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All content authored by John D. Hadden

Contact: 404-939-4525 | john@hadden.law | www.haddenfirm.com

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State and Local Procedures, Legal Update, and Trends

John D. Hadden
Atlanta, Georgia
john@hadden.law

A. Deciding Whether to Take a Case

The decision to accept or reject a case is one of the most fundamental parts of a law practice, particularly for a personal injury plaintiff's practice where the lawyer's fee is directly dependent on the success and intrinsic value of the case, and where the lawyer may be required to advance costs out of his or her own pocket.

A commonly-shared aphorism is that "You make more money from the cases you reject than the ones you take."[1] The temptation to liberally accept cases can be powerful, however, especially when considering a prospective client who is hurt, and who may truly need a lawyer to obtain any relief. This is true even for the most accomplished of lawyers. When asked to give one piece of advice to young litigators, George Carley, a past Georgia Supreme Court Chief Justice and a practicing litigator for many years, responded:

> be more selective in your clients than I was, and learn how to say no. I wanted to help everybody, and that's a good thought, but once you take a case you've got to complete it and sometimes you can get in over your head. I certainly want people to do pro bono, but pro bono should be pro bono, not something you think you're going to make money on and it doesn't work out![2]

Although every lawyer approaches case selection differently and the process cannot be broken down into mere mathematical considerations, a number of factors should be considered when reviewing a new case.

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[1] This principle is not limited to the practice of law.

[2] Interview with Chief Justice George Carley, June 6, 2012, by John Hadden, published in The Sidebar (Summer 2012), a publication of the American Association for Justice.

1. Is the case meritorious on liability grounds?

It seems obvious that every lawyer would only take meritorious cases and those that are likely to lead to a good outcome, but the reality is far more complicated. Many cases may have significant damages but questionable, or even doubtful, liability. It is often impossible to fully analyze the liability question before filing suit and engaging in discovery, which generally will happen long after the decision is made to take the case. But many cases where liability is doubtful at the outset ultimately result in positive recoveries once the facts are fully developed, and therefore questionable liability should not automatically result in a case rejection, at least where there is at least a plausible possibility of proving the case.

How, then, can an attorney analyze the merits of a case before the facts are fully developed? Perhaps most critical is a thorough understanding of the substantive law involved. In premises liability cases involving falls, for example, it is often the case that the prospective client will not know how long a hazardous condition had been present on the premises, or how it got there, which are key factors in determining liability. But even without knowing all of the facts, an attorney with sufficient substantive knowledge can reach at least a preliminary opinion on liability based on the prospective client's recollection of the facts. Were employees of the defendant present? Could they see the hazard? Did the hazard appear to have resulted from something sold or present on the property to begin with? Were there video cameras? Did the store appear to have employees cleaning the premises? Because of the many factors relevant to premises liability claims, including constructive knowledge and the relevance of appropriate policies and procedures for inspections and cleaning, an attorney with sufficient knowledge of the law can determine with reasonable accuracy whether there is at least a fact question on liability, even without knowledge of all of the facts or the prospective defendant's arguments.

A similar analysis could be performed in other situations where liability can be a complex question, including medical malpractice, products liability, and construction defect claims. For lawyers without the requisite substantive knowledge, associating counsel who does may be advisable. Although, except in clear-liability cases, the question of liability cannot be determined with certainty, it is usually possible to form a reasonably educated and informed opinion on the issue through application of even limited facts to the relevant law. The liability factor can then be weighed with the other factors discussed below to help the lawyer determine whether to take the case.

2. Is the value of the case sufficient?

In many cases, liability is favorable enough that there is not a significant doubt that, should the case proceed to trial, the plaintiff will recover *some* amount. Although these cases may pass the lawyer's prima facie liability test, it is important to consider whether the outcome will be sufficient to justify the attorney's representation, both from the standpoint of the attorney's bottom line, as well as from the client's ultimate recovery.

