisory committee’s note to 803(6) made clear that opinions were expressly included in Rule 803(6) primarily to insure that medical diagnoses would be covered under the business records rule. *Beech Aircraft*, 488 U.S. at 163 n.8.

While opinions were rarely found in traditional “business records,” the expansion of that category to encompass documents such as medical diagnoses and test results brought with it some uncertainty in earlier versions of the Rule as to whether diagnoses and the like were admissible. . . . Since that specific concern was not present in the context of Rule 803(8)(C), the absence of identical language should not be accorded much significance.

*Id.*

105. *Id.* at 164-65 (quoting H.R. REP. NO. 650, 93rd Cong., 2d Sess. 14 (1973), *reprinted* in 1973 U.S.C.C.A.N. 7051, 7088 and S. REP. NO. 1277, 93rd Cong., 2d Sess. 18 (1974), *reprinted* in 1974 U.S.C.C.A.N. 7051, 7064).

106. *Beech Aircraft*, 488 U.S. at 166-67. The Supreme Court has “referred often” to the advisory committee’s notes “in interpreting the Rules of evidence . . .” *Williamson v. United States*, 114 S. Ct. 2431, 2442 (1994) (Kennedy, J., concurring) (citing *Huddleston v. United States*, 485 U.S. 681, 688 (1988); *United States v. Owens*, 484 U.S. 554, 562 (1988); *Bourjaily v. United States*, 483 U.S. 171, 179 n.2 (1987); *United States v. Abel*, 469 U.S. 45, 51 (1984)).

107. See *infra* notes 224-37 and accompanying text.

108. *Beech Aircraft*, 488 U.S. at 168.



afford to lay and expert opinion testimony.<sup>109</sup> Additionally, interpreting the Rule to encompass opinions and conclusions avoids the necessity to resolve conflicts over whether a particular statement in a report is a fact or an opinion, often a frustrating and elusive endeavor.<sup>110</sup>

The Fifth Circuit's decision in *McQuaig v. McCoy*<sup>111</sup> serves to illustrate the impact of *Beech Aircraft* in § 1983 actions. *McQuaig* grew out of the arrest of the plaintiffs, Jacque and Linda McQuaig. Following his arrest, Jacque McQuaig filed a complaint with the state police. The state police department's internal affairs section conducted an investigation that culminated in a report describing the events surrounding the arrest. The report was based upon interviews with the McQuaigs, with a friend who was with them at the time of the arrest, and with arresting officer McCoy. The report described the events in question based upon the investigation, and concluded that "McCoy was capricious and prejudicial in his arrest of McQuaig, but they could not totally substantiate the allegation of 'false arrest' and therefore did not sustain it."<sup>112</sup> The Fifth Circuit in 1987, prior to the Supreme Court's decision in *Beech Aircraft*, ruled that because Rule 803(8)(C) is limited to factual findings, the district court properly admitted only the findings of fact in the report, not the evaluative conclusions or opinions. Under *Beech Aircraft*, this position is no longer valid.

The Supreme Court in *Beech Aircraft* stated that it was not resolving whether the Rule 803(8)(C) hearsay exception covers legal conclusions in an investigatory report.<sup>113</sup> The weight of authority is that it does not.<sup>114</sup> The Eleventh Circuit reasoned that "[l]egal conclusions are inadmissible because the jury would have no way of knowing whether the preparer of the report was cognizant of the requirements underlying the legal conclusion and, if not, whether the preparer might have a higher or lower standard than the law requires."<sup>115</sup> At the same time,

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109. *Id.* at 169. See also *Daubert v. Merrell Dow Pharmaceuticals*, 113 S. Ct. 2786, 2794 (1993) (citing *Beech Aircraft*).

110. *Beech Aircraft*, 488 U.S. at 169.

111. 806 F.2d 1298 (5th Cir. 1987).

112. *Id.* at 1300.

113. *Beech Aircraft*, 488 U.S. at 170 n.13.

114. See *Hines v. Brandon Steel Decks*, 886 F.2d 299 (11th Cir. 1989); *In re Plywood Antitrust Litig.*, 655 F.2d 627 (5th Cir. 1981); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1125, 1184 (E.D. Pa. 1980), *rev'd in part on other grounds*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574 (1986); 2 STRONG, *supra* note 36, § 296, at 290 n.8.

115. *Hines*, 886 F.2d at 303. See also *Musselman-Brown*, *supra* note 16, at 983 n.59 (legal conclusions are "outside an investigator's area of expertise and therefore untrustwor-

however, the court cautioned that the line between “factual” and “legal” conclusions in this context, as in others, is often “amorphous.”<sup>116</sup>

It is also unclear whether an investigatory report containing opinions or conclusions is admissible if it does not also contain findings of fact. It will be recalled that the report in *Beech Aircraft* contained both findings of fact and opinions. Then, too, the language of Rule 803(8)(C) refers to investigatory reports “setting forth . . . factual findings . . . .” This would seem to support the position that to be admissible, the report must contain findings of fact. Likewise, the Court’s statement in *Beech Aircraft* states that “[a]s long as the conclusion is based on a factual investigation and satisfies the Rule’s trustworthiness requirement, it should be admissible *along with other portions of the report*.”<sup>117</sup> On the other hand, the Court in *Beech Aircraft* stated at one point that Rule 803(8)(C) “does not create a distinction between ‘fact’ and ‘opinion’ contained in such [investigatory] reports”<sup>118</sup> and, later, that “[o]ur conclusion that neither the language of the Rule nor the intent of its framers calls for a distinction between ‘fact’ and ‘opinion’ is strengthened by the analytical difficulty of drawing such a line.”<sup>119</sup> These statements in the Court’s opinion arguably support the conclusion that fact-based opinions and conclusions may be admissible even if the report does not actually contain findings of fact. Under this reading of *Beech Aircraft*, the opinions and conclusions need only be fact-based.

### C. Underlying Data

Another unresolved issue is whether the Rule 803(8)(C) hearsay exception is limited to the findings, opinions, and conclusions in investigatory reports, or whether it also encompasses the underlying

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thy”).

116. *Hines*, 886 F.2d at 303. See generally *Miller v. Fenton*, 474 U.S. 104, 113 (1985) (federal habeas corpus; referring to difficulties in determining if issue is of law, fact, or mixed question of law and fact); *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) (appellate review; Supreme Court has not formulated a “rule or principle that will unerringly distinguish a factual finding from a legal conclusion”).

117. *Beech Aircraft*, 488 U.S. at 170 (emphasis added). The Sixth Circuit’s decision in *Miller v. Field*, 35 F.3d 1088 (6th Cir. 1994), a § 1983 action, appears to support a reading of *Beech Aircraft* that the report must contain certain findings of fact. In *Miller*, the court ruled that while *Beech Aircraft* sanctions the inclusion of evaluations and opinions, the “report must first be a set of ‘factual findings.’” *Id.* at 1091 (quoting *Bright v. Firestone Tire & Rubber Co.*, 756 F.2d 19, 22 (6th Cir. 1984)). For an analysis of *Miller v. Field*, see *infra* notes 126-43 and accompanying text.

118. *Beech Aircraft*, 488 U.S. at 164.

119. *Id.* at 168.

data, information, and other materials relied upon by the agency. The prevailing view is that the 803(8)(C) exception covers only the findings, opinions, and conclusions, not the underlying data.<sup>120</sup> To hold otherwise would allow a great deal of otherwise unreliable inadmissible hearsay to come before the trier of fact. There may, however, be some other basis for admitting the underlying data, such as another hearsay exception.<sup>121</sup> Some commentators have suggested that the underlying data should be admitted if it meets the Rule 703 standard for material or data upon which an expert opinion may be based, namely that it is "of a type reasonably relied upon by experts in the particular field in forming opinions," even though inadmissible in evidence.<sup>122</sup> It is worth observing that Rule 703 does not authorize the actual admission of the data and materials underlying an expert opinion, but only establishes the permissible bases of expert opinions.<sup>123</sup> Finally, there is authority that even if the underlying data does not meet a specific hearsay exception it may be admitted, not for its truth, but to show that its existence provided the basis for the agency's findings and conclusions.<sup>124</sup> Regardless of which of these theories is invoked, the district court should, under Rule 403, carefully evaluate whether the probative value

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120. *Miller v. Field*, 35 F.3d 1088 (6th Cir. 1994) (§ 1983 action: bulk of reports consisted of inadmissible hearsay statements of the parties); *Moss v. Ole S. Real Estate*, 933 F.2d 1300, 1304-10 (5th Cir. 1991); *Brown v. Sierra Nevada Memorial Miners Hosp.*, 849 F.2d 1186, 1190 (9th Cir. 1988) (assumption that agency's findings are trustworthy "has substantially diminished force when extended to the sources outside the investigative agency from which the agency culls the information for its report"); *McClure v. Mexia Indep. Sch. Dist.*, 750 F.2d 396 (5th Cir. 1985) (while admission of EEOC finding of probable cause was proper, trial court erred in admitting the entire EEOC report, which contained various hearsay statements including newspaper articles); *McKinnon v. Skil Corp.*, 638 F.2d 270 (1st Cir. 1981); *John McShain, Inc. v. Cessna Aircraft Co.*, 563 F.2d 632 (3d Cir. 1977); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1125 (E.D. Pa. 1980); *Fraley v. Rockwell Int'l Corp.*, 470 F. Supp. 1264 (S.D. Ohio 1979). *See contra In re Air Crash Disaster*, 586 F. Supp. 711 (E.D. Pa. 1984), *rev'd*, 769 F.2d 115 (3d Cir. 1985), *cert denied*, 480 U.S. 941 (1987).

121. *See Fraley v. Rockwell Int'l Corp.*, 470 F. Supp. 1264 (S.D. Ohio 1979); WEISSENBARGER, *supra* note 24, § 803.44, at 433. It has been suggested that much of the underlying data will be admissible on this basis because of (1) the Federal Rules of Evidence expansive definition of vicarious admissions, FED. R. EVID. 801(d)(2)(c)(d); and (2) the likelihood that some other hearsay exception will, in fact, apply, such as present sense impression, statements for purposes of medical diagnosis or treatment, or declarations against interest. *See WEINSTEIN & BERGER, supra* note 36, § 803(8)[03].

122. *See GRAHAM, supra* note 40, § 803.8, at 906. *See also* WEINSTEIN & BERGER, *supra* note 36, at 803-48.

123. *See GRAHAM, supra* note 40, § 703.1.

124. *See Fowler v. Blue Bell, Inc.*, 737 F.2d 1007 (11th Cir. 1984); *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574 (1986).

of the underlying data is substantially outweighed by its danger to create unfair prejudice or to confuse or mislead the trier-of-fact.<sup>125</sup>

The Sixth Circuit dealt with the underlying data, as well as other investigatory report issues, in a § 1983 case, *Miller v. Field*.<sup>126</sup> In that case, Miller alleged "that while incarcerated in a Michigan penal institution, he was raped by another inmate."<sup>127</sup> He claimed that the defendant prison officials were deliberately indifferent to his safety because they ignored threats of assault against him. At issue on appeal was the propriety of the district court's admission, over the plaintiff's objections, of investigatory reports of the Michigan State Police of the rape charge. The first report "consisted of a short summary of interviews by the reporting [corrections] officer of four . . . inmates who, Miller alleged, had witnessed the assault."<sup>128</sup> All four prisoners denied any knowledge of the assault. The second report summarized the plaintiff's version of the event, while the third summarized an interview with the prosecutor. "It contained information that the alleged perpetrators . . . would not be charged . . . because of the 'lack of credibility of the victim' and because there was no evidence available to corroborate the victim's allegations."<sup>129</sup>

In an opinion taking an especially negative view of investigatory reports, the circuit court ruled that most of the reports should have been excluded on hearsay grounds, and that their admission was reversible error. The court's decision is based upon three analytically distinct, though related, grounds. First, the court, while acknowledging that investigatory reports admitted under Rule 803(8)(C) may contain opinions and evaluations, ruled that they must contain factual findings.<sup>130</sup> Furthermore, these factual findings must "be based upon the knowledge or observations of the preparer of the report."<sup>131</sup> The court relied in part upon the statement in the advisory committee's note to Rule 803(8)(C) that "[p]olice reports have generally been excluded *except to the extent to which they incorporate firsthand observations of the officer*."<sup>132</sup> Although some of the information in the reports was based upon personal knowledge, e.g., that certain interviews took place

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125. See *infra* notes 224-37 and accompanying text.

126. 35 F.3d 1088 (6th Cir. 1994).

127. *Id.* at 1088.

128. *Id.* at 1089.

129. *Id.*

130. See *supra* notes 117-19 and accompanying text.

131. *Miller*, 35 F.3d at 1091.

