FROM MY SIDE OF THE BENCH

Forty-Five Days Out

BY HON. RANDY WILSON

THE TRIAL BEFORE ME HAS BEEN A DISASTER from day one. Both sides failed to make proper disclosures and designations. They finally agree that to insist on strict adherence to the deadlines in the rules would result in mutually assured destruction and both sides agree to let each other put on the evidence without objection. Unfortunately, all of this drama could have easily been avoided by keeping a simple checklist I call "Forty-Five Days Out."

Gone are the days, if they ever existed at all except in legal lore, where a lawyer could simply pick up the file on the way to the courtroom and successfully try the case. Similarly, lawyers can no longer simply get a case ready for trial the week before. There are too many pitfalls and traps in the rules. Disclosures and designations have to be made well in advance in trial or you run the very real risk that your evidence will be excluded. Every trial lawyer ought to have a deadline marked in red on his calendar thirty days before the start of trial. But that's when trial preparation should end; for all practical purposes, the real trial preparation should begin forty-five days before the start of trial.

The party offering the undisclosed evidence has the burden to establish good cause or lack of surprise, which must be supported by the record.

Let's start with some law. The trial court often has little discretion but to exclude evidence if it hasn't been timely disclosed. Rule 193.6 is clear:

> A party who fails to make, amend, or supplement a discovery response in a timely manner may not introduce in evidence the material or information that was not timely disclosed, or offer the testimony of a witness (other than a named party) who was not timely identified, unless the court finds that:
> (1) there was good cause for the failure to timely make, amend, or supplement the discovery response; or
> 2) the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties.

Parties can no longer simply choose to delay disclosure until the last minute. *In re Allied Chemical Corp.*, 227 S.W.3d 652, 657 (Tex. 2007). The party offering the undisclosed evidence has the burden to establish good cause or lack of surprise, which must be supported by the record. Rule 193.6 is mandatory, and the penalty—exclusion of evidence—is automatic, absent a showing of (1) good cause; (2) lack of unfair surprise; or (3) lack of unfair prejudice. The purpose of the rule and sanction is to prevent trial by ambush. *See Keystone Architects v. Lanai Dev., L.L.C.,* 2008 WL 523272 (Tex. App.—Corpus Christi 2008); *Williams v. County of Dallas*, 194 S.W.3d 29, 32 (Tex. App.—Dallas 2006, pet. denied). The bottom line is that I, as a trial judge, have to exclude your undisclosed evidence if you fail to prove one of the three exceptions.

So, forty-five days before trial, you should sit down in a quiet room and pour through your file and make sure the following has been done:

- Rule 194.2(a) disclosure of parties—are your client and the opposing side correctly named?
- Rule 194.2(e) disclosure of witnesses—have all witnesses been disclosed? Are their telephone numbers and addresses current and correct?
- Rule 194.2(d) disclosure of damages—have all damage elements and theories been disclosed? If you are seeking past and future pain and suffering, past and future medical expenses, past and future lost wages or earning capacity, each of these must be separately identified and calculations provided. For example, you should state that you are seeking past wage losses of $10,000, calculated as $1,000 per week for 10 weeks.
- Rule 194.2(c) disclosure of legal theories—make sure each and every potential cause of action is listed and a brief statement of facts to support each.
- Rule 194.2(f) disclosure of experts—this is where many lawyers are often accused of falling short of the rules. Experts

are initially disclosed and general subject matters are listed, but the substance of their opinions are not spelled out. You must go back to the disclosures and make sure that not only is the subject matter disclosed, but also the substance of the opinions is identified. With respect to expert disclosures, has his name, telephone number and address been correctly identified? Has his resume been produced? Have all documents he has reviewed been produced? Has his report been fully produced?

- Interrogatories—go through all interrogatory answers and ensure that all questions have been fully answered and the answers are current.
- Exhibits—has every document you intend to use as an exhibit been produced?
- Witnesses—double check that all of your witnesses are aware of the trial setting and are available to attend trial. Set a time to meet with them the week before trial to prepare their testimony. If the witnesses are not under your control, get out trial subpoenas.
- Jury—has the jury fee been paid?
- Business records—have all business records been properly authenticated and proved up with a business record affidavit? Business record affidavits must be on file fourteen days before the start of trial, Tex. R. Evid. 902(10), and medical bills must be filed thirty days before trial. Tex. Civ. Prac. & Rem. Code § 18.001(d).

There are many other things that, of course, have to be done to prepare for trial, but this is the minimum checklist to avoid having your evidence struck and having to notify your carrier.

Judge Randy Wilson is judge of the 157th District Court in Harris County, Texas. Judge Wilson tried cases at Susman Godfrey for 27 years and taught young lawyers at that firm before joining the bench. He now offers his suggestions of how lawyers can improve now that he has moved to a different perspective. ★