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a duty to report or fact findings from legally authorized investigations. The opinions do not have to be redacted (though a court could always order redaction if, for example, the judge decided that the opinions but not the facts in the document were untrustworthy[9] or decided that the opinions were irrelevant or unnecessarily cumulative, or that redaction would be prudent to avoid confusing or prejudicing the jury.[10] The courts explain allowing opinions to remain in the certified public records on the textual ground that Rule 803(8) provides a hearsay exception for the entire record if it sets out agency activities or qualifying observations or fact – the Rule does not restrict the hearsay exception to only portions of the document.[11] I am not sure that this view is entirely reconcilable with the courts' insistence on personal knowledge about observations and fact findings in public records, discussed above.

So the good news is that the document custodian does not have to distinguish facts and observations from opinions in deciding whether to certify a record under Rule 803(8). But ...

How is the custodian supposed to know whether there was "a *legal duty* to report" (Rule 803(8)(A)(ii)) the results of an observation that is contained in the record to be certified or that fact findings in such record were obtained in a "*legally authorized*" investigation (Rule 803(8)(A)(iii)?

While there is a risk of waiving attorney-client privilege, the only solution to this question that occurs to me is that when unsure of the legal issues the custodian should consult the government lawyer and testify if questioned about the decision to certify or not certify that he or she relied on the legal advice. If we represent the custodian we could object to this line of questioning as irrelevant since the judge can and will determine those questions without regard to the custodian's opinions. However, the question might be permitted where a particularly critical record or records are at issue as relevant carefully the custodian made the decision to certify and what standards the custodian used. That line of questioning probably should be permitted to a limited extent if the local government is a party to the litigation or closely allied with a party, but more strictly limited if the government is a disinterested nonparty.

Conclusion

We have a duty to protect our clients from negligently certifying records that should not be certified, and from hostile cross-examination about such conduct. Most important, we have a duty to ensure that records certifications under our clients' official seals are truthful and accurate, even if courts and counsel for other parties might get impatient with our concern.

Notes

1. *See* Second Look: There Is No "Convenience" Defense to Perjury: Risks & Opportunities Arising From Careless Business Records Certifications, *Municipal Lawyer*, (vol. 55, no. 3; May–June 2014), p. 20.
2. *See* Sobel v. Hertz Corp., 291 F.R.D. 525, 533 (D. Nev. 2013) (NAAG not a "public office" within meaning of Rule 803(8).
3. *See* United States v. Spano, 421 F.3d 599, 604 (7th Cir. 2005) (minutes of town board meeting excluded under Rule 803(8)(B) as untrustworthy due to strong evidence of tampering).
4. Smith v. Isuzu Motors, Ltd., 137 F.3d 859, 862 (5th Cir. 1998).
5. United States v. Harris, 942 F.2d 1125, 1129 n. 3 (7th Cir. 1991) (dictum).
6. *See* Nachtsheim v. Beech Aircraft Corp., 847 F.2d 1261, 1273 (7th Cir. 1988).
7. *Id.*
8. The courts may relax this personal knowledge requirement if the official obtained the information from an outsider who had a legal duty to report. *See, e.g.,* United States v. Central Gulf Lines, Inc., 974 F.2d 621, 626–627 (5th Cir. 1992) (legally required surveyor reports). *But see United States v. Harris*, *supra n.5*, rejecting tax return information.
9. *See* Fed. R. Evid 803(8)(B).
10. *See* Fed. R. Evid. 403.
11. *See* Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 169 (1988). ML

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held a plaintiff need not plead this with particularity, but rather may allege it in general terms. Under the ADEA a plaintiff must exhaust administrative remedies and file a charge with EEOC within 300 days after the last date of discrimination, both of which are considered conditions precedent to filing under the ADEA. The District Court had held Hildebrand did not plead with particularity that he had exhausted his administrative remedies and dismissed his charge against Allegheny County. The Circuit Court reversed, noting that *Twombly/Iqbal* interpreted only FRCP 8(a), while the pleading of a condition precedent is covered under FRCP 9(c). That latter rule states "[i]n pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed."

On the third issue, "whether a complainant's submission of the Equal Employment Opportunity Commission's revised Intake Questionnaire constitutes the filing of a charge of discrimination," the Court held as long as the form is properly filled out it does constitute such a filing. Under *Federal Express Corp. v. Holowecki*, 552 U.S. 389 (2008), the Supreme Court held an EEOC filing may constitute a charge of discrimination. Hildebrand had checked a box on his EEOC form stating "I want to file a charge of discrimination, and I authorize the EEOC to look into the discrimination I described above. I understand that the EEOC must give the employer, union, or employment agency that I accuse of discrimination information about the charge, including my name. . . ." The Third Circuit held Hildebrand unquestionably filed a charge of discrimination and reversed the District Court on that issue.

***Hildebrand v. Allegheny County*, No. 13-1231 (3d Cir. June 27, 2014).**

Prohibiting Use of Vehicle as "Living Quarters" is Unconstitutionally Vague

A longstanding Los Angeles ordinance prohibiting people from using their vehicles as "living quarters" while on public streets or parking lots has been struck down by the Ninth Circuit for vagueness in that it failed to provide adequate notice to potential arrestees and did not provide police with sufficiently clear standards for enforcement.