132. *Id.* at 1091 (emphasis in original).

and that the local prosecutor elected not to press charges, most of the report was not "part of any factual finding made through firsthand observation."<sup>133</sup> "[T]he statements of the victim, the alleged assailants, and various witnesses . . . [and] statements by the prosecutor regarding reasons for not pursuing criminal charges . . . contained hearsay information, not facts observed by the preparer of the police report."<sup>134</sup>

This part of the court's analysis is seriously flawed. Investigations by their nature involve the gathering of information from numerous sources, including from third persons. Further, the statement in the advisory committee's note relied upon by the *Miller* court referred to the state of the decisional law *prior* to the adoption of the Federal Rules of Evidence; it was not an indication of how Rule 803(8)(C) should be interpreted. Unlike Rule 803(8)(B) which specifically refers to "matters observed pursuant to duty imposed by law[.]" subdivision (C) requires only that the report contain "factual findings resulting from an investigation . . . ." A requirement that the preparer of an investigatory report must have personal knowledge would come close to obliterating the efficacy of Rule 803(8)(C). The Rule 803(8)(C) hearsay exception contemplates that the findings will be based upon "multiple layers of hearsay . . . ."<sup>135</sup>

The *Miller* court, however, also couched its ruling in trustworthiness terms. It quoted *United States v. Paducah Towing Co.* for the proposition "that factual findings, which are based on inadmissible hearsay, are not admissible under Rule 803(8)(C) because the underlying information is untrustworthy."<sup>136</sup> This seems far too broad. The critical issue under Rule 803(8)(C) is not whether the factual findings are based upon admissible evidence, but whether "the sources of information or other circumstances indicate lack of trustworthiness."<sup>137</sup> The fact that the findings are based in part, or even largely upon, inadmissible hearsay should not *automatically* lead to the conclusion that the findings are untrustworthy. Indeed, Rule 803(8)(C) presumes that governmental

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133. *Id.*

134. *Id.*

135. MUELLER & KIRKPATRICK, *supra* note 24, § 8.47, at 976. See *Moss v. Ole S. Real Estate*, 933 F.2d 1300 (5th Cir. 1991).

136. *Miller*, 35 F.3d at 1091 (quoting *United States v. Paducah Towing Co.*, 692 F.2d 412, 420-21 (6th Cir. 1982)).

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

investigatory reports are trustworthy and places the burden upon the party opposing admission to show otherwise.<sup>138</sup>

The *Miller* court was on much firmer ground when it focused upon the actual contents of the reports. It found that the “bulk” of the reports did not contain findings, conclusions, or opinions, but was “largely a recitation of statements of other individuals that fall under no other exception to the hearsay rule.”<sup>139</sup> The statements of the victim’s alleged assailants, other witnesses, and the prosecutor were “hearsay within hearsay” that should not have been placed before the jury.<sup>140</sup> This conclusion seems correct. Rule 803(8)(C) authorizes the admission of investigatory reports containing “factual findings,” not otherwise inadmissible underlying data.<sup>141</sup>

The circuit court in *Miller* concluded that “only those portions of the reports that constituted either factual findings resulting from the firsthand knowledge of the report’s preparer or opinions and conclusions derived from those facts should have been admitted into evidence.”<sup>142</sup> Because the reports were admitted for their truth, to show that the sexual assault did not occur but was fabricated,<sup>143</sup> the error was prejudicial calling for a new trial. Although some of the circuit court’s reasons for finding the bulk of reports inadmissible are highly questionable, the court’s ruling, that Rule 803(8)(C) does not authorize the wholesale admission of all the inadmissible data and information underlying the findings and conclusions in an investigatory report, seems correct.

#### D. Trustworthiness

In the great majority of federal court § 1983 actions where admissibility of an investigatory report is at issue, the report’s trustworthiness is the single most important issue. The Rule 803(8)(C) hearsay exception has an escape hatch: even if an investigatory report satisfies the Rule’s requisites that it contain “factual findings” resulting from an

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138. See *infra* note 144 and accompanying text.

139. *Miller*, 35 F.3d at 1092.

140. *Id.*

141. The court found that the report did not satisfy the Rule 803(24) residual exception because it did not provide “equivalent circumstantial guarantees of trustworthiness” as out-of-court statements that come within a specific exception. *Id.*

142. *Id.* at 1093.

143. The court distinguished its unpublished opinion in *Roland v. Johnson*, 933 F.2d 1009 (6th Cir. 1991) where the police reports were not introduced for their truth but to show that the prison official knew about threats of homosexual violence.

"investigation" carried out pursuant to legal authority, the district court may exclude it when "the sources of information or other circumstances indicate lack of trustworthiness." However, because it is assumed that public officials perform their duties properly, investigatory reports encompassed within Rule 803(8)(C) are presumed to be trustworthy. The burden is thus placed upon the party opposing the admissibility of the report to demonstrate its lack of reliability.<sup>144</sup> The advisory committee's note to Rule 803(8)(C) sets forth a "non-exclusive list of four factors"<sup>145</sup> that should be considered in evaluating the report's trustworthiness:

- (1) the timeliness of the investigation;
- (2) the special skills or experience of the official;
- (3) whether a hearing was held and the level at which conducted; and
- (4) possible motivation problems suggested by *Palmer v. Hoffman*.<sup>146</sup>

The federal courts, both generally and in § 1983 actions specifically, place heavy reliance upon these four methodological factors in evaluating the trustworthiness of investigatory reports.<sup>147</sup> This makes sense, not just because these are the factors specifically articulated in the advisory committee's note, but also because these factors are highly relevant in assessing trustworthiness. The timeliness of the investigation is highly pertinent because investigations that take place relatively close in time to the incidents in question are generally more likely to produce

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144. For § 1983 examples, see *Miller v. Field*, 35 F.3d 1088, 1090 (6th Cir. 1994); *Montiel v. City of Los Angeles*, 2 F.3d 335 (9th Cir. 1993); *Gentile v. County of Suffolk*, 926 F.2d 142 (2d Cir. 1991); *Perrin v. Anderson*, 784 F.2d 1040 (10th Cir. 1986). See also *Johnson v. City of Pleasanton*, 982 F.2d 350 (9th Cir. 1992); *United States v. Versaint*, 849 F.2d 827 (3d Cir. 1988); *Bradford Trust Co. of Boston v. Merrill, Lynch, Pierce, Fenner & Smith*, 805 F.2d 49 (2d Cir. 1986); *Ellis v. International Playtex*, 745 F.2d 292 (4th Cir. 1984); *In re Japanese Elecs. Prods. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574 (1986); *In re Paducah Towing Co.*, 692 F.2d 412 (6th Cir. 1982); *Robbins v. Whelan*, 653 F.2d 47 (1st Cir.), *cert. denied*, 454 U.S. 1123 (1981); FED. R. EVID. 803(8)(C) advisory committee's note.

Because Rule 803(8)(C) presumes trustworthiness, the district court need not make an *explicit* finding of trustworthiness. *Air Disaster at Lockerbie, Scotland v. PanAmerica World Airways*, 37 F.3d 804, 827-28 (2d Cir. 1994).

145. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167 n.11 (1988).

146. FED. R. EVID. 803(8)(C) advisory committee's note (citations omitted). The reference to *Palmer v. Hoffman*, 318 U.S. 109 (1943) is discussed later in the text. See *infra* notes 155-57 and accompanying text.

147. See *infra* notes 187-210 and accompanying text (§ 1983 applications).

reports of greater reliability.<sup>148</sup> The reason for this is rather apparent. As Judge Weinstein stated in a significant § 1983 decision, "it is important to interview witnesses before memories fade and to inspect physical evidence before it is affected by the passage of time or by tampering."<sup>149</sup> On the other hand, where "the report is the result of a study or particularly where . . . the investigators depend heavily upon documents, the passage of time does not appreciably detract from reliability."<sup>150</sup>

The importance of the special skills or experience of the investigators who conducted the investigation is also self-evident. This factor requires an inquiry into the background and experience of the investigators. For example, in finding that the report issued by the New York State Temporary Commission of Investigation concerning the Suffolk County Police Department and District Attorney's Office was reliable, Judge Weinstein relied upon the facts that the Commission was chaired by a former United States Attorney for the Eastern District of New York who was presently the dean of a law school, that the other five commissioners were lawyers, and that "[k]ey members of the staff were lawyers with extensive experience in criminal law enforcement."<sup>151</sup>

With respect to the procedures employed, Rule 803(8)(C) does not require that a public or other hearing be held. However, whether the agency conducted a hearing as part of its investigation is a pertinent consideration in evaluating the report's trustworthiness.<sup>152</sup> When a hearing is held, there is no requirement that it be adjudicatory in nature.<sup>153</sup> Because most investigations are carried out without an evidentiary hearing, "[r]equiring that the government report of an investigation be based on an evidentiary hearing providing an opportuni-

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148. For § 1983 examples, see *Perrin v. Anderson*, 784 F.2d 1040 (10th Cir. 1986) (report prepared approximately five weeks after incident in question; report admitted); *Wilson v. Beebe*, 743 F.2d 342 (6th Cir. 1984) (report prepared within one week after incident; report admitted), *vacated on other grounds*, 770 F.2d 578 (6th Cir. 1985). See also *Anderson v. City of N.Y.*, 657 F. Supp. 1571, 1578-79 (S.D.N.Y. 1987) (unclear how to evaluate timeliness factor) see *infra* note 205.

149. *Gentile v. County of Suffolk*, 129 F.R.D. 435, 450 (E.D.N.Y. 1990), *aff'd*, 926 F.2d 142 (2d Cir. 1991).

150. *Id.* See also *Ellis v. International Playtex*, 745 F.2d 292, 303 (4th Cir. 1984).

151. *Gentile*, 129 F.R.D. at 452. Cf. *Anderson v. City of N.Y.*, 657 F. Supp. 1571, 1579 (S.D.N.Y. 1987) (special skill or experience found "problematic").

152. See *In re Japanese Elecs. Prods. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574 (1989); *Walker v. Fairchild Indus.*, 554 F. Supp. 650 (D. Nev. 1982).

153. *Gentile*, 129 F.R.D. at 455.



ty for cross-examination would rob Rule 803(8)(C) of any practical utility."<sup>154</sup>

The advisory committee's citation to the Supreme Court's decision in *Palmer v. Hoffman*<sup>155</sup> suggests that the possible motivational problems it had in mind were primarily those stemming from reports prepared in anticipation of litigation. The *Palmer* decision, which upheld the exclusion of an accident report prepared by the train engineer, is best explained on the ground that the report was prepared with an eye toward litigation.<sup>156</sup> Because of this, the Second Circuit in *Palmer* had found that the engineer's report was "dripping with motivations to misrepresent."<sup>157</sup>

There may, however, be other types of motivational problems. In some cases courts have found that political bias or motivation was a significant factor in the evaluation of trustworthiness.<sup>158</sup> In *Anderson v. City of New York*,<sup>159</sup> a § 1983 action, the district court, in excluding a congressional subcommittee report on police misconduct as untrustworthy, found that "[o]bviously the 'witnesses' at these hearings were self-interested in their testimony" and that these types of legislative hearings and reports "are frequently marred by political expediency and grandstanding." In contrast, in finding the investigatory report of the New York State Temporary Commission of Investigation on police and prosecutorial misconduct to be trustworthy, Judge Weinstein in *Gentile v. County of Suffolk*<sup>160</sup> relied upon "[t]he nonpartisan make-up of the Commission."

Bias can result for other reasons as well. In *Lewis v. Velez*<sup>161</sup> the district court, in a prisoner excessive force case, excluded an investigatory report prepared by corrections officers as untrustworthy. The report

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154. *In re Japanese Elecs. Prods.*, 723 F.2d at 268.

155. 318 U.S. 109 (1943).

156. 2 STRONG, *supra* note 36, § 288; FED. R. EVID. 803(6) advisory committee's note.

157. *Hoffman v. Palmer*, 129 F.2d 976, 991 (2d Cir. 1942), *aff'd*, 318 U.S. 109 (1943), *quoted in* FED. R. EVID. 803(6) advisory's committee note.

158. *See Baker v. Firestone Tire & Rubber Co.*, 793 F.2d 1196, 1199 (11th Cir. 1986) (report of congressional subcommittee concerning Firestone 500 tires excluded because it did not contain "factual findings necessary to an objective investigation, but consisted of the rather heated conclusions of a politically motivated hearing"); *Anderson v. City of N.Y.*, 657 F. Supp. 1571, 1579 (S.D.N.Y. 1987) (witnesses at subcommittee on police misconduct were "self-interested in their testimony").

159. *Anderson*, 657 F. Supp. at 1579. *See also* discussion accompanying notes 202-06.

160. 129 F.R.D. 435, 457 (E.D.N.Y. 1990), *aff'd*, 926 F.2d 142 (2d Cir. 1991). *Gentile* is discussed in detail in the text below.

