October 25, 2013

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, DC 20544

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

Dear Members of the Committee:

Bayer Corporation welcomes the opportunity to submit these comments regarding the proposed amendments to the Federal Rules of Civil Procedure that have been published for comment.

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Bayer Corporation ("Bayer") is the North American subsidiary of Bayer AG. The Bayer Group is a global enterprise with core competencies in the fields of health care, agriculture, and high-tech materials. The Bayer Group's US operations employ approximately 15,000 people in 48 states and Puerto Rico and had sales in the US of over $12 billion in 2012.

Like any large business enterprise, Bayer and its affiliated companies have been involved in a variety of civil disputes before the federal courts. Bayer has particular experience litigating mass tort cases in federal MDL proceedings and brings that perspective to its comments.[1]

While Bayer endorses all of the detailed comments previously submitted to the Committee by Lawyers for Civil Justice ("LCJ"), of which Bayer is a member, we respectfully submit our own comments limited to certain points about the proposed amendments to Rules 26(b) and 37(e). We believe that the proposed amendments to these Rules have great potential, with some changes, to improve the quality of civil justice in our federal courts.

[1] *E.g., In re Baycol Prods. Liab. Litig.*, MDL No. 1431; *In re Genetically Modified Rice Litig.*, MDL No. 1811; *In re Gadolinium Contrast Dyes Prods. Liab. Litig.*, MDL No. 1909; *In re Trasylol Prods. Liab. Litig.*, MDL No. 1928; *In re Yasmin & Yaz (Drospirenone) Marketing, Sales Practices & Prods. Liab. Litig.*, MDL No. 2100; *In re Mirena IUD Prods. Liab. Litig.*, MDL No. 2434.

I. Comments on the Proposed Amendments to Rule 26(b)

It is widely recognized that civil litigation in the United States is disproportionately expensive compared to almost any other jurisdiction in the world. Despite all of the additional expense, however, we are not aware of any evidence that our courts do a better job, as matter of accurate fact finding and deciding disputes correctly under prevailing law, than their counterparts in other highly-developed legal systems.

The reason for the unusually high cost of litigation in the United States is almost entirely discovery. In many, perhaps most, litigated cases, almost nothing occurs other than the filing of simple pleadings that were easily drafted, followed by much higher-cost discovery and related motion practice before the parties agree on a settlement. Even when cases do proceed to dispositive motions or trial, most of the parties' time and effort in litigating a major case is still consumed by discovery.

Yet almost all discovery in large cases turns out to have been wasted effort and expense. A survey on the topic found that when cases of at least moderate size (with defense costs exceeding $250,000) go to trial, on average just 0.1% of the pages produced in discovery are even offered as trial exhibits.[2] In Bayer's own experience, in our most recent trial of a large matter, only 0.04% of the company's document production was offered and admitted into evidence at an eight-week trial. It confounds reason to suppose that it was truly helpful, much less cost-effective, to discover the other 99.96% of documents in order to locate the handful that turned out to be worth presenting to the trier of fact. And still fewer documents are used in cases that terminate short of a trial on the merits.

The situation is even worse when it comes to mass torts. In the survey noted above, the average document production per case was about five million pages,[3] while discovery in the Bayer matter described above included just over two million pages of company documents. In pharmaceutical mass torts, however, discovery routinely requires a defendant to produce many tens of millions of pages. For example, in Bayer's YAZ/Yasmin litigation, we have produced well over 90 million pages. The Vioxx litigation involved a production of over 50 million pages. *In re Vioxx Prods. Liab. Litig.*, 2010 U.S. Dist. LEXIS 64388, *4

[2] Lawyers for Civil Justice, et al., Litigation Cost Survey of Major Companies, App. 1 at 16 (2010), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf.

[3] *Id.*

n.2 (E.D. La. 2010). In such matters, an even smaller fraction of the documents produced in discovery will end up playing a role in any court's determination of the cases.

It would be a mistake to minimize the significance of excessive discovery with the observation that in many civil cases the contested facts are relatively simple and discovery burdens are symmetrical, so the parties will jointly choose to avoid unwarranted, high-cost discovery even when it is permitted by the Rules. Just 5% of cases account for 60% of litigation costs.[4] Therefore, procedural changes that may alter practice in only a minority of cases—those that are most complex and in which discovery burdens are most asymmetrical—can nevertheless be of enormous importance to improving our civil justice system.

It bears noting as well that the problem of excessive discovery costs does not just burden unwilling parties (and their shareholders) with unnecessary financial losses, but it also introduces systemic error into our civil justice system. Consider a simple example in which well-informed parties conclude that the plaintiff has a 30% chance of obtaining a $500,000 judgment, but discovery-driven defense costs through trial would be an additional $250,000. An economically rational defendant will often be willing to settle—and a rational plaintiff will likely insist on settling—the case for substantially more than its likely outcome, in principle up to $399,999.[5] Scenarios like this, which are not unusual, distort all of the goals of the civil justice system, including fairly compensating injured parties, modifying the conduct of potential defendants in socially desirable ways, and accurately defining and enforcing property, contract, and other legal rights.

