Advance Sheet

MISMATCHED EXPECTATIONS: MEET-AND-CONFER SESSIONS

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Has there ever been anything so ill-conceived and worthless as a meet-and-confer session? Judges don't seem to think so. For decades now, nearly every court, nationwide, has imposed a meet-and-confer obligation on counsel as a *de rigueur* first step before any material disagreement with an adversary can be presented to the judge. Rather than deeming such sessions futile, as the lawyers view them, judges seem to have almost a preternatural faith that they will lead to a resolution of all disputes, were they to be taken seriously, as required. Is this just the product of wishful thinking, a vain hope that judges can and will be freed to focus on seemingly more important tasks? Why do judges believe the lawyers can "work it out" by merely getting together and negotiating with one another about their different points of view, particularly when they or their clients haven't been able to do so in any other respect?

Certainly, the lawyers expect nothing good will come of such sessions. They are sure, and mostly right, that opposing counsel will not genuinely try to compromise on anything. The meet-and-confer session, they think, will never be taken seriously by the other side, except as something to be gamed. Their adversaries, they know, will take positions about which they are not really serious or from which they might get an advantage, or at least no disadvantage, posing and posturing to look as if they are conferring when they really are not. With such expectations about the other side, it's much better to get the upper hand, or try to. The trick is to look conciliatory and reasonable when the process breaks down, as it inevitably does.

Woe to the lawyer who innocently believes this process can work as judges expect. As she has been forewarned, she will soon find that, however well-meaning herself, her attempts at compromise are only being exploited, taken advantage of, used against her in the real action to come later, before the judge. At best, she will compromise with nothing comparable from the other side. No matter how reasonable she is or how hard she tries, her ill-meaning but skillful adversary will just as likely be able to play the sycophant with the court subsequently, and get away with it too. It doesn't take very long, in the midst of such misbehavior, to recognize that virtue will have to be its own reward, useless as it is for a successful pursuit of one's case.

Now, the news is that some judges seem to be catching on to the idea that the meet-and-confer is not quite what it's cracked up to be. In some jurisdictions, the meet-and-confer obligation can now be met simply by one or another lawyer saying he doesn't believe it can or will be productive. Why should this even be necessary? And is this kind of certification to be all that remains of a once-hopeful process now in tatters, a useless vestige of a more innocent time? The lawyer's statement is nothing but a self-fulfilling prophesy, even if not necessarily a wrong one.

What's happening here? How come the meet-and-confer obligation, as much a staple of day-to-day litigation as any other procedure in the books, never seems to work? And why is it now not even being given a chance to work? Why are the courts starting to abjure what they once so solemnly believed in or, at a minimum, reduced so predictably and petulantly to casting "a pox on both houses" instead of getting to the root of the matter? Are judges innocent fools or is it that the lawyers are pernicious? Do judges expect too much, or not enough? Or are the lawyers to blame for not taking the rules seriously?

Sources of the Problem

Is this any way to run a railroad? Surely not. But the problem can tell us much about the adversary ecosystem and the perspectives of those creatures (mostly busy judges and zealous advocates) that inhabit it. Start with the judges. They rightly view lawyers as officers of the court, duty-bound to help make the litigation process run smoothly. Lawyers are supposed to be highly trained, reasonable, and rule-bound professionals who

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know, or should know, the importance of, and how to reach, a fair compromise. They owe it to the system not to burden the courts with unnecessary controversies, which clog the judges' calendars and cause the courts to grind close to a halt. Surely, it is the lawyer's professional responsibility, indeed duty, to work together with an adversary to reach a workable outcome without the need for judicial intervention. This is not naïveté; it is part of being a professional in the first place. If it doesn't work, it must be perfidious lawyers who are to blame.

Good luck with all that. Formerly lawyers themselves, who are these judges kidding? A lawyer, particularly in civil litigation, is a zealous advocate, seeking to obtain any lawful advantage for his client, not excepting those available from processes the courts themselves have laid out. Face it, they say: Civil litigation has become almost a no-holds-barred blood sport—ultimate wrestling, no longer a rule-bound boxing match—where litigators cannot be expected to do less than what is necessary to be successful in its every phase. Yes, the rules require a lawyer to meet and confer. But nothing says the lawyer has to compromise or do anything more than one's adversary does. Whoever ingenuously relies on one's adversary to do what one believes one is doing oneself becomes a victim at best, and is a fool to boot.

