

FROM MY SIDE OF THE BENCH

The Motion to Compel

BY HON. RANDY WILSON

I'VE WRITTEN A LOT OF MOTIONS TO COMPEL as a lawyer, but I'd wager that I've read even more since becoming a judge. I wish I could get a redo of all my old motions, because now I would structure them differently.

In the last week, I've looked at two motions to compel and they represent the best and the worst of how a motion to compel should read. I must confess that many of my old motions were probably leaning more toward the latter category, but now I know better. I'll lay out the best and the worst with this hypothetical. You represent the plaintiff in a business fraud case against a vendor. You have propounded a long request for production of documents and received a litany of objections. You try to work it out, but conclude that you have no choice but to file a motion to compel. Here are the two examples of the good and the bad way to proceed.

The Bad. In this motion, the movant gives a background of the dispute and then lists the specific document categories sought. There are a total of 24 document requests at issue. The movant dutifully lists each request and then quotes the objection made by the respondent. After each request and objection, the movant then includes a paragraph why the requested information is relevant and why the documents should be produced. Many of the objections and arguments are identical and thus writing the motion involves considerable copying and pasting. While this type of motion is technically correct, it's not persuasive nor will it catch the judge's attention. That's because this format overwhelms the reader/judge. The judge is confronted with page after page of document requests and objections and argument with no effort to organize and group them. Even the most diligent judge will begin to glaze over after a few pages and instruct the lawyers to go work it out.

You've got to remember that judges read a lot of motions and

briefs. Even at their best, motions to compel are usually one of the least favorite parts of the job. They are tedious and often very fact intensive. Your job is to attempt to make these motions as lively and persuasive as possible. Yet, by simply listing each disputed request, you've made the judge's job as hard as possible.

The Good. The second motion to compel this week was a pleasure to read because the movant made my job easy. It began essentially the same as the first; it identified the parties and gave a brief statement of the facts of the case. However, rather than simply listing and reciting all the requests at issue, the movant lumped and categorized the requests in dispute by inserting this paragraph:

This Court needs to resolve two issues. First, is plaintiff entitled to see defendant's financial records? This issue affects document request numbers 2, 5, 6, 9, 10, 11 & 12 (attached as Ex. 1). These requests all involve various financial and tax records of defendant. While there are perhaps some potential individual issues among these requests concerning time and scope, the threshold issue remains: is plaintiff entitled to see defendant's financial records.

Second, defendant has objected to producing any documents concerning communications with customers. This issue affects document request numbers 15-19 and 21 (attached as Ex. 2). Plaintiff contends that communications with customers are critical to defendant's claim for damages in its counterclaim; defendant generally asserts that such communications are not relevant.

Turning to the first issue, production of financial records, these documents are relevant for the following reasons....

This motion makes it easy for the Court. The issues are

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clearly identified and the requests are sorted by issue. Now the judge can focus on the precise legal questions.

The two motions represent two very different approaches to motions to compel. The first motion requires the judge to sort out all the requests to find the common denominators; the second motion spells it out for the judge. The first motion focuses on the trees, whereas the second motion keeps the Court focused on the forest and the big issues in the case.

A well drafted motion to compel should do the following:

- Contain a brief summary of what the case is about. Don't assume the judge knows the facts. We forget. Include a summary.
- Organize the disputed requests by issue. It's important to remember that at the hearing the judge will want you to organize your arguments anyway, so you might as well do it in the motion.
- Fairly summarize your opponent's objections. Don't mischaracterize the objections or engage in hyperbole.
- Engage in a good faith and honest attempt to resolve and narrow the issues.
- Include a form of order. Moreover, the order should list each request with a checkmark for grant or deny. If there are 30 different requests at issue, don't simply include a global order granting the motion.

Just because it's a motion to compel doesn't mean it has to be dry and lifeless. Make it persuasive and alive.

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. ★