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September 1, 2016

Via E-mail: comments@gasupreme.us

Attn: Ms. Terese S. Barnes
Clerk of Supreme Court of Georgia
244 Washington Street, SW
Room 572
Atlanta, Georgia 30334

Re: Proposed Rule 6.8

Dear Justices:

As members of our firm's Appellate Practice Group, we write to express our concern that this proposed rule, which treats alleged spoliation of Electronically Stored Information ("ESI") differently than all other types of evidence, may unnecessarily infringe on the inherent power of the trial court judges of the State of Georgia to craft sanctions appropriate to each particular factual situation. In part (B), the proposed rule appears to limit a trial judge's discretion to impose spoliation remedies by offering only three options: (1) presume that the lost information was unfavorable to the party; (2) instruct the jury that it may or must presume the information was unfavorable to the party: or (3) dismiss the action or enter a default judgment. This exclusive list seems to run contrary to the Georgia cases that authorize a trial judge "to craft a solution that fits the facts[.]" *Kitchens v. Brusman*, 303 Ga. App. 703 (2010). Historically, the rule has been that "the trial court has wide latitude to fashion sanctions on a case-by-case basis, considering what is appropriate and fair under the circumstances." *Wal–Mart Stores, Inc. v. Lee*, 290 Ga.App. 551 at 545, 659 S.E.2d 905 (2008) (quoting *Bouvé & Mohr, LLC v. Banks*, 274 Ga.App. 758, 762(1), 618 S.E.2d 650 (2005)).

Accordingly, our concern is simply that the trial judges of our state should be allowed the same freedom, within the confines of statutory and decisional law, to craft remedies that they find to be appropriate to the factual situation presented irrespective of whether the evidence in question is ESI or any other type of evidence. In particular, as written, a trial judge may feel compelled by Rule 6.8 to issue a dispositive sanction in a case where the conduct is fairly egregious but could otherwise be remedied by something short of a dispositive sanction, such as through the exclusion of expert testimony or striking individual paragraphs of pleadings.

Further, the rule also begs the question: why are judges being limited in their ability to fashion an appropriate remedy for ESI but not traditional paper documents? This distinction may become particularly troublesome given that certain evidence may be contained in both a traditional paper document and as ESI. Many records are originally kept in paper form, then

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scanned into an ESI format for retention, after which the paper document is shredded or otherwise destroyed in order that the ESI version can be more efficiently, economically, and securely stored. It is not hard to envision a situation in which a judge might want to craft a remedy for the failure to retain a document in paper and ESI form that would be allowed under Georgia's statutory and decisional law, but would be limited to the three options provided in Proposed Rule 6.8(B).

As Proposed Rule 6.8 does not attempt to define when this particular type of evidence, ESI, "should have been preserved in the anticipation or conduct of litigation," potential litigants and the courts must rely for guidance on that issue from Georgia's statutory and decisional law. Perhaps the options available to judges should be governed by those existing, and potentially evolving, sources as well, rather than by the limited three options indicated by Proposed Rule 6.8(B).

We appreciate you consideration of this letter.

Best Regards,

/s/ John E. Hall, Jr.

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