MAKE THE MEET AND CONFER PROCESS WORK FOR YOU

The purpose of the "*meet and confe*r" requirements set forth in C.C.P. §§2025.450(b)(2), 2025.480, 2030.300(b), 2031.310(b), 2032.250 and 2033.290 was for the lawyers to revisit their position, and, in good faith, discuss a resolution in order to avoid the time, cost and delays associated with unnecessary discovery motions.

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, listen, and learn how to advance their case by knowing what is important without billing. No longer do lawyers have time for the "two-martini" lunch in order to pick their colleagues' brains about cases with which they are having trouble. No longer is the legal community so small that you know you are going to see opposing counsel again and fear their retaliation if you proceed unreasonably.

For the last thirty years since the passage of the Discovery Act, many of us had to learn how to litigate by doing and then 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 than in the courtrooms. This is most evident in the discovery battles and the failure of counsel to "*meet and confer*" in good faith.

A solid and well thought out plan to your discovery, including compromise where appropriate in the meet and confer process, is critical to ultimate success. Despite a party's threat that they will seek sanctions, no court is going to award sanctions if you do not meet and confer in good faith, and in fact, will sanction you if you do not**.**

What is a Good Faith Meet and Confer

The court will look at the following relevant factors in determining whether a party has *met and conferred* in good faith:

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 than to reach the merits of the case. See *Obregon v. Superior Court*(1998) 67 CA4th 424, 431

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

> "*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*."

Failure to meet and confer in good faith constitutes "***misuse of the discovery process***." [C.C.P. §2023.010(i)]

Meeting and Conferring with Opposing Counsel

Taking the above factors into consideration, review your requests and determine whether or not your opponent's objections are valid. If you determine that you will need supplemental responses to you propounded discovery, call opposing counsel and set up a time to meet in person. Tell them that you will prepare a written response to the objections so you can go through them when you meet. Also, consider offering to prepare a protective order, and consider whether a discovery referee may be useful depending on the complexity or volume of the discovery concerns.

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.

If a referee is appropriate, include in your letter the names of potential discovery referees whom you would be willing to stipulate to. A referee can be utilized for the limited purpose of reviewing the category of documents in the request, performing an in camera review and preparing a recommendation to the court. A Discovery Referee may also aid the parties in the meet and confer process itself and demonstrate reasonableness to the court if a later motion is needed.

If the objections relate to confidential privacy, trade secrets, etc., material (but not attorney client privilege), enclose with your letter a draft protective order to discuss at the meeting.

Finally, request a written agreement extending your time to bring a motion to compel further responses. This meet and confer process by itself ***DOES NOT*** extend the 45 Day limit within which you must file a motion to compel further responses. [C.C.P. §2031.310(c)] See *Vidal Sassoon, Inc. v. Superior Court*(1983) 147 Cal. App. 3d 681 at 683-684 and Sexton v. Superior Court (1997) 58 CA4th 1403, 1409-1410 where the courts have found that the 45-day time limit as "*jurisdictional.*"

Your meet and confer letter should look something like this:

> Dear Counsel;
>
> I am in receipt of your client's objections to our Request for Production of Documents, set #1 in the above entitled case. Below are a more detailed description of our problems with your responses. In order to satisfy our obligation to meet and confer, I would like to schedule a meeting with you regarding your concerns with the subpoenaed categories. I am available to come to your office on [*provide three dates*].
>
> In the alternative, I am also willing to stipulate to the appointment of a Discovery Referee for the limited purpose of reviewing the category of documents in the subpoena, performing an in camera review and preparing a recommendation to the court. I would be amenable to [*provide three names*] to act as our Discovery Referee.
>
> In reviewing your objections, we have the following concerns:
>
> [*Prepare this portion of the letter as you would a separate statement of items in dispute. Also, state what requests you are willing to modify or withdraw.]*
>
> Please advise me no later than [*five court days from date of letter*] on how you would like to proceed. If we do not hear from you, we will assume that we will need to bring a motion to compel further responses and further production of documents.
>
> Thank you for your anticipated cooperation. I look forward to working with you in resolving all issues regarding our Request for Production of Documents, Set #1.

