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COMMENTS
by
MARYLAND DEFENSE COUNSEL, INC.
and
LAWYERS FOR CIVIL JUSTICE
on
PROPOSED AMENDMENTS TO RULES
RELATED TO DISCOVERY OF ELECTRONICALLY STORED
INFORMATION
to the
STANDING COMMITTEE ON RULES OF PRACTICE AND
PROCEDURE
of the
MARYLAND COURT OF APPEALS

November 13, 2007

Sandra F. Haines, Esq.
Reporter, Rules Committee
2011-D Commerce Park Drive
Annapolis, Maryland 21401

Re: Comments on Proposed Amendments to Civil Rules Related to
Discovery of Electronically Stored Information

Dear Ms. Haines:

The undersigned, on behalf of Maryland Defense Counsel, Inc. (MDC) and Lawyers for Civil Justice (LCJ), respectfully submit these comments on amendments to the Civil Rules related to discovery of electronically stored information in the Maryland courts, as proposed by the Rules Committee in Category One of its One Hundred Fifty-Eighth Report.

MDC is an organization of over six hundred of Maryland's pre-eminent attorneys whose practices are primarily devoted to representing defendants in civil litigation - from individuals and small businesses to Fortune 500 companies. MDC is committed to promoting justice and providing solutions to all Marylanders.

LCJ's membership is composed of in-house counsel for major American corporations, outside defense trial counsel, and the leadership of three major defense bar organizations, the Defense Research Institute (DRI), the Federation of Defense and Corporate Counsel (FDCC), and the International Association of Defense Counsel (IADC), which collectively represent over 20,000 civil defense trial lawyers.

LCJ worked closely with the U.S. Judicial Conference Rules Committee throughout the lengthy and deliberate development of the 2006 e-discovery amendments to the Federal Rules of Civil Procedure. The Federal Amendments provided the model for recent amendments enacted by the states of Arizona, Indiana, New Jersey, Minnesota, Montana, and Utah, and are proving to be influential in discussions in Florida, Kansas, Ohio, Nebraska, New Mexico, North Dakota, Tennessee, Washington, and the District of Columbia, all of which are considering changes in their civil rules.

Given the close parallel between Maryland's discovery rules and those of the Federal Rules of Civil Procedure, the Federal Amendments are an important starting point, if for no other reason than "when a body of federal decisions begins to emerge, [the state] courts will be able to use that case law as a guide to interpreting its own rules."¹

We strongly support the Rules Committee's practical approach to adapting the Federal Amendments to Maryland's Rules. There are, however, some areas in which we respectfully suggest improvements on the Federal Amendments appropriate to Maryland practice and procedure.

Accordingly we recommend:

1. Rule 2-402(b)(2). Electronically Stored Information Not Reasonably Accessible

(a) Assessment of Costs

We commend the Committee's inclusion in Rule 2-402(b)(2) of specific reference to proportionality and assessment of costs. However, we invite consideration of a more certain and effective bright line rule similar to Texas Rule of Civil Procedure 196.4, which has been effective in reducing the costs and burdens of e-discovery by providing incentive for parties to agree on prompt production of information that is less costly to retrieve. We recommend that the final sentence of proposed Rule 2-402(b)(2) be modified to read as follows:

"If persuaded that the need for discovery does outweigh the burden and cost, the court may order discovery and specify conditions, ~~including an assessment of costs~~, provided that any order compelling production of information that is not reasonably accessible shall also require the

¹ David F. Herr, Reporter to the Advisory Committee, as quoted in "Minnesota mulls e-discovery rules for state courts," 11 Minn. Lawyer No. 15 (April 9, 2007), available at http://www.holsteinkremer.com/pdf/Minnesota_mulls_e-discovery_rules_040907.pdf

requesting party to pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.”²

In assessing undue burden or cost, we suggest that the Reporter’s Note reference not only the absolute burden and cost of preservation, retrieval and production, but also the burden and cost relative to the amount in controversy.

(b) Preservation of Inaccessible Information

Because discovery of information that is not reasonably accessible entails unique challenges and burdens, we respectfully submit that in the absence of agreement by the producing party, a duty to preserve such information should not be deemed to arise unless a court has determined its necessity by a prior court order. Such a rule would encourage early discussion and agreement and help reduce excessive and unnecessary preservation prompted by misperceptions as to what information must be retained. Not only is excessive preservation extremely costly and disruptive, but it can literally stop a company’s business because the deletion and overwriting of information is part of the routine operation of critical computer systems.

