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IT IS TIME TO REPLACE MARYLAND'S "SAFE HARBOR" RULE

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Rule 2-443(b) is called the "safe harbor" rule.[2] It prohibits the imposition of sanctions for certain routine, good faith destruction of electronically stored information.

There are several reasons for Maryland to replace Rule 2-433(b). **First,** the "safe harbor" is uncomfortably shallow and provides little or no protection. **Second,** it has not been used since it was adopted in 2008. **Third**, it has contributed to a lack of clarity, leading to conflicting decisions.

The U.S. Supreme Court promulgated the federal "ESI Rules" in December 2006. Maryland followed suit, adopting its "ESI Rules" effective January 2008. In many respects, the Maryland Rules, track the federal rules. In other areas, they differ.[3]

Maryland's "safe harbor" rule, Rule 2-433(b), tracks the 2006 version of Federal Rule of Civil Procedure 37, stating:

> 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.[4]

In December 2015, however, the federal rules jettisoned the safe harbor provision. The federal Advisory Committee gave the following reasons:

> New Rule 37(e) replaces the 2006 [safe harbor] rule.... Th[e] limited [safe harbor] rule has not adequately addressed the serious problems resulting from the continued exponential growth in the volume of such

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2 Minutes of the Oct. 13, 2006, meeting of the Court of Appeals Standing Committee on Rules of Practice and Procedure, 943.

3 See, e.g., Maryland v. Federal Rules on the Scope of Discovery and Proportionality at http://www.ediscoveryllc.com/maryland-v-federal-rules-on-the-scope-of-discovery-and-proportionality/

4 The Maryland Rules Committee Note states: "Section (b) is new and is derived from the 2006 version of Fed. R. Civ. P. 37 (f)."

information. Federal circuits have established significantly different standards for imposing sanctions or curative measures on parties who fail to preserve electronically stored information. These developments have caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough.

THE FEDERAL SAFE HARBOR RULE HAS BEEN CRITICIZED

The federal "safe harbor" rule has been widely criticized. For example, one article states:

> Thus, despite the intent of the original [safe harbor] rule to mitigate spending and over-preservation related to ESI, in practice, the limitations of the original rule actually encouraged cautious litigants to continue to incur unnecessary expenses to over-preserve ESI because those limitations encouraged inconsistent common law to develop.
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> Courts, litigants, and scholars came to agree that [the] original [safe harbor rule,] Rule 37(e) did not effectively address the serious problems caused by the continued, exponential growth of ESI and the questions surrounding its production (or nonproduction) in litigation.

Tanya Pierce, "Righting the Ship: What Courts Are Still Getting Wrong About Electronic Discovery," 72 SMU L. Rev. 785, 793–94 (2019).

Another article explains that: "Courts have not shown a propensity to give the safe harbor broad and ready application. *One court cited the rule at the outset of a case, warning the parties to be cautious in relying on its protection."* Dan H. Willoughby, Jr., et. al., "Sanctions for E-Discovery Violations: By the Numbers," 60 Duke L.J. 789, 826–27 (2010)(emphasis added).

The drafting history of the federal "safe harbor rule" is described in Kenneth J. Withers, "Two Tiers And A Safe Harbor: The Electronic Discovery Amendments to the Federal Rules Of Civil Procedure," 51 Fed. Lawyer 29, 2004 WL 2800780, 16 (2004). For present purposes, it is sufficient to say that the Rule was controversial before its inception. Mr. Withers suggested that it may not accomplish its goals, writing: "This 'safe harbor' proposal may be more notable for what it does not do than for what it does, and the original proponents of 'safe harbor' may not be satisfied that their concerns have been met."[5]

5 Mr. Withers notes one exception and that is in relation to information that is not reasonably accessible because of undue burden or cost.

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THE ORIGINAL RULE ACTUALLY ENCOURAGED CAUTIOUS LITIGANTS TO CONTINUE TO INCUR UNNECESSARY EXPENSES TO OVER-PRESERVE ESI BECAUSE THOSE LIMITATIONS ENCOURAGED INCONSISTENT COMMON LAW TO DEVELOP.

THE “SAFE” HARBOR IS NOT “SAFE”

The four elements of a “safe harbor” are that: “[a]bsent exceptional circumstances”; *sanctions* cannot be imposed; “under these Rules”; for ESI gone missing “as a result of the routine, good-faith operations of an electronic information system.” The Rule is intended to protect, for example: dynamic databases that change constantly; a party that routinely overwrites surveillance video; or, one that has an automatic deletion policy for texts or emails. Those are examples of routine, good faith operations that cause the loss of ESI and they would generally not support sanctions.