161. 149 F.R.D. 474 (S.D.N.Y. 1993).

incorporated statements from the corrections officers involved in the incident. These officers were obviously biased because their jobs were at stake and because they faced potential civil and criminal liability.<sup>162</sup> Whatever the possible source of bias, ultimately the district court must determine whether the investigatory body had “[a] neutral and objective stance . . . .”<sup>163</sup>

### *E. Other Trustworthiness Factors*

Although the four trustworthiness factors articulated in the advisory committee’s note to Rule 803(8)(C) are the most significant ones, they are not the only pertinent considerations. The advisory committee recognized this. After describing the four factors “which may be of assistance” in evaluating trustworthiness, the committee acknowledged that “[o]thers no doubt could be added.”<sup>164</sup>

In his district court decision in *Zenith Radio Corp. v. Matsushita Electrical Co.*,<sup>165</sup> Judge Becker extensively analyzed the trustworthiness issue and identified seven other pertinent factors in addition to the four articulated by the advisory committee: (1) the finality of the agency’s findings and the likelihood of modification or reversal; (2) the extent to which the agency’s findings are based upon inadmissible or biased evidence; (3) if a hearing was held, the procedural safeguards utilized; (4) “[t]he extent to which there is an ascertainable record on which the findings are based;”<sup>166</sup> (5) the extent to which the findings represent an attempt to implement agency or other governmental policy; (6) “[t]he extent to which the findings are based upon findings of another investigative body or tribunal which is itself vulnerable as the result of trustworthiness evaluation;”<sup>167</sup> and (7) where the report contains an expert opinion, “the extent to which the facts or data upon which the opinion is based are of a type reasonably relied upon by experts in the particular field.”<sup>168</sup> However, “[a]lthough there may be many reasons

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162. See *infra* notes 207-10 and accompanying text.

163. MUELLER & KIRKPATRICK, *supra* note 24, § 850, at 991.

164. FED. R. EVID. 803(8)(C) advisory committee’s note. See also *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167 n.11 (1988) (referring to the advisory committee’s “nonexclusive list of four factors” for assessing trustworthiness); *In re Japanese Elecs. Prods. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983), *rev’d on other grounds*, 475 U.S. 574 (1986).

165. 505 F. Supp. 1125, 1147 (E.D. Pa. 1980), *rev’d in part on other grounds*, 723 F.2d 238 (3d Cir. 1983), *rev’d on other grounds*, 475 U.S. 574 (1986).

166. *Id.* at 1147.

167. *Id.*

168. *Id.* See also *Moss v. Ole S. Real Estate*, 933 F.2d 1300 (5th Cir. 1991).

for finding a report untrustworthy, it is clear that the inability of the defense to cross-examine the author on the conclusions in the report is not a reason for the exclusion."<sup>169</sup>

Although on appeal the Third Circuit did not actually "endorse the seven [additional] specific criteria," it did not reject them and agreed that trial courts are not "restricted to the four factors listed by the Advisory Committee."<sup>170</sup> Furthermore, the circuit court made several important rulings concerning the trustworthiness evaluation: (1) The court agreed with the district court that the lack of cross-examination is not a reason for exclusion. Since "[m]ost governmental investigations proceed without either evidentiary hearings or the opportunity for cross-examination," a requirement that investigatory reports be based upon an "evidentiary hearing providing an opportunity for cross-examination would rob Rule 803(8)(C) of any practical utility."<sup>171</sup> "The indicia of reliability for the governmental investigative report is the fact that it is prepared pursuant to a duty imposed by law."<sup>172</sup> (2) The fact that the author of the report was absent from the hearings and relied upon the reports of other officials did not make the findings unreliable because governmental officials often must rely upon staff reports of the hearings.<sup>173</sup> (3) "If the government in conducting investigations pursuant to authority granted by law, is authorized to rely and does rely on confidential submissions in making a finding, that fact does not so impugn the trustworthiness of the finding as to make it inadmissible."<sup>174</sup> (4) Rule 803(8)(C) encompasses "accusatory" investigatory proceedings.<sup>175</sup> (5) The fact that an investigatory finding is subject to

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The seven additional *Zenith Radio* factors were endorsed in *Escrow Disbursement Ins. Agency v. American Title and Ins. Co.*, 551 F. Supp. 302 (S.D. Fla. 1982). *But see Masemer v. Delmarva Power & Light Co.*, 723 F. Supp. 1019, 1021 (D. Del. 1989) (declining to apply the seven additional factors).

169. *Distaff, Inc. v. Springfield Contracting Corp.*, 984 F.2d 108, 112 (4th Cir. 1993). *But see WEINSTEIN & BERGER, supra* note 36, § 8.03(7)[01], at 803 - 256-257 (where trustworthiness of the report is problematical, trial court may exclude report unless the reporting officer is produced for cross-examination).

170. *In re Japanese Elecs. Prods. Antitrust Litig.*, 723 F.2d 238, 265 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574 (1989).

171. *Id.* at 268.

172. *Id.*

173. *Id.* ("In the real world of governmental affairs, investigations into economic facts . . . will frequently require that the expert to whom the agency entrusts the task of making a finding rely on facts not directly observed by him."). *Accord Moss v. Ole S. Real Estate*, 933 F.2d 1300 (5th Cir. 1991).

174. 723 F.2d at 270-71.

175. *Id.* at 273.

possible judicial review “does not support an inference that the investigation was unreliable or the finding based upon it untrustworthy.”<sup>176</sup> and (6) A *recommended* investigatory decision may be trustworthy, even if it is superseded by a consent decree.<sup>177</sup>

Of the seven additional trustworthiness factors identified by the district court in *Zenith Radio*, the federal courts have paid the most attention to “finality.” The prevailing view is that, although lack of finality is a pertinent consideration in evaluating the trustworthiness of the report, finality is not an absolute requisite of admissibility.<sup>178</sup> On the other hand, a number of decisions have relied upon the lack of finality to support the conclusion that either the report does not contain “factual findings” or that, even if it does, it is untrustworthy.<sup>179</sup> In the

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176. *Id.* at 268-69.

177. The court stated: “That the recommended decision was superseded by the Consent Decree is irrelevant, since the Consent Decree in no sense rejects the findings in the recommended decision. The recommended decision unquestionably is sufficiently trustworthy for admission under Rule 803(8)(C). The congruence between the Recommendation, the draft recommended decision and the Consent Decree is strong circumstantial evidence that the staff investigation was thorough.” *Id.* at 274.

178. See *Ellis v. International Playtex, Inc.*, 745 F.2d 292 (4th Cir. 1984) (tentative findings may be admissible); *In re Japanese Elecs. Prods. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983) (lack of finality did not render report untrustworthy), *rev'd on other grounds*, 475 U.S. 574 (1986); *United States v. School Dist.*, 577 F.2d 1339 (6th Cir. 1978) (fact that agency proceeding was not complete did not mean report was not trustworthy); *Gentile v. County of Suffolk*, 129 F.R.D. 435, 458 (E.D.N.Y. 1990) (finality is not a *sine qua non* because “[i]n many instances non-final reports may be extremely useful and reliable as far as they go. But certainly finality is a consideration favoring admission.”), *aff'd*, 926 F.2d 142 (2d Cir. 1991).

The fact that judicial review is available “does not support an inference that the investigation was unreliable or the finding based upon it untrustworthy.” *In re Japanese Elecs. Prods.*, 723 F.2d at 268-69.

179. See *Toole v. McClintock*, 999 F.2d 1430, 1434-35 (11th Cir. 1993) (report containing only “proposed findings” not within Rule 803(8)(C): “Rule 803 makes no [hearsay] exception for tentative or interim reports subject to revision and review”); *United States v. Gray*, 852 F.2d 136, 139 (4th Cir. 1988) (district court did not abuse its discretion in excluding report that was “only a tentative internal report not purporting to contain agency factual findings”); *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1140 (5th Cir. 1983) (“If the document is not sufficiently final, it may not constitute a ‘factual finding,’ or may be considered untrustworthy . . . .”); *City of N.Y. v. Pullman, Inc.*, 662 F.2d 910, 914-15 (2d Cir. 1981) (“As an interim report subject to revision and review, the report did not satisfy the express requirement of the Rule that the proffered evidence must constitute the ‘findings’ of an agency or official.” The report’s “broad language did not embody the findings of an agency, but the tentative results of an incomplete staff investigation.”), *cert. denied*, 454 U.S. 1164 (1982).

In *Skorupski v. County of Suffolk*, 652 F. Supp. 690 (E.D.N.Y. 1987), a § 1983 case, the court held a noncompleted report inadmissible on hearsay and relevance grounds. At the time of trial, the Commission had compiled data and the investigation was still ongoing. “No specifics or results, however, have been provided by plaintiff regarding either the scope or focus of this investigation . . . and, at all events, such investigation is inadmissible hearsay

author's view, lack of finality should be considered a pertinent, not dispositive, trustworthiness factor. The critical inquiry should be the impact of the lack of finality upon the report's trustworthiness. There are still other important trustworthiness considerations: whether the investigatory body acted with care and sound methodology, pursued all relevant leads, interviewed all pertinent witnesses, considered all relevant information, employed "checking procedures that might catch mistakes," and subjected evaluative reports to peer review.<sup>180</sup>

As the above discussion demonstrates, trustworthiness focuses upon the methodology of the investigation, not on whether the findings and conclusions are complete and accurate.<sup>181</sup> So long as the trial judge finds that reasonable jurors could accept the findings and conclusions in the report, it may not be excluded on the grounds that the findings and conclusions are incomplete, inaccurate, or not credible.<sup>182</sup> These issues go to the weight the trier-of-fact may give to the report.

Given the numerous factors that may affect the trustworthiness determination, it is understandable that the district courts have broad discretion in this regard.<sup>183</sup> Further discretionary power to admit or exclude is found in Rule 403.<sup>184</sup> The Fifth Circuit has cautioned, however, that "Rule 403 should not be misused in such a way that 'would end the presumption that evaluative reports are admissible hearsay under Rule 803(8)(C).'"<sup>185</sup> Trustworthiness determinations are generally reviewed on appeal under the deferential abuse of discretion standard.<sup>186</sup>

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evidence in this case." *Id.* at 695.

180. MUELLER & KIRKPATRICK, *supra* note 24, § 850, at 992-93.

181. Moss v. Ole S. Real Estate, 933 F.2d 1300 (5th Cir. 1991).

182. *Id.*

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

184. See *supra* notes 211-37 and accompanying text.

185. Cortes v. Maxus Exploration Co., 977 F.2d 195, 201 (5th Cir. 1992).

186. Gentile v. County of Suffolk, 926 F.2d 142 (2d Cir. 1991); Perrin v. Anderson, 784 F.2d 1040 (10th Cir. 1986); City of N.Y. v. Pullman, Inc., 662 F.2d 910 (2d Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982). In *In re Japanese Elecs. Prods. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 564 (1986), the circuit court refined the standard of appellate review over the trustworthiness determination: (1) when the trial court makes Rule 104(a) findings of fact about the manner in which the report was prepared, the clearly erroneous standard of Fed. R. Civ. P. 52 governs on appeal; (2) if the determination of untrustworthiness was predicated on factors that are extraneous to the trustworthiness determination, this is an error of law reviewed de novo. See also Moss v. Ole S. Real Estate, 933 F.2d 1300 (5th Cir. 1991).

*F. Applications in § 1983 Actions*

The trustworthiness of investigatory reports has been at issue in several reported § 1983 decisions. These reports have been proffered in some cases on the issue of personal liability and in others on municipal liability. In some cases, the plaintiff sought to introduce the report, and in others the defendant.

In *Wilson v. Beebe*,<sup>187</sup> the plaintiff alleged that while being handcuffed he was shot by State Trooper Beebe. The Sixth Circuit ruled that the district court did not commit error in allowing the plaintiff to introduce into evidence an investigatory report prepared by Beebe's district commander, Captain MacGregor. The report detailed the events that led to the shooting and contained a statement by Captain MacGregor that Trooper "Beebe, by attempting to handcuff [the plaintiff] while holding a cocked weapon, acted contrary to department training in weapons use and handling."<sup>188</sup>

It is not difficult to understand why the plaintiff wanted to introduce this report. It was highly probative on the personal liability of Officer Beebe. Relying on the four factors set forth in the advisory committee's note to Rule 803(8)(C), the circuit court found that the report was sufficiently trustworthy. It was written by Captain MacGregor within one week of the incident; it was prepared for interdepartmental use; MacGregor was previously a firearms instructor in the police department and was thus familiar with its training procedures and policies; there were no motivational problems; and no evidence was "presented which impugned the memorandum's trustworthiness."<sup>189</sup>

In *Perrin v. Anderson*,<sup>190</sup> it was the defendant officers who introduced the investigatory report into evidence. The complaint in *Perrin* alleged that two members of the State Highway Patrol killed the deceased in violation of his constitutional rights. Following the incident, a board consisting of five members of the state police was convened under the auspices of the State Department of Public Safety to investigate the matter. The board, after interviewing the two defendant police officers and their superiors, issued a report finding that there was "no doubt that [Officer Anderson] acted within the guidelines set forth

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187. 743 F.2d 342 (6th Cir. 1984), *vacated on other grounds*, 770 F.2d 578 (6th Cir. 1985) (en banc).

188. *Id.* at 346.

189. *Id.* at 347.

190. 784 F.2d 1040 (10th Cir. 1986).

in the Policies and Procedures Manual.”<sup>191</sup> The Tenth Circuit found that the district court did not abuse its discretion in allowing the defendants to introduce the report into evidence. The fact that the report was prepared pursuant to lawful authority helped to ensure its reliability.<sup>192</sup> Furthermore, it was found trustworthy because it was prepared approximately five weeks after the incident and by high-ranking officers; hearings, although not adversarial, were held; and there were no motivational problems. The court refused to assume that an internal investigation is necessarily biased: “That an investigation was conducted internally should affect the weight to be given the report, not its admissibility.”<sup>193</sup> The plaintiff in *Perrin* failed to offer “convincing evidence” that the report was not trustworthy.

