

The Senate Judiciary Committee offered the following substitute to HB 643:

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:

**SECTION 1.**

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

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

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

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

40 (i) The discovery sought is unreasonably cumulative or duplicative;

41 (ii) The discovery sought is obtainable from some other source that is more  
 42 convenient, less burdensome, or less expensive;

43 (iii) The party seeking discovery has had ample opportunity by discovery in the  
 44 action to obtain the information sought; or

45 (iv) The burden or expense of the proposed discovery outweighs its likely benefit  
 46 considering what is proportional to the needs of the case, the amount in controversy,  
 47 the parties' resources, the importance of the issues at stake in the civil action, and the  
 48 importance of the discovery in resolving the issues.

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

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

59 ~~(3)~~**(4) Trial preparation; materials.**

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

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

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

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

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

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

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

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

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

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

103 (C) Unless manifest injustice would result:

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

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

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

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

116 (i) Expressly make the claim; and

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

120 **(B) Information produced.** If information subject to a claim of privilege or protection  
 121 as trial preparation material is inadvertently produced in response to a discovery  
 122 request, the party that produced the material may assert the claim by notifying any party  
 123 that received the information of the claim and basis for it promptly on discovery of the  
 124 inadvertent production of such information. The producing party shall preserve the  
 125 information until the claim is resolved. After being notified, the receiving party:

126 (i) Shall promptly return, sequester, or destroy the specified information and any  
 127 copies thereof;

128 (ii) Shall not use or disclose the information until the claim of privilege or protection  
 129 as trial preparation material is resolved;

130 (iii) Shall take reasonable steps to retrieve the information if the receiving party  
 131 disclosed such information before being notified; and

132 (iv) May promptly present the information to the court in camera for determination  
 133 of the claim of privilege or protection as trial preparation material.

134 **(c) Protective orders.**

135 (1) Upon motion by a party or by the person who is, or who may be, subject to a request  
 136 to preserve documents, electronically stored information, or tangible things, or from  
 137 whom discovery is sought and for good cause shown, the court in which the action is

138 pending or, alternatively, on matters relating to a deposition, the court in the county  
 139 where the deposition is to be taken may make any order which justice requires to protect  
 140 a party or person from annoyance, embarrassment, oppression, or undue burden or  
 141 expense, including one or more of the following:

142 ~~(1)(A)~~ That the discovery not be had;

143 ~~(2)(B)~~ That the discovery may be had only on specified terms and conditions, including  
 144 a designation of the time or place;

145 ~~(3)(C)~~ That the discovery may be had only by a method of discovery other than that  
 146 selected by the party seeking discovery;

147 ~~(4)(D)~~ That certain matters not be inquired into or that the scope of the discovery be  
 148 limited to certain matters;

149 ~~(5)(E)~~ That discovery be conducted with no one present except persons designated by  
 150 the court;

151 ~~(6)(F)~~ That a deposition, after being sealed, be opened only by order of the court;

152 ~~(7)(G)~~ That a trade secret or other confidential research, development, or commercial  
 153 information not be disclosed or be disclosed only in a designated way; ~~or~~

154 ~~(8)(H)~~ That the parties simultaneously file specified documents or information  
 155 enclosed in sealed envelopes to be opened as directed by the court; or

156 (I) That the terms of preservation be specified, including, if applicable, relieving a  
 157 party from preserving certain documents, electronically stored information, or tangible  
 158 things.

159 (2)(A) A party seeking a protective order on the basis that electronically stored  
 160 information sought is from a source identified as not reasonably accessible because of  
 161 undue burden or cost has the burden of showing that such basis exists. If the showing  
 162 is made, the court may nonetheless order discovery from the source if the requesting  
 163 party shows good cause but only after considering the limitations set forth in paragraph  
 164 (2) of subsection (b) of this Code section.

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

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

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

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

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

184 (A) The identity and location of persons having knowledge of discoverable matters;  
 185 and

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

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

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

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

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

198 (f) **Voluntary or court ordered discovery meetings, discovery plans, discovery**  
 199 **conferences.**

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

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

207 (C) A discovery meeting shall be held as agreed by the parties or as ordered by the  
 208 court, and the parties may submit to the court the agreed upon discovery plan, a  
 209 stipulation indicating that the parties have agreed that no discovery plan is necessary,  
 210 or a joint report detailing those parts of the discovery plan upon which they agree and

211 the position of each of the parties on the parts of the discovery plan upon which they  
212 disagree.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

