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January 23, 2014

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Comments of the Nassau County Bar Association to the Proposed Amendments to the Federal Rules of Civil Procedure

To the Committee:

On behalf of the Nassau County Bar Association, we hereby submit our comments ("Comments") to the proposed amendments to the Federal Rules of Civil Procedure, published on August 15, 2013 and open to public comment until February 15, 2014.

The Comments have been prepared by our Commercial Litigation Committee and the Federal Courts Committee and unanimously approved by the Board of Directors of the Nassau County Bar Association.

As more fully set forth in the Comments, the Nassau County Bar Association generally supports the efforts of the Federal Judicial Conference Committee on Rules of Practice and Procedure to make the management of federal civil litigation more efficient and cost-effective. We also support the concept of proportionality in the scope and extent of discovery. Most importantly, we support the manner in which the proposed amendments address issues concerning electronically stored information ("ESI") and, particularly, the standards proposed for determining whether sanctions should be imposed for deficiencies in the preservation and production of ESI, as well as other evidence. We disagree with those commentators who have argued that the proposed changes to Rule 37 will encourage careless or sloppy preservation efforts. We do not believe that counsel or their clients will act in a lax manner, given the clear obligation to preserve discoverable information, simply because a finding of substantial prejudice and willfulness or bad faith would be required, especially given the alternative ground for such sanctions – if the failure irreparably deprives a party of any meaningful opportunity to present or defend against claims, regardless of the level of culpability.

Finally, we strongly oppose those proposed amendments that unjustifiably seek to limit well-recognized and useful discovery devices, such as interrogatories, requests to admit and depositions. We see no reason to reduce the presumptive number of depositions from 10 to 5 or to reduce the presumptive 7 hour testimonial limit to 6 hours in depositions. Nor do we believe that reducing the approved number of interrogatories or setting limits on the extremely useful device of requests for admission is warranted. In fact, we believe these limitations would be counterproductive to the early and efficient resolution of disputes.

Thank you for your consideration of our Comments.

Respectfully yours,

Peter J. Mancuso, President

Enclosure

cc: Kevin Schlosser, Esq., Chair, Commercial Litigation Committee
Peter J. Tomao, Esq. Chair, Federal Courts Committee

NASSAU COUNTY BAR ASSOCIATION
COMMERCIAL LITIGATION COMMITTEE
FEDERAL COURTS COMMITTEE
REPORT AND COMMENTS ON THE PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE 1, 4, 26, 30, 31, 33, 34, 36, 37 AND 84

This report represents the official comments of the Commercial Litigation Committee and the Federal Courts Committee of the Nassau County Bar Association (jointly "Committee") regarding the proposed amendments to the Federal Rules of Civil Procedure as published for review and comment in the Memorandum of the Advisory Committee on Civil Rules, dated May 8, 2013, as supplemented June 2013 and available online at:
http://www.uscourts.gov/uscourts/rules/preliminarydraft-proposed-amendments.pdf.

The Committee's comments are summarized below following the text of each proposed amendment. At the heading of each amendment, the Committee indicates whether it "Supports" or "Opposes" the amendment, after which the Committee's brief reasoning follows.

SUMMARY OF THE COMMITTEE'S POSITIONS

Rule 1 (Supports)

Rule 4(m) (Opposes)

Rule 16(b) (Supports)

Rule 26 (Supports in Part; Opposes in Part)

Rule 30 (Opposes)

Rule 31 (Opposes)

Rule 33 (Opposes)

Rule 34(b)(2)(B) (Supports)

Rule 36 (Opposes)

Rule 37(e)(1) (Supports)

Rule 37(e)(2) (Supports)

Rule 84 (Supports)

COMMENTS OF THE COMMITTEE

Rule 1 **(Supports)**

1 **Rule 1. Scope and Purpose**
2 These rules govern the procedure in all civil actions
3 and proceedings in the United States district courts, except
4 as stated in Rule 81. They should be construed, ~~and~~
5 administered, and employed by the court and the parties to
6 secure the just, speedy, and inexpensive determination of
7 every action and proceeding.

Committee Commentary

The Committee supports the Advisory Committee's purpose in proposing the additional language to Rule 1 to help "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."

