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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
Suite 7-240
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:

On behalf of Eli Lilly and Company ("Lilly"), I welcome the opportunity to submit comments on the Committee's proposed amendments to the Federal Rules of Civil Procedure. I commend the Committee for its dedication to this important work and for its commitment to a fair and open process. We are pleased to provide these comments in strong support of the proposed amendments.

Lilly is a leading developer and manufacture of human pharmaceutical and animal health products that is committed to bringing life-changing medicines to those who need them. Our mission is to make medicines that help people live longer, healthier, more active lives. With global headquarters in Indianapolis, Indiana, we sell medicines to treat diabetes, cancer, schizophrenia, major depressive disorder, and many other significant medical conditions in nearly 130 countries.

I. Lilly's Experience with Litigation and Support of the Committee's Work

Given the nature of and size of our business, Lilly is regularly engaged in civil litigation over product liability, patents, commercial disputes, employment, and other matters. We also have experience with the civil justice systems in numerous other countries. Currently, Lilly is involved in nearly 4,000 civil cases. This extensive experience with both U.S. and foreign court systems informs our comments on the proposed amendments.

As an initial matter, Lilly recognizes a general preference for the U.S. federal court system over any other, primarily because it offers the promise of the "just, speedy, and inexpensive" determination of cases. We highly value this Committee's commitment to provide rules that allow parties to attempt to resolve their disputes in such a manner. Modern litigation practices, however, threaten this promise. Companies are pressured by the explosion of data that, under the current rules, has to be preserved, sifted through and produced. To make matters worse, lawyers in mass tort and patent cases have learned to leverage these costs, often by seeking overly broad discovery that can cost companies

millions of dollars to produce. The result is a system that consistently creates unbalanced and unreasonable discovery costs for civil defendants, abusive litigation tactics, and the resolution of cases based on costs rather than merits.

For these reasons, Lilly generally endorses the comments submitted by Lawyers for Civil Justice ("LCJ"). The changes LCJ seeks can help restore balance and proportionality to discovery without limiting access to courts or evidence important to a case at trial. For efficiency purposes, we will focus our comments on the proposals for Rules 37(e) and 26(b)(1) by providing data and other specific Lilly experiences that demonstrate the need for these changes.

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

Lilly supports the proposed amendments to Rule 37(e) and offers some suggestions to further the goals of these reforms.

As currently construed, Rule 37(e) provides little guidance as to the triggers, scope, and duration for a party's obligation to preserve documents and other information for trial. This lack of clarity has led to disparate judicial decisions, creating an unpredictable and a highly risky litigation environment. Compounding these risks is the possibility that a court will impose sanctions for failure to preserve even in the absence of bad-faith. Such sanctions can be costly, and even outcome-determinative.

Lilly Experiences: To minimize these litigation risks, Lilly spends tens of millions of dollars to over-preserve vast amounts of information, only a tiny fraction of which will ever be used in determining a case on the merits. Indeed, Lilly has spent tens of millions just to preserve e-mail messages in the past six years. Also, at any given time, more than 10,000 U.S. employees are under multiple litigation holds. These holds impose significant costs, resulting in thousands of employee working hours spent each year on the preservation of documents and information.

The current rules also create uncertainty and confusion. For example, last July a plaintiff's attorney indicated to one of our outside law firms that he was considering a potential product liability action against Lilly on a client's behalf. The plaintiff's attorney said he was going to send a "settlement binder" with information on the claim and a demand. Because of Lilly's conservative approach to preservation, we issued a hold notice. This attorney has not followed up at all, yet nearly 10,000 employees have been under a litigation hold notice for the past six months. It is also unclear when Lilly can lift this hold notice without risking future discovery sanctions.

Recommendations: As a preliminary matter, there should be bright-line, common sense triggers for preservation obligations, starting with the "filing of a lawsuit" and ending with the "termination of lawsuit." The number of custodian files a party must preserve should also be addressed.

Also, while the proposed amendments to Rule 37(e) are a step in the right direction, additional clarification would be helpful. It is clear that the Committee's goal here is to largely limit sanctions to those situations where a party fails to preserve in "bad faith." The amendment can be read otherwise and should be tightened.

First, the Committee should eliminate the term "willful" in the proposed amended rule or define "willful" (or any other term, such as "reckless") to mean "acting with specific intent to prejudice another party." As is, willful alone does not require ill-intent. Second, the proposed rule allows a court to impose sanctions if the failure to preserve "irreparably deprived" a party of a meaningful opportunity to

present a claim or defense, even when there is no bad faith. This clause is likely to become the proverbial exception that swallows the rule. We appreciate that the Committee may intend that this exception be used rarely, but Lilly strongly urges the Committee to eliminate it so that it does not undermine the other helpful changes. Sanctions for failure to preserve should apply only when a party, in bad faith, substantially prejudices another party. Lilly would also welcome efforts by this Committee to further define the term "substantial prejudice."

The above answers several of the questions in the Invitation for Public Comment. In response to the other questions, Lilly would apply these changes to all discoverable information, not just electronically stored data, and does not believe the current language of Rule 37(e) needs to be retained.