243 (I) When discovery should be completed; and

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

246 (4) If the parties are unable to agree to a discovery plan at a discovery meeting, the  
247 parties, upon motion of any party, may be ordered to appear before the court for a

248 discovery conference at which the court may order the entry of a discovery plan after  
 249 consideration of the report submitted pursuant to paragraph (1) of this subsection and the  
 250 position of the parties. For the discovery conference, each party may submit a brief  
 251 statement of the issues in contention along with a proposal for reaching a resolution to  
 252 all contested discovery issues. The court order may address other matters, including the  
 253 issuance of a protective order and, when necessary, an allocation of the reasonable costs  
 254 of responding to discovery including reasonable actual costs for duplicating documents  
 255 to be produced or producing copies of electronically stored information. The court may  
 256 enter a discovery order, which may be altered or amended as justice may require. Such  
 257 discovery order shall take into account the scope and limitations described in subsection  
 258 (b) of this Code section. The court may combine the discovery conference with a pretrial  
 259 conference authorized by Code Section 9-11-16.

260 (5) Even if the parties initially agree that a discovery plan is not needed, at any time after  
 261 commencement of a civil action, upon motion of a party, or upon the court's initiation,  
 262 the court may direct the parties to appear before it for a discovery conference.

263 (6) Nothing in this subsection shall alter a party's right to serve discovery or a party's  
 264 duty to respond to discovery."

265 **SECTION 2.**

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

268 **"(5) Production of documents and things.** The notice to a party deponent may be  
 269 accompanied by a request made in compliance with Code Section 9-11-34 for the  
 270 production of documents, electronically stored information, and tangible things at the  
 271 taking of the deposition. The procedure of Code Section 9-11-34 shall apply to the  
 272 request."

273 **SECTION 3.**

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

276 **"(c) Option to produce business or personal records.** ~~When~~ ~~Where~~ the answer to an  
 277 interrogatory may be ~~derived or ascertained from the~~ determined by examining, auditing,  
 278 compiling, abstracting, or summarizing a party's business or personal records of the party  
 279 upon whom the interrogatory has been served or from an examination, audit, or inspection  
 280 of such business records, or from a compilation, abstract, or summary based thereon,  
 281 including electronically stored information, and the burden of deriving or ascertaining the  
 282 answer is substantially the same for the party serving the interrogatory as for the party



283 served, it is a sufficient answer to the interrogatory to specify the records from which the  
 284 answer may be derived or ascertained and to afford to the party serving the interrogatory  
 285 either party, the responding party may answer by:

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

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

#### 291 SECTION 4.

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

294 "9-11-34.

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

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

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

309 (b) **Procedure.**

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

317 (2) The party upon whom the request is served shall serve a written response within 30  
 318 days after the service of the request, except that a defendant may serve a response within

319 45 days after service of the summons and complaint upon that defendant. The court may  
 320 allow a shorter or longer time. The response shall state, with respect to each item or  
 321 category, that inspection and related activities will be permitted as requested, unless the  
 322 request is objected to, in which event the reasons for objection shall be stated. If  
 323 objection is made to part of an item or category, the part shall be specified. In addition  
 324 to other bases for objection, the response may state an objection to production of  
 325 electronically stored information from sources that the party identifies as not reasonably  
 326 accessible because of undue burden or cost. The response shall state any objection to a  
 327 requested form for producing electronically stored information. If the responding party  
 328 objects to a requested form or if no form is specified in the request, the responding party  
 329 shall state the form it intends to use. The party submitting the request may move for an  
 330 order under subsection (a) of Code Section 9-11-37 with respect to any objection to or  
 331 other failure to respond to the request or any part thereof, or any failure to permit  
 332 inspection as requested.

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

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

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

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

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

342 (1) This Code section shall also be applicable ~~with respect~~ to discovery against persons,  
 343 firms, or corporations who are not parties, in which event a copy of the request shall be  
 344 served upon all parties of record; or, upon notice, the party desiring such discovery may  
 345 proceed by taking the deposition of the person, firm, or corporation on oral examination  
 346 or upon written questions under Code Section 9-11-30 or 9-11-31. A party requesting  
 347 discovery from a nonparty shall take reasonable steps to avoid imposing undue burden  
 348 or expense on the nonparty. The nonparty or any party may file an objection as provided  
 349 in subsection (b) of this Code section. If the party desiring such discovery moves for an  
 350 order under subsection (a) of Code Section 9-11-37 to compel discovery, he or she shall  
 351 make a showing of good cause to support his or her motion. Such motion shall include  
 352 a certification that the movant has attempted in good faith to meet and confer with the  
 353 nonparty to resolve the dispute. The court shall enforce the requesting party's duty to take  
 354 reasonable steps to avoid imposing undue burden or expense on a nonparty and may  
 355 award reasonable attorney's fees and expenses of litigation against a party who fails to

