REPORT OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

The Association of the Bar of the City of New York City greatly appreciates the opportunity for public comment provided by the Judicial Conference's Committee on Rules of Practice and Procedure on the amendments to the Federal Rules of Civil Procedure proposed by the Advisory Committee on Civil Rules. The Association, founded in 1870, has over 24,000 members practicing throughout the nation and in more than fifty foreign jurisdictions. The Association includes among its membership many lawyers in every area of law practice, including lawyers generally representing plaintiffs and those generally representing defendants; lawyers in large firms, in small firms, and in solo practice; and lawyers in private practice, government service, public defender organizations, and in-house counsel at corporations.

The Association's Committee on Federal Courts (the "Federal Courts Committee") is charged with responsibility for studying and making recommendations regarding proposed amendments to the Federal Rules of Civil Procedure. The Federal Courts Committee respectfully submits the following comments on the proposed amendments:

I. Executive Summary

In this report, the Federal Courts Committee has sought to take a balanced and thoughtful approach to the proposed amendments to the Federal Rules of Civil Procedure, and to offer constructive suggestions and/or modifications where we felt that was appropriate. We have not sought to address every one of the proposed amendments of the Rules; rather, we have tried to address the proposed amendments which we believed to be most significant and those where we believed we had something new to add to the discussion. Our silence with respect to the proposed amendments we do not address should not be taken as agreement with those proposals; rather, we take no position with respect to those proposed rule changes.

As discussed below, the Federal Courts Committee supports some of the proposed amendments to the Rules; supports others with proposed modifications or clarifying commentary; and opposes some of the proposed amendments. In particular, the Federal Courts Committee:

- supports the proposed amendment of Rule 4(m), with a suggested modification;
- supports the proposed amendments to Rule 26(b) regarding the scope of discovery, with suggested clarifying commentary;
- supports the proposed amendment to Rule 26(d)(2) that would authorize early document requests;
- opposes the proposed amendments to Rule 30 that would further limit the presumptive number and duration of depositions;
- supports the proposed amendments of Rules 33 and 34, with modifications;
- supports the proposed amendment to Rule 36; and,
- while generally supporting the goals of the proposed amendments to Rule 37, suggests significant revisions to the pending proposals.

Our report also includes three separate statements by individual members of the Federal Courts Committee, who dissent on various aspects of the Federal Courts Committee's discussion of Rules 26, 34 and 37.

II. Rule 4

The Advisory Committee has proposed a revision to Rule 4(m), which will shorten the time period for a plaintiff to serve a summons and complaint from 120 days to 60 days. This amendment has been proposed because four months to serve the summons and complaint is viewed as too long, and any concerns regarding circumstances that might justify a longer time period are already met by the district court's duty under Rule 4(m) to extend the time if the plaintiff demonstrates good cause for failure to complete service within the specified time.

The Federal Courts Committee generally supports the proposed amendment, with one qualification. We agree that, in the typical case, a period of 60 days to serve the summons and complaint ought to be sufficient. However, we are concerned that the proposed amendment may not take sufficient account of the time required to effect service on foreign corporate entities under the Hague Convention. Service under the Hague Convention routinely takes more than 60 days; if the new requirement applies to service on foreign entities under the Hague Convention, it would require plaintiffs to routinely file motions to extend the time while awaiting completion of the Hague Convention process, adding additional and unnecessary motion practice to the already overburdened courts.

We recognize that Rule 4(m) specifically provides that the rule "does not apply to service in a foreign country under Rule 4(f) or 4(j)(1)," and that the proposed amendment leaves that aspect of the Rule intact. However Rule 4(f) only applies, at least on its face, to service on individual defendants, and Rule 4(j)(1) applies only to service on foreign governments or their instrumentalities. Service on foreign corporations, partnerships or other associations is governed by Rule 4(h)(2). While Rule 4(h)(2) permits any means of service prescribed by Rule 4(f) except personal delivery, it is not clear that service on foreign corporate entities, partnerships or associations is excluded from the application of Rule 4(m). While most courts seem to assume that Rule 4(m) does not apply to service on foreign corporations, *see Nylok Corp. v. Fastener World, Inc.*, 396 F.3d 805, 806-07 (7th Cir. 2005) (reversing district court, which had dismissed action against foreign corporation for failure to comply with Rule 4(m)); *Loral Fairchild Corp. v. Matsushita Elec. Indus. Co.*, 805 F. Supp. 3, 4-5 (E.D.N.Y. 1992), their reasoning is unclear and they do not really address the issue. We therefore suggest that the last sentence of Rule 4(m)

to be amended to make clear that Rule 4(m) "does not apply to service in a foreign country under Rule 4(f), 4(h)(2) or 4(j)(1)."[1]

III. Rule 26

Several of the Advisory Committee's proposals with respect to the revision of Rule 26 have proven controversial, both within the Federal Courts Committee and in the bar at large. There is substantial concern that the Advisory Committee's proposed revisions will unfairly cut back on the appropriate scope of discovery and prevent plaintiffs from obtaining the discovery they need to pursue valid claims. The Federal Courts Committee takes these concerns seriously, and has carefully considered them, but on balance, the majority of our Committee believes that they are ultimately overstated. Accordingly, a majority of the Federal Courts Committee supports the proposed amendments to Rule 26. But we suggest below some clarifications that the Advisory Committee may want to consider adding to the Advisory Committee Notes that will accompany the proposed rules, to address and ameliorate the concerns that have been raised.

A. Proportionality

One of the Advisory Committee's proposed amendments would add a new clause to Rule 26(b)(1) that would expressly provide for a "proportionality" analysis applicable to the scope of discovery that parties may seek. Under the proposed rule, parties may obtain discovery "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

[1] We also note that *pro se* parties (especially those who are incarcerated) often have difficulty serving their complaints in a timely manner, and could be adversely affected by the reduction in the time permitted for service. We suggest that the Advisory Committee's Note address this issue, and make clear that extensions of time for *pro se* litigants should be liberally granted in appropriate circumstances.

resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."

The majority of the Federal Courts Committee agrees that adopting a proportionality analysis is appropriate in light of the substantial increases in discovery and discovery-related costs that have taken place over the past two decades, including but not limited to increases driven by the advent of discoverable electronic communications. Adding an express requirement to Rule 26(b)(1) that proportionality should govern the scope of discovery appropriately highlights for both the parties and the courts the need to engage in some type of cost-benefit calculus before the parties plunge headlong into unrestricted discovery. Those opposed to this proposal argue that individuals and small businesses rarely keep extensive business records, and therefore that the only beneficiaries of this proposal will be larger businesses. But the majority of the Federal Courts Committee believes a proportionality requirement will not only protect large corporate parties from abusive demands; properly applied, it will also protect individuals and smaller parties who find themselves subject to discovery demands from larger adversaries that would unreasonably impose disproportionate burdens.

