



THE

# DEFENSE LINE



A Publication From The Maryland Defense Counsel, Inc.

June 2019

## "It Was an Accident, I Swear!"

Evolving Federal and State Standards for the  
Inadvertent Spoliation of Electronically Stored Information

By John E. McCann, Jr. and Megan J. McGinnis

### Featured

Far from Home: Individuals and the Personal Jurisdiction Defense  
Maryland's Travel Insurance Laws Align Closely with NAIC Travel  
Insurance Model  
Five Things to Know About the Wild West of Bankruptcy and Insurance

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Legislative Summary  
MDC's 2019 Annual Meeting and Crab Feast  
MDC Appellate Practice Committee — Briefs

## PRESIDENT'S MESSAGE

*“A DREAM DOESN'T BECOME REALITY THROUGH MAGIC; IT TAKES SWEAT, DETERMINATION AND HARD WORK” — Colin Powell*

Welcome to the spring 2019 edition of *The Defense Line*! As you may remember, MDC's Executive Board's term runs from June to June. So, this is my last President's Message. In light of that, let me express my sincere thanks to everyone who has helped make this a great year for MDC. This includes the entire Executive Board and all our Board members. Also, before I review our last year and some of the things you can expect in the upcoming months, I would be remiss not to specifically thank our Publications Chair, Sheryl Tirocchi, and her team who work tirelessly to make this a great publication for you. Also, big thanks to Brian Greenlee. Brian is a graphic designer who has worked with MDC for more than a decade making sure our publications and website are top quality.

This year has been one of profound change for MDC. First, we hired Marisa Capone, Esq. as our Executive Director. She has been a fantastic addition to the MDC team. Marisa has focused on developing a robust computerized membership database to better communicate with you, our members. To that end, MDC has adopted Wild Apricot as our cloud-based database and communications tool. Like all change there has been a bit of a learning curve for everyone but throughout the process Marisa has plugged along helping to ensure MDC had a very successful year!

MDC's success comes from an extraordinary team of volunteers. Numerous members have devoted many hours to ensuring MDC has great programming and

innovative activities. This year we hosted our highly regarded Deposition Bootcamp. The room was packed with those ready to learn from a great set of lawyers and judges. Lunch & Learns dealing with the opioid crises and how to choose an effective expert, among other topics, were well received. Remember also that MDC interviews every willing judicial candidate in Maryland for the circuit courts, the Court of Special Appeals and the Court of Appeals. We are also very active in the Maryland Legislature and before rule-making bodies. From filing amicus briefs to offering legal opinions on proposed changes to the judiciary, MDC is engaged to ensure the defense bar's interests are heard.

MDC proudly hosted Wendy Merrill of the consulting firm StrategyHorse for four modules addressing the development of personal branding, networking and marketing. These are needs our members have said they have and MDC is always ready to answer the call. We also volunteered at Happy Helpers for the Homeless, a charity dedicated to feeding the less fortunate. **Of course, we got to enjoy our Annual Meeting and Crab Feast!**

A new Executive Board was elected at the Crab Feast. Congratulations to: Dwight Stone of Miles & Stockbridge, P.C. as President, Colleen O'Brien of Wilson/Elser as President-Elect, Katherine Lawler of Nelson/Mullins as Treasurer and Chris Jeffries of Kramon & Graham, P.A. as Secretary.

Once again, thank you to everyone who has made this a successful year for MDC!



John T. Sly, Esquire  
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June 2019



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# “It Was an Accident, I Swear!”

## Evolving Federal and State Standards for the Inadvertent Spoliation of Electronically Stored Information

John E. McCann, Jr. and Megan J. McGinnis



As lawyers typically pride themselves in being careful and attentive to detail, perhaps nothing is more disconcerting than the realization that you or your client may have failed to take appropriate steps to preserve e-mails, text messages, or other forms of electronically stored information (“ESI”) for use in litigation. Although there are a number of reported instances in which a litigant deliberately destroyed ESI in an effort to hide evidence or gain perceived advantage in litigation,<sup>1</sup> such egregious misconduct thankfully is rare. The far more common problem that practitioners face is the inadvertent deletion of ESI due to an untimely implementation of an effective “litigation hold” on the electronic files of the custodians pertinent to the case.<sup>2</sup> Although most practitioners routinely advise clients to implement a litigation hold once a suit has been filed, many overlook that there exists a pre-suit duty to preserve ESI that may attach as soon as litigation can be “reasonably anticipated.”<sup>3</sup> Failure to implement a litigation hold promptly upon receipt of a pre-suit demand or cease-and-desist letter, for example, can result in the inadvertent loss of ESI before the case even starts — information that is often just as likely to be helpful, as opposed to harmful, to your client’s case. Once the duty to preserve ESI attaches in a civil case, failure to

take reasonable steps to implement an effective litigation hold can lead to expensive and time consuming discovery disputes and claims for sanctions.

