

2006

Admissible or Inadmissible - Getting in - or Keeping out - Government Documents in Aviation Cases

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Recommended Citation

Leane Capps Medford et al., *Admissible or Inadmissible - Getting in - or Keeping out - Government Documents in Aviation Cases*, 71 J. AIR L. & COM. 449 (2006)
<https://scholar.smu.edu/jalc/vol71/iss3/3>

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ADMISSIBLE OR INADMISSIBLE? GETTING IN—OR KEEPING OUT—GOVERNMENT DOCUMENTS IN AVIATION CASES

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THERE IS NO denying the substantial impact that government documents and reports can have on an aviation case. Whether the case involves a wrongful death claim arising out of a single airplane crash, a business dispute arising out of the grounding of a fleet of aircraft, or a multitude of other aviation-related issues, there is a good chance that some type of government document or report exists that could make or break your case. It is therefore essential that every aviation practitioner understand the evidentiary issues raised by these documents and reports, and the arguments to be made for and against their admission.

The following article is divided into three parts. The first part provides an overview of the two evidentiary issues that are most commonly raised with respect to the admission of government

documents and reports: (1) whether the document or report falls within the hearsay exception of Federal Rule of Evidence 803(8); and (2) whether the probative value of the document or report is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The second part reviews caselaw discussing the admissibility of specific types of government documents and reports. The third part provides additional arguments that can be made for and against admission.¹

I. COMMON EVIDENTIARY ISSUES RAISED BY GOVERNMENT DOCUMENTS

With the exception of National Transportation Safety Board (“NTSB”) accident reports, whose admissibility is governed by statute, the two most common evidentiary issues raised by government documents is whether they are excepted from the general prohibition against hearsay as “public records and reports” and whether their relevance is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. For these reasons, you should always first consider whether the document is a public record and then consider the document’s potential to unfairly prejudice, confuse, or mislead the jury.

A. IS THE DOCUMENT A PUBLIC RECORD OR REPORT?

Although it is fundamental that you must first determine whether the government document is indeed a public record or report, many practitioners skip this first step and assume any government document is a public record; but this is not always the case.

In order for the document to fall within the hearsay exception of Rule 803(8)(a) or (b), the document must be a report, record, statement, or data compilation setting forth: (1) the activities of a public office or agency; or (2) matters observed pursuant to a duty imposed by law as to which matters there was a duty to report.² Many government documents such as internal agency memoranda, preliminary and interim opinions of an

¹ Although this article primarily discusses federal rules, statutes, and decisions, the statutes and holdings in the cases are equally applicable in state court litigation because most states have adopted rules of evidence similar to the Federal Rules of Evidence.

² FED. R. EVID. 803(8).

agency,³ or inconclusive drafts and documents do not set forth the activities of a public office or agency or matters observed under a duty imposed by law—and therefore are not public records.⁴

It is also important to remember that the public record exception assumes that public officers will perform their duties, that they have no motivation to falsify information, and that the record's existence in the public domain will uncover any inaccuracies in the report.⁵ If these assumptions are invalid under the facts of your case, your document is not a public record or report. Similarly, if the person providing the information is not a public official or is under no duty to provide the information, the essential elements of a public record are not met. For these reasons, the aviation practitioner should always carefully examine the government document at issue to insure it meets all these requirements. Never assume your document is a public record or report.

B. IS THE INVESTIGATIVE REPORT TRUSTWORTHY?

Rule 803(8)(c) also excepts from the prohibition against hearsay public records or reports setting forth the factual findings of an investigation made pursuant to an authority granted by law, unless the sources of the information or other circumstances indicate a lack of trustworthiness.⁶

In *Beech Aircraft Corp. v. Rainey*, the Supreme Court determined that the “factual findings” under Rule 803(8)(c) included opinions and conclusions.⁷ In doing so, the Court resolved a split among the Circuit Courts of Appeals, which held different opinions on whether “factual findings resulting from an investigation” included the conclusions and opinions based on those findings. Thus, Rule 803(8)(c) focuses not on whether the information is a “fact” or an “opinion,” but on whether it is trustworthy. The Court also set forth the factors trial courts

³ *Smith v. Isuzu Motors, Ltd.*, 137 F.3d 859, 862 (5th Cir. 1998), *cert. denied*, 525 U.S. 1142 (1999).

⁴ See *Figures v. Bd. of Pub. Utils.*, 967 F.2d 357, 360 (10th Cir. 1992); *United Air Lines, Inc. v. Austin Travel Corp.*, 867 F.2d 737, 743 (2d Cir. 1989) (finding House of Representatives committee reports with dissenters was properly excluded); *City of New York v. Pullman, Inc.*, 662 F.2d 910 (2d Cir. 1982), *cert. denied sub nom*, *Rockwell Int'l Corp. v. City of New York*, 454 U.S. 1164 (1982).

⁵ *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 143 (2d Cir. 2000).

⁶ FED. R. EVID. 803(8)(c).

