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Thomas J. McCarthy

John M. Power

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# TWO DECADES AFTER *BEECH*: CONFUSION OVER THE ADMISSIBILITY OF EXPERT OPINIONS IN PUBLIC RECORDS

THOMAS J. MCCARTHY & JOHN M. POWER\*

In *Beech Aircraft Corp. v. Rainey*,<sup>1</sup> the Supreme Court held that the “public records” hearsay exception, embodied in Federal Rule of Evidence 803(8)(C), included opinions and other evaluative materials contained in government reports that set forth “factual findings” from official investigations, “unless the sources of information or other circumstances indicate lack of trustworthiness.”<sup>2</sup> This decision constituted an important development in evidence law because, prior to *Beech*, a number of federal courts excluded opinions in public records on the ground that they were not “factual findings” within the meaning of Rule 803(8)(C) and, thus, not admissible via the hearsay exception.<sup>3</sup> The effect of *Beech* was to open the floodgates to the relatively uncritical admission of a wide variety of government reports and other documents that contain expert opinions and other evaluative statements involving scientific, technical, or other specialized knowledge.

The law has always exhibited a healthy skepticism of opinion evidence, but *Beech* dismissed such doubts in cases involving opinions contained in public records on the theory that the general

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\* Mr. McCarthy is a 1981 graduate of Georgetown University Law Center and a former partner of Jenner & Block LLP with extensive experience in complex civil litigation. Mr. Power is a 2008 graduate of Washington and Lee School of Law and a litigation associate at Jenner & Block LLP.

1. 488 U.S. 153 (1988) [hereinafter *Beech III*].

2. *Id.* at 167 (quoting FED. R. EVID. 803(8)(C)). In describing the nature of the content of public records that may be found admissible pursuant to Rule 803(8)(C), the *Beech* Court referred interchangeably to “opinions,” “conclusions,” and “evaluative reports.” *Id.* at 167-68. The Court’s language, as well as its underlying rationale, suggests that the holding of *Beech* is intended to encompass a broad range of extra-factual content in public records, regardless of its specific form, as long as it otherwise satisfies the requirements of Rule 803(8)(C). *Id.* at 168-69. For ease of reference, this article will refer to the broad types of content subsumed within the holding of *Beech* as “opinion” evidence.

3. *Id.* at 161-62.

rules of relevance and probativeness, together with the trustworthiness “safeguard” in Rule 803(8)(C), would screen out bad opinions.<sup>4</sup> That many of the opinions contained in public records constitute *expert* opinions was not a major concern at the time because the predominant standard for admitting expert testimony, taken from *Frye v. United States*,<sup>5</sup> was focused simply on “whether the techniques used [by the witness] were ‘generally accepted by the relevant scientific community.’”<sup>6</sup> Government agencies frequently set the guidelines under which scientific inquiry is conducted, so it was not unreasonable to expect that a government investigation conducted pursuant to those guidelines would be both trustworthy for purposes of Rule 803(8)(C) and consistent with the generally accepted standard under *Frye*. Opinions in public records that passed the trustworthiness test for hearsay under Rule 803(8)(C) typically were presumed to meet the *Frye* threshold standard for expert testimony as well. Indeed, as the Fourth Circuit explained in 1984, “[e]vidence that falls within the 803(8)(C) exception . . . has already met the *Frye* standard. Because the evidence has been gathered and presented by a public agency it may be presumed to reflect methodologies accepted by the scientific community.”<sup>7</sup>

The use of “trustworthiness” as a proxy for the *Frye* standard in this context made some sense as long as “general acceptance” remained the applicable standard for admitting expert evidence. Five years after *Beech*, however, the Supreme Court changed the landscape for the admission of expert evidence in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>8</sup> *Daubert* held that the *Frye* standard was superseded by Federal Rule of Evidence 702.<sup>9</sup> The Supreme Court explained that, while “general acceptance” still may be a relevant factor under Rule 702 for assessing the reliability of an expert’s opinion, district courts should consider a variety of additional factors modeled after the scientific method to determine whether expert testimony is sufficiently reliable to be admitted into evidence in federal trials.<sup>10</sup>

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4. *Id.* at 167-68. “[S]afeguards built into other portions of the Federal Rules, such as those dealing with relevance and prejudice, provide the court with additional means of scrutinizing and, where appropriate, excluding evaluative reports or portions of them.” *Id.*

5. 293 F. 1013 (D.C. Cir. 1923).

6. *Ellis v. Int'l Playtex, Inc.*, 745 F.2d 292, 303-04 (4th Cir. 1984).

7. *Id.* at 304.

8. 509 U.S. 579 (1993).

9. *Id.* at 589. “[T]he assertion that the Rules somehow assimilated *Frye* is unconvincing. *Frye* made ‘general acceptance’ the exclusive test for admitting expert scientific testimony. That austere standard, absent from, and incompatible with, the Federal Rules of Evidence, should not be applied in federal trials.” *Id.*

10. *Id.* at 592-95. These factors are described more fully *infra* Part II.B.

Under *Daubert*, many of the factors relevant to evaluating the reliability of expert opinions under Rule 702 are notably different than the considerations relevant to the “trustworthiness” safeguard built into Rule 803(8)(C) for public records.<sup>11</sup> While it may have been sufficient when *Beech* was decided, for the reasons described below, the trustworthiness safeguard embodied in Rule 803(8)(C) no longer serves as an adequate substitute for testing the evidentiary reliability of expert opinions in public records for purposes of Rule 702.<sup>12</sup> Despite this deficiency, most federal courts considering the admissibility of expert evidence contained in public records have failed to faithfully perform the role of gatekeeper described in *Daubert*.<sup>13</sup> In doing so, these courts have allowed into evidence expert opinions from public records that otherwise could never have passed muster if they had been authored by a privately-retained expert.

Part I of this Article explains the important role expert opinions in public records can serve at trial, and why application of the hearsay exception in Rule 803(8)(C) alone is not sufficient to ensure the reliability of those opinions. It also explains why, in determining the admissibility of expert opinions contained in public records, courts should apply the same level of *Daubert*-type scrutiny as expert testimony obtained from privately retained sources. Part II of this Article discusses the diverse methods cobbled together by courts and commentators to address the inherent tension between the expert opinion rules and the hearsay rules governing public records. This section also identifies the practical and doctrinal shortcomings in each method. Part III proposes a method for applying *Daubert* principles to expert opinions in public records that recognizes and accounts for the inherent differences between expert witnesses privately retained for trial and public officials who express an expert opinion in a government report.

## I. THE ROLE OF EXPERT OPINIONS IN PUBLIC RECORDS AND THE FEDERAL RULES OF EVIDENCE

### A. *The Importance of Expert Opinions in Public Records*

The “public records” exception to the hearsay rule contained

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11. See *infra* Tbl.1 at pp. 936-37 (noting the different considerations relevant to the untrustworthiness determination under FRE 803(8)(C) and the reliability factors under *Daubert*).

12. See discussion *infra* Part I.C. (questioning whether *Daubert* should be applied to public records).

13. See discussion *infra* Part II. (identifying confusion regarding the reconciliation with the public records hearsay exception and the expert testimony rules by noting the divergent approaches currently employed by the federal courts).

in Rule 803(8)(C) applies to

[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . [,] 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.<sup>14</sup>

This exception is invoked in a wide variety of civil cases. Although the reports issued by some public agencies are inadmissible by statute,<sup>15</sup> government reports containing opinions have played an important role in cases dealing with, among a myriad of other topics, Federal Aviation Administration "Airworthiness Directives" describing unsafe conditions in aircraft;<sup>16</sup> gunshot residue experiments conducted by police officers;<sup>17</sup> "Morbidity and Mortality Weekly Reports" conducted by the Center for Disease Control and similar state agencies investigating a link between toxic shock syndrome and tampon use;<sup>18</sup> Surgeon General reports on the dangers of smoking;<sup>19</sup> Coast Guard reports related to a boating accident;<sup>20</sup> and a fire department report written following a propane gas explosion.<sup>21</sup> In addition to documents prepared by federal agencies, the exception extends to reports generated by public agencies on the state and local levels.<sup>22</sup>

Public record expert opinions admitted into evidence under Rule 803(8)(C) and *Beech* can have a significant impact on the outcome of trials. Juries tend to assign special weight to opinions

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14. FED. R. EVID. 803(8).

15. See, e.g., *Huber v. United States*, 838 F.2d 398, 403 (9th Cir. 1988) (noting that, among others, Congress has determined reports prepared by the National Transportation Safety Board and the Nuclear Regulatory Commission shall be inadmissible).

16. *Melville v. Am. Home Assurance Co.*, 584 F.2d 1306, 1315-16 (3d Cir. 1978).

17. *Estate of Griffin v. Hickson*, No. CIV.A. 98-3805, 2002 WL 988006, at \* 1, 3 (E.D. Pa. May 9, 2002).

18. *Kehm v. Proctor & Gamble Mfg Co.*, 724 F.2d 613, 617-18 (8th Cir. 1983).

19. *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 600-01 (8th Cir. 2005).

20. *In re Wandering Gentile*, 143 F.R.D. 560, 562-64 (D. N.J. 1992).

21. *Matthews v. Ashland Chem. Inc.*, 770 F.2d 1303, 1309-10 (5th Cir. 1985).

22. FED. R. EVID. 803 advisory committee's note to Paragraph (8) (1972 Proposed Rules). "The rule makes no distinction between federal and nonfederal offices and agencies." *Id.* See also 5 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 803.10[1] (Joseph M. McLaughlin ed., Matthew Bender & Co., Inc. 2d ed. 2009)(1975)(noting that there is no distinction drawn between federal and nonfederal records, and rather the sole criterion is whether the record is that of "public offices or agencies").

expressed by a governmental body.<sup>23</sup> Public records carry an “aura of special reliability and trustworthiness” because they are prepared by a presumptively impartial governmental body.<sup>24</sup> This presumed impartiality, coupled with the presumed expertise of public agencies, give the opinions expressed in public records a perceived measure of credibility and reliability that cannot be matched by an opinion from a traditional expert for hire. The “apparent ‘official’ nature [of public records] is likely to cause a jury to give the evidence inordinate weight.”<sup>25</sup>

Despite the widespread use of public records and the importance assigned by juries to expert opinions expressed in such records, the means available to test the underlying basis for such opinions are considerably less demanding than those for a traditional expert. Under the Federal Rules of Civil Procedure, any party wishing to use expert testimony from a privately retained expert must disclose a significant amount of background information, including the specific opinions of the expert as well as the basis for those opinions, information considered by the expert, the qualifications of the expert, and a statement of compensation.<sup>26</sup> In addition, an expert witness retained by a party is subject to cross examination at deposition and trial.<sup>27</sup> In contrast, a public record often does not disclose the specific basis for its opinions, the qualifications of its author, or the author’s or agency’s motivation.<sup>28</sup> Third-party discovery from the public

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23. See, e.g., James E. Robinson, *Challenging Admissibility and Use of Government Investigative Reports*, 38 TORT TRIAL & INS. PRAC. L. J. 887, 901 (2003) (stating undue prejudice “arises from the inordinate weight that a jury is likely to give to the probable cause determination reached by a government fact-finding body.”); Note, *The Trustworthiness of Government Evaluative Reports Under Federal Rule of Evidence 803(8)(C)*, 96 HARV L. REV. 492, 495 (1982) [hereinafter *The Government Evaluative Reports*] (noting that “[b]ecause the report has the government’s endorsement, the jury might give it too much weight.”).

