



Public Record Certification Traps under Fed. R. Evid. 803(8)

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Certifying Official Records is Serious Business. My last column discussed some dangers raised by careless certification of local government records as business records.¹ Other dangers can arise from abuse of the “official records” or “public records” hearsay exception and I consider some of them here. There is little literature on these issues because most writers, and virtually all the cases that construe the public records hearsay rule understandably focus on the admissibility or inadmissibility of documents that purport to qualify under that exception to the hearsay rule. The same is true for writing on the business record hearsay exception. My focus instead is on the inception, not the end, of the certification process: when can a government records custodian properly state that the records in the custodian’s custody qualify as public records under Rule 803(8)? I do not dwell on the limits that Rule 803(8) places on the admissibility of public records in criminal cases – because I am concerned here with creating the certified record rather than with getting it into evidence.

A local government puts its reputation and credibility on the line when it certifies a document as an official record. Despite the entreaties of our fellow lawyers to certify records expeditiously in government offices, certification should not be lightly provided. Of course it should not be improperly withheld either.

Why Not Just Always Use the Business Records Exception? Not all official records are business records. For example, a report of an investigation into official

corruption involving a city’s own officials may (and hopefully is) something that is never repeated. Therefore, perhaps it is not in the regular course of a city’s business to make and keep such reports. The report might qualify as a “Public Record” under Fed. R. Evid. 803(8) (or state equivalent) but might not qualify as a record of regularly conducted activities under Rule 803(6).

Elements of the Official Records

Hearsay Exception. As I noted in the last column, not every record in a city’s files qualifies as a “business record.” Similarly, not every record in a city’s custody fits the evidence rules as an official record either. State hearsay exceptions for official records vary somewhat, but most resemble the federal standard in its present form. In addition, a revision of the federal rule will go into effect on December 1, 2014, unless Congress vetoes it. I set out both Federal Rules of Evidence versions here:

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

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

[Current Federal Rule of Evidence 803(8)]:

(8) **Public Records.** A record or statement of a public office if:

- (A) it sets out:
 - (i) the office’s activities;
 - (ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or
 - (iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and
 - (B) neither the source of information nor other circumstances indicate a lack of trustworthiness.
- [Text of Rule 803(8) to become effective on December 1, 2014, absent contrary Congressional action]:
- (8) **Public Records.** A record or statement of a public office if:
- (A) it sets out:
 - (i) the office’s activities;
 - (ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or
 - (iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and
 - (B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

Now Hold On Just One Second!

When should a custodian think very carefully about certifying, or refuse to certify, his or her records as “public records” under Rule 803(8):

Rule 803(8)(A). Is the document to be certified a “record or statement of a public office”? The term “public office” is not defined, but probably excludes records of public-private partnerships and associations of government officials such as the National League of Cities or the International Municipal Lawyers Association.² What about records of voluntary citizen advisory boards formed at the request of a local government? Perhaps under some states’ laws these boards would be “public offices.” Or not. Maybe their records are also the records of the local government

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addition to being the City where the Star Spangled Banner was written, what are the top five reasons that Baltimore is better place to live than Washington DC?

1. It's a real City. With friendly people.
2. The Ravens vs. the "R....." And Orioles over Nationals. I rest my case.
3. More quirky neighborhoods.
4. Less traffic.
5. More charm.

That last one in particular is hard to challenge, George. We'll conduct more research when we see you in September. **M.**

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department that provides the board with administrative services – but that result could vary depending on quirks of state and local laws. It might be prudent for the ordinance or resolution that establishes the board to provide that the Director of X department is the custodian of the Board's records and that such records are official government records, even though the Board does not set City policy or speak for the City? However, while such a provision might provide future convenience for records certification, the convenience might have a price – perhaps tying the advisory board's policy recommendations to the local government in the eyes of the public, the courts, and jurors more closely than the government would prefer. What about associations of multiple local governments? The records of these associations might be considered to be the records of each member government or of the government whose official presides over the organization. Or the records might not be public records. Before taking the position that such an association's records can be certified under Rule 803(8) consider how that position might prejudice other positions, such as that those records are exempt from the state's open records laws or that a particular local government lacks custody or control over such records for purposes of pretrial discovery.

There may be situations where the records kept by a government custodian are so obviously untrustworthy that the custodian should refuse to

certify – even though the Rule 803(8)(B) “trustworthiness” determination is usually reserved for the court when ruling on an evidentiary objection. When might such a situation arise? Perhaps, for example, where the minutes of a town council meeting are so obviously doctored that tampering must be suspected.³

I have not found any instance of a mandamus action seeking to compel a custodian to certify a document as a “public record” under Rule 803(8). Mandamus would not lie if the certification decision were discretionary. Is such certification a purely ministerial act or must the custodian exercise some judgment? I think that the decision to certify is discretionary because the custodian must determine that the record fits one of the Rule 803(8) criteria and that determination involves both subjective and objective standards – requiring the custodian to read the document to be certified and to understand the content to at least some minimal extent.

Rule 803(8)(A)(i). Does the record or statement “set out” the public office's activities? Not all records gathered in the course of a public office's activities necessarily “set out” the office's activities. For example, National Highway Traffic Safety Administration staff memoranda evaluating possible safety standards contained preliminary staff opinions rather than setting out the agency's activities and therefore were held to be inadmissible hearsay.⁴ To the same effect, the contents of federal gift tax returns were deemed to be hearsay because the taxpayer's information did not “set out” IRS' activities.⁵ One could argue that the IRS' activities include collecting and storing tax returns and from that perspective the returns “set out” the collection and storage activities of the IRS – perhaps more accurately and completely than could any narrative report. However, no IRS official had personal knowledge of the collected returns. Except to the extent that the IRS audited the returns, the IRS would have no grounds for vouching for the accuracy of the returns' contents – the precise point for which the

government offered the returns into evidence (“for the truth of the matter stated” in the returns).

The lack of personal knowledge of the accuracy of the document in the government records by any public servant is significant not only in helping define the scope of the Rule 803(8)(a)(i) exception (records “sets out” agency activities), it is also a key consideration in determining whether a record qualifies under ...

Rule 803(8)(A)(ii) and (iii). Does the public office's record or statement “set out” “a matter observed while under a legal duty to report” or “factual findings from a legally authorized investigation”? Here too the courts usually require that the observation or factual findings be within the personal knowledge of an agency official.⁶ *Nachtsheim* quotes Judge Weinstein's Evidence Treatise for the proposition that

“Rule 803(8) is silent about a requirement of personal knowledge, although the introductory notes to Rule 803 state that “neither this rule nor Rule 804 dispense with the requirement of first-hand knowledge.”⁷

Thus, the courts tend to require personal knowledge as an implicit component of the “trustworthiness” requirement in Rule 803(8)(B).⁸ Of course the certifying custodian does not have to be the official with personal knowledge. However the custodian and the investigator who created the report or statement at issue, as well as a representative witness of the agency at a deposition could all be cross-examined vigorously as to the extent or absence of personal knowledge as relevant to Rule 803(8)(B). Therefore, if we do not want the credibility of our officials and officers impeached we need to be careful about attestations under Rule 803(8).

What about opinions contained within records that qualify as containing observations and fact findings that are admissible under Rule 803(A)(ii) and (iii)? Custodians can certify as public records full documents that contain matters observed under

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 untrustworthy⁹ 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).

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.