However, the Rule fails in its mission, for several reasons. It “is… a shallow and coral-filled ‘safe harbor’….”[6]

First, the rule applies only “[a]bsent exceptional circumstances.” That undefined exception may swallow the Rule. The potential problems presented by the absence of a definition of “exceptional circumstances” were foreshadowed in the Maryland Rules Committee’s discussion:

> “Mr. Johnson[7] asked if the exceptional circumstances to which the Rule refers are left to determination by case law. This concept could lead to bludgeoning using a spoliation argument.”[8]

Second, the rule prohibits only sanctions imposed “under these Rules.” By its unambiguous text, the “safe harbor” Rule *provides no protection* when a Court relies on its inherent powers to impose sanctions.[9] However, Maryland Courts have long and frequently relied on both the Rules and their *common-law inherent powers* to impose sanctions.[10]

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6 J. Mark Coulson, “Maryland Courts No Longer Safe Haven for E-Discovery Resistors,” in M. Berman, et al., eds., “Electronically Stored Information in Maryland Courts” (Md. State Bar Ass’n. 2020), Chap. 2; *accord* The Honorable Shira A. Scheindlin, Jonathan M. Redgrave, “Special Masters and E-Discovery: The Intersection of Two Recent Revisions to the Federal Rules of Civil Procedure,” 30 Cardozo L. Rev. 347, 367 (2008) (describing “a very shallow harbor”); *see generally*, Berman, “Electronically Stored Information in Maryland Courts,” 109-10, 220.

7 Harry S. Johnson, Esq.

8 Minutes of the Oct. 13, 2006, meeting of the Court of Appeals Standing Committee on Rules of Practice and Procedure, 94.

9 “[T]he Rule says nothing about sanctions imposed under the Court's inherent authority from the Safe Harbor, an area of concern for those who support the Safe Harbor.” Daniel Renwick Hodgman, “A Port in the Storm?: The Problematic and Shallow Safe Harbor for Electronic Discovery,” 101 Nw. U. L. Rev. 259, 281 (2007).

10 The leading “inherent power” decision is *Klupt v. Krongard*, 126 Md. App. 179, 197 (1999); *accord e.g., Kadish v. Kadish*, 254 Md.App. 467, 494, 499 (2022)(inherent power to impose sanctions); *A.A. v. Ab.D.*, 246 Md. App. 418, 443 (quoting *Klupt), cert. denied sub nom. Daneshpour v. Ahmad,* 471 Md. 75 (2020); *Peterson v. Evapco, Inc.,* 238 Md. App. 1, 51 (2018)(same); *Bolger v. Wayne,* 2014 WL 10656549, at *1 (Md.Cir.Ct. Sep. 23, 2014) (“this Order is entered pursuant to Maryland Rule 2-423 and the Court's inherent powers associated with that rule, not pursuant to Maryland Rule 2-432 or 2-433.”).

Third, after the duty to preserve is triggered, there is no safe harbor. At that point, destruction is no longer a result of "the routine, good-faith operations" of an electronic information system. Simply stated: "'Good faith' requires a party to respond appropriately when litigation is reasonably anticipated or at the very latest when it begins."[11] To the same effect, the 2006 Advisory Committee Note states "that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve."[12]

Fourth, the Rule prohibits only "sanctions." The federal Advisory Committee Note to the safe harbor rule states:

> *This rule restricts the imposition of "sanctions." It does not prevent a court from making the kinds of adjustments frequently used in managing discovery if a party is unable to provide relevant responsive information.* For example, a court could order the responding party to produce an additional witness for deposition, respond to additional interrogatories, or make similar attempts to provide substitutes or alternatives for some or all of the lost information. [emphasis added.]

Parallel language is found in the Minutes of the Oct. 13, 2006, meeting of the Court of Appeals Standing Committee on Rules of Practice and Procedure, 93. Some of those "adjustments" may be indistinguishable from "sanctions"; however, the Rule offers no protection.

Fifth, if the destruction was not in "good faith," the Rule provides no safety.[13]

Thus, there are several "mines" in the "safe harbor."[14] In short, the protection offered by the Rule is, at best, limited and, at worst, illusory.

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11 The Honorable Shira A. Scheindlin, Jonathan M. Redgrave, "Special Masters and E-Discovery: The Intersection of Two Recent Revisions to the Federal Rules of Civil Procedure," 30 Cardozo L. Rev. 347, 367–68 (2008).