The investigatory reports in *Wilson* and *Perrin* were relevant on the issue of the defendant officers’ personal liability. Findings and conclusions in investigatory reports have also been introduced on the issue of municipal liability. The leading case is *Gentile v. County of Suffolk*.<sup>194</sup> In *Gentile*, the plaintiffs sought relief against individual police officers and the county. The plaintiffs alleged that the Suffolk County Police Department and District Attorney’s Office were refusing to seriously investigate police and prosecutorial misconduct. Judge Weinstein’s district court opinion contains a comprehensive analysis of most of the evidentiary aspects of investigatory reports, including their trustworthiness.

Ultimately, the Second Circuit upheld Judge Weinstein’s admission of portions of the *Report of the New York State Temporary Commission of Investigation of the Suffolk County District Attorney’s Office and Police Department*, the so-called SIC Report. The report concluded that these offices tolerated and ratified police and prosecutorial misconduct. In finding the SIC Report trustworthy, Judge Weinstein considered the timeliness of the investigation, the special skills, experience, and expertise of the investigators, the procedures employed, the nonpartisan makeup of the Commission, which belied charges of bias, and the report’s finality. Significantly, Judge Weinstein found that, given the evidentiary difficulties in proving a municipal custom or practice, admitting the report furthered the policies of § 1983:

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191. *Id.* at 1046.

192. *Id.*

193. *Id.* at 1047. Cautionary instructions were given in *Perrin*. See *infra* notes 231-37 and accompanying text.

194. 129 F.R.D. 435 (E.D.N.Y. 1990), *aff’d*, 926 F.2d 142 (2d Cir. 1991).

Avoidance of undue delay is of particular importance in civil rights cases brought against municipalities under § 1983. Were reports such as the SIC Report to be excluded, plaintiffs would be forced to introduce proof of innumerable individual incidents of police and prosecutorial misconduct in order to show that a municipal practice, policy or custom existed. This would make it difficult, if not impossible, for many deserving plaintiffs to prevail, thereby frustrating federal civil rights policy . . . .<sup>195</sup>

This is an important point deserving amplification. There are rarely factual issues when a municipal policy is embodied in a formally promulgated ordinance, regulation, or policy statement or the final decision of a municipal policymaker.<sup>196</sup> By contrast, sharp factual issues are often present when the municipal liability claim is premised upon an alleged custom or practice. The parties may well find it necessary to conduct broad discovery and their own investigations. To prove a custom or practice, the plaintiff's counsel will normally find it necessary to weave together numerous individual pieces of circumstantial evidence, including the testimony of many witnesses.<sup>197</sup> This can, as Judge Weinstein observed, be very time consuming and costly. However, if the government carried out an investigation of a systemic problem and issued an investigatory report finding that the particular unlawful practice existed, the government may, in effect, have done the factual work-up for the plaintiff. The report, if admissible, may be highly probative proof of the alleged practice. In this context, it becomes a type of "large size economy measure."

Of course, the defendants must be protected against unfair prejudice. In *Gentile*, Judge Weinstein developed procedures specifically designed to prevent unfair prejudice to the defendants. The entire report was not introduced. Rather, each side was allowed to select a few findings to *read* to the jury. By refusing to admit the report itself into evidence, the district court limited the possible unfair prejudice from its being "taken into the jury room where it might continue to speak."<sup>198</sup> Further, both the parties and the district court stressed in instructions that because the

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195. *Gentile*, 129 F.R.D. at 459.

196. The Supreme Court has resolved that whether an official is a municipal policymaker is a question of law for the court. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 739 (1989); *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988); *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986).

197. See MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: FEDERAL EVIDENCE §§ 12.4-12.5 (2d ed. 1995).

198. *Gentile*, 129 F.R.D. at 461.



SIC Report did not contain any findings with respect to the individual officer defendants, it was relevant only with respect to the municipal liability claim against the county.

On appeal, the Second Circuit found that Judge Weinstein did not abuse his discretion in admitting the portions of the SIC Report.<sup>199</sup> The report was relevant on the question of municipal liability because, as the district court found, it "supports plaintiffs' allegation that the police and the District Attorney's Office were likely because of a course of conduct to consistently ignore evidence of misconduct on the part of the defendant officers and to sanction and cover up any wrongdoing connected with the . . . investigation [involving the plaintiffs]."<sup>200</sup> Furthermore, the circuit court ruled that Judge Weinstein did not abuse his discretion in finding the report to be trustworthy and in finding that the defendants did not meet their burden of showing otherwise.

The defendants in *Gentile* also challenged Judge Weinstein's procedures for determining the trustworthiness of the report. They argued that the district court erred in admitting the report at trial and delaying the hearing on trustworthiness until the post-trial stage. The circuit court rejected this contention. Although it is true that Judge Weinstein delayed the hearing on trustworthiness until the post-trial stage, he had found the SIC Report to be trustworthy before admitting it. Further, the defendants' request for an earlier hearing, made on the third day of trial, was untimely. Given the fact that a party does not have a legal right to a hearing to resolve questions of admissibility of evidence, the post-trial hearing actually gave the defendants more process than they were entitled to when contesting the evidentiary issue. Although it is somewhat unusual to admit evidence at trial and hold a post-trial hearing on its admissibility, under the particular circumstances there was no abuse of discretion.<sup>201</sup>

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199. 926 F.2d 142 (2d Cir. 1991).

200. 129 F.R.D. at 446.

201. The circuit court in *Gentile* also found that Judge Weinstein properly distinguished *Janetka v. Dabe*, 892 F.2d 187 (2d Cir. 1989), a § 1983 case in which the circuit court upheld the exclusion of the same State Temporary Commission of Investigation report on the ground that the plaintiff there failed to show its relevance to the case at hand and, indeed, neither produced a copy of the report for the district court nor made an offer of proof of its relevant portions. See *infra* notes 219-20 and accompanying text.

In a post-*Gentile* case, *Ricciuti v. New York City Transit Auth.*, 941 F.2d 119 (2d Cir. 1991), the Second Circuit suggested that the hearsay problem involving the admissibility of investigatory reports might be avoided if the report was not admitted for the truth of its contents, but only for the fact that the report was made, which could be relevant on the issue of whether the municipal policy makers were on notice of repeated failures to investigate

It is instructive to contrast the finding of trustworthiness in *Gentile* with the finding of untrustworthiness in *Anderson v. City of New York*.<sup>202</sup> In *Anderson*, the plaintiff, a black male, alleged that officers of the New York City Police Department used excessive force ("physical violence") while arresting him. He alleged that this violence, "as well as the arrest and prosecution itself, were manifestations of a [city] policy of civil rights deprivations against racial minorities . . . ." <sup>203</sup> In support of his motion for summary judgment, the plaintiff sought to rely upon a congressional report entitled the *Report on Hearings in New York City on Police Misconduct by the Subcommittee on Criminal Justice*. The report was based on two public hearings at which testimony was given by civilians alleging police misconduct, police officers, former New York City Mayor Koch, and by the City Police Commissioner. "The [R]eport, summarizing these hearings, is an indictment of a system seen as encouraging—through failures of supervision, training and discipline—a pattern of illegal arrest, harassment, foul language and racial slurs, and brutality, aimed at minorities by white police officers."<sup>204</sup>

The court found that the report was not sufficiently trustworthy to meet the Rule 803(8)(C) hearsay exception for investigatory reports. Its reliability was undercut by the facts that the subcommittee members lacked personal knowledge of the events about which the witnesses testified, and, moreover, the witnesses were "self-interested in their testimony."<sup>205</sup> The court was generally distrustful of legislative subcommittee reports, finding them "frequently marred by political expediency and grandstanding."<sup>206</sup>

In *Lewis v. Velez*,<sup>207</sup> a prisoner excessive force case, the federal district court ruled that an investigatory report of the incident in

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charges of police use of excessive force.

202. 657 F. Supp. 1571 (S.D.N.Y. 1987).

203. *Id.* at 1572.

204. *Id.* at 1577.

205. *Id.* at 1579. The court in *Anderson* found that the timeliness factor was unclear because, although plaintiff's arrest occurred in 1982 and the hearings took place in 1983 and covered the period 1979-1983, the "[s]ubcommittee did not investigate or examine, in a timely manner, reports regarding the instant set of facts and how, if at all, they are related to the alleged general policy of discrimination." *Id.*

206. *Id.* The court in *Anderson* quoted *Knight Pub. Co. v. United States Dep't. of Justice*, 631 F. Supp. 1175, 1178 (W.D.N.C. 1986) ("[C]ongressional committee hearings are oft time[s] conducted in a circus atmosphere, with a gracious plenty of posturing by the politicians for T.V. publicity in large part for benefit of constituents back home . . . . This 'circus' is hardly conducive to the development of facts . . . .").

207. 149 F.R.D. 474 (S.D.N.Y. 1993).

question, that incorporated statements from the corrections officers involved, was not trustworthy. The investigator, Captain Bryan, lacked any training in investigative skills. Furthermore, the corrections officers' jobs were on the line and they faced potential criminal and civil liability.<sup>208</sup> The court stated that "[a] strong likelihood of improper motivation . . . can outweigh all other trustworthiness factors."<sup>209</sup> Indeed, the court found that most cases in which investigatory reports have been excluded present suspicions of bias.<sup>210</sup>

A finding that a report is trustworthy does not mean that it is admissible, because it still must clear other hurdles of admissibility, including the balancing test of Rule 403, exclusionary rules such as that provided for in Federal Rule of Evidence 407 for subsequent remedial measures, and governmental privilege. These issues are discussed in the following sections. Before doing so, however, it should be stressed that the trustworthiness issue is closely related to the Rule 403 evaluation because the greater the trustworthiness of the report, the higher its probative value, and the less likely it will mislead or cause unfair prejudice.

## V. RELEVANCE AND RULE 403; CAUTIONARY INSTRUCTIONS

Even if an investigatory report satisfies the Rule 803(8)(C) hearsay exception, it must still meet the test of relevance<sup>211</sup> and the Rule 403 balancing test.<sup>212</sup> Given the broad definition of relevance,<sup>213</sup> and the

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208. The *Lewis* court observed that "[a] longstanding awareness that correction officers may be liable under § 1983 for inmate beatings has been found [by the Seventh Circuit] to warrant the assumption that 'at least some guards write their reports on such occurrences with that possibility in mind.'" *Id.* at 489 (quoting *Bracey v. Herring*, 466 F.2d 702, 704 (7th Cir. 1972)).

209. *Id.*

210. *Id.* But see *Clark v. Clabaugh*, 20 F.3d 1290 (3d Cir. 1994) (bias of persons interviewed did not render report inherently biased).

211. Federal Rule of Evidence 401 defines "relevant evidence" 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." Under Rule 402, "[e]vidence which is not relevant is not admissible."

212. Federal Rule of Evidence 403 provides that "[a]lthough 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."

213. Under Federal Rules of Evidence 401, it is enough that the evidence has "any tendency" to make a fact of consequence more or less probable.

strong presumption of admissibility under Rule 403,<sup>214</sup> these normally are not significant obstacles. Nevertheless, there are § 1983 cases in which investigatory reports have been excluded both as irrelevant and on Rule 403 grounds.

For example, in *Kinan v. City of Brockton*,<sup>215</sup> the plaintiff asserted § 1983 claims arising out of his arrest against the City and several of its police officers. On appeal, the plaintiff argued that the district court erred in excluding an internal affairs investigatory report of the incident involving the plaintiff. Two years after the incident, Police Chief Cronin ordered an in-house investigation, which concluded that the police officers had acted appropriately and that there was no wrongdoing by the police department. Although the plaintiff argued that the report tended to “prove a policy on part of the city of ratification of civil rights abuses by the police department,”<sup>216</sup> the circuit court failed to see its relevance under the particular circumstances. The court found it

difficult to comprehend how a report finding no wrongdoing by the police would prove a city policy of ratification of civil rights abuses. Presumably this no-fault report would become evidence of condonation of improper police behavior if the jury found, contrary to the report, that the police officers had in fact violated plaintiff’s civil rights. Since the jury did not make such a finding, if there was error, it was harmless.<sup>217</sup>

The circuit court also rejected the “convoluted reasoning” of plaintiff’s second argument, namely that excluding the investigatory report prevented him from proving the Chief of Police’s responsibility, as a policymaker, for the alleged constitutional violation. Cronin was neither the Chief of Police at the time of the event in question nor a city policymaker. The circuit court failed “to see how an investigation ordered by [the police chief] two years after the incident concluding that there was no police misconduct would be evidence of [the chief’s] liability as a policymaker.”<sup>218</sup> Thus, the First Circuit upheld the district court’s exclusion of the investigatory report on relevance grounds.

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214. See GRAHAM, *supra* note 40, § 403.1, at 175-76. Under Rule 403, evidence may be excluded only if its probative value is “substantially outweighed” by one or more of the countervailing factors. See *supra* note 212.

