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## The Meaning of "Bad Faith" Under the Exceptions to the Hearsay Rule

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# The Meaning of “Bad Faith” Under the Exceptions to the Hearsay Rule

I. INTRODUCTION .....	481
II. RULE 803(6) AND LACK OF TRUSTWORTHINESS.....	483
A. <i>Procedural Aspects of Exclusion Analysis Under Rule 803(6)</i> .....	485
B. <i>Exclusion of Legal Documents Under Rule 803(6)</i> .....	487
C. <i>Exclusion of Other Documents Based on Relationship and Purpose</i> .....	488
III. RULE 803(8) AND LACK OF TRUSTWORTHINESS.....	490
A. <i>Documents Created in Anticipation of Litigation Excluded Under Rule 803(8)</i> .....	491
B. <i>Exclusion of Politically Motivated Documents</i> .....	492
IV. “BAD FAITH” UNDER THE EXCITED UTTERANCE EXCEPTION .....	494
V. HEARSAY STATEMENTS UNDER RULE 803(3).....	497
A. <i>Applying “Bad Faith” as a Component of Relevancy Under Rule 403</i> .....	498
B. <i>Exclusion of Self-Serving Statements Under Ponticelli and Its Progeny</i> .....	499
1. THE <i>PONTICELLI</i> CASE—THE THREE PRONG TEST—A CRACK IN THE DAM ..	500
2. <i>PONTICELLI</i> USED IN EVALUATING OTHER ORAL STATEMENTS .....	500
3. WRITTEN DOCUMENTS EXCLUDED UNDER <i>PONTICELLI</i> .....	501
4. <i>PONTICELLI</i> EXPANDED INTO THE CIVIL CONTEXT .....	502
5. THE DIFFICULTIES IN APPLYING THE <i>PONTICELLI</i> TEST CONSISTENTLY .....	503
VI. THE PROBLEM WITH “BAD FAITH” ANALYSIS IN OUR SYSTEM OF JUSTICE .....	505
VII. RESOLVING THE “BAD FAITH” DILEMMA .....	506
VIII. CONCLUSION .....	508

## I. INTRODUCTION

Arnold’s panicked hand quickly dials “911,” he exclaims “Oh my God! Brenda is after me with a gun” and then hangs up. When the police arrive, Brenda is dead. The police charge Arnold with murder and he pleads self defense.

Arnold’s statement constitutes hearsay because it 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.”<sup>1</sup> Hearsay statements are inadmissible<sup>2</sup> unless they fall under an exception or exemption to the hearsay rule.<sup>3</sup> At trial, Arnold’s attorney seeks to have the above statement admitted in evidence under the excited utter-

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

2. Federal Rule of Evidence 802 provides that hearsay is not admissible except as provided by the rules of evidence.

3. Rules 801, 803 and 804 provide numerous exceptions to and exemptions from the hearsay rule.

ance<sup>4</sup> or then existing state of mind<sup>5</sup> exceptions to the hearsay rule. The prosecutor's principal contention for inadmissibility is that the statement lacks trustworthiness because Arnold had a motive to fabricate the statement.

Unlike other hearsay exceptions, such as those concerning business records and public records, Rule 803(3) contains no provision for a judge to exclude hearsay statements based on lack of trustworthiness.<sup>6</sup> Rule 803(3) constitutes an exception from the rule against hearsay statements of present mental or emotional states of mind. The Model Code's<sup>7</sup> provision for mental or emotional states of mind, on which the Federal Rules of Evidence are based, does permit the denial of admissibility based on a lack of trustworthiness or "bad faith."<sup>8</sup> Although the Federal Rules of Evidence are based on the Model Code, the Advisory Committee, in drafting Rule 803(3), purposefully omitted the "bad faith" provision because it believed that "good or bad faith essentially bears upon credibility and is a matter for the jury."<sup>9</sup>

A conflict exists in the federal courts over whether Rule 803(3) may be used to exclude self-serving statements. At least one court has used Rule 403 to exclude "bad faith" statements.<sup>10</sup> Others use a three-prong test, which includes a "bad faith" component, when applying Rule 803(3).<sup>11</sup> Still other courts refuse to allow exclusion simply because after the application of Rule 803(3) the judge does not believe the declarant.<sup>12</sup> These courts allow "bad faith" statements to be weighed as a matter of credibility<sup>13</sup> by the jury in its fact-finding deliberations.<sup>14</sup>

This comment contends that statements like Arnold's should

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4. Federal Rule of Evidence 803(2) and similar state rules of evidence except excited utterances from the rule against hearsay. See *infra* notes 95-120 and accompanying text.

5. A then existing state of mind is excepted from the rule against hearsay under Federal Rule of Evidence 803(3) and similar state rules. See *infra* notes 121-208 and accompanying text.

6. 4 WEINSTEIN & BERGER, WEINSTEIN'S EVIDENCE ¶ 803(3)[1], at 803-105 (1992). The hearsay exceptions for business records and public records, however, explicitly include a provision for lack of trustworthiness. FED. R. EVID. 803(6), (7) & (8).

7. The American Law Institute promulgated The Model Code of Evidence on May 15, 1942. Some of the most distinguished legal scholars including John H. Wigmore, acting as chief consultant, offered guidance to the American Law Institute in its endeavor.

8. 2 WEINSTEIN & BERGER, *supra* note 6 ¶ 803(3)[04], at 803-121. The terms "lack of trustworthiness" and "bad faith" have the same meaning and are used interchangeably throughout this comment.

9. *Id.*

10. United States v. Miller, 874 F.2d 1255, 1265 (9th Cir. 1989).

11. See *infra* text accompanying notes 142-193.

12. See *infra* text accompanying notes 201-207.

13. The fact that the statement was made in "bad faith" may be brought out by cross-examination of the in-court witness, by examination of a witness who has personal knowledge of the "bad faith," or by counsel in his opening or closing arguments.

14. See *infra* text accompanying notes 201-207.

always be admitted and weighed by the jury in its fact-finding deliberations. In evaluating Rules 803(6) and 803(8), this comment will demonstrate how "bad faith" has been used in the business and public records context. Next, this comment probes the excited utterance and present state of mind exceptions to the hearsay rule to determine: (1) the possible origins of "bad faith" analysis; (2) the factual situations in which courts have used "bad faith" analysis; (3) what conduct constitutes "bad faith" categorically; (4) the difficulties in applying "bad faith" analysis even when a hearsay exception has strong policy considerations; and (5) possible solutions that would further the interests of judicial integrity, uniformity, and consistency in the decision making process.

This Comment focuses on Rule 803(3) to demonstrate that without the subterfuge of application of underlying policy considerations which allow "bad faith" analysis to take place under the guise of the application of legitimate policy concerns textually described in the rules, "bad faith" analysis becomes clearly improper. This covert "bad faith" analysis is most clearly demonstrated when the strong policy considerations of Rule 803(2) are extended to Rule 803(3) in the application of the three-prong *Ponticelli* test discussed *infra*. Several states have amended Rule 803(3) when adopting it to include a "bad faith" provision to avoid confusion over whether trial courts have discretion to exclude statements based on "bad faith".<sup>15</sup> In the absence of such an amendment, however, courts should give effect to the plain meaning of Rule 803(3).<sup>16</sup>

## II. RULE 803(6) AND LACK OF TRUSTWORTHINESS

Counsel may examine an *in-court* witness testifying regarding first hand knowledge on each of four factors: (1) perception, (2) recordation and recollection, (3) narration, and (4) sincerity.<sup>17</sup> When the *in-court* witness is testifying to an *out-of-court* statement, however, the risks are doubled.<sup>18</sup> First, the declarant must perceive an event, record and recollect it, and narrate it with sincerity. Next, the *in-court* witness must do the same, except the event that he perceives is the declarant's statement.<sup>19</sup> Sometimes the declarant is the *in-court* witness. If, however,

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15. See FLA. STAT. ch. 90.803(3) (1992); KAN. STAT ANN. § 60-460(l) (1992); CAL. EVID. CODE § 1252 (West 1993).

16. NORMAN J. SINGER, SUTHERLAND STAT. CONST. § 46.01 (5th ed. 1992).

17. MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 801.1, 704 (3rd ed. 1991). But see 2 KENNETH S. BROWN ET AL., MCCORMICK ON EVIDENCE § 245 (4th ed. 1992) (stating that sincerity is only one aspect of the other three elements).

18. For a simplified pictorial explanation of the risks of hearsay statements, see MICHAEL H. GRAHAM, EVIDENCE: TEXT, RULES, ILLUSTRATIONS AND PROBLEMS 64 (Rev. 2d ed. 1989).

19. At the outset, any finding that an in court declarant is exhibiting "bad faith", and therefore the statement itself is inadmissible, must be rejected. In *In re Marriage of L.R.*, 559 N.E.2d 779 (Ill. App. Ct. 1990), *appeal denied*, 567 N.E.2d 333 (Ill. 1991), a mother accused a father of

the declarant is unavailable, opposing counsel will not have the opportunity to cross-examine the declarant on the four factors. Thus, the defendant will not have the opportunity to confront a witness against him.

