

**REPORT OF THE EVIDENCE STUDY COMMITTEE
OF THE STATE BAR OF GEORGIA**

PROPOSED NEW RULES OF EVIDENCE

(Draft: June 6, 2005)

Submitted By:

**W. Ray Persons, Chair
Thomas M. Byrne, Vice-Chair
Paul S. Milich, Reporter**

TABLE OF CONTENTS

Membership of Evidence Study Committee	2
Overview	3
Map of Adopting States	6
Brief Summary of Differences Between Existing Georgia Law and Proposed Rules of Evidence	7
Draft of New Title 24	15
Chap. 1 - General Provisions	16
Chap. 2 - Judicial Notice	27
Chap. 3, 4 - Relevance	30
Chap. 5 - Privileges	51
Chap. 6 - Witnesses	57
Chap. 7 - Opinion and Expert Testimony	78
Chap. 8 - Hearsay	88
Chap. 9 - Authentication	114
Chap. 10 - Best Evidence Rule	123
Chap. 11, 12, 13, 14, 15 retained Georgia Chapters	128 - 131
Appendix A - Table Summarizing New Title 24 with References to Sources	132
Appendix B - Lists changes (repeal or amendment or renumbering) to existing Georgia statutes	138

EVIDENCE STUDY COMMITTEE OF THE STATE BAR OF GEORGIA

MEMBERSHIP

W. Ray Persons - Chair

Thomas M. Byrne - Vice Chair

David Isaac Adelman

William Q. Bird

Thomas C. Bordeaux Jr.

Robert M. Brinson

Dennis K. Calhoun

Ronald L. Carlson

Hon. Edward E. Carriere Jr.

Warren N. Coppedge Jr.

Dwight J. Davis

Foy R. Devine

Mark A. Dickerson

J. Melvin England

Warren D. Evans

Wayne W. Gammon

Edward T M Garland

Charles L. Gregory

Charles M. Jones

Robert Keller

J. Michael Lamberth

Robert Freeman Leverett

W. Bruce Maloy

John T. Marshall

Mary Ann B. Oakley

Mary Margaret Oliver

James L. Pannell

Penn Payne

Albert M. Pearson III

Evans J. Plowden Jr.

Dennis C. Sanders

Hon. Wendy L. Shoob

Hon. Ben Studdard

Charles B. Tanksley

Henry C. Tharpe Jr.

Charles A. Thomas Jr.

R. Wayne Thorpe

Norman L. Underwood

Hon. Robert G. Walther, Retd.

Reporter: Paul S. Milich

Executive Committee Liaison

David S. Lipscomb

Advisors

Tom Boller

W. G. Elliott

Frank C. Jones

Russell N. Sewell Jr.

OVERVIEW

In 1858, the Georgia Legislature appointed three commissioners, Richard Clark, Thomas Cobb, and David Irwin, to prepare a code which should “as near as practicable, embrace in a condensed form, the laws of Georgia” including the common law and principles of equity then recognized by the courts of this state. It was a massive task for the commissioners and they were given less than two years to finish it. To Judge Irwin fell the task of preparing the Code of Practice which included civil procedure, equity practice, and the rules of evidence. The work was completed in 1860 and adopted by the Legislature with only a few minor changes in December of that year. Due to the war, publication was delayed until 1863 and thus the code has been referred to ever since as the Code of 1863.

Most of Georgia’s current rules of evidence are derived from the Code of 1863. But litigation has changed substantially over the last 140 years. With the liberalization of pre-trial discovery, growth in the use of experts, and the increase in the education and experience of the average juror, the pressure has been to open up the trial --- to let in more evidence, more efficiently.

Georgia courts have not been immune to this pressure and have struggled with the older statutes to broaden the admissibility of probative evidence. Indeed, in a few cases, Georgia courts nearly have abandoned the statutes and, from necessity, developed rules in a common law like manner. These incremental efforts have helped keep Georgia law somewhat current. But the overall result is not that satisfying. From the standpoint of the trial judge and lawyer, “the rule” is not necessarily found in the statutes, since 140 years of judicial gloss may have changed that. And the cases that have applied that gloss are not always consistent. In short, despite our courts’ frequent efforts at rejuvenation, Georgia’s Evidence Code is showing its age.

The effort to draft the Federal Rules of Evidence began in 1961 when Professor Thomas Green of the University of Georgia prepared an Advisability and Feasibility Study for a committee appointed by Chief Justice Earl Warren. In 1965, Professor Green joined 14 other lawyers, judges, and legal scholars on the Advisory Committee to formulate uniform rules of evidence for the federal courts. In 1969, the Committee issued a preliminary draft of the rules and comments were invited from every segment of the practicing bar. A new draft was issued in 1970 and submitted to the United States Supreme Court. The Court returned the draft for still further consideration. A new round of comments were solicited and considered, leading to further revisions. The United States Supreme Court finally approved the Rules in late 1972.

Congress insisted that the rules be statutory rather than judicial and both the House and Senate conducted detailed studies of the rules. The Federal Rules of Evidence were enacted in 1975. The major changes by Congress related to privileges (Congress deleted all the specific rules on privileges) and presumptions.

Since 1975, the Federal Rules (or the Uniform Rules equivalent) have been adopted in 42 states and the commonwealth of Puerto Rico. (See the map following this Overview). This extraordinary response is testament to the fact that the Advisory Committee's 10 years of study and exposure of the Rules to comments by all sectors of the legal community produced a remarkably balanced set of rules. The Federal Rules succeeded in gaining wide state adoption partly because, unlike earlier proposed uniform rules, they did not try to blaze bold new trails and did not appear to favor one group over any other.

Substantively, the Federal Rules break relatively little new ground. Most of the departures from such traditional principles as the ultimate issue rule, legal and logical relevancy, *res gestae*, and the hypothetical question, are based on long-standing scholarly and judicial criticism of those doctrines. In this sense, the Federal Rules reflect two centuries of experience with what works and what does not.

Evidentiary weaknesses that might entail inadmissibility under older, traditional rules are more likely treated as matters of weight rather than admissibility under the Federal Rules. In this sense, the Federal Rules reflect greater confidence in the skills of the advocates and the good sense of the trial judge and jury. Counsel are expected to expose any weaknesses in evidence by careful cross-examination and argument. The judge is given ample discretion to control the order and method of proof to facilitate clarity, fairness, and efficiency. The jurors are trusted to use their good sense in weighing the evidence.

The Federal Rules have been praised for their accessibility. They are relatively straightforward, specific, and well-organized. Accessibility is important. Rules of evidence are only as good as the lawyers and judges who must recall and apply them quickly and accurately in the heat of trial. The Uniform Commercial Code can afford to be highly technical, rules of evidence cannot.

The rules proposed in this Report are based predominantly on the Federal Rules. Some older Georgia statutes have been retained to fill gaps in the Federal Rules and to reflect specific Georgia policies. A few changes have been made to the language of the Federal Rules to customize the rules for Georgia and to clarify some issues that have arisen under the Federal Rules. All of this is discussed in the Comments to each proposed rule in the materials that follow.

Adoption of new rules of evidence would bring two changes to Georgia practice. The first, the substantive changes in the law of evidence, is briefly summarized in the following section. The second change relates to accessibility. Compared with existing

Georgia law, the new rules provide a clearer, simpler, more comprehensive approach to evidentiary issues.

Some might say that if the Georgia rules of evidence aren't broke, don't fix them. But a more apt analogy is to an old car that still runs but is tough to drive and prone to sputtering at times. The Federal Rules are a proven model based on much the same design as the old one but incorporating changes based on experience. With millions of miles already logged on this model in federal courts and the courts of 42 states, there are no surprises; you know what you are getting. But best of all, it's easier to drive.

When Judge Irwin wrote Georgia's evidence code 140 years ago he began with the simple principle: "The object of all legal investigation is the discovery of truth." These new rules are dedicated to that end.

[insert copy of color map in place of this page]

A BRIEF SUMMARY OF THE MAJOR DIFFERENCES BETWEEN EXISTING GEORGIA LAW AND THE PROPOSED NEW RULES OF EVIDENCE

Court Decides Preliminary Questions of Admissibility - In Georgia, most questions regarding the admissibility of evidence are determined by the trial judge but there are a few areas in which Georgia law holds that the admissibility question is ultimately one for the jury. The proposed rules reflect the modern trend of leaving all admissibility questions to the trial judge. The jury, of course, continues to be the final arbiter of the weight to be accorded admitted evidence. See, proposed O.C.G.A. § 24-1-104.

Definition of Hearsay - The proposed rules use the Federal Rules, assertion-oriented definition of hearsay — hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Georgia's statutory definition of hearsay is taken from Professor Greenleaf's 1853 treatise on evidence. Analytically, the two definitions are basically the same but the federal definition is more familiar and easier to understand and apply in a trial setting. The federal definition makes it clear that out-of-court statements offered only to establish the fact that they were made or heard, and not to prove the truth of the matter asserted, are nonhearsay. This definition meshes well with the traditional common law categories of nonhearsay - - effect on hearer, verbal act, and so forth. See, proposed O.C.G.A. §24-8-801.

Party's Own Statements - In Georgia, a party generally cannot offer his own out-of-court statements if they are "self-serving". Under the proposed rules, they are admissible even if self-serving, if they have a relevant, nonhearsay use or come within a hearsay exception. The rule that a party may not testify to his own self-serving statements has its origin in the old rule that a party was incompetent to testify on his own behalf because a party could not be trusted to tell the truth. Georgia repealed party incompetency about 120 years ago, as did everyone else, on the theory that it is better to have whatever evidence a party could give and let the jury take the self-serving nature of the evidence into account in weighing the evidence.

Admissions by Agents - Georgia's agency admission rule has a confusing history, due in large part to the overlap of two, inconsistent statutes - - one in the Evidence Code and one in the Title on Agency - - that both speak to the admissibility of an agent's statements against his principal. But even the most liberal readings of these statutes limit admissibility to statements of the agent which are authorized by the principal. Since few employees are authorized to make statements damaging to their employers, the Georgia rule is quite restrictive in effect. The proposed rules only require that the statement have been made during the agency relationship and that the subject matter of the statement fall within the scope of the agent's duties. See, proposed O.C.G.A. § 24-8-801(d)(2)(C) and (D).

Statements of Co-Conspirators - The proposed rule differs from existing Georgia law in three ways. (1) Georgia's statute requires that the statement have been made during the "pendency of the criminal project." Georgia courts have included pre-conspiracy statements when such statements illustrate the origins or motives for the subsequent criminal project. The proposed rule requires that the statement have been "during the course and in furtherance of the conspiracy." Pre-conspiracy statements therefore would be inadmissible under the new rule.

(2) Georgia does not require that a co-conspirator's statement have been in furtherance of the conspiracy in order to be admissible under this exception. This has implications under the Confrontation Clause since statements that are not in furtherance of the conspiracy fall outside the firmly established common law exception for co-conspirator statements and thus may require special handling by the court to avoid Confrontation Clause problems. The proposed rule is based on the requirement at common law and carried forward in the Federal Rule that any statements admissible as a co-conspirator admission must have been in furtherance of the conspiracy.

(3) Under Georgia law, the "concealment phase" of a criminal project may continue long after the crime has been committed and until the perpetrators have surrendered or been caught. Compared to the common law and federal practice, Georgia views this "concealment phase" very broadly. Under the proposed rules, statements made during a "concealment phase" would be admissible only if the statements were in furtherance of concealment. See, proposed O.C.G.A. § 24-8-801(d)(2)(E).

Res Gestae - The proposed rules retire the term "*res gestae*." While the obscurity of this concept may have been useful when the theory of hearsay exceptions was still growing, most jurisdictions have come to replace it with specific rules covering several classes of statements that experience (primarily with the *res gestae* concept) has proved are especially trustworthy. See, proposed O.C.G.A. § 24-8-803 (1),(2),(3).

Business Record Exception - Current Georgia law and the proposed rules differ in two respects. (1) The Georgia rule does not allow opinions in the record. The proposed rules do. Thus, for example, an appraiser's report as to the value of certain property could be admissible under the new rule but not under Georgia law. Expert opinions in the record still would have to qualify under the rules governing expert testimony. Moreover, the court can exclude business records when "the source of information or the method or circumstances of preparation indicate a lack of trustworthiness."

(2) With the exception of a special statute admitting medical narratives in certain civil cases, Georgia requires that a witness lay any foundation necessary to the admission of a business record. The proposed rules allow the use of an affidavit to lay this foundation if the proponent gives opposing parties notice and an opportunity to examine the records before trial. See, proposed O.C.G.A. §§24-8-803(6); 24-9-902(11).

Public Records Exception - Georgia has dozens of statutes regarding the admissibility of specific public records scattered all over the Official Code of Georgia. Together, their coverage is similar to proposed O.C.G.A. § 24-8-803(8)(A), admitting the routine records of any public agency.

Georgia uses its general business record exception for admitting public records not specifically covered by statute. Again, this does not permit statements of opinion in the record. Proposed O.C.G.A. § 24-8-803(8)(B) and (C) admit matters observed and reported pursuant to duty and factual findings resulting from duly authorized investigations, though these provisions are unavailable to the prosecution in criminal cases.

Learned Treatises - In Georgia, an expert may refer to treatises and other learned publications on direct but the expert may not disclose the pertinent contents of the publication. The contents may be inquired into on cross. The proposed rule allows relevant portions of a treatise to be read to the jury on direct if it is shown that the work is considered a reliable authority in the particular field. See, proposed O.C.G.A. § 24-8-803(18).

Hearsay Exceptions Requiring the Unavailability of the Declarant

(1) The proposed rules define “unavailability” more broadly than Georgia’s comparable standard of “inaccessibility.” The proposed rules include failure of memory or an unjustified refusal to testify as making that witness “unavailable to testify at trial.” Moreover, for several hearsay exceptions such as dying declarations and statements against interest, current Georgia law requires that the declarant be dead at the time of trial while the new rules only require that the declarant be “unavailable.” See, proposed O.C.G.A. §24-8-804.

(2) In Georgia, a dying declaration is admissible only in a prosecution for homicide of the declarant. The proposed rules admit dying declarations in any civil case as well. See, proposed O.C.G.A. §24-8-804(b)(2).

(3) Statements Against Interest - In Georgia criminal cases, statements against penal interest are inadmissible. Under the proposed rules, a statement against penal interest would be admissible if offered by the prosecution or the defense if there exists corroborating circumstances that clearly indicate the trustworthiness of the statement. See, proposed O.C.G.A. §24-8-804(b)(3).

Expert Opinion Testimony - Georgia’s rules regarding expert testimony in civil cases, passed in 2005, are based on the Federal Rules. The rules in criminal cases are based on pre-existing Georgia law. The proposed rules on expert testimony would apply in both civil and criminal cases.

Comparing the proposed rules to traditional Georgia law (still applied in criminal cases) there are two major differences. (1) Georgia law allows an expert to base an opinion on inadmissible hearsay but the parameters are unclear. Georgia does not require that the hearsay on which the expert relied be of a type reasonably relied upon by experts in the field. Moreover, it is unclear if an expert's opinion can be based entirely on inadmissible hearsay. Finally, it is unclear if and when an expert may disclose inadmissible hearsay on which the expert relied.

The proposed rules allow an expert to base his opinion on any facts or data, whether admitted or not, if they are of a type reasonably relied upon by experts in the particular field. An expert may not disclose inadmissible hearsay on which the expert relied in forming an opinion unless the court finds that the probative value of disclosing the hearsay in order to assist the jury in understanding the expert's opinion substantially outweighs the unfair prejudice to the opposing party. See, proposed O.C.G.A. § 24-7-703.

(2) Georgia's rules regarding the role of the trial judge in reviewing and excluding unreliable scientific testimony in criminal cases are unclear. Some cases suggest that expert evidence must be based on scientific theories or principles that have reached a stage of scientific certainty. Other cases limit this requirement to scientific tests and procedures, allowing expert testimony based on novel or controversial scientific theories to go to the jury without any screening by the trial court for scientific reliability. In civil cases, the courts are to apply Federal Rules 702 and *Daubert* to such issues.

The proposed rules would apply the same principles to criminal and civil cases. The trial court would have a gatekeeping role designed to exclude expert testimony that is not based on reliable principles or methods or is not supported by sufficient data or is the product of unreliable methodology. See, proposed O.C.G.A. § 24-7-702.

Character Evidence - Existing Georgia law and the proposed rules are quite similar. Both generally exclude character evidence to prove that a person acted in conformity therewith and recognize the same exceptions to this general rule. There are, however, a few changes.

When character evidence is admissible, the Georgia Code allows reputation testimony, but not opinion testimony. The new rules allow both. As one Georgia court wrote, "[I]t is an evidentiary anomaly that in proving general moral character [Georgia] law prefers hearsay, rumor, and gossip, to personal knowledge of the witness." See, proposed O.C.G.A. §§ 24-4-405, 24-6-608.

Under both existing Georgia practice and the proposed rules, a criminal defendant has the right to present evidence of his own good character. The State may not offer evidence of the accused's character except in rebuttal. In Georgia, any evidence of the accused's good character opens the door to any evidence the state might have, no matter how broad, of the defendant's bad character. The door is completely open or

completely closed. The proposed rules open the door only to the extent relevant in rebuttal. An accused charged with larceny, for example, might present evidence of his general character as law abiding or of a specific trait such as honesty because both are relevant to answer the crime charged. If the accused presents evidence that he is law abiding, the door is wide open for rebuttal. But if the accused limits his character evidence to his honesty, on the other hand, the state is correspondingly limited in rebuttal. See, proposed O.C.G.A. § 24-4-404.

Georgia's exception for independent crimes and acts, the "similar transaction rule," has become quite expansive and includes an exception for proving "bent of mind," a category recognized by no other American jurisdiction. The proposed rule is based on Federal Rule 404(b) and should bring Georgia practice more in line with how this issue is handled in the rest of the country. Many Georgia cases have urged a careful balancing of probative value and unfair prejudice in the consideration of similar transaction evidence but one Georgia Supreme Court case states that such balancing is not necessary. The proposed rules clarify that the trial court should engage in this balancing.

Use of Character Evidence to Impeach a Witness - Two major differences:

(1) Reputation testimony. Under Georgia law, one can attack or bolster the credibility of a witness with reputation evidence as to the witness' general character. Only "general" character, not character for a specific trait such as veracity, is allowed. General bad character evidence is not admitted against a criminal defendant, even if he testifies, unless he puts his character in issue.

Under the proposed rules, a witness' credibility may be attacked with reputation or opinion evidence specific to his veracity. General good or bad character evidence is not allowed. A criminal defendant is not exempted from this rule if he testifies. See, proposed O.C.G.A. §§ 24-6-608, 24-4-403.

(2) Specific Instances of Conduct. Both current Georgia law and the proposed rules allow raising specific instances of conduct on cross-examination of a character witness to test the extent and foundation of the witness' knowledge. The major difference is that under current practice, the witness testifies to general character and thus the cross-examination can raise any conduct that tests that broad assertion. The proposed rules limit the direct examination to evidence regarding veracity and thus any specific instances of conduct raised on cross are limited to those that are probative of the subject's veracity. See, proposed O.C.G.A. §24-6-608.

Current Georgia law does not allow a party to impeach a witness by asking the witness on cross-examination about instances, unrelated to the case, in which the witness has acted untruthfully. The proposed rules allow this inquiry, subject to the court's discretion. See, proposed O.C.G.A. § 24-6-608(b).

Use of Prior Convictions to Impeach - The Criminal Justice Act of 2005 revamped the rules for impeaching witnesses, including the defendant in a criminal case, with that witness' prior convictions. See, current O.C.G.A. § 24-9-84.1. These changes were generally based on Federal Rule 609 and are carried forward in this proposal with minor changes to improve clarity. See, proposed O.C.G.A. § 24-6-609.

Prior Inconsistent Statements - Georgia follows the rule of Queen Caroline's case, requiring that a witness be shown his prior statement before he can be impeached upon it. The proposed rules do not require this foundation. It is only necessary under the proposed rules that the witness have an opportunity to explain or deny the statement. In practice, this means the prior statement must be introduced on cross-examination of the declarant.

Competency of Juror to Impeach Verdict - In Georgia, a juror is competent only to sustain, never to impeach, a verdict. An exception for external influences exists in criminal cases, but not in civil cases. The proposed rules make the juror incompetent to sustain or impeach a verdict but provide an exception for evidence of external information improperly brought to bear upon any juror in any case, civil or criminal. See, proposed §24-6-606(b).

Authentication and Identification - Existing Georgia law and the proposed rules are consistent, though the proposed rules are broader in some areas, such as identification of parties to a phone conversation and self-authentication of commercial paper, notarized documents, etc. The proposed rules pull together all authentication rules into one, clear set. See, proposed O.C.G.A. § 24-9-901, 902.

Best Evidence Rule - Georgia's best evidence rule consists mainly of 19th Century statutes. Georgia's rule, for example, does not apply to photos or videos but only writings. The proposed rules apply to all forms of recordation.

Georgia requires that in most cases in which an writing must be produced, the proponent must produce the original or else account for why the original cannot be produced before being allowed to use a copy. The proposed rules allow the use of copies unless the opponent cites specific reasons why the court should insist on production of the original. See, proposed O.C.G.A. §24-10-1001 through 1008.

Exclusion of Evidence Because of Prejudice, Confusion, or Waste of Time.

Although Georgia cases have recognized the trial court's authority to balance the probative value of the evidence against its unfairly prejudicial effect, the cases are inconsistent on the standard and scope of the trial court's authority. The proposed rules give the trial court discretion to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion, or undue delay. This standard applies to all evidence except where specific evidence rules expressly set a different standard. See, proposed O.C.G.A. § 24-4-403.

Rape Victim Shield Law. Although the policy behind Georgia’s current rape shield law and the proposed rule are the same, there are several differences in coverage and application. See, proposed O.C.G.A. § 24-4-412.

(1) The new rule expressly applies to all cases in which the criminal defendant is charged with a sexual offense.

(2) When the defendant claims consent as a defense, the Georgia rule allows evidence of the victim’s reputation, past boyfriends, and details of past sexual experiences. The proposed rule limits the evidence to specific instances of conduct between the victim and the accused, excluding any other evidence regarding the victim’s past sexual behavior.

(3) The proposed rule has a provision admitting evidence that another person was the source of semen, injury, pregnancy, or other physical or psychological evidence of the offense. Existing Georgia law has no such provision (though Georgia case law has recognized such an exception).

Use of plea bargain discussions. The proposed rules bar the use of plea bargain discussions with the prosecution and colloquies with the court concerning a plea agreement or the voluntariness of a guilty plea. Georgia courts may exclude a confession as involuntary if it was induced “by the slightest hope of benefit.” Georgia courts do not apply current O.C.G.A. § 24-3-37 (excluding statements made “with a view to a compromise”) to criminal cases. The main purpose of the new rules’ broad protection of plea discussions is to encourage responsible plea bargaining. This is consistent with current Georgia practice. (See, e.g., Unif. Sup. Ct. Rule 33.6 - “Consideration of Plea in Final Disposition”). See, proposed O.C.G.A. § 24-4-410.

Offers to Compromise - Settlement Negotiations - Georgia law and the proposed rules are substantially similar though the proposed rules are simpler in two respects. (1) Georgia courts have made some arduous distinctions between “offers to settle” and “offers to compromise.” The proposed rules simply require that liability or damages be in dispute. (2) Georgia has struggled with “collateral admissions” - - statements made in the course of presenting an offer to compromise but not themselves made with a view to a compromise. The proposed rules cover such statements if they are part of the settlement negotiations or a mediation. See, proposed O.C.G.A. § 24-4-408.

Subsequent Remedial Measures - Existing Georgia law and the proposed rule share the same underlying principle --- evidence of subsequent remedial measures is generally inadmissible to prove negligence. However, Georgia cases suggest that the rule does not apply in product liability cases. The proposed rule would apply in such cases. See, proposed O.C.G.A. § 24-4-407.

Habit Routine Practice - Georgia law has slowly recognized the admissibility of

evidence of habit evidence but it generally does not allow a third party to testify to another's habit. The proposed rule has no such restriction. If adequate foundation is laid showing how the witness would be familiar with the subject's habit or routine, the witness may testify to it. See, proposed O.C.G.A. § 24-4-406.

Refreshing Recollection - Under current Georgia law in criminal cases, a party may ask to examine any materials a witness has reviewed since the trial began to refresh his recollection and prepare his testimony for trial. The proposed rules extend this right to all cases and provide that when the court "in its discretion determines it is necessary in the interests of justice," the court may allow the opposing party to examine any documents used by the witness to refresh his recollection before he testified, without any time limit. The purpose is to facilitate inquiry into the relevant issue of how much of the witness' testimony on direct is based on his personal knowledge and memory and how much is based on information supplied by others. See, proposed O.C.G.A. § 24-6-612.

LEGISLATIVE PROPOSAL

The Evidence Study Committee recommends:

- (1) The enactment of a new Title 24 on Evidence, and
- (2) Repeal, renumbering, or amendment of existing Code sections as set forth in Appendix B of this Report.

On the following pages is a draft of a new Title 24 that incorporates most of the Federal Rules of Evidence as well as existing Georgia statutes that are not replaced by the new rules. Some existing Georgia statutes have been modified to accommodate the new rules, others have been renumbered.

Appendix A - A Table of the new Title 24.

Appendix B - Lists changes (repeal or amendment or renumbering) to existing Georgia statutes.

Each Rule is followed by a Comment that explains any difference between the new Rules and existing Georgia practice. In some instances, the Federal Rule has been modified for use in Georgia. These changes also are discussed in the Comments to each Rule.

The Comments are to help explain the proposed rules but the Comments are not part of the legislative package and will not be included in the bill.

In the Comments, references to proposed new O.C.G.A. provisions will always be preceded with “new,” as in “new O.C.G.A. § 24-1-102.” References to current O.C.G.A. sections will be preceded with “current,” as in “current O.C.G.A. § 24-3-1.”

Title 24 - EVIDENCE

(Draft: June 6, 2005)

CHAPTER 1. GENERAL PROVISIONS

ARTICLE 1.

24-1-1. Purpose and Construction.

The object of all legal investigation is the discovery of truth. Rules of evidence shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Comment - This section is drawn from Federal Rule of Evidence 102 and current O.C.G.A. § 24-1-2.

24-1-2. Applicability of Rules of Evidence

(a) Jury Trials. The rules of evidence apply in all trials by jury in any court in this state.

(b) Courts generally. The rules of evidence apply generally to all non-jury trials and other fact finding proceedings of any court in this state, including contempt proceedings except those in which the court, by law, may act summarily, subject to the limitations set forth in subsection (c) or by statute or by a uniform rule of court that is not inconsistent with any statute.

(c) Rules Inapplicable. Except as otherwise provided by statute or a uniform rule of court that is not inconsistent with any statute, the rules of evidence do not apply in the following situations:

- (1) Preliminary questions of fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Code section 24-1-104.
- (2) Grand jury. Proceedings before grand juries.

- (3) Miscellaneous proceedings. Proceedings for extradition or rendition; or revoking parole; or issuance of warrants for arrest and search warrants; or proceedings with respect to release on bond or otherwise.
- (4) Presentence hearings except in cases in which the death penalty or life without parole may be imposed.
- (5) Dispositional hearings and custody hearings in Juvenile Courts.

(d) Rules Applicable in Part.

- (1) In criminal commitment hearings in any court, the rules of evidence apply except that hearsay is admissible.
- (2) In *In Rem* Forfeiture proceedings the rules of evidence apply except that hearsay is admissible in determining probable cause or reasonable cause.
- (3) In non-jury proceedings concerning violations of any provision of Title 40, Chapter 5 (Driver's Licenses) or Chapter 6 (Uniform Rules of the Road) of this Code or any county or municipal ordinance authorized in Code sections 40-6-371 and 40-6-372, the rules of evidence do not apply except that a conviction cannot be based on the uncorroborated statement by a witness to a law enforcement officer or official unless the witness is available for cross-examination at the trial, provided that the rules of evidence apply to any trial concerning a violation of Code section 40-6-391 or any other Code section which requires mandatory time to serve upon a conviction, or which is punishable as a high and aggravated misdemeanor or as a felony.
- (4) In administrative hearings, the rules of evidence apply subject to special statutory or agency rules that liberalize the admission of certain kinds of evidence.

(e) Preexisting law and practice. The rules of evidence shall include the common law as expounded and practiced by Georgia courts except as modified by statute.

Comment - This section defines the courts and proceedings to which the rules of evidence apply. The “rules of evidence” include not only the sections in Title 24 but any statutes with an effect on the presentation or admissibility of evidence. This section is based on Federal Rule 1101 with numerous adjustments for Georgia courts and proceedings.

