

House Bill 643 (COMMITTEE SUBSTITUTE)

By: Representatives Willard of the 51st, Lindsey of the 54th, Jacobs of the 80th, Ramsey of the 72nd, Welch of the 110th, and others

A BILL TO BE ENTITLED
AN ACT

1 To amend Chapter 11 of Title 9 of the Official Code of Georgia Annotated, relating to the
2 "Georgia Civil Practice Act," so as to change provisions relating to general provisions
3 governing discovery; to provide for discovery of electronically stored information; to provide
4 for preservation of electronically stored information; to change provisions relating to when
5 an interrogatory answer allows the option to produce business records; to change provisions
6 relating to production of documents and things and entry upon land for inspection and other
7 purposes; to correct cross-references; to change provisions relating to failure to make
8 discovery; to change provisions relating to subpoenas for taking depositions; to provide for
9 related matters; to provide an effective date; to repeal conflicting laws; and for other
10 purposes.

11 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

12 style="text-align:center">**SECTION 1.**

13 Chapter 11 of Title 9 of the Official Code of Georgia Annotated, relating to the "Georgia
14 Civil Practice Act," is amended by revising Code Section 9-11-26, relating to general
15 provisions governing discovery, as follows:

16 "9-11-26.

17 (a) **Discovery methods.** Parties may obtain discovery by one or more of the following
18 methods: depositions upon oral examination or written questions; written interrogatories;
19 production of documents or things or permission to enter upon land or other property for
20 inspection and other purposes; physical and mental examinations; and requests for
21 admission. Unless the court orders otherwise under subsection (c) of this Code section, the
22 frequency of use of these methods is shall not be limited.

23 (b) **Scope of discovery.** Unless otherwise limited by order of the court in accordance with
24 this chapter, the scope of discovery is shall be as follows:

25 (1) **In general.** Parties may obtain discovery regarding any matter, not privileged, which
26 is relevant to the subject matter involved in the pending action, whether it relates to the

27 claim or defense of the party seeking discovery or to the claim or defense of any other
 28 party subject to the limitations identified in paragraph (2) of this subsection, including the
 29 existence, description, nature, custody, condition, and location of any books, documents,
 30 electronically stored information, or other tangible things and the identity and location
 31 of persons having knowledge of any discoverable matter. It ~~is~~ shall not be ground for
 32 objection that the information sought will be inadmissible at the trial if the information
 33 sought appears reasonably calculated to lead to the discovery of admissible evidence;

34 **(2) Limitations on frequency and extent of discovery.**

35 (A) The discovery methods set forth in subsection (a) of this Code section shall be
 36 limited by the court upon its own initiative after reasonable notice to the parties or
 37 pursuant to a motion under subsection (c) of this Code section if the court determines
 38 that:

- 39 (i) The discovery sought is unreasonably cumulative or duplicative;
 40 (ii) The discovery sought is obtainable from some other source that is more
 41 convenient, less burdensome, or less expensive;
 42 (iii) The party seeking discovery has had ample opportunity by discovery in the
 43 action to obtain the information sought; or
 44 (iv) The burden or expense of the proposed discovery outweighs its likely benefit
 45 considering what is proportional to the needs of the case, the amount in controversy,
 46 the parties' resources, the importance of the issues at stake in the civil action, and the
 47 importance of the discovery in resolving the issues.

48 (B) In addition to any limitation imposed pursuant to subparagraph (A) of this
 49 paragraph, discovery of electronically stored information shall be subject to the
 50 limitations set forth in subsection (b) of Code Section 9-11-34;

51 ~~(2)~~(3) **Insurance agreements.** A party may obtain discovery of the existence and
 52 contents of any insurance agreement under which any person carrying on an insurance
 53 business may be liable to satisfy part or all of a judgment which may be entered in the
 54 action or to indemnify or reimburse for payments made to satisfy the judgment.
 55 Information concerning the insurance agreement is not by reason of disclosure admissible
 56 in evidence at trial. For purposes of this paragraph, an application for insurance shall not
 57 be treated as part of an insurance agreement;

58 ~~(3)~~(4) **Trial preparation; materials.**

59 (A) Subject to paragraph ~~(4)~~ (5) of this subsection, a party may obtain discovery of
 60 documents and tangible things otherwise discoverable under paragraph (1) of this
 61 subsection and prepared in anticipation of litigation or for trial by or for another party
 62 or by or for that other party's representative, ~~(including his~~ the party's attorney,
 63 consultant, surety, indemnitor, insurer, or agent), only upon a showing that the party

64 seeking discovery has substantial need of the materials in the preparation of his or her
 65 case and that ~~he~~ the party is unable without undue hardship to obtain the substantial
 66 equivalent of the materials by other means. In ordering discovery of such materials
 67 when the required showing has been made, the court shall protect against disclosure of
 68 the mental impressions, conclusions, opinions, or legal theories of an attorney or other
 69 representative of a party concerning the litigation. A party may obtain, without the
 70 required showing, a statement concerning the action or its subject matter previously
 71 made by ~~that~~ such party. Upon request, a person not a party may obtain, without the
 72 required showing, a statement concerning the action or its subject matter previously
 73 made by ~~that~~ such person. If the request is refused, the person may move for a court
 74 order. Paragraph (4) of subsection (a) of Code Section 9-11-37 applies to the award of
 75 expenses incurred in relation to the motion.

