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Request To Testify
1/28 Dallas

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To Peter_McCabe@ao.uscourts.gov

cc

Subject Hearing on Proposed Amendments to Federal Rules of Civil Procedure--Dallas, TX, January 28, 2005

Mr. McCabe,

I am Coordinator, Corporate Litigation, for Exxon Mobil Corporation. I have previously commented on the proposed amendments to the Federal Rules of Civil Procedure as they relate to electronic discovery, and I would like to offer further comments at the hearing that the Civil Rules Advisory Committee has scheduled for Dallas, Texas, on January 28, 2005. Thank you for your consideration.

Regards,

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04-CV-002
Supplement To Testimony

ExxonMobil

February 11, 2005

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Re: **Proposed E-Discovery Amendments to Federal Rules of Civil Procedure**

Dear Mr. McCabe:

I am Coordinator, Corporate Litigation, for Exxon Mobil Corporation (ExxonMobil). I submit these comments to supplement the oral comments I made at the hearing of the Civil Rules Committee in Dallas on January 28, 2005. Again, I thank the Committee for its sustained effort to identify and deal with the challenges that electronically stored information pose for everyone involved in pretrial discovery. ExxonMobil generally supports the package of amendments proposed in the *Report of the Civil Rules Advisory Committee*, but we would urge the Committee to consider the following comments and suggestions.

ExxonMobil views the proposed amendments from the perspective of a company that has a large number of litigations and complex, decentralized computer systems that store vast quantities of information.

ExxonMobil has thousands of litigations pending at any one time in state and federal courts in the U.S. We receive hundreds of new cases each month. ExxonMobil and its affiliates operate in 200 countries. We have 306 offices worldwide (70 in the U.S.). We generate 5.2 million emails daily (2.5 million in the U.S.). Our employees have 65,000 desktop computers (26,000 in the U.S.) and 30,000 laptop computers (15,000 in the U.S.). The storage capacity of the desktop and laptop computers we are now issuing to employees is 40 gigabytes each. (One gigabyte equates to 500,000 typewritten pages. Forty gigabytes equates to 20 million typewritten pages.) Our employees use between 15,000 and 20,000 Blackberrys or PDAs (between 7,500 and 10,000 in the U.S.). By the end of 2005, we estimate that our employees will be using 100,000 "thumb drives" (40,000 in the U.S.). (A thumb drive is a device the size of a small pocket knife with a computer chip on the end that can store as much as 1 gigabyte of information.) We have 7,000 servers (4,000 in the U.S.); 1,000 - 2,000 networks (400 - 600 in the U.S.); 3,750 e-document collaboration rooms (3,000 in the U.S.); and 3,000 databases (2,000

in the U.S.). The total amount of electronic information that we currently store is 800 terabytes (500 terabytes in the U.S.). (One terabyte equates to 500 million typewritten pages. Eight hundred terabytes equates to 400 billion typewritten pages. Five hundred terabytes equates to 250 billion typewritten pages.) In the U.S. our disaster recovery systems generate 121,000 back-up tapes a month (1.45 million back-up tapes per year). Backup occurs at 45 separate locations. If a court were to order us to interrupt the recycling of all of our back-up systems, the cost for extra back-up tapes alone would be about $1.98 million per month (about $23.76 million per year). (We currently have no figures for the back-up systems outside the U.S.)

A rule that works for parties with a small amount of litigation and with simple, centralized computer systems may not work for a party with complex, decentralized computer systems or for a party that must comply with the rule in thousands of cases simultaneously and prepare to comply hundreds of times again each month. When drafting rules aimed at meeting the challenges of electronic discovery, the Committee should look at each proposal from all perspectives and determine if, when viewed from the various perspectives, the proposed rule will comply with the mandate of Rule 1 of the Federal Rules of Civil Procedure that the rules must "secure the just, speedy, and inexpensive determination of every action."

Rule 26(b)(2)—The two-tier proposal in Rule 26(b)(2) is a reasonable and necessary way to focus discovery on the vast quantities of electronically stored information that parties use in their normal course of business rather than focusing on electronic information that is not reasonably accessible and rarely contains case determinative evidence.

The Committee has proposed adding the following three sentences to the end of Rule 26(b)(2):

> A party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible. On motion by the requesting party, the responding party must show that the information is not reasonably accessible. If that showing is made, the court may order discovery of the information for good cause and may specify terms and conditions for such discovery.

