

## NOTICE OF PROPOSED RULE

**To:** Chairman, House Judiciary Committee  
Chairman, Senate Judiciary Committee  
President, State Bar of Georgia  
President, Council of State Court Judges  
President, Georgia Chamber of Commerce  
President, Georgia Trial Lawyers Association

**From:** Justice David E. Nahmias, Liaison Justice for Uniform Rules,  
Supreme Court of Georgia <sup>DN</sup>

**Date:** July 19, 2016

**Re:** Proposed Amendment to the Uniform Superior Court Rules to  
Add Rule 6.8

**Cc:** Chairman, Uniform Rules Committee

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As stated in the attached letter, the Council of Superior Court Judges has asked the Supreme Court to approve a proposed amendment to the Uniform Superior Court Rules adding Rule 6.8. (The other proposed rule referenced in the letter, Rule 48, has since been approved by the Court.) Proposed Rule 6.8 deals with the consequences of a party's failure to preserve electronically stored information (ESI) in civil cases. The proposed rule tracks the amended Federal Rule of Civil Procedure 37 (e), which took effect on December 1 of last year, with the addition of a provision allowing a party to request or the court to order a hearing on the issue and allowing a party to require the court to make findings of fact and conclusions of law upon request.

The proposed rule deals with a subject that has been extensively studied by committees established by the State Bar of Georgia during each of the past three years, resulting in proposed legislation that was introduced but not passed in the 2014 and 2016 sessions of the General Assembly. None of the three committee proposals, and neither of the proposed bills, dealt with the issue of

the failure to preserve ESI in the way that proposed Rule 6.8 does. Indeed, it appears that the main point of contention in both the State Bar process and the legislative process was over this particular issue.

For these reasons, the Supreme Court wants to ensure that the entities that have been most deeply involved in the prior discussions of this subject are specifically notified of proposed Rule 6.8 and have the opportunity to provide comments on the proposal before the Court acts on it. Accordingly, we are sending this notice to the entities listed above. We are also posting it on the Court's website to notify the bar and the public in general, and we encourage its further distribution to anyone who may have an interest in this subject.

**The Court is soliciting comments from all interested persons and entities on both (1) the merits of proposed Uniform Superior Court Rule 6.8 and (2) the propriety of this subject being regulated by uniform court rule rather than by statute and/or decisional law.** Please send any comments to the attention of Therese S. Barnes, Clerk of the Supreme Court of Georgia, by email to [comments@gasupreme.us](mailto:comments@gasupreme.us) (include "Proposed Rule 6.8" in the subject line) or by mail to 244 Washington Street, SW, Room 572, Atlanta, Georgia 30334. **The deadline for receiving comments is September 1, 2016.**



## **Council of Superior Court Judges of Georgia**

Suite 104, 18 Capitol Square, Atlanta, Georgia 30334

(404) 656-4964 Fax (404) 651-8626

May 20, 2016

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

**Re: Request to Amend the Uniform Rules for the Superior Courts:**

**Rule 6.8 Failure to Preserve Electronically Stored Information**

**Rule 48 INQUIRY REGARDING WEAPONS CARRY LICENSE**

Dear Ms. Barnes:

I enclose proposed amendments to the Uniform Rules for the Superior Court pursuant to Section XVII of the Rules of the Supreme Court, for filing with the Clerk.

New Rule 6.8 provides courts with a mechanism to address the failure of a party to preserve electronically stored information in civil cases. The proposed rule largely tracks Rule 37 (e) of the Federal Rules of Civil Procedure, with one additional paragraph: a party may request or the court may order a hearing, and the court shall make findings of fact and conclusions of law upon the request of a party.

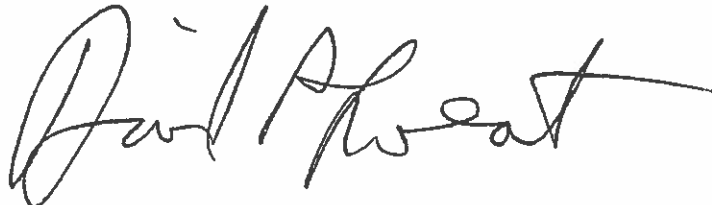
The Council of Superior Court Judges drafted new Rule 48 pursuant to the statutory mandate of OCGA § 16-11-129(e). The statute provides that, in certain circumstances, a court must inquire whether a person before it has a weapons carry license and, if so, the statute directs the court to notify the judge of the probate court which issued the license.

Ms. Tee S. Barnes  
Clerk of the Supreme Court of Georgia  
May 20, 2016

The Council published notice of the proposed amendments in the Georgia Bar Journal, Vol. 21, No. 2, the October 2015 edition, for comment. The Council approved the proposed changes at its business meeting on January 21, 2016. The Council requests that the Supreme Court amend the Uniform Rules to include these provisions.

