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Guidance on Proposed Federal Rules

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We write to comment on the fine article, "[Questions Raised by Proposed Amendments to Federal Rules](#)," by Kevin F. Meade and Arielle Gordon (NYLJ, Dec. 2). At the end of their article, the authors raise concerns about certain unresolved issues arising from the proposed amendments. In its report to the Advisory Committee on Civil Rules, the New York State Bar Association's Commercial and Federal Litigation Section offers its insight on these issues. In this letter, we respond briefly to key questions raised by Meade and Gordon.

With respect to proposed Rule 26(b)(1), which adds a proportionality requirement, the Commercial and Federal Litigation Section supports the proposal but harbors the same concern that Meade and Gordon have, namely that the proposed proportionality requirement may lead to substantial (and wasteful) litigation over its application.

To mitigate this risk of litigation, the section has proposed including in the advisory committee note to the proposed rule, language making clear that the case law interpreting and applying existing Rule 26(b)(2)(C)(iii), from which the proposed proportionality language is taken, should be applied to the proposed rule.

With respect to proposed Rule 37(e), which concerns failures to preserve discoverable information, the section wholeheartedly supports the proposal as a means to encourage more consistent determinations relating to the duty to preserve. Meade and Gordon raise eyebrows over the fact that the proposal leaves open the scope of curative measures a court could order. To a degree, the section shares this concern, and has recommended in its report that the language of proposed Rule 37(e)(2) be revised to direct courts to "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" (emphasis added).

Meade and Gordon ask what is meant by the terms "willfulness," "bad faith," and "substantial prejudice" as they are used in proposed Rule 37(e). The Commercial and Federal Litigation Section report recommends that "willfulness" be defined as "intentional or reckless conduct sufficiently unreasonable so as to render harm likely." We have elected to leave "bad faith" open to a court's interpretation, which of course should be guided by existing case law.

Likewise, we have not recommended a definition of "substantial prejudice" on the ground that a determination of substantial prejudice would be best made within its own context rather than pursuant to a rigid standard. We do recommend, however, that the proposed rule be clarified to state that the burden of demonstrating the absence of substantial prejudice should fall upon the party acting willfully or in bad faith to spoliage relevant material.

The section's entire report can be accessed on the New York State Bar Association's website at www.nysba.org.

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