

House Bill 643

By: Representatives Willard of the 51<sup>st</sup>, Lindsey of the 54<sup>th</sup>, Jacobs of the 80<sup>th</sup>, Ramsey of the 72<sup>nd</sup>, Welch of the 110<sup>th</sup>, 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  
5 production of documents and things and entry upon land for inspection and other purposes;  
6 to correct a cross-reference; to change provisions relating to failure to make discovery; to  
7 change provisions relating to subpoenas for taking depositions; to provide for related matters;  
8 to provide an effective date; to repeal conflicting laws; and for other purposes.

9 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

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

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

14 "9-11-26.

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

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

23 (1) **In general.** Parties may obtain discovery regarding any matter, not privileged, which  
24 is relevant to ~~the subject matter involved in the pending action, whether it relates to the~~  
25 any claim or defense of the party seeking discovery or to the claim or defense of any  
26 other party and proportional to the needs of the case considering the factors identified in

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

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

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

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

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

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

43 (iv) The discovery is unduly burdensome or expensive, taking into account the needs  
 44 of the case, the amount in controversy, limitations on the parties' resources, the  
 45 importance of the issues at stake in the litigation, and the importance of the discovery  
 46 in resolving the issues.

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

50 ~~(2)~~**(3) Insurance agreements.** A party may obtain discovery of the existence and  
 51 contents of any insurance agreement under which any person carrying on an insurance  
 52 business may be liable to satisfy part or all of a judgment which may be entered in the  
 53 action or to indemnify or reimburse for payments made to satisfy the judgment.  
 54 Information concerning the insurance agreement is not by reason of disclosure admissible  
 55 in evidence at trial. For purposes of this paragraph, an application for insurance shall not  
 56 be treated as part of an insurance agreement;

57 ~~(3)~~**(4) Trial preparation; materials.**

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

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

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

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

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

81 ~~(4)(5)~~ (5) **Trial preparation; experts.** Discovery of facts known and opinions held by  
 82 experts, otherwise discoverable under paragraph (1) of this subsection and acquired or  
 83 developed in anticipation of litigation or for trial, may be obtained only as follows:

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

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

95 (B) A party may discover facts known or opinions held by an expert who has been  
 96 retained or specially employed by another party in anticipation of litigation or  
 97 preparation for trial and who is not expected to be called as a witness at trial, only as  
 98 provided in subsection (b) of Code Section 9-11-35 or upon a showing of exceptional  
 99 circumstances under which it is impracticable for the party seeking discovery to obtain  
 100 facts or opinions on the same subject by other means; and

101 (C) Unless manifest injustice would result:

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

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

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

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

114 (i) Expressly make the claim; and

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

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

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

126 (ii) Shall not use or disclose the information until the claim is resolved;

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

129 (iv) May promptly present the information to the court under seal for determination  
130 of the claim.

131 **(c) Protective orders.**

132 (1) Upon motion by a party or by the person who is, or who may be, subject to a request  
133 to preserve documents, electronically stored information, or tangible things, or from  
134 whom discovery is sought and for good cause shown, the court in which the action is  
135 pending or, alternatively, on matters relating to a deposition, the court in the county  
136 where the deposition is to be taken may make any order which justice requires to protect

137 a party or person from annoyance, embarrassment, oppression, or undue burden or  
 138 expense, including one or more of the following:

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

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

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

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

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

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

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

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

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

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

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

167 (C) The court shall not consider a motion for protective order unless the movant  
 168 certifies that he or she has in good faith conferred or attempted to confer with the other  
 169 affected parties in an effort to resolve the dispute without court action.

170 (d) **Sequence and timing of discovery.** Unless the court, upon motion, for the  
 171 convenience of parties and witnesses and in the interests of justice, orders otherwise,  
 172 methods of discovery may be used in any sequence; and the fact that a party is conducting

173 discovery, whether by deposition or otherwise, shall not operate to delay any other party's  
174 discovery.