The proposal would carry on the principle of two-tier discovery established in Rule 26(b)(1), which differentiates between discovery a party can obtain by request and discovery available only by court order.

Under the proposed amendment, the first tier of electronically stored information would be "reasonably accessible" information, which a party could obtain without a court order. The second tier would be electronically stored information that a party "identifies as not reasonably accessible." Such information would not be discoverable without a court order.

Given the vast quantities of reasonably accessible electronically stored information and the disruption and expense of preserving, collecting, and reviewing electronically stored information that is not reasonably accessible, the proposed amendment is a reasonable and necessary step to bring electronic discovery within the mandate of Rule1. The vast quantities of reasonably accessible information will provide enough evidence to give a clear picture of the

facts and ensure a just resolution in the overwhelming majority of cases. The avoidance of the inordinate expense and time needed to deal with electronically stored information that is not reasonably accessible will promote the speedy and inexpensive determination of cases. In the rare instance in which discovery of electronically stored information that is not reasonably accessible becomes necessary, the party demanding the discovery has the option of seeking a court order to obtain it.

The word " reasonably" is the key word in the term "not reasonably accessible."

The Committee has asked for comments on the adequacy of the term "not reasonably accessible." Setting a standard based on "accessibility" has its drawbacks in a world in which forensic experts can locate, retrieve, and review almost any electronically stored information if time and expense are no objects, but the term is no less problematic than terms others have suggested. As the Committee points out, the term is flexible and allows for evolving technology and variations among computer systems.

The Committee Note helpfully identifies several categories of information that will normally fall within the scope of the term "not reasonably accessible." The examples in the Committee Note include information stored "solely for disaster recovery purposes," "legacy data," and "deleted" information. The Note also cites Section 11.446 of the *Manual for Complex Litigation* (4th), which includes "word-processing files with all associated metadata" as information that should be produced only upon a showing of good cause. The Note should mention metadata more prominently as a category of information that a party need not produce without a court order. The Note should also mention the ever-changing information in dynamic databases. Guidance on the treatment of metadata and dynamic databases will reduce the countless hours litigants and courts spend in discovery disputes over those categories of information.

The key word in the term "not reasonably accessible" is the word "reasonably." The Note should make clear that in determining what is and is not "reasonably accessible," courts should look at all of the current proportionality standards in Rule 26(b)(2) and not just at technical feasibility. Courts should also keep in mind the purpose for which the information is being retrieved. Information on disaster recovery tapes may be easily accessible for restoring a crashed network, but the information is not reasonably accessible for purposes of litigation. The Note should make clear that the question courts should be asking is: "Is the information reasonably accessible for purposes of pretrial discovery"?

The obligation to "identify" electronically stored information is reasonable if a party satisfies the obligation by identifying general categories of information and if the safe harbor in proposed Rule 37(f) applies to the identified information.

Creating a new obligation to "identify" electronically stored information that is "not reasonably accessible" creates a risk that courts will interpret the obligation to require the same specificity that courts now require for privilege logs. If interpreted in that way, the propose amendment would be counter productive. It would vastly increase the burden of electronic discovery rather than lessen the burden.

The Committee Note states that identifying a general category of information would be sufficient in some cases, such as information on disaster recovery tapes. In other cases, such as legacy data, the Note indicates that a party would have to explain why recovery of the information would be unreasonable. The Note should expressly state that the obligation to "identify" information does not require specificity approaching that required for a privilege log.

The bigger issue is the need to clarify the protection a party obtains by identifying electronically stored information that is "not reasonably accessible." The Committee Note should expressly state that the purpose of identifying electronic information that is "not reasonably accessible" is to put other parties on notice that the identified information is outside of discovery and within the safe harbor proposed in Rule 37(f) until and unless the parties agree or a court orders that the information is discoverable. If the obligation to "identify" information does not give such protection, the obligation would be an unjustified additional discovery burden.

> *The fear that corporations will use the two-tier provision to hide critical evidence is based on the illogical assumption that companies would store information they need in places where they cannot get at it.*

At the Committee hearing in Dallas, opponents of the proposed amendment to Rule 26(b)(2) raised a concern that companies would take advantage of the two-tier proposal to move information from storage that is accessible to storage that would render the information "not reasonably accessible." Such a concern relies on the irrational supposition that corporations would move information that they need for business or regulatory reasons to storage that would make retrieval of the information unreasonably difficult. Doing so would make the cost and disruption that the corporation was trying to avoid in the event of litigation an everyday occurrence as its employees tried to access the information to use it for its intended business or regulatory purpose.

