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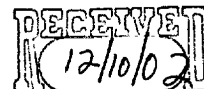

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December 9, 2002

Peter McCabe
Secretary
Committee on Rules of Practice and Procedure
Federal Judiciary Building
Washington, D.C. 20544

Re: Request for Comment on Current Electronic Discovery Issues

Dear Mr. McCabe:

I appreciate the opportunity to comment on the emerging issues relating to electronic discovery, as requested by Professor Marcus on behalf of the Discovery Subcommittee. A clear consensus has emerged among lawyers, consultants and in-house litigation managers around the need for practical actions in certain areas. Recently, for example, participants in a two-day working session in Phoenix shared their experiences with electronic discovery and discussed possible options for the proper resolution of key issues. Our discussions, which were observed by Dean John L. Carroll and Kenneth J. Withers, helped me better formulate my own views as to the implications for possible Rule changes.

Accordingly, I respectfully submit a summary of my observations about this emerging consensus. While the opinions expressed are my own, I believe that these comments reflect the views of many others who have routinely dealt with these issues.

1. **The producing party should determine the best and most reasonable approach to locating and producing relevant electronic information during discovery.**

Comment:

It is the right and the responsibility of a producing party to determine what is or is not responsive in the first instance to discovery demands and to make adequate arrangements to preserve and produce that information. Failure to do so in an organized and methodical fashion has led some courts to impose penalties upon top corporate officers. See Danis v. USN Communications, Inc., No. 98 C 7482, 2000 US Dist. LEXIS 16900, *42-*45 (N.D. Ill., Oct. 20, 2002) (listing elements of notification of discovery

obligations not put into place). One acceptable approach is for the producing party to promptly identify and inform the key individuals likely to have relevant information of the need to preserve information that may be relevant to the dispute at issue. Thereafter, reasonable steps are taken to facilitate production of documents, after review for privilege, trade secrets, or other appropriate bases for non-production. There is no principled reason to require additional intrusive efforts merely because the party seeking discovery is suspicious of or concerned about the quality of the efforts undertaken by the producing party. See McCurdy Group v. American Biomedical Group, 9 Fed. Appx. 822, 831 (10th Cir. 2001) (affirming denial of motion to compel production of hard drives based on fact that party seeking discovery was "skeptical" that all relevant and non-privileged documents had been produced).

Examples:

a. Reliance upon identifiable individuals. A producing party enlists the assistance of its employees or agents who are identified as possibly having relevant information by informing them of the nature of the controversy and the time frame involved, and by providing them with a method of accumulating the relevant information for production. The individuals are instructed on the necessity of preserving relevant information (this instruction is sometimes referred to as a "litigation hold order"), including the information available to them in their active e-mail and other electronic formats, and steps are established to secure the information. The obligations of the producing party under the Rules have been met.

b. Focus on active e-mail. A producing party reviewing its electronic files for relevant e-mails initiates an effective freeze on deletion of relevant material and thereafter focuses on the active e-mail accounts of the relevant employees. The producing party does not undertake a search for deleted materials. This satisfies the duty to make reasonable efforts to produce relevant materials. No more duty exists to preserve and produce deleted electronic information after commencement of litigation than exists to sequester and search the trash bin outside an office building. See ABA Civil Discovery Standards (1999), Comment to Subsection (a)(iii) (no duty to "resurrect or restore" information that was deleted in the ordinary course of business).

Implication for Rules:

Given the apparent confusion among commentators and in some cases regarding this topic, a presumption should be established that undertaking reasonable steps to notify identifiable individuals to preserve existing active electronic information is sufficient. If deleted information is sought, an explicit request should be made so that the request can be subject to mutual discussion and, if needed, court review. This presumption of compliance should be coupled with a clear articulation of what would be needed in order to establish a basis for an order of sanctions based on non-production. A possible formulation is included in Point (c) of the Model Rule appended hereto.

