Rules for Avoiding the Pitfalls of Filing Inadequate Affidavits by Custodians of Business Records

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Courts routinely grant dispositive motions based upon business records when such records are accompanied by affidavits establishing their admissibility under the business records exception to hearsay. The rules permitting Courts to do so are key features that contain the cost of business litigation.[1] However, litigators should not take these rules for granted. In several recent opinions, Florida's appellate courts have reversed judgments based upon the improper admission of records custodian affidavits when the affiants or proffered witnesses lacked sufficient knowledge about how the records were maintained.[2] These cases highlight the importance of selecting the correct persons to act as records custodians and the need to assure that their affidavits contain all the elements required under the law governing the business records exception. This article analyzes the lessons to be learned from these cases and offers a list of "dos" and "don'ts."

Rules of Evidence Governing the Business Records Exception to Hearsay

Subject to certain exceptions, hearsay—any oral or written statement offered to prove the truth of the matter asserted, other than one made by the declarant while testifying—is inadmissible.[3] The Federal Rules of Evidence and the evidentiary rules of most states recognize a "business records" exception to hearsay, under which records that are made and kept by a company in its ordinary course of regularly conducted business are admissible if they are "made at or near the time" of the events they record "by—or from information transmitted by—someone with knowledge," so long as neither the source of information nor the method or circumstances of preparing the records indicate that the records are untrustworthy.[4]

A party who wishes to introduce a business record at trial or in support of a dispositive motion must establish each of these elements in one of two ways. First, the party can have the records custodian or other qualified person testify about these facts at the trial or evidentiary hearing.[5] Alternatively, the party can proffer a written "certification" (affidavit) of the records custodian attesting to such facts.[6] A party who chooses the second option must serve "reasonable written notice" to every other adverse party of its intention to proffer such evidence and must "make the record and certification available for inspection—so that the party has a fair opportunity to challenge them."[7]

Most litigants prefer the second option because it is less expensive. It is more convenient for a business to have its custodian execute an affidavit than to force him to miss hours or even days of work travelling to a court to testify. It is also safer. By using an affidavit, a litigant can prevent the custodian from being cross-examined by an adversary, and thereby limit the risk that the custodian will provide harmful answers.

"Dos" and "Don'ts" for Preparing Affidavits of Business Records Custodians

Recent Florida appellate opinions have shown that if a party submits the affidavit of a purported records custodian who lacks knowledge about how business records are collected or maintained,[8] or attempts to establish the foundation for admission of a business record through the testimony of a witness who lacks such knowledge,[9] the party risks rejection of the affidavit and refusal by the court to admit the business records. Florida courts have also confirmed that even if a records custodian possesses the required knowledge, his affidavit may be stricken and the admission of the purported business records may be denied if the affidavit fails to attest to all of the required elements.[10] These opinions call attention to the following rules that attorneys should follow when introducing business records through affidavits:

(1) Do not let your client sign an affidavit without reading it, understanding it, and ensuring that every statement in it is true and accurate. This is common sense—no one should ever sign an affidavit without reading it and making sure it is true and accurate. However, because affidavits are typically drafted by attorneys who represent the employers of the persons asked to sign them, employees often sign them without much thought. To avoid risking harm to the affiant's credibility by filing an affidavit containing false statements, attorneys should stress to both their clients and their selected affiants that they need to closely review the affidavits and confirm the truth of all statements contained in them. Attorneys must assure the affiants that they will not anger their employers if they propose revisions. Even if such revisions call into question whether the document can be admitted as a business record, it is better to learn this before the affidavit is filed.

(2) Assume that the person signing an affidavit will be required to explain the statements in the affidavit. Adverse parties have the right to challenge the statements made in an affidavit,[11] and they typically do so by deposing the affiant. Assume that if any statement in an affidavit is untrue, or if the affiant lacks knowledge about any element needed to establish the admissibility of the proffered business records, the adverse party will find out. Litigants must consider the possibility of a deposition when selecting the person who will sign an affidavit.

