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TRIAL AND APPELLATE LAWYERS

August 30, 2016

Via U.S. Regular Mail and Electronic Mail to
comments@gasupreme.us

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

Re: Comments Relating To Proposed Uniform Superior Court Rule 6.8

Dear Ms. Barnes:

I am writing as the former Chair of the State Bar Task Force on Electronically Stored Information. To be clear, at the outset, because that Task Force has not been re-appointed, the opinions that are expressed in this letter are mine and are not an attempt to represent the current views of any other member of the Task Force.

Instead, I write to provide some history on this issue and to urge that this provision not be adopted for several reasons. First, the proposed Superior Court Rule is contrary to the position that the Board of Governors of the State Bar adopted prior to the 2016 session of the Georgia General Assembly. Second, the proposed Superior Court Rule only addresses one aspect of Electronically Stored Information, leaving open a host of other issues that Courts will be called upon to address. Finally, and with all appropriate deference to those who are attempting to address a valid concern, because the proposed Rule modifies the substantive law of the State, it is outside the rule-making authority.

I recognize the frustration of those who have dealt with this problem over the years but urge that interested parties continue to work toward a comprehensive solution to the issues surrounding electronically stored information and not simply adopt a substantive legal provision in the guise of an expedient rule.

I was appointed to the Task Force in 2012 by then-State Bar President Ken Shigley. I was reappointed and ultimately served as Chair beginning in 2015. After a series of failed efforts at developing a proposal, in 2015, the Task Force adopted a legislative package that was submitted to the State Bar for review and approval. That package included the work from prior years and included a compromise solution to O.C.G.A. §9-11-37 that broke the prior impasse. The 2015 Task Force that I chaired was comprised of highly qualified and highly respected

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lawyers from around the state who represented a variety of interests – large firms, sole practitioners, plaintiffs' lawyers, members of the defense bar, and lawyers active in domestic relations.

After a series of hearings and meetings, the State Bar Board of Governors adopted the Task Force recommendations for comprehensive legislation to address the discovery and treatment of Electronically Stored Information. Ultimately, House Bill 1017 was introduced and received a favorable vote from the House Judiciary Committee. It went no further during the last legislative session.

I. The Proposed Rule Is Contrary to the Bar-Approved Changes to O.C.G.A. § 9-11-37

The Task Force reached consensus on an amendment to O.C.G.A. § 9-11-37 that the State Bar Board of Governors approved as part of the overall legislative package. That proposal, while borrowing heavily from Fed.R.Civ.P. 37(e), did not track it exactly. The proposed Superior Court rule is a wholesale adoption of the federal rule (with the addition of a provision allowing for a hearing) that the State Bar's Task Force and the State Bar Board of Governors specifically rejected in their adoption of the proposal that became part of the Bar's legislative package. I recognize the frustration with the fact that the Bar was unable to secure passage of the legislation but suggest that the solution is not to merely adopt the federal rule.

We have been through this before in our efforts to rewrite the evidence code. Some of the provisions of the Federal Rules of Evidence were adopted in their entirety, some were rejected, and others were modified to conform to Georgia law. There is no reason that such an approach would not work here as the State tries to move forward with its rules of civil procedure. It is not appropriate to effect such a change in a mere court rule.

II. The State Bar Approved Proposal Was Comprehensive As Opposed To The Proposed Rule – Which Only Addresses Spoliation

A significant problem with the proposed Superior Court rule is that it is limited to sanctions for the destruction of electronically stored information when litigants have no direction on the discovery of electronically stored information. To address the issue of sanctions without telling litigants how to go about getting it in the first place misplaces the cart and the horse. So, while this section recites the history of the attempts in Georgia to address ESI throughout the rules, it is a necessary backdrop to understanding why Georgia should not adopt a court rule without considering other factors.

To understand this issue in context, some history on the development of the Federal Rules of Civil Procedure and of the Georgia Civil Practice Act is necessary. In 2006, the Federal Rules of Civil Procedure were amended to, among other things, accommodate the discovery of electronically stored information. One of those amendments, to Rule 37 – the Federal sanctions rule - dealt with sanctions that could be imposed for the loss of electronically stored information and provided a safe harbor if the information was lost "as a result of the routine, good-faith operation of an electronic information system." The proposed Rule is focused on this limited issue of sanctions for the loss of data.

To some, the 2006 amendment to Rule 37 was unworkable because the courts applied different standards and, in some cases, imposed sanctions – such as an adverse inference instruction – when the loss of the data was only due to negligence. As a result, the Federal Rules Advisory Committee attempted to develop another proposal that would not permit what were perceived by some as draconian sanctions for a negligent loss.

The Advisory Committee's approach was unquestionably thorough and solicited opinions from across the bar. The result was a proposed rules change that was approved and that became effective December 1, 2015. Not only were there revisions to Rule 37 addressing the spoliation of electronically stored information but there were also significant revisions to other rules – including Rule 26, the over-riding rule governing discovery.

Notably, the Georgia Civil Practice Act, O.C.G.A. § 9-11-1, et seq., was last amended, in any significant way, in 1993. Since that time, there have been a number of substantial amendments to the Federal Rules of Civil Procedure that have added provisions not found in the Georgia rules.