In supporting the proposed amendment, we note that the proposed addition to Rule 26(b)(1) mirrors the proportionality analysis *already* required by present Rule 26(b)(2)(C)(iii). Moving this analysis forward to Rule 26(b)(1) makes clear that the proportionality calculus applies to the parties' initial discovery demands, and not merely when a discovery dispute comes to the attention of the Court. *See* Report of the Advisory Committee on Civil Rules, at pp. 265 & 296 of 354. In so doing, the proposed amendment furthers policy objectives that the Judicial Conference embraced in connection with the 1983 amendments to the Federal Rules. *Id* at pp. 264-65 & 354-55.

To address the concerns that have been expressed about this amendment, however, the Federal Courts Committee suggests that the Advisory Committee Notes to the final rule address the following points:

(i) One of the concerns expressed about moving Rule 26's discussion of proportionality forward from Rule 26(b)(2)(C)(iii) to Rule 26(b)(1) is that it could be viewed as shifting the burden of proving proportionality from the party resisting discovery to the party who propounded the discovery. The Federal Courts Committee believes that the burden of proof should not be shifted in this way, and we assume that it was not the intent of the Advisory Committee to effect such a shift in the burden of proof. To make its intent clear, we respectfully suggest that the Advisory Committee Notes make explicit that the amendment to add the "proportionality" analysis to Rule 26(b)(1) is not intended to address or alter existing law on the question of which party should bear the burden on any issue that may arise in the event of a discovery dispute.

(ii) To alleviate the concerns that have been raised regarding this proposed amendment to Rule 26, we would also suggest that the Advisory Committee Notes make explicit that the purpose of adding an express "proportionality" requirement to Rule 26(b)(1) is not intended to tilt the playing field in favor of one set of parties or against others, and to make the point that a proportionality requirement, properly applied, may not only protect large parties from abusive demands in some cases, but may also protect individuals and smaller parties who might otherwise be subjected to potentially disproportionate discovery burdens.

(iii) We would further suggest that the Advisory Committee Notes make clear that the addition of a "proportionality" requirement to Rule 26(b)(1) is not intended to effectuate an across-the-board reduction in the scope of discovery, and in many cases will have no impact at all. Those opposed to this amendment argue that the adoption of a proportionality requirement will result in a significant across-the-board reduction in the scope of discovery generally, particularly when combined with the limitation of discovery to matters relating to existing claims or defenses, as discussed below. However, the majority of the Federal Courts Committee believes that that the proposed amendment is intended to address the distinct minority of cases where proportionality is not already being applied in practice. As stated by the Advisory Committee in the original version of its May 8, 2013 Report:

> In most cases discovery now, as it was [at the time of the 1983 Amendments], is accomplished in reasonable proportion to the realistic needs of the case. . . . But at the same time discovery runs out of proportion in a worrisome number of cases, particularly those that are complex, involve high stakes, and generate particularly contentious adversary behavior.

Advisory Committee on Federal Rules of Civil Procedure, *Report of the Advisory Committee on Civil Rules*, at 10 (May 8, 2013).

(iv) The Advisory Committee Notes should emphasize that "proportionality" analysis includes consideration of a number of factors, and not simply the amount in controversy. Even if the case may involve relatively modest dollar amounts, the case may nevertheless present issues that are extremely important to the litigants or of great public importance. Although this is expressly stated in the text of the rule's definition of proportionality, we

believe that it bears re-emphasis in the Notes that proportionality entails consideration of a variety of circumstances, including not only the amount in controversy, but also the importance of the issues at stake and the importance of discovery in resolving the issues. Ultimately, in any case, there must be an assessment of whether the burden or expense of the proposed discovery outweighs its likely benefit.

(v) Finally, the Advisory Committee Notes should clarify that a decision based on proportionality made at the outset of litigation is subject to reconsideration later in the litigation, where developments in the litigation or evidence revealed in discovery may make such reconsideration appropriate.

B. Limiting Discovery to Claims or Defenses

The Advisory Committee's proposed amendments would limit the proper scope of discovery to the claims or defenses of the parties, and eliminate language in Rule 26, as it currently stands, that permits the court, for good cause, to order broader discovery "of any matter relevant to the subject matter involved in the action." Opponents of this amendment argue that it will unreasonably preclude discovery of closely related claims where a plaintiff may not have sufficient evidence at the outset of litigation to allege the alternative claim.

On balance, however, a majority of the Federal Courts Committee supports this proposed amendment. We do not regard this proposed amendment as a significant retrenchment on the scope of discovery. Rule 26(b)(1), as it currently stands, defines the scope of discovery by stating that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense," and this language will be retained in the amended rule. While the current rule allows parties to make a motion seeking court approval of broader discovery into "any matter relevant to the subject matter" of the action, in our experience this provision is rarely

relied upon. It is rare that a party expressly *seeks* discovery of matters that cannot reasonably be tied to the claims or defenses already presented in the action, and rarer still for the court to *grant* such discovery. Moreover, as the Advisory Committee's Report notes, discovery "*should* be limited to the parties' claims and defenses." Report of the Advisory Committee on Civil Rules, at p. 265 of 354 (emphasis added). Discovery is intended to provide the means for parties to obtain the information they need to support their claims and defenses; it was never intended to provide an opportunity to seek evidence to support other claims that have not been alleged. In light of the increasing burden and expense of discovery in many cases, the Federal Courts Committee believes that the proposed rule's effort to focus parties and the courts on the need to require relevance to a claim or defense may prevent abuses in some cases, and should not impede legitimate discovery.

As the Advisory Committee's Report notes, if discovery relating to the parties' claims and defenses provides support for new claims or defenses, "amendment of the pleadings may be allowed when appropriate." *Id*. at pp. 265-66 of 354. The Federal Courts Committee suggests that the Advisory Committee Notes make clear that such amendment of the pleadings should be freely given when justice so requires, in accordance with the standards provided in Rule 15, when information supporting new claims and defenses has been revealed in discovery.

C. Discovery Need Not Be Admissible

Another of the Advisory Committee's proposed amendments to Rule 26 would delete the sentence in the current rule stating 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 Advisory Committee would amend Rule 26(b)(1) to provide that "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable."

