



STATE COURT OF DEKALB COUNTY  
DEKALB COUNTY COURTHOUSE  
DECATUR, GEORGIA 30030

CHAMBERS OF  
WAYNE M. PURDOM  
JUDGE

(404) 687-7180

August 12, 2016

Ms. Therese S. Barnes  
Clerk of the Supreme Court of Georgia  
244 Washington St., S.W., Room 572  
Atlanta, GA 30334

Re: Comments relating to proposed Uniform Rule 6.8

#### SCOPE OF UNIFORM RULES

The preliminary issue before the Court is whether this proposal is within the rule-making authority of the Court, or whether it is in conflict with the Preamble to the Uniform Rules or, alternately, this Court's view of the proper scope of Uniform Rules.

As this Court is aware, the original Uniform Rules were enacted by this Court without any restrictive preamble and Justice Hill, who oversaw the original development of the Rules, took an expansive view of their proper scope. At least one appellate decision found the Uniform Rules were controlling over prior case law and statutes.<sup>1</sup> This caused considerable opposition in the General Assembly, and Speaker Murphy proposed a constitutional amendment restricting this Court's rule-making authority. In response, the Superior and State Courts adopted the preamble, followed shortly by the other classes of court, excluding the magistrate courts, who only adopted a similar provision many years later. The Preamble to the Uniform Rules of Superior and State Courts states:

It is not the intention, nor shall it be the effect, of these rules to conflict with the Constitution or substantive law, either per se or in individual actions and these rules shall be so construed and in case of conflict shall yield to substantive law.

#### Proposed 6.8(A)

This provision seems to be in the interests of justice and a reasonable case could be made out that it does not conflict with existing controlling decisional law, although it certainly could be viewed as in a state of tension with the existing abuse of discretion standard in reviewing sanctions for spoliation imposed by a trial court:

Certainly a trial court has wide discretion in adjudicating spoliation issues, and such discretion will not be disturbed absent abuse.

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<sup>1</sup> *Dallas Blue Haven Pools, Inc. v. Taslimi*, 180 Ga. App. 734, 350 S.E.2d 265 (1986).

*Phillips v. Harmon*, 297 Ga. 386, 774 S.E.2d 596 (2015). The paragraph does, however, appear to conflict with the standard for the scope of the Uniform Rules suggested by Justice Melton in *Edwards v. State*, 281 Ga. 108, 111, 636 S.E.2d 508, 510 (2006):<sup>2</sup> “this Court has no inherent rule-making authority to create substantive legal standards that either supplement or contradict existing substantive law.” Insofar as spoliation sanctions can involve case-determinative factual conclusions, this provision adds a supplemental requirement to the existing substantive law.

#### Proposed 6.8(B)

Existing Georgia case law offers no support for distinguishing between electronic and non-electronic discovery. Numerous cases involve video recordings, the vast majority of which for years have been digital electronic records. Other cases have involved electronic receipts, digital data in truck electronic systems, etc.<sup>3</sup> Nowhere in Georgia law is there any suggestion that the application of *Baxley v. Hakiel Industries, Inc.*, 282 Ga. 312, 647 S.E.2d 29 (2007)<sup>4</sup> is limited to old-fashioned VCR tapes. Accordingly, this provision conflicts with existing controlling decisional law, most recently reaffirmed in *Phillips v. Harmon*, 297 Ga. 386, 774 S.E.2d 596 (2015), where the good or bad faith of the party destroying is only one factor, albeit a very important one, in the five factors used in determining the propriety of the sanction chosen. As such, Rule 6.8(B) appears outside the permissible scope of the Uniform Rules under the holding of the unanimous court in *Russell v. Russell*, 257 Ga. 177, 356 S.E.2d 884 (1987).<sup>5</sup> At the very least, unless specifically addressed by this Court in an order adopting the rule, the question of the validity of this rule would invite future litigation.

Historically, the Georgia Civil Practice Act was derived from the Federal Rules of Civil Procedure. This has been done through legislative action. In 1972, the legislature adopted in large

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<sup>2</sup> *Edwards* had no majority opinion. Two views of the scope of the Uniform Rules were supported by three justices each and Justice Benham merely concurred in the result.

<sup>3</sup> *Sentry Select Ins. Co. v. Treadwell*, 318 Ga.App. 844, 734 S.E.2d 818 (2012). *Treadwell* is an example of a case which makes reasonably clear that jury instructions are permissible for destruction of electronic data without any such instructions.

<sup>4</sup> *Baxley* appeared to some, including this author, to mandate jury instructions as the minimum sanction for spoliation, especially in the context of some Court of Appeals decisions requiring the imposition of some sanction. This still appeared to be the case as of the time that the legislature refused to adopt a provision similar to proposed 6.8 in 2014. Since then, *Phillips* has made clear that the trial court has the discretion to not impose such a sanction and that rebuttable presumption jury instructions should only be imposed in exceptional cases.

<sup>5</sup> The authority of the federal courts, in the absence of a legislative veto, under the Rules Enabling Act is much broader than the authority of this Court without a revision of the Preface. As made clear in Advisory Opinion Notes, federal rule revisions are frequently intended to make broad revisions in existing law.

part the version of the federal rules as of the 1970 revisions. Since that time, the legislature has only occasionally adopted the revisions made in the federal rules. As a member of the working group of the Judiciary Committee prior to consideration of the most recent attempted revision of the discovery provisions of the Civil Practice Act in 2014, I will point out that a very similar provision was the most controversial proposal considered in the revision, and ultimately resulted in no bill being passed. There was a fairly broad consensus of approval as to most of the other provisions, including provisions similar to those in the revisions to Uniform Rule 5 recently adopted.<sup>6</sup> The House passed a revision that did not include a provision similar to 6.8, the Senate added such a provision, and the House refused to agree to the revision. To adopt such a far-reaching outcome-determinative rule after its consideration and rejection by the legislature would be unprecedented.