215. 876 F.2d 1029 (1st Cir. 1989).

216. *Id.* at 1035.

217. *Id.*

218. *Id.*

The Second Circuit upheld the exclusion of an investigatory report on relevance grounds in *Janetka v. Dabe*.<sup>219</sup> In *Janetka*, the plaintiff alleged § 1983 claims based upon the use of excessive force during his arrest and malicious prosecution. He sued the arresting officer, Darrell Dabe, and the County of Suffolk. On appeal, he contested the district court's refusal to admit an investigatory report of the New York State Temporary Commission of Investigation, the SIC Report, which concluded "that Suffolk County tolerated and approved of misconduct by individual police officers."<sup>220</sup> The plaintiff argued that the district court erred in failing to consider the pertinent trustworthiness factors under Rule 803(8)(C). The circuit court, however, found that the district court properly evaluated the relevance of the report before proceeding to the Rule 803(8)(C) hearsay issue and, furthermore, that the district court properly found that the plaintiff failed to establish the relevance of the report. The plaintiff did not even produce a copy of the report for the district court or make an offer of proof as to its relevant portions. He also failed to connect Officer Dabe's conduct to a policy or practice of Suffolk County.

It will be recalled that in *Gentile v. County of Suffolk*,<sup>221</sup> the Second Circuit upheld the district court's determination that the very same SIC Report was relevant. Unlike *Janetka*, however, the plaintiffs in *Gentile* produced a copy of the report and demonstrated its relevance on the issue of municipal liability. The district court in *Gentile* found that

[n]ot only does the SIC report tend to establish the existence of a municipal policy or practice, but it also supports plaintiffs' allegation that the police and the District Attorney's Office were likely because of a course of conduct to consistently ignore evidence of misconduct on the part of the defendant officers and to sanction and cover up any wrongdoing connected with the [plaintiffs] *Gentile* and *Rydstrom* investigation.<sup>222</sup>

Defendants' argument that the SIC Report lacked probative value because it did not specifically deal with the *Gentile* and *Rydstrom* cases was without merit. The report was relevant because it tended "to support an inference of an affirmative link between municipal policy and the *type* of individual behavior involved here."<sup>223</sup>

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219. 892 F.2d 187 (2d Cir. 1989).

220. *Id.* at 190.

221. 129 F.R.D. 435 (E.D.N.Y. 1990), *aff'd*, 926 F.2d 142 (2d Cir. 1991).

222. *Id.* at 446.

223. *Id.* at 447 (emphasis in original).

An investigatory report that meets the requirements of the Rule 803(8)(C) hearsay exception and the test of relevance is still subject to possible exclusion under Rule 403 balancing. It must be kept in mind, however, that not only does Rule 403 strongly favors admissibility, but the Rule 803(8)(C) trustworthy determination is also pertinent to the Rule 403 evaluation because the greater the trustworthiness of the report, the higher its probative value and the lower the danger to mislead or cause unfair prejudice.<sup>224</sup> The Fifth Circuit has cautioned "that the balancing test of Rule 403 should not be misused in such a way that 'would end the presumption that evaluative reports are admissible hearsay under Rule 803(8)(C),' " that is, that they are presumed trustworthy.<sup>225</sup>

Nevertheless, there are § 1983 cases in which investigatory reports were excluded under Rule 403. For one thing, the availability of alternative modes of proof may affect the probative value of an investigatory report. For example, in *Swietlowich v. County of Bucks*,<sup>226</sup> a § 1983 arrestee suicide case, the complaint alleged that the police officers did not comply with their duty to periodically look in on prisoners. The district court excluded a district attorney's investigatory report of alterations of the cell check log, primarily because it doubted its trustworthiness. The circuit court found that this ruling was not error, "particularly since most of the information that [the report] contained could have been obtained from witnesses who were present in court and who contributed to the investigation."<sup>227</sup> Although the circuit court did not cite to Rule 403, the existence of alternative evidence is plainly pertinent to the Rule 403 probative value evaluation, as well as to such 403 goals as preventing needless cumulative evidence and waste of time.<sup>228</sup>

Because of the official character of investigatory reports, courts must be sensitive about the potential for unfair prejudice to the party against whom it is introduced.<sup>229</sup> Steps can be taken to minimize such preju-

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224. See *In re Japanese Elecs. Prods. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574 (1986).

225. *Moss v. Ole S. Real Estate, Inc.*, 933 F.2d 1300, 1308 (5th Cir. 1991) (quoting *Cortes v. Maxus Exploration Co.*, 977 F.2d 195, 201 (5th Cir. 1992)).

226. 610 F.2d 1157 (3d Cir. 1979).

227. *Id.* at 1165.

228. See GRAHAM, *supra* note 40, § 403.1.

229. See *Lindsay v. Ortho Pharmaceutical Corp.*, 637 F.2d 87 (2d Cir. 1980) (report excluded because of danger of unfair prejudice); *Gentile v. County of Suffolk*, 129 F.R.D. 435, 460 (E.D.N.Y. 1990), *aff'd*, 926 F.2d 142 (2d Cir. 1991). See also *United States v. MacDonald*, 688 F.2d 224 (4th Cir. 1982) (exclusion of report upheld because of potential jury confusion),

dice. As discussed earlier, in *Gentile v. County of Suffolk*,<sup>230</sup> Judge Weinstein refused to admit the entire investigatory report into evidence, but instead allowed the parties to read selected portions of it to the jury. Further, Judge Weinstein gave the jury detailed limiting instructions emphasizing that the excerpts "were to be viewed with caution and considered only with regard to the case against the municipal defendant provided the jury first found that the individual defendants had violated plaintiff's constitutional rights."<sup>231</sup> By refusing to admit the report itself into evidence, the court limited the possible unfair prejudice from the report being "taken into the jury room where it might continue to speak."<sup>232</sup> Ultimately, the district court found that, especially because of its importance on the issue of municipal liability, the SIC Report was admissible under Rule 403:

The trustworthiness and probative value of the SIC report, considered in conjunction with the limiting instruction given by the court, other protections afforded defendants and the opportunity defendants were given to produce evidence in derogation of the report, adequately protected against the risk that the excerpts read to the jury may have had an unfair prejudicial effect. Rule 403 does not require the court to exclude the best available evidence supporting plaintiff's *Monell* claim.<sup>233</sup>

On appeal, the Second Circuit ruled that Judge Weinstein did not abuse his discretion under Rule 403.<sup>234</sup>

Cautionary instructions also played an important role under Rule 403 in *Perrin v. Anderson*.<sup>235</sup> There, the Tenth Circuit ruled that the district court did not err in allowing the defendants to introduce an internal investigatory report finding that the police officer's use of deadly force was within police department guidelines. The district court had instructed the jury that this investigatory report resulted from "an agency hearing of its own personnel and for its own purpose and was to have no 'determinative effect on any issue in the case.'"<sup>236</sup> The Tenth Circuit found that "this cautionary instruction mitigated any prejudice the report may have had."<sup>237</sup>

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*cert. denied*, 459 U.S. 1103 (1983).

230. 129 F.R.D. 435 (E.D.N.Y. 1990), *aff'd*, 926 F.2d 142 (2d Cir. 1991).

231. *Id.* at 437.

232. *Id.* at 461.

233. *Id.*

234. *Gentile v. County of Suffolk*, 926 F.2d 142 (2d Cir. 1991).

235. 784 F.2d 1040 (10th Cir. 1986).

236. *Id.* at 1047.

237. *Id.*

## VI. APPLYING THE RULE 407 EXCLUSIONARY RULE FOR SUBSEQUENT REMEDIAL MEASURES TO INVESTIGATORY REPORTS

Federal Rule of Evidence 407 codifies the common law exclusionary rule for remedial measures taken by an alleged wrongdoer following an injury-producing event when the evidence is offered on the issue of liability.<sup>238</sup> The advisory committee's note to Rule 407 articulates the twin rationales for this exclusionary rule. First, there is the relevance concept that taking a remedial step does not constitute an admission of prior wrongdoing; it may simply grow out of the lessons of experience or a present desire for greater care. "Or, as Baron Bromwell put it, the rule rejects the notion that 'because the world gets wiser as it gets older therefore it was foolish before.'"<sup>239</sup> Second, the "more impressive" rationale for the rule is the important public policy "of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety."<sup>240</sup>

The advisory committee's note to Rule 407 provides examples of the types of remedial measures that may fall within the Rule: "[s]ubsequent repairs, installation of safety devices, changes in company rules and discharge of employees . . . ." To this may be added, as circuit courts

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238. FED. R. EVID. 407 provides:

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

*Id.*

239. As the advisory committee's note to Rule 407 recognizes, however, this non-relevance rationale alone would not support the exclusionary rule because, under the liberal definition of relevance set forth in Federal Rule of Evidence 401, an inference of fault from the remedial action taken may be permissible.

240. FED. R. EVID. 407 advisory committee's note. Given the rationale of promoting remedial measures, it follows that the Rule 407 exclusionary rule should be limited to *voluntary* measures undertaken by the party charged with wrongdoing and that are undertaken *after* the injury-producing event. Thus, the exclusionary rule does not pertain to remedial measures *compelled* by governmental authority, for in these circumstances the policy of encouraging remedial measures has no role; one cannot be encouraged to do what one is already compelled to do. In *re Aircrash in Bali, Indonesia*, 871 F.2d 812, 816 (9th Cir.), *cert. denied*, 493 U.S. 917 (1989); *Herndon v. Seven Bar Flying Serv., Inc.*, 716 F.2d 1322 (10th Cir. 1983), *cert. denied*, 466 U.S. 958 (1984); *Rozier v. Ford Motor Co.*, 573 F.2d 1332 (5th Cir. 1978). Additionally, the rationale behind the exclusionary rule justifies its limitation to remedial measures undertaken by the party charged with wrongdoing, not by third persons. 2 STRONG, *supra* note 36, § 267, at 201; WEINSTEIN & BERGER, *supra* note 36, § 407[a].



have recognized in § 1983 suits, changes in governmental policies and priorities, and the conducting of employee disciplinary proceedings.<sup>241</sup> The question arises whether a governmental investigation and an investigatory report constitute remedial measures within the meaning of Rule 407.<sup>242</sup>

This issue has arisen in a number of lower federal court decisions, including several § 1983 actions. The weight of authority draws an important distinction: although the investigation and investigatory report are not remedial measures within Rule 407 because they would not have made the event less likely to occur,<sup>243</sup> investigatory report references to remedial measures that were taken by the party charged with

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241. *Specht v. Jensen*, 863 F.2d 700 (10th Cir. 1988) (disciplinary action); *Ford v. Schmidt*, 577 F.2d 408 (7th Cir.) (modification of regulations), *cert. denied*, 439 U.S. 870 (1978).

242. Before proceeding to that issue, it should be pointed out that the Rule 407 exclusionary rule applies only when evidence of the remedial measure is used to show liability ("negligence or culpable conduct"). Rule 407 provides that exclusion of the evidence is not required when it is "offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment." The critical distinction, then, is between evidence of a subsequent remedial measure offered to show liability, which is within the exclusionary rule, and such evidence offered for some other relevant controverted purpose "such as" ownership or control, which is not. The use of the phrase "such as" shows that the listing of potentially permissible uses of remedial measure evidence is not exclusive, but illustrative of the recurring potentially permissible uses. *See* 2 STRONG, *supra* note 36, § 267, at 201. When used for a permissible "other purpose," a limiting instruction to that effect should be given. WEISSENBARGER, *supra* note 25, § 407.4, at 111.

Offering evidence of a remedial measure on a relevant issue other than liability, however, does not insure its admission into evidence. To be admitted, the issue in question, e.g., ownership or control, must be "controverted." Thus, a concession of the issue by the party against whom the evidence is sought to be introduced (normally the defendant) effectively shields the evidence from the trier of fact. FED. R. EVID. 407 advisory committee's note. Further, even evidence of a remedial measure that is offered for a controverted non-liability purpose is subject to possible evaluation under Rule 403. FED. R. EVID. 407 advisory committee's note.

