Altria
Altria Client Services

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

Re: Public Comment on Proposed Amendments to the Federal Rules of Civil Procedure

Dear Members of the Committee:

I am pleased to comment on the proposed amendments to the Federal Rules of Civil Procedure ("FRCP" or the "Rules").

I. Interests of Altria and Philip Morris USA and Summary of Position

I submit this comment on behalf of Altria and its Philip Morris USA tobacco operating company ("PM USA"). Altria and PM USA employees are dedicated to compliance with the companies' legal obligations. Like other large companies, Altria and PM USA are involved in many different types of litigation including class actions, product liability, commercial, employment, patent, environmental and tax disputes. As a result, Altria and PM USA devote considerable resources to ensure that their litigation obligations are met.

I have been a litigator for 20 years, the last five managing discovery support for all Altria and PM USA litigation. I am therefore keenly aware of the importance of the Rules for both litigants and courts. I supervise a team of 3 lawyers and 26 legal professionals whose mission is to ensure in concert with outside litigation counsel that Altria and PM USA comply with all preservation and discovery obligations. My role requires me to understand how the Rules define the companies' obligations and it is with this knowledge and experience as a backdrop that I provide the following comments on the proposed amendments.

Altria and PM USA support the full range of the Committee's proposed amendments; however, I will focus my comments on the proposed amendments to Rule 26(b)(1) scope of discovery and Rule 37(e) sanctions.[1] These amendments will provide relief

[1] As described below, Altria and PM USA support additional changes to both Rules 26(b)(1) and 37(e) set forth in submissions by Lawyers for Civil Justice ("LCJ") and The Sedona Conference ("Sedona").

from the burden and cost associated with unnecessary preservation and discovery practices, practices that are often used by plaintiffs to leverage settlement rather than to litigate claims. Requiring bad faith for the imposition of discovery sanctions will allow litigants to more rationally scale their preservation practices to the true needs of a case. Likewise, limiting the scope of discovery under Rule 26(b)(1) to only information that is relevant, material and proportional to the claims and defenses of the case will relieve litigants of the excessive discovery cost and burdens that currently exist.

The proposed changes would also address the very real data security risk created by over-preservation and unfettered discovery scope. That risk increases significantly when litigation causes companies to maintain huge repositories of information which include competitively sensitive data and personal identifying information of employees, customers, vendors and consumers. The risk that such information may be lost or stolen is an additional justification for the Committee's amendments to Rules 26(b) and 37(e).

II. Case Study: Document Preservation and Discovery in Philip Morris USA's Product Liability Litigation

Since the 1998 agreements resolving nationwide tobacco and health litigation with the states, PM USA has maintained a public website containing documents it has produced in all products liability litigation. Today, plaintiffs have access to more than five million documents – nearly 25 million pages of information that detail virtually every aspect of PM USA's business since the 1930s.[2]

In the last 10 years PM USA has engaged in discovery related to many product liability cases filed against it and has tried scores of cases to verdict. This experience provides PM USA a clear line of sight between the effort and expense of its preservation and discovery on the one hand, and plaintiffs' actual use of documents in trial on the other.

To illustrate the point, between 2004 and 2013 Altria and PM USA employees preserved for litigation purposes alone more than 133 million documents – approximately 700 million pages of information. Most of the information preserved was unstructured ESI created during the ten year period (e.g., email; word documents; spreadsheets; PowerPoint presentations).[3] Of those 133 million

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[2] PM USA uses its public document website, and a confidential plaintiff-only website containing additional confidential company information available only to plaintiffs, as its primary means for producing information subject to discovery in PM USA's litigation. PM USA will maintain its public litigation document website through 2021. *See* Order #1015, published as *United States v. Philip Morris USA Inc., et al.* 449 F. Supp. 2d 1, 940-44 (D.D.C. 2006), *aff'd in part & vacated in part,* 566 F.3d 1095 (D.C. Cir. 2009) (*per curiam*), as modified by Remand Order #27, dated 12/15/11.