Before an out-of-court statement offered to prove the truth of the matter asserted can be admitted into evidence, the statement must have circumstantial guarantees of trustworthiness.<sup>20</sup> The Federal Rules of Evidence use a categorical approach to define which statements possess such guarantees. For example, Rule 804(b)(2) excepts from the hearsay rule statements made by a person under the belief of their impending death, because of the belief that no one wishes to die with a lie on their lips.<sup>21</sup>

The Advisory Committee<sup>22</sup> has determined which situations give rise to statements that qualify as reliable hearsay. Rather than admitting or excluding all hearsay or allowing judges to perform some type of ad hoc balancing test to determine reliability, the Advisory Committee's notes to the Rules specify the criteria which must be met. The Advisory Committee balances the circumstantial trustworthiness of a particular type of statement against the opposing party's need to cross-examine the declarant to determine whether an exception to the hearsay rule is needed.<sup>23</sup> When considering some of the hearsay rule exceptions the

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sexually abusing the parties' minor child and sought to have his visitation rights terminated. *Id.* The mother and grandmother both testified that the child told them that she had been sexually abused by her father. *Id.* at 781-83. The appellate court overruled the trial court's admission of the statement. *Id.* at 787. The appellate court stated that the mother's motive to deny the father's visitation was too strong to allow admission of the statement. This approach removes the fact finding role of the jury and determines credibility itself. Note that if the trial court had admitted the statement and simply stated that, as the finder of fact in a non-jury case, it either did not believe that the statement was made or that it should be given very little weight to it because the statement was not corroborated, that would be acceptable.

20. GRAHAM, *supra* note 17 § 803.0.

21. *Id.* at § 804.2.; FED. R. EVID. 804(b)(2).

22. The creation of the Advisory Committee and the creation and eventual adoption of the Federal Rules of Evidence were summarized by the late Professor Edward W. Cleary, Reporter to the Advisory Committee for the Federal Rules of Evidence.

Chief Justice Warren in 1965 appointed an advisory committee to draft rules of evidence for the federal courts. The committee's Preliminary Draft was published and circulated for comment in 1969. 46 F.R.D. 161. A Revised Draft was circulated in 1971. 51 F.R.D. 315. In 1972, the Supreme Court prescribed Federal Rules of Evidence, to be effective July 1, 1973. 56 F.R.D. 183. Justice Douglas dissented. Pursuant to the various enabling acts, Chief Justice Burger transmitted the rules to the Congress, which suspended the rules pending further study by the Congress. P.L. 93-12. After extensive study, the Congress enacted the rules into law with various amendments, to become effective July 1, 1975. P.L. 93-595, approved January 2, 1975, 88 Stat. 1926.

FEDERAL RULES OF EVIDENCE III (West Publishing, 1992).

23. Professor Laughlin stated the policy as follows: "[A]ny exception must be predicated upon a basis for reliability to offset the injury to probative value resulting from the lack of an oath

Advisory Committee decided that judicial discretion was necessary to deal with all of the possible situations which may arise and therefore created an open-ended "bad faith" provision in some of the hearsay rule exceptions.<sup>24</sup>

Rule 803(6) contains such an open-ended "bad faith" provision. Rule 803(6) provides that records of regularly conducted business activity are excluded from the rule against hearsay.<sup>25</sup> The policy behind Rule 803(6) is that business records "cannot fulfill the function of aiding the proper transaction of business unless accurate."<sup>26</sup> The systematic checking of these records and the business duty make business records reliable.<sup>27</sup>

#### A. *Procedural Aspects of Exclusion Analysis Under Rule 803(6)*

Business records may be excluded if circumstances indicate lack of trustworthiness. The business record may be untrustworthy on its face or it may be untrustworthy because of motivational problems.<sup>28</sup>

Relevant case law reveals two ways in which business records may be excluded as untrustworthy based on motivational considerations.<sup>29</sup> First, Rule 803(6) lists the categorical requirements of trustworthiness. The business record exception requires that the witness who provides the foundation for admission must testify that: (1) the declarant in the records had knowledge to make accurate statements; (2) the declarant recorded the statements contemporaneously with the actions which were the subject of the reports; (3) the declarant made the records in the regu-

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and of cross examination." Charles V. Laughlin, *Business Entries and the Like*, 46 IOWA L. REV. 276 (1960). Not all hearsay is equally trustworthy. It is difficult to compare different types of hearsay and find similar components. See Laurence H. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957 (1974) (attempting to make a synthesizing comparison of the hearsay exceptions).

24. FED. R. EVID. 803(6) advisory committee's notes.

25. Records of Regularly Conducted Activity. 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, *unless the source of information or the method or circumstances indicate lack of trustworthiness*.

FED. R. EVID. 803(6) (emphasis added).

26. GRAHAM, *supra* note 17 § 803.6 at 867.

27. *Id.*

28. *Id.* at § 803.6 at 871. This article addresses only the motivational aspects of trustworthiness analysis.

29. Although either analysis yields the same result, the reader of cases involves excluded hearsay under Rule 803(6) must be aware of the distinction between the two modes of analysis to understand the more subtle application of "bad faith" analysis under the "not created in the regular course of business" exclusion.

lar course of the business activity; and (4) such records were regularly kept by the business.<sup>30</sup> One way to exclude business records using "bad faith" analysis is to find that they do not fall within the legal definition of "created in the regular course of business," because ordinary business documents are not guided by purely self-motivating concerns, but rather by a business duty or a need to keep accurate records. In other words, the records do not meet the categorical requirements.

Applying a general overall requirement of trustworthiness is another way to exclude business records based on "bad faith." For example, the United States Supreme Court has routinely considered documents prepared in anticipation of litigation to lack trustworthiness.<sup>31</sup> The difference between excluding hearsay based on the categorical requirements using "bad faith" or based on the overall trustworthiness requirement is one of semantics. In *Solomon v. Shuell*,<sup>32</sup> the Michigan Supreme Court identified this distinction by comparing the Second Circuit and Supreme Court decisions in *Palmer v. Hoffman*.<sup>33</sup> Although both reached the same conclusion, it was reached on slightly different grounds. In *Hoffman*, the Supreme Court upheld the exclusion of a deceased railroad engineer's accident report on the ground that the regular course of railroading did not include writing accident reports.<sup>34</sup> The Second Circuit Court of Appeals had taken a slightly different view, finding that the document was inadmissible because of the declarant's powerful motive to misrepresent.<sup>35</sup>

A minor technical distinction differentiates whether the document is said to be inadmissible because a motive to misrepresent takes it out of the class of documents prepared in the "regular course of business", or whether it is inadmissible based on "bad faith." Some courts use the latter framework of analysis.<sup>36</sup> Other courts adopt the approach of the Supreme Court in *Hoffman* and simply find that, even though accident reports are regularly made, the reports do not fall within the "legal" definition of the regular course of the business of railroading. Under either analysis the result should be the same.

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30. See, e.g., *United States v. Furst*, 886 F.2d 558, 571 (3d Cir. 1989), *cert. denied*, 493 U.S. 1062 (1990).

31. See, e.g., *Palmer v. Hoffman*, 318 U.S. 109 (1943).

32. 457 N.W.2d 669 (Mich. 1990).

33. *Id.* at 676.

34. *Id.* at 113.

35. *Palmer v. Hoffman*, 129 F.2d 976, 991 (2d Cir. 1942), *aff'd*, 318 U.S. 109 (1943).

36. See *Solomon v. Shuell*, 457 N.W.2d 669, 677 (Mich. 1990) (noting that "trustworthiness is itself an express threshold condition of admissibility"); *United States v. Casoni*, 950 F.2d 893, 910 (3rd Cir. 1991) (stating "[o]ur opinion in *Furst* [laying out the categorical requirements of Rule 803(6)] does not include trustworthiness in the four specific requirements it lists . . .").

B. *Exclusion of Legal Documents Under Rule 803(6)*

For legal documents, the relationship of the parties and the purpose of the business record determines whether the documents should be excluded. In *United States v. Casoni*,<sup>37</sup> a co-conspirator made statements to his attorney implicating the defendant.<sup>38</sup> The co-conspirator's attorney recorded the statements in a memorandum and proffer which were presented to the government as a bid for the co-conspirator's immunity.<sup>39</sup> The government later sought to have the proffer entered into evidence in a trial against the defendant.<sup>40</sup> The defendant argued that the attorney had a motive to fabricate the report because, as an advocate of the co-conspirator, he wanted to minimize his client's criminal responsibility and maximize that of the other co-defendants.<sup>41</sup>

In denying admission of the proffer, the Third Circuit stated: "[w]e do not think the proffer of an attorney seeking immunity from criminal prosecution for his client has the element of trustworthiness that the business records exception to Rule 803(6) requires."<sup>42</sup> The court expanded upon what it meant by trustworthiness:

[o]ur holding does not imply that a proffer prepared by an attorney in a bid for his client's immunity is untrustworthy because the attorney is likely to misrepresent the facts, but only that such an attorney's narrative prepared for the purpose of securing a bid for immunity from criminal prosecution for his client is an example of a case in which the method and circumstances of preparation bear so heavily on the requirement of trustworthiness that it should not be admitted under the hearsay exception for statements prepared in the course of "a regularly conducted business activity."<sup>43</sup>

The court held that the proffer was not a "record routinely prepared in the 'business' of the practice of law" but "instead, a product of the advocate's craft, consciously shaped to serve a client's end. It is a tool of controversy, not a routine record of fact."<sup>44</sup> If artfully crafted legal documents do not fall within the course of the "regularly conducted business activity" of practicing law, one is hard-pressed to imagine what would.