ExxonMobil is in the oil and gas business—not the business of avoiding litigation or pretrial discovery. It puts the information it needs to retrieve for business or legal reasons on systems designed to preserve and make the information easily retrievable. The only information that it intentionally stores so that it is not reasonably accessible and is subject to routine deletion or overwriting is information for which the company has no business or legal need to retrieve.

> *The proposed two-tier provision should provide for cost sharing when courts order production of electronically stored information that is not reasonably accessible, because cost sharing forces the party that is in the best position to make a cost benefit decision to make that decision rather than forcing courts to do so.*

The proposed amendment to Rule 26(b)(2) provides that when a court orders the production of electronically stored information that is "not reasonably accessible," the court "may specify terms and conditions for such discovery." The Committee Note makes passing reference to the possibility of a court making "provision regarding the cost of production" when the court orders production of electronic information that is "not reasonably accessible." The

proposed rule and the Committee Note should do more to suggest the appropriateness of cost sharing when a court orders extraordinary discovery of electronically stored information.

Although the general practice with respect to document production in federal court is that the producing party pays the cost of production, the Committee should reexamine that practice with respect to extraordinary electronic discovery. The *Manual for Complex Litigation* (4th) points out that the economics of electronic discovery differ from the economics of paper discovery. Section 11.466 of the *Manual* explains that while conventional "warehouse" productions of paper documents are often costly and time-consuming, the time and resources the requesting party must commit to reviewing and copying the documents keep excesses in check. The Section goes on to explain:

> In a computerized environment, the relative burdens and expense shift dramatically to the responding party. The cost of searching and copying electronic data is insignificant. Meanwhile, the tremendously increased volume of computer data and a lack of fully developed electronic records-management procedures have driven up the cost of locating, organizing, and screening data for relevance and privilege prior to production. Section 11.466, *Manual for Complex Litigation* (4th).

This shift in the economics of production alone justifies a reexamination of the "producer pays" rule.

In addition to the shift in economics, the Committee should look at the effectiveness of mandatory cost shifting in reducing discovery abuse in the three most populous jurisdictions in the U.S.—California, Texas, and New York. Section 2031 of the California Code of Civil Procedure requires that the party demanding discovery pay the reasonable cost of extraordinary electronic discovery. *Toshiba America Electronic Components, Inc. v. Superior Court,* 2004 Cal. App. LEXIS 2055 (December 3, 2004). Rule 196.4 of the Texas Rules of Civil Procedure provides that when a court orders a party to produce electronic information that is not "reasonably available...in its ordinary course of business," the court "must also order that the requesting party pay the reasonable expense of any extraordinary steps required to retrieve and produce the information." In New York, the requesting party has to pay the reasonable costs of document production—hardcopy or electronic. *Lipco Electrical Corp. v. ASG Consulting Corp.*, 2004 N.Y. Misc. LEXIS1337 (August 17, 2004).

At the Committee hearing in Dallas, the testimony from both plaintiff attorneys and defense counsel confirmed that the Texas rule has worked to curb abuse without depriving litigants of a fair opportunity to try their cases on the merits. Requiring the requesting party to pay all or a substantial part of the cost of extraordinary electronic discovery forces the requesting party—the party that is in the best position to judge the need for the information—to make a cost benefit decision before demanding the discovery. Rules that force parties—not courts—to make cost benefit decisions on discovery further Rule 1's mandate of securing the "just, speedy, and inexpensive determination of every action."

The Committee should add the words "including cost sharing" at the end of the proposed amendment of Rule 26(b)(2). The Committee Note should explain the differing economics of electronic discovery; point out the effectiveness of cost sharing in California, Texas, and New York; and suggest the appropriateness of a presumption of cost sharing when a party demands extraordinary electronic discovery.

Rule 37(f)—A well-defined, narrow safe harbor that protects a party from sanctions when "not reasonably accessible" electronically stored information is lost due to the continued routine operation of the party's computer systems is a critically needed reform.

