

SECOND LOOK

A Checklist: Who Speaks for the City?

by Pete Haskel

When will prior statements of municipal officials or employees be admissible against and imputed to the municipality in civil litigation to which the entity is a party – assuming relevance and assuming that possible prejudice, jury confusion, and redundancy do not outweigh probative value? *See* Fed. R. Evid. 403. (For convenience I will cite only to the federal rules of evidence, not to state evidentiary rules or precedent.) If there is imputation, when will the statements be "binding" on the municipality, and when will they be "merely" evidentiary?

Official statements of a governing body that are embodied in resolutions or ordinances. These are always admissible against the body and will be treated as non-hearsay statements. Fed. R. Evid. 801(d)(2)(A). The statements would not necessarily be "binding" in the sense that inconsistent evidence would be per se inadmissible, but, absent a subsequent repeal or amendment by the governing body, this will be almost impossible to contradict as a practical matter. Usually, these records will not be hearsay for the additional reason that they are rarely offered for the truth of the matter stated – instead, they will be relevant to issues such as the scope of a perceived municipal problem that engendered the passage of an ordinance or the scope of an investigation before the passage of an ordinance. *See N.W. Enterprises, Inc. v. City of Houston*, 27 F. Supp. 2d 754, 786 (S.D. Tex. 1998), *aff'd in part on other grounds, rev'd in part on other grounds, dismissed in part on other grounds sub nom. N.W. Enterprises Inc. v. City of Houston*, 352 F.3d 162 (5th Cir. 2003), *rev'd in part on other grounds and affirmed in part on other grounds on reh'g in part*, 372 F.3d 333 (5th Cir. 2004).

Statements of members of the governing body made during debate in open session. Admissible against and in favor of the municipality to the extent that the legislative history of an ordinance is at issue, to the same extent that a legislator's comments on pending matters would be admissible to show the legislative intent for state or federal enactments. Except in unusual situations, such as where the knowledge of the local governing body of facts is at issue and is established by the individual member's statement at a public meeting, the individual's statements should not be admissible as prior statements of the municipality under Rule 801(d), because members of municipal council or other governing body are not "agents" or "employees" within meaning of Rule 801(d)(2)(D). *See LaFond v. Sturz*, 03-C-435-C, 2004 WL 1946404 (W.D. Wis. Aug. 18, 2004) (citing cases). There is a semantic problem as to whether governing body's members who receive pay from the municipality may be "employees," but I think the proper approach is that "employee" status within Rule 801(d)(2)(D) refers not to whether an individual is on the payroll, but instead, to whether he or she is an agent ("servant" using the older language of pre-2011 Rule 801) of the entity. Only to the extent that an individual governing body member has the power to bind or act for the city should his or her statements be admissible as those of an agent or employee.

Statements made in prior pleadings in the same litigation. These are probably admissible to the extent that the prior pleading contains statements inconsistent with the municipality's position at trial, but subject to explanation and clarification. See Fed. R. Evid. 801(d)(2)(C)

Statements made in prior municipal pleadings in different litigation. These would traditionally be admissible but subject to contradiction in federal court. *See Donald M. Drake Co. v. United States*, 153 Ct. Cl. 433, 444 (1961). There is some authority that the prior pleadings can only be used for impeachment. *See Arnold v. Groose*, 109 F. 3d 1292, 1296 (8th Cir. 1997). I doubt that this limitation would be applied under current standards.

Admissions and interrogatory responses in different litigation. Fed. R. Civ. P. 36(b) provides that "[a]n admission under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding." Many state rules of procedure have similar provisions. However, it would be a close question under the Supremacy Clause and comity whether a state court could consider an admission made in federal litigation in response to a request for admission, notwithstanding Rule 36(b). *Cf.*, Fed. R. Evid. 502(d) (federal court can order that production of information in federal litigation will not be deemed a waiver of attorney-client privilege in later state litigation). A municipality's interrogatory responses in earlier litigation likely would always be admissible against it, but subject to explanation and contradiction at trial.