Even the clearest of liability cases will require time and money to litigate. If the case can be resolved pre-suit, these costs may be minimal. Costs at this point would likely include those connected with postage and obtaining medical records, and perhaps expenses relating to obtaining incident reports or other records. If the case cannot be resolved pre-suit, however, the expected costs can rise significantly, and can include filing fees, deposition/transcript costs, and the cost to depose doctors, if necessary. At the very minimum, even for an admitted-liability car wreck case, costs can be expected to be at least $1,000-1,500 if suit is filed, and far more if there are multiple witnesses and medical professionals to be deposed. Other expected costs in preparing a case for trial include video deposition editing, demonstrative aid/exhibit preparation, and witness fees for witnesses who will testify live. Additionally, the attorney's time commitment rises significantly once the decision is made to litigate the case, and particularly when trial appears likely.

For this reason, many attorneys set a minimum case value threshold, often based on medical expenses, below which the attorney will not take a case. Although there may be exceptions to such a rule, setting this sort of threshold helps avoid wasting both the lawyer and client's time when the attorney is unlikely to take the case. A good referral network can help ensure that the client is placed in good hands if the case is otherwise a meritorious one.

3. What are the prospective client's expectations?

In conjunction with consideration of a case's potential overall monetary outcome is the question of the client's bottom line and what his or her expectation is. It is unfortunately not uncommon for a lawyer to obtain a very good verdict or settlement for a particular case that nevertheless leaves the client dissatisfied or even angry once legal fees and expenses, medical costs, insurance reimbursement claims, litigation loans, and other payments are deducted. Although these payments are sometimes negotiable, the reality is that insurers, medical providers, and loan companies expect to be paid out of the proceeds of a settlement or judgment, and may well have solid legal grounds to be paid.[3]

At a minimum, the client should be advised of the prospect of repayment of these payments at the outset of a case, and ideally the attorney should ensure that the prospective client affirmatively understands that this will be an issue. Unfortunately, clients sometimes object to payment of these alleged debts at the conclusion of the case, or insist on the lawyer reducing his or her legal fees in order to compensate for the reduced recovery.[4] The lawyer may have no choice but to do

[3] The specific rights of these groups to be paid is a complex question that depends on, inter alia, the type of payment, the nature of any agreement by the client or lawyer and the payer, and the state of state and federal law, which changes from time to time. See generally Georgia Rules of Professional Conduct, Rule 1.15(I) (setting forth a lawyer's duties with respect to funds claimed by third parties); O.C.G.A. § 33-24-56.1 (Georgia statute discussing reimbursement rights of certain insurers).

[4] Litigation funding loans can be particularly problematic, where the client has already received certain funds but may not recognize this fact when the principal, plus interest, is deducted from the recovery.

so, or alternatively to file an interpleader action, in order to resolve the payments issue. Neither outcome is a favorable one. Where a client expresses dissatisfaction at the outset about the lawyer's legal and ethical duty toward third parties, it may be a sign that the case should be more closely scrutinized before accepting.

4. How will a jury like the prospective client?

The "likeability" factor is a subjective but important factor in assessing a case. A strong case with respect to damages and liability may nevertheless result in a disappointing verdict based either on a jury or defense attorney's dislike of the client. This is not to say that a less-than-ideal client cannot obtain a good result, but the attorney may have to work harder to convince a jury that such a client deserves the award sought. Clients who are arrogant or obnoxious to a defense lawyer may be viewed negatively to a jury, as can a client who is alleged to have argued or verbally attacked defendants or others following the incident giving rise to the claim.

This is not to say that a prospective client with a problematic background should automatically be dismissed. A criminal background, for example, may not come into evidence by virtue of the rules regarding character evidence, and general acts of negative behavior may similarly be irrelevant and excluded. Even where a negative background is admitted into evidence, a lawyer can often shift the focus from the plaintiff's past wrongdoings to the defendant's. For example, if the plaintiff has a criminal past but has served time in prison or otherwise been punished, the plaintiff's lawyer can point out that the plaintiff took responsibility for his or her past actions and that the defendant should do the same.

B. Navigating Statute of Limitation Issues

Once the decision is made to take a case, one of the most important early tasks is confirming and recording the expiration of the statute of limitations, and taking appropriate action where necessary. Most rules governing statutes of limitation are contained in Chapter 3 of Title 9 of the Official Code of Georgia. For most personal injury cases, the statute of limitation is two years from the date of

the injury,[5] although there are numerous exceptions, including shortened periods for certain types of claims, tolling provisions, statutes of ultimate repose, and ante litem notice provisions. These issues are discussed below.

