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Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle NE
Washington, DC 20544

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

Dear Committee,

My name is Lori Cohen and I am a Shareholder and Chair of the Pharmaceutical, Medical Device and Health Care Litigation Practice at Greenberg Traurig. On behalf of myself and other members of Greenberg Traurig,[1] we provide the following comments to and support for the Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure prepared by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States ("Committee"). As national counsel for medical device and pharmaceutical companies as well as large corporations in other industries in cases ranging from mass torts, with hundreds or thousands of plaintiffs, to one-off single plaintiff claims, we know first-hand the disproportionate burden of discovery placed on defendants and routinely experience abusive discovery by those who seek to use the high cost of responding to discovery in order to pressure parties into settlements that are not based on the merits of a matter. With this backdrop, we appreciate being given the opportunity to provide comments.

Comments on Proposed Amendments to Rule 26

We support the proposed amendments to Rule 26 clarifying the scope of discovery. Proposed Rule 26(b) (1) will help guide courts and litigants to implement and utilize discovery, especially of electronically stored information ("ESI"), in the way it was intended. Allowing discovery on "any matter relevant to the subject matter involved," as the Rule is currently written, permits overly broad discovery by litigants, which has become standard practice to the detriment of the legal process.[2] This phrase,

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[1] This letter is sent on behalf of the following Greenberg Traurig shareholders: Hilarie Bass, Co-President; David Coulson, Chair, Miami Litigation Practice; Victoria Lockard, Vice-Chair, Pharmaceutical, Medical Device & Health Care Litigation Practice; Cliff Merrell; Ginger Pigott, Vice-Chair, Pharmaceutical, Medical Device & Health Care Litigation Practice; Sara Thompson; and Todd Wozniak.

[2] This all-encompassing view of the discovery rules is long-standing. "We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored

coupled with an allowance of discovery that "appears reasonably calculated to lead to the discovery of admissible evidence," "obliterate[s] all limits on the scope of discovery" since nearly any information could feasibly lead to admissible evidence.[3]

By moving the proportionality provision, currently located in Rule 26(b)(2)(C)(iii), to Rule 26(b)(1), this amendment would curb the use of the discovery process as a mechanism to purposefully increase costs in the hopes of forcing an early settlement. The proportionality standard, if enforced, would place a real limit on the information to be produced without becoming a detriment to any party.[4] Adding limiting language regarding proportionality and striking the language 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," will help to ensure that discovery is narrowly tailored to the subject matter truly at issue.[5] Litigants would also be forced to have a better understanding of their claims and defenses prior to propounding discovery in order to properly assess and defend the proportionality of the discovery requests, rather than relying on overarching requests.

Further, the proposed amendment to Rule 26(c) allowing courts to shift discovery costs at their discretion is another step toward curtailing abuse of the discovery process in order to inflate litigation costs. Often, the amount of ESI is disproportionately distributed among parties, a common situation in pharmaceutical or medical device tort litigation,

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cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). Even though this interpretation was construed prior to the introduction and use of electronic discovery, this sentiment continues to this day. *See Black Hills Molding, Inc. v. Brandom Holdings*, LLC, CIV. 12-5051, 2013 WL 6092215 (D.S.D. Nov. 19, 2013); *Hunt v. 21st Mortgage Corp*., 2:12-CV-2697-WMA, 2013 WL 5230061 (N.D. Ala. Sept. 17, 2013) (acknowledging the "low bar" set out in Rule 26).

[3] Committee on Rules of Practice and Procedure, January, 2013 Agenda Book, 263-264.

[4] Both Plaintiff and Defense attorneys of the American College of Trial Lawyers strongly believed that judges do not enforce current Rule 26(b)(2)(C) to limit discovery. Federal Judicial Center's Report to the Judicial Conference Advisory Committee on Civil Rules on Attorney Satisfaction with the Federal Rules of Civil Procedure, 9-10, March 2010, *available at*: http://www.fjc.gov/public/ pdf.nsf/ lookup/costciv2.pdf/$file/costciv2.pdf.