If You are Unsuccessful Meeting and Conferring, Ask the Court for Help

Effective January 1, 2019, Code of Civil Procedure Section 2016.080 authorizes the court to conduct an informal discovery conference upon request of a party or on the court's own motion. The statute reads:

> (a) If an informal resolution is not reached by the parties, as described in Section 2016.040, the **court *may* conduct an informal discovery conference upon request by a party or on the court's own motion** for the purpose of discussing discovery matters in dispute between the parties.
>
> (b) **If a party requests an informal discovery conference, the party shall file a declaration described in Section 2016.040 with the court**. Any party may file a response to a declaration filed pursuant to this subdivision. If a court is in session and does not grant, deny, or schedule the party's request within 10 calendar days after the initial request, the request shall be deemed denied.

(c)

(1) **If a court grants or orders an informal discovery conference, the court may schedule and hold the conference no later than 30 calendar days after the court granted the request or issued its order, and before the discovery cutoff date.**

(2) **If an informal discovery conference is granted or ordered, the court may toll the deadline for filing a discovery motion or make any other appropriate discovery order**.

(d) If an informal discovery conference is not held within 30 calendar days from the date the court granted the request, the request for an informal discovery conference shall be deemed denied, and any tolling period previously ordered by the court shall continue to apply to that action.

(e) The outcome of an informal discovery conference does not bar a party from filing a discovery motion or prejudice the disposition of a discovery motion.

(f) This section does not prevent the parties from stipulating to the timing of discovery proceedings as described in Section 2024.060.

(g) This section shall remain in effect only until January 1, 2023, and as of that date is repealed, unless a later enacted statute that is enacted before January 1, 2023, deletes or extends that date. [Emphasis added]

As stated in paragraph (b) of the statute, you must file the same type of declaration as you would for a motion to compel further responses. Your declaration should contain the following:

1. Timeline from the request for production to the final receipt of the documents.
2. A summary of the documents requested that are still in issue with the Request for Production of Documents and the Response attached as exhibits.
3. A summary of the numerous *meet and confer* attempts with attached exhibits.
4. A summary of any court orders regarding the document requests and any other discovery orders that have been issued against the opposing parties with attached exhibits.
5. The flaws in the production (i.e., not responsive to the request, not categorized/or produced as kept in the normal course of business, no proper response document, garbage objections and an insufficient privilege log).

Preparing this declaration in detail will save you time if you are forced to bring a motion to compel further responses to the discovery requested.

Beware of the Court's Ire

In *Clement v. Alegre* (2009) 177 CA4th 1277 the First Appellate District in affirming a sanction award for imposing frivolous objections to interrogatories stated:

> "Twenty-three years ago, the Legislature enacted the Civil Discovery Act of 1986 . . . a comprehensive revision of pretrial discovery statutes, the central precept of which is that **civil discovery be essentially self-executing**. More than 10 years ago, *Townsend v. Superior Court* (1998) 61 CA 4th 1431) lamented the all too often interjection of "**ego and emotions of counsel and client[s]**" into discovery disputes,

> warning that "[**l]ike 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* at 1436.) Townsend counseled that the "informal resolution" of discovery disputes "entails something more than bickering with [opposing counsel]." (*Townsend* at 1439) Rather, the statute "requires that there be a serious effort at negotiation and informal resolution." (*Townsend* at 1438.)" [Emphasis added]

MORAL OF THE STORY: Litigators need to put down the sword and talk to one another when the discovery battles begin as the Discovery Act intended. These battles cost your clients money and you too much time and angst. But if you do have to file that motion to compel further responses make sure you look reasonable and can show that you made every effort to work out a resolution.