1. General statutes of limitation[6]

Unless otherwise noted, the time periods below are from date of accrual of the cause of action, which is generally such time as the injury from the harmful act has occurred.

- Personal Injury/wrongful death: Two years. (O.C.G.A. § 9-3-33).
- Defamation/damages to reputation: One year. (O.C.G.A. § 9-3-33).
- Loss of consortium: Four years. (O.C.G.A. § 9-3-33).
- Real and personal property damage: Four years. (O.C.G.A. §§ 9-3-30 and -31).[7]
- Medical malpractice claims: Two years. (O.C.G.A. § 9-3-71).
- Medical malpractice claims for foreign objects left in body: One year after discovery of object, or two years from date of procedure, whichever is *later*. (O.C.G.A. § 9-3-72).[8]

2. Ante litem requirements

When a prospective defendant is a city or county, or the state or federal government, appropriate pre-suit notice is required, which acts as a type of statute of limitation. Failure to send a proper notice will bar the claimant from pursuing

[5] O.C.G.A. § 9-3-33.

[6] The statutes below include only those commonly applicable to personal injury and wrongful death cases. Other limitation periods are noted throughout O.C.G.A. § 9-3-1 et seq.

[7] Note that there are significant exceptions to this limitation in certain circumstances, such as for claims involving synthetic siding and asbestos. See generally O.C.G.A. §§ 9-3-30 et seq. and 9-3-50 through -53.

[8] For a discussion of the interplay between O.C.G.A. § 9-3-71 and -72, see *Spivey v. Whiddon*, 260 Ga. 502, 503, 397 S.E.2d 117, 119 (1990).

the action.[9] The following requirements are set forth in the Official Code of Georgia, setting forth the time notice must be given from the accrual of the cause of action.

- Cities: Six months. (O.C.G.A. § 36-33-5).[10]
- Counties: One year. (O.C.G.A. § 36-11-1).[11]
- State government: One year. (O.C.G.A. § 50-21-26).[12]
- Federal government: Two years. (28 U.S.C. § 2401 (b)).[13]

With respect to governmental entities within Georgia, it is not always easy to determine whether such entities are part of the state government, local governments, or whether they are autonomous governmental units. This is true, for example, of authorities, some of which are state, falling under the Georgia Tort Claims Act and its one-year ante litem requirement, while others are not (MARTA, for example). If it is not possible to determine definitively the limitation required, it is best to comply with the most stringent of ante litem notice requirements within the shortest possible limitation period.

3. Statutes of ultimate repose

Statutes of repose are limitation periods beyond which claims may not be brought. While ordinary statutes of limitation limit the period following the accrual of the cause of action within which actions may be brought, statutes of repose limit the time within which the cause of action itself may accrue. Statutes of repose

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[9] The requirements of ante litem notices can be complex and failure to follow them may result in dismissal of a case. The statutes cited herein and the cases analyzing them should be studied carefully.

[10] Under a recent amendment to the city ante litem notice statute, claimants are now required to include a demand for a specific amount, and failure to do so would likely render the notice invalid.

[11] It should be noted that the provision applicable to counties requires that the claim be presented within one year. The lawsuit itself may serve as the "presentment," however, and therefore the statute is not technically an ante litem requirement. This is not true of cities and the state, however, where notice must be sent prior to filing suit.

[12] Claims against the state are governed generally by the Georgia Tort Claims Act, O.C.G.A. § 50-21-20 et seq.

[13] This section also bars actions unless the action "is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented."

frequently are applicable in cases where the harm may not occur until long after the tortious act was committed, such where a construction defect causes injury years after completion of the construction, or where the statute of limitation might otherwise be tolled. These limitation periods are set forth below:

- Medical malpractice: Five years, or, for minors under the age of five when the negligent act occurred, no later than age ten. (O.C.G.A. §§ 9-3-71(b) and -73(c)).[14]
- Products liability: Ten years from first sale for use of consumption of product. (O.C.G.A. § 51-1-11(b)).[15]
- Construction defects: Eight years from substantial completion of construction, unless injury or damage occurs in the seventh or eighth year following substantial completion, in which case the action must be brought within two years of the injury, but no later than ten years following substantial completion. (O.C.G.A. § 9-3-51).

