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Vii. Evidence

furthers the principle purpose of the Civil Rights Act of 1964: the provision of a federal forum to address the problems of discrimination that the particular states are unable to resolve.[129]

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VII. EVIDENCE

A. *Rejecting* Frye v. United States: *The Fourth Circuit Takes a Liberal Approach to the Admission of Government Reports Under Federal Rule of Evidence 803(8)(C)*

Federal Rule of Evidence 801(c) defines hearsay as an out of court statement offered into evidence to prove the truth of the matter asserted.[1] Under rule 801(a) of the Federal Rules of Evidence, a statement may be oral, written, or nonverbal.[2] The Federal Rules of Evidence exclude hearsay from evidence unless the statement satisfies an exception to the rule against hearsay.[3] Two important theories justify excluding hearsay.[4] First, the factfinder in a judicial proceeding cannot observe the declarant's demeanor when the declarant makes a statement outside the courtroom.[5] Second, if the declarant

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129. *See supra* note 1 (Congress designed Title VII and the EEOC to supplement but not supplant state authorities in resolution of problems of discrimination).

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1. FED. R. EVID. 801(c).

2. FED. R. EVID. 801(a). Under the Federal Rules of Evidence, oral or written statements and nonverbal conduct are statements if the declarant intended the statement or conduct to be an assertion. *Id.*

3. FED. R. EVID. 802. Rule 803 of the Federal Rules of Evidence lists a number of exceptions to the rule against hearsay which do not require consideration of whether the declarant is available as a witness. *See* FED. R. EVID. 803. Rule 804 of the Federal Rules of Evidence contains exceptions to the hearsay rule that are applicable only when the declarant is unavailable to testify. *See* FED. R. EVID. 804. Out-of-court statements that the offering party does not offer to prove the truth of the matter asserted do not meet the definition of hearsay and are admissible. 4 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 410 (1980) [hereinafter cited as LOUISELL & MUELLER].

4. *See infra* notes 5 and 6 and accompanying text (discussing value of live testimony and cross-examination).

5. FED. R. EVID. 801 advisory committee note; LOUISELL & MUELLER, *supra* note 3, at § 413. Four risks accompany the admission of hearsay. LOUISELL & MUELLER, *supra* note 3, at § 413. First, admitting hearsay risks ambiguity. *Id.* Ambiguity may occur when the declarant's intended meaning and the meaning understood by the factfinder do not coincide. *Id.* Second, the admission of hearsay risks insincerity. *Id.* Declarants may intentionally lie or distort the

does not testify at trial, cross-examination of the declarant cannot occur to uncover the whole truth behind the statement.[6] Certain types of hearsay, however, carry circumstantial guarantees of trustworthiness and, therefore, are admissible under exceptions to the hearsay rule.[7]

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truth. *Id.* Third, admitting hearsay risks inaccuracy. *Id.* A declarant's memory may be faulty, and the declarant consequently may not remember accurately events, people, places, or things. *Id.* Finally, misperception may flaw a hearsay statement's value as evidence. *Id.* Declarants may misperceive the events, people, or situations that their statements describe. *Id.*

In-court testimony reduces the risks associated with hearsay in three ways. *Id.* First, all courts require witnesses to swear to tell the truth before allowing the witnesses to testify. FED. R. EVID. 801 advisory committee note; LOUISELL & MUELLER, *supra* note 3, at § 413. The oath requirement grew out of a belief that the oath would impress upon witnesses the seriousness of the occasion and the legal obligation to testify truthfully. LOUISELL & MUELLER, *supra* note 3, at § 413. The oath may diminish the risk of insincerity by forcing the witness to speak truthfully. *Id.* Although the effectiveness of the oath is now in question, legislators have not attempted to relax the requirement that courts swear witnesses prior to giving testimony. FED. R. EVID. 801 advisory committee note. Second, a witness' presence at trial reduces two of the risks associated with hearsay. *Id.;* LOUISELL & MUELLER, *supra* note 3, at § 413. Requiring a witness to be present at trial presumes that the possibility of public disgrace will diminish a witness' impulse to deceive. FED. R. EVID. 801 advisory committee note; LOUISELL & MUELLER, *supra* note 3, at § 413. When listening to a witness testify, the trier of fact can observe the witness'nonverbal communications. LOUISELL & MUELLER, *supra* note 3, at § 413; Sahm, *Demeanor Evidence: Elusive and Intangible Imponderables,* 47 A.B.A.J. 580 (1961). The factfinder's ability to observe a witness' demeanor is especially important when a witness' testimony contradicts that of another witness. Sahm, *supra,* at 581. Factfinders also may find a witness' intelligence and the emotion evidenced in a witness' responses important in assigning weight to a witness' testimony. *Id.* at 580. Third, a witness' presence in court provides the opportunity to cross-examine the witness. FED. R. EVID. 801 advisory committee note; LOUISELL & MUELLER, *supra* note 3, at § 413; *see infra* note 6 (discussing cross-examination).

6. FED. R. EVID. 801 advisory committee note; LOUISELL & MUELLER, *supra* note 3, at § 413. Cross-examination is an opportunity for opposing counsel to dissect a witness' testimony and probe for the truth. State v. Saporen, 205 Minn. 358,____, 285 N.W. 898, 901 (Minn. 1939). On direct examination, counsel for the party who produced a witness usually will ask the witness only questions that will reveal facts favorable to the party offering the witness. 5 WIGMORE, EVIDENCE § 1368 (Chadbourn rev. 1974). Relying solely on facts favoring one party might produce a body of evidence consisting of half truths. *Id.* Cross-examination conducted by the opposing party, provides an opportunity to uncover any facts omitted from a witness' testimony on direct examination. *Id.* Cross-examination also provides an opportunity for opposing counsel to expose a witness' lie or distortion of the truth. *Id.* Cross-examination can reveal gaps in a witness' memory or problems in a witness' perception. LOUISELL & MUELLER, *supra* note 3, at § 413. Cross-examination is the most effective legal device for combatting the four risks associated with hearsay. *Id.*

7. *See* FED. R. EVID. 803 (listing exceptions to hearsay rule); FED. R. EVID. 804 (same); *supra* note 3 (describing nature of exceptions to hearsay rule). The exclusion of all hearsay would result in the loss of a great deal of relevant evidence. 4 WEINSTEIN, EVIDENCE § 800(01) (1985). Commentators unanimously agree that exclusion of all hearsay is undesirable. *Id.* The Federal Rules of Evidence, therefore, contain exceptions to the rule against hearsay which allow the admission of either trustworthy or necessary hearsay. LOUISELL & MUELLER, *supra* note 3, at § 413; WIGMORE, *supra* note 6, at §§ 1420-22. The principle of necessity makes admission of hearsay appropriate when the declarant is dead, insane, or otherwise unavailable to testify. WIGMORE, *supra* note 6, at § 1421; *see* FED. R. EVID. 804 (establishing exceptions to hearsay

Written scientific reports, if offered to prove the truth of the report's findings, satisfy the broad definition of hearsay and are inadmissible unless the reports fall within one of the exceptions to the hearsay rule.[8] To introduce into evidence a scientific report, the offeror must show that the report satisfies the criteria for admission under an exception to the rule against hearsay.[9] Federal Rule of Evidence 803(8)(C) is one possible exception under which a court may admit a scientific report into evidence.[10] Rule 803(8)(C) allow the admission into evidence of reports containing factual findings from an investigation conducted by a public office or agency.[11] When a party offers a governmental scientific report as evidence, the court must determine whether the scientific report contains factual findings and whether the report is trustworthy.[12] When deciding whether to admit scientific evidence, federal courts often apply the test for trustworthiness enunciated in *Frye v. United States*[13] in addition to, or as an alternative to, applying the criteria for admission expressly adopted in the Federal Rules of Evidence.[14] Under *Frye,* scientific evidence is admissible only when the results of the scientific procedure stem from a methodology generally accepted within the scientific

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rule based upon necessity). Certain circumstances usually produce truthful statements, and hearsay produced under those circumstances carries sufficient guarantees of trustworthiness to warrant admission of the hearsay into evidence. WIGMORE at § 1422; *see* FED. R. EVID. 803 (establishing exceptions to hearsay rule based upon indicia of trustworthiness).

8. *See* United States v. Oates, 560 F.2d 45, 65 (2d Cir. 1977) (chemist's report is hearsay); FED. R. EVID. 801(c), (a) (defining hearsay); FED. R. EVID. 802 (excluding hearsay unless exception applies).

9. *See Oates,* 560 F.2d at 65 (upholding admission of chemist's report after offeror showed that report satisfied terms of rule 803(8)(C)). As an alternative to offering a scientific report as an exhibit, parties may introduce scientific evidence through the testimony of an expert witness. *See* FED. R. EVID. 703 (expert testimony rule). Federal Rule of Evidence 702 permits expert witnesses to express their opinions when knowledge of scientific matters will aid the trier of fact. *Id.* Parties also may have an expert read from a learned scientific treatise and thus orally introduce into evidence a scientific report. *See* FED. R. EVID. 803(18) (learned treatise exception to hearsay rule).

10. Riley, *Toxic Shock Syndrome: Proving Causation Before Science Has,* 6 AMER. J. TRIAL ADVOC. 15, 19 (1982).

11. FED. R. EVID. 803(8)(C). Federal Rule of Evidence 803(8)(C) excepts the following from the rule against hearsay:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Id.

12. *See* Kehm v. Procter and Gamble Mfg. Co., 724 F.2d 613, 618-30 (8th Cir. 1983) (evaluating whether governmental scientific reports contained factual findings and were trustworthy under rule 803(8)(c)).

13. 293 F. 1013 (D.C. Cir. 1923).

14. Giannelli, *The Admissibility of Novel Scientific Evidence:* Frye v. United States, *a Half-Century Later,* 80 COLUM. L. REV. 1197, 1228-31 (1980); *see infra* note 73 (circuits which employ test developed in *Frye v. United States).*

community.[15] The continued viability of the *Frye* test, however, is the subject of considerable debate among commentators.[16] The United States Court of Appeals for the Fourth Circuit, in *Ellis v. International Playtex, Inc.*,[17] announced the standards that Fourth Circuit courts should apply to determine whether to admit scientific reports under Federal Rule of Evidence 803(8)(C).[18]

In *Ellis,* the plaintiff purchased tampons for his wife that the defendant had manufactured.[19] The plaintiff's wife used the tampons and, three days later, developed several symptoms associated with Toxic Shock Syndrome (TSS).[20] Two days after the symptoms appeared, the plaintiff's wife died in a hospital emergency room, and the attending physicians designated the cause of death to be heart failure attributable to TSS.[21] The plaintiff brought a wrongful death action against International Playtex, Inc. (Playtex), the manufacturer of the tampons.[22] The plaintiff claimed that Playtex's negligence in manufacturing and marketing a defective product caused his wife's death.[23] In addition to the negligence theory of liability, the plaintiff alleged

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15. 293 F. 1013, 1014 (D.C. Cir. 1923). Under the test developed in *Frye v. United States,* a scientific procedure must enjoy general acceptance in the field of science that uses the procedure. *Id.* The procedure need not enjoy general acceptance in the scientific community as a whole, but only general acceptance in the particular science, art, or trade that uses the procedure. *See id.*

16. *See* Note, *The Scope of Federal Rule of Evidence 803(8)(C),* 59 TEX. L. REV. 155, 156 (1980) (continued viability of *Frye* test is questionable); Strong, *Questions Affecting the Admissibility of Scientific Evidence,* 1970 U. ILL. L.F. 1, 9-14 (Frye test is no longer appropriate); MCCORMICK, EVIDENCE § 203 (Cleary ed. 1984) (same).

17. 745 F.2d 292 (4th Cir. 1984).

18. *Id.* at 299-305.

19. *Id.* at 296.

20. *Id.* In *Ellis v. International Playtex, Inc.,* the plaintiff's wife developed five symptoms associated with Toxic Shock Syndrome (TSS). *Id.* at 296-97. A victim of TSS commonly exhibits symptoms including sudden high fever, rash, desquamation (peeling of the skin from the palms of the hands and the soles of the feet), hypotension (low blood pressure), profuse diarrhea, and injury to three or more of the seven major organ systems. Brief for Appellee at 5-10, *Ellis v. International Playtex, Inc.,* 745 F.2d 292 (4th Cir. 1984). In addition, a sore throat, a headache and severe muscular pain sometimes accompany the onset of TSS. *Id.* A bacteria, staphylococcus aureus, produces virulent toxins in association with TSS. Riley, *supra* note 10, at 16. The exact cause of TSS and the conditions that cause the staphylococcus aureus to produce toxins are unknown. *Id.* at 15-17. Although TSS most frequently strikes menstruating women, authorities first observed TSS in seven boys and girls. *Id.* at 18. The exact role which menstruation plays in fostering TSS is also unknown. *Id.* at 17-18

21. 745 F.2d at 296-97.

22. *Id.* at 296.

23. *Id.* In order to prevail on a negligence theory under Virginia product liability law, a plaintiff must prove that injury occurred, that the product can cause the injury, that the product actually caused the injury, that the defendant knew of the dangers associated with the product, and that the defendant failed to warn his customers of the dangers associated with the product. *See id.* In *Ellis,* the plaintiff claimed that the defendant's tampons caused the plaintiff's wife to contract TSS. *Id.* The plaintiff also asserted that the defendant knew of the dangers of TSS associated with the defendant's product. *Id.* at 297. The plaintiff testified that the box of Playtex tampons which he had purchased for his wife carried no warning of the danger of TSS. *Id.*

that Playtex had breached an implied warranty of merchantability by producing and marketing a dangerous product.[24]

At trial in the United States District court for the Eastern District of Virginia, the plaintiff sought to introduce two epidemiological studies concerning TSS.[25] The Federal Center for Disease Control (CDC) had prepared one of the studies, and a tri-state commission from the Wisconsin, Minnesota, and Iowa state health departments had prepared the second study.[26] The CDC study contained raw data and an editorial note.[27] The tri-state commission's study was in the form of a letter summarizing the study's methodology, findings, and conclusions.[28] *The Morbidity and Mortality Weekly Report,* the official publication of the CDC, published the findings of both studies,[29] and the Federal Food and Drug Administration published a summary of the tri-state commission study.[30] Both studies showed that tampon use increases the risk of contracting toxic shock syndrome as compared to the risk of contracting TSS without tampon use.[31] The studies also identified

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24. *Id.* at 296. To prevail upon a breach of implied warranty of merchantability claim under Virginia law, a plaintiff must show that injury occurred, that the product can cause the injury, and that the product caused the injury. *Id.* at 296-97. Each of the elements of breach of an implied warranty of merchantability is also an element of negligence in Virginia products liability law. *Id.* at 296-97; *see supra* note 23 (discussing elements of negligence).

25. 745 F.2d at 297. Epidemiological studies are statistical studies showing the incidence of disease in human populations. Dore, *A Commentary on the Use of Epidemiological Evidence in Demonstrating Cause-in-Fact,* 7 HARV. ENVIRONMENTAL L. REV. 429, 431 (1983). Epidemiologists use statistical methods to identify agents within the environment that contribute to an increased risk of disease. *Id.* Epidemiologists gather data from surveys, death certificates, and clinical and medical observations. *Id.; see infra* notes 27 and 28 (discussing epidemiological studies used in *Ellis).*

26. 745 F.2d at 297.

27. *Id.* at 299. In 1980, the Federal Center for Disease Control (CDC) instituted an epidemiological study of toxic shock syndrome (TSS). *Id.* The CDC sent questionnaires to a number of TSS victims and a control group. *Id.* The CDC compiled data from the responses to the questionnaires and issued a report containing the data drawn from the CDC surveys and an editorial note. *Id.; see* Mobilia & Rossignol, *The Role of Epidemiology in Determining Causation in Toxic Shock Syndrome,* 24 JURIMETRICS 79-80 (1983) (generally discussing Center for Disease Control study on toxic shock syndrome).

28. 745 F.2d at 300. In 1980, the state health departments of Wisconsin, Minnesota, and Iowa formed a tri-state commission. *Id.* at 299. In conjunction with the Federal Center for Disease Control (CDC), the tri-state commission gathered data from questionnaires which the tri-state commission had sent to a selected group of toxic shock syndrome victims and a control group. *Id.* The tri-state commission published a report containing the data and conclusions based on the data. *Id.*

29. 745 F.2d at 299. The *Morbidity and Mortality Weekly Report* (MMWR) is the official publication of the Federal Center for Disease Control. *Id.* at 299 n.4. The *MMWR* publishes only statistically significant health data. *Id.* at 301. Doctors and scientists throughout the nation use the *MMWR* as a reference journal. *Id.* at 302.

30. *Id.* at 299. In addition to appearing in the *Morbidity and Mortality Weekly,* the findings of the Wisconsin, Minnesota, and Iowa state health departments' study of toxic shock syndrome appeared in the Federal Register. *Id.* at 300; *see* 46 Fed. Reg. 23, 766-68 (later codified at 21 C.F.R. § 801.430) (1985).

31. *Id.* at 299; *see supra* note 20 (discussing toxic shock syndrome).

the risks of contracting toxic shock syndrome associated with specific brands of tampons.[32] The plaintiff offered the studies to prove that the tampon manufactured by the defendant caused the plaintiff's wife to contract toxic shock syndrome which led to the wife's death.[33] The district court held that the plaintiff's foundation testimony concerning the CDC and tri-state commission studies was insufficient to show that the methodologies used in the epidemiological studies were reliable.[34] The district court refused to admit the studies under the public records and reports exception in rule 803(8)(C).[35] The jury delivered a verdict in favor of the defendant manufacturer.[36]

After addressing the parties' arguments on the proper standard for motions for directed verdict and new trial,[37] the Fourth Circuit reversed the district court and held that the epidemiological studies satisfied the requirements of the public records and reports exception to the hearsay rule in rule 803(8)(C).[38] The *Ellis* court noted that courts should presume that public records and reports are admissible because an assumption exists in the common law and under rule 803(8)(C) that a public official conducts his delegated duties responsibly.[39] In addition, the Fourth Circuit reasoned that the presumption of admissibility of public reports was justifiable because courts routinely presume that public officials conduct their duties under the pure motive of informing the public accurately and fairly.[40] The *Ellis* court concluded, however, that the presumption of admissibility was rebuttable.[41]

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32. 745 F.2d at 297, 299; *see supra* note 20 (discussing toxic shock syndrome).

