CORDIAL CONVERSATIONS

Conferring with opposing counsel for better motion practice.

BY MARK RITCHIE

The certificate of conference has been an established part of Texas motion practice for some time, but its potential for streamlining and promoting the informal resolution of disputes has yet to be fully realized. Many lawyers view the certificate as a mere pro forma requirement, one to be addressed with minimum effort in the hours (or perhaps minutes) after their motions are drafted while they wait to hear back from the court on the availability of hearing dates. This approach has fueled irritation on the part of trial court judges and litigators for decades,[1] but sustained criticism has done little to discourage the practice. Setting aside the waste of time and resources on unnecessary motions and hearings, such deficient efforts to confer also mean these lawyers miss opportunities to craft the most persuasive arguments possible on behalf of their clients.

Background and Purpose

Certificates of conference have long been a component of federal practice, starting out as a requirement for discovery motions that subsequently was expanded by each district's local rules to apply to non-dispositive motions generally.[2] In 1999, the certificate of conference was added to state-court motion practice by Texas Rule of Civil Procedure 191.2, which requires that all discovery motions and requests for hearings include a certificate of conference stating a "reasonable effort" was made to resolve the matter with opposing counsel before seeking the trial court's assistance. Local rules and court procedures in many parts of the state now impose the requirement on motions generally, with specific carve-outs for summary judgments and other dispositive motions.[3] Regardless of whether the certificate of conference is required under state or local rules, the fundamental purpose of the certificate "is to ensure that parties cooperate … and make reasonable efforts to resolve … disputes without the necessity of court intervention." *See Union Carbide Corp. v. Martin*, 349 S.W.3d 137, 146 (Tex. App.—Dallas 2011, no pet.) (analyzing the conference requirement under Tex. Civ. P. 191.2 and Dallas (Tex.) Civ. Dist. Ct. Loc. R. 2.07).[4]

Practical Consequences for Evading the Intent of the Rules

Even though the purpose behind the certificate of conference requirement is abundantly clear, some lawyers still communicate with opposing counsel in a manner that makes it less likely any meaningful dialogue will take place.[5] An overly aggressive, insulting, or openly hostile approach is fairly common among lawyers who wish to avoid appearing weak at all costs. These lawyers often treat the conference as a zero-sum game with no room for compromise, to be "won" at all costs even when such a win comes at the expense of diminished credibility or damage to the client's case in the long run.[6]

At the opposite extreme, some lawyers avoid engaging opposing counsel to the greatest extent possible, preferring to state their position, demands, and deadline for compliance in an all-or-nothing, "take it or leave it" manner. This approach is typically motivated by concern that opposing counsel will abuse the conferral process by dragging out discussions indefinitely with no intent to ever reach agreement.[7] Such "death by conferral" tactics are deeply frustrating, and even the most professional lawyers may find themselves tempted to cut discussion short in the face of mounting evidence that no amount of dialogue will ever end in agreement. Even though the desire to put a stop to such tactics may be overwhelming, racing to the courthouse without first engaging in substantial discussion is rarely justifiable as it presents an opportunity to shift the court's attention away from the merits with (often indignant) protests that counsel failed to adequately confer.[8]

In the end, minimal or disingenuous attempts to confer are a poor strategic choice regardless of justification. Trial courts struggle to allocate time to legitimate disputes, and so judges are rarely forgiving when no sustained effort to work things out is made before filing a motion.[9] Frequently the court will refuse to rule on such a motion until after the parties make a serious effort to resolve the matter among themselves,[10] and there is good reason for the moving party to be pessimistic if no agreement is reached. The relief ultimately granted is likely to be shaped to some extent by counsel's lack of professionalism, disregard of the rules, and casual attitude toward wasting the court's time.[11]

Guidelines for Conferring More Effectively

To avoid this sort of self-sabotage, a better approach is to confer with opposing counsel in a detailed and well-documented manner that addresses each of the issues to be raised in your motion.[12] This investment of time and effort on the front end allows you to rapidly narrow down the issues to those where there is genuine disagreement, in turn providing both the framework for your motion and, perhaps more importantly, an effective road map of the arguments you can anticipate from opposing counsel.[13] The systematic approach to discussion is a particularly effective method for dealing with evasive tactics, as it forces opposing counsel to either take a definitive position or come across as deliberately slippery, thus sacrificing a measure of credibility in the eyes of the court. Investing the necessary time and effort to carefully document these discussions provides a clear and persuasive record establishing your efforts to resolve the dispute amicably,[14] thus making it all the more likely that the court will ultimately grant your requested relief.