⁷ *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 164-68 (1988).

should consider to determine whether the information in the document is "trustworthy":⁸

- (1) the timeliness of the investigation;
- (2) the investigator's skill and experience;
- (3) whether a public hearing was held; and
- (4) possible bias when reports are prepared with a view to possible litigation.⁹

These factors are not exclusive.¹⁰ The trial court can consider any evidence that is probative of the information's trustworthiness.¹¹

C. IF THE GOVERNMENT DOCUMENT IS ADMISSIBLE, IS IT LIKELY TO BE EXCLUDED UNDER RULE 403?

Even if a government document is admissible under Rule 803(8), it may still be excluded under Rule 403 if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by the considerations of undue delay, waste of time, or needless presentation of cumulative evidence.¹²

A strong argument can be made that a government document, while relevant, should be excluded because of the danger that the jury will place undue weight on its findings and conclusions or will simply adopt them and fail to consider any contradictory evidence.¹³ This danger is heightened when the report's findings and conclusions purport to settle disputed facts central to the parties' claims. As one court explained:

[B]ecause this documentary evidence is in the form of reports promulgated by agencies of the United States government, its apparent "official" nature is likely to cause a jury to give the evidence inordinate weight and for this reason, any probative value the evidence might have would be far outweighed by the danger

⁸ *Id.* at 167 (accepting the Report of the Senate Committee on the Judiciary advocating the admissibility of conclusions and opinions under the rule).

⁹ *Id.* at 167 n.11 (citation omitted).

¹⁰ *Id.*

¹¹ *Id.* at 167.

¹² FED. R. EVID. 403.

¹³ See *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1358 (4th Cir. 1995) (upholding trial court's exclusion of state agency report because the jury would have placed undue weight on the evidence) (internal citations and quotations omitted); *Williams v. Nashville Network*, 132 F.3d 1123, 1129 (6th Cir. 1997).

of unfair prejudice, confusion of the issues, or misleading the jury.¹⁴

On the other hand, some courts have rejected the notion that a jury will place undue weight on a report simply because of its official nature and require a strong showing that the report's admission is somehow unfair or inappropriate:

We have no doubt that this evidence was, in one sense, "prejudicial" to Northwest's claims of due care. That "prejudice," of course, is precisely why McDonnell Douglas offered the evidence. But Rule 403 does not exclude evidence because it is strongly persuasive or compellingly relevant—the rule only applies when it is likely that the jury will be moved by a piece of evidence in a manner that is somehow unfair or inappropriate. The truth may hurt, but Rule 403 does not make it inadmissible on that account.¹⁵

Admittedly, the relative potential for unfair prejudice, confusion of the issues, or misleading the jury will vary according to the facts of each case. But, if you are trying to exclude a government document, the broad discretion afforded the court under Rule 403 is often your best argument. If you are trying to admit the document, stress that your opponent must demonstrate unfair prejudice, not just that the information is compelling.

II. THE ADMISSIBILITY OF DIFFERENT TYPES OF GOVERNMENT DOCUMENTS

A. NTSB REPORTS

1. *Only the Factual Accident Reports Are Admissible*

The admissibility of NTSB accident reports is governed by Title 49, Subtitle II, Chapter 11, Subchapter IV of the United States Code Annotated ("U.S.C.A.") and Title 49, Subtitle B, Chapter VIII, Part 835 of the Code of Federal Regulations ("C.F.R.").

49 U.S.C.A. § 1154(b) states that "[n]o part of a report of the [NTSB], related to an accident or an investigation of an accident, may be admitted into evidence or used in a civil action for

¹⁴ *Fowler v. Firestone Tire & Rubber Co.*, 92 F.R.D. 1, 2 (N.D. Miss. 1980) (excluding National Highway Safety Administration report); *see also* *Rockwell Int'l Corp. v. City of New York*, 454 U.S. 1164 (1982) (stating that government reports have an "aura of special reliability"); *City of New York v. Pullman Inc.*, 662 F.2d 910, 915 (2d Cir. 1981), *cert. denied sub nom.*

¹⁵ *In re Air Crash Disaster*, 86 F.3d 498, 538 (6th Cir. 1996).

damages resulting from a matter mentioned in the report.”¹⁶ 49 C.F.R. § 835.2 states that “no part of a [NTSB] accident report may be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report.”¹⁷

Although there is a strict prohibition against the admission of NTSB accident reports, certain factual information from the investigation of an accident in preparation for a NTSB accident report may be admissible. Importantly, section 835.2 distinguishes between the admissibility of NTSB accident reports and factual accident reports.¹⁸ A “factual accident report” is the result of the NTSB investigator’s investigation.¹⁹ Section 835.2 states that the NTSB “does not object to, and there is no statutory bar to, admission in litigation of factual accident reports.”²⁰

Factual accident reports should not be confused with factual findings that appear in the NTSB accident report. Unfortunately, this important distinction has been muddled by some circuit court opinions, resulting in some confusing, and often times, incorrect authority.²¹

For example, some courts have mistakenly referred to the “factual findings” of the NTSB accident report, when they were actually referring to the investigator’s factual accident report.²² The result of this “judicial mislabeling” is that some courts and practitioners believe there is a judicially created exception to

¹⁶ 49 U.S.C.A. § 1154(b) (West 2005).

¹⁷ 49 C.F.R. § 835.2 (2005).

¹⁸ *Id.*

¹⁹ *In re Air Crash Disaster at Sioux City, Iowa*, 780 F. Supp. 1207, 1210 n.4 (N.D. Ill. 1991).

²⁰ 49 C.F.R. § 835.2; *see also In re Air Crash at Charlotte, N.C. on July 2, 1994*, 982 F. Supp. 1071, 1075-78 (D.S.C. 1996).