33. 745 F.2d at 305; *see supra* note 20 (discussing toxic shock syndrome); *see supra* note 23 (outlining elements of negligence which plaintiff must prove in Virginia products liability suit).

34. 745 F.2d at 297.

35. 745 F.2d at 297. In *Ellis v. International Playtex, Inc.*, the United States District Court for the Eastern District of Virginia found that the studies conducted by the Center for Disease Control and the Wisconsin, Minnesota, and Iowa state health departments were hearsay and thus inadmissible. *Id.* The district court reasoned that the plaintiff failed to offer sufficient evidence of the studies' trustworthiness. *Id.*

36. *Id.* at 296.

37. *Id.* at 298-99. At trial in the United States District Court for the Eastern District of Virginia, the plaintiff in *Ellis* moved to have the jury's verdict set aside. *Id.* On appeal to the United States Court of Appeals for the Fourth Circuit, the plaintiff contended that the district court had misapplied the law by using the standard for a directed verdict as a substitute for the standard for setting aside a verdict. *Id.* The Fourth Circuit in *Ellis* found that a motion for a new trial required the trial court to weigh the evidence presented by both parties. *Id.* The district court in *Ellis* ruled against the plaintiff on the motion for a new trial. *Id.* at 299. The Fourth Circuit concluded that the district court's ruling was justifiable because each party had presented sufficient evidence to support the jury's verdict. *Id.* at 298-99. The Fourth Circuit later cited the *Ellis* court's holding in *Dennis v. General Elec. Corp.* as the standard for reviewing a motion for a new trial. *See Dennis v. General Electric Corp.*, 762 F.2d 365, 367 (4th Cir. 1985) (affirming *Ellis* standard for reviewing motions for new trial).

38. 745 F.2d at 300-04.

39. *Id.* at 300.

40. *Id.*

41. *Id.* at 300-01. The Fourth Circuit in *Ellis v. International Playtex, Inc.* noted that a party may rebut the presumption that a government report is trustworthy by offering evidence

Concerning the foundation necessary for the admission of public reports into evidence, the Fourth Circuit held that the offeror must show that the report contains factual findings derived from an investigation conducted under authority granted by law and thus satisfies the express terms of rule 803(8)(C).[42] The Fourth Circuit indicated that once the party offering the report has shown that the report satisfies the express terms of rule 803(8)(C), the burden shifts to the party opposing admission of the report to offer evidence of the report's untrustworthiness.[43] The *Ellis* court determined that the three factors indicating untrustworthiness are a lack of timeliness in the investigation, a lack of skill or experience in the public official who prepared the report, and a motivational problem in making the investigation.[44] The *Ellis* court reasoned that placing the burden of showing why the "time-tested" presumption of admissibility is inappropriate on the party opposing admission was fair and reasonable because government studies generally use accepted methodologies.[45] The Fourth Circuit also observed that placing the burden on the party opposing admission avoided the costs of requiring the official who conducted an investigation to testify concerning his methodology and motivation each time a litigant attempted to introduce his governmental report into evidence.[46]

Having concluded that courts should presume that public reports are admissible, the Fourth Circuit found that scientific reports deserve the same treatment in terms of admissibility as any other public record or report.[47] Under the *Ellis* court's rule, therefore, once the proponent of a scientific report has made a prima facie showing of admissibility and has overcome any rebuttal, the propriety of the methodology used in preparing the scientific report is merely a factor for the jury to consider in determining what weight to give the report.[48] The Fourth Circuit surmised that cross-examination

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which shows that the report is untrustworthy. *Id.* Specifically, the party opposing admission may show that the investigation leading to the report was untimely, that the official conducting the investigation lacked the skill or experience necessary to produce reliable findings, or that the investigator had an improper motive for conducting the investigation. *Id.*

42. *Id.; see* FED. R. EVID. 803(8)(C); *supra* note 7 (rationale for admitting hearsay under exceptions to hearsay rule); *supra* note 11 (text of rule 803(8)(c)).

43. 745 F.2d at 300-01.

44. *Id.; see infra* note 114 (pertaining to advisory committee's note on indicia of trustworthiness).

45. *Id.* at 301. In determining that placing the burden of showing untrustworthiness on the party opposing admission of a governmental report was fair, the Fourth Circuit in *Ellis* noted that authorities conducting government investigations usually employ well-established methodologies. *Id.* The *Ellis* court also reasoned that forcing the same authority to testify each time a litigant attempted to introduce a report that the authority had prepared wasted judicial time. *Id.*

46. *Id; see supra* note 45 and accompanying text (discussing justifications for placing burden of showing inadmissibility on party opposing admission of government report).

47. 745 F.2d at 301.

48. *Id.* at 303; *see supra* note 41 and accompanying text (party opposing admission of government report may rebut presumption of admissibility in three ways).

concerning the report would reveal any flaws in the methodology used in preparing the report and that juries possess sufficient sophistication to understand methodological issues.[49] The *Ellis* court interpreted rule 803(8)(C) as rejecting the requirement, which the United States Court of Appeals for the District of Columbia enunciated in *Frye v. United States,* that the trial judge assess the trustworthiness of a methodology prior to admitting the scientific reports.[50] In *Frye,* the defendant appealed his conviction for murder on the theory that the Supreme Court of the District of Columbia improperly excluded the results of a lie detector test which the defendant had taken.[51] The United States Court of Appeals for the District of Columbia rejected the defendant's theory in *Frye,* on the grounds that the lie detector test did not enjoy general acceptance in the field of science that used lie detector tests.[52] The Fourth Circuit, however, concluded that rule 803(8)(C) creates a rebuttable presumption that public officials employ methodologies generally accepted within the appropriate scientific communities.[53]

In determining whether the defendant had satisfied the burden of overcoming the rule 803(8)(C) presumption of admissibility of public reports, the *Ellis* court observed a number of factors that supported the report's admissibility.[54] First, the Fourth Circuit found that the studies that the plaintiff offered were factual findings within the meaning of rule 803(8)(C) even though the studies included evaluations and conclusions.[55] The *Ellis* court reasoned that, although confusion surrounds the meaning of the term "factual findings," precedent from various federal circuits and statements from commentators authorize a broad, liberal interpretation of the term "factual findings".[56] The Fourth Circuit also determined that scientific findings, unlike other types of findings, are never final, but rather are subject to endless refinement.[57] The *Ellis* court found that authorized federal and

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49. 745 F.2d at 303-04; *see supra* notes 5 and 6 and accompanying text (discussing function of witness' presence at trial and cross-examination); *infra* note 77 and accompanying text (pertaining to jury's ability to understand sophisticated methodology issues).

50. 745 F.2d at 304; *see supra* note 15 and accompanying text (discussing holding in *Frye v. United States); supra* note 11 (test of rule 803(8)(C)).

51. 293 F. at 1013, 1014 (D.C. Cir. 1923).

52. *Id.*

53. 745 F.2d at 301; *see supra* note 45 and accompanying text (discussing reasons for placing burden of showing inadmissibility on party opposing admission of government report); *infra* notes 75 and 77 and accompanying text (addressing problems with *Frye* test).

54. 745 F.2d at 301-03.

55. *Id.* at 301. In determining that the studies offered as evidence by the plaintiff were factual findings within the meaning of 803(8)(C), the Fourth Circuit in *Ellis* relied on rulings from other circuits which held reports containing evaluative language were admissible under 803(8)(c). *Id.; see* Kehm v. Procter & Gamble Mfg. Co., 724 F.2d 613, 617-20 (8th Cir. 1983); *infra* note 145 (discussing *Kehm* court's decision which held same CDC and tri-state commission reports offered as evidence in *Ellis* admissible).

56. 745 F.2d at 301; *see infra* note 90 (concerning difficulties in determining congressional intent on scope of meaning of term "factual findings" in rule 803(8)(C)).

57. 745 F.2d at 301.

state agencies conducted the CDC and tri-state commission studies.[58] Because the epidemiological studies contained factual findings made by public officials under authority granted by law, the Fourth Circuit concluded that the plaintiff had made a prima facie showing of admissibility under rule 803(8)(C).[59]

In addition, the Fourth Circuit rejected the defendant's attempt to rebut the plaintiff's showing of admissibility of the epidemiological studies by arguing that the reports were untrustworthy.[60] The *Ellis* court found that the studies contained the necessary indicia of trustworthiness to allow the admission of the reports into evidence.[61] First, the *Ellis* court determined that the studies were timely because the CDC and tri-state commission acted as quickly as possible and could not interview the large number of TSS victims immediately upon each victim's recovery.[62] Second, the court stated that the CDC and tri-state commission officials who prepared the reports were highly skilled in the study of epidemiology and in the proper procedures for conducting epidemiological studies.[63] Finally, the Fourth Circuit concluded that no improper motive led to the CDC or tri-state commission investigations since no evidence suggested that either study was biased.[64]

In addition to evaluating the admissibility of the epidemiological studies under rule 803(8)(C), the *Ellis* court applied the test embodied in Federal Rule of Evidence 403 which balances the prejudicial effect of the admission of evidence against the probative value of the evidence.[65] Rule 403 gives trial judges the discretion to exclude evidence otherwise admissible when the prejudicial effect of the evidence upon a party's case or the probability that the evidence will confuse the jury substantially outweighs the probative value

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58. *Id.* In holding that the Federal Center for Disease Control and the tri-state commission conducted their studies on toxic shock syndrome pursuant to law as required by Federal Rule of Evidence 803(8)(C), the Fourth Circuit in *Ellis* relied on the agencies' status as branches of federal and state government. *Id.*

59. *Id.*

60. *See id.* at 302 (burden rested on defendant to show untrustworthiness of government report); *infra* note 91 (concerning indicia of reliability under rule 803(8)(C)).

61. 745 F.2d at 301-03.

62. 745 F.2d at 303; *see supra* notes 27 and 28 (discussion of methodology used by Center for Disease Control and tri-state commission in conducting toxic shock syndrome studies). In *Ellis,* the Fourth Circuit noted that rule 803(8)(C) does not require publication of reports in any particular form. 745 F.2d at 302; *see supra* note 11 (text of rule 803(8)(C)). The *Ellis* court noted that the *Morbidity and Mortality Weekly Report* (MMWR), which published the Center for Disease Control and tri-state commission findings, publishes only statistically significant data. 745 F.2d at 302; *see supra* note 29 (discussing *MMWR).* In addition to appearing in the *MMWR,* the state health department's findings appeared in the Federal Register. 745 F.2d at 302; *see* 46 Fed. Reg. 23, 766-68 (later codified at 21 C.F.R. § 801.430) (1985). The Fourth Circuit concluded that although publication of a government report is not a prerequisite to the admission of a report into evidence under rule 803(8)(C), publication of a report is indicative of the trustworthiness of a report. 745 F.2d at 302; *see supra* note 11 (text of rule 803(8)(c)).

63. 745 F.2d at 301.

64. *Id.*

65. *Id.* at 304-05; *see* 1 WEINSTEIN'S EVIDENCE § 403[1] (1985) (rule 403 applies to evidence of any type); *see also* FED. R. EVID. 403 (balancing substantial prejudicial effect against probative value).

of the evidence.[66] In *Ellis,* the defendant manufacturer argued that the district court should have excluded the epidemiological studies because the epidemiological studies were prejudicial to the defendant on the issue of causation.[67] The Fourth Circuit, however, viewed the epidemiological studies as highly probative of causation and easily understandable by a jury.[68]

In explicitly rejecting the traditional test developed in *Frye v. United States* and relying instead upon the terms of Federal Rules of Evidence 803(8)(C) and 403 to determine whether to admit scientific evidence, the Fourth Circuit in *Ellis* adopted several potentially controversial positions.[69] First, the *Ellis* court's rejection of the *Frye* test raises questions concerning a jury's ability to understand methodological concepts and issues.[70] Second, the Fourth Circuit's reliance upon rules 803(8)(C) and 403 creates questions concerning the scope of the term "factual findings" and the appropriate burden of proof for determining the admissibility of a governmental report.[71] Finally, the nature of epidemiological studies invites questions concerning the possible prejudicial effect of using epidemiological studies to prove causation.[72]

A number of federal courts have adopted the test enunciated in *Frye* to

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66. FED. R. EVID. 403; WEINSTEIN, *supra* note 65, at § 403[01]. In addition to allowing trial judges to exclude prejudicial or confusing evidence of little probative value, rule 403 of the Federal Rules of Evidence grants trial judges the discretion to exclude evidence that will unduly delay a trial. WEINSTEIN, *supra* note 65, at § 403[01].

67. 745 F.2d at 304.

68. *Id.* at 304-05. After determining that the Center for Disease Control and tri-state commission studies were admissible under Federal Rules of Evidence 403 and 803(8)(C), the *Ellis* court considered the defendant manufacturer's argument that the district court's exclusion of the epidemiological studies was harmless error. *Id.* at 305. Observing that the epidemiological studies were highly probative of causation, the Fourth Circuit accordingly rejected the defendant's contention that exclusion of the studies was harmless error. *Id.* Upon disposing of the defendant's harmless error argument, the *Ellis* court examined the plaintiff's argument that the district court's exclusion of a number of consumer complaints received by Playtex was erroneous. *Id.* The Fourth Circuit upheld the district court's exclusion of the consumer complaints because admission of the complaints would have prolonged the trial unduly. *Id.* The *Ellis* court next addressed the plaintiff's argument that the district court's refusal to allow an expert testifying on the plaintiff's behalf to read from a medical journal was erroneous because the journal satisfied the learned treatise exception to the hearsay rule. *Id.* at 305-06. The Fourth Circuit concluded that the district court had not abused its discretion under rule 403 because the treatise's effect on the defendant's case was potentially prejudicial while the report's relevance was low. *Id.* at 306. Finally, the *Ellis* court rejected the plaintiff's challenge to the sufficiency of the jury instructions that the district court gave concerning the failure to warn issue. *Id.* at 306-07. Because trial courts enjoy broad discretion in framing the jury charges, and because the district court's instruction contained every critical element of the plaintiff's proposed charge, the Fourth Circuit deemed the district court's instruction sufficient. *Id.* at 307.

69. *See infra* notes 73-145 and accompanying text (concerning *Ellis* court's holdings).

70. *See infra* notes 73-86 and accompanying text (discussing controversy surrounding *Frye* test).

71. *See infra* notes 87-124 and accompanying text (concerning interpretation of rule 803(8)(C)).

72. *See infra* notes 125-45 and accompanying text (pertaining to nature of epidemiological studies).

ensure that courts admit only trustworthy scientific evidence.[73] Under the *Frye* test, a scientific procedure must gain general acceptance in the appropriate scientific community before the results from the procedure become admissible as evidence.[74] Commentators, however, have criticized the *Frye* test because the mere acceptance of a procedure in a particular field does not necessarily ensure the procedure's reliability.[75] Bloodletting and purging, for example, enjoyed wide acceptance among practicing physicians as having curative powers for a vast number of illnesses until scientific advancement proved bloodletting and purging of limited medical usefulness.[76] Furthermore, premising the admission of evidence on the general acceptance of a procedure by members of a profession or field of science may produce a prejudicial result by leading the jury to believe that the procedure is infallible.[77] With the advent of the Federal Rules of Evidence, however, the continued viability of the *Frye* test became questionable because the drafters of the Federal Rules did not incorporate the *Frye* test in the Federal Rules as the general

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73. *See, e.g.,* United States v. Brady, 595 F.2d 359, 362-63 (6th Cir.) (lack of general acceptance of microscopic hair analysis in scientific community rendered results of analysis inadmissible), *cert. denied,* 444 U.S. 862 (1979); Hughes v. Mathews, 576 F.2d 1250, 1258 (7th Cir.) (citing *Frye* in determining that psychiatric evidence was admissible), *cert. dismissed,* 439 U.S. 801 (1978); United States v. Kilgus, 571 F.2d 508, 510 (9th Cir. 1978) (citing *Frye* in determining admissibility of results from forward looking infrared system); United States v. Addison, 498 F.2d 741, 743 (D.C. Cir. 1974) (relying upon *Frye* in concluding that voice prints were inadmissible); Giannelli, *supra* note 14, at 1200-07 (many courts adopted *Frye* test to ensure admission of reliable scientific evidence).

74. 293 F.2d 1013, 1014 (D.C. Cir. 1923).

75. *See* Giannelli, *supra* note 14, at 1223-25 (discussing inability of general acceptance test to ensure reliability); Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome and Its Implications for Expert Psychological Testimony,* 70 MINN. L. REV. 395, 432-36 (1985) (describing problems associated with general acceptance test in rape trauma cases); Strong, *Questions Affecting the Admissibility of Scientific Evidence,* 1970 U. ILL. L.F. 1, 9-14 (general acceptance test does not ensure reliable results); MCCORMICK, EVIDENCE § 203 (Cleary ed. 1972) (general acceptance test obscures main concern, which is relevancy, without ensuring reliable results). The fallability of the general acceptance standard enunciated in *Frye v. United States* finds stark illustration in the paraffin test. Giannelli, *supra* note 14, at 1223-35. The paraffin test, developed in the 1930s, was used to detect gunshot residue on the hand. *Id.* The test gained wide acceptance in the law enforcement field. *Id.* The results of paraffin tests, therefore, were admissible under *Frye* which required a novel scientific technique to enjoy general acceptance in the particular science, art or profession using the procedure. 293 F. 1013, 1014 (D.C. Cir. 1923); Giannelli, *supra* note 14, at 1223-25. In 1967, a comprehensive evaluation of the paraffin test proved that the paraffin test was unreliable. Giannelli, *supra* note 14, at 1223-25. The *Frye* test assumes that wide acceptance of a procedure will lead to sufficient testing of that procedure to reveal methodological fallacies. *Id.* The long-delayed demise of the paraffin test helps disprove this assumption. *Id.*

76. *See* E. ACKERKNECHT, A SHORT HISTORY OF MEDICINE, 126, 138 (rev. ed. 1982) (describing various therapeutic techniques later found to be harmful).