If the Court has any questions about these proposed amendments, I will be happy to provide additional information.

Cordially,

A handwritten signature in black ink that reads "David R. Sweat". The signature is written in a cursive style with a large, looping initial "D" and a long horizontal stroke at the end.

David R. Sweat  
Chair, Uniform Rules Committee  
Council of Superior Court Judges

Enclosure

cc: Hon. David Nahmias  
Hon. Horace Johnson

**PROPOSED AMENDMENTS TO THE  
UNIFORM RULES FOR SUPERIOR COURT,  
APPROVED FOR SECOND READING, JANUARY 21, 2016**

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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:

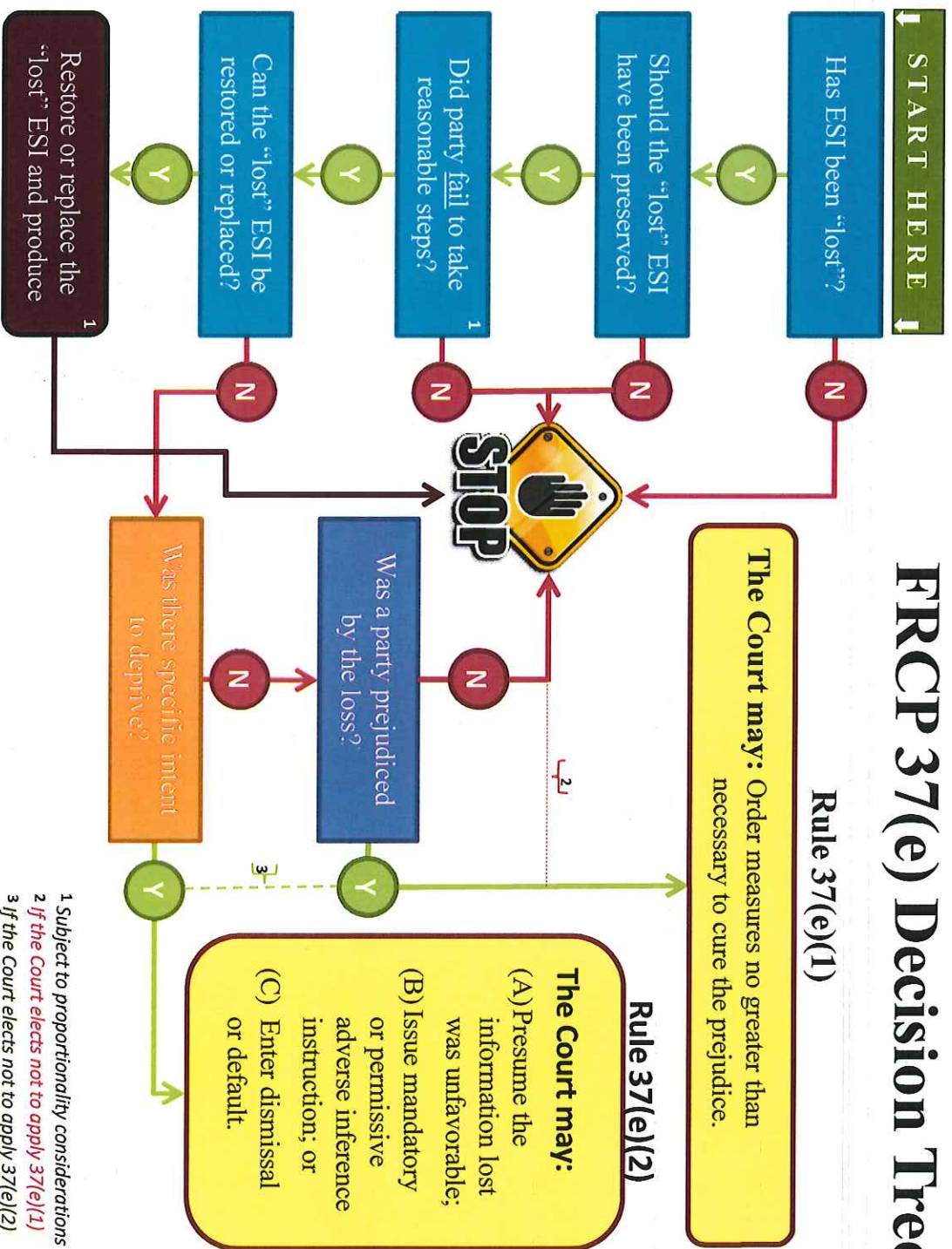
(1) presume that the lost information was unfavorable to the party;

(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.

# FRCP 37(e) Decision Tree



<sup>1</sup> Subject to proportionality considerations  
<sup>2</sup> If the Court elects not to apply 37(e)(1)  
<sup>3</sup> If the Court elects not to apply 37(e)(2)