September 1, 2016

Via Electronic Mail

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

Re: *Proposed Rule 6.8*

Dear Ms. Barnes:

In response to Justice Nahmias' memorandum, dated July 19, 2016, the Georgia Chamber of Commerce and the legal officers of the corporations and organizations that have signed this letter, strongly support proposed Uniform Superior Court Rule 6.8. As discussed in more detail below, the proposed rule provides much needed guidance to Georgia trial courts and litigants (both individuals, small and big businesses, and government at all levels) in addressing the particular challenges associated with discovery of electronically stored information ("ESI"). Enormous volumes of ESI are generated on a daily basis, through e-mail, social media, text messages, video, and other forms of recording, and the amount of such information is growing exponentially each year. These volumes, coupled with the complexity, costs and burdens of storing and retrieving such information, and the difficult issues that can arise when that information is needed in litigation, require that we have clear, consistent "rules of the road" that apply equally to both a divorce case in Atlanta and a business dispute in Albany.

Yet we lack clear authority in our state to guide behavior or prescribe the appropriate resolution of the issues that arise in situations where ESI that should have been preserved in anticipation of litigation is not available. Proposed Rule 6.8 provides that needed direction, and does so with a balanced, well-considered approach that tracks the recently-adopted Rule 37(e) of the Federal Rules of Civil Procedure. The federal rule, which went into effect on December 1, 2015, was the product of years of study and review by a bipartisan committee of judges, leading civil procedure scholars, and a diverse group of attorneys representing virtually every interest imaginable. After extensive public input, the rule was *unanimously* approved by the Judicial

Conference of the United States and the U.S. Supreme Court. This same rule is very much needed here and is the proper subject of a uniform court rule.

I. The Need for, and Merits of Proposed Uniform Superior Court Rule 6.8

The proposed rule provides trial courts specific guidance following the Georgia Supreme Court's recent decision in *Phillips v. Harmon*, 297 Ga. 386 (2015). There, the Court clarified *when* the duty to preserve evidence arises, but left the question of *what* sanctions to impose to the discretion of trial courts. *Id.* at 399. In doing so, the Court cited Court of Appeals' decisions which provide less than clear and potentially inconsistent standards for trial courts to apply in determining the type of sanctions that may be appropriate for failure to preserve evidence, particularly for the imposition of serious sanctions such as an adverse jury instruction or entry of a default judgment. *See, e.g., Johnson v. Riverdale Anesthesia Assocs*., 249 Ga. App. 152, 154 (2001) ("[a] party should only be penalized for destroying documents if it was wrong to do so.") and *AMLI Residential Properties v. Georgia Power Co.*, 293 Ga. App. 358, 363 (2008) ("Exclusionary sanctions may be appropriate where the spoliator has not acted in bad faith.").

This absence of clear and consistent standards results in a lack of predictability in our procedural law, and presents serious risk of varying trial court decisions in cases with similar facts. Under these circumstances, the common advice that lawyers give to their clients is to "keep everything" in order to minimize the potential for serious sanctions in the event of litigation – this advice is impractical as the form and volume of ESI continues to expand at incomprehensible rates. The uncertainty in the law also contributes to parties using discovery motions as a litigation tactic to drive up costs and to force settlements that are not based on the merits of a case. These conditions are incompatible with the basic purpose of our rules of civil procedure—"to secure the just, speedy, and inexpensive determination of every action." O.C.G.A. § 9-11-1. Proposed Rule 6.8 provides clear guidance to the courts when ESI is lost and, importantly, requires a finding of "intent to deprive" before the imposition of serious sanctions—an approach that is consistent with the traditional purpose of spoliation sanctions, *i.e.*, to punish wrongful conduct. *See* FED. R. CIV. P. 37(e) (Advisory Committee Notes, 2015 Amendment) ("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…").