Obviously, each of the parties in this sorry dialectic is focused on a different aspect of the litigator's role. It is true that the officer-of-the-court element is supposed to be paramount. But rationality and compromise are in the eyes of the beholder. And it doesn't take very long for a lawyer to convince himself from his own skewed perspective that he is being fair and reasonable or to recognize that he can be just as ruthless and irrational as he thinks his adversary is being as long as the "beholder" is a judge too busy to investigate what is really going on. Indeed, once he realizes that this truth is universally established, isn't he duty-bound in zealously representing his client to take every advantage that the judge's lack of attention affords him? Indeed, might a litigator not be criticized if she relies on vague notions of civility and "working it out" instead of doing what's necessary to win the case, which, after all, is what she is hired to do?

It shouldn't take long amidst this back-and-forth to figure out where the real problem lies. Yes, lawyers should be officers of the court and "work it out." To do so, however, lawyers need to regulate themselves, whereas suffused as they are with hyper-adversarial zeal, they cannot espy the limits of their own reasonableness, or won't, particularly once they learn that they will never suffer consequences for not doing so. So they don't. Judges, meanwhile, do not have time to police the lawyers in their performance of their officer-of-the-court obligations. Needing to enforce the rules and good manners, they too don't, or cannot. This vicious and futile cycle is thus beginning to give way to a mere certification, all that's left of such mismatched expectations amidst practical realities.

What Is to Be Done?

Perhaps civil litigators can learn a different way, but the undertaking requires a fundamental change in outlook. Compare them for a moment with criminal lawyers. It is a commonplace that the ruthlessness that currently prevails in civil litigation is much less apparent amidst the bar of criminal trial lawyers. Why? Because each prosecutor recognizes that he will likely someday sit across the table, serving as a member of the defense bar. Likewise, every defense counsel recognizes an earlier version of herself in the wet-behind-the-ears prosecutor on the other side. There is a kind of community of practice and expectation that educates the lawyers in "how it's done," in a common vein, in which no one wants to be distrusted by the other side, let alone become a pariah for the community as a whole.

Not in the civil litigation bar. No one has a common upbringing, as it were; everyone is trained by someone different. Most see different adversaries day to day, year to year, as one's practice continues. There is no community of interest strong enough to remind one of an alternative point of view or deter bad or overzealous conduct, no cultural sanction for misbehavior. "Unwritten rules" don't exist or quickly fail. With the pressures to win greater than ever, the likelihood that one will find in one's adversary a fellow traveler of the professionalism school is much lower indeed. And so one expects very little good from one's previously unknown adversary, and even oneself, and usually gets none, making compromise next to impossible.

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It seems impossible, then, for the civil litigation ecosphere to remake itself or for civil litigators to learn any course in which they question or moderate themselves or eschew overzealous advocacy in favor of compromise. This is not to say that meet-and-confer sessions can never work. But it's mostly pure happenstance, and one of diminishing likelihood, as the courts seem now to be acknowledging. There is very little reason to believe that a sudden burst of professionalism will create the new ethos necessary for the meet-and-confer obligation to work any better. Inns of Court and lessons in civility do not stand much chance here. If it was

ever true that civil litigators knew how to conduct themselves in a more restrained fashion, the toothpaste is now out of the toothpaste tube. And it's not going back in.

The problem is in fact a microcosm of a far broader social dilemma. Our current political dialogues, such as they are, seem to have become more eristic than dialectical, where all are certain of their own rectitude and the perfidiousness of the other side, where instead of genuine open-mindedness we get mere impatient toleration, at best, of the opinions of others. No one seems to expect much sense, let alone fairness and good, from one's adversary, and just as certainly doesn't get it. It is a world of "rights," which are, after all, a form of congealed self-interest (*my* right to life, *my* right to liberty, and *my* pursuit of happiness), without a concomitant commitment to responsibility, moderation, and good manners. All that's left is law, which often proves impotent, not just because it is not sensibly enforced but because its sometimes unpleasant restraints are also insufficiently supported by a belief in its fundamental good sense or worthiness.

