

SECOND LOOK

There Is No "Convenience" Defense to Perjury: Risks and Opportunities Arising From Careless Business Records Certifications

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Lazy Lawyers and Lazy Staff

How many times a day does our local government staff execute affidavits or certificates attesting that government documents are "business records" (records of regularly conducted activity)? How many times a day does our legal office do so – for example in preparing evidentiary exhibits for summary judgment or other motions? The certificates serve several functions – outside of litigation they provide official authentication of government records that our citizens can use for their own purposes. In litigation, the government records custodian's properly executed business record certificate establishes that the exhibit is authentic and that it is not hearsay. These two steps make the record admissible for the truth of the matters stated therein in any proceeding at which the rules of evidence apply (assuming relevance and absent other objections).[1]

How carefully do government staff–non-lawyers who may not even have a high school diploma–consider the accuracy of our certifications? How carefully do our legal assistants and lawyers?

Probably not carefully enough. However, we probably are more careful than our litigation adversaries – which we can use to our advantage.

Careless or unthinking certifications can render our clients and our offices subject to potential attacks (and worse) for making false official statements, false swearing, and related (sometimes-criminal) conduct, and jeopardize the admissibility in evidence of documents that we certify. Careless certifications by adverse parties can furnish a fruitful subject for deposition, for impeachment if the certifying custodian ever testifies, and for evidentiary objections.

The enumerated established hearsay exceptions such as the one for business records are supposedly justified on grounds of "convenience and necessity"[2] and defended based on the notion that long experience provides assurances that evidence within hearsay exceptions are usually reliable.[3] How a blatantly false rumor published 22 years ago in a tabloid rag becomes reliable as an "ancient document" after the passage of 20 years,[4] I will leave to others to prove. But there can be no denying that the established hearsay exceptions are convenient (unless you are objecting to the evidence).

However, but convenience does not justify failure to use due diligence to ensure the accuracy of custodial certifications. I have grown tired of arguing this point – which to me is self-evident–with lawyers for non-government parties who want city clerks to certify document to facilitate their use in evidence regardless of any other considerations.

How the Business Records Exception Should Work

The details of the business records exception vary among jurisdictions, but most if not all include the two elements that I consider most likely to be abused: Certification that (i) the content of the certified document came from a person "with knowledge" of the information and (ii) making "the record" was in the ordinary course of the business of the organization whose custodian attests to the record. Subdivisions (A) and (C) of Federal Rule of Evidence 803(6) include both of these elements:

Rule 803. Exceptions to the Rule Against Hearsay~Regardless of Whether the Declarant Is Available as a Witness

(6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by~or from information transmitted by~someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

Typical Abuses of the Business Records Exception

So, when can a city clerk validly certify, for example, that a license application's recital of a business' gross sales, net worth, or corporate directors' names is furnished by a "person with knowledge"? One could argue that furnishing the application under oath should suffice. But how does the fact that the application is under oath prove to the certifying custodian that the applicant had "knowledge" of the facts in the appli-

Continued on page 33

Day in the Life *Cont'd from page 18*

volved. How do you allocate your time?
Allocation of time is a difficult and fluid issue. I often think I would drown in projects without the wonderful attorneys at my firm that function as my assistant city attorneys and do most of the drafting and research necessary to respond to the city on a timely basis. Most days, my to-do list starts with the phone calls I get on my drive to the office. No two days are the same and there is never a dull moment.

Most of my time is spent in meetings or on phone calls with city management staff, talking through issues that don't have easy answers or projects that need to be scoped or reviewed. I spend the majority of my time these days working on utility issues – water and sewer issues, including rate setting, and finance issues. In addition I spend a lot of my time on land use and planning issues. Most recently, as the clients approach the election season, I have been working on structuring taxes that will be placed on the ballot and reviewing other ballot and election issues. In addition, I am very involved in litigation regarding the legality of the way water and sewer fees are structured.

ML: That's a broad spectrum, plenty wide to have generated some notable moments. What are some of the successes you're most proud of?
Thanks to Davis, California's desire to conserve the farm land adjacent to the city, I drafted what I think was the first, or one of the first, agricultural preservation ordinances in the country. This ordinance required new development to obtain preservation easements on two acres of land for every one acre that was to be developed. The city holds conservation easements on most of this property, and the fee interest in others. This ordinance, together with an open space tax ordinance that the voters approved by more than a two-thirds vote, has resulted in the preservation of 5,000 acres of farm and open space lands in the area around Davis. I also helped develop and draft an affordable housing inclusionary zoning ordinance that has provided land for much-needed affordable housing projects and developer-built affordable units in the city over the last 25 years.

I have also worked on numerous cable franchise renewals and cell facility matters that have provided added value to my public clients. For example, I have negotiated several fiber optic institutional networks for cities and other agencies that are currently in place and are providing broadband services to the agencies. Some of the public agency clients that I have assisted in siting cell towers or other facilities have been receiving rental income that has helped them to whether the recession.

Lately I have been working on greenhouse gas reduction and energy issues that are extremely interesting. For example, I have been working on energy conservation requirements for new development and net zero energy development standards. In addition, the City of Davis has begun a review of electricity service and costs to determine, after due diligence, whether it wishes to become a publicly owned utility and acquire the existing electrical facilities from the incumbent investor owned utility.