The Federal Courts Committee supports this proposed amendment. As the Advisory Committee Report explains, the objective of this change is to better express the scope of discovery that has always been intended. *See id*. at p. 266 of 354. While the language to be deleted is often cited in support of a broad scope of discovery, the Advisory Committee explains that it was never intended to define the scope of discovery, and was in fact added to the rule to address decisions that had precluded discovery into hearsay and other evidence that would not be admissible at trial. The language the Advisory Committee proposes to add to the rule continues to make explicit that the fact that a matter may not be admissible in evidence does not prevent it from being discovered.[2]

D. Detailed Listing of Discoverable Matters

The Advisory Committee also proposes deletion of the language in Rule 26(b)(1) providing that discoverable matters may include "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." The Advisory Committee's Report explains that "[d]iscovery of such matters is so deeply entrenched in practice" that citing such examples in the

[2] The Advisory Committee's Report does not address the discoverability of metadata relating to particular electronic documents or information about a party's computer systems. It is our understanding that the proposed amendments are not intended to have any effect on the discoverability of information of this type. We respectfully suggest that the Advisory Committee Notes should address this important topic.

rule "is no longer necessary." *Id*. at p. 266 of 354. The Federal Courts Committee agrees. Discovery of such things is widely and routinely accepted in practice, and there is no need to include such details in the rule. However, we note that the proposed Advisory Committee Note on the revisions to Rule 26 does not mention the deletion of this language, and does not clarify that the reason for its deletion is simply that it is no longer necessary because the practice is so firmly established. To avoid any misunderstanding, the Federal Courts Committee urges that the issue should be addressed in the Advisory Committee Note, and that language substantially similar to the discussion in the Advisory Committee's Report be included.

E. Early Document Requests

Another proposed amendment would amend Rule 26(d)(2) to authorize "early Rule 34 requests" for production of documents that are deemed served at the first Rule 26(f) conference. The draft Advisory Committee Note regarding this amendment explains that the purpose of allowing these early discovery requests is "to facilitate focused discussion during the Rule 26(f) conference," *id*. at p. 298 of 354, by allowing consideration of specific document requests. *See id.* at p. 263 of 354. The time for the adverse party to respond to the document requests would not begin to run until the Rule 26(f) conference, and should not be affected. Indeed, the draft Advisory Committee Note states that the fact the request was served early "should not affect a decision whether to allow additional time to respond." *Id*. at p. 298 of 354.

The Federal Courts Committee supports this proposal. This proposed change serves a potentially beneficial purpose with no practical downside, since where additional time to respond is required – as is often the case – the parties and the court should continue to be amenable to appropriate extensions of the time to respond.

IV. Rule 30

The proposed amendments to Rule 30 would decrease the presumptive limit on the number of depositions from 10 per side to 5, and would reduce the time limit for each deposition from 7 hours to 6 hours.[3]

A. Presumptive Number of Depositions

The Advisory Committee's proposal to reduce the presumptive limit on the number of depositions cites the comments of some federal judges that parties overuse depositions, and notes the substantial costs of depositions. *See id*. at 267 of 354. Opponents argue that in many cases, plaintiffs need deposition discovery in order to develop their claims, and that this amendment would unreasonably restrict their access to necessary discovery.

On balance, the Federal Courts Committee does not support this proposed amendment. We do not believe that the Advisory Committee has made a persuasive case that the presumptive number of depositions should be reduced. In the cases we see, there is generally a need for more than five depositions per side, and a party should not be dependent upon the reasonableness of its opponent or its ability to persuade a judge in order to be entitled to do the discovery it believes necessary to prepare the case. Moreover, in our experience, most lawyers already take into account the cost of depositions in determining which depositions, and how many, to take.

The Advisory Committee's Report notes that judges regularly see lawyers in criminal cases cross-examine witnesses in criminal trials without the benefit of depositions, *see id*. at 267 of 354, but there are important policy reasons – inapplicable to civil cases – why depositions and broad pre-trial discovery are not permitted in criminal cases, and defendants in criminal cases have the benefit of the Government's obligation to produce witness statements under 18 U.S.C. §

[3] The Advisory Committee's proposals would similarly reduce the number of depositions on written questions permitted under Rule 31.

3500, exculpatory material under *Brady v. Maryland*, 373 U.S. 83 (1963), and impeachment material under *Giglio v. United States*, 405 U.S. 50 (1972). The Report's reference to practices in criminal cases is not a valid model for discovery in civil cases.

The Report also notes that judges rarely see witnesses effectively impeached with deposition transcripts, *see* Advisory Committee Report, at p. 267 of 354, but this comment vastly undervalues the importance of depositions in pre-trial preparation. Even if there is no need to impeach the witness at trial, discovering before trial what the witness will say is crucial to proper trial preparation, and allows the party to shape its case or defense. In our experience, depositions are a vitally important pre-trial discovery tool, and they should not be further limited without a compelling justification, which the Advisory Committee has not presented.

It is also important to point out that, to the extent that a party in a particular case may seek to take a number of depositions that the adversary believes to be unwarranted or harassing, the Federal Rules already allow a party to seek appropriate relief. As the Advisory Committee Notes to the 1993 amendments make clear, "in some cases the ten-per-side limit should be reduced in accordance with" the principles of Rule 26(b)(2), including the principles of proportionality now being moved to Rule 26(b)(1). We respectfully suggest that the Advisory Committee Notes be revised to expressly make this point.

Finally, if the Advisory Committee decides to go forward with its proposal to limit the presumptive number of depositions to five per side, we would recommend that the amended rule be modified to make clear that the presumptive limit applies only to fact depositions, and not to the depositions of experts. A litigant who takes 3 to 4 depositions of fact witnesses should not be prejudiced if an adversary subsequently identifies multiple expert witnesses.

B. Length of Depositions

The Advisory Committee also proposes to reduce the time limit for each deposition from 7 hours to 6 hours. This is a substantial change from the Advisory Committee's initial proposal, which would have reduced the time limit for each deposition to four hours.

In explaining the proposed reduction to six hours, the Advisory Committee explains that many depositions (with breaks) extend into the evening, and are time-consuming and arduous for the witness. The Advisory Committee believes that proposed amendment will permit the parties to conduct a full examination during each deposition, while encouraging efficient use of deposition time and making the experience less arduous. See *id*. at p. 268 of 354.

The Federal Courts Committee does not endorse this proposed change. We do not believe that reducing the time limit by 1 hour will promote efficiency, nor do we see a demonstrated need for this limitation.

V. Rule 33

The proposed amendments to Rule 33 would decrease the presumptive limit on the number of interrogatories from 25 to 15. The Advisory Committee's stated purpose is to encourage parties to think carefully about the most efficient and least burdensome use of discovery devices. Opponents of this amendment express concern that it will preclude parties (particularly plaintiffs) from pursuing valid discovery, and argue that interrogatories are a relatively inexpensive discovery form, the use of which should be further expanded rather than circumscribed.