The problems noted above were observed and well-documented in the federal courts prior to the adoption of Rule 37(e), and were attributed to inconsistency in decisions regarding the standard for the imposition of serious sanctions for the loss of ESI. A number of the federal circuit courts, including the Eleventh Circuit, followed the traditional rule that serious spoliation sanctions could only be imposed when it was shown that absence of the evidence was "predicated on bad faith." *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997) ("mere negligence in losing or destroying the records is not enough for an adverse inference, as it does not sustain an inference of consciousness of a weak case.").

However, in *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), the Second Circuit held that "[t]he sanction of an adverse inference may be appropriate in some cases involving the negligent destruction of evidence..." *Id*. at 108. As noted by the Advisory Committee on the Civil Rules, the unclear and inconsistent framework created by these

varying federal decisions forced litigants "to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court [found] that they did not do enough." *See* FED. R. CIV. P. 37(e) (Advisory Committee Notes, 2015 Amendment). Commentators also noted that the inconsistent court rulings led to an undesirable and significant increase in litigation about ESI discovery sanctions. *See* D.H. WILLOUGHBY, ET AL., *Sanctions for E-Discovery Violations: By the Numbers*, 60 Duke Law Journal 789, 795 (Dec. 2010).

To address these problems, the Advisory Committee convened multiple conferences and committees to study and formulate recommendations for changes to the Federal Rules of Civil Procedure, including Rule 37. After years of study and input from a bipartisan committee of judges, leading civil procedure scholars, lawyers representing plaintiffs and defendants, and the public at large,[1] the Advisory Committee, the Judicial Conference of the United States, and the U.S. Supreme Court adopted Federal Rule 37(e) (and other rules), that went into effect on December 1, 2015.[2] New Rule 37(e) rejects cases such as *Residential Funding*, and adopts the traditional rule that the most serious of sanctions require a showing of "intent to deprive" another party of evidence. The new rule provides a clear, uniform standard for the federal courts to apply in order "to bring consistency and coherence to the ways that courts handle claims of failure to preserve ESI" THOMAS Y. ALLMAN, *Preservation and Spoliation Revisited: Is it Time for Additional Rulemaking?*, at 2, 2010 Litigation Review Conference.

Similarly, we believe that proposed Rule 6.8 will provide our trial courts a coherent and well-considered standard to address the failure to preserve ESI, and for the imposition of serious sanctions when there is a finding that a party has acted with the intent to deprive another of evidence. We expect that the Rule will bring consistency and predictability across the state that is sorely needed in this area of our procedural law and, as a result, should reduce unnecessary over-preservation of ESI and curb unproductive litigation tactics. Proposed Rule 6.8 will also allow trial courts to address intentional efforts to avoid discovery obligations through the imposition of serious sanctions. Finally, Rule 6.8 will align Georgia procedure with federal practice, providing parties with consistent rules across state and federal courts, as well as guidance from the Advisory Committee Notes and federal case law development.[3]

II. Propriety of Addressing Sanctions for Failure to Preserve ESI by Uniform Court Rule

Article VI, § 9 of the Georgia Constitution states that "the Supreme Court shall, with the advice and consent of the council of the affected class or classes of trial courts, by order adopt and publish uniform court rules . . . which shall provide for the speedy, efficient, and inexpensive resolution of disputes and prosecutions." Furthermore, O.C.G.A. § 15-1-5 states that "rules of the

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[1] The federal process included over 2,300 written public comments and testimony from over 120 witnesses.
[2] Under the federal rule-making process, the proposed rules were also submitted to Congress which did not intervene to reject or modify them.
[3] *See Barnum v. Coastal Health Services, Inc.*, 288 Ga. App. 209, 215 (2007) ("the Georgia Civil Practice Act was taken from the Federal Rules of Civil Procedure and with slight immaterial variations its sections are substantially identical to corresponding rules. Because of this similarity it is proper that we give consideration and great weight to constructions placed on the Federal Rules by the federal courts.")

respective courts, legally adopted and not in conflict with the Constitution of the United States or of this state, or the laws thereof, are binding and must be observed." *Id* (emphasis added).

