Judge Teresa Beaudet
LOS ANGELES SUPERIOR COURT

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
July 2020

Meet and confer, compromise and stipulate

CONFLICTS RESOLVE MORE READILY WHEN HUMAN BEINGS CAN OBSERVE EACH OTHER'S FACIAL EXPRESSIONS AND HEAR THE TONE OF VOICE OF THE PERSON OPPOSITE THEM

Anyone who has ever appeared in my courtroom for a case management conference (CMC) has heard me advocate for the benefits of meeting and conferring *in person* with your opposing counsel in your case. (All references to counsel in this article apply equally to self-represented litigants.) However, as you are reading this article, you may still be maintaining social distancing and wearing masks to ward off COVID-19. Though that may be the case, it does not mean you should abandon the benefit of "in person" meeting and conferring. You can meet and confer via Zoom or FaceTime or some other internet or phone method that will allow you to see and hear opposing counsel. The benefits of the "in person" meeting, even if virtually, have not diminished in our current situation, and they may, in fact, be a necessary adjunct to the efficient resumption of proceedings in the civil courts.

I am not a psychologist, but my experience as a civil practitioner and as a judge in family law, the personal injury hub and in unlimited civil cases, has taught me that nothing resolves conflicts more readily and more fairly than when human beings are able to observe each other's facial expressions as well as listen to the tone of voice of the person opposite them as they explain their points of view. This works best when the people involved are all in the same room, even if only virtually.

Informal discovery conference

When the PI hub first opened, Judge Samantha Jessner and I shared a courtroom and we also shared our observations of what worked and what did not work. We quickly learned that conducting an informal discovery conference (IDC) did not work as well when one or both attorneys appeared only via telephone. Hearing just the tone of voice was not enough to move them closer to compromising with each other. I imagine that seeing the expression on the judge's face also helped them assess the likelihood that their positions would win out in the end! But having said that, I have to note that in about 65% of the cases that were scheduled in my courtroom for an IDC before COVID-19, the attorneys resolved their dispute when they met and conferred just before they were scheduled to meet with me in chambers. Before my clerk would let them meet with me for the IDC, she would ask them if they had already met in person; if not, she would send them off to the jury room if no jury was deliberating, or out to the hall or even off to Starbucks for a coffee break before she would let them see me. Once they told her they had an agreement, she would hand them a blank stipulation and order form that they completed, and all I did was sign it and express my congratulations and gratitude for the good work they just did. It saved them and the court time and money. When we are all back at the courthouse and I resume holding IDCs, my clerk will likely encourage the same scenario, only virtually.

As for the other 35% or so of the cases that I saw for IDCs, I found that nearly all of those disputes resulted in resolution without the need for actual motion practice. My courtroom instructions and my comments to counsel and parties when they appear at the CMC alert them that they must meet and confer in person or via telephone, and they must participate in an IDC *before* the court will hear any discovery motions (i.e., motions to compel, compel further, for protective order, etc.). They are informed that if the other side will not agree to extend the time to file the discovery motion, I will do so on an ex parte basis. It works wonderfully, and I almost never see any such ex parte applications or any motions filed without an IDC having occurred; and very few of those are filed because we almost always find a resolution at the IDC.

Why do most of the remaining cases resolve at the IDC? Phasing is a big part of it. When I hear the parties describe what they want in discovery, there usually is some part of what they are seeking that is the most important part. For example, a party might be seeking "me too" evidence but "the ask" is so broad that the defendant just decides to say "no" to all of it. If the parties can compromise and stipulate to a "first round" that is narrowly tailored without waiving the right to request a second round, if necessary, it usually ends the dispute, or at least it ends my part of it, probably because the parties have determined that they can deal with the second phase without me. That's a great result.

Try something new

The benefits of meeting and conferring are not limited to discovery disputes. The benefits apply to pleading-related motions (demurrers, motions to strike, motions for judgment on the pleadings and anti-SLAPP motions), summary judgment and summary adjudication motions, motions in limine and trial preparation. Over the past few years, in person or telephonic meet and confer requirements have been mandated for demurrers, motions to strike and motions for judgment on the pleadings, and bills have been offered in the legislature to require the same for anti-SLAPP and summary judgment/adjudication motions; unfortunately, such new legislation has not moved forward

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while the legislature is understandably focused on the COVID-19 crisis. But the trend is toward encouraging the parties to resolve as many issues as possible through in-person or telephonic dialogue and not through single-spaced, lengthy (and often tone-deaf) letters that do not constitute "meeting and conferring" and rarely result in resolution. The benefits of actually meeting and conferring regarding demurrers alone has resulted in a significant decrease in the number of demurrers filed.