The two-tier proposal in Rule 26(b)(2) and the safe harbor in proposed Rule 37(f) are the two central reforms in the Committee's packet of proposed amendments. The two-tier proposal deals mainly with the most obvious challenges of electronic discovery—the vast quantities of electronically stored information and the practical impossibility of retrieving much of that information for discovery purposes. The safe harbor deals with two less obvious, but more intractable, challenges—the loss of information caused by the routine operation of some computer systems and the practical impossibility of interrupting those routine operations. The two-tier proposal reduces the volume of electronically stored information and deals with the problem of the difficulty of retrieval by taking electronic information that is "not reasonably accessible" out of normal pretrial discovery. The safe harbor deals with the routine loss of electronically stored information and the impracticability of interrupting the routine operation of some computer systems by protecting a party from sanctions in certain circumstances when information is lost due to the continued routine operation of computer systems.

The proposed safe harbor is narrow. First, it does not protect a party that destroys electronically stored information in violation of "an order...requiring it to preserve electronically stored information." Second, it does not protect a party that fails to take reasonable steps to preserve electronically stored information once the party "knew or should have known that the information was discoverable." Third, it applies only if the loss of information results from the "routine operation of the party's electronic storage system." A party cannot change the routine operation of the system or selectively delete information.

> *Without a safe harbor, parties face a broad, uncertain preservation obligation each time litigation is commenced.*

Section 11.442 of the *Manual for Complex Litigation* (4^{th}) acknowledges that broad preservation orders may be "prohibitively expensive and unduly burdensome for parties dependent on computer systems for their day-to-day operations." Without a safe harbor, parties automatically face a broad, ill-defined preservation obligation until the parties agree or the court orders otherwise. The reverse should be true. A party should never have a broad preservation obligation with respect to electronic information that is not reasonably accessible until the party has had a chance to convince the court that such an obligation is unreasonable or that the requesting party should share the cost.

Going into broad preservation mode and then seeking to narrow the preservation obligation defeats the purpose of the safe harbor. The safe harbor is to avoid the disruption of

interrupting the routine operation of computer systems, such as disaster recovery systems or dynamic databases, except when the need to stop them has been established and the scope and duration of any interruption has been determined.

> *The Committee could clarify the safe harbor provision by adding the word "specified" before "electronically stored information" in the main paragraph of proposed Rule 37(f).*

The Committee could clarify proposed Rule 37(f) by adding the word "specified" before the term "electronically stored information" in the first paragraph of the proposed rule. That part of the proposed rule would then read:

> Unless a party violated an order in the action requiring it to preserve **specified** electronically stored information, a court may not impose sanctions under these rules on the party for failing to provide such information if.... (Emphasis added.)

The addition of "specified" would clarify that the safe harbor applies to the loss of electronically stored information even when a court has ordered preservation of electronic information, so long as the lost information was not covered by the order.

> *The safe harbor provision should apply unless a party "intentionally or recklessly" violates a court order requiring it to preserve specified electronic information.*

The Committee has asked for comments on whether the proposed safe harbor should give more protection by protecting parties from sanction unless the party's failure to preserve information results from intentional or reckless conduct.

An "intentional or reckless" standard would acknowledge that preventing the routine destruction of electronically stored information is more complex than preventing the destruction of paper documents. Given the greater susceptibility of electronically stored information to unintentional deletion or overwriting, parties need greater protection than a "negligence" standard provides. The higher standard of culpability would reduce the number of abusive sanction motions.

The following wording would accomplish the Committee's objective of creating a narrow, but well-defined safe harbor:

> A court may not impose sanctions under these rules on a party for failing to provide electronically stored information deleted or lost as a result of the routine operation of the party's electronic information system unless the party intentionally or recklessly violated an order issued in the action requiring the preservation of the lost information.

The essential element of any safe harbor provision is a bright line that says a party does not have to interrupt the routine recycling of disaster recovery tapes or stop

computers containing dynamic databases unless a court orders the party to do so and sets reasonable conditions and limits for doing so.

The Committee should modify the Committee Note to send the message that although the safe harbor in Rule 37(f) is narrow, it is safe.

The main concern with the proposed safe harbor is not the language of proposed Rule 37(f), but the tone of the proposed Committee Note. The first two paragraphs of the Note explain the purpose, operation, and narrowness of the safe harbor. Much of the rest of the Note sounds a warning that the harbor is not safe.

The third paragraph states that the safe harbor would only apply to loss of electronically stored information "after commencement of the action." The proposed note goes on to state that the proposed rule "does not define the scope of a duty to preserve and does not address the loss of electronically stored information that may occur before an action is commenced." While the statement is theoretically true, it sends the wrong signal. It implies that a party can never get to the harbor on time.