*Casoni* highlights the difficulty in applying "bad faith" analysis to legal documents. Almost all legal documents are created to portray the

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37. 950 F.2d 893 (3d Cir. 1991).

38. *Id.* at 900.

39. *Id.* at 901.

40. *Id.* at 902.

41. *Id.* at 910.

42. *Id.* at 912.

43. *Id.* at 912-13.

44. *Id.* at 912.



client in the most favorable light possible. The very nature of an adversarial legal system renders such a result inevitable.<sup>45</sup>

The relationship of an attorney to a client gives rise to a presumption that documents prepared by an attorney are meant to portray the client in the most favorable light. In addition, the purpose of the document—in this instance, a proffer meant to secure immunity for the client—is much less trustworthy than other types of documents. In contrast, an internal memorandum would probably be found to contain a more candid statement of fact.

### C. *Exclusion of Other Documents Based on Relationship and Purpose*

Other cases have focused on the relationship between the various parties in the litigation. In *Hoffman*, the relationship in question was between an employee and his employer. The fact that the creator of the report was an employee of a party likely to be involved in a lawsuit, coupled with the purpose of the document, protection against future litigation, led the court to exclude the accident report.<sup>46</sup>

Sometimes the purpose of the document itself provides sufficient basis for exclusion, particularly if the party who *created* the document seeks to use it in present litigation.<sup>47</sup> In such a case, the court may scrutinize the report more thoroughly, especially if the creator admits that the purpose of the report was to portray that party in a favorable light. For example, in *United States v. Williams*,<sup>48</sup> the Fifth Circuit excluded a memorandum prepared by the company's head of maintenance that estimated the value of a stolen company trailer.<sup>49</sup> The court noted that the declarant "made the statement almost three years after the incident in question. It was not made 'in the course of a 'regularly conducted business activity' nor was it 'the regular practice of that business activity to make the memorandum.' " The court concluded that "[a]ll too clearly, [the declarant] prepared the statement for purposes of the trial alone."<sup>50</sup>

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45. As one legal scholar notes: "The theory of our adversary system of litigation is that each litigant is most interested and will be most effective in seeking, discovering, and *presenting* the materials which will reveal the strength of his own case and the weakness of his adversary's case . . . ." EDMUND M. MORGAN, *SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION* 3, (1956) (emphasis added).

46. *Hoffman v. Palmer*, 129 F.2d 976, 991 (2d Cir. 1942), *aff'd*, 318 U.S. 109 (1943).

47. If the document is being used against the person who created it, then the document will usually not be excluded. *Korte v. New York, N.H. & H.R. Co.*, 191 F.2d 86 (2d Cir.), *cert. denied*, 342 U.S. 868 (1951).

48. 661 F.2d 528 (5th Cir. 1981).

49. *Id.* at 531.

50. *Id.*

Other cases confirm that courts may exclude a report if it was prepared simply to make the party look good. In *Pan-Islamic Trade Corp. v. Exxon Corp.*,<sup>51</sup> the court excluded a memorandum prepared by the plaintiff, although it was not prepared specifically for litigation purposes, its admitted purpose was to portray the plaintiff in the "best light possible."<sup>52</sup>

Conversely, in several instances the court has allowed business records to be admitted under circumstances that otherwise appear to lack trustworthiness.<sup>53</sup> A report prepared pursuant to a government mandate may not be subjected to the usual scrutiny even though the report was obviously prepared for the purpose of litigation.<sup>54</sup> Thus, in *Abdel v. United States*,<sup>55</sup> the court admitted transaction reports prepared by a Food Stamp Review Officer despite the objection that the reports were prepared in anticipation of imminent litigation.<sup>56</sup> In *Abdel*, investigative officers tried to use food stamps to buy non-food items from various stores. The officers made a record of the items purchased on the transaction report immediately after the purchase.<sup>57</sup> The court admitted the report primarily because of the Food and Nutrition Service's mandate to effectuate the food stamp system.<sup>58</sup>

As a general rule, courts will exclude reports prepared in anticipation of litigation or created to make a party appear in its best light, unless a government agency is in pursuit of a government mandate. Predicting which business records courts will exclude as untrustworthy, however, is difficult. In *Casoni*, for example, if a financial report rather than a proffer had implicated the defendant, and the relationship between the co-conspirator and the attorney instead had been an accountant-client relationship, that report may not have been excluded. An accountant will usually prepare reports in a light most favorable to his client, but strict accounting principles and ethical obligations require accountants' statements to accurately depict clients' financial positions. If the analysis is based on the purpose of the report alone, the result is even less clear.

The Advisory Committee recognized the addition of the motiva-

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51. 632 F.2d 539 (5th Cir. 1980), *cert. denied*, 454 U.S. 927 (1981).

52. *Id.* at 560.

53. *Id.*

54. See *Hodge v. Seiler*, 558 F.2d 284, 288 (5th Cir. 1977) (admitting a report prepared in accordance with HUD's statutory mandate).

55. 670 F.2d 73 (7th Cir. 1982).

56. *Id.*

57. *Id.*

58. *Id.* at 76. This case represents a renegade approach to "bad faith" analysis. As long as the overall purpose of the declarant is good (i.e. to help poor people acquire adequate nutrition) then individual statements prepared for enforcement purposes are admissible.

tional factor as "a source of difficulty and disagreement."<sup>59</sup> In *Hoffman*, Judge Clark said in his dissent, "I submit that there is hardly a grocer's account book which could not be excluded on [a "bad faith"] basis."<sup>60</sup> Commentators have found introduction of the motivational factor disturbing because the fact that business records may be self-serving has not traditionally been a basis for their exclusion.<sup>61</sup>

Although the Advisory Committee recognized this dilemma, it concluded that:

[t]he formulation of specific terms which would assure satisfactory results in all cases is not possible. Consequently the rule proceeds from the base that records made in the course of a regularly conducted activity will be taken as admissible but subject to authority to exclude if "the sources of information or other circumstances indicate lack of trustworthiness."<sup>62</sup>

Rule 803(6) is not a useful tool for applying "bad faith" analysis under other hearsay exceptions because the exception is vague, its adoption was highly controversial, and the case law offers no consistent categorical framework for its application. This suggests the necessity of rethinking the "lack of trustworthiness" provision in Rule 803(6).

### III. RULE 803(8) AND LACK OF TRUSTWORTHINESS

Rule 803(8) provides that public records and reports are excepted from the rule against hearsay.<sup>63</sup> The most controversial area of the public records exception is the evaluative report. The Advisory Commit-

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59. FED. R. EVID. 803(6) advisory committee's notes.

60. *Hoffman v. Palmer*, 129 F.2d 976, 1002 (2d Cir. 1942), *aff'd*, 318 U.S. 109 (1943).

61. FED. R. EVID. 803(6) advisory committee's note (citing Charles V. Laughlin, *Business Records and the Like*, 46 IOWA L.REV. 276, 285 (1961)). Professor Laughlin stated: "That records are self-serving is no objection to admissibility." Laughlin, *supra*, at 285. He further stated: "This point is so obvious that little actual authority can be cited." *Id.* at n.27 (citing *Joseph v. Krull Wholesale Drug Co.*, 147 F. Supp. 250, 256 n.22 (E.D. Pa. 1956); *Estate of Buchman*, 291 P.2d 547 (Cal. Ct. App. 1955); *John Scowcroft & Sons Co. v. Roselle*, 289 P.2d 621 (Idaho 1955); *Smith v. Abel*, 316 P.2d 793, 799 (Or. 1957); *Istrouma Mercantile Co. v. Northern Assur. Co.*, 165 So. 11 (La. 1935)).

62. FED. R. EVID. 803(6) advisory committee's note.

63. The Rule provides:

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

FED. R. EVID. 803(8) (emphasis added).

tee's note to Rule 803(8) sets out factors for determining the trustworthiness of evaluative reports: "(1) the timeliness of the investigation; (2) the special skill or experience of the official; (3) whether a hearing was held and the level at which conducted; (4) possible motivational problems suggested by *Palmer v. Hoffman*."<sup>64</sup> The Advisory Committee also indicated that this list is not exhaustive.<sup>65</sup>

The motivation factor of the general trustworthiness requirement is most relevant to this comment's analysis. The Advisory Committee's note to Rule 803(8) cites *Palmer v. Hoffman* for the proposition that any public records prepared in anticipation of litigation are untrustworthy and may therefore be subject to exclusion.<sup>66</sup> Several federal cases support this position.<sup>67</sup>

A. *Documents Created in Anticipation of Litigation Excluded Under Rule 803(8)*

In *Attorney General v. John A. Biewer Co.*,<sup>68</sup> the Michigan Court of Appeals excluded several Department of Natural Resources memoranda which set forth the costs that the agency incurred during the investigation of contamination of ground water by the defendant's plant.<sup>69</sup> The court concluded that the memoranda were prepared by the Department for the specific purpose of recovering damages in a civil lawsuit.<sup>70</sup> Consequently, the court concluded that "[t]he inherent trustworthiness of documents prepared by a public official in carrying out his duties which justifies the public records exception does not apply to this case"<sup>71</sup>

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64. FED. R. EVID. 803(6) advisory committee's note.

