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## **Distinctions Between the Public Records Exception to the Hearsay Rule in Federal and New York Practice**

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# **DISTINCTIONS BETWEEN THE PUBLIC RECORDS EXCEPTION TO THE HEARSAY RULE IN FEDERAL AND NEW YORK PRACTICE**

## **INTRODUCTION**

Imagine hundreds of public officials, including police officers, interrupted from their administration of public affairs, appearing in court daily to testify at trial about the subject matter of their reports and records, because they feared that the reports alone would be inadmissible hearsay.<sup>1</sup> The federal courts have.<sup>2</sup> In order to resolve the inconvenience, common law developed an exception to the hearsay rule for written records and reports of public officials.<sup>3</sup> While hearsay has and always will be a weapon

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1. Hearsay is defined 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." FED. R. EVID. 801(C).

2. *See* *Wong Wing Foo v. McGrath*, 196 F.2d 120, 123 (9th Cir. 1952) ("A further necessity [for admitting a public record into evidence] lies in the inconvenience of calling to the witness stand all over the country government officers who have made in the course of their duties thousands of similar written hearsay statements concerning events coming within their jurisdictions."); *Genitle v. County of Suffolk*, 129 F.R.D. 435, 448 (E.D.N.Y. 1990) ("It would be almost impossible to require individual investigators to appear in court to testify any time the results of an investigation were probative of issues in individual litigation."), *aff'd*, 926 F.2d 142 (2d Cir. 1991).

3. *See, e.g.,* *Gaines v. Relf*, 53 U.S. (12 How.) 472, 570 (1851). Justice Wayne set forth the principle behind admitting public records into evidence without having the public official testify:

[Public records] are admissible in evidence on account of their public nature, though their authenticity be not confirmed by the usual tests of truth; namely, the swearing and the cross-examination of the persons who prepared them. They are entitled to this extraordinary degree of confidence, partly because they are required by law to be kept, partly because their contents are of public interest and notoriety, but principally because they are made under the sanction of an oath of office, or at least under that of official duty, by accredited agents appointed for that purpose . . . .

*Id.*; *People v. Hoats*, 102 Misc. 2d 1004, 1010, 425 N.Y.S.2d 497, 501 (County Ct. Monroe County 1980) ("Under the common law exception, when

used by attorneys to object to an unsworn written document offered into evidence for the truth of the matter asserted,<sup>4</sup> the public records exception to the hearsay rule<sup>5</sup> diminishes the strength of these objections.

The impetus for the development of a hearsay exception for public documents<sup>6</sup> is based on the presumption that a public official is obligated to perform his official duties properly.<sup>7</sup> For convenience and efficiency, it is also necessary to admit into

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a public officer is authorized by the nature of his official duty to keep records of transactions occurring in the course of his duty, the record so made by him . . . is admissible in evidence.”).

4. See *People v. Violante*, 144 A.D.2d 995, 534 N.Y.S.2d 281 (4th Dep’t 1988) (objecting to the receipt of an autopsy report where examiner who prepared report was available to testify); *In re Zurich-American Ins. Co.*, 89 A.D.2d 542, 452 N.Y.S.2d 633 (1st Dep’t 1982) (opposing admission of report by Department of Motor Vehicles as hearsay); *In re Eighth Judicial Dist. Asbestos Litig.*, 152 Misc. 2d 338, 576 N.Y.S.2d 757 (Sup. Ct. Erie County 1991) (opposing admission of Environmental Protection Agency report into evidence because of hearsay).

5. See FED. R. EVID. 803(8) (federal public records exception); see also N.Y. CIV. PRAC. L. & R. 4250 (McKinney 1992) (New York public records exception).

6. Public documents are defined as “any document or record, evidencing or connected with the public business or the administration of public affairs, preserved in or issued by any department of the government.” BLACK’S LAW DICTIONARY 482 (6th ed. 1990).

7. See *Chesapeake & Del. Canal Co. v. United States*, 250 U.S. 123, 128-29 (1919). The Court stated that:

[T]heir character as public records required by law to be kept, the official character of their contents entered under the sanction of public duty, the obvious necessity for regular contemporaneous entries in them and the reduction to a minimum of motive on the part of public officials and employees to either make false entries or to omit proper ones, all unite to make these books [of the Treasury Department] admissible . . . .

*Id.*; *People v. Garneau*, 120 A.D.2d 112, 116, 507 N.Y.S.2d 931, 935 (4th Dep’t 1986) (stating that the common law exception is based on “a public official’s lack of motive to distort the truth when recording a fact or event in discharge of public duty”).

evidence a report made by a public official without having that public official testify.<sup>8</sup>

However, simply recognizing the necessity for a public records exception to the hearsay rule does not mean that this exception is utilized in the same fashion in both the federal and New York State courts.<sup>9</sup> This Comment will specifically target the differences in how federal and New York courts address similar issues relating to the public records exception. First, in order to appreciate the distinctions between the federal and New York public records exception to the hearsay rule, this Comment will include a brief overview of the rules of evidence that apply in both federal and New York practice when a party seeks to admit an official document into evidence.<sup>10</sup> Second, the differences between federal and New York practice in receiving public documents into evidence without disturbing the hearsay rule will be examined,<sup>11</sup> as well as the practical effects that arise from their respective treatment.<sup>12</sup> Third, this Comment will suggest that New York adopt the public records exception set forth in the 1991-92 Proposed Code of Evidence.<sup>13</sup> In conclusion, this Comment will state that New York's evidentiary rules for receiving public records into evidence under the public records exception may lead to some serious implications which the applicable federal rules seem to avoid. The consequences of New York's actions stem from a misunderstanding of the basic justification for such an exception, namely the trustworthiness of such reports.

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8. MCCORMICK ON EVIDENCE § 295, at 508 (John William Strong ed., 4th ed. 1992). Given the volume of business in public offices, most reports are made "routinely and mechanically." *United States v. Agustino-Hernandez*, 14 F.3d 42, 43 (11th Cir. 1994).

9. See *infra* notes 70-197 and accompanying text.

10. See *infra* notes 14-69 and accompanying text.

11. See *infra* notes 70-166 and accompanying text.

12. See *infra* notes 167-197 and accompanying text.

13. See *infra* notes 198-202 and accompanying text.

## I. THE EVIDENTIARY RULES PERTAINING TO PUBLIC RECORDS

### *A. Federal Rules of Evidence*

Although a hearsay exception for public records exists in common law,<sup>14</sup> admissibility of public reports in federal courts are now governed by statute.<sup>15</sup> Rule 803(8) of the Federal Rules of Evidence, which is now applicable to the admissibility of public records and reports, classifies public records into three groups.<sup>16</sup> The rule does not distinguish between federal and nonfederal offices and only requires that the record is one of a public body.<sup>17</sup> The creation of Rule 803(8) is based on the assumption that public officials will perform their duties properly and that they lack a motive to falsify.<sup>18</sup>

The first group of records that are exempt from the hearsay rule include those records and reports of the activities of the

14. See cases cited *supra* note 3 and accompanying text.

15. FED. R. EVID. 803(8). Rule 803(8) provides in pertinent part:

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

(8) Public records and reports.

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

*Id.*

16. *Id.*

17. *Id.*

18. *Bradford Trust Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 805 F.2d 49, 54 (2d Cir. 1986) (explaining the presumption that public officials perform their duty without private motives).

office itself.<sup>19</sup> Examples of this type of record include receipts and books of the Department of Treasury,<sup>20</sup> general land office records,<sup>21</sup> pension office records,<sup>22</sup> and other governmental agency reports.<sup>23</sup>

The second group of records which are admissible as a hearsay exception incorporate those matters observed and reported by public officials pursuant to the law in which there is a duty to report,<sup>24</sup> with exception to matters observed by police officers or other law enforcement personnel in criminal cases.<sup>25</sup> Public records and reports falling within this group include warrants of deportation,<sup>26</sup> computer reports of stolen cars,<sup>27</sup> and weather

19. FED. R. EVID. 803 (8)(A). *See supra* note 15 and accompanying text.

20. *Chesapeake & Del. Canal Co. v. United States*, 250 U.S. 123 (1919) (holding that books from the Department of Treasury are admissible hearsay at trial).

21. *Howard v. Perrin*, 200 U.S. 71 (1906). In *Howard*, the Court upheld the admission of certified copies of records filed in the General Land Office. *Id.* at 73. The court explained that “[t]he certificate of the local land officers was competent to show that on the records of their office were no homestead, preemption or other valid claims, and that the land had not been returned or denominated as swamp or mineral land.” *Id.*

22. *Ballew v. United States*, 160 U.S. 187, 191-92 (1895) (admitting page from records of Pension Office into evidence because properly authenticated).

23. *See, e.g., United States v. Johnson*, 722 F.2d 407 (8th Cir. 1983). In *Johnson*, the Eighth Circuit held that a serial number report made by the manufacturer of the defendant’s firearm, but *possessed* by the Bureau of Alcohol, Tobacco and Firearms, was admissible. *Id.* at 409. “Clearly the information in the report was not a matter ‘observed by law enforcement personnel.’ Neither was it a factual finding ‘resulting from an investigation made pursuant to authority granted by the law.’” *Id.* at 410. The court held that the report was admissible since it was kept in a “ministerial fashion” by a public agency. *Id.*; *United States v. Stone*, 604 F.2d 922 (5th Cir. 1979) (holding public records admissible under Rule 803(8)(A)).