²¹ *Chiron Corp. and Perceptive Biosystems, Inc. v. Nat’l Transp. Safety Bd.*, 198 F.3d 935, 940 (D.C. Cir. 1999); *see also In re Lawrence W. Inlow Accident Litig.*, No. IP 99-0830-C H/K, 2002 WL 970403, at *2 (S.D. Ind., April 16, 2002) (unpublished), *aff’d sub nom*; *First Nat’l Bank and Trust Corp. v. Am. Eurocopter Corp.*, 378 F.3d 682 (7th Cir. 2004) (explaining that “[a]lthough some older cases . . . permitted the use of the factual portions of NTSB reports while striking their conclusions, more recent cases have followed the plain meaning of the statute”).

²² *Id.* (citing *Am. Airlines, Inc. v. United States*, 418 F.2d 180, 196 (5th Cir. 1969)) (allowing admission of graphs based on information from a safety committee’s report); *see also Berguido v. E. Air Lines, Inc.*, 317 F.2d 628, 631-32 (3d Cir. 1963), *cert. denied*, 375 U.S. 895 (1963) (allowing testimony of witness based on investigator’s factual accident report); *Lobel v. Am. Airlines*, 192 F.2d 217, 220 (2d Cir. 1951), *cert. denied*, 342 U.S. 945 (1952) (allowing admission of an investigator’s report based on an examination of the plane wreckage).

the statutory prohibition against the admission of NTSB accident reports.²³

A careful examination of these opinions, however, reveals that the courts were still adhering to the general principle that only the investigator's factual accident report was admissible, but mislabeling these reports as the factual findings from NTSB accident reports. For this reason, the aviation practitioner should carefully evaluate cases that are cited by her opponent in support of the admission of portions of NTSB accident reports. This is particularly important when the cited cases were published before 1998.

2. *The 1998 Amendment to Section 835.2 Clarified the Distinction Between NTSB Accident Reports and Factual Accident Reports*

In 1998, section 835.2 was amended to clarify the NTSB's position with respect to admission of NTSB accident reports and factual accident reports.²⁴ The amendment was "intended primarily to answer questions that often arise regarding the use of [NTSB] reports in litigation . . . [and] the scope of permissible testimony."²⁵ Thus, the amendment attempted to clarify the distinction between NTSB accident reports and factual accident reports. It also explicitly stated "that the NTSB does not object to,

²³ *Id.*

²⁴ See 63 Fed. Reg. 71606 (December 29, 1998). After the 1998 revision, the text of Section 835.2 reads:

§ 835.2 Definitions.

Accident, for purposes of this part includes "incident."

Board accident report means the report containing the Board's determinations, including the probable cause of an accident, issued either as a narrative report or in a computer format ("briefs" of accidents). Pursuant to section 701(e) of the Federal Aviation Act of 1958 (FA Act), and section 304(c) of the Independent Safety Board Act of 1974 (49 U.S.C. 1154(b)) (Safety Act), no part of a Board accident report may be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such reports.

Factual accident report means the report containing the results of the investigator's investigation of the accident. The Board does not object to, and there is no statutory bar to, admission in litigation of factual accident reports. In the case of a major investigation, group chairman factual reports are factual accident reports.

²⁵ *Id.*

and there is no statutory bar to, the admission in litigation of factual accident reports.”²⁶

The amendment has had mixed success in achieving its desired affect.²⁷ Although a majority of the courts recognize the distinction raised in the 1998 amendment, there are post-1998 opinions that still rely on pre-amendment cases allowing the admission of portions of NTSB accident reports. Indeed, these post-amendment opinions either rely upon cases predating the amendment,²⁸ or no authority at all.²⁹ As a result, it is imperative that the aviation practitioner be aware of the impact of the 1998 amendment on the body of authority discussing the admissibility of the investigator’s factual findings and NTSB accident reports.

3. *The NTSB’s Conclusion on the Probable Cause of an Accident Is Never Admissible*

Thankfully, there is no confusion regarding the admissibility of the NTSB’s conclusions on the probable cause of an accident—they are not admissible.³⁰

4. *Using NTSB Reports in Deposing NTSB Employees*

The distinction between factual accident reports and NTSB accident reports also applies to the testimony of NTSB employees. Although these witnesses may use factual accident reports

²⁶ Compare 49 C.F.R. § 835.2 (1996), with 49 C.F.R. § 835.2 (1999).

²⁷ Compare *Chiron Corp. & Perseptive Biosystems, Inc. v. Nat’l Transp. Safety Bd.*, 198 F.3d 935, 941 (D.C. Cir. 1999) (explaining distinction between investigator’s accident report and NTSB accident report and recognizing that courts had erroneously confused the investigator’s findings with findings of the NTSB), and *Hickson Corp. v. Norfolk S. Ry. Co.*, 227 F. Supp. 2d 903, 908 (E.D. Tenn. 2002) (recognizing distinction between investigator’s accident report and NTSB accident report), and *Coffey v. Cherokee Aviation, Inc.*, No. E1999-01037-C0A-R3-C, 2000 WL 991657, at *3 (Tenn. Ct. App. July 19, 2000) (discussing distinction between factual accident report and NTSB accident report), with *Major v. CSC Transp.*, 278 F. Supp. 2d 597, 604-05 (D. Md. 2003) (holding certain portions of NTSB report admissible and certain portions inadmissible), and *Starling v. Union Pac. R.R. Co.*, 203 F.R.D. 468, 485 (D. Kan. 2001) (relying upon pre-amendment cases and stating that “the only parts of the NTSB report that are off limits are those that contain agency conclusions on the probable cause of an accident”), and *Hurd v. United States*, 134 F. Supp. 2d 745, 750 (D.S.C. 2001), *aff’d*, 34 Fed. Appx. 77 (4th Cir. 2002) (relying upon pre-amendment cases to hold that portions of an NTSB report are admissible and portions are inadmissible).