Even where the statute of repose has expired, however, a limited exception may exist to the limitation where the injury occurred within the repose period and the defendant's fraud prevented the plaintiff from timely filing suit.[16]

[14] The interplay between statutes of limitation, repose and tolling in medical malpractice cases is particularly complicated and should be carefully studied to determine the applicable period for any particular case.

[15] This limitation does not apply to "an action seeking to recover from a manufacturer for injuries or damages arising out of the negligence of such manufacturer in manufacturing products which cause a disease or birth defect, or arising out of conduct which manifests a willful, reckless, or wanton disregard for life or property," or to failure-to-warn claims. O.C.G.A. § 5-1-11(c).

[16] See generally *Rosenberg v. Falling Water, Inc.*, 289 Ga. 57, 709 S.E.2d 227 (2011); *Esener v. Kinsey*, 240 Ga. App. 21, 522 S.E.2d 522 (1999); *Hill v. Fordham*, 186 Ga. App. 354, 367 S.E.2d 128 (1988).

4. Tolling the statute of limitation

Under certain circumstances, the running of the statute of limitation (but not a statute of repose) may be tolled (stopped) for some period of time. A few of these situations are set forth below.[17]

- Minors and legally incompetent persons by virtue of mental retardation or mental illness: Tolled until the removal of disability or age of majority, as applicable. (O.C.G.A. § 9-3-90).[18]
- Unrepresented estates of parties: Where either a plaintiff or a defendant has died and his or her estate is unrepresented (that is, no administrator or executor has been appointed), the statute of limitation shall be tolled for up to five years, after which it will begin to run. (O.C.G.A. §§ 9-3-92 and -93).
- Fraud: Under certain circumstances, fraud on the part of the liable party, where the fraud prevents or deters the claimant from bringing an action, may serve to toll the statute of limitation. (O.C.G.A. § 9-3-96).
- Medical malpractice: The statute of limitation may be tolled in limited circumstances where the plaintiff or plaintiff's attorney seeks medical records following strict statutory procedures. (O.C.G.A. § 9-3-97.1).
- Criminal acts of defendant: The statute of limitation is tolled for torts arising from commission of a criminal act, if the allegedly liable party is criminally charged, for up to six years, until the final disposition of the charge. (O.C.G.A. § 9-3-99). The Georgia Supreme Court has held that this provision applies to routine traffic citations.[19] The Court of

[17] This is not a complete list of tolling provisions. See O.C.G.A. Title 9, Chapter 5, for the complete list.

[18] This includes tolling of the statute of limitation where disability occurs after the cause of action accrues. O.C.G.A. § 9-3-91.

[19] *Beneke v. Parker*, 285 Ga. 733, 684 S.E.2d 243 (2009).

Appeals recently overruled its own precedent and held that this tolling provision applies to all defendants, not just those criminally charged.[20]

C. Major Elements of Local Procedure

1. Sources of procedural law in state courts

In Georgia, the primary source of procedural rules at the trial court level is the Georgia Civil Practice Act, located in the Official Code of Georgia at Title 9, Chapter 11. Additionally, the Uniform Superior Court Rules (and corresponding State Court rules) provide additional procedural rules and guidance for litigators. Other relevant provisions that may be relevant to litigators in state courts include:[21]

- O.C.G.A. Title 1, Chapters 1 and 3 (governing general interpretation, construction, and effect of laws).
- O.C.G.A. Title 5 (governing appeals and new trials).
- O.C.G.A. Title 9 (in addition to Civil Practice Act at Chapter 11, governing broad range of court rules and procedures, including statutes of limitation, venue, declaratory actions, judgments, and courts costs).
- O.C.G.A. Title 14 (providing for rules governing corporations and other business entities, including provisions for venue, service, and liabilities).
- O.C.G.A. Title 15 (providing rules governing operations of courts).
- O.C.G.A. Title 24 (providing for uniform rules of evidence).
- O.C.G.A. Title 33 (governing insurers, including claims against insurers).

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[20] *Harrison v. McAfee*, Georgia Court of Appeals Case No. A16A0648, 2016 WL 3654284 (July 7, 2016), overruling *Mays v. Target Corp.*, 322 Ga. App. 44, 743 S.E.2d 603 (2013); *Columbia Cnty. v. Branton*, 304 Ga. App. 149, 695 S.E.2d 674 (2010).