Advising clients on these issues in Maryland is complicated by a divergence in the applicable federal and state rules addressing the spoliation of ESI. Under the current version of Rule 37(e) of the Federal Rules of Civil Procedure, sanctions for a failure to take “reasonable steps” to preserve ESI “in the anticipation or conduct of litigation” are appropriate: (i) if the information “cannot be restored or replaced through additional discovery,” and (ii) upon a finding of prejudice to another party. FED. R. CIV. P. 37(e)(1). The current Federal Rule further restricts the imposition of the most severe of sanctions (*i.e.*, adverse inference instructions at trial, dismissal, or default) only upon a “finding that the party acted with the intent to deprive another party of the information’s use in litigation.” FED. R. CIV. P. 37(e)(2). The current Federal Rule, which went into effect on December 1, 2015, was intended to fix a host of inadequacies with the prior 2006 version of the Rule 37(e) (the “Former Federal Rule”) that had been interpreted by many federal courts as allowing for the imposition of even the most severe sanctions for a merely negligent or grossly negligent failure to preserve ESI. FED. R. CIV. P. 37, 2015 Ad. Comm. Notes. Neither the United States District Court for the District of Maryland nor the United States Court of Appeals for the Fourth Circuit has provided guidance regarding the level of intent required under the current Federal Rule 37(e)(2), though other courts within the Fourth Circuit have taken a conservative approach to the sanctions analysis thereunder, characterizing the

intent requirement as “stringent,” and “not parallel” with other discovery standards.<sup>4</sup>

In Maryland state courts, sanctions for spoliation of ESI are governed by Maryland Rule 2-433(b). The current Maryland Rule is derived from and mirrors the Former Federal Rule, and has not been amended in wake of the 2015 revisions to Federal Rule 37(e). As a result, Maryland Rule 2-433(b), as interpreted and applied by the Maryland courts, presents the same uncertainties and risks arising out of the unintentional spoliation of ESI — difficulties that have been alleviated by its current federal counterpart. As a result, a civil litigant in Maryland state court may still confront the risk of severe sanctions for a negligent failure to properly preserve ESI — a result that the federal judiciary now views as contrary to sound public policy and the proper administration of justice. This divergence between the applicable federal and state rules is not only important to remember when advising clients litigating in Maryland, but presents an opportunity to make some interesting arguments when moving for or opposing requests for sanctions based on the inadvertent spoliation of ESI in Maryland state courts.

### A. The Purpose and Effect of Current Federal Rule 37(e).

As reflected in the Advisory Committee Notes, current Federal Rule 37(e) was born out of a recognition that the Former Federal Rule, “ha[d] not adequately addressed the serious problems resulting from the continued exponential growth in the volume of [ESI].” FED. R. CIV. P. 37(e), 2015 Ad. Comm. Notes. The Former Federal Rule, like current Maryland Rule 2-433(b), simply stated:

<sup>1</sup> See, e.g., *Peterson v. Evapco, Inc.*, 238 Md. App. 1, 188 A.3d 210, (2018) (affirming entry of default judgment against defendants found to have intentionally destroyed ESI both before and after suit was filed); *Erickson v. Kaplan Higher Ed., LLC*, No. 14-cv-3106-RDB, 2015 WL 6408180, at \*6 (D. Md. Oct. 21, 2015) (finding plaintiff acted willfully, though not in bad faith, in running a program she knew would destroy some data on a computer she acknowledged held potentially relevant evidence and recommending the exclusion of certain evidence and a jury instruction to cure the resulting prejudice); *Goodman v. Praxair Services, Inc.*, 632 F. Supp. 2d 494, 522 (D. Md. 2009) (finding a party acted willfully when it destroyed a computer and selectively deleted emails following receipt of a letter threatening litigation and imposing an adverse inference instruction).