2. **Preservation obligations can and should be satisfied without suspending the normal operation of computer systems or practices that only incidentally overwrite electronic information.**

Comment:

The obligation to preserve relevant evidence must be balanced against the right of a party to manage its electronic information in the best interest of the enterprise even though some electronic information is necessarily overwritten on a routine basis. If such overwriting is incidental to the operation of the systems, it should be permitted to continue after the commencement of litigation. See Martin C. Redish, Electronic Discovery and the Litigation Matrix, 51 Duke L. J. 561, 621 (2001) ("(1) Electronic evidence destruction, if done routinely in the ordinary course of business, does not automatically give rise to an inference of knowledge of specific documents' destruction, much less intent to destroy those documents for litigation-related reasons, and (2) to prohibit such routine destruction could impose substantial costs and disruptive burdens on commercial enterprises."). Striking that balance in the context of routine operating systems which are intended to operate continuously presents special problems which should be addressed with care. Only where specific restrictions upon operating systems are sought and, if objected to, required by order should the court impose sanctions for non-production. But see Linen v. A.H. Robins, 1999 Mass. Super. LEXIS 240 (Mass. Super. Ct., June 15, 1999) (obligation to cease recycling of backup tapes arose by inference after ex parte order governing same was lifted).

Examples:

a. Backup tapes. A producing party routinely copies and retains, for a short period of time, resulting backup tapes for the purpose of crisis reconstruction in the event of an accidental erasure, disaster or system malfunction. A requesting party seeks an order requiring the producing party to cease reuse of existing backup tapes. Complying with the requested order would impose substantial expenses on the producing party. No credible evidence is shown establishing the likelihood that, absent the requested order, the producing party will not produce all relevant information during discovery. The system user should be permitted to continue the routine recycling of backup tapes in light of the burden and potential complexity of restoration and search of the backup tapes. See McPeek v. Ashcroft, 202 F.R.D. 31, 33 (D. D.C. 2001) ("There is certainly no controlling authority for the proposition that restoring all backup tapes is necessary in every case. The Federal Rules of Civil Procedure do not require such a search, and the handful of cases are idiosyncratic and provide little guidance."); Concord Boat Corp. v. Brunswick Corp., No. LR-C-95-781, 1997 WL 33352759, *4 (E.D. Ark. Aug. 29, 1997) ("[T]o hold that a corporation is under a duty to preserve all e-mail potentially relevant to any future litigation would be tantamount to holding that the corporation must preserve all e-mail").

b. Management of active e-mail accounts. A producing party requires its employees to limit the quantity of electronic information that is stored or the time that e-mails can remain in the employees' active e-mail accounts. Upon commencement of litigation, adequate steps are taken to identify and save relevant e-mail now and in the

future. The organization should not be required to suspend the routine deletion of e-mail not identified for production.

Implication for Rules:

Some commentators and courts apparently do not accept that there are any limits to the primacy of the preservation doctrine. See Applied Telematics, Inc. v. Sprint Communications Co., Civl Action No. 94-4603, 1996 U.S. Dist. LEXIS 14053, *13 (E.D. Pa. Sept. 17, 1996) (monetary sanctions awarded for failure to suspend "routine deletion of backup files" despite inaction of requesting party after becoming aware of that the producing party would not comply with discovery request for deleted materials). Accordingly (1) an explicit process should be in place to allow objection to production deemed to require overly intrusive efforts and (2) a specific order should be required as a precondition to halting such operations. The former point is well covered by Texas Rule 196.4 and has been adopted in Section (a) of the Model Rule attached hereto. The latter point, sometimes referred to as providing a presumptive "safe harbor," is contained in Section (c) of the Model Rule attached hereto. Any resulting preservation order should provide that a producing party may "continue routine erasures of computerized data pursuant to existing programs." See, e.g., In re Baycol Products Litigation, MDL No. 1431 Pretrial Order No. 6., http://www.mnd.uscourts.gov/Baycol_Mdl/pretrial_minutes/pretrial_order_6.pdf (March 4, 2002 D. Minn.).

3. A request for "all documents" should ordinarily be understood to include only intentionally created information and its identifying characteristics.

Comment:

Rule 34 was amended in 1970 to add "data compilations" to the list of formats in which documents could be found. The clear intention was to make it obvious that information embodied in electronic form is not immune from discovery. There is no reason to believe that the amendment was intended to expand the definition of a document beyond its ordinary meaning, i.e., an intentionally created embodiment of information such as an e-mail, memorandum, or database. This should be contrasted with the types of information automatically generated by software or operating systems such as file directories, annotations as to changes, etc ("meta" or "embedded" data"). While separately discoverable upon proper request and for good cause shown, metadata should not be deemed to be part of the documents themselves. See The Hon. Shira A. Scheindlin and Jeffrey Rabkin, Electronic Discovery In Federal Civil Litigation: Is Rule 34 Up To The Task, 41 B. C. L. Rev. 327, 372 (2000) ("Embedded data, Web caches, history, temporary, cookie and backup files – all of which are forms of electronically-stored information automatically created by computer programs rather than by computer users – do not obviously fall within the scope of the term 'documents.' Certainly they are not 'documents' in any traditional sense.").