Rule 4(m) **(Opposes)**

1 **Rule 4. Summons**
2 * * * * *
3 **(m) Time Limit for Service.** If a defendant is not served
4 within ~~120~~60 days after the complaint is filed, the court—
5 on motion or on its own after notice to the plaintiff—must
6 dismiss the action without prejudice against that defendant
7 or order that service be made within a specified time. But
8 if the plaintiff shows good cause for the failure, the court
9 must extend the time for service for an appropriate period.
10 This subdivision (m) does not apply to service in a foreign
11 country under Rule 4(f) or 4(j)(1) or to service of a notice
12 under Rule 71.1(d)(3)(A).

Committee Commentary

The Committee opposes this amendment. The Advisory Committee's stated purpose in proposing this change is to limit "delay" in the adjudication of claims. However, this does not seem to consider how this rule would apply in practice. This rule primarily affects the plaintiff in the action, as it dictates the time by which the plaintiff must serve the defendant. Of course, as the party bringing the action, the plaintiff presumptively desires to adjudicate its claims in a timely manner or at least on a schedule that suits its goals. Thus, the "delay" in serving the summons and complaint results from the plaintiff's own intentional or unavoidable failure to serve process sooner. At that stage of the case, the defendant typically is not seeking to accelerate the process. If the defendant wants to

accelerate the process, it could accept service. Given that there does not appear to be any prejudice to either side by affording the current time by which to serve process, the Committee opposes this proposed amendment.

Rule 16(b) (Supports)

Rule 16. Pretrial
1 **Conferences; Scheduling;**
2 **Management**
3 * * * * *
4 **(b) Scheduling.**
5 **(1)** ***Scheduling Order.*** Except in categories of
6 actions exempted by local rule, the district
7 judge — or a magistrate judge when
8 authorized by local rule — must issue a
9 scheduling order:
10 **(A)** after receiving the parties' report
11 under Rule 26(f); or
12 **(B)** after consulting with the parties'
13 attorneys and any unrepresented
14 parties at a scheduling conference ~~by~~
~~15 telephone, mail, or other means.~~
16 **(2)** ***Time to Issue.*** The judge must issue the
17 scheduling order as soon as practicable, but
~~in any~~
18 ~~event~~ unless the judge finds good
19 cause for delay, the judge must issue it
20 within the earlier of ~~120~~90 days after any
21 defendant has been served with the
22 complaint or ~~90~~60 days after any defendant
23 has appeared.
24 **(3)** ***Contents of the Order.***
25 * * * * *
26 **(B)** *Permitted Contents.* The scheduling
27 order may:
28 * * * * *
29 **(iii)** provide for disclosure, or
30 discovery, or preservation of
31 electronically stored
32 information;
33 **(iv)** include any agreements the
34 parties reach for asserting
35 claims of privilege or of
36 protection as trial-preparation
37 material after information is
38 produced, including
39 agreements reached under

40 Federal Rule of Evidence
41 502;
42 (v) direct that before moving for
43 an order relating to
44 discovery, the movant must
45 request a conference with the
46 court;†
47 * * * * *

Committee Commentary

The Committee supports all of the proposed amendments to Rule 16(b). All of the proposed amendments are appropriately targeted to facilitate case management.

Rule 26 **(Supports in Part; Opposes in Part)**

1 **Rule 26. Duty to Disclose; General Provisions**
2 **Governing Discovery**
3 * * * * *
4 **(b) Discovery Scope and Limits.**
5 **(1)** ***Scope in General.*** Unless otherwise limited
6 by court order, the scope of discovery is as
7 follows: Parties may obtain discovery
8 regarding any nonprivileged matter that is
9 relevant to any party's claim or defense and
10 proportional to the needs of the case,
11 considering the amount in controversy, the
12 importance of the issues at stake in the
13 action, the parties' resources, the importance
14 of the discovery in resolving the issues, and
15 whether the burden or expense of the
16 proposed discovery outweighs its likely
17 benefit. Information within this scope of
18 need not be admissible in
19 evidence to be discoverable. ~~— including~~
~~20 the existence, description, nature, custody,~~
~~21 condition, and location of any documents or~~
~~22 other tangible things and the identity and~~
~~23 location of persons who know of any~~
~~24 discoverable matter. For good cause, the~~
~~25 court may order discovery of any matter~~
~~26 relevant to the subject matter involved in the~~
~~27 action. Relevant information need not be~~
~~28 admissible at the trial if the discovery~~
~~29 appears reasonably calculated to lead to the~~

† Present (v) and (vi) would be renumbered.

