

Practitioners Beware: Pitfalls Created by Virginia's New Business Records Statute

by William E. Evans

Many of the documents you need to prove your client's case at trial are business records. Prior to July 1, 2014, those records had to be authenticated by live testimony from the custodian of records or another qualified witness, but the enactment of Virginia Code Section 8.01-390.3 creates a new method for getting business records into evidence. Unfortunately, certain provisions of the statute significantly limit its usefulness, and practitioners should be wary of the statute's potential to unpleasantly surprise them if they are unfamiliar with it.

Virginia Code Section 8.01-390.3 allows authenticity and foundation to be established by a written declaration or sworn affidavit in lieu of live testimony. In order to use such a written certification, you must provide a copy of it and the records it certifies, as well as written notice that you intend to use the certification, to all other parties at least fifteen days before the trial or hearing.

However, the statute also provides that “[o]bjections shall be made within five days thereafter, unless an order of the court specifies a different time. If any party timely objects to reliance upon the certification, the authentication and foundation required . . . shall be made by witness testimony unless the objection is withdrawn.” The statute provides no guidance as to the proper bases for an objection, only that the certification cannot be used “unless the objection is withdrawn.” This language does not contemplate the possibility of the objection being overruled by the court. Ostensibly, this is because the objection is to the procedure of using a certification and the resulting inability to cross-examine the authenticating witness. In other words, under the statute, if a party objects to your use of a certification, you cannot use the certification, end of story.

Because the statute essentially requires your opposing counsel to consent to the authenticated record, it makes no substantive change to current practice, as parties are already capable of stipulating to the authenticity of records. The statute does, however, create the troublesome possibility that counsel unfamiliar with the statute will fail to object to a proffered certification within five days because they do not know they are

required to and, as a result, otherwise objectionable records will be authenticated by certification and admitted into evidence.

The standard scheduling order, which in many Virginia state courts provides that exhibits must be identified within fifteen days of trial and objections to exhibits made ten days thereafter, exemplifies one way this might happen to the unwary. Presumably, serving an exhibit list on opposing counsel that identifies a certification as an exhibit satisfies the statute's written notice requirement. Some attorneys also provide copies of their exhibits, which would satisfy the statute's requirement that a copy of the certification and records be provided. An attorney who receives a book of exhibits fifteen days before trial may not review it until closer to the ten-day deadline for objections. If the attorney does not review it until after the five-day statutory deadline, the attorney may be too late to object to the use of any certification found therein.

Given the recent enactment of the statute, there are no reported opinions interpreting Virginia Code Section 8.01-390.3. It is very possible, and I would certainly argue, that the deadline for objecting to exhibits set forth in a scheduling order should be deemed an “order of the court specif[ying] a different time” for objecting to use of the certification. However, until clarification has been provided, counsel would be well-served to check any exhibit list they receive for record certifications immediately upon receiving an exhibit book. More generally, counsel would also be well-served to familiarize themselves with the statute and to object immediately to any proffered certification if there is any dispute regarding the certified records.



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