



CHIEF JUDGE J. STEPHEN SCHUSTER
SUPERIOR COURT OF COBB COUNTY
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MARIETTA, GEORGIA 30090

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August 29, 2016

Via Electronic Mail and U.S. Mail

Therese S. Barnes
244 Washington Street SW
Room 572
Atlanta, Georgia 30334

Re: *Proposed Uniform Superior Court Rule 6.8*

Dear Ms. Barnes:

As a Superior Court Judge, I regularly hear disputes that arise when electronically stored information (“ESI”) that should have been preserved in anticipation of litigation was not preserved. These disputes can arise in any type of case in which a litigant owns a computer or a smartphone. These issues occur in divorce cases, custody matters and a wide variety of other civil cases. As electronic devices have become ubiquitous, so too have disputes over failure to preserve ESI. Unfortunately, neither statutory nor decisional law provides trial courts with clear standards for how to handle these disputes. Proposed Rule 6.8 fills this void by providing clear standards for trial courts to follow when adjudicating disputes over failure to preserve ESI. That is why I strongly support the Council of Superior Court Judges’ proposed Rule.

I have reviewed Justice Nahmias’s memorandum seeking comments regarding the proposed Rule, as well as the comment submitted by Judge Purdom of the State Court of DeKalb County. With respect to the propriety of addressing this issue by rule, I have the following comments:

The Georgia Constitution provides 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.” GA. CONST. ART. VI, § 9, ¶ I. A rule may be adopted by the Supreme Court pursuant to this Constitutional provision so long as it does not conflict with the U.S. Constitution, the Georgia Constitution, or with the laws of the United States or the State of Georgia. O.C.G.A. § 15-1-5. As the preamble to the Uniform Superior Court Rules makes clear,

in cases of conflict between a Uniform Rule and substantive law, the Uniform Rule “shall yield to substantive law.” GA. UNIF. SUP. CT. R. 1.

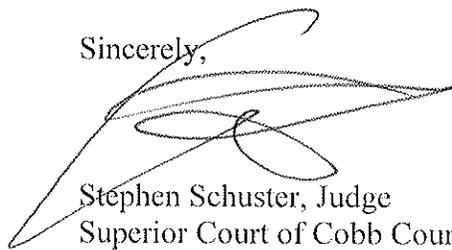
Pursuant to this provision, the Supreme Court is within its authority to consider and approve the proposed Rule. As required by Article VI, § 9 of the Constitution, the Supreme Court has received the advice and consent of the council of the affected class of trial courts—here, the Council of Superior Court Judges of Georgia—which strongly supports the proposal. Most importantly, the proposed Rule does not conflict with any provision of substantive law. As noted above, the problem this Rule addresses is the absence of clear standards or guidance about how to handle the loss of ESI. It is thus entirely proper for the Supreme Court to adopt the proposed Rule. Should the General Assembly later decide that it prefers a different standard, it is free to update the Civil Practice Act accordingly.

With respect to Judge Purdom’s concern that the proposed Rule will invite future litigation, I note that one of the benefits of adopting the Rule, which tracks Federal Rule 37(e), is that doing so will align Georgia procedure with Federal procedure. This will give courts and litigants throughout Georgia the benefit of the guidance provided by decisions interpreting the Federal rule, as well as the Federal Advisory Committee’s notes. Under the current state of affairs, *i.e.*, the absence of clear standards, we have unnecessary discovery motion practice. After nearly a year of experience under FRCP 37(e) a recent review of the cases indicate that discovery motion practice has been reduced in the federal system and federal courts have been providing useful guidance interpreting the new rule. *See* E-Discovery Sanctions Way Down From Previous Years, *Law 360*, August 23, 2016.

Finally, with respect to Judge Purdom’s concern that the proposed Rule will require that elected trial court judges make explicit findings of “intentional deceit,” as trial court judges we are all called on to make difficult decisions that adversely affect the litigants before us, even though those litigants may be voters.

For the foregoing reasons, I strongly recommend that the Supreme Court adopt proposed Uniform Superior Court Rule 6.8.

Sincerely,



Stephen Schuster, Judge
Superior Court of Cobb County