²⁸ *Starling*, 203 F.R.D. at 485; *Hurd*, 134 F. Supp. 2d at 750.

²⁹ *Major*, 278 F. Supp. 2d at 605.

³⁰ 49 U.S.C.A. § 1154(b) (West 2005); 49 C.F.R. §835.4(a)(b).

to refresh their recollections, they may not use NTSB accident reports for any purpose.³¹ The use of NTSB factual accident reports in depositions is further complicated because the factual accident report used to refresh the employee's recollection or referred to in the deposition must be the one that he or she prepared.³²

B. OTHER GOVERNMENT DOCUMENTS.

Unlike NTSB reports, there are no statutory provisions governing the admissibility of other types of government documents. Thus, the admissibility of other types of government documents is governed by the rules of evidence.

1. *Airworthiness Directives*

Airworthiness directives ("ADs") are legally enforceable rules that apply to aircraft, aircraft engines, propellers, and appliances.³³ The Federal Aviation Administration ("FAA") issues ADs when it finds that: (a) an unsafe condition exists in a product; and (b) the condition is likely to exist or develop in other products of the same type design.³⁴ Most courts have found ADs to be admissible, but they have done so with caution.³⁵ For example, although the Third Circuit was concerned in *Melville v. American Home Assurance Co.* that ADs contained opinions and conclusions, it ultimately concluded that the trustworthiness requirement of Rule 803(8)(c) provided "a sufficient safeguard against the admission of unreliable evidence."³⁶ Since there was no evidence that the information was untrustworthy, the Third Circuit found that ADs were admissible.³⁷

³¹ 49 C.F.R. § 835.4(a), (b). Section 835.4 states:

§ 835.4 Use of reports.

(a) As a testimonial aid and to refresh their memories, Board employees may use copies of the factual accident report they prepared, and may refer to and cite from that report during testimony.

(b) Consistent with section 701(e) of the FA Act and section 304(c) of the Safety Act, a Board employee may not use the Board's accident report for any purpose during his testimony.

³² 49 C.F.R. § 835.4(a) (2005).

³³ These terms are defined at 14 C.F.R. §1.1 (2005).

³⁴ 14 C.F.R. § 39.5 (2005).

³⁵ See, e.g., *Melville v. Am. Home Assurance Co.*, 584 F.2d 1306, 1315 (3d Cir. 1978).

³⁶ *Id.*

³⁷ *Id.*

2. *Advisory Circulars*

Although FAA advisory circulars are FAA recommendations that do not have the force of law,³⁸ most courts have found them to be admissible as relevant evidence of custom within a particular industry or group that may assist the jury in its determination of whether the defendant breached the standard of care.³⁹

A number of cases have briefly addressed the admissibility of FAA advisory circulars, but only one has discussed the issue in any detail. In *Muncie Aviation Corporation v. Party Doll Fleet, Inc.*, the defendant asserted that the trial court should not have allowed the plaintiff to introduce two advisory circulars containing recommended landing procedures at uncontrolled airports because they were merely the opinions of the writers.⁴⁰ The trial court admitted them as relevant evidence of the customary standard of care.⁴¹ On appeal, the court found the circulars were relevant as evidence of a custom within a particular industry, group, or organization.⁴²

The court assumed the circulars were hearsay but found they did not violate the hearsay rule.⁴³ Interestingly, the court relied on Rule 43 of the Federal Rules of Civil Procedure, stating that the rule provided the trial court “considerable leeway for expanding the traditional exceptions to the hearsay rule when the relevancy, trustworthiness, and probative value of the evidence is otherwise guaranteed.”⁴⁴ It supported this somewhat tenuous rationale by finding that the trustworthiness of the circulars was “guaranteed”:

Their trustworthiness is guaranteed by the fact that they were recently published by a governmental agency whose only conceivable interest was in insuring safety and whose recommendations

³⁸ *Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178, 1180 (5th Cir. 1975).

³⁹ See, e.g., *In re Air Crash Disaster at John F. Kennedy Int'l Airport on June 24, 1975*, 635 F.2d 67, 76-77 (2d Cir. 1980); *Muncie*, 519 F.2d at 1180-81; *Reliant Airlines, Inc. v. Broome County*, 122 F.3d 1057, 1997 WL 416912, at *3 (2d Cir. July 25, 1997) (unpublished); *Mallen v. United States*, 506 F. Supp. 728, 735 (N.D. Ga. 1979).

⁴⁰ *Muncie*, 519 F.2d at 1180.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 182.

should have the highest probative value regarding national, state, or local practices.⁴⁵

The *Muncie* court also held that the circulars fell within the residual hearsay sections of Rules 803 and 804.⁴⁶ Thus, even if a document is not a public record or report, many courts are willing to admit government documents if they believe they are relevant and trustworthy.