~~30 discovery of admissible evidence. All~~
~~31 discovery is subject to the limitations~~
~~32 imposed by Rule 26(b)(2)(C).~~
33 **(2)** ***Limitations on Frequency and Extent.***
(A) *When Permitted.*
34 By order, the court
35 may alter the limits in these rules on
36 the number of depositions, ~~and~~
37 interrogatories, and requests for
38 admissions, or on the length of
39 depositions under Rule 30. ~~By order~~
~~40 or local rule, the court may also limit~~
~~41 the number of requests under~~
~~42 Rule 36.~~
43 * * * * *
44 **(C)** *When Required.* On motion or on its
45 own, the court must limit the
46 frequency or extent of discovery
~~47 otherwise allowed by these rules or~~
48 ~~by local rule~~ if it determines that:
49 * * * * *
50 **(iii)** the ~~burden or expense of the~~
51 proposed discovery is outside
52 the scope permitted by
53 Rule 26(b)(1) ~~outweighs its~~
~~54 likely benefit, considering the~~
~~55 needs of the case, the amount~~
~~56 in controversy, the parties'~~
~~57 resources, the importance of~~
~~58 the issues at stake in the~~
~~59 action, and the importance of~~
~~60 the discovery in resolving the~~
~~61 issues~~.
62 * * * * *

63 **(c) Protective Orders.**
64 **(1) In General.** * * * The court may, for good
65 cause, issue an order to protect a party or
66 person from annoyance, embarrassment,
67 oppression, or undue burden or expense,
68 including one or more of the following:
69 * * * * *
70 **(B)** specifying terms, including time and
71 place or the allocation of expenses,
72 for the disclosure or discovery;
73 * * * * *

74 **(d) Timing and Sequence of Discovery.**
75 **(1)** ***Timing.*** A party may not seek discovery
76 from any source before the parties have
77 conferred as required by Rule 26(f), except:
78 **(A)** in a proceeding exempted from
79 initial disclosure under
80 Rule 26(a)(1)(B),; or
81 **(B)** when authorized by these rules,
82 including Rule 26(d)(2), by
83 stipulation, or by court order.
84 **(2)** ***Early Rule 34 Requests.***
85 **(A)** *Time to Deliver.* More than 21 days
86 after the summons and complaint are
87 served on a party, a request under
88 Rule 34 may be delivered:
89 **(i)** to that party by any other
90 party, and
91 **(ii)** by that party to any plaintiff
92 or to any other party that has
93 been served.
94 **(B)** *When Considered Served.* The
95 request is considered as served at the
96 first Rule 26(f) conference.
97 **(23)** ***Sequence.*** Unless, ~~on motion,~~ the parties
98 stipulate or the court orders otherwise for
99 the parties' and witnesses' convenience and
100 in the interests of justice:
101 methods of discovery may be used in
102 any sequence; and
103 **(B)** discovery by one party does not
104 require any other party to delay its
105 discovery.
106 * * * * *

107 **(f) Conference of the Parties; Planning for Discovery.**

108 * * * * *

109 **(3)** ***Discovery Plan.*** A discovery plan must
110 state the parties' views and proposals on:
111 * * * * *
112 **(C)** any issues about disclosure, or
113 discovery, or preservation of
114 electronically stored information,
115 including the form or forms in which
116 it should be produced;
117 about claims of privilege

118 or of protection as trial-preparation
119 materials, including — if the parties
120 agree on a procedure to assert these
121 claims after production — whether
122 to ask the court to include their
123 agreement in an order under Federal
124 Rule of Evidence 502;
125 * * * * *

Committee Commentary

The Committee supports all of the proposed amendments to Rule 26, except the deletion of the text "... 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.:." As the Advisory Committee notes, this is a well-known concept, but we disagree that as a result, it should therefore be removed. Removing the language is both unnecessary and would incorrectly imply that the concept indicated is no longer valid. Since the concept is still recognized and supported, there is no reason to delete it.