356 comply with this duty. The requesting party shall pay reasonable costs associated with  
357 the retrieval, production, conversion, and formatting of the requested electronically stored  
358 information by nonparties. The party making a request under this Code section shall,  
359 upon request from any other party to the action, make all reasonable efforts to cause all  
360 information produced in response to the nonparty request to be made available to all  
361 parties and may require the payment of a reasonable document copying charge. A  
362 ~~reasonable document copying charge may be required.~~

363 (2) This Code section shall also be applicable ~~with respect~~ to discovery against a  
364 nonparty who is a practitioner of the healing arts or a hospital or health care facility,  
365 including those operated by an agency or bureau of the state or other governmental unit.  
366 Where such a request is directed to such a nonparty, a copy of the request shall be served  
367 upon the person whose records are sought by certified mail or statutory overnight  
368 delivery, return receipt requested, or, if known, ~~that~~ such person's counsel, and upon all  
369 other parties of record in compliance with Code Section 9-11-5; where such a request to  
370 a nonparty seeks the records of a person who is not a party, a copy of the request shall be  
371 served upon the person whose records are sought by certified mail or statutory overnight  
372 delivery, return receipt requested, or, if known, ~~that~~ such person's counsel by certified  
373 mail or statutory overnight delivery, return receipt requested, and upon all parties of  
374 record in compliance with Code Section 9-11-5; or, upon notice, the party desiring such  
375 discovery may proceed by taking the deposition of the person, firm, or corporation on  
376 oral examination or upon written questions under Code Section 9-11-30 or 9-11-31. The  
377 nonparty, any party, or the person whose records are sought may file an objection with  
378 the court in which the action is pending within 20 days of service of the request and shall  
379 serve a copy of such objection on the nonparty to whom the request is directed, who shall  
380 not furnish the requested materials until further order of the court, and on all other parties  
381 to the action. Upon the filing of such objection, the party desiring such discovery may  
382 move for an order under subsection (a) of Code Section 9-11-37 to compel discovery and,  
383 if he or she shall make a showing of good cause to support his or her motion, discovery  
384 shall be allowed. If no objection is filed within 20 days of service of the request, the  
385 nonparty to whom the request is directed shall promptly comply therewith.

386 (3) For any discovery requested from a nonparty pursuant to paragraph (2) of this  
387 subsection or a subpoena requesting records from a nonparty pursuant to Code Section  
388 9-11-45, when the nonparty to whom the discovery request is made is not served with an  
389 objection and the nonparty produces the requested records, the nonparty shall be immune  
390 from regulatory, civil, or criminal liability or damages notwithstanding that the produced  
391 documents contained confidential or privileged information.

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

401 **SECTION 5.**

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

404 "9-11-34.1.

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

410 **SECTION 6.**

411 Said chapter is further amended by revising paragraph (2) of subsection (a) of Code Section  
 412 9-11-36, relating to requests for admission, as follows:

413 "(2) Each matter of which an admission is requested shall be separately set forth. The  
 414 matter is admitted unless, within 30 days after service of the request or within such  
 415 shorter or longer time as the court may allow, the party to whom the request is directed  
 416 serves upon the party requesting the admission a written answer or objection addressed  
 417 to the matter, signed by the party or by his or her attorney; but unless the court shortens  
 418 the time, a defendant shall not be required to serve answers or objections before the  
 419 expiration of 45 days after service of the summons and complaint upon him or her. If  
 420 objection is made, the reasons therefor shall be stated. The answer shall specifically deny  
 421 the matter or set forth in detail the reasons why the answering party cannot truthfully  
 422 admit or deny the matter. A denial shall fairly meet the substance of the requested  
 423 admission; and, when good faith requires that a party qualify his or her answer or deny  
 424 only a part of the matter of which an admission is requested, he or she shall specify so  
 425 much of it as is true and qualify or deny the remainder. An answering party may not give  
 426 lack of information or knowledge as a reason for failure to admit or deny unless ~~he~~ such

427 party states that he or she has made reasonable inquiry and that the information known  
 428 or readily obtainable by him or her is insufficient to enable him or her to admit or deny.  
 429 A party who considers that a matter of which an admission has been requested presents  
 430 a genuine issue for trial may not, on that ground alone, object to the request; he or she  
 431 may, subject to subsection (c) (d) of Code Section 9-11-37, deny the matter or set forth  
 432 reasons why he or she cannot admit or deny it."