Example:

a. Scope of Document Request. A plaintiff demands that "all documents, whether in hard copy or electronic format," be produced. The producing party assembles copies of the relevant hard copy memoranda, prints out copies of relevant e-mails and electronic memoranda, and combines them into a format on a CD-ROM that does not include associated metadata. Absent a special request for the metadata and a prior order of the court based on a showing of substantial need, this production of "documents" complies with the ordinary meaning of Rule 34.

Implication for Rules:

It might be useful to amend the definition of "documents" in Rule 34 (a) to clarify that it includes identifying information, but not information that is not intentionally created by or related to the subject matter of the documents. This would preempt unnecessary debates or uncertainty among producing parties, and would reduce the opportunity for "ambush" tactics in which assertions are made late in the discovery process that metadata information should have been produced.

4. The parties should discuss and resolve at the earliest opportunity any disagreements involving the scope of electronic discovery.

Comment:

It is clearly in the interest of all parties to clarify early in discovery exactly what will and will not be at issue. Framing open issues at a meet and confer opportunity prior to a Rule 16 conference will allow the court to develop appropriate methods of resolving disputes and will avoid post-discovery spoliation disputes. This principle has already been embodied in the local rules of the courts of several districts. See U.S. Dist. Ct. Ark. R. 26.1 ("The Fed.R.Civ.P. 26(f) report filed with the court must contain the parties' views and proposals regarding ... Whether any party will likely be requested to disclose or produce information from electronic or computer-based media. If so, the report must also include a variety of details on electronic discovery as specified by the rule."); U.S. Dist. Ct. Wyo. R. 26.1(d)(3)(a) ("The parties shall meet and confer regarding the following matters during the Fed.R.Civ.P. 26(f) conference: (i) Computer-based information (in general) ... (ii) E-mail information ... (iii) Deleted information ... and (iv) Back-up data.").

Examples:

a. Meet and confer opportunities. A party seeking production of e-mails requests that all backup tapes, hard drives, laptops, PDAs, etc. in the organization be preserved without making provision for ongoing systems or the need to narrow the request as to subjects covered. After informal consultations, the parties are able to agree upon resolution of the issues (such as which databases will be searched, which search terms will be used, and the form in which information will be produced) and their agreement is embodied in an agreed order. The court need not become involved and the tactical decisions of the parties do not result in binding precedents for other factual patterns. This is far preferable to the situation where issues are not raised by either side with the court

until after one party files a motion to compel. But see Kleiner v. Burns, 48 Fed.R.Serv.3d 644 (D. Kan. 2000) (granting motion to compel production of electronic data despite failure of parties to meet and confer on the issue).

b. Preservation orders. A party seeks a broad preservation order at the outset of a case. Refusing to act ex parte, the court schedules a hearing and considers the opposing arguments as to burdens of production and the likelihood of loss of discoverable evidence, and applies the normal standards for injunctive relief. See In re: Potash Antitrust Litig., No. 3-93-197, 1994 WL 1108312, *7-*8 (D. Minn. Dec. 5, 1994) (applying standard for injunctive relief to request for a preservation order); Humble Oil & Ref. Co. v. Harang, 262 F.Supp. 39, 42-43 (E.D. La. 1966) (same). A carefully drawn preservation order that does not impose undue burdens is subsequently issued reflecting the input from that hearing. If done properly, the resulting order can set the parameters for both sides and avoid subsequent contentious debates.

Implications for Rules:

The Rules should mandate early discussion of the scope of electronic discovery and related matters and discourage issuance of ex parte preservation orders. Preservation orders should not issue over objection unless credible evidence exists to believe that discoverable evidence would otherwise be lost and a substantial need for the order is shown. This approach gives the courts the opportunity to minimize the impact on the operation of business systems. In addition, the violation of a specific discovery request or preservation order should become the sole potential basis for subsequent imposition of sanctions. A possible formulation of this point is set forth in Section (c) of the Model Rule appended below.