77. Giannelli, *supra* note 14, at 1237. Juries may attribute a mystic infallability to scientific evidence in general. United States v. Addison, 498 F.2d 741, 744 (D.C. Cir. 1974). If juries understand that scientists accept a particular scientific technique, the popularity of the technique may strengthen the jury's belief that the technique cannot produce incorrect results. Giannelli, *supra* note 14, at 1237.

standard for admission of scientific evidence.[78] Instead, under the Federal Rules of Evidence, the threshold concern in admitting all forms of evidence is relevancy.[79] The test for relevancy under Federal Rule of Evidence 401 is whether the evidence makes the existence of a fact more or less probable.[80] The admission of a scientific report concerning a fact at issue may assist a jury in determining whether the existence of the fact is more or less probable.[81] An argument against using the role 401 relevancy test as an alternative to the *Frye* test in determining a methodology's reliability is that juries may lack the sophistication necessary to understand methodological issues and arguments.[82] Given the uncertainty surrounding the jury's ability to understand methodological issues, judicial reliance on cross-examination to reveal untrustworthy methodologies is questionable.[83] In contrast, the fallacy in the assumption underlying the *Frye* test that acceptance of a procedure is dispositive of the procedure's reliability leaves federal courts with no rational choice other than to abandon the *Frye* test.[84] One commentator recently approved of the Fourth Circuit's rejection of the *Frye* test in *Ellis*.[85] The Fourth Circuit is the only federal court of appeals to reject the *Frye* test expressly.[86]

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78. Giannelli, *supra* note 14, at 1228-31; 22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE & PROCEDURE § 5168, at 92 (1978).

79. *See* FED. R. EVID. 401; FED. R. EVID. 402. Federal Rule of Evidence 401 defines relevant evidence as evidence which tends to make the existence of a fact more or less probable. FED. R. EVID. 401. Rule 402 allows the admission of all relevant evidence, except when the United States Constitution, federal statutes, the Federal Rules of Evidence, or Supreme Court rules prohibit admission of the evidence. FED. R. EVID. 402. Scientific evidence may be relevant under rule 401 without regard to its general acceptance within the appropriate scientific community. Giannelli, *supra* note 14, at 1230. Whether a scientific community accepts scientific evidence is arguably not germane to the admissibility standard under the Federal Rules of Evidence. *Id.;* Strong, *supra* note 75, at 9-14.

80. FED. R. EVID.401.

81. *See* Giannelli, *supra* note 14, at 1230 (scientific evidence may be relevant even though technique is not generally accepted by scientific community); WRIGHT & GRAHAM, *supra* note 78, at 88-91 (same); *supra* note 79 (discussing admissibility under Federal Rules of Evidence).

82. Giannelli, *supra* note 14, at 1239-40.

83. *Id.; but see* United States v. Williams, 583 F.2d 1194, 1199-1200 (2d Cir. 1978) (jury is free to reject evidence from controversial scientific procedure after hearing arguments concerning methodology), *cert. denied,* 439 U.S. 1117 (1979); United States v. Ridling, 350 F. Supp. 90, 98 (E.D. Mich. 1972) (juries today are more sophisticated than in earlier years because of increased education and communication); Massaro, *supra* note 75, at 443 (proper use of expert testimony to explain scientific principles and procedures avoids jury confusion).

84. WRIGHT & GRAHAM, *supra* note 78, at § 5168; Strong, *supra* note 75, at 9-14; *see* Giannelli, *supra* note 14, at 1223-25 (describing failures of *Frye* test).

85. LOUISELL & MUELLER, *supra* note 3, at § 456 (Supp. 1985).

86. *Id.; see also* United States v. Williams, 583 F.2d 1194, 1197-99 (2d Cir. 1978) (modifying *Frye), cert. denied,* 439 U.S. 1117 (1979); United States v. Baller, 519 F.2d 463, 466 (4th Cir.) (rejecting *Frye* test in determining admissibility of voice prints), *cert. denied,* 423 U.S. 1019 (1975). Although the Fourth Circuit in *Ellis* rejected the *Frye* test as applied to public reports and records, the *Ellis* court stated that the Fourth Circuit continues to apply the *Frye* test in certain situations. *Ellis,* 745 F.2d at 304 n.14. The *Ellis* court, however, did not indicate

In addition to encountering difficulty in determining whether the *Frye* test remains viable, federal courts face considerable difficulty in determining whether Congress intended a liberal or restrictive approach to the admission of governmental reports under rule 803(8)(C).[87] Rule 803(8)(C) allows the admission of factual findings resulting from an investigation authorized by law.[88] The House Judiciary Committee stated that the term "factual findings" requires strict construction and excludes evaluations or opinions.[89] The Senate Judiciary Committee, however, rejected the House Judiciary Committee's strict construction rule on the belief that the drafters of rule 803(8)(C) intended that courts assume the admissibility of all government reports, absent some indicia of untrustworthiness.[90] The Senate Judiciary Committee relied on the Federal Rules of Evidence Advisory Committee's Note to rule 803(8)(C) which furnishes a four part test for determining a report's trustworthiness.[91] The four criteria comprising the Advisory Committee's suggested test for trustworthiness include the timeliness of the investigation, the special skill or experience in the official who prepared the report, whether an agency hearing was held, and the absence of motivational problems.[92]

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the situations under which the *Frye* test is applicable. *See id.* In addition to the Fourth Circuit, several federal district courts have implicitly rejected the *Frye* general acceptance standard. *See* United States v. Sample, 378 F. Supp. 44, 53-54 (E.D. Pa. 1974) (implicitly rejecting *Frye* test based on defendant's failure to object to voice print methodology); United States v. Ridling, 350 F. Supp. 90 (E.D. Mich. 1972) (implicitly rejecting *Frye* test on theory that jury possesses sufficient sophistication to understand methodology issues); United States v. Wilson, 361 F. Supp. 510, 511 (D. Md. 1973) (implicitly rejecting *Frye* test in favor of relevancy test under rules 401 and 403).

87. *See* Pierce, *Admission of Expert Testimony in Hearsay Form: Federal Rules of Evidence 803(6), 803(8)(C), and 803(18),* 17 FORUM 500, 500-01 (1981) (discussing controversial language concerning rule 803(8)(C)); Comment, *The Admissibility of Evaluative Reports Under Federal Rule of Evidence 808(8),* 68 KEN. L. J. 197, 201-03 (1979-80) (same); LOUISELL & MUELLER, *supra* note 3, at § 456 (same).

88. FED. R. EVID. 803(8)(C); *see supra* note 11 (text of rule 803(8)(C)).

89. H.R. REP. No. 353, 93d Cong., 2d Sess. (1973), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051, 7088 *and part in* FED. R. EVID. 803 historical note [hereinafter cited as *803 Historical Note].*

90. S. REP. No. 1277, 93d Cong., 2d Sess. 18 (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051, 7064-65 *and in pertinent part in* FED. R. EVID. 803 historical note [hereinafter cited as *803 Historical Note].* The Senate Judiciary Committee strongly took exception to the House Judiciary Committee's position that the term "factual findings" excludes reports containing evaluative language or opinions. *Id.* The Senate Judiciary Committee agreed with the Advisory Committee that existing federal statutes which allow the admission into evidence of evaluative reports should serve as guidelines for admitting evaluative reports under rule 803(8)(C). *Id.* The Senate Judiciary Committee viewed the House Judiciary Committee's strict interpretation of factual findings as a misunderstanding of the Advisory Committee's intended operation of the rule. *Id.* The Senate Judiciary Committee concluded that courts should presume in the first instance that a government report is admissible unless the report fails to satisfy one of the four indicia of reliability proposed by the Advisory Committee. *Id.; see* FED. R. EVID. 803 advisory committee note (listing indicia of trustworthiness).

91. *803 Historical Note; see* FED. R. EVID. 803 advisory committee note (indicia of trustworthiness are timeliness, skill of official, hearing, and absence of motivational problems).

92. FED. R. EVID. 803 advisory committee note; *see* Palmer v. Hoffman, 318 U.S. 109,

The Congressional Conference Committee Report adopted the House Judiciary Committee's version of rule 803(8)(C), not because of the House Judiciary Committee's interpretation of "factual findings," but because of other considerations.[93]

By concluding that the CDC and tri-state commission reports that contained conclusions were admissible, the Fourth Circuit in *Ellis* followed the Senate Judiciary Committee's liberal approach which rejected the belief that the term "factual findings" requires strict construction.[94] Several theories support the admission of public reports containing evaluative language.[95] The Senate Judiciary Committee and the Advisory Committee Notes accompanying role 803(8) refer to a number of federal statutes that allow the admission into evidence of reports containing opinions and that courts may use as guidelines in determining whether to admit evaluative reports.[96] The drafters of rule 803(8) apparently recognized that the admission of certain types of evaluative reports is desirable.[97] Federal courts that exclude reports containing opinions, however, typically justify excluding these reports by comparing the public records exception in rule 803(8)(C) to the business records exception in rule 803(6).[98] While rule 803(8) allows the admission of factual findings, the terms of rule 803(6) expressly allow the admission of opinion and diagnoses.[99] In other respects, the language of rules 803(6) and

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114 (1943) (suggesting that evidence of motivational problems indicates untrustworthiness); Franklin v. Skelly Oil Co., 141 F.2d 568, 572 (10th Cir. 1944) (lack of hearing makes report's trustworthiness questionable); McCormick, *Can the Courts Make Wider Use of Reports of Official Investigations?* 42 IOWA L. REV. 363, 365, 367-68 (1957) (timeliness of investigation and special skill of official show trustworthiness).

93. H.R. REP. No. 1597, 93d Cong., 2d Sess. 11 (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051, 7104-05 *and in part in* FED. R. EVID. 803 historical note.

94. *See Ellis,* 745 F.2d at 300-01 (holding that party offering government report must show only that report resulted from investigation conducted under authority of law to receive benefit of presumption of admissibility); *supra* note 90 and accompanying text (discussing Senate Judiciary Committee's interpretation of factual findings and presumption of admissibility).

95. *See* Pierce, *supra* note 87, at 500-01 (arguing that liberal admission of evaluative reports is desirable); Comment, *supra* note 87 at 208-09 (listing arguments in favor of admitting evaluative reports).

96. *See* FED. R. EVID. 803 senate judiciary committee note (referring to advisory committee note's citation of certain federal statutes that allow admission of evaluative reports as guidelines); FED. R. EVID. 803 advisory committee note (citing federal statutes allowing admission of evaluative reports).

97. FED. R. EVID. 803 advisory committee note.

98. *See* Smith v. Ithaca Corp., 612 F.2d 215, 221-22 (5th Cir. 1980) (concluding that courts must delete opinion language from public reports on basis of comparison of business records and public reports exception); Complaint of Am. Export Lines, 73 F.R.D. 454, 459 (S.D.N.Y. 1977) (comparing business records and public reports exceptions justifies exclusion of evaluative reports); Note, *supra* note 16, at 158-59 (citing *Complaint of American Export Lines* with approval); *see also* FED. R. EVID. 803(8)(C) (authorizing admission of certain public reports); FED. R. EVID. 803(6) (allowing admission of certain business records).

99. *See* FED. R. EVID. 803(6) (business records exception to hearsay rule); FED. R. EVID. 803(8)(C) (public reports exception to hearsay rule).

803(8) is similar.[100] Courts that have employed the comparison of the two exceptions have concluded that Congress intended the terms "factual finding" and "opinion" to have distinct meanings and that evaluative reports thus are inadmissible under rule 803(8).[101] Nonetheless, the Senate Judiciary Committee and Advisory Committee Notes' reference to federal statutes that allow the admission of reports containing opinions provides solid support for the Fourth Circuit's determination that the epidemiological studies containing conclusions were admissible under rule 803(8)(C).[102]

In addition to the support provided by the Senate Judiciary Committee and the Advisory Committee Notes, practical considerations support the Fourth Circuit's decision in *Ellis* to admit the epidemiological studies containing evaluative language.[103] Differentiating between fact and opinion is often a difficult task.[104] Critics of the admission of evaluative reports argue that evaluative reports tell the jury what conclusion to reach and thus invade the jury's factfinding function.[105] Trial courts, however, are capable of distinguishing between opinions that preempt the jury's factfinding function and opinions that merely help the jury understand the facts at issue.[106] Under

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100. *See* Smith v. Ithaca Corp., 612 F.2d 215, 222 (5th Cir. 1980) (language and framework of rules 803(6) and 803(8) are similar); *Complaint of Am. Export Lines*, 73 F.R.D. 454, 457 (S.D.N.Y. 1977) (same). Both rules 803(6) and 803(8)(C) of the Federal Rules of Evidence allow the admission of any form of records or reports. *See* FED. R. EVID. 803(6) (allowing admission of business records in any form); FED. R. EVID. 803(8)(C) (allowing admission of public reports in any format). Rules 803(6) and 803(8)(C) describe the situations that differ between the rules, in which records or reports are admissible. *See* FED. R. EVID. 803(6) (allowing admission of all business records kept in normal course of business and under regular business practices); FED. R. EVID. 803(8)(C) (allowing admission of public reports made pursuant to investigation under authority of law).

101. *See Smith v. Ithaca Corp.*, 612 F.2d 215, 222 (5th Cir. 1980) (difference between business records and public reports exceptions allowed exclusion of Coast Guard's report concerning cause of contamination); *Complaint of Am. Export Lines*, 73 F.R.D. 454, 457-59 (S.D.N.Y. 1977) (difference between business records and public reports exceptions justified exclusion of National Transportation Safety Board report containing conclusions regarding cause of accident).

102. *See* Baker v. Elcona Homes Corp., 588 F.2d 551, 556-59 (6th Cir. 1978) (reasoning that congressional reports and advisory committee note justify admission of evaluative reports under rule 803(8)(C)), *cert. denied*, 441 U.S. 933 (1979); LOUISELL & MUELLER, *supra* note 3, at § 455 (arguing that drafter's intent to allow admission of evaluative reports under rule 803(8)(C) should control construction of rule 803(8)(C)).

103. *See* Comment, *supra* note 87, at 209 (discussing practical considerations that support admission of reports containing evaluative language). Proponents of admission of evaluative reports under Federal Rule of Evidence 803(8)(C) argue that calling public officials away from the officials' duties to testify concerning reports that they prepared deprives the public of efficient governmental operation. *Id.* Furthermore, once a court has found a public report to be trustworthy, forcing other courts to make the same determination wastes the courts' time and the litigants' money. *Id.*

104. Pierce, *supra* note 87, at 502.

105. Note, *supra* note 16, at 164-65.

106. *Id.* Under rule 702 of the Federal Rules of Evidence, an expert may give his opinion on a fact in issue if the expert's opinion will help the factfinder understand the issues. FED. R. EVID. 702. In admitting opinion testimony, courts must be careful to exclude an opinion that

rule 403, the district courts may exclude as prejudicial those public reports containing opinions that invade the jury's province of deciding the legal facts.[107] Thus, as the Fourth Circuit emphasized in *Ellis,* lower courts may rely on rule 403 as the final test for determining the admissibility of public reports containing evaluative language.[108]

In concluding that evaluations and opinions contained in public reports are within the scope of rule 803(8)(C), the Fourth Circuit's decision in *Ellis* reaches the same result as decisions in the Second, Third, and Sixth Circuits.[109] In contrast, the United States District Court for the Southern District

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merely tells the jury what conclusion to draw. FED. R. EVID. 702 advisory committee note. Like expert testimony, opinion in a government report may assist the trier of fact in understanding an issue. *See* Note, *supra* note 16, at 164-65. Unlike an expert testifying at trial, a report cannot be cross-examined. *Id.* The party opposing the admission of a report, however, may retain expert witnesses to testify at trial and to attack the methodology and opinions contained in the report. Kehm v. Procter and Gamble Mfg. Co., 724 F.2d 613, 619 (8th Cir. 1983); *see* Migliorini v. United States, 521 F. Supp. 1210, 1218-19 (M.D. Fla. 1981) (defendant's experts successfully challenged report's findings and conclusions by showing that study was biased). Both rules 702 and 803(8)(C) require that the expert and the report's preparer demonstrate skill or experience in the area. *See* FED. R. EVID. 702 (expert must have skill, experience, knowledge or expertise to testify); FED. R. EVID. 803(8)(C) advisory committee note (preparer's lack of skill or experience is one basis on which to exclude report from evidence). Because of the similarities between expert opinion and public reports, the admission of public reports generally is consistent with the admission of expert opinion. *See* Pierce, *supra* note 87, at 503 (analogy to expert opinion rules is useful basis for attacking trustworthiness of documents under public records exception); *but see* Note, *supra* note 16, at 164-65 (ultimately rejecting analogy between expert opinion and public records as justification for admitting opinions via public records exception because of opposing party's inability to cross-examine report's preparer).

