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Satisfying the "Meet and Confer" Requirement in Federal Court

By Nicholas E.O. Gaglio and Aaron J. Feigenbaum – January 28, 2013

We've all endured them. Interminable phone calls where opposing counsel talk *at*—but rarely *with*—each other. Extended letter or email exchanges in which lawyers articulate and re-articulate positions that are meant only to serve as placeholders for an inevitable ill-tempered discovery motion, rather than to promote resolution of a dispute. And as we endured them, we racked our brains about how to spare our clients the financial burden of another round of discovery-related motion practice.

Engaging in meaningful communication with opposing counsel can be an effective way of saving client resources, by separating disputes in which court involvement is avoidable from those in which it is unavoidable. But a meaningful meet-and-confer is not only a way to lower clients' discovery bills. It is also a critical prerequisite to obtaining relief in those disputes that truly do require court involvement. To avoid denial of motions to compel for failure to meet and confer, lawyers need to pay close attention to the source and scope of this conferral obligation.

Prior to filing a motion to compel in federal court, virtually all litigators inform the court that "the parties met and conferred in a good faith effort to resolve their dispute." The reality, however, is that such statements encompass a broad range of communications, from unilateral missives to combative telephone calls, and even sometimes—once in a while—productive, in-person discussions. Increasingly, judges are reminding parties that meet-and-confer conferences are "party—not judge—driven" and requiring parties to demonstrate that their meet-and-confer was "meaningful." *See, e.g.*, The Sedona Conference Cooperation Proclamation. This begs the question: What does counsel need to do in the meet-and-confer to make it meaningful?

The Source(s) of the "Meet and Confer" Requirement

Federal Rule of Civil Procedure 37 obligates a party to certify, along with its motion to compel, that it "in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." Fed. R. Civ. P. 37(a)(1). In addition, 77 federal district courts in the United States have local rules that in some way discuss the duty to "meet and confer" before filing a motion to compel. Federal Rule 37 still applies, of course, in the other 13 districts.

The Scope of the "Meet and Confer" Requirement

Federal Rule 37 does not specify a preferred (much less required) mode of conference, e.g., email, letter, telephone, or face-to-face. Nor do many districts' local rules. Local Rule 26-7(b) in the District of Nevada, for example, requires "personal consultation and sincere effort" to resolve discovery disputes before moving to compel, but it does not define "personal" or "sincere." In

some districts, however, the local rules are more specific. In the District of Kansas, for example, Local Rule 37.2 requires "more than mailing or faxing a letter to the opposing party." The Southern District of California has extremely specific rules: Local Rule 26.1(a) states that if counsel for the parties have offices in the same county, they must meet and confer "in person"; if not, they must confer "by telephone"; and "[u]nder no circumstances" is the exchange of "written correspondence" sufficient. Similarly, Local Rule 7(H) in the Eastern District of Texas—a popular district for patent cases—requires a telephone or in-person conference between each party's "lead attorney" *and* local counsel before filing a motion to compel.

Regardless of the particular mechanism, parties moving for discovery relief are advised to focus on meeting Rule 37's requirement that they make "good faith" efforts to resolve the dispute. The burden associated with such a demonstration will necessarily depend on the circumstances of each case: A more complex dispute will likely require more efforts than a relatively simple one. But local rules, case law, and other resources make clear that the meaningfulness of communication between the parties is the touchstone of the good-faith analysis. For example, unilateral communication, such as "correspondence, e-mails, and facsimile transmissions" may not be sufficient and "are not evidence of good faith." E.D. Tex. Local Rule 7(H). In *Greenwood v. Point Meadows Place Condominium Ass'n, Inc.*, No. 3:10-cv-1183-J-34TEM, 2011 WL 5358682, at **1–2 (M.D. Fla. Nov. 7, 2011), one letter sent to opposing counsel "detailing the deficiencies in Plaintiff's discovery responses" was deemed insufficient to satisfy the "meet and confer" requirement, and the court denied the defendant's motion to compel on that basis alone. The court directed that parties must "actually speak to each other in an attempt to resolve the disputed issues"—preferably by telephone or in person. Similarly, in *Racine v. PHW Las Vegas, LLC*, No. 2:10-cv-01651-LDG-VCF, Dkt. 41 (D. Nev. Dec. 7, 2011), the plaintiff sent one letter to opposing counsel and followed up with emails. The District of Nevada found that this was not a "meaningful" discussion, denied the plaintiff's motion to compel on that basis, and ordered the parties to meet "face to face" before the court would entertain another motion to compel.

While conferring by telephone is safer than relying on written correspondence, even that may not insulate a motion to compel from dismissal. In *Layne Christensen Co. v. Bro-Tech Corp.*, No. 09-cv-2381, 2011 WL 3880830, at **1–2 (D. Kan. Aug. 31, 2011), for example, two telephone calls "of unspecified duration" between the parties' counsel were deemed insufficient. The court warned the parties not to view the "conference requirements merely as formalistic prerequisites," and instructed them to confer out of court "with the same detail and candor expected in the memoranda they would file with the court on the discovery dispute." Thus, as unpleasant as it may be to speak with certain opposing counsel, there may be no other option when it comes to filing a motion to compel in certain jurisdictions.

The Sedona Conference Cooperation Proclamation speaks to parties having "exhausted reasonable alternatives to a formal motion," which demands not just expression of either side's positions, but affirmative suggestions and compromise aimed at achieving the sought-for relief without court involvement. As one court observed, parties "must make genuine efforts to resolve the dispute by determining precisely what the requesting party is actually seeking; what responsive documents or information the discovering party is reasonably capable of producing; and what specific, genuine objections or other issues, if any, cannot be resolved without judicial intervention." *Cotracom Commodity Trading Co. v. Seaboard Corp.*, 189 F.R.D. 456, 459 (D.

Kan. 1999). As the court concluded, "the quality of the contacts [between opposing counsel] is far more important than the quantity."

Indeed, the proclamation speaks not only to the moving party's obligations, but also requires that a *responding* party demonstrate that it "made, or offered to make, discovery that might obviate the need for a motion." An adversary's lack of good faith, therefore, should not be overlooked during a discovery dispute.

Conclusion

Different district courts (and judges) construe the "meet and confer" requirement differently. Counsel should always check the local rules, their judge's individual practices, and case law as soon as a discovery dispute arises. While these sources may not always be models of clarity, they often provide useful guidance. Generally, conferring by telephone is preferable to conferring by email, and meeting in person is the most preferable where practicable and cost-efficient. Mere exchange of positions is not enough; a moving party should demonstrate efforts to engage in meaningful negotiation and compromise. An adversary's refusal to negotiate should be held against that adversary. Taking these precautions will reduce the risk of a worthy discovery motion being denied, leaving not only an angry judge, but a client who may not want to pay for a motion that could have provided value if only you had engaged in a meaningful meet-and-confer.

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