The Federal Courts Committee endorses the proposed amendment, subject to one suggested modification noted below. The proposed amendment contemplates that the parties in any case can stipulate to a greater number of interrogatories, and provides that the court "may" grant leave to serve additional interrogatories consistent with the scope of discovery set out in

Rule 26(b)(1) and (2). To alleviate concerns that discovery may be unfairly limited, we believe the proposed amendment should be revised to provide that the court "must" grant leave to serve additional interrogatories consistent with Rule 26(b)(1) and (2), making this provision consistent with the approach taken in Rules 30 and 31.

With that caveat, we believe the proposed amendment will encourage efficient and thoughtful use of interrogatories, and help avoid the propounding of interrogatories that do not yield substantive or helpful responses. In that regard, we note that interrogatories can (and often do) impose great burdens on litigants, because they can require searching reviews of documents and factual investigation in order to respond, even though the same work could be done by the requesting party based on the documents produced in discovery, and that interrogatories are most valuable in identifying the names of witnesses with relevant knowledge and the existence, custodian and location of relevant documents.

VI. Rule 34

A. Objections Stated with Specificity

The Advisory Committee's proposed amendments to Rule 34(b)(2)(B) would require that objections to requests for production of documents be stated with specificity. The Federal Courts Committee endorses this change. While generalized objections can be useful in limited circumstances, where all the document requests share a common, identifiable flaw (for example, if all the requests cover an overly broad time period), we agree that some attorneys may overuse generalized objections. An objection to a request to produce documents ideally should lead to transparency in the discovery process. The discovery process works most efficiently when the producing party communicates with clarity the specific nature of its objection to a particular request, as well as information regarding how the request is being interpreted and implemented by the producing party. Such particularized objections provide the basis for reasoned

negotiations regarding the proper scope of discovery, and allow a court to assess the validity of a stated objection in the case of a discovery dispute. In contrast, boilerplate objections do little more than generate confusion as to how the request has been interpreted by the producing party, and obscure whether responsive documents exist and whether any responsive documents have been withheld. An amendment to the Rules that finally does away with such boilerplate objections is a welcome one.

In addition, we note that the Advisory Committee Notes with respect to Rule 34(b)(2)(C) indicate that "[a]n objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been 'withheld'." Report, at p. 309 of 354. In our view, the same principle is applicable to Rule 34(b)(2)(B), and we respectfully suggest that a similar statement be included in the Advisory Committee Notes with respect to Rule 34(b)(2)(B). For example, we would suggest adding an explanation like the following: "An objection is sufficiently specific if it states the limits that have controlled the search for responsive and relevant materials. Examples would be a statement that the search is limited to materials created during a defined period, or maintained by identified sources."

B. Specifying Time to Produce Documents

The proposed amendments to Rule 34(b)(2)(B) also provide that a party who intends to produce copies of responsive documents (rather than permitting inspection) must say so, and must either produce the documents by the response date or state in the response when production will be made. We endorse the amendment requiring a responding party to specify whether it will be producing copies of documents. We also agree that requiring litigants to provide clearer responses regarding the timeline for document production will make discovery more efficient.

However, in large complex cases, it may not be feasible for a responding party to specify at the time of the response exactly when it will be able to complete its production. The Advisory

Committee acknowledges "the value of 'rolling production' that makes production in discrete stages." Advisory Committee Report, at p. 269 of 354. The Advisory Committee therefore includes in the draft Advisory Committee Notes an explanation that "[w]hen it is necessary to make the production in stages, the response should specify the beginning and end dates of the production." *Id.*, at p. 309 of 354.

We greatly appreciate this recognition of the benefits of a rolling production in a large case. We would suggest, however, a minor refinement in the language of the Advisory Committee Note. In view of the inherent uncertainty involved at the outset of a large production, it often is not possible to specify with confidence an "end date" for the production before the production is underway. Accordingly, we respectfully suggest that the Advisory Committee Note be revised to state that a party may comply with the rule by stating that it will produce documents on a rolling basis, specifying when the production will begin and when it is anticipated to be complete.

C. Specifying Whether Documents Are Being Withheld

The Advisory Committee has also proposed an amendment to Rule 34(b)(2)(C) that would require the responding party to specify whether any documents are being withheld based on a particular objection. The Advisory Committee explains that the purpose of this amendment is to eliminate uncertainty regarding whether a particular objection is generalized or hypothetical, or whether there are particular documents that would otherwise be responsive that are being withheld on this basis.

The Federal Courts Committee generally supports the goals of this provision, but has several reservations. While we agree that greater transparency regarding the withholding of documents is desirable, we believe that the amendment discussed above requiring more specific objections should help eliminate much of the uncertainty with which the Advisory Committee is

concerned. Moreover, we are concerned that this proposed amendment could prove to be burdensome to implement, as the producing party may have to go to considerable effort – at a time before the document production is really underway – to determine whether responsive documents are being withheld under a particular objection. We would respectfully suggest that a better method for curbing evasive discovery responses is to prohibit conditional responses to document requests. If responding parties are no longer permitted to provide a response that is "subject to, and without waiving" objections, and are further required to be specific as to which portions of a document request they find objectionable, then uncertainty as to whether the responding party has produced only a portion of responsive documents should be greatly diminished.

We are also concerned that, as currently framed, the amendment is not practical. Given that responses to document requests are usually prepared when the search for responsive documents has either just begun or has not yet even commenced, it is not reasonable to require a responding party to ascertain at such an early stage in the process whether particular documents exist that fall within the scope of a particular objection, and whether such documents will ultimately be produced. Given such uncertainties, if this requirement is retained in the proposed rule, attorneys are likely to provide the type of protective generalized responses that the proposed amendments to Rule 34 were designed to avoid.

We recognize that the draft Advisory Committee Note explains that "[a]n objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been 'withheld,'" and that the Note provides as examples statements that the search was limited to documents created during a specific time period or held by specific custodians. *See* Advisory Committee Report, at p. 309 of 354. These points are very helpful, and should result in greater transparency in many situations where the scope of the

document request is not clear or is overbroad. But there are many other situations where it will be impossible to know at the outset of the document production whether documents will be withheld under a particular objection. We therefore respectfully suggest that, if the concept of requiring a statement as to whether documents have been withheld pursuant to a particular objection is going to be retained in the amended rule as finally promulgated, the proposed rule should be modified to require notification regarding whether documents have been withheld pursuant to a particular objection only at the conclusion of the party's document production, rather than at the outset, or at such other earlier time as the parties may agree or the Court may order.