107. FED. R. EVID. 403; Pierce, *supra* note 87, at 604-05.

108. *See* Pierce, *supra* note 87, at 504-05 (even if report is trustworthy, rule 403 may require report's exclusion). Federal Rule of Evidence 403 applies to all forms of evidence and recognizes that the technical tests for admissibility of evidence, such as the exceptions to the hearsay rule, do not always result in fair decisions concerning the admissibility of evidence. 1 WEINSTEIN & BERGER, EVIDENCE § 403[01] (1985). Rule 403 thus serves as a safety valve in the evidentiary system. *Id.* Courts can apply rule 403 when considering the admissibility of any evidence. *Id.* Rule 403 acts as a second level test of admissibility and operates after the technical tests for admissibility are satisfied. *Id.*

109. *See* Baker v. Elcona Homes Corp., 588 F.2d 551, 556-57 (6th Cir. 1978) (term "factual findings" includes some conclusory language), *cert. denied,* 441 U.S. 933 (1979); Melville v. American Home Assurance Corp., 584 F.2d 1306, 1316 (3d Cir. 1978) (rule 803(8)(C) does not require exclusion of reports containing opinion as well as fact); Miller v. New York Produce Exch., 550 F.2d 762, 769 (2d Cir.) (same), *cert. denied,* 434 U.S. 823 (1977). In *Baker v. Elcona Homes Corp.,* the defendant offered a police report as evidence to prove that the defendant's truck entered an intersection before the plaintiff's car and that the defendant, therefore, had the right of way. *Id.* at 554-55. The district court admitted the police report, and the plaintiff appealed. *Id.* The United States Court of Appeals for the Sixth Circuit determined that the police report, which concluded that the plaintiff's car ran a red light, contained factual findings within the meaning of rule 803(8)(C) and upheld the admission of the report. *Id.* at 556-57.

In *Melville v. American Home Assurance Corp.,* the plaintiff offered as evidence reports prepared by the Federal Aviation Administration (FAA) to show that a mechanical malfunction caused an airplane to crash. 584 F.2d at 1315. The FAA reports described unsafe conditions existing in various classes of aircraft and contained conclusions concerning the planes' safety.

of New York excludes entirely reports that contain evaluative language.[110] The First and Fifth Circuits allow the admission of factual findings after deleting any evaluative language.[111]

In addition to following circuits that take the Senate Judiciary Committee's liberal approach to the admission of evaluative reports, the Fourth Circuit in *Ellis* followed the Senate Judiciary Committee's liberal approach by adopting the presumption that all government reports are trustworthy and thus admissible.[112] Similarly, the *Ellis* court adhered to the Senate Judiciary Committee's view that the opponent of the admission of a public report may rebut the presumption of admissibility by using the trustworthiness criteria suggested by the Advisory Committee to show the untrustworthiness of the document.[113] The Fourth Circuit, however, adopted only three of the four criteria that the Advisory Committee proposed.[114] The *Ellis* court declined to use the Advisory Committee's criterion concerning whether the government report included findings determined by a hearing.[115] In omitting the hearing factor from the test for trustworthiness, the Fourth Circuit cited as authority the Sixth Circuit's ruling in *Baker v. Elcona Homes Corp.*[116] In

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Id. The Third Circuit upheld the district court's admission of the evaluative reports under rule 803(8)(C). *Id.* at 1316.

In *Miller v. New York Produce Exch.*, the Second Circuit upheld the district court's admission of a Commodities Exchange Authority report containing data and conclusions. 550 F.2d at 769. The *Miller* court reasoned that distinguishing fact and opinion is often difficult. Id. The Second Circuit, however, noted that rule 803(8)(C) does not require the exclusion of reports containing opinion as well as fact even when the distinction between fact and opinion can be made. *Id.*

The *Ellis* court allowed the admission of reports containing a conclusion which concerned an ultimate jury fact of whether tampons can cause TSS. *See Ellis,* 745 F.2d at 304 (studies were highly probative of causation); *supra* note 23 (outining elements required to show negligence in products liability suit). Because scientific and medical knowledge of the causes of toxic shock syndrome are beyond the knowledge of most laymen, the *Ellis* court's admission of the Center for Disease Control and tri-state commission studies arguably was correct. *See supra* note 106 (discussing similarities between expert opinion and scientific reports).

110. *See* Complaint of Am. Export Lines, 73 F.R.D. 454, 458 (S.D.N.Y. 1977) (comparing of rules 803(6) and 803(8)(C) justifies exclusion of evaluative reports); *supra* note 100 (addressing comparison of rules 803(6) and 803(8)(C)).

111. *See* Smith v. Ithaca Corp., 612 F.2d 215, 221-22 (5th Cir. 1980) (holding that district court properly deleted opinion portion of report before admitting report into evidence proper); Gencarella v. Fyfe, 171 F.2d 419, 422 (1st Cir. 1948) (pre-Federal Rules of Evidence decision approving severing opinion from fact before admitting public report).

112. *See Ellis,* 745 F.2d at 300 (stating that once party offering report shows that official made report as result of legally authorized investigation, courts may presume report admissible under rule 803(8)(C)); *supra* note 90 (discussing Senate Judiciary Committee's position on presumption of admissibility).

113. *See* 745 F.2d at 300-01 (citing Federal Rules of Evidence Advisory Committee note as source for view that presumption of admissibility may be rebutted).

114. *See* 745 F.2d at 300-01; *cf.* FED. R. EVID. 803 advisory committee note (indicia of trustworthiness are timeliness, skill, hearing, and absence of motivational problems).

115. *See* 745 F.2d at 300-01 (indicia of trustworthiness are timeliness, skill, and absence of motivational problems).

116. 745 F.2d at 301 (citing *Baker,* 588 F.2d at 551.

Baker, the defendants offered as evidence a police report prepared by a police officer soon after the accident had occurred.[117] The Sixth Circuit presumed the admissibility of the officer's report under rule 803(8)(C) and employed three of the four criteria for trustworthiness suggested in the Advisory Committee's Note on rule 803(8)(C).[118] Concluding that the hearing requirement was not an indispensible factor in evaluating a report's trustworthiness, the *Baker* court reasoned that since the Advisory Committee framed the four criteria as suggested factors, rule 803(8)(C) does not require that courts consider all four factors.[119] The purpose of the hearing criterion is to ensure that authorities conduct the investigation in compliance with the mandates of procedural due process to ensure fairness in the factual findings.[120] Not all governmental reports, however, are the product of administrative judicial proceedings.[121] A wealth of arguably reliable evidence would be inadmissible if the hearing requirement were an indispensible element of the Advisory Committee's test for trustworthiness.[122] In addition to the Sixth Circuit, the Fifth and Eighth Circuits have adopted the view that the hearing criterion is not an indispensible element of the Advisory Committee's test for trustworthiness in public reports.[123] The Fourth Circuit, therefore, appears to stand on solid policy and precedential grounds in omitting the requirement that a public report must be the product of a hearing.[124]

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117. *Baker,* 588 F.2d at 553-54.

118. *Id.* at 557-58.

119. *Id.* at 558.

120. *See* Denny v. Hutchinson Sales Corp., 649 F.2d 816, 820-22 (10th Cir. 1981). In *Denny v. Hutchinson Sales Corp.,* the plaintiff alleged that the defendant discriminated in the sale of housing on the basis of race. *Id.* at 818-21. The plaintiff sought admission into evidence of a Colorado Civil Rights Commission report to prove that discrimination had occurred. *Id.* at 819. The Tenth Circuit determined that the district court could exclude the report as untrustworthy on the grounds that the report did not contain findings resulting from a judicial proceeding. *Id.* at 821. The *Denny* court found that the absence of formal procedures and an opportunity to cross-examine witnesses were proper indicia of untrustworthiness under the Advisory Committee Note's list of indicia. *Id.* at 822. Formal procedures and opportunity to cross-examine witnesses thus ensure exposure of flaws in a report's findings and fairness. *See id.*

121. Note, *supra* note 16, at 156.

122. *See* Comment, *supra* note 87, at 209-10 (courts should avoid loss of relevant evidence in public reports unless courts are certain that reports are untrustworthy); Note, *supra* note 16, at 156 (numerous government reports are available from variety of types of investigations). Some government reports result from *ex parte* investigations while other government reports arise from administrative trial-like proceedings in which lawyers argue and an administrative law judge rules on the case. Note, *supra* note 16, at 156. The purposes of government agencies and their investigations vary dramatically. *Id.* No hearing is necessary for certain types of investigations. *Id.* Reports arising out of investigations that do not require hearings are not necessarily less trustworthy than reports produced in agency hearings. *Baker,* 588 F.2d at 558.

123. *See* Kehm v. Procter & Gamble Mfg. Co., 724 F.2d 613, 619 (8th Cir. 1983) (indicia of trustworthiness under rule 803(8)(C) are timeliness, skill, and lack of motivational problem); Robbins v. Whelan, 653 F.2d 47, 50-51 (1st Cir.) (same), *cert. denied,* 454 U.S. 1123 (1981).

124. *See supra* note 122 (absence of hearing does not necessarily show that report is untrustworthy); *supra* note 123 (listing circuits that do not require hearing as indicia of report's trustworthiness).

In addition to raising issues common to the admission of any type of public report, epidemiological studies present special problems when offered to prove causation in a negligence action.[125] Epidemiological studies, unlike many other types of scientific studies, merely reveal whether exposure to certain agents will increase the risk of contracting a given disease within a defined population.[126] Although the results of epidemiological studies pinpoint the increased risk of contracting a disease within a given population, these results are not sufficient to prove causation in a particular case.[127] Rather, independent evidence, in addition to the epidemiological study, is necessary to prove medical and legal causation in a particular case.[128] The *Ellis* court recognized that the epidemiological studies were highly probative of causation, but did not instruct the jury to consider the epidemiological studies on the issue of increased risk alone.[129] Without a limiting instruction, juries may confuse increased risk with cause in fact.[130] The danger of omitting a limiting instruction is that the jury may view the epidemiological study as dispositive of causation in a particular case.[131] Federal courts, however, have admitted epidemiological studies in an Agent Orange disability case and swine flu vaccination cases on the basis of the studies' relevance.[132] More

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125. *See infra* notes 128-130 and accompanying text (discussing problem of distinguishing between increase in risk and cause in fact).

126. Dore, *supra* note 25, at 431. Epidemiological studies contain generalized information about disease in a population rather than information regarding specific individuals' cases. *Id.; see supra* note 25 (concerning nature of epidemiological studies).

127. Dore, *supra* note 25, at 431-37. Because epidemiological studies show an increase in the risk of contracting a disease, epidemiological studies can be highly relevant to the issue of whether an agent can cause an injury. *Id.; see supra* note 23 (listing elements of negligence in products liability); *infra* note 129 (concerning epidemiology's inability to prove cause-in-fact).

128. Dore, *supra* note 25, at 431-37. Epidemiological studies are probative of causation in an individual case only if the statistical association between exposure and risk is strong, if the statistical association is consistent with other knowledge, and if the association is unexplained by alternate hypotheses. *Id.* at 432. The testimony of the treating physician is the strongest method of proving causation in an individual case. *Id.* at 431-32; Dickson, *Medical Causation by Statistics,* 17 FORUM, 792, 805 (1982).

129. *See* 745 F.2d at 304; *see also* Dore, *supra* note 25, at 437-38. Professor Dore recommends that courts warn juries that the treating physician, not the epidemiologist, understands the facts about causation in a particular case. *Id.* Epidemiologists are qualified to testify only about risk among all the members of a population. *Id.; see supra* note 25 (discussing epidemiology). Professor Dore believes that juries are likely to confuse the issues of risk and actual causation when courts fail to make clear to the jury the distinction between the qualifications of treating physicians and epidemiologists. *See* Dore, *supra* note 25, at 437-38; *see also* Dickson, *supra* note 128, at 802-05 (asserting that difference between epidemiological and legal definitions of "cause" is likely to confuse jury).

130. Dore, *supra* note 25, at 437-38; *see supra* notes 128 and 129 (discussing testimony of treating physician and independent proof of cause in fact and risk of jury confusion).

131. Dore, *supra* note 25, at 437-38.

132. *See In re* Agent Orange Prod. Liab. Lit., Nos. MDL No. 381 (JBW) and CJ 80-2284 (E.D.N.Y. July 13, 1985) (citing *Ellis* as authority for admission of Center for Disease Control studies on Agent Orange under rule 803(8)(C)) (available 2/10/86 on LEXIS, Gen. fed. library, Dist. file [search: Ellis v. International Playtex]); Migliorini v. United States, 521 F. Supp.

importantly, the Eighth Circuit concluded in *Kehm v. Proctor & Gamble Manufacturing Co.*[133] that the same CDC and tri-state commission studies proffered in *Ellis* were admissible under rule 803(8)(C)[134] The plaintiffs in *Kehm* alleged that the defendant manufacturer had produced an unreasonably dangerous tampon which caused the decedent's death.[135] To prove that the defendant's product caused the decedent to contract TSS, the plaintiffs offered the CDC and tri-state commission studies concerning the association between the use of tampons and the incidence of TSS.[136] The district court admitted the studies into evidence, and the jury found for the plaintiffs.[137] On appeal, the Eighth Circuit presumed the admissibility of the studies in the first instance and placed the burden of showing untrustworthiness on the party opposing admission of the reports.[138] Precedent, therefore, supports the Fourth Circuit's holding that the CDC and tri-state commission studies are admissible on the issue of causation.[139]

The admission of government reports containing evaluative language presents cross-examination issues in addition to creating problems concerning proof of causation.[140] The function of cross-examination is to reveal the whole truth behind a statement.[141] If a party offers as evidence a governmental report containing only facts but does not produce the person who prepared the report to testify, the opposing party still can attack effectively the facts in evidence by offering contradictory facts.[142] The jury thus hears all the facts pertinent to the issue.[143] However, when a party offers a report containing opinions as well as facts and does not produce the person who prepared the report as a witness, the opposing party cannot cross-examine

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1210, 1217-1219 (M.D. Fla. 1981) (upholding admission of Center for Disease Control studies concerning incidence of disease connected with swine flu vaccinations).

133. 724 F.2d 613 (8th Cir. 1983).

134. *See id.* at 617-20 (concluding that Center for Disease Control and tri-state commission studies were admissible); *infra* note 145 (concerning Eighth Circuit's reasoning in *Kehm v. Procter & Gamble Mfg. Co.).*

135. 724 F.2d at 616.

136. *Id.* at 617.

137. *Id.*

138. *Id.* at 618.

139. *See id.* at 620 (affirming district court's admission of Center for Disease Control and tri-state commission studies on toxic shock syndrome); *infra* note 145 (discussing Eighth Circuit's reasoning in *Kehm v. Procter & Gamble Mfg. Co.).*

140. *See* Note, *supra* note 16, at 159-61 (without opportunity to cross-examine official who prepared report, factfinder cannot evaluate official's perception, memory, and sincerity); Comment, *supra* note 87, at 208 (inability to cross-examine official who prepared reports prevents jury's assessment of official's qualifications); *supra* note 6 (discussing function of cross-examination).

141. *See* WIGMORE, *supra* note 6, at § 1368 (cross-examination reveals distortions in truth); *see supra* note 6 (discussing purpose of cross-examination).

142. *See* Note, *supra* note 16, at 163-64 (narrow construction of factual findings under rule 803(8)(C) prevents admission of vague conclusions which cannot be contradicted by conflicting evidence).

143. *Id.*

the preparer concerning the reasons for the opinions reached.[144] In contrast, with scientific reports containing scientific conclusions, the opposing party can question an expert witness who is familiar with the particular field of science to expose flaws in the preparer's methodology, conclusions, and opinions.[145]

Although the Fourth Circuit is the first federal circuit to overrule the *Frye* test expressly, sound policy reasons support the *Ellis* court's rejection of the *Frye* general acceptance standard.[146] Similarly, precedent supports the *Ellis* court's adoption of a liberal approach to the admission of government reports under rule 803(8)(C).[147] Practitioners in the Fourth Circuit now may offer as evidence the numerous government reports available without incurring the cost and inconvenience of securing the officials who prepared the reports as witnesses.[148] When admitting government epidemiological studies, courts in the Fourth Circuit should consider giving a limiting instruction to direct the jury to consider the epidemiological studies only with respect to the issue of increased risk.[149] Because cross-examination can occur through the use of expert testimony, the *Ellis* court's holding that epidemiological studies are admissible is justified.[150]

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144. *Id.*

145. *See* Kehm v. Procter & Gamble Mfg. Co., 724 F.2d 613, 619 (8th Cir. 1983) (Center for Disease Control study on toxic shock syndrome admissible because opposing party could criticize study's methodology through expert testimony); Migliorini v. United States, 521 F. Supp. 1210, 1218 (M.D. Fla. 1981) (Center for Disease Control (CDC) study on incidence of swine flue admitted along with testimony criticizing CDC's methodology). In *Kehm v. Procter & Gamble Mfg. Co.*, the Eighth Circuit reasoned that cross-examination of the toxic shock syndrome victims surveyed in the studies was unnecessary since the defendant's experts had ample opportunity to attack the Center for Disease Control and tri-state commission studies' methodologies and conclusions. *Kehm*, 724 F.2d at 619. The Eighth Circuit concluded that rule 803 does not require the declarant's presence at trial and that rule 803 does not entitle the defendants to cross-examine the preparer of the tri-state commission's study. *Id.* at 618.

146. *See supra* notes 75 and 77 and accompanying text (general acceptance test does not ensure reliability and may lead to prejudicial effect upon jury).

147. *See supra* notes 87-111, 122 and accompanying text (policies underlying liberal approach to admission of government reports under rule 803(8)(C)).

148. *See* Comment, *supra* note 87, at 209-10 (costs associated with requiring official's presence at trial).

149. *See supra* notes 129-31 and accompanying text (limiting instruction is necessary when admitting epidemiological studies).

150. *See supra* note 145 and accompanying text (cross-examination through expert testimony allows opposing party to expose flaws in study's methodology).