[5] The American College of Trial Lawyers and the Institute for the Advancement of the American Legal System "emphasize that the primary goal [of proportionality is] to change the default from unlimited discovery to limited discovery. No matter how the limitations are defined, there should be limitations. Additional discovery beyond the default limits would be allowed only on a showing of good cause and proportionality." American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System's Final Report, 11 (March 11, 2009), a*vailable at:* http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4008.

where years of design and communication on a single product can result in the production of hundreds of thousands or millions of pages. Discovery is an integral part of any litigation, with high costs for all parties involved,[6] and recent court decisions have imposed heavy sanctions on litigants that were unable to respond effectively to discovery requests. The proliferation of information technology has made it difficult for a litigant to know what information is within its control and how to manage that information to reduce litigation risk and comply with various laws. The presumption that the responding party bears the expense weighs heavily against such parties who have additionally already borne the cost of preserving that information.[7] While advancements in ESI discovery promise to reduce the associated cost, it remains one of the greatest expenses of the litigation process. Permitting courts to allocate this expense among the parties as justice requires may force litigants to fully appreciate the magnitude of a request and should help limit the amount of discovery to what is needed rather than what is within one's right. This proposed amendment appropriately ensures this power is placed with judges, who are in the best position to gauge whether and how such costs should be apportioned.

Comments on Proposed Amendments to Rule 37(e)

We commend the Committee's efforts to establish uniform standards for addressing preservation and sanctions during discovery by proposing amendments to Rule 37(e). The Committee's proposed changes work toward balancing the goals of limiting over-preservation while ensuring the right of parties to obtain discovery. Most importantly, we welcome the measure providing discretion to courts to order curative measures if a party fails to preserve discoverable information that should have been preserved. When a party somehow fails in good faith to preserve information that should have been preserved, "curative measures" referred to in proposed Rule 37(e)(1)(A) are the best method for resolution. For those instances when curative measures are not sufficient, the Committee's proposed amendments to Rule 37(e) shed much-needed light on the imposition of sanctions. However, we respectfully submit the following reservations regarding the proposed changes.

We believe that Rule 37(e) should not be limited to sanctions for loss of ESI only and that it should apply to all discoverable information. To include all discoverable information under the rule would avoid the potential problem of courts applying different

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[6] A survey conducted by the American Bar Association's Litigation Section reported that 82% of responding lawyers from Defense and Plaintiffs' Bars agreed that discovery is too expensive; 66% believed that e-discovery is abused. *See* John L. Carroll, *Proportionality in Discovery: A Cautionary Tale*, 32 CAMPBELL L. REV. 455, 456 (2010).

[7] *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978) ("the presumption is that the responding party must bear the expense of complying with discovery requests").

standards of preservation for different types of media, thus avoiding further costly and time-consuming litigation surrounding how to treat ESI versus non-ESI discovery.

Proposed Rule 37(e)(1)(B)(i) takes an important step toward establishing a uniform standard for sanctionable conduct by requiring that party's actions to be "willful or in bad faith." Because of varying standards in federal courts, clients involved in litigation in numerous jurisdictions attempt to account for consistency by carrying out measures that lead to over-preservation of ESI, thus driving up discovery costs for all parties. We recommend that the Committee change the wording in Rule 37(e)(1)(B)(i) by either removing the term "willful" altogether or changing the proposed wording from "willful or in bad faith" to "willful *and* in bad faith" to establish the standard as the intentional destruction of evidence for the purpose of depriving an opponent of that evidence. Willful conduct by a party can include conduct devoid of evidence of bad faith. Courts have addressed the element of intent with varied results,[8] even permitting sanctions absent a finding of a culpable state of mind.[9] If a litigant destroys data within its possession, custody, or control because it believes, based on good faith, that it had no reason to maintain the data, the litigant could still be sanctioned under the proposed amendment. An amendment to Rule 37(e) requiring evidence of willfulness *and* bad faith as a prerequisite to ordering sanctions would support the Committee's goal of designing a rule "to ensure that potential litigants who make reasonable efforts to satisfy their preservation responsibilities may do so with confidence that they will not be subjected to serious sanctions should information be lost despite those efforts."[10]