24. *City of New York v. Pullman Inc.*, 662 F.2d 910, 915 (2d Cir. 1981). See also *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d at 601 (observing that “the fact that a report was prepared by a disinterested governmental agency pursuant to a legal obligation constitutes a badge of trustworthiness”); *The Government Evaluative Reports*, *supra* note 23, at 507 (noting that “[t]he biases of ‘hired guns’ can be exposed to the trier of fact during cross-examination when opposing counsel inquires about the fees the expert will receive for his favorable testimony. Biased government reports, however, may not be so easily impeached.”).

25. *Fowler v. Firestone Tire & Rubber Co.*, 92 F.R.D. 1, 2 (N.D. Miss. 1980).

26. See FED. R. CIV. P. 26(a)(2) (discussing required expert disclosures).

27. See FED. R. EVID. 705 (stating “[t]he expert may testify in terms of opinion or inference and give reasons therefor[e] without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.”).

28. *The Government Evaluative Reports*, *supra* note 23, at 493-95.

agency or official who authored the report often is very limited.<sup>29</sup> Furthermore, in many contexts, a public record may be admitted into evidence without its author ever being required to testify.<sup>30</sup>

The absence of any meaningful ability to test the reliability of public record opinions might not be a major source of concern if there was some assurance that government officials consistently and rigorously employed reliable methodologies in arriving at the conclusions expressed in those records. Unfortunately, there can be no such blanket assurance. The reliability of opinions expressed in public records have been repeatedly questioned on the basis of a wide variety of concerns, including the lack of public officials' skill and experience, biases of the official or the agency writing the report, faulty assumptions and methodologies, the quantity and quality of resources devoted to the investigation, and the investigator's reliance on material not admissible at trial.<sup>31</sup>

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29. See Jason C. Grech, Note, *Exxon Shipping, The Power to Subpoena Federal Agency Employees, and the Housekeeping Statute: Cleaning Up the Housekeeping Privilege for the Chimney-Sweeper's Benefit*, 37 WM. & MARY L. REV. 1137, 1145-47 (1996) (noting the limitations caused by agency regulations).

As authorized by the Housekeeping Statute, most federal agencies have passed regulations limiting access to agency records and testimony from agency employees concerning agency business. . . . Often, housekeeping regulations provide no standard of determination at all, giving the agency head free rein. This lack of direct, unambiguous language allows agency heads great leeway in their decisions whether to allow a subordinate agency employee to testify. Such power is dangerous because it gives agency heads unfettered discretion to affect the outcome of private civil actions. Under current procedure, once an agency head makes a determination not to allow a litigant to obtain the testimony of an employee, the litigant often is without any viable recourse.

*Id.*; see also David P. Graham & Jacqueline M. Moen, *Discovery of Regulatory Information for Use in Private Products Liability Litigation: Getting Past the Road Blocks*, 27 WM. MITCHELL L. REV. 653, 655-68 (2000) (discussing access to regulatory information); William Bradley Russell, Jr., Note, *A Convenient Blanket of Secrecy: The Oft-Cited But Nonexistent Housekeeping Privilege*, 14 WM. & MARY BILL RTS. J. 745, 749-62 (discussing the history and difficulties in obtaining discovery from federal agencies).

30. See FED. R. EVID. 902 (discussing the self-authentication of public records).

31. See Jack London, *Issues of Trustworthiness and Reliability of Evidence from NTSB Investigations in Third Party Liability Proceedings*, 68 J. AIR L. & COMM. 39, 50-55 (2003) (noting the evidentiary problems of trustworthiness and reliability); Robinson, *supra* note 23, at 890-903 (discussing the grounds for challenging the admissibility of a government investigative report); Alan Charles Raul & Julie Zampa Dwyer, "Regulatory Daubert": *A Proposal to Enhance Judicial Review of Agency Science by Incorporating Daubert Principles into Administrative Law*, 66 LAW & CONTEMP. PROBS. 7, 8-18 (2003) (discussing the shortcomings of agency regulation and accountability in the science realm); D. Hiep Truong, *Daubert and Judicial Review: How Does an Administrative Agency Distinguish Valid Science from Junk Science?*, 33 AKRON L. REV. 365, 367-70 (2000) (pointing out problems affecting regulatory

The Supreme Court recently noted that, even in criminal cases, documents that appear to utilize “neutral scientific testing” for law enforcement purposes are often subject to a variety of institutional pressures that can render the test results neither neutral nor scientific.<sup>32</sup>

While some of these concerns, in theory, might be filtered out by a diligent application of the “trustworthiness” safeguard of Rule 803(8)(C), the hearsay exception is no better suited to accomplish this task than trial courts’ past reliance on the *Frye* standard for expert evidence. A more systematic approach, such as that established by the Supreme Court in *Daubert*, is the most effective means of ensuring that the reliability of expert opinions expressed in public records is on a par with the reliability of other expert opinions offered into evidence in federal trials.

### B. Evidentiary Reliability of Expert Testimony Under *Daubert*

The Supreme Court in *Daubert* held that Rule 702 imposed on federal courts the obligation to “ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.”<sup>33</sup> In carrying out this obligation, the Court declared that district courts should serve as “gatekeepers” because, “[u]nlike an ordinary witness, an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation.”<sup>34</sup> Such testimony “can be both powerful and quite misleading because of the difficulty in evaluating it.”<sup>35</sup> Thus, in deciding whether to admit expert evidence of a scientific nature, the judge-“gatekeeper” must make “a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.”<sup>36</sup> As the Court explained, “[p]roposed [expert] testimony must be supported by appropriate validation ( *i.e.*, ‘good grounds’) based on

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agencies’ decision-making and risk assessment process); Andrew Trask, Comment, *Daubert and the EPA: An Evidentiary Approach to Reviewing Agency Determinations of Risk*, 1997 U. CHI. LEGAL F. 569, 570-74 (1997) (discussing the problems of credibility, inconsistency, and inaccuracy in EPA policies).

32. *Melendez-Diaz v. Mass.*, 129 S. Ct. 2527, 2536-37 (2009) (noting that “[f]orensic evidence is not immune from the risk of manipulation” because, among other influences, “A forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution.”).

33. *Daubert*, 509 U.S. at 589.

34. *Id.* at 592 (citation omitted).

35. *Id.* at 595.

36. *Id.* at 592-93.



what is known.”<sup>37</sup>

*Daubert* departed from *Frye* by requiring that district courts play a more active role in assessing the validity of the methodology or reasoning underlying proffered expert scientific evidence.<sup>38</sup> The Court eschewed a rigid, all-encompassing checklist for trial courts to follow: “The inquiry envisioned by Rule 702 is, we emphasize, a flexible one.”<sup>39</sup> Subject to that caveat, the Court suggested four factors that were relevant to the reliability assessment in the context of the scientific evidence proffered by the plaintiff:

1. Whether the theory or technique underlying the expert evidence can be (and has been) tested;
2. Whether the theory or technique has been subjected to peer-review and publication;
3. The known or potential rate of error for the particular scientific technique, and the existence and maintenance of standards controlling the technique’s operation;
4. Whether the theory or technique is generally accepted in the relevant scientific community.<sup>40</sup>

In *Kumho Tire Co. Ltd. v. Carmichael*,<sup>41</sup> the Supreme Court extended the principles of *Daubert* to expert evidence outside the realm of scientific knowledge.<sup>42</sup> Although the rationale underlying *Daubert* borrowed heavily from the scientific method, the *Kumho Tire* Court observed that the language of Rule 702 “makes no relevant distinction between ‘scientific’ knowledge and ‘technical’ or ‘other specialized’ knowledge,” and that the “evidentiary rationale that underlay the Court’s basic *Daubert* ‘gatekeeping’ determination” was not limited to scientific evidence.<sup>43</sup> Accordingly, the Supreme Court held that the trial court must undertake the same kind of reliability assessment in nonscientific cases involving expert evidence that *Daubert* required in the scientific context.<sup>44</sup>

37. *Id.* at 590.

38. *Id.* at 592-93.

39. *Id.* at 594.

40. *Id.* at 593-94.

41. 526 U.S. 137 (1999).

42. *Id.* at 147.

43. *Id.* at 147-48.

44. *Id.* at 148-49. Since *Kumho Tire*, federal courts have articulated a number of additional factors that may bear on the reliability of nonscientific expert evidence in particular cases including, for example, the relationship of the technique to methods which have been established as reliable, the qualifications of the expert in connection with the methodology employed, and the uses to which the method has been put outside of the courtroom. See, e.g., *United States v. Mitchell*, 365 F.3d 215, 235 (3rd Cir. 2004) (identifying additional reliability factors discussed above). See generally FED. R. EVID. 702 advisory committee’s note (2000 Amendments) (discussing the *Daubert* relevance factors and noting that these factors are neither dispositive nor exhaustive).

### C. Should *Daubert* Be Applied to Public Records?

*Kumho Tire* teaches that, regardless of the field of expertise involved, Rule 702 requires a systematic analysis of the methodological reliability of proffered expert testimony. Nothing in *Kumho Tire* or *Daubert* suggests any exception to this requirement. To the contrary, taking a cue from *Kumho Tire*, the “evidentiary rationale” underlying Rule 702 and the systematic analysis required by the Rule should extend to *all* expert evidence, regardless of its source. There is no logical reason to relax the court’s gate-keeping role under *Daubert* simply because a government official proffered an expert opinion in a public record.

Unfortunately, the Supreme Court has provided little guidance about the proper evidentiary standard to apply to expert opinions contained in public records. In *Beech*, the seminal public record case, the Supreme Court remained silent about how courts should assess the reliability of expert opinions in public records under Rule 702, even though the report at issue clearly contained conclusions based on scientific, technical, or other specialized knowledge.<sup>45</sup> The issue in *Beech* was whether the opinion expressed in a public record was within the scope of the hearsay exception embodied in Rule 803(8)(C), not whether the opinion satisfied the standards for expert testimony under Rule 702.<sup>46</sup> *Beech* described the trustworthiness requirement of Rule 803(8)(C) as a “safeguard” against the otherwise unreliable nature of a hearsay opinion in a public record, but it did not address whether that safeguard supplanted the reliability standards otherwise applicable to expert opinions under Rule 702.<sup>47</sup>

Some might argue that any distinction between the public record hearsay exception and the expert opinion rules is illusory because opinion evidence that is sufficiently reliable to be trustworthy also is likely to be sufficiently reliable to be admitted as an expert opinion. While the simplicity of this argument is appealing, it overlooks three important points. First, opinion evidence in a public record qualifies as an exception to the hearsay rule because it is granted a rebuttable presumption of trustworthiness.<sup>48</sup> The courts have never explicitly extended such

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45. See *Beech III*, 488 U.S. at 157-59 (describing the nature of the Judge Advocate General Report at issue in the case).

