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# STATE VS. FEDERAL COURT – AN OVERVIEW

By John D. Hadden

*Note: Certain rules discussed in this paper have been amended since its publication. Please check the current federal, state, and local rules for up-to-date information*

As we all learned early in law school (if not before), Georgia, like all states, has two separate court systems of general jurisdiction: the state courts, made up of the superior and state courts,[1] and the federal courts, which, in Georgia, are divided into the United States District Courts for the Northern, Middle, and Southern Districts. This paper is intended to provide a broad overview of the practical distinctions between state and federal practice, including some of the distinctions between the three federal districts in Georgia, as well as a brief discussion of appellate practice in the two systems.[2]

## 1. Considerations when deciding between state and federal courts

In most cases, there will be no federal subject-matter jurisdiction over a lawsuit and the only option will be to file in state court. Where federal jurisdiction is available, however, a plaintiff (or a defendant contemplating removal) should carefully consider which of the two systems is likely to be more favorable to its

1 As used in this paper, "state courts" includes both state and superior courts. Of course, Georgia's court system also includes others such as probate and magistrate courts, but the jurisdiction of these courts is substantially more limited. The same is true of specialized federal courts.

2 The state uniform and federal local rules are modified regularly and should be reviewed carefully before litigating in those forums. For a more comprehensive discussion of the considerations and distinctions discussed in this paper, including a cross-reference chart detailing the state uniform rules and district court local rules, see Chapter 14 of Kenneth L. Shigley and John D. Hadden, Georgia Law of Torts – Trial Preparation and Practice (Thomson/West 2012).

case.[3] The following are a few of the more substantial differences between the two court systems that merit initial consideration, some of which are discussed in further detail later in this paper.

*Procedural rules and cost-shifting*

Georgia's adoption of the Civil Practice Act in 1966 brought the state court system largely in line with the Federal Rules of Civil Procedure (FRCP). Some distinctions remain, however, such as a plaintiff's ability to dismiss a civil action one time as a matter of right in the state system, as well as the rules governing counterclaims and defaults. Moreover, all federal courts in Georgia now have mandatory electronic filing and service, compared with only a handful of Georgia courts that provide electronic filing systems.

Another consideration is that costs of litigation in federal courts are generally taxed against the losing party. While few litigants take legal action planning to lose, it is worth considering the implications of a worst-case scenario. Deposition expenses and other routine costs of litigation (though not attorneys' fees) are generally recoverable against the losing party in federal court, which is not usually the case in state courts (although judges have discretion over this issue). On the other hand, substantive state laws sometimes provide for the recovery of both attorneys' fees and costs, such as OCGA §§ 13-6-11, 9-11-68, and 9-15-14. In some

3 A plaintiff should also consider the implications of the case being removed to federal court if that appears to be a possibility at some point during the litigation.

cases these remedies may also be available in federal courts.[4]

*Venue, jury pools, and voir dire*

Venue in state courts is a relatively straightforward proposition: venue rules require a lawsuit to be filed where the defendant lives, with special rules in the cases of multiple defendants and certain corporate defendants. Juries in state court trials are drawn exclusively from the county in which the lawsuit is filed.

Federal venue rules in Georgia are somewhat more complex, partly owing to the fact that the three federal judicial districts act as separate and independent units.[5] Additionally, each district is divided into a number of divisions composed of multiple counties, and separate local rules govern assignment of cases to the different divisions.[6] Federal jury pools are drawn from the entire multi-county division where the action is pending, which could result in a substantially different jury pool composition than in state court.