VII. Rule 36

The proposed amendment to Rule 36 sets a new presumptive limit of 25 for requests for admission, excluding requests for admission addressed to the genuineness of documents. We endorse the proposed amendment. Requests for admission are useful tools for streamlining trials, but excessive or irrelevant requests for admission can be overly burdensome or harassing.

Accordingly, setting a presumptive limit in the number of requests for admission would curb potential abuses of the process. We note that a number of jurisdictions have adopted local rules that set a presumptive limit of 25 requests for admission, without adverse effect on the conduct of trials.

VIII. Rule 37

The Federal Courts Committee agrees that there is a need to revise Rule 37(e) to address the issues of data preservation, spoliation and the availability of sanctions, and generally supports the approach adopted by the Advisory Committee in drafting proposed Rule 37(e). We share the Advisory Committee's belief that parties should not suffer draconian sanctions when they act in good faith, particularly when their actions or omissions do not result in substantial

prejudice to the other party or where any prejudice can be remedied or ameliorated by measures short of sanctions. We also believe that the factors identified in proposed Rule 37(e)(2) are relevant and appropriate to be considered in assessing the reasonableness of a party's efforts to preserve information for litigation.

Nevertheless, we have reservations regarding some of the provisions of proposed Rule 37(e)(1), and believe that further study and revised drafting is necessary before a final rule is promulgated.

First, it appears that one of the principal purposes of the rule is to create a new concept of "curative measures" that a court may take to remedy or reduce the effects of any failure to preserve information for litigation, in lieu of imposing "sanctions." We agree that the courts should have available to them a wide range of remedial measures to address the failure to preserve relevant information, measures which are less severe than the "sanctions" authorized by Rule 37(b)(2)(A) and do not carry the stigma (and potential collateral consequences) of measures labeled as "sanctions." This is particularly true when the conduct at issue was not willful or in bad faith.

However, the proposed rule is very imprecise in defining the contours of what may constitute appropriate "curative measures," and we respectfully suggest that this imprecision needs further attention. The text of proposed Rule 37(e)(1)(A) discusses what appear to be three distinct remedies that a court may choose in addressing the failure to preserve information: it may "[1] permit additional discovery, [2] order curative measures, or [3] order the party to pay the reasonable expenses, including attorney's fees, caused by the failure." But it is not clear why these are not *all* considered to be "curative measures." Certainly permitting the parties to conduct additional discovery would seem to be a classic example of a curative measure; indeed, the draft Advisory Committee Note indicates that two examples of "curative measures" would be

"requiring the party that failed to preserve information to restore or obtain the lost information, or to develop substitute information that the court would have ordered the party to create but for the failure to preserve," *see* Advisory Committee Report, at p. 320-21 of 354, and both of these could easily be viewed as forms of "additional discovery." Similarly, it is not unreasonable to regard compensation for additional expenses incurred as a "curative measure," and in fact, the draft Advisory Committee Note seems to *treat* the payment of expenses as a form of "curative measure." *See id*. at p. 321 of 354.

Thus, the Advisory Committee may want to reword Rule 37(e)(1)(A) to clarify that the court may "order curative measures, *including* permitting additional discovery, ordering the party to pay reasonable expenses, etc." We also believe that it would be useful if the Advisory Committee Note could explain more fully that curative measures are intended to be remedial in nature and are intended to restore fairness to the litigation process by putting the party disadvantaged by the failure to preserve information in a position as close as possible to the position they would have been in if they had had access to the information. We also think it would be useful if the Advisory Committee Note compiled in one place a listing of examples of measures that might, in appropriate circumstances, be considered as curative measures, and make clear that this listing does not preclude other remedial measures that the court may devise on the facts of a particular case.

Second, the Advisory Committee does not explain why it has decided to treat an "adverse inference jury instruction" as a "sanction" under Rule 37(e)(1)B) – and therefore very difficult to justify without bad faith or willfulness – rather than as a "curative measure" under Rule 37(e)(1)(A). Certainly many of the courts that have approved this remedy have viewed it as a necessary corrective to address the particular discovery failure at issue, and therefore closer to a "curative measure" than a sanction. Indeed, the Second Circuit in *Residential Funding Corp. v.*

DeGeorge Financial Corp., 306 F.3d 99 (2d Cir. 2002) – which the Advisory Committee expressly rejects, *see* Report, at p. 272 of 354 – recognized that an adverse inference instruction should be available only when it was "necessary to further the remedial purpose of the inference." 306 F.3d at 108 (quoting *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 75 (S.D.N.Y. 1991)).

Moreover, the Advisory Committee itself recognizes that "[a]dditional curative measures might include permitting introduction at trial of evidence about the loss of information or allowing argument to the jury about the possible significance of lost information." Report, at p. 321 of 354. But if it is permissible as a "curative measure" to allow the jury to hear evidence about the loss of information and to allow counsel to argue to the jury about it, it is hard to understand why the court cannot properly give the jury an instruction to guide its consideration of that evidence.[4]

We understand that an adverse inference instruction – depending on its scope and wording – can be devastating to a party's ability to prosecute or defend its case. It may well be that, because of its uniquely serious consequences, the adverse inference instruction needs to be addressed separately from other curative measures. In our view, however, treating the adverse inference instruction as a "sanction" that effectively cannot be imposed without bad faith or willfulness sets too high a bar, and would make the adverse inference instruction unavailable in cases where – coupled with a substantial basis to believe that the unavailable evidence would have been favorable to the opposing party – it would appropriately serve an important remedial purpose and help level the playing field caused by an opposing party's failure to preserve relevant evidence.

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[4] *See Mali v. Federal Insurance Co.*, 720 F.3d 387, 391-94 (2d Cir. 2013) (explaining that adverse inference instruction may be appropriate to explain trial testimony even where it is not a sanction).

It is apparent that the Advisory Committee believes that the Second Circuit's decision in *Residential Funding*, by permitting an adverse inference instruction based on a negligence standard of culpability, set too low a standard and will cause parties to bend over backwards to over-preserve evidence in order to avoid being later second-guessed, with the benefit of hindsight, and found negligent for failing to preserve evidence that turns out to be relevant. The Federal Courts Committee understands and agrees with this concern, although we note that the Advisory Committee has failed to (and ought to) explain its reasoning in calling for rejection of the Second Circuit's holding. But requiring the district court to find bad faith or willfulness before an adverse inference instruction is permissible swings too far in the other direction, and takes away a remedial measure that the court should have available in appropriate circumstances without making those findings.[5] Accordingly, we suggest that the proposed rule be amended to treat the adverse inference instruction separately, and to require a showing of gross negligence or recklessness, plus substantial prejudice to the opposing party, before it can be employed.

