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ISSUES CONCERNING THE ADMISSIBILITY IN FEDERAL COURTS OF BUSINESS RECORDS CONTAINING OPINIONS OR DIAGNOSES UNDER FEDERAL RULE OF EVIDENCE 803(6)

Erik C. Olson*

I. INTRODUCTION

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay is generally inadmissible in federal judicial proceedings under the Federal Rules of Evidence, but the Rules allow admission of hearsay evidence if the evidence conforms to any of a number of stated exceptions.

Prior to the enactment of the Federal Rules of Evidence in 1975, the admissibility into evidence of business or commercial records in the federal courts was governed by the Commonwealth Fund Act. The Act simplified the then-existing process of introducing such records because it "eliminated the common law requirement of calling or accounting for all participants" in the chain of preparation of any proffered business record. Although the Act "provided only for records of an "act, transaction, occurrence, or

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1. FED. R. EVID. 801(c).
2. FED. R. EVID. 802.
3. Throughout the text of this note, the capitalized words "Rule" and "Rules" refer to the Federal Rules of Evidence, unless otherwise indicated.
4. See FED. R. EVID. 803, 804 and 807.
5. FED. R. EVID. 803(6) advisory committee's note.
6. Id.
event,\textsuperscript{7}'' many federal courts "experienced no difficulty in freely admitting diagnostic entries."\textsuperscript{7} Other federal courts were reluctant to do so.\textsuperscript{8} In order to resolve this conflict in favor of admissibility of such records, Rule 803(6) "specifically includes both diagnoses and opinions, in addition to acts, events, and conditions, as proper subjects of admissible entries."\textsuperscript{9} 

Even given the explicit language of Rule 803(6)\textsuperscript{10} and the Advisory Committee's Note to it, federal courts still routinely do not admit business records containing opinions or diagnoses.\textsuperscript{11} The aim of this note, therefore, is two-fold. First, it will describe the reasons the federal courts often give when ruling that proffered business records containing opinions or diagnoses are inadmissible, indicating any conflicts between the courts on those reasons when they are noteworthy. Second, it will analyze and critique those rationales and offer resolutions to conflicts between the courts concerning them.

\textsuperscript{7} Id.
\textsuperscript{8} Id.
\textsuperscript{9} Id.
\textsuperscript{10} Federal Rule of Evidence 803(6) excepts from the general hearsay rule of Rule 802, any records of regularly conducted activity, defined as:
A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

\textsuperscript{11} See, e.g., Lamb Eng'g & Constr. Co. v. Nebraska Pub. Power Dist., 103 F.3d 1422 (8th Cir. 1997); Weaver v. Phoenix Home Life Mut. Ins. Co., 990 F.2d 154 (4th Cir. 1993); United States v. Blackburn, 992 F.2d 666, 670 (7th Cir. 1993); Noble v. Alabama Dep't of Envtl. Mgmt., 872 F.2d 361 (11th Cir. 1989); Waddell v Comm'r, 841 F.2d 264 (9th Cir. 1988); Ricciardi v. Children's Hosp. Med. Ctr., 811 F.2d 18 (1st Cir. 1987); Fowler v. Carrollton Pub. Library, 799 F.2d 976 (5th Cir. 1986); and Forward Commc'ns Corp. v. United States, 221 Ct. Cl. 582 (1979).
II. REASONS GIVEN BY FEDERAL COURTS FOR NOT ADMITTING BUSINESS RECORDS CONTAINING OPINIONS AND DIAGNOSES

A. THE DIAGNOSIS OR OPINION FAILS TO MEET THE FOUNDATIONAL REQUIREMENTS OF RULE 803(6)

For a given document to meet the foundational requirements of Rule 803(6), the document

[1)] must be prepared in the normal course of business; 2) it must be made at or near the time of the events it records; and 3) it must be based on the personal knowledge of the entrant or on the personal knowledge of an informant having a business duty to transmit the information to the entrant.\(^{12}\)

‘In the normal course of business,’ means that the document was ‘made in the regular course of business of a regularly conducted business activity . . . [for which it was a] regular practice . . . to have made the [document].\(^ {13}\)

The federal courts have excluded proffered documents for failing to meet any of these elements. In *Waddell v. Commissioner*, for example, the Ninth Circuit upheld the trial court’s exclusion of a professional appraiser’s appraisal of medical equipment because the appraisal was not made in the normal course of business.\(^ {14}\) The appellate court found that the appraisal could not have been an admissible business record of the seller of the equipment because it had not “obtained appraisals of this sort as a ‘regular practice’ of its business.”\(^ {15}\) Nor was it an admissible business record of the appraiser’s firm because there was no evidence that the “firm had a practice of preparing such appraisals for [the seller of the equipment].”\(^ {16}\) Similarly,
the Fourth Circuit, in *Tokio Marine & Fire Insurance Company v. Norfolk & Western Railway*, excluded an appraisal made by a salvage company of the value of wrecked cars.\(^{17}\) The appraiser's "business was buying wrecked motor vehicles and dealing in used auto parts," not in making appraisals for a fee.\(^{18}\) Therefore, the appraisal was not a record of a regularly conducted business activity.\(^{19}\)

Concerning when the document is made, in *Goldsmith v. Commissioner* the U.S. Tax Court found an investigative report\(^{20}\) inadmissible in part because is sought to reconstruct events which had occurred two to eight years earlier.\(^{21}\)

Concerning the "personal knowledge" requirement, the other reason the *Goldsmith* court gave for excluding the investigative report at issue was because the report's "drafters also did not have first-hand knowledge of many of the facts in the report and frequently had to rely on second-hand or hearsay sources of information."\(^{22}\) In *Petrocelli v. Gallison*, the First Circuit ruled that the "complete absence of any indication" as to where information in medical records came from rendered the entry inadmissible under Rule 803(6) because it was impossible to tell whether the record was made by a person with knowledge.\(^{23}\)

