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Conferral Needs Caselaw Support

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Don't Just Go Through the Motions With Opposing Counsel

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In Oregon's state and local federal courts, civil litigants are required to confer prior to submitting most motion practice. For state civil cases, UTCR 5.010 requires that attorneys engaging in certain non-dispositive motion practices must certify that they have first made a "good-faith" effort to confer with opposing counsel. The 2023 *Multnomah County Judges Civil Motion Consensus Statement* specifies that "to confer" requires a conferring lawyer to have an in-person or phone discussion with opposing counsel. Oregon's federal district court requires the same under Locale Rule 7-1(a). The federal local rule goes one step further and requires that the parties discuss each "claim, defense, or issue" in dispute. LR 7-1(a)(2).

Under these current rules, the following is evident. The act of "conferral" is considered complete when a lawyer speaks with opposing counsel. A "good faith effort" at conferral is complete when, at a minimum, a conferral-seeking lawyer makes a genuine effort to speak with opposing counsel. Most judges reject a mere email as a conferral. If opposing counsel will not return the conferral-seeking lawyer's call, the blame for a potentially unnecessary dispute being placed in court may fall on opposing counsel. In that case, it may be up to a non-responsive opposing counsel to try to explain to the judge why the call was not returned. If the court agrees that the conferral-seeking lawyer's attempts were sufficient, this may not work in the opposing counsel's favor.

Substance Over Superficial Conferral

While a simple phone call made prior to filing a motion may be deemed sufficient to fulfill the conferral requirement, the substance of the conferral is often lost in practice. Many attorneys enter these conversations without the legal authority necessary to support their positions. Some fail to cite any authority at all. Instead, they merely inquire whether their adversary will concede. When the adversary refuses, they then proceed to file their motion, and assert that they have conferred.

This practice undermines the very purpose of conferral. Courts in other jurisdictions have rejected such superficial conferral processes. Instead, these courts emphasize the need for meaningful engagement on the legal authority supporting the issues. For instance, in the Nevada federal district court, a discovery motion can be denied under its local rule for failure to address legal support during the conferral process. *Guerrero v. Wharton* shows that in Nevada, to confer means to explicitly discuss the legal support for their positions.

In *Guerrero*, the attorneys conferred prior to the filing defendant's discovery motion. However, during the conference, the attorneys failed to discuss the issues with "the same level of detail and legal support as they would during briefing a discovery motion." In denying the motion, the *Guerrero* court stated as follows:

Judges in this District have held that these rules require that 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." (citation omitted). The consultation obligation "promote(s) a rank exchange between counsel to resolve issues by agreement or to at least narrow and focus matters in controversy before judicial resolution is sought." (citation omitted). To meet this obligation, parties must "*treat the informal negotiation process as a substitute for, and not simply a formalistic prerequisite to, judicial resolution of discovery disputes.*" (citation omitted). 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.*" (citation omitted).

Our civil bar would be best served by enforcing a similarly rigorous approach regarding conferral in state and federal courts. This approach offers several benefits. First, requiring parties to explicitly discuss legal support during conferral increases the likelihood of resolving the dispute. When preparing for a conferral call with the necessary legal support in hand, attorneys are compelled to thoroughly review the law. This process not only ensures a better understanding of the legal landscape but also facilitates the identification of any recent developments that may impact the motion or opposition. Armed with comprehensive legal knowledge, attorneys can engage in substantive discussions during conferral,

potentially leading to a resolution of the dispute or a clearer understanding of the key contentious issues. For those who fear revealing too much in these discussions, there is little risk that an attorney's motion will be compromised by discussing during conferral the same arguments the attorney plans to make in motion practice.

Second, requiring attorneys to explicitly discuss legal authority promotes judicial economy. It is no secret that courts dislike discovery disputes. Given that our federal and state dockets are overburdened, it is no wonder that judges are loathe to wade into the morass of non-dispositive civil battles. Members of the civil bar have a responsibility to try to keep these matters off of court dockets by having frank and clear conversations on the applicable law.

Third, requiring the presentation of legal authority during conferral levels the playing field, particularly for younger lawyers and those from nonprivileged backgrounds. By emphasizing the importance of substantive legal discussions, rather than relying solely on positional bargaining power, this approach empowers all attorneys to participate meaningfully in the resolution process.

Fourth, requiring the presentation of legal authority is consistent with the standards of professionalism. The Oregon State Bar's 2019 Statement of Professionalism identifies the principle that an attorney "will explore all legitimate methods and opportunities to resolve disputes at every stage in (the attorney's) representation of (the attorney's) client." Oregon's federal district court expands this principle in several respects. Local Rule 83-8(a) states that "(c)ounsel must cooperate with each other, consistent with the interests of their clients, in all phases of the litigation process and be courteous in their dealings with each other, including matters relating to scheduling and timing of various discovery procedures." The district court's Statement of Professionalism General Guideline 1.9 further states that attorneys "will not knowing(ly) cause a person to form a mistaken conclusion of facts or law."

Collectively, these principles provide a "true north" regarding conferral communications. An on-point case or statute has the power to nip a legal dispute in the bud before a brief is drafted. Explicitly discussing this legal authority at a conferral call is a "legitimate method and opportunity" that we as attorneys are required to explore under professionalism standards. Conversely, an intentional failure to have that discussion may contribute to a "mistaken conclusion of law," which is inconsistent with professionalism standards in federal court. Ultimately, the safe course of action during these conferral calls is to place one's legal authority cards on the table.

Conferral should function as a means for attorneys to objectively resolve disputes. The best way to do this is to require legal support during conferral. You've got your cases. I've got my cases. Let's discuss what they say. By embracing a more stringent approach that prioritizes



showing your legal authority, we can enhance the effectiveness of conferral and promote a culture of professionalism and mutual respect within our legal community.

About the Author

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Endnotes

1. *Guerrero v. Wharton*, No.216CV01667GMNNJK, 2018 WL 706494, at*1 (D. Nev. Jan. 22, 2018)
2. *Id* at *2.
3. *Id*.
4. *Id*.

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