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

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

180 (A) The identity and location of persons having knowledge of discoverable matters;  
181 and

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

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

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

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

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

194 (f) **Discovery meeting, discovery conference, discovery plan.**

195 (1) No earlier than 40 days after a civil action is filed, any party may file a motion  
196 requesting a meeting on the subject of discovery, including the discovery of electronically  
197 stored information. If such motion is filed, the parties shall physically meet in the county  
198 in which the civil action is pending or confer by telephone not less than 21 days after  
199 such motion is filed and served upon the parties unless otherwise agreed by the parties  
200 or unless an earlier time for such meeting is ordered by the court or agreed to by the  
201 parties. Even if the parties do not seek to have a discovery meeting, at any time after  
202 commencement of a civil action the court may direct the parties to appear before it for a  
203 discovery conference.

204 (2)(A) During a discovery meeting held pursuant to paragraph (1) of this subsection  
205 the parties shall:

206 (i) Consider the nature and basis of the parties' claims and defenses and the  
207 possibilities for promptly settling or resolving the claims;

208 (ii) Resolve any issues regarding the scope of preservation; and

209 (iii) Discuss the preparation of a discovery plan as set forth in paragraph (3) of this  
210 subsection.

211 (B) The parties to the civil action shall be jointly responsible for arranging the meeting  
212 on the subject of discovery, for being prepared to discuss a discovery plan, and for  
213 attempting in good faith to agree on a discovery plan. Such meeting may be held by  
214 telephone, by video conference, or in person, or a combination thereof, unless the court,  
215 on motion, orders the parties to attend in person. Within 14 days after such meeting,  
216 the parties shall either submit the agreed upon discovery plan to the court or submit a  
217 joint report detailing those parts of the discovery plan upon which they agree and the  
218 position of each of the parties on the parts of the discovery plan upon which they  
219 disagree. Unless the parties agree otherwise, the first plaintiff listed in the civil action  
220 shall be responsible for submitting the discovery plan or joint report. The parties may  
221 request a conference with the court regarding the discovery plan.

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

223 (A) A statement of the 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 materials if different from that provided in  
237 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, any limitations or conditions pursuant to  
245 subsection (c) of this Code section.

246 (4) If the parties are unable to agree to a discovery plan at a meeting held pursuant to  
 247 paragraph (1) of this subsection, the parties shall, upon motion of any party, appear  
 248 before the court for a discovery conference at which the court shall order the entry of a  
 249 discovery plan after consideration of the report required to be submitted pursuant to  
 250 paragraph (2) of this subsection and the position of the parties. Each party shall submit  
 251 a brief statement of the issues in contention along with a proposal for reaching a  
 252 resolution to all contested issues. The court order may address other matters, including  
 253 the allocation of discovery costs, as are necessary for the proper management of  
 254 discovery in the action. A court order may be altered or amended as justice may require.  
 255 Such court order shall take into account the scope and limitations described in subsection  
 256 (b) of this Code section. The court may combine the discovery conference with a pretrial  
 257 conference authorized by Code Section 9-11-16."

258

## SECTION 2.

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

261 "9-11-34.

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

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

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

276 (b) **Procedure.**

277 (1) The request may, without leave of court, be served upon the plaintiff after  
 278 commencement of the action and upon any other party with or after service of the  
 279 summons and complaint upon that party. The request shall set forth the items to be  
 280 inspected, either by individual item or by category, and describe each item and category  
 281 with reasonable particularity. The request shall specify a reasonable time, place, and



282 manner of making the inspection and performing the related acts. The request may  
 283 specify the form in which electronically stored information shall be produced.

284 (2) The party upon whom the request is served shall serve a written response within 30  
 285 days after the service of the request, except that a defendant may serve a response within  
 286 45 days after service of the summons and complaint upon that defendant. The court may  
 287 allow a shorter or longer time. The response shall state, with respect to each item or  
 288 category, that inspection and related activities will be permitted as requested, unless the  
 289 request is objected to, in which event the reasons for objection shall be stated. If  
 290 objection is made to part of an item or category, the part shall be specified. In addition  
 291 to other bases for objection, the response may state an objection to production of  
 292 electronically stored information from sources that the party identifies as not reasonably  
 293 accessible because of undue burden or cost. The response shall state any objection to a  
 294 requested form for producing electronically stored information. If the responding party  
 295 objects to a requested form or if no form is specified in the request, the responding party  
 296 shall state the form it intends to use. The party submitting the request may move for an  
 297 order under subsection (a) of Code Section 9-11-37 with respect to any objection to or  
 298 other failure to respond to the request or any part thereof, or any failure to permit  
 299 inspection as requested.