24. FED. R. EVID. 803(8)(B). *See supra* note 15 and accompanying text.

25. *See United States v. Oates*, 560 F.2d 45 (2d Cir. 1977). In *Oates*, the Second Circuit construed the phrase in Rule 803(8)(B) “other law enforcement personnel” to mean “any officer or employee of a governmental agency which has law enforcement responsibilities.” *Id.* at 68. Accordingly, the court held that full time chemists employed by the United States Customs Service would satisfy the requirement of “other law enforcement personnel.” *Id.*

26. *United States v. Agustino-Hernandez*, 14 F.3d 42, 43 (11th Cir. 1994) (“We hold that admission of routinely and mechanically kept I.N.S.

bureau records.<sup>28</sup> The purpose behind Rule 803(8)(B) was to exempt those records routinely observed by public officials in a civil action or against the government in a criminal case.<sup>29</sup>

An important aspect of Rule 803(8)(B) involves the introduction of public records in criminal cases. Rule 803(8)(B) does not allow for the admission of public records containing matters which are observed by public officials and recorded pursuant to the law in a criminal case.<sup>30</sup> Although a few circuit courts have held that public records, including police reports, can be used against a criminal defendant where the report was "prepared in a routine non adversarial setting,"<sup>31</sup> the majority of circuits have not admitted at trial such reports in accordance with Rule 803(8)(B) when that report entails a "more subjective investigation and evaluation of a crime."<sup>32</sup>

The third group of public records known as "investigative reports," provide for the admission in civil actions and against the government in criminal cases, of "factual findings resulting from an investigation made pursuant to authority granted by law,

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records . . . does not violate Rule 803(8)(B)."); *United States v. Quezada*, 754 F.2d 1190, 1195 (5th Cir. 1985) (en banc) (holding that warrant of deportation does not violate Rule 803(8)(B)).

27. *United States v. Enterline*, 894 F.2d 287 (8th Cir. 1990) (holding that computer report identifying stolen car qualifies under Rule 803(8)(B)).

28. *Minnehaha County v. Kelley*, 150 F.2d 356 (8th Cir. 1945) (holding weather bureau records indicating rainfall admissible at trial).

29. *See United States v. Smith*, 521 F.2d 957, 968-70 n.24 (D.C. Cir. 1975) (discussing history behind Rule 803(8)(B)).

30. *See supra* note 15 and accompanying text.

31. *See, e.g., United States v. Brown*, 9 F.3d 907, 911-12 (11th Cir. 1993) (per curiam) (holding that there were no hearsay concerns for public records used against a criminal defendant where the "custodian . . . had no incentive to do anything other than mechanically record the relevant information . . .").

32. *See United States v. Enterline*, 894 F.2d 287, 290 (8th Cir. 1990) ("Such [police] observations [at the scene of a crime] are potentially unreliable since they are made in an adversary setting, and are often subjective evaluations of whether a crime was committed."); *United States v. Orozco*, 590 F.2d 789, 794 (9th Cir.) ("In adopting this exception [to criminal cases], Congress was concerned about prosecutors attempting to prove their cases in chief simply by putting into evidence police officers' reports of their contemporaneous observations of crime."), *cert. denied*, 442 U.S. 920 (1979).

unless the sources of information or other circumstances indicate lack of trustworthiness.”<sup>33</sup> Investigative reports, the most controversial of public records,<sup>34</sup> allow for the admissibility of public records or police reports where the records are reliable and trustworthy.<sup>35</sup> The Advisory Committee on the Federal Rules of Evidence set forth particular factors to be considered when determining the trustworthiness of investigative reports.<sup>36</sup> Such factors include “(1) the timeliness of the investigation . . . (2) the special skill or experience of the official . . . (3) whether a hearing was held and the level at which it was conducted . . . [and] (4) possible motivation problems suggested by *Palmer v. Hoffman*”<sup>37</sup> . . . .”<sup>38</sup> Thus, when utilizing Rule 803(8)(C), courts primarily focus on the trustworthiness of the investigative report.<sup>39</sup> Moreover, the burden of establishing a basis for

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33. FED. R. EVID. 803(8)(C). *See supra* note 15 and accompanying text.

34. *See* FED. R. EVID. 803(8)(C) advisory committee’s note. The advisory committee’s note states that the disagreement among the circuit court decisions on the issue of whether to admit evaluative reports into evidence “has been due in part, no doubt, to the variety of situations encountered, as well as to differences in principle.” *Id.*

35. *See, e.g.,* *Simmons v. Chicago & Northwestern Transp. Co.*, 993 F.2d 1326, 1328 (8th Cir. 1993) (admitting investigative police report into evidence under Rule 803(8)(C) because investigation was timely, police officer was experienced and had objective state of mind); *Bank of Lexington & Trust Co. v. Vining-Sparks Sec., Inc.*, 959 F.2d 606, 617 (6th Cir. 1992) (holding that letters of caution written by the NASD were trustworthy and thus admissible); *Wilk v. American Medical Ass’n*, 671 F. Supp. 1465, 1472 (N.D. Ill. 1987) (determining that New Zealand report regarding findings on chiropractics in its nation was not trustworthy “because its conclusions [were] based upon otherwise inadmissible, unreliable evidence collected and evaluated by persons with no particular skill or background . . .”), *aff’d*, 895 F.2d 352 (7th Cir.), *cert. denied*, 498 U.S. 982 (1990).

36. FED. R. EVID. 803(8)(C) advisory committee’s note.

37. 318 U.S. 109 (1943) (holding that reports made only in anticipation of litigation not admissible at trial because they are not reliable).

38. FED. R. EVID. 803(8)(C) advisory committee’s note.

39. *See, e.g.,* *Foster v. General Motors Corp.*, 20 F.3d 838, 839 (8th Cir. 1994) (per curiam) (stating that police officer’s investigative report of accident was admissible under Rule 803(8) because “[t]he officer was experienced in motor vehicle accident investigations, he conducted a neutral investigation shortly after the accident occurred, and he prepared his report the next day”);

excluding public records as being untrustworthy falls upon the opponent of the evidence.<sup>40</sup>

With regard to what constitutes a “factual finding” as stated in Rule 803(8)(C), there was a clear division between the House and Senate Judiciary Committees on its definition. In enacting Rule 803(8)(C), the House Judiciary Committee interpreted “factual findings” narrowly to include only factual evaluations.<sup>41</sup> However, the Senate construed the phrase “factual findings” to encompass evaluative reports including opinions made by the public official.<sup>42</sup> In order to alleviate the controversy developing between the circuit courts and the initial House and Senate Judiciary Reports, the Supreme Court, in *Beech Aircraft Corp. v. Rainey*,<sup>43</sup> held that “factually based conclusions or opinions are not . . . excluded from the scope of Rule 803(8)(C).”<sup>44</sup> A further development of this issue, as well as its application to Rule 803(8)(C) in criminal matters, will follow when comparing Rule

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*Baker v. Elcona Homes Corp.*, 588 F.2d 551 (6th Cir. 1978) (applying four factors of trustworthiness to investigative police report and upholding admissibility of report under Rule 803(8)(C)).

40. *Johnson v. City of Pleasanton*, 982 F.2d 350, 352 (9th Cir. 1992) (stating that party opposing the admission of a public record is responsible for putting forth evidence that “enough negative factors” exist to make the record untrustworthy).

41. H.R. REP. NO. 650, 93d Cong., 1st Sess. 14 (1973). The House Judiciary Committee intended the term “factual findings” to “be strictly construed and that evaluations or opinions in the report shall not be admissible under this Rule.” *Id.*

42. S. REP. NO. 1277, 93d Cong., 2d Sess. 18 (1974). The Senate disagreed with the narrow interpretation given by the House Judiciary Committee. The committee report states that since various kinds of evaluative reports are already admissible under appropriate Federal statutes “[t]he willingness of Congress to recognize these and other such evaluative reports provides a helpful guide in determining the kind of reports which are intended to be admissible under this rule.” *Id.*

43. 488 U.S. 153 (1988).

44. *Id.* at 162. In *Beech Aircraft*, the Supreme Court concluded that “neither the language of the Rule nor the intent of its framers calls for a distinction between ‘fact’ and ‘opinion’ . . . .” *Id.* at 168.

803(8)(C) with the applicable New York public records exception to the hearsay rule.<sup>45</sup>

### *B. New York's Public Record Exception to the Hearsay Rule*

Although there is no statutory compilation of New York evidence, New York has recognized an exception to the hearsay rule pertaining to public documents.<sup>46</sup> Public records created by public officials can be admitted at trial through one of two avenues of New York law.<sup>47</sup> Where a public record does not fall within one area of law, courts will often look to the remaining avenue in order to receive the document into evidence.<sup>48</sup>

#### 1. New York Statutory Rule

The first avenue in which public records may be an exception to the hearsay rule is more narrow than the second one. Section 4520 of the Civil Practice Law and Rules [hereinafter CPLR] creates a hearsay exception for certain records prepared by public officers.<sup>49</sup> In general, in order for a public record to qualify under CPLR 4520, it must be in the form of a certificate or affidavit and the public officer must be required or authorized by law to make this certificate or affidavit as to facts ascertained or

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45. *See infra* notes 85-197 and accompanying text.

46. JEROME PRINCE, *RICHARDSON ON EVIDENCE* § 342, at 308-09 (10th ed. 1973).

47. *See infra* notes 49-65 and accompanying text.

