

**NEW YORK STATE BAR ASSOCIATION
COMMERCIAL & FEDERAL LITIGATION SECTION
REPORT ON PROPOSED AMENDMENTS TO
FEDERAL RULES OF CIVIL PROCEDURE
1, 4, 16, 26, 30, 31, 33, 34, 36, 37, 84 AND APPENDIX OF FORMS**

I. INTRODUCTION

The Judicial Conference Committee on Rules of Practice and Procedure has requested comments on proposed amendments to Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, 37, 84, and Appendix of Forms of the Federal Rules of Civil Procedure. The proposed amendments and related discussion are set forth in the Memorandum of the Advisory Committee on Civil Rules (“Advisory Committee”), dated May 8, 2013, as supplemented June 2013 (“Advisory Committee Memo”).¹ Although the proposed amendments are intended as a “package” designed “to reduce cost and delay,” they are “not interdependent in the sense that all, or even most, must be adopted to achieve meaningful gains.” Advisory Committee Memo at 259, 270. Rather, the Advisory Committee encourages that each proposed amendment “be scrutinized and stand, be modified, or fall on its own.” *Id.* at 270.

This report sets forth the comments by the Commercial and Federal Litigation Section of the New York State Bar Association (the “Section”) to the proposed amendments.²

II. SUMMARY

The Section supports many of the proposed amendments, but there are other amendments that it cannot support because, after careful study, it has concluded they are not warranted or will

¹ The Advisory Committee Memo forms part of the Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure, available online at <http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf>. All page citations herein to the Advisory Committee Memo are based upon this online version.

² Opinions expressed are those of the Section preparing this report and do not represent those of the New York State Bar Association unless and until the report has been adopted by the Association’s House of Delegates or Executive Committee.

not achieve their proposed objective. As discussed below, the Section supports the proposed amendments to Rules 4, 16, 26, 34, 37, 84, and Rule 84 Official Forms (and a related amendment to Rule 4 regarding Official Forms 5 and 6), although the Section has made suggestions with respect to certain of those proposed amendments.

The Section does not support the proposed amendments to Rules 1, 30, 31, 33 and 36. Although the Section agrees that cooperation among parties should be the norm, if Rule 1 is to be amended to encourage cooperation, it should be done explicitly and not indirectly through a comment in the Advisory Committee Note to the amended Rule. While including the concept of proportionality in the scope of discovery will be salutary in all cases, reducing or imposing presumptive limits on depositions (Rules 30, 31), and interrogatories (Rule 33), and imposing presumptive limits on requests to admit (Rule 36) would not solve any problem that exists in the majority of cases and should not apply to the complex cases where discovery will usually exceed those limits. Instead, courts may rely on the proportionality factors of proposed Rule 26(b)(1) during a Rule 16 conference to impose suitable discovery limitations on a case-by-case basis.

Although the Section generally supports the proposed amendments to Rule 37, certain standards articulated in the proposed rule require clarification. With respect to the imposition of sanctions under proposed Rule 37(e)(1), the Rule should impose a rebuttable presumption of substantial prejudice against a party who acts willfully or in bad faith to spoliage material. “Willfulness” should be defined as intentional or reckless conduct sufficiently unreasonable so as to render harm likely. “Actions,” for purposes of Rule 37(e)(1), should be defined to include omissions; this is a particularly important change in light of the role automation plays in the electronic storage of information. Also, the prefatory language in proposed Rule 37(e)(2) should explicitly direct courts to impose the “least curative measure or sanction” necessary to repair prejudice arising from lost information.

III. PRIOR EFFORTS

A conference at Duke Law School in May 2010 (the “Duke Conference”) was the impetus for the proposed rule changes (except those relating to Rule 84 and the Appendix of Forms). Advisory Committee Memo at 259. Among other things, participants at the Duke Conference “urged the need for increased cooperation; proportionality in using procedural tools, most particularly discovery; and early, active judicial case management.” *Id.* The consensus was that early involvement by judges would enable “early definition of the issues that are important to the resolution of the litigation, whether that resolution is by motion, settlement, or trial.” Hon. John G. Koeltl, *Progress in the Spirit of Rule 1*, 60 Duke L. Rev. 537, 542 (2010). Early judicial involvement would also assure that proceedings are conducted in such a way that their costs are proportionate to the stakes of the litigation. *Id.*

Many of the ideas presented at the Duke Conference were not new. For example, a six-hour limitation on depositions was first proposed and considered in 1991. *See* Richard Marcus, *Discovery Containment Redux*, 39 BOSTON COLLEGE L. REV. 747, 767, n.111 (1998). The six-hour limit on depositions was not adopted. *Id.* at 767. The criticisms against it were varied, and included the fear that a timekeeper would be needed to measure colloquy, a concern over problems that would arise from dividing time between counsel, an expectation that the reduction in time would increase motion practice, and a suspicion that it would encourage expert witnesses to stonewall *Id.* at n. 111. In 2000, the current presumptive durational limit of seven hours was added in an effort to avoid overly long depositions. 2000 Advisory Committee Notes on Amendment of Rule 30(d).

Similarly, amending Rule 26 to narrow the scope of discovery was first advanced by a special committee of the American Bar Association in 1977. *Id.*, at 754. This effort was later abandoned for lack of support; the criticisms launched against the proposal caused more modest

proposals to be considered, but those modest proposals were viewed as too inconsequential to be effective. *Id.* at 754-60. The Section renewed the suggestion to amend Rule 26 in 1989, but the Advisory Committee was not receptive. *Id.* at 775 (citing Committee on Discovery, N.Y. State Bar Ass'n, Section on Commercial and Fed. Litig., *Report on Discovery Under Rule 26(b)(1)*, 127 F.R.D. 625, 634-638 (1989)).

The rationale for the proposed amendments regarding discovery – limiting discovery abuse and attendant costs – is a concern that has been articulated since the adoption of the Federal Rules of Civil Procedure in 1938:

- In commenting on the Advisory Committee's 1936 preliminary draft of the federal rules, Judge Edward Finch (New York Court of Appeals) warned that the discovery provisions would “increase so-called speculative litigation or litigation based on suspicion rather than facts, with the hope that such fishing may reveal a good cause of action as alleged or otherwise” Edward R. Finch, *Some Fundamental and Practical Objections to the Preliminary Draft of Rules of Civil Procedure for the District Courts of the United States*, 22 A.B.A.J. 809, 809 (1936). Parties asserting claims would be given so many tools for discovery, Judge Finch warned, “that it will be cheaper and more to the self interest of the defendant to settle for less than the cost to resist.” *Id.*, at 810.
- “Large expense in depositions can be a double-barreled evil: it is *per se* repugnant to the principle of just, speedy and *inexpensive* determination of cases; and it operates to permit counsel to exert pressure for settlement under the threat of taking depositions which the adverse party can ill afford.” Comment, *Tactical Use and Abuse of Depositions under the Federal Rules*, 59 YALE L.J. 117, 126-127 (1949). Among the measures proposed by the author to curb the abuses was (i) “the inclusion of expense as a basis for protective orders” and (ii) “an amendment to Rule 30 requiring leave of court for depositions lasting more than 5 days, and permitting the court at its discretion to limit the scope and/or length of the deposition, or to appoint a master to supervise the deposition.” *Id.* at 138.
- “Lawyers critical of discovery said that they were constantly going through their files to prepare for discovery proceedings and that the resulting expense in many small cases was out of proportion to the value.” William H. Speck, *The Use of Discovery in United States District Courts*, 60 YALE L.J. 1132, 1148 (1951).

- Commenting that “free and full disclosure of relevant, non-privileged information and evidence . . . meets with resistance in practice,” a Columbia Law School professor made this observation:

Difficulty creeps in because however dedicated the lawyers may be to the principle of full disclosure, their clients must also be considered. Laymen do not view with unbounded enthusiasm the prospect of expending their time and money in pretrial procedures that are expressly designed to produce information or evidence to help their adversary’s case. And the longer and costlier the proceedings, the more irked the client becomes. Sometimes sooner, sometimes later, the client’s attitude is translated into his lawyer’s actions, and he resists his adversary’s discovery demands. Even without prodding from clients, many lawyers, prone to cooperate as a matter of principle, become resentful and balk at what they deem excessive intrusion upon their client’s time, money, privacy or patience.

Maurice Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLUMBIA L. REV. 480, 482 (1958).

IV. ANALYSIS OF THE PROPOSED AMENDMENTS

A. RULE 1

Proposed Rule 1 reads as follows:

* * * [These rules] should be construed, ~~and~~ administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.³

The three goals of the Federal Rules of Civil Procedure stated in Rule 1 – “the just, speedy, and inexpensive determination of every action and proceeding” – have been described by the Supreme Court as “the touchstones of federal procedure.” *Brown Shoe Co. v. United States*, 370 U.S. 294, 306 (1962). As originally envisioned by the Advisory Committee, the proposed amendment to Rule 1 would have added “cooperation” as a fourth goal. “Participants at the Duke Conference regularly pointed to the costs imposed by hyperadversary behavior and wished for some rule that would enhance cooperation.” Advisory Committee Memo at 259; *see also*

³ Throughout this Report, additions are signified by underlining, and deletions by ~~strikeouts~~.

The Sedona Conference Cooperation Proclamation, *available at* www.thesedonaconference.org (last accessed September 24, 2013).

However, imposition of an explicit “direct and general duty of cooperation” was abandoned. The Advisory Committee found that, because “[c]ooperation is an open-ended concept . . . [i]t is difficult to identify a proper balance of cooperation with legitimate, even essential adversary behavior. A general duty might easily generate excessive collateral litigation similar to the experience with an abandoned and unlimited version of Rule 11.” *Id.* at 260. Such collateral litigation would involve determining whether counsel “adequately” cooperated, or whether counsel was simply a zealous advocate. In this way, if a duty of cooperation were imposed, “there may be some risk that a general duty of cooperation could conflict with professional responsibilities of effective representation.” *Id.*

Instead, the proposed amendment to Rule 1 is termed a “modest addition,” which the Advisory Committee suggested would ensure that the “parties are made to share responsibility for achieving the high aspirations expressed in Rule 1” Advisory Committee Memo at 270. It is the Advisory Committee’s intention that Rule 1, as amended, “will encourage cooperation by lawyers and parties directly, and will provide useful support for judicial efforts to elicit better *cooperation* when the lawyers and parties fall short.” *Id.* (emphasis added). The Committee conceded that it “cannot be expected to cure all adversary excesses,” but the amendment “will do some good.” *Id.*

The Advisory Committee also added a Note, which specifically confirms that “[e]ffective advocacy is consistent with – and indeed depends upon – cooperation and proportional use of procedure.” The Advisory Committee Note seems appropriate and is consistent with the other proposed amendments.

But the form of the amendment as proposed by the Advisory Committee renders it arguably unnecessary. The last amendment to Rule 1 (other than stylistic changes) was in 1993, when the words “and administered” were added to the second sentence. According to the Advisory Committee Notes that accompanied that change, the amendment was intended:

to recognize the *affirmative duty of the court* to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay. As officers of the court, *attorneys share this responsibility with the judge* to whom the case is assigned.

1993 Advisory Committee Notes on Rule 1 (emphasis added).

Thus, since at least 1993, it should have been understood that both the courts and the parties have the responsibility of securing the just, speedy and inexpensive determination of every action. *See also Kenney v. California Tanker Co.*, 381 F.2d 775, 777 (3d Cir. 1967) (courts have that responsibility); *Smarter Agent, LLC v. Mobilerealtyapps.com, LLC*, 889 F. Supp. 2d 673, 677 (D. Del. 2012) (same). As a result, it does not appear that the proposed “modest addition” to Rule 1 is needed or will effect any change.

