

Senate Bill 354

By: Senators Cowser of the 46th, Bethel of the 54th, Hill of the 32nd and Stone of the 23rd

A BILL TO BE ENTITLED
AN ACT

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

11 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

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

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

16 "9-11-26.

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

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

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

27 ~~claim or defense of the party seeking discovery or to the~~ any claim or defense of any
 28 ~~other party~~ considering the factors identified in paragraph (2) of this subsection, including
 29 the existence, description, nature, custody, condition, and location of any books,
 30 documents, electronically stored information, or other tangible things and the identity and
 31 location of persons having knowledge of any discoverable matter. It ~~is~~ shall not be
 32 ground for objection that the information sought will be inadmissible at the trial if the
 33 information sought appears reasonably calculated to lead to the discovery of admissible
 34 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 discovery is unduly burdensome or expensive, taking into account the needs
 46 of the case, the amount in controversy, limitations on the parties' resources, the
 47 importance of the issues at stake in the litigation, and the importance of the discovery
 48 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 such 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. The producing party shall
 124 preserve the information until the claim is resolved. After being notified, the receiving
 125 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) Discovery meeting, discovery plan, discovery conference.**

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

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

206 (C) A discovery meeting shall be held:

207 (i) Within 30 days after the filing of the last answer if all parties have been served
 208 with process; or

209 (ii) Within 60 days of the date of the filing of the civil action if all parties to the
 210 action have been served with process but not all parties have filed an answer;

211 provided, however, that any agreement among the parties relating to a discovery plan
212 shall not bind any party who was not served with process.

213 (D) Within 14 days after a discovery meeting, the parties shall submit to the court the
214 agreed upon discovery plan, a pleading indicating that the parties have agreed that no
215 discovery plan is necessary, or a joint report detailing those parts of the discovery plan
216 upon which they agree and the position of each of the parties on the parts of the
217 discovery plan upon which they disagree.

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

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

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

223 (B) Resolve any issues regarding the scope of preservation; and

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

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

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

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

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

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

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

239 (F) The method for asserting or preserving claims of privilege or protection of the
240 information as trial preparation materials if different from that provided in
241 paragraph (6) of subsection (b) of this Code section;

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

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

247 (I) When discovery should be completed; and

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

250 (4) If the parties are unable to agree to a discovery plan at a discovery meeting, the
 251 parties shall, upon motion of any party, appear before the court for a discovery
 252 conference at which the court shall order the entry of a discovery plan after consideration
 253 of the report submitted pursuant to paragraph (1) of this subsection and the position of
 254 the parties. For the discovery conference, each party shall submit a brief statement of the
 255 issues in contention along with a proposal for reaching a resolution to all contested issues.
 256 The court order may address other matters, including the issuance of a protective order
 257 and, when necessary, an allocation of discovery costs for the proper management of
 258 discovery in the action. The court shall enter a discovery order, which may be altered or
 259 amended as justice may require. Such discovery order shall take into account the scope
 260 and limitations described in subsection (b) of this Code section. The court may combine
 261 the discovery conference with a pretrial conference authorized by Code Section 9-11-16.
 262 (5) Even if the parties initially agree that a discovery plan is not needed, at any time after
 263 commencement of a civil action, upon motion of a party, or upon the court's initiation,
 264 the court may direct the parties to appear before it for a discovery conference."

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

283 ~~a sufficient answer to the interrogatory to specify the records from which the answer may~~
 284 ~~be derived or ascertained and to afford to the party serving the interrogatory either party,~~
 285 ~~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 or costs against a party who fails to comply with this

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

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

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

391 (d) **Confidentiality.** The provisions of this Code section shall not be deemed to repeal the
 392 confidentiality provided by Code Sections 37-3-166 concerning mental illness treatment

393 records, 37-4-125 concerning ~~mental-retardation~~ developmental disability treatment
 394 records, 37-7-166 concerning alcohol and drug treatment records, 24-9-40.1 concerning the
 395 confidential nature of AIDS information, and 24-9-47 concerning the disclosure of AIDS
 396 information; provided, however, that a person's failure to object to the production of
 397 documents as set forth in paragraph (2) of subsection (c) of this Code section shall waive
 398 any right of recovery for damages as to the nonparty for disclosure of the requested
 399 documents."

400 **SECTION 5.**

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

403 "9-11-34.1.

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

409 **SECTION 6.**

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

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

428 A party who considers that a matter of which an admission has been requested presents
 429 a genuine issue for trial may not, on that ground alone, object to the request; he or she
 430 may, subject to subsection (c) (d) of Code Section 9-11-37, deny the matter or set forth
 431 reasons why he or she cannot admit or deny it."