For all of these reasons, we believe that a meaningful change to the scope of discovery in civil cases is badly needed and could be accomplished without significant impact on litigants' ability to present a trier of fact with a full record on which to make accurate decisions.

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[4] William H.J. Hubbard, Written Statement for Hearing on the Costs and Burdens of Civil Discovery, Subcomm. on the Constitution, Comm. on the Judiciary, US House of Reps., at 6 (2011), available at http://judiciary.house.gov/hearings/pdf/12132011Hubbard.pdf.

[5] While there is an important sense in which the action has a value of only $150,000 (30% times $500,000), from the defendant's perspective the case is much more expensive, regardless of who wins. There is a 70% likelihood of an outcome that will cost the defendant $250,000 (defense costs but no liability) and a 30% likelihood of an outcome that will cost $750,000 ($250,000 in defense costs plus a $500,000 judgment). So, despite the high probability that the defendant will win the case and the case's correspondingly low value, the lawsuit still has an "expected" cost to the defendant of $400,000 (70% times $250,000 plus 30% times $750,000).

Toward that end, we support the proposed amendment that would build proportionality requirements into Rule 26(b)(1)'s generally applicable limits on the scope of permissible discovery. A true requirement of proportionality in all cases, without court intervention, would be a welcome change to current practice. In particular, the proposed amendment would mark a significant improvement over the present reference to proportionality only in Rule 26(b)(2)(C)(iii), where it is the seldom-invoked basis for a court order in the nature of a protective order, which parties are often reluctant to seek.

We similarly support the proposed amendment striking the current reference in Rule 26(b)(1) to whether discoverable information must be admissible at trial. It is no longer subject to dispute that discovery may include evidence, for example hearsay, that might not be admissible. But this provision of the Rule has often been misunderstood as doing far more than simply clarifying that legal point. Courts have repeatedly taken it to articulate an extremely broad standard for the scope of discovery. They have interpreted the Rule to mean that discovery properly extends to any information that may be "reasonably calculated to lead to the discovery of admissible evidence," without further consideration of its significance to the case or the likelihood that any party would seek to use the subsequently discovered "admissible evidence" at a real trial.[6]

However, as the Committee's letter of transmittal notes, a past effort to cabin excessive discovery through amendments to the Rules "cannot be said to have realized the hopes of its authors" and has done too little to limit discovery "in a worrisome number of cases, particularly those that are complex, involve high stakes, and generate contentious adversary behavior."[7] We fear that the current proposed amendments to Rule 26(b) may likewise fail to achieve their promise without a clearer signal that they significantly narrow the scope of discovery in the sorts of cases that today generate excessive discovery and associated costs.

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[6] *E.g.*, *In re Consellior SAS*, 2013 U.S. Dist. LEXIS 142280, *8 (D. Conn. 2013) ("Relevance in the context of federal discovery is broadly construed to encompass matters that are reasonably calculated to lead to discovery of admissible evidence."); *Teichgraeber v. Memorial Union Corp.*, 932 F. Supp. 1263, 1265 (D. Kan. 1996) ("'Discovery relevance is minimal relevance,' which means it is possible and reasonably calculated that the request will lead to the discovery of admissible evidence.").

[7] Mem. from Hon. David G. Campbell to Hon. Jeffrey S. Sutton, at 265 (May 8, 2013 as supp. June 2013), available at http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf.

Consequently, we support LCJ's additional proposal that Rule 26(b)(1) should require that discoverable information be not just "relevant" but also "*material*" to the claims and defenses set forth in the pleadings. This addition is important, because the concept of "relevance" in the discovery context is often construed in such exceptionally broad terms. In one common formulation, for example, all information is deemed "relevant" and therefore subject to discovery unless it has "no possible bearing on the subject matter" of a lawsuit.[8] A requirement of materiality, on the other hand, would clearly limit discovery to information that is of genuine importance to a case as the parties have chosen to plead it. There is no legitimate reason why any party should need, or other parties should be required to bear the cost of producing, discovery that is any broader than that.

II. Comments on the Proposed Amendments to Rule 37(e)

The current system virtually guarantees the costly overpreservation of evidence: No clear standards govern when a party should "reasonably anticipate litigation," triggering an obligation to preserve evidence; the sanctions for a failure to comply with preservation obligations (again, without clear standards) can be severely prejudicial or fatal to a party's ability to prosecute or defend a case, to say nothing of their impact on professional reputations and careers; motion practice over spoliation allegations is almost routine in large cases; and inconsistent case law permits sanctions even absent a finding of bad faith.[9]

To review Bayer's experience under the current rules, we examined a group of related class actions that recently concluded with a summary judgment decision in favor of Bayer following full fact and expert discovery. To comply with our preservation obligations in these matters, we preserved an estimated 17,388 GB of information over a period of four years. In response to plaintiffs' discovery requests, we produced 31.1 GB of that information (comprising 1.3 million pages). In other words, the ratio of information preserved to information produced in the litigation was 559:1.