If the purpose of the proposed change is to achieve greater cooperation by counsel and the parties, then the proposal does not go far enough. To effectively impose a duty of cooperation, the duty needs to be stated explicitly in the Rule. It is not sufficient to simply state in the Advisory Committee Memo that it is the Advisory Committee’s hope that, as amended, “Rule 1 will encourage cooperation by lawyers and parties directly, and will provide useful support for judicial efforts to elicit better cooperation . . .” *Id.* It is also not enough to say in the proposed Advisory Committee Note that, “Rule 1 is amended to emphasize that . . . the parties share the responsibility to employ the rules [to secure the just, speedy and inexpensive determination of every action].” Advisory Committee Memo at 281.

The Advisory Committee’s desire to require cooperation among counsel is laudable and the Section strongly supports the goal. Indeed, it complements the mandate of the Southern and Eastern Districts of New York that counsel cooperate, at least as to discovery. Moreover, the Sedona Conference Cooperation Proclamation, www.thosedonaconference.org, first issued in 2008, has been endorsed (as of 2012) by scores of federal and state court judges. Many judicial opinions have expressly referenced the Proclamation. *See, e.g., Kleen Products LLC v. Packaging Corp. of Am.*, No. 10-5711, 2012 WL 4498465, at *19 (N.D. Ill. Sept. 28, 2012) *objections overruled in* 2013 WL 120240 (N.D. Ill. Jan. 9, 2013); *Apple Inc. v. Samsung Electronics Co. Ltd.*, No. 12-0630, 2013 WL 1942163, at *3, n.22 (N.D. Cal. May 9, 2013); *U.S. Bank Nat. Ass’n v. PHL Variable Ins. Co.*, No. 12-6811, 2013 WL 1728933, at *7 (S.D.N.Y. Apr. 22, 2013). In addition, encouraging (rather than requiring) cooperation would likely avoid ancillary motion practice regarding satisfaction of the standard. Nonetheless, the proposed “modest addition” does not seem any more likely to achieve its goal of encouraging cooperation than the previous modest addition in 1993, even with the proposed reference in the Advisory Committee Note. To enshrine cooperation as a touchstone of federal procedure, it needs to be made explicit in Rule 1. If such were to occur, the litigation that would ensue over compliance might very well be worth it. Here, however, the Section does not support the proposed amendment to Rule 1.

B. RULE 4

Proposed Rule 4(m) reads as follows:

* * *

(m) **TIME LIMIT FOR SERVICE.** If a defendant is not served within ~~120~~ 60 days after the complaint is filed, the court * * * must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. * * *

By reducing the time to serve a summons and complaint from 120 days to 60 days, the proposed amendment would “get the action moving in half the time.” Advisory Committee Memo at 261. As the Advisory Committee noted, “[t]ime is money” and the change would address the “commonly expressed view that four months to serve the summons and complaint is too long.” *Id.* As the Advisory Committee has further pointed out, “delay is itself undesirable.” *Id.* Along with the amendments to Rule 16 governing scheduling orders, this amendment is intended to “reduce delay at the beginning of litigation.” *Id.* at 282.

The Section supports the proposed change to Rule 4(m) for the reasons given by the Advisory Committee.

The Section, however, suggests that the Advisory Committee Note explicitly state that extensions of time under the “good cause” exception should be “liberally granted for the sake of better overall efficiency,” *see* Advisory Committee Memo at 262, and that the proposed amendment is not intended to effect any change in the discretion courts currently have to grant extensions even in the absence of “good cause.” *See Meilleur v. Strong*, 682 F.3d 56, 61 (2d Cir. 2012)(under Rule 4(m), “district courts have discretion to grant extensions, and may do so even in the absence of ‘good cause’,” (citations omitted)); Advisory Committee Notes to 1993 Amendment of Subdivision (m) of Rule 4 (“The new subdivision. . .authorizes the court to relieve a plaintiff of the consequences of an application of this subdivision even if there is no good cause shown”); 4B C. Wright & A. Miller, *Fed. Prac. & Proc.: Civil 3d* § 1137, pp. 364-69 (2002). The Section further suggests that the Advisory Committee Note include, as an example of when “good cause” may be found, multi-party actions in which it may be difficult to identify, locate and serve all defendants in two months (possibly excepting cases where fewer than all defendants must be served via the Hague Convention).

RULE 16

Proposed Rule 16(b) reads as follows:

* * *

(b) SCHEDULING.

(1) *Scheduling Order.* Except in categories of actions exempted by local rule, the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference ~~by telephone, mail, or other means.~~

(2) *Time to Issue.* The judge must issue the scheduling order as soon as practicable, but ~~in any event unless the judge finds good cause for delay the judge must issue it~~ within the earlier of ~~120~~ 90 days after any defendant has been served with the complaint or ~~90~~ 60 days after any defendant has appeared.

(3) *Contents of the Order.* * * *

(B) *Permitted Contents.* The scheduling order may: * * *

(iii) provide for disclosure, ~~or~~ discovery, or preservation of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502;

(v) direct that before moving for an order relating to discovery the movant must request a conference with the court;

[present (v) and (vi) would be renumbered] * * *

As discussed below, the Section supports the proposed amendments to Rule 16(b).

1. Proposed Amendment to Rule 16(b)(2)

Rule 16(b) was first amended in 1983 to include changes based on a widely-held view that is reiterated in the current proposed amendments:

[W]hen a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices.

1983 Advisory Committee Note. In keeping with that view, the 1983 amendments to Rule 16(b) made a scheduling order mandatory (albeit subject to certain local exemptions) and included a number of items for which the parties were to set a timetable, including joinder and amendment of the pleadings, motion practice and completion of discovery.

Rule 16(b) was next amended in 1993, when the time for entry of the initial scheduling order was changed from 120 days from the filing of the complaint (which may have coincided with the outside deadline for service of the summons and complaint and thus may have prevented involvement by the defendant) to 90 days after a defendant's appearance or 120 days after service. The change was intended "to alleviate problems in multi-defendant cases" and promote participation by all named parties in the scheduling process. 1993 Advisory Committee Notes.⁴

The proposed change to Rule 16(b)(2) would shorten the time for the court to issue a scheduling order unless the court found "good cause" for delay. The Section agrees that "[t]his change, together with the shortened time for making service under Rule 4(m), will reduce delay at the beginning of litigation," and this is a worthy objective. Advisory Committee Memo at 287.

There is concern the "good cause" exception will be routinely applied in cases involving parties with complex infrastructures and complex discovery issues. In such cases, shortening the time for issuing a scheduling order will mean that the parties and the court will be unable to

⁴ In light of the current proposed amendment's emphasis on a Rule 16(b) hearing, it is interesting that the Advisory Committee observed, more than twenty years ago, that "in view of the benefits to be derived from the litigants and a judicial officer meeting in person, a Rule 16(b) conference should, to the extent practicable, be held in all cases that will involve discovery." 1993 Advisory Committee Notes

meaningfully address these complex issues at the Court conference, thereby undercutting the very purpose of the proposed amendment.

Nevertheless, the Section supports the proposed amendment provided the “good cause for delay” language is adopted, since there are undoubtedly cases in which a delay in issuing the scheduling order is warranted, as the Advisory Committee has recognized. Advisory Committee Memo at 261. The “good cause for delay” exception provides the court with necessary flexibility if more time is needed. The “good cause for delay” exception appropriately addresses “cases in which it is not feasible to prepare for a meaningful scheduling conference on an accelerated schedule,” including, for example, because the case is “inherently too complex to allow even a preliminary working grasp of likely litigation needs in the presumptive times allowed.” Advisory Committee Memo at 262; *see also id.* at 287 (“[A] new provision recognizes that the court may find good cause to extend the time to issue the scheduling order. In some cases it may be that the parties cannot prepare adequately for a meaningful Rule 26(f) conference and then a scheduling conference in the time allowed. Because the time for the Rule 26(f) conference is geared to the time for the scheduling conference or order, an order extending the time for the scheduling conference will also extend the time for the Rule 26(f) conference.”) It also appropriately addresses concerns expressed by the United States Department of Justice (“DOJ”), as to the time DOJ often needs to respond in litigation against the government. *Id.* at 262. To the extent shortening the time period might cause any problems in multi-defendant cases where one or more of the parties are not served until close to the end of the 60-day period, the Section believes that the “good cause” exception should alleviate any problems. The Section suggests that the Advisory Committee Note include as an example of when “good cause” may be found to exist, multi-defendant actions where one or more of the defendants were not served until close to the 60-day deadline and would be prejudiced if an extension were not granted.

2. Proposed Amendment to Rule 16(b)(1)(B)

The proposed deletion from Rule 16(b)(1)(B) of “by telephone, mail, or other means” is intended to implement the Advisory Committee’s conclusion that “an actual conference by direct communication among the parties and the court is very valuable.” Advisory Committee Memo 262 (“if there is to be a scheduling conference. . . it should be by direct communication; ‘mail, or other means’ are not effective.’ ”). The proposed Advisory Committee Note would state: “A scheduling conference is more effective if the court and parties engage in direct simultaneous communications. The conference may be held in person, by telephone, or by more sophisticated electronic means.” *Id.* at 286-87.

The Section agrees that a scheduling conference is more effective if the court and the parties engage in direct simultaneous communication. In the Advisory Committee Memo, at 261, the Advisory Committee noted that the proposed amendments address a “perception that the early stages of litigation often take far too long.” *Id.* at 261. Inefficient and ineffective communication among parties is often the hallmark of unnecessarily delayed or unreasonably expensive proceedings. *See IOWI, LLC v. Monaco Coach Corp.*, No. 07-3453, 2011 WL 2038714, at *1 (describing the party's inability to agree to a search methodology "despite the Court's repeated directives to meet and confer."); *S. De R.L. v. V. Ships Leisure Sam*, No. 09-234-11-CIV, 2011 WL 181439, at *6 (S.D. Fla. Jan. 19, 2011) (noting that the discovery dispute between the parties was caused by "the parties' mutual failure to communicate and work together in a good faith effort to resolve the areas of dispute").

E-discovery-specific disagreements, which can quickly spin out of control and impede the just, speedy, and inexpensive resolution of a matter, should benefit significantly from this amendment requiring direct communication. Issues related to information governance, network infrastructure, preservation efforts, data collection methodology, processing specifications, the

nuances of metadata, production format, the use of advanced technology, and more may present counsel with unfamiliar challenges. Such challenges often manifest themselves in more pugilistic behavior as attorneys may be more willing to fight or use delaying tactics than address a novel issue. This amendment will eliminate any tactical advantage or unnecessary delay associated with leveraging the "mail, or other means" as a way to discuss complex discovery issues.

We believe that the scheduling conference is most effective if in person, but we recognize that there may be good reasons, such as geography or limited stakes in the case, that mitigate against the need for an in person meetings. Therefore, the Section supports the proposed amendment to Rule 16(b)(1)(B).

The Advisory Committee rejected a proposal that would require an actual scheduling conference in all actions, except those in exempted categories, because there “are cases in which the judge is confident that a Rule 26(f) report prepared by able lawyers provides a sound basis for a scheduling order without further ado.” Advisory Committee Memo at 262. The Section agrees.

3. Proposed Amendments to Rule 16(b)(3)

The Section supports the three proposed amendments to Rule 16(b)(3). By explicitly referring to the preservation of electronically stored information and agreements reached under Rule 502 of the Federal Rules of Evidence (“Rule 502”), the proposed amendments focus litigants at an early stage on these useful subjects for discussion and possible agreement. Advisory Committee Memo at 263. The Section supports the proposed amendment that a court may require a pre-motion conference for discovery motions, but also endorses leaving that decision to the discretion of the court.