46. *Id.* at 160-61.

47. *Id.* at 167-68 (stating “[t]his trustworthiness inquiry—and not an arbitrary distinction between “fact” and “opinion”—was the Committee’s primary safeguard against the admission of unreliable evidence, and it is important to note that it applies to all elements of the report.”).

48. See, e.g., *Gilbrook v. City of Westminster*, 177 F.3d 839, 858 (9th Cir. 1999) (upholding the presumption of trustworthiness in public records); *Johnson v. City of Pleasanton*, 982 F.2d 350, 352-53 (9th Cir. 1992) (stating that this rule is “premised on the assumption that public officials perform their duties properly without motive or interest other than to submit accurate

a presumption to expert testimony. The hearsay rules have embraced the presumption that public records are trustworthy because they are prepared by officials who are acting under authority of law and are expected to be unbiased and to possess the knowledge, experience and credibility to monitor and govern the relevant subject matter or field of activity. Ironically, this presumption appears to be based on a legacy belief that itself is neither tested nor verified.<sup>49</sup> And, as noted above, anecdotal evidence suggests that there are many instances in which this faith is not justified.<sup>50</sup>

While the particular qualifications, experience, and likely sources of bias of privately-retained experts are readily discoverable, the specific background and viewpoint of the government investigator who prepared a public record may not be easily uncovered. Coupled with the practical limitations often imposed on eliciting third-party discovery from many government agencies, the presumption of trustworthiness effectively cuts off the opponent's opportunity in any individual case to test whether the author of the expert opinion in a public record is, in fact, neutral or possesses the knowledge, experience, and credibility to monitor or govern the field in a proper manner.

Second, trustworthiness for purposes of the public records exception to the hearsay rule and reliability for purposes of the expert opinion rule are two different things. That a public record is sufficiently trustworthy to escape the bar of the hearsay rule

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and fair reports")(quoting *Bradford Trust Co. v. Merrill Lynch*, 805 F.2d 49, 54 (2d Cir. 1986)); *Sussel v. Wynne*, No. 05-00444, 2006 WL 2860664, at \*2 (D. Haw. Oct. 4, 2006) (stating "[a] trial court is entitled to presume that a public report is authentic and trustworthy.") (citations omitted); *Miranda-Ortiz v. Deming*, No. 94 Civ. 476, 1998 WL 765161, at \*2 (S.D.N.Y. Oct. 29, 1998) (stating "[b]ecause it is assumed that public officials perform their duties properly, investigative 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.") (citation omitted).

49. Wigmore explains that official reports are accorded a presumption of trustworthiness in part because they are prepared in the course of the performance of an official duty:

Official honor may or may not be what it has been or what it ought to be, and it may differ in different communities and persons. But in the matters with which the law of evidence is concerned, official duty is on the whole a vital force, more potent than might be supposed, even in a community where official ceremony and dignity are as little regarded as with us. *And even if the traditional assumption of the potency of official duty and honor be in some regions or for some classes of incumbents more a fiction than a fact, it is at least a fiction which we can hardly afford in our law openly to repudiate.*

5 WIGMORE, EVIDENCE § 1632 (Chadbourn rev. 1974) (emphasis added).

50. *Supra* note 31 and accompanying text; *infra* note 63 and accompanying text.

does not mean that the opinion expressed in the record is the product of a valid and reliable methodology that has been tested or is capable of being measured against some verifiable standard.

As a general rule, hearsay exceptions save second-hand evidence from the scrap heap because something about the circumstances of its creation bolsters its trustworthiness enough to bring it up to the level of first-hand evidence that can be tested in the crucible of cross-examination.<sup>51</sup> Jurors are expected to be more than capable of evaluating first-hand evidence from their own experience. But simply being good enough to stand on a par with first-hand evidence does not mean that a public record is reliable enough to stand on a par with the heightened standards for expert opinions. Unlike an excited utterance or present sense impression, expert opinions require specialized knowledge that is likely to be unfamiliar to the trier of fact and may depend in whole or in part on something other than first-hand information.<sup>52</sup> The reliability of such opinions can frequently go off track for any number of specialized or technical reasons that are unrelated to the factor which bolstered its trustworthiness for hearsay purposes. Since expert opinions can have a disproportionate influence on the trier of fact, it is important that courts hold expert opinions in public records to a higher standard of reliability than other evidence, including evidence found to be sufficiently trustworthy to avoid the bar of the hearsay rule.<sup>53</sup>

Third, the specific factors used to test the presumption of trustworthiness for public records in any given case are not the same factors that are at the core of the courts' reliability gate-keeping responsibilities under *Daubert* and Rule 702. According to the Advisory Committee Notes to Rule 803(8)(C), the presumption of trustworthiness can be rebutted by challenging the fairness, completeness, and regularity of the investigation which culminated in the public record.<sup>54</sup> While these procedural factors

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51. As Wigmore explains in discussing the conceptual bases for exceptions to the hearsay rule generally, "under certain circumstances the probability of accuracy and trustworthiness of [a] statement is practically sufficient, if not quite equivalent to that of statements tested in the conventional manner." 5 WIGMORE, EVIDENCE § 1422 (Chadbourne rev. 1974).

52. See FED. R. EVID. 701-03 (discussing limitations of opinion testimony by lay witnesses, circumstances under which expert testimony is required, and the bases of expert testimony).

53. See *Daubert*, 509 U.S. at 595 (quoting Judge Weinstein who noted that "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses.").

54. See FED. R. EVID. 803 advisory committee's note to Paragraph 8(C) (1972 Proposed Rules) (noting that while the rule assumes admissibility in the first instance, it allows ample provisions for escape if sufficient negative factors are present).

are obviously relevant to any reliability determination, *Daubert* requires considerably more, including an assessment of the substantive validity of the methodology upon which the proffered expert opinion is based.<sup>55</sup> A side-by-side comparison of the specific factors relevant to this determination demonstrates the nature of the difference:

Table 1	
Considerations Relevant to Untrustworthiness Determination Under FRE 803(8)(C)	<i>Daubert</i> Reliability Factors Under FRE 702
<p>Advisory Committee Note (1972):            Factors which may be of assistance in passing on the admissibility of evaluative public reports 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 conducted;            (4) possible motivation problems suggested by <i>Palmer v. Hoffman</i>.<sup>56</sup>            "Others no doubt could be added."<sup>57</sup>            Courts have also listed other factors to determine whether a report is untrustworthy, including such items as:            - finality of findings            - extent to which report is based</p>	<p>Under <i>Daubert</i>, the trial court must serve as the gatekeeper to ensure that expert testimony is both relevant and reliable. In the context of scientific evidence, reliability should be determined on the basis of such factors as:            (a) whether the theory or technique has been tested;            (b) subject to peer review or publication, and existence of standards;            (c) generally accepted within the scientific community; and            (d) known or potential rate of error.<sup>59</sup>            In performing their gate-keeping role even in non-scientific cases, courts should apply these or comparable factors to test the reliability</p>

55. *Daubert*, 509 U.S. at 592-93 ("This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.").

56. 318 U.S. 109 (1943). The Court held that an accident report was inadmissible because it was prepared in anticipation of litigation, rather than in the regular course of business.

57. FED. R. EVID. 803 advisory committee's note to Paragraph 8(C) (1972 Proposed Rules).

<p>on inadmissible evidence or non-neutral sources</p> <ul style="list-style-type: none"> <li>- possibility that the report reflects agency's agenda or mission</li> <li>- the depth of the investigation</li> <li>- the specificity of the report<sup>58</sup></li> </ul>	<p>of proffered expert opinion testimony. Other factors considered include:</p> <ul style="list-style-type: none"> <li>- relationship of technique to other techniques already found to be reliable</li> <li>- expert qualifications on technique employed</li> <li>- uses of technique outside of litigation<sup>60</sup></li> </ul>
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The above-enumerated factors relevant to Rule 803(8)(C) and Rule 702 do not purport to be applicable in every case, but there can be no doubt that the analytical emphasis of each rule is different. Rule 803(8)(C) is focused primarily on the procedure by which the public agency collected and digested the facts, while *Daubert* and its progeny under Rule 702 are focused on the soundness and validity of the reasoning underlying the proffered expert's opinion.<sup>61</sup> And while the *opponent* of a public record has the burden of overcoming the presumption of trustworthiness

59. 509 U.S. at 593-94.

58. See, e.g., *Colman v. Home Depot, Inc.*, 306 F.3d 1333, 1342 n.4 (3d Cir. 2002) (noting seven additional factors to be considered when addressing the adequacy of the investigative/evaluative process of agency determinations); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd.*, 505 F. Supp. 1125, 1147 (E.D. Pa. 1980), *aff'd in part, rev'd in part sub nom. In re Japanese Elec. Prod. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983), *rev'd sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (discussing the seven additional factors).

60. FED. R. EVID. 702 advisory committee's note (2000 Amendments). See also *Kumho Tire*, 526 U.S. at 152 (1999) (stating that the goal of *Daubert* is to ensure the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (noting "[t]rained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert"). "A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Id.*; *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997) (stating *Daubert* "requires the district judge to satisfy himself that the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting.").

61. Jon Y. Ikegami, Note, *Objection: Hearsay—Why Hearsay-Like Thinking Is a Flawed Proxy for Scientific Validity in the Daubert 'Gatekeeper' Standard*, 73 S. CAL. L. REV. 705, 706-07 (2000). "[A] crucial distinction must be made between evidentiary reliability in the scientific sense, which focuses on the validity of the underlying science, and evidentiary reliability in the hearsay sense, which generally focuses instead on the circumstances surrounding the evidence and the speaker." *Id.* at 707.

under Rule 803(8)(C), the *proponent* of expert opinion testimony has the burden of demonstrating that the witness' testimony is sufficiently reliable to satisfy the requirements of Rule 702.<sup>62</sup>

It might be argued that scrutinizing a public record opinion under *Daubert* is not really necessary because the hearsay trustworthiness requirement, while concededly not the same as *Daubert*, is a workable filter that has the effect of weeding out the same kind of unreliable expert opinions that *Daubert* was designed to detect. For example, consideration of potential biases or the skills and experience of the public official or agency preparing the report—both hearsay trustworthiness factors—could be expected to filter out many unreliable opinions. But third-party discovery from public officials or agencies is often limited or prohibited altogether, so the party opposing the admission of public records has only a limited opportunity, if any, to discover a problem and develop an adequate record even with respect to these trustworthiness factors.

