

FROM MY SIDE OF THE BENCH

The Document Production

BY HON. RANDY WILSON

HEAR THIS EXCHANGE MORE OFTEN THAN I CARE TO ADMIT:

Plaintiff Attorney: Your Honor, I move to admit Ex. 23.

Defense Attorney: I object; I've never seen this document before. It's never been produced.

Plaintiff Attorney: It was produced as part of our document production.

Defense Attorney: No it wasn't; I would have remembered this document.

Plaintiff Attorney: Yes, it was.

Court: Is there any documentation showing what was or was not produced?

Attorneys: [Silence]

I constantly see disputes over documents. Constantly. Relevant documents are not produced. Documents are produced at the last minute. Issues arise whether documents were or were not actually produced.

Here are my suggestions of how to avoid the problems I see.

- **Gather the responsive documents yourself.** When the other side requests documents, don't rely on your client to determine what documents are responsive.

You must make that determination. Review the document requests and, working with your legal assistant, prepare a summary of what is requested and then discuss with your client. But, do not stop there. Go to the client's office. Look at the client's files. Ask questions and find out from key witnesses and document custodians where the documents are kept. Find out what documents are electronic and what documents exist in paper format. Devise a strategy to collect and review each type. Neither you nor your legal assistant should be bashful about asking: Where are your documents? Where do you store your documents? How are they organized? Quiz the secretaries and document clerks. Don't take no for an answer—probe. Look carefully for

personal collections of documents, e.g., personal “working files”, documents stored on local drives or put in personal email folders. Personal documents may also be stored in an executive's credenza or, if old, even placed in off-site storage. Spend the time and effort understanding how and where responsive documents are located. More often than not, a complete and thorough search for documents yields materials that are crucial for your claims or defenses.

- **Number the documents.** I'm surprised by the number of times when one side produces documents in response to a document request without numbering the documents. You absolutely must number the documents, either with Bates numbers or stickers or whatever system you employ. Importantly, you are not required to simply number the documents sequentially; you can employ a system. You can use different prefixes for document locations. For example, documents produced from the Houston office could begin with prefix “1”, Dallas could begin with “2”, etc. Different

divisions or departments could be designated with the second digit. And, you can even identify individual witness files by using a system of initials and numbers. You must employ some form of numbering system so that if an issue arises in the future, you will be able

to tell the court that a document was produced. Employing a specific system that identifies location and/or person will also tell you precisely where any document was found and can be helpful in putting the document in context or understanding its import.

- **Should you produce the originals or copies to the other side?** This is sometimes a difficult question. With a relatively small production, it's often easiest to simply produce copies. But, if the production involves a room full of documents, it may not be economical or feasible to go through the expense of copying a vast quantity of documents, many of which may not ever be copied by the opponent. With huge productions,

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you may have little choice but to produce the originals to the opposition for inspection. If you produce the originals, you still must number the documents. How else will you know what was produced? When you make original documents available to your opponent, you need to inventory what was produced and follow it up with a letter to the opposing side. A simple letter to your opponent detailing the date and number range of documents produced is all that is necessary. You may also want to take a simple digital photo of the production so that there is no question about what happened.

If such documentation exists, then, picking upon the colloquy above, you can have the following exchange with the court:

Court: Is there any documentation showing what was or was not produced?

Plaintiff Attorney: Yes. Here is a letter to opposing counsel confirming that on [date] we produced documents numbered one through 59,000. The document in question is numbered within that range. Here is a photograph of the data room showing the documents that were produced. Defense counsel chose not to copy all documents but rather only selectively copied certain documents. He chose not to copy this document. Nevertheless, we produced it to him, and we offer it now in evidence.

Court: Admitted.
This kind of record is essential to avoid the back and forth we so frequently encounter. ★

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.