The 2006 amendments to Rule 16(b) included among the permitted contents of the scheduling order “disclosure or discovery of electronically stored information.” *See* Rule 16(b)(3); 2006 Advisory Committee Note. The proposed amendment would now specifically permit inclusion of the “preservation” of electronically stored information. This proposed amendment, along with the proposed amendment to Rule 26(f)(3)(c), would close the loop in that parties would clearly be on notice to address preservation issues early and the court would be available to address those efforts. By amending Rule 16(b) to explicitly state that a scheduling order may provide for the preservation of electronically stored information, the court may modify current preservation practices and set the rules for any post-order preservation activity. Addressing preservation through an order will provide more certainty as to the duties of parties regarding the preservation of information.

In combination with the proposed amendments to Rule 26(f)(3)(c), this rule provides a strong incentive for parties to cooperate and either agree on preservation issues, or clearly identify the positions on which they disagree. Any failure to identify and articulate preservation issues in a scheduling order could result in a disadvantageous position later. The Section believes that the proposed amendment will provide a means to address preservation issues more efficiently.

The 2006 amendments to Rule 16(b) included among the permitted topics “any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced.” *See id.* The proposed amendment adds a specific non-limiting reference to agreements under Rule 502. This reference is likely to focus the parties’ attention on the importance of such agreements concerning the production and return of attorney-client privileged material and attorney work product. With the increase in the volume of data subject to preservation, collection and review, the advent of technology-assisted review, and the

increasingly tight time frames within which documents and ESI must be processed, reviewed and produced, the Section supports efforts to increase the use of orders under Rule 502(d). Given the Advisory Committee's statement that the "Evidence Rules Committee is concerned that Rule 502 remains under used," we believe that litigants may benefit from more discussion of the importance of Rule 502(d) agreements and orders in the Commentary to the Proposed Amendment.

The proposed amendment adds that the scheduling order may include a provision that, before making a discovery motion, the movant must request a conference with the court. Advisory Committee Memo at 286. This is often an efficient way to resolve discovery disputes without the delay, burdens, and expense of a formal motion. Advisory Committee Memo at 263; 287. The local rules of many courts and the individual practices of many judges require either such a conference or a short letter to the court regarding the discovery motion the party wishes to make. Anecdotal experience of Section members and reports from judges suggest that such a requirement reduces the number and burden of discovery motions, though some question the value of pre-motion conferences for complex matters, where a terse presentation could predispose the court to a decision before an adequate presentation is made in motion papers. On balance, the Section agrees that it is premature to make such a pre-motion conference mandatory in all courts and circumstances. *See* Advisory Committee Memo at 263.

C. RULE 26

The Advisory Committee has proposed a number of amendments to Rule 26: (i) amending Rule 26(f) to correspond with the proposed amendments to Rule 16(b)(3) to require that a discovery plan state the parties' views on any issue about preservation of electronically stored information and as to whether they should ask the court to include in the scheduling order the parties' agreement, if any, under Rule 502; (ii) adding a new Rule 26(d)(2) to permit early

Rule 34 requests; (iii) limiting the scope of discovery under Rule 26(b)(1) to matters relevant to claims and defenses and explicitly incorporating the proportionality requirement of Rule 26(b)(2)(C)(iii); and (iv) amending Rule 26(c)(1)(B) to expressly authorize the court, for good cause, to protect a party from undue burden or expense by allocating discovery expenses.

1. Rule 26(f)

Because it is appropriate to include in the scheduling order under Rule 16(b) preservation of electronically stored information and any agreement on inadvertently disclosed privileged information under Rule 502, it follows that Rule 26(f) should be amended to include these items as topics of the parties' discussions at their Rule 26(f) conference. The Section supports the change.

a. Incorporating Preservation Issues into the Discovery Plan

By adding "preservation" to the list of issues that parties must incorporate into a discovery plan, the proposed amendment attempts to avoid foreseeable downstream spoliation claims.

The preliminary conference, or "meet and confer," mandated by Rule 26(f) provides parties a forum in which they can discuss their respective preservation obligations, including: (1) the scope of preservation, considering the limitations imposed by Rule 26(b)(2)(C); (2) the applicable time frames for preservation; (3) the sources of information over which the parties have possession, custody or control and whether any third parties may be the custodians of relevant information; (4) the classification of any sources of electronically stored information as not reasonably accessible because of undue burden or costs under Rule 26(b)(2)(B); and (5) the conditions under which the duty to preserve may be terminated.

Because the duty to preserve is triggered when a party reasonably anticipates litigation, it is almost impossible, if not impractical, for a party not to have begun making critical decisions

regarding preservation before conferring with its opposing party. The meet and confer process provides parties with an opportunity to quickly address these preliminary actions and adjust their procedure as necessary. The goal is for the parties to cooperate and ultimately reach a consensus on various preservation issues before seeking guidance or intervention from the court. However, the fact-specific nature of when the duty to preserve is triggered and methods and standards for preservation make it a fertile ground for disputes. Requiring the parties to include “any issues” about preservation in a discovery plan helps put the court on early notice of such disputes.

The proposed Rule not only requires that such issues be highlighted, but that parties also state their “views and proposals” on preservation issues. The discovery plan should discuss issues on which the parties agree and disagree and, as to any disagreement, the plan should include a brief summary, devoid of argument, a brief statement articulating the position of each party and a proposed solution designed to foster agreement.⁵ With the required joint discovery plan, the court is better positioned to usher the parties toward a middle ground prior to incorporating any agreement into a scheduling order.

b. Rule 502(d) Orders

The Section endorses the text of the proposed amendment and believes it will help focus parties on the need for a Rule 502(d) order. We suggest that the amendment reference Rule 502(d) specifically, to emphasize that the parties should specifically ask the court for such an order – as failure to do so will leave them only with the protections of Rule 502(b) and the case law that has developed concerning inadvertence, rather than the more fulsome protections of a Rule 502(d) order.

⁵ Counsel can find further direction on drafting the discovery plan in the Advisory Committee Notes to the 1993 Amendments.

2. Rule 26(d)(2)

The Advisory Committee has proposed adding a new subparagraph (2) to Rule 26(d) to permit the early service of Rule 34 requests:

(d) TIMING AND SEQUENCE OF DISCOVERY.

(2) *Early Rule 34 Requests.*

(A) *Time to Deliver.* More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:

(i) to that party by any other party, and

(ii) by that party to any plaintiff or to any other party that has been served.

(B) *When Considered Served.* The request is considered as served at the first Rule 26(f) conference.⁶

Rule 26(d)(1), which currently prohibits a party from seeking discovery from any source before the parties have held their Rule 26(f) conference, would also be amended to specifically exclude from its scope early Rule 34 requests under Rule 26(d)(2). The Advisory Committee has also proposed amending Rule 34(b)(2)(A) to provide that the time to respond to an early Rule 34 request under proposed Rule 26(d)(2) would be 30 days after the parties' first Rule 26(f) conference, unless a shorter or longer time were stipulated by the parties or ordered by the court.

The Section supports the proposed amendments permitting early Rule 34 requests and extending the time to respond to 30 days after the first Rule 26(f) conference. The Section agrees that the proposed procedure could “facilitate the [parties’ Rule 26(f)] conference by allowing consideration of actual requests, providing a focus for specific discussion.” Advisory Committee Memo at 263. “Concrete disputes as to the scope of discovery could then be brought

⁶ A corresponding change would be made to Rule 34(b)(2)(A) setting the time to respond to a request delivered under Rule 26(d)(2) within 30 days after the parties’ first Rule 26(f) conference.

to the attention of the court at the Rule 16 conference.” *Id.* And “[l]ittle harm will be done if parties fail to take advantage of the opportunity.” *Id.* at 264.

The Section also does not believe that initial requests made before the Rule 26(f) conference are likely to be any broader than requests served after the conference, although that is a possibility. However, in the event requests are served which are too broad, they may then be appropriately narrowed at the parties’ Rule 26(f) conference, or, if necessary, by the court.

3. Rule 26(b)(1)

Rule 26(b)(1), which sets forth the scope of discovery, would be amended as follows:

(b) DISCOVERY SCOPE AND LIMITS.

(1) Scope in General. 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 amount in controversy, the importance of the issues at stake in the action, 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 including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. ~~For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~ .

(a) Prior Changes Limiting The Scope of Discovery

The proposed changes to Rule 26(b)(1) are not the first attempt to narrow the scope of discovery. As one observer has noted, “there are only so many different ideas available for dealing with discovery problems” and, of these, “the persistent champion is the idea of narrowing the described scope of discovery.” *See* Richard L. Marcus, *Discovery Containment Redux*, 39 BOSTON COLL. L. REV. 747, 775 (1998).

As originally adopted, Rule 26(b)(1) was intentionally broad and permitted “discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party” *See, e.g., Hickman v. Taylor*, 329 U.S. 495, 507 (1947) (commenting on the broad discovery under the Federal Rules: “No longer can the time-honored cry of ‘fishing expedition’ serve to preclude a party from inquiring into the facts underlying his opponent’s case”) (footnote omitted).

In 1977, spurred by perceived abusive discovery, the American Bar Association’s Litigation Section Special Committee for the Study of Discovery Abuse (“ABA Special Committee”) recommended that the scope of discovery in Rule 26(b)(1) be limited to “any matter . . . which is relevant to the issues raised by the claims or defenses of the party.” ABA Special Committee, *Report to the Bench and Bar*, 92 F.R.D. 151, 157-158 (1980) (narrowed scope of discovery in response to the “sweeping and abusive discovery [that] is encouraged by permitting discovery confined only by the ‘subject matter’ of a case (existing Rule 26 language) rather than limiting it to the issues presented”).

In 1978, the Advisory Committee suggested changing the scope of discovery to “any matter . . . which is relevant to the claim or defense of the party.” *Second Report*, 92 F.R.D. at 140; *see generally Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 77 F.R.D. 613 (1978) (same). Ultimately, however, in response to general opposition to any change, the Advisory Committee withdrew its proposal to narrow the scope of discovery.⁷ *See Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 80 F.R.D. 323 (1979).

⁷ *See* Marcus, 39 B.C. LAW REV. at 759 (“forty individuals and five bar groups opposed any change, five individuals or groups approved of the [Advisory] Committee’s tentative draft, and eight individuals or groups endorsed the ABA Special Committee’s proposal”).

Within a year of the 1980 amendments, the ABA Special Committee issued a Second Report, noting “our committee’s judgment that the 1980 amendments to the discovery rules, while making important improvements, were an insufficient response to a serious problem.” *Second Report*, 92 F.R.D. at 157. It again advocated the removal of the “subject matter” language from Rule 26(b). *Id.* at 140, 142 (“[a]doption of the more focused ‘claims and defenses’ relevance in subdivision (b)(1). . .will be a significant step toward elimination of unnecessarily expansive and expensive discovery”).

In 1983, Rule 26(b) was amended by adding one sentence which granted courts the authority to limit discovery when it was redundant or duplicative. This amendment heralded the advent of the concept of proportionality in the American legal system. The Advisory Committee commented that the objective of the 1983 amendment was to “guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry.” Rule 26(b)(1) Advisory Committee Note.