Further, we respectfully urge the comment to amend Rule 37(e) to include a clearly defined triggering event that initiates a duty for the preservation of evidence. The current standard too often results in parties erring on the side of drastic over-preservation. Significant resources are devoted to preserving data and documents in "anticipation of litigation," a too vague standard capable of multiple interpretations. With a clear definition of when a litigant's preservation duty arises, a party can efficiently direct its focus and allocate its limited resources towards properly preserving information. Clearly

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[8] *Stocker v. United States*, 705 F.3d 225, 236 (6th Cir. Jan. 17, 2013) ("more severe sanctions [should be] reserved for the knowing or intentional destruction of material evidence"); *Buckley v. Mukasey*, 538 F.3d 306, 323 (4th Cir. Aug. 20, 2008) (allowing sanctions for "intentional," "willful," or "deliberate" conduct); *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002) (ordering sanctions in for negligent conduct); *Rinkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010) (determining whether the litigant took steps "proportional" to the case and "consistent with clearly established applicable standards").

[9] *See Sekisui Am. Corp. v. Hart*, 2013 WL 4116322, *5 (S.D.N.Y. Aug. 15, 2013) ("The culpable state of mind factor is satisfied by a showing that the evidence was destroyed knowingly, even if without intent to [breach a duty to preserve it], or negligently.").

[10] Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure, at 318 (2013) (Committee Note to Rule 37(e)).

defining when a duty to preserve arises not only lets a party know when it should begin to take preservation actions but also provides a court with an objective determination of whether a party has violated that duty.

We also recommend that Rule 37(e)(l)(B)(ii), which permits sanctions if a party has been "irreparably deprived" of critical information, should be removed. We are concerned that the exception contained in Rule 37(e)(1)(B)(ii) that allows sanctions or an adverse-inference jury instruction if the court finds that the failure "irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation" creates a lower standard for parties who cannot show that the loss of evidence was due to bad faith, thereby undermining the effectiveness of the amendments to Rule 37(e)(1)(B)(i). Under this proposal, courts could impose sanctions without receiving any evidence of willfulness or bad faith. The exception could, in effect, "swallow the rule." We therefore urge that this exception be removed from the proposed changes to Rule 37(e).

Comments on Proposed Amendments to Rule 1

Cooperation between parties is generally desirable and has the potential to reduce costs and increase the efficiency of litigation.[11] However, proposed Rule 1 goes beyond the overall goals and spirit of the current Federal Rules of Civil Procedure, adding a requirement of cooperation that is not clearly defined. The imposition of such a responsibility upon all parties will inevitably result in a violation of that responsibility by some. Proposed Rule 1 may invite motions alleging opposing counsel's failure of an ambiguous duty and one that may be difficult to reconcile with the good faith already required under the Federal Rules of Civil Procedure, such as Rule 37(f). Therefore, we recommend that the requirement of cooperation be removed from proposed Rule 1 as unnecessary.

Instead, litigants should continue to strive for cooperation throughout the litigation process, utilizing the Sedona Cooperation Proclamation[12] as their guide, without the threat of sanctions for any showing of less than total cooperation. Let us not forget that for better or worse, litigation is inherently adversarial. At some point, providing information beyond what an opposing party is entitled runs counter to the interests of the client.

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[11] Attorneys from the American College of Trial Lawyers, American Bar Association Section of Litigation, and National Employment Lawyers Association agreed that the time to complete discovery was the "primary cause of delay in the litigation process." Report to the Judicial Conference Advisory Committee, at 9-10.

[12] The Sedona Conference, Cooperation Proclamation, 10 Sedona Conf. J. 331 (Nov. 2009 Supp.).

Thank you for the opportunity to submit these comments.

With kindest regards,

Very truly yours,

Lori G. Cohen