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August 31, 2016

By U.S. Regular Mail and email to
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Ms. Therese S. Barnes
Clerk of the Supreme Court of Georgia
244 Washington St, S.W., Room 572
Atlanta, Georgia 30334

Re: GTLA Comments relating to Proposed Uniform Superior Court
Rule 6.8

Dear Ms. Barnes:

Pursuant to the Supreme Court's request that our organization provide comments on both (I) the merits of proposed Uniform Superior Court Rule 6.8 and (II) the propriety of this subject being regulated by uniform court rule rather than by statute and/or decisional law, please find below the comments of the Georgia Trial Lawyers Association (GTLA) which have been prepared through our Executive Committee and other participating GTLA members.

Summary of GTLA Comments

Aside perhaps from perjury, no act serves to threaten the integrity of the judicial process more than the spoliation of evidence. Our adversarial process is designed to tolerate human failings – erring judges can be reversed, uncooperative counsel can be shepherded, and recalcitrant witnesses compelled to testify. But, when critical documents go missing, judges and litigants alike descend into a world of ad hocery and half measures—and our civil justice system suffers.¹

¹ United Medical Supply Co. v. United States, 77 Fed. Cl. 257,259 (Fed. Cl. 2007).

Every year since 2011, the president of the State Bar of Georgia has empanelled or kept in place an ad hoc committee assigned the task of working out appropriate language for addressing issues related to Electronically Stored Information (ESI) or E-discovery. These various committees have included representatives from the plaintiffs' bar, the defense bar and various industry interests. Hundreds, if not thousands, of hours have been dedicated to researching, drafting, debating and voting on drafts of "e-discovery" bills for submission to the Georgia General Assembly for its consideration. Each of these drafts has been agreed to by at least a majority of the members of the Bar committees and, ultimately, by the State Bar's Board of Governors.

In addition to the State Bar's efforts, on at least two occasions, the Legislature has followed the Bar's urging and attempted to amend the Civil Practice Act (in 2014² and in 2016³) in order to address ESI issues, including spoliation and sanctions therefor, but has failed to produce a suitable amendment for passage by the Georgia General Assembly.

Yet, despite the Court's recitation of these past legislative efforts in the Notice of Proposed Rule now being considered, a bold new initiative is now underway to bypass any further legislative consideration by introducing a procedural rule-making component. This new rule would significantly alter the substantive law of spoliation in Georgia relating to the very topic that the Georgia General Assembly has at least twice considered in the form of an amendment to the Civil Practice Act and in a manner that is strikingly similar to an approach that was twice rejected by the General Assembly. That proposed change would dramatically depart from current substantive law by requiring that before *any* ESI spoliation sanction can be imposed, there must be an express finding that the spoliating party acted in bad faith or with the intent to deprive the adverse party of relevant information. As discussed herein, the Proposed Rule attempts to change the long-standing substantive law of Georgia concerning the duty to preserve evidence that is relevant to potential litigation. To our knowledge, this Court has never attempted to change the substantive law through the rule-making process, and has even cautioned against doing so. For this reason alone, this Proposed Rule should be rejected.

Presently pending the Court's consideration, and upon which these comments are based, is a request by the Council of Superior Court Judges of Georgia to Amend the Uniform Rules for the Superior Courts by adding the following Rule:

² See HB 643, 2013-2014 Reg. Sess. (Ga. 2014).

³ See HB 1017, 2015-2016 Reg. Sess. (Ga. 1016).

Rule 6.8 Failure to Preserve Electronically Stored Information

If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery:

(A) the court, upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(B) the court, only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

- (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;

(C) a party may request or the court may order a hearing. Upon the request of a party, the court shall make findings of fact and conclusions of law.

See Proposed Amendment to the Uniform Superior Court Rules to Add Rule 6.8; Notice of proposed rulemaking (July 19, 2016).