[3] The 133 million document figure represents only the tip of the preservation iceberg. This figure does not include structured information (e.g., data maintained in company systems, such as market

documents subject to preservation, 24 million documents were collected and thus subject to the burden and expense of discovery. Ultimately, 1.1 million documents – less than 1% of documents preserved – were required to be produced and in fact were produced. PM USA's preservation and discovery efforts relating to those 133 million documents required the services of hundreds of lawyers, legal professionals, technologists and other vendors and cost the company more than $165 million.[4]

From the dozens of PM USA product liability cases tried to verdict between 2004-2013 we selected a representative sample of ten so-called "Engle-progeny" cases (essentially, individual personal injury lawsuits in which findings from the Engle class action trial were given res judicata effect) tried by eight different plaintiff firms, each resulting in a plaintiff's verdict. We also selected a product liability case tried in federal court in New York (plaintiff verdict) and a class action tried in federal court in California (defense verdict).[5] We identified how many documents produced in discovery were actually admitted as exhibits at trial. In the ten Engle cases, plaintiffs admitted on average, 31 PM USA document exhibits. In the New York case, plaintiff admitted 54 PM USA document exhibits. And, in the one class action tried to verdict, plaintiffs admitted 62 PM USA document exhibits. Importantly, almost all of the admitted documents pre-dated 1985. Only <u>two</u> of the 133 million documents preserved during the period 2004-2013 were admitted as exhibits at trial.

The cost and burden of preservation and discovery imposed on PM USA over the past 10 years clearly bears no proportion to plaintiffs' use of documents in litigation. The proposed changes to the Rules would help rectify this problem.

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or financial data) maintained because of its potential litigation relevance, nor information contained on thousands of legacy backup tapes, hard drives and other media dating back decades in some cases. Altria and PM USA are saddled with the burden, expense and non-litigation risk of maintaining these repositories because of its uncertainty regarding the legal consequences of disposal.

[4] Continuing the iceberg analogy, the $165 million in preservation and discovery costs incurred during the period 2004-2013 is dramatically understated. That figure only includes ***document-related*** preservation and discovery costs. It does not include the significant costs related to written discovery, depositions, and discovery-related motions practice. Indeed, even as a measure of the cost and burden of only document-related preservation and discovery, the $165 million is significantly understated because it includes only internal legal and technical costs, and external vendor costs related to hard copy documents and ESI. The $165 million does not include costs attributed to law firm attorneys for their role in the document preservation and discovery process; again, services that added many millions of dollars more to PM USA's litigation cost and burden.

[5] Barbanell v. Philip Morris USA Inc., et al. (2009); Hess v. Philip Morris USA Inc., et al. (2009); Douglas v. Philip Morris USA Inc., et al. (2010); Kayton v. Philip Morris USA Inc., et al. (2010); Huish v. Philip Morris USA Inc., et al. (2011); Allen v. Philip Morris USA Inc., et al. (2011); Calloway v. Philip Morris USA Inc., et al. (2012); Buchanan v. Philip Morris USA Inc., et al. (2012); Searcy v. Philip Morris USA Inc., et al. (2013); Rizzuto v. Philip Morris USA Inc., et al. (2013); Mulholland v. Philip Morris USA, Inc (2013) ; Brown v. American Tobacco Company, Inc. et al. (2013).

III. Proposed Amendments to Rule 37(e) Will Reduce Preservation Burden and Cost

Altria and PM USA support amending Rule 37(e) to establish a uniform, nationwide guideline for preservation-related sanctions. However, Altria and PM USA respectfully submit that the Committee's formulation of an amended Rule 37(e) does not go far enough. The Committee recognizes that only conduct that is both culpable and substantially prejudicial warrants sanctions. Removing the negligence-based sanctions standard imposed by some courts would, over time, remove much of the uncertainty that drives massive over-preservation. However, there are several aspects of the proposed amendment that could undermine the Committee's goal.

The "Irreparably Deprives" Exception to the Rule 37(e) Culpability Requirement Should be Removed

In Rule 37(e), subsection (1)(B)(ii), the Committee would allow sanctions absent any finding of culpability if a party's failure to preserve "irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation." This exception injects a negligence-like standard back into a court's sanctions calculus and so defeats the essence of a culpability-based standard. It will also spawn satellite litigation and inevitably inconsistent rulings as to what "irreparably deprived" and "meaningful opportunity" actually mean. Without a Rule that forbids sanctions for good-faith mistakes in preservation, litigants will be unable to get out from under the crushing cost and burden caused by over-preservation. Altria and PM USA favor removing subsection (1)(B)(ii) from the proposed amendment.

The Rule 37(e) Culpability Standard Should be Clarified

Proposed Rule 37(e)(B)(i) would permit sanctions for conduct that is either *willful* or in *bad faith*. Since conduct that is intentional but lacking in culpable intent can be interpreted as *willful*, a Rule that permits sanctions for merely willful conduct is inconsistent with the Committee's goal of establishing a "uniform national standard for culpability findings."[6] The Committee should abandon the disjunctive "*or*" in favor of the conjunctive "*and*". A standard that requires willfulness *and* bad faith furthers the amended Rule's purpose of basing sanctions determinations on culpable conduct. Better still; the Committee should consider eliminating the word *willful* altogether since a sanctions standard requiring a finding of *bad faith* would appear to subsume willful conduct as well.[7] Alternatively, Altria and PM USA support the formulation

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[6] *See* Sedona Comment at 10.

