

## Getting Government Records into Evidence

by Mark E. Sullivan\*

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1. Q. How do you get government records into evidence if you have to go to trial and the other side won't stipulate to their admissibility?  
A. You'll need to check your state's rules of evidence to find out the requirements for admission of business records. Each state is different. Some have adopted the Federal Rules of Evidence (FRE), and some have their own evidence codes. The business records rule is contained at FRE 902 (11), but your rule might be slightly or entirely different. Make sure you know what is needed as essential statements in the affidavit.
  
2. Q. Don't these agencies have a template they can use for the affidavit? I'm being told that I have to submit to the agency a sample of what the wording should be.  
A. "One size fits all" is not the rule in this area. There are no standard affidavits which are universally used among the agencies. It is a common practice to require the applicant's attorney to draft the affidavit, which is then reviewed and revised by the legal office in the agency. You must submit the wording to the federal office which has the records, which can adopt or adapt the language as needed.
  
3. Q. So do they just say that they've provided the records and they're accurate?  
A. In terms of trial practice, that would be a major mistake. How will the court know what records were provided? How will the judge know that the documents which you have are the ones that the agency sent to you? The records must be attached to the affidavit, not merely referred to.
  
4. Q. But the agency sends the affidavit to me, right? Or is it sent to the court?  
A. That's your decision. If the records and affidavit – the "packet" – is sent to the court under seal, then there can be no legitimate question as to whether you have substituted documents or altered them. The judge is the one who will open the packet and determine what records have been provided. On the other hand, unless you get an extra copy of what's in the packet, you won't know what is in the records until the court opens them. This leads to three alternatives:
  - a) Get a copy from the agency (by consent of the individual concerned or by court order or judge-signed subpoena). Then request the documents again, along with a business records affidavit that accompanies your request.
  - b) Get the documents (as above) from the agency, and then send them back to the agency with your business records affidavit, so they can certify that these are indeed the records provided, and then can attach them to the affidavit.
  - c) Have the agency send the packet to the court but also send copies to the attorneys.
  
5. Q. This is all so complicated. Do you have an example that I can use for these affidavits?  
A. Of course. It's on the next page...



**DEPARTMENT OF VETERANS AFFAIRS**  
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**123 Green Street**  
**Blacksboro, North Carolina**  
**Phone: 919-832-6677**

**BUSINESS RECORDS DECLARATION**  
**Pursuant to 28 U.S.C. § 1746**

**This is a certification of authenticity of domestic business records pursuant to Federal Rules of Evidence 902 (11).**

I, Larry G. West, attest under the penalties of perjury (or criminal punishment for false statement or false attestation) that:

- 1) I am employed by the United States Department of Veterans Affairs (DVA).
- 2) My official title is Paralegal.
- 3) I am a custodian of records for the DVA.
- 4) Each of the records attached hereto is the original record or a true and accurate duplicate of the original record in the custody of the DVA, and I am a custodian of the attached records.
- 5) The records attached to this certificate were made at or near the time of the occurrence of the matters set forth.
- 6) The records attached were made by (or from information transmitted by) a person with knowledge of those matters.
- 7) Such records were kept in the course of a regularly conducted business activity of the DVA.
- 8) Such records were made by the DVA as a regular business practice.

The enclosed records are:

- Letter to Jacob Harris Stein, XXX-XX-5566, dated April 12, 2010, titled "Your Original VA Disability Rating and Reasons for the Rating" and
- Letter to Jacob Harris Stein, XXX-XX-5566, dated June 15, 2012, titled "Your Revised VA Disability Rating and Reasons for the Rating."

Dated: July 13, 2012

**Larry G. West**

Larry G. West, Paralegal

Subscribed and sworn to before me this \_\_\_\_ day of \_\_\_\_\_, 2012.

\_\_\_\_\_  
Notary signature

My commission expires: \_\_\_\_\_