(3) When identifying who will sign the affidavit, select an employee who is familiar with how the business records are created and maintained. This is one of several key lessons to be learned from the recent cases: litigants occasionally fail to choose the correct employees with the knowledge required to establish the admissibility of their business records.[12] The company should not simply select any employee with access to documents or the company's computer system. The person selected to sign the affidavit must know: (a) that the records were made at or near the time of the events they record; (b) that the records were made by or from information transmitted by a person with knowledge of the events they record; (c) that the records were kept in the ordinary course of business; and (d) that it was the regular practice of the business to make such records.[13] If the selected affiant does not know one or more of these facts, a person who does must be found to execute an affidavit. (Note, the affidavit does not have to be executed by the employee who *prepared* the document that the client seeks to introduce.[14] But he or she must know that that the document was made by, or from information transmitted by, a person with knowledge of the events they record.[15])

(4) If the affidavit contains statements about computerized data or data compilations, select a person who knows about the computer system to sign the affidavit. This is the lesson

illustrated most clearly by *Glarum*, in which Florida's Fourth District Court of Appeal reversed the entry of summary judgment because the plaintiff offered the affidavit of an employee of a loan servicer who knew nothing about the servicer's data entry system and could not verify the accuracy of that data, even though he relied upon that data to establish the amount of damages owed.[16] If an affiant bases his certification upon data maintained on his employer's computer system, he must be familiar with the computer system and must know who, how, and when data entries are made.[17] The affiant does not have to be the person who actually entered the data; he does not even need to be able to identify the specific persons who made specific data entries.[18] But the affiant must know which department's employees entered the pertinent data, and he must be able to confirm that the data entries were correctly made.[19]

(5) Do not assume that a single person can serve as the records custodian and that only one affidavit is required. Multiple affidavits may be required for any number of reasons. For example, suppose that the only employee who knows that a key record was made by a person with knowledge of the events recorded therein knows nothing about the company's record keeping practices. The company may need to provide two affidavits to establish the admissibility of that record—one by the employee with knowledge of who made the key document and another from an employee familiar with the company's record keeping practices who can attest that the document was created and kept in the ordinary course of the company's regular conducted business. In addition, different records may require different custodians. For example, although an employee of the current loan servicer may have sufficient knowledge to establish the admissibility of a current servicer's records, she may not be able to establish the admissibility of the *prior* loan servicer's records, and an affidavit for those records may need to be obtained from the prior loan servicer.[20]

(6) Clearly lay out all of the elements for admissibility in the affidavit, and do not use overly-simplistic, incomplete language. A records custodian's affidavit must do more than simply set forth the affiant's credentials as a records custodian, identify the documents that the client seeks to introduce, and state that those documents "are kept in the ordinary course of business."[21] The affidavit must state (a) that the records were made at or near the time of the events they record; (b) that the records were made by or from information transmitted by a person with knowledge of the events they record; (c) that the records were kept in the ordinary course of business; and (d) that it was the regular practice of the business to make such records.[22] An affidavit that omits one or more of these key elements may be stricken by the Court.[23]

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[1] *See, e.g.*, Fed. R. Civ. P. 56(c)(1)(A); Fed. R. Evid. 803(6); Fed. R. Evid. 902(11); Fla. R. Civ. P. 1.510(c); Fla. Stat. § 90.803(6)(a)-(c); Fla. Stat. 90.902(11).

[2] *See, e.g., Glarum v. LaSalle Bank National Assoc.*, 83 So. 3d 780, 781-83 (Fla. 4th DCA 2011) (reversing a trial court's entry of summary judgment because of the Court's improper admission of an affidavit of the loan servicer's records custodian, where the custodian lacked sufficient knowledge of the loan servicer's records and electronic data entry system); *Mazine v. M&I Bank*, 67 So. 3d 1129, 1131-32 (Fla. 1st DCA 2011) (reversing the entry of final judgment in favor of the plaintiff based upon the trial court's improper admission of the plaintiff's affidavit attesting to the amount of damages, where the witness offered at trial to establish the admissibility of the affidavit lacked sufficient knowledge of plaintiff's record keeping practices to establish that the affidavit was a business record); *cf. Weisenberg v. Deutsche Bank National Trust Co.*, 89 So. 3d 1111, 1112 (Fla. 4th DCA 2012) (recognizing that an affidavit of a records custodian may be rejected when the affiant does "not know who, how, or when the data entries were made" onto a business's computer system, but affirming the admission of an affidavit of a bank's records custodian because the affiant "was familiar with the bank's record-keeping system and had knowledge of how the data was uploaded into the system").