48. *People v. Kollere*, 151 Misc. 2d 384, 573 N.Y.S.2d 357 (City Ct. Mount Vernon County 1991) (determining that Department of Motor Vehicles abstract of defendant's driving record was admissible under CPLR 4520 and common law public records exception).

49. N.Y. CIV. PRAC. L. & R. 4520 (McKinney 1992). CPLR 4520 provides:

Where a public officer is required or authorized, by special provision of law, to make a certificate or an affidavit to a fact ascertained, or an act performed, by him in the course of his official duty, and to file or deposit it in a public office of the state, the certificate or affidavit so filed or deposited is prima facie evidence of the facts stated.

*Id.*

acts performed by him or her in the midst of official duty.<sup>50</sup> Moreover, the public officer must be required or authorized to file or deposit the record "in a public office of the state."<sup>51</sup>

Once the prerequisites of CPLR 4520 are satisfied, the record will be "prima facie evidence" of the truth of the matters asserted.<sup>52</sup> Although the statute requires the public record to be prima facie evidence of the facts asserted, the New York Court of Appeals, in *People v. Mertz*,<sup>53</sup> held that prima facie evidence merely creates a permissive inference which the jury is free to reject, even in the absence of opposing evidence.<sup>54</sup> Furthermore, where a public record has qualified under CPLR 4520, foundation testimony appears to be unnecessary based on such strict requirements. Yet, where foundation testimony is required, courts may elect to take judicial notice of the laws pursuant to which the public record was created.<sup>55</sup>

50. *Id.*

51. *Id.* See *In re Zurich-American Ins. Co.*, 89 A.D.2d 542, 543, 452 N.Y.S.2d 633, 634 (holding that Department of Motor Vehicles form should not have been admissible under CPLR 4520 since "[t]he Commissioner of the Department of Motor Vehicles is not mandated to file the result of an insurance search 'in a public office of the state' . . .").

52. See *supra* note 49 and accompanying text.

53. 68 N.Y.2d 136, 497 N.E.2d 657, 506 N.Y.S.2d 290 (1986).

54. *Id.* at 148, 497 N.E.2d at 663, 506 N.Y.S.2d at 296-97. In *Mertz*, the New York Court of Appeals stated that "[p]resumptive evidence, is, however, like the prima facie evidence to which CPLR 4518(c) refers, evidence which permits but does not require the trier of fact to find in accordance with the 'presumed' fact, even though no contradictory evidence has been presented." *Id.* at 148, 497 N.E.2d at 663, 506 N.Y.S.2d at 297. Thus, the court of appeals held that a jury was not required to accept a public official's report that a breathalyzer test was properly functioning. *Id.* at 148-49, 497 N.E.2d at 664, 506 N.Y.S.2d at 297.

55. See N.Y. CIV. PRAC. L. & R. 4511(a) (McKinney 1992). Section 4511(a) states:

Every court shall take judicial notice without request of the common law, constitutions and public statutes of the United States and of every state, territory and jurisdiction of the United States and of the official compilation of codes, rules and regulations of the state except those that relate solely to the organization or internal management of an agency of the state and of all local laws and county acts.

*Id.*

Since the New York Court of Appeals has never truly defined the scope of CPLR 4520 and given the difficulty in satisfying its many conditions, many public records are admissible hearsay under the broader common law rule.<sup>56</sup>

## 2. New York Common Law Rule

*Richards v. Robin*<sup>57</sup> was one of the earliest cases to succinctly define the common law rule pertaining to public documents.

[A]n official statement kept or prepared by or under the direction of a public officer, acting under his oath of office, either pursuant to a positive requirement of statute or in the discharge of a public duty, is competent *prima facie* evidence as against all the world of such facts therein stated as the official was required or authorized by law to state.<sup>58</sup>

Thus, in *Richards* the court upheld the admission of books and reports of a governmental agency under the common law exception.<sup>59</sup>

Under the common law rule, although the public official who created the report need not take the stand and testify, the public document must still be authenticated to be that which it purports to be.<sup>60</sup> However, in contrast to CPLR 4520,<sup>61</sup> once the public document has satisfied the common law requirements, the record is not *prima facie* evidence of the facts contained therein.<sup>62</sup>

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56. For explanation and cases stating the common law basis in admitting public records as an exception to the hearsay rule, see cases cited *supra* note 3.

57. 178 A.D. 535, 165 N.Y.S. 780 (1st Dep't 1917).

58. *Id.* at 539, 165 N.Y.S. at 784.

59. *Id.*

60. See, e.g., *People v. Garneau*, 120 A.D.2d 112, 507 N.Y.S.2d 931 (4th Dep't 1986) (holding that failure to authenticate documents which stated that breathalyzer test was properly functioning when given to defendant was error).

61. Section 4520 of the CPLR states that a certificate or affidavit filed by a public officer is "prima facie evidence of the facts stated." N.Y. CIV. PRAC. L. & R. 4520 (McKinney 1992).

62. See *Consolidated Midland Corp. v. Columbia Pharmaceutical Corp.*, 42 A.D.2d 601, 345 N.Y.S.2d 105, 106 (2d Dep't 1973) (determining that under common law hearsay exception for public documents, such documents

The statutory provisions of the New York public records exception do not supersede the common law rule.<sup>63</sup> Thus, in *Consolidated Midland Corp. v. Columbia Pharmaceutical Corp.*,<sup>64</sup> the Appellate Division, Second Department found that while certain exhibits did not qualify under CPLR 4520, such exhibits should have been admitted under the common law rule since “[t]he common-law rule . . . has not been superseded by CPLR 4520.”<sup>65</sup>

Therefore, the second avenue that may be taken to introduce public records into evidence under a hearsay exception is the common law exception as stated in *Richards*.

### *C. New York’s Business Record Exception to the Hearsay Rule*

In New York as opposed to federal practice, many public records which would otherwise be inadmissible under both the common law public records exception and the narrow CPLR 4520, are ultimately admissible under the *business* records exception contained in section 4518 of the CPLR.<sup>66</sup>

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“will not be ‘prima facie evidence of the facts’ contained in them, but merely some evidence which the trier of the facts is free to disbelieve even though the adverse party offers no evidence on the point”).

63. See N.Y. CIV. PRAC. L. & R. 4543 (McKinney 1992). CPLR 4543 states: “Nothing in this article [Art. 45, Evidence] prevents the proof of a fact or a writing by any method authorized by any applicable statute or by the rules of evidence at common law.” *Id.*

64. 42 A.D.2d 601, 345 N.Y.S.2d 105 (2d Dep’t 1973).

65. *Id.* at 601, 345 N.Y.S.2d at 106.

66. N.Y. CIV. PRAC. L. & R. 4518 (McKinney 1992 & Supp. 1994). Section 4518 provides in pertinent part:

#### Rule 4518 Business records

- (a) Generally. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter. All other circumstances of the making of the memorandum or record, including lack of personal knowledge by the maker, may be proved to affect its weight, but

Traditionally, the business records exception applied only to mercantile "shop books."<sup>67</sup> More recently, however, New York courts have expanded this exception to include *public* records,<sup>68</sup> such as police reports.<sup>69</sup>

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they shall not affect its admissibility. The term business includes a business, profession, occupation and calling of every kind . . . .

- (c) Other records. All records, writings and other things referred to in sections 2306, 2307 . . . are admissible in evidence under this rule and are prima facie evidence of the facts contained, provided they bear a certification or authentication by the head of the hospital, laboratory, department or bureau of a municipal corporation or of the state, or by an employee delegated for that purpose . . . .

*Id.*

67. *Id.* practice commentary. The business record exception originated from the "shop book" rule of the English common law courts. *See generally* 5 JOHN HENRY WIGMORE, EVIDENCE ON TRIALS AT COMMON LAW § 1518 (James H. Chadbourn ed., 1974). The shop book rule eventually allowed shopkeepers, who maintained their own books and records, to admit records of their business at trial regularly kept by third persons who had since died. MCCORMICK, *supra* note 8, § 305, at 871. In New York, the shop book rule was expanded to apply only to transactions in the ordinary course of buying and selling. *Smith v. Rentz*, 131 N.Y. 169, 30 N.E. 54 (1892). It did not apply to books of a corporation. *Congdon & Aylesworth Co. v. Sheehan*, 11 A.D. 456, 112 N.Y.S. 255 (3d Dep't 1896). Under present law, regularly kept business records and reports are generally admissible under CPLR 4518.

68. *See, e.g., In re Zurich-American Ins. Co.*, 89 A.D.2d 542, 452 N.Y.S.2d 633 (1st Dep't 1982) (holding that lower court erred in not considering whether Department of Motor Vehicles form was admissible under the business records exception after determining form was not a public record pursuant to CPLR 4520); *People v. Hoats*, 102 Misc. 2d 1004, 425 N.Y.S.2d 497 (County Ct. Monroe County 1980) (considering CPLR §§ 4518(c), 4520, and common law public records exception to determine whether documents concerning breathalyzer test were admissible hearsay).

69. *See, e.g., Lindsay v. Academy Broadway Corp.*, 198 A.D.2d 641, 642, 603 N.Y.S.2d 622, 623 (3d Dep't 1993) ("The police report is hearsay but . . . it is admissible under the business record exception of CPLR 4518(a) inasmuch as the witnesses who gave the statements were police officers at the scene with a duty to report their observations to the recording officer."); *Bracco v. MABSTOA*, 117 A.D.2d 273, 502 N.Y.S.2d 158 (1st Dep't 1986) (holding police reports made in regular course of business admissible under CPLR 4518); *Jones v. Gelineau*, 154 Misc. 2d 930, 932, 587 N.Y.S.2d 99, 101 (Sup. Ct. Queens County 1992) ("A police report is clearly a business record, as the police officer preparing such report is under a business duty to

Thus, CPLR 4518 provides yet another route to admit public records into evidence that may not have been admissible under the public record exception.