76 (B) For purposes of this paragraph, a 'statement previously made' is:

77 ~~(A)~~(i) A a written statement signed or otherwise adopted or approved by the person
 78 making it; or

79 ~~(B)~~(ii) A a stenographic, mechanical, electrical, or other recording, or a
 80 transcription thereof, which is a substantially verbatim recital of an oral statement
 81 by the person making it and contemporaneously recorded; ~~and~~

82 ~~(4)~~(5) **Trial preparation; experts.** Discovery of facts known and opinions held by
 83 experts, otherwise discoverable under paragraph (1) of this subsection and acquired or
 84 developed in anticipation of litigation or for trial, may be obtained only as follows:

85 (A)(i) A party may, through interrogatories, require any other party to identify each
 86 person whom the other party expects to call as an expert witness at trial, to state the
 87 subject matter on which the expert is expected to testify, and to state the substance of
 88 the facts and opinions to which the expert is expected to testify and a summary of the
 89 grounds for each opinion.

90 (ii) A party may obtain discovery under Code Section 9-11-30, 9-11-31, or 9-11-34
 91 from any expert described in this paragraph, the same as any other witness, but the
 92 party obtaining discovery of an expert hereunder must pay a reasonable fee for the
 93 time spent in responding to discovery by that expert, subject to the right of the expert
 94 or any party to obtain a determination by the court as to the reasonableness of the fee
 95 so incurred;

96 (B) A party may discover facts known or opinions held by an expert who has been
 97 retained or specially employed by another party in anticipation of litigation or
 98 preparation for trial and who is not expected to be called as a witness at trial, only as
 99 provided in subsection (b) of Code Section 9-11-35 or upon a showing of exceptional

100 circumstances under which it is impracticable for the party seeking discovery to obtain
 101 facts or opinions on the same subject by other means; and

102 (C) Unless manifest injustice would result:

103 (i) The court shall require the party seeking discovery to pay the expert a reasonable
 104 fee for time spent in responding to discovery under subparagraph (B) of this
 105 paragraph; and

106 (ii) With respect to discovery obtained under division (ii) of subparagraph (A) of this
 107 paragraph, the court may require, and with respect to discovery obtained under
 108 subparagraph (B) of this paragraph the court shall require, the party seeking discovery
 109 to pay the other party a fair portion of the fees and expenses reasonably incurred by
 110 the latter party in obtaining facts and opinions from the expert; and

111 **(6) Claiming privilege or protecting trial preparation materials.**

112 **(A) Information withheld.** When a party withholds information otherwise
 113 discoverable by claiming that the information is privileged or subject to protection as
 114 trial preparation material, the party shall:

115 (i) Expressly make the claim; and

116 (ii) Describe the nature of the documents, communications, or tangible things not
 117 produced or disclosed and do so in a manner that, without revealing information itself
 118 privileged or protected, will enable other parties to assess such claim.

119 Contemporaneously with the service of the discovery response in which a claim of
 120 privilege or protection as trial preparation or attorney work product material is made,
 121 or within a time mutually agreed upon by the parties or ordered by the court, the party
 122 asserting the privilege or protection shall serve a privilege log, which at a minimum
 123 shall provide the following information:

124 (I) The author and all recipients of the documents, communications, or tangible
 125 things;

126 (II) The date the documents, communications, or tangible things were created;

127 (III) A description of the documents, communications, or tangible things;

128 (IV) The nature of the privilege or protection claimed;

129 (V) Whether the author and recipients are attorneys for the party or are outside
 130 counsel for the party; and

131 (VI) Whether the documents, communications, or tangible things have previously
 132 ever been produced or made available to the public.

133 **(B) Information produced.** If information produced in discovery is subject to a claim
 134 of privilege or of protection as trial preparation material, the party making the claim
 135 shall promptly notify after learning of such material's inadvertent production any party

136 that received the information of the claim and the basis for it. The producing party shall
 137 preserve the information until the claim is resolved. After being notified, a party:
 138 (i) Shall promptly return, sequester, or destroy the specified information and any
 139 copies thereof;
 140 (ii) Shall not use or disclose the information until the claim is resolved;
 141 (iii) Shall take reasonable steps to retrieve the information if the party disclosed it
 142 before being notified; and
 143 (iv) May promptly present the information to the court for in camera review for
 144 determination of the claim.

145 (c) **Protective orders.**

146 (1) Upon motion by a party or by the person who is, or who may be, subject to a request
 147 to preserve documents, electronically stored information, or tangible things, or from
 148 whom discovery is sought and for good cause shown, the court in which the action is
 149 pending or, alternatively, on matters relating to a deposition, the court in the county
 150 where the deposition is to be taken may make any order which justice requires to protect
 151 a party or person from annoyance, embarrassment, oppression, or undue burden or
 152 expense, including one or more of the following:

- 153 ~~(1)~~(A) That the discovery not be had;
- 154 ~~(2)~~(B) That the discovery may be had only on specified terms and conditions, including
 155 a designation of the time or place;
- 156 ~~(3)~~(C) That the discovery may be had only by a method of discovery other than that
 157 selected by the party seeking discovery;
- 158 ~~(4)~~(D) That certain matters not be inquired into or that the scope of the discovery be
 159 limited to certain matters;
- 160 ~~(5)~~(E) That discovery be conducted with no one present except persons designated by
 161 the court;
- 162 ~~(6)~~(F) That a deposition, after being sealed, be opened only by order of the court;
- 163 ~~(7)~~(G) That a trade secret or other confidential research, development, or commercial
 164 information not be disclosed or be disclosed only in a designated way; ~~or~~
- 165 ~~(8)~~(H) That the parties simultaneously file specified documents or information
 166 enclosed in sealed envelopes to be opened as directed by the court; or
- 167 (I) That the terms of preservation be specified, including, if applicable, relieving a
 168 party from preserving certain documents, electronically stored information, or tangible
 169 things.
- 170 (2)(A) A party seeking a protective order on the basis that electronically stored
 171 information sought is from a source identified as not reasonably accessible because of
 172 undue burden or cost has the burden of showing that such basis exists. If the showing

173 is made, the court may nonetheless order discovery from the source if the requesting
 174 party shows good cause but only after considering the limitations set forth in paragraph
 175 (2) of subsection (b) of this Code section.