The third paragraph should send a message along the following lines: "Although Rule 37(f) addresses only sanctions under the Civil Rules and applies only to the loss of electronically stored information after commencement of the action in which discovery is sought, the Rule defines a balanced framework for courts to consider when judging the loss of electronic information due to the routine operation of computer systems whenever the loss occurs."

The first four sentences of the fourth paragraph give a good summary of the standards for judging the reasonableness of preservation efforts. They make specific reference to proposed Rule 26(b)(2). The fourth sentence reassuringly concludes: "In most instances, a party acts reasonably by identifying and preserving reasonably accessible electronically stored information that is discoverable without court order." The rest of the fourth paragraph undermines the comfort and guidance of the first four sentences. It says that a party must keep information that is "not reasonably accessible" if the party "should have known that it was discoverable ...and could not be obtained elsewhere." It then appears to break the link between the two-tier proposal in Rule 26(b)(2) and the safe harbor proposed in Rule 37(f) by stating that "[p]reservation...is necessary to support discovery under Rule 26(b)(2) if good cause is shown." The paragraph continues to say that if a party knows the "nature of the litigation," "what subjects are pertinent to the action," "which people and systems are likely to have relevant information," and which systems have "design features that may lead to automatic loss of discoverable information" the safe harbor disappears. The overall messages are the following: (1) Unless all of the potentially relevant information on the disaster recovery tapes is stored elsewhere, a party should interrupt the recycling of back-up tapes or risk being second guessed by hindsight; and (2) if a party understands its computer systems and the litigation in which it is involved, the party loses the protection of the safe harbor.

The fifth paragraph is a useful discussion of the interplay between the safe harbor and the destruction of information in violation of a regulation or statute.

The sixth paragraph points out that the proposed safe harbor would not protect a party that violated a court order requiring the preservation of specified electronic information--"even though the party took 'reasonable steps' to comply with the order." That statement may be the best argument for the need of the "intentional or reckless" standard that the Committee is considering.

The eighth paragraph explains that deleting or overwriting electronic information "may not totally destroy the information, but may make it difficult to retrieve or restore." The paragraph concludes, "If the information is not reasonably accessible because a party has failed to take reasonable steps to preserve the information, it may be appropriate to direct the party to take steps to restore or retrieve information that the court might otherwise not direct." Instead of emphasizing that the safe harbor will protect a party when electronic information is lost due to the routine operation of the party's computer systems, the paragraph warns that parties may be ordered to restore deleted information if they knowingly let it be deleted. Again, the message is that the harbor is not safe.

> *The greatest obstacle to the safe harbor is the unrealistic, hypothetical nightmare that the continued routine loss of electronically stored information that is "not reasonably accessible" will result in the loss of case determinative evidence.*

The greatest obstacle to acceptance of a safe harbor provision is the unrealistic, hypothetical nightmare that essential evidence will be lost if backup systems and dynamic databases are not stopped immediately. The nightmare ignores the volumes of reasonably accessible electronic information that, in the vast majority of cases, will provide sufficient evidence to make a just determination on the merits. The hypothetical also ignores that, in addition to requests for documents and electronically stored information, the Federal Rules provide an array of discovery tools, including interrogatories, requests for admission, and depositions, to develop the facts of a case. The nightmare ignores that the routine operation of computer systems does not pick and choose among "good" and "bad" bits of information. Routine operation is neutral on the merits of a case. It deletes, overwrites, or changes information blindly. Both sides are equally at risk of losing helpful or harmful information.

The Committee's inclusion in Rule 26(b)(2) of an obligation to identify electronically stored information that a party deems "not reasonably accessible" and the Committee's proposal in Rule 26(f) that parties discuss preservation issues at the discovery planning conference are safe guards to prevent the nightmare from coming true.

The Committee should not base a rule on a hypothetical worst-case scenario. Such rules tend to be extreme and inefficient. The appropriateness of any civil rule must be judged by the criteria in Rule 1—does the rule help "secure the just, speedy, and inexpensive determination of every action." No one questions that a safe harbor would lessen the time and cost of litigation. A safe harbor would also assist the just resolution of cases, because it would lead to more cases being determined on the merits. Under current practice, a party with little or no electronically stored information has a means of dictating settlements that are unrelated to the merits of the case. By lessening that unfair advantage, a narrow, well-defined safe harbor would facilitate the just resolution of cases on the merits.