Proposed Rule 6.8 may thus be adopted by the Georgia Supreme Court so long as it does not *conflict with* the U.S. Constitution, the Georgia Constitution, or with any law of the United States or of Georgia.[4] *Id*; *see also* GA. UNIF. SUP. CT. R. 1 ("It is not the intention, or 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."); *Fulton Paper Co., Inc. v. Reeves*, 212 Ga. App. 314 (1994) ("it is true that Uniform State Court Rules must give way to the Civil Practice Act whenever a conflict exists"); *Valhalla, Inc. v. O'Donnell*, 199 Ga. App. 679, 680 (1991) ("Rule 6.2 must yield to conflicting provisions of the Civil Practice Act"); *Wyse v. Potamkin Chrysler-Plymouth, Inc.*, 189 Ga. App. 64, 65 (1988) ("To the extent the requirements of Uniform Rule 6.2 conflict with this statutory provision, the rule must yield.").

Because proposed Rule 6.8 is not in conflict with any provision of the United States Constitution, the Georgia Constitution, or with any of the laws of the United States or of Georgia, it is proper for the Supreme Court to adopt the rule by order.

That the Supreme Court may properly adopt proposed Rule 6.8 is further supported by the analogous legal framework that led to the adoption of Federal Rule 37(e). Specifically, the Rules Enabling Act authorizes the U.S. Supreme Court to "prescribe general rules of practice and procedure" so long as such rules do not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072. Pursuant to the authority granted by the Rules Enabling Act, the United States Supreme Court adopted Federal Rule 37(e). *See* FED. R. CIV. P. 37(e). Similarly, the Georgia Constitution and O.C.G.A. § 15-1-5 authorize this Court to adopt such a rule of procedure.

Based on the foregoing, it is entirely *proper* for the Georgia Supreme Court to regulate this subject by uniform court rule. Regulation by uniform court rule is also *preferable* to regulation by decisional law or statute.

Decisional law is a poor alternative to uniform court rule under the circumstances. It could take years (if ever) for the appropriate case to make its way to the Supreme Court for resolution, but the need for clear guidance and consistency is immediate. Superior Court judges are on the front lines of resolving these issues, and they have proposed Rule 6.8 to address this immediate need. Their judgment should therefore be given considerable weight, particularly since the proposed rule tracks the thoroughly-vetted Rule 37(e).

For similar reasons, waiting on legislative action is not a preferable approach. Under *Phillips v. Harmon*, Superior Court judges are currently required to address these sanctions issues and they have collectively determined that proposed Rule 6.8 is the best way to do so. To the

extent that the General Assembly determines that a different approach is needed, it can enact legislation to such effect.

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We appreciate your consideration of this matter, and request that the Justices of the Georgia Supreme Court approve proposed Rule 6.8 for the reasons discussed above.

Sincerely,

President and CEO
Georgia Chamber of Commerce

Allstate Insurance Company

American Tort Reform Association

AT&T

Caterpillar Inc.

Ciox Health

Cox Enterprises, Inc.

The Coca-Cola Company

The Coca-Cola Bottlers' Association

CSM Bakery Solutions, Inc.

CSX Transportation

Delta Airlines

Eli Lily and Company

Ford Motor Company

Georgia Bankers Association

Georgia Health Care Association

Georgia Hospital Association

Georgia Association of Manufacturers

Georgia Pacific

Georgia Power

GlaxoSmithKline LLC

Home Depot

Invesco Ltd.

Medical Association of Georgia

Merck Sharp & Dohme Corp.

Mohawk Industries

National Federation of Independent Business

Neenah Paper, Inc.

Norfolk Southern

Novartis Pharmaceuticals Corporation

Pulte Group

SavaSeniorCare, LLC

Shaw Industries

Shell Oil Company

Southern General Insurance Company

Southwire

State Farm

SunTrust

Turner Broadcasting System, Inc.

TSYS

United Parcel Service

U.S. Chamber Institute for Legal Reform