65. *Id.* See also *Beach Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988) (The Court recognized that courts may exclude evaluative reports under Rule 403-type relevancy analysis).

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

67. See *United States v. Johnson*, 722 F.2d 407, 410 (8th Cir. 1983) (Although the record in *Johnson* was admissible the court stated: "[t]he 803(8) exception was designed to allow admission of official records prepared for purposes independent of specific litigation. See, e.g., *United States v. Stone*, 604 F.2d 922, 925 (5th Cir. 1979). The record at issue here was kept in ministerial fashion, pursuant to legal authority, and not in anticipation of [litigation]."); *Glados, Inc. v. Reliance Insurance Co.*, 888 F.2d 1309 (11th Cir. 1987), *cert. denied*, 497 U.S. 1025 (1990) (police officer had no stake in litigation therefore document was not prepared in anticipation of litigation); *United States v. Diaz*, No. 92-78, 1993 WL 85764, \*12 (E.D.Pa. March 25, 1993) (In *Diaz* the document was not a public document but the court stated that if it had been it would have been inadmissible partly because it was prepared in anticipation of litigation); *Solomon v. Shuell*, 457 N.W.2d 669 (Mich. 1990) (record prepared in anticipation of litigation excluded); *Attorney General v. John Biewer Co.*, 363 N.W.2d 712 (Mich. Ct. App. 1985) (same). But see *United States v. Davis*, 826 F. Supp. 617 (D.R.I. 1993) (document not excluded although one of the purposes of its preparation was litigation).

68. 363 N.W.2d 712, 726 (1985).

69. *Id.* at 719-20.

70. *Id.* at 720.

71. *Id.*

In *Solomon v. Shuell*,<sup>72</sup> the Supreme Court of Michigan held in a wrongful death action against the City of Detroit Police Department that several reports prepared by four subject police officers lacked trustworthiness and were therefore inadmissible.<sup>73</sup> The reports contained the officers' own statements of the incident as well as reports of conversations with the other officers involved.<sup>74</sup> The plaintiff argued and the court agreed that the reports must be excluded on the basis of "bad faith" because the officers "knew they were the subject of a homicide investigation that could result in criminal prosecution, civil liability, and inter-departmental discipline" when the reports were prepared.<sup>75</sup>

Alternatively, in *Glados, Inc. v. Reliance Insurance Co.*,<sup>76</sup> the Eleventh Circuit Court of Appeals examined a police accident report for improper motive in a situation where both of the parties and the subject matter were unrelated to the police officer in any way.<sup>77</sup> Finding no improper motive, the court stated that: "as a police investigator, [the detective] had no stake in any future litigation."<sup>78</sup> *Glados* implies that if the declarant of a public record *did* have stake in any future litigation, then the public record would be subject to exclusion.<sup>79</sup>

### B. *Exclusion of Politically Motivated Documents*

Courts may also exclude public records for lack of trustworthiness if the public record is politically motivated. In *Baker v. Firestone Tire & Rubber Co.*,<sup>80</sup> the Eleventh Circuit refused to admit into evidence a report of a congressional investigation into Firestone tires.<sup>81</sup> The plaintiff-appellant sought admission of the report to support his claim for punitive damages.<sup>82</sup> The court found that "[t]he subcommittee report did not contain factual findings necessary to an objective investigation, but consisted of *the rather heated conclusions of a politically motivated*

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72. 457 N.W.2d 669 (Mich. 1990).

73. *Id.* at 678.

74. *Id.* at 673.

75. *Id.* at 674.

76. 888 F.2d 1309 (11th Cir. 1987), *cert. denied*, 454 U.S. 1025 (1990).

77. *Id.* at 1313.

78. *Id.*; *see also* Robbins v. Whelan, 653 F.2d 47 (1st Cir.) *cert. denied* 454 U.S. 1123 (1981); Baker v. Elcona Homes Corp, 588 F.2d 551 (6th Cir. 1978), *cert. denied*, 441 U.S. 933 (1979); Vanderpoel v. A-P-A Transport Corp., No. 90-5866, 1992 WL 158426 (E.D. Pa. July 1, 1992).

79. *But see* *infra* text accompanying notes 92-94.

80. 793 F.2d 1196 (11th Cir. 1986).

81. *Id.* at 1189. The report at issue was: The Safety of Firestone 500 Steel Belted Radial Tires, Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 2d sess., (Comm. Print 1978).

82. *Id.*

hearing.”<sup>83</sup> In *Anderson v. City of New York*,<sup>84</sup> a district court refused to admit a congressional report noting that “it cannot be denied that hearings and subsequent reports are frequently marred by political expediency and grandstanding.”<sup>85</sup> The court characterized committee hearings as a “circus” and stated that they were not conducive to development of the facts.<sup>86</sup>

Courts do not limit the political motivation doctrine to reports of the United States Congress. In *Gentile v. County of Suffolk*,<sup>87</sup> a federal district court found that a report prepared by a state appointed body regarding the police department and district attorney supervision of personnel was subject to attack on the ground that it was motivated by partisan interests.<sup>88</sup> Although the court found that the Commission was non-partisan and thus the report was admissible, the case indicates that courts will apply the political motivation test to lower-level government bodies.<sup>89</sup>

Courts may exclude public records for lack of trustworthiness if (1) the declarant is motivated by the possibility of future litigation; or, (2) the report was prepared by a politically-motivated body. The application of the “bad faith” concept under Rule 803(8), however, has been inconsistent in both the political motive area as well as the anticipation of litigation areas.

A federal district court in *In Re Air Crash Disaster at Stapleton Airport, Denver, Colorado on November 15, 1987*<sup>90</sup> held that: “the fact that the agency preparing the report has, as a whole, an interest in its conclusions goes to weight, not admissibility, absent specific evidence of bias.”<sup>91</sup>

The general trustworthiness rule is also contradicted in the preparation in anticipation of litigation area. In *Perrin v. Anderson*,<sup>92</sup> the Tenth Circuit Court of Appeals held that a report from the Shooting Review Board under the Oklahoma Department of Public Safety was admissible despite the fact that the board was comprised of police officers.<sup>93</sup> In

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83. *Id.* (emphasis added).

84. 657 F. Supp. 1571 (S.D.N.Y. 1987).

85. *Id.* at 1579.

86. *Id.*; but see *In Re Air Crash Disaster at Stapleton Airport, Denver, Colorado on November 15, 1987*, 720 F. Supp. 1493 (D. Cal. 1989).

87. 129 F.R.D. 435 (E.D.N.Y. 1990), *aff'd*, 926 F.2d 142 (2d Cir. 1991).

88. *Id.* at 457.

89. *Id.*

90. 720 F. Supp. 1493 (D. Col. 1989).

91. *Id.* at 1498.

92. 784 F.2d 1040 (10th Cir. 1986).

93. *Id.* at 1047.

*Diaz v. United States*,<sup>94</sup> a district court held that an incident report prepared by the government and offered on its behalf was admissible in a negligence action by an invitee, against the United States and a private party. *Diaz* flies in the face of *Palmer v. Hoffman*. The court stated that JAG reports (reports prepared in accordance with the Judge Advocate General's Manual), are routinely prepared as a candid recitation of the facts involved in a particular incident. The court found that the JAG reports were highly trustworthy because they are prepared under military standards. This case is also contrary to the *Biewer* case, which excluded a Department of Natural Resources memorandum. In both cases government agencies created reports to document events that had a strong potential for litigation. However, in *Diaz* the report was admitted and in *Biewer* it was not.

As with Rule 803(6), Rule 803(8) offers little in the way of a consistent categorical framework of analysis. Hence its usefulness is limited in analyzing "bad faith" as applied to other rules. Both Rules 803(6) and 803(8) seemingly serve as warning beacons of the difficulties in applying inconsistent principles to the exclusion of self-serving documents.

#### IV. "BAD FAITH" UNDER THE EXCITED UTTERANCE EXCEPTION

Courts have also addressed motivational considerations in the context of excited utterances. Federal Rule of Evidence 803(2) excludes excited utterances from the rule against hearsay.<sup>95</sup> Although federal courts have not applied lack of trustworthiness analysis in applying the excited utterance exception, some state courts have.<sup>96</sup>

The Illinois rule of evidence dealing with spontaneous declarations requires that there be: "(1) an occurrence sufficiently startling so as to produce a spontaneous and unreflecting statement; (2) an absence of time to fabricate; and (3) a statement that relates to the circumstances of the occurrence."<sup>97</sup> As the following discussion indicates, the Illinois courts have extended the absence of "time to fabricate" requirement to a requirement that there be no "motive to fabricate." This extends the strong policy consideration of requiring an absence of time between a startling event and a statement to an unsupported qualification of absence of motive to fabricate.

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94. 655 F. Supp. 411 (E.D. Va. 1987).

