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FEDERAL E-DISCOVERY

Are Meet, Confer Efforts Doing More Harm Than Good?


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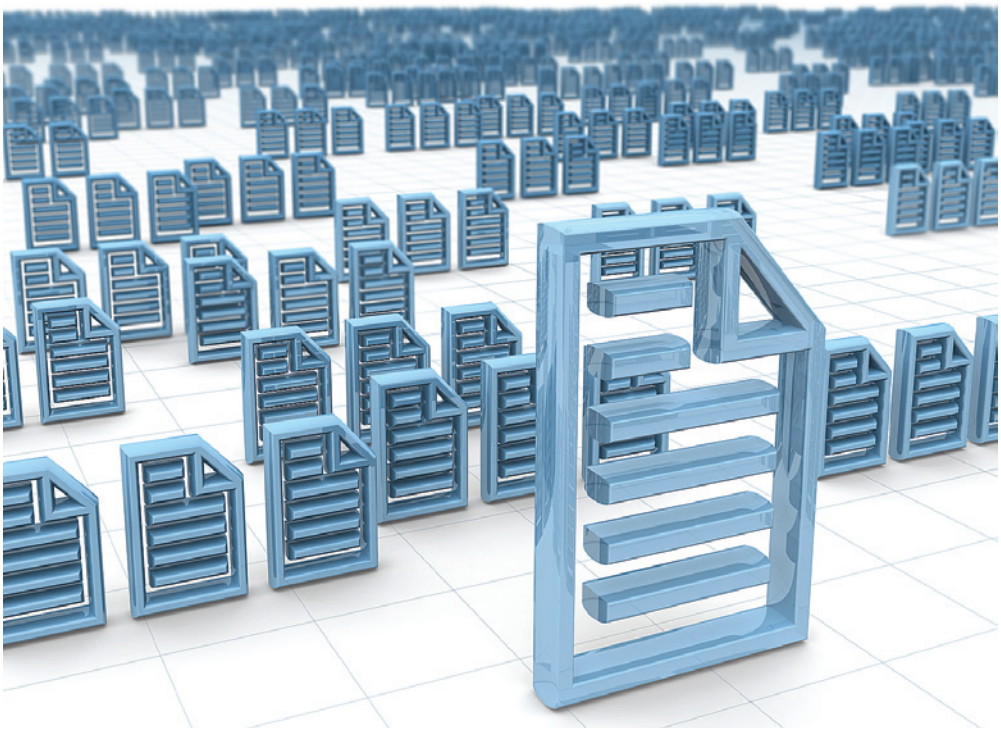
"When the parties do anticipate disclosure or discovery of electronically stored information [ESI], discussion at the outset may avoid later difficulties or ease their resolution."

So said the notes of the Advisory Committee that accompanied the e-discovery-related amendments to the Federal Rules of Civil Procedure on Dec. 1, 2006, specifically in reference to Rule 26(f), better known as the "meet-and-confer" rule. And that has been the received wisdom of e-discovery experts and commentators for some time. That central tenet has fueled a series of pilot projects and local rules—including in the Southern District of New York[1] and in New York State[2]—all designed to require lawyers to speak early and in great detail about all aspects of e-discovery and preservation.

Nearly six years later, the question must be asked: How effective has Rule 26(f) been? Are parties meeting and conferring as envisioned in the amended rules or are most meet-and-confers generally ineffective with respect to e-discovery? Is early discussion of e-discovery-related issues helping to avoid issues or leading to more of them? Have well-intentioned efforts to foster "cooperation" and discussion between parties actually been helpful?

The results of two recent surveys suggest that not only has the e-discovery meet-and-confer generally failed to meet the expectations of the Advisory Committee, but also that efforts to promote early, detailed discussion of e-discovery issues may actually lead to delay and an *increase* in e-discovery-related disputes between parties. In light of these surveys, perhaps it is time to reconsider whether early is always better and whether allowing lawyers to address e-discovery issues when they actually arise, as they do with most other aspects of the case, might encourage more focus on the merits and reduce the number of satellite disputes about e-discovery and preservation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Rule 26(f) Improvement Effort

FRCP 26(f), as amended on Dec. 1, 2006, requires the parties to a lawsuit to meet and confer at least 21 days before a scheduling conference or a scheduling order is due. In conferring, the parties must, among other things, discuss any issues about preserving discoverable information and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. This discovery plan must state the parties' views and proposals on topics, including:

- "the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues";
- "any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced"; and
- "any issues relating to claims of privilege or of protection as trial-preparation material, including—if the parties agree on a procedure to assert such claims after production—whether to ask the court to include their agreement in an order[.]"[3]

In the past few years, a number of efforts have been undertaken in support of Rule

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26(f) and the notion that cooperation and discussion between parties are key to reducing e-discovery disputes.