Aside from the jury pools, voir dire differs substantially between state and federal court and may be a key consideration for some attorneys. In state courts, attorneys are entitled to conduct a broad scope of oral voir dire: "the counsel for either party shall have the right to inquire of the individual prospective jurors examined touching any matter or thing which would illustrate any interest of the

4 See, e.g., Wheatley v. Moe's Southwest Grill, LLC, 580 F. Supp.2d 1324 (N.D. Ga. 2008).
5 See generally 28 USC § 1391.
6 See Local Rule 3.1 of the Northern and Middle Districts and Local Rule 2 of the Southern District.

prospective juror in the case . . . ."[7] In federal courts, however, the parties and their attorneys have no such right, and voir dire is sometimes conducted exclusively by the judge, although federal trial judges retain the right to allow attorney questioning.[8] Voir dire procedures vary widely among the different district judges, however, who are allowed very wide discretion over the conduct of jury selection.[9]

*Evidence*

Although the new Georgia evidence code will go into effect on January 1, 2013, for now the Federal Rules of Evidence (FRE) differ substantially, at least in form, from the Georgia rules. While in many cases the rules are substantively the same or similar, there are some distinctions that may be an important consideration in making a decision between federal and state court. For example, state evidence rules in Georgia allow for a plaintiff to testify about his or her medical bills directly,[10] while in federal court introducing such bills may involve calling a record custodian for the billing entity, a potentially more time-consuming and expensive proposition. On the other hand, introducing opinion testimony as a hearsay exception contained in business records is not allowed under the Georgia rules but is admissible under the FRE, which could mean the difference between simply introducing, for example, a medical record containing a diagnosis as opposed to

7 OCGA § 15-12-133.
8 FRCP 47.
9 See, e.g., Lips v. City of Hollywood, 350 Fed. Appx. 328, 338-39 (11th Cir. 2009).
10 This rule will remain in the new Georgia evidence code. See OCGA § 24-9-921 (effective January 1, 2013).

calling a doctor live to state that diagnosis. Under its new evidence code, however, Georgia will follow the federal rule in this regard, allowing business records – including opinions and diagnoses that are rendered in the ordinary course of business – to be introduced upon an affidavit of the records custodian.[11]

*Discovery*

State and federal discovery procedures also differ substantially. In state courts, a six-month discovery period begins once an answer is filed, and courts are somewhat (though not universally) lenient with regard to extending the discovery period. In federal courts, the discovery period may be substantially shorter and the courts less flexible regarding extensions. On the other hand, mandatory federal disclosures, conferences, and planning reports encourage the early exchange of discoverable information and documents that may lead to a quicker resolution of the case. Federal court does boast one big advantage over state court – attorneys have nationwide subpoena power. An attorney litigating in the Southern District of Georgia, for example, can issue a subpoena out of the Central District of California if necessary, despite having never been admitted in either the state or federal courts of that state.[12] Issuing an out-of-state subpoena, or requesting records from out of state, in a state court action is a far more time-consuming endeavor. An additional distinction in federal practice is that attorneys can unilaterally issue subpoenas for depositions or document production, rather than obtaining a clerk-signed blank

11 See FRE 803 (6) and OCGA § 24-8-803 (6) (effective January 1, 2013).
12 See FRCP 45.

from the court as under state practice.[13] This federal court advantage will disappear when Georgia's new evidence code goes into effect.[14]

*Pleading requirements*

Both the state and federal rules purport to operate under "notice pleading" standards, requiring that a complaint be merely sufficient to place the defendant on notice of the nature of the claims asserted. Recently, however, the federal courts have adopted a heightened interpretation of the notice pleading standard than has traditionally been required. Although far beyond the scope of this paper, the implications of this shift, which remains an evolving area of law, should be considered whenever federal courts become a potential forum.[15]

## 2. Getting into federal court

Most civil cases can be filed in either the state or superior courts of Georgia, although some, such as domestic and equitable cases, can be filed only in the superior courts.[16] Otherwise, the choice between state and superior court is largely a personal one, although local considerations or judicial preferences may come into play.

Federal court, on the other hand, is available only in limited circumstances as provided by federal law. Generally speaking, federal subject-matter jurisdiction

13 Id.
14 See OCGA § 24-13-21 (effective January 1, 2013).
15 See Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009).
16 Many Georgia counties do not have a state court, leaving superior court as the only option.

arises in cases involving federal questions (under 28 USC § 1331) or diversity of citizenship (under 28 USC § 1332), and a few other specialized areas of law. Federal jurisdiction based on diversity of citizenship requires complete diversity (i.e. no plaintiff resides in the same state as any defendant) and an amount in controversy greater than $75,000 exclusive of interest and costs.