## II. DISTINCTIONS BETWEEN FEDERAL AND NEW YORK APPLICATION OF THE PUBLIC RECORDS EXCEPTION

### A. *Minor Distinctions*

In general, rules governing the admissibility of public records in both federal and New York courts are distinct. In a federal courthouse, Federal Rule of Evidence 803(8) is all that an attorney needs to consider when dealing with the admissibility of public records as a hearsay exception.<sup>70</sup> Rule 803(8) is all-encompassing since it provides for a public record to be offered into evidence as admissible hearsay when that public record sets forth (1) an activity of a public office; (2) matters observed by a public official who is under a duty of law to report such activity; or (3) factual findings in the form of investigative reports.<sup>71</sup> Rule 803(8)(B) also provides a stipulation that public records are inadmissible hearsay in criminal cases where the government is using the public record against a criminal defendant.<sup>72</sup>

However, in contrast to the federal exception, New York takes a more narrow approach and provides little opportunity for admitting public records into evidence under a public records

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investigate the subject at the report and memorialize the details thereof.”). *But see* *Stevens v. Kirby*, 86 A.D.2d 391, 450 N.Y.S.2d 607 (4th Dep’t 1982) (holding investigative police report inadmissible under CPLR 4518 since issues of fact were not within the personal knowledge of the police).

70. *See* MCCORMICK, *supra* note 8, § 295, at 507 (discussing admissibility of public records in federal court only under Rule 803(8)).

71. *See supra* note 15 and accompanying text.

72. *See supra* note 15 and accompanying text; *see also* *United States v. Oates*, 560 F.2d 45, 72 (2d Cir. 1977) (“We thus think it manifest that it was the clear intention of Congress to make evaluative and law enforcement reports absolutely inadmissible against defendants in criminal cases.”).

exception.<sup>73</sup> The public records exception in New York is based on only two sources; section 4520 of the CPLR, which is extremely restrictive,<sup>74</sup> and common law.<sup>75</sup> In contrast to Federal Rule 803(8), most public records filed by public officials are admitted into evidence under New York's business record exception rather than New York's public record exception.<sup>76</sup> Therefore, CPLR 4518<sup>77</sup> is the most common mechanism that a New York attorney will utilize when seeking to admit public records under a hearsay exception. For example, under Rule 803(8) most police reports are admissible into evidence under the public records exception,<sup>78</sup> however, in New York, police reports are generally admitted into evidence under the business records exception.<sup>79</sup>

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73. See, e.g., *In re Eighth Judicial Dist. Asbestos Litig.*, 152 Misc. 2d 338, 576 N.Y.S.2d 757 (Sup. Ct. Erie County 1991) (relying upon a strict interpretation of CPLR 4520 as basis for not admitting Environmental Protection Agency report on asbestos).

74. See *supra* note 49 and accompanying text.

75. See *supra* notes 57-65 and accompanying text; see also *People v. D'Agostino*, 120 Misc. 2d 437, 442, 465 N.Y.S.2d 834, 839 (County Ct. Monroe County 1983) ("[W]hen a public officer is authorized by the nature of his official duties to keep records during the course of his duties, the record so made is admissible in evidence.").

76. See, e.g., *Lindsay v. Academy Broadway Corp.*, 194 A.D.2d 641, 603 N.Y.S.2d 622 (3d Dep't 1993) (holding that public record is admissible under business record exception rather than public record exception).

77. See *supra* note 66 and accompanying text.

78. See *Simmons v. Chicago & Northwestern Transp. Co.*, 993 F.2d 1326 (8th Cir. 1993) (admitting state trooper's report into evidence under public documents exception); *Wilson v. Beebe*, 770 F.2d 578 (6th Cir. 1985) (holding police report admissible under public records exception in negligence suit against police officer); *United States v. Oates*, 560 F.2d 45 (2d Cir. 1977) (stating that police reports not qualifying under public documents exception may not be admissible under business records exception).

79. See, e.g., *Bracco v. MABSTOA*, 117 A.D.2d 273, 502 N.Y.S.2d 158 (1st Dep't 1986) (holding police reports admissible only under business records exception); *Jones v. Gelineau*, 154 Misc. 2d 930, 932, 587 N.Y.S.2d 99, 101 (Sup. Ct. Queens County 1992) (stating that police reports are "clearly a business record . . .").

One slight difference that should be mentioned briefly concerns foundation testimony.<sup>80</sup> In general, both Federal Rule 803(8) and New York's public records exception to the hearsay rule require foundation testimony.<sup>81</sup> Moreover, it is possible for courts to take judicial notice of the nature of the records and eliminate the requirement of foundation testimony.<sup>82</sup> Where the difference lies, however, is in Section 4520 of the CPLR.<sup>83</sup> Under this section, if a certificate or affidavit is prepared by a public official and the certificate indicates on its face that the official has ascertained facts or performed acts described in the record in the course of his duty and filed in a public office, foundation testimony is unnecessary.<sup>84</sup> Thus, it appears that where all of the elements of CPLR 4520 are satisfied, foundation testimony is not required.

### *B. Major Distinctions*

There are two major distinctions between federal and New York practice regarding the admissibility of public records which require closer examination. The distinctions involve the treatment of governmental investigative reports, and the introduction of

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80. Foundation testimony consists of a series of preliminary questions to a witness which are necessary to establish the admissibility of evidence. BLACK'S LAW DICTIONARY 656 (6th ed. 1990). "'Laying foundation' is a prerequisite to the admission of evidence at trial. It is established by testimony which identifies the evidence sought to be admitted and connects it with the issue in question." *Id.*

81. *See, e.g.,* United States v. Liebert, 519 F.2d 542 (3d Cir.) (holding foundation testimony sufficient to admit IRS computer printouts into evidence under the federal public records exception), *cert. denied*, 423 U.S. 985 (1975); People v. Gower, 42 N.Y.2d 117, 366 N.E.2d 69, 397 N.Y.S.2d 368 (1977) (stating breathalyzer test is admissible hearsay under public records exception provided that proper foundation is met).

82. *See* People v. Kollore, 151 Misc. 2d 384, 573 N.Y.S.2d 357 (City Ct. Mount Vernon County 1991) (stating that certificate of Department of Motor Vehicle containing abstract of defendant's driving record need not require foundation testimony because court took judicial notice that abstract was prepared pursuant to specific provision of Vehicle & Traffic Law).

83. *See supra* note 49 and accompanying text.

84. N.Y. CIV. PRAC. L. & R. 4520 practice commentary (McKinney 1992).

police records under a public records exception to the hearsay rule.

### 1. Governmental Investigative Reports Containing Opinions and Conclusions

One of the major differences between Rule 803(8) of the Federal Rules of Evidence and New York's public records exception to hearsay concerns governmental investigative reports. Most importantly, the difference lies in New York's reluctance to admit reports that contain opinions and conclusions.<sup>85</sup> While under Rule 803(8)(C), "factual findings resulting from an investigation made pursuant to authority granted by law"<sup>86</sup> are admissible when such findings include opinions,<sup>87</sup> under the New York law, such reports are not admissible.<sup>88</sup>

The focal point of discussion begins with the Supreme Court case, *Beech Aircraft Corp. v. Rainey*.<sup>89</sup> In *Beech Aircraft*, a Navy training airplane crashed killing the two pilots aboard the aircraft.<sup>90</sup> The surviving spouses brought suit against the manufacturer of the plane and Beech Aerospace Services, the

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85. See, e.g., *Stevens v. Kirby*, 86 A.D.2d 391, 450 N.Y.S.2d 607 (4th Dep't 1982) (holding state liquor authority's investigation report containing opinions and conclusions regarding history of disturbances at tavern inadmissible).

86. See *supra* note 15 and accompanying text.

87. See, e.g., *Simmons v. Chicago & Northwestern Transp. Co.*, 993 F.2d 1326 (8th Cir. 1993) (receiving into evidence under Rule 803(8)(C), investigatory report of car accident containing police officer's opinion about cause of accident); *United States v. Garland*, 991 F.2d 328 (6th Cir. 1993) (holding foreign judgments containing opinions admissible under Rule 803(8)(C)).

88. See, e.g., *Stevens*, 86 A.D.2d at 391, 450 N.Y.S.2d at 607 (holding opinion of disturbances by police officer inadmissible).

89. 488 U.S. 153 (1988).

