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VIA FEDERAL EXPRESS & U.S. MAIL

February 10, 2005

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

Re: Proposed Amendments to the Civil Rules of Procedure

Dear Mr. Secretary:

On behalf of General Motors Corporation ("General Motors"), I write to express our strong support for proposals of the Rules Advisory Committee to amend the Civil Rules of Procedure regarding the management of discovery of electronically stored information.

General Motors has had substantial experience with electronic discovery under a variety of local rules and practices. The majority of our cases have proceeded without major problems, but in some instances we have had to face and resolve contentious disputes. It has been our observation that disparate local rulings and practices, along with the limited developing case law, create a clear lack of clarity of a litigant's obligations and, thus, exacerbates the already difficult task of anticipating the obligations which apply to a producing party. As a result, we are convinced that adoption of a framework of national standards which reflect a balanced and realistic view will be of substantial assistance to both the bench and the bar.

In our view the Committee Proposals for the interrelated adoption of a two-tiered system of preservation and production and a safe harbor from sanctions will provide an important framework for national standards and should be adopted. Accordingly, we will confine our comments to these two recommendations.

As proposed, Rule 26(b)(2) would presumptively limit the obligation to produce electronically stored information which is not reasonably accessible and would place the burden on the

producing party to defend that characterization if challenged as to a specific source of electronically stored information. We support that approach because it acknowledges and reflects accepted practice which has worked well in more traditional discovery contexts. Experience has shown that accessible information forms the primary source of discoverable information and this proposal will facilitate its prompt production without burdensome objection and motion practice. It is important for the Committee to re-emphasize, however, that even accessible information may also be unduly burdensome to produce, which may invoke other limitations already present in Rule 26(b). As currently drafted, the proposed Committee Note is not clear on this point.

However, a troublesome aspect of proposed Rule 26(b)(2) is the requirement that the presumptive limitation applies only to information that the producing party "identifies" as not reasonably accessible. While this could refer to a process of self-identification, we believe that the Committee anticipates that producing parties will provide broad and generic descriptions of categories not reviewed such as deleted information, backup tapes, and the like. However, the proposed approach is so expansive and cumbersome that it carries a substantial risk of confusion and may spawn unnecessary and intrusive satellite disputes. We therefore support the suggestion of the ABA Section on Litigation that the party seeking electronically stored information should spell out what is sought in a specific request and leave to the producing party the obligation to respond by way of objection so as to facilitate an orderly discussion on whether or not court intervention is needed. Accordingly, we would suggest deletion of the identification requirement.

We also support adoption of the two-tiered approach to electronically stored information because of its positive impact on the process of implementing preservation obligations. As the Committee Note mentions in its discussion of Rule 37(f), the preservation of accessible electronically stored information will in most cases satisfy the common law obligations which apply to potentially producing parties. This common-sense observation reflects our experience and will be useful to all entities, whether large or small, who must anticipate and decide on the scope of litigation holds or similar procedures. It would be very helpful if the Committee could explicitly mention this point in its discussion of the impact of Rule 26(b)(2) and illustrate its linkage to the safe harbor proposal of Rule 37(f).

The second key aspect of the Committee Proposals which we strongly endorse is the limited "safe harbor" proposed for Rule 37(f). As originally proposed by groups such as the Lawyers for Civil Justice ("LCJ") at the Fordham Conference, the guidance would have emphasized that parties need not suspend or alter the good faith operation of disaster recovery or other electronic data systems unless ordered to do so by a court for good cause. The current proposal to add Rule 37(f) would limit sanctions for the loss of information due to the routine operation of a party's electronic information systems, provided that the party took reasonable steps to preserve the information at issue and did not violate a preservation order.

General Motors supports the basic principle that sanctions for non-production of discoverable information should be limited to those instances where a producing party has acted contrary to its

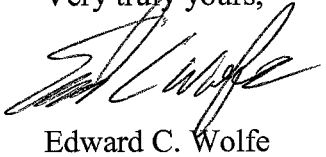
obligations under the rules or the terms of a specific preservation court order. Under amended Rule 26(b)(2), the obligation to produce inaccessible information will not exist without a court order which should be specific with regard to the source of that information. The Committee could usefully emphasize this point in proposed Rule 37(f) by modifying the introductory clause to provide that such disqualification only involves orders which require a producing party to "preserve **specified** electronically stored information (emphasis added)."

The Committee has also raised an issue regarding the degree of culpability of a party which is sufficient to preclude the application of the safe harbor. Traditional formulations of the standard of care required to execute preservation obligations require only reasonable actions, taken in good faith and as judged by the specific circumstances. Given the volume of information potentially involved in some litigation and the complexities of information systems, we believe this should remain the appropriate standard. As Sedona Principle 5 explains, "it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant data." *The Sedona Principles: Best Practice Recommendations & Principles for Addressing Electronic Document Production* (January 2004) (*at* www.thesedonaconference.org).

As to preservation obligations in general, we support the general proposition that preservation obligations should not be explicitly included in the Federal Rules. However, all parties would benefit from a common understanding that reasonableness guides such obligations, especially if a reference to preservation obligations is to be incorporated into Rule 37(f) and Rule 26(f). Given the reluctance to deal with Enabling Act issues, perhaps the Committee could clearly articulate these expectations as to the standard of care in the Committee Note. If this approach is undertaken, we would recommend explicit citation to the Sedona Principles for the practical implementation of the test of reasonableness.

In conclusion, we commend the Committee for its hard work and diligent efforts to provide an updated framework for the future discovery of electronically stored information. We urge the Committee to continue its focus on providing uniform national standards, with clear guidance in the Committee Notes, so as to achieve a just and fair result through effective and cost-effective discovery.

Very truly yours,



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