176 (B) If the a motion for a protective order is denied in whole or in part, the court may,
 177 on such terms and conditions as are just, order that any party or person preserve
 178 documents, electronically stored information, or tangible things or provide or permit
 179 discovery. Paragraph (4) of subsection (a) of Code Section 9-11-37 applies shall apply
 180 to the award of expenses incurred in relation to the motion.

181 (C) The court shall not consider a motion for a protective order unless the movant
 182 certifies that he or she has in good faith conferred or attempted to physically meet or
 183 to confer by telephone with the other affected parties in an effort to resolve the dispute
 184 without court action.

185 (d) **Sequence and timing of discovery.** Unless the court, upon motion, for the
 186 convenience of parties and witnesses and in the interests of justice, orders otherwise,
 187 methods of discovery may be used in any sequence; and the fact that a party is conducting
 188 discovery, whether by deposition or otherwise, shall not operate to delay any other party's
 189 discovery.

190 (e) **Supplementation of responses.** A party who has responded to a request for discovery
 191 with a response that was complete when made is under no duty to supplement his or her
 192 response to include information thereafter acquired, except as follows:

193 (1) A party is under a duty seasonably to supplement his or her response ~~with respect to~~
 194 any question directly addressed to:

195 (A) The identity and location of persons having knowledge of discoverable matters;
 196 and

197 (B) The identity of each person expected to be called as an expert witness at trial, the
 198 subject matter on which he or she is expected to testify, and the substance of his or her
 199 testimony.;

200 (2) A party is under a duty seasonably to amend a prior response if he or she obtains
 201 information upon the basis of which:

202 (A) He or she knows that the response was incorrect when made; or

203 (B) He or she knows that the response, though correct when made, is no longer true
 204 and the circumstances are such that a failure to amend the response is, in substance, a
 205 knowing concealment.; and

206 (3) A duty to supplement responses may be imposed by order of the court, agreement of
 207 the parties, or at any time prior to trial through new requests for supplementation of prior
 208 responses.

209 (f) Voluntary or court ordered discovery meetings, discovery plans, discovery
210 conferences.

211 (1)(A) Upon the agreement of the parties, or pursuant to a court order, the parties to a
212 civil action may be jointly responsible for arranging a meeting on the subject of
213 discovery, for being prepared to discuss a discovery plan, and for attempting in good
214 faith to agree on a discovery plan or for agreeing that a discovery plan is unnecessary.

215 (B) A discovery meeting may be held by telephone, by video conference, or in person,
216 or a combination thereof, unless the court, on motion, orders the parties to attend in
217 person.

218 (C) A discovery meeting shall be held as agreed by the parties or as ordered by the
219 court, and the parties may submit to the court the agreed upon discovery plan, a
220 stipulation indicating that the parties have agreed that no discovery plan is necessary,
221 or a joint report detailing those parts of the discovery plan upon which they agree and
222 the position of each of the parties on the parts of the discovery plan upon which they
223 disagree.

224 (D) Unless the parties agree otherwise, the first plaintiff listed in the civil action shall
225 be responsible for submitting the discovery plan or joint report.

226 (2) During a discovery meeting, the parties shall:

227 (A) Consider the nature and basis of the parties' claims and defenses and the
228 possibilities for promptly settling or resolving the claims;

229 (B) Resolve any issues regarding the scope of preservation of electronically stored
230 information; and

231 (C) Discuss the preparation of a discovery plan as set forth in paragraph (3) of this
232 subsection, if a discovery plan is necessary.

233 (3) A discovery plan shall contain the following:

234 (A) A statement of the discovery issues as they then appear;

235 (B) A proposed plan and schedule of discovery, including the discovery of
236 electronically stored information;

237 (C) If appropriate under the circumstances of the case, a reference to the scope of
238 preservation of electronically stored information, including conditions for terminating
239 the duty to preserve in whole or in part prior to final resolution of the civil action;

240 (D) The media form, format, and procedures by which electronically stored
241 information will be produced, including technical specifications related to any load files
242 and the identification of any metadata to be produced;

243 (E) Sources of electronically stored information identified as not reasonably accessible
244 because of undue burden or costs under paragraph (2) of subsection (c) of this Code
245 section;

246 (F) The method for asserting or preserving claims of privilege or protection of the
 247 information as trial preparation or attorney work product materials if different from that
 248 provided in paragraph (6) of subsection (b) of this Code section;

249 (G) The method for asserting or preserving confidentiality and proprietary status and
 250 any other matters addressed by the parties;

251 (H) Any limitations proposed to be placed on discovery, including, if appropriate under
 252 the circumstances of the case, that discovery be conducted in phases or be limited to or
 253 focused on particular issues;

254 (I) When discovery should be completed; and

255 (J) If appropriate under the circumstances of the civil action, any limitations or
 256 conditions pursuant to subsection (c) of this Code section.