ML: So you continue to be involved in leading-edge issues. May we assume you'd recommend the municipal law route to other attorneys?
I would encourage attorneys who are interested in public service to consider working for cities and counties. The work is extremely challenging, offering both the ability to assist local agencies in reaching their policy goals and helping create facilities and services to improve the lives of citizens within the jurisdiction. In addition, even after practicing in this area for 30 years, there continue to be questions posed that have not arisen before and have no easy answers, creating a continual challenge to provide practical and constructive advice to city clients.

ML: Parting thoughts?
When I drive or bike around the City of Davis, where I have been city attorney for more than 25 years, I marvel at the many projects and facilities that I have assisted the city in creating and implementing. I think the day-to-day work that has helped the city over the years is truly rewarding as I look back to see if I have helped to make a difference.

-Thank you, Harriet. ML

Code Enforcement *Cont'd from page 19*

beneficial. Further, I believe that responsible owners will understand the need for some reasonable regulation of the activity and likely comply without hesitation. The problem will arise with those owners who get the chickens just for fun and really have no concept of how to keep and maintain them properly.

Another issue that has come to mind with backyard chickens is the issue of slaughter. I understand that chickens may only lay eggs for a finite time frame. Once that time period ends and the chickens no longer provide eggs to the owner, what if the owner wants to slaughter the birds for meat? The distinct possibility of an owner desiring an allowance for that activity brings another set of circumstances and problems to address. Hopefully we will gain enough input and information from those interested in the activity to address all of the issues that might arise.

As I get geared up to work on backyard chickens, my mind turns to the future and whether I will also be looking at potbellied pigs and goats. Hmmm... food for thought (so to speak).

Second Look *Cont'd from page 20*

cation? Two important reservations about unquestionably accepting a sworn application for later certification as a business record: First, even a truthful applicant could be relying in good faith on information from others. Second, virtually every document submitted to a government raises a risk of criminal penalties for the submitter if the document contains material falsehoods – the oath (or certificate under penalty of perjury) really adds no additional assurance of veracity.

What if the sworn application includes a statement that the applicant has personal knowledge of the facts in the application? As a practical matter, I think this is as close as we can expect to get to providing an assurance of "personal knowledge," unless the custodian has reason to doubt the accuracy of either the statement of personal knowledge or the truth of substantive matters stated in the application.[5] The form of the record cannot substitute for the custodian

actually reading the document to be certified. I sincerely doubt that many custodians peruse applications sufficiently to catch even obvious defects in the element of "personal knowledge."

The other common, and more pernicious, abuse of the business records hearsay exception involves the filing of self-serving documents of dubious accuracy as attachments to routine government forms in order to boot-strap the admissibility of the attachments' content in later formal proceedings. For example, a property owner might try to use a letter that the owner wrote or solicited reciting the value of real property that the owner submitted as an attachment to a special use permit application in a later eminent domain or tax assessment proceeding, even if the letter was irrelevant or only tangentially relevant to the SUP application.

The "Certified Copy" and Residual Hearsay Exception Alternatives

There are some alternative approaches that avoid technical examination of documents for compliance with Rule 803(6). If the contents of the document are not offered for their truth, then document is not hearsay. It must still be authenticated but the elements of Rule 803(6) will be irrelevant. Authentication can usually be accomplished by a simple notary stamp of "certified copy." Alternatively, if the truth of the document's contents will be relevant, consider invoking the "official records" exception under Fed. R. Evid. 803(8) or the residual hearsay excetion such as is recognized by Fed. R. Evid. 807 if your jurisdiction has a similar rule.[6]

Depositions, Voir Dire, and Objections Regarding defective Certificates

If thine own house be in good order and thou hast no qualms about risking equivalent treatment ...you can have substantial fun deposing the custodian about the truth of the certificate. If the questioning does not deter the offer of the certified record into evidence, object and offer the deposition in support of the objection, perhaps with additional live testimony of the custodian if they are present in court either coincidentally or because you have subpoenaed them for the purpose of contesting their certificate.

Notes

1. *See* Fed. R. Evid. 803, 902.
2. *Mattox v. United States*, 156 U.S. 237, 240 (1895).
3. *See Lee v. Illinois*, 476 U.S. 530, 552 (1986) (Blackmun, J., dissenting) ("[S]tatements squarely within established hearsay exceptions possess 'the imprimatur of judicial and legislative experience' ... and that fact must weigh heavily in our assessment of their reliability for constitutional purposes") (citation omitted), *quoted with approval*, *Idaho v. Wright*, 497 U.S. 805, 817 (1990).
4. *See* Fed. R. Evid. 803(16). "The rationale of the rule is that 'age affords assurance that the writing antedates the present controversy.' Fed. R. Evid. 803(16) advisory committee's note." *Columbia First Bank, FSB v. United States*, 58 Fed. Cl. 333, 336 (2003).
5. I do not defend this approach as a matter of logic. The oath of personal knowledge is subject to the same reservations as the more general oath. I just do not relish spending the rest of my career litigating Rule 803(6) issues and the "personal knowledge" affidavit component provides at least some marginal comfort.
6. Rules 803(8) and 807 are subject to their own abuses. Stay tuned. ML

