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State Bar of California
180 Howard Street
San Francisco, CA 94105-1639
tel: 415/538-2549
fax: 415/538-2368

Death, By Meet and Confer

By Edward P. Sangster

Complying with rules requiring counsel to "meet and confer" should clarify issues, avoid waste and conserve scant judicial resources. A successful conference may focus the dispute, eliminate tangential disagreements, or even avoid unnecessary motions altogether.

But meet and confer requirements trap the unwary. Valid discovery sometimes goes unanswered and otherwise legitimate motions get denied because of the failure to "meet and confer" sufficiently. When abused, "meet and confer" requirements can serve as handy tools for delay and evasion. The process can be deliberately drawn out, wearing down opponents and killing legitimate discovery with a kind of death by a thousand cuts.

Experienced litigators know that state and federal procedural rules prohibit the filing of discovery motions without an out-of court attempt to avoid a motion or narrow the issues. California state courts require "a reasonable and good faith attempt at an informal resolution of each issue presented by the motion." See, e.g., Cal. Code Civ. Pro. §2030(l). Discovery motions in federal court must include a certification that the moving party "has in good faith conferred or attempted to confer" to obtain adequate responses without court action. Fed.R.Civ.P., Rule 37(a)(2)(B).

The obligation to confer with opposing counsel now extends beyond discovery motions, however. It is impossible to bring a case to trial in either state or federal court without participating in at least one conference, and usually more. For example, California Rules of Court, Rule 212 requires that opposing counsel "meet and confer, in person or by telephone" with each other prior to filing a case management conference statement. Some federal courts in California, such as the Central District, require counsel to confer before filing virtually *any* motion. Central District L.R. 7-3.

In addition to the increasing circumstances requiring conferences, courts and individual judges are imposing detailed requirements governing the timing and protocol for the conferences. The Central District's rule requiring a "meet and confer" before filing non-discovery motions mandates that the conference occur at least 20 days before the filing. *Id.* The Northern District of California requires that "lead trial counsel"

Mr. Sangster is a litigation partner in the San Francisco office of Kirkpatrick & Lockhart LLP

conduct the discovery planning conference required by Fed.R.Civ.P., Rule 26(f). Northern District L.R. 16-3. The Central District requires that a mandatory meeting of counsel for preparation of the pre-trial statement occur "in person." Central District L.R. 16-2.

Northern District Magistrate Judge Joseph Spero requires that the conferences prerequisite to the filing of discovery motions occur in person, "except where good cause is shown why a telephone meeting is adequate." Standing Order for Magistrate Judge Spero, Northern District of California. "Good cause" may be difficult to show. In a patent case, Magistrate Judge Spero recently ordered counsel to fly across the country to hold the conferences in person.

Despite the increasingly numerous circumstances requiring counsel to "meet and confer," little guidance exists to inform counsel specifically what is required. A few cases have delineated what is *not* sufficient, but none of them provides affirmative guidance as to what will satisfy the requirements in the face of an unavailable, uncooperative or contumacious opponent.

This lack of guidance becomes critical when one realizes that an inadequate attempt to "meet and confer" results in severe penalties. Loss of critical discovery, denial of a meritorious motion, and, of course, sanctions are among the options. Opprobrium is also a possibility. Judge William Orrick, now retired from the Northern District bench, sometimes publicly educated counsel who failed to confer adequately on just how the process could be made to work. He would call their motions at the beginning of his calendar, express his views in no uncertain terms to everyone in the courtroom about the failure of capable counsel to talk to each other, and then order counsel to repair to his jury room until they had conferred meaningfully.

Although pre-filing conference requirements have existed for many years, numerous attorneys continue to struggle with compliance. Counsel either fail to make any attempt at a pre-filing conference, or they make such half-hearted attempts that courts hold the efforts to be inadequate. Hardball litigators batter each other with repeated assertions of the correctness of their arguments, without ever progressing towards resolution of the issues. One federal judge has observed, "in many instances the conference requirement seems to have evolved into a pro forma matter." *Dondi Properties Corp. v. Commerce Sav. And Loan Ass'n*, 121 F.R.D. 284, 289 (N.D. Tex. 1988).

Rather than rushing to court, however, some wily litigators invoke and prolong the meet and confer process at every opportunity. Retired Commissioner Richard Best includes a section on his *California Discovery* website entitled, "Meet and Confer as a Discovery Abuse." He observes, "When the process takes on a life of its own or is used to obstruct the discovery process, it fails to achieve its purpose and may rise to the level of a discovery abuse that could subject a party or counsel to sanctions pursuant to CCP§2023." R.Best, "California Discovery Law," at http://californiadiscovery.findlaw.com/practice_points.htm#M&C%20abuse.