Sanctions—and Their Limits

Can the courts do anything to remedy the narrower problem? Maybe. But, just as in society generally, it is fraught to assume that one can enforce by rule what needs to be done as a matter of custom. Or, to put it in more familiar terms, you cannot legislate morality. A small application of sanctions can perhaps curb the worst misbehavior. There was a judge in Chicago who insisted on reading Rule 37 as it was written, awarding attorney fees against the losing side in every discovery dispute brought into his court. It didn't take the lawyers long to figure out that they needed to genuinely try to work it out, for fear that showing up in court might result in highly negative circumstances and great embarrassment before their client. At a minimum, they understood that positions that repeatedly risked sanctions by this judge were unlikely to be a winning strategy in his courtroom.

But there are limits to this approach in the current environment. First, there is the issue of the court's time. The whole point of the meet-and-confer process is to spare the courts the time necessary to oversee the lawyers. What good is it if, as things currently stand, the process eats up as much time as it is designed to save? The answer to this is that, as the Chicago judge showed, a little muscle, early applied, may have a more lasting effect. A few sanctions sprinkled here or there, not necessarily for every discovery motion but enough for a monetary penalty to be perceived as a genuine risk, may have an extremely salutary effect on the lawyers. But if only a few judges undertake the effort, surely they will find themselves outliers very soon, with parties frequently unfamiliar with the unusual circumstances of appearing before this or that judge or, even if informed, willing to risk it.

More is needed. Indeed, years of abuse of the officer-of-the-court requirement have allowed civil litigators to perfect their skills at making themselves appear reasonable when they are not. To reverse decades of such practiced misbehavior, civil litigators need to learn or be taught to think differently, recognizing that such conduct is not acceptable, let alone good. In law schools, in law firms, and in law courts, everyone needs to start taking seriously that a lawyer is an officer of the court, not just paying lip service to the notion, but giving it real substance, especially educating young lawyers to understand that their first obligation is to make the system run fairly and smoothly. Such a mantra will not by itself resist the pressures on these same neophytes from being told by their elders that they have to win at all costs, that lawyering is a business where success is everything, and that one must prove to one's clients that one is always tough, ruthless in fact, toward one's adversaries. But it's a start.

Second, courts generally must resist the temptation to treat every discovery or other dispute as one to which "a pox on both your houses" is an appropriate response. Sometimes it is true that both sides are to blame. But more often, there is someone acting improperly, and it behooves the courts to find out who. If the court does not do so, the bad actor not only gets away free but is not dissuaded from acting so again. He's emboldened to become a serial offender. A "pox" response is thus an invitation to bad conduct for the system as a whole, and it should seldom, if ever, cross the court's lips.

Finally, the use of sanctions for genuinely bad conduct ought not to be dismissed. Sure, it is not a full remedy, and there is plenty of scale for misuse and mistake. On the other hand, the scruples embedded in Rule 37, for example, should not be ignored either. If the courts were to take the time to be just a little bit more willing to punish demonstrably bad behavior, there would be a lot less of it. Sanctions cannot exist in a vacuum. There must be the proper education of the lawyers first and the careful scrutiny that a sanctions regime necessarily demands. But if the schools, the mentors, and the courts do their part, with the judges scrutinizing the behavior more carefully and applying sanctions judiciously, there is some reason for hope for better conduct subsequently.

Will it all work to restore fully the aspirational goals of the meet-and-confer process? Doubtful. At a minimum, though, these measures may retard the continuing slide into the dog-eat-dog world that civil litigation often seems on the verge, or perhaps in the midst, of becoming. Surely, they are a better response to that slide than the courts uttering their imprecations upon counsel or just giving in to what the basest instincts and ever-tempting bad behavior of the lawyers hath wrought. And wouldn't that be a blessing for both lawyers and the courts alike? ■