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

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

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

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

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

309 (1) This Code section shall also be applicable ~~with respect~~ to discovery against persons,  
 310 firms, or corporations who are not parties, in which event a copy of the request shall be  
 311 served upon all parties of record; or, upon notice, the party desiring such discovery may  
 312 proceed by taking the deposition of the person, firm, or corporation on oral examination  
 313 or upon written questions under Code Section 9-11-30 or 9-11-31. A party requesting  
 314 discovery from a nonparty shall take reasonable steps to avoid imposing undue burden  
 315 or expense on the nonparty. The nonparty or any party may file an objection as provided  
 316 in subsection (b) of this Code section. If the party desiring such discovery moves for an  
 317 order under subsection (a) of Code Section 9-11-37 to compel discovery, he or she shall  
 318 make a showing of good cause to support his or her motion. Such motion shall include

319 a certification that the movant has attempted in good faith to meet and confer with the  
320 nonparty to resolve the dispute. The court shall enforce the requesting party's duty to take  
321 reasonable steps to avoid imposing undue burden or expense on a nonparty and may  
322 award reasonable attorney's fees or costs against a party who fails to comply with this  
323 duty. The requesting party shall pay reasonable costs associated with the production of  
324 electronically stored information by nonparties. The party making a request under this  
325 Code section shall, upon request from any other party to the action, make all reasonable  
326 efforts to cause all information produced in response to the nonparty request to be made  
327 available to all parties. ~~A reasonable document copying charge may be required.~~

328 (2) This Code section shall also be applicable ~~with respect~~ to discovery against a  
329 nonparty who is a practitioner of the healing arts or a hospital or health care facility,  
330 including those operated by an agency or bureau of the state or other governmental unit.  
331 Where such a request is directed to such a nonparty, a copy of the request shall be served  
332 upon the person whose records are sought by certified mail or statutory overnight  
333 delivery, return receipt requested, or, if known, ~~that~~ such person's counsel, and upon all  
334 other parties of record in compliance with Code Section 9-11-5; where such a request to  
335 a nonparty seeks the records of a person who is not a party, a copy of the request shall be  
336 served upon the person whose records are sought by certified mail or statutory overnight  
337 delivery, return receipt requested, or, if known, ~~that~~ such person's counsel by certified  
338 mail or statutory overnight delivery, return receipt requested, and upon all parties of  
339 record in compliance with Code Section 9-11-5; or, upon notice, the party desiring such  
340 discovery may proceed by taking the deposition of the person, firm, or corporation on  
341 oral examination or upon written questions under Code Section 9-11-30 or 9-11-31. The  
342 nonparty, any party, or the person whose records are sought may file an objection with  
343 the court in which the action is pending within 20 days of service of the request and shall  
344 serve a copy of such objection on the nonparty to whom the request is directed, who shall  
345 not furnish the requested materials until further order of the court, and on all other parties  
346 to the action. Upon the filing of such objection, the party desiring such discovery may  
347 move for an order under subsection (a) of Code Section 9-11-37 to compel discovery and,  
348 if he or she shall make a showing of good cause to support his or her motion, discovery  
349 shall be allowed. If no objection is filed within 20 days of service of the request, the  
350 nonparty to whom the request is directed shall promptly comply therewith.

351 (3) For any discovery requested from a nonparty pursuant to paragraph (2) of this  
352 subsection or a subpoena requesting records from a nonparty pursuant to Code Section  
353 9-11-45, when the nonparty to whom the discovery request is made is not served with an  
354 objection and the nonparty produces the requested records, the nonparty shall be immune

355 from regulatory, civil, or criminal liability or damages notwithstanding that the produced  
356 documents contained confidential or privileged information.