95. FED. R. EVID 803(2) provides: "Excited utterance. A statement relating to a startling event or condition made while the declarant was under the excitement caused by the event or condition."

96. See *infra* text accompanying notes 97-118.

97. *People v. Poland*, 174 N.E.2d 804, 807 (Ill. 1961); *People v. Robertson*, 356 N.E.2d 1180, 1183 (Ill. App. Ct. 1976).

In *People v. Parisie*,<sup>98</sup> an Illinois Fourth District Court of Appeal made such an extension. It held that when considering whether the excitement predominated over the statement the court may consider the nature of the event, the condition of the declarant, the influence of intervening occurrences, and the presence or absence of self-interest.<sup>99</sup>

Courts have often considered lack of motive to fabricate in child sex abuse cases. In *In re Marriage of Theis*,<sup>100</sup> the court stated, "Illinois courts have recognized the special circumstances which exist concerning the motivations behind the statements of very young children. The rationale for the admission of their statements is that it is unlikely that a child of tender years will have any reason to fabricate stories of attacks."<sup>101</sup>

Courts have also used the theory of lack of motive to fabricate in other contexts. In *People v. Gacho*,<sup>102</sup> the declarant, while suffering from multiple gunshot wounds and severe blood loss, was confined for six and one half hours in a car trunk with a dead man on a cold December night.<sup>103</sup> When the trunk was opened by police and paramedics, a police officer asked, "Who did this to you?"<sup>104</sup> The declarant, in pain and having difficulty breathing, responded "Gott or Gotch."<sup>105</sup> In holding the identification admissible the court said that "[w]e believe it is inconceivable, as the trial court ruled, that [the victim] would have spent the time under these conditions to attempt to fabricate a story or statement about the event."<sup>106</sup>

In *People v. House*,<sup>107</sup> the victim/declarant was severely burned in a violent attack.<sup>108</sup> Hours later, at the hospital, she gave a description of her assailants to police officers.<sup>109</sup> Defense counsel sought to introduce the statement because the description did not match that of the defendant, but the trial court denied admission.<sup>110</sup> The Supreme Court of Illinois, however, reversed the trial court citing and quoting from *Gacho*: "Neither [victim/declarant] had a motive to fabricate. Quite the contrary, both would have every reason to see their assailants brought to

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98. 287 N.E.2d 310 (Ill. App. Ct. 1972).

99. *Id.* at 322-23 (citing *State v. Stafford*, 23 N.W.2d 832, 835-36 (Iowa 1946)).

100. 460 N.E.2d 912 (Ill. App. Ct. 1984).

101. *Id.* at 917; *see also* *People v. Chatman*, 441 N.E.2d 1292, 1298 (Ill. App. Ct. 1984).

102. 522 N.E.2d 1146 (Ill. 1988).

103. *Id.* at 1150.

104. *Id.* at 1151.

105. *Id.*

106. *Id.* at 1156.

107. 566 N.E.2d 259 (Ill. 1990).

108. *Id.* at 261.

109. *Id.* at 261-62.

110. *Id.* at 270.



justice.”<sup>111</sup> The court therefore admitted the statement.

The Illinois courts have even admitted hearsay statements where the declarant had a motive to fabricate. In *People v. Watson*,<sup>112</sup> the defendant was convicted of sexually abusing the declarant, a three-year-old girl.<sup>113</sup> The defendant claimed that the girl was trying to climb into a crib and fell onto a small rocking chair.<sup>114</sup> The declarant told nurses, “I didn’t fall on the rocking chair.”<sup>115</sup> Defendant, seeking to have the statement excluded as “bad faith” hearsay, argued that the declarant had been told repeatedly not to climb on the chair and that she therefore had a motive to fabricate the statement.<sup>116</sup> The court, however, allowed the statement, finding that the “credibility of a child of such tender years would be a matter for the jury to weigh.”<sup>117</sup> This approach allowed the court to determine the admissibility under the hearsay exception and the jury to determine its weight.

If courts can consider self-interest, what level of self interest will serve to demonstrate that the statement is not an excited utterance and when will they simply allow the “bad faith” component to be weighed by the jury as matter of credibility? Moreover, should the need for consistency in decision-making and uniform application of the categorical framework of the hearsay rule dictate that the “bad faith” component always be a matter for the finder of fact when weighing credibility? The following example illustrates the difficulty in applying “bad faith” analysis under Rule 803(2).

Assume that after a car accident, the declarant exclaims, “Oh my God, the pink car [the defendant’s] ran the red light.” Now assume that the defendant was the declarant’s stock broker and had lost the declarant’s money in a bad stock deal. Or, assume that the defendant was black and the declarant was a member of the Klu Klux Klan, or that the defendant had an affair with the declarant’s wife, or that the declarant was proven to hate the color pink.

The declarant’s statement may manifest varying levels of “bad faith” which make it difficult to determine what circumstances warrant attack upon the declarant’s credibility and when a judge should step in and declare as a matter of law the statement should be excluded because

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111. *Id.* at 287; see also *Simmons v. Firestone*, 467 N.E.2d 327 (Ill. App. Ct. 1984) (noting that because of pain, declarant had little time or incentive to fabricate).

112. 438 N.E.2d 453 (Ill. App. Ct. 1982).

113. *Id.* at 455.

114. *Id.*

115. *Id.* at 456.

116. *Id.*

117. *Id.* at 457.

it was made in "bad faith."<sup>118</sup> The same fact pattern, when posed to various judges, may potentially have varying results under Rule 803(2), as was the case under Rules 803(6) and 803(8).<sup>119</sup>

When an exception to the hearsay rule has requirements other than trustworthiness, a finding of "bad faith" is more easily obscured as a mere factor in the overall analysis.<sup>120</sup> The next section demonstrates the difficulty of analyzing statements under Rule 803(3)—an exception that lacks strict policy considerations and enumerated requirements and therefore possesses even fewer circumstantial guarantees of trustworthiness than the excited utterance exception.

## V. HEARSAY STATEMENTS UNDER RULE 803(3)

Rule 803(3) excepts from the rule against hearsay statements of then existing mental, emotional, or physical conditions.<sup>121</sup> The exception to hearsay under Rule 803(3) encompasses statements such as, "My leg hurts" or "I love you"<sup>122</sup>, but does not apply to a statement such as, "I felt bad when Johnny threw the ball through the window last week."<sup>123</sup> Rule 803(3) textually excludes the last statement as a recount of a past emotion or a fact remembered. Allowing such a statement would eviscerate the rule against hearsay. Thus, the statement may look forward but not backward.<sup>124</sup> In addition, statements admitted under Rule 803(3) may be used to show only the declarant's belief—not the fact believed.<sup>125</sup>

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118. This naturally raises the issue of whether judges rather than juries should be determining credibility. Because this issue has been adequately discussed elsewhere, this comment does not address it. Query what does the constitutional right to a jury trial mean? Preservation of judicial integrity warrants removing "bad faith" analysis from the bench and delegating it to the jury.

119. See *supra* parts II & III.

120. This was demonstrated by the courts' preference of using the "not prepared in the regular course of business" framework as opposed to the overall trustworthiness requirement in Rule 803(6) analysis. *Palmer v. Hoffman*, 318 U.S. 109 (1947). See *supra* note 34 and accompanying text. Under the excited utterance exception, motivation was only one factor among many. *People v. Parisie*, 287 N.E.2d 310, 322-23 (Ill. App. Ct. 1972).

121. The Rule provides:

Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

FED. R. EVID. 803(3).

122. MICHAEL K. GRAHAM, *MODERN STATE AND FEDERAL EVIDENCE: A COMPREHENSIVE REFERENCE TEXT* 185 (Patricia C. Bobb et al. eds., 1989).

123. *Id.* at 191.

124. FED. R. EVID. 803(3) advisory committee's note.

125. If a declarant states "My brakes are bad" his comment is admissible to show that he

Rule 803(3) contains no provision for exclusion based on lack of trustworthiness. As discussed *supra*, the Model Code of Evidence does contain such a provision. The Advisory Committee, however, purposefully omitted the "bad faith" provision when creating the Federal Rules of Evidence, because it felt that good or bad faith essentially bears upon credibility and thus is a matter for the jury.<sup>126</sup> Some courts exclude "bad faith" statements, using Rule 403.<sup>127</sup> Others use a three-prong test which includes a "bad faith" component when applying Rule 803(3). Still others refuse to allow exclusion simply because the judge does not believe the declarant or the witness.

A. *Applying "Bad Faith" as a Component of Relevancy Under Rule 403*

Judge Jack Weinstein<sup>128</sup> states that the "bad faith" component may be introduced through Rule 403 balancing.<sup>129</sup> Rule 403 weighs the probative value of evidence against various trial concerns.<sup>130</sup> If the trial concerns outweigh the probative value of the statement, the statement is excluded. Judge Weinstein offers that "bad faith" is only one factor that should be considered in the equation.<sup>131</sup>

The Ninth Circuit adopted Judge Weinstein's approach in *United States v. Miller*.<sup>132</sup> In *Miller*, the defendant made the statement at issue during a telephone conversation with his wife.<sup>133</sup> During the conversation, the defendant described his "confused and distraught" state.<sup>134</sup> The court excluded the statement as "unreliable and self-serving."<sup>135</sup> The court pointed out that the defendant knew the conversation was being recorded because he mentioned it during the call.<sup>136</sup> The Ninth Circuit determined that "[g]iven the potentially manufactured nature of this evidence, the district court properly recognized that [the statement] was unreliable and of little probative value."<sup>137</sup> Furthermore, the court rec-

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thought that his brakes were bad. It is not admissible to show that his brakes were in fact bad. GRAHAM, *supra* note 17 § 803.3 n.2.