Even if these indicia of lack of trustworthiness could be readily uncovered, *Daubert's* reliability criteria are intended to detect a much broader range of problems. As demonstrated by cases challenging agency rulemaking, seemingly experienced and disinterested public agencies are more than capable of reaching conclusions that are unreliable or scientifically indefensible.<sup>63</sup>

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62. The proponent's burden at this stage under *Daubert* is to demonstrate by a preponderance of the evidence that the expert opinion is reliable, not to prove that it is correct. *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 744, n.11 (3d Cir. 1994). See, e.g., *Moore v. Ashland Chem., Inc.*, 151 F.3d 269, 276 (5th Cir. 1998) (stating "the party seeking to have the district court admit expert testimony must demonstrate that the expert's findings and conclusions are based on the scientific method, and, therefore, are reliable."); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1316 (9th Cir. 1995) (stating "the party presenting the expert must show that the expert's findings are based on sound science, and this will require some objective, independent validation of the expert's methodology.").

63. For example, in *United States v. Ottati & Goss, Inc.*, 900 F.2d 429, 441 (1st Cir. 1990), then Circuit Judge Stephen Breyer took the Environmental Protection Agency ("EPA") to task for a two page calculation advocating a standard for PCBs in soil based upon the assumption that small children would eat contaminated dirt 245 days a year for three years. The court also questioned the methods employed in the investigation of the contaminated site, noting that the soil "samples" were not collected on a random basis, but from already suspect "discolored soils." *Id.* at 441-42. Other courts have found that federal agencies employed questionable scientific methodologies in a wide variety of other contexts. See, e.g., *Earth Island Inst. v. Hogarth*, 494 F.3d 757, 763-66 (9th Cir. 2007) (discussing rules for dolphin-safe nets for catching tuna); *Ecology Ctr., Inc. v. U.S. Forest Service*, 451 F.3d 1183, 1192-94 (10th Cir. 2006) (concerning logging in a National Forest); *Midwater Trawlers Co-Operative v. Dept. of Commerce*, 282 F.3d 710, 720-21 (9th Cir. 2002) (involving the allocation of fishing rights to a Native-American tribe); *Chlorine Chem. Council v. Env'tl. Prot. Agency*, 206 F.3d 1286, 1290 (D.C. Cir. 2000) (regarding chloroform levels in drinking water); *Sierra Club v. U.S. Env'tl.*

Expert opinions in public records are not immune from the malady of “junk science” that infects many private opinions from highly credentialed experts with no apparent stake in the outcome.<sup>64</sup>

## II. CONFUSION AMONGST THE COURTS AND COMMENTATORS ON HOW TO RECONCILE THE PUBLIC RECORDS HEARSAY EXCEPTION AND THE EXPERT RULES

While the practical need and doctrinal bases for applying *Daubert* to public record opinions are clear, the post-*Daubert* caselaw involving public record opinions is not. The limited number of cases that address this topic directly reflect a wide variety of approaches, *none* of which are genuinely faithful to *Daubert*. Some courts continue to believe that if an expert opinion in a public record is sufficiently trustworthy to satisfy Rule 803(8)(C), it must be reliable enough to admit into evidence.<sup>65</sup> Other courts pay lip service to the need to apply *Daubert* standards to opinions expressed in public records but then fail to diligently perform the gate-keeping role required by *Daubert*.<sup>66</sup>

Judges alone, however, are not solely responsible for the confusion. If the relative dearth of caselaw discussing the tension between Rule 803(8)(C) and the rules governing expert opinions is any guide, it appears that litigants and their lawyers do not raise this issue with any degree of frequency or pursue it with any

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Prot. Agency, 167 F.3d 658, 664 (D.C. Cir. 1999) (discussing performance standards for medical waste incinerators); Chem. Mfr. Ass'n v. Envtl. Prot. Agency, 28 F.3d 1259, 1264-66 (D.C. Cir. 1994) (involving high risk designations of certain airborne chemicals); AFL-CIO v. OSHA, 965 F.2d 962, 975-80 (11th Cir. 1992) (concerning permissible exposure limits for 428 toxic substances); Corrosion Proof Fittings v. Envtl. Prot. Agency, 947 F.2d 1201, 1218-19 (5th Cir. 1991) (discussing regulations for the manufacture, importation, processing, and distribution of asbestos).

64. See, e.g., *Harrison v. Howmedica Osteonics Corp.*, No. Civ. 06-0745, 2008 WL 906585, at \*9, 13 (D. Ariz. Mar. 31, 2008) (finding that an expert, who had an extensive curriculum vitae, including several chemistry-related degrees, a Ph.D. from Stanford, a position as professor, and membership in numerous professional associations, did “not carry sufficient indicia of reliability to satisfy Rule 702 as explicated in *Daubert* and its progeny.”); *Toole v. Toshin Co.*, No. 00-CV 821S, 2004 WL 2202580, at \*2, 4 (W.D.N.Y. Sept. 29, 2004) (finding that the expert had “considerable academic and professional experience” and “designed, manufactured and or tested a wide range of mechanical and electrical devices and machines” but, nevertheless, “failed to employ reliable methods and principles in reaching his conclusions and failed to apply his methodology reliably to the facts of this case.”); *Coffey v. Dowley Mfg.*, 187 F. Supp. 2d 958, 977 (M.D. Tenn. 2002) (finding that despite the expert’s doctorate in mechanical engineering, sixteen years as a professor at Tennessee Technological University, and nineteen years as a consultant, the expert “did not apply scientifically valid principles and methodology to the facts of this case.”).

65. *Infra* text and accompanying notes 67-70 and accompanying text.

66. *Infra* note 72 and accompanying text.



measure of thoroughness. And legal commentaries that have addressed the subject exhibit a pattern of disarray that parallels the confusion found in court decisions. Some commentators have stopped at the point of recognition, choosing to note that tension exists between Rule 803(b)(C) and Rule 702, but without offering a definitive solution.<sup>67</sup> Others have argued that the trustworthiness requirement of Rule 803(8)(C) is sufficient for public record expert opinions. As explained below, however, all of these perspectives fall short of a practical solution that is faithful to the principles underlying both Rule 803(8)(C) and *Daubert*. The diverse spectrum of legal thinking in this area makes manifest the need for a single standard and procedure to govern the admissibility of expert evidence contained in public records.

The first and most basic approach employed by some courts when assessing the admissibility of an expert opinion in a public record is to rely solely on a Rule 803(8)(C) trustworthiness analysis. In *Mayer v. City of Hammond*,<sup>68</sup> for example, after finding that a police report satisfied the trustworthiness requirement of Rule 803(8)(C), the district court refused to consider the defendant's separate Rule 702 challenge to the report or to critically analyze the methodology utilized in the report.<sup>69</sup> The court explained that it was not necessary to perform its gate-keeping role because "the bases for exclusion asserted by [the defendant] in his reply brief was Rule 702 and Rule 26(a)(2), which in fact go right back to the determination of trustworthiness of the underlying reports and are not a separate analysis . . ." <sup>70</sup>

*Mayer's* holding is a convenient shortcut for determining the admissibility of public records, but it disregards the substantive differences between the hearsay trustworthiness analysis under Rule 803(8)(C) and the expert reliability analysis under Rule 702 and *Daubert*. It presumes the reliability as well as the trustworthiness of expert opinions in public records, thereby

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67. For example, London, *supra* note 31, at 41, notes that public records are presumptively admissible until proven untrustworthy, while expert opinion testimony is presumptively inadmissible until proven reliable. Hence, London observes, "[T]he admission of opinion testimony under Chapter VII of the Federal Rules of Evidence is dealt with in a manner exactly the opposite of admission of written evidence which may contain the same opinions and offered for admission under Rule 803(8)." *Id.* As London notes, however, the resulting "conflict" between Rule 803(8)(C) and *Daubert* "is yet to be resolved." *Id.*

68. No. 2:03-CV-379-PRC, 2006 WL 2054377 (N.D. Ind. July 21, 2006).

69. *Id.* at \*7 n.2.

70. *Id.* See also Christopher Phelps & Assoc., LLC v. Galloway, 492 F.3d 532, 542 (4th Cir. 2007) (noting but not considering plaintiff's Rule 702 *Daubert* challenge to county tax assessment record because document was admissible under Rule 803(8), "which holds such documents sufficiently reliable because they represent the outcome of a governmental process and were relied upon for non-judicial purposes.").

placing the entire burden of demonstrating otherwise on the opponent,<sup>71</sup> the party that in most cases tends to be the least able to obtain full discovery in order to challenge the opinions stated in the public record. Under this approach, the proponent of a public record can avoid the burden *Daubert* assigned to the party seeking to introduce the expert opinion into evidence. This result is inherently inconsistent with *Daubert* and awards a presumption of reliability to public records that is neither earned nor justified from experience.

A second approach to the issue recognizes that, while Rule 702 involves consideration of a number of reliability factors that are distinct from those trustworthiness factors typically associated with Rule 803(8)(C), the two inquires are similar in nature and should be melded into a single trustworthiness inquiry.<sup>72</sup> This omnibus approach finds a source in the pre-*Daubert* sentiment expressed by the district court in *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*<sup>73</sup> In assessing the admissibility of various

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71. *Mayer*, 2006 WL 2054377, at \*7. “The Court finds that the [police] report appears trustworthy on its face. The burden thus shifts to Defendants to demonstrate that the report lacks trustworthiness such that it should be inadmissible.” *Id.*

72. See *Zenith Radio Corp. v. Matsushita Elec. Ind. Co.*, 505 F. Supp. 1125, 1149 (E.D. Pa. 1980), *aff’d in part, rev’d in part sub nom.* (noting that implicit in the trustworthiness determination is the right to attack its helpfulness to the trier of fact in order to understand the evidence presented under Federal Rule 702). A variant of this approach is to deny the direct applicability of Rules 702-705 but to allow the court to implicitly consider the factors relevant to the expert rules in determining whether the evidence is unduly prejudicial under Rule 403. Erik C. Olson, Note, *Issues Concerning the Admissibility in Federal Courts of Business Records Containing Opinions or Diagnoses Under Federal Rule of Evidence 803(6)*, 4 HASTINGS BUS. L.J. 153, 171-72 (2008). Taken from the business records exception to the hearsay rule, this approach is based in part on the notion that the rules of expert evidence do not apply directly because “Congress did not make Rule 803(6) explicitly subject to Rules 702-705.” *Id.* at 166. Unfortunately, this commentary does not explain why admissibility of an expert opinion under Rule 803(6) should be subject to Rule 403 if it is not also subject to Rules 702-705, or even why a Rule 403 safety net is preferable to applying Rule 702-705 directly. Nor does it explain why the burden of demonstrating that expert evidence is reliable under *Daubert* should be shifted to the party opposing the record to show that it is prejudicial.