Official reports of municipal employees. These are admissible as a hearsay exception for or against the municipality to the extent that the reports (A) recount (i) "the officer's activities"; "a matter observed while under a legal duty to report"; or (iii) "factual findings from a legally authorized investigation"; and (B) "neither the source of informwation nor other circumstances indicate a lack of trustworthiness." Fed. R. Evid. 803(8). There still may be some disagreement about the extent to which opinions expressed in the report will be admissible, in addition to reported facts (absent qualifying the reporting employee as an expert), but the modern trend is to allow factually-based opinions from a report if the overall report is as not

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H.R. 2827, which is pending currently before the House Financial Services Committee, was introduced by Robert Dold (R-IL) and is titled "To amend the Securities Exchange Act of 1934 to clarify provisions relating to regulation of municipal advisors, and for other purposes." In the form approved by the Subcommittee on Capital Markets and Government Sponsored Enterprises and sent to the full Committee, H.R. 2827 would eliminate the fiduciary duty for all municipal advisors. The bill would exempt dealers and all other financial institutions from regulation as municipal advisors, even when serving as financial advisors (as opposed to serving as underwriters). Further, the bill would permit municipal advisors to deal with their municipal-entity clients as principals (i.e., in arms'-length, instead of agency, capacities) to accommodate cross-selling of products and services, as opposed to a focus solely upon issuers' actual needs, and would make other changes to the significant disadvantage of state and local governments. The bill also would exempt appointed officials from the definition of "municipal advisor," although, as noted, the SEC is expected to take similar action in its final definition.

Rep. Dold and his staff, as well as certain key interest groups, have been commendably willing to listen to comments, however, and have signaled that H.R. 2827 may be amended significantly to eliminate some of the more objectionable provisions. Unfortunately, that has not occurred as of this writing early in August 2012, and one cannot predict the legislative process. There are powerful interests that remain in favor of H.R. 2827 in its present form. Moreover, special interests are seeking exemptions for the preparation of financial feasibility studies, which are among the most important financial advice upon which issuers rely in issuing bonds for highly risky start-up or rapidly-expanding projects (e.g., the Harrisburg, PA, incinerator, the Jefferson County, AL, sewer system, and the WPPSS nuclear plants).

This is legislation that bears watching closely. If it is not enacted in 2012, it almost certainly will reappear in some form in the next Congress. State and local governments have much at stake and much to lose. When state and local governments make ill-advised decisions to issue bonds for unsound projects, defaults can and do occur (e.g., numerous private prisons, nursing homes, toll roads and sports arenas, and a telecom system, a toll bridge, a monorail, a manufacturing plant, a technology facility, and a steam utility). In those instances, at times, taxpayers and ratepayers can, and do, lose many millions of dollars in losses and litigation, and investors can be, and are, harmed.

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untrustworthy. *Compare Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988) with *Moss v. Ole S. Real Estate, Inc.*, 933 F.2d 1300 (5th Cir. 1991). Interestingly, the limitation under Rule 803(8)(B), that the circumstances do not indicated lack of trustworthiness, can be ignored if the employee's report is within the scope of his or her official duties. If that is the case, even if the report contains hearsay or speculation, it can come in as a party's prior statement under Fed. R. Evid. 801(d)(2)(D), at least against the municipality. *See Mister v. Ne. Ill. Commuter R.R. Corp.*, 571 F.3d 696, 698 (7th Cir. 2009).

Unofficial or draft written or verbal statements of municipal employees on matters related to their duties, and reports by outside contractors. Courts will exercise discretion about admitting draft reports, or in attributing outside contractors' reports to the commissioning municipality, under Rule 801(d)(2)(D) as a prior statement of a party. However, at least where a series of drafts were closely monitored by city staff as they evolved, and the city closely supervised a contractor's work, there is a substantial likelihood that the drafts and contractor reports will be admissible against the municipality. *See Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 166 (1988). In theory, the same rationale should permit such reports to be used by the city in support of its own position, but I think the courts would make that more difficult.

Records of Regularly-Conducted Activity. To the extent that information is regularly recorded pursuant to a municipality's normal or usual business, courts likely will admit that information for the truth of the matters stated. *See* Fed. R. Evid. 803(6). This is so even though sometimes, the information may be hearsay because one of the predicates for admissibility under Rule 803(6) is lacking. The most common gap under Rule 803(6) is a failure to prove that the source of the information in the record is "someone with knowledge." Fed. R. Evid. 803(6)((A). Often, the municipality fails to object under Rule 803(6) when there is an offer of information provided by the public, which a municipal employee records ministerially, but without verifying it. For example, a water customer's statement of his residential address, when opening an account, is unlikely to be verified by the municipal water utility (and even if verified, the verification would rely on hearsay documentation).

All too often, the municipality wants information to come in, and so contributes to the general acceptance of its records as proving the truth of matters stated, so that it becomes difficult for it to take the contrary position. Courts find it convenient to rely on government records, and naturally, will be hostile to technical objections under Rule 803(6). However, where the source of the information in the municipal record is the opposing party, or the municipality has no indication that the information is accurate, an objection is appropriate, particularly if the municipality can cast doubt on the reliability of the record. While the proponent may assert that an objection based on reliability should only go to weight, the often-overlooked final predicate for admissibility of a record of regularly-conducted activity under Rule 803(6) is "(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness." ML