257 (4) If the parties are unable to agree to a discovery plan at a discovery meeting, the
 258 parties, upon motion of any party, may be ordered to appear before the court for a
 259 discovery conference at which the court may order the entry of a discovery plan after
 260 consideration of the report submitted pursuant to paragraph (1) of this subsection and the
 261 position of the parties. For the discovery conference, each party may submit a brief
 262 statement of the issues in contention along with a proposal for reaching a resolution to
 263 all contested discovery issues. The court order may address other matters, including the
 264 issuance of a protective order and, when necessary, an allocation of reasonable actual
 265 costs for duplicating documents to be produced or producing copies of electronically
 266 stored information. The court may enter a discovery order, which may be altered or
 267 amended as justice may require. Such discovery order shall take into account the scope
 268 and limitations described in subsection (b) of this Code section. The court may combine
 269 the discovery conference with a pretrial conference authorized by Code Section 9-11-16.
 270 (5) Even if the parties initially agree that a discovery plan is not needed, at any time after
 271 commencement of a civil action, upon motion of a party, or upon the court's initiation,
 272 the court may direct the parties to appear before it for a discovery conference.
 273 (6) Nothing in this subsection shall alter a party's right to serve discovery or a party's
 274 duty to respond to discovery."

275 **SECTION 2.**

276 Said chapter is further amended by revising paragraph (5) of subsection (b) of Code
 277 Section 9-11-30, relating to depositions upon oral examination, as follows:

278 **"(5) Production of documents and things.** The notice to a party deponent may be
 279 accompanied by a request made in compliance with Code Section 9-11-34 for the
 280 production of documents, electronically stored information, and tangible things at the

281 taking of the deposition. The procedure of Code Section 9-11-34 shall apply to the
282 request."

283 **SECTION 3.**

284 Said chapter is further amended by revising subsection (c) of Code Section 9-11-33, relating
285 to interrogatories to parties, as follows:

286 "(c) **Option to produce business or personal records.** ~~When~~ Where the answer to an
287 interrogatory may be ~~derived or ascertained from the~~ determined by examining, auditing,
288 compiling, abstracting, or summarizing a party's business or personal records of the party
289 upon whom the interrogatory has been served or from an examination, audit, or inspection
290 of such business records, or from a compilation, abstract, or summary based thereon,
291 including electronically stored information, and the burden of deriving or ascertaining the
292 answer is substantially the same for the party serving the interrogatory as for the party
293 served, it is a sufficient answer to the interrogatory to specify the records from which the
294 answer may be derived or ascertained and to afford to the party serving the interrogatory
295 either party, the responding party may answer by:

296 (1) Specifying the records that must be reviewed in sufficient detail so as to enable the
297 interrogating party to locate and identify such records as readily as the responding party
298 could locate and identify such records; and

299 (2) Giving the interrogating party a reasonable opportunity to examine, audit, or inspect
300 such records and to make copies, compilations, abstracts, or summaries."

301 **SECTION 4.**

302 Said chapter is further amended by revising Code Section 9-11-34, relating to production of
303 documents and things and entry upon land for inspection and other purposes, as follows:

304 "9-11-34.

305 (a) **Scope.** Any party may serve on any other party a request:

306 (1) To produce and permit the party making the request, or someone acting on his behalf
307 of the party, to inspect and copy any designated documents (including writings, drawings,
308 graphs, charts, photographs, phono-records, and other data compilations from which
309 information can be obtained, translated, if necessary, by the respondent through detection
310 devices into reasonably usable form), or to inspect and copy, test, or sample any
311 designated documents, electronically stored information, or tangible things which
312 constitute or contain matters within the scope of subsection (b) of Code Section 9-11-26
313 and which are in the possession, custody, or control of the party upon whom the request
314 is served; or

315 (2) To permit entry upon designated land or other property in the possession or control
 316 of the party upon whom the request is served for the purpose of inspection and
 317 measuring, surveying, photographing, testing, or sampling the property or any designated
 318 object or operation thereon, within the scope of subsection (b) of Code Section 9-11-26.

319 **(b) Procedure.**

320 (1) The request may, without leave of court, be served upon the plaintiff after
 321 commencement of the action and upon any other party with or after service of the
 322 summons and complaint upon that party. The request shall set forth the items to be
 323 inspected, either by individual item or by category, and describe each item and category
 324 with reasonable particularity. The request shall specify a reasonable time, place, and
 325 manner of making the inspection and performing the related acts. The request may
 326 specify the form in which electronically stored information shall be produced.

327 (2) The party upon whom the request is served shall serve a written response within 30
 328 days after the service of the request, except that a defendant may serve a response within
 329 45 days after service of the summons and complaint upon that defendant. The court may
 330 allow a shorter or longer time. The response shall state, with respect to each item or
 331 category, that inspection and related activities will be permitted as requested, unless the
 332 request is objected to, in which event the reasons for objection shall be stated. If
 333 objection is made to part of an item or category, the part shall be specified. In addition
 334 to other bases for objection, the response may state an objection to production of
 335 electronically stored information from sources that the party identifies as not reasonably
 336 accessible because of undue burden or cost. The response shall state any objection to a
 337 requested form for producing electronically stored information. If the responding party
 338 objects to a requested form or if no form is specified in the request, the responding party
 339 shall state the form it intends to use. The party submitting the request may move for an
 340 order under subsection (a) of Code Section 9-11-37 with respect to any objection to or
 341 other failure to respond to the request or any part thereof, or any failure to permit
 342 inspection as requested.

343 (3) Unless otherwise stipulated by the parties or ordered by the court, the following
 344 procedures shall apply to producing documents or electronically stored information:

345 (A) A party shall produce documents as they are kept in the usual course of business
 346 or shall organize and label documents to correspond to the categories in the request;

347 (B) If a request does not specify a form for producing the electronically stored
 348 information, a party shall produce such information in a reasonably usable form; and

349 (C) A party shall not be required to produce the same electronically stored information
 350 in more than one form.