I. THE PROPOSED RULE HAS NOT BEEN ESTABLISHED AS NECESSARY

There has been no showing by the proponents of the proposed Rule 6.8 ("Proposed Rule") that spoliation sanctions are "run amok" in Georgia. To the contrary, the newly Proposed Rule makes any meaningful sanction much harder to impose because it incorporates an "intent to deprive" standard as an absolute prerequisite to any substantive sanctions, starting with an adverse inference as a jury charge. In Georgia, that is a solution in search of a problem that has not been shown to exist, either by data or by anecdote.

Moreover, the proposed "intent to deprive" standard invites early and systematic destruction of ESI by encouraging the development of document

retention policies that provide minimal periods for ESI retention. In practical terms, such systematic schemes – while certainly intentional – will often result in the destruction of relevant evidence even before notice of potential litigation reasonably arises, and will therefore obliterate the legion of cases holding that the “duty to preserve relevant evidence arises when litigation is reasonably foreseeable to the party in control of that evidence.” *Phillips v. Harmon*, 297 Ga. 386, 397, 774 S.E.2d 596, 605 (2015). Georgia has a well-developed body of decisional law to guide trial courts in exercising their discretion to determine whether spoliation has occurred and in fashioning an appropriate remedy when it does. For the Court to throw out the majority of that precedent under the auspices of procedural rule-making is bad policy and a bad idea.

II. IMPROPRIETY OF REGULATING THE LAW OF SPOILIATION BY RULE-MAKING, RATHER THAN BY STATUTE OR DECISIONAL LAW

A. THE DUTY TO PRESERVE EVIDENCE IS A SUBSTANTIVE OBLIGATION THAT CANNOT BE CHANGED THROUGH THIS COURT’S PROCEDURAL RULE-MAKING PROCESSES.

The legal duty to preserve relevant evidence has long-been engrained in Georgia jurisprudence as a matter of substantive law for more than 130 years. *E.g.*, *Mitchell v. State*, 71 Ga. 128, 139 (1883).⁴ Neither the law of spoliation, nor the remedies, is a recent development in Georgia. In the civil context, the duty to preserve documents or tangible evidence, including ESI, arises under common law and is triggered by the existence of pending, threatened, or reasonably foreseeable litigation. *See Phillips, supra* at 397 (“duty to preserve relevant evidence arises when litigation is reasonably foreseeable to the party in control of that evidence”); *Accord Baxley v. Hakiel Indus., Inc.*, 282 Ga. 312, 314, 647 S.E.2d 29, 30 (2007). Spoliation of evidence does not have to be intentional to require a remedy. *Phillips* at 363 (“Exclusionary sanctions may be appropriate where the spoliator has not acted in bad faith”); see also *American Cas. Co. of Reading, Pa. v. Schafer*, 204 Ga. App. 906, 420 S.E.2d 820 (1992) (defendant claimed that he stored documents in a building, but that a tenant in the building must have lost or destroyed the

⁴ Legal duties are obligations to conform to a standard of conduct for the protection of others against unreasonable risks of harm, and can arise either from statute, or by common law principles recognized in the case law. *Rasnick v. Krishna Hosp., Inc.*, 289 Ga. 565, 566–67, 713 S.E.2d 835, 837 (2011).

documents—the defendant was responsible for spoliation if defendant “caused or contributed to the loss of the records”); *Bouve & Mohr, LLC v. Banks*, 274 Ga. App. 758, 762, 618 S.E.2d 650 (2005) (“Sanctions may be imposed against a litigant based on a third party's spoliation of evidence if the third party acted as the litigant's agent in destroying or failing to preserve the evidence.”)

Where spoliation of evidence has been proven to have occurred, Georgia trial courts have appropriately wide discretion under current law in fashioning appropriate remedies based upon the following non-exhaustive factors:

- (1) whether the party seeking sanctions was prejudiced as a result of the destruction of the evidence;
- (2) whether the prejudice could be cured;
- (3) the practical importance of the evidence;
- (4) whether the party who destroyed the evidence acted in good or bad faith; and
- (5) the potential for abuse if expert testimony about the evidence was not excluded.