Subsection (a) - Formal rules of evidence are particularly needed in jury trials in order to protect and maximize the fairness of the fact finding process. The rules of evidence apply to any jury trial in any Georgia court without exception.

Subsection (b) - The rules of evidence are generally applicable in non-jury proceedings except as otherwise provided in subsection (c), or any other statute or officially promulgated rule of court. A judge may not suspend the rules of evidence in any non-jury proceeding without some higher authority. In the past, Uniform Rules of Court have sometimes touched on evidence areas. See, e.g., Unif. Superior Ct. Rule 31.3 re: Notice of Prosecution's Intent to Present Evidence of Similar Transactions. Although these court rules typically do not conflict with any statute (see, e.g., Rule 31.3), sometimes they do, see, e.g., Unif. Superior Ct. Rule 13.1(D), in which case the statute controls. *McIntyre v. Pope*, 215 Ga.App. 600, 451 S.E.2d 110 (1994). Subsections (b) and (c) recognize the authority of uniform rules of court that are not inconsistent with existing statutes.

Subsection (c) (1) - See new O.C.G.A. §24-1-104 and Comment thereto.

Subsection (c) (2) - This is consistent with current Georgia practice. See, *Mitchell v. State*, 239 Ga. 456 (1977).

Subsection (c) (3) - This is mostly consistent with current Georgia practice. Georgia currently does not apply the rules of evidence to probation revocation proceedings, *Sellers v. State*, 107 Ga. App. 516 (1963), but does not permit a probation revocation to be based on hearsay. *Couch v. State*, 246 Ga.App. 106 (2000). Federal Rule 1101 does not prohibit a bond or probation revocation based on hearsay.

The Committee believes that the stakes at a probation revocation hearing are high enough that the rules of evidence ought to be applied. Parole revocation, on the other hand, is an administrative matter handled by the Board of Pardons and Parole and the rules of evidence traditionally have not been applied in such proceedings. *Williams v. Lawrence*, 273 Ga. 295 (2001). Moreover, the Board may not be sufficiently knowledgeable about the rules of evidence to apply them correctly if required to do so. Thus the proposed rule would apply the rules of evidence to probation revocation hearings but not to parole revocation proceedings.

Subsection (c) (4) - This changes Georgia practice somewhat. Currently, the rules of evidence apply in all sentencing hearings. *Thomas v. State*, 248 Ga. 247 (1981). This subsection would limit the application of the rules of evidence to sentencing hearings in capital cases regardless of whether it is the judge or a jury who is making findings regarding mitigating or aggravating circumstances.

Subsection (c) (5) - This is consistent with current Georgia practice. See, current O.C.G.A. §§15-11-65(b); 15-11-56. The rules of evidence would continue to apply to delinquency hearings, current O.C.G.A. § 15-11-7; *In re: J.C.*, 257 Ga.App. 657 (2002),

and hearings concerning deprivation or termination of parental rights. *In re: C.D.E.*, 248 Ga.App. 756 (2001).

Subsection (d) - This subsection mostly codifies current practice. Regarding criminal commitment hearings: see, e.g., Unif. Supr. Ct. Rule 26.2(B)(1); Magist. Ct. Rule 25.2(C)(1). Regarding *In Rem* Forfeiture proceedings, see, current O.C.G.A. § 16-13-49(s)(1); *Rabern v. State of Georgia*, 221 Ga.App. 874 (1996). Regarding administrative proceedings, see, e.g., current O.C.G.A. §§ 50-13-15, 45-20-9(d); 34-9-102(e).

Traffic Cases – The Uniform Rules of the Road in Georgia cover everything from a simple failure to yield right of way to vehicular homicide. Unlike many states that treat simple traffic offenses as a civil matter, all traffic offenses in Georgia are crimes.

A defendant charged with a traffic misdemeanor has a right to trial by jury and under proposed 24-1-2(a), the rules of evidence would apply to any jury trial. The applicability of the rules of evidence to non-jury trials concerning a violation of the Uniform Rules of the Road should depend, to some extent, on the magnitude of the violation and its potential punishment.

Since all traffic offenses are “criminal trials,” there is an inclination to apply the rules of evidence to all such offenses. But realistically, defendants in simple traffic offense cases do not face jail time (unless they don’t pay their fines). It was not considered desirable to apply the rules of evidence to traffic cases generally because of the disadvantages this would place on defendants who typically are not represented by counsel in such proceedings. Moreover, outside the large metropolitan areas, the judges who hear these traffic cases are not always lawyers and they would have difficulties applying the rules of evidence. The proposed rule attempts to make a distinction between simple and serious cases.

The rules of evidence would not apply to non-jury trials concerning most violations of chapters 5 or 6 of Title 40. This covers drivers license violations and violations of most of the Uniform Rules of the Road. The rules of evidence would apply to a non-jury trial of a violation of 40-6-391 (driving under the influence) or any provision which requires mandatory time to serve upon a conviction or which is punishable as a high and aggravated misdemeanor or as a felony.

Because the stakes in a DUI case are typically higher than in more mundane traffic violation cases, the rules of evidence should be applied even in non-jury DUI trials. Sometimes, if the defendant waives a jury trial, such trials will be conducted by a probate court with a non-lawyer judge and we should not expect the rules of evidence to be perfectly applied in such cases. However, there is an absolute right to have the Superior Court review the record in such a trial and this provides relief to the defendant who lost his case in probate or municipal court because of the admission of inadmissible evidence. (See, O.C.G.A. § 40-13-28; *Walton v. State*, 261 Ga. 392(2), 405 S.E.2d 29 (1991)).

The Confrontation Clause and *Crawford v. Washington* apply to all criminal trials, jury and non-jury, and the proposed rule expressly applies *Crawford* to the situation in which it most frequently would arise; namely, the use of a statement by a witness to a law enforcement officer or official (such as a 911 operator) when the defendant has no opportunity to cross-examine the witness. Current Georgia law does not allow a traffic conviction based on uncorroborated hearsay. *Day v. State*, 235 Ga.App. 771 (1998)

Subsection (e) - Clarifies that evidence rules and practices that predated the revision of Title 24 and have not been modified by the new statutes are retained. Thus traditional Georgia rules such as the “continuing witness rule” and the “rule of completeness” (when applied to oral conversations) are retained.

ARTICLE 2

24-1-103. Rulings on Evidence.

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Once the court makes a definitive ruling on the record admitting or excluding any evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

If on direct examination of a witness, objection is made to the admissibility of evidence, neither cross-examination of the witness on the same subject matter nor the introduction of evidence on the same subject matter shall constitute a waiver of the objection made on direct examination.

(b) Record of offer and ruling. The court shall accord the parties adequate opportunity to state grounds for objections and present offers of proof. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The court may direct the making of an offer in question and answer form.

(c) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain error. Nothing in this Code section precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

Comment - This section is based Federal Rule of Evidence 103.

Subsection (a) - The first part of subsection (a) incorporates the harmless error doctrine and does not purport to change existing Georgia law on what constitutes harmless error. See, current O.C.G.A. §9-11-61; *Crowder v. State*, 237 Ga. 141 (1976).

Subsections (a) (1) and (2) require that trial counsel make a timely, specific objection, and, if appropriate, an offer of proof to preserve for appellate review any errors in admitting or excluding evidence. This is consistent with current Georgia law. See, *D.O.T. v. Sharpe*, 267 Ga. 267 (1995) (objections must be timely); *Willett v. State*, 223 Ga.App. 866 (1996) (offer of proof); *Lancaster v. State*, 253 Ga.App. 224 (2002) (specificity required). These requirements serve the dual purposes of giving the trial judge the legal and factual information necessary to make an informed evidentiary ruling and providing a clear record for appellate review. *Plaza Prop. Ltd. v. Prime Business Invest. Co.*, 273 Ga. 97 (2000). See also, current O.C.G.A. §9-11-46 governing objections and abolishing the need to make formal exceptions to the court's rulings.

Subsection (a)(2) and current Georgia practice are consistent in one respect: once a party receives a definitive ruling on a pretrial motion in limine, that party need not renew that objection at trial. See, e.g., *Weems v. State*, 269 Ga. 577 (1998). But current Georgia practice requires that a criminal defendant renew any objections to similar transaction evidence at trial even if the court has ruled against the defendant's objection to such evidence in a pretrial Rule 31.3 hearing. See, e.g., *Stirrat v. State*, 226 Ga.App. 350 (1997). Current Georgia practice also requires that a party at trial object to evidence every time it is offered unless the party gets a "continuing objection" from the trial judge. See, e.g., *Werner v. State*, 246 Ga.App. 677 (2000).

Current Georgia law holds that hearsay evidence, even if not objected to at trial, has no probative value and thus is insufficient to support a verdict. See, *Woodruff v. Woodruff*, 272 Ga. 485 (2000); *Stamper v. State*, 235 Ga. 165 (1975). Georgia is the only state left in the U.S. that maintains this legal fiction. See, Milich, *Georgia Rules of Evidence*, (2d ed.), §16.7 (Thomson/West 2002). Under this section, hearsay, like any other inadmissible evidence, must be objected to in order to preserve for appeal any error in admitting it. The fiction that hearsay has no probative value is abandoned, though a

party still may urge the trier of fact to accord less weight to such evidence.

The last sentence of subsection (a) was added to the Federal Rule version and is taken verbatim from current O.C.G.A. § 24-9-70.

Subsection (b) -- The first sentence was added to underscore the trial court's duty to allow parties the opportunity to state their objections and offers of proof on the record. This is consistent with current Georgia law. *Pettis v. State*, 244 Ga.App. 77 (1996).

Subsection (c) requires that the court take all practical measures to shield the jury from exposure to inadmissible evidence at every stage of the proceedings. See also, new O.C.G.A. §24-1-104 (c) regarding hearings on the admissibility of confessions in criminal cases. See also, current O.C.G.A. §§ 9-10-7, 17-8-57 (prohibiting the trial judge from commenting on the evidence or intimating an opinion on the merits in front of the jury).

Subsection (d) modifies current Georgia practice which does not embrace a general plain error rule except in capital cases or when the trial judge comments on the evidence. *Paul v. State*, 272 Ga. 845 (2000). But see, *Gosnell v. State*, 247 Ga. App. 508 (2001) (applying plain error rule in non-capital case). The subsection does not purport to enlarge the grounds for appeal or weaken the policy requiring litigants to preserve errors at the trial level. But it does give appellate courts the power to reverse a judgment tainted by manifest error so substantial the court feels compelled to act even though the error was not properly preserved at trial. Georgia courts have defined plain error as error "so clearly erroneous as to result in a likelihood of a grave miscarriage of justice or which seriously effects the fairness, integrity or public reputation of a judicial proceeding." *Thorne v. State*, 246 Ga.App. 741 (2000). See, *United States v. Rodriguez*, 398 F.3d 1291 (11th Cir. 2005).

24-1-104. Preliminary Questions.

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges. Unless otherwise provided, preliminary questions shall be resolved by a preponderance of the evidence standard.

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of jury. Hearings on the admissibility of confessions shall in all

cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

(e) Weight and credibility. This section does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Comment - This section is nearly identical to Federal Rule of Evidence 104.

Subsection (a) - Under current Georgia law, most evidentiary issues are decided by the trial judge. Some, however, are left to the jury. See, e.g., *Gunther v. State*, 179 Ga. App. 71 (1986) (co-conspirator exception); *Georgia Power Co. v. Busbin*, 159 Ga. App. 416 (1981) (agency admission). Under subsection (a), all evidentiary issues are decided by the trial judge alone. If that decision requires determination of factual questions, the judge may take evidence in any form, including affidavits, without regard to formal rules of evidence except those concerning privilege.

The last sentence of subsection (a) was added to the Federal Rule in order to clarify what federal case law has confirmed: the court should use a preponderance of the evidence standard in deciding preliminary questions. See, e.g., *Bourjaily v. United States*, 483 U.S. 171 (1987).

Subsection (b) - This subsection addresses two issues. The first issue relates to when evidence is offered that is relevant only if certain underlying facts are true. For example, if the prosecution offers a note allegedly written by the defendant but the defendant claims the note is a forgery, the relevance of the note is conditioned upon whether the note is authentic or not. Subsection (b) requires the trial judge to determine whether the evidence that the note is authentic is sufficient that a reasonable jury could find that it is. If so, the judge must admit the note and let the jury decide the authentication issue. This is consistent with current Georgia practice. See, e.g., *Thomas v. State*, 268 Ga. 135 (1997).

Subsection (b) also recognizes that the relevance or admissibility of a fact presented by one witness may not be apparent until it is connected up with facts presented by another witness. Since the law requires that only one witness be examined at a time, subsection 104(b) allows the trial judge to admit such evidence conditionally pending introduction of the supporting evidence. This is consistent with current Georgia practice. See, e.g., *Canal Ins. Co. v. Tate*, 111 Ga.App. 377 (1965). If the likelihood is small that the proponent will successfully connect up the evidence, and the conditional admission of the evidence would be unfairly prejudicial should it not be connected up, subsection

(b) allows the court to defer the admission of the evidence until the supporting facts are presented. This also is consistent with current Georgia law. See, e.g., *Miller v. State*, 204 Ga.App. 562 (1992). Where evidence has been conditionally admitted, the opponent has the burden of alerting the court by an objection or motion to strike if the evidence is never sufficiently connected up. See, *Timberlake v. State*, 246 Ga. 488 (1980).

Subsection (c) - A hearing on the admissibility of a confession in a criminal case must be conducted out of the hearing of the jury. See, *Jackson v. Denno*, 378 U.S. 368 (1964); *Schneider v. State*, 130 Ga. App.3 (1973). This subsection does not purport to address when a hearing on the admissibility of a confession is required. Nor does this subsection limit any party from presenting evidence to the jury relevant to the weight the jury should accord a confession that has been admitted.

When an accused is a witness on a preliminary matter, the accused may request that the examination take place outside the hearing of the jury and the court must honor that request. For all other witnesses in preliminary matters, it is within the discretion of the trial judge to decide what to do about the jury. When deciding whether an expert is qualified, for example, the trial court usually allows the jury to hear the foundation testimony since if the court qualifies the expert to testify, the foundation testimony will be relevant to the weight and credibility the jury accords the expert's testimony. On the other hand, when the court needs to know what a witness will say in order to determine whether a hearsay exception applies to that testimony, the court should receive that information outside the hearing of the jury.

Subsection (d) - When a criminal defendant testifies on a preliminary matter before the trial judge, the scope of the prosecution's cross-examination is limited to the preliminary matter and may not stray to other issues, although the prosecution may cross-examine the accused concerning his credibility. This is consistent with current Georgia practice. See, e.g., *Culpepper v. State*, 132 Ga. App. 733 (1974).

Subsection (e) - This subsection clarifies that although the admissibility of evidence is for the trial judge alone, matters affecting the weight and credibility the jury should give the evidence are always relevant. This is consistent with current Georgia law. See, current O.C.G.A. §24-9-80; *Brinson v. State*, 201 Ga.App. 80 (1991).

24-1-105. Limited Admissibility.

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Comment - This section is identical to the Federal Rule of Evidence 105 and consistent

with current Georgia practice. See, e.g., *Pouncey v. Adams*, 206 Ga.App. 126 (1992).

This section does not address the fact that sometimes instructing the jury on limited admissibility may prove inadequate to mitigate the danger of misuse by the jury. See, *Bruton v. United States*, 391 U.S. 123, 126, 129-136 (1968). This issue is addressed by proposed Rule 403 (new O.C.G.A. § 24-4-403) which gives the court the power to exclude otherwise admissible evidence when its probative value is substantially outweighed by the danger of unfair prejudice or misleading the jury.

24-1-106. Remainder of or Related Writings or Recorded Statements.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. Evidence that qualifies for admission under this Code section shall be admissible notwithstanding that it otherwise would be inadmissible under the rules of evidence except those concerning privileges unless the trial court determines that the probative value of admitting the otherwise inadmissible evidence is substantially outweighed by the danger of unfair prejudice. Whether a party has waived a privilege by offering a writing or part thereof is a matter to be determined by the court on a case by case basis.

Comment - This section is based on Federal Rule of Evidence 106. It is a variation on the common law “rule of completeness” which prohibits a party from introducing a fragment of a writing or set of writings when such fragmentary presentation may distort the meaning of the evidence. This section allows the adverse party to insist, at the time the writing is introduced, that the proponent introduce the remainder of that writing or related material that is truly necessary to guard against the proponent misleading the jury or distorting the evidence should be admitted under this section. This rule is consistent with current Georgia practice, (current O.C.G.A. § 24-2-4), but under Georgia practice, the opposing party must wait until cross-examination to offer related statements that “complete” the evidence while Rule 106 allows the opponent to insist upon contemporaneous completion of the document. Georgia allows contemporaneous completion only with depositions. See, e.g., *Brown v. Macheers*, 249 Ga.App. 418 (2001).

The second and third sentences of the section were added to the Federal Rule in order to clarify that in all situations except those involving privilege, admissibility under this section overrides other evidentiary objections such as hearsay provided that the judge finds that the probative value of admitting the remaining matter is not substantially outweighed by the danger of unfair prejudice. There is disagreement in federal courts on this question and the 11th Circuit has not reached the issue. See, *United States v. Pendas-Martinez*, 845 F.2d 938 (11th Cir. 1988). The court must consider claims of

privilege on a case by case basis. In many instances, the proponent of the fragmentary evidence also holds the privilege governing the remainder evidence and the privilege may be deemed waived by offering the fragment. But when the privilege is held by a third party, and thus cannot be waived by the party offering the fragment, the court must determine whether the third party asserts or waives the privilege.

Rule 106 is limited to writings or other tangible memorializations of the conversation. This is because of the practical problem of trying to determine, in the middle of a witness examination, the nature, scope, and content of oral conversations allegedly part of or related to the witness's testimony. Thus the rule is limited to tangible records of conversations so that the trial court can evaluate the admissibility of material within the four corners of a writing or other recording. This rule would not bar application of the rule of completeness to oral statements or conversations but the opposing party would have to wait until cross-examination to offer the related remainder of the statement or conversation, as is the current Georgia practice. *See, e.g., Peacock v. State*, 170 Ga.App. 309 (1984). *See also*, current O.C.G.A. § 24-3-38 (retained as new O.C.G.A. § 24-8-822) which provides that when one party offers another's admission, the opponent may offer the remainder of the conversation in which the admission took place or related conversations, whether oral or written. *See also*, new O.C.G.A. § 24-4-410 regarding a criminal defendant's introduction of parts of otherwise protected plea bargain discussions.

CHAPTER 2. JUDICIAL NOTICE

ARTICLE 1

24-2-201. Judicial Notice of Adjudicative Facts.

(a) **Scope.** This section governs only judicial notice of adjudicative facts.

(b) **Kinds of facts.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) **When discretionary.** A court may take judicial notice, whether requested or not.

(d) **When mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) **Opportunity to be heard.** A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) **Time of taking notice.** Judicial notice may be taken at any stage of the proceeding.

(g) **Instructing jury.** In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

Comment - This section is identical to Federal Rule of Evidence 201.

Subsection (a) - Judicial notice of “legislative facts” is covered by new O.C.G.A. § 24-2-220 which has been amended to cover only legislative facts just as this section covers only adjudicative facts.

Subsection (b) - This is consistent with current Georgia law which allows judicial notice of matters of “public knowledge.” It clarifies that judicial notice may be taken not only of matters commonly known in the community, but also matters that can be easily and accurately determined by highly reliable sources. See, e.g., *Owens v. State*, 269 Ga. 887 (1998).

Subsections (c),(d) and (f) - Consistent with current Georgia law, a court may take judicial notice of a fact even if no request has been made to do so and at any stage of the proceedings. See, e.g., *Genesco, Inc. v. Greeson*, 105 Ga.App. 798 (1962).

Subsections (e) - This is consistent with current Georgia law. See, e.g., *Graves v. State*, 269 Ga. 772 (1998).

Subsection (g) - In a civil case, once a fact has been judicially noticed, the court will allow no contrary evidence and will instruct the jury to accept the fact judicially noticed as conclusive. The purpose of judicial notice is to obviate the need for formal proof of facts that are incontestable. Thus, by definition, any attempt by a party to upset a fact judicially noticed would only confuse or mislead the jury and waste the court's time.

But this policy gives way in criminal cases where courts customarily avoid instructing the jury to accept any facts as conclusive since this could compromise the defendant's constitutional right to trial by jury. Thus in criminal cases, the court may take judicial notice of a fact but the parties may offer contrary evidence and the court must instruct the jury that it need not accept the fact judicially noticed as conclusive.

This is consistent with current Georgia law. See, *Graham v. State*, 275 Ga. 290 (2002).

ARTICLE 2

24-2-220. Judicial notice of Legislative Facts.

The existence and territorial extent of states, their forms of government, symbols of nationality, the laws of nations, all laws and resolutions of the General Assembly and the journals of each branch thereof as published by authority, the laws of the United States and of the several states thereof as published by authority, general customs of merchants, the admiralty and maritime courts of the world and their seals, the political constitution and history of our own government as well as the local divisions of our own state, the seals of the several departments of the government of the United States and of the several states of the Union, and all similar matters of legislative fact shall be judicially recognized without the introduction of proof. Judicial notice of adjudicative facts is governed by Code section 24-2-201.

Comment - This is based on current O.C.G.A. §24-1-4 as amended to remove the reference to judicial notice of matters of public knowledge which would be covered by new § 24-2-201.

24-2-221 Judicial notice of ordinance or resolution.

When certified by a public officer, clerk, or keeper of county or municipal records in this state in a manner as specified for county records in Code section 24-9-920 or in a manner as specified for municipal records in Code section 24-9-902(1) or (2), and in the absence of contrary evidence, judicial notice may be taken of a copy of any ordinance or resolution included within a general codification required by paragraph (1) of subsection (b) of Code section 36-80-19 as representing an ordinance or resolution duly approved by the governing authority and currently in force as presented. Any such certified copy shall be self-authenticating and shall be admissible as prima facie proof of any such ordinance or resolution before any court or administrative body.

Comment - Based on current O.C.G.A. § 24-7-22 with minor changes to conform to the new rules and improve clarity.

24-3-301. <Reserved>

Comment - Federal Rule of Evidence 301 which provides a single rule governing the use of all presumptions in civil cases is not included since presumptions in Georgia are used differently depending upon their origin and purpose. This Code section has been reserved, however, should Georgia adopt a general rule on the use of such presumptions in the future. In the meantime, Georgia law on the use of presumptions in civil or criminal cases would remain unchanged.

CHAPTER 4.

RELEVANCY AND ITS LIMITS

24-4-401. Definition of “Relevant Evidence.”

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Comment - This section is identical to Federal Rule of Evidence 401 and consistent with prior Georgia practice. It broadly recognizes evidence with any probative value as “relevant”. See, e.g., *Kelly v. Floor Bazaar, Inc.*, 153 Ga.App. 163 (1980).

24-4-402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible.

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, or by other rules applicable in the courts of this state. Evidence which is not relevant is not admissible.

Comment - This section is based on Federal Rule of Evidence 402 with modifications for state use. The rule states the general proposition that logically relevant evidence under new O.C.G.A. § 24-4-401 is admissible unless otherwise excluded by a specific rule or statute.

24-4-403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Comment - This section is identical to Federal Rule of Evidence 403. The common law recognized authority in the trial judge to exclude evidence that although relevant, was so prejudicial, misleading, confusing, or such a waste of time that its admission would be contrary to the fair and efficient administration of justice. This view is consistent with

modern Georgia practice, *see, e.g., Carroll v. State*, 261 Ga. 553 (1991), though Georgia cases inconsistently described the standard as “substantially outweighed” or just “outweighed.” *See, e.g., Carroll*, above (“outweighs”); *King v. State*, 273 Ga. 258 (2000) (“substantially outweighs”).

This section applies to all evidentiary issues at every stage of the proceedings. The trial court applies this section by weighing the probative value of the evidence when offered for its admissible, legitimate use against the negative effects of admitting the evidence. The negative effects might include the likelihood that the jury, despite a limiting instruction, will use the evidence for an improper purpose.

The “probative value” of evidence is determined not only by the tendency of the evidence to shed light on a relevant issue but also the level of need for evidence on that issue in the context of the case. The less important the issue, the lower the probative value of any evidence offered on that issue. Likewise, when evidence has already been admitted on a particular point, the probative value of additional evidence on the same point is reduced. The court also should consider whether the same proof might not be made by other means that are less prejudicial, confusing, or time consuming. Only if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion, or other negative effects may the court exclude the evidence. *See, e.g., United States v. Dodds*, 347 F.3d 893 (11th Cir. 2003). This is the general rule. Specific rules may incorporate a different balancing test. *See, e.g., new O.C.G.A. §§ 24-4-404(a)(1); 24-4-404(b); 24-4-412 (c)(3); 24-6-609(b).*

24-4-404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes.

(a) Character evidence generally. Evidence of a person’s character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under subsection (a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim. Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as

provided in Code sections 24-6-607, 608, and 609;

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, if the probative value of admitting this evidence outweighs the danger of unfair prejudice. The prosecution in a criminal case shall provide reasonable notice to the defense at least ten days in advance of trial, unless the time is shortened or pretrial notice is excused by the judge on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Comment - Subsection (a) is identical to Federal Rule of Evidence 404(a). Subsection (b) has two changes from Federal Rule of Evidence 404(b) and these are discussed below.

Subsection (a) - This subsection embraces the common law view that evidence of a person's character or past acts may not be used to prove that the person acted in conformity therewith on a particular occasion. See, current O.C.G.A. § 24-2-2. While a logical inference from a person's character or past conduct to subsequent conduct is possible, the probative value of such an inference is generally weak and its capacity to unfairly prejudice or mislead the trier of fact with information not directly related to the particular case is great.

When evidence of character is admissible for a legitimate purpose, new O.C.G.A. § 24-4-405 defines the available methods for proving character. New O.C.G.A. §§ 24-6-608 and 24-6-609 govern the limited use of character evidence to attack or support the credibility of a witness.

Subsection (a)(1) - The accused in a criminal trial may offer evidence of a pertinent trait of his own character. This is consistent with current Georgia law. See, e.g., *Conner v. State*, 251 Ga. 115 (1983). In Georgia, evidence of good character may create a reasonable doubt as to guilt in the eyes of the jury. This section does not purport to change existing Georgia law concerning the use of or instructions regarding good character as a defense in a criminal case.

Under current Georgia law, an accused can present general reputation evidence of his good character which the prosecution can rebut with either reputation evidence of the accused's general bad character or cross-examination of the defendant's good character witnesses regarding specific prior acts that reflect the accused's bad character. See, *Jones v. State*, 257 Ga. 753 (1988). Subsection (a)(1) has a more exacting relevancy standard. The accused may offer only pertinent traits of character. Although such general character traits as "law abiding" are always pertinent in a criminal case, evidence that the accused has a peaceful disposition, for example, would not be

pertinent when the accused is charged only with theft. Likewise, the prosecution's rebuttal is limited to the particular character traits presented by the accused. If the accused presents evidence of his reputation for being law abiding, the door is opened wide for rebuttal. But if the accused limits his character evidence to the trait of honesty, for example, the prosecution can respond only with evidence rebutting that specific character trait.

Regardless of whether the accused presents evidence of his good character, if the defendant or his witness testifies to certain material facts on direct, the prosecution may offer evidence in rebuttal of those facts even if the rebuttal reflects poorly on the accused's character. See, current O.C.G.A. § 24-9-82 (new O.C.G.A. § 24-6-621); *Jones v. State*, 257 Ga. 753 (1988).

Subsection (a)(1) allows the prosecution to respond to defense evidence of the victim's character under subsection (a)(2) with evidence of similar character traits of the accused. Georgia does not currently have such a rule.

Subsection (a)(2) - This subsection modifies current Georgia law in one respect. Under current law, when the accused pleads self-defense in an assault or murder case, evidence of the victim's violent character may be admissible and proved by evidence of the victim's reputation or specific instances of the victim's violent conduct toward third persons (though the defense must provide pretrial notice of the latter). See, *Smith v. State*, 270 Ga. 240 (1998); *Chandler v. State*, 261 Ga. 402 (1991). Under this new subsection and proposed rule O.C.G.A. § 24-4-405, only reputation or opinion evidence regarding the victim's character for violence is allowed on direct examination, not evidence of specific prior acts against third persons. (Current Unif. Supr. Ct. Rule 31.6, requiring notice of specific acts against third parties, would be made superfluous by this new rule).

However, the defendant can always present evidence under 404(b) of prior violent attacks by the victim against the defendant in order to prove the defendant's state of mind at the time of the attack. This is consistent with current Georgia law. See, *Owens v. State*, 270 Ga. 199 (1998) (no pretrial notice required).