The Committee supports 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) and for clarification we submit that the Advisory Committee Note recommend that existing case law interpreting and applying Rule 26(b)(2)(C)(iii) apply to the amended provision.

The Committee 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 Committee 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 Committee 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. Of course, the Advisory Committee would be well advised to make clear 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, that is, that the term "expenses" does not include attorneys' fees.

Rule 30 (Opposes)

1 Depositions by Oral Examination

2 **(a) When a Deposition May Be Taken.**
3 * * * * *
4 **(2)** ***With Leave.*** A party must obtain leave of
5 court, and the court must grant leave to the
6 extent consistent with Rule 26(b)(1) and (2):
7 **(A)** if the parties have not stipulated to
8 the deposition and:
9 **(i)** the deposition would result in
10 more than 105 depositions
11 being taken under this rule or
12 Rule 31 by the plaintiffs, or
13 by the defendants, or by the
14 third-party defendants;
15 * * * * *
16 **(d) Duration; Sanction; Motion to Terminate or**
17 **Limit.**

18 otherwise stipulated or
19 ordered by the court, a deposition is limited
20 to one day of 7 6 hours. The court must
21 allow additional time consistent with
22 Rule 26(b)(1) and (2) if needed to fairly
23 examine the deponent or if the deponent,
24 another person, or any other circumstance
25 impedes or delays the examination.
26 * * * * *

Committee Commentary

The Committee adamantly opposes the limitations suggested upon the most critical of all discovery devices – the oral deposition. In nearly all cases, and especially commercial litigation, depositions are an absolutely essential tool in the discovery process. Very often, depositions either lead to settlement or facilitate the settlement process. They are also vital for trial preparation.

The 1993 Advisory Committee attempted to reduce delay and abuse, increase efficiency and economy, and secure an economical use of judicial resources by introducing 2(A), which gives each party no more than ten depositions, without permission from the court or agreement among the parties, *Notes of Advisory Committee on Rules – 1993 Amendment.* Now, the present Advisory Committee seeks to do the same thing by further reducing the availability of depositions, thereby showing that limiting the availability of depositions does little to streamline litigation, avoid delay, and minimize expense and the use of judicial resources. There is nothing to suggest that a further reduction in the number of depositions will promote efficient and economical litigation or guarantee the responsible, competent, and efficient use of oral depositions.

The current presumptive limit for the number of depositions strikes an appropriate balance, and there is no need for any further tipping of the scale. Forcing parties to litigate and seek court intervention to conduct this most basic and essential discovery device is wholly unwarranted and would be counterproductive. Indeed, the necessary focus on E-Discovery issues creates a separate area for depositions of IT personnel and those involved in the preservation, collection and production of electronically stored information ("ESI"). Thus, it is now common for a number of depositions to be required concerning ESI issues and apart from the substance of the claims – yet further reason why the number of depositions should not be limited further.

Further limiting the time by which to conduct a deposition is also completely unnecessary and disruptive. The suggestion that an hour will make a meaningful difference is not well taken. Counsel should not be given further ammunition to posture and pressure the party conducting the deposition to rush or curtail proper, thorough questioning. If the questioner is abusing the process, application to the court is always a remedy. Moreover, reducing the deposition by one hour is not likely to result in eliminating any unwarranted "abuse" in any event. Further, in virtually all commercial litigation, written exhibits are shown to the witness and are the subject of much of the questioning. Reviewing exhibits alone is a time-consuming process. The amount of time to examine a witness, with or without exhibits, should not be artificially shortened without any new, compelling reason. The Committee strongly believes that the further limitation upon the length of depositions is inappropriate and extremely disruptive to a full and fair discovery process.

Such a limitation it is likely to be prejudicial. Every party has the right to investigate, seek, and acquire information probative of claims and defenses, from which relevant information is gleaned and proffered as evidence. Truncating the process may prevent a party from fully exploring information relevant or pertaining to claims and defenses, and thereby preclude a party from thoroughly preparing for trial, increase the element of surprise at trial, and prevent the submission of a full and complete record and the issuance of a reasoned and informed decision.