126. See *supra* note 72, at 803-121.

127. *United States v. Miller*, 874 F.2d 1225 (9th Cir. 1989).

128. Judge Weinstein is a well noted legal scholar on the law of evidence as well as a District Court Judge for the Eastern District of New York.

129. See 4 WEINSTEIN & BERGER, *supra* note 6, ¶ 803(3)[4].

130. FED. R. EVID. 403.

131. 4 WEINSTEIN & BERGER, *supra* note 6, ¶ 803(3)[4].

132. 874 F.2d 1255 (9th Cir. 1989).

133. *Id.* at 1265.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

ognized that the evidence was likely to confuse the jury.<sup>138</sup>

In evaluating the incremental probative value for the purpose of determining admissibility under Rule 403, the trial judge *must* assume that the statement will be believed by the trier of fact.<sup>139</sup> This poses a problem in using a "bad faith" analysis under Rule 403. The application of another rule of evidence should not serve to circumvent the unambiguous intention of the legislature to limit judicial discretion in consideration of "bad faith" when applying Rule 803(3).<sup>140</sup> Thus, Rule 403 is an improper vehicle for "bad faith" analysis.

B. *Exclusion of Self-Serving Statements Under Ponticelli and Its Progeny*

Under Rules 803(6), 803(8), and 803(2), the circumstantial grounds for possible exclusion of hearsay statements are fairly clear. Under Rule 803(6) the business duty and regularity make reports trustworthy. Under Rule 803(8) the official duty makes a record trustworthy. Under Rule 803(2) an exciting event is presumed to still the declarant's capacity to lie. Under Rule 803(3), however, the justification for allowing statements of present mental conditions is simple necessity.<sup>141</sup> Rule 803(3) does not condense policy considerations into factors to be used when applying the rule, such as contemporaneousness to a startling event under Rule 803(2) or preparation in the regular course of business under Rule 803(6). As a result, "bad faith" analysis is a strong consideration for exclusion, if not the only consideration.

The following cases form a framework of analysis similar to that employed in Rule 803(2) by relating the statements to an event and then requiring that the statement be made in close proximity to that event, excluding statements that do not meet that requirement. There is no such requirement under Rule 803(3), however, that the statement relate to any event, only that it be a statement of a "present" mental state.

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138. *Id.* at 1266.

139. GRAHAM *supra* note 122, at 20; *see Ballou v. Henri Studios, Inc.*, 656 F.2d 1147, 1154 (5th Cir. 1981); *United States v. Thompson*, 615 F.2d 329, 333 (5th Cir. 1980).

140. *See SINGER, supra* note 16, § 46.01.

141. GRAHAM, *supra* note 17 § 803.3. Some courts have tried to sure up this exception and other hearsay exceptions by requiring corroboration or allowing the statement to be used only against the party who created it. With regard to Rule 803(6) the Advisory Committee stated: "If a report is offered by the party at whose instance it was made, however, it has been held inadmissible." FED. R. EVID. 803(6) advisory committee's note; *see Yates v. Blair Transport Inc.*, 249 F. Supp. 681 (S.D.N.Y. 1965).

1. THE *PONTICELLI* CASE—THE THREE PRONG TEST—A CRACK IN THE DAM

In *United States v. Ponticelli*,<sup>142</sup> the Ninth Circuit Court of Appeals held that in applying Rule 803(3), the court must evaluate three factors: contemporaneousness, chance for reflection, and relevance.<sup>143</sup> In *Ponticelli*, the defendant, Ponticelli, testified before a grand jury that he did not recall how he came to possess a written list of four names used in a loan-sharking operation.<sup>144</sup> At a second grand jury proceeding, a co-defendant in the original grand jury investigation agreed to testify that Ponticelli told him that Ponticelli intended to lie to the grand jury.<sup>145</sup> Subsequently, at trial, the co-defendant testified that he personally gave Ponticelli the piece of paper with the four names on it.<sup>146</sup> In the ensuing prosecution of Ponticelli for perjury concerning his possession of the list, Ponticelli sought to offer the statement he previously made to his lawyer that he could not remember where he got the list. The court excluded the statement.<sup>147</sup> The court concluded that Ponticelli had sufficient time to "concoct" the story about how he came to possess the list, namely that the F.B.I. planted it there.<sup>148</sup> The court determined that the fact that Ponticelli made the statement after his arrest while in consultation with a lawyer indicated that he appreciated the legal significance of his statement.<sup>149</sup> In other words, Ponticelli made the statement in anticipation of future litigation.

2. *PONTICELLI* USED IN EVALUATING OTHER ORAL STATEMENTS

In *United States v. Harvey*,<sup>150</sup> the government charged the defendant, a self proclaimed "loan broker," with mail and wire fraud.<sup>151</sup> He had promised loans from a reliable source but never produced the loans. At trial, the defendant sought to introduce the statement of a third party who purportedly heard the defendant state that he believed that his financiers were "hustlers."<sup>152</sup> The Seventh Circuit Court of Appeals agreed with the trial court's exclusion of the statement because it was made two years after the loans were promised and only the state of mind of the

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142. 622 F.2d 985 (9th Cir.), *cert. denied*, 449 U.S. 1016 (1980).

143. *Id.* at 991.

144. *Id.* at 987.

145. *Id.*

146. *Id.*

147. *Id.* at 991.

148. *Id.* at 988, 992.

149. *Id.* at 992.

150. 959 F.2d 1371 (7th Cir. 1992).

151. *Id.* at 1377.

152. *Id.* at 1375.

defendant at the time of the alleged mail and wire fraud was relevant.<sup>153</sup> The Seventh Circuit Court of Appeals found this to be a valid reason for excluding the statement.<sup>154</sup> The court, however, went on to apply the *Ponticelli* test and required that the statement be made under "circumstances showing that the declarant had no time to reflect and perhaps misrepresent his thoughts."<sup>155</sup>

In *United States v. Jackson*,<sup>156</sup> the defendant made an exculpatory statement regarding a fuel stealing scheme to an informant. The defendant made the statement two years after the fuel stealing scheme had ended.<sup>157</sup> The Seventh Circuit Court of Appeals properly excluded the statement under the text of Rule 803(3) as a statement of past belief or fact remembered.<sup>158</sup> The relevant issue in the case related to criminal intent at the time of the fuel stealing scheme.<sup>159</sup> The earlier statement was relevant only as it related to the belief at the time of the fuel stealing scheme. But after the court excluded the statement on past belief grounds, the Seventh Circuit applied the *Ponticelli* test and found the statements also failed that test.<sup>160</sup>

In *United States v. Carter*,<sup>161</sup> the defendant sought to introduce his mother's testimony that while at the police station she heard the defendant say that he had lied to protect his fiancée.<sup>162</sup> The Seventh Circuit held the statement inadmissible on two grounds.<sup>163</sup> First, it held that the statement was of memory or belief to prove a fact remembered or believed.<sup>164</sup> Second, the court, applying the *Ponticelli* test, found that the defendant had an hour to fabricate the statement rendering it inadmissible.<sup>165</sup>

### 3. WRITTEN DOCUMENTS EXCLUDED UNDER *PONTICELLI*

Some courts have extended the *Ponticelli* test to include written documents reflecting mental or emotional conditions among inadmissible statements. In *United States v. Faust*,<sup>166</sup> the trial court had excluded

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153. *Id.*

154. *Id.* at 1377.

155. *Id.* at 1375.

156. 780 F.2d 1305 (7th Cir. 1986).

157. *Id.* at 1313.

158. FED. R. EVID. 803(3).

159. *Jackson*, 780 F.2d at 1315.

160. *Id.*

161. 910 F.2d 1524 (7th Cir.), *cert. denied*, 111 S. Ct. 1628 (1990).

162. *Id.* at 1530.

163. *Id.*

164. *Id.*

165. *Id.* at 1531.

166. 850 F.2d 575 (9th Cir. 1988).

a letter containing exculpatory statements on the grounds that it was cumulative.<sup>167</sup> After affirming the trial court's ruling, the Ninth Circuit went on to apply the *Ponticelli* test. The court ruled that because the defendant had time to reflect before writing the letter, and because he evaluated several drafts of the letter, the evidence was unreliable.<sup>168</sup>

Similarly, in *United States v. Harris*,<sup>169</sup> defendants to a prosecution for income tax evasion sought to introduce a letter written by Kritzak.<sup>170</sup> In the letter Kritzak stated that he loved the defendants and that he would do all he could to make them happy.<sup>171</sup> The Seventh Circuit Court of Appeals reversed the trial court's exclusion of the letters and held that the letters were not hearsay for the purpose for which they were introduced.<sup>172</sup> But, in dicta, the court stated that the letters would be inadmissible under the *Ponticelli* test, concluding "[t]he act of letter writing usually provides as much time as the writer might want to fabricate or misrepresent his thoughts, so this exception [803(3)] does not apply . . . ."<sup>173</sup> These two cases purport to exclude any written statement that captures a mental condition, plan or motive simply because it was in writing. Yet Rule 803(3) makes no mention of the exclusion of written statements. The Federal Rules of Evidence recognize that written statements are as communicative as oral statements.<sup>174</sup> Courts have stretched the "bad faith" analysis to exclude types of hearsay that fall within the Rule 803(3) exception.