Both Rule 404(a)(2) and current Georgia law allow the prosecution to rebut evidence of the victim's character for violence with evidence of the victim's character for peacefulness. See, *Austin v. State*, 268 Ga. 602 (1997). However, subsection (a)(2) also allows the prosecution, in a homicide case, to present evidence of the victim's character for peacefulness even if the accused only presents evidence that the victim was the first aggressor. Georgia currently does not have such a rule.

Subsection (b) - This is generally consistent with current Georgia law. Subsection (b) only expresses what new O.C.G.A. §§ 24-4-402 and 24-4-404(a) already imply: evidence that reflects on character but is offered for a relevant use other than to suggest someone's propensity to act a certain way, is admissible. Thus the list of

admissible uses of other crimes, wrongs, or acts in subsection (b) is illustrative, not exhaustive. Subsection (b) applies to both civil and criminal cases.

Subsection (b) has two changes from Federal Rule of Evidence 404(b). The first adds a special balancing test that instructs the trial judge to determine whether the probative value of the evidence offered for a legitimate, non-propensity use is outweighed by the unfair prejudice from the jury using the evidence, despite a jury instruction, for its propensity use; that is, that since the accused has committed crimes or wrongs in the past, he likely committed the crime charged in this case. Such a propensity use of the evidence can seriously erode the presumption of innocence and create, in effect, a presumption of guilt. See, Milich, *Georgia Rules of Evidence*, (2d ed.), §§ 11.10, 11.12 (Thomson/West 2002).

Many Georgia cases have urged a careful balancing of probative value versus prejudice to address these concerns. See, e.g., *Edwards v. State*, 262 Ga. 470 (1992) (Fletcher, concurring: "... it must be demonstrated that the relevance of the independent act evidence outweighs its inherently prejudicial nature."); *Brunson v. State*, 207 Ga.App. 523 (1993) ("... evidence of independent crimes is never admissible unless its relevancy to the issues on trial outweighs the prejudice it creates."); *Oller v. State*, 187 Ga. App. 818 (1988) ("Evidence of similar crimes is admissible where its relevance to show identity, motive, plan, scheme, bent of mind and course of conduct, outweighs its prejudicial impact."); *Wimberly v. State*, 180 Ga.App. 148 (1986) ("The prejudicial effect of evidence concerning independent offenses is the paramount consideration behind the general rule of inadmissibility of such evidence, and if the evidence tends to show a general criminal propensity more than it tends to prove an issue in the case, it should not be introduced to the jury."); *Obiozor v. State*, 213 Ga.App. 523 (1994) ("Any danger arising from this incidental placing of an appellant's character in evidence is offset when a balancing test is applied to determine whether the relevance of the similar transaction evidence outweighs its prejudicial impact."); *Carroll v. State*, 143 Ga.App. 796 (1977) ("If the evidence [of uncharged conduct] tends to show a general criminal propensity more than it tends to prove an issue in the case, it should not be introduced to the jury.").

The second change to 404(b) modifies the prosecution's duty to give the defense notice of evidence it intends to offer under 404(b). The change drops the Federal Rule's requirement that the defense specifically request that notice be given. This change conforms 404(b) to current Georgia law where prosecution notice is automatic. Moreover, the Federal Rules requirement that the defense request notice serves no useful purpose and is mainly a trap for the unwary (particularly pro se defendants) and leads to claims of ineffective counsel when defense counsel fails to request notice.

Georgia currently requires notice of "similar transaction" evidence. See, Unif. Supr. Ct. Rule 31.1. This has been construed to not require notice when the prosecution is offering evidence of independent crimes or acts to prove motive or prior difficulties. See, e.g., *Sterling v. State*, 267 Ga. 209 (1996) (motive); *Wall v. State*, 269 Ga. 506 (1998) (prior difficulties). Rule 404(b) requires notice when independent crimes or acts are

being offered for any purpose. Both current Georgia law and the Federal Rules do not require notice when the uncharged crime or act is part of the *res gestae* or is intrinsic to or intertwined with the charged offense. See, Advisory Committee's Note to 1991 amendment to Rule 404(b); *United States v. Cancelliere*, 69 F.3d 1116 (11th Cir. 1995).

Federal Rule 404(b) requires "reasonable notice in advance of trial." This subsection incorporates current Unif. Supr. Ct. Rule 31.1's 10 day rule with leave for the court to shorten the period or excuse pretrial notice on good cause shown.

24-4-405. Methods of Proving Character.

(a) Reputation or opinion. Except as provided in subsection (b) of this Code section, in all cases in which evidence of character or a trait of character of a person is admissible, proof must be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, or when an accused testifies to his or her own character, proof may also be made of specific instances of that person's conduct. The character of the accused, including specific instances of the accused's conduct, also is admissible in a presentencing hearing subject to the provisions of Code section 17-10-2.

Comment - Subsection (a) is substantially identical to Federal Rule of Evidence 405(a). Current Georgia law permits proof of character by testimony as to reputation and subsection (a) is to the same effect. Current Georgia law does not allow opinion testimony as to character though Georgia courts sometimes bridle at this statutory limitation. See, *Simpkins v. State*, 149 Ga. App. 763, 765 (1979) ("[I]t is an evidentiary anomaly that in proving general moral character, the law prefers hearsay, rumor, and gossip to personal knowledge of the witness."). Subsection (a) expressly allows a qualified witness to express an opinion concerning a person's character. The witness must be qualified by satisfying the requirements for lay opinions in general under new O.C.G.A. § 24-7-701. The opinion must be rationally based on the personal knowledge or perception of the witness and must be helpful to the trier of fact.

A character witness may not testify on direct to specific instances of the subject's conduct that illustrate the subjects's character. See, e.g., *United States v. Reed*, 700 F. 2d 638 (11th Cir. 1983). Current Georgia law is the same. See, e.g., *Brooks v. State*, 236 Ga.App. 604 (1999).

Subsection (a) is consistent with Georgia practice in allowing a cross-examiner to ask a character witness about specific instances of conduct by the person about whom the character witness has testified. This allows the cross-examiner to test the extent of the witness's knowledge about the subject or the subject's reputation. See, e.g., *Medlock v. State*, 264 Ga. 384 (1994). The specific instances of conduct must be "relevant" to the character trait testified to on direct. Thus, if the witness testified only regarding a defendant's honesty, a prior incident demonstrating the defendant's violent disposition would be irrelevant on cross-examination. See, e.g., *United States v. Reed*, 700 F. 2d 638 (11th Cir. 1983).

The cross-examiner must have a good faith basis for believing that any specific instances of conduct raised on cross-examination actually occurred. See, *Michelson v. United States*, 335 U.S. 469 (1958); *State v. Clark*, 258 Ga. 464 (1988). The court has discretion to require that counsel reveal this good faith basis outside the hearing of the jury before allowing counsel to raise the prior conduct on cross-examination.

The specific instance must be conduct of the person, not something done to that person. Thus, for example, a witness should not be asked whether he knew that the defendant was accused of stealing money from his employer; although he could be asked whether he knew that the defendant stole money from his employer if there is a good faith basis for believing that to be true.

Inquiry into specific instances of conduct is limited to cross-examination and no extrinsic evidence of specific instances of conduct is allowed, even if the witness denies that the conduct took place. The cross-examiner must accept the witness's answer and may not call witnesses or offer other evidence to prove that the conduct took place. This is consistent with current Georgia law. Current O.C.G.A. § 24-9-84. Character witnesses called to rebut the opponent's character evidence likewise are limited to reputation or opinion testimony on direct examination.

Subsection (b) is based on Federal Rule of Evidence 405(b) but adds two provisions. The first allows an accused to testify on direct regarding relevant specific instances of his or her conduct in proving character. This addition reflects current Georgia practice, see, *State v. Brady*, 254 Ga. 366 (1985), and is consistent with Georgia permitting a criminal defendant to raise his good character as a substantive defense.

The second addition is in the last line which clarifies that the character of a guilty defendant is admissible at a presentence hearing subject to the notice provisions of current O.C.G.A. § 17-10-2.

24-4-406. Habit; Routine Practice.

Evidence of the habit of a person or of the routine practice of an organization,

whether corroborated or not and regardless of the presence of eyewitnesses, is admissible to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Comment - This section is substantially identical to Federal Rule of Evidence 406 and generally consistent with prior Georgia law. It recognizes that habitual behavior, by definition, is much more probative of a person's propensity to act a certain way on a particular occasion than general character evidence and thus the law admits the former while excluding the latter. But to exhibit such probative force and thus qualify for admission, the evidence must meet several conditions. It must be a specific action or pattern of behavior repeated regularly enough that the person's response has become so fixed and reflexive that the likelihood of deliberate or unintentional changes in the behavior at the time in question is small. See, e.g., *Leo v. Williams*, 207 Ga.App. 321 (1993); *Loughan v. Firestone Tire & Rubber Co.*, 749 F.2d 1519 (11th Cir. 1985). Georgia generally does not permit a third party to testify as to the habit of another except when the subject is deceased, as in a wrongful death or homicide case. The Federal Rule has no such limitation.

The organizational counterpart to an individual's habits are an organization's routine practices and this section allows evidence of these routine practices to prove that the organization acted consistently with them on a particular occasion. This is consistent with current Georgia practice. See, e.g., *Thomas v. Newnan Hosp.*, 185 Ga.App. 764 (1988).

One minor change to the Federal Rule here is the substitution of the word "admissible" for the word "relevant." This is consistent with the use of the word "admissible" throughout the Federal Rules and corrects what was probably a minor drafting error.

24-4-407. Subsequent Remedial Measures.

When, after an injury or harm, remedial measures are taken to make such injury or harm less likely to reoccur, evidence of the remedial measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of remedial measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Comment - This section is based on Federal Rule of Evidence 407 (as amended in 1997) and is mostly consistent with prior Georgia law. The rule encourages parties to improve or repair and not be deterred by the fear that if they do so their acts will be construed into an admission that they have been wrongdoers. See, *D.O.T. v. Cannady*,

270 Ga. 427 (1999).

Georgia courts have expressed the view that the subsequent remedial measures rule does not apply in product liability cases. *See, e.g., John Crane, Inc. v. Jones*, 262 Ga.App. 531 (2003); *General Motors Corp. v. Moseley*, 213 Ga.App. 875 (1994). Federal Rule 407 was amended in 1997 to clarify that the rule does apply in product liability cases.

Under the 1997 amendment to the Federal Rule, it appears that if a manufacturer, for example, takes remedial measures after its product harms person A, and that product (in its pre-remedied state) later harms person B, the remedial measure may be used in B's lawsuit against the manufacturer (but not A's lawsuit). This seems inequitable and unintended. The intent of the amendment was to clarify that if a manufacturer remedied an apparent defect in a product *before* it injured anyone, the remedy would not fall within the exclusion of Rule 407. (See, Advisory Committee Note to 1997 amendment to 407). The proposed revision to 407 excludes only those remedial measures that followed an injury or harm but without the limitation that the remedial measure must have followed the injury or harm to the plaintiff in the subject lawsuit.

Subsequent remedial measures are admissible if offered for a purpose other than "to prove negligence or culpable conduct." This is consistent with current Georgia law. *See, Medi-Clean Services, Inc. v. Hill*, 144 Ga. App. 389 (1979).

24-4-408. Compromise and Offers to Compromise.

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of any claim or its amount. Evidence of conduct or statements made in compromise negotiations or mediation is likewise not admissible. This Code section does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations or mediation. This Code section also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay or abuse of process, or proving an effort to obstruct a criminal investigation or prosecution.

Comment - This section is substantially the same as Federal Rule of Evidence 408. The term “Code section” is substituted for “rule.” The clause “or abuse of process” was added after “undue influence” in the last sentence to clarify the admissibility in post-trial proceedings of efforts to compromise in defending a motion for attorney’s fees under current O.C.G.A. §§ 9-15-14 or 9-11-68. The word “any claim” was substituted for “the claim” at the end of the first sentence. This clarifies that the ban covers settlement negotiations the defendant had with third parties arising out of the same incident – a position consistent with the common law and with current Georgia practice. See, e.g., *Plaza Pontiac, Inc. v. Shaw*, 158 Ga.App. 799 (1981); *Wren Mobile Homes, Inc. v. Midland-Guardian Co.*, 117 Ga.App. 72 (1967). Finally, the proposed rule explicitly covers statements made during a mediation.

Current Georgia law distinguishes between offers to settle an uncontested claim (admissible) and offers to compromise a contested claim (not admissible). See, e.g., *Stover v. Candle Corp. of America*, 238 Ga.App. 637 (1999); *Teasley v. Bradley*, 110 Ga. 497 (1900). This section contains the same distinction but the issue is simply whether the claim “was disputed” and this is determined on an objective basis.

Current Georgia law only protected statements made with a view to compromise. It is possible that some statements made during compromise negotiations are sufficiently directed at a compromise to be protected, while others are not. See, e.g., *Centre Point Investments, Inc. v. Frank M. Darby Co.*, 249 Ga.App. 782 (2001); *Blakley Hardwood Lumber Co. v. Reynolds Bros.*, 173 Ga. 602 (1931). This somewhat obscure distinction can be a trap for the unwary. The proposed rule extends protection to any conduct or statements made during compromise negotiations on the rationale that this will encourage freer communication in such negotiations and avoid controversy over whether or not a particular statement was made with a view to compromise. See, e.g., *Blu-J, Inc. v. Kemper CPA Group*, 916 F.2d 637 (11th Cir. 1990).

24-4-409. Payment of Medical and Similar Expenses.

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

Comment - This section is identical to Federal Rule of Evidence 409 and is generally consistent with current Georgia law, though Georgia requires that the payment have been made for humanitarian purposes rather than as acknowledgment of any liability. See, e.g., *Neubert v. Vigh*, 218 Ga.App. 693 (1995); *White v. The Front Page*, 133 Ga. App. 749 (1975). This section does not embrace this distinction and instead generally covers any payment of expenses. This section applies only to situations in which the beneficiary of the payment has sustained physical injuries.

Any statements or admissions of liability by a person while making such payments are not protected under this section and, if they do not qualify for exclusion under new O.C.G.A. § 24-4-408 or § 24-4-420, may be admissible.

24-4-410. Inadmissibility of Pleas, Plea Discussions, and Related Statements.

Except as otherwise provided in this Code section, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

- (1) a plea of guilty which was later withdrawn;
- (2) a plea of nolo contendere;
- (3) any statement made in the course of any proceedings in which the foregoing pleas were entered; or
- (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority or an agent of the attorney for the prosecuting authority who the defendant reasonably believed was authorized to negotiate a plea bargain which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

Comment - This section is substantially the same as Federal Rule of Evidence 410 with minor changes to conform the rule for state use.

Subsection (1) - Current Georgia law prohibits the use of withdrawn guilty pleas in subsequent criminal proceedings against the defendant. See, current O.C.G.A. § 17-7-93(b); *Mathias v. State*, 145 Ga. App. 754 (1978). The admissibility of a withdrawn guilty plea in a subsequent civil proceeding is less clear since §17-7-93(b) only bans the admission of the withdrawn guilty plea at the accused's trial. Under this subsection, a withdrawn guilty plea is not admissible against the defendant in any civil or criminal proceeding.

Subsection (2) - This is consistent with prior Georgia law barring evidence of a plea of nolo contendere in any civil or criminal proceeding. See, current O.C.G.A. §17-7-95 regarding nolo contendere pleas generally. However, federal cases have interpreted Rules 410 and 609 such that a conviction based on a plea of nolo contendere is admissible to impeach a witness. See, e.g., *United States v. Sonny Mitchell*, 934 F.2d 77 (5th Cir. 1991). This would change current Georgia law which does not permit the use of a conviction based on a nolo plea for impeachment of a witness in a criminal or civil case. See, *Pitmon v. State*, 265 Ga.App. 655 (2004) (en banc). Since current O.C.G.A. § 17-7-95(c) prohibits the use of a nolo plea "as an admission of guilt or for any purpose," new O.C.G.A. § 24-6-609 has been modified to retain current Georgia law and expressly prohibit the use of a conviction based on a nolo plea to impeach a witness.

Subsections (3) and (4) - These subsections protect any statements made during court proceedings concerning a plea of guilty later withdrawn or a plea of nolo contendere, and during plea discussions. The broad protection that subsections (3) and (4) give statements made in plea discussions and proceedings is designed to encourage open, responsible, and fruitful plea bargaining; a goal consistent with modern Georgia law and practice. See, Unif. Supr. Ct. Rule 33.6.

Current Georgia law excludes confessions made with a hope of a direct benefit (reduction of sentence) but not those made with hope of a collateral benefit. See, current O.C.G.A. §§ 24-3-50; 24-3-51. These statutes would be replaced by the simpler rules in the new 24-4-410. Under current Georgia law, if a police officer offers to reduce or drop charges against the accused or reduce his sentence in exchange for the accused's confession, the accused's resulting confession is not admissible against him if the bargain later collapses for any reason. See, e.g., *State v. Ray*, 272 Ga. 450 (2000). Federal Rule 410 does not cover communications between law enforcement officers and the accused and such situations must be individually examined under *Jackson v. Denno* for the voluntariness of the confession. See, e.g., *United States v. Davidson*, 768 F.2d 1266 (11th Cir. 1985). The Committee believes that the current Georgia rule which covers communications between police and the accused as well as the prosecuting attorney and the accused is preferable, as long as the accused reasonably believed at the time of the communications that the police officer had authority to deal.

This section is a shield, not a sword. If a defendant introduces a part of otherwise

protected plea statements or discussions, other portions are admissible if they ought in fairness to be considered with it.

24-4-411. Liability Insurance.

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This section does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

Comment - This section is identical to Federal Rule of Evidence 411 and consistent with current Georgia law. See, e.g., *Conley v. Gallup*, 213 Ga.App. 487 (1994). When evidence of insurance is relevant to prove something other than the mere fact the party has liability insurance, it may be admissible. This is consistent with current Georgia law. See, *Bentley v. BMW, Inc.*, 209 Ga.App. 526 (1993).

24-4-412. Sexual Offense; Relevance of Victim's Past Behavior.

(a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape, statutory rape, assault with intent to commit rape, sexual battery, child molestation, incest, or any other sexual offense, reputation or opinion evidence of the past sexual behavior of an alleged victim of such rape or offense is not admissible. For the purposes of this Code section, evidence of past sexual behavior includes, but is not limited to, evidence of the complaining witness's marital history, mode of dress, general reputation for promiscuity, non-chastity, or sexual mores contrary to the community standards.

(b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape, statutory rape, assault with intent to commit rape, sexual battery, child molestation, incest, or any other sexual offense, evidence of an alleged victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is:

(1) Admitted in accordance with subsections (c) (1) and (c) (2) and is constitutionally required to be admitted; or

(2) Admitted in accordance with subsection (c) and is evidence of - -

(A) Past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the complaining witness, the source of semen, injury, pregnancy, disease, or

other physical or psychological evidence of the commission of a sexual act or offense offered by the prosecution; or

(B) Past sexual behavior with the accused and is offered by the accused upon the issue of whether the complaining witness consented to the sexual behavior in question, provided that the court finds that the evidence supports an inference that the accused could have reasonably believed that the complaining witness consented to the conduct complained of in the prosecution and the physical evidence in the case is not demonstrably inconsistent with consent; or

(C) Part of the circumstances immediately surrounding the offense with which the accused is charged, provided that the court finds that the evidence supports an inference that the accused could have reasonably believed that the complaining witness consented to the conduct complained of in the prosecution and the physical evidence in the case is not demonstrably inconsistent with consent; or

(D) Past sexual behavior offered to impeach the alleged victim's testimony or other evidence offered by the prosecution concerning the extent to which such victim had engaged in other similar conduct; or

(E) Past sexual behavior which, together with other competent evidence, will substantially support a conclusion that the complaining witness has made a false accusation against the defendant in order to hide that past sexual behavior.

(c)(1) If the accused intends to offer under subsection (b) evidence of specific instances of the alleged victim's past sexual behavior, the accused shall make a motion, outside the presence of the jury, to offer such evidence before presenting that evidence in any manner in open court.

(2) The motion described in paragraph (1) of this subsection shall include a specific offer of proof. If the court determines that the offer of proof contains evidence described in subdivision (b), the court shall order a hearing in chambers to determine if such evidence is admissible. At such hearing the parties may call witnesses, including the complaining witness, and offer relevant evidence. Notwithstanding subsection (b) of Code section 24-1-104, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue before allowing admission of the evidence.

(3) If the court determines on the basis of the hearing described in paragraph (2) of this subsection that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial and the court shall by order state what evidence

may be introduced at the trial and in what manner the evidence may be introduced.

Comment - This section is based on Federal Rule of Evidence 412, current O.C.G.A. § 24-2-3 and Georgia case law, with changes to make applications of the rule clearer and simpler. This section, like the current Georgia rape victim shield statute, is designed to protect victims of sexual offenses from the humiliating and embarrassing disclosure of intimate details about their private lives by limiting the admissibility of evidence of the victim's past sexual conduct.

The current Georgia rape victim shield statute refers only to a "prosecution for rape" but Georgia courts have extended its application to other sexual offenses. See, Milich, Georgia Rules of Evidence, (2d ed.) §11.6, n.4. Likewise, § 24-4-412 would apply to all sex offense cases.

Subsection (a) - Reputation and opinion testimony concerning the past sexual behavior of a victim of a sexual offense is not admissible in any circumstance. This changes current Georgia law which prohibits reputation evidence generally but allows it when relevant to whether the defendant could have reasonably believed the complaining witness consented.

Subsection (b) - Evidence of a complaining witness's past sexual behavior other than reputation or opinion evidence is not admissible unless it qualifies under one of the three exceptions stated in subsection (b).

Subsection (b)(1) - recognizes that if evidence of a complaining witness's past sexual conduct is constitutionally required, the court must admit the evidence. This is based on Federal Rule 412(b)(1)(C) and reflects the general principle that state evidence rules must yield to the accused's constitutional rights to present evidence on his own behalf in certain critical situations. See, *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982); *Rock v. Arkansas*, 483 U.S. 44 (1987); *Chambers v. Mississippi*, 410 U.S. 284 (1967); *Dean v. State*, 267 Ga. 306 (1996).

Subsection (b)(2)(A) provides an exception for evidence of sexual conduct with persons other than the accused when there exists an issue whether the accused was the source of semen, injury, pregnancy, disease or other physical or psychological evidence. Georgia's current statute has no express provision for such an exception but Georgia cases have recognized one. See, e.g., *Chambers v. State*, 205 Ga.App. 78 (1992); *Burris v. State*, 204 Ga.App. 806 (1992); *Reece v. State*, 192 Ga.App. 14 (1989); *Marion v. State*, 206 Ga.App. 159 (1992) (psychological evidence). Subsection (b)(2)(A) recognizes that without such an exception, an accused may find it impossible to support a defense that someone else accounts for the physical or psychological evidence being used to establish the sexual offense or to tie the accused to the crime. Only if the physical or psychological evidence is first offered by the prosecution is this exception applicable. See, *United States v. Richards*, 118 F.3d 622 (8th Cir. 1997).

Subsection (b)(2)(B) provides an exception for evidence of the complaining witness's past sexual conduct with the accused upon the issue of consent. It is based on Federal Rule 412, the current Georgia statute, and Georgia case law. It requires the court to examine whether the evidence really supports a consent defense and allows the court to reject the evidence if the physical evidence in the case negates a consent defense. See, e.g., *Davis v. State*, 235 Ga.App. 362 (1998) (evidence of prior sex with accused rejected where victim was severely beaten thus negating any issue of consent).

The current Georgia statute also allows evidence of past sexual conduct of the complaining witness with others than the accused when relevant to whether the accused could have reasonably believed that the complaining witness consented. Subsection (b)(2)(B) strictly limits the evidence to prior sexual conduct with the accused.

Subsection (b)(2)(C) provides an exception for evidence of the alleged complaining witness's sexual behavior immediately before or after the alleged offense when relevant to the issue of consent. Georgia cases have disagreed over whether the current rape victim shield law trumps the *res gestae* rule which admits all that is said and done during the events in question. Compare, *Villafranco v. State*, 252 Ga. 188 (1984) (*res gestae* evidence admissible where relevant to consent); with, *Mooney v. State*, 266 Ga.App. 587 (2004) (rape shield law supersedes *res gestae* rule). This subsection admits *res gestae* evidence subject to heightened scrutiny of the relevance of the evidence and the heightened balancing in subsection (c)(3), discussed below.

Subsection (b)(2)(D) clarifies that a defendant may offer evidence of the complaining witness's prior sexual conduct that directly rebuts the testimony of the complaining witness or other evidence offered by the prosecution as to the complaining witness's chastity or sexual inexperience. This is consistent with current Georgia case law. See, e.g., *Villafranco v. State*, 252 Ga. 188 (1984); *Mooney v. State*, 266 Ga.App. 587 (2004); *Wagner v. State*, 253 Ga.App. 874 (2002).

Subsection (b)(2)(E) provides an exception when evidence of the complaining witness's prior sexual behavior is necessary in order for the accused to present a particular theory on why the alleged complaining witness falsely accused the defendant. For example, when the defendant has proof that the alleged victim was made pregnant by her boyfriend and, afraid of the reaction of her strict parents, concocted the rape story to explain her pregnancy, the defendant would be allowed to present this evidence even though it entails a reference to the alleged victim's prior sexual behavior. The need for this kind of exception is based on the famous Gary Dotson case where Dotson was convicted because the rape shield statute, in effect, prevented him from presenting the truth. See, "Gary Dotson as Victim: The Legal Response to Recantation Testimony," 35 Emory L.J. 969 (1986). On the other hand, courts must not allow exceptions to the rape victim shield law simply because of speculation by the accused that he is the victim of false accusation. See, e.g., *Green v. State*, 221 Ga.App. 436 (1996). Under subsection (b)(2)(E), the defense first would have to present competent evidence to the trial court that "substantially support[s]" the false accusation theory before the evidence could be

offered at trial.

Subsection (c)(1) requires that the defendant make a motion outside the presence of the jury of intent to offer any evidence under subsection (b). This is consistent with the current Georgia statute.

Subsection (c)(2) requires that the motion include an offer of proof. If that offer of proof, on its face, comports with a subsection (b) exception, the court must hold a hearing in chambers to determine the admissibility of the evidence. The complaining witness may be called to testify at this hearing. If the admissibility of the evidence of past sexual conduct is conditioned on the ability to prove some other fact, the court shall take evidence on that other fact at a hearing in chambers before ruling on the admissibility of the subsection (b) evidence. The court as near as possible should resolve all questions regarding the admissibility of evidence of prior sexual conduct in chambers before allowing such evidence to be heard in the open courtroom.

Subsection (c)(3) requires that the court weigh the probative value of any admissible evidence of prior sexual conduct of the complaining witness against the danger of unfair prejudice to the complaining witness and to the policy behind the rule of encouraging victims to report sexual crimes and testify against their assailants. The evidence is admissible only if the probative value outweighs the negative effects.

24-4-413 Evidence of Similar Crimes in Sexual Assault Cases

(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the prosecution intends to offer evidence under this Code section, the prosecutor shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least ten days in advance of trial, unless the time is shortened or pretrial notice is excused by the judge on good cause shown.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this Code section and Code section 24-4-415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved--

- (1) any conduct proscribed by chapter 109A of title 18, United States Code;
 - (2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;
 - (3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;
 - (4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or
 - (5) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).
-

Comment - This is based on Federal Rule 413 with minor changes to conform it to state use.

Subsection (a) - This is mostly consistent with current Georgia case law. While Georgia requires that any prior sex offense be “similar” to the charged sex offense, the rule “has been most liberally applied in cases involving sexual offenses.” See, e.g., *Goodroe v. State*, 238 Ga.App. 66 (1999); *Moore v. State*, 207 Ga.App. 412 (1993). See, *United States, v. Guardia*, 135 F. 3d 1326 (10th Cir. 1998).

Subsection (b) - The pretrial notice provision is changed from 15 days to 10 days to conform with the similar notice provision in new § 24-4-404(b).

24-4-414 Evidence of Similar Crimes in Child Molestation Cases

(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least ten days in advance of trial, unless the time is shortened or pretrial notice is excused by the judge on good cause shown.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this Code section and Code section 24-4-415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved--

(1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;

(2) any conduct proscribed by chapter 110 of title 18, United States Code;

(3) contact between any part of the defendant's body or an object and the genitals or anus of a child;

(4) contact between the genitals or anus of the defendant and any part of the body of a child;

(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

(6) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(5).

Comment - This is based on Federal Rule 414 with minor changes to conform it to state use.

Subsection (a) - This is consistent with current Georgia case law. See, e.g., *Livery v. State*, 233 Ga.App. 332 (1998); *Hostetler v. State*, 261 Ga.App. 237 (2003). See, *United States v. McHorse*, 179 F.3d 889 (10th Cir. 1999).

Subsection (b) - The pretrial notice provision is changed from 15 days to 10 days to conform with the similar notice provision in new § 24-4-404(b).