<sup>2</sup> A “litigation hold” (sometimes also referred to as a “legal hold”) generally refers to a directive by counsel to a client that the ESI of certain individuals be preserved by suspending the automatic or routine deletion of such information by the information technology (“IT”) systems on which the designated information resides.

<sup>3</sup> See Michael D. Berman, *The Duty to Preserve ESI and the Spoliation Doctrine in Maryland State Courts*, 45.2 U. Balt. L. F. 129 at 133 (2015); Fed. R. Civ. P. 37(e) (recognizing a duty to preserve ESI “in the anticipation or conduct of litigation.”).

<sup>4</sup> *Knight v. Boehringer Ingelheim Pharm., Inc.*, 323 F. Supp. 3d 837, 845 (S.D.W.Va. 2018) (observing the dearth of Fourth Circuit authority interpreting Rule 37(e)(2)’s “stringent” intent requirement, and declining to impose sanctions despite a finding of bad faith, due to the court’s inability to conclude that the defendant’s failure to retain information was for the intent of depriving plaintiffs of relevant information in the instant lawsuit); *Jenkins v. Woody*, No. 3:15-cv-355, 2017 WL 362475, at \*17 (E.D. Va. Jan. 21, 2017) (“Rule 37(e)’s stringent ‘intent’ requirement does not parallel other discovery standards.”).

(INFORMATION) Continued from page 4

*Absent extraordinary circumstances*, a court may not impose sanctions *under these rules* on a party for failing to provide [ESI] lost as a result of the routine, good-faith operation of an electronic information system.

*Id.*; see also MD. RULE 2-433(b) (emphasis added).

Although the Former Federal Rule attempted to establish a “safe harbor” from sanctions for the loss of ESI except in “extraordinary” circumstances, the rule was widely criticized as so imprecise as to gut its effectiveness.<sup>5</sup> Nowhere did the Former Federal Rule define or provide any guidance as to what constituted an “extraordinary” situation. In the absence of clear guidance in the text of the Former Federal Rule, some courts looked to the 2006 Advisory Committee Notes, which explained that “good faith” in the routine operation of an information system may involve a party’s intervention to modify or suspend certain features of that routine operation to prevent loss of information . . . [as] one aspect of what is often called a ‘litigation hold.’”<sup>6</sup> Based on this note, some courts concluded that any failure to implement a timely and effective litigation hold was, by definition, bad faith and, therefore, an “extraordinary circumstance” justifying sanctions.<sup>7</sup> Under this reading of the Former Federal Rule, the safe harbor became largely illusory as even a negligent deletion of information could open the door to the full panoply of potential sanctions available to a federal court.<sup>8</sup>

Furthermore, the phrase “under these rules” led many federal courts to conclude that sanctions under the Former Federal Rule could only be imposed for spoliation events that occurred after the lawsuit was filed.<sup>9</sup> Thus, the Former Federal Rule provided no guidance as to whether and when a pre-suit duty to preserve ESI arose, and simply did not authorize sanctions for instances of pre-suit spoliation.<sup>10</sup> Although the courts’ power to sanction this conduct

was not expressly based on the Federal Rules, courts looked to both these rules and state common law principles for guidance as to a pre-suit preservation duty and the availability of sanctions or other curative measures for a breach of that duty, which they then imposed via their inherent powers.<sup>11</sup>

As a result of the inadequacies of the Former Federal Rule:

Federal circuits ha[d] established significantly different standards for imposing sanctions and curative measures on parties that fail to preserve [ESI]. 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.

FED. R. CIV. P. 37(e), 2015 Ad. Comm. Note.

To address these concerns, current Federal Rule 37(e)<sup>12</sup> specifically recognizes a duty to preserve ESI “in the anticipation or conduct” of litigation, so as to clearly apply to instances of both pre-suit and in-suit spoliation. FED. R. CIV. P. 37(e). In resolving a split among the federal circuits, the current Federal Rule expressly rejects the imposition of severe sanctions in the form of adverse inference instructions, dismissal, or default for a merely negligent or grossly negligent loss of ESI. FED. R. CIV. P. 37(e)(2). As the Advisory Committee noted:

This subdivision authorizes courts to use specified and very severe measures to address and deter failures to preserve [ESI], but only on a finding that the party that lost the information acted with the intent to deprive the other party of the information’s use in litigation. . . . It rejects cases such as *Residential Funding Corp. v. De George Financial Corp.*, 306 F.3d 99 (2d Cir. 2002) that authorize the giving of adverse-inference instructions

on a finding of negligence or gross negligence.