Although there currently is no requirement to meet and confer regarding an anti-SLAPP motion or a summary judgment/adjudication motion, why not give it a try? Anti-SLAPP motions consume a lot of time and money, and they take up what will now be even more precious judicial resources that will be needed to catch up on the backlog due to COVID-19. And the anti-SLAPP proceedings seem to never end because of the right to appeal and the attorney fees at issue. Wouldn't it be better to take a shot at fixing whatever arguably makes the pleading a SLAPP before using up all those resources? Summary judgment/adjudication motions also could benefit from meeting and conferring. I have read many such motions where a cause of action is not defended in response to the MSJ/MSA. Wouldn't it be worthwhile to meet and confer with the other side in person (albeit virtually) or via telephone to see if they might not drop one or more of the causes of action rather than spend the time and money on a cause of action that is going nowhere?

Stipulations will streamline the proceeding

Meeting and conferring in person or virtually or via telephone as part of trial preparation also will become even more critical than it has been in the past. Assuming we are able to find a way to empanel a civil jury while maintaining social distancing, that jury will be expecting a highly streamlined proceeding, and so will the judge in court trials. The best way to accomplish that streamlining is for the parties to get together as early as possible to try to stipulate to as much as possible. The richest target for such streamlining is the exhibit list. Too often, parties throw every exhibit they have onto the joint exhibit list with the idea that they will sort it out later. That may be alright for the first round of discussions, but it is not alright for the final joint exhibit list filed with the court. In many courtrooms, including mine and the PI hub courts, the parties are obligated to meet and confer in person or via telephone before filing the final joint exhibit list to resolve as many objections to the exhibits as possible. Although parties regularly object on the basis of a lack of foundation or authentication to almost every exhibit on the list, rarely do such objections succeed. If you can see that there is a witness on the witness list who can lay the foundation or authenticate the document, then why not stipulate with the opposition that you have no objection to foundation or authentication assuming that the witness testifies thereto? That stipulation can be part of the joint exhibit list or a separate document.

As much as possible, I try to get the parties to stipulate in advance to the admission of exhibits that will be proffered at trial. What this means is that we know in advance of the start of the trial, that if, for example, the plaintiff asks a witness to turn to Exhibit 15, that exhibit will then be deemed admitted because we have so agreed in advance. There is no squabbling over the exhibit that just leads to jury confusion. And more importantly than ever, we can move right along. This approach definitely requires more time to be spent by the parties in advance of the final status conference (FSC). Because of the backlog that is expected, the court may not have as much time to spend with the parties at the FSC as in the past. Consequently, the parties should do everything in their power now to resolve their exhibit disputes beforehand.

Similarly, stipulations can be reached regarding the joint witness list before filing it. Parties often will identify every possible percipient witness who may be called to testify, probably because counsel do not know for sure which witnesses will be available when the case finally does go to trial. Each of those witnesses also has a time estimate. It has been my experience that counsel know they will never call all of those witnesses, and they know which witnesses can be grouped together so they can indicate that only one or two of them will be called in the end with a greatly reduced time estimate. So, for example, if five witnesses who heard the alleged sexual harasser's comments have been identified on the joint witness list, each with a one-hour time estimate, but the intention is to call only two of them, for a total of two hours of testimony, why not expressly stipulate in your final joint witness list that you will call only two of the five for a total of two hours? That way both sides are protected because the universe of potential witnesses has been disclosed, but the court already has the benefit of knowing that the real time estimate is two hours, not five. Doing this yourselves, rather than making the court extract such a stipulation from you at the FSC, will save precious time that can be better used for more significant issues.

Other topics that will be addressed at the FSC can also benefit from meeting and conferring in person or via telephone. Why not provide the court with a list of stipulated facts? I require the parties to have that discussion and it almost always results in stipulations that we can include in the joint statement of the case and in the jury instructions. I have yet to have a case where the parties determined that there were no useful stipulated facts upon which they could agree. And what about a questionnaire? Why not discuss in advance whether your case will benefit from a questionnaire and what should go into it? Here again, I require the parties to present a joint proposed questionnaire that they have worked out before I have to consider it. Usually, their proposal is pretty good and requires only modest fine tuning.

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Successful settlements

The last comment I want to make about meeting and conferring is about settlement. If you and your opposition have been meeting and conferring since the beginning of the case, whether about pleadings, discovery issues, motion practice or trial preparation, the likelihood that settlement will be reached is greatly increased. And I would venture to say, that settlement will probably happen sooner too.

So, good luck with meeting and conferring, stipulating and compromising!

Judge Terresa A. Beaudet is a Los Angeles County Superior Court Judge, currently sitting in an independent calendar (IC) courtroom at the Stanley Mosk Courthouse. She was appointed to the bench in 2008 and has sat in both Family and Criminal law courts as well as Civil. Prior to being appointed to the bench, she was a Partner at Mayer Brown LLP specializing in complex business litigation before trial and appellate courts. Judge Beaudet is a graduate of Loyola Law School and Loyola Marymount University.