In 1989, this Section suggested narrowing the scope of discovery. *See Report on Discovery under Rule 26(b)(1)*, 127 F.R.D. 625, 629 (1989). We commented that the “central defect” of Rule 26(b) “is that it permits discovery of any unprivileged matter which is ‘relevant to the subject matter’ involved in the pending action, regardless of whether it relates in any meaningful way to the ‘claim or defense’ therein” and that, “[g]iven discovery’s scope and duration ‘district judges cannot keep [discovery] practice within reasonable bounds’” *Id.* (footnotes omitted). Based upon, among others, a survey showing “current dissatisfaction among practitioners with [the] discovery process and the definition of ‘relevance’ in Rule 26(b)(1),” the Section recommended that the scope of discovery be limited to “issues raised by the claim or defense of the party...” *Id.* at 625, 634-635. However, the Advisory Committee

decided not to proceed on the Section’s proposal because, among other things, it was “not clear that there [was] a real difference between ‘claims and defenses’ and ‘subject matter.’” *See* Marcus, 39 BOSTON COLL. L. REV. at 776, n.153 (internal citation omitted). Other participants at the time thought that the “‘claims and defenses’ approach implies fact pleading.” *Id.*

In 2000, those advocating for narrowing discovery finally achieved a change. The 2000 amendments to Rule 26(b)(1) provided that, to be discoverable, matter had to be relevant to “any party’s claim or defense,” rather than just having to be relevant to the subject matter of the action. In making this change, the Advisory Committee intended to eliminate any pretense that discovery under the Federal Rules permitted “fishing expeditions.” 2000 Advisory Committee Note to Rule 26 (emphasizing that parties “have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings”). However, the 2000 amendment did not entirely eliminate discovery on the subject matter of the action because the Rule provided that, “[f]or good cause, the court may order discovery of any matter *relevant to the subject matter* involved in the action.” Rule 26(b)(1) (emphasis added). In this Section’s October 22, 1998 Report on Proposed Changes to the Civil Discovery Rules, we opposed the two-tier scope of discovery and again recommended that the scope of discovery be limited to claims and defenses.

Since 2000, there has been a “two-tiered” discovery process: the first tier being *attorney-managed discovery* of information relevant to any claim or defense of a party (sometimes referred to as “core discovery”), and the second tier being *court-managed discovery* that can include information relevant to the subject matter of the action (or perhaps just reasonably calculated to lead to the discovery of admissible evidence). *See, e.g.*, Advisory Committee Memo at 265; 8 C. Wright, A. Miller & R. Marcus, *Federal Practice and Procedure: Civil 3d* §

2008 (2d ed. 2008); Thomas D. Rowe, Jr., *A Square Peg in a Round Hole? The 2000 Limitation on the Scope of Federal Civil Discovery*, 69 TENN. L. REV. 13, 17 (2001).⁸

(b) Proposed Proportionality Limitation

The proposed amendment seeks to limit the scope of discovery by ensuring that discovery is “proportional” to the needs of the case, in light of the “the amount in controversy, the importance of the issues at stake in the action, the parties’ resources, the importance of discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefits.” These considerations derive from current Rule 26(b)(2)(C)(iii), which authorizes a court to issue a protective order under certain circumstances.⁹ The language of Rule 26(b)(2)(C)(iii) will also be changed to require a protective order when proposed discovery is outside the scope permitted by Rule 26(b)(1).

Rule 26(b)(2)(C)(iii) is the successor to language added to Rule 26(b)(1) in 1983 to promote judicial limitation of the amount of discovery “to avoid abuse or overuse of discovery through the concept of proportionality.” 8 C. Wright & A. Miller, *Fed. Prac. & Proc.: Civil 3d* § 2008.1, p. 150 (2010). The language added in 1983 authorized courts to limit discovery if they

⁸ Echoing earlier commentary, the 2000 amendments to Rule 26(b) were intended “to involve the court more actively in regulating the breadth of sweeping or contentious discovery.” 2000 Advisory Committee’s Note to Rule 26 ; *see also* 1983 Advisory Committee’s Note to Rule 26 (“The rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis”); 1993 Advisory Committee’s Note to Rule 26 (“Textual changes are then made . . . to enable the court to keep tighter rein on the extent of discovery”). Thus, when the party opposing the discovery request argues that it goes beyond what is relevant to the claims or defenses, “the court would become involved to determine whether the discovery is relevant to the claims or defenses and, if not, whether good cause exists for authorizing it so long as it is relevant to the subject matter of the action.” 2000 Advisory Committee’s Note to Rule 26. Based on “the reasonable needs of the action[,] [t]he court may permit broader discovery in a particular case depending on the circumstances of the case, the nature of the claims and defenses, and the scope of the discovery requested.” *Id.*

⁹ Current Rule 26(b)(2)(C)(iii) provides in pertinent part:

(C) When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

* * *

(iii) the burden or expense of the proposed discovery outweighs 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.

found that “(iii) the discovery is unduly burdensome and expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties’ resources, and the importance of the issues at stake in the litigation.” *Id.* The provision was moved to Rule 26(b)(2) in 1993. *Id.*

Since then, there has been a continued movement toward proportionality in e-discovery as evidenced in the federal case law.¹⁰ Also, the Sedona Conference has issued papers setting forth principles of proportionality to be applied by courts and practitioners.¹¹ Additionally, even more recently, a number of local rules, guidelines and model orders have implemented rules embracing the concept of proportionality, including the Seventh Circuit e-discovery program, the District of Delaware default standards, and the Northern District of California local rules.¹²

The Section supports these changes, although it does so with caution. The Section endorses the Advisory Committee’s efforts to ensure that discovery proceeds in an efficient and cost-effective manner commensurate with the needs of the case. The Section believes that the proposed rule change would likely lead, at least initially, to substantial litigation regarding the application of the proportionality requirement. Because parties would be more likely to focus on the proportionality requirement as a limitation on the scope of discovery, there could possibly be more objections based on discovery not satisfying this requirement and attendant discovery motions when compared with the number of motions for protective orders under current Rule

¹⁰ *Mancia et al. v. Mayflower Services Corp.* 253 F.R.D. 354, 357 (D.Md. 2008); *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F.Supp.2d 598, 613 (S.D. Tex. 2010); *Kay Beer Distrib., Inc. v. Energy Brands, Inc.*, No. 07-1068, 2009 WL 164592 (E.D. Wis. June 10, 2009)

¹¹ The Sedona Conference Commentary on Proportionality in Electronic Discovery, January 2013.

¹² Seventh Circuit Electronic Discovery Pilot Program Committee website, *available at* <http://www.discoverypilot.com/about-us> (last accessed September 24, 2013); Delaware Default Standard for Discovery, *available at* <http://www.ded.uscourts.gov/SLR/Misc/Electronic-Standard-for-Discovery.pdf> (last accessed September 24, 2013); Northern District of California Guidelines for the Discovery of Electronically Stored Information, Nov. 27, 2012, *available at* (<http://www.cand.uscourts.gov/eDiscoveryGuidelines>) (last accessed September 24, 2013).

26(b)(2)(C)(iii). *See* Advisory Committee Memo at 265 (regarding Rule 26(b)(2)(C)(iii), “[t]he problem is not with the rule text but with its implementation – it is not invoked often enough to dampen excessive discovery demands”).

The proposed language adds the term “proportional” to the language taken from Rule 26(b)(2)(C)(iii). The Section assumes that it is the Advisory Committee’s intent that the existing case law applying and interpreting Rule 26(b)(2)(C)(iii) would apply to the language as added to Rule 26(b)(1). Thus, application of the proportionality requirement would not be written on a clean slate, but would be subject to an existing body of case law. To avoid any doubt, the Section proposes that the Advisory Committee Note to amended Rule 26(b)(1) make clear that existing case law interpreting and applying Rule 26(b)(2)(C)(iii) would apply to the “proportional” language being added to Rule 26(b)(1). This should help minimize some of the additional litigation due to the change and further the successful and efficient implementation of the amendment.

The proposed change communicates the Advisory Committee’s intention to give litigants and the courts yet another tool to address excessive discovery requests. The “proportionality” requirement should reduce the time and expense of discovery. More importantly, the new Rule’s most important function may be to signal strongly that the scope of discovery should be narrowed.

As recorded by the Advisory Committee in 1983, the Advisory Committee thought it had solved any problems of disproportionate discovery by adding the protective order provision currently found in Rule 26(b)(2)(C)(iii). Advisory Committee Memo at 264-65. While the Advisory Committee has concluded, based on “repeated empirical studies,” that, “[i]n most cases[,] discovery now, as it was then, is accomplished in reasonable proportion to the realistic needs of the case,” the Advisory Committee has also concluded that “at the same time discovery

runs out of proportion in a worrisome number of cases, particularly those that are complex [or] involve high stakes . . . The number of cases and the burdens imposed present serious problems. These problems have not yet been solved.” Advisory Committee Memo at 265.

(c) Proposed Deletions From Rule 26(b)(1)

The Section supports the deletion of the current language in Rule 26(b) authorizing a court to order, upon good cause, discovery of “any matter relevant to the subject matter involved in the action.” The Section agrees with the Advisory Committee that discovery should be limited to matter relevant to the parties’ claims or defenses identified in the pleadings, and that, if discovery of relevant information shows support for new claims or defenses, amendment of the pleadings may be allowed when appropriate. Advisory Committee Memo at 265-66. The Committee Note to be published with the amended rule states that “[p]roportional discovery relevant to any party’s claim or defense suffices,” and the Section agrees. There is no justification for the current system of two-tiered discovery – one tier party-controlled, and the other tier court-controlled.

The Section also supports the proposed deletion of the text providing that “[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” In its place, the proposed rule includes language stating that “[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable.”

This language was added in 1946, but the word “relevant” at the beginning of the sentence was not added until 2000. This addition was made due to concern that the “reasonably calculated” standard “might swallow any other limitation on the scope of discovery [and] . . . to clarify that information must be relevant to be discoverable.” Advisory Committee Memo at 266, quoting 2000 Advisory Committee Note to Rule 26(b)(1). The Advisory Committee has

concluded that, despite the 2000 amendment, “many cases continue to cite the ‘reasonably calculated’ language as though it defines the scope of discovery, and judges often hear lawyers argue that this sentence sets a broad standard for appropriate discovery.” *Id.*

The encapsulated language in the proposed deletion has been misapplied by courts and litigants to expand the scope of permissible discovery from discovery of information “relevant to any party’s claim or defense” to any discovery as long as “the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” The Advisory Committee Note to the amended rule should clarify that the deleted language was misconstrued and that is the reason for the deletion. The proposed deletion is, therefore, salutary.

The Section also supports the proposed substitution of the language “[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable.” This change adequately preserves the principle that, to be discoverable, information need not be admissible in evidence. And, unlike the proposed deletion, the new language should not result in the expansion of the scope of discovery beyond that set forth in the first sentence of Rule 26(b)(1) (i.e. discovery related to any party’s claim or defense).

The Section also supports, with caution, the proposal to delete the language in current Rule 26(b)(1) that explicitly provides for discovery of matters relating to the “existence, description, nature, custody, condition, and location of any documents or other tangible things, and the identity and location of any persons who know of any discoverable material.” The Section believes, as does the Advisory Committee, that discovery of such matters is deeply and properly entrenched in practice. Advisory Committee Memo at 266. Deleting the language, however, creates the risk that litigants will successfully argue the deletion means such matters are no longer discoverable. That risk can be obviated somewhat by including in the Advisory Committee Note a statement to the effect that discovery of the deleted matters is properly

entrenched in practice and the deletion does not mean such matters are no longer discoverable. The Section recommends such an addition to the Advisory Committee Note.

4. Rule 26(c)(1)(B)

The Section supports the proposed amendment to Rule 26(c)(1)(B) to expressly authorize the court, for good cause, to enter a protective order to protect a party from undue burden or expense by allocating discovery expenses. The proposed amendment would cause Rule 26(c)(1) to read as follows:

(c) PROTECTIVE ORDERS.

(1) In General. * * * The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: * * *

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery; * * *

The Section agrees that “[t]his power is implicit in present Rule 26(c). . . The amendment will make the power explicit, avoiding arguments that it is not conferred by the present rule text.” Advisory Committee Memo at 266.

However, the Section believes the Advisory Committee should make clear, either in the proposed new text of Rule 26(c)(1)(B) or in the accompanying Advisory Committee Note, that the proposed change is not intended to alter the American rule on attorneys’ fees and does not authorize the court to allocate attorneys’ fees incurred in connection with disclosure or discovery, *i.e.*, that the term “expenses” does not include attorneys’ fees.