12 The same language is found in the comment to the Maryland Rule. Minutes of the Oct. 13, 2006, meeting of the Court of Appeals Standing Committee on Rules of Practice and Procedure, 93.

13 Berman, "Electronically Stored Information in Maryland Courts," 295. For example, in a decision involving intentional deletion of ESI, the safe harbor rule was not cited. *Peterson,* 238 Md. App. at 54. That is likely because – unlike current Fed.R.Civ.P. 37(e) – Md. Rule 2-433(b) is inapposite in that context.

14 *Id.* at 223.

RULE 2-433(b) LANGUISHES IN THE BACKWATERS

Diligent research has not disclosed any Maryland case relying on the "safe harbor" of Rule 2-433(b) to preclude sanctions since it was adopted in January 2008.[15]

In *Steamfitters Loc. Union No. 602 v. Erie Ins. Exch.,* 469 Md. 704, 744 (2020), the Court affirmed a spoliation instruction for a failure to preserve video evidence. It "was undisputed that the video was taped over and destroyed 30 days" after the fire at issue. *Id.* at 738. A witness testified "that the video recording had been taped over prior to receiving the litigation hold letter." This would appear to be an assertion of the destruction of ESI by the routine, good faith operation of an electronic information system. However, Rule 2-433(b) was not cited.

In *Benson v. ALDI, Inc.,* 2019 WL 5704532 (Ct.Spl.Apls. Nov. 5, 2019)(unreported), a plaintiff sued for personal injuries in grocery store. Video footage had not been preserved. Plaintiff asserted spoliation. Defendant responded that the video was destroyed pursuant to company policy before a preservation demand was made by plaintiff. It retained video for only six weeks and then it is overwritten. The Court denied the sanctions request with no mention of Rule 2-433(b).[16]

In *Maryland Orthotics & Prosthetics Co., Inc. v. Metro Prosthetics, Inc.,* 2013 WL 8813708 (Md. Cir. Ct. Balt. Cnty., June 6, 2013), plaintiff asserted spoliation based on deletion of text messages and attempting to wipe devices by resetting them. In response, the defendants offered evidence that the destruction was not intentional and, instead, the data was auto-deleted. The Court did not analyze whether the auto-deletion was protected under the "safe harbor" provision of Rule 2-433(b). *Accord Ghee v. The Great Atlantic and Pacific Tea Company,* 2010 WL 2128987 (Md. Cir. Ct. Balt. City Apr. 1, 2010) (digital recordings automatically overwritten).[17]

15 "[E]mpirical studies of spoliation jurisprudence have not uncovered a single case where the Safe Harbor would have protected a spoliating party." Hodgman, "A Port in the Storm?: The Problematic and Shallow Safe Harbor for Electronic Discovery," 101 Nw. U. L. Rev. at 283; see Md. Law Encyclopedia §67.

16 "An unreported opinion of the Court of Appeals or Court of Special Appeals is neither precedent within the rule of stare decisis nor persuasive authority." Md. Rule 1-104. The Rule "may not be circumvented merely because a commercial publisher decides to publish the opinion. If we file the Opinion as unreported and, as a result, it does not appear in the official Maryland Appellate Reports, it is subject to the Rule." *Nicholson v. Yamaha Motor Co.,* 80 Md. App. 695, 718 (1989), *cert denied,* 318 Md. 683 (1990).

17 In *Webb v. Giant of Maryland, LLC,* 477 Md. 121 (2021), the Court held that it was error to instruct the jury on spoliation of video evidence. While decided on its facts - there was insufficient evidence that the video of the incident existed - the Court did not cite to Rule 2-433(b) in its discussion of sanctions.

THE RULE DOES NOT SPECIFY THE CULPABLE STATE OF MIND REQUIRED

Federal case law provides "three possible states of mind that can satisfy the culpability requirement [for spoliation]: bad faith/knowing destruction, gross negligence, and ordinary negligence." *Goodman v. Praxair Servs., Inc.,* 632 F. Supp. 2d 494, 518 (D. Md. 2009).

