Meet & Confers Prior to Filing Discovery Motions

Posted on **September 16, 2013** by **Michael Lowry**

An opposing party's responses to your client's discovery requests are inadequate and assert a variety of inappropriate objections. You want to file a motion to compel. Now what?

Whether in state or federal court, you must first attempt to resolve the dispute without court intervention. The requirements for each are spelled out by local rules.

Discovery motions may not be filed unless an affidavit of moving counsel is attached thereto setting forth that after a discovery dispute conference or a good faith effort to confer, counsel have been unable to resolve the matter satisfactorily. A conference requires either a personal or telephone conference between or among counsel. Moving counsel must set forth in the affidavit what attempts to resolve the discovery dispute were made, what was resolved and what was not resolved, and the reasons therefor. If a personal or telephone conference was not possible, the affidavit shall set forth the reasons.

If the responding counsel fails to answer the discovery, the affidavit shall set forth what good faith attempts were made to obtain compliance. If, after request, responding counsel fails to participate in good faith in the conference or to answer the discovery, the court may require such counsel to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure. When a party is not represented by counsel, the party shall comply with this rule.

EDCR 2.34(d). The federal equivalent is somewhat shorter. "Discovery motions will not be considered unless a statement of the movant is attached thereto certifying that, after personal consultation and sincere effort to do so, the parties have been unable to resolve the matter without Court action." LR 26-7(b).

~~T~~o comply with both, I typically first send a letter or email listing all of the problems and indicating, absent a response, I will call at a certain date and time to conduct the meet and confer call. If counsel ~~refuses to take the call or simply ignores it~~ is not available, I send a second letter recapping that I called, I was unable to reach counsel and I will file the motion to compel on date certain absent a response.

I have seen some do this routine but accelerate it. Counsel sends the letter at 4:45, calls at 4:50, send a second letter at 4:55 accusing me of ignoring the call and then files the motion to compel at 4:59. The entire process took 15 minutes. It does not actually comply with the rule and just causes consternation for all. Give opposing counsel a chance to respond, even if you can guess what the response will be.

Next, each motion requires a statement of moving counsel as to their compliance with the meet and confer requirements. In state courts there seem to be two standards created by

court administrative procedures. If a party seeks to have a motion set for hearing on an order shortening time, the motion must be submitted directly to Discovery to have a hearing set. This means moving counsel's EDCR 2.34 affidavit is reviewed by the discovery staff and the applicable Discovery Commissioner before an order shortening time is approved. If the affidavit or the meet and confer efforts are insufficient, the motion is simply rejected. If, however, the motion to compel is filed in the normal course via e-filing, the affidavit is not reviewed until a Discovery Commissioner begins hearing preparations. The state courts are arranged so that nearly all discovery motions are resolved via hearing and, by the time the affidavit is reviewed, even if the meet and confer was deficient, it seems the hearing still goes forward. During the hearing you could expect to hear "I do not think you had an effective meet and confer" but it seems the motions still get heard on the merits.

Not so in federal courts. Federal magistrate judges will summarily deny the entire motion if the meet and confer was insufficient. Consider these examples.

*The Defendant has not met and conferred with the Plaintiff in an attempt to resolve this dispute without Court intervention. See LR 26-7(b) (Discovery motion will not be considered unless a statement of the movant is attached thereto certifying that, after personal consultation and sincere effort to do so, the parties have not been able to resolve the matter without Court action.); see also ShuffleMaster, Inc. V. Progressive Games, Inc., 170 F.R.D. 166, 172 (D. Nev. 1996) (Holding that personal consultation means the movant must "personally engage in two-way communication with the nonresponding party to meaningfully discuss each contested discovery dispute in a genuine effort to avoid judicial intervention); see also Fifty-Six Hope Rd. Music, Ltd. v. Mayah Collections, Inc., 2007 WL 1726558, *11 (D. Nev. June 11, 2007) (Holding that meaningful discussion means the parties must present the merits of their respective positions and assess the relative strengths of each).*

Painter v. Atwood, 2013 U.S. Dist. LEXIS 112552 (D. Nev. 2013). Motion summarily denied.

*The initial inquiry here, as with any motion to compel, is whether the Defendants made adequate meet and confer efforts. Fed.R.Civ.P. 37(a)(2)(B) requires that a "party bringing a motion to compel discovery must include with the motion a certification that the movant has in good faith conferred or attempted to confer with the nonresponsive party." Similarly, Local Rule 26-7(b) provides that "[d]iscovery motions will not be considered unless a statement of the movant is attached thereto certifying that, after personal consultation and sincere effort to do so, the parties have not been able to resolve the matter without Court action." LR 26-7. This Court has previously held that personal consultation means the movant must "personally engage in two-way communication with the nonresponding party to meaningfully discuss each contested discovery dispute in a genuine effort to avoid judicial intervention." ShuffleMaster, Inc. v. Progressive Games, Inc., 170 F.R.D. 166, 171 (D. Nev. 1996). Meaningful discussion means the parties must present the merits of their respective positions and assess the relative strengths of each. See Fifty-Six Hope Rd. Music, Ltd. v. Mayah Collections, Inc., 2007 U.S. Dist. LEXIS 43012, 2007 WL 1726558, *11 (D. Nev. June 11, 2007). [*3] The consultation obligation "promote[s] a frank exchange between counsel to resolve issues by agreement or to at least*

narrow and focus matters in controversy before judicial resolution is sought." Nevada Power v. Monsanto, 151 F.R.D. 118, 120 (D.Nev.1993). To meet this obligation, parties must "treat the informal negotiation process as a substitute for, and not simply a formal prerequisite to, judicial review of discovery disputes." Id. This is done when the parties "present to each other the merits of their respective positions with the same candor, specificity, and support during the informal negotiations as during the briefing of discovery motions." Id. The mere exchange of letters does not satisfy the personal consultation requirement. ShuffleMaster, Inc. 170 F.R.D. at 172.Judicial intervention is appropriate only when "(1) informal negotiations have reached an impasse on the substantive issue in dispute, or (2) one party has acted in bad faith, either by refusing to engage in negotiations altogether or by refusing to provide specific support for its claims of privilege." Monsanto, 151 F.R.D. at 120.Branch Banking & Trust Co. v. Pebble Creek Plaza, LLC, 2013 U.S. Dist. LEXIS 104879, 1-3 (D. Nev. July 26, 2013)

On June 12, 2013, after reviewing the parties' briefing, the Court denied, without prejudice, the Defendant's Emergency Motion to Compel. Docket No. 15. The Defendant did not adequately certify that the parties met and conferred prior to filing the motion and the Plaintiff agreed he needed to produce the discovery requested by the Defendant. Docket No. 15. The Court found that "[h]ad the Defendant's counsel met and conferred with the Plaintiff's counsel, the parties could have resolved this matter without Court intervention." Id

Green v. Wal-Mart Stores, 2013 U.S. Dist. LEXIS 112581 (D. Nev. 2013). Motion denied, again.

This motion was filed after the close of discovery and long after the Defendant responded to Elan's written discovery requests. The motion contains a one-line assertion that "pursuant to L.R. 27-7(b), the undersigned certifies that, after personal consultation and sincere efforts by Elan to do so, the parties have been unable to resolve this matter without Court action." This one-line statement does not come close to complying with Elan's meet-and-confer obligations. ... Nothing before the court suggests that Elan attempted to resolve this matter without the court's intervention before filing this motion.

Elan Microelectronics Corp. v. Pixcir Microelectronics Co., 2013 U.S. Dist. LEXIS 114165 (D. Nev. 2013). Motion summarily denied.