BE PROACTIVE IN DOCUMENT PRODUCTION

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In many kinds of litigation, document production is a dirty term. Even when done carefully, responsibly, and well by both sides, the process of producing documents (and, for the other side, the process of dealing with documents that have been produced) is tedious, thankless, and consumes a remarkable amount of resources. Things become much worse when the parties clash over what should be produced and how, and worse still when the party receiving the documents is more interested in using the discovery process to inflict pain or to generate a record for sanctions motion practice than he is in getting documents to help him prepare his case.

As a party producing documents, you can't change the way the other side will behave, but you can still set up your document production to make it much more likely that things will go well. Anticipate your document production needs when a case is filed, not when you first receive written discovery requests. If the litigation is on a brand-new subject for which no documents have previously been gathered, get started on the process. If it is serial or otherwise familiar litigation, consider what unique discovery might be required by this case, and look into it.

Take the initiative by offering the document production on your terms. Consider making an offer of documents up front, before the other side even serves its requests. The new Federal Rule of Civil Procedure 26(a)(1)(B) requires the production of documents, or a description of documents, that a party may use to support its claims and defenses. (Some local rules expand this to require production of documents that either side might use to support its claims and defenses.) This is a good opportunity to make an initial proffer of documents, but you may also choose to do so in a letter to the opposing counsel.

You should at the same time flag any issues that you see as potentially troublesome. This may be a set of documents that will take you some time to produce, or a group of electronic documents that would cost more to recover than the likely value of the entire case. (In the latter circumstance you may want to inform the other side that it would be unreasonably burdensome to produce those documents, but that you will do so if they will bear the cost.)

Taking the initiative in this way accomplishes several important objectives with one stroke. First, it signals to the opposing counsel and the court that you intend to be cooperative and forthcoming with regard to the documents that the other side is reasonably entitled to receive. Second, it enables you to have the first shot at defining the scope of the relevant documents that can be produced without undue burden. And finally, it establishes your good faith with regard to discovery issues. If the other side goes to the judge to complain that you have not responded to their requests for production within the allotted 30 days, you may end up with a court order to comply in full in a very short period of time. But if you can show the judge that you started your document production efforts immediately upon receiving the complaint, and told the other side that these documents would take 6 months to produce and did so before they even sent their requests for production, you are likely to get a much better result. Similarly, it is hard to make a spurious motion for discovery sanctions stick against a party that has shown itself to be working hard to produce responsive documents from the very start.

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