Rule 31 (Opposes)

1 **Depositions by Written Questions**
2 **(a) When a Deposition May Be Taken.**
3 * * * * *
4 **(2)** ***With Leave.*** A party must obtain leave of
5 court, and the court must grant leave to the
6 extent consistent with Rule 26(b)(1) and (2):
7 **(A)** if the parties have not stipulated to
8 the deposition and:
9 **(i)** the deposition would result in
10 more than 105 depositions
11 being taken under this rule or
12 Rule 30 by the plaintiffs, or
13 by the defendants, or by the
14 third-party defendants;

15 * * * * *

Committee Commentary

For the reasons stated in the foregoing commentary, the Committee opposes this amendment as well.

Rule 33 (Opposes)

1 **33. Interrogatories to Parties**
2 **(a) In General.**
3 **(1)** ***Number.*** Unless otherwise stipulated or
4 ordered by the court, a party may serve on
5 another party no more than ~~25~~15
6 interrogatories, including all discrete
7 subparts. Leave to serve additional
8 interrogatories may be granted to the extent
9 consistent with Rule 26(b)(1) and (2).
10 * * * * *

Committee Commentary

The Committee opposes this unnecessary limitation of yet another basic discovery device. There is no justification for reducing the number of interrogatories by ten. Interrogatories can be a cost-effective and well-tailored complement to the other discovery devices and should continue to be available to its current extent.

The 1993 Advisory Committee also attempted to reduce delay and abuse, increase efficiency and economy, and secure an economical use of judicial resources by allowing each party to serve no more than twenty-five (25) interrogatories, without permission from the court or agreement among the parties. ***Notes of Advisory Committee on Rules – 1993 Amendment.*** **Now, the Advisory Committee seeks to do the same thing by further reducing the use of interrogatories thereby showing that curtailing the use of interrogatories does little to streamline litigation, avoid delay, and minimize expense and the use of judicial resources. There is nothing to suggest that a further reduction in the number of interrogatories will promote efficient and economical litigation or guarantee the responsible, competent, and efficient use of this discovery device.**

Rule 34(b)(2)(B) (Supports)

1 **Rule 34. Producing Documents, Electronically**
2 **Stored Information, and Tangible Things, or Entering**
3 **onto Land, for Inspection and Other Purposes**
4 * * * * *
5 **(b) Procedure.**
6 * * * * *
7 **(2)** ***Responses and Objections.***

8 * * * * *

(B) 19 *Responding to Each Item.* For each
20 item or category, the response must
21 either state that inspection and
22 related activities will be permitted as
23 requested or state ~~an objection to the~~
24 ~~request~~ the grounds for objecting to
25 the request with specificity,
26 including the reasons. The
27 responding party may state that it
28 will produce copies of documents or
29 of electronically stored information
30 instead of permitting inspection. The
31 production must then be completed
32 no later than the time for inspection
33 stated in the request or a later
34 reasonable time stated in the
35 response.

Committee Commentary

The Committee 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.

Rule 36 (Opposes)

1 **Rule 36. Requests for Admission**
2 **(a) Scope and Procedure.**
3 **(1)** ***Scope.*** A party may serve on any other
4 party a written request to admit, for purposes
5 of the pending action only, the truth of any
6 matters within the scope of Rule 26(b)(1)
7 relating to:
8 **(A)** facts, the application of law to fact,
9 or opinions about either; and
10 **(B)** the genuineness of any described
11 document.
12 **(2)** ***Number.*** Unless otherwise stipulated or
13 ordered by the court, a party may serve no
14 more than 25 requests to admit under

15 Rule 36(a)(1)(A) on any other party,
16 including all discrete subparts. The court
17 may grant leave to serve additional requests to the extent
18 consistent with Rule 26(b)(1)
19 and (2).‡
20 * * * * *

Committee Commentary

As with the other attempts to limit pretrial devices designed to narrow the issues and facilitate presentation of evidence, the Committee opposes this new proposed limitation. Requests for Admission are used to avoid further litigation over issues that can be effectively eliminated or narrowed. There is no justification for setting an arbitrary limit on the number that can be served. As with other devices, if truly abused, court intervention is fully available.