The December 2015 amendments to Fed.R.Civ.P. 37(e) address intentional spoliation[18] and spoliation caused by less egregious states of mind.[19]

Maryland courts have addressed spoliation since at least the 1880s. *Love v. Dilley,* 64 Md. 238, 1 A. 59, 59–60 (1885), *modified,* 64 Md. 238, 4 A. 290 (1886). The spoliation doctrine has two goals: (1) to deter misconduct; and, (2) to level the playing field.[20]

There is Maryland authority that "intent" is required to support spoliation. *Cost v. State,* 417 Md. 360, 369 (2010); *Peterson v. Evapco, Inc.,* 238 Md. App. 1, 52 (2018); *Keyes v. Lerman,* 191 Md. App. 533, 537 (2010); *Weaver v. ZeniMax Media, Inc.,* 175 Md. App. 16, 43 (2007); *Hollingsworth & Vose Co. v. Connor*, 136 Md. App. 91, 137 (2000); *Klupt v. Krongard*, 126 Md. App. 179, 199 (1999); Berman, "Electronically Stored Information in Maryland Courts," 214, *passim;* P. Grimm, *et. al.,* "Maryland Discovery Problems and Solutions" (Md. State Bar Ass'n 2021), Chap. 48; Kenneth B. Abel, Benjamin J. Rubin, "Advising Business Clients on Document Retention Policies," 37 Md. B.J. 30, 35 (Jan./Feb. 2004).[21]

However, there is also Maryland authority that negligence is sufficient to support spoliation. *Steamfitters Loc. Union No. 602 v. Erie Ins. Exch.,* 469 Md. 704, 743 (2020)(affirming pattern jury instruction based, in part, on negligence); *Muse-Ariyoh v. Board of Education of Prince George's County*, 235 Md. App. 221, 239 (2017)(discussing pattern instruction and inadvertence), *cert. denied,* 457 Md. 680 (2018); *Cumberland Ins. Grp. v. Delmarva Power*, 226 Md. App. 691, 699, 702-03 (2016)(intent to destroy is not a prerequisite to sanctions); Berman, "Electronically Stored Information in Maryland Courts," 217, passim.[22]

The difference stems from continued reliance on an antiquated federal decision that was cited in *Klupt,* 126 Md. App. at 199 (citing *White v. Office of Public*

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> **... THE COURT THEN HELD THAT SANCTIONS WERE NOT WARRANTED. BY THAT TIME, HOWEVER, THE CAREERS OF THE ATTORNEYS HAD BEEN IRREPARABLY DAMAGED.**

18 Fed.R.Civ.P. 37(e)(2).

19 Fed.R.Civ.P. 37(e)(1).

20 Berman, "Electronically Stored Information in Maryland Courts," at 273. It is "grounded in fairness and symmetry." *Peterson,* 238 Md. App. at 51(citation omitted).

21 See also *Claxton v. Mayor & City Council of Baltimore,* 2019 WL 7193928, at *3 (Md. Ct. Spec. App. Dec. 26, 2019)(unreported); *Clar v. Muehlhauser,* 2017 WL 2962816, at *7 (Md. Ct. Spec. App. July 12, 2017)(unreported); *Tyler v. Judd,* 2016 WL 3570467, at *12 (Md. Ct. Spec. App. June 30, 2016)(unreported).

22 In Note 8, the *Steamfitters* Court wrote: "[W]e agree with the Court of Special Appeals that it is for the jury to determine whether the destruction of evidence is the product of *mistake* or is intentional." 469 Md. at 745 (emphasis added).

Defender for the State of Md., 170 F.R.D. 138 (D. Md. 1997)). *White* required a showing of "an intent to destroy the evidence" and the *Klupt* Court adopted that standard.

Things have changed since 1997. The federal rules and federal courts have moved away from the requirement of "intent." I suggest that *White's* requirement of "intent to destroy" would not be followed today in the District of Maryland.[23]

Further, the drafting history of Rule 2-433(b) supports the conclusion that sanctions may be imposed based on negligence. The Court of Appeals *did not adopt* a suggestion to state: "Sanctions should not be imposed unless there has been an intentional or reckless loss of electronically stored information."[24]

EQUITY DEMANDS CLARITY IN THE RULE GOVERNING SANCTIONS

The imposition of sanctions can, in addition to being case dispositive, destroy the careers of attorneys. In 2008, a Magistrate Judge in California imposed an $8.5 million sanction on a litigant and referred six attorneys to Bar Counsel as a sanction for litigation abuse. Exceptions were taken and the order was vacated. A fifteen-month period of discovery followed.

Presented with additional facts, the court then held that sanctions were not warranted. By that time, however, the careers of the attorneys had been irreparably damaged. Several left their law firm and were not able to find jobs with other firms. "Although on review the court was clear that the attorneys were not error free, under the circumstances presented, the collateral impact of the erroneous imposition of sanctions appears disproportionate to the flaws identified." *See* Berman, "Electronically Stored Information in Maryland Courts" at 278-80.

