

THE DAILY RECORD

Monday, June 20, 2016

Volume 127 | Number 179

TheDailyRecord.com

With ESI, difference between federal, state rules

Disputes over electronically stored information (“ESI”) are arising in Maryland courts. However, there are significant differences between the Federal Rules of Civil Procedure as amended in December 2015 and the Maryland Rules that apply to ESI. Those differences may impact the scope of the pre-litigation duty to preserve, as well as the scope of discovery in the different systems.

One of the stated goals of the December 2015 federal amendments was to create a uniform national standard governing spoliation, in order to prevent over-preservation of ESI. The Maryland Rules Committee, however, has not proposed changes paralleling the federal rules. Many aspects of the current Maryland Rules regarding discovery continue to follow the superseded 2006 Federal Rules.

This means, in part, that there are significant differences in the scope of discovery. FRCP 26 continues to limit the scope of discovery to the claims and defenses but eliminated the court’s power to enlarge the scope to the subject-matter of the action. Maryland Rule 2-402(a), however, permits discovery “if the matter sought is relevant to the subject matter involved in the action, whether it relates to the claim or defense.” Additionally, the federal rules eliminated the clause that the scope of discovery includes information “reasonably calculated to lead to the discovery of admissible evidence.” Instead, under the amended federal rule, “[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable.”

The Maryland Rules retain the broader “reasonably calculated” concept that was deleted from FRCP 26. Additionally, the federal rules have elevated the proportionality limitation, added an additional factor to consider and re-ordered the factors for emphasis. The Maryland Rules retain the prior proportionality iteration as a separate limitation under Rule 2-402(b)(1).

The federal rules also have enunciated specific principles governing sanctions for the failure to preserve ESI and eliminated the so-called “safe harbor” language of FRCP 37(e). Under the December 2015 amendments, a federal court’s power to sanction negligent loss of ESI is markedly narrowed, while the power to impose sanctions for intentional destruction is

MICHAEL D.
BERMAN

Commentary

ALICIA
SHELTON

Commentary

carefully delineated.

In both instances, specific predicates must be shown, such as breach of the duty to preserve, failure to take reasonable preservation steps, and inability to restore or replace the missing data through additional discovery. The Maryland Rules, however, retain the “safe harbor” language of the 2006 federal rules, leaving the rest to common law. Like the federal rule, Maryland permits sanctions for negligent destruction. Nevertheless, there are substantial differences between the federal and state rules.

Sanctions

The federal Committee Notes indicate that amended Rule 37(e) eliminates a court’s reliance on its inherent powers to sanction litigants. Federal decisions have differed over the interpretation of that limitation, with some authority indicating that the inherent power is not completely replaced by the Rule.

Maryland common law expressly reserves the inherent power to sanction litigants. Again, this may be a significant difference, depending on how the federal courts interpret Rule 37(e).

Under amended FRCP 1, the duty to seek the “just, speedy, and inexpensive determination of every action and proceeding” has been expressly imposed on the courts and parties. While this may be implicit in the Maryland Rules 1-201 and 2-303, which in part “promote[s] the orderly and efficient administration of justice,” the Maryland Rule does not echo the federal language.

In recent cases, federal courts have used Rule 1 to prioritize discovery of certain counts over others in a multi-count complaint and impose limits on trial time.

Proposed ESI amendments to Fed.R.Evid. 902 (13 and 14) also bear watching. Those pro-

“

The federal Committee Notes indicate that amended Rule 37(e) eliminates a court’s reliance on its inherent powers to sanction litigants. Federal decisions have differed over the interpretation of that limitation, with some authority indicating that the inherent power is not completely replaced by the Rule. Maryland common law expressly reserves the inherent power to sanction litigants. Again, this may be a significant difference, depending on how the federal courts interpret Rule 37(e).

posals, if adopted, will address authentication of ESI, issues addressed by the Court of Appeals of Maryland in *Griffin v. State* (2011) and *Sublet v. State* (2015). The proposed federal rules would markedly simplify that process.

Michael D. Berman is with Rifkin Livingston Weiner LLC in Baltimore and presented on this topic at a session Thursday during the Maryland State Bar Association’s annual meeting in Ocean City. Alicia Shelton is an associate with Zuckerman Spaeder LLP in Baltimore.