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18. *Id.*
19. *Id.*
20. In *Beech Aircraft Corp. v. Rainey*, the Supreme Court, in discussing whether admissible (under Rule 803(8)) "factual findings" of government reports included the declarant's "opinions and conclusions," said that, at least insofar as concerns the contents of government reports investigating causes of past events, "all statements in language are statements of opinion . . . (citation omitted)." 488 U.S. 153, 168 (1988). It seems prudent, then, to say that the Court would find statements of "facts and conclusions" in investigative reports made by private parties also to be statements of opinions. Private investigative reports would therefore seem to fall comfortably within the "opinions, or diagnoses" language of Rule 803(6), and, read in light of *Beech Aircraft Corp.*, admissible. However, if the report was made long after occurrence of the events investigated, it may be excluded. *See infra* note 21.
21. *Goldsmith v. Comm'r*, 86 T.C. 1134, 1145 (1986). *See also* United States v. Kim, 595 F.2d 755, 760 (D.C. Cir. 1979) (finding that a telex failed to meet the Rule 803(6) exception in part because it "report[ed] deposits that took place in 1975. Yet it was not prepared until April of 1977, over two years after the first deposit was allegedly made."); *Fujisawa Pharm. Co.* 1999 U.S. Dist. LEXIS 11381, at *36 (reports excluded in part because they were prepared several years after investigated events occurred).
When the federal courts exclude an otherwise qualifying record containing an opinion on the grounds that it is not of the type contemplated by Rule 803(6), they usually mean that they believe the opinion is an expert opinion, and therefore subject to the requirements of Rules 702 and 705 (governing expert testimony) rather than 803(6). In no circumstance is this concept more relevant than when a party seeks to admit a report of an expert appraisal. Perhaps the leading case on this issue is *Forward Communications Corporation v. United States.* 24 There, the Court of Claims found that an independent appraisal of the fair market value of a liquidated newspaper’s machinery and equipment was inadmissible as a business record under Rule 803(6) because it was an expert opinion. 25 And because the record was “not only devoid of any evidence establishing the qualifications of the preparer of the appraisal report in question but fail[ed] even to disclose his identity,” the appraisal also failed the requirements of Rule 702 and was therefore inadmissible. 26 Many subsequent federal court decisions have cited the rationale of *Forward Communications Corporation* when ruling an expert appraisal or report inadmissible. 27

The courts diverge significantly on the issue of expert appraisals, however. For example, in *United States v. Licavoli,* the Ninth Circuit found an expert appraisal of the value of a painting admissible under Rule 803(6) and refused to “adopt an inflexible rule that every case requires the proponent of a business record containing expert opinion to affirmatively establish the qualifications of the person forming the opinion” because “Rule 803(6) expressly provides for the exclusion of a business record if the source of information indicates a lack of trustworthiness.” 28 If *Forward Communications Corporation* stands for the proposition that when expert appraisals are offered, Rules 702 and 705 require the proponent to affirmatively establish the preparer’s qualifications and present him for

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25. *Id.* at 629.
26. *Id.*
27. *See,* e.g., *Judd v. Univ. of Denver,* No. 81-Z-101, 1983 U.S. Dist. LEXIS 18749, at *3-4 (D. Colo. Mar. 7, 1983) (finding anonymous reviews of a scholarly article authored by plaintiff and based on his dissertation inadmissible if writers of reviews not present in court to testify to their qualifications and be subject to cross examination); *Tokio Marine & Fire Ins. Co. v. Norfolk & W. Ry. Co.,* No. 98-1050, U.S. App. LEXIS 476, at *10 (4th Cir. Jan. 14, 1999) (holding appraisals of salvage value of damaged cars “are not admissible without the preparer being present in court to testify as to his qualifications as an expert and to be cross-examined on the substance.”); *Van Der AA Invs., Inc. v. Comm’r,* 125 T.C. 1, 6-7 (2005) (finding valuation report produced by Arthur Anderson and proffered to prove truth of value asserted inadmissible because it was expert opinion and the preparer was not available for cross examination).
cross examination, Licavoli stands for the proposition that rather than an affirmative duty of the proponent, the opponent has the duty to raise an issue of untrustworthiness of the expert appraisal under Rule 803(6), with the judge deciding pursuant to Rule 104(a) whether the expert is qualified to give such an opinion. Which of these is the better policy is discussed in Part III.b., infra.

C. THE DIAGNOSIS OR OPINION IS NOT TRUSTWORTHY

This is the exception to the Rule 803(6) exception. A business record is properly excluded when "the source of information or the method or circumstances of preparation indicate lack of trustworthiness."29 The motivation of the informant of a business record to be accurate has long been an issue upon which admissibility of such a record hinged30 because for many courts the presence of a vigorous motivation to misrepresent renders a business record untrustworthy.31

The classic situation in which the courts have found a motivation to misrepresent, and, consequently, a given business record inadmissible, is when the record is prepared in anticipation of litigation.32 However, some courts will still find such documents trustworthy, and, therefore, admissible, if the proponent can show a "business significance [for the document] apart from its use in the [litigation]."33

Additionally, at least some of the federal courts seem to recognize that a strict rule excluding all opinions prepared in anticipation of litigation is untenable. For example, "although autopsy reports are not prepared for use