In the separate context of Maryland Rule 1-341, sanctions are an "extraordinary remedy" that are reserved "for the rare and exceptional case." *Art Form Interiors, Inc. v. Columbia Homes, Inc.,* 92 Md. App. 587, 594-95 (1992). "[J]udicial hindsight" is not permitted. *Legal Aid Bureau, Inc. v. Bishop's Garth Associates Ltd. P'ship*, 75 Md. App. 214, 222 (1988) (referring to "judicially guided missiles"); *see also* Andrew J. Felser, "Guiding the Guided Missile," The Baltimore Barrister, Fall 1988, at 19 ("One court has called these sanctions judicially guided missiles pointed at those who proceed in the courts without any colorable right to do

23 "[O]rdinary negligence" can satisfy the culpability requirement." *Membreno v. Atlanta Rest. Partners, LLC,* 338 F.R.D. 66, 72 (D. Md. 2021); *Goodman v. Praxair Servs., Inc.,* 632 F. Supp. 2d 494, 518 (D. Md. 2009); accord Fed.R.Civ.P. 37(e)(1). *White's* requirement of "intent" is no longer "good law" in the jurisdiction that enunciated it. Berman, "Electronically Stored Information in Maryland Courts," at 274.

24 Berman, "Electronically Stored Information in Maryland Courts," 218, citing Nov. 13, 2007, Comments by Maryland Defense Counsel, Inc., and Lawyers for Civil Justice on Proposed Amendments to Rules Related to Discovery of Electronically Stored Information, etc., submitted to the Reporter, Rules Committee, at 4.

so."); Albert D. Brault, "Maryland's Controversial Law of Sanctions," 26 Md. Bar J. 19 (1993) (stating that the rule "has turned out to be an additional weapon in litigation"). [25]

"As we have said time and time again, the Maryland rules are 'precise rubrics,' which are to be strictly followed." *Att'y Grievance Comm'n of Maryland v. O'Neill,* 477 Md. 632, 660 (2022). As such, the experiences subsequent to January 2008 should be taken into account in evaluating Rule 2-433(b). Equity suggests or demands a degree of clarity that is missing from Rule 2-433(b).

CONCLUSION

Rule 2-433(b) should be replaced, not simply because the federal rules have done so,[26] but because replacement would further the goal of construing the Maryland Rules "to secure simplicity in procedure, fairness in administration, and elimination of unjustifiable expense and delay." Md. Rule 1-201.

Rule 2-433(b) served its purpose when adopted; however, it is no longer workable or useful. Further, the process of replacing it with a more comprehensive rule can provide the opportunity to clarify the degree of culpability that can support sanctions.

In its 211th Report, the Standing Committee on Rules of Practice and Procedure has recommended that Maryland's expert discovery rule be amended to follow the 2010 Federal Rule.[27] A similar approach to Rule 2-433(b) should be considered. Fed.R.Civ.P. 37(e), as amended in 2015, provides a preferable template. [28]

Postscript: After this white paper went to press, the Maryland Court of Appeals amended Maryland Rule 2-402(g)(1), relating to discovery about experts, to comport with Fed.R.Civ.P. 26(b)(4). A parallel process is recommended in this white paper regarding Maryland Rule 2-443(b) and Fed.R.Civ.P. 37(e).

25 See M. Berman, "The Duty to Preserve ESI (Its Trigger, Scope, and Limit) & the Spoliation Doctrine in Maryland State Courts," 45 U. Balt. L. Forum 129, 161 n. 189 (2015).

26 The provision was added because the federal iteration was, at that time, "a mainstay of the federal rule process." Minutes of the Oct. 13, 2006, meeting of the Court of Appeals Standing Committee on Rules of Practice and Procedure, 93. It is no longer a mainstay of the Federal Rules of Civil Procedure.

27 Proposed Changes to the Maryland Rules Regarding Discovery of Experts (Aug. 4, 2022), http://www.ediscoveryllc.com/proposed-changes-to-the-maryland-rules-regarding-discovery-of-experts/.

28 Although I suggest the need for replacement, in fairness it must be noted that, "safe harbor" rules remain operational in some jurisdictions. "While the 2006 rule operated in the federal district courts for only nine years, it has been adopted and continues to operate in several states." Jeffrey A. Parness, "State Spoliation Claims in Federal District Courts," 71 Cath. U. L. Rev. 1, 31 n. 21 (2022).


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