To implement this proposal, we suggest including a sentence in Rule 2-402(b)(2) or the Reporter’s Note, as follows:

“Unless the parties otherwise agree, no duty to preserve information that is not reasonably accessible because of undue burden or cost shall arise unless and until a court enters an order requiring such preservation after reasonable notice to the party from whom preservation is sought.”

Bright-line rules such as those above would enable parties to approach electronic discovery issues from a common, agreed framework and would help them to plan for and resolve those issues in a predictable manner.

2. Rule 2-402(e)(3). Effect of Inadvertent Disclosure

We also commend the inclusion of provisions governing claims of privilege and offer suggested revisions that would conform proposed Rule 2-402(e)(3) to the language of proposed Federal Rule of Evidence 502(b) as approved by the Judicial Conference of the United States on September 18, 2007 and forwarded to Congress, as follows:

“A disclosure of a communication or information covered by the attorney-client privilege or work product protection does not operate as a waiver if the holder of the privilege or work product protection (A) made the disclosure inadvertently, (B) took reasonable ~~precautions~~ steps to prevent disclosure, and (C) took ~~reasonably prompt measures~~ reasonable steps to

² Suggested deletions are ~~struck through~~ and additions are underscored throughout.

rectify the error ~~once the holder knew or should have known of the disclosure~~, including, if applicable, following Rule 2-402(b)(2).”

3. Rule 2-433. Sanctions

(b) For Loss of Electronically Stored Information

We also applaud the inclusion in Rule 2-433(b) of Federal Rule of Civil Procedure 37(f), because the Rule captures the common sense approach needed to deal with the innocent loss of information due to complexities of the operation of computer systems. We would recommend, however, two revisions in the proposed Rule appropriate to Maryland practice -- removal of both the introductory phrase “absent exceptional circumstances” and the reference to sanctions originating “under these rules.” The former phrase adds an element of uncertainty, which invites wasteful motion practice; the latter phrase is not needed because, as a sovereign state, Maryland’s rulemaking power is not circumscribed by the statutory limitations on the federal rule makers.

The Federal Rules do not address the issue of sanctions under a Court’s inherent authority to sanction parties for pre-litigation conduct, because the Rules of Civil Procedure apply after litigation begins and the federal Rules Enabling Act prohibits the Rules from altering substantive law. Maryland does not have a similar inhibition on its power to enact rules and, therefore, can and should afford the protection of the Rule as soon as the duty to preserve evidence arises, even when that duty arises prior to commencement of the lawsuit. The purpose of the safe harbor is to protect parties from sanctions for the innocent loss of information; the protection should apply whether the loss occurs before or after commencement of the litigation.

Further, what is “routine” and “in good faith” will depend on the facts of the case and the features of the computer system in question. It is important to clarify that negligent conduct is not inconsistent with “good faith.” Accordingly, we recommend that the Rule clarify that courts should not impose sanctions "unless there has been an intentional or reckless loss of electronically stored information" and respectfully suggest that Rule 2-433(b) be revised as follows:

“Rule 2-433. Sanctions

“(b) For Loss of Electronically Stored Information

~~Absent exceptional circumstances~~, [A] court may not impose sanctions on a party ~~under these rules~~ for failing to preserve or produce information lost as the result of the routine, good faith operation of an electronic information system. Sanctions should not be imposed unless there has been an intentional or reckless loss of electronically stored information.”

We also support the Reporter's Note to Rule 2-433(b) as supplying valuable guidance in interpreting the new rules and respectfully suggest the addition of three key words, as follows:

REPORTER'S NOTE

“The addition of section (b) focuses on a distinctive feature of computer operations, the routine alteration and deletion of information that goes along with ordinary use. Many steps essential to computer operation may alter or destroy information for reasons that have nothing to do with how that information might relate to litigation. The new language applies only to information lost due to the routine operation of an electronic information system, and only if the operation was in good faith. This means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by recklessly or intentionally allowing that operation to continue in order to destroy specific stored information that it is required to preserve. Whether good faith would call for steps to prevent the loss of information on sources that the party believes are not reasonably accessible under Rule 2-402 (b)(2) depends on the circumstances of each case. The Rule restricts the imposition of sanctions, but 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.”

* * * *

We express our appreciation for the opportunity to submit these comments. The proposed amendments represent an important and necessary step in ensuring fairness, balance, and predictability in the field of electronic discovery. We hope that the Rules Committee will agree that the revisions suggested above will help resolve some ambiguities and implement the objective of the Rules to facilitate the production of relevant evidence and reduce the cost and expense of discovery in Maryland's courts.

Respectfully submitted,

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