243. *Prentiss & Carlisle Co. v. Koehring-Waterous Div. of Timberjack, Inc.*, 972 F.2d 6 (1st Cir. 1992) (non-§ 1983 case); *Benitez-Allende v. Alcan Aluminio do Brasil*, 857 F.2d 26 (1st Cir. 1988) (non-§ 1983; diagnostic test report), *cert. denied*, 489 U.S. 1018 (1989); *Rocky Mountain Helicopters, Inc. v. Bell Helicopters Textron*, 805 F.2d 907 (10th Cir. 1986) (non-§ 1983); *Wilson v. Beebe*, 770 F.2d 578 (6th Cir. 1985) (§ 1983 action); *Westmoreland v. CBS*, 601 F. Supp. 66 (S.D.N.Y. 1984) (non-§ 1983). *Contra* *Alimenta, Inc. v. Stauffer*, 598 F. Supp. 934 (N.D. Ga. 1984) (non-§ 1983). *Cf. In re Aircrash*, 871 F.2d 812 (9th Cir. 1989) (report prepared by government without voluntary participation of party charged with wrongdoing not within Rule 407). Documents prepared under government *compulsion* are clearly outside the scope of Rule 407. *See* *Rozier v. Ford Motor Co.*, 573 F.2d 1332 (5th Cir. 1978) (non-§ 1983).

wrongdoing are within Rule 407.<sup>244</sup> If a report clears the rule against hearsay, Rule 403, and other admissibility hurdles, and is offered on the issue of liability, the portions referring to the remedial measures should be redacted.<sup>245</sup>

The Tenth Circuit in *Rocky Mountain Helicopters v. Bell Helicopters Textron*<sup>246</sup> gave a cogent explanation about why investigations, studies, and reports are not themselves remedial measures under Rule 407. That diversity jurisdiction case arose out of a fatal helicopter accident. The case was brought against the manufacturer of the helicopter. In rejecting the defendant's argument that the post-helicopter accident study was a remedial measure that should have been excluded, the circuit court stated:

It would strain the spirit of the remedial measure prohibition in Rule 407 to extend its shield to evidence contained in post-event tests or reports. It might be possible in rare situations to characterize such reports as 'measures' which, if conducted previously, would reduce the likelihood of the occurrence. Yet it is usually sounder to recognize that such tests are conducted for the purpose of investigating the occurrence to discover what might have gone wrong or right. Remedial measures are those actions taken to remedy any flaws or failures indicated by the test. In this case, the remedial measure was not the Photoelastic Study of the trunnion [i.e., the part of the helicopter connecting the mast with the rotor blades] but rather the subsequent redesign of the trunnion . . . . [R]eferences to redesign were excluded at trial.

We believe that the policy considerations that underlie Rule 407, such as encouraging remedial measures, are not as vigorously implicated where investigative tests and reports are concerned. To the extent that such policy concerns are implicated, they are outweighed by . . . the danger of depriving "injured claimants of one of the best and most accurate sources of evidence and information."<sup>247</sup>

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244. *O'Dell v. Hercules, Inc.*, 904 F.2d 1194 (8th Cir. 1990) (non-§ 1983); *Maddox v. City of Los Angeles*, 792 F.2d 1408 (9th Cir. 1986) (§ 1983 action); *Masemer v. Delmarva Power & Light Co.*, 723 F. Supp. 1019 (D. Del. 1989) (non-§ 1983).

245. *O'Dell v. Hercules, Inc.*, 904 F.2d 1194 (8th Cir. 1990) (non-§ 1983); *Masemer v. Delmarva Power & Light Co.*, 723 F. Supp. 1019 (D. Del. 1989) (non-§ 1983). *See also* *Rocky Mountain Helicopters v. Bell Helicopters Textron*, 805 F.2d 907 (10th Cir. 1986).

246. 805 F.2d 907 (10th Cir. 1986).

247. *Id.* at 918-19 (quoting *Westmoreland*, 601 F. Supp. at 68 (S.D.N.Y. 1984)). *Accord* *Fasanaro v. Mooney Aircraft Corp.*, 687 F. Supp. 482, 487 (N.D. Cal. 1988) (non-§ 1983; "the policy considerations underlying Rule 407 are to some extent implicated in the context of

The circuit court in *Rocky Mountain* thus concluded that the "correct procedure" is for the results of the report to be communicated to the trier-of-fact without reference to their "post-event time frame, unless one of the exceptions to Rule 407 applies."<sup>248</sup>

In *Wilson v. Beebe*,<sup>249</sup> a § 1983 case arising out of a state trooper's shooting of the plaintiff, the Sixth Circuit, sitting en banc, held that the district court did not commit error in admitting a memorandum written after the shooting by the trooper's district commander detailing the events leading to the shooting, and concluding that the trooper acted contrary to his training in attempting to handcuff the suspect while holding a cocked weapon. The court reasoned that "[t]he report was an official inter-office communication required by a standing departmental order" that met the hearsay exception for public records.<sup>250</sup> Defendants' argument that the report should have been excluded under Rule 407 had no merit because "[t]he report did not recommend a change in procedures following the shooting; it was a report of that incident and nothing more."<sup>251</sup> *Wilson*, then, is consistent with the philosophy expressed in *Rocky Mountain Helicopters*.

Not all courts, however, have taken cognizance of the distinction between the investigation and investigatory report, on the one hand, and the resulting remedial measures, on the other. In *Maddox v. City of Los*

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post-event tests, but . . . it would extend the Rule beyond its intended boundaries to include such tests within its ambit. Post-event tests will not, in themselves, result in added safety. Rather, it is only if the defects revealed in those tests are remedied and changes implemented that the goal of added safety will be furthered. By its terms Rule 407 includes only the actual remedial measures themselves and not the initial steps toward ascertaining whether any remedial measures are called for." The court in *Westmoreland* rejected the argument that the internal network report should be excluded because its admission would discourage "honest self-examination and self-policing." *Westmoreland*, 601 F. Supp. at 67.

248. *Rocky Mountain*, 805 F.2d at 919.

249. 770 F.2d 578 (6th Cir. 1985) (en banc).

250. *Id.* at 590 (referring to FED. R. EVID. 803 (8)(A) and (C)).

251. *Wilson*, 770 F.2d at 590. See also *Bergman v. Kemp*, 97 F.R.D. 413 (W.D. Mich. 1983). In *Bergman*, the plaintiff alleged that the FBI had advance knowledge of a conspiracy to assault participants in a "Freedom Ride," but failed to prevent the resulting violence. Defendants sought to exclude evidence of a Task Force Report on the activities of the FBI. Defendants argued that the Report was within the "critical self-evaluation privilege," but the court found that privilege largely undefined and, moreover, not generally recognized. See *infra* notes 290-300 and accompanying text. With respect to defendants' Rule 407 argument, the court found that the Report was not a remedial measure because it was not "an indicia of a change that was made to make an event less likely to occur or to correct a previous condition," and did not cause any change in FBI procedures regarding the use of informants. *Bergman*, 97 F.R.D. at 418.

*Angeles*,<sup>252</sup> a deadly force arrest case brought under § 1983, the Ninth Circuit ruled that the district court did not err in excluding the police officer's admission, during a post-incident departmental disciplinary proceeding, that he violated city policy regarding the use of chokeholds. The circuit court found that "[t]he Internal Affairs investigation and measures taken by the defendant City were remedial measures taken after the incident. Pursuant to Federal Rule of Evidence 403, evidence of these proceedings was therefore properly excluded with respect to the City's liability."<sup>253</sup> This analysis is not only conclusory, but imprecise and partially erroneous. First, the circuit court failed to spell out the remedial "measures" taken by the City. This is an important point because Rule 407 does not exclude all post-event evidence, but only that of a remedial nature. However, even assuming that the measures were remedial, the court should not have lumped the "investigation," "disciplinary proceeding," and "remedial measures" together. An investigation by itself is not remedial action. The taking of disciplinary action may be a remedial action, as might other "measures" taken as a result of an investigation.

In *Specht v. Jensen*,<sup>254</sup> a § 1983 action alleging an unconstitutional search, the Tenth Circuit held that a press release summarizing the result of the city's investigation of the event in question, and stating "that the officers involved exercised poor judgment in failing to read the writ of assistance thoroughly, and that appropriate disciplinary action would be taken," was properly excluded under Rule 407.<sup>255</sup> The circuit court found that the release "sets out remedial measures taken by the City to prevent the recurrence of the poor judgment the investigation revealed, and is therefore within the ambit of Rule 407."<sup>256</sup>

While the decision in *Specht* suffers from the same conclusory and imprecise vices that plagued the decision in *Maddox*, especially the lumping together of the investigation with the resulting remedial action, the court at least indicated that it understood the significance of the distinction. It did so by citing *Maddox* for the proposition that a disciplinary proceeding was an inadmissible remedial measure, and *Bell*

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252. 792 F.2d 1408 (9th Cir. 1986).

253. *Id.* at 1417. See also *Segura v. City of Reno*, 116 F.R.D. 42 (D. Nev. 1987) (following *Maddox*: recognizing that the statements of the parties given during the investigation may be used for impeachment purposes, but the portion of the report concerning disciplinary recommendations had no impeachment value).

254. 863 F.2d 700 (10th Cir. 1988).

255. *Id.* at 701.

256. *Id.*

for the proposition that even though an investigatory report may be admissible, resulting remedial measures should be excluded on the issue of liability under Rule 407.<sup>257</sup>

## VII. GOVERNMENTAL PRIVILEGES-APPLICATIONS TO INVESTIGATORY REPORTS

An evidentiary governmental privilege may pose a substantial obstacle to the admissibility of an investigatory report in a federal § 1983 action. Federal Rule of Evidence 501 provides that in federal question cases, the evidentiary privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience."<sup>258</sup> It is clear, then, that the federal common law governs the evidentiary privileges in § 1983 actions.<sup>259</sup>

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257. *But see In re Aircrash in Bali, Indonesia*, 871 F.2d 812, 816 n.2 (9th Cir.) ("We need not address the issue of whether post-accident studies generally qualify as remedial measures under Rule 407."), *cert. denied*, 439 U.S. 917 (1989).

258. FED. R. EVID. 501 in its entirety states:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

259. *See, e.g., Coughlin v. Lee*, 946 F.2d 1152 (5th Cir. 1991); *Slakan v. Porter*, 737 F.2d 368 (4th Cir. 1984), *cert. denied*, 470 U.S. 1035 (1985); *American Civil Liberties Union v. Finch*, 638 F.2d 1336 (5th Cir. 1981); *Socialist Workers Party v. Grubisic*, 619 F.2d 641 (7th Cir. 1980). Where § 1983 and pendent state law claims are asserted, most courts have applied the federal law of privileges to both claims. *See SCHWARTZ, supra* note 197, § 7.4.

As with other evidentiary privileges, governmental privileges are litigated most frequently at the discovery stage. Federal Rule of Civil Procedure 26(b)(1) defines the scope of discovery as all matter "not privileged, which is relevant to the subject matter involved in the pending action . . . ." The privileges referred to in Rule 26 are the same privileges that are assertable at trial under the Federal Rules of Evidence. 8 CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2016, at 122 (1970). Therefore, decisions resolving privilege disputes at the discovery stage are relevant precedents for privilege issues arising at trial.

Because a large proportion of discovery disputes are referred by federal district court judges to federal magistrate judges, *see* 28 U.S.C. § 636(b)(1)(A) (1994) (power to refer pretrial matters), many discovery decisions are written by the magistrate judges. It is unclear whether these decisions are entitled to the same precedential weight as decisions of the district court judges. The writer believes that although it is true that federal magistrates do not enjoy life tenure and protection against diminution of salary, as the district judges do, the

There are a number of different governmental privileges.<sup>260</sup> The two with the greatest potential for affecting the admissibility of investigatory reports in § 1983 actions are the privileges for law enforcement investigatory materials and, to the limited extent it has been recognized, for critical self-evaluations.

Like governmental privileges generally,<sup>261</sup> the governmental privilege for law enforcement investigatory materials is qualified and requires a balancing between the private litigant's need for the information and the government's interest in non-disclosure.<sup>262</sup> Two decisions that are especially important for evaluating the law enforcement privilege in § 1983 actions are Judge Becker's decision in *Frankenhauser v. Rizzo*<sup>263</sup> and Judge Weinstein's decision in *King v. Conde*.<sup>264</sup> The opinions of these two well-respected, scholarly jurists provide a detailed analytical framework for resolving claims of governmental privileges in § 1983 actions.<sup>265</sup>

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precedential weight of a federal trial court decision should depend upon the strength of the analysis, not whether the decision was written by a district court judge or by a magistrate judge.

260. The governmental privileges include privileges for: law enforcement investigatory materials, grand jury materials, personnel records, deliberate process materials, the legislative process, and, to the limited extent it has been recognized, critical self-evaluations. See SCHWARTZ, *supra* note 197, ch. 8. Governmental privileges belong to the government, not to private individuals who convey information to governmental authorities. *Walker v. Huie*, 142 F.R.D. 497 (D. Utah 1992) (§ 1983 action).

Courts at times refer to a "governmental," "executive," or "official information" privilege, without specifying the specific governmental privilege at issue. This may occur at least in some cases because there is an overlapping with respect to some of the governmental privileges. For example, investigatory materials most directly implicate the specific privilege for law enforcement investigatory materials, but may also implicate the privilege for personnel records or the critical self-evaluation privilege. The label attached to the privilege should not control. Rather, what is critical is the identification and application of the competing pertinent interests in favor of the privilege and of disclosure.