90. *Id.* at 156. The crash took place during training exercises. *Id.* After its "fourth pass at the runway," the plane turned left prematurely, "cutting out the aircraft ahead of it in the pattern and threatening a collision." *Id.* The plane, which carried Rainey, a Navy flight instructor, and her student, lost altitude after trying to avoid a collision with another aircraft and eventually "crashed and burned." *Id.*

company which was contracted to service the plane.<sup>91</sup> At trial the dispute involved the issue of whether the crash was caused by pilot error or whether an equipment malfunction led to the crash.<sup>92</sup> Evidence included "an investigative report prepared by Lieutenant Commander William Morgan on order of the training squadron's commanding officer and pursuant to authority granted in the Manual of the Judge Advocate General."<sup>93</sup> At trial, the judge admitted most of the "opinions" prepared by the Lieutenant with a few exceptions.<sup>94</sup> On appeal, the Eleventh Circuit reversed this ruling, holding that Rule 803(8)(C) "did not encompass evaluative conclusions or opinions."<sup>95</sup> Thus, the issue before the Supreme Court was whether or not Federal Rule of Evidence 803(8)(C) applies to conclusions and opinions contained in a public investigative report.<sup>96</sup>

The Supreme Court stated that Rule 803(8)(C) should be interpreted broadly and held that opinions and conclusions contained in "factual finding" reports are also admissible hearsay.<sup>97</sup> The Court examined several areas of the law in resolving this issue.<sup>98</sup> First, the Court discussed the language of

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91. *Id.*

92. *Id.* at 157.

93. *Id.* This report contained sections on "finding of fact," "opinions," and "recommendations." *Id.*

94. *Id.* at 159. The judge would not admit the Lieutenant's reconstruction of what may have occurred minutes before the crash. *Id.*

95. *Id.* at 160.

96. *Id.* at 156.

97. *Id.* at 162. Prior to *Beech Aircraft*, the circuit courts were split as to whether opinions fell under Rule 803(8)(C). *Id.* at 161. The minority of circuits have followed the "narrow" approach, interpreting "factual findings" to not include opinions. See *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980) (reasoning that since both terms are used in same rule, Congress intended for the terms to have separate and distinct meanings). The majority of circuits now adhere to a broader meaning of "factual findings" which includes opinions and conclusions; see also *Jenkins v. Whittaker Corp.*, 785 F.2d 720, 726 (9th Cir.), cert. denied, 479 U.S. 918 (1986); *Perrin v. Anderson*, 784 F.2d 1040, 1046-47 (10th Cir. 1986); *Ellis v. International Playtex Inc.*, 745 F.2d 292, 300-01 (4th Cir. 1984); *Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1315-16 (3d Cir. 1978).

98. *Beech Aircraft*, 488 U.S. at 161-70.

Rule 803(8) and found that the rule itself does not create a dichotomy between “facts” and “opinions.”<sup>99</sup> Second, the Court stated that the legislative history does not explain how Rule 803(8)(C) should be interpreted. The House Judiciary Committee and the Senate Committee each interpreted the phrase “factual findings” differently, with the former allowing opinions and the latter excluding them.<sup>100</sup> The Court in *Beech Aircraft*, believed that the Senate’s interpretation was in accord with the language of Rule 803(8).<sup>101</sup> Third, upon examination of the Advisory Committee’s Note, the Court found that the committee did not even consider whether opinions were to be included within the definition of “factual findings.”<sup>102</sup> The Supreme Court noted that the concern of admitting unreliable opinion evidence into evidence was unfounded since all evaluative reports must also satisfy Rule 803(8)(C)’s requirement of trustworthiness.<sup>103</sup> Thus, all three sources support the holding in *Beech Aircraft* that the Lieutenant’s evaluative report was rightfully admitted as a public record exception to the hearsay rule.

“As long as the conclusion is based on a factual investigation and satisfies the Rule’s trustworthiness requirement,”<sup>104</sup> *Beech*

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99. *Id.* at 163-64. The Supreme Court stated that “it is not apparent that the term ‘factual findings’ should be read to mean simply ‘facts’ . . . .” *Id.* Moreover, the Court noted that a common definition of “factual findings” includes conclusions as well as facts. *Id.* at 164.

100. *Id.* at 164-65. The House Judiciary Committee wrote in its report on Rule 803(8) in pertinent part: “The Committee intends that the phrase ‘factual findings’ be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this Rule.” H.R. REP. NO. 650, 93d Cong., 1st Sess. 14 (1973).

The Senate Committee, however, disagreed with the definition enunciated by the House Committee in its report. “The committee takes strong exception to this limiting understanding [stated by the House Committee] of the application of the rule . . . . The committee concludes that the language of the rule together with the explanation provided by the Advisory Committee furnish sufficient guidance on the admissibility of evaluative reports.” S. REP. NO. 1277, 93d Cong., 2d Sess. 18 (1974).

101. *Beech Aircraft*, 488 U.S. at 165.

102. *Id.* at 166-67.

103. *Id.* at 167. See *supra* note 15 and accompanying text.

104. *Beech Aircraft*, 488 U.S. at 167.

*Aircraft* now requires federal courts to admit into evidence all investigatory reports, even those containing conclusions and opinions.<sup>105</sup> Consistent with the Court's ruling, the Sixth Circuit, in *Baker v. Elcona Homes Corp.*,<sup>106</sup> held that an investigatory police report was admissible under Rule 803(8)(C).<sup>107</sup> The court found that the police officer's opinion as to the color of the traffic light was "essentially an evaluative opinion resulting from evidence"<sup>108</sup> and was included within Rule 803(8)(C)'s definition of "factual findings."<sup>109</sup> The court examined the report in light of the trustworthiness factors<sup>110</sup> and concluded that the police officer's "own objective finding[s] of facts . . . were admissible."<sup>111</sup>

Public reports regarding the cause of an accident have also been received into evidence in light of *Beech Aircraft*.<sup>112</sup> In *Distaff, Inc. v. Springfield Contracting Corp.*,<sup>113</sup> the Fourth Circuit considered whether conclusions stated in a report based on an investigation into a fire at a Navy facility were admissible under Rule 803(8)(C).<sup>114</sup> An investigation by the chief fire inspector was conducted following a fire at plaintiff's job-site.<sup>115</sup>

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105. *Id.* at 170. See, e.g., *Simmons v. Chicago & Northwestern Transp. Co.*, 993 F.2d 1326 (8th Cir. 1993) (holding police trooper's evaluation of what caused car accident admissible).

106. 588 F.2d 551 (6th Cir. 1978), *cert. denied*, 441 U.S. 933 (1979).

107. *Id.* at 557. The police report offered into evidence included a police officer's opinion that "'apparently unit #2 [a second car involved in the accident] entered the intersection against a red light.'" *Id.* at 555.

108. *Id.* at 557.

109. *Id.*

110. See *supra* note 38 and accompanying text.

111. *Baker*, 588 F.2d at 558. The court explained that since the police officer arrived at the scene minutes after the accident and had investigated hundreds of car accidents within his official duty, the opinion was trustworthy. *Id.*

112. *Distaff, Inc. v. Springfield Contracting Corp.*, 984 F.2d 108 (4th Cir. 1993) (holding that district court's exclusion of fire investigator's report solely because author could not be questioned about the conclusions and opinions in the report was error).

113. *Id.*

114. *Id.* at 109-10.

115. *Id.* at 109.

The report prepared by the fire inspector stated that “a high impedance short in the electrical power cord of a contractor’s air machine” was the probable cause of the fire.<sup>116</sup> Based on the decision in *Beech Aircraft*, the court held that the report and its opinions should not have been excluded just because the defendant could not cross-examine the fire inspector about his opinions.<sup>117</sup> The court stated that as long as the report was trustworthy, as defined by the Advisory Committee for Rule 803(8), the opinions were admissible hearsay.<sup>118</sup>

In at least one case, a foreign judgment was received into evidence even though it contained opinions and conclusions.<sup>119</sup> In *United States v. Garland*,<sup>120</sup> the issue was whether a criminal judgment rendered by the National Public Tribunal of Ghana was admissible under the federal public records exception to the hearsay rule.<sup>121</sup> The Sixth Circuit utilized the holding in *Beech Aircraft* to determine whether opinions expressed in a foreign judgment were reliable and trustworthy to qualify under Rule 803(8)(C).<sup>122</sup> The court reasoned that “[a]s with public records, there is no reason to distinguish between facts and ‘opinions’ contained in foreign judgments.”<sup>123</sup> Thus, the Ghanaian judgment was admitted as prima facie evidence in the subsequent criminal action.<sup>124</sup>

In New York, however, present law is unclear as to whether governmental investigative reports containing opinions as well as factual findings are admissible under the hearsay exception for public records and reports. New York courts have not yet adopted the holding in *Beech Aircraft*, which allows opinions and

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116. *Id.* at 109-10.

117. *Id.* at 112.

118. *Id.* See *supra* note 38 and accompanying text.

119. See *United States v. Garland*, 991 F.2d 328 (6th Cir. 1993).

120. *Id.*

121. *Id.* at 330. The judgment that was to be used by the defendant concerned a conviction of two other men for defrauding the defendant and making false misrepresentations. *Id.* at 332. The judgment contained several pages which “corroborate[d] the defendant’s claims” in the present action. *Id.*

122. *Id.* at 335

123. *Id.*

124. *Id.*

conclusions to be admitted into evidence as part of an investigatory report. In fact, most decisions refuse to admit any reports containing opinions.<sup>125</sup> For example, autopsy reports stating opinions as to the cause of death are generally inadmissible under the New York public records exception.<sup>126</sup> *People v. Violante*<sup>127</sup> was one such case where the Appellate Division, Fourth Department held that “while the autopsy *findings* are admissible to establish the primary facts stated therein, *opinions* as to the cause of death contained in such report are not admissible.”<sup>128</sup> Even prior to the *Beech Aircraft* decision, New York courts would not admit opinions into evidence under the public records exception.<sup>129</sup> The case of *People v. Hampton*<sup>130</sup> is an example of New York’s reluctance to admit opinions and conclusions under the public records exception prior to *Beech Aircraft*. The *Hampton* case also involved autopsy reports.<sup>131</sup> Although, at that time, the court was willing to admit the factual findings contained in the report, as to opinions, the court explained, “[o]ur courts have not extended the [public records exception] to include opinions as to the cause of death contained in such reports.”<sup>132</sup> The court’s main concern in

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125. See, e.g., *Kelly v. Diesel Constr. Div. of Carl A. Morse Inc.*, 35 N.Y.2d 1, 8, 315 N.E.2d 751, 754, 358 N.Y.S.2d 685, 690 (1974) (holding elevator inspector’s accident report admissible, however, opinions as to *cause* of accident must “qualify independently for admission under a recognized exception to the hearsay rule”).