[21] The provisions that follow are in addition to statutory enactments governing substantive areas of law, such as those contained in Title 40 (motor vehicles) and Title 51 (Torts).

- O.C.G.A. Title 36 (governing local governments, including provisions for claims against cities and counties).
- O.C.G.A. Title 40, Chapter 12 (Georgia Non-resident Motorist Act).
- O.C.G.A. Title 50, Chapter 21 (Georgia Tort Claims Act)
- Relevant rules of the probate, magistrate, and other lower courts, as applicable.

2. Initiating and serving the lawsuit

Initiating suit involves filing a summons and complaint (and, often, discovery) and serving it upon the defendant(s). When the defendants are all Georgia residents, service is accomplished as provided under O.C.G.A. § 9-11-4, generally by a sheriff, marshal, or appointed process server.[22] Foreign corporations may be served as provided under O.C.G.A. § 9-11-4 if they maintain a registered agent in Georgia. For foreign persons and entities not maintaining a presence in Georgia, service may be made under the Georgia Long-Arm Statute[23] or the Georgia Non-resident Motorist Act, as applicable.[24] In any event, the return or other proof of service must be filed with the clerk within five days of service, or else the defendant's time to answer does not begin to run until the filing of that proof.[25]

3. Defendant's answer

Generally speaking, subject to stipulations of the parties and the provisions of O.C.G.A. § 9-11-4(h), defendants are required to file an answer within 30 days of service. Certain defenses may be asserted, some of which are required to be asserted with the answer or else are waived as provided by O.C.G.A. § 9-11-12. A defendant must also file a counterclaim where the claim would be compulsory, or

[22] Georgia law also provides for waiver and acknowledgement of service.

[23] O.C.G.A. § 9-10-90 et seq.

[24] O.C.G.A. § 40-12-1 et seq.

[25] O.C.G.A. § 9-11-4(h).

else be required to seek leave of court to file the counterclaim later.[26] Cross-claims and third-party complaints are not compulsory, but may be filed if the defendant so desires.[27]

4. Discovery

Perhaps the most active part of litigation, other than trial, occurs during the discovery stage. In state courts, the discovery period begins upon the defendant's filing of an answer, and runs, per the Uniform Rules, for six months, although the period is routinely, extended where the parties so request. In some cases, the judge may enter a scheduling order specifying the timelines for the progression of discovery and other pre-trial proceedings, including dispositive motions (motions for summary judgment, motions to dismiss, etc.). During this stage of litigation, written discovery (interrogatories, requests for production of documents, including to non-parties, requests for admissions) are often exchanged, and depositions may be taken. Where the plaintiff served written discovery upon the defendant with the summons and complaint, the defendant has 45 days to serve responses; otherwise, responses are generally due 30 days after service.[28]

5. Pre-trial procedures

After the close of the discovery period, if the case has not resolved, trial preparation is usually the next step. Preparation of the pretrial order, if required, may take place, along with evidentiary depositions and submission of jury charges, motions in limine, and motions for summary judgment.

At any point in the litigation, but especially following discovery, attempts at settlement may be made. Mediation may be attempted, and offers of settlement may be exchanged under O.C.G.A. § 9-11-68. If unsuccessful, the case is eventually set for trial.

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[26] O.C.G.A. § 9-11-13.

[27] O.C.G.A. §§ 9-11-13 and -14.

[28] Litigation deadlines are generally, though not always, extended by three days by virtue of O.C.G.A. § 9-11-6.

6. Trial

The progression of trial is largely dependent on the trial court judge's personal preferences, combined with the applicable Uniform Rules and statutory provisions. Counsel is expected to file timely motions in limine and jury charges before trial, and sometimes exhibit and witness lists, particularly if no pretrial order has been filed. From counsel's standpoint, any original discovery the party wishes to use should be filed, including original deposition transcripts. Any records required to be served upon opposing counsel to admit records under the Business Records Exception to hearsay should be served well in advance of trial.[29] Similarly, counsel should file with the court notices of service of subpoenas upon any witnesses sought to be introduced at trial.[30]

7. Post-trial/appeal

Following trial, relief may be sought through a variety of methods. Commonly, a motion for new trial is filed (under O.C.G.A. § 5-5-1 et seq.) in conjunction with a motion for judgment notwithstanding the verdict (under O.C.G.A. § 9-11-50).[31] Both a motion for new trial and for judgment notwithstanding the verdict act as "resetting" motions under the Appellate Practice Act and will serve to extend the time to file a notice of appeal until 30 days after a ruling on such motions.[32] Otherwise, unless an extension is given by the trial court, the notice of appeal is required to be filed no later than 30 days after the entry of judgment.[33]

[29] O.C.G.A. §§ 24-8-803(6) and -902(11).

