



THE BUSINESS PERSON'S GUIDE TO WINNING DOCUMENTATION

By Randy Sutton

In a court trial, the "truth" is whatever the judge or jury believes. Because both sides tell contradicting stories, a trial is all about what you can *prove*, not what *actually happened*.

Lawyers use testimony and exhibits to prove a case. Documents that cannot be refuted are the most persuasive: the audiotape of a meeting; a signed and notarized contract; photographs of construction defects; notes from a terminated employee's exit interview. These are the "smoking guns" that can win or avoid a trial. Without documentation, the outcome of a business dispute depends on the memories and the credibility of the parties.

Avoid "Handshake" Deals: Every offer, promise or decision should be documented in writing. A "handshake" deal is usually just as enforceable as a written contract. However, verbal deals are far more difficult to prove, and the parties usually don't consider or agree about key details. Putting the agreement in writing may expose areas of disagreement, which can be dealt with on the front-end.

Reasons to Document Agreements: There are several good reasons why all agreements should be memorialized. Juries find contemporary documents far more believable than the witness's recollections at trial. As memories fade, the inability to remember key details will make the testimony far less credible. Oregon law also gives great weight to written agreements by prohibiting the parties from denying the truth of facts recited in a contract.

Date Your Documents: In litigation, the timeline of events is usually critically important. Unfortunately, business people often forget to date their correspondence and contracts. A document with a missing date must be explained through trial testimony.

Authenticate Your Documents: In today's age of digital imaging, being able to prove that a document is authentic is more important than ever. It is easy to falsify an email printout. Photos can be digitally altered. Color copiers make copies that look like originals. The judge will not allow a questionable document to be used in trial. On the other hand, keeping and date-stamping the original paper or electronic version of a document can help prove that the document is authentic.

Acknowledge Receipt: It is often important to prove that the other party actually reviewed a document. Certified letters provide a signed acknowledgement of receipt. Fax transmission reports confirm delivery, but only if you print and keep the transaction report on file. An original signature on a document is an effective way to authenticate, because document experts can verify handwriting style and inks. When sending email, don't assume that the recipient actually read the message. Email can get lost in delivery, be filtered by the recipient, misaddressed, or simply deleted along with SPAM mail before it is read.

Effective Types of Documentation: Audio and video recordings are highly effective in documenting transactions. For example, an audio recording reciting the parties' agreement, or explaining intentions, is very difficult to refute. Redline versions help show the thinking of the parties while the deal was hammered out. Date imprinted photographs really are worth a thousand words. At a minimum, every important business issue should be documented through letter, fax, email, or memo to the file.

Keeping documentation can be a double-edged sword. Bad documentation may be worse than no documentation at all. However, if you carefully document important business matters, your odds of avoiding litigation, or prevailing in a lawsuit, will be greatly improved.