

Variations In Federal and Georgia Court Practice By Jake Evans, Holland & Knight LLP, Atlanta

This outline provides an overview of differences in practicing in Georgia state courts and Federal courts. Federal rules are typically more stringent and carry harsher consequences for non-compliance. But this is not always the case. Comprehensive knowledge of the procedural rules of the court in which a litigator practices has direct and indirect benefits.

I. Pleadings

a. *Timing of Answer*

- i. Georgia State Court — Answer to Complaint is due 30 days after service of summons and complaint unless proof of service is not filed with the court within five business days after service was made, in which case the answer is not due until 30 days after proof of service is filed.

-No answer is required to a cross-claim or counterclaim, unless ordered by the court.

- ii. Federal Court — Answer to Complaint is due 21 days after service of the Complaint summons.

-Count by touchdowns.

-Parties served with a counterclaim or crossclaim **must** serve an answer to the counterclaim or crossclaim within 21 days.

b. *Waiver of Defenses*

- i. Georgia State Court — following defenses are waived if not raised in initial responsive pleading or contemporaneous motion:

1. Lack of Personal Jurisdiction
2. Improper Venue
3. Insufficient Process
4. Insufficient Service of Process

- ii. Federal Court — a party **may** assert the following defenses through a motion filed before pleading (12(b)(6) Motions):

1. Lack of Subject-Matter Jurisdiction
2. Lack of Personal Jurisdiction
3. Improper Venue
4. Insufficient Service of Process
5. Failure to State a Claim Upon Which Relief Can be Granted
6. Failure to Join a Necessary or Dispensable Party

c. *Affirmative Defenses*

- i. Georgia State Court — Civil Practice Act requires the following affirmative defenses be raised in the initial defensive pleading:

1. Accord & Satisfaction;
2. Arbitration & Award;
3. Discharge in Bankruptcy;
4. Duress;
5. Estoppel;
6. Failure of Consideration;
7. Fraud;
8. Illegality;
9. Injury by Fellow Servant;
10. Laches;
11. License;
12. Payment;
13. Release;
14. Res Judicata;
15. Statute of Frauds;
16. Statute of Limitations;
17. Waiver;

-Interestingly, though, the Court of Appeals has held that the “affirmative defenses” listed in O.C.G.A. 9-11-8(c) (those enumerated above) may be asserted for the first time in a motion for summary judgment. *See Phillips v. State Farm Mut. Auto. Ins. Co.*, 121 Ga. App. 342, 345-46 (1970). So, to an extent, the rule has bark with no bite. It is still recommended to include these in an initial pleading if there is any possibility they are implicated in a case.

-Defenses other than those enumerated above need not be asserted in a defendant’s answer and can be raised for the first time in a motion or at trial.

- ii. Federal Court — “every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required.”

1. Rule 8(c) contains a list of affirmative defenses that must be asserted in responding to a pleading, but that list is not exhaustive and all affirmative defenses must be asserted in responding to a pleading.
2. Failure to raise affirmative defenses in one’s answer or other responsive pleading will result in waiver of the defense.

3. Throw in the kitchen sink. At worst, will have to file a withdrawal of an affirmative defense.
- d. *Tolling Effect of Motions to Dismiss*
- i. Georgia State Court — a motion to dismiss filed at or before the time of filing an answer will result in a stay of discovery for 90 days or until the court rules on the motion.
 - ii. Federal Court — filing of a motion to dismiss does not stay discovery. But the due date for the answer is 14 days after receiving “notice” that the court denied the motion to dismiss or postponed disposition of the motion until trial.
- e. *Right to Trial by Jury*
- i. Georgia State Court — a party is entitled to a jury trial unless the party stipulate otherwise in writing or in open court and on the record.
 1. A party may demand a jury trial “at any time before the case is called for trial or upon the call for trial.” *Carleton v. State*, 176 Ga. App. 399 (1985).
 - ii. Federal Court — a party **must** make a demand for jury trial within 14 days after service of the last pleading directed to the issue on which jury trial is demanded.
 1. Unforgiving.
- f. *Third-Party Complaints*
- i. Georgia State Court — third-party complaints may be filed in state court without leave of court within 10 days after filing of the initial answer; otherwise, leave of court is required.
 - ii. Federal Court — third-party complaint is due 14 days after service of the original answer, otherwise leave of court is required.
- g. *Amended Pleadings*
- i. Georgia State Court — parties must amend their pleadings as a matter of course, without leave of court, any time before entry of a pretrial order.
 1. Very lenient standard.
 2. **No** response is required to an amended pleading, unless ordered by the court.