[30] O.C.G.A. § 24-13-20 et seq.

[31] In federal courts, the terminology for judgment notwithstanding the verdict is "renewed judgment as a matter of law," and the concept was also traditionally referred to as "judgment non obstante veredicto," or j.n.o.v.

[32] O.C.G.A. § 5-6-38(a).

[33] O.C.G.A. § 5-6-38(a).

8. Federal courts

The above procedures apply to Georgia state courts. For federal court litigation, the Federal Rules of Civil Procedure and various local rules of the Northern, Middle, and Southern Districts of Georgia control. The local rules are differ greatly between the Districts with respect to timing of procedures and required filings, and therefore should be studied carefully to avoid running afoul of deadlines. All Georgia Federal District Courts require filings to be made via the CM/ECF electronic filing system, and each district requires separate attorney admissions to practice before them.

D. State Legislative Changes and Case Law

Each year, the Georgia General Assembly passes hundreds of new laws, some of which affect court proceedings, with respect to both procedure and substantive law. Similarly, the Federal Rules of Civil Procedure and Evidence are periodically updated, sometimes with significant results. This section will discuss some of the more significant recent changes to state and federal rules in recent years.

1. The 2013 Georgia Evidence Code

Likely the most significant change to Georgia trial practice in recent years has been the enactment of the new Evidence Code in 2013. Georgia's first revised evidence rules in 150 years, the 2013 Code largely adopted the Federal Rules of Evidence while retaining certain preexisting provisions of Georgia law. Due to extensive training by the various judicial counsels, Georgia judges are well-versed in the new Code, which in some key ways differs substantially from pre-2013 law, and therefore attorneys should take time to become proficient with the new rules. Some of the most substantial changes to Georgia evidence law include:

- Hearsay rules (codified at O.C.G.A. Title 24, Chapter 8) have been significantly revised. The doctrine of res gestae has been eliminated, though some evidence previously covered under the doctrine may remain admissible under the new Code. Additionally, a change to a specific hearsay exception, the Business Records Exception (O.C.G.A. §

24-8-803(6)), makes it far easier to admit business records through a written certification of a records custodian, and also allows the admission of opinions and diagnoses in those records. This has the potential to significantly alter the way many cases are tried.

- The rules governing character evidence have been revised. Although largely a change affecting criminal trials, evidence of certain convictions of witnesses may be admitted in civil cases,[34] along with evidence of other acts to demonstrate issues such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[35] Additionally, O.C.G.A. §§ 24-4-413 through -415 permit the introduction of evidence of prior sex crimes.
- Authentication, covered in O.C.G.A. Title 24, Chapter 9, has generally been simplified and the methods of authenticating documents broadened. It should be noted, however, that authentication and hearsay foundations remain separate.
- Counsel may now issue subpoenas under O.C.G.A. § 24-13-21, potentially negating the requirement of obtaining blank subpoenas from the clerk. This rule applies to both trial and deposition subpoenas.

These changes represent only a small portion of the changes effected by the 2013 Evidence Code. A number of articles and treatises cover the Code and recent changes in greater detail.

[34] O.C.G.A. § 24-6-609.

[35] O.C.G.A. § 24-4-404(b).

2. Revised requirements for claiming privilege in discovery

Uniform Superior Court Rule 5.5(1), effective June 4, 2015, provides in pertinent part as follows:

> When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial preparation material, the party shall:
>
> a. Expressly make the claim; and
>
> b. Describe the nature of the documents, communications, or tangible things not produced or disclosed and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess such claim.[36]

This language essentially mirrors language contained in Federal Rule of Civil Procedure 26, and prohibits a party from claiming a privilege or trial preparation protection without providing additional information. Although the rule does not prescribe a particular format for such a disclosure, a privilege log is routinely used as it is a simple way to comply with the requirement.