432 **SECTION 7.**

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

435 "9-11-37.

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

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

444 (2) **Motion; protective order.** If a deponent fails to answer a question propounded or
 445 submitted under Code Section 9-11-30 or 9-11-31, or a corporation or other entity fails
 446 to make a designation under paragraph (6) of subsection (b) of Code Section 9-11-30 or
 447 subsection (a) of Code Section 9-11-31, or a party fails to answer an interrogatory
 448 submitted under Code Section 9-11-33, or if a party, in response to a request for
 449 inspection submitted under Code Section 9-11-34, fails to respond that inspection will be
 450 permitted as requested or fails to permit inspection as requested, the discovering party
 451 may move for an order compelling an answer, or a designation, or an order compelling
 452 inspection in accordance with the request. Such motion shall include a certification that
 453 the movant has in good faith conferred or attempted to confer with the person or party
 454 failing to make the discovery in an effort to secure the information or material without
 455 court action. When taking a deposition on oral examination, the proponent of the
 456 question may complete the examination or adjourn the examination before ~~he applies it~~
 457 is completed in order to apply for an order. If the motion is based upon an objection to
 458 production of electronically stored information from sources the objecting party identified
 459 as not reasonably accessible because of undue burden or cost, the objecting party has the
 460 burden of showing that the basis for the objection exists. If the court denies the motion
 461 in whole or in part, it may make such protective order as it would have been empowered
 462 to make on a motion made pursuant to subsection (c) of Code Section 9-11-26;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

519 (A) Permit additional discovery;

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

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

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

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

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

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

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

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

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

- 537 (C) The clarity and reasonableness of the request to preserve discoverable information;
 538 (D) Whether the party receiving a request to preserve information and the person who
 539 made such request engaged in good faith consultation regarding the scope of
 540 preservation;
 541 (E) The party's resources and sophistication in litigation;
 542 (F) The proportionality of the preservation efforts to any anticipated or ongoing
 543 litigation;
 544 (G) Whether a party is able to specify the information that was not preserved; and
 545 (H) Whether a party sought timely guidance from the court regarding any unresolved
 546 disputes concerning the preservation of discoverable information.
 547 (3) If the court determines that the conditions of division (1)(E)(i) or (1)(E)(ii) of this
 548 subsection are satisfied, the court may impose an appropriate sanction. Such sanctions
 549 may include any of the following:
 550 (A) Direct that the matters embraced in the order or other designated facts be taken as
 551 established for purposes of the civil action as the prevailing party claims;
 552 (B) Prohibit the nonmovant party from supporting or opposing designated claims or
 553 defenses or introducing designated matters in evidence;
 554 (C) Strike pleadings in whole or in part;
 555 (D) Dismiss the civil action or proceeding in whole or in part;
 556 (E) Render a default judgment against the nonmovant; or
 557 (F) Treat the failure as a contempt of court if there has been a violation of a previous
 558 court order.
 559 (4) In determining which sanction to impose, the court shall impose the most appropriate
 560 sanction necessary to redress the failure to preserve.
 561 ~~(c)~~**(d) Expenses on failure to admit.** If a party fails to admit the genuineness of any
 562 document or the truth of any matter as requested under Code Section 9-11-36 and if the
 563 party requesting the admissions thereafter proves the genuineness of the document or the
 564 truth of the matter, ~~he~~ the requesting party may apply to the court for an order requiring the
 565 other party to pay him or her the reasonable expenses incurred in making that proof,
 566 including reasonable attorney's fees. The court shall make the order unless it finds that the
 567 request was held objectionable pursuant to subsection (a) of Code Section 9-11-36, or the
 568 admission sought was of no substantial importance, or the party failing to admit had
 569 reasonable ground to believe that he or she might prevail on the matter, or there was other
 570 good reason for the failure to admit.
 571 ~~(d)~~**(e) Failure of party to attend at own deposition or serve answers to interrogatories**
 572 **or respond to request for inspection.**

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

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

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

596 SECTION 8.

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

599 "9-11-45.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

665 (5) When information subject to a subpoena is withheld on the objection that it is subject
666 to protection as trial preparation materials, or that it is otherwise privileged, the objection
667 shall be made with specificity and shall be supported by a description of the nature of the
668 books, papers, documents, electronically stored information, or other tangible things not
669 produced, sufficient for the requesting party to contest the objection."

670 **SECTION 9.**

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

672 **SECTION 10.**

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