The cases are not uniform on whether courts have authority under the Rules to shift costs associated with the search and review of accessible data. *Mikron Indus., Inc. v. Hurd Windows & Doors, Inc.*, No. 07-532, 2008 WL 1805727, at *2 (W.D. Wash. Apr. 21, 2008) (“Cost-shifting would not be appropriate” in the context of searching non-backup ESI, such as employee hard drives and active e-mail servers, “as this ESI is considered reasonably accessible within the

meaning of Fed. R. Civ. P. 26(b)(2)(C).”); *Ameriwood Indus., Inc. v. Liberman*, No. 4:06-524, 2007 WL 496716, at *2 (E.D. Mo. Feb. 13, 2007) (denying request for production of accessible information based solely on the volume of the potentially responsive e-mail and computer files where the requesting party failed to meet its burden of showing good cause for the production.); *W Holding Co., Inc. v. Chartis, Ins. Co. of Puerto Rico*, No. 11-2271, 2013 WL 1352426, at *5 (DPR Apr. 3, 2013) (finding that Rule 26(b)(2)(B) was not triggered because access to the data was not “hindered by any unique technological hurdles.”); *Couch v. Wan*, No. 08-1621, 2011 WL 2971118, at *3-4 (E.D. Cal. July 20, 2011) (ordering cost-shifting where non-party’s data was stored on hard-drives and CD-ROMS and therefore accessible but would cost an estimated \$54,000 to process.)

D. RULES 30 & 31

1. Reduction in the Presumptive Number of Depositions

The desire to minimize cost and delay is cited as the impetus for the proposal to amend Rules 30 and 31 to reduce the presumptive number of depositions from ten to five.¹³ Advisory Committee Memo at 267. Rule 30(a)(2) would provide:

A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2):

(A) if the parties have not stipulated to the deposition and:

- (i) the deposition would result in more than ~~10~~ 5 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants;

Advisory Committee Memo at 300. Rule 31 would contain comparable language. *Id.* at 303.

Under Rule 26(b)(2)(A), a court may alter the limits on the number of depositions.

¹³ This proposed reduction also relates to Rule 30 (Depositions by Written Questions).

The Section does not support the proposed reduction in the presumptive number of depositions because the Section does not believe the Advisory Committee has shown that the reduction is necessary. The Advisory Committee has not shown that the current presumptive limit of ten depositions has resulted in widespread overuse of depositions. The Advisory Committee seems to be relying on comments by “[s]ome judges” at the Duke Conference that they believe there is an overuse of depositions. Advisory Committee Memo at 267. The Advisory Committee cites to the Federal Judicial Center (“FJC”) 2009 survey to support the concerns expressed by those judges. *Id.* The results of the survey are set forth in Emery G. Lee III & Thomas E. Willging, Federal Judicial Center, National, Case-Based Civil Rules Survey, Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules (October 2009) (“FJC Preliminary Report”). However, the statistics cited by the Advisory Committee do not show there is an overuse of depositions, and they do not show that, if there is any overuse, it is a widespread problem.

The data used in the FJC Preliminary Report excluded several categories of cases that were not likely to have discovery and also excluded cases in which no depositions were taken. Advisory Committee Memo at 267. Even after excluding those cases, more than five depositions were taken in fewer than 25% of the cases studied, and, of those cases, ten or fewer depositions were taken 75% of the time. *Id.* In only 3% to 5% of the cases were there more than ten depositions per side. The median number of depositions per side was two to three. FJC Preliminary Report at 10. In fact, the litigants conducted more than ten depositions per side in only 3% to 5% of the cases studied.

It should also be noted that the median cost of litigation in the FJC study was \$20,000 for defendants and \$15,000 for plaintiffs, with some reporting costs of less than \$1,600. Only at the 95th percentile did reported costs reach \$280,000 for plaintiffs and \$300,000 for defendants.

Median discovery costs represented 3.3% of the amount at stake in the litigation. The median estimate of stakes in the litigation for plaintiffs was \$160,000, with estimates ranging from \$15,000 at the 10th percentile to almost \$4,000,000 at the 95th percentile. FJC Preliminary Report at 2. Thus, the cost of discovery in most cases currently appears to be proportional to the stakes in the litigation. These numbers simply do not justify reducing the presumptive number of depositions to five.¹⁴

Moreover, the Advisory Committee acknowledged there were many comments saying that the present limit works well and that parties do not take more than five depositions simply because the presumptive limit is 10 depositions. Also, the Advisory Committee conceded that in certain categories of cases, plaintiffs commonly need more than five depositions to establish their case. Advisory Committee Memo at 268.

Nevertheless, the Advisory Committee proposes reducing the presumptive limit to five depositions because “the lower limit can be useful in inducing reflection on the need for depositions, in prompting discussions among the parties, and – when those avenues fail – in securing court supervision.” *Id.* It is difficult to see how compelling the parties to approach the Court to seek relief from the lower presumptive limit will cause them to reflect on the cost of depositions, when the very act of approaching the Court will drive up the cost of litigation in cases where the present limits seem to be working well. Even if, in most cases, the number of depositions is established during the meet and confer or the scheduling conference, there would likely be situations in which, long after the scheduling order has been entered, discovery leads a party to conclude that more than five depositions are necessary. Adding the burden of motion

¹⁴ Indeed, two decades of empirical studies by the Federal Judicial Center have failed to show that the number and length of depositions have been out of proportion to the stakes in cases. See Thomas E. Wilging, Donna Stienstra, John Shepard and Dean Miletich, “*An Empirical Study of Discovery and Disclosure Practice under the 1993 Federal Rule Amendments*,” 39 *B.C.L. Rev.* 525, 571 (1998) (“we have been unable to find reliable evidence that such [durational] limits [on depositions] have achieved their intended effects”).

practice to any such case increases litigation costs without providing any corresponding benefit or providing a remedy for any alleged discovery abuse--because there is no proof of any such abuse in the majority of cases. Moreover, the Advisory Committee has not shown that lawyers – or their clients – fail to consider the cost of a deposition in determining whether a deposition is necessary. In the real world, Section members report that deposition costs are almost always considered before the deposition is scheduled.

The Advisory Committee discounted the likelihood that reducing the presumptive number of depositions would result in greater motion practice in cases where one side believed it deserved more than five depositions by assuming that “the parties can be expected to agree, and should manage to agree, in most of those cases.” *Id.* Yet, the Advisory Committee cites nothing to support its assumption, and it is far from clear that its assumption comports with the real world experience of litigators in cases where one of the parties seeks more than the presumptive number of depositions. In between 11% and 18% of the cases studied by the FJC there have been five to 10 depositions. Thus, reducing the presumptive number to five would affect only a limited percentage of cases.

The Advisory Committee ignores that depositions often need to be taken because a party cannot assume that witnesses beyond the subpoena power of the court whose testimony is needed will appear at trial. In addition, in cases involving issues relating to the discovery of electronically stored information, one or more depositions are often needed on that subject alone to determine that appropriate searches for discoverable information have been made. That will limit the number of fact depositions to four or less, and that number will be further reduced to the extent expert depositions are needed.

The Advisory Committee rejects out of hand any concern that reducing the presumptive limit will make judges more reluctant to permit depositions that exceed the new limit. *Id.* at 268.

The Advisory Committee concluded that it was sufficient that the proposed Advisory Committee Note to Rule 26 would state, “Rule 30(a)(2), however, continues to direct that the court must grant leave to take more depositions to the extent consistent with Rule 26(b)(1) and (2).” Advisory Committee Memo at 301. But that side-steps the issue. By reducing the presumptive limit to five depositions, the Rule would be placing the burden on a party to justify taking more than five depositions, a burden the party does not now have unless it seeks to take more than ten depositions. It also shifts the leverage in any negotiation between the parties’ attorneys over the number of depositions to be taken. Further, it would be only natural for judges to believe that, because the limit had been reduced to five depositions, they should be reluctant to permit depositions exceeding that limit. Otherwise, what would be the purpose of the rule change?

The Advisory Committee cites the expressed concern of *some judges* at the Duke Conference that civil litigators overuse depositions because they apparently hold the view that every trial witness needs to be deposed before trial, while noting the practice in criminal trials where witnesses are effectively cross-examined without the benefit of depositions. Advisory Committee Memo at 267-68. The Section does not believe the comparison to criminal cases is apt. In criminal cases, for example, constitutional protections require disclosure of witness statements and exculpatory material to the defense. *See Brady v. Maryland*, 373 U.S. 83 (1963). The government, on the other hand, has effective investigatory powers to obtain facts and pin down witnesses before trial, *e.g.*, wiretapping (widely used in white collar and other criminal cases), surveillance, and the power to question witnesses. Reducing the presumptive number of depositions because there are no depositions in criminal cases would put civil litigation back on the road to “trial by ambush.”

The Advisory Committee also cites the use of alternative dispute resolution (“ADR”) as another reason why depositions should be curtailed in civil litigation. Advisory Committee

Memo at 267. Since ADR is effective, it is argued, and since depositions are not used in ADR, depositions are not necessary in civil litigation either. *Id.* This ignores the fact that depositions are, in fact, often used in arbitration. *See e.g. In Re Nat'l Fin. Partners Corp.*, No. 09-00027, 2009 WL 1097338 (E.D. Pa. April 21, 2009).

Finally, some judges at the Duke Conference argued that depositions are not that important as few attorneys have, in their experience, used deposition transcripts to effectively impeach a witness. While this may be so, it ignores the fact that depositions are taken to “lock in” testimony so that the witness does not change his or her testimony on the stand. It also ignores the fact that depositions are taken as a discovery device to flesh out the facts of the case.

Therefore, there is no objectively reasonable basis to justify a reduction in the presumptive limits on depositions from ten to five, especially considering that a single plaintiff suing multiple defendants already is given the presumptive equivalent of the number of depositions as all defendants combined. While in such a situation a court may be likely to grant leave to exceed the limits imposed, reducing the threshold for court action, and compelling the parties to obtain such leave, itself imposes a litigation cost on the parties.

If there is a need to impose restrictions on discovery greater than those already in place, the Section believes that this will be accomplished through the proposed amendments to Rule 26(b)(1), which add a proportionality requirement to the scope of discovery. Any further restrictions on discovery should be implemented by the court during the Rule 16 conference after assessing the various factors set forth in the proposed revisions to Rule 26 concerning proportionality in discovery. That should be sufficient to prevent undue delay and cost in the vast majority of federal cases requiring discovery, which, as indicated by the 2009 FJC study, is not a problem in any event.

2. Reduction of the Presumptive Time Limit of Depositions

The Advisory Committee's justification for reducing the hours in a deposition day from seven to six is even less compelling and appears to be based entirely on anecdotal complaints that lunch and comfort breaks may extend the deposition day past 5:00 p.m. Advisory Committee Memo at 268. There are no facts cited to demonstrate what percentage of federal depositions extend past normal business hours, nor whether any parties or litigants cite such "after hours" work as a major problem in litigation. The Advisory Committee also refers to the fact that in Arizona state court there is a limit of four hours. *Id.* The Section believes the comparison to the practice in state court in Arizona is inapt, as Arizona has strictly enforced disclosure requirements that compel parties to disclose their legal theories and witness statements very early in the litigation. *Allstate Ins. Co. v. O'Toole*, 896 P.2d 254 (1995). Again, without some factual data establishing that there is an actual problem needing redress, the Section cannot support the proposed amendment.