3. *Special Certification Review Reports*

Only a few courts have issued opinions on the admissibility of Special Certification Review reports, and the results are split.⁴⁷ For example, the court in *In re Air Crash Near Roselawn, Indiana* found that the Special Certification Review report was inadmissible because it was not trustworthy.⁴⁸ In fact, the court stated that it generally considered any post-accident report or action untrustworthy because "each government agency involved in the post-accident investigation was subject to different agendas and fact-finding methodology."⁴⁹ The court also emphasized that the "functions of the Court and the jury must be preserved uninfluenced by the findings of government investigators," noting that the reports are influenced by the agenda of the party that prepares it."⁵⁰

Although *Held v. Mitsubishi Aircraft International* held a Special Certification Review report was admissible,⁵¹ the precedential value of this case is limited by the fact that the party seeking to exclude the report did not object to it on hearsay grounds or challenge its trustworthiness, but only raised the issue of whether it was relevant.⁵²

⁴⁵ *Id.* at 182-183 (quoting James L. Foutch, Comment, *Admissibility of Safety Codes, Rules and Standards in Negligence Cases*, 37 TENN. L. REV. 581, 583 (1970)).

⁴⁶ *Id.* at 1184. The residual hearsay sections of these two rules were repealed and consolidated into FED. R. EVID. 807 in 1997.

⁴⁷ See, e.g., *In re Air Crash Near Roselawn, Ind.*, No. 95 C 4593, MDL 1070, 1997 WL 572896, at *1 (N.D. Ill. Sept. 10, 1997) (holding that Special Certification Review report was inadmissible); *Held v. Mitsubishi Aircraft Int'l, Inc.*, 672 F. Supp. 369, 390-91 (D. Minn. 1987) (finding Special Certification Review report admissible).

⁴⁸ *In re Air Crash Near Roselawn, Ind.*, 1997 WL 57896, at *1.

⁴⁹ *Id.*

⁵⁰ *Id.*; see also *Wetherill v. Univ. of Chic.*, 518 F. Supp. 1387, 1390 (N.D. Ill. 1981) (noting that the agency itself may be biased because it is protecting itself or a private group with which it is aligned).

⁵¹ *Held*, 672 F. Supp. at 390-91.

⁵² *Id.*

4. Other FAA Reports

At least one court has found that FAA inspection reports are admissible under Rule 803(8).⁵³ FAA reports of an airline's safety record⁵⁴ and FAA audit reports have also been deemed admissible.⁵⁵ Conversely, an FAA bulletin on icing conditions that was later canceled was excluded on the basis that it was untrustworthy.⁵⁶

5. JAG Reports and Administrative Opinions

In *Rainey*, the United States Supreme Court upheld a trial court's ruling that a judge advocate general's ("JAG") report was admissible even though it contained opinions and conclusions in addition to "factual findings."⁵⁷ The Court held that the reports' conclusions were properly admitted once the trial court determined that they were trustworthy.⁵⁸

Two other courts, in separate cases arising out of the same incident, came to different conclusions regarding the admissibility of the JAG report and its conclusions as to the cause of the crash.⁵⁹ In *Fraleigh v. Rockwell International Corp.*, the United States District Court for the Southern District of Ohio refused to admit the report, finding it "was prepared by an inexperienced investigator in a highly complex field of investigation," which rendered it unreliable.⁶⁰

Conversely, in *Sage v. Rockwell International Corp.*, the United States District Court for the District of New Hampshire held that the investigator's inexperience simply went to the weight of the evidence, not its admissibility.⁶¹ However, both courts agreed a second report prepared by a more experienced investigator was reliable and therefore admissible.⁶²

⁵³ *Omni Holding & Dev. Corp. v. 3D.S.A., Inc.*, 156 S.W.3d 228, 241 (Ark. 2004).

⁵⁴ *In re Aircrash in Bali, Indon.*, 871 F.2d 812, 816 (9th Cir. 1989).

⁵⁵ *In re Air Crash Disaster*, 86 F.3d 498, 537-38 (6th Cir. 1996).

⁵⁶ *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1275 (7th Cir. 1988).

⁵⁷ *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 162-70 (1988).

⁵⁸ *Id.*

⁵⁹ Compare *Sage v. Rockwell Int'l Corp.*, 477 F. Supp. 1205, 1209-10 (D.N.H. 1979), with *Fraleigh v. Rockwell Int'l Corp.*, 470 F. Supp. 1264, 1267 (S.D. Ohio 1979).

⁶⁰ *Fraleigh*, 470 F. Supp. at 1267.

⁶¹ *Sage*, 477 F. Supp. at 1209.

⁶² *Sage*, 477 F. Supp. at 1210; *Fraleigh*, 470 F. Supp. at 1267.

One court has also addressed the admissibility of an administrative law judge's ("ALJ") findings. In *Zeus Enterprises, Inc. v. Alphin Aircraft, Inc.*, the Fourth Circuit affirmed the admission of an ALJ's finding that a restored aircraft was not airworthy on the grounds that it was a public record and that the probative value of the finding outweighed any unfair prejudice caused by its admission.⁶³

Courts, however, have disagreed over the admissibility of exhibits attached to agency reports.⁶⁴ For example, some courts contend that excluding the exhibits is necessary to avoid the risk of unfair prejudice and confusion of the issues, as well as to prevent a waste of judicial resources,⁶⁵ while other courts have concluded that the exhibits are admissible if they have a direct bearing on the issues at trial.⁶⁶

Finally, there is also authority for the proposition that documents from foreign governments attached to other admissible reports are admissible.⁶⁷

III. ADDITIONAL ARGUMENTS FOR, OR AGAINST, THE ADMISSIBILITY OF GOVERNMENT DOCUMENTS

There are numerous arguments for and against the admission of the types of government documents discussed above—too many to list in this brief article. The following, however, provides some additional arguments in support of the admission or exclusion of government documents.

⁶³ *Zeus Enter., Inc. v. Alphin Aircraft, Inc.*, 190 F.3d 238, 243 (4th Cir. 1999).