5. A prior showing of substantial need must be made before extraordinary efforts to produce electronic information are required.

Comment:

Parties seeking discovery routinely request electronic materials that are not reasonably accessible to the producing party. A Court should order that extraordinary efforts be made to facilitate production only where there is a substantial likelihood that the discoverable information exists in the form sought and production is likely to materially advance the interests of justice in the individual case. See Fed. R. Civ. P. 26(b)(2) ("The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that ... the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."). Courts should not order impossible or unduly burdensome tasks, regardless of who is ultimately ordered to pay for it.

Examples:

a. Backup tapes. A requesting party seeks an order that all backup tapes created during a relevant period should be restored so that a search can be made for deleted material. It offers to pay for the exercise but cannot provide proof sufficient to demonstrate the likelihood that substantial amounts of deleted but relevant information existed in the time frame covered by the backup tapes. The court should deny the order because the likely benefit, when weighed against the burden, is minimal. See In re General Instrument Corp. Sec. Litig., Master File No. 96 C 1129, 1999 US Dist. LEXIS 18182, *18-*19 (N.D. Ill. Nov. 15, 1999) (noting that the technical matter of retrieving is only part of the process, which includes assessing responsiveness and determining whether privileges apply).

b. Use of mirror imaging. After departure of a key employee to a competitor, a suspiciously similar competitive product suddenly emerges from the new company. Testimony exists that the employee bragged about extensive deletions of e-mail on his home computer. The court, over objection, properly orders that the hard drive be produced for inspection and for mirror image copying, subject to an appropriate protocol to preserve the privacy of personal information on the computer. Under a showing of special need, with appropriate protective orders, extraordinary efforts to restore electronic information can also be ordered.

Implications for Rules:

It would be useful for the Rules to explicitly embody the distinction between material which is reasonably available in the ordinary course of business and that which can only be acquired by the exercise of extraordinary efforts. Such a distinction would serve to remind the parties and the courts that discovery is not an absolute value. The Rules should also provide that the latter type of electronic information must be produced only where a requisite showing of "substantial need" is made and an explicit order is entered.

6. **The costs of extraordinary efforts required to produce electronic information not reasonably available should be shifted to the requesting party unless special circumstances can be shown.**

Comment:

The ordinary and predictable costs of discovery are normally borne by the producing party, although Rule 26(b) clearly empowers courts to shift costs where a demand is unduly burdensome because of the nature of the effort involved. Thus, where a court requires extraordinary efforts to retrieve information, it should also consider the appropriateness or need for cost shifting in the case. See Rowe Entertainment, Inv. v. The William Morris Agency, Inc., 205 F.R.D. 421, 431 (S.D.N.Y. 2002) ("[A] party that happens to retain vestigial data for no current business purposes, but only in case of an emergency or simply because it has neglected to discard it, should not be put to the expense of producing it."); ABA Discovery Standard, 29(b)(iii) ("The discovering party generally should bear any special expenses incurred by the responding party in producing requested electronic information."). In so acting, the courts should principally act to deter

burdensome requests that have no reasonable prospect, given the size or nature of the case, of producing information of material assistance to the fact finder. See Stallings-Daniel v. The Northern Trust Co., 52 Fed.R.Serv.3d 1406 (N.D. Ill. 2002) ("Nothing in the documents produced justifies an intrusive and wholly speculative electronic investigation into defendant's e-mail files."). Care should be taken, however, that the discretionary act of ordering payment of costs does not sanction fishing expeditions by allowing a party seeking discovery to "purchase" an unfettered right to explore business records of the opposing party.

Example:

a. Restoration of backup tapes. A requesting party demands that the producing party preserve, restore and search a backup tape for information about a topic in dispute. The results of a sample restoration of a single backup tape convince the court to order the restoration and search of a large number of tapes. Absent proof that the producing party knowingly deleted information relevant to the issues in the case after reasonably being aware of the litigation, the requesting party should pay for the costs associated with the request.

b. Circumstances do not warrant cost-shifting. A requesting party in an employment discrimination case is able to produce, over objection, evidence that his supervisor ordered the deletion of key e-mails after learning of the filing of the litigation. The former employee is able to demonstrate that the supervisor routinely copied e-mails to his home laptop and seeks an order examining the hard drive of the laptop. The costs of the extraordinary efforts involved in the restoration and search of the hard drive should not be taxed to the requesting party under these circumstances.