B. *Advantage for the Prosecution: The Fourth Circuit Examines the Relationship Between the Confrontation Clause and the Hearsay Rule*

A witness' testimony made in the presence of the trier of fact allows the factfinder to assess the witness' memory, perception, and sincerity.[1] In addition, cross-examination of a witness tests the witness' statements for imperfections.[2] Because factfinders cannot observe the demeanor of a declarant who made statements outside the courtroom, and because out-of-court statements are not subject to testing for imperfections through cross-examination, courts exclude out-of-court statements from evidence as hearsay under Federal Rule of Evidence 802.[3] Hearsay is an out-of-court statement offered as proof of the matter asserted.[4] The Federal Rules of Evidence establish a number of exceptions to the hearsay rule that allow admission of

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1. FED. R. EVID. 801 advisory committee note (*Introductory Note: The Hearsay Problem).* Under the Federal Rules of Evidence a witness must take an oath to tell the truth. *Id.* In an earlier time, courts considered the oath an effective means of ensuring that a witness would tell the truth. *Id.* Although doubt now surrounds the effectiveness of the oath, legislators have not attempted to relax the requirement of swearing witnesses. *Id.* The oath, together with cross-examination and the factfinder's ability to observe the witness' demeanor, represent the primary methods for inducing witnesses to testify truthfully in the Anglo-American judicial system. *Id.* The requirement that a witness be present at trial rests on an assumption that the solemnity of the occasion and the possibility of public disgrace will discourage falsehood. *Id.* Concommitant with that assumption is the belief that witnesses will encounter greater difficulty in falsifying when a witness must testify before the person who would be the subject of the lie. *Id.* Allowing the factfinder to observe a witness' demeanor permits the factfinder to perceive a witness' nonverbal communications. Sahm, *Demeanor Evidence: Elusive and Intangible Imponderables,* 47 A.B.A.J. 580, 580 (1961). Observation of a witness' demeanor is particularly important when witnesses give contradictory testimony. *Id.* Among the aspects of a witness' demeanor that are important to the factfinder's ability to assess a witness' credibility are the promptness, spontenaity, distinctness, coverage of essentials, consistency and directness of a witness' answers. *Id.* Juries may give weight to a witness' intelligence and the emotion shown in a witness' response. *Id.*

2. FED. R. EVID. 801 advisory committee note. On direct examination, counsel normally asks a witness questions intended to reveal only those facts favorable to the party who produced the witness. 5 WIGMORE, EVIDENCE § 1368 (Chadbourn rev. 1974). Use of facts favoring one party alone might result a body of evidence composed of half truths. *Id.* Cross-examination provides an opportunity for the opposing party to reveal facts omitted from a witness' statements during direct examination. *Id.* Cross-examination also provides an opposing party the opportunity to qualify facts revealed on direct examination. *Id.* Furthermore, cross-examination is the vehicle which exposes facts that may diminish a witness' credibility or trustworthiness. *Id.*

3. *See* FED. R. EVID. 802 (excluding hearsay); FED. R. EVID. 801(c) (defining hearsay); FED. R. EVID. 801 advisory committee note. The Advisory Committee on the proposed Federal Rules of Evidence adopted the common-law rule excluding hearsay because live testimony in the presence of the factfinder carries greater guarantees of trustworthiness than does hearsay. FED. R. EVID. 801 advisory committee note; *see supra* notes 1 & 2 (discussing benefits of live testimony and function of cross-examination).

4. *See* FED. R. EVID. 801(c) (definition of hearsay).

hearsay statements that carry circumstantial indicia of trustworthiness.[5] When a criminal defendant raises the defense of entrapment, the vast majority of the circuits agree that hearsay is inadmissible to prove the defendant's predisposition to commit the alleged crime.[6] Similarly, hearsay evidence that proves predisposition, although offered to prove some fact at issue other than predisposition, is generally inadmissible.[7]

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5. *See* FED. R. EVID. 803; FED. R. EVID. 804. Rule 803 contains various exceptions to the hearsay rule under which analysis of the declarant's availability is unnecessary. FED. R. EVID. 803. Rule 804 contains exceptions to the hearsay rule which are applicable only when the declarant is unavailable to testify. FED. R. EVID. 804. All of the exceptions under either rule 803 or rule 804 rest on the premise that the hearsay contained in these exceptions carries circumstantial indicia of reliability. FED. R. EVID. 801 advisory committee note.

6. *See, e.g.*, United States v. Webster, 649 F.2d 346, 350 (5th Cir. 1981) (in drug case, hearsay showing that defendant had sold drugs previously ruled inadmissible); United States v. McClain, 531 F.2d 431, 435-37 (9th Cir.) (hearsay proving that defendant was drug dealer held inadmissible when defendant charged with violating drug law), *cert. denied*, 429 U.S. 835 (1976); United States v. Ambrose, 483 F.2d 742, 750 (6th Cir. 1973) (hearsay concerning defendant's reputation for selling moonshine ruled inadmissible in non-tax-paid liquor case); United States v. Johnston, 426 F.2d 112, 114 (7th Cir. 1970) (finding inadmissible hearsay indicating that defendant had participated in previous drug transaction); United States v. Catanzaro, 407 F.2d 998, 1001 (3d Cir. 1969) (hearsay that defendant sold drugs previously found inadmissible in drug misbranding case); Hansford v. United States, 303 F.2d 219, 226 (D.C. Cir. 1962) (uncorroborated assertion that defendant previously sold drugs was inadmissible in narcotics case); Whiting v. United States, 295 F.2d 512, 519 (1st Cir. 1961) (hearsay showing that defendant sold and used heroin was inadmissible when defendant charged with violations of narcotics law). In an entrapment defense, the defendant admits committing the criminal acts alleged, but asserts that the government, usually through an undercover agent, induced the defendant to commit the crimes. United States v. Russell, 411 U.S. 423, 428-29 (1973); W. R. LAFAVE & J. H. ISRAEL, CRIMINAL PROCEDURE 254 (1985). Serious constitutional problems may exist, however, in the admission of guilt because the defendant's admission of guilt undercuts the presumption of innocence. W. R. LAFAVE & J. H. ISRAEL, *supra*, at 254. Consequently, a trend allowing pleading in the alternative is developing. *Id.* Under this new trend, the defendant denies commission of the crimes alleged, but asserts that, if the jury finds the defendant guilty of the crimes alleged, the government entrapped the defendant. *Id.* Denying commission of the crime is not necessarily inconsistent with asserting entrapment because the defendant is innocent of the crime and a victim of entrapment if the defendant lacked the requisite element of intent. *Id.* at 255.

A defendant may prevail on an entrapment defense only when the defendant can show that the Government implanted the criminal scheme in the defendant's mind. United States v. Russell, 411 U.S. 423, 428-29 (1973). Thus, in an entrapment case, the focus of inquiry is on whether the defendant was predisposed to commit the criminal act in question. *Id.* at In most jurisdictions, the defendant bears the burden of establishing that the Government induced the defendant to commit the crime. W. R. LAFAVE & J. H. ISRAEL, *supra*, at 255. In entrapment cases, however, the allocation of the burdens of production and persuasion is controversial. *Id.* Because entrapment is an affirmative defense, the burden of production rests on the defendant. *Id.* Some jurisdictions require the defendant to establish entrapment by a preponderance of the evidence. *Id.* Other jurisdictions require the defendant to produce only some evidence of Government inducement. *Id.* In these jurisdictions requiring the defendant to produce only some evidence of inducement, the Government must prove beyond a reasonable doubt that the defendant was predisposed to commit the type of crime alleged. *Id.*

7. *See, e.g.*, United States v. Webster, 649 F.2d 346, 349 (5th Cir. 1981) (hearsay probative of defendant's predisposition inadmissible on issue of Government's reason for

The confrontation clause of the sixth amendment to the United States Constitution guarantees criminal defendants the right to confront their accusers at trial.[8] Central to the concept of confrontation is the belief that cross-examination exposes imperfections in testimony and thus reveals the truth.[9] Yet, despite the reliable evidence goal common to the confrontation clause and the exceptions to the hearsay rule, hearsay evidence that is admissible under an exception to the hearsay rule is not necessarily admissible under the confrontation clause.[10] The Supreme Court, however, has held that certain firmly rooted exceptions to the hearsay rule satisfy the confrontation clause.[11] These holdings have produced confusion among courts and

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investigating defendant's activities); United States v. McClain, 531 F.2d 431, 435 (9th Cir. 1976) (same); United States v. Ambrose, 483 F.2d 742, 752 (6th Cir. 1972) (same); United States v. Silver, 457 F.2d 1217, 1220-22 (3d Cir. 1972) (same); United States v. Catanzaro, 407 F.2d 998, 1000-01 (3d Cir. 1969) (same); *but see* United States v. Lambinus, 747 F.2d 592, 596-98 (10th Cir. 1984) (although defendant raised entrapment defense, hearsay relevant to predisposition admitted to prove effect of statement on listener), *cert. denied,* 105 S. Ct. 2143 (1985).

8. U.S. CONST. amend. VI. The sixth amendment of the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." *Id.* The accused's right to confrontation is a fundamental right and is applicable to state criminal proceedings via the fourteenth amendment of the United States Constitution. Pointer v. Texas, 380 U.S. 400, 403 (1965). The constitutional right to confrontation rests on a common law principle which perhaps developed in reaction to the abuses at the trial of Sir Walter Raleigh. Graham, *The Right to Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One,* 8 CRIM. L. BULL. 99, 100-01 (1972). The evidence upon which Raleigh's conviction for high treason rested was a confession, later recanted, of Raleigh's alleged coconspirator and second hand hearsay supposedly made by an unknown declarant. *Id.* Neither the confessing coconspirator nor the unknown declarant was present at Raleigh's trial. *Id.* Raleigh made an impassioned plea to the court to bring his accusers to face him, but Raleigh's plea was fruitless. *Id.*

9. *See* Ohio v. Roberts, 448 U.S. 56, 63 (1980) (purpose of cross-examination is to challenge truth and sincerity of declarant's statement); Mancusi v. Stubbs, 408 U.S. 204, 213-14 (1972) (full and effective cross-examination satisfies confrontation clause); Nelson v. O'Neil, 402 U.S. 622, 627 (1971) (concerning scope of full and effective cross-examination under confrontation clause); California v. Green, 399 U.S. 149, 158 (1970) (concerning meaning of "full and effective cross-examination" under confrontation clause); *but see* Dutton v. Evans, 400 U.S. 74, 87-88 (1970) (when testimony would be peripheral and not crucial to case, confrontation and cross-examination not necessary). *See also supra* note 2 and accompanying text (function of cross-examination).

10. *See* Dutton v. Evans, 400 U.S. 74, 86-87 (1970) (Supreme Court has never held that confrontation clause and hearsay rule completely overlap one another); California v. Green, 399 U.S. 149, 155 (1970) (although confrontation clause and exceptions to hearsay rule protect same values, confrontation clause may give greater protection than does hearsay rule); 4 D. W. LOUISELL & C. B. MUELLER, FEDERAL EVIDENCE § 418 (1980) (same) [hereinafter cited as LOUISELL & MUELLER]; Note, *Confrontation and the Hearsay Rule,* 75 YALE L. J. 1434, 1436-37 (1966) (courts should not view confrontation clause and hearsay rule as interchangeable because confrontation clause embodies broader principles than does hearsay rule) [hereinafter cited as *Confrontation].*

11. *See* Ohio v. Roberts, 448 U.S. 56, 65 (1980) (prior testimony at preliminary hearing which was subject to cross-examination falls under well-established exception to hearsay rule and satisfies confrontation clause); Mancusi v. Stubbs, 408 U.S. 204, 216 (1972) (prior testimony at trial satisfies confrontation clause); Dutton v. Evans, 400 U.S. 74, 87-89 (1970) (statement

commentators concerning the relationship between the evidentiary rules and the confrontation clause.[12] In *United States v. Hunt,*[13] the Fourth Circuit recently held that no violation of the confrontation clause occurred when a district court admitted out-of-court statements that were dispositive of predisposition on the issue of the Government's reason for investigating the defendant's activities.[14]

In *Hunt,* the prosecution offered statements from three sources, none of whom testified at trial, to show that the Government had cause to investigate the defendant's activities.[15] Some statements implicating the defendant came from police officers in Columbus County, North Carolina, and linked the defendant, Judge J. Wilton Hunt, a local magistrate, to criminal activity.[16] The officers alleged that Judge Hunt had associated with criminals, had taken guns seized as evidence for his personal collection, and had attempted to purchase stolen weapons.[17] Another allegation against Hunt came from a woman who told law enforcement authorities that Judge Hunt's cousin told her that the Judge had "taken care of" some firearms charges against the cousin.[18] The final incriminating allegation came from a prison inmate who claimed that Judge Hunt had participated in drug transactions and had purchased an M-16 rifle.[19]

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identifying defendant not defined as hearsay and admissible without violation of confrontation clause); California v. Green, 399 U.S. 149, 165-68 (1970) (prior testimony which was subject to full and effective cross-examination falls under recognized hearsay exception and meets confrontation clause's requirements); Mattox v. United States, 156 U.S. 237, 243 (1895) (prior testimony at trial admissible without confrontation clause violation when declarant dies before second trial).

12. *See* U.S. CONST. amend. VI (confrontation clause); Note, *Confrontation and the Unavailable Witness: Searching for a Standard,* 18 VAL. U.L. REV. 193, 196 (1983) (relationship between confrontation clause and hearsay rule unclear under Supreme Court's holdings) [hereinafter cited as *Searching for a Standard];* 4 LOUISELL & MUELLER, *supra* note 10, at § 418 (Supreme Court offers no guidelines for determining which hearsay exceptions satisfy confrontation clause). The language of the confrontation clause allows an interpretation that a defendant has a right to cross-examine only those witnesses who come into court to testify against him. 4 LOUISELL & MUELLER, *supra* note 10, at § 418. The confrontation clause also supports the broader interpretation that a defendant may exclude certain out-of-court statements when the declarant does not testify at trial. *Id.* In holding that certain, but not all, well-established exceptions to the hearsay rule satisfy the confrontation clause, the Supreme Court adopted the interpretation that a defendant may exclude certain out-of-court statements when the declarant does not testify at trial. *Id.; see* Barber v. Page, 390 U.S. 719, 725 (1968) (although testimony from preliminary hearing is admissible under exception to hearsay rule, court's admission of preliminary testimony violated confrontatin clause). The Supreme Court has never established guidelines for determining which exceptions to the hearsay rule satisfy the confrontation clause. 4 LOUISELL & MUELLER, *supra* note 10, at § 418; *Searching for a Standard, supra,* at 196.

13. 749 F.2d 1078 (4th Cir. 1984), *cert. denied,* 105 S. Ct. 3479 (1985).

14. *Id.* at 1083.

15. *Id.* at 1082-84.

16. *Id.* at 1082. Judge J. Wilton Hunt, the defendant in *United States v. Hunt,* presided over a North Carolina State district court that handled traffic and misdemeanor cases. *Id.* at 1080.

17. *Id.* at 1082.

18. *Id.*

19. *Id.*

Based on the allegations connecting Judge Hunt with criminal activity in Columbus county, the Federal Bureau of Investigation (FBI) initiated an undercover investigation of Judge Hunt's activities.[20] FBI agents, representing themselves as members of an organized crime syndicate in need of judicial protection, arranged a meeting with Judge Hunt.[21] At that meeting, the agents received Judge Hunt's assurance of leniency for those arrested in connection with the syndicate's proposed illegal gambling operation.[22] In subsequent meetings, Hunt accepted bribes from the undercover agents.[23] Later, Judge Hunt gave the agents the telephone number of a "bookie" in South Carolina, assisted the agents in obtaining a license necessary to open a shop to use as a front for a drug operation, reduced a traffic ticket at an agent's request, and admitted to having bought smuggled goods in the past.[24] A grand jury indicted Hunt for violations of the federal racketeering laws.[25]

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20. *Id.* at 1080, 1082. In *Hunt,* the FBI began an investigation called "Colcor" of corruption in Columbus County, North Carolina, in 1980. *Id.* at 1080. During the course of the countywide investigation, the FBI focused attention on Judge Hunt's activities after rumors linking Hunt to corruption reached the FBI. *Id.* The FBI began its investigation of Judge Hunt when Joseph Moody, who had an upcoming appearance in Judge Hunt's court, told the FBI that Danny Edwards claimed that Edwards could bribe Judge Hunt. *Id.* The FBI paid Edwards $300 to bring Judge Hunt to an arranged meeting place. *Id.* Judge Hunt never appeared. *Id.* Later, FBI agents met with James Carroll, a bar owner, who arranged a meeting at Carroll's bar between an FBI undercover agent and Hunt. *Id.* The FBI agents presented themselves to Carroll as members of a crime syndicate which sought to buy Carroll's bar at a favorable price. *Id.* The undercover agents told Carroll that the syndicate intended to run a poker game in a back room of the bar, for which the syndicate needed judicial protection. *Id.*

21. *Id.* at 1080; *see supra* note 20 (discussing circumstances of FBI meeting with Judge Hunt).

22. 749 F.2d at 1081. In *Hunt,* FBI undercover agent William Redden asked Judge Hunt for advice on possible law enforcement problems that might arise from an illegal poker game which the agent proposed starting. *Id.* Judge Hunt told the agent that the game's operators probably would not receive jail time for the first offense. *Id. See supra* note 20 (discussing FBI's meeting with Judge Hunt).