Rule 34(b)—The default for form of production of electronically stored information should be "reasonably usable form."

The Committee has proposed amending Rule 34(b) by adding a sentence that provides that a request for production "may specify the form in which electronically stored information is to be produced." The Committee then proposes that if the parties have not agreed on the form and the court has not ordered the form, a responding party must produce the information in a form "in which it is ordinarily maintained, or in an electronically searchable form."

The Committee chose the default language to parallel the default language for production of hardcopy documents, but as often happens when people make a literal translation from one language to another, the result has unintended consequences. The term "form in which it is ordinarily maintained," when applied to electronically stored information, may mean "native" format. Producing electronic information in native format is often not practical. Parties cannot number or bates stamp native data; native data is easily lost or altered intentionally or unintentionally; native format may contain proprietary information; and many parties—especially unsophisticated litigants or those on low budgets—may not be able to handle native data.

The term "in an electronically searchable form" may require the producing party to provide a search tool and to instruct the other side in how to use it. Again, the unsophisticated and low budget litigants may prefer paper, but they are the litigants that are most likely not to deal with the issue of form until they unexpectedly receive information in electronic form.

The current standard default is "a reasonably usable form." Rule 34(a) talks of translating electronically stored information into "reasonably usable form." Note 3 to the Texas electronic discovery rule, Rule 196.4, provides that "[u]nless ordered otherwise, the responding party need only produce the data reasonably available in the ordinary course of business in reasonably usable form." Section 2031(g)(1) of the California Code of Civil Procedure also talks of translating data compilations into "reasonably usable form."

The phrase "reasonably usable form" has worked well. It provides greater flexibility than the two phrases the Committee has suggested, and it has fewer unintended consequences.

Rule 26(b)(5)(B)—The proposed rule protecting the inadvertent production of privileged information is necessary, but it shows that the excessive burden of discovery has eroded the privilege and the attorney's ability to protect his/her clients' interests.

The Committee proposes a new Rule 26(b)(5)(B), which will give a party that has produced information "without intending to waive a claim of privilege...a reasonable time [to] notify any party that received the information of its claim of privilege." After being notified, a party "must promptly return, sequester, or destroy the specified information and any copies."

Existing law in number of jurisdictions protects a party from waiver of the privilege if the party makes an inadvertent disclosure of privileged material, but the protection is conditioned on

a showing that the party took reasonable steps to protect against inadvertent disclosure. The Committee's proposal makes no pretense of requiring reasonable steps to prevent disclosure. The unspoken premise of the proposed rule is that the volume of discoverable information makes taking reasonable steps to prevent inadvertent disclosure of privileged information too burdensome, too expensive, and futile.

The rule is necessary, but it is an admission that the unbounded obligation to produce documents and electronic information has eroded the privilege and overwhelmed attorneys' ability to review their clients' documents and electronic information adequately. This erosion has taken place as an unintended consequence of the increasing discovery obligation and not as a result of considering the policy and purpose of the privilege and weighing whether the protection of the privilege is less important than increasing the obligation to produce information.

The Committee's proposal may lead to further erosion of the privilege in that it gives a party or a court that wants to "streamline" discovery a basis for pressuring parties to agree to discovery deadlines and procedures that make the prior review of documents for privilege impossible.

A number of countries do not recognize the attorney-client privilege. A review of the privilege in this country may conclude that the privilege is not important or that it should be weakened. That debate has not taken place, nor have we debated whether erosion of the privilege is a move toward or away from Rule 1's mandate to secure "just" resolution of disputes.

Rule 26(f)—Meet-and-Confer Proposals—Adding preservation of discoverable information, the form of production of electronically stored information, and agreed orders on privilege to the list of matters parties should discuss at the discovery planning conference makes sense because those obligations are part of a packet of amendments that includes the two-tier proposal in Rule 26(b)(2) and the safe harbor proposal in Rule 37(f), but the Committee should be aware of the possible drawbacks to its proposals.

The Committee has recommended the following three additions to the list of topics the parties must discuss at the Rule 26(f) discovery planning conference: (a) "issues relating to preserving discoverable information"; (b) issues relating to "the form" in which electronically stored information should be produced"; and "whether, on agreement of the parties, the court should enter an order protecting the right to assert privilege after production of privileged information."