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[8] *E.g.*, *Adelman v. Boy Scouts of Am.*, 2011 U.S. Dist. LEXIS 54277, *8 (S.D. Fla. 2011) ("'[R]elevance for discovery purposes is much broader than relevance for trial purposes,' and as such '[d]iscovery should ordinarily be allowed under the concept of relevancy unless it is clear that the information sought has no possible bearing on the subject matter of the action.'"); *Precision Indus. v. Tyson Foods, Inc.*, 2010 U.S. Dist. LEXIS 47994, *13-14 (D. Neb. 2010) ("Discovery requests should be considered relevant if there is any possibility the information sought is relevant to any issue in the case and should ordinarily be allowed, unless it is clear the information sought can have no possible bearing on the subject matter of the action.").

[9] *E.g.*, *Sekisui Am. Corp. v. Hart*, 2013 U.S. Dist. LEXIS 115533, *17 (S.D.N.Y. 2013).

While we believe that the proposed amendments to Rule 37(e) would be an improvement over the current state of affairs, we submit that they do not go far enough to solve the overpreservation problem.

When a party acting in good faith nevertheless fails to preserve information that should have been preserved, the correct means to remedy the problem is through the sort of non-punitive "curative measures" referred to in proposed Rule 37(e)(1)(A).[10] Such curative measures are, by nature, necessary only when the information that is no longer available was truly material to the litigation and non-cumulative; otherwise, there is no gap in the evidentiary record that needs to be cured.

The much harsher remedy of sanctions under proposed Rule 37(e)(1)(B) is not appropriate unless a court finds that a party has acted in bad faith. However, proposed Rule 37(e)(1)(B)(i) would permit sanctions when a party's conduct was "willful *or* in bad faith" (emphasis added), apparently permitting sanctions for conduct that was in some pertinent sense "willful" though not in bad faith. The level of culpability required for sanctions under the proposed Rule is confused rather than clarified by the non-exclusive list of factors to be considered in proposed Rule 37(e)(2). And then proposed Rule 37(e)(1)(B)(ii) goes a step further, permitting sanctions without a finding of either willfulness or bad faith when the prejudice to an opposing party is great enough. Thus, under the proposed amendments to Rule 37(e), just like today, a party could not rely on its own good faith as protection against severe sanctions relating to the preservation of evidence.

Parties who are concerned to avoid sanctions at all costs will continue to overpreserve evidence unless the Rules delineate a clear line between a bad faith failure to preserve evidence, which should subject a party to sanctions, and less culpable failures, which can be remedied through the curative measures of proposed Rule 37(e)(1)(A). To accomplish this goal, we endorse LCJ's proposals to replace the disjunctive "or" with the conjunctive "and" in proposed Rule 37(e)(1)(B)(i) and to strike proposed Rules 37(e)(1)(B)(ii) and 37(e)(2).

Finally, Bayer strongly urges the adoption of a clearly defined and easily identifiable triggering event, such as the commencement of litigation, that would initiate a defendant's obligation to take affirmative steps to preserve

[10] For example, the logic of an adverse inference instruction makes sense only in a case of bad faith. When evidence has been lost inadvertently, even negligently, by a party acting in good faith, the fact of its destruction says nothing about the likelihood that the evidence supported one party or the other.

information, such as issuing hold notices to employees and modifying standard auto-delete or retention schedules. The ill-defined "reasonable anticipation of litigation" standard under current law is too vague to provide useful direction to a party who wishes to avoid the risk of sanctions while still limiting preservation efforts and costs to what the law requires. The consequence, again, is overpreservation (by excessively early preservation).

Bayer's own experience illustrates the untenable position that a party may find itself in under the present rule. Late last year, an attorney sent the company a letter attaching a federal court complaint that he said he would file if Bayer did not meet certain demands within 30 days. The company immediately issued a litigation hold notice and disabled computer auto-delete features for employees who might have relevant information. While we promptly advised the attorney that we disagreed with his demands, to our knowledge no lawsuit has yet been filed. Ten months later, 382 employees remain subject to a legal hold, and the company continues to bear the cost of preserving their information. Current law offers scant guidance to company lawyers who must determine when we may safely conclude that we no longer "anticipate litigation" of this matter and are no longer subject to a preservation obligation.

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Bayer thanks the Committee for the opportunity to submit these comments.

Respectfully submitted,

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