AMLI Residential Props., Inc. v. Georgia Power Co., 293 Ga. App. 358, 361, 667 S.E.2d 150, 153–54 (2008). Towards this end, Georgia common law provides strong deterrents to spoliation by creating “the presumption that the evidence would have been harmful to the spoliator,” e.g., *Baxley v. Hakiel Indus., Inc.*, 282 Ga. 312, 313, 647 S.E.2d 29, 30 (2007) and Georgia’s evidentiary code provides that “a [rebuttable] presumption arises that the charge or claim against such party is well founded.” O.C.G.A. § 24-14-22 (formerly O.C.G.A. § 24-4-22, originally enacted in 1865). It has also been recognized that “spoliation of critical evidence - for whatever reason - may result in trial by ambush,” *Bridgestone/Firestone N. Am. Tire, LLC v. Campbell*, 258 Ga. App. 767, 771, 574 S.E.2d 923, 927 (2002)(citations omitted), and proof that spoliation has occurred is “a fact rendering summary judgment inappropriate.” *Baxley, supra*, at 313. Thus, the duty to preserve relevant evidence, and the remedies for its destruction, are inherently substantive because they determine and affect the substantive rights, claims and defenses applicable to all litigation.

The Uniform Rules for the Superior Courts were created pursuant to the inherent powers conferred by Article VI, Section IX, Paragraph I of the Georgia Constitution “in order to provide for the speedy, efficient and inexpensive resolution of disputes and prosecutions.” They were not meant to be a vehicle for this Court to either create or displace substantive law regarding the duty to preserve relevant evidence, including ESI. Indeed, the *Preamble* to these rules confirms in very clear terms:

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.

Unif. Sup. Ct. R. 1 Preamble.

Simply stated, under its rule-making powers for trial court procedures, the Georgia Supreme Court “has no inherent rule-making authority to create substantive legal standards that either supplement or contradict existing substantive law.” *Edwards v. State*, 281 Ga. 108, 111, 636 S.E.2d 508, 510 (2006) (citing *Russell v. Russell*, 257 Ga. 177, 356 S.E.2d 884 (1987)). Consequently, the Uniform Superior Court Rules must be read in conjunction with substantive law, and, if a conflict occurs, the Rules must yield to substantive law. *Edwards v. State*, 281 Ga. 108, 111, 636 S.E.2d 508, 510 (2006) (citing *Russell v. Russell*, 257 Ga. 177, 356 S.E.2d 884 (1987)).

As currently phrased, Proposed Rule 6.8 conflicts with, and significantly changes, the existing duties pertaining to the law of evidence spoliation and destruction. Paragraph 6.8(B) of the Proposed Rule provides:

If ***electronically stored information*** that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery:

(B) the court, ***only upon finding that the party acted with the intent to deprive*** another party of the information's use in the litigation may [enter specific sanctions]

Proposed Unif. Sup. Ct. Rule 6.8 (emphasis added.)
.....

Without any statutory or decisional law guidance, the Proposed Rule improperly segregates the legal duty owed for the preservation of ESI from the legal duties imposed for the preservation of all other types of evidence. More significantly, however, it attempts to convert the existing duty to preserve ESI “when litigation is reasonably foreseeable to the party in control of that evidence” to a lesser duty that somehow excuses compliance unless the trial court finds the evidence was excluded with an “***intent to deprive.***” No other evidence preservation duties enjoy this same

proposed safe-harbor. If accepted, ESI would be held to one standard of preservation and all other evidence to another, all at a time when even more evidence, such as medical records, digital imaging and videos, is being electronically stored. Thus, the Proposed Rule does far more than merely provide courts “with a mechanism” to address ESI preservation failures.⁵ It forges a conflict with – and is an impermissible attempt to change – the existing substantive rule of law regarding the rights, duties and obligations to preserve all relevant evidence “when litigation is reasonably foreseeable to the party in control of that evidence.” *Phillips, supra at 397*. Such a change to existing substantive law is not appropriate in the rule-making context.