Rule 37(e)(1) (Supports)

1 **Rule 37. Failure to Make Disclosures or to Cooperate**
2 **in Discovery; Sanctions**
3 * * * * *
4 ~~**(e) Failure to Provide Electronically Stored**~~
5 ~~**Information.** Absent exceptional circumstances, a~~
6 ~~court may not impose sanctions under these rules on~~
7 ~~a party for failing to provide electronically stored~~
8 ~~information lost as a result of the routine, good-faith~~
9 ~~operation of an electronic information system.~~
10 **(e) Failure to Preserve Discoverable Information.**
11 **(1)** ***Curative measures; sanctions.*** If a party
12 failed to preserve discoverable information
13 that should have been preserved in the
14 anticipation or conduct of litigation, the
15 court may:
16 **(A)** permit additional discovery, order
17 curative measures, or order the party
18 to pay the reasonable expenses,
19 including attorney's fees, caused by
20 the failure; and
21 **(B)** impose any sanction listed in Rule
22 37(b)(2)(A) or give an adverse
23 inference jury instruction, but only if
24 the court finds that the party's
25 actions:
26 **(i)** caused substantial prejudice
27 in the litigation and were

‡ Present (2), (3), (4), (5), and (6) would be renumbered.

28 willful or in bad faith; or
29 (ii) irreparably deprived a party
30 of any meaningful
31 opportunity to present or
32 defend against the claims in
33 the litigation.

Committee Commentary

The Committee supports the proposed amendments to Rule 37(e) and welcomes the general approach of dealing with the failure to preserve ESI in a less onerous and fairer manner.

The Committee supports the proposed amendment to Rule 37(e)(1) to incorporate directly into the Rules an obligation to preserve information in anticipation of or during litigation. Insofar as this inherent power of the courts has been created and recognized through well-established case law, codifying the principal makes sense. The Committee also agrees that the appropriate scope of information to be preserved should be "discoverable information."

The Committee 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 Committee 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 Committee disagrees with those commentators who have argued that this rule change will encourage careless or sloppy preservation efforts. The Committee does not believe that counsel or their clients will act in a lax manner, given the clear obligation to preserve discoverable information, simply because a finding of substantial prejudice and willfulness or bad faith would be required, especially given the alternative ground for such sanctions -- if the failure irreparably deprives a party of any meaningful opportunity to present or defend against claims, regardless of the level of culpability.

Rule 37(e)(2) (Supports)

1 **Rule 37. Failure to Make Disclosures or to Cooperate**
2 **in Discovery; Sanctions**
3 * * * * *

10 **(e) Failure to Preserve Discoverable Information.**

(2) ***Factors***
34 ***to be considered in assessing a***
35 ***party's conduct.*** The court should consider

36 all relevant factors in determining whether a
37 party failed to preserve discoverable
38 information that should have been preserved
39 in the anticipation or conduct of litigation,
40 and whether the failure was willful or in bad
41 faith. The factors include:
42 **(A)** the extent to which the party was on
43 notice that litigation was likely and
44 that the information would be
45 discoverable;
46 **(B)** the reasonableness of the party's
47 efforts to preserve the information;
48 **(C)** whether the party received a request
49 to preserve information, whether the
50 request was clear and reasonable,
51 and whether the person who made it
52 and the party consulted in good faith
53 about the scope of preservation;
54 **(D)** the proportionality of the
55 preservation efforts to any
56 anticipated or ongoing litigation; and
57 **(E)** whether the party timely sought the
58 court's guidance on any unresolved
59 disputes about preserving
60 discoverable information.
61 * * * * *

Committee Commentary

The Committee is in favor of explicitly listing factors for the courts to consider in assessing the parties' conduct in preserving discoverable information, and the factors so listed appear to be helpful and relevant. The Committee suggests that the Advisory Committee Note be incorporated directly into the text of the Rule: "The court shall employ the least severe sanction needed to repair the prejudice resulting from the loss of the information."

Rule 84 (Supports)

1 **Rule 84. Forms**
2 **[Abrogated (Apr. __, 2015, eff. Dec. 1, 2015).]**
~~3 The forms in the Appendix suffice under these rules~~
~~4 and illustrate the simplicity and brevity that these rules~~
~~5 contemplate.~~

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

NASSAU COUNTY BAR ASSOCIATION

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Kevin Schlosser, Chair
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Federal Courts Committee – Subcommittee on Comments to the Proposed Amendments to FRCP
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Dated: December 12, 2013