73. 505 F. Supp. at 1149. *In re Japanese Elec. Prod. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983), *rev’d sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The district court’s lengthy opinion in *Zenith Radio* addressed a significant number of substantive antitrust and summary judgment issues as well as evidentiary issues, including Rule 803(8)(C)’s “trustworthy” requirement. *Id.* at 1125. On appeal, the Third Circuit reviewed these various rulings, including the district court’s Rule 803(8)(C) determinations. *In re Japanese Elec.*, 723 F.2d at 267-73. While the Third Circuit disagreed with some of the conclusions the district court reached on the admissibility of particular documents under Rule 803(8)(C), it did not reject the basic framework or new factors suggested by the district court for evaluating “trustworthiness.” *Id.* at 264-66. In the Supreme Court, Justice

public records relating to plaintiffs' antitrust claims, the district court in *Zenith Radio* folded the then-controlling *Frye* "general acceptance" standard for scientific expert evidence<sup>74</sup> into its expanded list of trustworthiness criteria under Rule 803(8)(C).<sup>75</sup> The court's willingness to expand the trustworthiness analysis in this way reflected its view that "most 803(8)(C) reports are in the nature of expert reports"<sup>76</sup> and that there is a "close relationship between 803(8)(C) and F.R.E. Article VII (the opinion evidence rules)."<sup>77</sup>

Since *Zenith Radio*, the trustworthiness factors under Rule 803(8)(C) and the reliability factors under Rule 702 have diverged as a result of *Daubert* and its progeny.<sup>78</sup> But efforts to merge the analysis persist. One commentator argues that "when testing the trustworthiness of opinion testimony under Rule 803(8)(C), it is appropriate for one to utilize the framework provided by the Federal Rules of Evidence for challenging the admission of expert opinion testimony generally set forth in Rules 702 through 705."<sup>79</sup> Similarly, in his *Federal Rules of Evidence Manual*, Professor Saltzburg writes approvingly that limitations on the admissibility of opinions in public records "are imposed by the Courts pursuant to the trustworthiness clause of Rule 803(8)" in part because "the standard of trustworthiness in Rule 803(8) is parallel to those contained in Federal Rules 702-704."<sup>80</sup>

This willingness to include consideration of *Daubert*-like reliability factors, albeit under the rubric of the Rule 803(8)(C) trustworthiness inquiry, reflects the general sentiment that "[t]he proponent [of a public record containing an expert opinion] should not be better off by introducing the report instead of live testimony from an expert."<sup>81</sup> This sentiment is laudable, but merging the reliability analysis into the trustworthiness analysis under Rule

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Powell's majority opinion focused on the standard of review used by the Third Circuit in evaluating the district court's summary judgment determination and on issues related to substantive antitrust law. *Matsushita*, 475 U.S. at 574. The Supreme Court did not address the district court's Rule 803(8)(C) rulings. *Id.*

74. *Frye*, 54 App. D.C. at 47.

75. See *Zenith*, 505 F. Supp. at 1147 (listing as the seventh factor "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.").

76. *Id.* at 1148.

77. *Id.* at 1149.

78. Robinson, *supra* note 23, at 894.

79. *Id.* at 894-95.

80. STEPHEN A. SALTZBURG ET AL., 4 FEDERAL RULES OF EVIDENCE MANUAL § 803.02[9][f] (9th ed., Matthew Bender & Co., Inc. 2006) (1975). Professor Saltzburg also cites his discussion of *Daubert* to support the proposition that "untrustworthy opinions will be excluded" from business records under Rule 803(6). *Id.* § 803.02[7][h].

81. *Id.* § 803.02[9][f].

803(8)(C) defeats the purpose. Rather, merging the analysis relieves the proponent of the public record expert opinion from the burden of producing evidence to support the reliability of that opinion. The burden shifts instead to the party who is seeking to exclude the record to produce evidence that the methodology employed by the government agency is not reliable. This result not only places the proponent in a considerably better position than if the opinion was delivered by a live witness, but it also places the burden on the party least likely to be in a position to know about the methodology behind an expert opinion in the public record or to discover the facts necessary to make a specific showing of unreliability.<sup>82</sup> Placing this burden on the party least likely to meet it opens the door to the introduction of expert opinions in public records that could never have passed the gatekeeping scrutiny of *Daubert*.

One commentator has argued explicitly that, while the policy considerations on each side of the issue make it a close question, the “burden of proof” on the issue of reliability as well as trustworthiness should be placed entirely on the party opposing admission of a public record expert opinion.<sup>83</sup> This position accepts the rationale underlying the presumption of trustworthiness and extends it to support the reliability of expert opinions in public records as well. This view is also predicated on the notion that considerations of cost and judicial efficiency merit the reversal of the normal allocation of the burden under *Daubert* in this context.<sup>84</sup> As already discussed, however, the rationale for the presumption of trustworthiness—even assuming it is valid in its own right—does not logically apply to many of the reliability factors underlying a *Daubert* inquiry.<sup>85</sup> Moreover, any efficiencies resulting from the reallocation of the reliability burden to the opponent would come at the expense of full and fair discovery, as well as the development of evidence and demonstration of the reliability concerns that motivated the Supreme Court’s ruling in

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82. See, e.g., *Zenith*, 505 F. Supp. at 1188 (holding that the defendants’ objection that a report prepared by the Statistical Office of the United Nations did not indicate a confirmed source was “insufficient to impugn the sources of the information and thus the presumed trustworthiness of the document.”).

83. Harvey Brown, *Daubert Objections to Public Records: Who Bears the Burden of Proof?* 39 HOUS. L. REV. 413, 433-35 (2002). This commentator’s reference to “burden of proof” is something of a misnomer. The burden *Daubert* assigned to the proponent of expert testimony is the burden of producing sufficient evidence to permit the trial court to make a preliminary determination that the expert opinion is reliable, not to prove the validity of the expert opinion. *Maryland Cas. Co. v. Therm-O-Disc, Inc.*, 137 F.3d 780, 783 (4th Cir. 1998) (per curiam).

84. Brown, *supra* note 83, at 432-36.

85. *Supra* Tbl.1 at pp. 936-37.

*Daubert*.<sup>86</sup>

A third approach to reconciling Rule 803(8)(C) and Rule 702 acknowledges the legal basis for a separate hearsay and expert inquiry but, nonetheless, requires the opponent of the public record evidence to show some indicia of untrustworthiness before entertaining any Rule 702 challenge. The leading early case embracing this approach was decided by the Third Circuit in 1978 in *Melville v. American Home Assurance Co.*<sup>87</sup> In the course of discussing the admissibility of Airworthiness Directives issued by the Federal Aviation Administration, the *Melville* court found that the inherent tension between Rule 803(8)(C) and Rules 702 and 705 could be “reconcile[d]” as follows:

Official reports are admitted as an exception to the hearsay rule because they are presumed to be generally reliable. The objections permitted by Rules 702 and 705 provide a means of testing their reliability. Before these objections may be recognized, however, the party challenging the validity of an official report under 803(8)(C) must come forward with some evidence which would impugn its trustworthiness.<sup>88</sup>

The *Melville* court justified this two-step process on the theory that allowing an objection to expert evidence in official reports under Rules 702 and 705 without a prior threshold

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86. In particular, the advocate of this burden-shifting approach argues that requiring the opponent to demonstrate the unreliability of an expert opinion in this context will change the result in only a few cases because (1) the opponent already is obligated to identify “in a meaningful fashion” the reliability defect in its *Daubert* objection before most courts will put the proponent to its proof to demonstrate reliability; and (2) once the reliability issue is raised, the court will hear the dispute anyway and the result is likely to change only where “the judge is in equipoise or the parties elect not to conduct discovery.” *Id.* at 433-35. These arguments, however, overlook the practical realities typically facing the parties in this context. In current practice, the opponent can raise a *Daubert* challenge and put the proponent to its proof without having to come forward with evidence of unreliability if it can identify a facial deficiency in the expert’s report or a substantive reason to doubt the expert’s methodology. *Id.* at 433. Requiring the opponent to affirmatively make an evidentiary showing of unreliability—particularly in a setting where the government report itself may not contain enough information or explanation to make a facial attack, and discovery from government officials is severely circumscribed—would, in many cases, effectively predetermine the result in favor of admissibility. Requiring the proponent to justify the methodology of the expert opinion it seeks to offer into evidence effectively levels the playing field and removes the inherent bias resulting from expanding the presumption of admissibility of public record expert opinions. *See id.* at 435 (disagreeing with the notion but noting that “[t]his is not to say there are not good policy arguments for imposing a *Daubert* obligation that the proponent of evidence must show its reliability as part of the foundation for admissibility of opinions in public records.”).

87. 584 F.2d 1306 (3d Cir. 1978).

88. *Id.* at 1316.

showing of untrustworthiness “would have the practical effect of nullifying the exception to the hearsay rule provided by Rule 803(8)(C).”<sup>89</sup> This reasoning is dubious, even in the pre-*Daubert* world. If a Rule 702 challenge truly provides a distinctive means of testing the reliability of an expert opinion in an official report, there is no good reason to withhold such a reliability test simply because the report is otherwise presumed to be trustworthy under Rule 803(8)(C). Acceptance of *Melville’s* two-step approach could lead to the admission of a “trustworthy” public record expert opinion under Rule 803(8)(C) that nonetheless rests on a fundamentally invalid premise or methodology. Moreover, as a matter of logic, if the party opposing admission could make a threshold showing that the public record lacks the necessary indicia of trustworthiness, there would be no need to perform a Rule 702 analysis because the record would be excluded as inadmissible hearsay. Requiring the opponent of a public record expert opinion to show untrustworthiness as a prerequisite for making a Rule 702 objection would render Rule 702 meaningless in this context.

Notwithstanding the flaw in *Melville’s* logic, echoes of this two-step process have been heard in later cases. For example, citing *Melville*, the Eleventh Circuit’s 1987 *en banc* opinion in *Rainey v. Beech Aircraft Corp.* observed:

[A]lthough public records are excepted from the hearsay evidence rule because they are presumed generally to be reliable, the reliability of a particular evaluative report can be tested not only with the trustworthiness inquiry called for by Rule 803(8)(C), but also with the objections permitted by Rules 702 and 705.<sup>90</sup>

Despite this professed willingness to test the reliability of public records under the rules applicable to expert witnesses, the Court did not consider any such objections because the party opposing introduction of the report never challenged the trustworthiness of the record under Rule 803(8)(C).<sup>91</sup>

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89. *Id.*

90. *Rainey v. Beech Aircraft Corp.*, 827 F.2d 1498, 1514 (11th Cir. 1987)(*en banc*), *aff’d in part, rev’d in part*, 488 U.S. 153 (1988)[hereinafter *Beech II*].