29. FED. R. EVID. 803(6).
30. See FED. R. EVID. 803(6) advisory committee's note. Note that the Advisory Committee is troubled by the courts making proper motivation a requirement of the Rule:
   The direct introduction of motivation is a disturbing factor, since absence of motivation to misrepresent has not traditionally been a requirement of the rule; that records might be self-serving has not been a ground for exclusion. . . . As Judge Clark said in his dissent [in Hoffman v. Palmer, 129 F.2d 976, 1002 (2d Cir. 1942), aff'd, 318 U.S. 109 (1943)], "I submit that there is hardly a grocer's account book which could not be excluded on that basis."
   Id.
32. See, e.g., Lamb Eng'g & Constr. Co. v. Neb. Pub. Power Dist., 103 F.3d 1422, 1432 (8th Cir. 1997) (holding report prepared by a certified public accountant for plaintiff's attorney just weeks before trial and explicitly indicating that it was prepared solely for use in litigation did not qualify as a business record under Rule 803(6)); Potamkin Cadillac Corp. v. B.R.I. Coverage Corp., 38 F.3d 627, 632 (2d Cir. 1994) ("Data prepared or compiled for use in litigation are not admissible as business records."); Clark v. Los Angeles, 650 F.2d 1033, 1037 (9th Cir. 1981) ("[A] document prepared for purposes of litigation is not a business record because it is lacking in trustworthiness.").
33. United States v. Frazier, 53 F.3d 1105, 1110 (10th Cir. 1995).
at trial . . . any medical examiner preparing such a report must expect that it may later be available for use at trial." A rule preventing the introduction of autopsy reports in criminal homicide cases because the medical examiner foresees that his report may well be used in a prosecution could bring such prosecutions to a grinding halt. Such a strict rule therefore seems unworkable for some courts.

Finally, a court may be willing to admit an opinion or diagnosis prepared in anticipation of litigation if the document is not self-serving to the party who made the opinion (or for whom it was made). The reason given is that the lack of a self-serving function of the opinion mitigates the danger of untrustworthiness normally presented by documents prepared in anticipation of litigation.

Other significant reasons for which courts find opinions in business records untrustworthy include a lack of reliance on the opinion by either the maker of the opinion or by the party for whom the opinion was made and the fact that the conveyor of the information recorded is not under a business duty to report or record the events he conveyed.

34. United States v. Feliz, 467 F.3d 227, 235 (2d Cir. 2006) (upholding admission of autopsy report); See also Sosna v. Binnington, 321 F.3d 742, 747 (8th Cir. 2003) ("[O]pinions of the pathologist contained in his autopsy report fit comfortably within Rule 803(6)'s confines."); United States v. Rosa, 11 F.3d 315, 332 (2nd Cir. 1993) ("[A] medical examiner . . . bears more similarity to a treating physician than he does to one who is merely rendering an opinion for use in the trial of a case " (quoting Manocchio v. Moran, 919 F.2d 770, 777 (1st Cir. 1990))).

35. Still, other courts will even exclude opinions and diagnoses in death certificates and autopsy reports, though not necessarily because the diagnoses or opinions are untrustworthy. See, e.g., Pollard v. Metro. Life Ins. Co., 598 F.2d 1284, 1286-87 (3d Cir. 1979) (upholding, in a suit for benefits under a life insurance policy covering "accidental death," trial judge's redaction under Rule 403 of references to "accidental death" from a death certificate, coroner's certificate and pathologist's necropsy report because those statements could mislead the jury because the legal meaning of the phrase "accidental death" as defined and used in the insurance policy could differ from its meaning as used in the medical reports); Holbrook v. Lykes Bros. S S Co., 80 F.3d 777, 786 (3d Cir. 1996) (redacting diagnosis of mesothelioma in death certificate, autopsy report and hospital records pursuant to Rule 403 because mesothelioma in particular had a high rate of misdiagnosis and allowing in such diagnoses without cross-examination of preparers would unfairly prejudice the opponent of the records).

36. See, e.g., Sana v. Hawaiian Cruises, Ltd., 181 F.3d 1041, 1046-47 (9th Cir. 1999) (holding defendant's insurance carrier's report citing evidence of plaintiff's illness admissible because defendant's insurance carrier had "no incentive to gather such evidence of [plaintiff's] illness").

37. Id.

38. Waddell v. Comm'r, 841 F.2d 264, 267 (9th Cir. 1988) (appraisal report not admissible where there was no reliance on report by company for which it was made). Cf. United States v. Licavoli, 604 F.2d 613, 623 (9th Cir. 1979) (insurer's reliance on appraisal of painting was affirmative evidence of the reliability of the appraisal).

39. See, e.g., United States v. Cason, 950 F.2d 893, 910 (3d Cir. 1991) (holding client interview notes of attorney inadmissible in part because the client had no business duty to the attorney to report the information the notes contained).
D. Rule 403: The Probative Value of the Opinion or Diagnosis is Outweighed by the Prejudicial Effect Its Introduction Will Cause

Rule 403 allows a federal court to exclude otherwise relevant and admissible hearsay evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." And the courts have little trouble in using it to exclude opinions or diagnoses that satisfy Rule 803(6) if they find those opinions or diagnoses troubling.

In Fowler v. Carrolton Public Library, for example, the Fifth Circuit held that the district court abused its discretion in admitting medical records offered to prove pain and suffering of an employment discrimination plaintiff without any expert explanation of their significance. Though the court did not expressly cite Rule 403, it channeled its spirit: "The [unexplained] records could lead only to unwarranted speculation by the jury and inferences in favor of Fowler, and their prejudicial impact manifestly outweighed the benefit of verifying such uncontested facts as the hospitalization."

In Holbrook v. Lykes Brothers Steamship Company, the plaintiff "sued several shipping companies and manufacturers and suppliers of asbestos products, alleging that he developed mesothelioma from exposure to asbestos-containing products while working aboard the shipping companies' vessels." At trial, the district court used Rule 403 to redact references to mesothelioma in an autopsy report, death certificate and hospital records. On appeal, the Third Circuit upheld the district court, stating that the lower court's ruling was "based on its determination that mesothelioma is difficult to diagnose." In light of that difficulty the trial court had properly found that the "risk of unfair prejudice, by leaving references to mesothelioma in documents not testified to by their authors nor relied on by qualified experts, outweighed their probative value." Further, "the unexamined references were not helpful to and could potentially have misled the jury."

The application of Rule 403 is not limited to medical opinions, either.