24-4-415 Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation

(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Code sections 24-4-413 and 24-4-414.

(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses

or a summary of the substance of any testimony that is expected to be offered, at least ten days in advance of trial, unless the time is shortened or pretrial notice is excused by the judge on good cause shown.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

Comment - This is based on Federal Rule 415 with minor changes to conform it to state use. See, *Johnson v. Elk Lake School Dist.*, 238 F.3d 138 (3d Cir. 2002).

Subsection (a) - Current Georgia case law admits such “similar transaction” evidence in criminal cases and there is no reason to believe it would not do so in civil cases.

Subsection (b) - The pretrial notice provision is changed from 15 days to 10 days to conform with the similar notice provision in new § 24-4-404(b).

24-4-420 Statements of Sympathy in Medical Malpractice Cases

In any claim or civil action brought by or on behalf of a patient allegedly experiencing an unanticipated outcome of medical care, any and all statements, affirmations, gestures, activities or conduct expressing benevolence, regret, apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence which are made by a health care provider or an employee or agent of a health care provider to the patient, a relative of the patient, or a representative of the patient and which relate to the unanticipated outcome shall be inadmissible as evidence and shall not constitute an admission of liability or an admission against interest.

Comment - This section was moved to here from current O.C.G.A. § 24-3-37.1(c). Current O.C.G.A. § 24-3-37.1(c) was part of SB 3, the tort reform act of 2005.

The only change to the statute would delete statements regarding mistake or error from the statute’s coverage. All of the other types of statements covered by the statute (statements of sympathy, regret, etc.) are arguably irrelevant in a malpractice case and, worse, may be misconstrued as admissions of liability. But statements by a party admitting mistake or error have been admissible as evidentiary admissions for over 200 years in all American courts. The rationale behind the admission rule is quite simple. A party cannot complain that his own relevant statements are repeated in court and the party has the opportunity to explain those statements to the jury.

Moreover, to repeal the party admission rule only in medical malpractice cases and only when offered against the defendant seems not only unjustified but raises constitutional

issues of due process and equal protection. "Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws." Art. I, Sec. I, Par. II of the Constitution of the State of Georgia of 1983.

CHAPTER 5

TESTIMONIAL PRIVILEGES

Comment - This Chapter moves the privilege statutes from current O.C.G.A. § 24-9-20 et seq. to here. The Committee recommends several minor changes to the rules on privilege.

The Committee recommends deleting three of the four attorney-client privilege statutes in the Georgia Code. (§§ 24-9-27(c); 24-9-24, and 24-9-25). The statutes are partially conflicting and suggest that the privilege cannot even be waived. What is left is current § 24-9-21(2) – the assertion that communications between attorney and client are privileged.

24-5-501 - Certain Communications Privileged

There are certain admissions and communications excluded on grounds of public policy. Among these are:

- (1) Communications between husband and wife;
- (2) Communications between attorney and client;
- (3) Communications among grand jurors;
- (4) Secrets of state;
- (5) Communications between psychiatrist and patient;
- (6) Communications between licensed psychologist and patient as provided in Code section 43-39-16;
- (7) Communications between patient and a licensed clinical social worker, clinical nurse specialist in psychiatric/mental health, licensed marriage and family therapist, or licensed professional counselor during the psychotherapeutic relationship; and
- (8) Communications between or among any psychiatrist, psychologist, licensed clinical social worker, clinical nurse specialist in psychiatric/mental health, licensed marriage and family therapist, and licensed professional counselor who are rendering psychotherapy or have rendered psychotherapy to a patient, regarding that patient's communications which are otherwise privileged by paragraph (5), (6), or (7) of this Code section;
- (9) Communications between an accountant and client as provided by Code section 43-3-32.

As used in this Code section, the term "psychotherapeutic relationship" means the relationship which arises between a patient and a licensed clinical social worker, a clinical nurse specialist in psychiatric/mental health, a licensed marriage and family

therapist, or a licensed professional counselor using psychotherapeutic techniques as defined in Code section 43-10A-3 and the term "psychotherapy" means the employment of "psychotherapeutic techniques."

Comment - This section was moved to here from current O.C.G.A. § 24-9-21 and renumbered. The only change is the addition of the reference to the accountant-client privilege in current O.C.G.A. § 43-3-32.

24-5-502 - Communications to ministers, priests and rabbis

Every confidential communication made by any person professing religious faith, seeking spiritual guidance, reconciliation, or counseling to any minister, priest, rabbi, imam, or similar functionary of a bona fide religious organization, shall be deemed privileged and shall not be disclosed by the minister, priest, rabbi, imam, or similar functionary of such a bona fide religious organization.

Comment - This section is based on current O.C.G.A. § 24-9-22. The current statute has several problems that are corrected in the proposed revisions.

First, the current statute appears to limit the privilege to members of the Christian and Jewish faiths and this is not only unjustified but probably an equal protection violation. The added language "or similar functionary of a recognized religious organization" was adapted from Uniform Rule of Evidence 505.

Second, the current statute makes the cleric incompetent to disclose communications privileged under the statute and, as at least one case has noted, this appears to create a privilege that cannot be waived. See, *Security Life Ins. Co. v. Newome*, 122 Ga.App. 137, 176 S.E.2d 463 (1970). The revised statute would create a privilege that can be waived by the penitent or church member.

A few minor changes: The word "confidential" was added to the first sentence for clarity. The term "reconciliation" was added to clarify that statements made during that Catholic sacrament are covered. (Catholics now use the term "reconciliation" instead of "confession"). The second sentence of the current statute not only creates a privilege but also prohibits the disclosure of protected communications by the cleric generally. This was retained in the revised version.

24-5-503 - Husband and wife as witnesses for and against each other in criminal proceedings

(a) Husband and wife shall be competent but shall not be compellable to give evidence in any criminal proceeding for or against each other.

(b) The privilege created by subsection (a) of this Code section or by corresponding privileges in paragraph (1) of Code Section 24-5-501 or subsection (a) of Code Section 24-5-505 shall not apply in proceedings in which the husband or wife is charged with a crime against the person of a minor child, but such person shall be compellable to give evidence only on the specific act for which the defendant is charged.

Comment - This section was moved to here from current O.C.G.A. § 24-9-23 and renumbered without change except its references to other Code sections have been changed to conform to the revised Title 24.

24-5-504 - Law enforcement officers testifying in criminal proceedings not compelled to reveal home address

Law enforcement officers testifying before any court in any criminal proceedings shall not be compelled to reveal their home address but may be required to divulge the business address of their employer, except that the court may require any officer to answer questions as to his home address whenever such fact may be material to any issue in the case.

Comment - This section was moved to here from current O.C.G.A. § 24-9-26 and renumbered without change.

24-5-505 - Privilege of party or witness

(a) No party or witness shall be required to testify as to any matter which may criminate or tend to criminate himself or which shall tend to bring infamy, disgrace, or public contempt upon himself or any member of his family.

(b) Except in proceedings in which a judgment creditor or his successor in interest seeks post-judgment discovery involving a judgment debtor pursuant to Code section 9-11-69, no party or witness shall be required to testify as to any matter which shall tend to work a forfeiture of his estate.

(c) No official persons shall be called on to disclose any state matters of which the policy of the state and the interest of the community require concealment.

Comment - This section was moved to here from current O.C.G.A. § 24-9-27 and renumbered. Subsection (c): “No party or witness shall be required to make discovery of the advice of his professional advisers or his consultation with them,” was deleted. The subsection has only been applied to the attorney - client relationship and thus is redundant. Moreover, to the extent it could be applied to other professional relationships such as psychiatrist - patient or accountant - client, these relationships are covered by their own individual privileges.

24-5-506 - Person not compellable to testify for or against self; testimony of defendant in criminal case

(a) No person who is charged in any criminal proceeding with the commission of any indictable offense or any offense punishable on summary conviction shall be compellable to give evidence for or against himself.

(b) If a defendant in a criminal case wishes to testify and announces in open court his intention to do so, he may so testify in his own behalf. If a defendant testifies, he shall be sworn as any other witness and, unless otherwise provided in this Code, may be examined and cross-examined as any other witness. The failure of a defendant to testify shall create no presumption against him, and no comment shall be made because of such failure.

Comment - This section was moved to here from current O.C.G.A. § 24-9-20 and amended to reflect that a testifying accused may be impeached under new 24-6-608 and 24-6-609. Subsection (c) of current O.C.G.A. § 24-9-20 (referring to right to open and close argument) was deleted by the Criminal Justice Act of 2005.

24-5-507 - Immunity from prosecution for persons ordered to testify or produce evidence in criminal prosecutions; contempt

(a) Whenever in the judgment of the Attorney General or any district attorney the testimony of any person or the production of evidence of any kind by any person in any criminal proceeding before a court or grand jury is necessary to the public interest, the Attorney General or the district attorney may request the superior court in writing to order that person to testify or produce the evidence. Upon order of the court that person shall not be excused on the basis of his privilege against self-incrimination from testifying or producing any evidence required; but no testimony or other evidence required under the order or any information directly or indirectly derived from such testimony or evidence may be used against the person in any proceedings or prosecution for a crime or offense concerning which he testified or produced evidence under court order. However, he may nevertheless be prosecuted or subjected to penalty

or forfeiture for any perjury, false swearing, or contempt committed in testifying or failing to testify, or in producing or failing to produce evidence in accordance with the order but shall not be required to produce evidence that can be used in any other courts of this state, the United States, or any other state. Any order entered under this Code section shall be entered of record in the minutes of the court so as to afford a permanent record thereof; and any testimony given by a person pursuant to such order shall be transcribed and filed for permanent record in the office of the clerk of the court where it shall be sealed and maintained in a secure place and opened only upon order of the court after notice to all interested parties.

(b) If a person refuses to testify after being granted immunity from prosecution and after being ordered to testify as aforesaid, he may be adjudged in contempt and committed to the county jail until such time as he purges himself of contempt by testifying as ordered without regard to the expiration of the grand jury. If the grand jury before which he was ordered to testify has been dissolved, he may purge himself by testifying before the court.

Comment - This section was moved to here from current O.C.G.A. § 24-9-28. Two minor changes: The wording regarding the use of evidence in other courts was changed to improve clarity. The second change provides that the transcript filed for permanent record be kept sealed and generally unavailable absent court order.

24-5-508 - Qualified privilege for persons, companies, or other entities engaged in news gathering or dissemination

Any person, company, or other entity engaged in the gathering and dissemination of news for the public through a newspaper, book, magazine, or radio or television broadcast or by any electronic means shall have a qualified privilege against disclosure of any information, document, or item obtained or prepared in the gathering or dissemination of news in any proceeding where the one asserting the privilege is not a party, unless it is shown that this privilege has been waived or that what is sought:

- (1) Is material and relevant;
- (2) Cannot be reasonably obtained by alternative means; and
- (3) Is necessary to the proper preparation or presentation of the case of a party seeking the information, document, or item.

Comment - This section was moved to here from current O.C.G.A. § 24-9-30. The phrase “or by any electronic means” was added to clarify that the privilege extends to news reporting activities that use the internet.

CHAPTER 6. WITNESSES

ARTICLE 1

24-6-601. General Rule of Competency

Every person is competent to be a witness except as otherwise provided by statute.

Comment - This section is based on Federal Rule of Evidence 601 with a deletion of the second sentence of the Federal Rule regarding choice of law and a substitution referring to other state statutes regarding the competency of a witness. No substantive changes were made.

This section generally makes all persons competent to testify. Current Georgia statutes cited drunkenness and “lunatics during lunacy” as incompetent to testify. These statutes will be repealed though this does not mean that a drunk or mentally incapacitated witness will be allowed to testify. But instead of trying to classify the various ways in which a witness might prove incompetent, the proposed rules of evidence use a functional approach to allow or disallow a witness’s testimony. New O.C.G.A. §2 4-6-602 requires that a witness testify only to matters of which he has personal knowledge. New O.C.G.A. § 24-6-603 requires that every witness take an oath before testifying. These two rules entail that the witness must understand the nature and import of the oath and be able to present facts sufficient to demonstrate how his testimony is based on personal knowledge. A witness who cannot do these things is functionally incompetent as a witness, regardless of the cause of the incapacity. *See, United States v. Gates*, 10 F.3d 765, 766 (11th Cir. 1993) (“Notwithstanding Rule 601, a court has the power to rule that a witness is incapable of testifying ...”).

24-6-602. Lack of Personal Knowledge.

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness’ own testimony. This section is subject to the provisions of Code section 24-7-703, relating to opinion testimony by expert witnesses and does not apply to party admissions.

Comment - This section is based on Federal Rule of Evidence 602 and consistent with current Georgia law. *See, e.g., Williams v. State*, 224 Ga.App. 665 (1997). The personal knowledge requirement extends to lay opinion testimony. *See, new O.C.G.A. § 24-7-701*. It also extends to hearsay statements. *See, Miller v. Crown Amusements*, 821 F. Supp. 703 (S.D. Ga. 1993). The last clause was added to clarify that party

admissions are admissible even if not based on personal knowledge, a rule consistent with common law, federal practice, *see, e.g., Blackburn v. UPS, Inc.*, 179 F.3d 81 (3d Cir. 1999), and current Georgia law, *see, e.g., Brooks v. Sessoms*, 47 Ga.App. 554 (1933).

24-6-603. Oath or Affirmation.

(a) Before testifying, all witnesses shall be required to declare that they will testify truthfully, by oath or affirmation administered in a form calculated to awaken their consciences and impress their minds with the duty to do so. Unless otherwise provided by law, the court may frame such oath or affirmation.

(b) Notwithstanding the provisions of subsection (a) of this Code section, in all cases involving deprivation as defined by Code section 15-11-2, or in criminal cases involving child molestation, and in all other criminal cases in which a child was a victim of or witness to any crime, any such child shall be competent to testify, and the child's credibility shall be determined as provided in Chapter 6 of this Title.

Comment - Subsection (a) is substantially the same as Federal Rule of Evidence 603 with some minor changes to improve readability. The second sentence of subsection (a) retains the substance of the second sentence of existing O.C.G.A. § 24-9-60 that the court may frame the form of the oath or affirmation taken by a witness unless the form of the oath is prescribed by statute. *See e.g., O.C.G.A. §§ 15-12-68 and 17-8-52* (witness oath in grand jury and criminal proceedings).

Subsection (b) is taken from current O.C.G.A. § 24-9-5(b), retaining Georgia's mandatory competency of child witnesses in certain cases.

24-6-604. Interpreters.

Except as otherwise provided by statute or court rule, an interpreter is subject to the provisions of Code section 24-7-702 relating to qualification as an expert and Code section 24-7-603 relating to the administration of an oath or affirmation to make a true translation.

Comment - This section is substantially the same as Federal Rule of Evidence 604 except for a provision added at the beginning of the rule referring to other relevant Georgia statutes or court rules. *See e.g., new O.C.G.A. § 24-6-650* regarding use of sign language interpreters.

24-6-605. Competency of Judge as Witness.

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

Comment - This section is identical to Federal Rule of Evidence 605 and consistent with current Georgia practice. See, current O.C.G.A. §§ 9-10-7 and 17-8-57 -- trial judge prohibited from expressing an opinion on the merits of the case in front of the jury.

24-6-606. Competency of Juror as Witness.

(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so as to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the juror's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Comment - This section is identical to Federal Rule of Evidence 606.

Subsection (a) - Current Georgia law allows a juror to testify as a witness in a case on which that juror sits. See, current O.C.G.A. §§ 9-10-6, 17-9-20. This subsection is opposite. Jurors are strictly prohibited from testifying.

Subsection (b) - Current Georgia law provides that the testimony of jurors, in affidavits or otherwise, is admissible to sustain but not to impeach their verdict. Current O.C.G.A. §§ 9-10-9, 17-9-41. This is generally consistent with the common law view that protecting the jurors from post-verdict prying provides a freer atmosphere for jury deliberation and spares the jurors from post-trial harassment by the losing party. See, *McDonald v. Pless*, 238 U.S. 264, 267-68 (1915).

Subsection (b) pursues the same goal as prior Georgia law but in a somewhat different manner. The general prohibition against a juror testifying to the content of jury

deliberations remains but with a narrow exception for evidence of improper, extraneous, prejudicial information or external influences brought to bear upon any juror. This is consistent with current Georgia practice in criminal cases, *Spencer v. State*, 260 Ga. 640 (1990), but not in civil cases where the prohibition of jurors impeaching their verdict is absolute. See, *Newson v. Foster*, 261 Ga.App. 16 (2003).

Under subsection (b), the only instance in which a juror's testimony is admissible to sustain the verdict is in answering a charge of extraneous influence or information.

24-6-607. Who May Impeach.

The credibility of a witness may be attacked by any party, including the party calling the witness.

Comment - This section is identical to Federal Rule of Evidence 607 and abolishes the "vouching rule" against impeaching one's own witness. Current O.C.G.A. § 24-9-81, as amended in 2005, abolished the vouching rule in Georgia.

24-6-608. Evidence of Character and Conduct of Witness.

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness which are relevant only for the purpose of attacking or supporting the witness' credibility may not be inquired into on direct examination or proved by extrinsic evidence except for conviction of crime as provided in Code section 24-6-609 or conduct indicative of the witness' bias toward a party.

Specific instances of conduct may, however, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified, or (2) concerning the witness' character for truthfulness or untruthfulness if the court, in its discretion after being given an offer of proof by the cross-examiner outside the hearing of the jury, determines that such inquiry is in the interests of justice. The cross-examiner must have a good faith basis to believe that any specific instances of conduct raised on cross-examination are true.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Comment - This section is substantially the same as Federal Rule of Evidence 608. An addition has been made in subsection (b) to clarify that conduct indicative of a witness' bias toward a party may be proved by extrinsic evidence. This is the law in both Georgia and federal courts. See, *Simmons v. State*, 266 Ga. 223 (1996); *United States v. Abel*, 469 U.S. 45 (1984).

When character evidence is admissible for its substantive use regarding a party, new O.C.G.A. § 24-4-405 governs the manner of proving such evidence. When character evidence is being used for the limited purpose of attacking or sustaining a witness's credibility, this section governs.

There are several differences between this section and current Georgia law. Under current Georgia law, the witness's credibility may be attacked only with reputation evidence of general bad character and, though the impeaching witness may be asked whether, based on the reputation of the subject, he would believe him on his oath, the witness may not otherwise give a personal opinion of the subject's character.

This section allows either reputation or opinion testimony but only as to the subject's specific character for truthfulness or untruthfulness. Testimony as to truthfulness is admissible only after the subject witness's credibility has been attacked.

Current Georgia law prohibits impeaching a testifying criminal defendant with evidence of his general bad character unless the defendant first puts his character in issue. Current O.C.G.A. § 24-9-20(b). This section treats a testifying criminal defendant the same as any other witness. By taking the stand and swearing to tell the truth, the accused's character for truthfulness is put in issue. The prosecution is limited, however, to evidence probative of the defendant's veracity. Use of prior convictions to impeach any witness, including a criminal defendant, is governed by new O.C.G.A. § 24-6-609.

This section continues the practice under current Georgia law of barring the use of specific instances of conduct on direct examination to prove a person's general good or bad character. See, *Haynes v. Phillips*, 67 Ga.App. 574 (1942); *Ailstock v. State*, 159 Ga.App. 482 (1981). The exceptions in subsection (b), prior convictions and conduct indicating bias, are also consistent with current Georgia law. See, e.g., *Hood v. State*, 179 Ga.App. 387 (1986) (prior conviction); *Simmons v. State*, 266 Ga. 223 (1996) (bias).

Under subsection (b)(1), a character witness can be asked on cross-examination about specific instances of conduct probative of the veracity of the person about whom he testified in order to test the extent and basis of the character witness's knowledge. This

is consistent with current Georgia practice. Current O.C.G.A. § 24-9-84; *Porter v. State*, 240 Ga.App. 554 (1999).

Subsection (b)(2) also allows impeaching any witness on cross-examination with specific instances of the witness's own conduct that are probative of the witness's untruthfulness, even if they are unrelated to the issues in the case. Georgia currently does not allow such impeachment. See, e.g., *Pruitt v. State*, 270 Ga. 745 (1999). Subsection (b)(2) expressly gives the trial court discretion on whether to allow the use of specific instances of conduct to attack or rehabilitate the credibility of a witness. This discretion is in addition to the court's exclusionary authority under new O.C.G.A. § 24-4-403. See, e.g., *United States v. Matthews*, 168 F.3d 1234 (11th Cir. 1999). The Federal Rule makes the inquiry into such conduct of the witness subject to the court's discretion but does not state if or when the cross-examiner should give the judge an opportunity to exercise that discretion. The proposed changes clarify that the cross-examiner must first ask the judge, outside the hearing of the jury, to permit the inquiry.

The cross-examiner must have good faith basis for believing that any specific instances of conduct raised on cross-examination actually occurred. See, *Michelson v. United States*, 335 U.S. 469 (1948). The court has discretion to require that counsel reveal this good faith basis outside the hearing of the jury before allowing counsel to raise the prior conduct on cross-examination.

Although subsection (b) only speaks of raising specific instances of conduct "on cross-examination," it must be read in conjunction with the rest of this section and the other rules of evidence. For example, this section expressly allows a party to rehabilitate a witness whose credibility has been attacked by raising specific instances of conduct on redirect that are probative of the witness's truthfulness. Likewise, new O.C.G.A. § 24-6-607 allows a party to impeach his own witness and this implies the use of any methods available to the cross-examiner, including raising specific instances of conduct probative of the witness's untruthfulness on direct examination.

Whenever the cross-examiner confronts a witness with specific instances of conduct, the examiner must, as under new O.C.G.A. § 24-4-405, accept the witness's answer. No external evidence is admissible to prove or disprove the specific instances of conduct raised unless they are relevant to the issues in the case. See, e.g., *United States v. Matthews*, 168 F.3d 1234 (11th Cir. 1999).

24-6-609. Impeachment By Evidence of Conviction of Crime.

(a) General rule. For the purpose of attacking the credibility of a witness, or of the criminal defendant, if the criminal defendant testifies:

- (1) Evidence that a witness has been convicted of a crime shall be admitted if the crime was punishable by death or imprisonment of one

year or more under the law under which the witness was convicted if the court determines that the probative value of admitting the evidence for its impeachment use outweighs its prejudicial effect to the witness or the criminal defendant; and

(2) Evidence that the criminal defendant has been convicted of a crime shall be admitted if the crime was punishable by death or imprisonment of one year or more under the law under which the defendant was convicted if the court determines that the probative value of admitting the evidence for its impeachment use substantially outweighs its prejudicial effect to the defendant; and

(3) Evidence that any witness or the defendant has been convicted of a crime shall be admitted if it involved dishonesty or making a false statement, regardless of the punishment that could be imposed for such offense.

(b) Time limit. Evidence of a conviction under this Code section is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party written notice at least ten days in advance of trial, unless the time is shortened or pretrial notice is excused by the judge on good cause shown.

(c) Effect of pardon, annulment, certificate of rehabilitation, or discharge from a first offender program. Evidence of a conviction is not admissible under this section if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence. Evidence of a finding of guilt and subsequent discharge under any first offender statute may not be used to impeach any witness.

(d) Nolo Contendere Pleas and Juvenile adjudications. A conviction based on a plea of nolo contendere shall not be admissible to impeach any witness under this Code section. Evidence of juvenile adjudications is generally not admissible under this Code section. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

(f) Certified copy of record of conviction. A party impeaching a witness with a prior conviction on cross-examination need not have or produce a certified copy of the record of conviction but must have a good faith basis to believe that the witness has a prior conviction that qualifies under this section before asking the witness about it.

Comment - Current O.C.G.A. § 24-9-84.1 was enacted in 2005 and includes a version of Federal Rule 609. This proposed rule closely follows 24-9-84.1 with a few minor changes discussed below.

The first change to 24-9-84.1 simply clarifies that when the rule refers to the “defendant” it means the “criminal defendant.” The second clarifies that in performing the balancing tests, the court is to consider the probative value of the impeachment use of the prior conviction. This may help remind the court that the probative value of a prior conviction for its illegitimate, character use belongs on the prejudice, not probative, side of the balancing equation. (If a prior crime is admissible for its substantive use as a “similar transaction,” it is admitted under proposed § 24-4-404(b), not this section).

Secondly, current 24-9-84.1 states the balancing test under subsection (a)(1) as comparing the probative value of the prior conviction against the prejudice to the testifying witness. This departs from federal practice which, when considering whether to allow the impeachment of an ordinary witness in a criminal case with that witness’ prior convictions, balances the probative value against the prejudice to the criminal defendant. Indeed, the courts are not usually concerned with the prejudicial effect on a witness which amounts to little more than embarrassment as opposed to prejudice to the accused who faces the loss of his liberty. The type of situations that raise concern are when the witness is a close friend, associate, or family member of the accused and impeaching that witness with his prior felony convictions will send the message to the jury that the defendant associates with or is part of a family of felons.

Subsection (b) - The requirement of advanced written notice for the use of convictions more than 10 years old was made more specific.

Subsection (c) - Evidence of a finding of guilt and subsequent discharge under Georgia’s first offender statute, (O.C.G.A. § 42-8-65), may not be used to impeach any witness in a criminal or civil case. This conforms the rule to existing Georgia law. See, *Matthews v. State*, 268 Ga. 798 (1997).

Subsection (d) - Federal cases have interpreted Rules 410 and 609 such that a conviction based on a plea of nolo contendere is admissible to impeach a witness. See, e.g., *United States v. Sonny Mitchell*, 934 F.2d 77 (5th Cir. 1991). This would change

current Georgia law which does not permit the use of a conviction based on a nolo plea for impeachment of a witness in a criminal or civil case. See, *Pitmon v. State*, 265 Ga.App. 655 (2004)(en banc). Since current O.C.G.A. § 17-7-95(c) prohibits the use of a nolo plea “as an admission of guilt or for any purpose,” subsection (d) has been modified to expressly prohibit the use of a conviction based on a nolo plea to impeach a witness.

Subsection (e) regarding pendency of an appeal is consistent with current Georgia law. See, *James v. State*, 160 Ga. App. 185 (1981).

Subsection (f) - Current Georgia law requires that a party produce a properly certified record of conviction before impeaching a witness with it. See, e.g., *Rucker v. State*, 205 Ga.App. 651 (1992). Federal courts generally allow a party to ask a witness to admit his prior conviction without first producing a copy of the record of conviction. See, e.g., *United States v. Scott*, 592 F.2d 1139, 1143 (10th Cir. 1979). The proposed rule dispenses with the requirement that counsel produce a certified copy of the record of conviction but requires that counsel have a good faith basis to believe that the witness has a prior conviction that qualifies for impeachment use under this Code section.

24-6-610. Religious Beliefs or Opinions.

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of proving that by reason of their nature the witness’ credibility is impaired or enhanced.

Comment - This section is identical to Federal Rule of Evidence 610. Under current O.C.G.A. § 24-9-3, a witness’ religious beliefs are admissible on the issue of the witness’ credibility. Under this section, they are inadmissible for that purpose. A witness’ religious beliefs or opinions may be admissible, however, when relevant to show bias or interest on the part of the witness. See, e.g., *United States v. Teicher*, 987 F.2d 112 (2d Cir. 1993). See, new O.C.G.A. § 24-6-622.

24-6-611. Mode and Order of Interrogation and Presentation.

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Cross-examination. A witness may be cross-examined on any matter relevant to any issue in the case. The right of a thorough and sifting cross-examination

shall belong to every party as to the witnesses called against the party. If several parties to the same case have distinct interests, each may exercise this right.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Comment - Subsection (a) - This is identical to Federal Rule of Evidence 611(a) and consistent with Georgia law and practice. See, Current O.C.G.A. § 24-9-62.

Subsection (b) - This differs from Federal Rule of Evidence 611(b) and retains the Georgia practice of allowing wide open cross-examination. Current O.C.G.A. § 24-9-64, "The right to a thorough and sifting cross-examination ..., " is retained and incorporated here.

Subsection (c) - This is identical to Federal Rule of Evidence 611(c) and consistent with current Georgia practice. See, current O.C.G.A. § 24-9-81; *Parker v. State*, 172 Ga.App. 540 (1984); *Stein Enterprises v. Chatham County*, 200 Ga.App. 385 (1991).

24-6-612. Writing Used to Refresh Memory.