Civil actions meeting the federal jurisdictional requirements may be filed originally in federal court or they may be removed by the defendant, although a case that would otherwise meet the diversity requirements cannot be removed if any defendant is a resident of the state where the suit was filed.[17] Removal of civil actions is governed by 28 USC § 1441 *et seq*. and requires that a defendant file a notice of removal with the federal court within 30 days of service of the lawsuit or within 30 days of the suit becoming removable (such as after dismissal of a party that precluded complete diversity). A lawsuit cannot be removed, however, at any point beyond 1 year after it was commenced, regardless of whether it might thereafter become removable. It should also be noted that recent amendments to 28 USC § 1441 (c) now prohibit federal courts from assuming subject-matter jurisdiction over certain otherwise non-removable state-law claims made along with removable claims in a lawsuit. Previously, courts were given discretion over whether to retain jurisdiction over the entire action or whether to sever the lawsuit and remand the state-law claims. The latter procedure is now required, although

17 28 USC § 1441 (a). The plaintiff could originally file such a lawsuit in federal court, however.

this does not affect the existing law of supplemental jurisdiction under 28 USC § 1367 for "all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."

### 3. Key procedural distinctions between state and federal courts

Despite the similarities between the Georgia Civil Practice Act and the Federal Rules of Civil Procedure, certain critical distinctions remain in addition to those discussed above. This section will discuss some of those distinctions. Attorneys should keep in mind that, while state court rules are usually less structured that federal procedures with regard to deadlines for disclosures, discovery, and motions, an increasing number of state court judges are requiring scheduling orders that set forth firm deadlines similar to those usually found in federal courts.

*Time calculations*

Both the state and federal rules state that where a court filing requires a response and the due date for the response falls on a weekend or legal holiday, the response is due the next business day after the holiday.[18] In state court, where a response is required in fewer than 7 days, intervening holidays and weekends are not counted. Such short deadlines are rare in state court, and therefore this is a

18 FRCP 6 and OCGA §§ 1-3-1 and 9-11-6.

seldom-used exception. In federal courts, all intervening holidays and weekends count toward the deadline.

Both state and federal rules allow an extra 3 days for a response to post-answer filings after service by "mail," which includes electronic service. There has been some discussion in the federal courts about abolishing this extra time allowance given the ubiquity of electronic service. At the present, however, the rule remains.

*Complaints, answers, counterclaims, and default*

In Georgia state courts, answers are due 30 days after service, and a counterclaim requires no answer unless the court orders one, whereas, in federal court, defendants must file their answer within 21 days, and a counterclaim requires an answer within 21 days after it is served.[19] Amendments to a pleading, which may be made freely at any time in state court until the entry of the pretrial order, are allowed in federal court only within 21 days of the filing of the original pleading or within 21 days of the answer or certain motions under FRCP 12.[20] While a motion to dismiss filed within the 21 days allowed for a response tolls the time for an answer in federal court, this is not true in a state court, where an answer must be filed regardless of the filing of a motion to dismiss.[21]

In state courts, a defendant who fails to respond to a complaint within 30

19 FRCP 12 and OCGA § 9-11-12.
20 FRCP 15 and OCGA § 9-11-15.
21 FRCP 12 and OCGA § 9-11-12.

days has an additional 15 days to open default as a matter of right upon payment of costs, after which default can only be opened at the discretion of the court.[22] The FRCP does not provide for a period in which default can be opened as a matter of right, although default is entered only upon request to the clerk of court for entry. As a practical matter, federal courts appear somewhat more likely to open a default and allow litigation on the merits, though in both state and federal courts the trial court is granted substantial discretion.