126. *People v. Hampton*, 38 A.D.2d 772, 327 N.Y.S.2d 961 (3d Dep’t 1972) (extending hearsay exception to include autopsy report but not to include opinions in report as to cause of death).

127. 144 A.D.2d 995, 534 N.Y.S.2d 281 (4th Dep’t 1988).

128. *Id.* at 996, 534 N.Y.S.2d at 283 (emphasis added).

129. *Kelly*, 35 N.Y.2d at 8, 315 N.E.2d at 754, 358 N.Y.S.2d at 690 (holding public official’s opinion as to cause of accident inadmissible).

130. 38 A.D.2d 772, 327 N.Y.S.2d 961 (3d Dep’t 1972).

131. *Id.* at 773, 327 N.Y.S.2d at 962. The autopsy report stated that “death was caused by (1) traumatic shock and (2) battered child syndrome.” *Id.*

132. *Id.* The court, however, did note that admitting the opinions was only harmless error since there was enough evidence to establish guilt. *Id.* at 773, 327 N.Y.S.2d at 963.

*Hampton* was the defendant's inability to cross-examine the medical examiner.<sup>133</sup>

However, despite the fact that *Hampton* and *Violante* involved criminal matters, New York decisional law still conflicts with the policies of Rule 803(8)(C) and is reluctant to admit opinion evidence in civil actions where governmental investigations occur.<sup>134</sup> For example, in *Stevens v. Kirby*<sup>135</sup> the issue on appeal concerned the admissibility of a New York State Liquor Authority investigative report regarding a disturbance at a tavern.<sup>136</sup> The investigative report included police reports of prior incidents, examinations of previous court records and more importantly, a general opinion that the owner of the tavern could not control his patrons.<sup>137</sup> The appellate court, however, disagreed with the lower court's decision to admit the report into evidence because "ultimate issues of facts [were] not within the personal knowledge of the [investigators]."<sup>138</sup> Although *Stevens* referred to the report as a business record and not a public record, the court still found that "[t]he opinions of the individual deputies summarized by the Liquor Authority investigator are conclusions which only the jury could draw after having heard the evidence."<sup>139</sup>

Such a categorical exclusion of opinions by New York is in contrast to federal practice.<sup>140</sup> New York courts should consider admitting opinions under its public records exception just as the federal courts do under the federal public records exception in the wake of *Beech Aircraft*. It appears that New York has forgotten the basis for admitting such reports into evidence, namely the presumed trustworthiness of those public officials preparing the

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133. *Id.* at 773, 327 N.Y.S.2d at 962.

134. *See Kelly v. Diesel Constr. Div. of Carl A. Morse Inc.*, 35 N.Y.2d 1, 315 N.E.2d 751, 358 N.Y.S.2d 685 (1974) (holding elevator inspector's accident report regarding cause of accident inadmissible).

135. 86 A.D.2d 391, 450 N.Y.S.2d 607 (4th Dep't 1982).

136. *Id.* at 391-92, 450 N.Y.S.2d at 609.

137. *Id.* at 393, 450 N.Y.S.2d at 610.

138. *Id.* at 395, 450 N.Y.S.2d at 611.

139. *Id.* at 396, 450 N.Y.S.2d at 612.

140. *See supra* notes 85-124 and accompanying text.

reports. *Kozlowski v. City of Amsterdam*,<sup>141</sup> however, is one such case which may be the impetus for admitting evaluative reports with opinions in the future. In *Kozlowski*, the Appellate Division, Third Department held that a medical review commissioner's report on the cause of death of an inmate was admissible under the common law public record exception to the hearsay rule.<sup>142</sup> The court explained that "[s]ince the report was properly prepared and clearly relevant, plaintiff had a right to have it admitted into evidence."<sup>143</sup>

## 2. Police Records

Another contrast between the public records exception under Federal Rule 803(8) and section 4520 of New York's CPLR involves police reports.<sup>144</sup> Specifically, police reports are usually treated as admissible hearsay in federal courts under the federal public records exception, Rule 803(8).<sup>145</sup> In New York, however, these same reports and records are exceptions to the hearsay rule and are treated as business records rather than public records.<sup>146</sup> Although there are distinctions between the two rules,

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141. 111 A.D.2d 476, 488 N.Y.S.2d 862 (3d Dep't 1985).

142. *Id.* at 478, 488 N.Y.S.2d at 864.

143. *Id.*

144. N.Y. CIV. PRAC. L. & R. 4518 practice commentary (McKinney 1992). "In contrast to the approach taken in federal practice . . . records of the police and other law enforcement agencies are often admitted in New York criminal prosecutions pursuant to CPLR 4518(a) [business records exception] rather than the hearsay exceptions for public records provided by CPLR 4520 and the common law." *Id.*

145. *See, e.g., Foster v. General Motors Corp.*, 20 F.3d 838 (8th Cir. 1994) (concluding that investigative police report falls under public records exception); *Simmons v. Chicago & Northwestern Transp. Co.*, 993 F.2d 1326 (8th Cir. 1993) (stating that police report of accident containing officer's conclusions was admissible under Rule 803(8)(C) in civil suit); *Baker v. Elcona Homes Corp.*, 588 F.2d 551, 556 (6th Cir. 1978) ("A police report is, in our judgment, a 'public record and report' within the meaning of the first part of Rule 803(8)."), *cert. denied*, 441 U.S. 933 (1979).

146. *See, e.g., Lindsay v. Academy Broadway Corp.*, 198 A.D.2d 641, 603 N.Y.S.2d 622 (3d Dep't 1993) (holding police report admissible under business record exception); *Leonick v. City of New York*, 120 A.D.2d 573,

one principle that is treated in a similar manner in both New York and federal practice is the adherence to a defendant's Sixth Amendment right to confrontation,<sup>147</sup> which will be discussed later.<sup>148</sup> This Comment submits that New York's treatment of police records and reports can lead to serious implications, including a conflict with the Second Circuit's holding in *United States v. Oates*.<sup>149</sup>

Before examining these implications, a brief discussion of the distinct treatment of police reports in both federal and New York practice is warranted. Police reports are implicitly covered by Rule 803(8) of the Federal Rules of Evidence. In civil actions, police reports can fall squarely within the definition of Rule 803(8)(B) when the police officers have observed matters "pursuant to a duty imposed by law as to which matters there was a duty to report."<sup>150</sup> *Baker v. Elcona Homes Corp.*<sup>151</sup>

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502 N.Y.S.2d 60 (2d Dep't 1986) (stating that police reports were admissible under business records exception); *Bracco v. MABSTOA*, 117 A.D.2d 273, 502 N.Y.S.2d 158 (1st Dep't 1986) (holding police report made in regular course of business admissible as business record); *State Farm Mut. Auto. Ins. Co. v. Bermudez*, 111 A.D.2d 858, 490 N.Y.S.2d 595 (2d Dep't 1985) (stating that police accident report was properly received into evidence under business record exception); *Jones v. Gelineau*, 154 Misc. 2d 930, 932, 587 N.Y.S.2d 99, 101 (Sup. Ct. Queens County 1992) ("A police report is clearly a business record . . .").

147. U.S. CONST. amend. VI. The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." *Id.*

148. See *infra* notes 167-79 and accompanying text.

149. 560 F.2d 45 (2d Cir. 1977). In the Second Circuit, under *Oates*, hearsay statements as to investigative findings, including police reports and records, may not be introduced against a criminal defendant under the business records exception when the public record exception does not apply. *Id.* at 75.

The Fifth Circuit has relied on *Oates* in holding that police reports which are inadmissible as public records under Rule 803(8) cannot then be received into evidence under the business record exception. *United States v. Cain*, 615 F.2d 380, 381 (5th Cir. 1980). The court stated that although the police report may qualify under the business record exception, it was nevertheless inadmissible since it was within the exception to Rule 803(8)(B) as a matter observed by law enforcement personnel. *Id.* at 381-82.

150. FED. R. EVID. 803(8). See *supra* note 15 and accompanying text.

151. 588 F.2d 551 (6th Cir. 1978), *cert denied*, 441 U.S. 933 (1979).

similarly states that “[a] police report is . . . a ‘public record and report’”<sup>152</sup> and direct observations of police officers are clearly “matters observed pursuant to duty imposed by law” in which there is a duty to report.<sup>153</sup> Other circuit courts have confirmed the reasoning expressed in *Baker*.<sup>154</sup> Thus, under federal practice, police reports are generally admissible under the public records exception and not the business record exception.

In contrast with federal practice, New York has treated police reports and records in civil or criminal matters as business records.<sup>155</sup> It is submitted that such treatment is based on the fact that New York’s public record exception is extremely narrow, limiting what is admissible as a public record. Since it is difficult to admit into evidence public records under the public record exception, police reports are generally received into evidence under the more lenient business record exception.