- ii. Federal Court — a party generally may amend his pleading once, either within 21 days after service of the initial pleading or within 21 days after the earlier of service of the responsive pleading or service of a motion to dismiss, motion for more definite statement, or motion to strike.
 - 1. A party **must** file a response to the amended pleading within the remaining time to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.
 - 2. In other words, you must file an answer to an amended Complaint.
- h. *Special Pleading and Formatting Requirements*
 - i. Georgia State Court — less special pleading requirements than in state court. But must include facts on which venue depends in Complaint.
 - ii. Federal Court — more stringent formatting and pleading requirements.
 - 1. N.D.Ga. Formatting Requirements — formatting requirements that must be complied with including margins, font size and type, page numbering, citations, and other matters.
 - Regardless of district court you are in, make sure to carefully review the local rules.
 - 2. Corporate Disclosure Statement — any nongovernmental corporate party must file disclosure statement that identifies any parent corporation and any publicly-held corporation owning ten percent or more of its stock or states there is no such corporation.
 - Must be filed at the time of a party's first appearance, pleading, petition, motion, response, or other requires to the court.
 - 3. N.D.Ga. Certificate of Interested Parties — in the North District of Georgia, parties also are required to file a "certificate of interested parties" consisting of (i) "[a] complete list of other persons associations, firms, partnerships, or corporations having either a financial interest in or other interest which could be substantially affected by the outcome of th[e] particular case; and (ii) [a] complete list of each person serving as a lawyer in th[e] proceeding."
 - 4. Standing Orders — Federal judges often issue lengthy standing orders at the beginning of a case governing the conduct of the parties and counsel and various procedures during litigation. Although some state court judges also issue standing orders, it is much more prevalent in federal court. Many such orders include extensive procedural standards,

especially regarding depositions. Carefully review these and make a concerted effort to comply with such orders. It can quickly put in you good graces with the judge.

II. Scheduling and Discovery Practices

- a. Initial Disclosures — federal rules require parties in most civil cases to make certain “initial disclosures” even without being served with any written discovery requests. The information required includes:

- i. Information related to persons likely to have discoverable information;
- ii. Copy, or description by category and location of all relevant documents, electronically stored information, and tangible things the disclosing party has in its possession;
- iii. Computation of each category of damages claimed by the disclosing party, and a copy of all material on which the computation is based;
- iv. A copy of any insurance agreement which may be liable to satisfy all or party of a possible judgment;

-Initial disclosures must be served within 14 days after the parties 26(f) initial planning conference, unless the parties stipulate or the court orders otherwise.

-N.D.Ga. — initial disclosures must be made within 30 days after appearance of a defendant by answer or motion.

-Failure to provide information or to disclose a witness in a party’s initial disclosures will result in exclusion of that information or witness on a motion, at a hearing, or at trial, unless the failure was “substantially justified or is harmless.”

- b. Initial Planning Conference/26(f) Conference — the federal rules require an initial planning conference and accompanying report, neither of which are required under the Civil Practice Act. This conference must be held “as soon as practicable” and, in any event, no later than 21 days before a scheduling conference is set to be held or the scheduling order is due under Rule 16(b).

-N.D.Ga. — Rule 26(f) conference must be held within 16 days after the appearance of a defendant by answer or motion.

-Must talk through issues, including nature and basis of claims and defenses, possibilities of settlement, arrange for disclosures of information, develop a proposed discovery plan.

-The discovery plan is due 14 days after the Rule 26(f) conference. This plan must state a number of items, most of which revolve around discovery and its extent.

c. Scheduling Orders

- i. Georgia State Courts — the Civil Practice Act does not specifically provide for issuance of scheduling orders, though an increasing number of state and superior courts have begun issuing scheduling orders as a matter of course in complex cases.

-While other sanctions may be imposed, exclusion of probative trial evidence is not an appropriate remedy for curing an alleged discovery admission.

- ii. Federal Courts — federal courts, conversely, are required to issue a scheduling order “as soon as practicable”, but in no case later than 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared, whichever is earlier.

-Once issued, a scheduling order may be modified only for “good cause” and with the judge’s consent.

-Federal Rules permit imposition of Rule 37(b)(2)(A) sanctions for failure to comply with the court’s scheduling order.

-Failure to provide information or identify a witness can prohibit the party from using that information or witness on a motion, at a hearing, or at trial, unless the failure was substantially justified or is harmless.