The Sedona Conference Cooperation Proclamation. The Sedona Conference is a think tank dedicated to moving the law forward on key "tipping point" issues, with a focus on e-discovery. "The Sedona Conference Cooperation Proclamation,"[4] issued in 2008, encourages a "paradigm shift"[5] in the attitudes toward the discovery process, in an effort "to facilitate cooperative, collaborative, transparent discovery."[6] The Proclamation recognizes that cooperation is consistent with zealous advocacy and is meant to discourage e-discovery brinkmanship and avert the notion that a case can be adjudicated on discovery issues instead of its merits. This Proclamation has been endorsed by over 100 state and federal judges.

As one of a number of publications to complement the Cooperation Proclamation, last year, the Sedona Conference published a "Resources for the Judiciary" document.[7] In this document, it suggests how judges can encourage cooperation between parties. Some suggestions related to improving the meet-and-confer include using the initial scheduling order to:

- encourage parties to assess the scope of preservation of ESI and the adequacy of their preservation efforts;
- suggest that each party identify a person particularly knowledgeable about the party's electronic information systems and who is prepared to assist counsel in the FRCP 26(f) meet-and-confer and later in the litigation;
- encourage the parties to consider any issues of privilege and potential inadvertent disclosure, and to direct them to Federal Rule of Evidence 502, as a potential resource;
- require the parties to meet and confer on e-discovery issues as early as possible; and
- direct the parties to report on any agreements and disagreements that resulted from the meet-and-confer.[8]

Southern District of New York Pilot Project and Recent Changes to New York Rules. Late last year, the Southern District of New York began an e-discovery pilot program, the Pilot Project Regarding Case Management Techniques for Complex Civil Cases. This 18-month project was implemented to "improve judicial case management"[9] and "reduce costs and delay"[10] in response to the federal bar's concerns about the high costs of litigating complex civil cases. The program shortens the timeline for certain actions, reduces motion practice, and flags issues requiring judicial intervention at an earlier stage in the litigation. It requires a very detailed "Joint Electronic Discovery Submission" for complex civil cases that involve ESI that will govern the management of e-discovery in the matter. Counsel must certify they are "sufficiently knowledgeable in matters relating to their clients' technological systems to discuss competently issues relating to electronic discovery."[11] Also, the submission must include the date(s) of meet-and-confer(s), provide detailed information on the areas of agreement, and list issues unresolved after the meet-and-confer process is completed.[12]

Recent changes to New York's Uniform Civil Rules of the Supreme and County Courts place similar requirements on parties to confer in detail about potential e-discovery issues prior to the preliminary conference and on counsel appearing at the conference to "be sufficiently versed in matters relating to their clients' technological systems to discuss competently all issues relating to electronic discovery[.]"[13]

Seventh Circuit E-Discovery Pilot Program. The most ambitious e-discovery pilot program to date is the Seventh Circuit E-Discovery Pilot Program, a multi-phase, multi-year program "to develop, implement, evaluate, and improve pretrial litigation procedures that would provide fairness and justice to all parties while seeking to reduce the cost and burden of electronic discovery consistent with Rule 1 of the Federal Rules of Civil Procedure."[14] The Program focuses on the development of "Principles Relating to the Discovery of Electronically Stored Information" and a Proposed Standing Order.

> In conferring, the parties must, among other things, discuss any issues about preserving discoverable information and develop a proposed discovery plan.