In *Lindsay v. Academy Broadway Corp.*,<sup>156</sup> the Appellate Division, Third Department, held that the lower court was correct in admitting a police report under the business record exception to the hearsay rule since “the witnesses who gave the statements [of the events observed] were police officers at the scene with a duty to report their observations to the recording officer.”<sup>157</sup> This report, however, would be inadmissible under the New York public records exception because there was no certificate or affidavit from the police officer.

In *Bracco v. MABSTOA*,<sup>158</sup> over a hearsay objection, the Appellate Division, First Department, admitted into evidence pages of a police officer’s memo book and accident report

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152. *Id.* at 556.

153. *Id.*

154. *See, e.g., Foster v. General Motors Corp.*, 20 F.3d 838 (8th Cir. 1994) (per curiam) (holding police report prepared by investigating police officer who was experienced in accident investigations admissible under public records exception).

155. Police records may also be admissible under the more narrow New York statutory public record exception. N.Y. CIV. PRAC. L. & R. 4520 (McKinney 1992).

156. 198 A.D.2d 641, 603 N.Y.S.2d 622 (3d Dep’t 1993).

157. *Id.* at 641, 603 N.Y.S.2d at 623.

158. 117 A.D.2d 273, 502 N.Y.S.2d 158 (1st Dep’t 1986).

prepared by the police officer.<sup>159</sup> The court admitted the records as business records rather than as public records reasoning that “[a]ll of these entries were made in the regular course of business, and it was the duty of the police officer . . . to include them in his reports.”<sup>160</sup>

*People v. Jones*,<sup>161</sup> for example, demonstrates how a police record in New York is admissible under the business record exception in criminal matters.<sup>162</sup> In *Jones*, the court upheld the admissibility of a speedometer test record prepared by the police.<sup>163</sup> However, the court noted that although the speedometer record did not satisfy the public records exception because it was “not deposited in a public office[,]”<sup>164</sup> it was “indicative . . . of the trend to admit [these] official records [as business records since they were] kept in the regular course of business.”<sup>165</sup>

Thus, because New York’s public record exception is so restrictive, most police reports and records are ultimately admissible into evidence as business records. This is in contrast to federal practice where police records are treated as public records. Moreover, since New York’s public record exception does not require the exclusion of police records in actions against criminal defendants, unlike Rule 803(8), it is not surprising that so many police records are classified as business records and used against criminal defendants in New York.<sup>166</sup>

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159. *Id.* at 277, 502 N.Y.S.2d at 161.

160. *Id.* See *Jones v. Gelineau*, 154 Misc. 2d 930, 932, 587 N.Y.S.2d 99, 101 (Sup. Ct. Queens County 1992) (“A police report is clearly a business record, as the police officer preparing such report is under a business duty to investigate the subject of the report and memorialize the details thereof.”).

161. 10 Misc. 2d 1067, 171 N.Y.S.2d 325 (Magistrate’s Ct. Queens County 1958).

162. *Id.* at 1075, 171 N.Y.S.2d at 333.

163. *Id.*

164. *Id.* at 1073-74, 171 N.Y.S.2d at 332.

165. *Id.*

166. See *supra* notes 144-65 and accompanying text.

*a. Sixth Amendment Right to Confrontation*

One principle that is treated similarly in both New York and federal practice is a defendant's constitutional right to confrontation. No matter how police reports and records are categorized in New York or in federal courts, one principle that still may override the admissibility of such reports is a defendant's right of confrontation under the Sixth Amendment.<sup>167</sup>

Although a defendant has a Sixth Amendment right to confrontation, public records have nevertheless been admissible against a criminal defendant.<sup>168</sup> The reason for receiving such reports into evidence without the need for a police officer to testify is based on the notion that "certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.'" <sup>169</sup> Since business and public records are both considered reliable hearsay exceptions, such reports are usually admissible without the need for a defendant to confront the person who prepared them.<sup>170</sup>

New York courts follow federal practice in admitting public reports into evidence despite the defendant's Sixth Amendment right to confrontation.<sup>171</sup> For example, a crime laboratory report identifying heroin as a substance found on the defendant was held

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167. U.S. CONST. amend. VI. The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." *Id.* See *Ohio v. Roberts*, 448 U.S. 56 (1980) (recognizing defendant's constitutional right to confront witnesses); *People v. Nisonoff*, 293 N.Y. 597, 59 N.E.2d 420 (1944), *cert. denied*, 326 U.S. 745 (1945).

168. See *Nisonoff*, 293 N.Y. 597, 59 N.E.2d 420 (1944).

169. *Roberts*, 448 U.S. at 66 (quoting *Mattox v. United States*, 156 U.S. 237, 244 (1895)).

170. *Id.*

171. See *Nisonoff*, 293 N.Y. at 601-02, 59 N.E.2d at 421-22 (stating that police autopsy report was admissible and consistent with defendant's right to confrontation); *People v. Reese*, 258 N.Y. 89, 96, 179 N.E. 305, 306 (1932) ("The rule of confrontation . . . has never been deemed to require the exclusion of certificates or records made by a public officer in the course of his official duty.").

admissible against the criminal defendant in *In re Kevin G.*<sup>172</sup> Furthermore, a police ballistics report was received into evidence concerning the operability of a gun found in possession of a juvenile in *In re Nelson*.<sup>173</sup>

New York's public record or business record exception, however, has given way to a defendant's right to confrontation when a police report contains a subjective interpretation of facts or identifies a defendant as a criminal participant.<sup>174</sup> For example, in *People ex rel. McGee v. Walters*,<sup>175</sup> an issue arose as to whether a parolee has a due process right to confront adverse witnesses whose statements made in a public report are offered into evidence at a parole revocation hearing.<sup>176</sup> The New York Court of Appeals first noted that a defendant's right to confrontation is not absolute.<sup>177</sup> In a parole revocation hearing, the court recognized that the principle of confrontation is to ensure the enhancement of the fact-finding process "when the recollections of the witness may be tested and his or her

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172. 80 Misc. 2d 517, 521-22, 363 N.Y.S.2d 999, 1004 (Fam. Ct. N.Y. County 1975). The court in *In re Kevin G.* examined other jurisdictions and found that several other courts have admitted drug content reports prepared by police chemists despite a defendant's wish to confront the public official who has prepared the report. *Id.*

173. 83 Misc. 2d 1081, 1084, 374 N.Y.S.2d 982, 986 (Fam. Ct. Bronx County 1975). The court, in *In re Nelson*, also stated that "the reporter who signs a routine ballistics report on operability, if called to the witness stand, has no recollection whatever of the reported test; [therefore,] his testimony [only] consists of his reading the report aloud." *Id.*

174. See, e.g., *People ex rel. McGee v. Walters*, 62 N.Y.2d 317, 465 N.E.2d 342, 476 N.Y.S.2d 803 (1984). Under the federal public records exception, police reports containing subjective statements or identifications of a defendant have also been excluded as violating a defendant's right to confrontation. *United States v. Agustino-Hernandez*, 14 F.3d 42, 43 (11th Cir. 1994) (per curiam) ("[T]his court has recognized that the public records exception [Rule 803(8)] does not exclude police records 'prepared in a routine non adversarial setting,' as it does 'those resulting from a more subjective investigation and evaluation of a crime.'" (quoting *United States v. Brown*, 9 F.3d 907, 911 (11th Cir. 1993) (per curiam))).

175. 62 N.Y.2d 317, 465 N.E.2d 342, 476 N.Y.S.2d 803 (1984).

176. *Id.* at 319, 465 N.E.2d at 343, 476 N.Y.S.2d at 804.

177. *Id.* at 321-22, 465 N.E.2d at 344, 476 N.Y.S.2d at 805.

demeanor may be evaluated through cross-examination.”<sup>178</sup> Thus, the court did not admit a parole officer’s report of parole violations by the parolee, because the hearing officer did not consider the “policies favoring confrontation, the objective or subjective nature of the particular report, and the potential assistance that cross-examination would lend to the fact-finding process . . . .”<sup>179</sup>

Hence, what seems to be a necessary requirement when admitting police reports against a criminal defendant is an individualized evaluation of the respective report and the circumstances under which it was prepared. Both federal and New York practice are correct in examining public records in this light when dealing with the delicate subject of a defendant’s right to confrontation.

#### *b. United States v. Oates Ruling*

One serious implication arising from New York’s treatment of police reports as a business record rather than as public records, involves the ruling in *United States v. Oates*.<sup>180</sup> Although *Oates*’s principle regarding public records is not controlling for all of the federal courts,<sup>181</sup> it was the first case to consider whether police reports can be introduced against a criminal defendant under the business record exception when such reports

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178. *Id.* at 322, 465 N.E.2d at 344-45, 476 N.Y.S.2d at 806.

179. *Id.*

180. 560 F.2d 45 (2d Cir. 1977).