Implications for Rules:

As has been done in Texas R. Civ. P. 196.4, the Rules should clarify that the extraordinary costs associated with producing information not reasonably available are eligible for cost-shifting. In contrast to the Texas rule, however, the appropriateness of shifting the costs in a particular case should be left to the discretion of the court.

7. Use of search terms and statistical analysis should be encouraged to facilitate more efficient production of electronic information.

Comment:

A principal advantage to electronic information, once it is placed in a searchable format, is the availability of high speed searching for selected patterns of words, thereby allowing more narrow searches of voluminous amounts of information. Courts should encourage the use of such techniques in appropriate circumstances.

Examples:

a. Sampling of backup tapes. A requesting party seeks an order, over objection, that backup tapes created during a relevant period should be preserved and restored. It develops sufficient proof to raise an initial inference that substantial amounts of deleted but relevant information existed in the time frame covered by the backup tapes. The producing party contests the inference. Before ruling on the merits of the request, the court should consider having a sample of the backup tapes restored and searched at the requesting party's expense to determine the likelihood that relevant and discoverable material, not otherwise available, can be recovered. See McPeek, 202 F.R.D. at 35 (ordering production of e-mails from a limited time period from the computer of a single user); Murphy Oil USA, Inc. v. Fluor Daniel, Inc., 52 Fed. R. Serv. 3d 168 (E.D. La. 2002)(establishing alternative protocols for sample review).

b. Search of active e-mail accounts. The active e-mail of identifiable individuals contain thousands of individual e-mails of all types from the relevant time period. Rather than read each one, the producing party first utilizes a series of search terms that capture the key concepts in the allegations of the complaint before beginning a detailed review. The producing party has satisfied its search obligations. See Tulip Computers Int'l B.V. v. Dell Computers Corp., No. Civ.A. 00-981-RRM, 2002 WL 818061, *4 (D. Del. April 30, 2002) ("Tulip's consultant will search the CD ROM on certain mutually agreed-upon search terms that relate to the infringing products or to this case. Such terms may involve "Tulip" or code words for the allegedly infringing models such as "STINGER," "MASH," or "HONEYCUT." If the search terms generate hits, Dell will review the documents and produce them to Tulip subject to the privilege and confidentiality designations provided under the protective order.").

Implications for Rules:

This type of approach is probably best treated as a recommended practice and should be embodied in a Litigation Manual or other materials produced by the Federal Judicial Center which can be discussed at seminars or otherwise informally reviewed by practitioners.

8. Non-production of electronic information should not be the basis for a sanction order unless the party seeking a sanction order establishes a knowing violation of a specific obligation.

Comment:

Due to the sheer volume of electronic materials, their fragility and the constant changes inherent in the operations of electronic systems, there will always be good faith omissions in the process of preserving and producing electronic information. To avoid the specter of drawing unwarranted conclusions from the routine operation of electronic systems, a spoliation finding should require the existence and willful disregard of an existing discovery order, subpoena, preservation order, or similar preservation obligation. In determining intent, the existence of neutral policies routinely applied is relevant. See

Lewy v. Remington Arms Co., 836 F.2d 1104, 1112 (8th Cir. 1988) ("[A] court should consider the following factors before deciding whether to give the [spoliation] instruction to the jury. First, the court should determine whether Remington's record retention policy is reasonable considering the facts and circumstances surrounding the relevant documents. Second, in making this determination the court may also consider whether lawsuits concerning the complaint or related complaints have been filed, the frequency of such complaints, and the magnitude of the complaints. Finally, the court should determine whether the document retention policy was instituted in bad faith.").