> *Early discussion of preservation protects against prejudice resulting from the proposed safe harbor provision, but may stimulate unnecessary motion practice.*

The early discussion of preservation of electronically stored information makes sense if—and only if—the safe harbor in Proposed Rule 37(f) is a true safe harbor. The early discussion of preservation of electronically stored information proposed in Rule 26(f) along with the proposed obligation in Rule 26(b)(2) that the parties identify electronically stored

information that they consider outside normal discovery constitute the "entry fee" to the safe harbor.

Identification of electronically stored information that is "not reasonably accessible" puts everyone on notice that dynamic databases and disaster recovery systems will continue to alter and overwrite information. To avoid any prejudice from the continued routine operation of such computer systems, the parties must promptly discuss what information is and is not being preserved, so that a party that is not satisfied with what any other party is doing can negotiate an agreement or obtain a court order to interrupt the continued operation of the systems.

The following paragraph in the proposed Committee Note is particularly helpful in explaining how the early discussion in Rule 26(f) fits with proposed Rule 37(f):

> Rule 26(f) is also amended to direct the parties to discuss any issues regarding preservation of discoverable information during their conference as they develop a discovery plan. The volume and dynamic nature of electronically stored information may complicate preservation obligations. The ordinary operation of computers involves both the automatic creation and the automatic deletion or overwriting of certain information. Complete cessation of that activity could paralyze a party's operations. *Cf. Manual for Complex Litigation* (4th) sec. 11.422 ('A blanket preservation order may be prohibitively expensive and unduly burdensome for parties dependent on computer systems for their day-to-say operations.') Rule 37(f) addresses these issues by limiting sanctions for loss of electronically stored information due to the routine operation of a party's electronic information system. The parties' discussion should aim toward specific provisions, balancing the need to preserve relevant evidence with the need to continue routine activities critical to ongoing business. Wholesale or broad suspension of the ordinary operation of computer disaster-recovery systems, in particular, is rarely warranted.

The foregoing paragraph makes little sense if the parties are not within the proposed Rule 37(f) safe harbor during the discussions. If the safe harbor is not in effect, the parties must react as if a broad preservation order is in effect until the scope of the preservation obligation is reduced. A party wanting to engage in abusive discovery would have incentive to delay and leverage to press for broader than necessary preservation.

> *During the early discussion of form of production, the default requirement should be the neutral, flexible standard—"reasonably usable form."*

Early discussion of the "form" of electronic discovery makes sense. During the discussion, the default position in Proposed Rule 34(b) should be "reasonably usable form," rather than "a form in which it is ordinarily maintained, or in an electronically searchable form." "Reasonably usable form" is a neutral position. "Ordinarily maintained" and "electronically searchable" form give unfair leverage to a party that wants electronic information in "native format" or wants to force the producing party to go to the expense of providing a search tool and lessons in how to use it. Those defaults may also be traps for unsophisticated or low budget

litigants that would prefer hardcopy documents, but fail to take steps necessary to avoid the proposed defaults.

> *The Committee's proposal wisely provides that an order protecting the right to assert privilege after production of privileged information require agreement of the parties, but such an agreed order may not protect the privilege if challenged in another court in unrelated litigation.*

The suggestion that parties discuss protecting the right to assert privilege after production of privileged information is more evidence that excessive discovery obligations are eroding the privilege. The "claw back" and "quick peek" arrangements mentioned in the Committee Note involve no effort to take reasonable steps to avoid disclosure of privileged material. The purpose of the agreements is to permit discovery to proceed without the need to take such steps.

The proposal sets at least two traps for the unwary. First, although the proposal wisely requires an agreement of the parties before a court can enter an order permitting the post-production assertion of privilege, the availability of such orders gives a party or a court that wants to impose such an arrangement leverage to do so. Second, even if parties willing agree to such an order, they have no guarantee that the order will protect them in litigation with another party in another court.

The proposed amendment is necessary, but it does not solve the underlying problem. The underlying problem is excessive discovery and the unintended collateral damage it is doing to our system of civil justice.

Conclusion

The proposed amendments, taken as a complete package, move the discovery of electronically stored information in the direction mandated by Rule 1—toward the "just, speedy, and inexpensive determination of every action." ExxonMobil thanks the Committee for its efforts and for the opportunity to assist the Committee to formulate its final recommendations.

Respectfully submitted,