If a witness uses a writing to refresh memory for the purpose of testifying, either:

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing or trial, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If the writing used is protected by the attorney-client privilege or as attorney work product under Code section 9-11-26, use of the writing to refresh recollection prior to the hearing or trial does not constitute a waiver of that privilege or protection. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this Code section, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not

to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

Comment - This section is substantially the same as Federal Rule of Evidence 612 with references to federal statutes deleted. This section has the added sentence: “If the writing used is protected by the attorney-client privilege or as attorney work product under Code section 9-11-26, use of the writing to refresh recollection prior to the hearing or trial does not constitute a waiver of that privilege or protection.” The issue of whether a party waives the attorney-client privilege or attorney work product protection by showing a witness protected documents before trial has split federal courts. See, Weinstein & Berger, Evidence, § 612[04] (discussing cases). This added sentence clarifies this issue in favor of upholding the privilege – a result consistent with current Georgia law. See, e.g., *McKinnon v. Smock*, 264 Ga. 375 (1994) (upholding work product protection when witness used attorney materials to prepare testimony before trial). There is little question that a waiver of the attorney-client privilege occurs if the witness is refreshed with otherwise privileged documents while actually testifying. See, McCormick on Evidence, (5th ed.) v.1, p. 38 (1999).

Subsection (1) - When a witness uses a writing to refresh memory while testifying the opponent can ask to examine the writing, cross-examine the witness based upon it, and introduce relevant portions of it into evidence. This is consistent with current Georgia practice. See, *Baxter v. State*, 254 Ga. 538 (1985); *Lester v. S.J. Alexander, Inc.*, 127 Ga.App. 470 (1972).

Subsection (2) - This expands the rule beyond current Georgia practice to cover writings used by a witness before trial, if the court in its discretion finds it is necessary in the interest of justice. Current Georgia law only allows the opposing party to examine documents which were used to refresh a witness’ recollection since the jury was impaneled and sworn in the trial. *Johnson v. State*, 259 Ga. 403 (1989).

24-6-613. Prior Statements of Witnesses.

(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement by a witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is first afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Code Section 24-8-801(d)(2).

(c) Prior consistent statements of a witness offered for rehabilitation. A prior consistent statement is admissible to rehabilitate a witness if the prior consistent statement logically rebuts the attack made on the witness' credibility. A general attack on a witness' credibility with evidence offered under Code sections 24-6-608 or 24-6-609 would not permit rehabilitation under this subsection. If a prior consistent statement is offered to rebut an express or implied charge against the witness of recent fabrication or improper influence or motive, the prior consistent statement must have been made before the alleged recent fabrication or improper influence or motive arose.

Comment - Subsections (a) and (b) are mostly identical to Federal Rule of Evidence 613. Subsection (c) is new and is discussed below. The Federal Rules split up the provisions addressing a witness' prior inconsistent and consistent statements – part of them are found in Rule 613 and part are found in Rule 801(d)(1), with little thematic consistency. The proposed 24-6-613 addresses all the relevancy and foundation issues with prior inconsistent and consistent statements in one section and leaves 801(d)(1) to address only the hearsay issues with the use of such prior statements.

Subsection (a) - modifies the rule of Queen Caroline's case, followed in Georgia, (current O.C.G.A. § 24-9-83), which requires showing a witness his prior written statement or drawing his attention to the time, place, and circumstances of a prior oral statement, before questioning him about it or using it to establish any inconsistency with his testimony. Under subsection (a), the examiner may confront a witness with a prior inconsistent statement without prior disclosure, though opposing counsel thereafter may request to see any written or other evidence of the prior statement.

Prior inconsistent statements of a witness are admissible both to impeach the witness, and, if the witness is available for cross-examination, as substantive evidence. See, new O.C.G.A. §24-8-801(d)(1)(A). This is consistent with current Georgia law. See, *Gibbons v. State*, 248 Ga. 858 (1982).

Subsection (b) requires that the witness be given an opportunity to explain or deny a prior inconsistent statement before it is proved by extrinsic evidence. Unless the prior inconsistent statement qualifies as an admission, counsel must confront the witness with his prior statement before using other witnesses or documents to prove the statement. When the prior inconsistent statement was oral, counsel must have a good faith basis for believing the statement was made before raising it on cross-examination of the witness.

Proposed subsection (b) slightly changes Federal Rule 613(b) by adding the word "first" in the first sentence. Some courts have interpreted Federal Rule 613 to permit the following sequence: witness makes statement on direct examination; opponent does not confront witness with prior inconsistent statement on cross; opponent later presents extrinsic evidence of the witness' prior inconsistent statement; witness is recalled to explain or deny his prior inconsistent statement. See, e.g., *Wilmington Trust Co. v.*

Manufacturers Life Ins. Co., 749 F.2d 696 (11th Cir. 1985).

Other courts have used Federal Rule 611 to insist that the cross-examiner first confront the witness with his prior inconsistent statement and give the witness a chance to explain or deny it before offering any extrinsic evidence of the prior inconsistent statement. See, e.g., *United States v. Schnapp*, 322 F.3d 564 (8th Cir. 2003); *United States v. Bonnett*, 877 F.2d 1450 (10th Cir. 1989). This latter approach is consistent with current Georgia practice and makes sense for two reasons. First, it avoids the risk that the witness who is impeached is unable to return to trial and be recalled thus making fulfillment of Rule 613's requirement that he have an opportunity to explain or deny the statement impossible. Second, if the witness is first confronted with the statement on cross and admits it, there is no need for the extrinsic evidence to prove the prior statement. See, e.g., *BankAtlantic v. Blythe Eastman Paine Webber, Inc.*, 955 F.2d 1467 (11th Cir. 1992).

When hearsay is admitted under an exception, the admissibility of other, inconsistent statements by the hearsay declarant is governed by new O.C.G.A. § 24-8-806.

Subsection (c) adds a provision governing prior consistent statements of a witness. Prior consistent statements generally are merely cumulative of the witness' in court testimony and thus inadmissible on relevancy grounds and are considered improper bolstering of the witness' credibility. See, *Parker v. State*, 162 Ga.App. 271, 274–75, 290 S.E.2d 518, 521–22 (1982). ("In Georgia, as well as most other jurisdictions, the general rule is that a witness' testimony cannot be fortified or corroborated by his own prior consistent statements.... It can scarcely be satisfactory to any mind to say that, if a witness testifies to a statement today under oath, it strengthens the statement to prove that he said the same thing yesterday when not under oath.... The idea that the mere repetition of a story gives it any force or proves its truth is contrary to common observation and experience that a falsehood may be repeated as often as the truth.")

However, a prior consistent statement is relevant and admissible when the prior consistent statement is offered to rebut an attack on the witness' credibility, particularly an express or implied charge of recent fabrication or improper influence or motive. To qualify for this use, the prior consistent statement should have predated the alleged source or cause of fabrication or improper influence. See, *Tome v. United States*, 513 U.S. 150 (1995). Other specific attacks on a witness' credibility also may open the door to rehabilitation with a prior consistent statement. For example, if the cross-examiner impeaches a witness' testimony at trial with suggestions that the witness' memory is faded or weak, prior consistent statements by the witness closer in time to the events described would be admissible to rehabilitate. But general attacks on a witness' credibility, such as proof that the witness has a prior felony conviction or a poor reputation for truthfulness in the community would not open the door to rehabilitation by prior consistent statement.

Current Georgia law is a bit confused on the use of a prior consistent statement to rehabilitate a witness. Prior to 1998, the clear rule in Georgia was that a prior consistent

statement is admissible to rehabilitate a witness after *any* attack on the witness' credibility. This may have been a bit broad since the prior consistent statement does not logically rebut any and all attacks on credibility. In 1998, the Georgia Supreme Court, in dicta, endorsed Federal Rule 801(d)(1)'s approach limiting the use of a prior consistent statement to rebutting an express or implied charge of recent fabrication or improper influence or motive. *Woodard v. State*, 269 Ga. 317 (1998). The *Woodard* approach is arguably too narrow since there are other situations in which a prior consistent statement would logically rebut an attack on credibility (see discussion of impeaching a witness' memory, above). Since *Woodard*, Georgia courts have gone back and forth in their acceptance of that case's dicta. See, Milich, *Georgia Rules of Evidence*, (2d ed.), § 17.15 (Thomson/West 2002). Subsection (c) attempts to occupy that "just right" space in between pre and post-*Woodard* law.

24-6-614. Calling and Interrogation of Witnesses by Court.

(a) Calling by court. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party.

(c) Objections. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

Comment - This section is identical to Federal Rule of Evidence 614 and consistent with current Georgia law. A judge interrogating a witness under this rule must exercise great caution to avoid running afoul of current O.C.G.A. §§ 9-10-7, 17-8-57, which prohibit the trial judge from making any comments on the evidence or intimating an opinion on the merits in front of the jury.

When a witness is called by the court, all parties are entitled to cross-examine the witness. See *also*, new O.C.G.A. § 24-7-706 regarding the calling of a court appointed expert.

24-6-615. Exclusion of Witnesses.

Except as otherwise provided in Code section 24-6-616, at the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This section does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee

of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

Comment - This section is the same as Federal Rule of Evidence 615, except for the reference at the beginning to new O.C.G.A. § 24-6-616 (current O.C.G.A. § 24-9-61.1) which gives the court discretion to allow the victim of a crime to remain in the courtroom.

Consistent with existing Georgia practice, a party has a right to have a witness put under the rule of sequestration. Georgia's current statute, O.C.G.A. § 24-9-61, technically only prohibits witnesses from the same side in being in the courtroom together, though Georgia courts typically expand the order to prohibit witnesses from one side being in the courtroom while opposing witnesses testify. See, e.g., *Gray v. State*, 222 Ga.App. 626 (1996). Current Georgia practice discourages, but did not always prohibit, sequestering a party. See, e.g., *Barber v. Barber*, 257 Ga. 488 (1987). This section prohibits sequestration of a party but the trial court still has discretion under new O.C.G.A. § 24-6-611 to require that a party testify before other witnesses.

Current Georgia law never allows exclusion of a witness' testimony because of a violation of an order of sequestration. Current O.C.G.A. § 24-9-61. Under Federal Rule 615, a witness' testimony may be excluded when it is shown that the violation of the sequestration order caused serious unfair prejudice to the moving party. See, *United States v. Eyster*, 948 F.2d 1196 (11th Cir. 1991).

24-6-616. Presence in courtroom of victim of criminal offense.

(a) The victim of a criminal offense may be entitled to be present in any court exercising jurisdiction over such offense. It shall be within the sole discretion of the judge to implement the provisions of this Code section and determine when to allow such victim to be present in such court and, if such victim is permitted to be present, to determine the order in which the testimony of such victim shall be given.

(b) The failure of a victim to exercise any right granted by this Code section shall not be a cause or ground for an appeal of a conviction by a defendant or for any court to set aside, reverse, or remand a criminal conviction.

Comment - Current O.C.G.A. § 24-9-61.1.

ARTICLE 2

24-6-620. Credibility a jury question.

The credibility of a witness is a matter to be determined by the jury under proper instructions from the court.

Comment - Current O.C.G.A. § 24-9-80.

24-6-621 Impeachment by contradiction.

Except as otherwise provided by statute, a witness may be impeached by disproving the facts testified to by the witness.

Comment - Current O.C.G.A. § 24-9-82 (changed to make it gender neutral) with the addition of "Except as otherwise provided by statute." This addition clarifies that some statutes limit whether and how a party may disprove facts testified to by a witness. See, e.g., new O.C.G.A. §§ 24-6-613 (prior inconsistent statement); 24-6-608(b) (impeachment on collateral conduct).

24-6-622. Witness's feelings and relationship to parties provable.

The state of a witness's feelings towards the parties and the witness' relationship to them may always be proved for the consideration of the jury.

Comment - Current O.C.G.A. § 24-9-68 (changed to make it gender neutral).

24-6-623. Treatment of witness.

It shall be the right of a witness to be examined only as to relevant matter and to be protected from improper questions and from harsh or insulting demeanor.

Comment - Current O.C.G.A. § 24-9-62.

ARTICLE 3.

24-6-650. State policy.

It is the policy of the State of Georgia to secure the rights of hearing impaired persons who, because of impaired hearing, cannot readily understand or communicate

in spoken language and who consequently cannot equally participate in or benefit from proceedings, programs, and activities of the courts, legislative bodies, administrative agencies, licensing commission, departments, and boards of the state and its subdivisions unless qualified interpreters are available to assist them.

Comment - Current O.C.G.A. § 24-9-100.

24-6-651. Definitions.

As used in this article, the term:

(1) "Agency" means any agency, authority, board, bureau, committee, commission, court or department, of the legislative, judicial, or executive branch of government of the state or any political subdivision thereof.

(2) "Hearing impaired person means any person whose hearing is totally impaired or whose hearing is so seriously impaired as to prohibit the person from understanding oral communications when spoken in a normal conversational tone.

(3) "Intermediary interpreter" means any person, including any hearing impaired person, who is able to assist in providing an accurate interpretation between spoken English and sign language or between the variance of sign language by acting as an intermediary between a hearing impaired person and a qualified interpreter.

(4) "Proceeding" means any meeting, hearing, trial, investigation, or other proceeding of any nature conducted by an agency.

(5) "Qualified interpreter" means any person certified as an interpreter for hearing impaired persons by the National Registry of Interpreters for the Deaf or approved as an interpreter for hearing impaired persons by the Georgia Commission on Interpreters for Non-English Speakers.

Comment - Sections 24-6-651 through 659 are based on current O.C.G.A. sections 24-9-101 through 108. They have been revised to remove obsolete references to the Department of Human Resources and the Georgia Registry of Interpreters of the Deaf. During budget reductions in 2000, the Governor's office eliminated all funding for the Department of Human Resources to operate the Georgia Registry of Interpreters for the Deaf and transferred the responsibility for dealing with hearing impaired persons to the Department of Labor.

24-6-652. Appointment of interpreters for hearing impaired persons interested in or witness at agency proceedings; hearing impaired persons to make requests for interpreters.

(a) The agency or court conducting any proceeding shall provide a qualified interpreter to the hearing impaired person:

(1) Whenever the hearing impaired person is a party to the proceeding or a witness before the proceeding; or

(2) Whenever a person below the age of 18 years whose parents are hearing impaired persons is a party to the proceeding or a witness before the proceeding conducted by an agency.

(b) The hearing impaired person shall notify the agency or court not less than ten days, excluding weekends and holidays, prior to the date of the proceeding of the need for a qualified interpreter. If the hearing impaired person received notice of the proceeding less than ten days, excluding weekends and holidays, prior to the proceeding, he shall notify the agency or court as soon as practicable after receiving such notice.

24-6-653. Procedure for interrogation and taking of statements from hearing impaired persons arrested for violation of criminal laws; interpreters to be provided upon arrest of hearing impaired persons.

(a) The arresting law enforcement agency shall provide a qualified interpreter to any hearing impaired person whenever the hearing impaired person is arrested for allegedly violating any criminal law or ordinance of the state or any political subdivision thereof.

(b) (1) Except as provided in paragraph (2) of this subsection, no interrogation, warning, informing of rights, taking of statements, or other investigatory procedures shall be undertaken unless a qualified interpreter has been provided or the law enforcement agency has taken such other steps as may be reasonable to accommodate such person's disability. No answer, statement, admission, or other evidence acquired through the interrogation of the hearing impaired person shall be admissible in any criminal or quasi-criminal proceedings unless such was knowingly and voluntarily given. No hearing impaired person who has been taken into custody and who is otherwise eligible for release shall be detained because of the unavailability of a qualified interpreter.

(2) If a qualified interpreter is not available, the arresting officer may interrogate or take a statement from such person, provided that if the hearing impaired

person cannot hear spoken words with a hearing aid or other sound amplification device such interrogation and answers thereto shall be in writing and shall be preserved and turned over to the court in the event such person is tried for the alleged offense.

24-6-654. Indigent hearing impaired defendants to be provided with interpreters.

(a) A court shall provide a qualified interpreter to any hearing impaired person whenever the hearing impaired person has been provided with a public defender or court appointed legal counsel if counsel is not qualified to communicate directly with the hearing impaired person.

(b) The qualified interpreter authorized by this Code section shall be present at all times when the hearing impaired person is consulting with legal counsel unless counsel is qualified to communicate directly with the hearing impaired person.

24-6-655. Waiver of right to interpreter.

Whenever a hearing impaired person shall be authorized a qualified interpreter, such person may waive the right to the use of such interpreter. Any such waiver shall be in writing and shall be approved by the agency, law enforcement agency, or court before which the hearing impaired person is to appear. In no event shall the failure of a hearing impaired person to request an interpreter be deemed to be a waiver.

24-6-656. Replacement of interpreters unable to communicate accurately with hearing impaired persons; appointment of intermediary interpreters; preparation and maintenance of qualified interpreter list.

Whenever a hearing impaired person shall be authorized a qualified interpreter, the agency, law enforcement agency, or court shall determine whether the qualified interpreter so provided is able to communicate accurately with and translate information to and from the hearing impaired person. If it is determined that the qualified interpreter cannot perform these functions, the agency, law enforcement agency, or court shall obtain the services of another qualified interpreter or shall appoint an intermediary interpreter to assist the qualified interpreter in communicating with the hearing impaired person.

24-6-657. Oath of interpreters; privileged communications; situation of interpreters during proceedings; taping and filming of hearing impaired persons' testimony.

(a) Prior to providing any service to a hearing impaired person, any qualified interpreter or intermediary interpreter shall subscribe to an oath that he will interpret all communications in an accurate manner to the best of his skill and knowledge. The Supreme Court of Georgia may by rule of court adopted as provided by Section IX of

Article VI prescribe the form of the oath for interpreters and intermediary interpreters for use in court and other judicial proceedings.

(b) Whenever a hearing impaired person communicates with any other person through the use of an interpreter and under circumstances which make such communications privileged or otherwise confidential, the presence of the interpreter shall not vitiate such privilege and the interpreter shall not be required to disclose the contents of such communication.

(c) Whenever an interpreter is required by this article, the agency, law enforcement agency, or court shall not begin the proceeding or take any action until the interpreter is in full view of and spatially situated so as to assure effective communication with the hearing impaired person.

(d) The agency, law enforcement agency, or court may, upon its own motion or upon motion of any party, witness, or participant, order that the testimony of the hearing impaired person be electronically and visually taped or filmed. Any such tape or film may be used to verify the testimony given by the hearing impaired person.

24-6-658. Compensation of interpreters; fee schedule; fee may be assessed as cost in civil proceeding.

(a) Any qualified interpreter or intermediary interpreter providing service under this article shall be compensated by the agency, law enforcement agency, or court requesting such service.

(b) The Supreme Court of Georgia may by rule of court adopted as provided by Section IX of Article VI, provide for the compensation of interpreters in court proceedings.

(c) The expenses of providing a qualified interpreter or intermediary interpreter in any civil or administrative proceeding may be assessed by the court or agency as costs in such proceeding.

CHAPTER 7.

OPINIONS AND EXPERT TESTIMONY

24-7-701. Opinion Testimony by Lay Witnesses.

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inference which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (3) not based on scientific, technical, or other specialized knowledge within the scope of Code section 24-7-702.

Comment- This section is identical to Federal Rule of Evidence 701. It would replace the current, somewhat cryptic, O.C.G.A. § 24-9-65 ("When the question under examination, and to be decided by the jury, shall be one of opinion, any witness may swear to his opinion or belief, giving his reasons therefore. If the issue shall be as to the existence of a fact, the opinions of witnesses shall be generally inadmissible."). Despite the statute, Georgia courts have developed reasonable rules governing lay opinion testimony that for the most part are consistent with this section.

There are several overlapping requirements in this section. The opinion must be based on the perception of the witness. It cannot be based on inadmissible hearsay. See, e.g., *McCorkle v. D.O.T.*, 257 Ga.App. 397 (2002). Likewise, an opinion may not be based on speculation. See, e.g., *Evans v. State*, 275 Ga. 541 (2002) (witness may not give an opinion as to what another person meant by a particular statement).

Current Georgia law does not specifically require that a lay witness' opinion be "rational," generally leaving that matter for the jury. However, Georgia courts have held that if the lay witness' opinion is "plainly and indisputably insufficient," it should be excluded. *In re: Copelan*, 250 Ga.App. 856 (2001).

This section requires that any opinions on scientific, technical or other specialized matters be properly qualified under Rule 702. This is consistent with current Georgia practice. See, e.g., *Johnson v. Knebel*, 267 Ga. 853 (1997).

As under current Georgia law, lay witnesses are not allowed to state their conclusions in legal terms such as testimony that someone was "negligent". See, e.g., *Garner v. Salter*, 168 Ga. App. 757 (1983). Such opinions are not helpful to the trier of fact and only confuse a jury when the court later instructs them on the law. See also, O.C.G.A. § 24-4-704.

24-7-702. Testimony by Experts.

(a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, subject to Code section 24-7-710.

(b) An expert may testify under subsection (a) if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods and (3) the witness has applied the principles and methods reliably to the facts of the case.

(c) A motion to exclude an expert witness' testimony on the grounds that it does not meet the requirements of subsection (b) of this Code section is subject to the following provisions:

(1) In civil cases, the motion to exclude must be made no later than 14 days after the close of discovery or such other time as the court may set.

(2) In civil cases, the motion to exclude must state with specificity each and every respect in which the expert witness' testimony does not meet the requirements of subsection (b).

(3) In considering the motion to exclude, the court may consider any evidence regardless of whether it is admissible under the rules of evidence except those with respect to privileges. Whether or not to hold a hearing on the motion to exclude is within the court's discretion. The court may base its decision on affidavits, depositions, in court testimony or any other sources that the court, in its discretion, finds sufficient.

(4) The court shall deny the motion if the court finds that a reasonable jury could find that (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods and (3) the witness has applied the principles and methods reliably to the facts of the case.

Comment - This section is almost identical to Federal Rule of Evidence 702 as amended in 2000 and almost identical to current O.C.G.A. § 24-9-67.1(b), adopted in March 2005 and applicable in civil cases.

Subsection (a) - relates to qualification of an expert by "knowledge, skill, experience, training, or education," and is consistent with longstanding Georgia law. See, e.g., *Dennis v. State*, 158 Ga.App. 142 (1981). The reference in subsection (a) to Code section 24-7-710 is to those renumbered parts of O.C.G.A. § 24-9-67.1 which limit who may qualify as an expert witness in professional malpractice cases. See, new O.C.G.A. § 24-7-710, below.

Subsection (b) - The language in subsection (b) was added to Federal Rule 702 in 2000

to codify the *Daubert* line of cases which require that the court perform a gatekeeping function, excluding unreliable scientific or technical evidence.

Prior to the recent adoption of O.C.G.A. § 24-9-67.1, Georgia law on the trial court's role in screening scientific evidence was somewhat muddled. *Harper v. State*, 249 Ga. 519 (1982), had allowed a party to challenge expert testimony which was based on scientific theories or techniques that had not "reached a scientific stage of verifiable certainty." *Home Depot USA v. Tvrdeich*, 268 Ga.App. 579 (2004) limited *Harper* to issues regarding the reliability of scientific procedures and techniques, but provided no scrutiny of the scientific theories or principles used as a basis of an expert's opinions. *Riley v. State*, 278 Ga. 677 (2004) appeared to reinstate *Harper* review of the expert's application of scientific theories, at least in criminal cases. With the adoption of O.C.G.A. § 24-9-67.1 in March 2005, Georgia applies *Daubert* in civil cases and *Harper/Riley* in criminal cases. The proposed section would apply to expert testimony in both criminal and civil cases.

Current O.C.G.A. § 24-9-67.1(b) added the following language to Federal Rule 702 (added language is underlined): "if (1) the testimony is based upon sufficient facts or data which are or will be admitted into evidence at the hearing or trial." The reason for this additional language is unclear and it flatly contradicts Federal Rule 703 which is also part of O.C.G.A. § 24-9-67.1 and which allows an expert to base an opinion on facts reasonably relied upon by experts even though the facts are not admissible in evidence. The proposed rule retains just the language of Federal Rule 702.

Current O.C.G.A. § 24-9-67.1(f) states:

"It is the intent of the legislature that, in all civil cases, the courts of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other states. Therefore, in interpreting and applying this Code section, the courts of this state may draw from the opinions of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999); and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases."

This provision should not be carried forward in the new rules. First, it assumes some correlation between the application of the *Daubert* line of cases and the admissibility of evidence "in other states." *Daubert* is not the law in most states, though some states have their own versions of *Daubert* just as Georgia has *Harper*. In any event, one does not look to the federal *Daubert* cases to make sure Georgia is not admitting expert evidence that would be inadmissible "in other states." Second, a statute telling courts that they "may" draw from the opinions of other jurisdictions seems merely advisory and unnecessary in light of the language of O.C.G.A. § 24-9-67.1(b), (proposed 24-7-702 (b)).

Subsection (c) - adds some procedural elements to the rule. Subsection (c)(1) creates a

time frame for bringing a “*Daubert*” motion to exclude expert evidence in civil cases. When such a motion is brought on the very eve of trial and is granted, the party who offered the expert may have insufficient time before the trial begins to adjust the case and perhaps acquire another expert witness. In most circumstances, there is no good reason why a party who intends to bring a *Daubert* motion cannot do within two weeks after all discovery has been completed. In cases where the court does not set a formal discovery schedule or the court for other reasons wishes to change the time when such motions must be filed, the court has authority to set its own deadlines.

Because the rules of discovery are different in criminal cases and there often is very little time between notice that an expert will testify and the trial date, no time limit is recommended for bringing a *Daubert* motion in criminal cases.

Subsection (c)(2) requires that a motion to exclude evidence under this Code section in a civil case be specific as to the grounds for the motion. The process for resolving *Daubert* issues works best and most efficiently when the moving party directs the court’s and opposing party’s attention to the specific problems the moving party sees in the expert’s testimony.

There is no provision for taking expert depositions in criminal cases and often a short time period between identification of expert witnesses and trial. Therefore, it may not be possible to state the grounds for a *Daubert* motion with great specificity. For this reason, the specificity requirement applies only to civil cases.

The first sentence of subsection (c)(3) merely restates Federal Rule 104(a), (proposed new rule 24-1-104(a)). As for the second sentence, the court should have wide flexibility in handling a *Daubert* motion. This is consistent with federal practice. See, *United States v. Majors*, 196 F.3d 1206, 1215 (11th Cir.1999) (the trial court did not abuse its discretion in deciding to admit expert testimony without the benefit of a *Daubert* hearing after determining that the expert possessed specialized knowledge by virtue of his practical training and experience); *City of Tuscaloosa v. Harcross Chemicals, Inc.*, 158 F.3d 548, 564 n. 21 (11th Cir.1998) (while complicated cases involving multiple expert witnesses are well-served by the holding of a *Daubert* hearing, such hearings are not required by law or by rules of procedure); *Kirstein v. Parks Corp.*, 159 F.3d 1065, 1067 (7th Cir.1998) (a products liability plaintiff was not automatically entitled to a hearing on the admissibility of expert testimony); Jack B. Weinstein & Margaret A. Berger, Weinstein’s Federal Evidence, §§ 702.02[2], 702.05[2][a] (Joseph M. McLaughlin, ed., Matthew Bender 2d ed.2000) (it is within the trial judge’s discretion whether to hold an admissibility hearing).

Subsection (c)(4) articulates the standard the trial judge should use in deciding a motion to exclude expert testimony under this Code section. If there is sufficient evidence such that a reasonable jury could find that the expert’s testimony is based on sufficient facts or data, is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case, the testimony should be admitted. This standard is slightly different from the federal default standard of

preponderance of the evidence. In other words, in a case in which the judge was not personally convinced that the expert's testimony was, for example, the product of reliable methods but the judge would concede that reasonable people (i.e. jurors) could differ on that conclusion, a federal judge might exclude the evidence using the preponderance standard while a Georgia judge would admit the evidence in deference to the jury's ultimate primacy in deciding factual issues.

24-7-703. Bases of Opinion Testimony by Experts.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Comment - This section is identical to Federal Rule of Evidence 703. Current O.C.G.A. § 24-9-67.1(a), adopted in March 2005, applies this rule in civil cases. This proposed section would apply in both criminal and civil cases.

The factual bases of an expert's opinion can be categorized into three types: (1) the expert's own personal knowledge, (2) facts admitted at trial, (3) facts that will not or cannot be formally proved at trial. Traditional Georgia law allowed the first two types to serve as bases for an expert's opinion, but normally not the third. *See, Stouffer Corp. v. Henkel*, 170 Ga. App. 383, (1984). Since the early 1980's, however, Georgia law has increasingly permitted an expert to testify to opinions based, in part, on inadmissible hearsay with the hearsay factor going to weight rather than admissibility. *See, e.g. King v. Browning*, 246 Ga. 46 (1980); *Bagwell v. State*, 270 Ga. 175 (1998).

Under this section, a physician could base a medical opinion on his review of hospital records, medical treatises, and consultations with the patient's family and other physicians, even though those sources are not offered into evidence, as long as the facts and sources are reasonably relied upon by physicians in forming medical opinions of the type in question.