Examples:

a. Ambush tactics. A party seeks "all documents" in discovery and makes no specific objection to production without making provisions for searching all possible sources of electronic information. Shortly before trial, the requesting party files a motion seeking sanctions and an adverse instruction based on the failure to preserve and produce all information. Having not raised the issue earlier, the court should not entertain a motion that seeks an unfair advantage by ambush due to the confusion over what is or is not reasonably included in the scope of electronic discovery. No attempt was made to seek a timely discovery order (and thus the producing party had no opportunity to object and seek a court resolution).

b. Reasonable behavior. At the commencement of litigation, the producing party reasonably identifies the key individuals needed to respond to the requests for discovery, and concentrates on their active e-mail accounts. Subsequently, additional individuals are identified and the requesting party contends that the failure to order all members of the unit to completely cease all deletion of information is spoliation. The requesting party seeks an order instructing the jury to draw an inference in the requesting party's favor. No attempt had been made to seek a specific preservation order (and thus no opportunity was given to object and seek a court resolution). No spoliation sanctions should issue, and the jury should not be instructed to draw the requested inference. See Crescendo Investments, Inc. v. Brice, 61 S.W.3d 465, 479 (Tex. App. – San Antonio 2001, writ denied) (e-mail deletions pursuant to pattern of erasure after reading does not constitute evidence of fraudulent intent or purpose).

Implications for Rules:

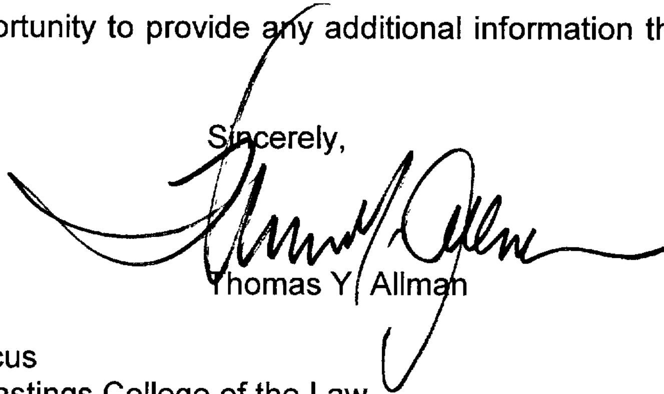
Given the pervasive nature of the "spoliation" problem, which bedevils corporate planners and is believed to be very unfair, a "safe harbor" presumption should exist for good faith activities pursuant to existing corporate practices and policies that are not undertaken in knowing violation of discovery requests or preservation orders. The producing party should have the obligation to raise and have adjudicated any issues involving the scope of electronic discovery at the earliest point possible. However, only where a specific order exists and is knowingly violated would sanctions be appropriate. A sample of such a provision is incorporated as Section (c) of the Model Rule attached hereto.

Conclusion

Practical experience and common sense suggest that unnecessary disputes over the scope of electronic discovery and the nature of spoliation have increased and are unlikely to be completely eradicated without Rules changes. Although only one possible way to achieve the results discussed above, a judicious modification of the principles enacted into Texas procedure can form a good starting point for the Discovery Subcommittee. As amended to reflect the suggestions above, I have attached a revised draft for consideration.

I look forward to the opportunity to provide any additional information that may be of use to the Committee.

Sincerely,



Thomas Y. Allman

cc: Professor Richard L. Marcus
University of California, Hastings College of the Law

TYA/dac

PROPOSED MODEL RULE REGARDING PRODUCTION; COST-SHIFTING AND SAFE HARBOR

[Electronic Discovery; Provisions for]

(a) **General.** To obtain discovery of data or information that exists in electronic, digital or magnetic form, a requesting party must specifically request production of such data or information and specify the form in which it should be produced. The responding party must produce the data or information that is responsive to the request and is reasonably available to the responding party in the ordinary course of business. If the responding party cannot – through reasonable efforts – retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules.

(b) **Cost-Shifting For Extraordinary Steps**. A court may order, upon showing of substantial need, production of data or information that is otherwise subject to production but is not reasonably available in the ordinary course of business. If the court orders production of such data or information in the requested or other form, the court may also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.

(c) **Safe-Harbor; Sanctions.** Nothing in these rules shall require the responding party to suspend or alter the operation in good faith of electronic backup or other routine disaster recovery or document retention systems absent a preservation order issued upon good cause shown, which shall not issue unless the standards applicable to obtaining injunctive relief are met. No sanctions or other relief predicated upon a failure to maintain or preserve documents or data shall be entered in the absence of a discovery request or preservation order that describes with particularity the specific documents or data requested and evidence that the party upon whom the request or order was served willfully failed to preserve such documents or data. Evidence that reasonable steps were undertaken to notify relevant custodians of preservation obligations shall be prima facie evidence of compliance with obligations under such discovery requests or preservation orders."