The Section also notes the proposed revisions to Rule 30 do not even attempt to deal with issues that currently arise under the present rules and which courts grapple with on a regular basis, including how to count Rule 30(b)(6) corporate witnesses and whether fact witnesses who are also designated as Rule 30(b)(6) witnesses are counted as two separate depositions with two full days of testimony, *Beaulieu v. Board of Trustees of the Univ. of West Florida*, No. 07-30, 2007 WL 4468704 (N.D. Fla. Dec. 18, 2007); *Sabre v. First Dominion Capital, LLC*, No. 01-2145, 2001 WL 1950544 (S.D.N.Y. December 12, 2001); whether leave must be taken to obtain a second Rule 30(b)(6) deposition of the same entity and whether the second deposition counts against the overall limit, *State Farm Mutual Automobile Ins. Co. v. New Horizon, Inc.*, No. 03-6516, 2008 U.S. Dist. LEXIS 96411 (E.D. Pa. November 26, 2008); against whose side third party defendant depositions should be counted, *Foreclosure Management Co. v. Asset*

Management Holding LLC, No. 07-2388, 2007 U.S. Dist. LEXIS 8924 (D. Kan. Dec. 3, 2007) (case management order defining plaintiffs to include counter- and cross-claimants, third-party plaintiffs, intervenors and “any other parties who assert affirmative claims for relief”); and whether excessive delays by counsel or the witness in an effort to “run out the clock” should be counted toward the overall time limit of the deposition. *Kingsway Fin. Services Inc. v. PricewaterhouseCoopers, LLP*. No. 08-5560, 2008 U.S. Dist. LEXIS 205222, at *5-6 (S.D.N.Y. Dec. 31, 2008) (court review of video testimony to consider allegations of stalling). All of these disputes are likely to continue and be exacerbated by any further artificial limit on the number and length of depositions.

E. RULE 33

No data is offered to justify reducing the presumptive number of Rule 33 interrogatories from 25 to 15. *See* Advisory Committee Memo at 268. While acknowledging that there has been “some concern” that 15 interrogatories are not enough, the Advisory Committee minimizes those concerns by stating in conclusory fashion the proposed rule change has not attracted “much” concern and that “15 will meet the needs of most cases.” *Id.* Because the Advisory Committee has not demonstrated there is a problem with the current limit of 25 interrogatories, the Section cannot support the proposed amendment. If it is not broken, do not try to fix it, particularly because the law of unintended consequences always applies.

We also note the proposed change to Rule 33 does not address existing disputes under the current rule about whether “subparts” are “discrete” or “logically related.” *Mount Hamilton Partners v. Google Inc.*, No. 12-01698, 2013 U. S. Dist. LEXIS 104556 (N.D. Cal. July 23, 2013). Reducing the presumptive number of interrogatories will encourage more broadly worded and burdensome interrogatories.

While the Advisory Committee states that the presumptive limit needs to be reduced “to encourage parties to think carefully about the most efficient and least burdensome use of discovery devices,” Advisory Committee Memo at 305, it is difficult to see how this will be effectively accomplished when the Advisory Committee is seeking to limit the use of all discovery devices. Indeed, the reduction in the number of interrogatories to 25 places a greater emphasis on the use of requests to admit under Rule 36 and on oral depositions to secure testimony. Since the potential use of these discovery devices is proposed to be reduced as well, it is difficult to see what options the Advisory Committee intends should be contemplated. (It would be interesting for the FJC to study the interplay among all of the discovery devices permitted, and whether imposing restrictions on one type of discovery may inversely affect practitioners’ use of other discovery devices.)

F. RULE 34

The Advisory Committee’s proposed amendments to Rule 34(b)(2)(B) appear reasonably calculated to address the goal of requiring greater specificity in parties’ responses to document requests, and the Section supports them.¹⁵ The proposed amendments would expressly require a responding party to: (1) “state the grounds for objecting to the request with specificity,” and (2)

¹⁵ Proposed Rule 34(b) reads as follows:

(b) PROCEDURE. ***

(2) *Responses and Objections.* ***

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served or if the request was delivered under Rule 26 (d) (1) (B) – within 30 days after the parties’ first Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state the grounds for objecting to the request with specificity, including the reasons. If the responding party states that it will produce copies of documents or of electronically stored information instead of permitting inspection, the production must be completed no later than the time for inspection stated in the request or a later reasonable time stated in the response.

(C) *Objections.* An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest... ***

state that it will produce copies of documents or electronically stored information instead of permitting inspection. Advisory Committee Memo at 307.

The Advisory Committee also proposes amending Rule 34(b)(2)(B) to provide that, “[i]f the responding party states that it will produce copies of documents or of electronically stored information instead of permitting inspection, the production must be completed no later than the time for inspection stated in the request or a later reasonable time stated in the response.” Advisory Committee Memo at 307. The Section supports these amendments. It also endorses the statement to be included in the proposed Advisory Committee Note to amended Rule 34 that, “[w]hen it is necessary to make the production in stages[,] the response should specify the beginning and end dates of production,” but we recommend that the language be included in Rule 34(b)(2)(B) itself, not merely in the Advisory Committee Note.

The proposed amendments to Rule 34(b)(2)(C) would also require parties to affirmatively state whether any responsive materials are being withheld from production on the basis of a stated objection. Advisory Committee Memo at 309. As the Advisory Committee itself recognizes, all too often responses to Rule 34 Requests are designed to obfuscate, and the requesting party has little idea whether any responsive materials are being withheld on the basis of an objection to a particular request. *Id.*

The Section approves the Committee’s goal but is concerned the proposal may have unintended consequences. For example, the amendments as written would seemingly require a responding party to obtain extensions of time to respond until it knows whether documents to a particular request are being withheld. Such a response can only be accurately made after there has been a sufficient document review to enable an accurate response. Yet, it does not appear to be desirable to delay a written response for that reason. This potential problem could be cured by making it clear in the proposed rules that a party can respond by saying, in effect, that it has

not yet determined whether responsive documents are being withheld to the request, but it will supplement its response to provide that information within a reasonable time.¹⁶

G. RULE 36

The Advisory Committee proposes limiting the number of requests for admissions to 25, excepting requests to admit the genuineness of documents, unless otherwise stipulated or ordered by the court. Advisory Committee Memo at 310-11. There is currently no presumptive limit on the number of requests for admission. The Advisory Committee does not cite any data to support the need for this rule change. The Advisory Committee merely states that “[t]his proposal did not draw much criticism.” *Id.* at 267.

The imposition of the new presumptive limit will create more issues than any it purports to solve. There will inevitably be disputes about what constitutes a “discrete subpart,” similar to those involving interrogatories. Moreover, it is inevitable that there will be disputes about whether the request to admit is truly directed at admitting the genuineness of the document as opposed to some other purpose. For example, in a forgery case, a request to admit the genuineness of the document in dispute will generate controversy as to whether it should be counted toward the limit or not.

There is no demonstrated need for the proposed change. The Section recommends that it not be made.

¹⁶ While the proposed rule requires an objection to state whether any responsive materials are being withheld on the basis of that objection, it does not require the materials to be described. In addition, if a party were to object to a document request as unduly burdensome or because it seeks documents beyond the permissible scope of discovery, for example, the proposed rule would not obligate the objecting party to review all documents sought by the request so as to disclose the existence of any withheld documents falling within its purview. We do not support a contrary interpretation, and assume such contrary interpretation was not intended by the Advisory Committee as it would be contrary to the goal of the proposed amendments to reduce the burden and expense of discovery. To avoid any doubt, the Advisory Committee Note to the proposed amendment should make that clear.

H. RULE 37

Current Rule 37(e) provides a “safe harbor” from sanctions for the loss of electronically stored information (ESI) “as a result of the routine, good faith operation of an electronic information system.” The rule essentially codifies existing case law that, in the absence of a duty to preserve, routine destruction of ESI for business and technical rationales does not constitute spoliation subject to sanctions under the Federal Rules of Civil Procedure. The Advisory Committee proposes to replace this rule with a new broader provision governing the availability and nature of curative measures and sanctions for failures to preserve discoverable information.¹⁷

The proposed rule governs failures to preserve discoverable information in anticipation or conduct of litigation. It thereby brings within the purview of the Federal Rules conduct that currently is dealt with by the inherent power of the courts, including conduct that occurs prior to the filing of any litigation.¹⁸ See *Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001) (in case about pre-litigation destruction of car alleged to be defectively designed, court notes that “the power to sanction for spoliation derives from the inherent power of the court, not substantive law”); *Adkins v. Wolever*, 554 F.3d 650, 652 (6th Cir. 2009) (authority to impose sanctions for spoliated evidence arises from a court’s inherent power).

¹⁷ Proposed Rule 37(a) reads as follows:

(a) MOTION FOR AN ORDER COMPELLING DISCLOSURE OR DISCOVERY. ***

(3) *Specific Motions.* ***

(B) *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if: ***

(iv) a party fails to produce documents or fails to respond that inspection – will be permitted or fails to permit inspection – as requested under Rule 34.

¹⁸ It would not be a violation of the Rules Enabling Act, 28 U.S.C. § 2072, to apply remedial measures to conduct prior to the commencement of a suit. Cf. *Sibbach v. Wilson*, 312 U.S. 1, 13-16 (1941) (Rule 37 sanctions for discovery violations were constitutional exercises of rule-making power under Rules Enabling Act); *Perez v. Posse Comitatus*, 373 F.3d 321, 325-26 (2d Cir. 2004) (upholding court’s discretion to impose sanctions under Rule 11 for a violation in filing a complaint).

As cases like *Silvestri* indicate, there is no good reason to limit the establishment of a standard for preservation to ESI. Further, it would be anomalous and confusing to establish a preservation standard and remedial measures for ESI but continue to leave spoliation of other discoverable matter to the inherent power of the court. Therefore, the Section answers no to the Advisory Committee’s first question, “Should the rule be limited to sanctions for loss of electronically stored information?”

Proposed Rule 37(e)(1) divides remedial measures into: (a) curative measures, such as additional discovery or paying reasonable expenses, including attorneys’ fees; and (b) sanctions, such as an adverse-inference jury instruction or those listed in Rule 37(b)(2)(A), directing that matters be taken as established in the action, prohibiting introduction into evidence of designated matters, staying further proceedings until an order is obeyed; striking portions of pleadings, dismissing pleadings; rendering a default judgment; or holding a witness or party in contempt. However, the proposal provides that sanctions may be imposed only: (1) if the failure to preserve (a) was willful or in bad faith *and* (b) caused substantial prejudice, or, (2) if the failure irreparably deprives a party of any meaningful opportunity to present or defend against claims. Proposed Rule 37(e)(2) lists nonexclusive factors for a court to consider in assessing a party’s conduct: (A) the extent of notice that litigation was likely and the information would be discoverable; (B) the reasonableness of efforts to preserve; (C) the reasonableness of any request to preserve and the good faith of the parties in any subsequent consultation about the scope of preservation; (D) the proportionality of any preservation efforts; and (E) any request for the court’s guidance.

1. Addition of a Rule Concerning Preservation

The Section wholeheartedly supports codifying the obligation to preserve information in anticipation of and during litigation. Among other things, this should encourage more consistent

application of the standards for triggering and defining the scope of the duty to preserve. *Compare Goodman v. Praxair Servs. Inc.*, 632 F. Supp. 2d 494, 511 (D. Md. 2009) (letter threatening possible litigation and noting the retention of attorneys was sufficient to trigger a duty to preserve, even though litigation was not commenced until three years later), *with Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 623 (D. Colo. 2007) (demand letter does not trigger a duty to preserve, if the letter does not actually threaten litigation or demand preservation). The Section also agrees that the appropriate scope of information to be preserved is “discoverable information,” as defined in proposed Rule 26(b)(1) or, if not adopted, current Rule 26(b)(1).

2. Remedies

“[T]he range of available sanctions serve both normative – designed to punish culpable conduct and deter it in others – and compensatory – designed to put the party adversely affected by the spoliation in a position that is as close to what it would have been in had the spoliation not occurred – functions.” *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 534 (D. Md. 2010). Remedial measures “should (1) deter the parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore the prejudiced party to the same position [it] would have been in absent the wrongful destruction of evidence by the opposing party.” *Pension Comm. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 469 (S.D.N.Y. 2010) (quoting *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999)). However, the Circuit Courts of Appeal have varying standards as to what level of culpability and prejudice justify different remedial measures, as well as how these factors interrelate in determining sanctions for spoliation. *Compare Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 109 (2d Cir. 2002) (negligence sufficient to impose sanctions terminating the litigation), *with Vick v. Tex. Employment Comm’n*,

514 F.2d 734, 737 (5th Cir. 1975) (negligence not enough to impose severe sanctions); *see Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613-14 (S.D. Tex. 2010) (reviewing the varying standards for remedial measures based on culpability and prejudice).