357 (d) **Confidentiality.** The provisions of this Code section shall not be deemed to repeal the  
358 confidentiality provided by Code Sections 37-3-166 concerning mental illness treatment  
359 records, 37-4-125 concerning mental retardation treatment records, 37-7-166 concerning  
360 alcohol and drug treatment records, 24-9-40.1 concerning the confidential nature of AIDS  
361 information, and 24-9-47 concerning the disclosure of AIDS information; provided,  
362 however, that a person's failure to object to the production of documents as set forth in  
363 paragraph (2) of subsection (c) of this Code section shall waive any right of recovery for  
364 damages as to the nonparty for disclosure of the requested documents."

365

### SECTION 3.

366 Said chapter is further amended by revising paragraph (2) of subsection (a) of Code Section  
367 9-11-36, relating to requests for admission, as follows:

368 "(2) Each matter of which an admission is requested shall be separately set forth. The  
369 matter is admitted unless, within 30 days after service of the request or within such  
370 shorter or longer time as the court may allow, the party to whom the request is directed  
371 serves upon the party requesting the admission a written answer or objection addressed  
372 to the matter, signed by the party or by his or her attorney; but unless the court shortens  
373 the time, a defendant shall not be required to serve answers or objections before the  
374 expiration of 45 days after service of the summons and complaint upon him or her. If  
375 objection is made, the reasons therefor shall be stated. The answer shall specifically deny  
376 the matter or set forth in detail the reasons why the answering party cannot truthfully  
377 admit or deny the matter. A denial shall fairly meet the substance of the requested  
378 admission; and, when good faith requires that a party qualify his or her answer or deny  
379 only a part of the matter of which an admission is requested, he or she shall specify so  
380 much of it as is true and qualify or deny the remainder. An answering party may not give  
381 lack of information or knowledge as a reason for failure to admit or deny unless he such  
382 party states that he or she has made reasonable inquiry and that the information known  
383 or readily obtainable by him or her is insufficient to enable him or her to admit or deny.  
384 A party who considers that a matter of which an admission has been requested presents  
385 a genuine issue for trial may not, on that ground alone, object to the request; he or she  
386 may, subject to subsection (c) (d) of Code Section 9-11-37, deny the matter or set forth  
387 reasons why he or she cannot admit or deny it."

388

**SECTION 4.**

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

391 "9-11-37.

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

395 (1) **Appropriate court.** An application for an order to a party may be made to the court  
396 in which the action is pending or, on matters relating to a deposition, to the court in the  
397 county where the deposition is being taken. An application for an order to a deponent  
398 who is not a party shall be made to the court in the county where the deposition is being  
399 taken;

400 (2) **Motion; protective order.** If a deponent fails to answer a question propounded or  
401 submitted under Code Section 9-11-30 or 9-11-31, or a corporation or other entity fails  
402 to make a designation under paragraph (6) of subsection (b) of Code Section 9-11-30 or  
403 subsection (a) of Code Section 9-11-31, or a party fails to answer an interrogatory  
404 submitted under Code Section 9-11-33, or if a party, in response to a request for  
405 inspection submitted under Code Section 9-11-34, fails to respond that inspection will be  
406 permitted as requested or fails to permit inspection as requested, the discovering party  
407 may move for an order compelling an answer, or a designation, or an order compelling  
408 inspection in accordance with the request. Such motion shall include a certification that  
409 the movant has in good faith conferred or attempted to confer with the person or party  
410 failing to make the discovery in an effort to secure the information or material without  
411 court action. When taking a deposition on oral examination, the proponent of the  
412 question may complete the examination or adjourn the examination before ~~he~~ applies it  
413 is completed in order to apply for an order. If the motion is based upon an objection to  
414 production of electronically stored information from sources the objecting party identified  
415 as not reasonably accessible because of undue burden or cost, the objecting party has the  
416 burden of showing that the basis for the objection exists. If the court denies the motion  
417 in whole or in part, it may make such protective order as it would have been empowered  
418 to make on a motion made pursuant to subsection (c) of Code Section 9-11-26;

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

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

423 (A) If the motion is granted, the court shall, after opportunity for hearing, require the  
424 party or deponent whose conduct necessitated the motion or the party or attorney

425 advising such conduct or both of them to pay to the moving party the reasonable  
426 expenses incurred in obtaining the order, including attorney's fees, unless the court  
427 finds that the opposition to the motion was substantially justified or that other  
428 circumstances make an award of expenses unjust.