⁶⁴ Compare *In re Air Crash Disaster at Mannheim, F.R.G.*, 586 F. Supp. 711, 725 (E.D. Penn. 1984), *rev'd on other grounds*, 769 F.2d 115 (3d Cir. 1985), *with Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd.*, 505 F. Supp. 1125, 145 (E.D. Pa. 1980), *rev'd in part on other grounds sub nom., In re Japanese Elec. Prod. Antitrust Litigation*, 723 F.2d 238 (3d Cir. 1983).

⁶⁵ *Zenith*, 505 F. Supp. at 1145.

⁶⁶ *In re Air Crash at Mannheim, F.R.G.*, 586 F. Supp. at 726.

⁶⁷ See, e.g., *In re Korean Air Lines Disaster of September 1, 1983*, 932 F.2d 1475, 1482-83 (D.C. Cir. 1991), *cert. denied sub nom., Dooley v. Korean Air Lines, Ltd.*, 502 U.S. 994 (1991) (Soviet report included as appendix to International Civil Aviation Organization report was admissible and did not render report inadmissible); *Fed. Aviation Admin. v. Landy*, 705 F.2d 624, 632-33 (2d Cir. 1983) (German government's telex incorporated into FAA report was admissible).

A. ARGUMENTS FOR THE ADMISSION OF NTSB
ACCIDENT REPORTS

As explained above, the NTSB investigator's factual accident report is admissible.⁶⁸ As such, if the information you want to use is in the investigator's factual accident report, the argument for admission should be based upon section 835.2. More importantly, the factual accident report should be admissible even if it contains the investigator's opinions and/or conclusions.⁶⁹ But what if you want to use portions of the NTSB accident report? Under section 835.2, the report should be inadmissible.⁷⁰ However, there may be other ways to get the information you want to use from the NTSB accident report in front of the jury.

1. *Offer to Submit a Redacted Version*

At least one court has allowed a redacted version of an NTSB accident report to be admitted. For example, in *In re Air Crash Disaster at Stapleton International Airport, Denver, Colorado, on November 15, 1987*, the plaintiffs offered portions of an NTSB report that redacted the executive summary, probable cause finding, and recommendations, but included a human factors subcommittee's report concluding that the flight crew lacked the qualifications to fly the airplane in the weather conditions that the crew confronted on the day of the crash.⁷¹ On appeal, admission of the edited NTSB report and human factors report was upheld.⁷² In reaching its conclusion, the court explained that the human factors report was admissible because "case law under the public records exception holds that sub-committee reports submitted to the Board are . . . admissible . . . [if] their findings are approved or adopted by the Board's final report."⁷³

2. *Use It to Impeach a Witness' Testimony*

An NTSB accident report may also be admissible to impeach a witness. For example, in *In re Air Crash at Charlotte, North Caro-*

⁶⁸ 49 C.F.R. § 835.2 (2005).

⁶⁹ Coffey v. Cherokee Aviation, Inc., No. E1999-01037-C0A-R3-C, 2000 WL 991657, at *3 (Tenn. Ct. App. 2000) (unpublished) (holding that the investigator's conclusion in his factual accident report that there was no evidence of an in-flight fire was admissible).

⁷⁰ 49 C.F.R. § 835.2.

⁷¹ *In re Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo., on November 15, 1987*, 720 F. Supp. 1493, 1495 (D. Colo. 1989).

⁷² *Id.*

⁷³ *Id.* at 1499.

lina on July 2, 1994, although the trial court found the report of one of the members of an NTSB meteorological group was unreliable,⁷⁴ it found that the report could still be used to impeach any person whose statements appeared in the report.⁷⁵

3. *Argue that the Other Side Has "Opened the Door"*

An NTSB accident report may also become admissible if the other party "opens the door." For example, *Hickson Corp. v. Norfolk Southern Railway Co.* involved a lawsuit for damages that allegedly resulted from a chemical spill.⁷⁶ During its case-in-chief, the defendant introduced a letter sent to it by the head of the NTSB praising the defendant's environmental clean-up efforts at its yard.⁷⁷ In response, the plaintiff attempted to admit findings contained in an NTSB accident report in order to rebut the inference created by the letter from the NTSB.⁷⁸ The court concluded that although NTSB accident reports are ordinarily inadmissible, the report was admissible in this case to "cure the prejudicial inference that arose when" the defendant introduced the NTSB letter.⁷⁹

The door is not necessarily opened, however, just because the report is mentioned during trial. For example, in *Van Steenburg v. General Aviation, Inc.*, the defendant asked the plaintiffs' experts during cross-examination if they were aware of certain NTSB findings.⁸⁰ On appeal, the defendants argued that the plaintiffs' experts had opened the door to cross-examination regarding the contents of the NTSB accident report by stating during direct examination that their opinions as to the amount of

⁷⁴ *In re Air Crash at Charlotte, N.C.*, 982 F. Supp. 1071, 1079 (D.S.C. 1996).

⁷⁵ *Id.*; see also *Engelbrechtsen v. Fairchild Aircraft Corp.*, 21 F.3d 721, 732 (6th Cir. 1994) (noting that trial court allowed NTSB accident report to be used in order to cross-examine witness as to accident history of model plane involved in lawsuit); *In re Air Crash at Stapleton Int'l Airport*, 720 F. Supp. at 1499 (noting that portions of NTSB report that would be otherwise inadmissible may be used as a means of impeaching a witness who claims to have reviewed the report and relied upon it in drawing his conclusions); *Daniels v. Tew Mac Aero Servs., Inc.*, 675 A.2d 984, 990-91 (Me. 1996) (reversing trial court's judgment because party should have been able to use NTSB report to impeach opponent's experts' testimony).