Generally, an expert may disclose the admissible factual bases of his opinion on direct examination. *See, new O.C.G.A. § 24-7-705.* Georgia cases generally do not permit an expert to disclose inadmissible hearsay relied upon in forming the expert's opinions. To allow this would basically allow a backdoor exception to the hearsay rule. But in *Roebuck v. State*, 277 Ga. 200 (2003), the Court seemed to open this backdoor: "An expert may base his opinion on hearsay and may be allowed to testify as to the bases for his findings."

There were similar concerns regarding this backdoor exception to the hearsay rule under the original language of Federal Rule 703. Changes to Federal Rule 703 in 2000 added the last sentence which clarifies that any inadmissible facts upon which the expert relied may not be disclosed to the jury unless “their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.”

24-7-704. Opinion on Ultimate Issue.

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. But a witness may not state his opinion in legal terms or state legal conclusions when they are in dispute unless the court finds that it is necessary to enable the jury to decide the issues in the case.

Comment - This section is based on Federal Rule 704. Current Georgia law embraces a limited form of the ultimate issue rule by prohibiting lay or expert opinion that mixes law and fact. See, e.g., *Metropolitan Life Ins. v. Saul*, 189 Ga. 1 (1939); *Reed v. Heffernan*, 171 Ga. App. 83 (1984). For example, there is no problem under current Georgia law (or Federal Rule 704) if an expert testifies in a legal malpractice case that the defendant failed to use the degree of care and skill expected of an ordinary lawyer practicing in Georgia. The standard of care of attorneys is beyond the ken of ordinary jurors and thus they require expert assistance in drawing opinions and inferences from the evidence. See, e.g., *Bilt Rite of Augusta, Inc. v. Gardiner*, 221 Ga.App. 817 (1996).

Current Georgia law does not allow a witness to testify in legal terms or state legal conclusions and neither do federal courts. See, e.g., *Allen v. Columbus Bank & Trust Co.*, 244 Ga.App. 271 (2000); *Hinson v. D.O.T.*, 135 Ga.App. 258 (1975). But while Georgia labels its prohibition as part of the ultimate issue rule, federal courts cannot do that because of Federal Rule 704 and instead use the more obscure reasoning that such testimony by witnesses does not “assist the trier of fact.” See, e.g., *Montgomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537 (11th Cir. 1990) (expert’s testimony that defendant “had a duty to hire tax counsel” should have been excluded); *Shahid v. City of Detroit*, 889 F.2d 1543 (6th Cir. 1989) (expert’s testimony that police officer was “negligent” inadmissible).

The proposed addition to 24-7-704 (the second sentence) clarifies that despite the general abolition of the “ultimate issue rule” in 24-7-704, a witness still may not testify in legal terms or state legal conclusions. The “unless” caveat at the end of the proposed addition addresses those relatively rare situations in which there is such an overlap of legal and non-legal usage of certain terms of art that the witness cannot adequately inform the jury of his opinion without using the legal terms. For example, the term “permanently and totally disabled” is used in both the law and in medicine to mean the same thing and when it is necessary for a medical expert to give his opinion on whether a patient is permanently and totally disabled because such a finding is beyond the ken

of the ordinary juror, the expert should be allowed to do so. This is consistent with current Georgia law. See, e.g., *Metropolitan Life Ins. v. Saul*, 189 Ga. 1 (1939).

Subsection (b) of Federal Rule 704 prohibits an expert from testifying that a criminal defendant did or did not have the requisite mental state to support a crime or defense. This is the so-called “Hinkley Amendment” that was added by Congress in 1984 in the wake of public outcry over the finding that John Hinkley was not guilty by reason of insanity in the shooting of President Ronald Reagan. There is no good reason to treat an expert’s testimony regarding a defendant’s mental state different from an expert’s testimony regarding a plaintiff’s physical state. Both experts should avoid stating their opinions in legal terms or offering opinions on legal conclusions that jurors are able to draw for themselves. With the addition of the second sentence of 24-7-704, there is no reason to keep Federal Rule 704(b). Under 24-7-704 as proposed, a witness testifying in a criminal case would not be permitted to testify that “the defendant is legally insane” or the “the defendant intended to shoot the victim.”

24-7-705. Disclosure of Facts or Data Underlying Expert Opinion.

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Comment - This section is identical to Federal Rule of Evidence 705. It is consistent with current Georgia practice which does not require that an expert disclose the basis of his opinion before stating it. See, e.g., *Diambro Northend Assoc. v. Williams*, 169 Ga.App. 219 (1983).

This section dispenses with any requirement that an expert be examined by way of hypothetical questions, though counsel may use them if desired. See, e.g., *Taylor v. Burlington Northern Ry. Co.*, 787 F.2d 1309 (9th Cir. 1986). The hypothetical question was required at common law so that the trier of fact would more clearly understand the factual bases of the expert’s opinion. But experience with the requirement in Georgia and elsewhere showed it was often an unnecessary impediment to the clear presentation of expert testimony and an unneeded generator of courtroom quibbling and appeals. See, e.g., *Hyles v. Cockrill*, 169 Ga. App. 132 (1983). This section reflects the modern view that trial counsels’ competing motives to present a clear, persuasive direct examination of an expert and a thorough and sifting cross-examination, are sufficient to ensure that the trier of fact understands the bases and limits of an expert’s testimony.

If the expert is being asked to give an opinion based on facts of which he has no knowledge then of course only a hypothetical question will accomplish this purpose and as long as the hypothetical is based on facts that have been (or will be) admitted and reasonable inferences therefrom, the hypothetical is allowed. See, e.g., *Toucet v.*

24-7-706. Court Appointed Experts.

Except as otherwise provided by statute, the following procedures shall govern the appointment, compensation, and presentation of testimony of court appointed experts.

(1) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. Witnesses so appointed shall be informed of their duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. Witness so appointed shall advise the parties of their findings, if any; their depositions may be taken by any party; and they may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(2) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation for the taking of property. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(3) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(4) Parties' experts of own selection. Nothing in this section limits the parties in calling expert witnesses of their own selection.

Comment - This section is substantially the same as Federal Rule of Evidence 706 with a clause added at the beginning referring to other Georgia statutes, such as O.C.G.A. § 17-7-130.1 (appointment of expert when criminal defendant pleads insanity as a defense).

Current Georgia practice recognizes broad discretion in the trial court to appoint experts. See, *Presnell v. State*, 241 Ga. 49 (1978). This section is generally consistent with, though much more specific than, existing Georgia law.

24-7-710. - Experts in Professional Malpractice Cases.

(a) Notwithstanding the provisions of Code section 24-7-702 and any other provision of law which might be construed to the contrary, in professional malpractice actions, the opinions of an expert, who is otherwise qualified as to the acceptable standard of conduct of the professional whose conduct is at issue, shall be admissible only if, at the time the act or omission is alleged to have occurred, such expert:

(1) Was licensed by an appropriate regulatory agency to practice his or her profession in the state in which such expert was practicing or teaching in the profession at such time; and

(2) In the case of a medical malpractice action, had actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:

(A) The active practice of such area of specialty of his or her profession for at least three of the last five years, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in performing the procedure, diagnosing the condition, or rendering the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; or

(B) The teaching of his or her profession for at least three of the last five years as an employed member of the faculty of an educational institution accredited in the teaching of such profession, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in teaching others how to perform the procedure, diagnose the condition, or render the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; and

(C) Except as provided in subparagraph (D) of this paragraph:

(i) Is a member of the same profession;

(ii) Is a medical doctor testifying as to the standard of care of a defendant who is a doctor of osteopathy; or

(iii) Is a doctor of osteopathy testifying as to the standard of care of a defendant who is a medical doctor; and

(D) Notwithstanding any other provision of this Code section, an expert who is a physician and, as a result of having, during at least three of the last five years immediately preceding the time the act or omission is alleged to have occurred, supervised, taught, or instructed nurses, nurse practitioners, certified registered nurse anesthetists, nurse midwives, physician's assistants, physical therapists, occupational therapists, or medical support staff, has knowledge of the standard of care of that health care provider under the circumstances at issue shall be competent to

testify as to the standard of that health care provider. However, a nurse, nurse practitioner, certified registered nurse anesthetist, nurse midwife, physician's assistant, physical therapist, occupational therapist, or medical support staff shall not be competent to testify as to the standard of care of a physician.

(b) Upon motion of a party, the court may hold a pretrial hearing to determine whether the witness qualifies as an expert and whether the expert's testimony satisfies the requirements of this Code section. Such hearing and ruling shall be completed no later than the final pretrial conference contemplated under Code section 9-11-16.

(c) An affiant must meet the requirements of this Code section in order to be deemed qualified to testify as an expert by means of the affidavit required under Code section 9-11-9.1.

Comment - Taken from current O.C.G.A. § 24-9-67.1 (c),(d) and (e) without change. Subsection (a) of current O.C.G.A. § 24-9-67.1 is the new 24-7-703. Subsection (b) of current O.C.G.A. § 24-9-67.1 (with changes) is the new 24-7-702. Subsection (f) of current O.C.G.A. § 24-9-67.1 has been deleted (see Comments to 24-7-702).

CHAPTER 8. HEARSAY

Article 1.

24-8-801. Definitions.

The following definitions apply under this article:

(a) Statement. A “statement” is (1) an oral or written assertion or (2) non-verbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A “declarant” is a person who makes a statement.

(c) Hearsay. “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Prior Statements and Admissions.

(1) Prior statement by witness.

(A) An out-of-court statement is not hearsay if the declarant testifies at the trial or hearing, is subject to cross-examination concerning the statement, and the statement is admissible as a prior inconsistent statement or a prior consistent statement under Code section 24-6-613 or is admissible under some other Code section.

(B) If a hearsay statement is admitted and the declarant does not testify at the trial or hearing, other out-of-court statements of the declarant are admissible for the limited use of impeaching or rehabilitating the credibility of the declarant, and not as substantive evidence, if the other statements qualify as prior inconsistent statements or prior consistent statements under Code section 24-6-613.

(C) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is one of identification of a person made after perceiving the person.

(2) Admissions by party opponent. Admissions are not excluded by the hearsay rule. An admission is a statement offered against a party which is:

(A) the party’s own statement, in either an individual or

representative capacity, or

(B) a statement of which the party has manifested an adoption or belief in its truth, including a party's acquiescence or silence when the circumstances require an answer, denial, or other conduct, or

(C) a statement by a person authorized by the party to make a statement concerning the subject, or

(D) a statement by the party's agent or servant, but not including any agent of the State in a criminal case, concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or

(E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

Comment - This section is substantially similar to Federal Rule of Evidence 801.

Subsection (a)(2) - The definition of "statement" includes nonverbal conduct of a person if it was intended as an assertion. This is generally consistent with prior Georgia law. See, e.g., *White v. State*, 273 Ga. 787 (2001); *Brown v. State*, 234 Ga. 632 (1975). When a person intends and tries to communicate something with his conduct, hearsay dangers are present. Thus when an eyewitness to an accident pointed to the defendant when asked to identify the driver, the need for cross-examination of the witness on his perception and veracity is no less than had the witness uttered the words. However, when the actor did not intend to communicate anything with his conduct, there exists less danger the actor was using the conduct to communicate a fabrication. Thus although a suspect who flees the police when approached for questioning seems to be saying by such conduct, "I don't want the police to catch me," he does not intend to express that statement with his conduct and thus it presents no significant hearsay issue. Such non-assertive conduct is not barred by the hearsay rule and the jury can draw its own inferences from the conduct.

Subsection (c) - The definition of hearsay is identical to Federal Rule 801(c). This definition is generally consistent with current Georgia law. See, O.C.G.A. § 24-3-1(a): "Hearsay evidence is that which does not derive its value solely from the credit of the witness but rests mainly on the veracity and competency of other persons."

Normally, the law requires that facts be proved by the in-court testimony of witnesses with personal knowledge who are subject to cross-examination. When a party urges the trier of fact to accept as true what someone said outside of court, the party asks the trier of fact to rely upon the declarant's credibility — to assume that the declarant was not lying or mistaken when he made the statement. But without cross-examination of the declarant, there is no way to test the declarant's credibility.

If the relevance of the out-of-court statement is not to prove the truth of what the declarant said but the mere fact that the declarant said it, or that someone heard it, the traditional hearsay dangers are not present since it is only the credibility of the in-court witness who repeats the out-of-court statement that is at issue and that witness can be cross-examined. Thus subsection (c) excludes from the definition of hearsay the use of out-of-court statements when relevant to explain the conduct of the hearer (or reader), to prove notice or motive, as verbal act evidence, or to demonstrate the declarant's knowledge or other state of mind. These nonhearsay uses of out-of-court statements are consistent with current Georgia law which calls such statements "original evidence." See, O.C.G.A. § 24-3-2 ("When, in a legal investigation, information, conversations, letters and replies, and similar evidence are facts to explain conduct and ascertain motives, they shall be admitted in evidence not as hearsay but as original evidence."); Milich, *Georgia Rules of Evidence*, (2d ed.) §§ 17.1 - 17.13. Although current Georgia law is logically consistent with the federal definition of hearsay and the distinction between the hearsay and nonhearsay use of out-of-court- statements, Georgia has struggled with some of its arcane terminology in this area. See, e.g., *White Missionary Baptist Church v. Trustees of First Baptist Church of White*, 268 Ga. 668 (1997); *Teague v. State*, 252 Ga. 534 (1984). Adopting the federal definition of hearsay will provide Georgia with a more modern vocabulary and methodology for distinguishing hearsay from nonhearsay.

The "matter asserted" by an out of court statement includes not only the express words of the statement, but also that which is clearly and directly implied by the statement. Thus a party cannot avoid the hearsay rule by claiming he is not offering the out-of-court statement "I am in Texas" to prove the declarant was in Texas, but merely to prove that he was not in Georgia since the truth of the express statement must be assumed in order to draw the implication. Likewise, where the circumstances indicate that the declarant meant to imply a specific meaning with his words, the statement is hearsay if offered to prove the truth of that implication. This is consistent with current Georgia law. See, e.g., *Fields v. State*, 260 Ga. 331 (1990) ; *Park v. State*, 224 Ga. 467 (1968); *Evereedy Cab Co. v. Wilhite*, 66 Ga.App. 815 (1942).

Current Georgia law prohibits a party from offering his own prior out-of-court statements if such statements are "self-serving;" that is, if the statement "is a benefit to or in the interest of the one who made it ... and does not include testimony which he gives as a witness." *Georgia Ports Auth. v. Mitsubishi Intl. Corp.*, 156 Ga.App. 304 (1980). The proposed new rules would not retain the self-serving statement rule. If a hearsay statement of a party is admissible under a hearsay exception, the fact that it is self-serving should go to weight, not admissibility.

Subsection (d)(1)(A) - Under current Georgia law, the out-of-court statements of a testifying witness are not hearsay. See, e.g., *Carroll v. State*, 261 Ga. 553 (1991) ("In *Cuzzort*, we held that the concerns of the rule against hearsay are satisfied when the witness whose veracity is at issue is present at trial, under oath, and subject to cross-examination."); *Bowers v. State*, 241 Ga.App. 122 (1999) (defendant claimed that witness's testimony about her own prior out-of-court statements was hearsay: "We disagree. 'Hearsay evidence is that which does not derive its value solely from the credit of the witness but rests mainly on the veracity and competency of other persons.' OCGA §§ 24-3-1(a). Here, the witness was the declarant. ... Her statements were not dependent upon the competency and veracity of other persons.").

The prior consistent out-of-court statements of a testifying witness are ordinarily cumulative of the witness' in-court testimony and admitting them would constitute improper bolstering of that testimony. See, *Parker v. State*, 162 Ga.App. 271 (1982). ("In Georgia, as well as most other jurisdictions, the general rule is that a witness' testimony cannot be fortified or corroborated by his own prior consistent statements.... It can scarcely be satisfactory to any mind to say that, if a witness testifies to a statement today under oath, it strengthens the statement to prove that he said the same thing yesterday when not under oath.... The idea that the mere repetition of a story gives it any force or proves its truth is contrary to common observation and experience that a falsehood may be repeated as often as the truth.")

Under current Georgia law, the prior statements of a testifying witness are admissible, however, to impeach or rehabilitate the credibility of a witness. This is the same under the Federal Rules but the Federal Rules have two problems that are addressed in the proposed subsection (d)(1). First, the Federal Rules break up the treatment of prior statements between Rules 613 and 801(d)(1). As discussed in the Comments to proposed § 24-6-613, it is clearer to describe in rule 613 all the conditions concerning the relevance of and foundation for all prior statements of a witness (consistent and inconsistent) and limit 801(d)(1) to the hearsay status of such statements. Second, again as discussed in the Comments to proposed § 24-6-613, Federal Rule 801(d)(1)(B)'s description of when the prior consistent statements of a witness are relevant and admissible is too narrow. For example, if a witness is impeached with suggestions that the witness' memory of the events may have faded over time, the opposing party should be allowed to rehabilitate the witness with evidence that the witness made a prior consistent statement closer in time to the events described.

Under the Federal Rules, a prior inconsistent statement of a testifying witness is hearsay and admissible only for its impeachment use unless the prior inconsistent statement was made under oath at a trial, hearing, or deposition. Under current Georgia law, all prior inconsistent statements of a testifying witness are admissible for both their substantive and impeachment use. See, *Gibbons v. State*, 248 Ga. 858 (1982). The proposed subsection would retain Georgia's approach.

Subsection (d)(1)(A) also clarifies that prior out-of-court statements of a testifying witness that are admissible under other Georgia statutes would not be considered

hearsay. For example, current O.C.G.A. § 24-3-16 (new § 24-8-820) admits the prior out-of-court statements of a child testifying in a molestation or abuse case under certain circumstances.

Subsection (d)(1)(B) clarifies that when hearsay is admitted and the hearsay declarant does not testify, the declarant's prior statements may be admissible under 24-6-613 to impeach or rehabilitate the declarant's credibility (see, new O.C.G.A. § 24-8-806) but the prior statements are admissible only for that limited use and not as substantive evidence. This is consistent with current Georgia law. See, *Brinson v. State*, 268 Ga. 227 (1997).

Subsection (d)(1)(C) is identical to Federal Rule 801(d)(1)(C) and is consistent with current Georgia law. See, *White v. State*, 273 Ga. 787 (2001).

Subsection (d) (2) - Admissions In General

Only statements offered against a party can qualify as an admission. They need not be adverse to the contentions of the party at trial. Generally, a party cannot object to his own admissions on the grounds that they were not based on personal knowledge or constituted an unqualified opinion. This wide open admissibility of a party's admissions is justified on the grounds that while a party needs protection from the second hand knowledge and unqualified opinions of others, he deserves no such protection from his own statements. This is consistent with prior Georgia practice. See, *Brooks v. Sessoms*, 47 Ga. App. 554 (1933); *Overnite Transp. Co. v. Hart*, 126 Ga. App. 566 (1972).

A party whose admission has been offered into evidence may offer any other related parts of the document or conversation in which that admission took place. See, current O.C.G.A. § 24-3-38, retained and renumbered as new O.C.G.A. § 24-8-822.

Subsection (d)(2) does not address admissions *in judicio* - - admissions by a party in a pleading or at trial. See, new O.C.G.A. § 24-8-821.

The Federal Rules denominate admissions as "not hearsay." This peculiar and contradictory reference is confusing and unnecessary and therefore abandoned. Under the proposed rule, admissions are simply exceptions to the hearsay rule.

Subsection (d)(2)(A) - Any statement of a party offered by an opponent is an admission. This is consistent with current Georgia law. See, *e.g.*, *Clark v. Toms*, 181 Ga.App. 557 (1987) (party's statement need not have been against his interest at the time it was made in order to qualify as an admission). There must exist evidence identifying the party as the declarant but this may be established by circumstantial evidence. See, *Byrd v. State*, 251 Ga. 455 (1983).

Subsection (d)(2)(B) - This subsection covers tacit or adoptive admissions and is consistent with current Georgia practice in all but one respect. See, current O.C.G.A. §

24-3-36. Silence by a party in response to a statement made in his presence is an adoptive admission only if there would appear no good reason for the party's silence other than tacit agreement with the truth of the statement. When there exists another reason for the silence, the statement does not qualify as an adoptive admission. For example, a suspect in police custody may remain silent as an exercise of his constitutional rights and therefore his silence in response to the statements of others cannot be regarded as a tacit admission. *Doyle v. Ohio*, 426 U.S. 610 (1976).

At one time, Georgia cases liberally admitted anything said in the presence of a party, including when the party was a criminal suspect and was silent in the presence of the police. The Georgia Supreme Court repudiated this rule in *Jarrett v. State*, 265 Ga. 28 (1995) and broadly held that "a witness in a criminal case may not testify as to a declarant's statements based on the acquiescence or silence of the accused." This excludes tacit admissions by the accused's silence even when there are no police present and the accused was not exercising a right to remain silent. Subsection (d)(2)(B) would allow tacit admissions by the accused when there was no good reason for the accused's silence and the statements were not made in the presence of the police or other authorities. See, e.g., *United States v. Jenkins*, 779 F.2d 606 (11th Cir. 1986).

Subsection (d)(2)(C) and (D) - These subsections cover statements by agents of a party. Current Georgia law on admissions by agents is burdened by the presence of two overlapping and inconsistent statutes, one from the Evidence Title, O.C.G.A. § 24-3-33, ("Admissions by an agent or attorney-in-fact, during the existence and in pursuance of his agency, shall be admissible against the principal."), and one from the Agency Title, O.C.G.A. § 10-6-64, ("The agent shall be a competent witness either for or against his principal. His interest shall go to credit. The declarations of the agent as to the business transacted by him shall not be admissible against his principal unless they were part of the negotiation constituting the *res gestae*, or else the agent is dead."). See, Milich, *Georgia Rules of Evidence*, (2d ed.) § 18.10. Subsections (d)(2)(C) and (D) clarify and broaden the scope of agency admissions in contrast to prior Georgia law.

Subsection (d)(2)(D) sets forth two simple requirements for an agency admission: (1) the statement must have been made during the agency or employment relationship, and (2) the subject matter of the statement must fall within the scope of the agency or employment. The rule does not purport to redefine substantive law regarding when a principal is bound by the actions or words of his agent but only defines an agency admission for purposes of clearing hearsay objections. Thus even though an employee may not have been authorized to make the statement in question, it may still be admissible over a hearsay objection if it meets the requirements of this subsection. See, e.g., *Corley v. Burger King*, 56 F.3d 709 (5th Cir. 1995) (employee's statement as to what he was doing at time of car accident was agent admission – even though employee not authorized to speak for employer the subject matter of his statement fell within the scope of his employment). This differs from current Georgia law which requires that an agent or employee have authority to speak for the principal or employer. See, e.g., *Taylor v. Golden Corral Corp.*, 255 Ga.App. 860 (2002); *Stouffer*

Corp. v. Henkel, 170 Ga. app. 383 (1984).

Under current Georgia law, the jury ultimately decides whether the foundation for an agency admission has been met and is instructed accordingly. See, e.g., *Georgia Power Co. v. Busbin*, 159 Ga.App. 416 (1981). The offered statement may not be considered in making this determination. See, e.g., *McDevitt & Street Co. v. K-C Air Cond. Serv.*, 203 Ga.App. 640 (1992). Under proposed subsection (d)(2)(D), the judge alone would decide whether foundation exists, (see new O.C.G.A. § 24-1-104(a)), and the offered statement can be considered along with other evidence in making this determination. However, the offered statement alone is not sufficient to establish the basis for its admissibility but must be supported by independent evidence.

The federal courts have overwhelmingly held that Federal Rule 801(d)(2)(D) does not allow the accused to present the out-of-court statements of police officers or other agents of the State as agent admissions. See, e.g., *United States v. Prevatte*, 16 F.3d 767, 779, n.9 (7th Cir. 1994). Nor has Georgia ever permitted such statements as admissions of the State. The proposed rule makes this explicit.

Subsection (d)(2)(E) - This subsection presents a narrower basis for the admission of co-conspirator statements than current Georgia law. Current Georgia law allows statements made during “the pendency of the criminal project.” See, O.C.G.A. § 24-3-5. Georgia’s co-conspirator exception is one of the broadest in the U.S. because there is no requirement that the statement have been in furtherance of the conspiracy. See, e.g., *Knight v. State*, 239 Ga. 594 (1977). This has implications under the Confrontation Clause since statements that are not in furtherance of the conspiracy fall outside the firmly established common law exception for co-conspirator statements and thus may require special handling by the court to avoid Confrontation Clause problems. See, *Dutton v. Evans*, 400 U.S. 74 (1970); *Castell v. State*, 250 Ga 776 (1983). See also, *Horton v. Zant*, 941 F.2d 1449 (11th Cir. 1991).

Subsection (d)(2)(E) includes the requirement that the statement was in furtherance of the conspiracy at the time it was made. Statements made as part of idle conversation or mere boasting usually are not in furtherance of the conspiracy. Such statements carry a greater risk of fabrication or exaggeration and less attention to accuracy and detail.

Under current Georgia law, the jury is instructed to first determine whether a conspiracy has been proved and the defendant was a member of the conspiracy before considering the statement. See, e.g., *Mangum v. State*, 274 Ga. 5783 (2001). Under the proposed rules, the judge would make this determination. Before a co-conspirator statement can be admitted under subsection (d)(2)(E), the trial court must be satisfied that (1) a conspiracy was in existence at the time the statement was made; (2) the declarant and the defendant were members of the conspiracy, and (3) the statement was in furtherance of the conspiracy. See, e.g., *United States v. Carter*, 721 F.2d 1514, 1524 (11th Cir. 1984). This determination is made by the judge, not the jury, using a preponderance of the evidence standard. (see, new O.C.G.A. § 24-1-104(a); *Bourjaily v. United States*, 483 U.S. 171 (1987)).

Current Georgia law does not allow the offered statement to be used in determining whether foundation for the co-conspirator exception exists. *See, e.g., Copeland v. State*, 266 Ga. 664 (1996). Under this proposed subsection, the trial court, in considering whether foundation for the co-conspirator exception has been satisfied, may consider evidence that has not been admitted, including the offered statement itself. *See, Bourjaily v. United States*, 483 U.S. 171 (1987). However, the offered statement alone is not sufficient to establish the basis for its admissibility but must be supported by independent evidence.

The current Georgia statute admits any statements made during “the pendency of the criminal project.” Unlike a “conspiracy,” the “criminal project” can begin with just one person and only later involve others in a conspiracy. Georgia courts have allowed pre-conspiracy statements by one who began “the criminal project” and subsequently joined others, including the defendant, in a conspiracy. *See, e.g., Knight v. State*, 239 Ga. 594 (1977). Subsection (d)(2)(E) is limited to statements made “during the conspiracy” and thus pre-conspiracy statements are inadmissible.

24-8-802. Hearsay Rule.

Hearsay is not admissible except as provided by statute. However, if a party does not properly object to hearsay, the objection is deemed waived and the hearsay evidence is legal evidence and admissible.

Comment - The first sentence of this section is substantially the same as Federal Rule of Evidence 802 with modifications for state use. Unless hearsay fits under some exception provided by statute it is inadmissible.

The second sentence of this section was added to clarify that under the proposed new rules, an objection to hearsay must be made or the evidence is fully admissible. (See, new O.C.G.A. §24-1-103(a)). Under current Georgia law, hearsay is “illegal” evidence, without probative value and, even if admitted without objection, cannot not sustain a finding or verdict. *See, e.g., Woodruff v. Woodruff*, 272 Ga. 485 (2000). Georgia is the only remaining jurisdiction in the U.S. that deems hearsay evidence “illegal.”

24-8-803. Hearsay Exceptions; Availability of Declarant Immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

- (1) **Present sense impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

- (2) **Excited utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
- (3) **Then existing mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless such statements relate to the execution, revocation, identification, or terms of declarant's will and not including a statement of belief as to the intent of another person.
- (4) **Statements for purposes of medical diagnosis or treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.
- (5) **Recorded recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.
- (6) **Records of regularly conducted activity.** Unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness, a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, if:
- (A) made at or near the time of the described acts, events, conditions, opinions, or diagnoses;
 - (B) made by, or from information transmitted by, a person with personal knowledge and a business duty to report;
 - (C) kept in the course of a regularly conducted business activity; and
 - (D) it was the regular practice of that business activity to make the memorandum, report, record, or data compilation,

all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Code section 24-9-902(11), 24-9-

902(12), or other statute permitting certification. The term “business” as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted or profit. Public records and reports are not admissible under this subsection.