91. *Id.* at 1508. “[Plaintiffs] attacked neither the qualifications of [the report’s author] nor the methodology he employed . . . For these reasons, this court cannot, and does not, set aside the district court’s finding that the report is trustworthy.” *Id.* At the trial court level, the admissibility of the opinions in the report in question was only decided the day before trial. *Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523, 1527 n.7 (11th Cir. 1986) (per curiam), *vacated, reh’g granted en banc*, 791 F.2d 833 (11th Cir. 1986), *and reinstated en banc*, 827 F.2d 1498 (11th Cir. 1987), *cert. granted*, 485 U.S. 903 (1988), *affirmed in part, rev’d in part*, 488 U.S. 153 (1988) [hereinafter *Beech I*]. “Surprised” that both opinions and facts would be admitted, the party opposing the admission of the report was unprepared to challenge the trustworthiness of those opinions; and, without evidence to the contrary, the

The Supreme Court's subsequent opinion in *Beech* reflects the same mindset. The public record at issue was a Judge Advocate General report (the "JAG Report" or "Report") about an aircraft crash, including the author's opinion on the cause of the crash.<sup>92</sup> The JAG Report's stated opinion assigning pilot error as the cause of the crash indisputably involved scientific, technical, or specialized knowledge that should have triggered at least some analysis under Rule 702.<sup>93</sup> But apart from mentioning Rule 702 as an example of the Federal Rules' openness to opinion testimony,<sup>94</sup> the Supreme Court's opinion in *Beech* makes no attempt to apply the then-existing standards of Rule 702 to the JAG Report. To the contrary, *some* of the Court's language suggests that admissibility of the JAG opinion depended solely on satisfying the requirements of Rule 803(8)(C):

As long as the conclusion [in the JAG Report] is based on a factual investigation and satisfies the Rule's trustworthiness requirement, it should be admissible along with other portions of the report. As the trial judge in this action determined that certain of the JAG Report's conclusions were trustworthy, he rightly allowed them to be admitted into evidence.<sup>95</sup>

This broad language in *Beech* is not entirely consistent with other portions of the same opinion. Indeed, Justice Brennan's majority opinion also explains that Rule 803(8)(C) is not the exclusive test of admissibility for a public record opinion. According to Justice Brennan, "*other* portions of the Federal Rules, *such as* those dealing with relevance and prejudice," provide additional "safeguards" against unreliable opinions contained in public records.<sup>96</sup> The other rules, Justice Brennan explained, "provide the court with *additional* means of scrutinizing and,

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court found that the report was trustworthy. *Id.* at 1527. As the case made its way through the appeals process the trustworthiness of the report was generally taken as a given, and the courts focused instead on the issue of whether 803(8)(C) permitted opinions to be admitted at all, rather than on how to test the trustworthiness of those opinions. *Beech III*, 488 U.S. at 154, 156.

92. *Beech III*, 488 U.S. at 157-59.

93. *See Id.* at 169 (conceding that the "factual finding" in the JAG Report "could also be characterized as an opinion, which the investigator presumably arrived at on the basis of clues contained in the airplane wreckage.").

94. *See Id.* (stating "[a] broad approach to admissibility under Rule 803(8)(C), as we have outlined it, is also consistent with the Federal Rules' general approach of relaxing the traditional barriers to 'opinion' testimony. Rules 702-705 permit experts to testify in the form of an opinion, and without any exclusion of opinions on 'ultimate issues.'"). The court further noted that "Rule 701 permits even a lay witness to testify in the form of opinions or inferences drawn from her observations when testimony in that form will be helpful to the trier of fact." *Id.*

95. *Id.* at 170.

96. *Id.* at 167-68 (emphasis added).

where appropriate, excluding evaluative reports or portions of them.”<sup>97</sup>

While the Court’s opinion in *Beech* expressly referenced relevance (Rule 402) and prejudice (Rule 403) and did not mention Rule 702 in this context, the open-ended language of Justice Brennan on this point makes clear that the admissibility of public records are subject to scrutiny under *all* relevant Federal Rules of Evidence, not simply Rule 803. This view is consistent with the somewhat tortured language of the introduction to the Advisory Committee Notes to Rule 803: “The [hearsay] exceptions [in Rule 803] are phrased in terms of nonapplication of the hearsay rule, rather than in positive terms of admissibility, in order to repel any implication that other possible grounds for exclusion are eliminated from consideration.”<sup>98</sup>

The Supreme Court’s failure to address Rule 702 despite its reference to other Federal Rules of Evidence in this context most likely reflects that, apart from challenging the author’s qualifications, the party opposing introduction of the JAG Report in *Beech* did not dispute its trustworthiness under the hearsay rules<sup>99</sup> and, thus, did not even put at issue its reliability under the then-existing expert opinion rules. By its silence, however, the Supreme Court’s opinion fails to establish a framework for holding the proponent of the JAG Report to its burden of demonstrating on a preliminary basis that the expert opinion was reliable under Rule 702.<sup>100</sup>

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97. *Id.* at 168 (emphasis added).

98. FED. R. EVID. 803 advisory committee’s note (1972 Proposed Rules).

99. *See Beech II*, 827 F.2d at 1508 (stating that the plaintiff offered no evidence contradicting the reliability of the report).

100. *See Beech III*, 488 U.S. at 169-70 (holding 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.”). The JAG Report was a written document and did not constitute live testimony from a “witness,” the form of evidence expressly referenced in Rule 702. *Id.* at 157; FED. R. EVID. 702. Some commentators have attempted to latch onto this distinction to suggest that Rule 702 may not be applicable to public records or business records even if they contain expert opinions. *See, e.g., Brown, supra* note 83, at 433 (stating “Rule 702 concerns ‘testimony by experts’ and does not purport on its face to reach expert opinions in documents.”); Olson, *supra* note 72, at 166 (stating “[a]s a business record cannot be testimonial, Rules 702 and 705 [do not apply]”). But this view ignores the substantive purpose of the rule. As the 1972 Advisory Committee Notes to Rule 803 acknowledge, a hearsay declarant is a witness, albeit an out-of-court witness. FED. R. EVID. 803 advisory committee’s note (1972 Proposed Rules). Conveying to the trier of fact the substance of that witness’ declaration for consideration on its merits is every bit as much testimony as if the witness was on the stand, except that such a witness is not under oath and is not subjected to direct examination and the crucible of cross-examination. If anything, the absence of such safeguards should counsel for heightened, not relaxed, standards of admissibility. It would elevate form over substance to



If the two-step approach described by *Melville* and embraced *sub silentio* by *Beech* ever could have been justified, it no longer can after *Daubert*. As already discussed, under *Daubert*, the factors central to the proponent's burden of demonstrating sufficient reliability under Rule 702 are distinctly different from the factors central to the opponent's burden of demonstrating lack of trustworthiness under Rule 803(8)(C)<sup>101</sup>; hence, there is no analytical basis for making a *Daubert* challenge dependent on a showing of lack of trustworthiness. Still, some courts continue to make Rule 803 the ticket for consideration of challenges grounded under Rule 702 and *Daubert*. For example, in a 2002 business record case, *Shelton v. Consumer Products Safety Commission*, the Eighth Circuit declared that, because the district court did not abuse its discretion in concluding that the lab report in dispute satisfied the trustworthiness requirement of Rule 803(6), the court need not reach consideration of the appellant's Rule 702 challenge to the report.<sup>102</sup>

A fourth category of court decisions that address the admissibility of expert opinions in public records acknowledge the need for the trial court to perform its normal gate-keeping role under *Daubert* when examining public records, but no such decision actually reflects a rigorous examination of the methodology underlying the expert opinion at issue. In *Desrosiers v. Flight International Inc.*,<sup>103</sup> for example, the Ninth Circuit affirmed the district court's exclusion of certain portions of a Judge Advocate General's Report on the cause of an aircraft crash because the opponent of the Report presented sufficient evidence that the investigator was not qualified to render an opinion on the cause of the crash.<sup>104</sup> The Court found that the district court acted in a manner "consistent with its role under *Daubert* and Rule 702 as a 'gatekeeper' for relevant and reliable evidence" when it excluded the report from evidence.<sup>105</sup> Citing the trustworthiness requirement of Rule 803(8)(C), the Ninth Circuit concluded that "the district court's 'gatekeeper' role is not abrogated simply

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allow for a witness to convey the substance of an expert opinion in a public record without satisfying the reliability requirements of Rule 702 simply because the opinion is communicated in written form rather than oral form.

101. *Supra* Tbl.1 at pp. 936-37.

102. *Shelton v. Consumer Prod. Safety Comm'n*, 277 F.3d 998, 1009 n.8 (8th Cir. 2002). The business records hearsay exception of Rule 803(6), similar to the public record of Rule 803(8)(C), provides that documents that otherwise qualify as business records will not be excluded as hearsay "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." FED. R. EVID. 803(6).

103. 156 F.3d 952 (9th Cir. 1998).

104. *Id.* at 962-63.

105. *Id.* at 962.

because the evidence falls under Rule 803(8)(C)."<sup>106</sup>

While the result in *Desrosiers* was right, the Ninth Circuit's gloss over the basis for the district court's ruling was not. The district court barred the disputed causation analysis in the JAG Report from evidence because the opponent showed it lacked the trustworthiness required by Rule 803(8)(C), not because the proponent had failed to meet its burden under *Daubert* and Rule 702.<sup>107</sup> The qualifications of an expert are obviously relevant to any Rule 702 analysis, but the district court in *Desrosiers* never reached the Rule 702 issue because the proponent of the report never even attempted to qualify the author and investigator of the JAG Report as an expert and the court never put the proponent of the JAG Report to the burden of satisfying the requirements of *Daubert*.<sup>108</sup> Notwithstanding the Ninth Circuit's gloss to the contrary, the district court never performed its "gatekeeper" role" under *Daubert*.

The district court in *Heary Bros. Lightning Protection Co. v. Lightning Protection Institute*<sup>109</sup> followed an approach similar to *Desrosiers* in refusing to admit into evidence portions of a Technical Manual issued by the United States Army relating to electrical power supply systems.<sup>110</sup> Citing *Desrosiers* and referencing *Daubert*'s gate-keeping requirement, the district court rejected the Technical Manual under Rule 803(8)(C), noting that

there are no affirmative guarantees with the Technical Manual that the author has the expertise to evaluate the lightning tests, nor that the author undertook a comprehensive or reliable investigation of the scientific validity of lightning protection systems . . . . There is no evidence that the author had the scientific or technical expertise

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106. *Id.*

107. *See id.* (concluding that the district court could have reasonably inferred that the proffered opinion evidence lacked the required trustworthiness for admission under Rule 803(8)(C)). Without going further, the court noted that "the district court's actions were consistent with its role under *Daubert* and Rule 702 as a 'gatekeeper' for relevant and reliable evidence." *Id.*

108. *Id.* The district court stopped short of a full *Daubert* analysis and did not even examine the scientific methodology of the report in question, hanging its hat instead on the lack of qualifications of the report's author. *Id.* Indeed, this issue does not appear to have been fully briefed before the Ninth Circuit as the appellants simply argued the report was trustworthy under 803(8)(C). Reply Brief of Appellants at \*21, *Desrosiers v. Flight Int'l of Fla. Inc.*, 156 F.3d 952 (9th Cir. 1988) (No. 97-16062). The appellee essentially argued the report was cumulative and a waste of time, although it did also contend that the author was not sufficiently qualified to be an expert. Answering Brief of Appellees at \*45-49, *Desrosiers v. Flight Int'l of Fla. Inc.*, 156 F.3d 952 (No. 97-16062).