⁷⁶ *Hickson Corp. v. Norfolk S. Ry. Co.*, 227 F. Supp. 2d 903, 908-09 (E.D. Tenn. 2002).

⁷⁷ *Id.* at 904.

⁷⁸ *Id.*

⁷⁹ *Id.* at 908-09.

⁸⁰ *Van Steenburg v. Gen. Aviation, Inc.*, 611 N.E.2d 1144, 1155 (Ill. Ct. App. 1993).

ice present on the aircraft were based “on the NTSB report and other reports” the experts had reviewed.⁸¹ The court of appeals disagreed, finding defendant’s argument to be “tenuous at best.”⁸²

4. *Have Your Expert Witness Rely upon the NTSB Accident Report*

Of course, the best way to get the maximum evidentiary value out of a beneficial NTSB accident report is to have your expert witness rely upon it in reaching his or her conclusions. Not only can an expert witness properly rely upon the factual accident report, the expert can testify even if his or her conclusions are identical to, or substantially similar to, those contained in the NTSB accident report.⁸³

5. *Admit a Favorable NTSB Accident Report from an Investigation of Circumstances Similar to Those Involved in Your Case*

Perhaps your case involves circumstances similar to those involved in a previous NTSB investigation. Assuming that you could establish relevance, would the prior accident report be admissible? Possibly.

Section 835.2 states that no part of an NTSB accident report may be “admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report.”⁸⁴ Assuming that there is no issue as to trustworthiness, the report should not be excluded on hearsay grounds.⁸⁵ Moreover, because it is not being offered in a lawsuit “growing out of any matter mentioned in” the report, arguably, section 835.2 would not apply.⁸⁶

There appears to be only one case addressing the admissibility of an NTSB accident report from a different incident. In *Jack v. Trans World Airlines, Inc.*, the Court held that an NTSB report “regarding a different incident on a different airline at a differ-

⁸¹ *Id.* at 1155.

⁸² *Id.*; see also *Curry v. Chevron, USA*, 779 F.2d 272, 274-75 (5th Cir. 1985) (holding that counsel’s reference to NTSB report during opening argument did not open the door to admission of the report).

⁸³ See, e.g., *Mullan v. Quickie Aircraft Corp.*, 797 F.2d 845, 848 (10th Cir. 1986); see also *Monger v. Cessna Aircraft Co.*, 812 F.2d 402, 408 (8th Cir. 1987) (refusing to exclude testimony of expert witness that had worked closely with the NTSB during its investigation).

⁸⁴ 49 C.F.R. § 835.2 (2005).

⁸⁵ FED. R. EVID. 803(8).

⁸⁶ 49 C.F.R. § 835.2.

ent airport" was inadmissible.⁸⁷ The court, however, simply cited to the predecessor to 49 U.S.C. § 1154(b) and provided no analysis of the issue.⁸⁸ Given the plain language of § 1154(b) and section 835.2, it would appear that relevant NTSB accident reports from other incidents could be admissible notwithstanding the conclusory opinion in *Jack*. In the right case, it is at least an argument worth making.

B. ADDITIONAL ARGUMENTS FOR THE ADMISSION OF OTHER GOVERNMENT DOCUMENTS

The statutory hurdle to admissibility of NTSB accident reports is not present for other types of government reports. Thus, the admissibility of other types of government reports usually turns, at least initially, on their trustworthiness. There is no question that government reports constitute hearsay if they are offered to prove the truth of the matters asserted in the report. But, if they fall into the public records and reports exception to the hearsay rule or the residual hearsay exception, they are admissible.⁸⁹ As noted above, FAA and other government reports have consistently been held to fall within these exceptions.⁹⁰

In addition, numerous alternative grounds for admission apply to other aviation-related government documents. For example, government documents may be admissible for purposes of impeachment,⁹¹ to show a manufacturer's knowledge of dangerous conditions or defects in its product,⁹² or to prove customary practices to establish a standard of care.⁹³

C. ADDITIONAL ARGUMENTS FOR THE EXCLUSION OF GOVERNMENT DOCUMENTS AND REPORTS

The most effective arguments for the exclusion of government documents and reports have already been discussed. But,

⁸⁷ *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654, 661 (N.D. Cal. 1994).

⁸⁸ *Id.*

⁸⁹ FED. R. EVID. 803(8).

⁹⁰ *See, e.g., Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 162-70 (1988) (discussing admissibility of JAG report under Federal Rule of Evidence 803(8)); *Omni Holding and Dev. Corp. v. 3D.S.A., Inc.*, 156 S.W.3d 228, 241 (Ark. 2004) (finding FAA inspection report admissible because it satisfied the requirements of Arkansas' version of Rule 803(8)).

⁹¹ *See, e.g., Daniels v. Tew Mac Aero Servs., Inc.*, 675 A.2d 984, 990-91 (state-ments made to FAA held to be admissible for impeachment purposes).

⁹² *See, e.g., Schneider v. Cessna Aircraft Co.*, 722 P.2d 321, 330 (Ariz. Ct. App. 1986); *Piper Aircraft Corp. v. Evans*, 424 So.2d 586, 589 (Ala. 1982).

⁹³ *See, e.g., Mallen v. United States*, 506 F. Supp. 728, 736 (N.D. Ga. 1979).

there are also some less common arguments that may be appropriate, depending upon the circumstances of your case.