B. THE GEORGIA GENERAL ASSEMBLY HAS PREVIOUSLY CONSIDERED AND REJECTED THE CHANGES BEING PROPOSED BY RULE 6.8.

After failed legislation in 2014,⁶ the Georgia General Assembly again considered a bill to amend the Georgia Civil Practice Act, which would have added a new subsection (e) to O.C.G.A. § 9-11-37,⁷ similar to the Proposed Rule and FRCP 37(e)⁸ as follows:

(1) If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, and the court finds that there is prejudice to another party from the loss of the information, the court may order measures no greater than necessary to cure the prejudice. ***If the measures are insufficient to cure the prejudice, and further***

⁵ See *Request to Amend the Uniform Rules for the Superior Courts* (May 20, 2016).

⁶ See *supra*, note 2. The American Tort Reform Association included HB 643 on its national “Civil Justice Reform Outlook” agenda, noting that the proposed E-discovery provisions provided “a safe harbor for preservation of certain information.” See <http://www.mag.org/sites/default/files/downloads/atra-outlook-2014.pdf> (last visited Aug. 24, 2016).

⁷ HB 1017, 2016 Ga. Gen. Assem., available at <http://www.legis.ga.gov/Legislation/en-US/display/20152016/HB/1017>.

⁸ The only difference between the Proposed Rule and FRCP Rule 37(e) is the addition in the Proposed Rule of a paragraph (“Paragraph C”) allowing a party to request or the court to order a hearing, where “the court shall make findings of fact and conclusions of law.”

considering the practical importance of the evidence and whether the party who failed to preserve it acted in good or bad faith, the court may instruct the jury that it may presume the information was unfavorable to the party; provided, however, that when the court finds that the party who failed to preserve acted with the intent to deprive potential litigants of the information's use in litigation *or avoid civil, administrative, or criminal sanctions or penalties*, the court may:

(A) Instruct the jury that it shall presume the information was unfavorable to the party; or

(B) *Strike the party's claims or defenses*, dismiss the action, or enter default judgment.

(2) Any party or the court may request a hearing *regarding a party's failure to preserve electronically stored information*. Upon the request of a party, the court shall in its order make findings of fact and conclusions of law. (Emphasis added).

Functionally, HB 1017 would have accomplished much of what FRCP 37(e) does with one major departure – a hearing that requires findings of fact and conclusions of law, as is presently contained in the Proposed Rule pending this Court's consideration.⁹ Legal articles reporting on the proposed legislation touted it as “Bad Policy” that “imposes all the burdens of the 2015 e-discovery amendments to the Federal Rules of Civil Procedure and none of the benefits,” and “terrible” in that it would “fundamentally change how discovery of any stripe will work in every single civil matter filed in Georgia courts.”¹⁰ HB 1017 passed the House Judiciary Committee, but did not receive a floor vote before crossover day.¹¹ The General Assembly did not pass the bill, and its provisions were not incorporated into the Georgia Civil Practice Act. Now, however, an effort is afoot to use the Uniform

⁹ It does not appear from the General Assembly's limited discussion on HB 1017 that a good reason for the inclusion of Paragraph C (or subsection (e)(2) of the proposed O.C.G.A. § 9-11-37(e)) was ever advanced. Nor do the Advisory Committee Notes on the 2015 Amendment squarely address the necessity of a hearing on spoliation of ESI.

¹⁰ <http://www.dailyreportonline.com/id=1202750159861/EDiscovery-Bill-Is-Bad-Policy-but-Will-Keep-Us-Busy-Experts-Write?slreturn=20160722104221>; see also <http://www.gachamber.com/bill-electronic-discovery-expected-increase-costs-burdens/>

¹¹ https://www.gabar.org/committeesprogramssections/programs/leg/weekly_updates.cfm

Rules for the Superior Court to do precisely what the General Assembly declined to do on a topic that is rightfully and solely within the purview of the legislature in amending the existing Georgia Civil Practice Act. This Court must not engage in such a legislative process.

