

A plaintiff sued his insurance company for the full loss of his banquet hall by fire. The insurance company defended under a provision of the policy limiting liability to 50 percent if "flammable materials not essential to the operation of the business [were] stored on the premises and cause[d] a fire."

The insurance company called the keeper of the city fire inspection records to identify a report prepared and filed by the fire marshal as required by law, indicating that shortly before the fire, the fire marshal had cited the plaintiff for storing gasoline at the banquet hall.

Is the report admissible?

- A. No, because it is hearsay not within any exception.
- B. No, because the proceeding is civil, rather than criminal.
- C. Yes, as a public record describing matters observed as to which there was a duty to report.
- D. Yes, as a record of regularly conducted activity, provided that the fire marshal is unavailable.

## Explanation:

A written out-of-court statement or record offered for the truth of the matter asserted in the writing is **hearsay** and generally inadmissible unless it falls within a hearsay exception. A written statement of a public office falls within the **public records exception** to the hearsay rule if it records:

activities of the public office or agency (eg, fire marshal)

**matters observed** pursuant to a **legal duty to report**, excluding observations of law-enforcement personnel in criminal cases *or*

factual findings from a legally authorized investigation offered (1) in a civil case or (2) against the government in a criminal case.

Here, the fire marshal's report is hearsay because it was made before this lawsuit and is being offered to prove that the plaintiff stored gasoline in his banquet hall. But the fire marshal is required by law to report citations made while inspecting the premises and file them in the city fire inspection agency's records. Therefore, the report is admissible\* under the hearsay exception for public records **(Choice A)**.

*\*Here, the testimony of the keeper of the city fire inspection records is sufficient to authenticate the report—ie, to prove it is what it is claimed to be.*

**(Choice B)** Public records are more broadly admissible in civil cases than in criminal cases—eg, observations of law-enforcement personnel are only admissible in civil cases. And the fire marshal's report is admissible in this civil action under the public records hearsay exception.

**(Choice D)** The fire marshal's report would fall under the **business records** hearsay exception if it was (1) made at or near the time of the recorded event, (2) based on personal knowledge, and (3) made and kept as a regular practice. But this exception would apply *regardless* of the fire marshal's availability.

## Educational objective:

The public records hearsay exception applies to records of (1) a public agency's own activities (2) matters reported pursuant to a legal duty—but *not* observations of law-enforcement in criminal cases—or (3) factual findings from a legally authorized investigation offered in a civil case or against the government in a criminal case.

## References

Fed. R. Evid. 803(8) (public records).

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## Admissible public records (FRE 803(8))

Matters reported as legal duty



Legally authorized investigation



Activities of public agency



FRE = Federal Rule of Evidence

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