Third, apart from our reservations regarding the treatment of the adverse inference jury instruction, the Federal Courts Committee generally supports proposed Rule 37(e)(1)(B) and its goal of restricting sanctions to situations where the party's conduct both caused substantial prejudice and was willful or in bad faith. We would suggest, however, that the introductory sentence be revised to permit the imposition of sanctions "if the party's actions *or omissions*" caused substantial prejudice and were willful or in bad faith.

Finally, we note that one of the goals of the proposed amendment is to preclude federal district courts from imposing sanctions under their inherent powers or under state law. *See* Report, at pp. 272, 320 of 354. But it is not clear to us whether the courts really have the power

[5] We note that district courts are often reluctant to make findings of willfulness or bad faith, even when the facts would support them, because of concerns about the potential collateral consequences of such findings.

through amendment of the rules to preclude district courts from imposing sanctions under other sources of authority. This is particularly true where sanctions may be authorized under state law in a diversity case. Indeed, the Advisory Committee Note recognizes that it has no power to preclude a claim for spoliation if it is asserted as a separate cause of action, as is permissible under the law of some states. *See id*. at p. 320 of 354. It is not clear why the judiciary would have the authority to accomplish the same result by rule, by precluding sanctions in a pending federal case.

In its Report, the Advisory Committee posed a series of specific questions on which it invited public comment. *See* Report, at p. 275 of 354. The Federal Courts Committee's responses to those questions are set out below:

1. "Should the rule be limited to sanctions for loss of electronically stored information?" While we agree that much of the discussion and concern regarding this issue focuses on the burden of preserving electronically stored data, we see no reason why the principles set out in proposed Rule 37(e) are not equally applicable to any issue involving the failure to preserve evidence. Accordingly, we do not believe that the rule should be limited to electronically stored information.

2. "Should Rule 37(e)(1)(B)(ii)[6] be retained in the rule?' We would strongly urge that this provision be retained. We believe that there may well be circumstances where the consequences of the loss of electronically stored information could be so severe as to warrant the imposition of sanctions, even in the absence of bad faith or willfulness. Accordingly, we believe it is important to preserve this possibility in the rule. For the same reason, we do not believe that

[6] The Advisory Committee's May 8 Report actually refers to "Rule 37(b)(1)(B)(ii)," *see* p. 275 of 354, but we understand this to be a typographical error.

limiting the scope of Rule 37(e) to electronically stored information would make this provision unnecessary.

3. "Should the provisions of current Rule 37(e) be retained in the rule?" We see no need to retain current Rule 37(e). The Advisory Committee's Report notes that this provision "has been invoked only rarely," *see* p. 274 of 354, and for good reason: it really does not address or answer the key questions. It is well settled at this point that a party faced with litigation cannot simply allow the continued operation of an electronic information system to result in the loss of relevant electronically stored information, and must take some steps to impose a litigation hold on the continued operation of the system. The difficult questions are when such steps may need to be taken, and how broad such steps may need to be. Current Rule 37(e) provides no guidance in answering those questions. The proposed rule provides at least a framework for evaluating the reasonableness of the decisions that a party has made in answering those questions, and therefore is a useful step forward. We believe that the guidance provided by the proposed rule and the limitations it imposes on the imposition of sanctions cover in more detail the matters currently addressed by Rule 37(e), and that retaining the rule would not serve any useful purpose.

4. "Should there be an additional definition of 'substantial prejudice' under Rule 37(e)(1)(B)(i)?"

5. "Should there be an additional definition of 'willfulness' or 'bad faith' under Rule 37(e)(1)(B)(i)?"

In our view, these issues are inherently case- and fact-specific and are better left for development in the case law. These concepts are hardly new to the law, and there is no reason to believe that courts will have difficulty applying them to the facts of particular cases. At least at

this point, we believe that efforts to define these terms further are unlikely to be of substantial utility.

Dated: February 7, 2014
New York, New York

Respectfully submitted,

Committee on Federal Courts
Association of the Bar of the City of New York

Ira M. Feinberg, *Chair*
Benjamin A. Fleming, *Secretary*
Cindy P. Abramson
Andrew S. Baron
Laura G. Birger
Julia L. Brickell
Daniel Joseph Brooks
Theodore K. Cheng
James P. Chou
James Clare
Caren Decter
Seth D. Eichenholtz
Hagit M. Elul
Brian J. Farrar
Michael S. Flynn
Hon. Martin Glenn
Peter C. Hein
David B. Hennes
Andrew C. Levitt
Margaret A. Malloy
Natalie Marcus
Glen G. McGorty
Gordon Mehler
Pamela A. Miller
Concepcion A. Montoya
Eric S. Olney
Breon Peace
Clay J. Pierce
Carolyn Pokorny
Harry Rimm
Hon. Vera M. Scanlon*
Alan H. Scheiner
Brian A. Smith
MaryAnn Sung
Jeannette A. Vargas
George S. Wang
William R. Weinstein
Robert B. Weintraub
Sidney N. Weiss
Adrienne Eason Wheatley
James S. Zucker

* Magistrate Judge Scanlon took no part in the preparation of this report.

Separate Statement of Robert B. Weintraub, dissenting with respect to Rules 26, 30 and 34:

Report Section III. Rule 26, Subparts A through D

Collectively, the proposed amendments to Rule 26 will, contrary to the assertions of the Federal Courts Committee, substantially effect an across-the-board reduction in the scope of discovery and will permit and encourage a party responding to discovery requests to avoid the production of relevant information, and particularly avoid document discovery which almost invariably constitutes the best evidence. This is so even if any of the proposed Rule 26 amendments, individually and in isolation, would be unobjectionable.

The proposed Rule 26 changes today – including, *inter alia*, the transfer of the proportionality requirement from a defense, under Rule 26(b)(2)(C)(iii), to be raised by the party opposing discovery to inclusion as part of the requesting party's proportionality burden under Rule 26(b)(1), and the complete elimination of the language that a court, for good cause, "may order discovery of any matter relevant to the subject matter involved in the action" – will be a regressive step that will encourage constrained and unreasonable interpretations of the English language by a responding party in order to avoid production of important information relevant to the conduct of the parties in their normal course of business before their dispute.

Rule 26, Proportionality

The Rule 26 proposed amendment addressed by the Federal Courts Committee under Subpart A, Proportionality will tilt the playing field in favor of large parties with substantial economic resources not only with respect to fact discovery but will also tilt the field against smaller litigants alleging novel legal theories, even where those theories do not on their face appear to violate Rule 11.