40. FED. R. EVID. 403.  
42. Id.  
44. Id. at 786.  
45 Id. at 787.  
46. Id.  
47. Id
In *Vance v. Peters*, for example, a female prison inmate sued to recover for damages allegedly caused by constitutionally excessive force used on her by a prison guard.\(^{48}\) On appeal, the inmate argued it was error for the trial court to exclude a memo to the warden of the prison from the Employee Review Officer in the Illinois Department of Corrections.\(^{49}\) The memo indicated that the officer had conducted a hearing concerning the accused guard’s conduct in the incident that resulted in the plaintiff’s injury and had concluded that the guard had used excessive force on the plaintiff.\(^{50}\) The memo was signed by the warden, indicating her agreement with the hearing officer’s conclusion.\(^{51}\) The district court excluded the memo under Rule 403 because it was concerned that “the jury would ‘give inordinate weight to the conclusion or the decision reached by the hearing officer,’ and that the chance of prejudice therefore outweighed the probative value of the submission [citation omitted].”\(^{52}\) The Seventh Circuit upheld the trial court’s decision to exclude the evidence.\(^{53}\) The appellate court found it proper that the trial court had earlier admitted the evidence upon which the hearing officer’s conclusions had been based, allowing the jury to make up its own mind about whether the guard had used excessive force.\(^{54}\) Having done so, the trial court could then properly exclude the hearing officer’s memo because her conclusions could confuse the jury on the issue before it.\(^{55}\) That issue was not whether the guard had violated the prison’s standards on excessive force, but whether the guard had violated the *Eighth Amendment’s* standard of excessive force.\(^{56}\) And “[t]he hearing officer’s decision that C.O. Roy used excessive force was based on the standards set forth in the prison’s internal rules or policies, not on Eighth Amendment criteria.”\(^{57}\)

\(^{48}\) Vance v. Peters, 97 F.3d 987, 988 (7th Cir. 1996).
\(^{49}\) Id. at 994-95.
\(^{50}\) Id. at 995.
\(^{51}\) Id.
\(^{52}\) Id.
\(^{53}\) Id.
\(^{54}\) Id.
\(^{55}\) Id.
\(^{56}\) Id.
\(^{57}\) Id.
III. CRITIQUE OF FEDERAL COURTS' REASONS FOR EXCLUDING BUSINESS RECORDS CONTAINING OPINIONS OR DIAGNOSES

A. FAILURE TO MEET THE FOUNDATIONAL REQUIREMENTS OF RULE 803(6)

I. Normal Course of Business

While the "normal course of business" requirement is clearly a fundamental component of Rule 803(6), the manner in which the federal courts apply that requirement raises questions for which there is little helpful precedent. Such questions include: At what point does an activity become "regularly conducted?" And at what point does the making and/or keeping of a certain kind of document become a "regular practice" of that activity?

The Waddell court certainly did not deal with these questions. In excluding the appraisal report at issue, the court simply stated that it was not admissible as a business record of the firm for whom the appraisal was made (the medical equipment company) because the firm did not have a regular practice of having such appraisals made. Nor could it be an admissible business record of the appraiser because the appraiser did not have a regular practice of making such appraisals for the particular medical equipment company.

If applied bluntly, the Waddell court's rationale thus punishes not only businesses that produce documents in exceptional situations, but also new businesses and new types of records kept by going concerns. What should courts do when, for example, the appraisal produced is the first of its kind for an appraiser, but he goes on to make many more such appraisals subsequently? That is, may the regularity that Rule 803(6) requires arise after the record at issue has been produced, or must the practice be regular at the time the document is produced? Or what if an appraiser has made only one or two such appraisals prior to the appraisal that a party seeks to have admitted? Is that enough for the making of that type of appraisal to be a regular practice of the appraiser?

Of course, the longer a business is carried on, the more likely it is that

58. See FED. R. EVID. 803(6) and supra Part II.a
59. Waddell v. Comm’r, 841 F.2d 264, 267 (9th Cir. 1988).
60. Id.
61. Additionally troubling about the Waddell decision is that it seems to suggest that in order for the making of appraisals to be a "regular practice" of the appraiser, such appraisals must be made for the same client: "There is no evidence that Ott’s firm [the appraiser] had a practice of preparing such appraisals for Comp-U-Med [the client]." Id.
its records will become more and more reliable. As businesses—at least successful businesses—evolve, their managers reevaluate all their systems and processes, making changes where they believe those changes will improve efficiency. Improved accuracy is one of the underlying elements of business efficiency. Courts seem to recognize this, and thus tend to find reliable a record that has been made by a business for a long time.  

But acceptance of that proposition does not necessarily entail acceptance of the proposition that records of a type that have not been made or kept by a business for a long time fail to meet the foundational requirements of Rule 803(6). That has the unnecessary effect of preemptively excluding records made by a new business that may prove, after examination by the court of the circumstances of their making or keeping, to be as reliable as records of a type that have been kept for a long time. After all, a business that was new when the record was made may be well-established by the time litigation commences. And the very fact of that business becoming established may owe partially to its reliable record-keeping from its inception. The court should therefore be free to find regularity if it arises after the record at issue has been produced, or if, in the case of an appraiser, he has produced such appraisals before, regardless of for whom, and how many times. The escape hatch of "lack of trustworthiness" still remains for the court to exclude such records, but this approach has the added benefit of allowing the court to consider the circumstances of the record's preparation rather than preemptive exclusion.

II. Made At or Near the Time

Certainly the Goldsmith court was correct in finding that an investigative report that sought to reconstruct events that had occurred two to eight years earlier was inadmissible in part because it was not made "at or near the time" of the events it recorded. 63 Other federal cases citing the timing element as a ground for exclusion of records containing opinions also consider two years from the recorded events to be too long. 64 But those cases shed little light on what "near the time" means when it comes to records containing opinions other than that it does not mean as much (or more than) two years after the event(s) recorded. A report containing the recorder/observer's opinion made the same day (but not contem-
poraneously) as the events it records is admissible, but what about reports made the following day, week, or month? There is little helpful precedent on this specific question. Cases excluding records not containing opinions or diagnoses because they were not made “at or near the time” suggest that three months is too long. However, there is countervailing precedent admitting records that contain data on events that occurred as much as twelve months earlier.

