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August 29, 2016

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

Re: Proposed Rule 6.8

Dear Ms. Barnes:

On behalf of Lawyers for Civil Justice (LCJ), I write to urge the Georgia Supreme Court to adopt proposed Uniform Superior Court Rule 6.8.

Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, defense trial lawyer organizations and law firms that promotes excellence and fairness in the civil justice system to secure the just, speedy and inexpensive determination of civil cases. For over 29 years, LCJ has been working to reform civil rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation. LCJ was closely engaged in the federal rulemaking process that led to the creation and adoption of FRCP 37(e).

The reason it is important for Georgia to adopt Rule 6.8 is that preservation of electronically stored information (ESI) has developed into one of the major cost drivers in litigation. The lack of a coherent and workable preservation standard, which is exacerbated by the explosion in the volume of electronic records, has created an environment in which ancillary litigation about preservation thrives.

In jurisdictions without clearly defined preservation rules, preservation issues are decided on a case-by-case basis by courts that have created their own *ad hoc* "litigation hold" procedures. Parties struggle to draw the line on the scope of preservation—especially in the period prior to commencement of litigation—and are often forced to incur extraordinary expenses in an attempt to meet the most stringent requirements and a zero tolerance for error even without any improper intent. Organizations must divert resources to "defensive preservation" and individual litigants are faced with costly spoliation/sanctions battles that they simply do not have the economic resources

*Member, Executive Committee

to fight.¹ There has been a dramatic escalation in reported decisions on the topic, indicating the tip of an iceberg of motion practice and unfairness.²

The only alternative to costly over-preservation is to risk severe and embarrassing sanctions for failing to preserve what might be pertinent ESI but which almost always is not needed for the litigation. Many courts impose severe inconsistent sanctions, such as an adverse-inference jury instruction, on the basis of a party's unintentional failure to meet *ad hoc* requirements that do not exist in any rule.

In other words, the lack of a clear preservation rule forces a Hobson's Choice: Preserve too much, incurring high storage costs, significant burdens on custodians, and the resulting challenges of analysis and production of huge volumes of information, or preserve too little, and face the risk of second-guessing with spoliation allegations that can result in a case-altering jury instruction that a party acted wrongfully (even without a finding of improper intent or bad faith), which inevitably causes an adverse judgment.

Often lost in this discussion is that fact that most of the information subject to preservation has almost no direct relevance to the claims or defenses at issue. For example, Microsoft Corporation reported in 2011 that that "[f]or every 2.3 MB of data that are actually used in litigation, Microsoft preserves 787.5 GB of data—a ratio of 340,000 to 1."³ In terms of numbers of pages, Microsoft reported that in its average case, 48,431,250 pages are preserved, but only 142 are actually used.⁴ Microsoft indicates that these ratios are even more pronounced in 2012 and 2013.

The fear of sanctions and the inability to navigate the conflicting standards has bred an alarming increase in ancillary satellite litigation. Allegations of spoliation are easy to make because, in the absence of clearly defined limits on preservation, something "more" almost always could have been done to preserve digital information.

Proposed Uniform Superior Court Rule 6.8 would provide the much-needed guidance to remedy this situation in Georgia, and would do so with a balanced, well-considered approach. It is based on the recently-adopted Rule 37(e) of the Federal Rules of Civil Procedure, which was the product of years of study and review by a non-partisan committee of judges, leading civil procedure scholars, and a diverse group of attorneys from every aspect of the bar. After extensive public input, the rule was approved by the Judicial Conference of the United States and the U.S. Supreme Court.

¹ *Bozic v. City of Washington*, 912 F. Supp. 2d 257, 260, n. 2 (W.D. Pa. 2012) ("Neither state of affairs is a good one.").

² There has been a dramatic escalation in spoliation motions and rulings since the already elevated levels reported to the 2010 Duke Litigation Conference. *See* Dan H. Willoughby, Jr. et al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L. J. 789, 791 (2010) ("an all-time high").

³ Letter from the Microsoft Corporation to Honorable David G. Campbell, Chair, Advisory Committee on Civil Rules (August 31, 2011).

⁴ *Id.*

We urge the Georgia Supreme Court to adopt proposed Uniform Superior Court Rule 6.8. Thank you for considering LCJ's views.

Sincerely,



Mary Massaron
President