351 (c) **Applicability to nonparties.**

352 (1) This Code section shall also be applicable ~~with respect~~ to discovery against persons,
 353 firms, or corporations who are not parties, in which event a copy of the request shall be
 354 served upon all parties of record; or, upon notice, the party desiring such discovery may
 355 proceed by taking the deposition of the person, firm, or corporation on oral examination
 356 or upon written questions under Code Section 9-11-30 or 9-11-31. A party requesting
 357 discovery from a nonparty shall take reasonable steps to avoid imposing undue burden
 358 or expense on the nonparty. The nonparty or any party may file an objection as provided
 359 in subsection (b) of this Code section. If the party desiring such discovery moves for an
 360 order under subsection (a) of Code Section 9-11-37 to compel discovery, he or she shall
 361 make a showing of good cause to support his or her motion. Such motion shall include
 362 a certification that the movant has attempted in good faith to meet and confer with the
 363 nonparty to resolve the dispute. The court shall enforce the requesting party's duty to take
 364 reasonable steps to avoid imposing undue burden or expense on a nonparty and may
 365 award reasonable attorney's fees and expenses of litigation against a party who fails to
 366 comply with this duty. The requesting party shall pay reasonable costs associated with
 367 the retrieval, production, conversion, and formatting of the requested electronically stored
 368 information by nonparties. The party making a request under this Code section shall,
 369 upon request from any other party to the action, make all reasonable efforts to cause all
 370 information produced in response to the nonparty request to be made available to all
 371 parties and may require the payment of a reasonable document copying charge. ~~A~~
 372 ~~reasonable document copying charge may be required.~~

373 (2) This Code section shall also be applicable ~~with respect~~ to discovery against a
 374 nonparty who is a practitioner of the healing arts or a hospital or health care facility,
 375 including those operated by an agency or bureau of the state or other governmental unit.
 376 Where such a request is directed to such a nonparty, a copy of the request shall be served
 377 upon the person whose records are sought by certified mail or statutory overnight
 378 delivery, return receipt requested, or, if known, ~~that~~ such person's counsel, and upon all
 379 other parties of record in compliance with Code Section 9-11-5; where such a request to
 380 a nonparty seeks the records of a person who is not a party, a copy of the request shall be
 381 served upon the person whose records are sought by certified mail or statutory overnight
 382 delivery, return receipt requested, or, if known, ~~that~~ such person's counsel by certified
 383 mail or statutory overnight delivery, return receipt requested, and upon all parties of
 384 record in compliance with Code Section 9-11-5; or, upon notice, the party desiring such
 385 discovery may proceed by taking the deposition of the person, firm, or corporation on
 386 oral examination or upon written questions under Code Section 9-11-30 or 9-11-31. The
 387 nonparty, any party, or the person whose records are sought may file an objection with

388 the court in which the action is pending within 20 days of service of the request and shall
 389 serve a copy of such objection on the nonparty to whom the request is directed, who shall
 390 not furnish the requested materials until further order of the court, and on all other parties
 391 to the action. Upon the filing of such objection, the party desiring such discovery may
 392 move for an order under subsection (a) of Code Section 9-11-37 to compel discovery and,
 393 if he or she shall make a showing of good cause to support his or her motion, discovery
 394 shall be allowed. If no objection is filed within 20 days of service of the request, the
 395 nonparty to whom the request is directed shall promptly comply therewith.

396 (3) For any discovery requested from a nonparty pursuant to paragraph (2) of this
 397 subsection or a subpoena requesting records from a nonparty pursuant to Code Section
 398 9-11-45, when the nonparty to whom the discovery request is made is not served with an
 399 objection and the nonparty produces the requested records, the nonparty shall be immune
 400 from regulatory, civil, or criminal liability or damages notwithstanding that the produced
 401 documents contained confidential or privileged information.

402 (d) **Confidentiality.** The provisions of this Code section shall not be deemed to repeal the
 403 confidentiality provided by Code Sections 37-3-166 concerning mental illness treatment
 404 records, 37-4-125 concerning ~~mental-retardation~~ developmental disability treatment
 405 records, 37-7-166 concerning alcohol and drug treatment records, 24-9-40.1 concerning the
 406 confidential nature of AIDS information, and 24-9-47 concerning the disclosure of AIDS
 407 information; provided, however, that a person's failure to object to the production of
 408 documents as set forth in paragraph (2) of subsection (c) of this Code section shall waive
 409 any right of recovery for damages as to the nonparty for disclosure of the requested
 410 documents."

411 **SECTION 5.**

412 Said chapter is further amended by revising Code Section 9-11-34.1, relating to civil actions
 413 for evidence seized in criminal proceedings, as follows:

414 "9-11-34.1.

415 Notwithstanding the provisions of Code Section 9-11-34, in any civil action based upon
 416 evidence seized in a criminal proceeding involving any violation of Part 2 of Article 3 of
 417 Chapter 12 of Title 16, a party shall not be permitted to copy any books, papers,
 418 documents, photographs, tangible objects, audio and visual tapes, films and recordings,
 419 electronically stored information, or copies or portions thereof."