In 2010 Los Angeles received various complaints about homeless individuals living in cars on the streets of Venice. The City created a task force within the Los Angeles Police Department to cite and arrest people using their cars as "living quarters." The police relied on a 1983 ordinance to cite and arrest individuals, which stated "no person shall use a vehicle parked or standing upon any City street, or upon any parking lot owned by the City of Los Angeles and under the control of the City . . . as living quarters either overnight, day-by-day, or otherwise." The captain who ran the task force received informal, verbal training and an internal policy memo on how to enforce the ordinance. The memo directed officers to look for possessions normally found in homes to detect whether individuals were using vehicles as living quarters and instructed officers that individuals need not be sleeping in order to be in violation.

Officers began citing and arresting individuals under the ordinance. One plaintiff was cited while he was in his car parked on a public street waiting for a church to open so he could volunteer to serve food to homeless individuals. He knew the law and believed that since he did not sleep in his car on public streets – he had permission from the church to park in its lot at night – he was not breaking the law. A month later when officers saw him exiting his legally-parked vehicle they arrested him for violating the ordinance. A second plaintiff, after being issued a warning for sleeping in his car, began sleeping on the sidewalk near his parked car – which is legal in Venice. He was subsequently arrested when officers found him sitting in his car to avoid a rainstorm, despite his presenting an identification card from a local shelter where he was sleeping. A third plaintiff was driving through Venice when she was stopped by officers for failing to signal a left-hand turn and was issued a warning about the local ordinance. She had permission from a church in Santa Monica to park her RV at night and sleep there, but nonetheless the officers told her she would be arrested if ever again seen in Venice with her vehicle. A fourth plaintiff was cited and arrested after officers saw house-like items in his car, including bedding, boxed food, and bottles of medicine, despite his statements that he did not sleep in the vehicle.

Plaintiffs filed suit against the City under the Fourth, Fifth, and Fourteenth Amendments, alleging the ordinance was unconstitutionally vague and devoid of any standards to limit police discretion. The parties filed cross-motions for summary judgment and the District Court granted the City's motion on all claims.

HELD: On appeal, the Ninth Circuit reversed the District Court, holding the Los Angeles ordinance fails to provide sufficient notice to individuals of what conduct is prohibited and fails to provide guidelines to limit police discretion, enabling discriminatory enforcement.

DISCUSSION: The Ninth Circuit first dealt with the District Court ruling on summary judgment that it could not consider the plaintiff's vagueness challenge since it was not in the first amended complaint. The court held this was an abuse of discretion because the lower court should have granted the plaintiffs' request to amend. Noting that leave to amend should be granted freely and this policy should be "applied with extreme liberty," the court pointed out there are five factors courts use to determine whether an amendment should be granted. The factors include bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the plaintiff has already amended the complaint. The Ninth Circuit found none of these factors were an issue, and thus the lower court should have allowed the plaintiff's to amend their complaint a second time.

The court easily found the ordinance failed to provide fair notice such that citizens could conduct themselves accordingly. It did not define "living quarters" and did not set forth how long one must be using a car in this undefined fashion before breaking the law. As the Circuit Court put it, people "are left guessing as to what behavior would subject them to citation . . . . Is it impermissible to eat food in a vehicle? Is it illegal to keep a sleeping bag? Canned food? Books? What about speaking on a cell phone? Or staying in the car to get out of the rain? These are all actions plaintiffs were taking when arrested . . . all of which are otherwise perfectly legal."

The Ninth Circuit also found the ordinance unconstitutional for failing to provide any discernable guidelines to limit police discretion. The court found "arbitrary and discriminatory enforcement is exactly what [] occurred," given that the law is clearly broad enough to apply to anyone, but the police only targeted the homeless. The City argued that individuals were all cited and arrested because of health and safety concerns and that it was unsafe for them to be living in their vehicles. The court conceded that might well have been true, but the plaintiffs' conduct in each case "mimick[ed] the everyday conduct of many Los Angeles residents," and only the homeless were cited and arrested. The City also argued that it had legitimized an otherwise vague ordinance with limiting constructions given to the police, but the court rejected this argument, pointing out that the internal memo that was supposed to guide officers was completely ignored by the police and that the task force leader stated in his deposition that he did not favor that limiting construction and directed the task force members not to follow it.

***Desertrain v. City of Los Angeles*, No. 11-56957 (9th Cir. June 19, 2014).**

Where City Does Not Appeal Injunction, Non-Party Church Cannot Appeal As Intervenor

Where residents enjoined a city from permitting a church to erect a large religious display, the church, which had not been a party to the injunction suit, did not have standing to appeal the injunction.

The West Side Christian Church applied to Evansville, Indiana to construct "Cross the River," a display consisting of thirty-one, six-foot tall crosses covering four blocks of public riverfront. The City approved the application, but two residents filed suit to stop the display, claiming it violated the First Amendment's Establishment Clause. The District Court held for the residents and enjoined Evansville from permitting the display. The City did not appeal. However, West Side Christian Church appealed as an intervenor, arguing the display did not violate the Establishment Clause.

HELD: The Seventh Circuit held West Side Christian Church lacked standing to bring the appeal because any injury it may have suffered as a result of the lower court's injunction was not fairly traceable to Evansville.