23. 749 F.2d at 1081-82. In *Hunt,* James Carroll told Judge Hunt that FBI agent William Redden would pay Hunt $1500 per month for judicial protection of the gambling operation at Carroll's bar. *Id.* at 1081. Hunt agreed to provide protection and eventually accepted approximately $9000 in protection payments from FBI agents Redden and Robert Drdak. *Id.* After the FBI had made the second protection payment to Hunt, Drdak informed Hunt that the syndicate would begin a drug dealing operation in Whiteville, North Carolina. *Id.* Drdak requested that Hunt set low bonds for syndicate members arrested in connection with the drug operation, and Hunt agreed. *Id.* Drdak proposed running the drug operation from a gold and silver shop, and Hunt helped Drdak obtain the license necessary to open the shop. *Id.* Later, Hunt gave Drdak the telephone number of a bookmaker, which Drdak used in placing several bets. *Id.*

24. *Id.* at 1081-82. *See supra* note 23 (discussing FBI's bribery of Judge Hunt).

25. 749 F.2d at 1079. *See* 18 U.S.C. §§ 1962(d), 1963 (1982) (RICO statute). Based on Judge Hunt's use of his judgeship in conspiracy with others to engage in racketeering and in accepting bribes, a grand jury in *Hunt* charged Judge Hunt with violations of the Federal Racketeer Influenced and Corrupt Organizations (RICO) statute. 749 F.2d at 1079; *see* 18 U.S.C. §§ 1962(d), 1963 (1982) (RICO statute). RICO forbids the receipt of income derived from racketeering or from illegal debts run or incurred through an enterprise which affects interstate commerce. 18 U.S.C. § 1962(a) (1982). The government must prove four things to sustain a conviction under RICO. *See* United States v. Kopituk, 690 F.2d 1289, 1323 (11th Cir. 1982), *cert. denied,* 463 U.S. 1209 (1983). The prosecution must prove that an enterprise existed,

At trial, Judge Hunt raised two defenses, entrapment and outrageous governmental investigative conduct violating the due process clause of the United States Constitution.[26] During the direct examination of the FBI agents, the prosecution elicited the three allegations of Hunt's prior misconduct on which the FBI had based its investigation.[27] In response to the defendant's allegation that the FBI had no cause to investigate Judge Hunt, the prosecution offered the testimony including the hearsay statements concerning Hunt's conduct prior to the investigation to show the Government's reason for investigating Hunt.[28] Later, during cross-examination of an FBI agent, counsel for the defense elicited more information concerning Hunt's misconduct prior to the investigation.[29] The jury convicted Judge Hunt of conspiracy to conduct his judgeship through a pattern of racketeering in violation of North Carolina law and the Federal Racketeer Influenced and Corrupt Organizations (RICO) statute.[30]

On appeal to the United States Court of Appeals for Fourth Circuit, Judge Hunt contended that the testimony containing the allegations of Hunt's conduct prior to the investigation was inadmissible hearsay.[31] Judge Hunt

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that the enterprise affected interstate commerce, that the defendant derived income from a pattern of racketeering activity, and that the defendant used some part of the income to acquire or operate the enterprise. *Id.* In addition to charging Judge Hunt with RICO violations, the Government in *Hunt* charged Hunt with violations of federal and state laws prohibiting the use of interstate telephone facilities to carry on illegal gambling activities. 749 F.2d at 1079-80.

26. 749 F.2d at 1079-80. In a due process defense, the defendant alleges that the Government's involvement in the criminal activity was so extensive and outrageous that the Government's action was repugnant to the American sense of justice. *See* U.S. CONST. amend. XIV (due process clause); United States v. Russell, 411 U.S. 423, 428 (1973) (citing *Green v. United States*, 454 F.2d 783 (9th Cir. 1972), which held that overzealous law enforcement violated defendant's right to due process); W. R. LAFAVE & J. H. ISRAEL, CRIMINAL PROCEDURE § 5.4 (1985) (discussing due process defense). In *United v. Twigg*, the United States Court of Appeals for the Third Circuit stated that a violation of the concept of fundamental fairness embodied in the due process clause occurs when law enforcement officials conceive, create, and conduct full scale criminal activities merely to produce a conviction. 588 F.2d 373, 377-79 (3d Cir. 1978); *see* U.S. CONST. amend. XIV (due process clause).

27. 749 F.2d at 1082-84.

28. *Id.* at 1083-84.

29. *Id.* at 1083. In *Hunt*, the defendant, Judge Hunt, asserted that the Government lacked any reason to begin investigating Judge Hunt's activities. *Id.* On cross-examination, therefore, defense counsel questioned FBI Agent Drdak about the Government's reason for investigating Hunt. *Id.* Drdak related the entirety of the allegations concerning Hunt's conduct prior to the investigation. *Id.* at 1083; *see id.* at 1082-84 (concerning hearsay statements that proved Judge Hunt's predisposition).

30. *Id.* at 1079; *see* 18 U.S.C. §§ 1962(a), 1963 (1982) (RICO statute). In addition to finding the defendant guilty of violating the Federal Racketeer Influenced and Corrupt Organizations (RICO) statute, the jury in *Hunt* found the defendant guilty of violating state and federal laws prohibiting the use of interstate telephone facilities to further illegal gambling operations. 749 F.2d at 1079-80. The defendant's alleged help in telephoning a bookmaker in another state gave rise to the charge that the defendant used an interstate telephone facility to further illegal gambling activities. *Id.* at 1081; *see supra* note 25 (charges against Judge Hunt).

31. 749 F.2d at 1082; *see supra* note 6 and accompanying text (use of hearsay to prove predisposition).

also asserted that admission of the allegations violated the confrontation clause of the sixth amendment of the United States Constitution.[32] On the issue of confrontation, the *Hunt* court noted that under the United States Supreme Court case of *Ohio v. Roberts,*[33] the party offering the hearsay testimony must show that the declarant is unavailable to testify to meet the confrontation clause's requirements for admitting statements in the declarant's absence.[34] The *Hunt* court also noted that *Roberts* requires that a statement carry sufficient indicia of reliability to be admissible if the declarant is unavailable to testify.[35] The Fourth Circuit, however, held that the confrontation clause was inapplicable to the circumstances in *Hunt.*[36] The *Hunt* court reasoned that because the allegations concerning Judge Hunt's conduct prior to the FBI's investigation did not meet the definition of hearsay, no confrontation clause issues resulted from allowing admission of the allegations.[37] The content of the testimony concerning Hunt's conduct prior to the investigation showed that Hunt was predisposed to use his judicial office for racketeering activities.[38] The Fourth Circuit, however, found that the prosecution offered the statements not to prove predisposition, but to prove that the investigation of Hunt was reasonable and free from improper motive.[39]

After finding that the testimony concerning Hunt's conduct prior to investigation was admissible under the confrontation clause, the Fourth Circuit held that the testimony was admissible under the Federal Rules of Evidence and judicially developed evidentiary rules.[40] The Fourth Circuit noted that every federal circuit ordinarily prohibits the admission of hearsay to prove predisposition.[41] The *Hunt* court surmised, however, that the prosecution enjoys the right to rebut claims of investigative misconduct when the defense raises a due process claim.[42] The Fourth Circuit determined that

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32. 749 F.2d at 1082. *See* U.S. CONST. amend. VI (confrontation clause); *supra* notes 8 and 12 (discussing confrontation clause); *infra* note 103 and accompanying text (prosecutorial duty under confrontation clause).

33. 448 U.S. 56 (1980).

34. 749 F.2d at 1082. *See* Ohio v. Roberts, 448 U.S. 56, 74 (1980) (prosecution must show witness is unavailable to testify under confrontation clause); *infra* note 103 and accompanying text (discussing prosecution's duty under confrontation clause).

35. 749 F.2d at 1082. *See* Ohio v. Roberts, 448 U.S. 56, 67-76 (1980) (hearsay must carry sufficient indicia of reliability to be admissible under confrontation clause); *infra* note 101 (test for admission of hearsay under confrontation clause).

36. 749 F.2d at 1082-84.

37. 749 F.2d at 1082-84; *see* FED. R. EVID. 801(c) (defining of hearsay).

38. 749 F.2d at 1083.

39. *See id.* (admitting hearsay, if offered to prove predisposition, probably would be improper under confrontation clause).

40. *Id.* at 1084.

41. *Id.* at 1082; *see supra* note 6 and accompanying text (discussing federal circuits' position on admission of hearsay that proves predisposition).

42. 749 F.2d at 1084. The defendant in criminal trial must raise an issue or waive the right to appeal an adverse determination on that issue. W. R. LAFAVE & J. H. ISRAEL, CRIMINAL

the general rule prohibiting admission of hearsay to prove predisposition did not apply because the testimony concerning Hunt's conduct prior to the investigation, offered on the issue of the reasonableness of investigation and not on the issue of predisposition, was not offered to prove the truth of the matter asserted and thus did not meet the definition of hearsay.[43] The *Hunt* court also viewed defense counsel's further questioning of the FBI agent on the Government's reason for investigating Hunt as a waiver of the right to complain about the fruits of that questioning.[44] In determining that the general rule prohibiting the use of hearsay to prove predisposition was inapplicable, the *Hunt* court also relied on *United States v. Webster,*[45] a decision from the Fifth Circuit.[46] In *Webster,* the Government charged the defendant with selling cocaine to an undercover agent.[47] The defendant raised an entrapment defense and questioned the reasonableness of the Government's actions.[48] The *Webster* court noted that although the prejudicial effect of admitting hearsay, probative of the defendant's predisposition, on the issue of governmental good faith would outweigh the probative value in most cases, special circumstances might arise that would justify admitting this hearsay.[49] Without explanation, the Fourth Circuit deemed the *Hunt* case to be a special circumstance which justified the admission of the hearsay on the issue of governmental good faith.[50]

In addition to asserting that the evidence of predisposition was inadmissible, Judge Hunt contended that the evidence of predisposition was insufficient as a matter of law to sustain the conviction.[51] The Fourth Circuit first noted that although the evidence of predisposition was not overwhelming, the defendant's ready response to the Government's inducements to commit the crimes entitled the jury to find that the defendant was predisposed.[52] Noting that proving a public official's predisposition to accept bribes is often

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PROCEDURE § 26.5 (1985). Waiver results in the defendant's loss of either a substantive or procedural right. *Id.* at n.13. Thus, defense counsel must choose between raising issues that may reveal facts detrimental to the defendant's case or waiving the defendant's right to complain on appeal. *See id.* Once defense counsel raises an issue, however, the government is entitled to rebut the defendant's evidence to give the factfinder a complete understanding of the issue raised. United States v. Corrigan, 168 F.2d 641, 645 (2d Cir. 1948). During rebuttal, the Federal Rules of Evidence continue to apply. *See* United States v. Driscoll, 445 F. Supp. 864, 867 (D.N.J. 1978) (noting that prior testimony still must satisfy exception to hearsay rule even though defendant raised issue to which testimony was relevant).

43. 749 F.2d at 1082-84.

44. *Id.* at 1084; *see supra* note 42 (discussing concept of waiver); *supra* note 29 (defendant's allegations in *Hunt* that government lacked reason to investigate).

45. 649 F.2d 346, 350-51 (5th Cir. 1981).

46. 749 F.2d at 1084.

47. *Webster,* 649 F.2d at 351.

48. *Id.*

49. *Id.; see infra* note 75 and accompanying text (discussion of special circumstances which would justify admission of predisposition hearsay).

50. 749 F.2d at 1084.

51. *Id.*

52. *Id.* at 1085.

difficult, the *Hunt* court stated that the jury might look to the circumstances surrounding the acceptance of the bribes and find predisposition in the act of acceptance.[53] Upon reviewing the evidence of predisposition in Hunt's case, the Fourth Circuit concluded that Hunt's responses to the FBI's inducements were ready and that the surrounding circumstances offered some indication of predisposition, supporting the jury's verdict.[54]

In evaluating the substance of Hunt's due process claim that the Government's conduct was outrageous, the Fourth Circuit found that the Government had a reasonable basis on which to begin an investigation of Hunt's activities.[55] The Fourth Circuit determined that the reports concerning Judge Hunt's alleged activities prior to investigation provided a reasonable basis for investigation.[56] In addition to claiming that the FBI's persistence in investigating was unreasonable, Hunt claimed that the Government agents' threat of violence during the investigation provided a separate ground for holding that a due process violation had occurred.[57] The *Hunt* court concluded, however, that the threat of violence was not substantial enough to be outrageous and that no evidence existed to show that the agents directed any threat at Hunt himself.[58] After disposing of Hunt's due process claim, the *Hunt* court rejected Hunt's final argument that RICO was inapplicable to Hunt's case.[59] Hunt asserted that RICO applied only to members of organized crime.[60] Relying on a Seventh Circuit opinion which held that proof of the defendant's connection with organized crime was unnecessary to convict under RICO, the Fourth Circuit concluded that Hunt's activities fell within the ambit of the statute's proscriptions.[61]

While the majority in *Hunt* concluded that the district court properly admitted the out-of-court statements which were dispositive of both Hunt's predisposition and the Government's motive for investigating him, the dissent found that the prejudicial effect of the testimony concerning Hunt's prior conduct outweighed the probative value of the testimony.[62] Given the secondary status of the issue of the Government's good faith in entrapment cases and the ability of the hearsay admitted in *Hunt* to prove predisposition overwhelmingly, the dissent reasoned that the admission of the evidence

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53. *Id.* In holding that the jury might find predisposition in the circumstances surrounding the act of accepting a bribe, the *Hunt* court relied on the Third Circuit's holding in *United States v. Jannotti. Id.; see* United States v. Jannotti, 673 F.2d 578, 604 (3d Cir.) (holding that jury may find predisposition in defendant's acts during investigation as well as in acts prior to investigation), *cert. denied,* 457 U.S. 1106 (1982); *supra* note 6 (proof of entrapment).

54. 749 F.2d at 1085-86.

55. *Id.* at 1087.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 1088.

60. *Id.*

61. *Id.*

62. *Id.* at 1089 (Sprouse, J., dissenting).

concerning Hunt's prior conduct substantially prejudiced Hunt's case.[63] The dissent disagreed with the majority's finding that the *Hunt* case presented those special circumstances, required under *Webster,* to warrant the admission of hearsay tending to prove the defendant's predisposition.[64] Like the majority, however, the dissent failed to offer reasons for its conclusion that *Hunt* did not present special circumstances that would justify the admission of hearsay which proved Hunt's predisposition as well as the Government's good faith in investigating him.[65] The dissent stated that under the confrontation clause, the prosecution must show that the declarant was unavailable to testify before the admission of the hearsay evidence is permissible and noted that the prosecution had failed to show unavailability.[66] The dissent found that a careful analysis of hearsay questions was necessary in entrapment cases because the hearsay might be the product of excessive prosecutorial zeal.[67] The dissent also deemed careful analysis of the hearsay exceptions particularly important in cases in which the defendant claims a violation of the confrontation clause because satisfaction of a recognized hearsay exception does not necessarily satisfy the confrontation clause.[68] The dissent concluded that the majority's holding forced defendants in situations similar to the situation in *Hunt* to choose between an entrapment defense and a due process defense.[69]

The dissent's view that the special circumstances warranting admission of hearsay tending to prove predisposition were absent in *Hunt* is consistent with the Fifth Circuit's reasoning in *Webster.*[70] In *Webster,* the Fifth Circuit stated that only in rare cases is hearsay that is probative of the defendant's predisposition admissible on the issue of the Government's good faith in investigating the defendant's activities.[71] As an example of a case in which hearsay might be admissible on the issue of the investigator's good faith, the Fifth Circuit suggested the situation in which the defendant asserts that a certain agent initiated the investigation only because that agent harbored a

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63. *Id.* at 1090-91; *see supra* note 6 (nature of entrapment defense).

64. 749 F.2d at 1090-91 (Sprouse, J., dissenting).

65. *See id.* at 1089.

66. *Id.* at 1091; *see* Ohio v. Roberts, 448 U.S. 56, 74 (1980) (prosecution must show witness' unavailability before confrontation clause will permit admission of hearsay).

67. 749 F.2d at 1090 (Sprouse, J., dissenting).

68. *Id.* at 1090 (citing *California v. Green,* 399 U.S. 149, 155-56 (1970)); *see* Barber v. Page, 390 U.S. 719, 725 (1958) (although prior testimony was admissible under hearsay exception, confrontation clause prohibited hearsay's admission).

69. 749 F.2d at 1092 (Sprouse, J., dissenting); *infra* note 130 and accompanying text (choice between due process and entrapment defenses).

70. *See* 749 F.2d at 1089-91 (dissent's analysis of hearsay used to prove predisposition); *Webster,* 649 F.2d at 350-51 (Fifth Circuit's analysis of hearsay used to prove predisposition); *infra* note 75 (comparing Fifth and Ninth Circuit opinions on admission of hearsay that proves both defendant's predisposition and Government's good faith).

71. *Webster,* 649 F.2d at 351; *see infra* note 75 (discussing Fifth Circuit's subsequent case clarifying when special circumstances exist allowing admission of hearsay proving predisposition).

personal prejudice against the defendant.[72] In *Hunt,* Judge Hunt did not allege that the FBI agents initiated the investigation because of any personal bias against Judge Hunt.[73] Rather, Hunt alleged that the FBI's investigation constituted outrageous Government conduct because the FBI persisted in pursuing Hunt, and because the FBI threatened violence against Hunt's friend.[74] As the dissent in *Hunt* suggests, the facts of *Hunt* appear to lack the extraordinary circumstances which would justify bypassing the general rule prohibiting admission of hearsay relevant to predisposition.[75]

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72. *Webster,* 649 F.2d at 351.

73. *See* 749 F.2d at 1079-82 (describing basis for Judge Hunt's claim that Government's actions violated due process).

74. *Id.* at 1087.