FED. R. CIV. P. 37(e)(2), 2015 Ad. Comm. Note. The Advisory Committee reasoned:

Adverse-inference instructions were developed on the premise that a party’s intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence. Negligent or even grossly negligent behavior does not logically support that inference. *Information lost through negligence may have been favorable to either party, including the party that lost it, and inferring that it was unfavorable to that party may tip the balance at trial in ways the lost information never would have.* The better rule for the negligent or grossly negligent loss of electronically stored information is to preserve a broad range of measures to cure prejudice caused by its loss, but to limit the most severe measures to instances of intentional loss or destruction.

Fed. R. Civ. P. 37(e), Ad. Comm. Note (emphasis added). Even under current Federal Rule 37(e)(2), however, courts have held that “intent to deprive” may be proven by circumstantial evidence.<sup>13</sup>

## B. Maryland Rule 2-433(b)

Despite the 2015 revisions to Federal Rule 37(e), Maryland Rule 2-433(b) continues to track the Former Federal Rule. Maryland’s continued adherence to the Former Federal Rule is surprising given that Maryland courts traditionally have looked to the federal courts for guidance in addressing spoliation issues.

As the Maryland Court of Special Appeals recently stated, Maryland courts evaluate the propriety of sanctions for spoliation of ESI

<sup>5</sup> Alexander N. Gross, *A Safe Harbor from Spoliation Sanctions: Can an Amended Federal Rule of Civil Procedure 37(e) Protect Producing Parties?* 2015 Colum. Bus. L. Rev. 705, 718 (2015).

<sup>6</sup> FED. RULE CIV. P. 37(a) (2006 Ad. Comm. Note)

<sup>7</sup> Gross, *supra*, at 719.

<sup>8</sup> See, e.g., *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002) (“The sanction of an adverse inference may be appropriate in some cases involving the negligent destruction of evidence because each party should bear the risk of its own negligence.”); *Rogers v. T.J. Samson Cmty. Hosp.*, 276 F.3d 228, 232 (6th Cir. 2002) (“When a plaintiff is unable to prove an essential element of her case due to the negligent loss or destruction of evidence by an opposing party, . . . it is proper for the trial court to create a rebuttable presumption that establishes the missing elements of the plaintiff’s case that only could have been proved by the availability of the missing evidence.”).

<sup>9</sup> Paul W. Grimm, *Proportionality in the Post-Hoc Analysis of Pre-litigation Decisions*, 37 U. Balt. L. Rev. 381, 397, 398, n.75 (2008) (“[T]he Rules apply ‘in’ the courts, not to matters that predate initiation of litigation.”) (citing cases).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 399-402.

<sup>12</sup> The Advisory Committee notes, however, that, “Most court decisions hold that potential litigants have a duty to preserve relevant information when litigation is reasonably foreseeable. Rule 37(e) is based on this common-law duty; it does not attempt to create a new duty to preserve.” FED. RULE CIV. P. 37(a) (2015 Ad. Comm. Note). See *Alabama Aircraft Indus., Inc. v. Boeing Co.*, 319 F.R.D. 730, 740-41 (N.D. Ala. 2017), for an analysis of the pre-litigation duty to preserve under current Federal Rule 37(e).

<sup>13</sup> See *Alabama Aircraft Indus. Inc.*, 319 F.R.D. at 746 (setting forth factors which constitute circumstantial evidence of bad faith).

<sup>14</sup> *Kluft* involved a plaintiff’s deliberate destruction with a hammer of audiotapes containing conversations he had with the Appellees. 126 Md. App. at 199, 728 A.2d at 737.

(INFORMATION) Continued from page 5

using four factors:

- (1) An act of destruction;
- (2) Discoverability of the evidence;
- (3) An intent to destroy evidence; and
- (4) Occurrence of an act at a time after suit has been filed or, if before, at a time when the filing is fairly perceived as imminent.

*Peterson v. Evapco, Inc.*, 238 Md. App. 1, 51, 188 A.3d 210, 240 (2018) (citing *Klupt v. Krongard*, 126 Md. App. 179, 199, 728 A.2d 727, 737 (1999)). This four-part test, as initially adopted in *Klupt*, is derived from a decision of the Maryland federal district court's decision in *White v. Office of the Public Defender for the State of Maryland*, 170 F.R.D. 138 (D. Md. 1997). *Klupt*, 126 Md. App. at 199, 728 A.2d at 737 (citing *White*, 170 F.R.D. at 147-48).