3. Modified filing requirements for returns of service

O.C.G.A. § 9-11-4(h) provides that "The person serving the process shall make proof of such service with the court in the county in which the action is pending within five business days of the service date. If the proof of service is not filed within five business days, the time for the party served to answer the process shall not begin to run until such proof of service is filed." Thus, a sheriff/marshal or private process server must file an affidavit or return of service with the clerk in a timely manner or else the time for a defendant's answer may be extended. This also applies to proof of service by publication and to acknowledgements of service. Although this provision has been in effect since 2010, it is often overlooked and may

[36] The corresponding Uniform State Court Rule is identical.

result in an improper claim of default. Therefore, attorneys should ensure that returns/affidavits are timely filed in order to start the defendant's answer time running.

4. New rules for serving policy limit demands upon insurers

In 2013, the legislature significantly altered the rules governing pre-suit demands to liability insurers in personal injury claims involving automobile collisions, which are codified at O.C.G.A. § 9-11-67.1. Commonly referred to as "Holt" demands,[37] such demands can create liability on the part of an insurer to its own insured if not accepted and the plaintiff ultimately obtains a verdict in excess of the policy limit, under the theory that the insurer should have settled when it had a chance to protect the personal assets of its insured. Commonly, though not always, the claimant in these circumstances is assigned the insured's claim in exchange for a release of the insured's personal liability to the claimant.

Under the statute, a demand, which must be sent by certified mail or statutory overnight delivery, return receipt requested,[38] must include the following information:

(1) The time period within which such offer must be accepted, which shall be not less than 30 days from receipt of the offer;
(2) Amount of monetary payment;
(3) The party or parties the claimant or claimants will release if such offer is accepted;
(4) The type of release, if any, the claimant or claimants will provide to each releasee; and
(5) The claims to be released.[39]

[37] *S. Gen. Ins. Co. v. Holt*, 262 Ga. 267, 416 S.E.2d 274 (1992).

[38] O.C.G.A. § 9-11-67.1(e).

[39] O.C.G.A. § 9-11-67.1(a).

The person or entity to which the demand is directed may, if the demand is accepted, make payment by cash, money order, wire transfer, bank cashier's check, draft or bank check issued by an insurance company, or electronic funds transfer or other method of electronic payment.[40] The fact that the recipient of the demand may inquire as to additional medical records, or resolution of liens or similar issues, is expressly deemed not to constitute a rejection of the demand or a counteroffer.[41]

5. New rules on redaction of private information

Effective July 1, 2014, litigants are required to redact certain personal information from court filings, which brings the state courts in line with the Federal Rules of Civil Procedure. O.C.G.A. § 9-11-7.1 provides that:

> a filing with the court that contains a social security number, taxpayer identification number, financial account number, or birth date shall include only:
> (1) The last four digits of a social security number;
> (2) The last four digits of a taxpayer identification number;
> (3) The last four digits of a financial account number; and
> (4) The year of an individual's birth.

Similar provisions are made applicable to magistrate courts and other courts that are not considered courts of record. These provisions also provide for when the redacted information may be produced, and for remedial action in situations where information is mistakenly produced. Finally, by its terms, the statute only applies to automobile collisions, only to pre-suit demands, and only to demands prepared by or with the assistance of an attorney.[42]

6. Federal Rules of Civil Procedure

The Federal Rules of Civil Procedure are periodically revised, and occasionally these revisions alter material aspects of litigation. The most recent

[40] O.C.G.A. § 9-11-67.1(f).

[41] O.C.G.A. § 9-11-67.1(d).

[42] O.C.G.A. § 9-11-67.1(a).

revisions, which went into effect on December 1, 2015, altered the time allowed for service under FRCP 4, and also significantly modified standards for discovery under FRCP 26. Under the modified rules, the phrase "reasonably calculated to lead to the discovery of admissible evidence" has been removed, and a proportionality standard has been instituted with respect to discoverability of information. FRCP 26(b)(1) makes discoverable:

> any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Additionally, FRCP 37(e) has been revised to provide additional guidance for situations where a party fails to preserve electronically stored information. Generally speaking, dismissal of the action or default judgment, or an adverse inference regarding the effect of the evidence, is now only available where the evidence was intentionally destroyed.