420 **SECTION 6.**

421 Said chapter is further amended by revising paragraph (2) of subsection (a) of Code Section
 422 9-11-36, relating to requests for admission, as follows:

423 "(2) Each matter of which an admission is requested shall be separately set forth. The
 424 matter is admitted unless, within 30 days after service of the request or within such
 425 shorter or longer time as the court may allow, the party to whom the request is directed
 426 serves upon the party requesting the admission a written answer or objection addressed
 427 to the matter, signed by the party or by his or her attorney; but unless the court shortens
 428 the time, a defendant shall not be required to serve answers or objections before the
 429 expiration of 45 days after service of the summons and complaint upon him or her. If
 430 objection is made, the reasons therefor shall be stated. The answer shall specifically deny
 431 the matter or set forth in detail the reasons why the answering party cannot truthfully
 432 admit or deny the matter. A denial shall fairly meet the substance of the requested
 433 admission; and, when good faith requires that a party qualify his or her answer or deny
 434 only a part of the matter of which an admission is requested, he or she shall specify so
 435 much of it as is true and qualify or deny the remainder. An answering party may not give
 436 lack of information or knowledge as a reason for failure to admit or deny unless ~~he~~ such
 437 party states that he or she has made reasonable inquiry and that the information known
 438 or readily obtainable by him or her is insufficient to enable him or her to admit or deny.
 439 A party who considers that a matter of which an admission has been requested presents
 440 a genuine issue for trial may not, on that ground alone, object to the request; he or she
 441 may, subject to subsection (c) ~~(d)~~ of Code Section 9-11-37, deny the matter or set forth
 442 reasons why he or she cannot admit or deny it."

443 **SECTION 7.**

444 Said chapter is further amended by revising Code Section 9-11-37, relating to failure to make
 445 discovery, as follows:

446 "9-11-37.

447 (a) **Motion for order compelling discovery.** A party, upon reasonable notice to other
 448 parties and all persons affected thereby, may apply for an order compelling discovery as
 449 follows:

450 (1) **Appropriate court.** An application for an order to a party may be made to the court
 451 in which the action is pending or, on matters relating to a deposition, to the court in the
 452 county where the deposition is being taken. An application for an order to a deponent
 453 who is not a party shall be made to the court in the county where the deposition is being
 454 taken;

455 (2) **Motion; protective order.** If a deponent fails to answer a question propounded or
 456 submitted under Code Section 9-11-30 or 9-11-31, or a corporation or other entity fails
 457 to make a designation under paragraph (6) of subsection (b) of Code Section 9-11-30 or
 458 subsection (a) of Code Section 9-11-31, or a party fails to answer an interrogatory

459 submitted under Code Section 9-11-33, or if a party, in response to a request for
 460 inspection submitted under Code Section 9-11-34, fails to respond that inspection will be
 461 permitted as requested or fails to permit inspection as requested, the discovering party
 462 may move for an order compelling an answer, or a designation, or an order compelling
 463 inspection in accordance with the request. Such motion shall include a certification that
 464 the movant has in good faith conferred or attempted to confer with the person or party
 465 failing to make the discovery in an effort to secure the information or material without
 466 court action. When taking a deposition on oral examination, the proponent of the
 467 question may complete the examination or adjourn the examination before ~~he~~ applies it
 468 is completed in order to apply for an order. If the motion is based upon an objection to
 469 production of electronically stored information from sources the objecting party identified
 470 as not reasonably accessible because of undue burden or cost, the objecting party has the
 471 burden of showing that the basis for the objection exists. If the court denies the motion
 472 in whole or in part, it may make such protective order as it would have been empowered
 473 to make on a motion made pursuant to subsection (c) of Code Section 9-11-26;

474 (3) **Evasive or incomplete answer.** For purposes of the provisions of this chapter which
 475 relate to depositions and discovery, an evasive or incomplete answer is to be treated as
 476 a failure to answer; and

477 (4) **Award of expenses of motion.**

478 (A) If the motion is granted, the court shall, after opportunity for hearing, require the
 479 party or deponent whose conduct necessitated the motion or the party or attorney
 480 advising such conduct or both of them to pay to the moving party the reasonable
 481 expenses incurred in obtaining the order, including attorney's fees, unless the court
 482 finds that the opposition to the motion was substantially justified or that other
 483 circumstances make an award of expenses unjust.

484 (B) If the motion is denied, the court shall, after opportunity for hearing, require the
 485 moving party or the attorney advising the motion or both of them to pay to the party or
 486 deponent who opposed the motion the reasonable expenses incurred in opposing the
 487 motion, including attorney's fees, unless the court finds that the making of the motion
 488 was substantially justified or that other circumstances make an award of expenses
 489 unjust.

490 (C) If the motion is granted in part and denied in part, the court may apportion the
 491 reasonable expenses incurred in relation to the motion among the parties and persons
 492 in a just manner.

493 (b) **Failure to comply with order.**

494 (1) **Sanctions by court in county where deposition is taken.** If a deponent fails to be
 495 sworn or to answer a question after being directed to do so by the court in the county in

496 which the deposition is being taken, the failure may be considered a contempt of that
497 court.