The conflicting opinion regarding the time requirement, coupled with the absence of any Supreme Court decision resolving that conflict, suggests that the High Court is perfectly comfortable leaving the question of what “near the time” means to the trial court, to be answered on a case-by-case basis. This seems the most prudent path, especially when it comes to records containing opinions. Opinions are based on underlying factual observations, and as time progresses, memory of those facts fade, and evidence of those facts might be destroyed, discarded, corrupted or misplaced, so that an accurate opinion becomes harder, if not impossible, to make after the passage of even a relatively brief period of time. But this does not mean that all records containing opinions should be limited to a shorter time period between observation of the events and recordation than the period afforded to other types of business records in order to be admissible. A police report containing the writer’s opinion, for example, might be properly limited (in terms of admissibility) to a very short time period between observation of the events and recordation compared to, say, the time period between observation of a work of art and production of an appraisal of that work of art. Why? Because (at least in the absence of a video recording device) a police report relies solely on the writer's memory of the events upon which the report is based, and the writer may observe the events only once, whereas a work of art (with apologies to post-Modernists and Futurists) is static, and may be observed over and over again by the appraiser in order to refresh his memory.

65. See, e.g., Dorsey v. Detroit, 858 F.2d 338, 340, 343 (6th Cir. 1988) (finding that, in a civil suit against the Government, the “district court would have had discretion to admit” a police officer’s report of an arrest prepared on the same day of arrest if the report had been produced during discovery).

66. See, e.g., Willco Kuwait (Trading) S.A.K. v. De Savary, 843 F.2d 618, 628 (1st Cir. 1988) (finding proper the exclusion of a telex in part because it referred to an investigation and report which occurred more than three months before the telex was sent); Lamar v. Experian Info. Sys., 408 F. Supp. 2d 591, 596 (N.D. Ill. 2006) (holding letter written five months after house closing and referring to circumstances of denial of a mortgage for the house in question inadmissible under Rule 803(6) in part because of the time delay).

67. See, e.g., Ford Motor Co. v. Auto Supply Co., 661 F.2d 1171 (8th Cir. 1981) (admitting an exhibit containing data compilation, compiled at the end of each year, of events that may have occurred throughout the entire previous year).

68. Police reports may only be admitted in civil proceedings or against the government in criminal proceedings. FED. R. EVID. 803(8)(B)-(C).
III. Person With Knowledge

The Advisory Committee’s Note to Rule 803(6) makes clear that the Rule “require[s] an informant with knowledge acting in the course of the regularly conducted activity.” That is, if the supplier of the information contained in the record is not a part of the enterprise that makes such a record in the regular course of its business, then “an essential link is broken; the assurance of accuracy does not extend to the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail.”

I have been unable to find any federal precedent admitting under Rule 803(6) records that contain hearsay information supplied or recorded by an outsider of the business that made and kept the record. I have also been unable to find any reason why a federal court should. Accordingly, it is proper for a court to exclude business records if they contain information supplied by an outsider of the business.

B. The Opinion or Diagnosis Is Not of the Type Contemplated by Rule 803(6)

The federal courts are not in harmony concerning whether or not certain records containing opinions are subject to the requirements of Rules 702 and 705, which govern the admissibility of expert testimony. Whereas, for example, the U.S. Court of Claims would require the preparer of an expert appraisal to prove his credentials and be available for cross-examination, the Ninth Circuit would refuse to impose a strict rule requiring the proponent of an appraisal containing an expert opinion to affirmatively establish the credentials of the appraiser.

In excluding an appraisal of a newspaper’s tangible assets prepared by an independent company for fire insurance purposes in Forward Communications Corp. v. United States, the Court of Claims concluded . . . that the opinions referred to in Rule 803(6) are those which are incident to or part of factual reports of contemporaneous events or transactions. On the other hand, reports which are prepared to state or to support expert opinions are not admissible without the preparer being present in court to testify as to his qualifications as an expert and to be cross-examined on the substance, pursuant to Rules

69. FED. R. EVID. 803(6) advisory committee's note.
70. Id.
71. For caveats to this proposition, see supra note 12 (discussing the concept of business duty).
72. FED. R. EVID. 702, 705.
73. See supra Part II.b, and notes 24-28.
The court feared that if Rule 803(6) were construed to allow the introduction of expert opinions without opportunity to ascertain the qualifications of the maker, the extent of his study or for other reasons to cross-examine him[...][then] the report of every appraiser would be admissible upon the mere showing that the preparer was in the business of making such appraisals, without more.\[75\]

The position the Court of Claims takes is too narrow. Moreover, after the Supreme Court's decision in Crawford v. Washington, it is simply no longer valid. To begin with, a record "properly determined to be a business record...[under]...Federal Rule of Evidence 803(6)... is not testimonial within the meaning of Crawford, even where the declarant is aware that it may be available for later use at trial."\[76\] The Supreme Court itself has indicated that there is a difference between expert testimony and other forms of evidence that contain expert opinions.\[77\] Rule 702 only requires qualification of an expert if he is to provide testimony.\[78\] Rule 705, too, concerns only expert testimony.\[79\] As a business record cannot be testimonial, Rules 702 and 705 therefore cannot be independent bars to the admission of a business record meeting the foundational requirements of Rule 803(6) simply because that record contains an expert opinion.\[80\]

Second, if Congress had intended that Rules 702 and 705 should be used to evaluate business records containing expert opinions, it could have made Rule 803(6) explicitly subject to them. There are multiple instances of one Rule being made explicitly subject to another Rule.\[81\] As Congress did not make Rule 803(6) explicitly subject to Rules 702 and 705, the Court of Claims arguably exceeded its authority in reading into the Rule such a subjection.