The following guidelines for conferring effectively with

opposing counsel have proven invaluable in my own practice. While they require substantial time and effort on the front end, I find that this approach streamlines the overall process of conferring:

(1) Confine your conference with opposing counsel to a single email chain, making it easier to track the specific issues discussed. If there are multiple issues in play, consider breaking the discussion down into numbered paragraphs in your email to maintain a structured conversation that can be readily followed, both by counsel and the trial court. This makes it much easier to manage, as a series of separately threaded issues, while documenting the discussion in a way that promotes ease of reference. Separate threads make it simple to address issues raised by opposing counsel while maintaining the overall structure of the conversation.

(2) Defuse opposing counsel's efforts to derail the conversation with unrelated discussions, irrelevant matters, and posturing by (politely) insisting that he or she confine the discussion to the matters you have listed in your initial email. Many lawyers will throw in non-sequiturs and argumentative statements in an effort to muddy the waters of your discussion, usually shifting to a more professional tone only after they determine you will not be distracted by such tactics.

(3) If your preference is to speak over the phone, you should still send a detailed message outlining the issues and your position *before* making a phone call. This helps focus the discussion quickly, and goes a long way toward preventing early misunderstandings regarding the issues and the parties' respective positions. *See id.* (stating that in the context of discovery motions, detailed correspondence keeps the parties organized and focused during subsequent discussion).

(4) If the parties are unable to reach agreement, be sure to attach a copy of the *entire* email chain to your motion, explicitly directing the court's attention to this exhibit both in your certificate of conference and early on in the motion itself. This will encourage the trial court to familiarize itself with the issues by referring to the dialogue between counsel and strongly discourages opposing counsel from misrepresenting the substance of your discussions. Including the entire chain of emails also ensures that the court does not suspect omitted portions contain unflattering or inconsistent information.

(5) If you end up conferring verbally at some point, be sure to *immediately* summarize the discussion in a follow-up email. The longer you wait, the more the accuracy of your summation can (and likely will) be called into question. Delay in sending a summary email also makes it more likely that any progress you made in negotiations will be lost.

These are, of course, only guidelines for discussion, and the manner in which you implement them should be flexible enough to take into account the complexity of the dispute and its importance to the overall case. By making a diligent effort to confer, regardless of the specific approach, you will have a better chance of resolving disputes informally, and you will also be more likely to win if a formal motion proves necessary. In either case, putting more effort into conferring is the best strategic choice because it means you will fight fewer unnecessary battles, thus allowing you to achieve results for your clients with less wasted time and effort.[15] **TBJ**

Notes

1. As noted in *Dondi Properties Corp. v. Commerce Savings and Loan Association*:
   > The purpose of the conference requirement is to promote a frank exchange between counsel to resolve issues by agreement or to at least narrow and focus the matters in controversy before judicial resolution is sought. Regrettably over the years, in many instances the conference requirement seems to have evolved into a *pro forma* matter. With increased frequency I observe instances in which discovery disputes are resolved by the affected parties after a hearing has been set—sometimes within minutes before the hearing is to commence. If disputes can be resolved after motions have been filed, it follows that in all but the most extraordinary circumstances, they could have been resolved in the course of [Local] Rule 5.1(a) conferences.

