

In a civil action for misrepresentation in the sale of real estate, the parties contested whether the defendant was licensed by a public agency established by statute to license real estate brokers. The defendant testified that she was licensed. On rebuttal, the plaintiff has offered a certification, bearing the seal of the secretary of the public agency. The certification states that the secretary conducted a thorough search of the agency's records and all relevant databases, and that this search uncovered no record of a license ever having been issued to the defendant. The certification is signed by the secretary.

Is the certification that there is no record of a license having been issued to the defendant admissible?

- A. No, because it is hearsay not within any exception.
- B. No, because the writing was not properly authenticated.
- C. Yes, for the limited purpose of impeaching the defendant.
- D. Yes, to prove the nonexistence of a public record.

## Explanation:

### Hearsay exceptions for public records

<b>Existing public records</b>	Records or statements of public office/agency admissible if they set forth: activities of office or agency (FRE 803(8)) matters observed pursuant to legal duty (excluding police observations in criminal cases) OR factual findings from legal investigation if offered in civil case or against government in criminal case
<b>Absence of public records</b>	Evidence that diligent search failed to locate public record or statement admissible if: (FRE 803(10)) introduced through testimony or self-authenticating evidence certified under FRE 902 AND in criminal cases, prosecutor gives written notice of intent to offer certification 14 days before trial & defendant does not object in writing within 7 days of receiving notice

**FRE** = Federal Rule of Evidence.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted therein. These statements are inadmissible unless they fall within an **exception to the hearsay rule**. One exception applies to *existing* public records. Another exception applies to the **absence of public records**, which allows the admission of evidence that a **diligent search failed to locate** a public record to prove that:

the public **record** does **not exist** or  
a **matter** regularly kept in public records did **not occur**.

But this evidence must be **admitted through witness testimony** or **self-authenticating evidence** certified under Federal Rule of Evidence 902—eg, a signed and sealed document from a public agency.

Here, the plaintiff has offered a certification to show that a thorough search of the agency's records uncovered no record of a license having been issued to the defendant. And since the certification has the agency's seal and the secretary's signature, it is self-authenticating evidence. As a result, it is admissible under the absence of public records exception to prove the nonexistence of the defendant's license **(Choice A)**.

**(Choice B)** Domestic public documents bearing a government seal and signature attesting to their truth are self-authenticating. Therefore, no other evidence was needed to **authenticate** the certification here.

**(Choice C)** The certification is admissible to [impeach](#) the defendant's testimony. But since the certification is excepted from the rule against hearsay, it is also admissible to prove that the defendant did not have a real estate license.

**Educational objective:**

Under the absence of public records exception, evidence that a diligent search failed to locate a public record is admissible to prove that (1) the public record does not exist or (2) a matter regularly kept in public records did not occur. However, this evidence can only be admitted through witness testimony or self-authenticating evidence.

**References**

Fed. R. Evid. 803(10) (hearsay exception for absent public records).

Fed. R. Evid. 902(1) (self-authenticating evidence).

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