[7] "[The] [t]erm "bad faith" ... implies the conscious doing of a wrong .... it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will." *Black's Law Dictionary*, 127 (5th ed. 1979) citing *Stath v. Williams*, Ind. App., 367 N.E.2d 1120, 1124.

that Sedona developed, which substitutes the willful/bad faith standard with a sanctions standard requiring a finding that a party "*did not act in good faith*" regarding its preservation obligation.[8] Altria and PM USA agree with the Sedona Working Group 1 signatories, who include prominent practitioners from both the plaintiff and defense bars, that the "*did not act in good faith*" standard will further the Committee's goal of a consistent national sanctions standard. Adopting the Sedona language also would obviate the need to define *willful* and *bad faith*, which Altria and PM USA believe would be required if the Committee adopts the disjunctive willful/bad faith formulation.

Proposed Rule 37(e)(2) "Factors" Should be Removed or Clarified and Relocated

Much like the "irreparably deprives" exception discussed above, the "factors to be considered in assessing a party's conduct" language in the proposed amendment would seem to invite sanctions determinations based on findings of negligence. Two of the five proposed factors actually require courts to consider the "reasonableness" of party actions and the preservation at issue. *See* 37(e)(2)(B),(C). Altria and PM USA believe these factors should be removed from the proposed amendment to avoid undermining the Committee's culpability-based sanctions regime. If, however, the Committee believes that such factors would aid courts when considering how to remedy preservation errors through Rule 37(e)(1) *curative measures,* the language in Rule 37(e)(2) should be modified to remove the last clause (i.e. "and whether the failure was willful or in bad faith"), moved to the Commentary, and linked explicitly to the Rule 37(e)(1) curative measures provision.

Impact of Rule 37(e) Amendments for Altria and PM USA

At its Washington D.C. hearing, the Committee asked several supporters of the proposed Rule 37(e) amendments whether the changes would result in measurable relief for their business or client. For Altria and PM USA the answer is yes. The immediate benefit would be a significant reduction in the amount of information subject to preservation for PM USA's product liability litigation.

Today, and for the past decade, PM USA preserves millions of documents because of the uncertainty and risk it faces from potential spoliation challenges in the product liability cases it must defend. Any changes to Rule 37(e) that can provide PM USA confidence that it can reduce its preservation to better fit the true demands of the cases would result in a reduction in the volume of documents it maintains for potential discovery, yet still provide plaintiffs with the discovery to which they are entitled. For PM USA, the proposed Rule 37(e) amendments will provide millions of dollars of relief annually.

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[8] *See* Sedona Comment, 11-13.

The proposed amendments also would benefit Altria and PM USA in the area of legacy information disposal. If litigants can be confident that they will not face spoliation sanctions for disposing legacy information that they in good faith believe is irrelevant, duplicative, cumulative or not material to the claims and defenses in litigation, they can rid themselves of information that has no litigation value but which, as described in section V below, present significant non-litigation data security risk.

Answers to the Committee's Rule 37(e) Questions

Finally, in response to the Committee's request for comment on five specific Rule 37(e) questions, Altria and PM USA respond as follows:

1. Rule 37(e) amendments should not be limited to preservation of ESI but should apply to all information subject to discovery;
2. For the reasons stated above, Rule 37(e)(1)(B)(ii) should be abandoned;
3. Current Rule 37(e) should not be retained;
4. The Committee should define Rule 37(e)(1)(B)(i) "substantial prejudice";
5. For the reasons stated above, Rule 37(e)(1)(B)(i) should be further modified.

IV. Proposed Amendments to Rule 26(b)(1) Will Reduce Discovery Burden and Cost

The Committee's proposed changes to discovery scope under Rule 26(b)(1) will significantly reduce the cost and burden of responding to discovery. Altria and PM USA support the Committee's proposal to eliminate the language: "*discovery of any matter relevant to the subject matter involved in the action*". This change will ensure that the scope of discovery is appropriately tailored to the parties' claims and defenses. Likewise, by removing the language "*reasonably calculated to lead to the discovery of admissible evidence*", the Committee narrows the scope of discovery and will avoid the broad, scattershot approach of indiscriminate and virtually unfettered discovery engaged in by some plaintiffs. Finally, by including "*proportionality*" language in Rule 26(b)(1), the Committee encourages parties and courts alike to make reasoned assessments at the very beginning of the case regarding the types and amount of discovery needed.

Altria and PM USA also believe that there are several aspects of the proposed amendment to Rule 26(b)(1) which, if not addressed, will undermine the Committee's goal of reducing overbroad discovery and its attendant cost and burden.