1. *Other Government Reports Should Be Treated Like NTSB Accident Reports*

The dominant rationale for excluding NTSB accident reports is to protect the court and the jury from being improperly influenced by the NTSB's conclusions and opinions.⁹⁴ This same concern arises with the admission into evidence of other government reports containing conclusions and opinions. Indeed, at least one court has recognized that the admissibility of FAA and NTSB post-accident reports raise similar concerns:

The Court specifically finds that all post-accident government actions in this case, including the FAA Airworthiness Directives and Flight Safety Information Bulletins and the NTSB Safety Recommendations, are reports which lack trustworthiness because each government agency involved in the post-accident investigation was subject to different agendas and fact-finding methodology which could undermine and confuse the jury's distinct function in this case. The functions of the Court and the jury must be preserved uninfluenced by the findings of government investigators. The Court specifically finds that the most probative evidence in this case is that which was available and prepared prior to the crash. Post-crash evidence is inherently subject to the various agendas of the parties who prepared it.⁹⁵

Thus, the aviation practitioner might consider raising this policy argument in the form of a Rule 403 or 803(8) objection.

2. *The Documents May Be Excluded under Rule 407 as Subsequent Remedial Measures*

Federal Rule of Evidence 407 states:

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for

⁹⁴ See, e.g., *Lobel v. Am. Airlines*, 192 F.2d 217, 220 (2d Cir. 1951), *cert. denied*, 342 U.S. 945 (1952).

⁹⁵ *In re Air Crash Near Roselawn, Ind.*, on October 31, 1994, No. 95 C 4593, MDL 1070, 1997 WL 572896, at *1 (N.D. Ill. Sept. 10, 1997) (unpublished) (citations omitted).

another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.⁹⁶

In *Keating v. United Instruments, Inc.*, the appellate court found the trial court properly refused to allow the plaintiff to question the defendant regarding a change in the method by which the endplay was set in an overhauled altimeter that occurred after the subject accident because it was a subsequent remedial measure.⁹⁷

3. *The Documents Contain Multiple Layers of Hearsay*

Although Rule 803(8) generally excepts government reports from the hearsay rule, it does not protect those reports if they contain multiple layers of hearsay.⁹⁸ The reason for this is two-fold. First, under Federal Rule of Evidence 805, when a document contains multiple levels of hearsay, each level must fall within an exception to the hearsay rule.⁹⁹ Second, documents and reports containing multiple levels of hearsay may be inherently untrustworthy—and therefore would not even fall within the Rule 803(8) exception.¹⁰⁰

4. *If All Else Fails, Lessen the Sting of an Improperly Admitted Document*

Finally, even if a governmental document or report that you think is inadmissible is admitted, in some jurisdictions you may still be able to minimize the damage without risking waiver of your complaint to the admission of the document on appeal. In *Davis v. Cessna Aircraft Corp.*, the trial judge admitted, over the plaintiffs' objection, the NTSB's probable cause finding.¹⁰¹ On appeal, the court of appeals held the admission was reversible

⁹⁶ FED. R. EVID. 407.

⁹⁷ *Keating v. United Instruments, Inc.*, 742 A.2d 128, 130-31 (N.H. 1999). *But see In re Aircrash in Bali, Indon.*, 871 F.2d 812, 816 (9th Cir. 1989) (refusing to exclude report as subsequent remedial measure because "it was prepared by the FAA without the voluntary participation of" the party seeking to exclude the report).

⁹⁸ *See, e.g., In re Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo.*, on November 15, 1987, 720 F. Supp. 1493, 1498 (D. Col. 1989).

⁹⁹ FED. R. EVID. 805; *see also Hoselton v. Metz Baking Co.*, 48 F.3d 1056, 1061 (8th Cir. 1995).

¹⁰⁰ *See, e.g., John McShain Inc. v. Cessna Aircraft Co.*, 563 F.2d 632, 635-36 (10th Cir. 1981).

¹⁰¹ *Davis v. Cessna Aircraft Corp.*, 893 P.2d 26, 33 (Ariz. Ct. App. 1994).

error.¹⁰² It also rejected the defendant's argument that plaintiffs had waived their complaint by opening the door:

Finally, Cessna argues that plaintiffs opened the door to admission of the entire NTSB report by having their expert read, on direct examination, the probable cause conclusion from the report. We reject this argument. Cessna ignores the fact that it had successfully obtained the admission of the NTSB report four days earlier, while the jury was excused during a recess in the cross-examination of Cessna's expert. Although plaintiffs were the first to refer to the NTSB report after it was admitted, the reference was an effort by plaintiffs to draw the sting from the damage already done by the trial court's erroneous ruling. Plaintiffs were entitled to attempt to blunt the prejudicial effect of the admission of the NTSB's conclusion that pilot error caused the crash. Thus, the fact that plaintiffs referred to the report after it was admitted does not justify the trial court's initial error in admitting it.¹⁰³

IV. CONCLUSION

The admissibility of aviation-related government documents usually turns on whether they are public records and reports, whether they are trustworthy, and if they should be excluded under Rule 403. But the case law aptly demonstrates that there are a multitude of arguments and methods that can be used to admit—or exclude—this type of evidence. In the end, whether a document is admitted or excluded often turns on the aviation practitioner's imagination, tenacity, and understanding of the rules of evidence.

¹⁰² *Id.*

¹⁰³ *Id.* at 36 (citations omitted).