Rule 26, Limiting Discovery to Claims and Defenses

The Rule 26 proposed amendment addressed by the Federal Courts Committee under Subpart B would limit discovery to the claims and defenses alleged in the extant complaint, and would prohibit a court from, for good cause, "order[ing] discovery of any matter relevant to the subject matter involved in the action."

The proposed amendment will preclude discovery of facts concerning related claims where a plaintiff may not have sufficient evidence at the outset of the litigation to allege the alternative claim (*e.g.*, breach of contract versus a fraud claim). Moreover, statutes such as the Securities Act of 1933, Securities Exchange Act of 1934, the Sherman Act, Clayton Act and Investment Company Act of 1940, were deliberately drafted in broad strokes. The proposed Rule 26 amendments could readily be construed to unreasonably limit document discovery under these "Magna Carta of free enterprise" statutes (see Marshall, J.) where facts supporting additional claims under a statute often overlap and actions frequently have amended complaints that assert new claims after some amount of discovery. The proposed amendment in all likelihood will be interpreted to preclude such discovery.

The Advisory Committee Notes to the 2000 Amendment recognized the dangers of unnecessarily limiting discovery when it expressly stated that "[t]he good cause standard warranting broader discovery is meant to be flexible." That flexible standard will now be eliminated.

Rule 26, Discovery Need Not Be Admissible

The Rule 26 proposed amendment addressed by the Federal Courts Committee in Subpart C, deleting the language in the current Rule that "[r]elevant information need not be admissible at the trial" to be discoverable "if the discovery appears reasonably calculated to lead to the

discovery of admissible evidence," will severely limit the scope of discovery because its current long-standing application has been ingrained in the interpretation of the Rule.

Rule 26, Detailed Listing of Discoverable Matters

Concerning the Rule 26 proposed amendment addressed by the Federal Courts Committee in Subpart D, Detailed Listing of Discoverable Matters, the Federal Courts Committee supports the amendment but states that the Advisory Committee Note should be redrafted to make clear that the proposed deletion is acceptable only because such discovery (of the existence, type and location of documents, and witnesses) is so widely understood to be permitted that it need not continue to be specified in the Rule. However, the amendment should be opposed unless the Advisory Committee Note is expressly changed to state that discovery of such matters is so widely and routinely accepted in practice that there is no need to include such details in the Rule.

Rules 30 and 33, Depositions and Interrogatories

The Rule 30 and 33 proposed amendments seek to limit the number and length of depositions and seek to limit the number of interrogatories, respectively. While the Federal Courts Committee's opposition to these proposed amendments, *inter se*, is reasonable, the interplay of the Federal Courts Committee's opposition to the proposed Rule 30 and 33 amendments with its support of the proposed Rule 26 amendments graphically illustrates that the Rule 26 amendments will severely restrict document discovery and will favor large parties and other well-heeled litigants, because these amendments in combination restrict discovery of the best evidence and encourage an increase in costly wheel-spinning which smaller litigants cannot afford.

Discovery of documents created during the normal course of business between the parties, prior to the onset of the business dispute or depending on the circumstances even prior to

the litigation itself, is the best evidence because the documents were usually created for business purposes and without a view to litigation. On the other hand, responses to interrogatories are often contrived and deposition preparation usually makes the subsequent oral testimony under oath the equivalent of a memorized script that results in essentially useless testimony. Nevertheless, the Federal Courts Committee rejects the limitations on depositions and interrogatories, and indeed would mandate that a District Court "must" grant leave to serve additional interrogatories, while the Committee supports the limitations restricting the scope of document discovery. This combination will only benefit litigants who have substantial economic resources at their disposal because interrogatories and depositions have lost much of their probative value to discover information material to a summary judgment motion while document discovery retains its efficacy.

Rule 34, Document Production Objections Stated with Specificity

The Rule 34 proposed amendment, addressed in the Federal Courts Committee's Report in Part VI, would mandate that the party responding to the document request specifically disclose, at a relatively early stage of the litigation, whether responsive documents in fact exist and are being withheld under a particular objection. The Federal Courts Committee proposes limiting the proposed amendment to requiring such disclosure only at the conclusion of that party's document production, claiming that the responding party will not know what documents exist and are being withheld until the end of the production. The Committee's proposal is insufficient.

As a threshold matter, Rule 33 interrogatories requiring the disclosure of the existence, custodian and location of documents will probably have been served and answered early in discovery, providing sufficient knowledge to producing counsel that permitting a substantially delayed Rule 34 response will be unreasonable. Requiring a concrete answer only at the end of

that party's production undermines its usefulness in guiding discovery and will be so close to any discovery deadline that it would make a motion to compel production a practical impossibility. Also, granting such a motion to compel so late in the discovery period, even if warranted by fact and law, would often require that the discovery period be reopened and almost restarted at the beginning. Including delayed disclosure in the Rule will in itself unreasonably militate against the grant of such a motion. Specificity in identification should not be delayed and should be required earlier. In this instance, the Advisory Committee's proposal is the correct one.

Separate Statement of Julia L. Brickell, dissenting with respect to Rule 37:

The undersigned respectfully supports the proposal of the Advisory Committee which articulates a willfulness or bad faith standard under FRCP 37(e) for an adverse inference instruction, rather than the recommendation of the Federal Courts Committee that the standard be relaxed to one requiring only gross negligence or recklessness in the loss of discoverable information. The standard articulated by the Advisory Committee is appropriate.

An adverse inference instruction influences a fact-finder's determination of the merits of a case. The instruction should be given by a court only when it is clear that the lost information would have been (1) admissible, material evidence, and (2) adverse to the party that lost it. Absent willfulness and bad faith, the supposition that those conditions are met and the outcome-skewing impact of the instruction on the justice system are both unwarranted.

Lost Information Should Not be Presumed to be Lost Admissible Evidence. In the age of electronic information, a vast amount of information is created daily. It is copied, shared, and stored in multiple locations, devices, and forms. In the age of social media and "bring your own device to work," these locations are increasingly disparate. The variety of communication devices individuals use and the sharing opportunities of which they avail themselves at home are migrating to the work place; workers want to use means of communication with which they are comfortable and businesses reach out to consumers where they spend their time.

Further, the systems and cycles and rules for saving or backing up these locations, and for subsequently storing or disposing of them, are varied and often complex. There is so much information that managing information item-by-item based on perusal of content is difficult absent sophisticated search techniques. Often, information is managed based on high-level considerations such as date of creation (e.g., a time-based retention system), or employment status (e.g., handling of data of terminated employees). Therefore, if a source is lost or deleted,

absent evidence of a document-by-document determination, there is no inherent reason to presume that the content would have been adverse rather than favorable regardless of the care used in deciding to overwrite or delete it.