- (7) **Absence of entry in records kept in accordance with the provisions of paragraph (6).** Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of subsection (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.
- (8) **Public records and reports.** Except as otherwise provided by statute, records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, against the defendant in criminal cases, matters observed by police officers and other law enforcement personnel in connection with an investigation, or (C) in civil actions and proceedings and against the State in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.
- (9) **Records of vital statistics.** Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.
- (10) **Absence of public record or entry.** To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Code Section 24-9-902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.
- (11) **Records of religious organizations.** Statements of birth, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.
- (12) **Marriage, baptismal, and similar certificates.** Statements of fact

contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

- (13) **Family records.** Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.
- (14) **Records of documents affecting an interest in property.** The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of public office and an applicable statute authorizes the recording of documents of that kind in that office.
- (15) **Statements in documents affecting an interest in property.** A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.
- (16) **Statements in ancient documents.** Statements in a document in existence twenty years or more the authenticity of which is established.
- (17) **Market reports, commercial publications.** Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.
- (18) **Learned treatises.** To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets, whether published electronically or in print, on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.
- (19) **Reputation concerning personal or family history.** Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood,

adoption, of marriage, ancestry, or other similar fact of the person's personal or family history.

- (20) **Reputation concerning boundaries or general history.** Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.
- (21) **Reputation as to character.** Reputation of a person's character among associates or in the community.
- (22) **Judgment of previous conviction.** Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.
- (23) **Judgment as to personal, family or general history, or boundaries.** Judgments as proof of matters of personal family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

Comment - This section is substantially the same as Federal Rule of Evidence 803 with a few minor changes to improve clarity.

Subsections (1) and (2) - These are identical to Federal Rule 803(1) and (2). They are based on the common law "res gestae" rule though that term is no longer used in the proposed new rules. Subsection (1) admits statements that are contemporaneous, or nearly so, with the declarant's perception of the events or conditions described. See, *Miller v. Crown Amusements*, 821 F. Supp. 703 (S.D. Ga. 1993). Most such statements would be admissible under Georgia's res gestae rule. See, current O.C.G.A. § 24-3-3: "Declarations accompanying an act, or so nearly connected therewith in time as to be free from all suspicion of device or afterthought, shall be admissible in evidence as part of the *res gestae*.")

Subsection (2), the excited utterance exception, is consistent with current Georgia law. See, e.g., *Copeland v. State*, 235 Ga.App. 682 (1998); *Miller v. Keating*, 754 F.2d 507 (3d Cir. 1985).

Subsection (3) admits statements of the declarant's then existing mental, emotional, or physical condition when relevant to some issue in the case. Statements of a declarant's

belief or memory are not admissible if offered to prove the truth of the matter believed or remembered. Thus the out of court statement “I believe Joe killed Sally” is just as inadmissible as the statement “Joe killed Sally” when offered to prove the truth of the matter believed or asserted.

Subsection (3) admits a declarant’s statement of intent or plan regarding his future conduct as circumstantial evidence that the declarant carried out that intent. Thus the statement, “I plan to go to Savannah tonight” is admissible. But if the statement is “I plan to go to Savannah tonight with Sally,” the statement is both a statement of the declarant’s then existing intent and of the declarant’s belief as to the intent of another person. This is the so-called *Hillmon* problem based on the 1892 U.S. Supreme Court case, *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, where the declarant’s statement that he intended to travel to Colorado with Hillmon was admitted. The result in *Hillmon* has been harshly criticized and Georgia courts have not allowed a declarant’s statement of belief as to the intent of another. See, e.g., *Mallory v. State*, 261 Ga. 625 (1991) (declarant’s statement that she intended to meet the defendant later for coffee inadmissible to prove that the two probably met for coffee). See also, Report of U.S. House Committee on the Judiciary regarding Rule 803(3) (H.R. Rep. No. 650, 93rd Cong., 1st Sess., p. 13 (1973): “... the Committee intends that the Rule be construed to limit the doctrine of *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285 (1892), so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person.” The last line has been added to proposed subsection (3) to clarify that the declarant’s statement of belief as to another’s intent is inadmissible under this rule.

Subsection (3) broadens the exception for a testator’s statements regarding his will. Generally, the courts look no further than the four corners of the will for evidence of the terms of the will and parol evidence is inadmissible. But when parol evidence is required, Georgia courts have been liberal in allowing the testator’s statements into evidence over a hearsay objection. See, e.g., *Johnson v. Sullivan*, 247 Ga. 663 (1987); *Heard v. Lovett*, 273 Ga. 111 (2000); *Dodd v. Scott*, 250 Ga.App. 32 (2001); *Saliba v. Saliba*, 202 Ga. 791 (1947).

Subsection (4) - This exception is the same as current O.C.G.A. § 24-3-4. See, *Banks v. State*, 144 Ga. App. 471 (1978).

Subsection (5) - This is identical to Federal Rule 803(5). The exception for recorded recollections is consistent with current Georgia practice. It is not necessary that the witness have prepared the writing himself; it is enough that the witness adopted the writing as accurate at a time when the matters were fresh in his memory. See, current O.C.G.A. § 24-9-69; *Platt v. Natl. Gen Ins. Co.*, 205 Ga.App. 705 (1992).

Subsection (6) - This is substantially similar to Federal Rule 803(6) with technical changes to conform to Georgia statutes. The rule was rewritten in order to improve its clarity. The phrase “and a business duty to report” was added to paragraph (B) to clarify that when the preparer of the report is relying upon others as sources of the information

in the report, those sources must be acting pursuant to a business duty in reporting the information to the preparer. This is consistent with both federal and Georgia cases. See, e.g., *United States v. Ismoila*, 100 F.3d 380 (5th Cir. 1996) (bank records which included statements from customers that their credit cards were stolen were inadmissible under 803(6)); *J.H. Harvey v. Reddick*, 240 Ga.App. 466, 522 S.E.2d 749 (1999); *Strother v. South Expressway Radio*, 132 Ga.App. 771, 209 S.E.2d 93 (1974).

There are three basic differences between the proposed business record exception and Georgia's current exception, O.C.G.A. § 24-3-14.

First, Georgia's current exception does not admit opinions in the record. See, e.g., *D.H.R. v. Corbin*, 202 Ga.App. 10 (1991); *Knudsen v. Duffee-Freeman*, 95 Ga.App. 872 (1957). Subsection (6) allows opinions if the other requirements of the exception are met. The opinions are also subject to O.C.G.A. §§ 24-7-701 through 24-7-704 governing lay and expert testimony.

Second, subsection (6) contains a 2000 amendment to Federal Rule 803(6) that permits the proponent to lay foundation for the exception with a certified affidavit. The procedures governing the affidavit are described in new § 24-9-902(11) and (12) and require that a party who intends to use an affidavit in lieu of a live witness must give the opposing party written notice and an adequate opportunity to review the record. See, *Rambus, Inc. v. Infineon Tech.*, 384 F. Supp. 2d 698 (E.D. Va. 2004). Current Georgia law has no such affidavit procedure for business records in general but does have a similar rule and procedure for certain medical summaries in personal injury cases. See, current O.C.G.A. § 24-3-18. (Proposed 24-8-825).

Finally, current Georgia law uses the business record exception for both public and non-public records. The Federal Rules and these proposed rules have separate provisions governing the admission of public records over a hearsay objection. See, O.C.G.A. § 24-8-803(8), discussed below. The public records exception is careful to protect the criminal defendant's confrontation rights. The last sentence of 803(6) was added to clarify this separation. See, *United States v. Brown*, 9 F.3d 907 (11th Cir. 1993) (public record inadmissible under 803(8) cannot be admitted under 803(6)). This clarification is necessary because a few courts have applied 803(6) to public records that would not have been inadmissible under 803(8). See, e.g., *United States v. Baker*, 855 F.2d 1353 (8th Cir. 1988). In *Baker*, 803(6) was used to admit a lab report against the defendant in a drug case. The Georgia Supreme Court has held that the admission of such evidence against the accused without an opportunity to cross-examine the author of the report is a violation of the right of confrontation under Georgia's Constitution. *Miller v. State*, 266 Ga. 850, 856 (1996).

The foundation requirements for a subsection (6) exception are very similar to current Georgia practice. The proponent must establish: (1) the record is of a type regularly made and kept in the course of the business; (2) the record was made at or about the time of the events described in the report; (3) the preparer of the record was acting in the regular course of the business in preparing the report; (4) any sources of information

other than the preparer were persons with knowledge and acting in the regular course of their business in observing and reporting the information to the preparer. This foundation can be laid by any witness qualified by knowledge or experience to testify concerning the document in question or the routine practice of the organization regarding such documents. See, new O.C.G.A. § 24-4-406. The qualifying witness need not have personal knowledge of the contents of the report. See, e.g., *Hertz Corp. v. McCray*, 198 Ga.App. 484 (1991).

“Records” admissible under this subsection include information stored on electronic media or any other technology that provides a memorialization of the information. This is consistent with current Georgia law. See, e.g., *WGNX, Inc. v. Gorham*, 185 Ga.App. 489 (1988); *Freeland v. Baker*, 205 Ga.App. 470 (1992).

The goal of subsection (6) is to admit records that because of their routine nature and proximity in time to the events described have a high degree of trustworthiness. The trial court may exclude any records or parts thereof, however, if the sources of information or methods or circumstances of preparation indicate a lack of trustworthiness. Thus, accident reports prepared by a business after the business had reason to believe the report may relate to a subsequent claim or lawsuit against it should be excluded as lacking the degree of trustworthiness normally associated with ordinary business records. See, e.g., *Palmer v. Hoffman*, 318 U.S. 109 (1943). This is consistent with current Georgia law. See, e.g., *Reach Out, Inc. v. Capital Assoc., Inc.*, 176 Ga.App. 585 (1985).

Subsections (7) and (10) - Absence of records. These are identical to Federal Rule 803(7) and (10). These subsections are consistent with current Georgia practice. See, e.g., *Martin v. State*, 185 Ga.App. 145 (1987).

Subsection (8) - This subsection is almost identical to Federal Rule 803(8) with changes to conform its use to Georgia law and to clarify that subsection 803(8)(B) may be used by the defense but not by the prosecution in a criminal case. This latter clarification is consistent with how federal courts have construed 803(8)(B), see, e.g., *United States v. Smith*, 521 F.2d 957 (D.C. Cir. 1975), and with modern Confrontation Clause analysis under *Crawford v. Washington*, 541 U.S. 36 (2004). This is generally consistent with current Georgia law. See, e.g., *Brown v. State*, 274 Ga. 31 (2001). “Matters observed” extends only to statements of fact based on the personal knowledge of the source.

Subsection 803(8)(B) also is clarified to exclude only matters observed by police “in the course of an investigation.” In federal courts, the exclusion has not been applied to routine, ministerial matters recorded in non-investigative circumstances. See, e.g., *United States v. Agustino-Hernandez*, 14 F.3d 42 (11th Cir. 1994); *United States v. Brown*, 9 F.3d 907 (11th Cir. 1993) (quoting from *United States v. Quezada*, 754 F.2d 1190, 1194 (5th Cir. 1985): (“In the case of documents recording routine, objective observations, made as part of the everyday function of the preparing official or agency, the factors likely to cloud the perception of an official engaged in the more traditional law enforcement functions of observation and investigation of crime are simply not

present. Due to the lack of any motivation on the part of the recording official to do other than mechanically register an unambiguous factual matter ..., such records are, like other public documents, inherently reliable.”)

This distinction between investigative and non-investigative recording of information is also consistent with current Georgia law, see, e.g., *Price v. State*, 269 Ga. 222 (1998), and with the distinction between “testimonial” and non-testimonial hearsay under *Crawford v. Washington*, 541 U.S. 36 (2004). Thus, for example, a police officer’s report regarding a DUI stop would be inadmissible against the defendant under 803(8)(B) while a certification of a routine inspection of an intoxilyzer would be admissible. See, e.g., *United States v. Wilmer*, 799 F.2d 495 (9th Cir. 1986); *Brown v. State*, 268 Ga. 76 (1997).

Under current Georgia law, public records are often admitted under the general business record exception or one of the dozens of specific Georgia statutes relating to the admissibility of records of a particular agency. Subsection (8) provides a general set of rules governing the admission of public records but these general rules are subject to specific statutes. Thus, for example, accident reports filed with the Department of Motor Vehicle Safety would continue to be inadmissible under current O.C.G.A. § 40-9-41.

Subsection (8)(C) admits factual findings in a public report, except by the prosecution in a criminal case, if the findings resulted from an investigation made pursuant to legal authority. “Factual findings” is broader than “matters observed” (see subsection (8)(B)) in that it implies that the preparer of the report is relying on sources of information other than his own personal knowledge. In this respect, subsection (8)(C) may admit what otherwise might constitute multiple hearsay. It also may include opinions. See, *Rainey v. Beech Aircraft*, 488 U.S. 153 (1988). “Factual findings” should not extend to include legal conclusions of the preparer. See, e.g., *Hines v. Brandodn Steel Decks, Inc.*, 886 F.2d 299 (11th Cir. 1989). As with business records, if the sources of information or other circumstances indicate a lack of trustworthiness of any public record, the court may exclude it. See, *Rainey v. Beech Aircraft*, 488 U.S. 153 (1988).

Subsections (11), (12), (13) - These are identical to Federal Rule 803(11),(12) and (13). These exceptions concern the admissibility of religious, family and other records and are consistent with current Georgia practice, though to the extent current law requires that the declarant be deceased at the time of trial for the record to be admitted, such a requirement no longer exists under these exceptions. See, current O.C.G.A. § 24-3-12; *Mincey v. Mincey*, 233 Ga. 512 (1975); *Southern Life Ins. Co. v. Wilkinson*, 53 Ga. 535 (1874) (family Bible admissible).

Subsection (14) - This is identical to Federal Rule 803(14). This exception is consistent with current Georgia law. See, e.g., current O.C.G.A. §§ 44-2-23; 44-2-125; 44-14-38.

Subsection (15) - This is identical to Federal Rule 803(15). This exception is broader than current Georgia law. Recitals of fact in a deed or similar document are generally admissible regardless of the purposes for which they are offered or the availability of the

declarant as a witness. See, *Anderson v. Barron*, 208 Ga. 785 (1952); *McCann v. Miller*, 177 Ga. App. 53 (1985).

Subsection (16) - This is identical to Federal Rule 803(16). This exception is consistent with prior Georgia law though the age requirement is reduced from 30 to 20 years. See, e.g., current O.C.G.A. §§ 24-3-11; 24-5-28; 44-5-45; *Shaw v. Crawford*, 208 Ga. 595 (1952).

Subsection (17) - This is identical to Federal Rule 803(17). This exception is consistent with but slightly broader than current Georgia law which admits market reports and trade journals to prove market value as well as certain mortality and annuity tables. See, e.g., *Suarez v. Suarez*, 257 Ga. 102 (1987); *Columbian Peanut Co. v. Pope*, 69 Ga. App. 26 (1934); O.C.G.A. §§ 11-2-724; 24-4-44, 24-4-45.

Subsection (18) - This is nearly identical to Federal Rule 803(18) with an added reference to material published by any electronic means. The exception for learned treatises is a departure from current Georgia law. Current Georgia law does admit the contents of a treatise or similar authoritative publication on direct examination, though an expert may be cross-examined with respect to treatises with which he was familiar. See, *Dean v. State*, 250 Ga. 77 (1982); *Mize v. State*, 240 Ga. 197 (1977).

Under subsection (18), statements from a learned treatise are admissible as an exception to the hearsay rule if foundation is laid establishing the treatise as reliable authority. When used on direct examination, the treatise must have been relied on by the expert in forming his opinion. When used on cross-examination, the statements must be called to the attention of the expert, though there is no requirement that the expert relied on or is familiar with the treatise. When admissible, statements from learned treatises may be read to the jury but are not received as exhibits or sent out with the jury.

This subsection does not alter the requirement that an expert witness testify to his own opinion and not merely restate the opinions of others contained in a textbook. See, e.g., *Dartez v. Fibreboard Corp.*, 765 F.2d 456 (5th Cir. 1985). This is consistent with current Georgia law. See, *Dept. of Transp. v. Brand*, 149 Ga. App. 547 (1979).

Subsections (19), (20) - These are identical to Federal Rules 803(19) and (20). These exceptions are consistent with current Georgia law. See, e.g., current O.C.G.A. §§ 24-3-9; 24-3-12; 24-3-13; 44-4-6; *Mincey v. Mincey*, 233 Ga. 512 (1975); *Patterson v. Baugh*, 56 Ga.App. 660 (1937); *Crawley v. Selby*, 208 Ga. 530 (1951); *Shuman v. State*, 84 Ga. App. 585 (1951). See also, current O.C.G.A. § 41-3-5 (evidence of reputation of building or place admissible in action to enjoin a nuisance).

Subsection (21) - This is identical to Federal Rule 803(21). When reputation evidence regarding a person's character is admissible under new O.C.G.A. §§ 24-4-405, 24-6-608, this exception permits proof of that reputation. This is consistent with current

Georgia law. See, O.C.G.A. § 24-9-84.

Subsection (22) - This is identical to Federal Rule 803(22). This exception is a departure from current Georgia law which provides no hearsay exception for using a judgment of a previous conviction as proof of a fact essential to obtaining that conviction. See, *Cobb v. Garner*, 158 Ga.App. 110 (1981); *Nash v. Hess Oil and Chem. Co.*, 121 Ga. App. 546 (1970).

This subsection does not address the use of a previous judgment under the doctrines of *res judicata* or collateral estoppel. See, current O.C.G.A. §24-4-42. The exception does not apply to civil judgments, convictions of less than felony grade, pleas of nolo contendere, or acquittals, The prosecution may not use previous convictions of persons other than the accused as this may violate the accused's sixth amendment right of confrontation. See, *Kirby v. United States*, 174 U.S. 47 (1899).

Subsection (23) - This is identical to Federal Rule 803(23). This is a narrow exception allowing use of prior judgments to prove the kinds of facts that also would be provable by evidence of reputation under 803(19) and 803(21), though not for proof of character.

24-8-804. Hearsay Exceptions; Declarant Unavailable.

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant —

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or

testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Except as otherwise provided by statute, testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. If deposition testimony is admissible under either the rules stated in Code section 9-11-32 or this Code section it shall be admissible at trial in accordance with the rules under which it was offered.

(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his or her death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

Comment - This section is based on Federal Rule of Evidence 804 with changes as discussed below. The section includes five specific hearsay exceptions that share the requirement that the declarant be “unavailable as a witness” as defined in subsection (a).

Subsection (a) - The definition of “unavailable as a witness” is basically the same as current Georgia definitions of “inaccessibility” or “unavailability.” See, Milich, Georgia Rules of Evidence, (2d ed.), § 19.27. Subsection (a) clarifies that it is the availability of the witness’s testimony, not just his presence at trial, that is critical and deems a witness “unavailable” if, although present, he lacks memory of the subject matter of his earlier statement or refuses to testify about it.

Subsection (b) (1) - Former Testimony – This exception is based on Federal Rule of Evidence 804(b)(1) except language is added at the beginning of the subsection referring to other statutes that limit the admissibility of statements at prior hearings. See, e.g., O.C.G.A. § 15-11-79.1 (limits on admissibility of evidence adduced at juvenile hearings); § 15-11-30.2(e) (statements made by juvenile at hearing regarding transfer to another court for prosecution are inadmissible in any criminal proceedings following the transfer); § 15-11-101 (testimony at hearing regarding termination of parental rights not admissible in any other proceedings); §17-5-50(e) (statements by criminal defendant in hearing regarding owner’s request for return of stolen property inadmissible against defendant at trial); § 24-13-135 (perpetuation deposition in criminal cases admissible only if deponent deceased at the time of trial).

The last sentence was added to clarify that deposition testimony is admissible under either the rule stated in the Civil Practice Act, O.C.G.A. § 9-11-32, or under this rule. See, O.C.G.A. § 9-11-32(a)(4) which gives the trial court discretion to admit deposition testimony even if the declarant is available to testify at trial.

Subsection (b)(1) is generally consistent with current Georgia law. See, current O.C.G.A. § 24-3-10; *Wiseman v. State*, 249 Ga. 559 (1982). In civil cases, the party against whom the former testimony is offered need not have had an opportunity to examine the witness on the prior occasion if a predecessor in interest with a similar motive to develop the witness’s testimony did have such an opportunity. This may be a bit broader than current Georgia law which does not require that the former testimony be in the same case or even among the same parties as long as the real party in interest remained the same in both proceedings. See, e.g., *Pope v. Fields*, 273 Ga. 6 (2000). In a criminal case, subsection (b)(1) requires that the party against whom the former testimony is now offered have been a party at the prior proceeding. This is the same as Georgia law. See, e.g., *Lingerfelt v. State*, 231 Ga.App. 534 (1973).

Subsection (b) (2) - Statement Under Belief of Impending Death — This exception is similar to current Georgia law with two differences: (1) The current Georgia “dying declaration” statute, O.C.G.A. § 24-3-6, is limited to prosecutions for homicide.

Subsection (b)(2) extends the exception to any civil proceeding; though in criminal cases the use is still restricted to homicides. (2) Under current Georgia law, the admissibility of a dying declaration is ultimately a jury question. See, e.g., *Lloyd v. State*, 257 Ga. 108 (1987). Under new O.C.G.A. § 24-1-104(a), the admissibility of a dying declaration is solely a matter for the trial judge.

Subsection (b) (3) - Statements Against Interest — This exception is based on Federal Rule of Evidence 804(b) (3). This exception is similar to but slightly broader than current O.C.G.A. § 24-3-8, in two respects: First, under current Georgia law, the declarant must be deceased at the time of trial. Under subsection (b) (3), the declarant need only be “unavailable as a witness” as defined in subsection (a).

Second, the current Georgia rule allows a statement against penal interest only in civil, not criminal, cases. See, *State Farm Auto Ins. Co. v. Great Amer. Ins. Co.* 164 Ga. App. 457 (1982); *Timberlake v. State*, 246 Ga. 488 (1980). Georgia prosecutors have not really needed an exception for statements against penal interest because Georgia’s current co-conspirator exception rule is so broad. Both prosecutors and criminal defense counsel also may use the current necessity exception in Georgia where a federal court might admit evidence under 804(b)(3). With the adoption of new rules of evidence, however, the co-conspirator exception will narrow and the necessity exception will require pre-trial notice. Thus both sides in criminal cases may need an exception for statements against penal interest.

Federal Rule 804(b)(3) allows the accused to offer statements against penal interest that exculpate the accused only if corroborating circumstances clearly indicate the trustworthiness of the statement. There is no such corroborating circumstances requirement for statements offered by the prosecution which inculpate the accused. This uneven treatment has been criticized and many courts require corroborating circumstances for both kinds of statements whether offered by the defense or the prosecution. See, e.g. *United States v. Costa*, 31 F.3d 1073 (11th Cir. 1994). See also, *Williamson v. United States*, 512 U.S. 594, 605 (1994). The proposed subsection (b)(3) treats any offer of a statement against penal interest in a criminal case the same.

Subsection (b)(4) - The exception is the same as Federal Rule of Evidence 804(b)(4) and consistent with prior Georgia law. See, *Terry v. Brown*, 142 Ga. 224 (1914). See also, new O.C.G.A. §§ 24-8-803(11), (12), and (13) (proof of such matters by document); 24-8-803(19) proof of such matters by reputation evidence); and 24-8-803(23) (proof of such matters by previous civil or criminal judgment).

Subsection (b)(5) - The exception is the same as Federal Rule of Evidence 804(b)(6). [Former Federal Rule 804(b)(5) was moved to Rule 807, leaving a gap that we need not replicate]. This exception was added to the Federal Rules in 1997. There is no current Georgia rule to the same effect.

24-8-805. Hearsay Within Hearsay.

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule.

Comment - This section is identical to Federal Rule of Evidence 805 and consistent with current Georgia law. See, e.g. *Gibby v. State*, 213 Ga.App. 20 (1994).

This section provides that if each and every instance of hearsay is admissible under some exception, the whole statement may be admitted. For example, if a doctor's report states that the patient's wife reported her husband had chest pains, the report conforms to the business record exception, (new O.C.G.A. § 24-8-803(6)), and the wife's statement conforms to the exception for statements for purposes of medical diagnosis or treatment, (new O.C.G.A. § 24-8-803(4)), and thus the record is admissible despite the double hearsay.

24-8-806. Attacking and Supporting Credibility of a Declarant.

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Comment - This section is substantially identical to Federal Rule of Evidence 806. See, e.g., *United States v. Bovain*, 708 F.2d 606 (11th Cir. 1983). Generally, when hearsay is admitted under some exception, the out-of-court declarant is a "witness" and may have his credibility attacked or supported like any witness. See, new O.C.G.A. §§ 24-6-607, 24-6-608, 24-6-609, 24-6-613. This is consistent with current Georgia practice. See, e.g. *Smith v. State*, 270 Ga. 240 (1998); *Brantley v. State*, 177 Ga. App. 13 (1985).

24-8-807 Residual Exception

A statement not specifically covered by any statute but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted

under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Comment - This is nearly identical to Federal Rule 807 with minor changes to conform to state use. Section 807 provides an exception for hearsay when the triple requirements of necessity, materiality, and trustworthiness are met. The proponent of the evidence has the burden of showing that these requirements are satisfied and he must give notice to the opposing party prior to trial of his intent to offer any evidence under this exception. This consistent with current Georgia law though Georgia law does not require advance notice of intent to offer a hearsay statement under the necessity exception. See, O.C.G.A. § 24-3-1(b) "Hearsay evidence is admitted only in specified cases from necessity."; *Chapel v. State*, 270 Ga. 151 (1998). The notice requirement gives the opponent an opportunity to attempt to locate and subpoena the hearsay declarant, if desired, and an opportunity to gather impeachment evidence that may be used against the hearsay declarant under new O.C.G.A. § 24-8-806.

ARTICLE 2

24-8-820. Testimony as to child's description of sexual contact or physical abuse.

A statement made by a child under the age of 14 years describing any act of sexual contact or physical abuse performed with or on the child by another is admissible in evidence by the testimony of the person or persons to whom made if the child is available to testify in the proceedings and the court finds that the circumstances of the statement provide sufficient indicia of reliability.

Comment - Current O.C.G.A. § 24-3-16 without the 1995 amendment that was held unconstitutional in *Woodard v. State*, 269 Ga. 317 (1998).

24-8-821. Admissions in pleadings.

Without offering the same in evidence, either party may avail himself of allegations or admissions made in the pleadings of the other.

Comment - Current O.C.G.A. §24 -3-30.

24-8-822. Right to have whole conversation heard.

When an admission is given in evidence by one party, it shall be the right of the other party to have the whole admission and all the conversation connected therewith admitted into evidence.

Comment - Current O.C.G.A. § 24-3-38.

24-8-823 Admissions and confessions received with care; no conviction on uncorroborated confession.

All admissions shall be scanned with care, and confessions of guilt shall be received with great caution. A confession alone, uncorroborated by any other evidence, shall not justify a conviction.

Comment - Current O.C.G.A. §24-3-53.

24-8-824 Against whom confessions of conspirator admissible.

The confession of one joint offender or conspirator, made after the enterprise is ended shall be admissible only against himself.

Comment - Current O.C.G.A. §24-3-52.

24-8-825 Medical reports in narrative form.

(a) Upon the trial of any civil case involving injury or disease, any medical report in narrative form which has been signed and dated by an examining or treating licensed medical doctor, dentist, orthodontist, podiatrist, physical or occupational therapist, doctor of chiropractic, psychologist, advanced practice nurse, social worker, professional counselor, or marriage and family therapist shall be admissible and received in evidence insofar as it purports to represent the history, examination, diagnosis, treatment, prognosis, or interpretation of tests or examinations, including the basis therefor, by the person signing the report, the same as if that person were present at trial and testifying as a witness; provided, however, that such report and notice of intention to introduce such report must first be provided to the adverse party at least 60 days prior to trial. A statement of the qualifications of the person signing the report may be included as part of the basis for providing the information contained therein, and the opinion of the

person signing the report with regard to the etiology of the injury or disease may be included as part of the diagnosis. Any adverse party may object to the admissibility of any portion of the report, other than on the ground that it is hearsay, within 15 days of being provided with the report. Further, any adverse party shall have the right to cross-examine the person signing the report and provide rebuttal testimony. The party tendering the report may also introduce testimony of the person signing the report for the purpose of supplementing the report or otherwise.

(b) The medical narrative shall be presented to the jury as depositions are presented to the jury and shall not go out with the jury as documentary evidence.

Comment - Current O.C.G.A. § 24-3-18.

CHAPTER 9.

AUTHENTICATION AND IDENTIFICATION

Article 1.

24-9-901. Requirement of Authentication or Identification.

(a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this Code section:

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversation. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is

from the public office where items of this nature are kept.

(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute. Any method of authentication or identification provided by statute.

Comment - This section is nearly identical to Federal Rule of Evidence 901 with minor modifications for state use. This section attempts to clarify and simplify authentication requirements. The rule and its illustrations are mostly consistent with current Georgia law.

