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The Benefits of Meet/Confer Process

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If there is one concept on which the committees, judges and practitioners populating the world of e-discovery agree, it is this: if conducted properly, the meet-and-confer process under Federal Rule 26(f) can reduce the number and severity of discovery disputes, resulting in enormous savings of time and money for litigants and the courts.

In suggesting that the meet-and-confer process does "more harm than good" by increasing discovery costs and delays, Christopher Boehning and Daniel J. Toal, the authors of "Are Meet-and-Confer Efforts Doing More Harm Than Good?" (NYLJ July 31) misstate the results of the studies they cite and contradict the opinions of experts who continue to urge cooperation and transparency earlier in the process as the best method for controlling the burden and expense of discovery.

Neither of the reports cited in the article supports the authors' suggestion that early discussion of e-discovery issues does more harm than good. The statistics quoted from the Federal Judicial Center study deal only with the frequency of Rule 26(f) conferences and the manner in which they were conducted, not the effects of a properly-conducted conference. The survey confirms that the meet-and-confer process is being underutilized but it in no way indicates that the mechanism itself, used correctly, is either ineffective or counterproductive.

Regarding the effectiveness of the meet-and-confer process, the authors cite recent survey results from the Seventh Circuit E-Discovery Pilot Program. As noted, the survey indicated that, in those cases where the pilot program had a perceived effect, those effects were "overwhelmingly positive." The executive summary of the report concluded with this takeaway: "The bottom line is that the [Program] Principles are perceived to result in more cooperation, more access to needed information and more fairness."

The authors rely heavily on the survey findings that, according to attorney participants, the pilot program resulted in more discovery disputes, longer discovery periods and increased costs. But the report also explains that the increase in discovery disputes was an expected and, to some extent, intended outcome of the program: "The Principles seek to encourage and create an incentive for earlier and more fulsome discussion of potentially thorny discovery issues because these issues are usually easier to resolve the earlier they are addressed." Moreover, according to the report, the increased costs were considered substantial in only a small percentage of cases and were perceived by the participants as an acceptable trade-off for the gains in cooperation,

access and fairness. Finally, the report states that the judges who participated in the pilot program reported fewer discovery disputes and speedier case resolutions.

Nevertheless, based on the survey finding that the Seventh Circuit pilot program resulted in more disputes and increased costs, the authors suggest that it is time to "step back and consider" whether the pilot program and similar initiatives undertaken by courts around the country to encourage cooperation between parties are, in fact, furthering the goals of Rule 26(f). The clear implication is that the primary purpose of the rule is to prevent disputes (even legitimate ones) and decrease litigation costs.

While these are surely important goals, the authors do not seem to accord any weight to the goals of increased cooperation between the parties, improved access to relevant information or greater fairness in litigation.

In 2006, when the Federal Rules were amended to require parties to include the subject of e-discovery in the meet-and-confer process and the Rule 16 scheduling conference with the judge, Judge Lee Rosenthal wrote: "The new amendments that provoked the least controversy, the expansion of the meet-and-confer under Rule 26(f) and the initial conference with the court under Rule 16, may turn out to be the most important. The amended meet and confer requirements serve crucial purposes: to identify potential problems early in litigation and to establish workable electronic discovery protocols."[1]

The purpose of the meet-and-confer is not solely to make litigation cheaper and faster; the value of the process should not be judged on those metrics alone. As the Seventh Circuit report makes clear, early discussion of e-discovery issues furthers the interests of justice through increased cooperation, access to information and overall fairness.

But experienced judges and practitioners also know that the Rule 26 meet-and-confer process can greatly reduce the costs and burdens of e-discovery if the parties and their lawyers are properly prepared and approach the process in a spirit of cooperation rather than gamesmanship. To the extent parties are failing to garner these benefits, the fault lies not in the rule.

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Endnote:

1. Lee H. Rosenthal, "A Few Thoughts on Electronic Discovery After Dec. 1, 2006, 116 Yale L.J." Pocket Part 167 (2006), http://thepocketpart.org/2006/11/30/rosenthal.html.