109. *Heary Bros. Lightning Prot. Co. v. Lightning Protection Inst.*, 287 F. Supp. 2d 1038 (D. Ariz. 2003), *aff'd in part, rev'd in part on other grounds*, 262 Fed. Appx. 815 (9th Cir. 2008).

110. *Id.* at 1075-77.

to support his or her conclusions, and the Plaintiffs may not circumvent that requirement of offering scientific or technical evidence merely because the Technical Manual is issued by the government.<sup>111</sup>

While *Desrosiers* and *Heary Bros.* clearly acknowledge the need to conduct a separate Rule 803(8)(C) and Rule 702 analysis of expert opinions in public records, neither case actually performs a systematic *Daubert* analysis of the reliability of the methodology underlying the public record opinion. In each case, it was not necessary for the court to reach such an analysis because the public record opinion was deemed to be untrustworthy under Rule 803(8)(C) and therefore inadmissible as hearsay.<sup>112</sup> The courts' attempt to characterize these rulings as the product of a genuine *Daubert* analysis tends to confuse rather than illuminate the underlying basis for their decisions.

The disarray among the various court decisions in this area exposes the current lack of any doctrinal or procedural framework for testing the reliability of expert opinions in public records. Standing alone, however, the establishment of a consistent framework to apply *Daubert* in such cases will not assure the regular application of its principles to expert opinions in public records. Research on post-*Daubert* court decisions generally reveals that, while courts are more likely to exclude expert evidence after *Daubert* than before, the courts' stated reasons for excluding such evidence typically revolve around conventional considerations, such as relevance and expert qualifications, and do not involve consideration of the particular reliability factors cited in *Daubert*.<sup>113</sup>

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111. *Id.* at 1076.

112. *Desrosiers*, 156 F.3d at 961-62; *Heary Bros.*, 287 F. Supp. 2d at 1075.

113. See A. Leah Vickers, *Daubert, Critique and Interpretation: What Empirical Studies Tell Us About the Application of Daubert*, 40 U.S.F. L. REV. 109, 126-37 (2005) (containing a provocative summary of the empirical research in this area). Vickers summarized results of a 2001 RAND Institute for Civil Justice study of 399 federal court cases from 1980 to 1999, two Federal Judicial Center surveys of judges in 1991 and 1998 along with one survey of lawyers in 1999, a study in 2002 by Jennifer Groscup of appellate decisions in federal and state criminal cases, and a study by Edward Cheng and Albert Yoon of differences between states that have adopted *Daubert* and states that adhere to the *Frye* standard. *Id.* at 126-36. Although these studies produced somewhat variable results, at least two patterns emerged. *Id.* at 137.

As described by Vickers:

Taken together, these studies support two significant and somewhat paradoxical conclusions: *Daubert* has indeed raised the bar to admissibility, but judges are not frequently utilizing the reliability factors suggested in the decision. In other words, while judges are scrutinizing evidence more carefully, as required by *Daubert*, they appear to be developing their own criteria for determining admissibility.

This observed pattern in the cases likely reflects many different influences. There is no doubt that *Daubert* has caused experts and litigants alike to apply more rigorous scrutiny to their methodology before the expert opinion ever reaches the courts.<sup>114</sup> Moreover, judges may be analyzing the issues of reliability with the kind of flexibility encouraged by *Daubert* and without limiting themselves to the specific reliability factors listed in the Court's opinion.<sup>115</sup> But another contributing factor appears to be a certain judicial ambivalence to the systematic examination of expert methodology required by *Daubert*.<sup>116</sup>

If judges are not presently scrutinizing with any rigor the methodology underlying expert opinions in other contexts, it is fair to question whether they will assume such an obligation when asked to rule on the admissibility of expert opinions in public records. The only answer lies in the faithfulness of judges to the policies underlying *Daubert* and the persistence of litigants insisting on its application. A genuine examination of the methodological basis for an expert opinion in a public record is even more important than in cases involving privately retained experts because the conclusions of government agencies often carry even greater weight with juries than the conclusions of private experts.<sup>117</sup> Moreover, third-party discovery from public agencies is so circumscribed that often there is no other effective way to gather the kind of information necessary to test the reliability of those opinions. However lax some courts may be in analyzing the reliability of private expert opinions, judges need to be alerted to the heightened need for meaningful scrutiny of expert opinions in public records.

### III. PROPOSED SOLUTION

This Article argues that proffered expert opinions in public records should be subject to the same level of scrutiny for reliability that Rule 702 and *Daubert* demand in other contexts. The particular method by which that scrutiny should be applied is complicated, however, by the basic difference between a live expert witness able to respond to specific inquiries on the one hand and a

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*Id.*

114. Christina L. Studebaker & Jane Goodman-Delahunty, *Judge and Attorney Experiences, Practices, and Concerns Regarding Expert Testimony in Federal Civil Trials*, 8 PSYCHOL. PUB. POL'Y & L. 309, 328-29 (2002).

115. Victor E. Schwartz & Cary Silverman, *The Draining of Daubert and the Recidivism of Junk Science in Federal and State Courts*, 35 HOFSTRA L. REV. 233, 241-42 (2006).

116. See Vickers, *supra* note 113, at 142-43 (noting two possible explanations for the ambivalence: either the *Daubert* factors are inapplicable to the evidence before the judge or the judge may not have a proper understanding of how to apply the factors).

117. Robinson, *supra* note 23, at 901.

static public record in written form on the other hand. Moreover, there are practical differences between a traditional expert hired by a party to give opinion testimony on a disputed issue and a public official writing an official report based upon a factual investigation previously conducted in the course of his or her official duties. Public officials have numerous governmental duties that might suffer considerably if they are required to respond to, prepare for, and participate in the kind of private discovery and trial procedures to which we subject traditional experts.<sup>118</sup> In many cases, public officials will not have the opportunity or inclination to prepare adequately, if at all, for discovery or trial, thereby undermining the value and usefulness of the official's ability to explain or defend the opinions expressed in the report. In addition, by the time discovery and trial take place in any given case, many months, if not years, are likely to have elapsed since the investigation was completed and the official report written. Even if the author or investigator is still in a position of authority, he or she may not be able to recall the details of the factual investigation or the specific rationale underlying the opinion expressed in the report.<sup>119</sup>

These considerations are often identified as among the actual "justifications" for the public record hearsay exception.<sup>120</sup> Indeed, the law of evidence is strewn with imperfect compromises to accommodate real world needs and limitations.<sup>121</sup> But making

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118. See *The Government Evaluative Reports*, *supra* note 23, at 496 (noting that part of the justification for Rule 803(8)(C) is that "in-court testimony would unduly burden government officials."). A similar concern was voiced recently by twenty-six states and the District of Columbia in an *amici* brief filed in the Supreme Court urging the Court to overturn or substantially modify its ruling last term in *Melendez-Diaz v. Mass.*, 129 S. Ct. 2527 (2009) that the Confrontation Clause required the prosecution to make available live testimony from lab technicians in support of lab reports used in criminal drug prosecutions. The *amici* argue that, in addition to necessitating the expenditure of substantial additional time, effort and money, requiring live testimony from analysts in support of forensic lab reports "diverts analysts from their primary responsibilities of conducting scientific testing on drug samples, increases the already substantial backlog of cases awaiting forensic testing, [and] delays the scheduling of drug cases for trial." Brief of Amici Curiae in Support of Respondent at 24, *Briscoe v. Virginia*, (S.Ct.) (No. 07-11191).

119. See FED. R. EVID. 803 advisory committee's note to Paragraph (8) (1972 Proposed Rules) (stating that part of the justification for the public records hearsay exception is "the unlikelihood that [the public official] will remember details independently of the record.").

120. *Id.*

121. Wigmore explains, for example, that the hearsay rule exceptions are grounded in two principles: (1) the principle of necessity and (2) the principle of circumstantial probability of trustworthiness. 5 WIGMORE, EVIDENCE §§ 1421-22 (Chadbourn rev. 1974). The necessity principle underlies the public records exception to the hearsay rule because, according to Wigmore, "[w]ere

such an accommodation and allowing such evidence to be admitted without meaningful scrutiny betrays the importance of the principles underlying *Daubert*. Expert opinions have the potential to be game-changers, and expert opinions with the government's imprimatur even more so than traditional expert testimony. If the Supreme Court's concerns about the reliability of expert opinions that motivated *Daubert* are genuine, courts should do more than essentially ignore *Daubert's* gate-keeping safeguards when ruling on the admissibility of expert opinions in public records.

How can *Daubert* be applied to an expert opinion contained in a public record? The written record of a government investigation is static. Standing alone, the document itself is unlikely to contain the kind of information needed to actively evaluate such issues as whether the methodology employed by the public agency has been or can be tested, whether it has been peer reviewed, whether it has an acceptable error rate, or whether it is generally accepted in the field. Without a live and qualified witness to advocate the position expressed in the public record, the document itself is not likely to be sufficient on its face to be admissible as an expert opinion.

While it is true that the reliability of the expert opinion itself should be tested according to *Daubert's* standards, the typical absence of a live expert witness from the relevant government agency makes application of *Daubert* difficult. The underlying problem is that, in many civil cases, expert public officials do not occupy the same relationship with the parties or the issues as privately retained experts, so implementation of a *Daubert*-style review will necessitate certain procedural accommodations. Even when there is no statute or regulation prohibiting expert testimony from public officials, few public agencies are likely to willingly make the arrangements necessary to make one of their own employees available to prepare and facilitate discovery and testimony of this type. In all likelihood, a requirement that parties seeking to introduce public record expert opinions into evidence produce a qualified witness from the authoring agency would result in few public record expert opinions being admitted.

This result is not as radical as it might seem. Before *Beech*, some federal courts barred the introduction of opinion evidence in public records altogether on the theory that Rule 803(8)(C) did not except opinions from the hearsay rule.<sup>122</sup> This position was openly

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there no exception for official statements, hosts of officials would be found devoting the greater part of their time to attending as witnesses in court or delivering their depositions before an officer." *Id.* §1631.