#### MERITS OF THE PROPOSAL

As stated, this provision is based upon the recent revision to the Federal Rules of Civil Procedure. Due to the fact that the Georgia legislature has refused to adopt numerous revisions of the federal rules, particularly those relating to early mandatory case management by the trial judge, the federal provision operates in a different context.

The duty to preserve may in some instances be triggered or clarified by a court order in the case. Preservation orders may become more common, in part because Rules 16(b)(3)(B)(iii) and 26(f)(3)(C) are amended to encourage discovery plans and orders that address preservation.

2015 Advisory Committee Notes to F.R.C.P. § 37. It would be my impression, both as a trial judge and from reviewing cases in this area, that the cases which most often warrant severe sanctions involve spoliation after the commencement of litigation. F.R.C.P. §§ 16 & 26 have several protections against post-litigation spoliation. It provides for an early affirmative duty to disclose certain information, specifically including copies or descriptions of any electronically stored information which would be used to support a party's claims or defenses. It provides that parties must confer as soon as practicable to plan discovery. The judge is required to schedule an early conference as soon as practicable, which must result in a scheduling order under F.R.C.P. § 16 within 90 days of the defendant being served. The parties, and then the court if there are disagreements, are required to address all issues relating to what evidence is to be preserved. If spoliation occurs in negligent violation of the court order, sanctions would not be limited.

Another practical difference in the state environment arises from the election of judges. As a trial judge, I am not thrilled with the requirement to make an explicit finding of intentional deceit, which in many cases would be tantamount to a finding of professional misconduct of a lawyer, before giving relief to the party victimized. Such a finding is a difficult one for an elected

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<sup>6</sup> Notably, the Rule 5 revision reflected the experience of the working group - there was little controversy about an *optional* early planning conference, but no support for a mandatory conference or the early deadlines found in the federal rules.

judge to make.<sup>7</sup> Many spoliation evaluations will follow a common pattern: the defendant became aware of the threat of litigation, it investigated the facts, it chose to affirmatively preserve some evidence and did not preserve other evidence. Is this sufficient for a finding of intent, if not, what evidence in addition is required? Defining the scope of the “any evidence” standard in this context will likely take years of litigation.

The restriction on jury instructions, in particular, is apparently based upon fear of juries making deductions from the destruction that are not logically related to the evidence destroyed. The provision as adopted in the federal courts treats narrower, but more conclusive measures, such as exclusion of evidence, or conclusory fact-finding by the court, as less severe than a permissible inference instruction. Under the Advisory Committee Notes, the remedial “measures [remain] quite broad if they are necessary [to cure the prejudice]. There is no all-purpose hierarchy of the severity of various measures; the severity of given measures must be calibrated in terms of their effect on the particular case.”

Leaving aside the issue of the scope of Uniform Rules and whether the Court intends to extend the scope of its rule-making authority, my greatest concern for the merits of the provision is that its adoption in this simple form will lead to a lengthy period of confusion in the trial

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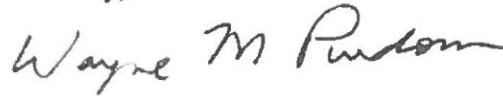
<sup>7</sup> The Advisory Committee Notes suggest a way around this difficulty, however:

Subdivision (e)(2) applies to jury instructions that permit or require the jury to presume or infer that lost information was unfavorable to the party that lost it. Thus, it covers any instruction that directs or permits the jury to infer from the loss of information that it was in fact unfavorable to the party that lost it. The subdivision does not apply to jury instructions that do not involve such an inference. For example, subdivision (e)(2) would not prohibit a court from allowing the parties to present evidence to the jury concerning the loss and likely relevance of information and instructing the jury that it may consider that evidence, along with all the other evidence in the case, in making its decision. These measures, which would not involve instructing a jury it may draw an adverse inference from loss of information, would be available under subdivision (e)(1) if no greater than necessary to cure prejudice. In addition, subdivision (e)(2) does not limit the discretion of courts to give traditional missing evidence instructions based on a party's failure to present evidence it has in its possession at the time of trial.

Subdivision (e)(2) requires a finding that the party acted with the intent to deprive another party of the information's use in the litigation. This finding may be made by the court when ruling on a pretrial motion, when presiding at a bench trial, or when deciding whether to give an adverse inference instruction at trial. If a court were to conclude that the intent finding should be made by a jury, the court's instruction should make clear that the jury may infer from the loss of the information that it was unfavorable to the party that lost it only if the jury first finds that the party acted with the intent to deprive another party of the information's use in the litigation. If the jury does not make this finding, it may not infer from the loss that the information was unfavorable to the party that lost it.

courts. Without a decision explaining its application or some sort of explicit adoption of the Advisory Committee Notes, we may go through a prolonged period of starting from scratch on spoliation law with false starts in the trial courts and Court of Appeals, such as we saw in the period between *Baxley v. Hakiel Industries, Inc.*, 282 Ga. 312, 647 S.E.2d 29 (2007) and *Phillips v. Harmon*, 297 Ga. 386, 774 S.E.2d 596 (2015). In particular, the adoption of this simple provision, without further guidance, is likely to result *in practice* in a much broader restriction on the powers of the court to protect against evidence destruction than is found in the federal analysis it tries to emulate.

Sincerely,

A handwritten signature in cursive script that reads "Wayne M Purdom".

Wayne M. Purdom, Chief Judge  
DeKalb County State Court