

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 400 - DISCOVERY

AMEND Rule 2-433 by replacing current section (b) with new section (b), by adding a Committee note following section (b), and by making stylistic changes, as follows:

Rule 2-433. SANCTIONS

(a) For Certain Failures of Discovery

Upon a motion filed under Rule 2-432 (a), the court, if it finds a failure of discovery, may enter such orders in regard to the failure as are just, including one or more of the following:

(1) An order that the matters sought to be discovered, or any other designated facts shall be taken to be established for the purpose of the action in accordance with the claim of the party obtaining the order;

(2) An order refusing to allow the failing party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence; or

(3) An order striking out pleadings or parts thereof, or staying further proceeding until the discovery is provided, or dismissing the action or any part thereof, or entering a

judgment by default that includes a determination as to liability and all relief sought by the moving party against the failing party if the court is satisfied that it has personal jurisdiction over that party. If, in order to enable the court to enter default judgment, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any matter, the court may rely on affidavits, conduct hearings or order references as appropriate, and, if requested, shall preserve to the plaintiff the right of trial by jury.

Instead of any of those orders or in addition thereto, the court, after opportunity for hearing, shall require the failing party or the attorney advising the failure to act or both of them to pay the reasonable costs and expenses, including attorneys' fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of costs and expenses unjust.

~~(b) For Loss of Electronically Stored Information~~

~~Absent exceptional circumstances, a court may not impose sanctions under these Rules on a party for failing to provide electronically stored information that is no longer available as a result of the routine, good-faith operations of an electronic information system.~~

(b) Failure to Preserve Electronically Stored Information

If electronically stored information that should have been preserved in the reasonable anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it and the information cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation, may (A) presume that the lost information was unfavorable to the party, (B) in a jury trial, instruct the jury that it may or must presume that the information was unfavorable to the party, or (C) dismiss the action or enter a default judgment.

Committee note: Section (b) of this Rule applies only to electronically stored information. Its application is limited to parties and it does not apply to non-party subpoenas. Under this section, the duty to preserve information arises when litigation is reasonably anticipated or commenced. See Rule 2-101 (a). While section (b) of this Rule does not define the scope or limits of the duty to preserve, when the duty arises, the duty under this section is limited to "reasonable steps." No sanction may be imposed if the court determines that secondary evidence reasonably can restore or replace the information that was not preserved. Subsection (b)(1) of this Rule applies where conduct was not intentional. Subsection (b)(2) of this Rule applies to intentional conduct. Section (b) is modeled after Fed. R. Civ. P. 37 (e), as amended in 2015.

(c) For Failure to Comply With Order Compelling Discovery

If a person fails to obey an order compelling discovery, the court, upon motion of a party and reasonable notice to other parties and all persons affected, may enter such orders in regard to the failure as are just, including one or more of the orders set forth in section (a) of this Rule. If justice cannot otherwise be achieved, the court may enter an order in compliance with Rule 15-206 treating the failure to obey the order as a contempt.

(d) Award of Costs and Expenses, Including Attorneys' Fees

If a motion filed under Rule 2-403, 2-432, or 2-434 is granted, the court, after opportunity for hearing, shall require (1) the party or deponent whose conduct necessitated the motion, (2) the party or the attorney advising the conduct, or (3) both of them to pay to the moving party the reasonable costs and expenses incurred in obtaining the order, including attorneys' fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court, after opportunity for hearing, shall require ~~the~~ (1) the moving party, (2) the attorney advising the motion, or (3) both of them to pay to the party or deponent who opposed the motion the reasonable costs and expenses incurred in opposing the motion, including attorneys' fees, unless the court finds that the making of the

motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable costs and expenses incurred in relation to the motion among the parties and persons in a just manner.

(e) Statement Regarding Costs and Expenses, Including Attorneys' Fees

If a motion or a response to a motion contains a request for an award of costs and expenses, including attorneys' fees, the request shall (1) include, or (2) be separately supported by, a verified statement in conformance with Rule 1-341 (b). With the approval of the court, the party requesting the award may defer the filing of the supporting statement until 15 days after the court determines the party's entitlement to costs and expenses, including attorneys' fees.

(f) Response to Request

Within 15 days after the filing of a statement in support of a request for an award of costs, expenses, or attorneys' fees, a party against whom the award ~~is~~ is sought may file a response.

(g) Guidelines

In determining an award of attorneys' fees and related expenses in excess of \$500 under this Rule, the court may

consider the Guidelines Regarding Compensable and Non-compensable Attorneys' Fees and Related Expenses contained in an Appendix to these Rules.

Source: This Rule is derived as follows:

Section (a) is derived from former Rule 422 c 1 and 2.

Section (b) is new and is derived from the ~~2006 version of Fed. R. Civ. P. 37 (f)~~ 2015 version of Fed. R. Civ. P. 37 (e).

Section (c) is derived from former Rule 422 b.

Section (d) is derived from the 1980 version of Fed. R. Civ. P. 37 (a) (4) and former Rule 422 a 5, 6 and 7.

Section (e) is new.

Section (f) is new.

Section (g) is new.

REPORTER'S NOTE

Proposed amendments to Rule 2-433 were presented to the Rules Committee by an attorney to address concerns regarding Maryland's "safe harbor" Rule. Current section (b) of Rule 2-433 prohibits a court, absent exceptional circumstances, from sanctioning a party for failing to provide electronically stored information when the information is unavailable as the result of the routine, good faith operations of an electronic information system. The attorney advised the Committee that Rule 2-433 (b) no longer is functioning. He explained that the current "safe harbor" provision offers little protection, has not been used since its adoption in 2008, and lacks clarity. Amendments to Rule 2-433 can clarify the culpability required to support sanctions when electronically stored information is lost. The attorney informed the Committee that the "safe harbor" provision of the parallel federal rule was amended in 2015 and suggested similar changes to Rule 2-433.

The deletion of current section (b) of Rule 2-433 is proposed. A new section (b), derived from the 2015 amendments to Federal Rule of Civil Procedure 37 (e), addresses the failure to preserve electronically stored information. The new section sets forth appropriate sanctions when information that should have been preserved in reasonable anticipation or conduct of litigation and cannot be restored or replaced through other discovery is lost because a party failed to take reasonable

preservation steps. Subsection (b)(1) permits the court to order measures to cure the prejudice when the loss of information prejudices another party. Subsection (b)(2) sets forth specific sanctions that may be ordered, including presumptions, jury instructions, dismissals, or default judgments, upon a finding that a party acted to deprive another party of the information intentionally.

A proposed Committee note following section (b) reiterates that the section applies only to electronically stored information requested from parties. The Committee note highlights the duty to preserve information, emphasizes that sanctions are not imposed if the lost information can be restored or replaced with secondary evidence, and clarifies the different sanctions for intentional and unintentional conduct.

Stylistic changes are made in sections (d) and (f).