#### 4. *PONTICELLI* EXPANDED INTO THE CIVIL CONTEXT

*Rock v. Huffco Gas & Oil Co.*, expanded the *Ponticelli* test into the civil context.<sup>175</sup> In a negligence action under the Jones Act, the plaintiff's administratrix sought to offer the statement and written report of the injured's supervisors as evidence.<sup>176</sup> The injured party stated that he had pain and difficulty walking, but the court held that the statement was not at issue in the case.<sup>177</sup> When the plaintiff sought to offer the accident report of the supervisors, the court similarly stated that the evidence was

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167. *Id.* at 585.

168. *Id.* at 586.

169. 942 F.2d 1125 (7th Cir. 1991).

170. *Id.* at 1130.

171. *Id.*

172. *Id.* The defense sought to introduce the letters for the purpose of showing what Harris believed, not for showing that Kritzak loved Harris. *Id.*

173. *Id.* at 1130 n.5.

174. FED. R. EVID. 801.

175. 922 F.2d 272 (5th Cir. 1991).

176. *Id.* at 279.

177. *Id.*

inadmissible.<sup>178</sup> The court first recognized that the evidence constituted double hearsay and Rule 805 should apply.<sup>179</sup> Under Rule 805 each level of hearsay must meet some exception or exemption in order for the statement to be admissible.<sup>180</sup> The court stated that the business record exception was satisfied. On the second level of hearsay, the court stated that “[e]vidence of [plaintiff’s] motive to fabricate such statements creates too great a risk of inaccuracy or untrustworthiness to provide the circumstantial guarantees of trustworthiness contemplated by the hearsay exceptions.”<sup>181</sup> The court used the *Ponticelli* language but cited only generally to the Rule 803 Advisory Committee’s Notes, noting no specific sections.<sup>182</sup> The *Rock* court attempts to achieve the best of both worlds by stating that it “made no determination as to the extent of evidence indicating that Rock, himself, was untrustworthy.”<sup>183</sup>

##### 5. THE DIFFICULTIES IN APPLYING THE *PONTICELLI* TEST CONSISTENTLY

The problem with the *Ponticelli* line of cases is the impracticable analysis employed. In *Ponticelli*, the court held that in applying Rule 803(3) a court must evaluate three factors: contemporaneousness, chance for reflection, and relevance.<sup>184</sup> These criteria are created out of whole cloth.<sup>185</sup> Judges cannot use the individual elements of the *Ponticelli* test as consistent guides in decision making. The first element cannot always be applied and is not required by Rule 803(3). The second element is in direct conflict with the existing rule of evidence.<sup>186</sup> Finally, Rule 403 already addresses the third element.

Under the contemporaneousness requirement of the *Ponticelli* test, some “event” must give rise to the declarant’s statement, but Rule

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178. *Id.* In excluding the statement, the court concluded that filing accident reports did not constitute an “integral part” of the injured’s usual course of business. *Id.*

179. *Id.* at 280.

180. Rule 805 states: “Hearsay within hearsay. Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.” FED. R. EVID. 805.

181. *Rock*, 922 F.2d at 280.

182. *Id.*

183. *Id.* at 281. This statement, however, is inconsistent with the court’s finding that his statement should be excluded.

184. *United States v. Ponticelli*, 622 F.2d 985, 991 (9th Cir.), *cert. denied*, 499 U.S. 1016 (1980).

185. The court does cite to *United States v. Partyka*, 561 F.2d 118, 125 (8th Cir. 1977), *cert. denied*, 434 U.S. 1037 (1978). However, *Partyka* offers no authority other than Rule 803(3) itself. *Id.* at 991. The court cites the Advisory Committee’s notes as the only other authority. *Id.* The notes provide no such criteria.

186. FED. R. EVID. 803(3). There is direct conflict because the Advisory Committee purposefully left the “bad faith” provision out of the Rule. See 2 WEINSTEIN & BERGER, *supra* note 4, ¶ 803(3)[04], at 803-121.



803(3) does not require this element. In the case of a statement of emotion, motive, plan, or design, no single underlying event may exist. Furthermore, the event may be so abstract that it is impossible to pinpoint. The statement "I love Mary", falls under Rule 803(3) as an exception to the hearsay rule.<sup>187</sup>

The declarant's love for Mary may have occurred the first time the declarant saw Mary or maybe the first time the declarant and Mary had a date. Or, the declarant may not be able to identify why he loves Mary, only that he presently does. Isolating specific events that give rise to human emotions is difficult. Under Rule 803(3), the point in time *when* some event giving rise to the feeling took place is immaterial; it matters only that it is a "present" emotion.

The second requirement of the *Ponticelli* test mandates that there be no chance for reflection.<sup>188</sup> With no identifiable observation, time for reflection cannot be measured. But this requirement is the key to applying "bad faith" analysis. Without it, one cannot analyze motive to fabricate.

The third requirement of the *Ponticelli* test is relevancy.<sup>189</sup> The *Ponticelli* test requires relevancy in the same way as do Rules 402 and 403 of the Federal Rules of Evidence. The court must first find relevancy and then minimum probative value which is not outweighed by substantial prejudice. In *Ponticelli*, the court finds both elements satisfied without citing to Rule 402 or 403.<sup>190</sup> Purporting to apply relevancy as an element in the application of Rule 803(3), however, adds nothing to our understanding of Rule 803(3); it merely clouds the dispositive issue—bad faith.

After disposing of the elements of the *Ponticelli* test as either inapplicable or superfluous, all that remains is the solitary "bad faith" analysis. In this context, the judge has the opportunity to form a pure judgment of the declarant's credibility. This analysis can be rationalized on the basis that the judge is merely measuring the sincerity risk involved. However, the Advisory Committee has already adjudged that the necessity of this type of hearsay requires its admission. In the absence of a sincerity risk, this type of statement would not be hearsay in the first place.<sup>191</sup>

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187. GRAHAM, *supra* note 123, at 185.

188. *Ponticelli*, 622 F.2d at 991.

189. Relevancy is not being applied under the *Ponticelli* test as Judge Weinstein suggested it be used.

190. *Ponticelli*, 622 F.2d at 991.

191. Any statement may be false, regardless of whether there is time to calculate a misstatement. In saying "I love Mary," the declarant may have had reasons to lie and say that he loved Mary when he did not. He may have wished to marry her to gain her fortune.

*Ponticelli* and its progeny significantly expand the class of circumstances that warrant exclusion under the "bad faith" element of the *Ponticelli* test, and thereby threaten to eviscerate Rule 803(3) itself. Under this line of cases, several levels of motivation warrant exclusion on "bad faith" grounds. First, any statement that is written will be excluded regardless of the writer's motive. Second, virtually any exculpatory statement made by a criminal defendant may be subject to exclusion, and those made after arrest will almost surely be excluded.<sup>192</sup> Third, the court will exclude any statement that it determines the declarant made to benefit him in some future litigation.<sup>193</sup>

## VI. THE PROBLEM WITH "BAD FAITH" ANALYSIS IN OUR SYSTEM OF JUSTICE

"Bad faith" analysis under the *Ponticelli* test is improper because bare credibility analysis invades the province of the jury by assuming that the declarant is not credible before the statement is heard.<sup>194</sup> John Henry Wigmore maintained that allowing exclusion based on "bad faith" runs contrary to the most basic notions of fairness.<sup>195</sup> The inference that the accused has "trumped up" his statement is flawed because it "[takes] the possible trickery of guilty persons as a ground for excluding evidence in favor of a person not yet proven guilty."<sup>196</sup> According to Wigmore, to uphold such an exclusion would be contrary to the presumption of innocence afforded to the accused.<sup>197</sup> A privilege which we:

elaborate . . . in painful and quibbling detail; we expend upon it pages of judicial rhetoric; we further maintain, with sentimental excess, the privilege against self-crimination; in short, we exhaust the resources of reasoning and strain the principles of common sense to protect an accused person against an assumption of guilt until the proof is irre-

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192. Empirical studies support this position. See Eleanor Swift, *The Hearsay Rule at Work: Has it Been Abolished De Facto by Judicial Decision?*, 76 MINN. L. REV. 473 (1992).

193. Professor Swift also documented that civil courts are much more likely to exclude risky statements made by plaintiffs than defendants. *Id.* at 486-90.

