

Business Records Rule Reformatting Under Discussion by Rules Drafters

Approving a recommendation of the Boyd-Graves Conference on Virginia Practice and Procedure, the Legislature has enacted a “certificate” procedure for the authentication of business records. While a simple objection by the adversary precludes use of this procedure, it is hoped that a large volume of consensual uses of the certificate procedure will reduce wasted time at trial laying what amount to uncontested foundations for the receipt of business records.

In response to the new Code section and the Legislature’s similar revision of § 8.01-390, the Advisory Committee on Rules of Practice and Procedure has forwarded to the Supreme Court of Virginia a “certificate” provision to be added to Evidence Rule 2:902, tracking the statutory provision enacted by the General Assembly.

In addition, as part of the Advisory Committee’s study of existing Virginia Rule of Evidence 2:803(6) (the business records hearsay exception) with an eye to inserting a few words acknowledging the existence of the new certificate procedural option for laying a business records foundation, the Committee seeks comment from the Bench and Bar on whether recasting the existing Rule into “outline format” as used in many other contexts would be helpful in applying it.

Existing Rule 2:803(6) provides:

Rule 2:803. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * * *

(6) Business records. -- A memorandum, report, record, or data compilation, in any form, of acts, events, calculations or conditions, made at or near the time by, or from information transmitted by, a person with knowledge in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make and keep the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, 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, organization, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

The Rules drafters are soliciting comments on whether the following reformatting of the Rule – which is intended to make no substantive change other than to insert the cross-reference to the new certification procedure – would be a beneficial clarification of the existing Rule:

The following are not excluded by the rule against hearsay rule, regardless of whether ~~even though~~ the declarant is available as a witness: * * * *

(6) Records of a Regularly Conducted Activity. A record of acts, events, calculations, or conditions if:

(A) the record was made at or near the time by--or from information transmitted by-- someone with knowledge;

- (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
- (C) making the record was a regular practice of that activity;
- (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 2:902(6) or with a statute permitting certification; and
- (E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

Comments on the desirability of this reformatting of Rule 2:803(6) into this outline format – with the intention of keeping the standards and doctrines of business records law in Virginia unchanged – may be sent by August 15 to Steven Dalle Mura, Director of Research, Supreme Court of Virginia, 100 North Ninth Street, Richmond, VA 23219, or by email, with the subject line "Rule 2:803(6)," to proposedrules@courts.state.va.us