Rule 26(b)(1) Should Include *Materiality* Language

Traditionally, the cost and burden incurred when litigants and courts adopted a broad notion of Rule 26(b)(1) "relevance" was manageable because the output of such discovery was measured in banker's boxes and thousands of pages of paper. But the proliferation of ESI has transformed modern discovery. Today, instead of boxes,

discovery is measured in terabytes of ESI equating to millions of documents. Clearly, the Committee's proposed changes to Rule 26(b)(1) are meant to address the challenges presented by the explosion of ESI; however, those changes do not go far enough. By confining the scope of discovery to only "*non-privileged matter that is relevant **and material** to any party's claim or defense...*" the Rules will relieve parties of the massive cost and burden of discovery measured in terabytes and millions of documents. Altria and PM USA join with LCJ in recommending that the Committee add a materiality requirement to Rule 26(b)(1) discovery scope.

Rule 26 Should Address Preservation

Altria and PM USA support Sedona's proposal to incorporate preservation scope language in Rule 26. *See* Sedona Comment at 6-7. The proliferation of ESI, and the often-times case dispositive impact of its litigation costs, requires a fresh look at the common law's suitability for defining preservation obligations. If codification of scope is appropriate for discovery, why should it be less so for discovery's antecedent, preservation? Other than a general reluctance to disturb the common law, there is no reason to subject litigants to the vagaries of its evolutionary development when the Rules can provide clear preservation guidance. Enabling litigants and courts to define the scope (and thus cost and burden) of preservation at the outset of litigation will more consistently satisfy the requirement of Rule 1 – the just, speedy, and inexpensive determination of each civil action.

Impact of Rule 26(b)(1) Amendment on Altria and PM USA

Approximately two thirds of the $165 million PM USA spent for document-related preservation and discovery during the period 2004-2013 was attributable to EDRM-based discovery. In litigation where Rule 26(b)(1) confines discovery to claims and defenses only, does not allow for fishing expeditions, and ensures that discovery is proportional and material to the needs of the case, Altria and PM USA can reasonably expect to save millions of dollars annually while still providing its adversaries the information they require. If EDRM-based document discovery is so limited, Altria and PM USA also will be able to mitigate the significant business and privacy risk associated with maintaining information that has no litigation value.

V. Amendment of Rules 26(b)(1) and 37(e) Will Promote Data Security

The security of personal and business information has never been more at risk. The ubiquity of information in the digital age has made ubiquitous its risk of loss and theft. By the time this comment is submitted the theft of Target and Neiman Marcus customer data will be old news, superseded by reports of data theft suffered by other victims. Criminals target businesses because of the great value of both their proprietary information and the personal information they possess. No information of value is immune from the depredations of criminals. And for the information thief, no personal or business information is presumed to be without value, no matter where or for what purpose it is maintained. The costs to victims of data theft are

enormous, estimated at $204 to $215 per compromised record, an average total cost of $5.4 million per breach. [9]

Less well known but nonetheless real is the threat to legal repositories because of the value of the sensitive client information they contain.[10] Legal information is an attractive target whether it resides on law firm or business servers. We live in a world where databases, hard drives, and even portable devices like thumb drives, smart phones and laptops can contain gigabytes and terabytes of data. Criminals have the ability to penetrate even the most sophisticated data security systems; accordingly, the need for companies to minimize their data footprint has never been greater. Unless companies can dispose of legacy data without fear of adverse litigation consequences, and resist amassing new repositories that have no more than tangential relevance to litigation, the data security risk to individuals and the companies to whom they entrust their personal information will only grow.

The proposed amendments to Rules 26(b)(1) and 37(e) will play a meaningful role in reducing the amount of information that litigants must store. If good faith preservation decisions are not subject to sanction, if discovery scope is defined in terms of proportionality and materiality, limited by claims and defenses and not subject to tangential demands, litigants will rid themselves of information that serves no purpose. The proposed Rules will aid businesses and their lawyers in reducing the risk of loss or theft of their sensitive business and personal information. It is for that reason, in addition to their promotion of the just, speedy and inexpensive determination of every action, that Altria and PM USA support their adoption.

Respectfully submitted,

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[9] *See* Symantec Corporation and Ponemon Institute 2013 Cost of Data Breach Global Analysis; *See also* Ponemon Institute, LLC 2009 Annual Study: Cost of a Data Breach (January 2010). Components of Ponemon's cost estimates include: detection, investigation, consumer notice, legal cost, lost customers, brand damage and remedial measures.

[10] A 2013 Data Breach Investigations Report prepared by Verizon indicates that 20% of all entities targeted by cyber criminals are professional services firms, including law firms.