261. See 2 STRONG, *supra* note 36, § 110.

262. *Mueller v. Walker*, 124 F.R.D. 654 (D. Or. 1989); *King v. Conde*, 121 F.R.D. 180 (E.D.N.Y. 1988); *Kelly v. City of San Jose*, 114 F.R.D. 653 (N.D. Cal. 1987); *Urseth v. City of Dayton*, 110 F.R.D. 245 (S.D. Ohio 1986); *Skibo v. City of N.Y.*, 109 F.R.D. 58 (E.D.N.Y. 1985); *Tyner v. City of Jackson*, 105 F.R.D. 564 (S.D. Miss. 1985); *Spell v. McDaniel*, 591 F. Supp. 1090 (E.D.N.C. 1984); *Elliot v. Webb*, 98 F.R.D. 293 (D. Idaho 1983); *Sirmans v. City of S. Miami*, 86 F.R.D. 492 (S.D. Fla. 1980); *Crawford v. Dominic*, 469 F. Supp. 260 (E.D. Pa. 1979); *Diamond v. City of Mobile*, 86 F.R.D. 324 (S.D. Ala. 1978); *Frankenhauser v. Rizzo*, 59 F.R.D. 339 (E.D. Pa. 1973). See also EMERGING PROBLEMS, *supra* note 55, at 103-04.

263. 59 F.R.D. 339 (E.D. Pa. 1973).

264. 121 F.R.D. 180 (E.D.N.Y. 1988).

265. See also Magistrate Brazil's elaborate analysis in *Kelly v. San Jose*, 114 F.R.D. 653 (N.D. Cal. 1987).

In *Frankenhauser*, a § 1983 deadly force case, the court held that law enforcement investigatory reports are covered by a qualified privilege requiring a balancing between "the public interest in the confidentiality of governmental information against the needs of a litigant to obtain data, not otherwise available to him, with which to pursue a non-frivolous cause of action."<sup>266</sup> In balancing these competing interests, Judge Becker detailed the following ten pertinent considerations:

(1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking the discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the . . . investigation has been completed; (7) whether any intradepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the plaintiff's suit is non-frivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources; and (10) the importance of the information sought to the plaintiff's case.<sup>267</sup>

Of these considerations, several courts have stated that the plaintiff's need for the information is the most important consideration.<sup>268</sup>

The ten *Frankenhauser* factors have been "widely followed"<sup>269</sup> by the lower federal courts. The decision in *King v. Conde*,<sup>270</sup> building upon *Frankenhauser*, contains an even fuller analysis of the issue. At issue in *King* was the discoverability of police officer personnel files,

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266. *Frankenhauser*, 59 F.R.D. at 344.

267. *Id.*

268. See *Urseth v. Dayton*, 110 F.R.D. 245 (S.D. Ohio 1986); *Inmates of Unit 14 v. Rebideau*, 102 F.R.D. 122 (N.D.N.Y. 1984); *Crawford v. Dominic*, 469 F. Supp. 260 (E.D. Pa. 1979).

269. *Spell v. McDaniel*, 591 F. Supp. 1090, 1116 (E.D.N.C. 1984). See, e.g., *Coughlin v. Lee*, 946 F.2d 1152 (5th Cir. 1991); *Everitt v. Brezzel*, 750 F. Supp. 1063 (D. Colo. 1990); *Mueller v. Walker*, 124 F.R.D. 654 (D. Or. 1989); *Scouler v. Craig*, 116 F.R.D. 494 (D.N.J. 1987); *Segura v. City of Reno*, 116 F.R.D. 42 (D. Nev. 1987); *Urseth v. City of Dayton*, 110 F.R.D. 245 (S.D. Ohio 1986); *Elliott v. Webb*, 98 F.R.D. 293 (D. Idaho 1983); *Crawford v. Dominic*, 469 F. Supp. 260 (E.D. Pa. 1979).

270. 121 F.R.D. 180 (E.D.N.Y. 1988).

civilian complaint records, disciplinary actions, and external investigatory materials.

Judge Weinstein established a detailed procedural framework for evaluating claims of qualified governmental privilege.<sup>271</sup> He then proceeded to evaluate the various factors in balancing the competing governmental and private interests. Finding *Frankenhauser's* mere listing of the factors insufficient, Judge Weinstein attempted to give guidance about the general importance of the pertinent factors. The factors favoring disclosure include the following: (1) the relevance and importance of the information to the plaintiff's case; (2) the strength of the plaintiff's case; (3) the availability of the information from other sources; and (4) the important public interest in § 1983 actions. The first two factors are self-evident, while the last two require some elaboration.

With respect to the availability of the information from other sources, Judge Weinstein stressed that the district court should consider not just the availability of alternative sources of information, but also its quality. It may be that the information in the police department files is of a better quality than the alternative sources.<sup>272</sup> Judge Weinstein recognized,<sup>273</sup> as have other courts, that the special public interest in

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271. The procedures adopted included the following:

1. The party invoking the privilege has the burden of justifying its application. *Id.* at 189.
2. "The police must make a 'substantial threshold showing' . . . that there are specific harms likely to accrue from disclosure of specific materials. . . ." *Id.* (quoting *Kelly v. San Jose*, 114 F.R.D. 653, 669 (N.D. Cal. 1987)).
3. This showing requires the police department to submit an affidavit from a responsible official with personal knowledge explaining in non-conclusory terms "how the materials at issue have been generated or collected; how they have been kept confidential; what specific interests (e.g., of the police officers, of law enforcement, or of public concern) would be injured by disclosure . . . ." *Id.*
4. Plaintiff must demonstrate "how the requested material is relevant [and] how the plaintiff or the public would be injured by nondisclosure . . . ." *Id.*
5. Consideration should be given to whether sensitive information, such as the officers' home addresses, should be deleted.
6. At the discovery stage consideration should also be given to the issuance of a protective order limiting disclosure to only the plaintiff and plaintiff's attorney, or perhaps solely to plaintiff's attorney. "Such an order can mitigate many if not all of the oft-alleged injuries to the police and to law enforcement." *Id.* at 190.

In addition, because disclosure of the contested information in open court can obviously thwart a claimed privilege, *in camera* review may be appropriate. The Supreme Court has stated that "*in camera* review is a highly appropriate and useful means of dealing with claims of governmental privilege." *Kerr v. United States Dist. Court for the N. Dist. of Cal.*, 426 U.S. 394, 406 (1976). See, e.g., *Castle v. Jallah*, 142 F.R.D. 618 (E.D. Va. 1992) (§ 1983 action).

272. *King*, 121 F.R.D. at 195.

273. *Id.*



§ 1983 litigation is a highly important factor in favor of disclosure.<sup>274</sup> As a federal district court stated, because § 1983 “represents a balancing feature in our governmental structure whereby individual citizens are encouraged to police those who are charged with policing us all,” “it is of special import that suits brought under this statute be resolved by a determination of the truth rather than by a determination that the truth shall remain hidden.”<sup>275</sup>

There are, however, a number of potential governmental interests in favor of secrecy. Judge Weinstein identified: (1) threats to an officer's safety; (2) invasion of an officer's privacy; (3) weakening of law enforcement programs; (4) chilling police investigation candor; and (5) chilling civilian complaint candor. Although these may be entitled to some weight, upon careful analysis the governmental interest usually turns out to not be sufficiently strong to justify non-disclosure, or there exists an alternative remedy short of non-disclosure. Thus, where there is a threat to an officer's safety, the district court should give careful consideration to redacting personnel information such as the officer's home address. Judge Weinstein found that personnel records, including discharges, normally do not implicate serious privacy concerns because the information is not highly personal. However, because information concerning an officer's psychiatric history is personal, it is necessary to weigh the officer's privacy interest against the litigant's need for this information.<sup>276</sup>

Judge Weinstein found that although police departments frequently assert that disclosure of personnel and investigatory files will inhibit the candor of police officers in furnishing information to the department, this “argument is probably often overstated . . . .”<sup>277</sup> “First, the possibility of disclosure to civil rights plaintiffs is probably not of great import to the officers at the time they file their reports. Second, there is no empirical evidence of which this court is aware supporting the ‘chilling’ contention.”<sup>278</sup> In fact, there is a strong probability that the

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274. See *ACLU v. Finch*, 638 F.2d 1336 (5th Cir. 1981); *Kelly v. San Jose*, 114 F.R.D. 653 (N.D. Cal. 1987); *Elliot v. Webb*, 98 F.R.D. 293 (D. Idaho 1983); *Diamond v. City of Mobile*, 86 F.R.D. 324 (S.D. Ala. 1978); *Lora v. Board of Educ.*, 74 F.R.D. 565 (E.D.N.Y. 1977); *Frankenhauser v. Rizzo*, 59 F.R.D. 339 (E.D. Pa. 1973); *Wood v. Breier*, 54 F.R.D. 7 (E.D. Wis. 1972).

275. *Breier*, 54 F.R.D. at 11.

276. *King*, 121 F.R.D. at 191-92.

277. *Id.* at 192.

278. *Id.*

fear of disclosure will increase rather than chill police candor.<sup>279</sup> And, although § 1983 defendants often assert that disclosure of law enforcement materials may chill civilian complaint candor, it is most likely that disclosure of internal materials will have no influence on the willingness of private citizens to make complaints.<sup>280</sup>

One governmental interest that Judge Weinstein found was entitled to considerable weight was the potential for weakening law enforcement programs. To the extent that the disclosure of police procedural guidelines reveals police tactics to sinister elements, it "could compromise the effectiveness of law enforcement . . . ."<sup>281</sup> This is especially so if the § 1983 claimant is, or is likely to be, a criminal defendant as a result of the same incident that gave rise to the § 1983 action.<sup>282</sup>

Some courts have held that the governmental interest is greater when the investigatory materials relate to an ongoing investigation rather than to a completed one.<sup>283</sup> One federal court, for example, stated that "there is no avowed public policy in barring disclosure of the contents of police investigatory files that no longer have any relation to any ongoing criminal litigation . . . ."<sup>284</sup>

Although the balancing of competing interests can at times be difficult, the admission of investigatory reports in § 1983 actions should rarely be completely barred by governmental privilege. The strong public interest in § 1983 actions generally weighs heavily in favor of a full airing of the relevant evidence.<sup>285</sup> On the other side of the equation, municipalities normally do not have sufficiently weighty interests to justify keeping investigatory reports from the trier-of-fact. In *Mercy v. County of Suffolk*,<sup>286</sup> the district court decisively rejected the argument that police officers will be less candid if they know that investigatory reports are not privileged. The court stated:

These investigations are conducted, at taxpayer expense, to determine whether the procedures of the department or individual police officers were responsible for the complained-of incident, and whether disciplinary or other remedial action is necessary to

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279. *Id.* at 193 (citing *Mercy v. County of Suffolk*, 93 F.R.D. 520 (E.D.N.Y. 1992)).

280. *Id.* at 193-94.

281. *Id.* at 192.

282. Judge Weinstein suggested that consideration be given to either the issuance of a protective order or delaying the § 1983 action until the completion of the criminal prosecution, before denying discovery altogether. *Id.*

283. *See, e.g.*, *Frankenhauser v. Rizzo*, 59 F.R.D. 339, 343 (E.D. Pa. 1973).

284. *Diamond v. City of Mobile*, 86 F.R.D. 324, 329 (S.D. Ala. 1978).

285. *See Wood v. Breier*, 54 F.R.D. 7 (E.D. Wis. 1972).

286. 93 F.R.D. 520 (E.D.N.Y. 1982).

prevent the recurrence of similar incidents. No legitimate purpose is served by conducting the investigations under a veil of near-total of secrecy. Rather, knowledge that a limited number of persons, as well as a state or federal court, may examine the file in the event of civil litigation may serve to insure that these investigations are carried out in an even-handed fashion, that the statements are carefully and accurately taken, and that the true facts come to light, whether they reflect favorably or unfavorably on the individual police officers involved or on the department as a whole. The claim of executive privilege is therefore rejected.<sup>287</sup>

Governmental privilege is not the only privilege that may be asserted to keep investigatory materials from the trier of fact. Some defendants have asserted attorney-client and work product privileges, although usually without success.<sup>288</sup> For example, in *Mercy*, the court, in rejecting the attorney-client privilege, focused upon the fact that the pertinent communications were not between the police officers and their attorneys, but between the police officers and those charged with carrying out the investigation. Further, the investigatory reports were not the "work product" of an attorney because they were prepared pursuant to standard police practice and contained primarily factual accounts of what transpired; they did not contain counsel's legal theories or analysis.<sup>289</sup>

In some § 1983 cases, the defendants have asserted a self-evaluation privilege against the disclosure of investigatory reports. There is a conflict in the lower federal courts over whether such a privilege exists. Some federal courts regard it as, "at the most . . . largely undefined and . . . not generally . . . recognized."<sup>290</sup> One district court called into

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287. *Id.* at 522.

288. *Hoptowit v. Ray*, 682 F.2d 1237 (9th Cir. 1982) (work product and attorney-client privileges rejected); *Kelly v. San Jose*, 114 F.R.D. 653 (N.D. Cal. 1987) (work product); *Mercy v. County of Suffolk*, 93 F.R.D. 520 (E.D.N.Y. 1982) (work product and attorney-client); *Diamond v. City of Mobile*, 86 F.R.D. 324 (S.D. Ala. 1978) (attorney-client); *Frankenhauser v. Rizzo*, 59 F.R.D. 339 (E.D. Pa. 1973) (attorney-client).

289. *See also Hoptowit v. Ray*, 682 F.2d 1237 (9th Cir. 1982). In *Hoptowit*, the circuit court, with little analysis, concluded that an investigatory report prepared at the direction of the State Attorney General's office for one of the defendants, the Secretary of the Department of Social and Health Services, was not within the work product or attorney-client privileges. The court observed that the report was written by non-lawyers, was not for the purposes of litigation, and was eventually made public.

