Trial Law TIPS

Roy D. Wasson's
TIP #55

Roy D. Wasson is board certified in Appellate Practice with extensive courtroom experience in more than 750 appeals and thousands of trial court cases, civil, criminal, family and commercial. AV-rated.

Florida Legislature and Supreme Court Team Up—Records Custodians No Longer Necessary at Trial

Introduction

Unless you have a cooperative opposing counsel, one of the annoying parts of going to trial in a case involving medical records or numerous documents of any sort is laying the foundation for the authenticity and hearsay exception for those exhibits. Sometimes the entire courtroom—judge, jury, witnesses and attorneys—is motionless, awaiting the arrival of the records custodian who will undoubtedly testify that the stack of hospital records was kept in the ordinary course of business, is true and correct, and the other rote elements of the foundation for admitting such evidence.

For those trial lawyers who plan ahead, unless your opposing counsel is particularly obstreperous, the foundation for

documentary exhibits usually can be laid by requests for admission. However, the time that such requests take to formulate, propound, and have answered really could be spent toward some activity which is more central to the merits of your case.

Finally, the Florida Legislature and the Florida Supreme Court have teamed-up to enact some "reform" in the civil litigation arena, rather than the type of harmful "deform" which closes courthouse doors. Under recent changes to the Florida Evidence Code enacted by the Legislature and adopted as Rules of Evidence by the Florida Supreme Court, the need for records custodians and other difficult methods of authenticating documentary evidence has been eliminated.

Amendments to Florida Evidence Code Self-Authentication and Hearsay Provisions

In *Amendments to the Florida Evidence Code*, 891 So. 2d 1037 (Fla. 2004), the Florida Supreme Court announced the following good news to all lawyers who try cases: "In chapter 2003-259, sections 2-3, Laws of Florida, the Legislature created a business records certification process that eliminates the need for a records custodian to testify at trial, thus amending two sections of the Florida Evidence Code." One of those amendments is to the portion of the hearsay rule (section 90.803) which provides the hearsay exception for "Records of Regularly Conducted Business Activity" (the business record exception).

The old version of subsection (6)(a) of 90.803 referred to the need for "the testimony of the custodian or other qualified witness, to permit a business record to be established. The new language adds as a means of laying the foundation for the hearsay exception "a certification or declaration" from the custodian, instead of testimony from a live witness. Similarly, the rule regarding self-authentication of documents have been amended to provide that a certification or declaration from the records custodian will constituted sufficient evidence to authenticate business records.

Section 90.902(11) describes what will be necessary in such a certification or declaration from the records custodian:

> (11) An original or a duplicate of evidence that would be admissible under s. 90.803(6), which is maintained in a foreign country or domestic location and is accompanied by ***a certification or declaration from the custodian of the record*** or another qualified person certifying or declaring ***that the record***:
>
> (a) ***Was made at or near the time of the occurrence of the matter set forth by, or from information transmitted by, a person having knowledge of those matters***;
>
> (b) ***Was kept in the course of the regularly conducted activity***;
>
> (c) ***Was made as a regular practice in the course of the regularly conducted activity***, provided that falsely making such a certification or declaration would subject the maker to criminal penalty under the laws of the foreign or domestic location in which the certification or declaration was signed.

(Emphasis added).

Under the new rules is that you will know long before trial that your documentary evidence will be admissible, and you will not have to worry about whether the records custodian shows up in the right courtroom. The best part of the new set of rules is that there is a provision for shifting the burden to the other party to object to the admissibility of such evidence before trial. The lack of such an objection will constitute a waiver.

Section 90.803(6)(c) describes the process of notifying the opposing side of your intent to introduce evidence authenticated by such a certification or declaration as follows:

> (c) A party intending to offer evidence under paragraph (a) by means of a ***certification or declaration shall serve reasonable written notice of that intention upon every other party and shall make the evidence available for inspection sufficiently in advance of its offer*** in evidence to provide to any

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> other party a fair opportunity to challenge the admissibility of the evidence. If the evidence is maintained in a foreign country, the party intending to offer the evidence must provide written notice of that intention at the arraignment or as soon after the arraignment as is practicable or, in a civil case, 60 days before the trial. ***A motion opposing the admissibility of such evidence must be made by the opposing party and determined by the court before trial.*** A party's failure to file such a motion before trial constitutes a waiver of objection to the evidence, but the court for good cause shown may grant relief from the waiver.

(Emphasis added).

While on this subject I must mention a pet peeve of mine: defense attorneys stipulating to the authenticity of medical records, then objecting at the time of trial to introducing them into evidence on the ground of hearsay. Next time that happens to you, cite the case of *Sorondo v. Batet,* 782 So. 2d 540 (Fla. 3d DCA 2001). That case makes it clear that–once medical records are authenticated–they are admissible over a hearsay objection:

> It is well established that duly authenticated medical records, such as these, are entirely admissible, notwithstanding the hearsay rule, as substantive evidence of what they contain. § 90.803, Fla. Stat. (1999); *Heckford v. Florida Department of Corrections*, 699 So. 2d 247 (Fla. 1st DCA 1997), *review denied*, 707 So. 2d 1124 (Fla. 1998). Specifically, under section 90.803(6), Florida Statutes (1999), this includes statements, like those in question, as to issues of opinion and diagnosis.

Id. at 541.

It would be a good idea to develop a form certification to provide to non-parties you serve with subpoenas duces tecum, so that the records custodians provide the signed certifications when you get copies of the documents initially. That will be easier than

going back to the doctor's office or other source of evidence later and asking the records custodian to sign a certificate concerning documents which have long since left their offices. Use this "TIP" in your next trial and get a great verdict!

Conclusion

Some things get easier in trial practice, after all. Put this one in your trial notebook and start spending more time working on the more significant aspects of proving your case to the jury. Above all, whether things are going smoothly for you or the defense insists on continuing to make things as difficult as possible,

Keep Tryin!

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