The Section applauds the Advisory Committee’s attempt to bring order out of the chaos of the differing standards for remedial measures for spoliation. The Section agrees there should be a showing of substantial prejudice and willfulness or bad faith to impose sanctions.¹⁹ *See Rimkus*, 688 F. Supp. 2d at 614. The Section sees no reason to define “substantial prejudice” any further, as it will be context specific.²⁰ *See id.* at 613 (prejudice occurs when spoliation substantially denies a party the ability to support or defend its claim); *Henry v. Gill Indus.*, 983 F.2d 943, 948 (9th Cir. 1993) (same); *Pension Comm.*, 685 F. Supp. 2d at 479 (same); *Jain v. Memphis Shelby Airport Auth.*, No. 08-2119, 2010 WL 711328, at *4 (W.D. Tenn. Feb. 25, 2010) (same); *Goodman*, 632 F. Supp. 2d at 519 (same); *Velez v. Marriott PR Mgmt., Inc.*, 590 F. Supp. 2d 235, 259 (D.P.R. 2008) (same); *Jones v. Bremen High Sch. Dist.* 228, No. 08 3548, 2010 WL 2106640, at *8-9 (N.D. Ill. May 25, 2010) (prejudice occurs when spoliation substantially denies a party the ability to support or defend its claim or delays production of evidence). However, some clarification is needed regarding the burden of establishing substantial prejudice, the definition of willfulness, and whether “actions” include failures to act.

The proposed rule should be clarified to state that the burden of demonstrating that there was no substantial prejudice should fall on the party acting willfully or in bad faith to spoliator

¹⁹ Judge Scheindlin disagrees. In *Sekisui Am. Corp. v. Hart*, No. 12 3479, 2013 WL 4116322, at *4 (S.D.N.Y. Aug. 15, 2013), she wrote:

“[I]mposing sanctions only where evidence is destroyed willfully or in bad faith creates perverse incentives and encourages sloppy behavior. Under the proposed rule, parties who destroy evidence cannot be sanctioned (although they can be subject to “remedial curative measures”) even if they were negligent, grossly negligent, or reckless in doing so.”

²⁰ The Section answers “no” to the Advisory Committee’s fourth question, “Should there be an additional definition of ‘substantial prejudice’ under Rule 37(e)(1)(B)(i)?”

relevant material. *See Sekisui*, 2013 WL 4116322, at *7 (quoting *Residential Funding*, 306 F.3d at 108) (once willfulness is established, “the risk that the evidence would have been detrimental rather than favorable [to the spoliator] should fall on the party responsible for the loss”). Concerns have been raised regarding whether the proposed rule is inconsistent with the goals of sanctions, *i.e.*, to deter, to shift risks to parties destroying evidence, and compensate parties prejudiced by sanctionable behavior. In other words, an intentional spoliator might be better off destroying all relevant ESI so that there could be no showing of substantial prejudice from the now nonexistent ESI. For precisely this reason, many courts have applied a presumption of prejudice where a party has destroyed evidence willfully or in bad faith. *See Sekisui*, 2013 WL 4116322, at *7 (quoting *Residential Funding*, 306 F.3d at 109) (“it would allow parties who have destroyed evidence to profit from that destruction”).

Burdening parties with the necessity of proving the relevance of information that no longer exists presents obvious problems. While the Advisory Committee points out several ways in which ESI that has been destroyed in one form may be ferreted out in another, this is not always possible. A party that destroys evidence stored in all its existing locations could be rewarded, even if it acted in bad faith, because of the difficulty of showing the content of the information destroyed.

The Advisory Committee Notes should define the standard of willfulness consistent with *Pension Comm.*, as “intentional or reckless conduct that is so unreasonable that harm is highly likely to occur.”²¹ 685 F. Supp. 2d at 464; *see also Victor Stanley*, 269 F.R.D. at 530 (“[w]illfulness is equivalent to intentional, purposeful, or deliberate conduct”). Such a definition may avoid the question of whether “willful” in the context of the rule applies to

²¹ The Section answers the Advisory Committee’s fifth question, “Should there be an additional definition of willfulness or bad faith under Rule 37(e)(1)(B)(i)?” by saying “yes” there should be a definition of willfulness in the Advisory Committee Notes, but “no” there should not be a definition of bad faith.

actions that are intentional as opposed to inadvertent. For example, if a party believes that certain ESI is outside the scope of the preservation duty and destroys that ESI, does such behavior in conjunction with the other requirements of the rule support sanctions? In other words, can a party be sanctioned for actions which substantially prejudice an adversary, if undertaken intentionally but in good faith?

Clarification is also necessary for the requirement that “actions” causing substantial prejudice or irreparably depriving a party of any meaningful opportunity to present or defend against claims include omissions. For example, if a party intentionally allows the overwriting of discoverable ESI to occur by the routine operation of its electronic information systems, notwithstanding that it knows it has a duty to preserve that ESI and that a failure to do so will cause substantial prejudice to its adversary, this failure to act should be considered at least willful. *See Sekisui*, 2013 WL 4116322, at *5 (destruction of ESI willful where plaintiff did not issue a litigation hold until 15 months after it sent a notice of claim, plaintiff did not notify its IT vendor of the duty to preserve until six months after the litigation hold, defendant’s and a key witness’s ESI was destroyed at the direct request of plaintiff’s employee after the duty to preserve had attached, and in one case with the knowledge of plaintiff’s president).

The Section agrees that, regardless of the level of culpability, sanctions may be imposed if a party’s actions have “irreparably deprived a party of any meaningful opportunity to present or defend against claims.” Proposed Rule 37(e)(1)(B)(ii); *see Silvestri*, 271 F.3d at 593 (dismissal is “usually justified only in circumstances of bad faith,” but, “even when conduct is less culpable, dismissal may be necessary if the prejudice to the defendant is extraordinary, denying it the ability to adequately defend its case”). If parties cannot be sanctioned for negligent or grossly negligent spoliation, they may be disincentivized from making reasonable efforts to preserve ESI, because the only penalty is a curative measure. Were this provision not

included in the proposed rule, the Section would be concerned that the sanctions of an adverse-inference jury instruction or a direction establishing matters or facts could not be imposed where the spoliated information is central to the action but the spoliator was merely grossly negligent or reckless, meaning that the spoliator failed “to exercise even that care which a careless person would use.” *Pension Comm.*, 685 F. Supp. 2d at 464 (quoting Prosser & Keaton on Torts § 34 at 211-12 (5th ed. 1984)). The standard stated in proposed Rule 37(e)(1)(B)(ii) is sufficiently high that it likely will be only the rare case that sanctions may be imposed when a spoliator does not act willfully or in bad faith.²²

Litigants acting in good faith and consistently with their ethical obligations would not be likely to exploit the availability of this exception to harass an adversary by causing ancillary litigation about spoliation. Such conduct would be independently sanctionable. The proposed rule should not be eliminated simply because it could present opportunities for parties acting in bad faith for purposes of harassment.

3. Factors To Be Considered

Proposed Rule 37(e)(2) lists nonexclusive factors to be considered in “assessing a party’s conduct.” While the Section strongly endorses the concept of describing with particularity these and other such factors in the text of the rule, we are concerned that the language and the factors listed do not clearly express the Advisory Committee’s intent.²³ The introductory language indicates the listed factors should bear on “determining whether a party failed to preserve discoverable information that should have been preserved . . . *and* whether the failure was willful or in bad faith.” (emphasis added.) First, by singling out willfulness and bad faith, an

²² Thus, the Section answers “yes” to the Advisory Committee’s second question, “Should Rule 37(e)(1)(B)(ii) be retained in the rule?”

²³ The Section therefore answers “no” to the Advisory Committee’s third question, “Should the provision of current Rule 37(e) be retained in the rule?” The nonexclusive factors listed in proposed Rule 37(e)(2) seem to encompass any conduct that would be protected under the current rule.

implication may be read into the language that the factors do not bear on whether actions were negligent or grossly negligent, which could affect what is an appropriate corrective measure under proposed Rule 37(e)(1)(A).

Second, while the proposed Advisory Committee Note to Subdivision (e)(1)(B)(i) states an “expectation” that courts “will employ the least severe sanction needed to repair the prejudice resulting from loss of the information,” that expectation has no foundation in the language of the proposed rule. The Section recommends the expectation be made explicit in the introductory language to Rule 37(e)(2). Accordingly, the Section suggests that the introductory language of proposed Rule 37(e)(2) be rewritten to read: “The court should consider all relevant factors in selecting the least severe curative measure or sanction under Rule 37(e)(1) needed to repair any prejudice resulting from the loss of information, including . . .”

I. RULE 84, RULE 84 OFFICIAL FORMS AND RELATED PROPOSED AMENDMENT TO RULE 4

Recent decisions by the Supreme Court have caused courts to reconsider federal pleading standards. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice”); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (“a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do”) (citation, internal quotation marks, and brackets omitted).

The uncertainty surrounding pleading standards has caused many to question the propriety of Rule 84 and its Official Forms.²⁴ The Advisory Committee established a Rule 84 subcommittee to gather information about the use of Rule 84’s Official Forms. The information

²⁴ Federal Rule 84 currently reads, “The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.”

obtained indicated that neither practitioners nor *pro se* litigants make much use of these forms. In light of the fact that the Official Forms are not typically consulted and yet live in tension with changing pleading standards, the Advisory Committee recommends that Rule 84 and its Official Forms be abrogated rather than amended. Because Official Forms 5 (Notice of a Lawsuit and Request to Waive Service of a Summons) and 6 (Waiver of the Service of Summons) remain relevant and useful, the Advisory Committee recommends that these forms be retained by recasting them as forms attendant to Rule 4.

The Section agrees with the Advisory Committee's recommendations.

1. Solutions Considered

The Advisory Committee considered several solutions, including (a) making no changes to Rule 84 and the Official Forms, (b) revising and maintaining the Official Forms so that they conform to, and stay in conformity with, contemporary practice, and (c) abrogating Rule 84 and its Official Forms. Advisory Committee Memo at 276.

The Section agrees with the Advisory Committee that the first option, making no changes to Rule 84 and the Official Forms, is unappealing. In certain instances, the forms are no longer satisfactory, and yet Rule 84 reads, "The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate."

We agree with the Advisory Committee that the second option, updating and maintaining the Official Forms, would require a substantial commitment without a substantial benefit, in light of the understanding that the Official Forms are not widely used.

The third option, abrogating Rule 84 and the Official Forms, takes into consideration the lack of popularity of the forms, the substantial work necessary to update them, and the fact that

alternative sources exist for high-quality forms.²⁵ A complete abrogation of the Official Forms without any remedial measure would, however, do away with Official Forms 5 and 6. These forms are exceptional because they remain useful today; indeed, the language in Official Form 5 must be used by plaintiffs in certain circumstances. *See* Rule 4(d)(1)(D) (stating a plaintiff must use language in Form 5 when requesting that defendant waive service of summons). The Advisory Committee has therefore recommended that Official Forms 5 and 6 become part of Rule 4. The Section supports that recommendation.

2. History of the Official Forms

Pleading forms were adopted in 1938 as illustrations to educate the bench and bar on the sweeping effect of Rule 8(a)(2), which shifted the pleading standard from one of Code pleading to one that required merely “a short and plain statement of the claim showing that the pleader is entitled to relief.” In 1948, those pleading forms and the other Official Forms were recognized to be sufficient under the Federal Rules. Today, the pleading forms do not include examples of many commonly pled actions. More troubling is the fact that some of the pleading forms, such as the one for patent infringement (Form 18), are inadequate. *See Gradient Enters., Inc. v. Skype Technologies S.A.*, No. 10 67122, 2013 WL 1208565, at *4 (W.D.N.Y. March 25, 2013). No effort has been made to update these forms to keep them current with the changing jurisprudence on pleading standards.