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

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

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

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

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

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

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

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

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

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

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

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

473 (1) If a party fails to preserve discoverable information that reasonably should be  
 474 preserved in the anticipation or conduct of litigation, the court may:

475 (A) Permit additional discovery;

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

477 (C) Require the party to pay the reasonable expenses, including attorney's fees, caused  
 478 by the failure;

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

480 (E) Give an adverse jury instruction only if the court finds that the failure to preserve  
 481 discoverable information:

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

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

486 (2) In determining whether a party failed to preserve discoverable information that  
 487 reasonably should have been preserved, and whether the failure was willful or in bad  
 488 faith, the court shall consider all relevant factors, including:

489 (A) The extent to which the party was on notice that litigation was likely and that the  
 490 information would be discoverable;

491 (B) The reasonableness of the party's efforts to preserve the information, including the  
 492 use of a litigation hold and the scope of the preservation efforts;

493 (C) The clarity and reasonableness of the request to preserve discoverable information;

494 (D) Whether the party receiving a request to preserve information and the person who  
 495 made such request engaged in good faith consultation regarding the scope of  
 496 preservation;

497 (E) The party's resources and sophistication in litigation;

498 (F) The proportionality of the preservation efforts to any anticipated or ongoing  
 499 litigation;

500 (G) Whether a party is able to specify the information that was not preserved; and

501 (H) Whether a party sought timely guidance from the court regarding any unresolved  
 502 disputes concerning the preservation of discoverable information.

503 (3) If the court determines that the conditions of division (1)(E)(i) or (1)(E)(ii) of this  
 504 subsection are satisfied, the court may impose an appropriate sanction. Such sanctions  
 505 may include any of the following:

506 (A) Direct that the matters embraced in the order or other designated facts be taken as  
 507 established for purposes of the civil action as the prevailing party claims;

508 (B) Prohibit the nonmovant party from supporting or opposing designated claims or  
 509 defenses or introducing designated matters in evidence;

510 (C) Strike pleadings in whole or in part;

511 (D) Dismiss the civil action or proceeding in whole or in part;

512 (E) Render a default judgment against the nonmovant; or

513 (F) Treat the failure as a contempt of court if there has been a violation of a previous  
 514 court order.

515 (4) In determining which sanction to impose, the court shall impose the most appropriate  
 516 sanction necessary to redress the failure to preserve.

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

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

529 (1) If a party or an officer, director, or managing agent of a party or a person designated  
 530 under paragraph (6) of subsection (b) of Code Section 9-11-30 or subsection (a) of Code  
 531 Section 9-11-31 to testify on behalf of a party fails to appear before the officer who is to  
 532 take ~~his~~ the deposition, after being served with a proper notice, or fails to serve answers  
 533 or objections to interrogatories submitted under Code Section 9-11-33, after proper  
 534 service of the interrogatories, or fails to serve a written response to a request for

535 inspection submitted under Code Section 9-11-34, after proper service of the request, the  
 536 court in which the action is pending on motion may make such orders in regard to the  
 537 failure as are just; and, among others, it may take any action authorized under  
 538 subparagraphs (b)(2)(A) through (b)(2)(C) of this Code section. In lieu of any order, or  
 539 in addition thereto, the court shall require the party failing to act or the attorney advising  
 540 him or her, or both, to pay the reasonable expenses, including attorney's fees, caused by  
 541 the failure, unless the court finds that the failure was substantially justified or that other  
 542 circumstances make an award of expenses unjust.