Generally, the Bar approved proposal was to amend the discovery provisions of the Civil Practice Act to govern the production of electronically stored information. The importance of the revisions stems from the pervasive nature of ESI in our world today. It may be the digital video from a grocery store that recorded the condition of the aisle just before a plaintiff fell and was injured or it may be the text messages sought in divorce proceedings or it may be the statistics that an employer maintains in a Fair Labor Standards Act case. In addition, to make other sections of the Code consistent, the proposed legislation also incorporated the term "electronically stored information" wherever the Code allowed for or compelled the production of documents.[1]

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[1] This is an example of why the proposed Superior Court rule is a stop gap solution at best. Various provisions of the Georgia Code need to be amended to allow for the production of ESI. The failure to adopt a comprehensive approach to ESI throughout the Code – as opposed to in one limited court rule – could lead to inconsistent results. If, for example, the Civil Practice Act allows for the discovery of ESI in litigation but a code section governing the

Several of the proposed amendments to the Civil Practice Act should be relatively non-controversial. For example, the Task Force proposed adding the phrase "electronically stored information" in O.C.G.A. §9-11-26 and the other discovery provisions as appropriate. In addition, as part of the 2006 amendments to the federal rules, Rule 34 (same as O.C.G.A. § 9-11-34) was amended to address some of the mechanical issues that ESI raises (such as the production format) as well as objections that can be asserted. The Bar's proposal adopted the federal rules approach in revisions to O.C.G.A. § 9-11-34.

Also as part of the 2006 amendments to the federal rules, there was a recognition that ESI can be voluminous and that it will contain metadata – basically the history of the information. Under the federal rule, if privileged information is produced, the results can shift the dynamics of a case dramatically. But, privilege can be difficult to identify in the context of voluminous data so the 2006 amendments attempted to address what happens when privileged information is inadvertently disclosed. Under the federal rule, a party receiving the privileged information may not use it until the claim of privilege is resolved. The proposed Georgia legislation adopted, essentially verbatim, those 2006 changes in the federal rule and incorporated them into O.C.G.A. § 9-11-26(b)(5)(B).

But the Bar's proposal was not without controversy surrounding two of the proposals: the placement of any proportionality and the very issue that this proposed rule addresses – sanctions for spoliation. That the provision on spoliation sanctions drew so much heated debate is, alone, sufficient reason to refuse to impose a rule that thoughtful and reasoned trial lawyers – and the Bar – rejected.

To understand the genesis of the controversy, the 2015 amendments to the federal rules are important. Those amendments, particularly the changes to F.R.Civ.P. 26, fundamentally changed the scope of discovery in federal court. Historically, the scope of discovery in federal court and in Georgia courts was basically parallel – any non-privileged matter that was relevant to the claims or defenses. Now, with the 2015 federal amendments, the scope of discovery in federal court has changed. Now, in federal court, parties may obtain discovery of any non-privileged matter that is relevant to the claims and defenses and proportional to the needs of the case. Proportionality, in federal court, is to be determined by reference to several factors.

The proposal to amend the Georgia rules acknowledged the role of proportionality but, instead of making it an "upfront" consideration as it is in the amended federal rules, the Georgia proposal imposed the burden of raising and proving a lack of proportionality on the party with

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scope of an administrative proceeding of the Department of Agriculture only refers to "documents," is there an inconsistency?

the information. So, under the Georgia proposal, a party claiming that a discovery request was not "proportional to the needs of the case" would file a motion for a protective order. So the language was the same; it just appeared in a different section of the rule addressing protective orders.

In the spoliation provision – a provision that only addresses the spoliation of ESI (as the proposed rule does also) – the Georgia provision differed from the federal rule in only one respect. Instead of adopting the federal two-tiered approach that is the proposed Superior Court rule, the proposed legislation adopted a three tiered approach that the Task Force believed used the language from existing Georgia cases for a middle ground in which the trial court, exercising its discretion, could instruct the jury that it may infer prejudice if the court finds that other measures were insufficient to cure the prejudice and further considered both the practical importance of the lost information and whether the party who "lost" it acted in good or bad faith.

In sum, to adopt the proposed Superior Court rule without any effort to modify other provisions in Civil Practice Act is to ignore the evolution of the federal rules over the past nearly 25 years during which the Georgia rules have remained as they were in 1993. We must deal with ESI but doing so through one Superior Court rule aimed at one aspect of the problem is not unlike the finger in the dyke.

III. Proposed Rule 6.8 Exceeds The Rule-Making Authority

It is always uncomfortable for a lawyer to tell a judge that the judge does not have the power to do what she is doing but, in this case, it would appear to be true. As the preamble to the Uniform Superior Court Rules recites,

> [i]t 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.

Rule 1, Uniform Superior Court Rules (2010).

This proposed Rule interferes with Georgia's long-standing understanding of the legal duty to preserve relevant evidence. And, as the law has made clear in Georgia, whether a party has acted in good or bad faith is a relevant inquiry. *See Phillips v. Harmon*, 297 Ga. 386, 774, S.E.2d 596 (Ga. 2015). Because the proposed rule – unlike the Task Force proposal – ignores that inquiry, it is contrary to Georgia law and therefore outside the scope of appropriate rule-making authority.

Conclusion

Thank you very much for the opportunity to offer comments on this important proposal.

Sincerely,

Leslie J. Bryan

LJB/dlv