C. THE COURT SHOULD REFRAIN FROM ALTERING THE SUBSTANTIVE LAW OF SPOILIATION THROUGH THE RULE-MAKING PROCESS.

The Georgia Civil Practice Act “governs the procedure in all courts of record of this state in actions of a civil nature. . . .” O.C.G.A. § 9-11-1. It is modeled on the Federal Rules of Civil Procedure. *Synovus Bank v. Peachtree Factory Center, Inc.*, 331 Ga. App. 628, 631 n.2 (2015); *WellStar Health Sys., Inc. v. Kemp*, 324 Ga. App. 629, 633 n.19 (2013). However, one important distinction between the Federal Rules of Civil Procedure and the Georgia Civil Practice Act is how each is adopted. The Federal Rules of Civil Procedure are adopted pursuant to the Rules Enabling Act, 28 U.S.C. §§ 2071 *et seq.* *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 394 (2010). Under this act, the Judicial Conference develops, considers, and proposes rules for adoption by the United States Supreme Court, which either approves or disapproves them. 28 U.S.C. §§ 2072 *et seq.* By contrast, the Georgia Civil Practice Act is codified into Georgia’s statutory law, and additions and amendments thereto are likewise contemplated and voted on by the General Assembly. *Georgia Dept. of Corrections v. Couch*, 295 Ga. 469, 477-80 (2014) (acknowledging the primacy of the General Assembly in enacting the Georgia Civil Practice Act).

The General Assembly’s power and the judiciary’s power must “forever remain separate and distinct.” GA. CONST. Art. 1, §2, ¶ III. It is well settled law in Georgia that the legislature makes the laws and the courts interpret them. *Modern Homes Constr. Co. v. Burke*, 219 Ga. 710, 715 (1964) (“[C]onstruction belongs to the courts, legislation to the legislature. We cannot add a line to the law, nor can the legislature enlarge or diminish a law by construction.”); *Deen v. Stevens*, 287 Ga. 597, 606-07 (2010) (distinguishing between the General Assembly’s constitutionally mandated role to study, analyze, and make policy determinations, and the courts’ role in interpreting the law). In *Anthony v. American General Fin. Svcs., Inc.*, when addressing whether a bank could be liable for its employee notary’s violation of statute, this Court held: “It is not the place of this Court to rewrite statutes to promote policies that are not expressed in the legislation. . . . 287 Ga. 448, 450 (2010). As this Court aptly notes, it can neither rewrite nor create statutes. Instead, the Court must act within the policy determinations and structures enacted by the General

Assembly, regardless of the wisdom or whim of the legislature's policy determinations. *See, e.g. PNC Bank, Nat. Ass'n. v. Smith*, 298 Ga. 818, 825 (2016).

The Georgia Supreme Court, State Bar Association, Chamber of Commerce and the Georgia Trial Lawyers Association have all recognized that spoliation of ESI is an important issue that the General Assembly has struggled to address for years. However, "the doctrine of separation of powers is an immutable constitutional principle which must be strictly enforced." *Etkind v. Suarez*, 271 Ga. 352, 353 (1999) (declining to recognize a cause of action for wrongful birth in the absence of legislative authorization). The Georgia General Assembly has also recognized that spoliation of ESI is an important issue, and attempted to address the substantive issues through proposed legislation and amendments to the Civil Practice Act. Although the legislative efforts may not have succeeded to date, these failed efforts cannot be construed as an invitation for this Court to step in and amend the substantive law through the rule-making process. The proposed rule is a thinly veiled attempt to administratively enact a rule that the legislature has twice rejected with good reason. This Court cannot and should not supplant the role of the General Assembly with its rule-making powers.

Conclusion

For all of the foregoing reasons, GTLA opposes the Court's adoption and approval of the proposed Rule 6.8 through the rule-making process and counsels its rejection as a matter more suited to be decided by the Georgia General Assembly.

On behalf the Georgia Trial Lawyers Association, I am

Respectfully yours,



William (Pope) P. Langdale, III
President, Georgia Trial Lawyers Association