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

547 **(f) Failure to participate in the framing of a discovery plan.** If a party fails to  
 548 participate in good faith in the framing of a discovery plan by agreement as is required by  
 549 subsection (f) of Code Section 9-11-26, the court may, after opportunity for a hearing,  
 550 require a party pay to another party's reasonable expenses, including attorney's fees, caused  
 551 by the failure to participate."

## 552 SECTION 5.

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

555 "9-11-45.

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

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

564 (C) Subpoenas issued pursuant to this paragraph shall be issued and served in  
 565 accordance with law governing issuance of subpoenas for attendance at court, except  
 566 as to issuance by an attorney. The subpoena may command the person to whom it is  
 567 directed to produce and permit inspection and copying of designated books, papers,  
 568 documents, electronically stored information, or tangible things which constitute or  
 569 contain matters within the scope of the examination permitted by subsection (b) of  
 570 Code Section 9-11-26, but in that event the subpoena will be subject to subsection (c)



571 of Code Section 9-11-26; or the court, upon motion made promptly and in any event at  
 572 or before the time specified in the subpoena for compliance therewith, may quash or  
 573 modify the subpoena if it is unreasonable and oppressive, or condition denial of the  
 574 motion upon the advancement by the person in whose behalf the subpoena is issued of  
 575 the reasonable cost of producing the books, papers, documents, electronically stored  
 576 information, or tangible things. A subpoena may specify the form in which  
 577 electronically stored information shall be produced. A party who issues a subpoena to  
 578 a nonparty to produce electronically stored information shall take reasonable steps to  
 579 avoid imposing undue burden or expense on such nonparty.

580 (2) The person to whom the subpoena is directed may, within ten days after the service  
 581 thereof or on or before the time specified in the subpoena for compliance, if such time is  
 582 less than ten days after service, serve upon the attorney designated in the subpoena  
 583 written objection to inspection or copying of any or all of the designated materials. If  
 584 objection is made, the party serving the subpoena shall not be entitled to inspect and copy  
 585 the materials except pursuant to an order of the court from which the subpoena was  
 586 issued. The party serving the subpoena may, if objection has been made, move, upon  
 587 notice to the deponent, for an order at any time before or during the taking of the  
 588 deposition, provided that nothing in this Code section shall be construed as requiring the  
 589 issuance of a subpoena to compel a party to attend and give his or her deposition or  
 590 produce documents at the taking of his or her deposition where a notice of deposition  
 591 under Code Section 9-11-30 has been given or a request under Code Section 9-11-34 has  
 592 been served, such notice or request to a party being enforceable by motion under Code  
 593 Section 9-11-37.

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

595 (1) In the county wherein he or she resides or is employed or transacts his business in  
 596 person;

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

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

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

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

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

608 (3) A person responding to a subpoena for electronically stored information shall not be  
609 required to:  
610 (A) Produce the same electronically stored information in more than one form; or  
611 (B) Provide discovery of electronically stored information from sources that the person  
612 identifies as not reasonably accessible because of undue burden or cost;  
613 (4) Regarding a motion to compel discovery or for a protective order, the person  
614 responding shall show that the information is not reasonably accessible because of undue  
615 burden or cost. If that showing is made, the court may nonetheless order discovery from  
616 such sources if the requesting party shows good cause, after considering the limitations  
617 set forth in paragraph (2) of subsection (b) of Code Section 9-11-26. The court may  
618 specify conditions for discovery, including requiring the party that seeks discovery from  
619 a nonparty to bear the costs of locating, preserving, collecting, and producing the  
620 electronically stored information involved; and  
621 (5) When information subject to a subpoena is withheld on the objection that it is subject  
622 to protection as trial preparation materials, or that it is otherwise privileged, the objection  
623 shall be made with specificity and shall be supported by a description of the nature of the  
624 books, papers, documents, electronically stored information, or other tangible things not  
625 produced, sufficient for the requesting party to contest the objection."

626 **SECTION 6.**

627 This Act shall become effective upon its approval by the Governor or upon its becoming law  
628 without such approval.

629 **SECTION 7.**

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