290. *Bergman v. Kemp*, 97 F.R.D. 413, 416 (W.D. Mich. 1983) (quoting *Lloyd v. Cessna Aircraft Co.*, 74 F.R.D. 518, 522 (E.D. Tenn. 1977)).

question the very existence of such a privilege.<sup>291</sup> Although some lower federal courts have recognized that self-evaluation materials are shielded by a qualified privilege,<sup>292</sup> “[t]he [United States] Supreme Court and the circuit courts have neither definitively denied the existence of such a privilege, nor accepted it and defined its scope.”<sup>293</sup>

Courts that have recognized the privilege seek to justify it on the basis of the public interest in bringing about evaluations that may lead to improved operations. For example, in *Skibo v. City of New York*,<sup>294</sup> a § 1983 excessive force case, the district court stated that “[t]he public has a strong interest in the police department’s ability to investigate its personnel and improve its procedures.” On the other hand, the court ruled that the privilege is not absolute and, in the case at hand, gave way to the plaintiff’s need for the material. The court further found that:

because the government has a vital interest in upholding the civil rights of the populace, impediments to judicial fact-finding in a § 1983 case are not favored. In addition, courts have declined to apply the privilege of self critical analysis when the proponent of the privilege fails to show that the process would be curtailed if discovery is allowed. The police department needs to continue to monitor itself to ensure that department procedures are effective and that officers are complying with these procedures.<sup>295</sup>

The court in *Urseth v. City of Dayton*,<sup>296</sup> however, gave more weight to the privilege. In that § 1983 deadly force case, the district court stated:

In order to preserve this important vehicle for self-evaluation, participating police department supervisors must be allowed to engage in the type of free-flowing exchange of ideas which can lead to honest reflection and considered re-evaluation of past practices. Accordingly, firearms hearing transcripts and summaries like those at issue herein must *not*, as a general rule, be

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291. *Robinson v. Magovern*, 83 F.R.D. 79 (W.D. Pa. 1979).

292. *See, e.g., In re Crazy Eddie Sec. Litig.*, 792 F. Supp. 197 (E.D.N.Y. 1992) (non-§ 1983 action); *Urseth v. City of Dayton*, 653 F. Supp. 1057 (S.D. Ohio 1986) (§ 1983 action); *Skibo v. City of N.Y.*, 109 F.R.D. 58 (E.D.N.Y. 1985) (§ 1983 action). The privilege was first recognized by the federal courts in *Bredice v. Doctors Hosp., Inc.*, 50 F.R.D. 249 (D.D.C. 1970), *aff’d*, 479 F.2d 920 (D.C. Cir. 1973).

293. *Dowling v. American Haw. Cruises*, 971 F.2d 423, 425 n.1 (9th Cir. 1992).

294. 109 F.R.D. 58, 63 (E.D.N.Y. 1985).

295. *Id.* at 64 (citations omitted).

296. 653 F. Supp. 1057 (S.D. Ohio 1986).

discoverable. Requests by plaintiffs for disclosure of such materials should be evaluated on a case-by-case basis to determine whether 'exceptional circumstances' in a particular case would warrant discovery of firearms hearings documents.<sup>297</sup>

Nevertheless, the court found that "exceptional circumstances" in fact warranted disclosure because the plaintiff demonstrated the relevance of the requested materials to the Police Chief's credibility and to the municipal liability claim, and showed that there had already been public disclosure of the firearms hearing. "As there has already been public disclosure of the Firearms Hearing . . . , the chilling effect which would accompany the disclosure of *these* documents is reduced."<sup>298</sup>

The Ninth Circuit in *Dowling v. American Hawaii Cruises*,<sup>299</sup> a Jones Act case, analyzed the critical self-evaluation privilege. Assuming, *arguendo*, that such a privilege exists, the court articulated four requirements that would have to be satisfied for the privilege to come into play:

first, the information must result from a critical self-analysis undertaken by the party seeking protection; second, the public must have a strong interest in preserving the free flow of the type of information sought; finally, the information must be of the type whose flow would be curtailed if discovery were allowed. To these requirements should be added the general proviso that no document will be accorded a privilege unless it was prepared with the expectation that it would be kept confidential, and has in fact been kept confidential.<sup>300</sup>

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297. *Id.* at 1061 (emphasis in original).

298. *Id.* at 1062 (emphasis in original).

299. 971 F.2d 423 (9th Cir. 1992).

300. *Id.* at 426 (citation omitted). Applying these standards, the circuit court in *Dowling* ruled that the privilege did not apply to voluntary, routine pre-accident corporate safety reviews. The court did not believe that these reviews would likely be curtailed if they were subject to disclosure, and did not expect that they are always "performed with the expectation that they will be kept confidential." *Id.* The court placed great weight on the voluntary nature of the safety review. "It may be unfair for a court to require a party to turn over to an opposing litigant self-damning assessments that the government has required it to prepare. But this concern obviously does not exist when the party has engaged in the self-evaluation voluntarily." *Id.* at 426-27 (citations omitted). The court also stressed that there is an important distinction between pre-accident safety reviews and post-accident investigations. This is because a "candid analysis" of the causes of an accident or other incident that has already occurred is more likely to be chilled by disclosure than routine pre-incident safety reviews. *Id.* at 427. Pre-incident reviews are designed to prevent accidents and thus avoid litigation. It is unlikely that this type of review will be inhibited by the fear that it might be disclosed in future hypothetical litigation. The same cannot be said about a post-incident review.

Although the debate over the existence of a critical self-evaluation privilege may be of significance in other contexts, this is not the case as applied to the admissibility of investigatory reports on § 1983 actions. This is because the pertinent competing private and governmental interests are already considered under the qualified privilege for investigatory materials. Given the existence of this privilege in the § 1983 investigatory report context, a critical self-evaluation privilege seems to be superfluous.

Finally, investigatory reports containing the names of confidential informers may implicate the well-established qualified privilege for the identity of confidential informants.<sup>301</sup> In *Roviaro v. United States*,<sup>302</sup> the Supreme Court explained that in criminal cases the qualified nature of the privilege requires a balancing between the public interest in encouraging individuals to supply information of criminal wrongdoing to the government and the criminal defendant's need for the information to prepare a defense. This balancing must be based upon the particular circumstances of each case. In criminal cases, "[w]here the disclosure of an informer's identity, or of the contents of his communication is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way."<sup>303</sup>

*Roviaro's* balancing of competing public and private interests has been extended to civil cases and applied by the federal courts in several § 1983 actions.<sup>304</sup> In civil cases, the critical issues are "whether

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301. In *Roviaro v. United States*, 353 U.S. 53, 59 (1957), a criminal case, the United States Supreme Court defined the privilege as "the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law." Its purpose is to preserve the informer's anonymity so that citizens will be encouraged to communicate information concerning criminal activity to law enforcement officers. *Id.* See also *Holman v. Cayre*, 873 F.2d 944, 946 (6th Cir. 1989) (§ 1983 action). The privilege is strictly limited to the identity of the informant. Thus, the contents of the informant's communication are not privileged and may be disclosed, so long as the contents do not reveal the identity of the informant. *Roviaro*, 353 U.S. at 60; *GRAHAM*, *supra* note 40, § 510.1. The privilege belongs to and thus may be raised only by the government or its officials, and not by the informant. 2 *STRONG*, *supra* note 36, § 111; Proposed Federal Rules of Evidence 510(b). See, e.g., *Belfeuil v. Waushara County*, 675 F. Supp. 459 (E.D. Wis. 1987) (County Board of Supervisors is proper party to invoke privilege).

302. 353 U.S. 53 (1957).

303. *Id.* at 60-61. The balancing should occur *in camera*. *United States v. Straughter*, 950 F.2d 1223 (6th Cir. 1991), *cert. denied*, 112 S.Ct. 1238, 1505, 1601 (1992).

304. *Hoffman v. Reali*, 973 F.2d 980 (1st Cir. 1992); *Coughlin v. Lee*, 946 F.2d 1152 (5th Cir. 1991); *Holman v. Cayce*, 873 F.2d 944 (6th Cir. 1989); *Cullen v. Margiotta*, 811 F.2d 698 (2d Cir.), *cert. denied*, 483 U.S. 1021 (1987); *Ghandi v. Police Dept. of City of Detroit*, 747 F.2d 338 (6th Cir. 1984); *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979), *rev'd on other grounds*, 446 U.S. 754 (1980); *Michelson v. Daly*, 590 F. Supp. 261 (N.D.N.Y. 1984). See also

disclosure is *essential* to the fair determination of a party's cause,"<sup>305</sup> and whether "the need for disclosure outweighs the need for secrecy."<sup>306</sup> The availability of alternative means of obtaining the information weighs against disclosure, as does the possibility of retaliation against the informant, "particularly where he is an employee of the target of the investigation, or has been assured by a law enforcement official that his identity will not be disclosed."<sup>307</sup>

The decisional law provides guidance as to how this balancing should be weighed. The privilege is stronger and more likely to be sustained in civil than in criminal cases because the stakes of the private civil litigant are normally not as high as those of the criminal defendant.<sup>308</sup> The Sixth Circuit in a § 1983 action ruled that where the informant was neither a witness nor an active participant in the conduct at issue in the civil case, it will normally be very difficult to overcome the privilege.<sup>309</sup> On the other hand, the Seventh Circuit in a § 1983 action stated that "[t]he assertion of informer's privilege by a law enforcement official defending against a civil suit for damages based on his own alleged official misconduct should be scrutinized closely."<sup>310</sup> In civil cases, the district courts have especially broad discretion to determine whether or not to order disclosure of an informer's identity; denial of disclosure will be overturned only for an abuse of discretion resulting in substantial prejudice.<sup>311</sup>

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Bergman v. United States, 565 F. Supp. 1353 (W.D. Mich. 1983).

305. Holman v. Cayce, 873 F.2d 944, 946 (6th Cir. 1989) (emphasis added).

306. Cullen v. Margiotta, 811 F.2d 698, 715 (2d Cir.), *cert. denied*, 483 U.S. 1021 (1987).

307. Cullen, 811 F.2d at 716 (citations omitted). See also Ghandi v. Police Dept. of City of Detroit, 747 F.2d 338 (6th Cir. 1984); Michelson v. Daly, 590 F. Supp. 261 (N.D.N.Y. 1984).

308. *In re Search of 1638 E. 2nd Street*, 993 F.2d 773 (10th Cir. 1993); Hoffman v. Reali, 973 F.2d 980 (1st Cir. 1992); Holman v. Cayce, 873 F.2d 944, 946-47 (6th Cir. 1989); Michelson v. Daly, 590 F. Supp. 261, 264-265 (N.D.N.Y. 1984); 2 WEINSTEIN & BERGER, *supra* note 36, § 510[05]. For examples of § 1983 cases sustaining the privilege, see Hoffman v. Reali, 973 F.2d 980 (1st Cir. 1992); Holman v. Cayce, 873 F.2d 944 (6th Cir. 1989); Cullen v. Margiotta, 811 F.2d 698 (2d Cir.), *cert. denied*, 483 U.S. 1021 (1987); Ghandi v. Police Dept. of City of Detroit, 747 F.2d 338 (6th Cir. 1984); Michelson v. Daly, 590 F. Supp. 261 (N.D.N.Y. 1984). For examples of § 1983 cases requiring disclosure, see Hampton v. Hanrahan, 600 F.2d 600 (7th Cir. 1979), *rev'd on other grounds*, 446 U.S. 754 (1980); Belfeuil v. Waushara County, 675 F. Supp. 459 (E.D. Wis. 1987).

309. Holman v. Cayce, 873 F.2d 944, 947 (6th Cir. 1989). In these circumstances the party seeking disclosure bears the "formidable burden" of making "a compelling demonstration that the information sought from the informant is likely to influence the outcome of the case or is essential to the party's preparation for trial." *Id.*

310. Hampton v. Hanrahan, 600 F.2d 600, 638 (7th Cir. 1979), *rev'd on other grounds*, 446 U.S. 754 (1980).

311. Cullen, 811 F.2d at 716; Ghandi, 747 F.2d at 354.

## VIII. CONCLUSION

Rule 803(8)(C) raises a broad array of important, contentious evidentiary issues. It authorizes the admission of governmental investigatory reports even though the investigators, the preparers of the report, and the suppliers of information are not subject to cross-examination. At the same time, governmental investigatory reports may contain highly important information for § 1983 actions. Further, because they carry the imprimatur of government, they are likely to be given great weight by the jury. The most critical evidentiary issue in § 1983 actions, as in other contexts, is the report's trustworthiness. For if the report is trustworthy, there is a great likelihood that it will not only be found to fall within the Rule 803(8)(C) hearsay exception, but also satisfy Rule 403 and overcome asserted governmental privileges. Investigatory reports found to be trustworthy are especially likely to be admitted in § 1983 actions because of the special public interest in § 1983 civil rights actions that all of the relevant, reliable evidence be considered by the trier of fact.