Third, the Court of Claims seems to hang its theory by its own terms. In reviewing the cases concerning admissibility of diagnostic entries in

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74. Forward Commc'ns Corp. v. United States, 221 Ct. Cl. 582, 629 (1979).
75. Id. at 627-628.
76. United States v. Feliz, 467 F.3d 227, 236 (2d Cir. 2006). See also Crawford v. Washington, 541 U.S. 36, 56 (2004) ("Most of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records ...") (emphasis added).
77. See Daubert v. Merrell Dow Pharms., 509 U.S. 579, 589 (US 1993) ("...[U]nder the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.") (emphasis added).
78. FED. R. EVID. 702.
79. FED. R. EVID. 705.
80. This would suggest that the Tax Court possibly erred in Van Der AA Investments, Inc. v. Commissioner in not allowing introduction of a valuation report as evidence of fair market value of a company without the accompanying availability of the author for cross-examination Van Der AA Invvs., Inc. v. Comm'rr, 125 T.C. 1, 7 (2005).
81. See, e.g., FED. R. EVID. 608(b), 609(a)(1).
medical reports that the Advisory Committee cites as those it meant to support with its inclusion of "opinions or diagnoses" as acceptable entries under Rule 803(6), the court notes that the reports considered in those cases included "facts found by... doctors and medical technicians and their conclusions from such facts." It seems a strange argument that doctors and medical technicians are not experts in the diagnosis and treatment of illness or injury, but that is the effect of the Court of Claim's rationale if taken on its face. It seems more reasonable to consider doctors and medical technicians, at least when they are practicing medicine, as experts, just as one would consider lawyers experts when they are practicing law, and accounts experts when they are auditing a company's books. Of course, some doctors are more expert than others in certain circumstances (a neurologist will know more about neurofibromatosis than a gastroenterologist will), but vis-à-vis a layperson, all doctors are experts in medicine. Having concluded that doctors are in fact experts in medicine, it follows that if their opinions and diagnoses are admissible under Rule 803(6), so are the opinions of other experts.

Fourth, the Court of Claims makes no allowance for the possibility that the expert might be dead or otherwise unavailable by the time of trial. A flat rule requiring the expert to be present at trial to have his credentials explained and his opinion(s) cross-examined could unduly prejudice a party who has proffered the record.

Fifth, and finally, the opinions of questionable experts might still be excluded by Rule 803(6)’s own terms. Even if the foundational requirements are laid by a proponent of a business record containing an expert opinion, the court always has the escape hatch of "lack of trustworthiness" to exclude that record. The Court of Claims was simply wrong when it wrote that without the added requirements of Rule 702 and 705, "the report of every appraiser would be admissible upon the mere showing that the preparer was in the business of making such appraisals, without more." The report of every appraiser would not be automatically admissible in such circumstances. If the opponent shows that "the source of information or the method or circumstances of preparation indicate lack of trustworthiness," the opinion will be excluded. And in evaluating the charge of lack of trustworthiness, nothing prevents the trial judge from, if not subjecting the record to Rules 702 and 705, at least looking to their spirit for guidance in making his determination on trustworthiness.

The Ninth Circuit’s rationale, as articulated in Licavoli, which hinges on the trustworthiness of the record and invests in the trial judge the discretion to “exclude from evidence a record of the opinion of an expert

82. Forward Commc’ns Corp. v. United States, 221 Ct. Cl. 582, 628 (1979).
83. Id.
84 FED. R. EVID. 803(6).
whose qualifications are seriously challenged by the opponent, is therefore the proper standard the federal courts should apply when determining whether an expert opinion contained in a business record is admissible.

C. THE DIAGNOSIS OR OPINION IS NOT TRUSTWORTHY

I. Opinion Prepared in Anticipation of Litigation/Informant Has a Motivation to Misrepresent Opinion

As discussed in Part II.c. many federal courts will find a business record untrustworthy, and hence inadmissible, if a) it is prepared in anticipation of litigation, or b) the informant of the record has a motivation to misrepresent the information contained in the record. But the courts are not in complete agreement on these principles, and even the Advisory Committee’s Note to Rule 803(6) explicitly articulates the Committee’s reluctance to endorse at least the latter of the two principles.

The two principles, each standing alone, present serious problems for courts. First, if a record is untrustworthy solely because it is prepared “in anticipation of litigation,” then certain otherwise reliable records may be excluded out of hand because the informant must foresee that his opinion could be used in future litigation. For example, a seasoned emergency room doctor treating trauma patients must anticipate that his reports could be used in all sorts of possible litigation, criminal and civil. Outside of the medical realm, an art appraiser who makes appraisals of works of art for a museum in order for the museum to obtain insurance on those works must foresee the possibility of litigation if the work of art is stolen or damaged.

Both the emergency room doctor and the art appraiser have serious incentives to produce and record their opinions accurately, the former to provide the best treatment for the patient, the latter to ensure that the museum continues to use him as their appraiser because his appraisals are accurate. Yet, if recordation in anticipation of litigation automatically renders a business record inadmissible, all the records they create in these scenarios are inadmissible.

85. United States v. Licavoli, 604 F.2d 613, 622-623 (9th Cir. 1979).
86. Compare Hoffman v. Palmer, 129 F.2d 976, 981 (2d Cir. 1942), aff’d, 318 U.S. 109 (finding that the absence of any vigorous motive to misrepresent is a circumstantial degree of trustworthiness) with United States v. Casoni, 950 F.2d 893, 911 (3d Cir. 1991) (finding that “Rule 803(6) contains no general rule limiting admissible business records to those prepared ante litem motam.”)
87. FED. R. EVID. 803(6) advisory committee’s note.
88. Indeed, the very fact that the appraisal is made for insurance purposes almost guarantees that, if the work is stolen or damaged, there will be litigation, albeit probably after subrogation.
Second, if a record is untrustworthy solely because the informant has *some* motivation to misrepresent *some* of the information in a given record, then the whole record might be excluded, even though some of its data may be relevant to the litigation, uncorrupted by the motivation to misrepresent, and otherwise reliable. This argument is true of any business record, not just those containing opinions.

