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Save Time, Money & Angst – Meet and Confer

By Katherine Gallo

I recently received an e-mail from a pro-per who asked me

" Is there any chance you can send me a link to an example "*meet & confer*" declaration form"

Wouldn't it be nice to have a Judicial Council form where you could check the boxes on such a form and be done with it? The judge should just assume that you did what needed to be done and grant your motion. Isn't that the way it should be? I mean, really, aren't we all professionals and if you say that you met and conferred in good faith your word should be enough. Right? Not quite…

The purpose of the "*meet and confe*r" requirements set forth in C.C.P. §§ 25.450(b)(2)), 2025.480, 2030.300(b), 2031.310(b), 2032.250 and 2033.290 was for the lawyers to revisit their position, in good faith discuss a resolution and avoid unnecessary discovery motions.

Unfortunately, times have changed since the Discovery Act of 1986 went into effect. No longer can a law firm afford to have an associate sit at the knees of a respected senior partner and watch and listen and not bill. No longer do lawyers have time for the "two martini" lunch in order to get input from their colleagues about cases they are having trouble with. No longer is the legal community so small that you know you are going to see opposing counsel again and fear their retaliation.

For the last twenty years, many of us, had to learn how to litigate by doing and suffering the repercussions. Bad habits, abuse and inaccuracies regarding the law have begat more bad habits, abuses and inaccuracies. It seems like more and more cases are doing battle in the gutter then in the courtrooms. This is most evident in the in the discovery battles and the failure of counsel to "*meet and confer*" in good faith.

Despite a party's threat that they will seek sanctions, no court is going to award sanctions if you don't meet and confer in good faith and in fact will sanction you if you don't. See C.C.P. §2033.290.

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The leading case on "*meet and confer*" requirements is *Obregon v. Superior Court* (1998) 67 CA4th 424. The Second Appellate District stated that in determining whether a party has met and conferred *met and conferred* in good the court should consider the following relevant factors:

1. The history of the case and the past conduct of counsel as it reflects upon the bona fides of their efforts;

2. the nature and extent of the actual efforts expended;

3. the nature of the discovery requested and its importance to the case;

4. the size and complexity of the case;

5. the effect of expense upon litigation of the case; and

6. whether or not the discovery propounded would be so expensive for the other side that its intent was to force settlement other then to reach the merits of the case. *Obregon* at 431.

Obregon is a helpful case for the court's, but what about the litigants. What should they be doing? According to *Townsend v. Superior Court* (1998) 61 CA 4th 1431 at 1439,

"a reasonable and good faith attempt at informal resolution 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." [Emphasis added]

In order to meet this standard, each side has their own responsibilities. These are my suggestions:

PROPOUNDING PARTY

First: Once you have determined that you will need supplemental responses to you propounded discovery, call opposing counsel and set up a time to meet in person. Tell him/he that you will prepare a written response to his objections so you can go through them.

Second: Review your requests and determine whether or not the objections are valid. Prepare your written "*meet and confer*" letter in the format of a Separate Statement of Items in Dispute. That way you are ready to file your motion to compel further responses, if it becomes necessary. Remember a "single brief letter" with no explanation why the discovery was proper does not constitute a reasonable and good faith attempt at informal resolution. See *Obregon* at 432.

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Third: Prepare a draft protective order to bring to the meeting if any objections are as to privacy, trade secrets, etc.

Fourth: Consider bringing in a discovery referee to mediate the discovery disputes, do an in camera review and/or to make a finding if necessary.

Fifth: Make sure you get a written stipulation extending your time to bring a motion to compel further responses. The meet and confer process ***DOES NOT*** extend the 45 Day limit within which the propounding party must file a motion to compel further responses. See *Vidal Sassoon, Inc. v. Superior Court* (1983) 147 Cal. App. 3d 681 at 683-684.

At the meeting:

A. Propose a protective order;

B. Ask for authorizations for third party custodian of records instead of the document request; and/or

C. Agree to narrow the scope of discovery by issues, time, location, etc.

RESPONDING PARTY

First: Offer or agree to an in person meeting to *meet and confer*.

Second: Prior to the meeting, revisit your objections and determine whether any are garbage objections. If any are, offer to withdraw them.

Third: Determine what is your real complaint to the discovery requests:

A. If vague and ambiguous, offer definitions and/or a revised version which you will answer.

B. If overbroad and burdensome, then offer a revised version narrowing the scope and/or offer signed authorizations to third party custodian of records.

C. If you are objecting on grounds of privacy, trade secrets, etc., prepare a protective order and bring it to the meeting.

At the meeting: offer your compromises and don't try and defend your garbage objections.

MORAL OF THE STORY: Litigators need to put down the sword and talk to one another when the discovery battles begin. These battles cost your clients money and you too much time and angst.

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Last week I received the following e-mail from one of my readers:

I have read your articles with interest and respect for some time now; I find them excellent plus.

I have a friend who is acting pro per in a civil case. Suffice it to say she can't afford or get an attorney.

Opposing counsel has made a mockery of discovery by making (putrid) garbage objections to 99% of discovery sent him. He uses every boilerplate objection and has even objected saying some discovery was "unintelligible" when my friend didn't define a name that was the name of the defendants product…

Opposing counsel is clearly abusing the intent of discovery dragging my friend into "Meet and Confer Hell" while knowing that as a pro per, my friend can not get anything more at this point than her costs of filing a Motion to Compel (which she has won) and photocopy costs. On the other hand, and I speak with authority, opposing counsel has created enough work for himself to literally turn a reasonably moderately sized case into a major matter and I would estimate he has made more than $250,000 in fees from his client (no insurance company involved) in 2011.

My point being: There is clearly a wrong here (major discovery abuse and a lack of

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any good faith) and no remedy.

Am I being naive in thinking something should be done or a remedy created?

This is a common problem for pro pers as well as parties who don't have a lot of money. It looks hopeless as you are being out muscled by a party who has deep pockets and a lawyer who's intent is to abuse the discovery process and run up his bills.

So what can you do? **GET THE COURT INVOLVED!!**

You need to file a motion to compel further responses requesting a protective order pursuant to C.C.P. §§ 2025.420, 2030.090, 2031.060, and/or 2033.080 and an award of monetary, issue and evidence sanctions.

TELL THE COURT:

1. The facts of the case in detail, including the procedural history of the case.

2. The discovery you are attempting to get.

3. The garbage objections you are receiving.

4. The futility of the meet and confer process.

5. Your good faith responses to opposing party's discovery.

6. All Motion for Summary Judgment/Summary Adjudication, arbitration, mediation and/or trial dates.

ASK THE COURT TO:

1. Stay all discovery propounded by opposing party until your discovery is complied with.

2. Impose deadlines for discovery responses with a return date to the court to show compliance.

3. Implement a discovery plan and to oversee all future discovery.

4. Rule that all depositions are to be held at the courthouse with the judge available to rule on all objections.

5. Appoint a Discovery Referee with the opposing party to pay for the vast majority of the referee's fees.

6. Award sanctions pursuant to C.C.P. §177.5 —up to $1500 in sanctions payable to the

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court for violation of court order.

7. Award issue and evidence sanctions.

8. Schedule an early settlement conference.

REMEMBER: You need to be pro active. You can't sit back and hope that justice will prevail.

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