Finally, information is commonly created and stored in locations that contain content on myriad topics. As litigators and in-house litigation counsel know, only a small percentage of information for a particular custodian or from a particular source is likely to relate to a claim or defense in a specific dispute. A far smaller percentage of that discoverable information is actually identified as a trial exhibit, and still less is actually admitted into evidence at trial. And a yet smaller percent is case-determinative.

As a result:

- Information lost from a particular device, location, or custodian may be discoverable by other means. Content that is on point, whether duplicative or not, is likely to exist in multiple locations and forms. Witnesses can testify.
- There is a low likelihood that information uniquely available from any particular source would have been admitted into evidence at trial.
- There is an even lower likelihood that the lost information uniquely available from a particular source would be case-determinative against the party that lost it.

In these circumstances, without evidence that a loss of information was willful or in bad faith, there is no basis to infer that the lost information would have been admitted into the trial, much less propelled the opponent to a win. In contrast, where information was deleted to prevent its detection, there is a rational basis to conclude that it would have been harmful to the deleting party. A standard based on willfulness or bad faith properly protects opponents from intentional deletion of content known or believed to assist the opponent.

A Willful or Bad Faith Standard Best Serves Our Justice System. In the electronic era, document discovery is reported to constitute the largest single cost in litigation. The cost to preserve electronic information for potential discovery is substantial as well, in both dollars and risk. Given the myriad sources and the relative invisibility of the electronic information (when boxes-worth of data are stored on a single thumb drive and much information is stored offsite or in a third-party's social media platform), preservation scope and method is often complex to determine and implement. The larger the litigant, the more data, sources, and routine data disposal practices are likely to be implicated; the smaller the litigant, the less likely it has the expertise to preserve properly its electronic information in the face of system functions that may change it.

Preservation involves judgment: what content, what time periods, what custodians, what sources. For an in-house counsel, those judgments are often made long before there is a formal claim, when counsel perceives that irritation or ill-will or other circumstances among business players could be judged, with hindsight, to have been enough to trigger a pre-complaint litigation hold. While the very issuance pre-litigation of a legal hold evidences good faith, an opponent may ask a court to evaluate the scope of the hold years later, when information outside the scope may be long-gone. Consider, for example, a claim brought on the eve of expiration of a three- or six-year statute of limitations, when a dispute on preservation occurs once the case is underway.

The standard on which an adverse inference instruction could issue directly impacts in-house preservation decisions. If with 20-20 hindsight educated by an actual complaint, a judge could determine that a well-intentioned judgment on preservation boundaries was grossly negligent and issue an adverse inference instruction on data counsel had never looked at, counsel can manage the risk only by preserving every imaginable source of information. Yet even that expansive preservation may not be enough if the complaint, when finally filed, takes an

unanticipated turn. The resources required to identify, locate, and preserve all those sources expand as well. It is important to note that not every anticipated litigation turns into an actual case, but the resources are expended and the data maintained until the statute of limitations expires nonetheless.

As a result:

- A lower standard for adverse inference instructions will drive up the cost of discovery and the attendant risks.
- Higher costs and risks will perpetuate the trend for cases to settle on factors other than the merits.

We serve the justice system poorly to let a court tell a jury that information that was of unknown and perhaps irrelevant or immaterial content would have hurt the side that lost it. To the contrary, the justice system should place a premium on just and speedy and cost effective disposition on the merits. The rules amendments as proposed permit a jury to hear about a loss of information in appropriate circumstances, and for the jury to make its own assessment – based on existing evidence and witness credibility – of the significance of the event. In the absence of bad faith, considering the factors above, there is no basis for an adverse inference instruction to turn preservation and discovery mistakes into case-dispositive events.

Peter C. Hein and **Pamela A. Miller** concur in the position expressed by Ms. Brickell above that the standard under Rule 37(e) proposed by the Advisory Committee in the proposed rule amendment should be adopted.

Separate Statement of Margaret A. Malloy, concurring in part with respect to Rule 37:

Although I largely agree with the portion of the Federal Courts Committee's Report that addresses Rule 37(e), I write separately to express my concern that the proposed rule and its accompanying note do not acknowledge that spoliation itself is a significant problem – one that undermines the truth-seeking function of the courts – and that the proposed rule unduly restricts courts' authority to restore the evidentiary balance when spoliation occurs.

The draft Advisory Committee Note states the rule is "designed to ensure that potential litigants who make reasonable efforts to satisfy their preservation responsibilities may do so with confidence that they will not be subjected to serious sanctions should information be lost despite those efforts." But the proposed rule protects not only litigants who behave reasonably, but also those who behave negligently, since it all but prohibits remedial, or "sanctions" orders, including even a permissive adverse inference instruction, when a party loses or destroys evidence negligently.

In the Second Circuit, a court may enter an appropriate order in response to spoliation resulting from negligence only when there is some showing that the lost evidence would have been favorable to the other party. In addition, before imposing an adverse inference or other remedial order, courts consider first whether lesser measures would be effective. Perhaps not surprisingly, these elements are similar to those required to prove a *Brady* violation in the criminal context. There, a finding that the prosecution, either intentionally or inadvertently, failed to disclose evidence that was favorable to the defendant, mandates a new trial. *See, e.g.*, *Poventud v. City of New York*, No. 12-1011-cv (2d Cir. Jan. 14, 2014), slip op. at 25-29. Of course, the purpose of the *Brady* rule is to ensure a fair trial – a goal that should be no less worthy in civil proceedings.

I agree with the Federal Courts Committee Report that when spoliation does not result

from behavior that is willful or bad faith, the remedy should not carry the stigmatizing term "sanctions"; while sanctions may serve punitive and remedial purposes, where there is no need for punishment, the terms "curative measures" or "remedial orders" are more apt.

I also agree with the Federal Courts Committee Report that, under certain circumstances, an adverse inference instruction may be an appropriate curative measure. But the Federal Courts Committee Report does not acknowledge that an adverse inference instruction may not always be the correct curative measure. For example, if a plaintiff's expert examines key evidence, but then negligently destroys that evidence, thus depriving the defendant of an opportunity to conduct its own examination, the most obvious remedy might be to preclude plaintiff's expert from testifying. Or, if a plaintiff negligently destroys evidence relevant to an affirmative defense, an appropriate remedy may be to shift the burden of proof.

The best rule would balance the need to protect the truth-seeking function of the courts with the need to protect parties from sanctions that are unduly punitive under the circumstances. The rule as drafted does not accomplish this, but instead places an essentially insurmountable burden of proof on a party whose ability to present its claims or defenses has been prejudiced by the other party's negligent actions.