498 (2) **Sanctions by court in which action is pending.** If a party or an officer, director, or
499 managing agent of a party or a person designated under paragraph (6) of subsection (b)
500 of Code Section 9-11-30 or subsection (a) of Code Section 9-11-31 to testify on behalf
501 of a party fails to obey an order to provide or permit discovery, including an order made
502 under subsection (a) of this Code section or Code Section 9-11-35, the court in which the
503 action is pending may make such orders in regard to the failure as are just and, among
504 others, the following:

505 (A) An order that the matters regarding which the order was made or any other
506 designated facts shall be taken to be established for the purposes of the action in
507 accordance with the claim of the party obtaining the order;

508 (B) An order refusing to allow the disobedient party to support or oppose designated
509 claims or defenses, or prohibiting him or her from introducing designated matters in
510 evidence;

511 (C) An order striking out pleadings or parts thereof, or staying further proceedings until
512 the order is obeyed, or dismissing the action or proceeding or any part thereof, or
513 rendering a judgment by default against the disobedient party;

514 (D) In lieu of any of the foregoing orders, or in addition thereto, an order treating as
515 a contempt of court the failure to obey any orders except an order to submit to a
516 physical or mental examination; or

517 (E) Where a party has failed to comply with an order under subsection (a) of Code
518 Section 9-11-35 requiring him or her to produce another for examination, such orders
519 as are listed in subparagraphs (A), (B), and (C) of this paragraph, unless the party
520 failing to comply shows that he or she is unable to produce such person for
521 examination.

522 In lieu of any of the foregoing orders, or in addition thereto, the court shall require the
523 party failing to obey the order or the attorney advising him or her, or both, to pay the
524 reasonable expenses, including attorney's fees, caused by the failure, unless the court
525 finds that the failure was substantially justified or that other circumstances make an
526 award of expenses unjust.

527 **(c) Failure to preserve information.**

528 (1) If a party fails to preserve discoverable information that reasonably should be
529 preserved in the anticipation or conduct of litigation, the court may provide for one or
530 more of the following remedies:

531 (A) Permit additional discovery;

532 (B) Order the party to undertake curative measures;

533 (C) Require the party to pay the reasonable expenses, including attorney's fees, caused
534 by the failure to preserve discoverable information that reasonably should have been
535 preserved in the anticipation or conduct of litigation;
536 (D) Give a jury instruction on spoliation of evidence which raises a presumption
537 against the spoliator;
538 (E) Direct that the matters embraced in the order or other designated facts be taken as
539 established for purposes of the civil action as the prevailing party claims;
540 (F) Prohibit the spoliator from supporting or opposing designated claims or defenses
541 or introducing designated matters in evidence;
542 (G) Strike pleadings in whole or in part;
543 (H) Dismiss the civil action or proceeding in whole or in part;
544 (I) Render a default judgment against the spoliator; or
545 (J) Treat the failure as a contempt of court if there has been a violation of a previous
546 court order.

547 (2) In determining whether to impose a sanction of dismissal or default, the court shall
548 consider the following factors:
549 (A) Whether the spoliation resulted in prejudice to another party;
550 (B) Whether the prejudice could be cured;
551 (C) The practical importance of the evidence;
552 (D) Whether the spoliator acted in good or bad faith; and
553 (E) The potential for abuse if expert testimony about the evidence is not excluded.

554 (3) In determining which sanction to impose, the court shall impose the most appropriate
555 sanction necessary to redress the failure to preserve discoverable information that
556 reasonably should have been preserved.

557 (4) Absent exceptional circumstances, a court may not impose sanctions under this
558 subsection on a party for failing to provide electronically stored information lost as a
559 result of the routine, good-faith operation of an electronic information system.

560 ~~(c)~~**(d) Expenses on failure to admit.** If a party fails to admit the genuineness of any
561 document or the truth of any matter as requested under Code Section 9-11-36 and if the
562 party requesting the admissions thereafter proves the genuineness of the document or the
563 truth of the matter, ~~he~~ the requesting party may apply to the court for an order requiring the
564 other party to pay him or her the reasonable expenses incurred in making that proof,
565 including reasonable attorney's fees. The court shall make the order unless it finds that the
566 request was held objectionable pursuant to subsection (a) of Code Section 9-11-36, or the
567 admission sought was of no substantial importance, or the party failing to admit had
568 reasonable ground to believe that he or she might prevail on the matter, or there was other
569 good reason for the failure to admit.

570 ~~(d)~~(e) **Failure of party to attend at own deposition or serve answers to interrogatories**
 571 **or respond to request for inspection.**

572 (1) If a party or an officer, director, or managing agent of a party or a person designated
 573 under paragraph (6) of subsection (b) of Code Section 9-11-30 or subsection (a) of Code
 574 Section 9-11-31 to testify on behalf of a party fails to appear before the officer who is to
 575 take ~~his~~ the deposition, after being served with a proper notice, or fails to serve answers
 576 or objections to interrogatories submitted under Code Section 9-11-33, after proper
 577 service of the interrogatories, or fails to serve a written response to a request for
 578 inspection submitted under Code Section 9-11-34, after proper service of the request, the
 579 court in which the action is pending on motion may make such orders in regard to the
 580 failure as are just; and, among others, it may take any action authorized under
 581 subparagraphs (b)(2)(A) through (b)(2)(C) of this Code section. In lieu of any order, or
 582 in addition thereto, the court shall require the party failing to act or the attorney advising
 583 him or her, or both, to pay the reasonable expenses, including attorney's fees, caused by
 584 the failure, unless the court finds that the failure was substantially justified or that other
 585 circumstances make an award of expenses unjust.

586 (2) The failure to act described in the provisions of this chapter which relate to
 587 depositions and discovery may not be excused on the ground that the discovery sought
 588 is objectionable unless the party failing to act has applied for a protective order as
 589 provided by subsection (c) of Code Section 9-11-26.

590 **(f) Failure to participate in the framing of a discovery plan.** If upon order of the court
 591 a party fails to participate in good faith in the framing of a discovery plan as required by
 592 subsection (f) of Code Section 9-11-26, the court may, after opportunity for a hearing,
 593 require a party pay to another party's reasonable expenses, including attorney's fees, caused
 594 by the failure to participate."