D. *Written Discovery*

- a. Georgia State Court — discovery period general begins upon filing of a defendant’s answer and lasts for six months (although the court has discretion to shorten, extend, or reopen the discovery period).

1. Discovery limitations

-50 Interrogatories

2. Deadline: must serve responses within 30 days of service of requests (with three plus dates of electronic service).

- b. Federal Court — discovery period typically does not begin until after the Rule 26(f) conference. Consequently, unlike in state court, discovery requests cannot be served with the complaint. The discovery deadline will be set in the scheduling order entered by the court after filing a parties’ discovery plan.

1. Discovery deadlines

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-N.D.Ga. discovery deadline: cases are assigned different discovery periods depending on the type of the case, generally four or eight months, although the parties may request more time.

-S.D.Ga. discovery deadline: unless court provides otherwise in its scheduling order, all written discovery must be served and all depositions must be completed within 140 days after filing of the last answer of the defendants named in the original complaint.

2. Discovery limitations

-25 Interrogatories;

3. Duty to supplement: the duty to supplement written discovery responses and disclosures is much broader in federal court than state court. A party must supplement any statement made in a disclosure or discovery response “in a timely manner” either if ordered by the court or upon learning that the disclosure or response is incomplete or incorrect “in some material respect”.

4. Deadline: must serve responses within 30 days of service of requests (with three plus dates of electronic service).

III. **Motion Practice**

a. Georgia State Court: motions generally must be filed sufficiently early that the time for a response will elapse prior to trial.

1. Motions for summary judgment must be filed “sufficiently early so as not to delay the trial,” and “no trial shall be continued by reason of the delayed filing of a motion for summary judgment.”
2. Any response to a motion filed in superior court must be filed and served within 30 days after service of the motion.
3. Any response to a motion filed in state court must be filed and served within 30 days after service of the motion or on the date of the hearing (if any), whichever is sooner.
4. The Civil Practice Act has no language relating to Reply briefs, despite parties frequently filing them. Georgia case law has held that parties do not have a right to file a Reply brief, so it is always recommended to file them as soon as possible.
5. Motions are generally decided without a hearing.

-An exception exists for motions for new trial, motions for judgment notwithstanding the verdict, and motions for summary judgment.

-As to motions for summary judgment, oral argument must be permitted if party requests oral hearing through a written pleading entitled "Request for Oral Hearing" which is filed either with the motion or no later than five days after the time for a response.

- b. Federal Court: deadlines for filing motions are most often determined by a court entered scheduling order.

1. The N.D.Ga. has a number of specific deadlines for motion filings, including:

-Motions to compel discovery typically must be filed prior to the close of discovery or within 14 days after service of the disclosure or discovery response at issue.

-Motions for summary judgment must be filed as soon as possible but no more than 30 days after close of discovery unless otherwise ordered by the court.

-Motions for reconsideration, which "shall not be filed as a matter of routine practice" and should only be filed when "absolutely necessary," must be filed within 28 days after the order or judgment to be reconsidered; responses must be filed within 14 days after service of the motion.

-*Daubert* motions generally must be filed no later than the date the proposed consolidated pretrial order is submitted.

-All others motions must be filed within 30 days after the beginning of discovery absent prior leave of court.

2. Responses: in both the Northern and Southern Districts of Ga, responses to motions are due 14 days after service of the motion, except for responses to motions for summary judgment, which are due 21 days after service of the motion. Reply briefs should be filed within 14 days of the response brief's service.

-Parties can consent to an extension, which should be filed with the court.

-Failure to respond will be deemed an indication the party does not oppose the motion.

3. Page Limitations: in the N.D.Ga. briefs in support of and in opposition to motions are limited to 25 pages, and reply briefs are limited to 15 pages.

4. Motions are generally decided without a hearing.

IV. Dismissal

- a. Georgia State Court: a plaintiff may dismiss his case voluntarily and without prejudice once at any time prior to the first witness being sworn at trial.
 - 1. This provision is very unique to Georgia and gives plaintiff great liberty in dismissing their cases.
 - 2. Georgia's renewal statute greatly enhances the effect of this dismissal rule. A plaintiff can still refile the action after the expiration of a statute of limitations as long as the action is filed within 6 months of voluntary dismissal.
 - 3. Applies in both state and federal court. *See Scott v. Muscogee County*, 949 F.2d 1122, 1123 (11th Cir. 1992).
- b. Federal Court: after an opposing party has filed an answer or a motion for summary judgment, a plaintiff may only dismiss his case either by court order or by a stipulation of all parties in the case.