Motions to Compel:
10 Tips & Techniques for Getting What You Need Without Annoying the Judge

Rachel C. Hughey[1] *and Nicole M. Moen*[2]

1. Know the rules on discovery motions (a/k/a meet and confer!)

Most jurisdictions have rules that require how motions should be handled, including the form of any brief and any requirements that must be met prior to filing. For example, Federal Rule of Civil Procedure 37 requires that a motion to compel "must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action."[3] Some jurisdictions have further local rules relating to motions generally or motions to compel specifically.

In Minnesota Federal Court, Local Rule 7.1(a) requires, if possible, the parties to meet and confer prior to filing a motion such as a motion to compel:

> Meet-and-Confer Requirement. Before filing a motion other than a motion for a temporary restraining order or a motion under Fed. R. Civ. P. 56, the moving party must, if possible, meet and confer with the opposing party in a good-faith effort to resolve the issues raised by the motion. The moving and opposing parties need not meet in person.
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> (1) Meet-and-Confer Statement.
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> (A) Filing. Ordinarily, the moving party must file a meet-and-confer statement together with the motion that it relates to. But if the opposing party was unavailable to meet and confer before the moving party files its motion, the moving party must promptly meet and confer with the opposing party after filing the motion and must supplement the motion with a meet-and-confer-statement.
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> (B) Contents. The meet-and-confer statement must:
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> (i) certify that the moving party met and conferred with the opposing party; and
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> (ii) state whether the parties agree on the resolution of all or part of the motion and, if so, whether the agreed-upon resolution should be included in a court order.
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> (2) Subsequent Agreement of the Parties. After the moving party has filed a meet-and-confer statement, if the moving and opposing parties agree on the resolution of all or part of the motion that the statement relates to, the parties must promptly notify the court of their agreement by filing a joint stipulation.[4]

[1] Shareholder, Merchant & Gould P.C., Minneapolis, MN.
[2] Shareholder, Fredrikson & Byron, P.A., Minneapolis, MN.
[3] Fed. R. Civ. P. 37.
[4] D. Minn. L. R. 7.1(a).

The Minnesota Rules of Civil Procedure contain a similar requirement to meet and confer:

> The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action.[5]

Some judges have their own further standards requiring the meet and confer process or the form of any brief in support of a motion to compel.

Failure to abide by the rules can result in a number of unpleasant results, including termination of the motion, angering the judge, sanctions, or otherwise.[6]

2. Try to work it out first (but don't get played)

As discussed above, jurisdictions generally require the parties to meet and confer. Under both the Federal Rules and the Minnesota Federal Local Rules, there must be an attempt to meet and confer prior to filing a motion to compel. While not encouraged, courts have permitted parties to file motions to compel on the same day that the request to confer is made, as long as there is a further attempt to confer after the motion is filed.[7]

In Minnesota Federal Courts, the rules make clear that the form of the meet and confer need not be in person. Nor does it necessarily need to be over the phone, although that is certainly preferred. The District of Minnesota has permitted parties to confer via email.

It is not uncommon for the party against which a motion to compel is anticipated to try to drag out the meet and confer process, such as by seeking more time to investigate the issue or to discuss with their client, or indicating unavailability to discuss for a while, or by behaving as though they are considering the request. While the party seeking to file a motion to compel should certainly try to work it out with the opposing side, they should avoid allowing the deficient party to unduly delay the process. This can most easily be done by creating a strong record of their attempts to confer and setting a date by which the motion will be filed.

3. Create a record

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[5] Minn. R. Civ. P. 37.01(b).

[6] *See generally Duwenhoegger v. King*, No. 10-3965, 2012 U.S. Dist. LEXIS 63332, at *14 (D. Minn. Feb. 13, 2012) ("In the future, the parties are reminded that the Federal Rules of Civil Procedure and the Local Rules bearing on discovery must be followed unless otherwise ordered by the Court.").

[7] *See Edeh v. Equifax Info. Servs.*, LLC, 295 F.R.D. 219, 224 (D. Minn. 2013). *See also* Minn. L. R. 7.1(a)(1)(A) ("Ordinarily, the moving party must file a meet-and-confer statement together with the motion that it relates to. But if the opposing party was unavailable to meet and confer before the moving party files its motion, the moving party must promptly meet and confer with the opposing party after filing the motion and must supplement the motion with a meet-and-confer-statement.").

As discussed above, it is important to create a record of the meet and confer process for purposes of meeting the requirements of the rules. But it is also important to demonstrate to the court that the moving party has acted reasonably in trying to obtain whatever it is seeking to compel. Thus, the record should not just be of the meet and confer process, but also that it was done in a reasonable time and in a reasonable way. It should also be clear that the request was clear about what exactly was being sought. Thus, while oral conferences are fine, there should also be a written record (or transcripts of the oral communications) that may be included as exhibits to any motion to compel.