For counsel adopting such a tactic, the meet and confer process becomes a form of filibuster, during which an opponent's strategy can be extracted as the price for cooperating with even the most obvious discovery. For these counsel, the meet and confer process rarely concludes with a definitive position. They always need additional time to ponder the points raised, so that they can defend a motion by asserting that the meet and confer process had not been completed. Alternatively, they repeatedly claim to be unavailable or impose ridiculous conditions to delay the conference, and then oppose the motion on the basis of the inadequate meet and confer process. See, e.g. *Berry v. Baca*, 2002 WL 1777412 (C.D. Cal. 2002); *Hart v. Gaioni*, 2003 WL 21149935 (C.D. Cal. 2003).

The courts are not satisfied with this state of affairs. A widely read treatise on federal pretrial practice states that the failure to comply with pre-filing meet and confer requirements is one of the most common reasons for the rejection of federal court motions. Hittner, Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Fed. Civ. Pro. Before Trial*, 5th ed. (TRG 2003), ¶12:14.1. Nor are counsel satisfied, as some regard the meet and confer process as one of the most wasteful and agonizing parts of pre-trial litigation – a crucible to be endured as the price for a hearing.

The theory behind meet and confer requirements is sound, and compliance should not be difficult. A pre-filing conference is designed "to encourage the parties to work out their differences informally so as to avoid the necessity for a formal order . . ." *McElhaney v. Cessna Aircraft Co.*, 134 Cal. App. 3d 285, 289 (1982). Such conferences "lessen the burden on the court and reduce the unnecessary expenditure of resources by litigants through promotion of informal, extrajudicial resolution of discovery disputes." *Townsend v. Superior Court*, 61 Cal. App. 4th 1431, 1435 (1998). Describing the purpose of the federal court rule, one court stated, "The purpose of the conference requirement is to promote a frank exchange between counsel to resolve issues by agreement or to at least narrow and focus the matters in controversy before judicial resolution is sought." *Dondi Properties Corp.,* 121 F.R.D. 284, 289 (N.D. Tex. 1988).

In practice, those general principles provide insufficient guidance as to whether efforts in a particular case will be regarded as sufficient. That uncertainty may to some extent be unavoidable because the amount of effort required varies with the complexity of the case and the issues, and the prior history of communications between counsel. More complicated cases and motions require more extensive efforts at resolution.

> In a larger, more complex discovery context, a greater effort at informal resolution may be warranted. In a simpler, or more narrowly focused case, a more modest effort may suffice. The history of the litigation, the nature of the interaction between counsel, the nature of the issues, the type and scope of discovery requested, the prospects for success and other similar factors can be relevant.
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> *Obregon v. Superior Court*, 67 Cal. App. 4th 424, 431 (1998).

"Although some effort is required in all instances, the level of effort that is reasonable is different in different circumstances, and may vary with the prospects for success." *Id.* at 432-33 (citation omitted).

Given the absence of clear authority, the few cases must serve as imprecise guideposts. *Townsend v. Superior Court*, 61 Cal. App. 4th 1431 (1998) is one of the most frequently cited. In *Townsend*, plaintiff's counsel steadfastly refused to let his client answer certain questions at her deposition. Several attorneys representing multiple defendants tried repeatedly and unsuccessfully during the deposition to persuade the plaintiff to answer. After the deposition, the party who noticed the deposition moved to compel without engaging in a separate effort to resolve the dispute informally. The plaintiff opposed the motion, in part, on the ground that the moving party had failed to attempt to resolve the dispute informally. The trial court rejected the plaintiff's argument, granting the motion and awarding sanctions. The trial court found that the moving party satisfied the requirement to attempt informal resolution during the deposition, itself.

The court of appeal issued a writ of mandate directing the trial court to vacate its decision, holding that the trial court lacked jurisdiction to grant the motion in the absence of an informal attempt to resolve the discovery dispute. It provided a "blow by blow" analysis of the supposed attempts at informal resolution based upon extensive quotation from the transcript of the deposition. The opinion stated,

> Closer inspection of the record . . . reveals that the exchanges between counsel were plainly only argument and that there was made no effort at informal negotiation. Argument is not the same as informal negotiation. In short, debate over the appropriateness of an objection, interspersed between rounds of further interrogation, does not, based upon the record before us, constitute an earnest attempt to resolve impasses in discovery.
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> Id. at 1437-38.

Another leading case is *Obregon v. Superior Court*, 67 Cal. App. 4th 424 (1998). The plaintiff served form and special interrogatories on the defendant that were, according the court of appeal, "grossly overbroad." The defendant responded with a mixture of "expectable" legal objections and some factual information. *Id.* at 432. Thirteen days before the deadline for filing a motion to compel, the plaintiff's attorney wrote a letter requesting further responses. One day before the deadline for filing a motion, the plaintiff's attorney received a letter from defense counsel that essentially restated the objections. The plaintiff's attorney then filed a motion to compel without contacting the defense attorney again. The defendant's counsel opposed the motion by arguing that the efforts of plaintiff's counsel did not constitute "a 'reasonable and good faith' attempt at 'informal resolution.'"