A more workable rule, a rule probably more palatable to both literalists (who have read the Advisory Committee's Note to Rule 803(6)) and realists (who know that most businesses have at least some motivation to fudge their books), is a fusion of the two rules. A business record should be considered untrustworthy when the anticipation of litigation is the motivation to misrepresent the information contained in the record. Further, such a record should be considered untrustworthy only as concerns that data the anticipated litigation motivates the informant to misrepresent.

The proper judicial action to take when a record is thus partially tainted by a motivation to misrepresent because of anticipated litigation would be: 1) redaction of those tainted portions of the records and admission of the records if the remaining portions contain relevant, admissible evidence, or 2) exclusion of the entire record if the tainted data is the only relevant data contained therein.

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89. For example, in order to prove that the defendant possessed the murder weapon, the prosecution may wish to introduce the sales receipts of the handgun dealer who sold the weapon to the defendant. The handgun dealer is motivated to minimize his tax liability, and has a practice of making out receipts for repeat, friendly customers (who are in on the scheme) indicating a lower sales price than that actually charged. (The customers might acquiesce to this because the dealer kicks back to them a portion of his tax savings in the form of an actual discount.) Besides sales price, the sales receipts also include the dates of the sales, the names of the customers, and the makes, models and serial numbers of the guns. Defense counsel can prove at trial the dealer's motivation to misrepresent the sales price on his sales receipts. If simple motivation to misrepresent *anything* on a business record is enough to destroy its admissibility in total, then the highly relevant data concerning customer, date of sale, make, model and serial number, which the dealer has no motivation to misrepresent, might be unduly excluded. The desire to minimize receipts (and inflate costs) for tax purposes might have been one of the motivations to misrepresent that Judge Clark had in mind when he wrote, "I submit that there is hardly a grocer's account book which could not be excluded on [the basis of motivation to misrepresent]." *Hoffman*, 129 F.2d at 1002 (Clark, J., dissenting).

90. Still, even those business records containing opinions for which the informant has a strong motivation to misrepresent because of anticipated litigation may be admitted. A perfect example would be an employer's performance evaluations of an employee the employer would like terminate for discriminatory reasons. If the employer fears that the discharged employee might file suit against him for wrongful discharge or violation of the employee's civil rights, the employer is motivated to "build a case" against the employee over a certain period of time so that the employer can prove that he discharged the employee for non-discriminatory reasons. The theory under which such evaluations would be admitted is that they were not hearsay, i.e., they were not admitted to prove the truth of the matters they asserted, but rather to prove that the employer had a good faith reason for discharging the employee other than for a discriminatory purpose. Federal courts accept this theory. See *Moore v. Sears, Roebuck & Co.*, 683 F.2d 1321, 1322-1323 (11th Cir. 1982), see also *Jones v. Los Angeles Community College Dist.*, 702 F.2d 203, 205 (9th Cir. 1983).
II. Lack of Reliance on the Opinion

Reliance by a business on a business record is one of the fundamental reasons business records are regarded by the courts as unusually reliable, as well as one of the underlying justifications for the hearsay exception Rule 803(6) provides. The Ninth Circuit, for one, has been consistent in its use of reliance by a business upon a record containing an opinion as a circumstantial guarantee of the record’s trustworthiness. In admitting an appraisal of a painting made for an insurer in Licavoli, the court indicated that “the insurer’s reliance on Aranoff’s appraisal is affirmative evidence of the reliability of the appraisal.” Nearly a decade later, in Waddell, the court excluded an appraisal of electrocardiogram terminals made for a medical equipment company, noting that “[t]here is no suggestion in this case . . . that [the medical equipment company] relied on the appraisal in a way that would vouch for its trustworthiness.”

The Ninth Circuit is in line with the spirit of Rule 803(6). Lack of reliance on an opinion implies either that the business does not trust the opinion itself, or that it does not consider important the matters to which the opinion relates. Either way, lack of reliance on the opinion points to lack of trustworthiness of the opinion. In the first instance, if the business does not trust the opinion, a trial court, whose job is to ascertain the truth for the purposes of rendering justice, and for whom standards for reliability should therefore be higher than for an enterprise seeking merely to turn a profit, certainly should not. In the second, if the business does not think important the matters to which an opinion relates, the business is less likely to demand accuracy in the opinion, and, by consequence, less likely to get it. This is not to say, of course, that lack of reliance upon an opinion in a business record should be dispositive of the issue of whether it lacks trustworthiness. A business may have not actually relied upon an opinion in a business record simply because it has not had occasion to do so by the time trial commences. Therefore, lack of reliance on the opinion should be a strike against a proponent seeking to admit the business record containing it, though not necessarily a fatal strike, to be considered along with all of the other factors.”

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91. See Fed. R. Evid. 803(6) advisory committee’s note (“The element of unusual reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation. [citation omitted]”) (emphasis added).
92. Other circuits also consider reliance by a business on a record to be a circumstantial guarantee of its trustworthiness. See, e.g., United States v. Salgado, 250 F.3d 438, 453 (6th Cir. 2001) (no need to prove the mechanical accuracy of the computer that generated telephone records where qualified witness testified that the telephone company “relied on these computer-generated records to ensure the accuracy of its billing”).
93. United States v. Licavoli, 604 F.2d 613, 623 (9th Cir. 1979).
94. Waddell v. Comm’r, 841 F.2d 264, 267 (9th Cir. 1988).
the other circumstances of preparation and keeping of the record when determining its trustworthiness.