In the recent *Peterson* decision, the Maryland Court of Special Appeals affirmed the circuit court's entry of default as a sanction for the defendants' deliberate spoliation of ESI. Both in anticipation of and during the conduct of the suit, the defendants deleted hundreds of emails from multiple accounts, as well as bank records and other discoverable documents from their personal laptops and a home desktop. *Peterson*, 238 Md. App. at 20-23, 188 A.3d at 221-23. Recognizing that, "[b]oth Maryland's discovery rules and the courts' inherent authority to manage the discovery process 'permit sanctions for the destruction of evidence,'" the Court found that the plaintiff "proved all four prongs of the test adopted in *Klupt*." *Id.*, 238 Md. App. at 51, 57, 188 A.3d at 239, 243. As to the element of "intent to destroy evidence" the Court found "ample evidence to support the circuit court's finding that [defendants] intentionally destroyed relevant evidence," and held that the lower court "did not abuse its discretion by entering judgment in default against [them]." *Id.*, 238 Md. App. at 56, 188 A.3d at 242.

Although the recent decision in *Peterson*, as well as the *Klupt* decision on which it relies<sup>14</sup>, arose in the context of the deliberate destruction of evidence, Maryland courts applying the *Klupt* standard have held that, "intent to destroy isn't a prerequisite to a find-



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ing of spoliation — courts often look to *fault*. . . . 'sometimes even an inadvertent, albeit negligent loss of evidence will justify dismissal because of the resulting unfairness.'" *Cumberland Ins. Group v. Delmarva Power*, 226 Md. App. 691, 702-03, 103 A.3d 1183, 1190 (2016) (quoting *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583 (4th Cir. 2001)) (emphasis in original). Consistent with federal authority that pre-dates the 2015 revisions to Federal Rule 37(e), therefore, *Cumberland* and other Maryland decisions can be read to support the imposition of even the most severe sanctions for a merely negligent destruction of ESI where the loss of such information is highly prejudicial. *Id.*<sup>15</sup>

Nevertheless, there are several important takeaways regarding the current state of Maryland law on the unintentional spoliation of ESI.

- The leading Maryland decisions on spoliation in the civil context are from the Maryland Court of Special Appeals. The Maryland Court of Appeals last addressed spoliation in the context of a criminal case, *Cost v. State*, 417 Md. 360 (2010). The high court, however, has not addressed spoliation of evidence in the context of a civil action except in passing,<sup>16</sup> and has never opined as to the proper interpretation and scope of current Maryland Rule 2-433(b) with respect to the destruction of ESI.
- Although the Court of Special Appeals' 2018 decision in *Peterson* relied heavily on its prior decision in *Cumberland*, *Peterson* did not involve (and, therefore, does not address) the negligent destruction of ESI

or the propriety of imposing sanctions for the unintentional spoliation of evidence, matters at issue in *Cumberland*.

- In the absence of guidance from the Maryland Court of Appeals, the Court of Special Appeals consistently has looked to federal authority for guidance.
- Nevertheless, the Maryland Court of Appeals has not undertaken to revise Maryland Rule 2-433(b) to reflect the 2015 revisions to Federal Rule 37(e).

### C. Addressing Inadvertent Spoliation in Maryland State Courts.

These considerations regarding the current state of Maryland law present an opportunity for litigants in Maryland's state courts to make and preserve some interesting arguments when moving for or opposing sanctions for the unintentional destruction of ESI. Assuming, for the sake of analysis, that a party's failure to preserve ESI was, in fact, negligent; the ESI cannot be otherwise recovered from other sources; and its loss is prejudicial to the other party — all important factors that should be carefully evaluated in the context of moving for or opposing a motion for sanctions in either state or federal court — such potential arguments may include:

- **For the Movant:** In moving for sanctions, one might argue that Maryland courts recognize that unintentional, albeit negligent spoliation of evidence can give rise to

<sup>15</sup> See also, *The Duty to Preserve ESI (Its Trigger, Scope and Limit) & The Spoliation Doctrine in Maryland State Courts*, 45.2 U. of Balt. Law Rev. 129, 158 (2015) ("The jury instruction quoted in *Cost* — and other Maryland decisions such as *Miller* and *Anderson* — support spoliation sanctions for negligent and unintentional destruction of information, the loss of which is prejudicial.") (citing *Cost v. State*, 417 Md. 360, 10 A.3d 184 (2010); *Anderson v. Litzenberg*, 115 Md. App. 549, 694 A.2d 150 (1997); *Miller v. Montgomery County*, 64 Md. App. 202, 494 A.2d 761 (1985); cert. denied, 304 Md. 299 (1985)).