Phase One of the E-Discovery Pilot Program ran from October 2009 through March 2010, and involved 13 judges from the Northern District of Illinois implementing the Principles in 93 civil cases. At the end of this phase, a survey was completed by program participants and, based on lessons learned in the phase, modifications were made to the Principles prior to Phase Two.[15]

Phase Two of the Program ran from May 2010 through May 2012, with 40 participating judges and 296 cases from across the Seventh Circuit. Another survey followed this phase.[16] One of the primary principles of the program, Principle 2.01, implemented a duty to meet and confer regarding e-discovery-related issues and to identify disputes for early resolution. Prior to the meet-and-confer, attorneys for each party were required to "review and understand" their client's IT systems, and the court had the ability to impose sanctions if counsel or party has failed to cooperate or participate in good faith.[17]

Principle 2.01 further required that parties discuss the identification of relevant ESI, including the identification and filtering of an initial subset of ESI "most likely to contain the relevant and discoverable information," the scope of discoverable ESI to be preserved, the format for preservation and production of ESI, the potential for phased discovery to help reduce costs, and "the potential need for a protective order and any procedures to which the parties might agree for handling inadvertent production of privileged information and other privilege waiver issues pursuant to Rule 502(d) or (e) of the Federal Rules of Evidence."[18] The Principles also specify, in detail, what the parties should resolve at the 26(f) conference with respect to identifying, de-duplicating, and filtering potentially relevant ESI, including using advanced techniques and discussing the form of production.[19]

These initiatives all stem from the same philosophy: Requiring parties to discuss e-discovery and preservation early in the case will reduce the number of disputes about these issues.

Measuring Success

The results of a recent survey by the Federal Judicial Center and the latest report from the Seventh Circuit E-Discovery Pilot Program provide some hard data on the success of the Rule 26(f) meet-and-confer and a target effort to improve its quality. Those results appear to call into question the wisdom of requiring parties to engage early and in detail about e-discovery and preservation.

Federal Judicial Center Survey. The Federal Judicial Center is the research and education agency for the federal courts; it regularly sends surveys to lawyers to gain information on key practice issues. In late 2011, it conducted its "Early Stages of Litigation Attorney Survey"[20] of almost 10,000 attorneys in closed civil cases and asked questions about the Rule 26(f) conference, including how it was conducted and how effective it was. To ensure unbiased results the survey was sent equally to attorneys representing parties on both sides of the caption. Over 3,500 responses were received, a 36 percent response rate.[21]

The report on the survey, released in March, provided some metrics on the incidence of what are called "drive by" meet-and-confers, which start and end quickly and that often do little to address the e-discovery issues present in any given case.

The survey found that 72 percent of respondents indicated they met with opposing counsel to plan for discovery. Yet only 40 percent of those who had a meet-and-confer discussed discovery of ESI, and only 60 percent of that number discussed preservation obligations.[22]

The overwhelming majority of those meetings—86 percent—occurred by telephone or videoconference, with only 9 percent of the meetings occurring in person, and 25 percent occurring by correspondence/email (multiple methods could be indicated).[23] (Yes, it seems some lawyers believe that a requirement that they "meet and confer" can be satisfied by an email exchange.) And importantly, almost

three-quarters—73 percent—of the respondents indicated that they were able to complete the meeting in a single conversation that lasted only 30 minutes or less—including 19 percent of that number whose meet-and-confer lasted 10 minutes or less.[24]

Considering the myriad, often complex issues related to managing e-discovery, it is difficult to imagine a substantive meet-and-confer (as likely envisioned by the drafters of Rule 26(f)) taking place in 30 minutes or less, much less one taking place through an email exchange. Indeed, across all survey respondents, only 25 percent discussed ESI issues and only 13 percent discussed preservation.[25] In short, it seems that lawyers (at least those not in a pilot project) are opting out of the e-discovery discussion altogether. Is that a bad thing? For that answer, it is useful to look at the results of the Seventh Circuit's survey.

Seventh Circuit E-Discovery Pilot Program—Phase Two Survey. As part of the Seventh Circuit E-Discovery Pilot Program, participants respond to surveys at the end of each phase of the program. According to the Phase Two Final Report, the results of the survey after Phase Two indicate that "[i]n those cases in which the Principles did have a perceived effect those effects were overwhelmingly positive with respect to cooperation and ability to resolve disputes amicably, ability to obtain relevant documents and zealously represent clients, and fairness."[26] However, according to the report, in these cases, "the consensus view among attorneys appears to be that the Principles resulted in more discovery disputes, more discovery on discovery, longer discovery periods, and greater expense for discovery and the litigation in general."[27]

The survey results appear to compel the conclusion that early, detailed discussion of e-discovery issues may be leading to more disputes about discovery and greater expense and delay. In short, exactly the opposite of what e-discovery experts have been preaching.