D. RULE 403: THE PROBATIVE VALUE OF THE OPINION OR DIAGNOSIS IS OUTWEIGHED BY THE PREJUDICIAL EFFECT ITS INTRODUCTION WILL CAUSE

In Daubert v. Merrell Dow Pharmaceuticals, the Supreme Court had this to say of a trial judge’s discretion concerning Rule 403 when the evidence at issue was expert in nature:

Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses.\(^9\)

It was upon this principle that the Third Circuit relied when it ruled in Holbrook that the district court did not err in deleting references to mesothelioma contained in a death certificate, autopsy report and hospital record under Rule 403.\(^96\) The district court had based its conclusion that allowing in the references to the disease in these documents would constitute unfair prejudice against the defendant because the disease in particular was difficult to diagnose, with the odds of a correct diagnosis varying widely with the type of method used to diagnose.\(^97\) Though nine different doctors had come to the same diagnosis of mesothelioma in these documents, the district court ruled that the difficulty of diagnosis of the disease made a diagnosis “something that has to be examined as to method of diagnosis, technique of diagnosis, certainty of diagnosis”\(^98\) in order for it “to be meaningful to a jury.”\(^99\) Otherwise, the unexamined references to the disease “could potentially have misled the jury.”\(^100\) Though the Third Circuit acknowledged that difficulty of diagnosis should go more to the weight of the evidence rather than its admissibility, the court found that the weight the evidence should be accorded was not irrelevant to admissibility in light of Rule 403.\(^101\)

In Holbrook, the Third Circuit accomplished correctly what the Court

\(^97\) Id. at 787.
\(^98\) Id.
\(^99\) Id. at 786.
\(^100\) Id. at 787.
\(^101\) Id.
of Claims accomplished incorrectly in *Forward Communications Corporation*. Whereas the Court of Claims would have unnecessarily incorporated Rules 702 and 705 into the foundational requirements of Rule 803(6), the Third Circuit implicitly looks to those rules for guidance in its Rule 403 analysis, without making them preliminary requirements of the Rule 803(6) exception. The result is the same: exclusion of business records containing expert opinions with which the court is uncomfortable.

In addition to the reasons for which the Court of Claims’ approach is mistaken, the Third Circuit’s approach is superior for two reasons. First, it accords with the Supreme Court’s charge to the federal courts, articulated in *Daubert*, to use Rule 403 to prevent the introduction of expert evidence that is unreliable and therefore potentially misleading to the jury. Second, it allows the trial court to consider all the circumstances surrounding the business record containing the expert opinion, not only whether or not the expert whose opinion is contained therein is available to testify in court to his qualifications and to be cross-examined. In some cases, it may be unfairly prejudicial to the opponent of the business record containing an expert opinion to admit it without the expert who made the opinion being present to testify because there is better evidence that tends to prove what the proponent wishes to prove with the opinion. On the other hand, it might be unfairly prejudicial to the proponent to exclude the opinion when it is the only evidence available that tends to prove the proponent’s point and the expert is unavailable to testify. While critics might argue that leaving this question to the court’s Rule 403 analysis provides little certainty to the parties, the benefit of flexibility in difficult situations such as those described above outweighs such concerns.

The Seventh Circuit’s affirmation in *Vance* of the trial court’s exclusion of the reviewing officer’s opinion that a prison guard had used excessive force on the plaintiff is a much more clear-cut case than *Holbrook*. Though the trial and appellate courts’ rationales differ somewhat, the Seventh Circuit was undoubtedly correct in finding that allowing in the opinion of the review officer would lead to confusion of the issues. The issue before the jury was whether the prison guard had used excessive force according to the Eight Amendment, not whether he had used excessive force according to the prison’s internal standards. Yet the review officer’s opinion was based on the prison’s standards, not those of

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102. See supra Part III.b.
103. See generally *Daubert v. Merrell Dow Pharm s.*, 509 U.S. 579, 592-95 (1993). The trial court’s Rule 403 analysis in *Holbrook*, citing the varying rates of correct diagnosis of mesothelioma, seems to respond to the Supreme Court’s instruction that “in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error” when determining whether proffered expert testimony is scientifically valid. *Id.* at 594.
104. See supra Part II.d.
the Eight Amendment.

There is no reason to critique the Seventh Circuit’s rationale. Rule 403 expressly reserves to the trial court the discretion to exclude relevant evidence if its introduction would lead to confusion of the issues. The contested evidence surely would have confused the issues. The Vance case is illustrative of the distinct danger presented by opinions in business records that state conclusions in terms identical to the terms used to describe the issue(s) before the trier of fact, but about matters not identical to those issues. The danger is that they will be too heavily relied upon by the trier in coming to conclusions about wholly different matters. It is therefore proper for the court to look closely at the language that opinions in business records use to ensure that it is not identical or substantially similar to the language used to describe the issue before the jury. If it is, the opinion should be excluded. Such a rule has the benefits of a) easy applicability and b) predictability for the parties.

IV. CONCLUSION

I have generally argued for a liberal interpretation of the Federal Rules of Evidence as they govern the admissibility of opinions and diagnoses contained in business records. The foundational requirements for Rule 803(6) should not be used to exclude the records of new businesses or new types of business records because of lack of regularity of making or keeping the record at the time the record was made. Regularity can arise subsequent to the creation of the record at issue, and it indicates the same sort or reliability that regularity prior to the creation of the record indicates. Similarly, a strict rule dictating how long after the events or conditions it describes an opinion must be recorded in order to be admissible would leave much to be desired, as different circumstances argue for different acceptable time intervals. Further, courts should not add to the foundational requirements of Rule 803(6), as the Court of Claims did, when it comes to records containing opinions or diagnoses. This is a task better left to Congress, and besides, the court has other tools at its disposal — like the “escape hatch” of lack of trustworthiness and Rule 403 — that leave it free to reach the same result without being forced to reach it. Motivation to misrepresent and anticipation of litigation, each standing alone, are insufficient to render opinions or diagnoses in business records automatically inadmissible because they would exclude surely reliable and relevant data. Reliance or lack of reliance, standing alone, is not dispositive of trustworthiness, either. It is merely a strike against or an argument for trustworthiness. Finally, Rule 403 should be the preferred tool courts use to

exclude troublesome opinions or diagnoses in business records because of the Rule's flexible nature.

In sum, the trial court should be granted wide discretion in dealing with opinions or diagnoses in business records. Unnecessarily prescriptive rules on their admissibility would lead to the exclusion of the best evidence available in certain cases, leading in turn to decisions based in part on ignorance. Such results are hardly the results an enlightened judiciary should aim for. Besides, such rigid "requirement[s] would be at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to “opinion” testimony."