

# Michigan Rule of Evidence 803-6 (“the business record exception”) and Unemployment Insurance Administrative Hearings

By Jacob Coate, University of Michigan Law School Class of 2017 and  
Steve Gray, Clinical Assistant Professor and Director of the Unemployment Insurance Clinic

February 4, 2016

The nature of Unemployment Insurance hearings typically implicates a great degree of out-of-court testimony. Perhaps more than any other exception to hearsay, Rule 803-6 is used by employers to admit this testimony. Broadly construed (and often argued by employers) the rule permits admission of all documents created at a place of business or tangentially relating to business activities.

This broad construction greatly jeopardizes the rule and creates a perverse incentive in the creation of documents. As such both the Michigan Supreme Court and the United States Supreme Court (in the context of the parallel Federal Rule of Evidence 803-6) have rejected such a broad construction. Instead, specific elements must be met before a document may qualify for admission under the rule. And even when those elements have been met, the document will not qualify if there is a reason to believe either the source of information or manner of preparation is untrustworthy.

This brief article seeks to flesh out both the elements of the rule as well as the more nuanced contours of its application as they relate to Unemployment Insurance hearings.

## **Rule Against Hearsay and Its Application in Administrative Proceedings**

The Michigan Administrative Procedures Act makes the Michigan Rules generally applicable in administrative hearings. MCL 24.275. We assume, for the sake of this article, that hearsay is generally inadmissible in contested cases. If hearsay is generally inadmissible, the question presented here is: How and when should the business record exception be applied to admit hearsay?

Michigan Rule of Evidence 802 makes hearsay evidence inadmissible. MRE 801(c) defines hearsay:

"Hearsay" is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

## **Text of MRE 803-6**

“A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.”

## Elements of Rule 803-6

### **Temporal**

The document must be made at or near the time of the event it describes.

### **Person**

The document must be made by a person with personal knowledge<sup>1</sup> of the event described.

### **Business Practice**

It must be the regular and consistent practice of the firm to record such events and produce such reports.

### **Witness**

All of the above elements must be established by either the custodian of the document or a qualified witness<sup>2</sup> or, properly authenticated pursuant to MRE 902-11 which requires an accompanying written declaration under oath by its custodian or other qualified person certifying the necessary elements.

## The Application of Rule 803-6

### **Hearsay within Hearsay**

The business record exception applies to the statements made by the author of the document itself. A business record may contain other statements other than statements made by the author. In these instances of hearsay within hearsay, the statement made by someone other than the author must also satisfy an exception to hearsay. See *Merrow v. Bofferding*, 458 Mich. 617, 625 (1998).

### **The Animating Principle behind the Rule**

“Unusual reliability is regarded as furnished by the fact that in practice regular entries have a comparatively high degree of accuracy (as compared to other memoranda) because such books and records are customarily checked as to correctness by systematic balance-striking, because the very regularity and continuity of the records is calculated to train the record- keeper in habits of precision, and because in actual experience the entire business of the nation and many other activities constantly function in reliance upon entries of this kind.” *Solomon v. Shuell*, 435 Mich. 104 (1990).

### **Trustworthiness**

Even when the literal requirements of the rule are met, if either the source or method of preparation seem untrustworthy, it will not be admissible. *Solomon v. Shuell*, 435 Mich. 104, 123 (1990).

### **Burden of Proof**

The burden rests entirely upon the party seeking the admission of the document. The offering party must prove all the elements of 803-6. See e.g., *Williams v. Jerviss Fehrtke Ins. Co.*, 2015 WL 5707176 (Court of Appeals of Mich. Sep. 29 2015).

### **“Regular Course of Business”**

In the case *Solomon v. Shuell*, 435 Mich. 104 (1990), the Michigan Supreme Court considered when a document is properly considered “in the regular course of business.” In doing so it analogized to the federal case, *Palmer v. Hoffman*, 318 U.S. 109 (1943) (United State Supreme Court holding that an accident report created by the railroad company did not qualify for the rule). The Michigan Supreme Court found the following factors persuasive in analyzing 803- 6:

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<sup>1</sup> See Rule 602 for clarification

<sup>2</sup> Again, see Rule 602 for expansion on “qualified witness.”

- 1) Even when it is in the regular course of the business to record such events, the document should not be admitted when it “has little or nothing to do with the management or operation of the business.”
- 2) The report should be made “for the systematic conduct of the enterprise as a railroad business.”
- 3) When the primary utility of the document is for litigation or future disputes, it should not be admitted.
- 4) Even when the report is made under a duty to report, the anticipation of highly probable litigations makes it inadmissible.
- 5) The potential motivation to lie in the face of inter-disciplinary action should also argue against admission. It is important to note that this motivation to lie does not go to weight, but goes to the admissibility of the document.

By direct analogy this would mean that discharge reports or disciplinary reports kept in an employee’s personal file are not “kept in the regular course of business” as defined by the Michigan Supreme Court.