The Section Reports on Proposed Amendments to Federal Rules and Appendix of Forms

By Michael C. Rakower

At its October 8, 2012 meeting, the Section unanimously adopted the report of its Federal Procedure and E-Discovery Committees on proposed amendments to Rules 1, 4, 16, 26, 26, 30, 31, 33, 34, 36, 37, 84 and Appendix of Forms of the Federal Rules of Civil Procedure. The report, written in response to a public request for comment, has been submitted to the Advisory Committee on Civil Rules ("Advisory Committee") of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. Federal Procedure Committee Co-chair Michael Rakower appeared before the Advisory Committee on November 7, 2013, in Washington, D.C. to discuss the Section's views.

The proposed amendments are set forth in the Memorandum of the Advisory Committee, dated May 8, 2013, as supplemented June 2013 ("Advisory Committee Memo"). 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.

The proposed amendments are intended to reduce litigation costs and delays. 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) because it agrees with both the purpose and anticipated effect of these proposed amendments, although the Section's report makes suggestions with respect to certain of the proposed rule changes. The Section, however, does not support the proposed amendments to Rules 1, 30, 31, 33, and 36 because, in certain instances, the Section believes the proposals are unwarranted, and, in other instances, the Section believes the proposals will be ineffectual.

Concerning the proposed change to Rule 1, which seeks to improve cooperation among parties, the Section agrees that cooperation should be the norm and strongly supports the goal of the proposed amendment, but the proposed language is too circumspect to achieve its desired effect. To enshrine cooperation as a touchstone of federal procedure, any proposed amendment needs to be made explicit in Rule 1.

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."

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.

Although the Section supports the goal of the proposed discovery-related amendments to include the concept of proportionality as a limitation on the scope of discovery, the Section does not support the proposed new or reduced presumptive limits on discovery because it believes the proposed amendments will 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, the Section recommends that courts 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. Specifically, the Section opposes:

- reducing the presumptive number of depositions from ten to five under proposed Rules 30 and 31;
- reducing the length of a deposition from seven hours to six hours under proposed Rule 30;
- reducing the presumptive number of interrogatories from 25 to 15 under proposed Rule 33; and
- limiting to 25 under proposed 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.

The Section's full report is expected to be published in the Winter 2014 issue of the *NYLitigator*.

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