433 **SECTION 7.**

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

436 "9-11-37.

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

440 (1) **Appropriate court.** An application for an order to a party may be made to the court  
 441 in which the action is pending or, on matters relating to a deposition, to the court in the  
 442 county where the deposition is being taken. An application for an order to a deponent  
 443 who is not a party shall be made to the court in the county where the deposition is being  
 444 taken;

445 (2) **Motion; protective order.** If a deponent fails to answer a question propounded or  
 446 submitted under Code Section 9-11-30 or 9-11-31, or a corporation or other entity fails  
 447 to make a designation under paragraph (6) of subsection (b) of Code Section 9-11-30 or  
 448 subsection (a) of Code Section 9-11-31, or a party fails to answer an interrogatory  
 449 submitted under Code Section 9-11-33, or if a party, in response to a request for  
 450 inspection submitted under Code Section 9-11-34, fails to respond that inspection will be  
 451 permitted as requested or fails to permit inspection as requested, the discovering party  
 452 may move for an order compelling an answer, or a designation, or an order compelling  
 453 inspection in accordance with the request. Such motion shall include a certification that  
 454 the movant has in good faith conferred or attempted to confer with the person or party  
 455 failing to make the discovery in an effort to secure the information or material without  
 456 court action. When taking a deposition on oral examination, the proponent of the  
 457 question may complete the examination or adjourn the examination before ~~he~~ applies it  
 458 is completed in order to apply for an order. If the motion is based upon an objection to  
 459 production of electronically stored information from sources the objecting party identified  
 460 as not reasonably accessible because of undue burden or cost, the objecting party has the  
 461 burden of showing that the basis for the objection exists. If the court denies the motion

462 in whole or in part, it may make such protective order as it would have been empowered  
463 to make on a motion made pursuant to subsection (c) of Code Section 9-11-26;

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

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

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

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

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

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

484 (1) **Sanctions by court in county where deposition is taken.** If a deponent fails to be  
485 sworn or to answer a question after being directed to do so by the court in the county in  
486 which the deposition is being taken, the failure may be considered a contempt of that  
487 court.

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

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

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

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

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

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

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

517 **(c) Failure to preserve electronically stored information.**

518 (1) If a party willfully and in bad faith fails to preserve discoverable electronically stored  
 519 information that reasonably should be preserved in the anticipation or conduct of  
 520 litigation, after having been provided written notice of the electronically stored  
 521 information or having been served with a request for production of such information in  
 522 the course of discovery, the court may provide for one or more of the following remedies:

523 (A) Permit additional discovery;

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

525 (C) Require the party to pay the reasonable expenses, including attorney's fees, caused  
 526 by the failure to preserve discoverable electronically stored information that reasonably  
 527 should have been preserved in the anticipation or conduct of litigation;

528 (D) Impose any of the sanctions in paragraph (3) of this subsection; or

529 (E) Give an adverse jury instruction on spoliation of evidence only if the court finds  
 530 that the failure to preserve discoverable electronically stored information:

531 (i) Was willful or in bad faith and caused substantial prejudice in the litigation as  
 532 provided in paragraph (2) of this subsection; or

533 (ii) Irreparably deprived a party of any meaningful opportunity to present a claim or  
 534 defense.