   121 F.R.D. 284, 289 (N.D. Tex. 1988).
2. E.D. Tex. Loc. R. CV-7(i); N.D. Tex. Loc. R. (Civ.) 7.1(b); S.D. Tex. Loc. R. 7.1(D); W.D. Tex. Loc. R. CV-7(i).
3. *See, e.g.*, Dallas (Tex.) Civ. Dist. Ct. Loc. R. 2.07(a), (d) (requiring certificates for all motions except "dispositive motions, motions for summary judgment, default judgments, motions to confirm arbitration awards, motions to exclude expert testimony, pleas to the jurisdiction, motions to designate responsible third parties, motions to strike designations of responsible third parties, motions for voluntary dismissal or nonsuit, post-verdict motions and motions involving service of citation"); Harris Cty. Dist. Ct. Loc. R. 3.3.6 (extending requirement "to all motions, pleas and special exceptions except summary judgments, default judgments, agreed judgments, motions for voluntary dismissal or nonsuit, post-verdict motions and motions involving service of citation").
4. *See, e.g.*, Dallas (Tex.) Civ. Dist. Ct. Loc. R. 2.07(b) & (c)(1) (specifying minimum standards for attempts to contact opposing counsel and content of certificate); Court Procedures of the 113th Judicial District Court, Harris County (stating that "[a] certificate of conference stating that a letter or email was sent to opposing counsel and a response was not received is insufficient," and specifying that certificate should list the dates and times of attempted contact).
5. De minimis attempts to contact opposing counsel shortly before filing are most common historically, although more subtle strategies have become popular in recent years. For example, some lawyers sabotage the discussion by making thoroughly unreasonable demands, relying on the rejection of their demands as grounds for declaring the parties at an "impasse."
6. *See* Sofia Androgué, *'Rambo' Style Litigation in the Third Millennium—The End of An Era?*, 37 Houston Lawyer 22, 25 (March/April 2000).
7. Edward P. Sangster, *Death, By Meet and Confer*, at 3, *available at* http://www.klgates.com/files/Publication/4359c827-3b77-4d37-b44f-55f2cde6ae5c/Presentation/PublicationAttachment/dddc7d0c-e96b-4b78-ae58-a100e3cd5195/Death.pdf (discussing such tactics in the context of federal meet-and-confer requirements).
8. *See* Sangster, *supra* note 7, at 3 (noting this tactic amongst federal practitioners); *see also* Androgué, *supra* note 6, at 25 (noting that overly aggressive tactics detract from legitimate arguments and risk alienating the court).
9. *See, e.g.*, Court Procedures of the 151st Judicial District Court, Harris County (requiring an explicit description of attempts to confer and supplementation when no conference occurred before filing). Indeed, in some jurisdictions no hearing can be scheduled before a detailed account of counsel's efforts to confer is provided. *E.g.*, *id.* (providing that the clerk will remove motions from the docket that do not comply with the certificate of conference requirement under the local rules); *see also* Court Procedures of the 127th Judicial District Court, Harris County (stating that "[a]ll motions without a detailed certificate of conference will be reset or passed").
10. At a minimum, counsel can expect to be sent outside to confer before the court resumes consideration of the motion. *E.g.*, Court Procedures of the 113th Judicial District Court, Harris County (stating that when a motion does not include a proper certificate of conference, "the court will not hear the motion until the lawyers have actually conferred outside the courtroom").
11. *See* Hon. Randy Wilson, *From My Side of the Bench: Judges Talk*, 72 The Advocate (Texas) 83, 83 (Fall 2015) (advising lawyers that "[e]ven if you're appearing before a judge for the first time, there's a decent chance that the judge has heard of you and may have an impression of you, be it good or bad").
12. *See Dondi Props. Corp.*, 121 F.R.D. at 289 (noting that discovery disputes are frequently resolved by the affected parties only after a hearing is set). Supplementing with an updated certificate is a good idea when this happens, and is required by certain courts. *E.g.*, Court Procedures of the 151st Judicial District Court, Harris County (stating that the certificate "should always be supplemented as soon as possible after the parties have actually conferred").
13. Giana Ortiz, *Discovery Motions: Practical Tips for Picking and Winning Battles*, 72 The Advocate. (Texas) 34, 34 (Fall 2015).
14. *See id.* (noting that "[w]ell documented conferences will go a long way toward illustrating to the court the requesting party's efforts to avoid the court's involvement").
15. *See* Sun Tzu, *The Art of War*, Ch. III (noting that "to fight and conquer in all your battles is not supreme excellence; supreme excellence consists in breaking the enemy's resistance without fighting") (Lionel Giles ed. 1988, available through The Internet Classics Online at http://classics.mit.edu/Tzu/artwar.html).

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