<sup>16</sup> E.g., *Larsen v. Romeo*, 254 Md. 220, 228, 255 A.2d 387, 391 (1969) ("As a general rule, an inference arises from the suppression or destruction of evidence by a litigant that such evidence would be unfavorable to his case. However, this inference does not amount to substantive proof and cannot take the place of proof of a fact necessary to the other party's case.") (citing *Maszczewski v. Myers*, 212 Md. 346, 129 A.2d 109 (1957)).

(INFORMATION) Continued from page 6

even the most severe of sanctions. *Cumberland*, 226 Md. App. at 705, 103 A.3d at 1191; *see also* fn. 15 *infra.* This is consistent with the view adopted by many federal courts when interpreting and applying the Former Federal Rule, which mirrors current Maryland Rule 2-433(b). Had the Maryland Court of Appeals thought it wise to revise Maryland Rule 2-433(b) in light of the 2015 revision to current Federal Rule 37(e), it could have done so, but has not.

- Opposing Sanctions:** In opposing the imposition of sanctions in Maryland state court, one might point out that the Maryland Court of Appeals has never addressed the inadvertent spoliation of ESI under either Maryland Rule 2-433(b) or the court's inherent power to manage the discovery process in a civil case. The Court of Special Appeals' decision in *Cumberland* did not involve the loss of ESI, but, rather, the unintentional spoliation of a fire scene that fatally prejudiced the defense. Although the *Peterson* decision relies on *Cumberland*, *Peterson* did not involve (and, therefore, does not address) the negligent destruction of ESI. Even under the Former Federal Rule, there was a split among the federal circuits on the issue of whether a merely negligent spoliation of ESI could give rise to severe sanctions in the form adverse inference instructions, dismissal, or default.<sup>17</sup> In resolving that circuit split, the 2015 revisions to Federal Rule 37(e) rejected the imposition of severe sanctions for an unintentional destruction of ESI as contrary to sound public policy and the proper administration of justice. To permit such sanctions would embrace a flawed interpretation of Maryland Rule 2-433(b) that has since been rejected by the federal judiciary and should not now be resurrected in the Maryland state courts.

## Conclusion

Although making these arguments may yield creative briefs, there is a real need to clarify Maryland law regarding the inadvertent spoliation of ESI. Whether such clarification will come in the form of a revision to Maryland Rule 2-433(b) or in the context of an opinion by the Court of Appeals remains to be seen.

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## Editors' Corner

The Editors are proud to publish this edition of *The Defense Line*. Once again, a huge shout out goes to you, members of the MDC, who answered the call for articles, advice, resources, and spotlights. The articles in this edition deal with a variety of legal issues and are reflective of the diversity of practice areas within our membership. A big thanks to our contributors for this edition: **John E. McCann, Jr.** and **Megan J. McGinnis** of Miles and Stockbridge, **Steven J. Willner** of Wilson Elser, **Patricia McHugh Lambert** and **Emily Devan** of Pessin Katz Law, and to the MDC Committee members, especially those featured in this publication, who work tirelessly to support the MDC and its interests. This has been a big year for the MDC under the leadership of John Sly and we are excited for what's to come following the election of the new Executive Board.

The Editors sincerely hope the members of the MDC enjoy this edition of *The Defense Line*. If you have any comments, suggestions, or would like to submit an article or spotlight for publication for a future edition, please contact one of the editors below.



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<sup>17</sup> Compare *n. 7 supra* with *Aramburu v. The Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997); *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997); *Brewer v. Quaker State Oil Ref. Corp.*, 72 F.3d 326, 334 (3d Cir. 1995); *Vick v. Texas Employment Comm'n*, 514 F.2d 734, 737 (5th Cir. 1975); *see also Med. Lab. Mgmt. Consultants v. Am. Broad. Co.*, 306 F.3d 806, 824 (9th Cir. 2002); *Jackson v. Harvard University*, 900 F.2d 464, 469 (1st Cir. 1990).