The trial court agreed that the plaintiff's counsel had not made sufficient effort to resolve the dispute informally, denied the motion, and awarded sanctions to the defendant. The plaintiff petitioned for a writ of mandate, which the court of appeal issued, but only because the trial court had failed to consider whether a lesser sanction than complete denial of discovery was appropriate. *Id.* at 434-35. The court of appeal held that "discovery should not be automatically denied in such circumstances." Id. at 434. Rather, the trial court should "consider whether it would be appropriate to specify additional efforts which will be required before the court will turn to the merits of the discovery dispute," and to assess sanctions on a party whose failure to make an adequate attempt at informal resolution led to unnecessary expense. *Id.* at 435.

The few other cases addressing the sufficiency of efforts to resolve disputes provide some additional guidance. In *Leko v. Cornerstone Bldg. Inspection Service*, 86 Cal. App. 4th 1109 (2001) the moving party filed a motion to compel a deposition based upon the nonappearance of the witness, even though the opposing party claimed to have incorrectly calendared the date and offered to reschedule. The court held the efforts to be insufficient. *Id.* at 1124-25. In *Volkswagenwerk Aktiengesellschaft*, 122 Cal. App. 3d 326 (1981), the court of appeal held that waiting until shortly before the deadline for filing a motion to compel, having a paralegal call once, followed by the attorney unsuccessfully attempting one or two phone calls, did not constitute a reasonable effort to settle the dispute. *Id.* at 332-33.

Several factual patterns recur in decisions finding attempts at informal resolution to have been inadequate. Counsel in all of the cases seemed bent on filing a motion and had no intention of letting an informal resolution get in their way. Personal vindication appears to have been a goal. The acrimony among counsel in *Townsend*, *Leko*, and *Volkswagenwerk Aktiengesellschaft* likely blinded them to otherwise reasonable solutions. "Like Hotspur on the field of battle, counsel can become blinded by the combative nature of the proceeding and be rendered incapable of informally resolving a disagreement." *Townsend*, 61 Cal. App. 4th 1431, 1436.

Lack of diligence is never helpful. In *Obregon* and *Volkswagenwerk Aktiengesellschaft*, the moving parties attempted to justify their truncated efforts by pointing to imminent filing deadlines. In both cases, however, counsel for the moving parties either failed to request an extension of time to file the motion (*Obregon*, 67 Cal. App. 4th at 430) or refused an extension that was offered (*Volkswagenwerk Aktiengesellschaft*, 122 Cal. App. 3d at 333). While it is clear that courts will not excuse the meet and confer requirement when the moving party dawdles before commencing informal resolution efforts, it is equally clear that they will not listen to complaints about the inadequacy of a moving party's informal resolution efforts from counsel who were unavailable or non-responsive. *See, e.g., Stewart v. Colonial Western Agency, Inc.*, 87 Cal. App. 4th 1006, 1016-17 (2001) ("need for immediate action" justified abbreviated informal resolution process where opposing counsel announced himself unavailable for long periods during time when discussions could have otherwise taken place, failed to offer available dates, and never indicated any intention to compromise).

Assuming opposing counsel will "meet and confer," what sort of discussion must occur? At a minimum, counsel must "listen to the reasons offered and make a good faith attempt to resolve the issue." *Leko v. Cornerstone Bldg. Inspection Service*, 86 Cal.App.4th 1109, 1124 (2001). A proper conference "entails something more than bickering with [opposing counsel]. Rather, the law requires that counsel attempt to talk the matter over, compare their views, consult, and deliberate." *Townsend v. Superior Court*, 61 Cal.App.4th 1431, 1439 (1998). As one federal court held, "the parties must present to each other the merits of their respective positions with the same candor, specificity, and support during informal negotiations as during the briefing of discovery motions." *Nevada Power v. Monsanto Co.*, 151 F.R.D. 118, 120 (D. Nev. 1993).

Some litigators wrongly assert that the obligation to attempt to resolve discovery disputes requires both sides to compromise. *Townsend* seemingly supports that view by repeatedly commenting on the failure of counsel to "negotiate." 61 Cal. App. 4th at 1437-38. Compromise, concession or agreement cannot be regarded as valid prerequisites to the filing of a motion, however. If they were, the meet and confer process would necessarily and readily thwart legitimate discovery and prevent the assertion of valid arguments. The meet and confer process does not require that legitimate positions be surrendered, only that they be meaningfully discussed, and alternatives explored.

Several guidelines derived from the foregoing discussion will help counsel survive the meet and confer process. First of all, diligently check court rules and judges' standing orders to know which procedures require a meet and confer, who must participate, when the conference must occur, and whether telephonic communication will suffice. Second, prepare for the conference and participate actively. Why risk sanctions or denial of a motion by failing to cite key facts or authorities? The opponent will see them anyway when the briefs are filed. Third, do not let your opponent drain you of your strategic secrets without getting something in return. You must frankly discuss the motion, but you do not have to unveil your entire case strategy. Fourth, start early and set flexible, reasonable deadlines for completion of the process. Courts insist on some cooperation, but they will not coddle those who play games by being unavailable. Fifth, recognize an impasse when it occurs. There will come a point when further discussion is pointless and it is appropriate to involve a court.

Be practical, prepared and reasonable, but don't get pushed around. You will the court time, and your client money.