3. Abrogation of Rule 84 and its Official Forms Except Official Forms 5 and 6

Although the concept of notice pleading was a fresh one when the Official Forms were initially promulgated, that concept is now well understood by the bar. Moreover, *Iqbal* and *Twombly* now demand something more than what is contemplated by the Official Forms. The Official Forms can therefore mislead the few who continue to make use of them. The Section

²⁵ The Administrative Office of the United States Courts (“Administrative Office”), among others, offers excellent forms at no charge.

agrees with the Advisory Committee that better practice would be to abrogate Rule 84 and its Official Forms, except for Forms 5 and 6, and to establish a liaison with the Administrative Office's working group on forms. In this way, high-quality, current forms may be maintained and developed and neither the bar nor *pro se* litigants will be harmed by the loss of the Official Forms.

4. Retention and Repositioning of Forms 5 and 6

Rule 4(d)(1)(D) requires litigants to use the language in Form 5 (Notice of a Lawsuit and Request to Waive Service of a Summons) when they wish both to notify their opposition of the commencement of an action and request that the opposition waive service of a summons. Form 6 (Waiver of the Service of Summons) is the suggested form for the responsive waiver requested by Form 5. While the precise language of Form 6 is not expressly required, the purpose of Form 6 is inextricably tied to that of Form 5. Therefore, Form 6 remains quite useful. In light of the proposed abrogation of Rule 84 and its Official Forms, the Section approves of the Advisory Committee's recommendation to recast Official Forms 5 and 6 as forms attendant to Rule 4. This elegant solution enables the retention of these two useful forms without impinging upon the decision to abrogate Rule 84 and its Official Forms.

5. Abrogation of the Official Forms Will Not Create a Vacuum

A working group on federal forms exists within the Administrative Office. It is composed of six judges and six court clerks. Their forms can be accessed via the Administrative Office's website, <http://www.uscourts.gov>. In the event the Official Forms are abrogated, the Advisory Committee has proposed that it appoint a liaison to work with the Administrative Office's working group. If warranted, a Forms Subcommittee could be established to review new and updated forms prepared by the working group.

* * *

Accordingly, the Section recommends the abrogation of Rule 84 and its Official Forms as well as the recasting of Official Forms 5 and 6 as Rule 4 Forms.

V. CONCLUSION

As set forth above, the Section supports many of the proposed amendments, but is unable to support certain of the proposed amendments because it has concluded they are not warranted or will not achieve their proposed objective.

The Section does not support the proposed amendment to Rule 1, which would add the language “and employed by the court and the parties.”

The Section supports the proposed amendment to Rule 4(m) to shorten the time to serve a summons and complaint, but recommends that the Advisory Committee Note explicitly state that extensions of time under the “good cause” exception should be liberally granted and that the proposed amendment is not intended to effect any change in the discretion the courts currently have to grant extensions even in the absence of good cause.

The Section supports all of the proposed amendments to Rule 16(b): (1) shortening the time for the court to issue the scheduling order unless there is good cause for delay (Rule 16(b)(2)); (2) adding to the subjects that may be included in the scheduling order, including a provision that requires a movant to request a court conference before making a discovery motion (Rule 16(b)(3)); and (3) the deletion in Rule 16(b)(1)(B) to emphasize that a scheduling conference with the court be by direct, simultaneous communication with the parties.

The Section supports all of the proposed amendments to Rule 26. It supports the proposed amendment to Rule 26(f) to include as topics of the parties’ discussion in their Rule 26(b) conference two of the permitted subjects that would be added under Rule 16(b): preservation of electronically stored information and Rule 502 agreements. The Section supports

the proposed amendment of Rule 26(d)(2) to permit early Rule 34 requests and to extend the time to respond to them to 30 days after the first Rule 26(f) conference.

The Section supports, with caution, the proposed amendment to Rule 26(b)(1) regarding scope of discovery that would include a requirement that the discovery be proportional to the needs of the case after considering certain specified factors, which is taken from Rule 26(b)(2)(C)(iii). It suggests that the Advisory Committee Note to amended Rule 26(b)(1) make clear that existing case law interpreting and applying Rule 26(b)(2)(C)(iii) would apply to the new language.

The Section supports the deletion of the current language in Rule 26(b)(1) authorizing a court to order, upon good cause, discovery of “any matter relevant to the subject matter involved in the action.” The Section also supports the deletion of the current text in Rule 26(b)(1) providing that “[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence” and to substitute language stating that “[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable.”

Finally, the Section supports, with caution, the deletion of the current text in Rule 26(b)(1) that provides that matter relating to the “existence, description, nature, custody, condition and location of any documents or tangible things, and the identity and location of any persons who know of discoverable material” is discoverable. The Section suggests that the Advisory Committee Note to amended Rule 26(b)(1) provide that the deletion does not mean that such matters are not discoverable.

The Section supports the proposed amendment to Rule 26(C)(1)(B) to expressly authorize a court, for good cause, to enter a protective order to protect a party from undue burden or expense by allocating discovery expenses. The Section suggests that the Advisory Committee

make clear, either in the proposed new text or in the accompanying Advisory Committee Note, that the proposed change is not intended to alter the American rule on attorneys' fees and does not authorize the court to allocate attorneys' fees incurred in connection with disclosure or discovery, *i.e.*, that the term "expenses" does not include attorneys' fees.

The Section does not support the proposed new or reduced presumptive limits on discovery:

- reducing the presumptive number of depositions from ten to five under Rules 30 and 31;
- reducing the length of a deposition from seven hours to six hours under Rule 30;
- reducing the presumptive number of interrogatories from 25 to 15 under Rule 33; and
- limiting to 25 under Rule 36 the number of requests for admission, other than requests to admit the genuineness of documents, unless otherwise stipulated or ordered by the court..

The Section supports the proposed amendments to Rule 34(b)(2)(B), which would expressly require a responding party to "state the grounds for objecting to the request with specificity" and to state whether it will produce copies of documents or electronically stored information instead of permitting inspection. It also supports the proposed amendment to Rule 34(b)(2)(B) that, in the case of production of copies, rather than inspection, the production be completed no later than the time for inspection stated in the request or a later reasonable time stated in the response. The Section supports the proposed amendment to Rule 34(b)(2)(C), which would require a responding party to affirmatively state whether any responsive materials are being withheld from production on the basis of a stated objection. However, the Advisory Committee should make clear, either in the Rule or in the Advisory Committee Note, that a party can respond by stating that it has not yet determined whether any responsive documents are

being withheld on the basis of a stated objection, but will supplement its response within a reasonable time to provide that information.

The Section supports the proposed amendment to Rule 37(e)(1) to incorporate an obligation to preserve information in anticipation of or during litigation. The Section also agrees that the appropriate scope of information to be preserved is “discoverable information.”

The Section supports the proposed amendment to Rule 37(e)(1) regarding measures the court may impose if “discoverable information” is not preserved after the duty to do so has arisen: (1) curative measures, such as additional discovery or paying reasonable expenses, including attorneys’ fees, and (2) sanctions, such as an adverse inference jury instruction or those listed in Rule 37(b)(2)(A).

The Section agrees that sanctions should be imposed only upon a showing of substantial prejudice and willfulness or bad faith, or if the failure irreparably deprives a party of any meaningful opportunity to present or defend against claims, regardless of the level of culpability. The Section does not agree that there should be an attempt to define “substantial prejudice,” as it will be context specific. However, some clarification is needed that the burden of establishing substantial prejudice should be shifted to the spoliator acting willfully or in bad faith, that willfulness is defined in the Advisory Committee Notes, and that “actions” in proposed Rule 37(e)(1)(B) include failures to act.

With respect to the proposed amendment of Rule 37(e)(2) to list nonexclusive factors the court should consider in assessing a party’s conduct, the Section supports the concept of describing such factors and supports the ones described in the proposed amendment. However, the Section recommends that the Advisory Committee’s “expectation” that courts “will employ the least severe sanction needed to repair the prejudice resulting from the loss of the information” be made explicit in the introductory language of Rule 37(e)(2), rather than in the

proposed Advisory Committee Note to Rule 37(e)(1)(B). The Section suggests that the introductory language of proposed Rule 37(e)(2) be rewritten to read: “The court should consider all relevant factors in selecting the least severe curative measure or sanction under Rule 37(e)(1) needed to repair any prejudice resulting from the loss of information.”

The Section supports the proposed amendment to abrogate Rule 84 and the official Forms, except Forms 5 and 6, which would become part of Rule 4.

October 1, 2013

**New York State Bar Association
Commercial and Federal Litigation Section**

Gregory K. Arenson, Chair

Committee on Federal Procedure

James F. Parver, Co-Chair*

Michael C. Rakower, Co-Chair*

Scott A. Barbour

Mathew P. Barry

Robert Edward Bartkus

Jessica Lyn Bartlett

Ernest T. Bartol

James A. Beha, II

James J. Beha, II

Leonard Benowich

Howard E. Berger

Gail Michele Blasie

William J. Brennan

Mark Budoff

Christopher M. Caparelli

John Castiglione*

J. Peter Coll, Jr.

John Arthur Degasperis

Michael W. Deyo

Robert Jay Dinerstein

Shannon Fields

Neil P. Forrest

Stephen J. Ginsberg*

Robert E. Glanville

Jeffrey E. Gross

Richard E. Hahn

Alan A. Harley

Jeffrey J. Harradine

Thomas P. Hartnett

Peter C. Hein

Michael T. Hensley

Robert J. Jossen

Isaiah Richard Kalinowski
Joshua Katz
Madeline Kibrick Kauffman
Rachel H. Kim
Muhammed Kashif Khan
Leyla A. Kiosse
Patrick A. Klingman*
Michael R. Lazerwitz
Ian Nathaniel Levy
Steve Madra
Michael R. McGee
Charles E. Miller
Ronald Minkoff
Sharon M. Porcellio
Seth A. Presser
Thomas J. Quigley
Shawn Preston Ricardo
Stephen T. Roberts*
Jorge Rodriguez
Dennis M. Rothman*
Joshua A. Roy
William Robert Samuels
Karl Silverberg
Doreen A. Simmons
Alexander R. Sussman
Ellen Unger
David H. Wilder
Scott H. Wyner

E-Discovery Committee

Constance M. Boland, Co-Chair*
Adam I. Cohen, Co-Chair*
Peter Avery
Steven C. Bennett*
Mark Berman
Michael P. Berman
Steven Berrent
Craig Brown
Alyson C. Bruns
Royce F. Cohen*
Christopher C. Costello*
Melissa A. Crane
Honorable John M. Curran
Michael W. Deyo
George F. du Pont
Ryne Duchmann
Natalie Feher
Peter Goodman

Ross M. Gotler*
Ignatius A. Grande*
Adam K. Grant
Jeffrey E. Gross
Maura R. Grossman
Ian K. Hochman*
Mitchell P. Hurley
Matthew Knouff*
Steven S. Krane
Josh Levy
Jason Lichter
Scott Malouf
Elizabeth A. Mason
Michael Masri
Dino E. Medina
Jay M. Miller
Paula L. Miller
Aaron D. Patton
Sandra Rampersaud
Rachelle Rennagel
Kevin Roddy
Jessica Perazzelli Ross
Sarit Schmulevitz
Dayna Shillet
Howard J. Smith III
Emily K. Stitelman
Daniel Tepper
Honorable Ira B. Warshawsky
Mitchell Wong
Aaron E. Zerykier
James S. Zucker

*Principal authors of the report.