[3] Fed R. Evid. 802; *see also* Fla. Stat. § 90.802.
[4] Fed R. Evid. 803(6); *see also* Fla. Stat. § 90.803(6)(a).
[5] Fed R. Evid. 803(6)(D); *see also* Fla. Stat. § 90.803(6)(a).
[6] Fed R. Evid. 803(6)(D); *see also* Fla. Stat. § 90.803(6)(a). The Federal Rules of Evidence also contain a self-authentication provision which provides that extrinsic evidence of authenticity is not required for an original or copy of a business record if it is accompanied by a certification from the custodian of the records or "another qualified person" declaring that the record was made at or near the time by (or from information transmitted by) someone with knowledge, that the record was kept in the ordinary course of the company's regularly conducted business, and that making the record was a regular practice of the company. Fed. R. Evid. 902(11); *see also* Fla. Stat. § 90.902(11).
[7] Fed R. Evid. 902(11); *see also* Fla. Stat. § 90.803(6)(c).
[8] *See Glarum*, 83 So. 3d at 792-83.
[9] *See Mazine*, 67 So. 3d at 1131-32. In *Mazine*, the First DCA reversed the admission *at trial* of the affidavit of the plaintiff's records custodian attesting to amounts due and owing because the affiant did not testify at trial and the witness who did testify lacked the knowledge required to establish that the affidavit was a business record. *Id*. The First DCA did not opine on whether the *affiant* had sufficient knowledge of the company's records to opine on the amounts owed. *See id*. (Because the judgment was not entered on a motion for summary judgment, the court could not consider the affidavit on its face, and the plaintiff had to look for an exception to hearsay as a basis for admitting the affidavit.) It is questionable whether the affidavit could have been admitted as a business record even if the trial witness *did* have sufficient knowledge to serve as a records custodian, as it was probably created exclusively for the lawsuit and not in the ordinary course of the plaintiff's regularly conducted business.
[10] *See United Automobile Ins. Co. v. Affiliated Healthcare Centers, Inc*., 43 So. 3d 127, 129-31 (Fla. 3d DCA 2010) (acknowledging that the trial court had correctly refused to admit documents offered as business records because the affidavit of the custodian of such records failed to state that the documents were "prepared or made by information transmitted by a person with knowledge," but reversing the trial court's refusal to permit the affidavit to be revised).
[11] Fed. R. Evid. 902(11); *see also* Fla. Stat. § 90.803(6)(c).
[12] *See, e.g., Glarum*, 83 So. 3d at 792-93.
[13] *Id.*; *Weisenberg*, 89 So. 3d at 1112*; Vilvar v. Deutsche Bank Trust Co. Americas*, 83 So. 3d 853, 854-55 (Fla. 4th DCA 2011) (affirming the admissibility of the affidavit of the plaintiff's loan officer on grounds that "she was familiar with [the servicer's] books, records, and documents relevant to the allegations in the complaint, and that all of the books, records and documents concerning the loan were kept by [the servicer] in the regular course of its business").
[14] *United*, 43 So. 3d at 130; *Mazine*, 67 So. 3d at 1132.
[15] *United*, 43 So. 3d at 130; *Mazine*, 67 So. 3d at 1132.
[16] *See Glarum*, 83 So. 3d at 782-83; *cf. Weisenberg*, 89 So. 3d at 1112 (affirming the trial court's admission of the affidavit of the loan servicer's servicing agent on grounds that the agent's deposition testimony "demonstrated that she was familiar with the bank's record keeping system and had knowledge of how the data was uploaded").
[17] *Glarum*, 83 So. 3d at 782-83; *Weisenberg*, 89 So. 3d at 1112.
[18] *Weisenberg*, 89 So. 3d at 1112; *Glarum*, 83 So. 3d at 782 n.2.
[19] *Glarum*, 83 So. 3d at 782-83; *Weisenberg*, 89 So. 3d at 1112.
[20] *See Glarum*, 83 So. 3d 782-83 (pointing out that the employee of a loan servicer who provided an affidavit aimed at establishing the admissibility of business records lacked sufficient knowledge concerning both the data supplied by his own employer and by a prior loan servicer).
[21] *United*, 43 So. 3d at 129 n.2, 130 (affirming an order striking such an affidavit because the records custodian failed to state that the business records were made by or from information transmitted by a person with knowledge of the events they recorded).
[22] *Id.* at 130-31.
[23] *Id.*