75. *See* United States v. Howell, 664 F.2d 101, 104-05 (5th Cir. 1981), *cert. denied,* 455 U.S. 1005 (1982). In *United States v. Howell,* the Fifth Circuit clarified, in two respects, the approach developed in *Webster* to determine whether to admit hearsay probative of predisposition. *See id.* at 105-06. In *Howell,* a jury convicted the defendant of conspiring to steal, transport, and dispose of a truck and some carpet. *Id.* at 103. The prosecution elicited hearsay testimony concerning the reputation of a store for trafficking in stolen goods and other hearsay testimony concerning the reputation of the defendant for associating with a ring of thieves. *Id.* at 104. Like Judge Hunt, the defendant in *Howell* did not allege that the Government's agent harbored any personal prejudice against the defendant. *See id.* at 102-05; *see supra* note 29 (Judge Hunt's allegation that Government's investigation was groundless). The Fifth Circuit held that the evidence concerning the store's reputation was admissible because the defendant initially questioned the reason for the investigation. *Howell,* 664 F.2d at 105; *see supra* note 42 and accompanying text (theory of waiver). Judge Hunt, like the defendant in *Howell,* first raised the issue of the reasonableness of the Government's investigation. *See* 749 F.2d at 1083 (defendant's pleadings alleged Government lacked cause to investigate); *supra* note 42 and accompanying text (discussing concept of waiver). Unlike the Fourth Circuit's reasoning in *Hunt* that the defendant's introduction of the issue of governmental good faith in investigating partially justified admitting the evidence, the Fifth Circuit held that the hearsay concerning the defendant's reputation, which was relevant to predisposition, was inadmissible under *Webster. Howell,* 664 F.2d at 105; *see Webster,* 649 F.2d at 351 (hearsay showing predisposition was inadmissible to show Government's good faith). The Fifth Circuit appeared to take the view that waiver alone was insufficient to justify relaxing the ban on admitting hearsay which proves both the defendant's predisposition and the Government's motive for investigating. *See Howell,* 664 F.2d at 105. The Fourth Circuit, in contrast, views waiver as a partial justification for relaxing the ban. *See Hunt,* 749 F.2d at 1084. Furthermore, the *Howell* court appears to follow the *Webster* court's suggestion that the defendant must allege that the Government's investigation arose out of personal prejudice against the defendant to create the special circumstances which justify relaxing the ban. *See Howell,* 664 F.2d at 105. The Fourth Circuit, however, has failed to define what constitutes special circumstances. *See* 749 F.2d at 1084. The *Howell* court's apparent conclusion that raising the issue of good faith by the defendant does not justify relaxing precedential rules of evidence, such as *Webster,* is arguably sound. *See* United States v. Driscoll, 445 F. Supp. 864, 867 (D.N.J. 1978) (rules of evidence continue to apply after defendant raises issue); *supra* note 42 (explaining concept of waiver). Furthermore, because the issue of the Government's good faith is a secondary issue in an entrapment defense, the *Howell* court's refusal to admit hearsay that proves both the defendant's predisposition and the Government's good faith, even when the defendant raises the issue, preserves the principle that the focus of inquiry in an entrapment defense is on predisposition. *See supra* note 6 (explaining elements of entrapment defense); *infra* note 83 (Government's good faith is secondary issue in entrapment defense).

In addition to finding support in *Webster,* the policies that underlie the Federal Rules of Evidence support the dissent's conclusion in *Hunt* that hearsay which proves both the defendant's predisposition and the Government's good faith is inadmissible.[76] In particular, the policies of the Federal Rules of Evidence suggest that exclusion of hearsay probative of predisposition is appropriate in entrapment cases.[77] In an entrapment defense, the

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The Fourth Circuit's holding in *Hunt* that raising the issue of governmental good faith justifies admission of hearsay relevant to the defendant's predisposition finds support in several Ninth Circuit opinions. *See* United States v. Rangel, 534 F.2d 147, 149 (9th Cir.), *cert. denied,* 429 U.S. 854 (1976); United States v. McClain, 531 F.2d 431, 436 (9th Cir. 1976); United States v. Walton, 411 F.2d 283, 290-91 (9th Cir. 1969). In *United States v. Rangel,* the defendant appealed his conviction for conspiracy to distribute heroin. 534 F.2d at 148. The defendant raised an entrapment defense at trial. *Id.* The Ninth Circuit in *Rangel* reasoned that admission of hearsay relevant to the defendant's predisposition was proper for two reasons, notwithstanding the general rule prohibiting use of hearsay dispositive of predisposition. *Id.* at 148-49. First, the identity of the declarant was known. *Id.* Second, the defendant called the declarant as a witness, and the declarant repeated the statement in court. *Id.* The *Rangel* court concluded that the defendant had waived his right to complain. *Id.* The *Rangel* court, however, refused to decide whether the admission of the hearsay actually violated the general rule prohibiting admission of hearsay probative of the defendant's predisposition. *Id.* at 149. The *Rangel* case differs from the *Hunt* case because the identity of the declarants in *Hunt* was unknown, and because the declarants in *Hunt* did not testify at trial. *See* 749 F.2d at 1082; *cf. Rangel,* 534 F.2d at 149.

In *United States v. Walton,* the Ninth Circuit affirmed the defendant's conviction for violations of federal narcotics and tax laws. 411 F.2d at 285, 291. The defendant in *Walton* claimed that the undercover agents, to whom the defendant sold heroin, had entrapped the defendant. *Id.* at 285. During cross-examination of the agents, defense counsel elicited testimony composed of hearsay concerning the defendant's reputation as a drug dealer. *Id.* at 291. Defense counsel failed to move to strike the hearsay elicited on cross-examination of the agents. *Id.* The *Walton* court accordingly concluded that the admission of the hearsay concerning the defendant's reputation was not reversible error. *Id.* The *Walton* case parallels the *Hunt* case because defense counsel in *Hunt* elicited on cross-examination hearsay probative of the defendant's predisposition and failed to move to strike the damaging testimony. *See* 749 F.2d at 1084; *cf. Walton,* 411 F.2d at 291.

In *United States v. McClain,* the defendant appealed his conviction for possession of cocaine with the intent to distribute. 531 F.2d at 432. At trial, the defendant raised an entrapment defense and asserted that an FBI undercover agent introduced the defendant to two men who beat the defendant until the defendant agreed to do their bidding. *Id.* at 432-33. The defendant asserted that the two men forced the defendant to complete a drug transaction. *Id.* The prosecution, over the defendant's objection, introduced hearsay which suggested that the defendant had a reputation as a cocaine dealer. *Id.* at 433. In holding the hearsay inadmissible, the Ninth Circuit distinguished the *McClain* case from the *Walton* case in which the defense raised the issue of the Government's good faith. *Id.* at 437. The significance of the Ninth Circuit's decision in *McClain* lies in the *Walton* court's suggestion that the hearsay concerning the defendant's predisposition might have been admissible if the defendant had raised the issue of the Government's good faith. *See id.* Accordingly, the *McClain* opinion offers some support for the *Hunt* court's reasoning that hearsay probative of the defendant's predisposition is admissible when the defendant has raised the issue of the Government's good faith. *See id.; cf. Hunt,* 749 F.2d at 1084.

76. *See supra* notes 1 and 2 (discussing principles underlying rule against hearsay); *infra* notes 77-95 (policies underlying Federal Rules of Evidence).

77. *See infra* notes 83-92 (policies underlying Federal Rules of Evidence); *infra* notes 86-88 (discussing purposes of rule 403 and hearsay rule).

defendant asserts that he did not possess the intent to commit the crime alleged and that only the Government's inducements convinced him to commit the crime.[78] The prosecution may rebut the defendant's assertion that he lacked the requisite intent by showing that the defendant was predisposed to commit the crime in question.[79] Predisposition concerns the defendant's state of mind before coming in contact with the Government's agents.[80] If the defendant's decision to commit the crime is the product of his own prior preference for criminal activity, and not the product of the Government's persuasion, then the defendant was predisposed to commit the crime.[81] The sole inquiry in an entrapment defense is whether the defendant was predisposed to commit the crime in question.[82] The issue of the Government's good faith and reasonableness is of secondary importance and may not be relevant at all.[83] Therefore, any evidence admitted on the issue of the Government's reason for investigating is necessarily of low relevance.[84]

Because the substantive theory of entrapment placed little emphasis on the Government's motive for investigating the defendant, and thus makes the relevance of evidence concerning the Government's motive weak, Federal Rule of Evidence 403 is particularly important to courts hearing cases in which the defendant alleges entrapment.[85] All evidence offered at trial is subject to rule 403.[86] Under rule 403, a court may exclude evidence when the prejudicial effect of the evidence outweighs the relevance of the evidence.[87] Second-hand hearsay coming from unknown informants of unascertainable reliability which proves that the defendant was predisposed to commit the crime is likely to be unfairly prejudicial.[88] The defendant is left with no effective way to rebut the informant's assertions or to cross-examine the

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78. *See supra* note 6 (discussing elements of entrapment defense).

79. *Id.*

80. United States v. Williams 705 F.2d 603, 618 (2d Cir. 1983), *cert. denied,* 464 U.S. 1007 (1983).

81. *Id.*

82. United States v. Russell, 411 U.S. 423, 433-35 (1973); *see supra* note 6 (discussing elements of entrapment defense).

83. *Webster,* 649 F.2d at 351; *see McClain,* 531 F.2d at 435-36 (Supreme Court's decisions on entrapment indicate that hearsay which proves both defendant's predisposition and Government's good faith is inadmissible because of secondary nature of good faith issue); W. R. LAFAVE & J. H. ISRAEL, *supra* note 6, at § 5.2 (focus of entrapment defense is on defendant's predisposition rather than on Government's conduct); *but see Russell,* 411 U.S. at 441 (Stewart, J., dissenting) (focus of entrapment defense should be on Government's conduct rather than on defendant's predisposition).

84. *See Webster,* 649 F.2d at 351.

85. *See infra* notes 86-95 (function of rule 403 in entrapment cases).

86. FED. R. EVID. 403; 1 WEINSTEIN'S, EVIDENCE § 403[01] (1975). Federal Rule of Evidence 403 applies to all forms of evidence, whether the evidence comes from testimony, hearsay admitted under an exception to the hearsay rule, exhibits, demonstrative or circumstantial proof. WEINSTEIN, *supra* at § 403[01].

87. FED. R. EVID. 403.

88. *See Webster,* 649 F.2d at 351 (hearsay concerning predisposition is poor evidence); *McClain,* 531 F.2d at 435-36 (allowing hearsay from unknown informant to prove predisposition is use of worst sort of evidence); W. R. LAFAVE & J. H. ISRAEL, *supra* note 6, at § 5.2 (major

absent informant, creating an unfair advantage for the prosecution.[89] The goals of rule 403 and the hearsay rule are similar when applied to situations involving hearsay.[90] The purpose of the hearsay rule is to prevent the factfinder from reaching verdicts based on half truths or truthless gossip.[91] Similarly, rule 403 seeks to ensure fair results.[92] The prejudicial effect of hearsay that proves predisposition will outweigh the necessarily low relevance of the hearsay in almost all entrapment cases.[93] Even though hearsay probative of the defendant's predisposition may not satisfy the definition of hearsay because the prosecution offered the statement on an issue other than predisposition, most federal circuits forbid admitting the hearsay to avoid the possibility of creating an unrebuttable and unfair prejudice to the defendant's case.[94] The Fourth and Tenth Circuits stand alone in allowing the admission of hearsay that is relevant to the question of the defendant's predisposition when the hearsay is also relevant to another issue.[95]

Like the Federal Rules of Evidence, which seek to ensure that neither party enjoys an unfair advantage, the confrontation clause seeks to ensure fairness and integrity in criminal proceedings by protecting the defendant's interest in revealing through cross-examination the whole truth behind the prosecution's allegations.[96] The disagreement between the majority and the dissent in *Hunt* on the confrontation clause's requirements is understandable in light of the confusion surrounding the relationship between the hearsay

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criticism is that courts often discard usual rules of evidence and use hearsay to prove predisposition in entrapment cases).

89. *McClain,* 531 F.2d at 435. The use of the rules of evidence in a way that employs no effort to avoid the danger of prejudice is prejudicial under rule 403. WEINSTEIN, *supra* note 86, at § 403[03]; *see* United States v. McManaman, 606 F.2d 919, 926 (10th Cir. 1979) (prosecution's failure to excise inflammatory portions of conversation offered as evidence was prejudicial).

90. *See* FED. R. EVID. 403 advisory committee note (purpose of Rule 403 is to prevent decisions based on improper foundation); *supra* notes 1 and 2 (discussing principles underlying rule against hearsay); WEINSTEIN, *supra* note 86, at § 402[01] (goal of ascertaining truth in factfinding process not served by indiscriminate admission of evidence).

91. *See* WIGMORE, *supra* note 2, at § 1367 (witness' presence in court allows opposing party to cross-examine and thus reveal truth behind witness' statement); *supra* notes 1, 2, and 3 and accompanying text (discussing principles supporting rule against hearsay).

92. *See* WEINSTEIN, *supra* note 86, at § 403[03] (rule 403 guards against admission of evidence which would unfairly prejudice party's case).

93. *Webster,* 649 F.2d at 351; *see supra* note 83 (central focus in entrapment defense is defendant's predisposition, not Government's conduct).

94. *See supra* note 6 (citing federal circuit court decisions prohibiting admission of hearsay which proves defendant's predisposition); *supra* note 89 and accompanying text (prejudice in admission of hearsay proving defendant's predisposition).

95. *See* United States v. Lambinus, 747 F.2d 592, 596-98 (10th Cir. 1984) (allowing admission of hearsay that proved defendant's predisposition); *supra* note 7 (comparing circuits' holdings on admissibility of hearsay that shows defendant's predisposition).

96. *See* Ohio v. Roberts, 448 U.S. 56, 63 n.6 (1980) (cross-examination allows testing of truth and sincerity of witness' statement); *supra* note 2 (discussing function of cross-examination); *supra* note 8 (text of confrontation clause); *supra* note 10 and accompanying text (overlap between confrontation clause and hearsay rule).

rule and the confrontation clause.[97] The Supreme Court has stated that the confrontation clause requires a narrower, stricter interpretation that the hearsay rule.[98] The Court has held that evidence that satisfies an exception to the hearsay rule nonetheless may be inadmissible under the confrontation clause.[99] During the Court's history of interpreting the confrontation clause, however, no clear guidelines have emerged for determining whether a given exception to the hearsay rule satisfies the confrontation clause.[100]

Despite the confusion surrounding the relationship between the confrontation clause and the hearsay rule, the Supreme Court has established a threshold requirement for analyzing confrontation clause problems.[101] The prosecution has an affirmative duty to make a good faith effort, using reasonable means, to produce the declarant at trial.[102] As a general rule, the

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97. *See supra* note 12 (discussing possible interpretations of confrontation clause).

98. California v. Green, 399 U.S. 149, 155-56 (1970).

99. *See* Bruton v. United States, 391 U.S. 123, 137 (1968) (confrontation clause required exclusion of nontestifying codefendant's confession which implicated defendant although confession would be admissible under new Federal Rules of Evidence 804(b)(3) as declaration against penal interest); *see also* Barber v. Page, 390 U.S. 719, 725-26 (1968) (excluding preliminary hearing testimony that is admissible under exception to hearsay rule but excludable under confrontation clause); Pointer v. Texas, 380 U.S. 400, 406-408 (1965) (same); *see also supra* note 10 and accompanying text (overlap between confrontation clause and hearsay rule).

100. *Searching for a Standard, supra* note 12, at 196; LOUISELL & MUELLER, *supra* note 10, at § 418; *see supra* note 12 (discussing possible interpretations of confrontation clause). The Supreme Court has identified three exceptions to the hearsay rule that satisfy the confrontation clause. *See* LOUISELL & MUELLER, *supra* note 10, at § 418. First, the statement of coconspirators may be admissible under the confrontation clause. Dutton v. Evans, 400 U.S. 74, 87-89 (1970). Second, dying declarations are admissible under the confrontation clause. Mattox v. United States, 156 U.S. 237, 243-44 (1895). Finally, prior testimony that carries sufficient indicia of reliability may be admissible under the confrontation clause if the witness is legally unavailable to testify. Ohio v. Roberts, 448 U.S. 56, 75-76 (1980). In *Roberts,* the Supreme Court stated that certain hearsay exceptions carry indicia of reliability adequate to warrant admission, but failed to enumerate the approved exceptions. *Id.* at 66. The *Roberts* Court indicated that if the prosecution offers evidence that does not satisfy an approved exception, however, the prosecution must show that evidence offered carries guarantees of trustworthiness. *Id.*

101. *See* Ohio v. Roberts, 448 U.S. 56, 65-66 (1980) (prosecution first must show that witness is unavailable and then demonstrate trustworthiness of hearsay); *Searching for a Standard, supra* note 12, at 194 (court must determine that witness is unavailable and that testimony is reliable before admitting evidence); Note, State v. Roberts: *Balancing the Right to Confront with the Admission of Preliminary Hearing Testimony,* 10 CAP. U. L. REV. 365, 375-79 (1980) (characterizing Supreme court's decision in *Ohio v. Roberts* as clarifying threshold requirements for admission of evidence under confrontation clause). LOUISELL & MUELLER, *supra* note 10, at 418.