595 **SECTION 8.**

596 Said chapter is further amended by revising Code Section 9-11-45, relating to subpoenas for
 597 taking depositions, as follows:

598 "9-11-45.

599 (a)(1)(A) The clerk of the superior court of the county in which the action is pending
 600 or the clerk of any court of record in the county where the deposition is to be taken shall
 601 issue subpoenas for the persons sought to be deposed, upon request.

602 (B) Upon agreement of the parties, an attorney, as an officer of the court, may issue
 603 and sign a subpoena for the person sought to be deposed on behalf of a court in which
 604 the attorney is authorized to practice or a court for a venue in which a deposition is

605 compelled by the subpoena, if the deposition pertains to an action pending in a court in
606 which the attorney is authorized to practice.

607 (C) Subpoenas issued pursuant to this paragraph shall be issued and served in
608 accordance with law governing issuance of subpoenas for attendance at court, except
609 as to issuance by an attorney. The subpoena may command the person to whom it is
610 directed to produce and permit inspection and copying of designated books, papers,
611 documents, electronically stored information, or tangible things which constitute or
612 contain matters within the scope of the examination permitted by subsection (b) of
613 Code Section 9-11-26, but in that event the subpoena will be subject to subsection (c)
614 of Code Section 9-11-26; or the court, upon motion made promptly and in any event at
615 or before the time specified in the subpoena for compliance therewith, may quash or
616 modify the subpoena if it is unreasonable and oppressive, or condition denial of the
617 motion upon the advancement by the person in whose behalf the subpoena is issued of
618 the reasonable cost of producing the books, papers, documents, electronically stored
619 information, or tangible things. A subpoena may specify the form in which
620 electronically stored information shall be produced. A party who issues a subpoena to
621 a nonparty to produce electronically stored information shall take reasonable steps to
622 avoid imposing undue burden or expense on such nonparty. A party who issues a
623 subpoena to a nonparty shall pay reasonable costs associated with the retrieval,
624 production, conversion, and formatting of the requested electronically stored
625 information by such nonparty.

626 (2) The person to whom the subpoena is directed may, within ten days after the service
627 thereof or on or before the time specified in the subpoena for compliance, if such time is
628 less than ten days after service, serve upon the attorney designated in the subpoena
629 written objection to inspection or copying of any or all of the designated materials. If
630 objection is made, the party serving the subpoena shall not be entitled to inspect and copy
631 the materials except pursuant to an order of the court from which the subpoena was
632 issued. The party serving the subpoena may, if objection has been made, move, upon
633 notice to the deponent, for an order at any time before or during the taking of the
634 deposition, provided that nothing in this Code section shall be construed as requiring the
635 issuance of a subpoena to compel a party to attend and give his or her deposition or
636 produce documents at the taking of his or her deposition where a notice of deposition
637 under Code Section 9-11-30 has been given or a request under Code Section 9-11-34 has
638 been served, such notice or request to a party being enforceable by motion under Code
639 Section 9-11-37.

640 (b) A person who is to give a deposition may be required to attend an examination:

641 (1) In the county wherein he or she resides or is employed or transacts his or her business
642 in person;

643 (2) In any county in which he or she is served with a subpoena while therein; or

644 (3) At any place which is not more than 30 miles from the county seat of the county
645 wherein the witness resides, is employed, or transacts his or her business in person.

646 (c) The following are duties in responding to a subpoena:

647 (1) A person responding to a subpoena to produce books, papers, documents,
648 electronically stored information, or tangible things shall produce them as they are kept
649 in the usual course of business or shall organize and label the documents to correspond
650 with the categories in the request;

651 (2) If a subpoena does not specify a form for producing electronically stored information,
652 the person responding shall produce it in a form which it ordinarily is maintained or in
653 a reasonably usable form;

654 (3) A person responding to a subpoena for electronically stored information shall not be
655 required to:

656 (A) Produce the same electronically stored information in more than one form; or

657 (B) Provide discovery of electronically stored information from sources that the person
658 identifies as not reasonably accessible because of undue burden or cost;

659 (4) When electronically stored information is capable of being produced in both physical
660 and electronic formats, production of physical copies shall be sufficient for compliance
661 with a subpoena. When electronically stored information has been produced in a physical
662 format, the party issuing the subpoena may obtain the electronically stored information
663 in another form only upon a showing of particularized need and a court order. When the
664 party issuing the subpoena has made a showing of particularized need, such party shall
665 pay reasonable costs associated with the retrieval, production, conversion, and formatting
666 of the requested electronically stored information;

667 (5) Regarding a motion to compel discovery or for a protective order, the person
668 responding shall show that the information is not reasonably accessible because of undue
669 burden or cost. If that showing is made, the court may nonetheless order discovery from
670 such sources if the requesting party shows good cause, after considering the limitations
671 set forth in paragraph (2) of subsection (b) of Code Section 9-11-26. The court may
672 specify conditions for discovery, including requiring the party that seeks discovery from
673 a nonparty to bear the costs of locating, preserving, collecting, and producing the
674 electronically stored information involved; and

675 (6) When information subject to a subpoena is withheld on the objection that it is subject
676 to protection as trial preparation or attorney work product materials, or that it is otherwise
677 privileged, the objection shall be made with specificity and shall be supported by a

678 description of the nature of the books, papers, documents, electronically stored
679 information, or other tangible things not produced, sufficient for the requesting party to
680 contest the objection."

681 **SECTION 9.**

682 This Act shall become effective on January 1, 2015.

683 **SECTION 10.**

684 All laws and parts of laws in conflict with this Act are repealed.