See, e.g.:

re: (1) *Aikens v. State*, 194 Ga.App. 195 (1990).

re: (2) Current O.C.G.A. § 24-7-6 ; *Dowdy v. State*, 159 Ga.App. 805 (1981) (witness' familiarity must not have been acquired for purposes of the litigation).

re: (3) Current O.C.G.A. § 24-7-7 (exemplars shown to jury); *Gross v. State*, 161 Ga.App. 489 (1982) (expert testimony).

re: (4) *Cotton States Mut. Ins. Co. v. Clark*, 114 Ga.App. 439 (1966); *Arevalo v. State*, 275 Ga. 392 (2002).

re: (5) *Willingham v. State*, 134 Ga.App. 603 (1975).

re: (6) New rule would make authentication of phone calls somewhat easier. *Carrollton Fed. Sav. & Loan Ass'n v. Young*, 165 Ga.App. 262 (1983); *Price v. State*, 208 Ga. 695 (1952).

re: (7) Current O.C.G.A. §§ 24-7-20; 24-7-21(b); 24-7-24(b).

re: (8) *Gaskins v. Guthrie*, 162 Ga. 103 (1926); O.C.G.A. § 24-7-4.

re: (9) *English v. State*, 205 Ga.App. 599 (1992).

24-9-902. Self-authentication.

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, or of a municipal corporation of this state, and a signature purporting to be an attestation or execution.

(2) Domestic public documents not under seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign public documents. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the courts may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this Code section or complying with any law of the United States or of the State of Georgia, including Code section 24-9-920.

(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.

(7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control or origin.

(8) Acknowledged documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) Presumptions created by law. Any signature, document or other matter declared by any law of the United States or the State of Georgia to be presumptively or prima facie genuine or authentic.

(11) Certified domestic records of regularly conducted activity. The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Code section 24-8-803(6) if accompanied by a written declaration of its custodian or other qualified person certifying that the record:

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

(12) Certified foreign records of regularly conducted activity. In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Code section 24-8-803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record:

(A) was made at or near the time of the occurrence of the matters

set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

Comment - This section is substantially the same as Federal Rule of Evidence 902 with modifications for state use. Under current Georgia law, many specific statutes provided for the self-authentication of specific public records. Subsections (1) through (5) describe five general categories of public documents and the self-authentication requirements for each in a manner generally consistent with Georgia law. Subsection (4) refers specifically to new 24-9-920 (current 24-7-20) which allows the certification of Georgia state and county records without seal. Certification of municipal records currently requires a seal, (current O.C.G.A. § 24-7-21), and this continues to be the rule under subsections (1) and (2). Certification of records from sister states would require a seal under subsection (1) or (2). This is consistent with current Georgia law. See, current O.C.G.A. § 24-7-24(b); *Sandifer v. Lynch*, 244 Ga. 369 (1979). Certification of federal records also would require a seal. This is consistent with current Georgia law. See, *Rice v. State*, 178 Ga.App. 748 (1986).

Regarding judicial notice of the laws and regulations of Georgia, other states, and the federal government, see new §§ 24-2-220 and 24-2-221 (based on current §§24-1-4 and 24-7-22).

Subsection (8) provides for self-authentication of documents accompanied by a certificate of acknowledgment duly notarized as provided by law. There is no current Georgia law to this effect.

Subsection (9) regarding self-authentication of commercial documents is consistent with current Georgia law. See, O.C.G.A. §§ 11-1-202, 11-3-307, 11-3-510.

Subsections (11) and (12) are part of the year 2000 amendment to the federal business records exception, Rule 803(6). They describe the basic content required in the affidavit to lay foundation for the business record and the requirement for pre-trial, written notice of intent to use an affidavit in lieu of live testimony.

24-9-903. Subscribing Witness' Testimony Unnecessary.

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

Comment - This section is identical to Federal Rule of Evidence 903. Generally, a subscribing witness's testimony is not necessary to authenticate a writing. If, however, the law of the jurisdiction governing the validity of the document requires that such writings be subscribed or attested to by a witness in order to be valid, then the testimony of that witness is required to authenticate the document. Under current Georgia law, if a person signed a document as a witness, whether the law required such a signature or not, the subscribing witness is generally required to authenticate the document. See, current O.C.G.A. § 24-7-4; *Bloodworth v. McCook*, 193 Ga. 53 (1941).

ARTICLE 2.

24-9-920 Authentication of Georgia state and county records without seal.

The certificate or attestation of any public officer either of this state or any county thereof, shall give sufficient validity or authenticity to any copy or transcript of any record, document, paper or file, or other matter or thing in his respective office, or pertaining thereto, to admit the same in evidence

Comment - Current O.C.G.A. § 24-7-20. This Code section is retained to keep the Georgia practice of accepting state and county (including court) records that are certified without seal. See, e.g., *McIntyre v. Balkcom*, 229 Ga. 81 (1972). Municipal records currently must be certified under seal. See, e.g., *City of College Park v. Flynn*, 248 Ga. 222 (1981). Under the proposed rules, this requirement would continue. (See, new O.C.G.A. § 24-9-902(1) and (2)).

24-9-921. Identification of medical bills; expert witness unnecessary.

(a) Upon the trial of any civil case involving injury or disease, the patient or the member of his family or other person responsible for the care of the patient shall be a competent witness to identify bills for expenses incurred in the treatment of the patient upon a showing by such a witness that the expenses were incurred in connection with the treatment of the injury, disease, or disability involved in the subject of litigation at trial and that the bills were received from:

- (1) A hospital;
- (2) An ambulance service;
- (3) A pharmacy, drugstore, or supplier of therapeutic or orthopedic devices; or
- (4) A licensed practicing physician, chiropractor, dentist, podiatrist, or psychologist.

(b) Such items of evidence need not be identified by the one who submits the bill, and it shall not be necessary for an expert witness to testify that the charges were reasonable and necessary. However, nothing in this code section shall be construed to limit the right of a thorough and sifting cross-examination as to such items of evidence.

Comment - Current O.C.G.A. § 24-7-9.

24-9-922. Full faith and credit.

The acts of the legislature of any other state, territory, or possession of the United States, the records and judicial proceedings of any court of any such state, territory, or possession, and the nonjudicial records or books kept in the public office in any such state, territory, or possession, if properly authenticated, shall have the same full faith and credit in every court within this state as they have by law or usage in the courts of such state, territory, or possession from which they are taken.

Comment - Based on current O.C.G.A. §§ 24-7-24, 25, this section retains the full faith and credit portion of the current statutes but drops the provisions dealing with the authentication of records from sister states since that would be covered by new §§ 24-9-902(1) and (2).

24-9-923 Authentication of photos and videotapes when witness unavailable.

(a) For purposes of this code section, "unavailability of a witness" includes situations in which the authenticating witness:

- (1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the authentication;
- (2) Persists in refusing to testify concerning the subject matter of the authentication despite an order of the court to do so;
- (3) Testifies to a lack of memory of the subject matter of the

authentication;

(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) Is absent from the hearing and the proponent of the authentication has been unable to procure the attendance of the authenticating witness by process or other reasonable means.

An authenticating witness is not unavailable as a witness if his or her exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of an authentication for the purpose of preventing the witness from attending or testifying.

(b) Subject to any other valid objection, photographs, motion pictures, videotapes, and audio recordings shall be admissible in evidence when necessitated by the unavailability of a witness who can provide personal authentication and when the court determines, based on competent evidence presented to the court, that such items tend to show reliably the fact or facts for which the items are offered.

(c) Subject to any other valid objection, photographs, motion pictures, videotapes, and audio recordings produced at a time when the device producing the items was not being operated by an individual person or was not under the personal control or in the presence of an individual operator shall be admissible in evidence when the court determines, based on competent evidence presented to the court, that such items tend to show reliably the fact or facts for which the items are offered provided that prior to the admission of such evidence the date and time of such photograph, motion picture, or videotape recording shall be contained on such evidence and such date and time shall be shown to have been made contemporaneously with the events depicted in the photograph, videotape, or motion picture.

(d) This Code section shall not be the exclusive method of introduction into evidence of photographs, motion pictures, videotapes, and audio recordings but shall be supplementary to any other statutes and lawful methods existing in this state.

Comment – Current O.C.G.A. § 24-4-48.

24-9-924 Department of Safety records obtained from G.C.I.C. computer.

Any court may receive and use as evidence in any case information otherwise admissible from the records of the Department of Public Safety obtained from any terminal lawfully connected to the Georgia Crime Information Center without the need for additional certification of those records.

Comment – Current O.C.G.A. § 24-3-17(b).

CHAPTER 10.

CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

24-10-1001. Definitions.

For purposes of this article the following definitions are applicable:

(1) Writings and recordings. “Writings” and “recordings” consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) Photographs. “Photographs” include still photographs, X-ray films, video tapes, and motion pictures.

(3) Original. An “original” of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An “original” of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an “original”.

(4) Duplicate. A “duplicate” is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

Comment - This section is identical to Federal Rule of Evidence 1001. O.C.G.A. §§ 24-10-1001 through 24-10-1008 cover what was known at common law and under Georgia practice as the “best evidence rule.” At early common law, the best evidence rule was sometimes cited for the general requirement that a party offer only the “best evidence” of a fact, though the rule was ultimately limited to documentary evidence. See, 4 Wigmore, EVIDENCE, §§ 1180-1183 (Chadbourn rev. 1972). Under O.C.G.A. §§ 24-10-1001 through 24-10-1008, the best evidence rule is confined to two basic issues: (1) when is the original document required in order to prove a fact, (Rule 1002), and (2) when can duplicates of documents be offered in lieu of the original, (Rule 1003)?

The definition in this section take into account the variety of means by which facts may be recorded or duplicated with modern technology. An “original” is established as such under the authentication rules.

24-10-1002. Requirement of Original.

To prove the content of a writing, recording or photograph, the original writing, recording or photograph is required, except as otherwise provided by statute.

Comment - This section is substantially the same as Federal Rule of Evidence 1002 with modification for state use and is generally consistent with current Georgia law. See, e.g., *Dunwoody-Woodlands Condo. Ass'n v. Hedquist*, 199 Ga.App. 91 (1991). Current Georgia, however, law only covers documents, not photos or videos. See, e.g., *Perkins v. State*, 260 Ga. 292 (1990).

A witness cannot testify with respect to what a writing says or photograph shows without accounting for the original document or photograph. But the witness need not refer to a writing that contains the fact if he can testify to the fact from independent knowledge. See, e.g., *Merrill Lynch v. Zimmerman*, 248 Ga. 580 (1981). Thus, for example, a plaintiff who claims money due and owing under a promissory note must produce the written note to prove what it says. But the defendant need not produce the check used to pay part of the note if he testifies to such payment on personal knowledge and without reference to the check. If, however, he refers to the check, he must produce it. A witness is not allowed to bolster his testimony by referring to a corroborating writing or recording without producing that writing or recording.

24-10-1003. Admissibility of Duplicates.

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Comment - This section is identical to Federal Rule of Evidence 1003. Under current Georgia law, a party offering a duplicate in lieu of the original often must account for why the original is not available, though duplicates made in the ordinary course of business are admitted. See, current O.C.G.A. §§ 24-5-2, 24-5-3, 24-5-21 - 24; *Harper v. Copelco Capital, Inc.*, 249 Ga.App 453 (2001).

This section makes duplicates generally admissible to the same extent as originals and shifts the burden to the opposing party to show some reason why the duplicate should not be admitted.

24-10-1004. Admissibility of Other Evidence of Contents.

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if –

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or

(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

Comment - This section is identical to Federal Rule of Evidence 1004. When the original writing or recording is required under new O.C.G.A. § 24-10-1002 to prove its contents, a duplicate usually is allowed under new O.C.G.A. §24-10-1003. But if a duplicate is not available or the duplicate is not admissible under O.C.G.A. §24-10-1003, other evidence, including oral testimony, may be offered to establish the contents of the writing or recording if one of the four exceptions of this section are met. There are no longer “degrees of secondary evidence.” If production of the original is excused, any secondary evidence is admissible.

Subsection (1) - If there exists evidence that the original has been lost or destroyed, other evidence may be used to prove the contents of the original if the proponent did not lose or destroy it in bad faith. This is consistent with Georgia law. See, O.C.G.A. § 24-5-21; *Harper v. Copelco Capital, Inc.*, 249 Ga.App 453 (2001).

Subsection (2) - If the original is in the hands of a third party and the proponent has used judicial process in an attempt to obtain it but failed, the original is not required. This is consistent with current Georgia law. See, *Jeff Goolsby Homes Corp. v. Thomas*, 181 Ga.App. 308 (1986).

Subsection (3) - This is basically an estoppel provision. If a party had control of the original at a time when he had reason to know its contents would be a subject of proof at the hearing, and he does not produce the original at the hearing, he cannot complain if his opponent offers secondary evidence of its contents. This subsection does not require that a party seek to compel production of the original from the opponent. It is enough that the opponent had reason to know that the contents of the original could be a subject of proof at the hearing. This would change Georgia law which requires that a party use due diligence to obtain the original from the opposing party. See, e.g., *Jeff Goolsby Homes Corp. v. Thomas*, 181 Ga.App. 308 (1986).

Subsection (4) - If the writing or recording is not closely related to the controlling issue in the case, the court may excuse the requirement of producing the original. This is

consistent with current Georgia law. See, *Walls v. State*, 161 Ga. App. 234 (1982).

24-10-1005. Public Records.

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Code section 24-9-902 or Code section 24-9-920 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

Comment - This section is nearly identical to Federal Rule of Evidence 1005 with technical changes to conform to state use. Since originals of public records often need to remain in the custody of a public agency, the rule allows certified copies in lieu of the originals. Such public records still need to satisfy authentication, hearsay, and relevancy requirements to be admitted. See, new O.C.G.A. §§ 24-9-902, 24-9-920, 24-8-803(8). This section applies to public records generally, not just those required by law to remain in official custody.

24-10-1006. Summaries.

The contents of otherwise admissible voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

Comment - This section is nearly identical to Federal Rule of Evidence 1006 and mostly consistent with current Georgia practice.

The phrase “otherwise admissible” was added to the first sentence to clarify that this section does not supercede authentication and hearsay rules. See, e.g., *United State v. Pelullo*, 964 F.2d 193, 204 (3d Cir. 1992). This is consistent with current Georgia law. See, e.g., *Tyner v. Sheriff*, 164 Ga.App. 360 (1982).

The actual documents upon which the summary is based shall be made available to all other parties for examination or copying. The summary must reflect only the contents of the writings or recordings described. Facts, opinions, conclusions, or other matter not contained in the underlying writings or recordings are not allowed in the summary. This is consistent with current Georgia law. See, e.g., *Lewis v. Uselton*, 224 Ga.App. 428 (1997).

Current Georgia law requires that the person who examined the underlying records and made the summary testify at trial. See, e.g., *Stewart v. State*, 246 Ga. 70 (1980) (testimony of supervisor who reviewed assistant's preparation of summary insufficient). Most federal cases under Rule 1006 allow a witness who supervised the production of the summary or reviewed it to lay the necessary foundation. See, e.g., *United States v. Soulard*, 730 F.2d 1292 (9th Cir 1984).

24-10-1007. Testimony or Written Admission of Party.

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.

Comment - This section is identical to Federal Rule of Evidence Rule 1007. A party may prove the contents of a writing or recording without production of the original through the admissions of his opponent if the admission was made in writing or in the party's testimony or deposition. Unsworn oral admissions of the party do not qualify for this exception. Current Georgia law is generally consistent with this approach. See, e.g., *Willis v. Hunt*, 116 Ga.App. 848 (1967).

24-10-1008. Functions of Court and Jury.

When the admissibility of other evidence of contents or writings, recordings, or photographs under the rules of evidence depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Code section 24-1-104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

Comment - This section is identical to Federal Rule of Evidence 1008. It clarifies the distinction between the court's jurisdiction over preliminary questions of fact regarding the admissibility of evidence and the jury's function in resolving factual disputes in the case. For example, if a party presents evidence tending to show that a copy offered by the opponent is not an accurate reproduction of the original, the court must decide whether to admit the copy as a "duplicate" under new O.C.G.A. §24-10-1003 or exclude it. If admitted, there still may exist a question for the jury as to whether the duplicate accurately reflects the contents of the original. The judge decides admissibility, the jury determines the weight of the evidence. This section is consistent with current Georgia law. See, *Mulkey v. State*, 155 Ga. App. 304 (1980).

CHAPTER 11. ESTABLISHMENT OF LOST RECORDS

[Existing O.C.G.A. §§ 24-8-1 through 30 are renumbered and would appear here as new O.C.G.A. §§ 24-11-1 through 30. There are no amendments to these sections and they have been omitted from this copy to save space.]

CHAPTER 12. Medical and Other Confidential Information

[This chapter consists entirely of existing O.C.G.A. sections without substantive amendment and therefore are not reproduced here to save space.]

<u>Existing</u>		<u>Renumbered</u>
OCGA 24-9-40	Medical Information from Physician, Hospital	24-12-1
OCGA 24-9-40.2	Confidentiality of Research Data	24-12-2
OCGA 24-9-41	Disclosure of Medical Records - Definitions	24-12-3
OCGA 24-9-42	Disclosure - Effect on Confidential Character	24-12-4
OCGA 24-9-43	Use of Medical Matter Disclosed	24-12-5
OCGA 24-9-44	Disclosure of Medical Records - Immunity	24-12-6
OCGA 24-9-45	Use for Educational Purposes Not Precluded	24-12-7
OCGA 24-9-46	Confidentiality of Certain Library Records	24-12-8
OCGA 24-9-40.1	Confidential Nature of AIDS Information	24-12-9
OCGA 24-9-47	Disclosure of AIDS Information	24-12-10
OCGA 24-9-29	Veterinarian - Confidentiality	24-12-11

CHAPTER 13.
**SECURING ATTENDANCE OF WITNESSES AND PRODUCTION AND
PRESERVATION OF EVIDENCE**

[Existing O.C.G.A. §§ 24-10-1 through 154 are renumbered and would appear here as revised O.C.G.A. §§ 24-13-1 through 154. There are no substantive amendments to any of these statutes. There is one minor change in § 24-10-20.]

§ 24-13-20. Issuance of subpoenas

(a) The provisions of this Code section apply to all court proceedings and grand juries unless otherwise provided by law.

(b) Every subpoena shall be issued by the clerk under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified.

(c) The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service.

Comment - Subsection (a) is added to existing O.C.G.A. § 24-10-1 and the section is renumbered. This change clarifies that by enacting the new § 24-1-3(c), we have not eliminated the authority for grand juries to issue subpoenas or to use subpoenas in any of the proceedings described in 24-1-3(c) (1) though (4).

CHAPTER 14 PROOF GENERALLY

[Existing O.C.G.A. §§ 24-4-1 through 65 are renumbered and would appear here as revised O.C.G.A. §§ 24-14-1 through 65. There are no substantive amendments to any of these statutes].

<u>Existing</u>		<u>Renumbered</u>
24-4-1	Burden of Proof	24-14-1
24-4-2	Change of Burden	24-14-2
24-4-3	Preponderance of Evidence	24-14-3
24-4-4	Where Preponderance Lies	24-14-4
24-4-5	Reasonable Doubt	24-14-5
24-4-6	Conviction - Circumstantial Evidence	24-14-6
24-4-7	Positive Testimony Preferred	24-14-7
24-4-8	Number of Witnesses Required	24-14-8
24-4-9	Inferences From Evidence	24-14-9
24-4-20	Presumptions of Law and Fact	24-14-20
24-4-21	Rebuttable Presumptions	24-14-21
24-4-22	Presumption From Failure to Produce	24-14-22
24-4-23	Presumption - Failure to Answer Letter	24-14-23
24-4-23.1	Presumption of Payment of Check	24-14-24
24-4-24	Estoppel Defined	24-14-25
24-4-25	Estoppel Re: Real Estate	24-14-26
24-4-26	Trustees Estopped	24-14-27
24-4-27	Equitable Estoppel	24-14-28
24-4-40	Evidence of Identity	24-14-40
24-4-41	Proof of de facto Officer	24-14-41
24-4-42	Judgment Admissible	24-14-42
24-4-43	Calendars As Proof of Dates	24-14-43
24-4-44	American Experience Mortality Tables	24-14-44
24-4-45	Other Mortality Tables	24-14-45
24-4-46	USDA Inspection Certificates	24-14-46
24-4-47	Written Federal Report Re: Death	24-14-47
24-4-48	Authentication of Video/Photos	24-9-923
24-4-60	DNA Analysis Upon Conviction	24-14-60
thru	For Certain Sex Offenses	thru
24-4-65		24-14-65

CHAPTER 15

PAROL EVIDENCE RULE

[Existing O.C.G.A. §§ 24-6-1 through 10 are renumbered and would appear here as revised O.C.G.A. §§ 24-15-1 through 10. There are no substantive amendments to any of these statutes].

APPENDIX A

Table Summarizing New Title 24 with References to Sources

Chapter 1 - General Provisions

<u>Article 1</u>		<u>Source</u>
OCGA 24-1-1	Purpose/Scope	FRE 102
OCGA 24-1-2	Applicability	FRE-1101
<u>Article 2</u>		
OCGA 24-1-103	Rulings on Evidence	FRE 103, OCGA 24-9-70
OCGA 24-1-104	Prelim Questions	FRE 104
OCGA 24-1-105	Ltd Admissibility	FRE105
OCGA 24-1-106	Remainder of Writings	FRE 106

Chapter 2 - Judicial Notice

<u>Article 1</u>		
OCGA 24-2-201	Adjudicative Facts	FRE 201
<u>Article 2</u>		
OCGA 24-2-220	Legislative Facts	24-1-4 (as amended)
OCGA 24-2-221	Jud. Notice - Ordinances	24-7-21

Chapter 3 - <Reserved>

Chapter 4 - Relevancy

OCGA 24-4-401	Relevant Evidence	FRE 401
OCGA 24-4-402	Relevant Evidence Admissible	FRE 402
OCGA 24-4-403	Balancing	FRE 403
OCGA 24-4-404	Character Evd	FRE 404
OCGA 24-4-405	Methods to Prove Character	FRE 405
OCGA 24-4-406	Habit; Routine Practice	FRE 406
OCGA 24-4-407	Subsequent Remedial Measures	FRE 407
OCGA 24-4-408	Offers to Compromise	FRE 408
OCGA 24-4-409	Payment of Medical Expenses	FRE 409
OCGA 24-4-410	Inadmissibility of Pleas, Bargaining	FRE 410
OCGA 24-4-411	Liability Insurance	FRE 411
OCGA 24-4-412	Rape Victim Shield	FRE 412, 24-2-3
OCGA 24-4-413	Similar Crimes - Sex Offenses	FRE 413
OCGA 24-4-414	Similar Crimes - Child Molest.	FRE 414
OCGA 24-4-415	Similar Crimes - Civil Sex Offense	FRE 415

OCGA 24-6-653	Procedure for Interrogation	24-9-103
OCGA 24-6-654	Interpreters Provided for Indigent Hearing Impaired	24-9-104
OCGA 24-6-655	Waiver of Right to Interpreter	24-9-105
OCGA 24-6-656	Interpreters Unable to Communicate; Maintenance of Interpreter List	24-9-106
OCGA 24-6-657	Oath of Interpreters; Taping and Filming of Hearing Impaired's Testimony	24-9-107
OCGA 24-6-658	Compensation of Interpreters	24-9-108

Chapter 7 - Opinions and Expert Testimony

OCGA 24-7-701	Opinion Testimony by Lay Witnesses	FRE 701
OCGA 24-7-702	Testimony by Experts	FRE 702
OCGA 24-7-703	Bases of Opinion Testimony by Experts	FRE 703
OCGA 24-7-704	Opinion on Ultimate Issue	FRE 704
OCGA 24-7-705	Disclosure of Facts or Data Underlying Expert Opinion	FRE 705
OCGA 24-7-706	Court Appointed Experts	FRE 706
OCGA 24-7-710	Experts in Malpractice Cases	24-9-67.1 (c),(d) and (e)

Chapter 8 - Hearsay

Article 1

OCGA 24-8-801	Definitions	FRE 801
OCGA 24-8-802	Hearsay Rule	FRE 802
OCGA 24-8-803	Hearsay Exceptions	FRE 803
OCGA 24-8-804	Hearsay Exceptions; Declarant Unavailable	FRE 804
OCGA 24-8-805	Multiple Hearsay	FRE 805
OCGA 24-8-806	Attacking and Supporting Credibility of Hearsay Declarant	FRE 806
OCGA 24-8-807	Residual Hearsay Exception	FRE 807

Article 2

OCGA 24-8-820	Statement by Child in Child Abuse Cases	24-3-16
OCGA 24-8-821	Admissions in Pleadings	24-3-30
OCGA 24-8-822	Remainder of Conversation Containing Admission	24-3-38
OCGA 24-8-823	Admissions / Confessions Received with Care	24-3-53
OCGA 24-8-824	Against Whom Confession of Conspirator Admissible	24-3-52
OCGA 24-8-825	Medical Reports in Narrative Form	24-3-18

Chapter 9 - Authentication

Article 1

OCGA 24-9-901	Requirement of Authentication of Identification	FRE 901
OCGA 24-9-902	Self-Authentication	FRE 902
OCGA 24-9-903	Subscribing Witness Testimony Unnecessary	FRE 903

Article 2

OCGA 24-9-920	Authentication of State and County Records	24-7-20
OCGA 24-9-921	Identification of Medical Bills	24-7-9
OCGA 24-9-922	Full Faith and Credit	24-7-24, 25
OCGA 24-9-923	Authentication of Videos/Photos When Witness Unavailable	24-4-48
OCGA 24-9-924	Information Obtained From GCIC computer	24-3-17(b)

Chapter 10 - Best Evidence Rule

OCGA 24-10-1001	Definitions	FRE 1001
OCGA 24-10-1002	Requirements of Original	FRE 1002
OCGA 24-10-1003	Admissibility of Duplicates	FRE 1003
OCGA 24-10-1004	Admissibility of Other Evidence of Contents	FRE 1004
OCGA 24-10-1005	Public Records	FRE 1005
OCGA 24-10-1006	Summaries	FRE 1006
OCGA 24-10-1007	Testimony of Written Admission of Party	FRE 1007
OCGA 24-10-1008	Functions of Court and Jury	FRE 1008

Chapter 11 - Establishment of Lost Records

OCGA 24-11-1 thru 24-11-30		24-8-1 thru 24-8-30
-------------------------------	--	------------------------

Chapter 12 - Medical and Other Confidential Information

OCGA 24-12-1	Medical Information from Physician, Hospital	24-9-40
OCGA 24-12-2	Confidentiality of Research Data	24-9-40.2
OCGA 24-12-3	Disclosure of Medical Records - Definitions	24-9-41
OCGA 24-12-4	Disclosure - Effect on Confidential Character	24-9-42
OCGA 24-12-5	Use of Medical Matter Disclosed	24-9-43
OCGA 24-12-6	Disclosure of Medical Records - Immunity	24-9-44
OCGA 24-12-7	Use for Educational Purposes Not Precluded	24-9-45
OCGA 24-12-8	Confidentiality of Certain Library Records	24-9-46
OCGA 24-12-9	Confidential Nature of AIDS Information	24-9-40.1
OCGA 24-12-10	Disclosure of AIDS Information	24-9-47
OCGA 24-12-11	Veterinarian Privilege	24-9-29

Chapter 13 - Securing Attendance of Witnesses

Article 1

OCGA 24-13-1
thru 24-13-7

24-10-1
thru 24-10-7

Article 2, Part 1

OCGA 24-13-20
thru 24-13-30

24-10-20
thru 24-10-29

Article 2, Part 2

OCGA 24-13-40
thru 24-13-45

24-10-40
thru 24-10-45

Article 3

OCGA 24-13-60
thru 24-13-62

24-10-60
thru 24-10-62

Article 4

OCGA 24-13-90
thru 24-13-97

24-10-90
thru 24-10-97

Article 5

OCGA 24-13-110
thru 24-13-112

24-10-110
thru 24-10-112

Article 6

OCGA 24-13-130
thru 24-13-137

24-10-130
thru 24-10-137

Article 7

OCGA 24-13-150
thru 24-13-154

24-10-150
thru 24-10-154

Chapter 14 - Proof Generally

OCGA 24-14-1 Proof Generally
thru 24-14-9

24-4-1
thru 24-4-9

OCGA 24-14-20 Presumptions and Estoppels
thru 24-14-28

24-4-20
thru 24-4-27

OCGA 24-14-40 Other Proof Issues
thru 24-14-47

24-4-40
thru 24-4-47

OCGA 24-14-60 DNA Analysis - Sex Offenders

24-4-60

thru 24-14-65

thru 24-4-65

Chapter 15 - Parol Evidence Rule

Article 1

OCGA 24-15-1 Parol Evidence Rule
thru 24-15-10

24-6-1
thru 24-6-10