

No custodian of records certificate – no problem?

We've all been there – your client has a bank statement that needs to be admitted into evidence, but you've been unsuccessful in obtaining a custodian of records certificate from the bank. Are you completely shut out from admitting it into evidence? Not necessarily.

Before offering a third-party document such as your client's bank statement into evidence you must satisfy Rules 5-901 and/or 5-902 (requiring authentication or identification) and Rule 5-803 (establishing a hearsay exception to the document).

In a perfect world, you would have had time to request that the bank provide you with a certificate or supporting testimony completed by the custodian of records or other qualified person averring that the bank statement was a true and accurate copy of records made at or near the time of the events described therein, made by or from a person with knowledge of those events, were made and kept in the course of regularly conducted business activities, and it was their regular practice to create such records.

Having obtained such statement, and assuming that your document is otherwise admissible and relevant, it would fall within one of the authenticity standards of Rules 5-901 and 5-902 and the hearsay exception of Rule 5-803 and may be admitted into evidence.

However, we do not always get to practice in a perfect world and time or other circumstances may prevent an attorney from being able to obtain such testimony or certificate.

While this has frustrated many a practitioner trying to get bank or similar records into evidence, a *criminal* case from the Court of Appeals holds the key (or at least a very strong argument) for establishing grounds to admitting these records into evidence.

In the case of *Jackson v. State*, Allan Jackson was convicted for first degree and assault. At the trial level, the victim testified regarding his own bank



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statements. Specifically, the victim testified that after a home invasion wherein Jackson stole his bank card, that he went to his bank and obtained a bank statement showing the funds that Jackson had withdrawn.

The Circuit Court admitted the bank statements pursuant to Rule 5-803 on the victim's testimony and without a supporting statement of authenticity on the basis that the bank statements were evidence of regularly conducted business activity. This ruling was later upheld by the Court of Special Appeals.

Notwithstanding these two rulings, Jackson maintained that the admissibility of bank statements was governed by Rule 5-902 and thus they were improperly admitted.

After a writ of certiorari was granted, this evidentiary issue was taken up by the Court of Appeals. The court of Appeals agreed with the lower courts that the bank statements were admissible under both Rules 5-901 and 5-803.

In looking to whether the documents could be authenticated under Rule 5-901, the court recognized that not only is authenticity case-specific, but the evidentiary foundation can be proven by either extrinsic evidence or circumstantial evidence of the manner and nature of the document.

The court looked to the victim's testimony at the trial level and found that the victim had testified that he had

received the statement directly from his bank, that the victim testified as to the transactions that he did and did not make, and that the trial judge noted that the statements had all the indicia of a regular bank statement. This testimony and findings satisfied the authenticity requirement of Rule 5-901.

The court then turned to whether the bank statements were properly admitted under the business record hearsay exception delineated in Rule 5-803.

The court examined prior holdings that noted that bank statements in particular have a "strong indicia" of reliability because the bank has no stake in the outcome of the litigation and are accurate records of acts or events made in the regular course of business in or around the time that the act or event occurred.

It went onto explain that the foundation for admissibility of a business record does not have to be made by someone with firsthand knowledge of the matter, or who has prepared the report, or even observed the preparation of the report.

Rather, to admit a business document, the offering party just has to show that the document satisfies the requirements of Rule 5-803(b)(6).

In the case before the court, it found that the bank created and produced the records in or around the time of the unauthorized withdrawals and that it was the regular practice of the bank to create such records and thus it was properly admitted.

Best and easiest practice would be to obtain a certificate of custodian of records but, at least in some cases, our clients' bank statements may be admitted based on their own testimony.

Elizabeth J. McInturff, Esq., a partner at JDKatz, PC, represents clients throughout Maryland and Washington D.C. in complex family, civil and commercial disputes. For more information, visit www.jdkatz.com.