These common sense changes can help remove the threat of outcome determinative sanctions when a company, in good faith, follows regular document retention policies and reasonable procedures.

III. Comments on Proposed Amendments to Rule 26(b)(1)

Lilly supports the proposed amendments to Rule 26(b)(1) as reasonable and meaningful measures to tailor the scope of discovery to a party's actual needs and to contain the runaway costs of discovery.

In modern litigation, excessive discovery directed at companies such as Lilly has become the rule. A mindset of "liberal" discovery has given way to an expectation of virtually "unlimited" discovery where the requesting party has no incentive to limit the scope of their requests to the claims and defenses at issue. Indeed, the explosion of data has been accompanied by demands for increasingly expansive amounts of discovery.

In fact, in many cases the goal of discovery has changed. Rather than being used to identify key facts for litigation, we have seen discovery used as a weapon to gain a litigation advantage. For example, discovery requests now often focus on how a defendant produces discovery, not just the facts in the case. Also, lawyers threaten to file spoliation motions whenever possible to get favorable jury instructions, negative inferences against the defendant if a document is not produced, and sanctions. This last tactic, which has been called "litigation by sanction," can increase the value of weak claims by forcing companies to settle claims to save on potential discovery sanctions rather than focus on the merits of a case.

Lilly experiences: In a recent product liability case, the plaintiffs' lawyer submitted 200 written discovery requests in the opening round of discovery. The lawyer essentially requested every document that mentions the product at issue without regard to the documents' relevance to the case. In another product liability case, the plaintiffs' lawyer did not even limit the requests to the product at issue. Instead, the lawyer requested documents and information on the subject product and every past, present, or potential (i.e., unmarketed and still in development) product in the same class of drugs.

Such discovery requests are completely wasteful. In a recent product liability case, Lilly reviewed more than 20 million pages of documents and produced 4.2 million pages, of which about 200 documents were admitted at trial. Similarly, in a recent patent lawsuit, Lilly reviewed 9.5 million pages of documents and produced 1.3 million pages. At trial, about 450 documents were admitted. In another patent lawsuit, Lilly reviewed more than 6 million pages of documents and produced more than 1.2 million pages with fewer than 140 documents being admitted at trial. Overall, Lilly has spent more than $50 million in the past three years processing, reviewing, and producing documents.

Compare this system to litigation in foreign jurisdictions. For example, in litigation Lilly recently had in the U.S. and other jurisdictions over the same patent issue, Lilly produced roughly 1.4 million pages of documents in the U.S. litigation, about 600,000 pages in one foreign jurisdiction, and about 20,000 pages in another foreign jurisdiction. Yet, roughly the same number of Lilly-produced documents was admitted in each trial (about 150), and each trial resulted in the same decision on the merits. In large part due to the significant costs of discovery in the U.S. system, Lilly's average spend on a patent case in the U.S. is thirteen times what it is in other countries.

Indeed, patent litigation is an area where Lilly and other companies have seen a whole new area of litigation evolve out of the ability of plaintiffs' attorneys to use discovery to artificially drive up the costs of defending a claim. Shell entities called "patent trolls" manipulate these costs and have been successful in getting companies to settle claims for less than the costs of complying with their discovery requests, even when the claims have little or no merit. Abuses by patent trolls have resulted in legislative proposals and bipartisan calls for reform intended to restore balance and fairness to the litigation process.

These tactics and inequities, however, are not isolated to patent litigation. The ability to leverage excessive discovery costs invites the filing of less meritorious claims in other litigations in the U.S. as well. In this regard, while about 60% of Lilly's business is in the U.S., more than 96% of our litigation docket is here.

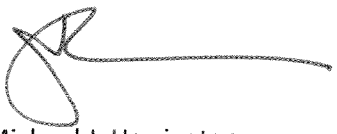
Recommendations: Rule 26(b)(1) should be amended to clarify that discovery must be "proportional" and "material" to the needs of a case. Discovery should be defined by the claims and defenses in the case, not the broad "subject matter involved in the action" standard. Further, Lilly strongly urges the Committee to remove the phrase that discovery can be anything that is "reasonably calculated to lead to the discovery of admissible evidence." This clause is routinely cited to justify broad-ranging and excessive discovery.

IV. Conclusion

Lilly generally supports the proposed changes to the federal rules, including the presumptive limits on depositions, interrogatories, and other aspects of discovery—in addition to the proposed changes to Rules 37(e) and 26(b)(1) that are the focus of our comments.

Discovery can promote fairness by giving all sides access to key facts needed to resolve a dispute. But, the Federal Rules of Civil Procedure have not kept up with the realities of litigating in the Information Age. Changes in technology have opened the door for discovery to be manipulated as a means for driving litigation outcomes, particularly when a case is weak on the merits. By adopting the proposed amendments, and perhaps other improvements discussed in this comment, the Committee can bring about needed improvements with respect to the handling of discovery in the federal court system.

Respectfully submitted,



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