

## **THE PROPOSED NEW GEORGIA RULES OF EVIDENCE A BRIEF OVERVIEW**

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In 1858, the Georgia Legislature appointed three commissioners, Richard Clark, Thomas R. 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. 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 some 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 invited comments from every segment of the practicing bar. The United States Supreme Court 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.

Since 1975, the Federal Rules have been adopted in 42 states, including all the states contiguous to Georgia. 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 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 proposed new Georgia rules are based predominantly, but not slavishly, 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.

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 below. The second change relates to accessibility and clarity. Compared with existing Georgia law, the new rules provide a clearer, simpler, more comprehensive approach to evidentiary issues. This increased accessibility and clarity will lead to greater consistency in the application of the rules in different courts and in a more economical trial process.

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.

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

A complete copy of the proposed new rules and commentary is located on the State Bar of Georgia's website.

**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).

**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.

**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).

**Business Record Exception** - Current Georgia law and the proposed rules differ in two respects. (1) The current 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) Georgia requires that a witness at trial 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.

**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.

**Hearsay** - Under current Georgia law, hearsay is "illegal" evidence and even if a party never objected to hearsay testimony at trial, the party may later attack the verdict as resting on illegal hearsay. Georgia is the only state in the country that retains this 19<sup>th</sup> century view of hearsay. The new rules would allow a fact finder to base a decision on hearsay if the no one objected to the hearsay at trial. *See*, proposed O.C.G.A. § 24-8-802.

**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 of the expert who relied on the publication 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).

**Expert Opinion Testimony** - Georgia's new rules regarding expert testimony in civil cases, passed in 2005, are based on the Federal Rules. Yet in criminal cases, we still use the old rules. The proposed rules would retain the current rules on expert testimony in civil cases and extend their application to criminal cases.

**Statements of Co-Conspirators** - 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. Georgia's law is very unusual in this respect. The proposed rule is based on the requirement at common law and carried forward in the Federal Rules that any statements admissible as a co-conspirator admission must have been in furtherance of the conspiracy. *See*, proposed O.C.G.A. §24-8-801(d)(2)(E).

**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 the declarant is unavailable and there exists corroborating circumstances that clearly indicate the trustworthiness of the statement. *See*, proposed O.C.G.A. §24-8-804(b)(3).

**Use of plea bargain discussions** - The proposed rules bar admission of statements made by the accused during plea bargain discussions with the prosecution. Existing Georgia law on this issue is not entirely clear. Georgia courts may exclude a confession as involuntary if it was induced "by the slightest hope of benefit" but not if the benefit was "collateral." 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 proposed rules clarify that only plea discussions with the prosecutor are protected. The main purpose of the new rule's 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.

**Character Witnesses** - Current Georgia law 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.

**Prior Inconsistent Statements** - Georgia follows the rule of Queen Caroline's case, requiring that a witness be shown his prior written statement or have his attention drawn to the time, place and circumstances of a prior oral 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 prior 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 exists for when the jury was exposed to external information or influence. This exception applies only in criminal, not civil cases. The proposed rules extend this exception to civil cases. *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 19<sup>th</sup> 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 or recording 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.

**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 case law has slowly recognized the admissibility 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.