*Discovery and pretrial procedures*

Georgia state court rules do not provide for any mandatory disclosures or meetings between counsel, allowing the parties the freedom to structure discovery as they feel is most appropriate for their case during the 6-month period commencing at the time an answer is filed.[23] The courts' compulsory powers apply so long as the discovery procedure at issue is commenced within the 6-month period; thus, interrogatories served on the last day before expiration of the discovery period are timely and subject to court intervention if not properly answered. A deposition notice issued during the discovery period for a deposition to take place after the close of discovery, however, likely would not be subject to enforcement, though this would be subject to the trial court's inherent powers to direct the proceedings.

In federal court, discovery does not start upon the filing of an answer/motion. Instead, a mandatory FRCP 26 (f) early planning conference is required to take

22 OCGA § 9-11-55.
23 Georgia Uniform State/Superior Court Rule 5.1.

place shortly after the appearance of a defendant in order to discuss preliminary issues in the case, including the possibility of settlement and any unusual matters that might come up in discovery. The parties are thereafter required to file a joint preliminary report with the court outlining the parties' basic contentions and alerting the court to any potential complicating issues that might be amenable to resolution at an early stage, such as parties that have been improperly named. The specific rules governing the timing of these procedures vary among the federal districts, and the applicable Local Rules should be carefully considered.[24] Furthermore, initial disclosures must be filed in compliance with FRCP 26 (a)(1) disclosing certain basic information including witness names and contact information, copies or descriptions of relevant documentary material, and specifications of damages. The Local Rules of the Northern and Southern Districts require the use of specific forms for these disclosures, while the Middle District simply refers to the FRCP Requirements. In the Northern District, parties are also required to confer no later than 14 days after the close of discovery to discuss the possibility of settlement; if the negotiations are unsuccessful, this fact must be reported to the court as part of the pretrial order.[25]

Per the FRCP, parties in federal court are limited to serving 25 interrogatories, compared with 50 in state court. The Local Rules may, however, be

24 See Local Rule 16.2 of the Northern District, Local Rule 26 of the Middle District, and Local Rule 26.1 of the Southern District.
25 Local Rule 16.3 of the Northern District.

more restrictive and should be carefully studied before beginning discovery. In the Middle District, for example, Interrogatories, Requests for Production, and Requests for Admission are limited to 25, 10, and 15 requests, respectively.[26] Similarly, the Southern District restricts parties to 25 requests for Admission.[27] Finally, counsel should be careful to serve timely discovery requests within the discovery period. For example, in the Northern District, the Local Rules require that written requests be sent early enough so that responses will be due within the discovery period.[28] Thus, interrogatories must be served upon an opposing party at least 33 days (the standard time for response plus 3 mailing days per FRCP 6, unless the discovery is hand delivered) before the expiration of the discovery period period in order to be subject to the court's compulsory powers.

In state courts, the filing of a pretrial order after discovery is directed by the trial court, as is the case in the Middle and Southern Federal District Courts.[29] In the Northern District, on the other hand, the pretrial order is due no later than 30 days after the close of discovery.[30]

*Expert disclosures*

In state courts, absent a scheduling order to the contrary, experts generally must be disclosed as requested by an opposing party through discovery, and, in any

26 Local Rules 33.1, 34, and 36 of the Middle District.
27 Local Rule 36 of the Southern District.
28 Local Rule 26.2 (A) of the Northern District.
29 Uniform State/Superior Court Rule 7.1 and Local Rules 16.1.2 and 16.4 of the Middle and Southern Districts, respectively.
30 Local Rule 16.4 of the Northern District.

event, by the time the proposed pretrial order is filed (which would be required to contain the names of all potential witnesses, including experts), although professional courtesy would suggest a better practice is disclosure well before the pretrial order. Otherwise, there are no formalized rules governing the disclosure of either the name or subject matter of the experts a party expects to call at trial.

This is not the case in federal court. FRCP 26 (a)(2) requires the disclosure of experts who may testify at trial at least 90 days before the date of trial, or as set forth by scheduling order or local rule. Local Rules 26.2 of the Northern and Southern Districts provide additional guidance as to such timing. Additionally, experts that are required to be disclosed under this provision must submit written reports to the court stating with particularity the subject matter of their testimony.[31] Failure to disclose an expert in a timely manner or provide the required expert report may well result in exclusion of the expert and, if the expert was critical to an essential element of the case, may result in dismissal.