102. Ohio V. Roberts, 448 U.S. 56, 74 (1980). In an early confrontation clause case, *Motes v. United States,* a coconspirator agreed to testify against the defendant, and the prosecution deposed the coconspirator prior to trial. Motes v. United States, 178 U.S. 458, 467 (1900). The prosecution secured the coconspirator's release from jail to testify at the defendant's trial. *Id.* at 868. The coconspirator disappeared, however, from the hotel in which the prosecution had housed the coconspirator. *Id.* The Supreme Court held that the admission of a deposition violated the confrontation clause when the prosecution's negligence caused the deponent's absence. *Id.* at 471. Thus, the confrontation clause appears to be more than a constitutional

prosecution must use reasonable efforts to produce a witness, except when the witness' testimony would not be crucial or devastating to the defendant's case.[103] The Court, however, has not developed a test to guide courts in determining whether a witness' testimony is crucial or devastating.[104] Nonetheless, if a witness' testimony would be crucial or devastating to the defendant's case, courts must engage in the two-step analysis, which the Supreme Court announced in *Ohio v. Roberts,*[105] before admitting hearsay in the absence of the declarant.[106]

In *Roberts,* a forgery and stolen credit card case, the prosecution introduced a witness' testimony from a preliminary hearing in which the witness stated that she had not given the defendant permission to use her

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hearsay rule. *Confrontation, supra* note 10, at 1436-37. The confrontation clause directs prosecutorial behavior in addition to controlling the type of evidence admissible at trial. *Id.*

The idea that the confrontation clause directs prosecutorial behavior finds further support in *Barber v. Page. See* Barber v. Page, 390 U.S. 719, 725 (1968). In *Barber,* the witness was a prisoner in a penitentiary beyond the jurisdictional reach of the state in which the defendant was on trial. *Id.* at 720. The prosecution did not request the prisoner's release from the penitentiary to testify. *Id.* at 723. At the defendant's trial, the prosecution introduced the witness' testimony from a preliminary hearing. *Id.* at 720. The Supreme Court held that use of the prior testimony violated the confrontation clause because the prosecution failed to make a good faith effort to produce the witness. *Id.* at 725. The confrontation clause, therefore, not only prevents the prosecution from acting negligently but also directs the prosecution to act affirmatively to produce the witness. *Searching for a Standard, supra* note 12, at 197-99.

Justice Harlan defined the scope of the prosecution's duty to produce a witness in *California v. Green. See* Green v. California, 399 U.S. 149, 189 n.22 (1970) (Harlan, J., concurring). In *Green,* the witness was available to testify and in fact testified at trial. *Id.* at 151. Because of an overindulgence in hallucinogenic drugs, however, the witness was unable to distinguish fact from fantasy. *Id.* at 152. The witness was unable to say with certainty that his identification of the defendant was the product of fact rather than of fantasy. *Id.* The trial court admitted the witness' testimony from a preliminary hearing during which the witness identified the defendant. *Id.* The Supreme Court upheld the admission of the prior testimony on the theory that defense counsel had subjected the witness to the type of questioning typical of cross-examination at the preliminary hearing. *Id.* at 165-69. The Court reasoned that the jury had the opportunity to assess the witness' efforts to explain the inconsistency in his testimonies. *Id.* at 164. In his concurrence, Justice Harlan noted that the prosecution need only make reasonable, not extraordinary, efforts to produce a witness. *Id.* at 189, n.22. Subsequently in *Ohio v. Roberts,* the Supreme Court adopted Justice Harlan's view that the prosecution need use only reasonable means to produce a witness. *See* Ohio v. Roberts, 448 U.S. 56, 74 (1980).

103. Dutton v. Evans, 400 U.S. 74, 87-89 (1970). In *Dutton,* a cellmate overheard a coconspirator make an incriminating statement concerning the defendant's involvement in a murder. *Id.* at 77. At trial, the prosecutor put the cellmate on the stand, and the cellmate repeated the incriminating statement. *Id.* at 77-78. Also at trial, however, were 20 other witnesses for the prosecution. *Id.* at 87. Among those witnesses was an eyewitness who related all the details of the murder. *Id.* The *Dutton* Court viewed the confrontation of the absent coconspirator to be of minimal value to the defendant's case, given the extensive evidence provided by the eyewitness. *Id.* at 87-89.

104. *Searching for a Standard, supra* note 12, at 201-02.

105. Ohio v. Roberts, 448 U.S. 56 (1980).

106. *See Roberts,* 448 U.S. at 65 n.7 (stating that prosecution had no duty to attempt to produce witness whose testimony would not have great impact on defendant's case); *supra* note 101 (two step analysis required by confrontation clause).

parents' checks or credit cards.[107] The prosecutor sent five subpoenas demanding the witness' presence at trial to the witness' parents' home.[108] The witness' mother testified that the witness had left home soon after the preliminary hearing and that her whereabouts were unknown.[109] The Supreme Court determined that the issuance of five subpoenas and contact with the witness' mother satisfied the prosecution's duty to make a reasonable, good faith effort to produce the witness.[110] The *Roberts* Court concluded, therefore, that the witness was legally unavailable.[111] The Court then found that the witness' preliminary hearing testimony was trustworthy because the witness gave her testimony in a judicial proceeding subject to the type of questioning characteristic of cross-examination.[112] The Supreme Court held that the preliminary hearing testimony was admissible under the confrontation clause.[113] *Roberts* established a rule, therefore, that courts first must determine that a witness is unavailable to testify and then examine the evidence for sufficient indicia of reliability before admitting hearsay.[114]

The majority's approach in *Hunt* to the admission of the allegations, concerning Judge Hunt's conduct prior to the FBI investigation, contradicts *Roberts* because the prosecution made no showing of the declarants' unavailability.[115] Predisposition is the central issue in entrapment cases, and thus the testimony concerning Hunt's conduct prior to investigation was crucial.[116] A showing of the witness' unavailability, therefore, was necessary.[117] In *Roberts,* the Supreme Court also required that hearsay carry some indicia of

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107. *Roberts,* 448 U.S. at 58.

108. *Id.* at 59.

109. *Id.* at 59-60.

110. *Id.* at 75-77; *see supra* note 102 and accompanying text (discussing nature or prosecution's duty to produce witness).

111. *Roberts,* 448 U.S. at 77; *see supra* note 102 and accompanying text (development of prosecution's duty to produce witness).

112. *Roberts* at 70-74.

113. *Id.* at 73.

114. *Id.* at 65-66; *see supra* note 101 (two step analysis required under confrontation clause).

115. *Roberts,* 448 U.S. at 65-66; *see* 749 F.2d at 1082-84 (hearsay allegations concerning Judge Hunt's conduct prior to investigation); 749 F.2d at 1082-84 (prosecution in *Hunt* made no showing of witnesses' unavailability); *supra* note 102 and accompanying text (discussing nature of prosecution's duty to produce witness);.

116. *See Russell,* 411 U.S. at 433 (focus of inquiry in entrapment defense is defendant's predisposition); 749 F.2d at 1082-84 (Judge Hunt's conduct prior to investigation); *supra* note 6 (discussing role of issues of predisposition and Government's good faith in an entrapment defense). In *Ohio v. Roberts,* the Supreme Court strongly implied that the prosecution must produce a witness or show that the witness is legally unavailable if the witness' testimony is crucial to the determination of guilt or innocence. *See Roberts,* 448 U.S. at 65 n.7 (stating that prosecution has no duty to produce witness whose testimony is not crucial).

117. *See Roberts,* 448 U.S. at 65 (prosecution must show witness' unavailability); 749 F.2d at 1082-84 (describing hearsay concerning Judge Hunt's predisposition); *supra* note 116 (prosecution must show witness' unavailability unless witness' testimony is not crucial); *supra* note 83 (primary issue in entrapment case is defendant's predisposition).

reliability before being admitting into evidence.[118] The *Hunt* court's approach is flawed in light of the Fourth Circuit's failure to determine whether the hearsay carried any indicia of reliability.[119] Emphasizing that the prosecution did not offer the evidence to prove the truth of the matter asserted, the *Hunt* court merely concluded that the statements technically were not hearsay and that the confrontation clause did not apply.[120] Thus the *Hunt* court's reasoning seems to evade the spirit of *Roberts,* which seeks to ensure that courts admit only trustworthy evidence.[121] Less reliable evidence than second and third hand statements made by persons not subject to cross-examination is difficult to imagine, making the *Hunt* court's reasoning even more questionable.[122] Given the absence of a Supreme Court opinion explaining the relationship between the confrontation clause and evidence that does not meet the definition of hearsay, the Fourth Circuit's reluctance to apply the confrontation clause to evidence that does not meet the definition of hearsay in understandable, although incorrect.[123]

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118. *Roberts,* 448 U.S. at 65-66; *see supra* note 99 (discussing prosecution's duty to show hearsay carries indicia of reliability).

119. *See Roberts,* 448 U.S. at 65-57 (hearsay must carry indicia of reliability); 749 F.2d at 1082-84 (Hunt court's discussion of hearsay concerning Judge Hunt's predisposition).

120. *See* 749 F.2d at 1083-84 (confrontation clause does not apply to evidence that does not satisfy definition of hearsay).

121. *See Roberts,* 448 U.S. at 65-57 (evidence admitted in declarant's absence should be reliable); *cf. supra* note 12 and accompanying text (discussing lack of guidance from Supreme Court in determining which hearsay exceptions satisfy confrontation clause). Excusing the prosecution from making the requisite showing of availability creates a presumption of unavailability which the defendant must overcome. *Searching for a Standard, supra* note 12, at 210. In contrast, the burden of showing unavailability should rest upon the prosecution. *Id.; see Roberts,* 448 U.S. at 65-66 (placing burden of showing unavailability on prosecution). In *Dutton v. Evans,* however, the Supreme Court reasoned that because the evidence in question did not satisfy the definition of hearsay, the confrontation clause did not apply. *Dutton,* 400 U.S. at 87-89. Thus, the Fourth Circuit's conclusion that the confrontation clause did not apply in the *Hunt* case because the evidence did not meet the technical definition of hearsay is justifiable under *Dutton. See* 749 F.2d at 1083-84 (confrontation clause did not apply to evidence in *Hunt); Dutton,* 400 U.S. at 87-89. *Dutton* is distinguishable from *Hunt* because the *Dutton* court's finding that the confrontation clause did not apply rested on the separate ground that the witness' testimony would not be crucial to the outcome of the case. *See Dutton,* 400 U.S. at 87-89. Subsequently in *Ohio v. Roberts,* the Supreme Court strongly implied that the prosecution must show that the witness is unavailable and that the evidence is trustworthy if the witness's testimony is crucial. *See Roberts,* 448 U.S. at 65 n.7 (prosecution need not produce witness whose testimony is peripheral to case). The evidence concerning Hunt's prior conduct was crucial to Hunt's case because evidence concerning predisposition is central to an entrapment defense. *See supra* note 6 (centrality of evidence of predisposition to entrapment defense).

122. *See McClain,* 531 F.2d at 435-36 (allowing hearsay from unknown informants not subject to cross-examination to prove predisposition is highly unreliable).

123. *See* LOUISELL & MUELLER, *supra* note 10, at § 418 (relationship between confrontation clause and hearsay rule is unclear); *Searching for a Standard, supra* note 12, at 196 (same); *supra* note 12 and accompanying text (problems in relationship between confrontation clause and hearsay rule); *supra* note 100 and accompanying text (discussing three hearsay exceptions identified by Supreme Court that satisfy confrontation clause).

While the *Hunt* court's analysis of the confrontation clause and Federal Rules of Evidence issues is faulty, the majority arguably reached the correct result.[124] Evidence existed, even with the exclusion of the testimony concerning *Hunt's* conduct prior to investigation, to support the jury's conclusion that *Hunt* was predisposed to commit the crimes in question.[125] Judge Hunt had complied with a number of the undercover agents' requests before the agents threatened violence against Hunt's friend.[126] Thus, the jury might have concluded that Hunt's responses were ready and found predisposition in Hunt's actions during the investigation.[127] Significantly, the Fifth and Ninth Circuits recognize that the admission of hearsay relevant to the defendant's predisposition is harmless error when other substantial evidence showing predisposition exists.[128]

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124. *See infra* note 128 (discussing application of harmless error doctrine to entrapment cases).

125. *See* United States v. Jannotti, 673 F.2d 578, 604 (3d Cir.) (jury may find evidence of predisposition in defendant's ready responses to Government's inducements), *cert. denied,* 457 U.S. 1106 (1982); *supra* notes 22 and 23 (evidence of Hunt's ready responses to Government's inducements).

126. 749 F.2d at 1081-82; *supra* notes 22 and 23 (discussing Judge Hunt's compliance with undercover agents' requests).

127. *See Jannotti,* 673 F.2d at 604 (defendant's ready response to Government's inducement may be evidence of predisposition); *supra* note 6 (theories of entrapment defense).

128. *See* United States v. Howell, 664 F.2d 101, 105 (5th Cir. 1981) (if independent evidence of predisposition exists, admission of hearsay concerning defendant's predisposition is harmless error); United States v. McClain, 531 F.2d 431, 438 (9th Cir. 1976) (same). In *United States v. Howell,* the Government charged the defendant with stealing and trafficking in stolen goods. 664 F.2d 101, 103 (5th Cir. 1981). The defendant raised an entrapment defense. *Id.* The district court admitted hearsay evidence concerning the defendant's reputation for assisting another man in trafficking in stolen goods. *Id.* at 104. In addition to the reputation evidence, the district court admitted recordings of the defendant's statements that showed that the defendant conceived of and initiated the stolen goods operation. *Id.* at 103-05. Other evidence proved that the defendant was an active participant in the operation. *Id.* The Fifth Circuit concluded that the evidence independent of the reputation evidence was sufficient to sustain the jury's finding that the defendant was predisposed to commit the crime and that the error in admitting the reputation evidence thus was harmless. *Id.* at 105-06.

In *United States v. McClain,* a jury convicted the defendant of violating a federal narcotics law. 531 F.2d 431, 432 (9th Cir. 1976). At trial, the defendant had raised an entrapment defense. *Id.* at 432-33. The district court had admitted hearsay evidence which suggested that the defendant had a reputation for dealing in cocaine. *Id.* at 435. The Ninth Circuit, however, determined that other evidence overwhelmingly proved that the defendant was predisposed to deal in drugs and that, therefore, the error in admitting the reputation evidence was harmless. *Id.* at 438.

Under *Howell* and *McClain,* the existence of evidence independent of the hearsay concerning the defendant's reputation justified the jury's conclusion that the defendant was predisposed to commit the crime in question. *Howell,* 664 F.2d at 105-06; *McClain,* 531 F.2d at 438. In *United Sates v. Hunt,* independent evidence existed which showed that Judge Hunt willingly complied with the FBI's inducements. *See* 749 F.2d at 1081, 1086 n.10 (Hunt agreed to give judicial protection to illegal gambling operation and accepted protection payment before FBI threatened violence). Under the doctrine announced by the Third Circuit in *United States v. Jannotti,* Judge Hunt's willing and free compliance with the FBI's inducements justified the jury's finding

After *Hunt,* defense attorneys in the Fourth Circuit should think carefully before recommending that their clients raise both entrapment and due process defenses.[129] The Fourth Circuit's decision in *Hunt* limits a due process defense, when used in conjunction with an entrapment defense, to an attack on the Government's actions during the investigation.[130] If the defendant questions the reason for the government's investigation, the defendant opens the door to the admission of hearsay concerning the defendant's predisposition to commit the crime alleged.[131]

The unavailability prong of the *Roberts* test protects the defendant's interest in revealing the entire truth through cross-examination.[132] The unavailability question also differentiates analysis of the admissibility of evidence under the confrontation clause from analysis of the admissibility of evidence under the hearsay rule.[133] The majority's failure in *Hunt* to address the unavailability issue suggests that the confrontation clause is merely a rule of evidence in the Fourth Circuit.[134] Prosecutors in the Fourth Circuit need not always show a witness' unavailability or offer guarantees of a reliability concerning a hearsay statement proving the defendant's predisposition if the

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that Hunt was predisposed. *See* 749 F.2d at 1081, 1086 n.10; *Jannotti,* 673 F.2d 578, 603 (3d Cir.) (public official's acceptance of bribe may be evidence of predisposition), *cert. denied,* 457 U.S. 1106 (1982); *but see* Fahy v. Connecticut, 375 U.S. 85, 87 (1963) (if reasonable possibility exists that evidence contributed to conviction, error is not harmless); 749 F.2d at 1090 (Sprouse, J., dissenting) (if district court excluded evidence concerning Hunt's reputation, case concerning predisposition would be close).

129. *See supra* note 75 (discussing federal circuit's determinations concerning whether opposing party has right to rebut evidence introduced by other party); *supra* note 42 (discussing theory of waiver).

130. *See supra* note 75 (discussing federal circuits' approaches to raising issue); *supra* note 42 (discussing wavier). Under the Fourth Circuit's approach in *United States v. Hunt,* the Government is entitled to rebut the defendant's assertion that the Government lacked cause to investigate the defendant's activities. *See Hunt,* 749 F.2d at 1084; United States v. Corrigan, 168 F.2d 641, 645 (2d Cir. 1948) (once defendant raises issue, Government is entitled to rebut). Defendants in the Fourth Circuit, therefore, no longer can allege that the Government's investigation was groundless without opening the door to the Government's use of hearsay that proves the defendant's predisposition as well as proving the Government's reason for investigation. *See Hunt,* 749 F.2d at 1084 (hearsay proving defendant's predisposition admissible to show basis for Government's investigation). Defendants in Fourth Circuit courts should limit their due process defenses to claims that the Government's investigation, and not the Government's reason for investigating, was outrageous. *See Corrigan,* 168 F.2d at 645 (defendant's introduction of issue into controversy entitled Government to rebut issue).

131. *See supra* note 130 and accompanying text (limitations on defendant's use of due process defense in Fourth Circuit).

132. *See supra* note 2 and accompanying text (function of cross-examination).

133. *See* FED. R. EVID. 803 (analysis of declarant's unavailability is unnecessary to admit hearsay under exceptions in rule 803); *Confrontation, supra* note 10, at 1439 (confrontation clause creates canon of prosecutorial behavior); *supra* note 102 (development of prosecution's duty to produce witness or show witness' unavailability).

134. *See* California v. Green, 399 U.S. 145, 155 (1970) (confrontation clause is not just constitutional rule of evidence); *Confrontation, supra* note 10, at 1439 (confrontation clause creates prosecutorial duty to produce witness in addition to controlling trustworthiness of evidence).