Conclusion

The available data—and anecdotal evidence—about meet-and-confers seem to suggest that they are not effective when measured against the intent of the Advisory Committee. Many attorneys are ignoring the requirement altogether. And those that are involved in a more intensive version of a 26(f) meet-and-confer dictated by one of the various pilot projects, such as that in the Seventh Circuit, appear to be finding that these early discussions are increasing the number of disputes and the costs of litigation, and leading to greater delay in getting to the merits. Why is this the case? And why, if this is a fair read of the survey results, do more and more courts seem to be reflexively adopting ever more onerous e-discovery pilot projects?

One potential reason for the survey responses is the timing of the 26(f) meet-and-confer. In some cases, it may be too early in the life of a matter to discuss e-discovery-related issues such as those that will surface after the exchange of document requests. The presence of competing document requests often has the effect of encouraging cooperation. Most lawyers recognize that if they pick a fight on a discovery issue their adversary is likely to identify another point of disagreement to raise with the court. Discussing e-discovery issues at such length at an early stage in the litigation may eliminate this natural counterweight.

> The Southern District e-discovery pilot program was implemented to "improve judicial case management" and "reduce costs and delay."

Some judges appear to share this view. Those judges largely ignore the required discussion topics enumerated in Rule 26(f), focus on setting a discovery schedule, and send a message that they will have little appetite for satellite disputes over e-discovery and preservation. The fact that many judges adopt this approach may explain the survey responses suggesting that practitioners not in a pilot program are largely going through the motions when they do meet and confer.

The well-intentioned and carefully designed e-discovery pilot programs and similar efforts to improve the quality of discussion and cooperation between parties may be imposing requirements on parties that are too extensive at an early stage of a litigation. Perhaps it is time for those overseeing such programs and promoting such programs to step back and consider—based on feedback from participants in the Seventh Circuit—whether the expansive requirements are indeed furthering the goal of Rule 26(f). Too much engagement on e-discovery issues, as opposed to the merits of a matter, may lead to more issues, more discovery on discovery, more disagreements, and more court involvement. Ideally, parties will engage on key e-discovery and preservation issues when and if the need arises. Lawyers have little trouble finding issues to fight over. Forcing lawyers to discuss in detail issues they would otherwise skip over at the outset of a litigation may not be the best way to reduce disagreement and foster cooperation.

1. In re Pilot Project Regarding Case Management Techniques for Complex Civil Cases, http://www.nysd.uscourts.gov/rules/Complex_Civil_Rules_Pilot.pdf.
2. N.Y. Ct. Rules, §202.12, §202.70(g) (Rule 1, Rule 8).
3. Fed. R. Civ. P. 26(f).
4. http://thesedonaconference.org/cooperation-proclamation.
5. Id. at 3.
6. Id. at 1.
7. http://thesedonaconference.org/publication/sedona-conference%C2%AE-cooperation-proclamation-resources-judiciary.
8. Id. at 12.
9. SDNY Implements Innovative Pilot Program to Improve the Quality of Judicial Case Management in Complex Civil Cases, http://www.nysd.uscourts.gov/file/news/complex_civil_case_pilot.
10. Id.
11. In re Pilot Project Regarding Case Management Techniques for Complex Civil Cases, 19, http://www.nysd.uscourts.gov/rules/Complex_Civil_Rules_Pilot.pdf.
12. Id. at 20-27.
13. N.Y. Ct. Rules, §202.12(b), §202.70(g) (Rule 1).
14. Seventh Circuit Electronic Discovery Pilot Program, http://www.discoverypilot.com/about-us.
15. Seventh Circuit Electronic Discovery Pilot Program Final Report On Phase Two, 1, http://www.discoverypilot.com/sites/default/files/Phase-Two-Final-Report-Appendix.pdf.
16. Id. at 4.
17. Id. at 74.
18. Id. at 74-75.
19. Id. at 84-97.
20. http://www.fjc.gov/public/pdf.nsf/lookup/leeearly.pdf/$file/leeearly.pdf.
21. Id. at 1.
22. Id.
23. Id. at 3-4.
24. Id. at 10.
25. Id. at 5.
26. Seventh Circuit Electronic Discovery Pilot Program Final Report On Phase Two, 78.
27. Id. at 79.