*Motions practice*

Motions practice in state court is somewhat similar to discovery in the sense that parties have a great deal of discretion over when to file motions, including dispositive motions, unless the court requires adherence to a scheduling order. Generally, motions should be filed prior to the entry of the pretrial order, although

31 FRCP 26 (a)(2)(B). See also Local Rule 26.2 (d)(ii) of the Southern District.

the form provided by Uniform State/Superior Court Rule 7.2 allows the parties to reserve motions to be filed later (subject to the judge's willingness to enter an order with such language). With regard to motions for summary judgment, which are not infrequently filed after the parties submit a proposed pretrial order, the Rules simply provide that they be filed early enough so that they do not delay trial.[32]

In federal court, the rules can be more strict, although the Middle District rules are less structured than those of the Northern and Southern Districts, subject to scheduling orders. For example, in the Northern District, motions other than those concerning summary judgment, *Daubert* qualifications, or discovery must generally be filed no later than 30 days after the start of discovery, subject to later filings with the permission of the court.[33] Summary judgment and *Daubert* motions in the Northern District must be filed before submission of the pretrial order 30 days after the close of discovery, while discovery motions must be filed before the expiration of discovery or within 10 days of service of the challenged responses, whichever is later.[34] In the Southern District, on the other hand, the rule is more uniform – motions must be filed no later than 30 days after the close of discovery.[35]

### 4. Appeals[36]

32 Uniform State/Superior Court Rule 6.6.
33 Local Rule 7.1 (A)(2) of the Northern District.
34 Local Rules 37.1 and 56.1 (D) of the Northern District
35 Local Rule 7.4 of the Southern District.
36 The discussion below is does not address all appellate requirements, and other procedures than

Rulings of Georgia state courts are appealed to the Georgia Court of Appeals, Georgia Supreme Court, or, very rarely, the United States Supreme Court.[37] Federal district court orders, on the other hand, are appealed first to the United States Court of Appeals for the Eleventh Circuit, and then to the United States Supreme Court. While a comprehensive discussion of the appellate procedures involved is beyond the scope of this paper, several general distinctions are important.

In Georgia courts, a party seeking an appeal of a final judgment usually has 30 days from the entry of judgment (as measured from the date of filing of the judgment) to file a notice of appeal, with some distinctions if the request is for interlocutory or discretionary review. The notice of appeal is filed with the trial court, and payment of the docket fee is not required until the appellate brief is filed.[38] A motion for reconsideration of an order does **NOT** toll the time for filing the notice of appeal, although a motion for new trial does extend the deadline for an additional 30 days after a ruling on the motion. Additionally, the trial court can, upon motion, extend the deadline to file a notice of appeal for one 30-day period.

A notice of appeal in federal court must also be filed within 30 days of a final

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the ones described may be necessary to confer jurisdiction upon an appellate court to review a trial court ruling. Anyone contemplating, or already involved in, a Georgia appellate matter would be well served to pick up a copy of Judge McFadden's treatise, Georgia Appellate Practice, published by Thomson/West. For federal appeals, Federal Appellate Practice, published by BNA and edited by Mayer Brown LLP is an excellent resource.

37 Unlike in the federal system, Georgia trial court orders are not always appealed to the Court of Appeals before reaching the Georgia Supreme Court.

38 There will likely be other costs to be paid to the trial court, however, before the appeal can be docketed, including record and transcript fees.

judgment or order. Unlike in state court, the docket fee must be paid to the trial court clerk along with the filing of the notice of appeal. Significantly, a motion under Federal Rule of Civil Procedure 60 asking for reconsideration of a trial court decision **DOES** toll the time for filing a notice of appeal, although the time limit for requesting such relief is itself limited to 28 days.[39]

39 Federal Rule of Appellate Procedure 4.