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Preparing for and Conducting a Productive Meet and Confer Under Rule 1.202

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Roger Slade, left, with Ariella Gutman, right, of Haber Law. Courtesy photos

It appears to be the position of the Florida Supreme Court and its legions of trial court judges that, if only there was better communication among lawyers, many of the disputes that are clogging our court system could be resolved without judicial intervention. This belief has now been turned into law through Rule 1.202 of the Florida Rules of Civil Procedure. Now, most motions, subject to several notable exceptions, must be discussed by counsel prior to the filing of the Motion through what has colloquially been called a “meet and confer” conference.

As a result of the codification of the new rule, which has been part of many local and individual Judge's rules for a long time, the Florida judiciary is requiring Florida lawyers to "meet and confer" in an unprecedented effort to determine whether it is possible to resolve most disputes without a hearing. Thus, the idea that the "meet and confer" is optional, or only applicable in certain jurisdictions, is now a thing of the past. While some of the pointers in this article may be self-evident, they are, nonetheless, worthy of review. Set forth below is a primer on how to prepare for and conduct a meet and confer and how not to.

Let us start with the things *not to do*.

- **Don't just send an email**. Emails serve a lot of important purposes. Resolving contentious disputes, whether it is a claim on the merits, or a discovery dispute, is probably not one of them. That, coupled with the fact that the average litigator is being snowed in by hundreds of emails daily makes this approach not likely to succeed. Your email is likely to get lost in the snow, or otherwise, ignored. More importantly, sending one email to your opposing counsel is not likely to satisfy the dictates of Rule 1.220 which requires you to specify the efforts you made to confer. Just saying that you sent one email without a response is not likely to be viewed positively by the Judge.
- **Do not attempt to meet and confer within hours or minutes prior to the filing the Motion at issue.** Sending an email or calling an attorney in the morning and filing a motion in the afternoon that states you attempted to "meet and confer" is a cop out. This is not a true effort and is the opposite of what the rule is meant to accomplish. Following this chain of events, the likelihood that you will have a meaningful and efficient conversation is very low. While emergencies arise, a last-minute attempt to meet and confer is not likely to accomplish anything.
- **If you do speak to opposing counsel, keep your attitude in check**. Actually, speaking to your opposing counsel is probably the best option. Nonetheless, if you are smart enough to communicate with your opposing counsel verbally, leave the attitude at home. Most litigators do not just roll over when confronted by an adversary with a chip on his or her shoulder. Typically, this just makes things worse and makes a resolution even more unlikely. Everyone can express their opinions on the issue or the law and agree to disagree in peace. In fact, sometimes hearing the other side's point may help you prepare for the arguments at a hearing on your motion or open up the discussion as to potential for resolution or what each part is seeking in the case.
- **Spare the Invective About Your Adversary's Client**. When you speak to your adversary, you are not likely to get anywhere disparaging another lawyer's client—even if they may deserve it. Most often, an opposing lawyer does not understand the relationship between the opposing counsel and his or her client. It could be a cherished relative or friend, or long-

time client of your opposing counsel. Slamming that person without understanding the relationship is not constructive in any way and will typically make matters worse. On the other hand, if you feel that there is a mistaken understanding of the facts or an issue by the adversary there is a way in which to respectfully communicate this.

This is just a random sample of what not to do. There are many others which time and experience will teach you.

Let's us consider some things that might actually help you resolve a dispute.

- **Understand what your client wants.** It is remarkable how many lawyers simply fight over things that their own clients really do not care about or that their clients may not even know about. Talk to your client before the meet and confer and make every effort to understand their objective in resolving a discovery dispute or even, in some cases, the dispute as a whole. On the other hand, your client may think an issue is extremely important and they want to win this particular battle—for reasons that you may not appreciate. Thus, you should think about what is important to your client and why and how it fits in with the overall goals of the case.
- **Study the file.** There is nothing worse than a lawyer that is unprepared to have an intelligent discussion. Before the meet and confer, it is important to understand the facts and circumstances that led to the dispute in the first place. Understanding these things and your client's position will go a long way to resolving the issues presented. Having a meeting without understanding the issues is likely a waste of time.
- **Make an agenda.** A meet and confer should not be a rambling diatribe on every issue in the case. Stick to the issues at hand and get your opposing counsel to agree that this is what you will discuss when you finally sit down to talk. By narrowing the focus at the outset, you can skip the posturing about other issues and get down to the specific issues present within the motion or objection being discussed. You can use this as an opportunity to understand where the other side is coming from, but this should not be used to posture and create even more acrimony.
- **Try Zoom for you meet and confer.** We all know that there a positives and negatives to zoom. Nonetheless, the "hallway settlement," where lawyers resolve things in the courthouse hallway, has all but disappeared. With the opening of the new Miami Dade courthouse, the "hallway settlement" may make a return engagement. Nonetheless, in the meantime, technology is probably the best option. Zoom works well for a meet and confer because it is a lot harder to be obstinate, difficult, and/or obstreperous when your opposing counsel is looking right at you.

- **Try lunch.** In one case in which our firm was involved, the Judge ordered the warring attorneys to have lunch with one another. Most of the lawyers were furious and excoriated the Judge for the misguided suggestion. But, guess what? Following lunch the case settled. Part of the idea behind this concept, which is seldom adopted, is the breaking down of perceived barriers between lawyers and their positions.
- **Get to know your opposing counsel.** The late Florida Supreme Court Justice Gerald Kogan, who spent much of his post-judicial career as a mediator, used a wonderful technique designed to defuse tension and create a sense of unity at mediation. He asked everyone around the table, lawyers and clients, to introduce themselves and provide background on their lives and careers. This was often time-consuming and sometimes frustrating for clients. But guess what? It was amazing how many of the participants attended the same college or law school or who grown up in the same town or city. When this happens, as it often does, differences and disagreements sometimes melt away.

The bottom line is that a good meet and confer requires forethought, preparation and a positive attitude. While all litigators know that many disputes simply cannot be resolved without a trial, there are likely some that could have been avoided as a result of well-planned, efficient, respectful and thought-out meet and confer.

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