122. *See, e.g., Smith v. Ithaca Corp.*, 612 F.2d 215, 221-22 (5th Cir. 1980) (discussing Rule 803(8)(C) and the differences between "factual findings" and "opinions" and admitting "factual findings" while stating that "evaluative conclusions and opinions of the Coast Guard Marine Board of Investigation contained in the report should not have been admitted into evidence.").

advocated by the House Judiciary Committee during Congress' consideration of proposed Rule 803.<sup>123</sup> Even after *Beech*, a significant number of statutes and regulations still prohibit the introduction of certain public reports as well as testimony from agency personnel about the subject matter of their official investigations.<sup>124</sup>

Rigid compliance with conventional *Daubert* procedures in the context of public record expert opinions has the virtue of consistency and reliability. But at the same time, such an approach runs counter to *Beech's* stated goal of liberalizing the admissibility of public record opinions in appropriate cases.<sup>125</sup> While the tension between *Daubert* and *Beech* is unmistakable, the Supreme Court's guidance in these cases is not irreconcilable. It is possible to fashion a course that allows for the admission of public record expert opinions, subject to reliability scrutiny consistent with *Daubert*, without overburdening public agencies with litigation-oriented demands.

One plausible method to thread the needle would be to open up the range of acceptable testimonial options to provide the foundation for the opinion expressed in the public record. If the official who authored the public record (or another qualified representative of the public agency) is available, the proponent could choose to produce such a witness for discovery and trial

123. REPORT OF THE COMMITTEE ON THE JUDICIARY, H.R.REP. NO. 93-650, at 14 (1973), reprinted in 1974 U.S.C.C.A.N. 7075, 7088.

124. For example, "[n]o part of a report of the [National Transportation Safety] Board, related to an accident or an investigation of an accident, may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report." 49 U.S.C.A. § 1154(b) (West 2009). Some states also have similar provisions for reports issued by their own transportation agencies. See, e.g., 75 PA. CONS. STAT. ANN. § 3754(b) (West 2009) (requiring that certain reports and records shall not be discoverable or admissible and, furthermore, that officers or employees preparing such documents shall not give depositions or evidence pertaining to such documents). Along these lines, also excluded are:

reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings . . . or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds.

23 U.S.C.A. § 409 (West 2009). A similar rule bars the admission of U.S. Coast Guard marine casualty reports. 46 U.S.C. § 6308(a) (West 2006). Similarly, the rules governing the Nuclear Regulatory Commission state "[n]o report by any licensee of any incident arising out of or in connection with a licensed activity made pursuant to any requirement of the Commission shall be admitted as evidence in any suit or action for damages growing out of any matter mentioned in such report." 42 U.S.C. § 2240 (West 2006).

125. See *Beech III*, 488 U.S. at 169 (recalling the intended broad approach to admissibility under Rule 803 (8)(C)).

testimony if the proponent believes that the official is willing and able to devote the necessary resources to the project. Alternatively, the proponent could choose to produce for discovery and trial testimony a privately retained “supporting expert,” an expert-qualified witness knowledgeable about either the public agency’s actual methodology or the type of methodology employed by the public agency in arriving at its opinion. In the supporting expert’s trial testimony, the witness would be responsible for describing his or her own background and experience, outlining the methodology utilized by the agency to the extent necessary to understand the agency’s opinion, and disclosing the public agency’s opinion. The witness would be expected to provide foundational support for the methodology employed by the agency and the agency’s use of that methodology in the case at hand, but it would not be necessary for the supporting expert to have independently verified the agency’s opinion or personally adopted the opinion.<sup>126</sup>

Preferably, the supporting expert will be able to draw upon his or her familiarity with the agency’s particular methodology in the case at hand; but if not, it may be sufficient in many cases that the supporting expert’s knowledge is based upon his or her familiarity with the methodology used in comparable circumstances or with the standard operating procedure at the agency. A typical example of such a supporting expert would be a former agency investigator or analyst who is closely familiar with the standards and methods of their former employer and has the time or resources to fill in whatever gaps exist in the underlying record.

The public record itself would function as the Rule 26(a) expert report. The testifying expert (whether a public official or a supporting expert) would be required to submit a supplement to the original public record to explain and support the methodology employed by the public agency and the use of that methodology in the context of the facts and circumstances of the case at hand. Although no doubt preferable from the proponent’s point of view, the supplemental report need not adopt the agency’s opinion itself

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126. At a minimum, therefore, the supporting expert would serve the conventional role of an expert who expresses an opinion that the agency’s methodology itself, and the use of the methodology under the circumstances presented by the case, was valid. Since the supporting expert will not have conducted or overseen the methodology being applied to the facts of the case at hand, he or she will not normally be in a position to adopt or endorse the agency’s ultimate opinion itself. Of course, if the supporting expert independently applies that methodology (or an alternative methodology) to the facts of the case and achieves results that are identical or similar to the results found by the public agency, the supporting expert may also adopt or endorse the agency’s opinion if the expert’s independent procedure otherwise satisfies Rule 702 and *Daubert*.



or show the results of an independent test of the agency's opinion. It would suffice that the supplement contains sufficient information (coupled with the supporting expert's deposition or *Daubert* hearing testimony) to demonstrate that the agency's methodology satisfies the kind of reliability factors cited in *Daubert* and that the agency's use of such a methodology in the case was a reliable means of arriving at the opinion expressed in the public record. If the testifying expert cannot obtain the information necessary to satisfy these elements and the court concludes that it cannot sufficiently assess the reliability of the agency's opinion without it, the public record opinion should not be admitted under Rule 702.

In addition to a defense of the public agency's methodology and its application to the case, the supplement should also provide as much of the other information required by Rule 26(a) as is readily available that is not already included in the public record. The supporting expert can draw upon the government agency or his or her own background and separate sources to supply the missing information so long as the information satisfies Rule 26(a) as well as Rule 702 and is otherwise logically supportive of the conclusions stated in the public record. If either the public agency witness or the supporting expert is able to provide sufficient information to satisfy the court in the exercise of its gate-keeping role under *Daubert*, the witness can testify at trial as any other expert. And if the written public record itself has independent significance, the proponent can introduce the expert portion of the report for the truth of the opinion asserted if it otherwise satisfies the requirements of the Federal Rules of Evidence.

Insisting on adherence to the basic principles underlying *Daubert* will add new procedural and substantive hurdles onto the party seeking to introduce a public record expert opinion into evidence. The extra burden will be relatively limited in cases where qualified government officials are available and willing to participate in the process. In other cases, the additional hurdle of locating and preparing a supporting expert may not seem worth the effort because a supporting expert may not appear to the jury as authoritative as a formal government report or qualified government witness. After all, as envisioned by this proposal, supporting experts will be privately retained (thereby losing the benefit of the presumed neutrality of government officials) and will not have been personally involved in the investigation or evaluation that culminated in the report. But this possible dilution of the effectiveness of public record expert opinion evidence will be counteracted, at least in part, by the supporting expert's ability to bring into evidence the otherwise inadmissible government's opinion and to explicate and justify the methodological basis for that opinion. When willing and able, the

supporting expert may also contribute his or her own endorsement to the government's conclusions. In some cases, a supporting expert's background and qualifications may even save the admissibility of a particular expert opinion in a public record by bolstering the court's otherwise shaky confidence in the reliability of the government agency's conclusions.

A rule that allows the proponent to opt for a substitute witness to serve as a supporting expert in order to meet *Daubert's* requirements should relieve a meaningful part of the time and expense the proponent and the government agency would otherwise need to invest. Depending on the nature of the public record and the original investigation, normally it should not be necessary for the supporting expert to reinvent the wheel and conduct an entirely new investigation, thereby saving the proponent the potentially considerable expense of starting from scratch. Meanwhile, the party against whom the public record expert opinion is offered has the added protection of a meaningful *Daubert* review before the opinion can be introduced into evidence.

Of course this approach will not always result in a perfect resolution of the tension between *Beech* and *Daubert*. For example, the supporting expert will not always be able to access or produce sufficient information to adequately defend the methodology underlying the public record expert opinion. If the lack of access is curable, the court should be able to facilitate access by court order. But if the needed information is not accessible or otherwise reproducible, any expert opinion based on a methodology that cannot be defended adequately should be excluded. Given the importance of providing the trier of fact with expert evidence that is reliable, excluding expert opinions in public records that cannot be defended with the same level of scrutiny as other expert opinions is preferable to admitting such evidence on the strength of an unproven and hyperextended legal presumption of trustworthiness.

Even if the supporting expert has access to sufficient backup information, disputes may arise over which particular portions of a public record that the proponent wishes to introduce into evidence actually implicates scientific, technical, or other specialized knowledge, thereby triggering Rule 702 and a *Daubert* inquiry. In order to minimize its *Daubert* burden, the proponent may attempt to selectively designate only limited portions of the public record as containing Rule 702 material while seeking to classify the balance of the document as nonexpert in nature. The opponent, hoping to maximize its adversary's burden, may contend that additional portions of the report constitute Rule 702 material for which the proponent is required to hire a testifying expert to

satisfy *Daubert*.<sup>127</sup> As a matter of good practice, the parties should be required to identify their positions on this issue and any disputes resolved in a front-loaded process that: (1) allows each side to receive adequate notice of precisely which public record opinions or other evaluative material its adversary seeks to introduce into evidence; and (2) provides adequate time before expert disclosures otherwise are due to resolve by stipulation or court order any dispute over which portions of a public record triggers Rule 702.

On balance, the extra burden associated with these procedural steps pales in comparison to the benefit of requiring that public record expert opinions meet the same standard of reliability as other expert testimony. *Daubert's* insistence that courts serve as gate-keepers for expert testimony at trial serves an important goal of excluding from evidence specialized opinions that have only the appearance of reliability. Expert opinions in public records are no different and should be analyzed with the same level of scrutiny.

As the Supreme Court has said, courts need to be vigilant in their role as evidentiary gatekeepers, excluding "junk science" while permitting opinions based on sound scientific principles. For too long, however, the public records hearsay exception has acted as a backdoor through the *Daubert* gate for faulty opinions found in public records. Opinions in government reports should be subject to a meaningful review of the methodology behind them, just like every expert opinion since *Daubert*. Theoretical and real world problems, however, have hindered the development of a straightforward way of testing these opinions. The proposed solution in this Article, however, offers a remedy mindful of both these theoretical and practical problems, while seeking to balance the interests of proponents and opponents in assuring that cases are decided based on sound evidence.

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127. It may not always be obvious on its face specifically what information in a public record qualifies as Rule 702 material and what information does not. For convenience, this article has typically referred to Rule 702 material as an expert opinion; but in fact, the rule is written broadly to encompass any testimony of a scientific, technical, or specialized nature that will assist the trier of fact. FED. R. EVID. 702 advisory committee's note (1972 Proposed Rules). In order to determine which information in the public record requires the court to exercise its *Daubert* gate-keeping function, it will be necessary in disputed cases for the parties and, if necessary, the court to delineate specifically which information in the record qualifies as expert in nature and which information does not.