181. See Daniel F. Sullivan, Annotation, *Admissibility, Over Hearsay Objection, of Police Observations and Investigative Findings Offered by Government in Criminal Prosecution, Excluded from Public Records Exception to Hearsay Rule under Rule 803(8)(B) or (C), Federal Rules of Evidence*, 56 A.L.R. FED. 168 (1982) (discussing other circuits ruling on whether investigative findings and observations of public officials may be admitted under other hearsay exceptions when excluded from public records exception); see also *United States v. Lee*, 589 F.2d 980 (9th Cir.) (admitting certified affidavits of CIA officials against criminal defendant under Rule 803(10)), *cert. denied*, 444 U.S. 969 (1979); *United States v. Sawyer*, 607 F.2d 1190 (7th Cir. 1979) (excluding law enforcement personnel’s reports under Rule 803(8) does not bar introducing reports under Rule 803(5)), *cert. denied*, 445 U.S. 943 (1980).

would not qualify for admission under the public records exception.<sup>182</sup> One other circuit as well has considered this issue and has since followed the rationale of *Oates*.<sup>183</sup>

In *Oates*, the defendant was convicted of possession of heroin with intent to distribute.<sup>184</sup> On appeal to the Second Circuit the issue arose as to whether an official report prepared by a United States Customs Service Chemist, which stated that the white powdery substance found on the defendant was heroin, was admissible under any applicable hearsay exception.<sup>185</sup> The Second Circuit first examined whether the chemist who prepared the report was considered "other law enforcement personnel" as defined in Rule 803(8)(B).<sup>186</sup> The court determined that the United States Chemist qualified as "law enforcement personnel" since this phrase was now to be construed "to include, at the least, any officer or employer of a governmental agency which has law enforcement responsibilities."<sup>187</sup> Thus, the Second Circuit found that the report, under Rule 803(8)(B), could not be admissible against the criminal defendant.<sup>188</sup>

The question then arose as to whether the report could still be used against the defendant if it could satisfy *another* hearsay exception.<sup>189</sup> After much discussion about the legislative history of Rule 803(8) and the reasons why Congress decided to exclude

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182. MCCORMICK, *supra* note 8, § 295, at 508 (stating that *United States v. Oates* was first case to decide whether official records could be admitted under other hearsay exceptions against a criminal defendant when records would be inadmissible under federal public records exception).

183. *See, e.g., United States v. Cain*, 615 F.2d 380 (5th Cir. 1980) (holding statements made in official report inadmissible against criminal defendant under business record exception).

184. *Oates*, 560 F.2d at 48.

185. *Id.* at 66.

186. *Id.* at 67.

187. *Id.* at 68. The Second Circuit noted that this definition "must be read broadly enough to make its prohibitions against the use of government-generated reports in criminal cases coterminous with the analogous prohibitions contained in FRE 803(8)(C)." *Id.* at 67-68.

188. *Id.* at 68.

189. *Id.* at 68-80.

such reports when used against a criminal defendant,<sup>190</sup> the Second Circuit was careful to note that “this was not the first time that a court has encountered a situation pitting some literal language of a statute against a legislative intent that flies in the face of that literal language.”<sup>191</sup> The Second Circuit, though, held that the legislative intent to exclude matters observed by the police in criminal cases must override the language of any other hearsay exception.<sup>192</sup>

[I]t was thus clear that the only way to construe FRE 803(6) so that it is reconcilable with this intended effect is to interpret FRE 803(6) and the other hearsay exceptions in such a way that police and evaluative reports not satisfying the standards of FRE 803(8)(B) and (C) may not qualify for admission under FRE 803(6) or any of the other hearsay exceptions to the hearsay rule.<sup>193</sup>

Thus, the chemist report was inadmissible under the business record exception as well.<sup>194</sup>

How does the *Oates* decision affect New York’s introduction of police reports under the business record exception against a criminal defendant? *Oates* is in direct conflict with New York’s policy of admitting public records under the business record

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190. The Second Circuit examined the various Senate and House Judiciary Committee Reports to determine what was Congress’ intent in enacting Rule 803(8)(B) and (C). *Id.* at 69. Since various Congressional statements discussed the reaffirmation of an accused right to confrontation, the Second Circuit explained that “the language retained in FRE 803(8)(B) and (C) meant that those provisions had the *effect* of rendering absolutely inadmissible against defendants in criminal cases the ‘police reports’ of item (B) and the ‘evaluative reports’ of item (C).” *Id.* at 70-71. Thus, police or evaluative reports were held inadmissible under any other hearsay exception if such report could not satisfy Rule 803(8)(B) or (C). *Id.*

191. *Id.* at 75.

192. *Id.* The Second Circuit stated that “[o]ur function as an interpretive body is, of course, to construe legislative enactments in such a way that the intent of the legislature is carried out.” *Id.*

193. *Id.* at 77.

194. *Id.* at 68.

exception even if they do not satisfy the public record exception.<sup>195</sup>

As discussed previously, police reports which are namely public records do not necessarily fall under the restrictive New York public records exception. Rather, they are introduced into evidence under the business records exception. However, were such a criminal matter to be brought into the Second Circuit, such reports would be *inadmissible* as business records under the *Oates* decision if the police reports are inadmissible under the public records exception. Thus, in federal courts, as opposed to New York courts, such records could not be admitted into evidence through other hearsay exceptions. In cases such as *In re Kevin G.*<sup>196</sup> and *People ex rel. Katz v. Jones*,<sup>197</sup> where police records were admissible under the business records exception, New York law was in direct conflict with the holding in *Oates* since the police records which did not qualify under the New York statutory public records exception were still received into evidence under the business record exception. The New York hearsay exception for public records needs now to consider the concerns addressed in the *Oates* decision.

### III. NEW YORK'S PROPOSED CODE OF EVIDENCE

Should New York adopt a more expansive version of Rule 803(8) and step away from the multi-faceted New York public records exception? The New York State Law Revision Commission believes so. Under the New York Proposed Code of Evidence, which was submitted to the 1991-92 session of the New York State Legislature, the Law Revision Commission proposed a New York public records exception. The proposal contemplates some of the same concerns addressed by Rule 803(8) as well as some other conditions that have not been expressed in either the federal or New York public records

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195. See THE NEW YORK STATE LAW REVISION COMMISSION, A CODE OF EVIDENCE FOR THE STATE OF NEW YORK § 803(c)(7) (1991).

196. 80 Misc. 2d 517, 363 N.Y.S.2d 99 (Fam. Ct. N.Y. County 1975).

197. 10 Misc. 2d 1067, 171 N.Y.S.2d 375 (Magistrate's Ct. Queens County 1958).

exception.<sup>198</sup> The New York Proposed Code of Evidence's public record exception provides as follows:

Records, reports, or other writings or data compilations of public offices not prepared solely for purposes of litigation setting forth: (i) the activities of the office; or (ii) matters observed pursuant to a duty imposed by law as to which matters there was a duty to report, except that in a criminal case a law enforcement record or report offered by the prosecution under this paragraph to prove directly an element of the crime charged or other crucial facts establishing guilt is admissible: (a) when the person who provided the information set forth in the record or report testifies, or is unavailable to testify within the meaning of subdivision (a) of section 804 of this article; and (b) when the record or report contains an expert opinion, if the person who rendered that opinion testifies, or if that person is unavailable to testify within the meaning of subdivision (a) of section 804 of this article and there is available no other witness who can provide equivalent testimony; or (iii) in civil actions and proceedings, factual findings resulting from an investigation made pursuant to authority granted by law.<sup>199</sup>

The Proposed Code should be adopted in New York because it contains pertinent clauses not found in either Rule 803(8) or New York's public records exception. This would ultimately "revive" the useful public records exception. One important proposal that the New York Proposed Code considers is the all-important right of a criminal defendant to confront his or her witnesses.<sup>200</sup> Thus, the Proposed Code allows a public record to be admitted into evidence against a criminal defendant but only when "the person who provided the information . . . in the record or report testifies . . ." <sup>201</sup> or "when the record or report contains an expert

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198. THE NEW YORK STATE LAW REVISION COMMISSION, A CODE OF EVIDENCE FOR THE STATE OF NEW YORK § 803(c)(7), *supra* note 195, at 184.

199. *Id.*

200. *Id.* at 208 ("Still, to protect an accused's state and federal confrontation rights, subparagraph (B) restricts the admissibility of official law enforcement reports concerning non routine matters against the accused in criminal cases in a manner identical to that provided for law enforcement reports under the business record exception.").

201. *Id.* at 184.

opinion, if the person who rendered that opinion testifies . . . .”<sup>202</sup> This is the most sound approach when dealing with any type of record or report where a criminal defendant is involved. Overall, the New York Proposed Code of Evidence’s public records exception is a wise proposal, which, if adopted, would clearly improve the fragmented New York public records exception.

## CONCLUSION

The public records exception to the hearsay rule, whether utilized in federal or New York courts, is a valuable tool and operates as an important link between the administration and judiciary system by allowing private litigants to take advantage of a reliable public resource.<sup>203</sup> Although an invaluable tool in today’s courthouse, the New York public record exception, as compared to Federal Rule 803(8), is difficult to utilize and at times seems to down-play the basis for admitting such records into evidence. Furthermore, the organization of New York’s public record exception makes it difficult to apply, especially to police reports. This Comment concludes that New York’s legislature should take the initiative to revise the intricacies set forth by the New York public records exception and adopt a rule similar to that stated in New York’s Proposed Code of Evidence; thus insuring a revival of the public records exception.<sup>204</sup>

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202. *Id.*

203. Note, *The Trustworthiness of Government Evaluative Reports Under Federal Rule of Evidence 803(8)(C)*, 96 HARV. L. REV. 492, 509 (1982).

204. See THE NEW YORK STATE LAW REVISION COMMISSION, A CODE OF EVIDENCE FOR THE STATE OF NEW YORK § 803(c)(7), *supra* note 195, at 184.