194. The United States Constitution, Art. III, Sec. 2, Clause 3 states: "The trial of all Crimes, except in cases of impeachment, shall be by jury . . ." The Seventh Amendment provides with respect to civil cases: "In Suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States . . ." Federal Rule of Civil Procedure 38(a) provides: "Right Preserved. The right of trial by jury as declared by the Seventh amendment to the Constitution or as given by a Statute of the United States shall be preserved to the parties inviolate." Federal Rule of Civil Procedure 39 provides: "The trial of all issues so demanded shall be by jury . . ."

195. JOHN H. WIGMORE, EVIDENCE IN TRIAL AS COMMON LAW § 1732, at 160 (Chadbourn rev. ed. 1974).

196. *Id.*

197. *Id.*

sistible; and yet, at the present point, we throw these fixed principles to the winds and make this presumption of guilt in the most violent form.<sup>198</sup>

Under Wigmore's approach, the exclusion of hearsay must give way to our "time-honored formula, [under which] credibility is a matter of fact for the jury, not a matter of law for the court."<sup>199</sup>

"Bad faith" analysis fails to meet Wigmore's ideals because it removes the right to allow a jury to make a determination of what testimony is true or false. By doing so, courts decide cases before they hear them.

## VII. RESOLVING THE "BAD FAITH" DILEMMA

"Bad faith" analysis should not present a problem for the courts from a textual standpoint. A statute should be given its plain meaning. The United States Supreme Court has held that "the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms."<sup>200</sup>

Rules 803(3) and 803(2) do not require exclusion based on lack of trustworthiness. Moreover, the presence of the lack of motive to fabricate provision in other sections of Rule 803 indicates that the Advisory Committee knew how to draft such a provision but purposefully omitted it from Rules 803(2) and 803(3).<sup>201</sup>

The Second Circuit Court of Appeals has taken a textual approach to the application of Rule 803(3). In *United States v. DiMaria*,<sup>202</sup> the defendant, when approached by federal agents, said, "I thought you guys were just investigating white collar crime; what are you doing here? I only came to get some cigarettes real cheap."<sup>203</sup> The defense asserted that the statement tended to disprove the state of mind required for conviction under some of the charges against the defendant.<sup>204</sup> The Assistant United States Attorney argued that the statement was a classic exculpatory false statement.<sup>205</sup> The court responded, "[f]alse it may well

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198. *Id.*

199. James H. Chadbourne, *Bentham and the Hearsay Rule-A Benthamic View of Rule 63(4)(c) of the Uniform Rules of Evidence*, 75 HARV. L. REV. 932, 947 (1962).

200. *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *see also* *United States v. Behnezhad*, 907 F.2d 896, 898 (9th Cir. 1990).

201. *See* *United States v. Wong Kim Bo*, 472 F.2d 720 (5th Cir. 1972) (holding that the presence of a provision in other parts of the same statute created a presumption that the legislature meant to exclude it from the subject section).

202. 727 F.2d 265 (2d Cir. 1984).

203. *Id.* at 270.

204. *Id.*

205. *Id.* at 271.

have been but if it fell within Rule 803(3), as it clearly did if the words of that Rule are read to mean what they say, its truth or falsity was for the jury to determine."<sup>206</sup> This approach ignores the temptation to employ "bad faith" analysis and relies on the jury to determine whether the statement is true or false. Other cases have taken a *DiMaria* approach as well.<sup>207</sup>

A problem arises when a "bad faith" analysis is read as a part of Rule 803(3). One possible solution would be to modify the hearsay exceptions to meet current needs. Congress could clarify the Rules and take the position that "bad faith" goes only to weight and not to admissibility.<sup>208</sup> Both Rules 803(2) and 803(3)<sup>209</sup> could be clarified by adding the following:

Motive to fabricate or "bad faith" of the declarant is not properly considered when applying this rule. "Bad faith" of the declarant is

206. *Id.*

207. See *Healey v. Chelsea Resources, Ltd.*, 947 F.2d 611 (2d Cir. 1991); *United States v. Arthur*, 949 F.2d 211 (6th Cir. 1991); *United States v. Torres*, 901 F.2d 205 (2d Cir.), *cert. denied sub nom. Cruz v. United States*, 498 U.S. 906 (1990); *United States v. Detrich*, 865 F.2d 17 (2d Cir. 1988); *United States v. Harris*, 733 F.2d 994 (2d Cir. 1984); *United States v. Lawal*, 736 F.2d 5 (2d Cir. 1984); *United States v. Yu*, 697 F. Supp. 635 (E.D.N.Y. 1988); *Warhurst v. White*, 838 S.W.2d 350 (Ark. 1992).

208. A second, yet far less attractive, type of modification could attempt to capture the elements of the concept of "bad faith." In an analysis of the *Ponticelli* line of cases, a workable balancing test may include the following factors: (1) whether the statement is central to the movant's claim or defense; (2) whether the statement is corroborated in any way; (3) whether the movant has any other means by which to establish the fact; (4) whether the statement was made by a criminal defendant in anticipation of criminal prosecution or whether it was made before said prosecution ensued; (5) whether there is an identifiable event from which a logical nexus between the event and the statement of the mental or emotional condition can be found, if so was the statement made contemporaneously with that event; (6) would reasonable jurors, given the knowledge of the "bad faith" be able to give the evidence its appropriate weight; and, (7) whether the declarant is so aligned with the movant's interest that the statement should be excluded based on the other factors.

Under the excited utterance exception a balancing test incorporating the following factors may compliment the other requirements when "bad faith" is alleged: (1) age of the declarant; (2) whether the declarant has a strong emotional motivation; (3) whether the declarant has a pecuniary interest that is being furthered by making the statement; (4) whether the declarant had any strong prior negative disposition towards any of the party's whom the statement disfavors; (5) whether the declarant has a close personal relationship or duty to provide favorable information to anyone who is benefiting from the statement; (6) whether the declarant or any party aligned with the declarant has a stake in litigation that concerned the statement.

Some commentators have suggested that hearsay analysis incorporate a different categorical framework which would be based on the quantity and quality of the information that the court has heard concerning the declarant. This would present a different type of modification. See generally Eleanor Swift, *Abolishing the Hearsay Rule*, 75 CAL. L. REV. 495 (1987) (categorizing various hearsay declarants as abstract, risky and burden-shifting declarants).

209. Considering the inconsistency in applying Rules 803(6) and 803(8) a reevaluation to eliminate the "bad faith" provision may be considered. The fact that Congress added the "bad faith" element to those rules came as a shock because historically no such provision existed in the business and public records exception.

properly considered by the finder of fact when determining weight and/or truth or falsity of the statement.

This addendum eliminates the need for a more literal application of the Rule and permits uniformity of admission of hearsay statements where possible "bad faith" is involved.<sup>210</sup>

### VIII. CONCLUSION

Clarifying Rule 803(3) to allow all "bad faith" statements into evidence to be weighed by the jury in their fact-finding deliberations would serve as the best solution to the "bad faith" dilemma surrounding the rule. All documents or statements of any kind have some potential for falsehood. Under Rules 803(6) and 803(8), courts attempt to use the "anticipation of litigation" framework to exclude documents that they have a "gut" feeling are untrustworthy. Yet any document could be excluded on that ground.<sup>211</sup> A similar problem occurs in determining the admissibility of statements under Rules 803(2) and 803(3). There is no clear reason why one statement is untrustworthy as a matter of law and another is not.

The weak policy considerations behind some of the hearsay exceptions including Rule 803(3), make some judges uneasy about allowing the jury to consider them. The ensuing result is strictly at odds with the principles behind the hearsay provisions. Judge Weinstein points out that the scheme adopted for the hearsay article in the Federal Rules is a system of class exceptions coupled with open ended provisions in Rules 803(24) and 804(b)(5).<sup>212</sup> The *DiMaria* court adds that "this excludes certain hearsay statements with a high degree of trustworthiness and admits certain statements with a low one. This evil was doubtless thought *preferable to requiring preliminary determinations of the judge with respect to trustworthiness*, with attendant possibilities of delay, *prejudgment and encroachment on the province of the jury*."<sup>213</sup>

Although the system of categorical exceptions to the hearsay rule may seem uneven when applied and perhaps prejudicial in allowing parties to enter exculpatory statements, the statements should be admitted. The legislature and the Advisory Committee, which have the power to

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210. The purpose of this comment is not to suggest recategorization of the existing hearsay exceptions, nor to deconstruct those exceptions and further define the possible subcategories that may fall under the existing hearsay exceptions; rather the focus is to point out that judicial recategorization and redefinition of the rules has created a conflict and cannot be the proper solution because it has led to an unpredictable and therefore undesirable system of justice. The same case may have a vastly different outcome depending on the circuit in which it is tried.

211. *Hoffman v. Palmer*, 129 F.2d 976, 1002 (2d Cir. 1942) (Clark, J., dissenting).

212. 4 WEINSTEIN & BERGER, *supra* note 6, ¶ 800[02], at 800-13.

213. *United States v. DiMaria*, 727 F.2d 265 272 (2d Cir. 1984) (emphasis added).

change the rules, should modify Rules 803(2) and 803(3)<sup>214</sup> to ensure that it is the fact-finders who determine what is or is not a “bad faith” self-serving statement.

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214. Based on the foregoing analysis of Rules 803(6) and 803(8), a reconsideration of the inclusion of the “lack of trustworthiness” provision may be appropriate.