4. Have authority for what you ask for

Federal Rule of Civil Procedure 26(b(1) permits a party to discover "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case":

> Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.[8]

Rule 26(b) was recently amended, with the underlined material added. It remains to be seen how courts interpret this new language.

Minnesota Rule of Civil Procedure 26.02(b) contains similar requirements regarding proportionality:

> Discovery must be limited to matters that would enable a party to prove or disprove a claim or defense or to impeach a witness and must comport with the factors of proportionality, including without limitation, the burden or expense of the proposed discovery weighed against its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.[9]

Federal Rule of Civil Procedure 26(b)(2)(C)(iii) further limits the scope of discovery, by allowing the court to limit the requested discovery if the "proposed discovery is outside the scope permitted by Rule 26(b)(1)."[10] This is also a recent change, replacing the old standard

[8] Fed. R. Civ. P. 26(b)(1).
[9] Minn. R. Civ. P. 26.02(b).
[10] Fed. R. Civ. P. 26(b)(2)(C)(iii).

that "the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that . . . the burden or expense of the proposed discovery outweighs its likely benefit . . . ." Also, the court "must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that "the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive" or "the party seeking discovery has had ample opportunity to obtain the information by discovery in the action."[11]

Discovery of ESI is subject to additional restrictions in both the District of Minnesota and Minnesota State Courts. Federal Rule of Civil Procedure 26(b)(2)(B) limits discovery to "reasonably accessible" ESI:

> A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.[12]

Minnesota Rule of Civil Procedure 26.02(b) contains nearly identical language:

> A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost.[13]

In a best-case scenario, you have legal support in the form of actual case law (preferably from your jurisdiction) supporting your discovery requests.

5. <u>Make sure it matters</u>

As a general matter, judges do not like discovery motions. The parties are expected to behave as professionals and work through most discovery issues without court intervention. But judges understand that there will, from time to time, arise a legitimate dispute between the party that requires court intervention. So, it is best to evaluate whether the dispute really matters. Move on things you really need to win, and give up on the ones you do not.

6. <u>Make the request narrowly-tailored and specific</u>

[11] Fed. R. Civ. P. 26(b)(2)(C)(i)-(ii).
[12] Fed. R. Civ. P. 26(b)(2)(B).
[13] Minn. R. Civ. P. 26.02(b).

Parties often believe that when a court considers a motion to compel, the court will just split the difference between the parties' positions. That often motivates parties to take very extreme positions. That is not a strategically smart position to take.

Because a motion to compel may be one of the first chances you have to substantively interact with the court, it is not a good strategy to come in with an unreasonable position that is unlikely to win. A better approach is to make a narrow request that is likely to make you look reasonable with the court and place you in the best position to actually get what you need. A party is much more likely to be successful in compelling a specific and narrow request than it is a broad and vague request.

7. <u>See if the court will resolve it without a brief</u>

Some judges would prefer not to deal with a formal motion to compel and instead would prefer to handle the matter orally. This may be especially true in the state courts. So, before filing a formal brief and supporting motion papers, consider calling the judge's clerk to see if the judge would prefer to discuss the matter by phone without any motion papers being filed. The judge might also prefer some other procedures, such as an email from each side to chambers identifying the issue and response.

8. <u>Any brief should be short</u>

What is true for all briefs is especially true for discovery motions—courts are busy, and have limited time and patience. Briefs in support of motions to compel should be short and concise and get to the point.

9. <u>Avoid ad hominem attacks</u>

It can be particularly tempting in discovery disputes to attack your opponent or, more likely, your opponent's attorneys. Avoid the temptation. Judges have very little patience for personal attacks, which will diminish both the strength of your arguments and the court's respect for your side.

10. <u>Don't underestimate the importance of oral argument</u>

Many judges will not allow the parties to submit full written briefs for a motion to compel, and even when the court allows briefing, the court may conduct a telephonic conference with counsel on the issues beforehand. Under these circumstances, an "informal" telephonic conference may turn out to be a party's only opportunity to raise a potential motion to compel.

In addition, the fluid nature of discovery could make the issues and relief sought a moving target. For instance, at the beginning of a discovery dispute, a party may contemplate

bringing a motion to compel on three issues. Assuming the parties meet and confer both *before* and *after* the motion is filed, the parties may reach agreement on some of the original issues. In addition, new discovery issues may arise, that a party may want to bring to the court's attention.

Moreover, discovery disputes are inherently fact-specific. A discovery request that may be reasonable and routine for one party to address might pose an undue burden for another party. Coupled with issues and requirements specific to ESI, a party will need to be able to articulate why particular discovery is necessary and not subject to any other limitation or restriction.

For those reasons, judges expect a lot out of oral argument for motions to compel, and counsel would do well to prepare for oral argument accordingly. Counsel should be able to present the reasons for a motion to compel, and the relief sought, in a short and succinct manner, using plain language, and without technological jargon.