- 535 (2) In determining whether a party failed to preserve discoverable electronically stored  
536 information that reasonably should have been preserved, and whether the failure was  
537 willful or in bad faith, the court shall consider all relevant factors, including:
- 538 (A) The extent to which the party was on notice that litigation was likely and that the  
539 electronically stored information would be discoverable;
  - 540 (B) The reasonableness of the party's efforts to preserve the electronically stored  
541 information, including the use of a litigation hold and the scope of the preservation  
542 efforts;
  - 543 (C) The clarity and reasonableness of the request to preserve discoverable  
544 electronically stored information;
  - 545 (D) Whether the party receiving a request to preserve electronically stored information  
546 and the person who made such request engaged in good faith consultation regarding the  
547 scope of preservation;
  - 548 (E) The party's resources and sophistication in litigation;
  - 549 (F) The proportionality of the preservation efforts to any anticipated or ongoing  
550 litigation;
  - 551 (G) Whether a party is able to specify the electronically stored information that was not  
552 preserved; and
  - 553 (H) Whether a party sought timely guidance from the court regarding any unresolved  
554 disputes concerning the preservation of discoverable electronically stored information.
- 555 (3) If the court determines that the conditions of division (1)(E)(i) or (1)(E)(ii) of this  
556 subsection are satisfied, the court may impose an appropriate sanction. Such sanctions  
557 may include any of the following:
- 558 (A) Direct that the matters embraced in the order or other designated facts be taken as  
559 established for purposes of the civil action as the prevailing party claims;
  - 560 (B) Prohibit the nonmovant party from supporting or opposing designated claims or  
561 defenses or introducing designated matters in evidence;
  - 562 (C) Strike pleadings in whole or in part;
  - 563 (D) Dismiss the civil action or proceeding in whole or in part;
  - 564 (E) Render a default judgment against the nonmovant; or
  - 565 (F) Treat the failure as a contempt of court if there has been a violation of a previous  
566 court order.
- 567 (4) In determining which sanction to impose, the court shall impose the most appropriate  
568 sanction necessary to redress the failure to preserve discoverable electronically stored  
569 information that reasonably should have been preserved.



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

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

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

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

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

603 **(f) Failure to participate in the framing of a discovery plan.** If upon order of the court  
 604 a party fails to participate in good faith in the framing of a discovery plan as required by  
 605 subsection (f) of Code Section 9-11-26, the court may, after opportunity for a hearing,

606 require a party pay to another party's reasonable expenses, including attorney's fees, caused  
 607 by the failure to participate."

608 **SECTION 8.**

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

611 "9-11-45.

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

615 (B) Upon agreement of the parties, an attorney, as an officer of the court, may issue  
 616 and sign a subpoena for the person sought to be deposed on behalf of a court in which  
 617 the attorney is authorized to practice or a court for a venue in which a deposition is  
 618 compelled by the subpoena, if the deposition pertains to an action pending in a court in  
 619 which the attorney is authorized to practice.

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

639 (2) The person to whom the subpoena is directed may, within ten days after the service  
 640 thereof or on or before the time specified in the subpoena for compliance, if such time is  
 641 less than ten days after service, serve upon the attorney designated in the subpoena

642 written objection to inspection or copying of any or all of the designated materials. If  
643 objection is made, the party serving the subpoena shall not be entitled to inspect and copy  
644 the materials except pursuant to an order of the court from which the subpoena was  
645 issued. The party serving the subpoena may, if objection has been made, move, upon  
646 notice to the deponent, for an order at any time before or during the taking of the  
647 deposition, provided that nothing in this Code section shall be construed as requiring the  
648 issuance of a subpoena to compel a party to attend and give his or her deposition or  
649 produce documents at the taking of his or her deposition where a notice of deposition  
650 under Code Section 9-11-30 has been given or a request under Code Section 9-11-34 has  
651 been served, such notice or request to a party being enforceable by motion under Code  
652 Section 9-11-37.

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

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

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

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

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

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

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

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

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

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

672 (4) When electronically stored information is capable of being produced in both physical  
673 and electronic formats, production of physical copies shall be sufficient for compliance  
674 with a subpoena. When electronically stored information has been produced in a physical  
675 format, the party issuing the subpoena may obtain the electronically stored information  
676 in another form only upon a showing of particularized need and a court order. When the  
677 party issuing the subpoena has made a showing of particularized need, such party shall

678 pay reasonable costs associated with the retrieval, production, conversion, and formatting  
679 of the requested electronically stored information;  
680 (5) Regarding a motion to compel discovery or for a protective order, the person  
681 responding shall show that the information is not reasonably accessible because of undue  
682 burden or cost. If that showing is made, the court may nonetheless order discovery from  
683 such sources if the requesting party shows good cause, after considering the limitations  
684 set forth in paragraph (2) of subsection (b) of Code Section 9-11-26. The court may  
685 specify conditions for discovery, including requiring the party that seeks discovery from  
686 a nonparty to bear the costs of locating, preserving, collecting, and producing the  
687 electronically stored information involved; and  
688 (6) When information subject to a subpoena is withheld on the objection that it is subject  
689 to protection as trial preparation or attorney work product materials, or that it is otherwise  
690 privileged, the objection shall be made with specificity and shall be supported by a  
691 description of the nature of the books, papers, documents, electronically stored  
692 information, or other tangible things not produced, sufficient for the requesting party to  
693 contest the objection."

694 **SECTION 9.**

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

696 **SECTION 10.**

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