Carlsons on Evidence
EVIDENTIARY PRACTICE TIPS AND POINTERS
Important Applications and Distinctions Under the Georgia and Federal Rules of Evidence
34th Annual Medical Malpractice Liability Institute
FRIDAY • NOVEMBER 2, 2018
Ritz-Carlton,
Amelia Island, Florida
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Today’s Presentation
Speaker Introductions
Carlsons on Evidence
Speaker Introductions

• **Presenters**

  • Ronald L. Carlson
    • Fuller E. Callaway Professor Emeritus, University of Georgia School of Law
    • 15 books on evidence, trial practice and criminal procedure
    • Article cited in Advisory Committee Notes of FRE’s

  • Michael Scott Carlson
    • Deputy Chief Assistant District Attorney, Cobb Judicial Circuit
    • Judge, Georgia Court Martial Review Panel
    • Successfully jury tried and Supreme Court argued murder cases under Georgia’ New Evidence Code

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Carlsons on Evidence


“...Also participating in plaintiffs' representation was Professor Ronald Carlson of Washington University in St. Louis, Missouri....but that organization requested his participation in the litigation due to his expertise with the Federal Rules of Evidence and his trial experience...A close review of those records, his role in the litigation, and the quality and nature of his work product convinces the Court that the time claimed and expended by Prof. Carlson is reasonable for a case of this type. Defendants' contention that Prof. Carlson represented a luxury on plaintiffs' trial team which defendants should not have to pay for fails to comprehend the importance and uniqueness of Prof. Carlson's actual contribution to preparation and trial.”
Carlsons on Evidence

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Today’s Program

Presentation and Materials
Carlsons on Evidence
Presentation and Materials

• Evidence Program Goals

1. Further Develop “Code Wide” Approach
2. Underscore Fundamental Principles of Interpretation
3. Analyze and Consider Specific Applications
Carlsons on Evidence
Presentation and Materials

• Will use experience, scholarship, and mock case scenarios as a vehicle to illustrate rules and cases *in context*
• Consider objections
• Materials and discussion will feature **New GRE and FRE authority**
• Where no new GA case available, focus placed on **relevant federal and related state authority**
• Using **actual quotes** from cases
• *Please hold questions until presentation is concluded*
Carlson on Evidence
Presentation and Materials

• Remain in contact with lawyers and judges for key areas of interest
• Slides and discussion will contain actual decisions
• Sometimes only advance citations are available

➤ WATCH FOR RECENT OPINIONS

• A few slides may repeat—please follow the action
We should encourage debate over what statutes, rules and cases “mean”

We should never argue over what statutes, rules and cases “say”

Therefore we focus on:

1. Using **actual quotations** from cases and language from the statutes
2. Leaving the **policy determinations** to legislatures and courts
3. “**Content heavy**” presentations
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Georgia’s New Evidence Code
Fundamental Considerations
January 1, 2013
Georgia’s new evidence code goes into effect

Numerous issues remained to be addressed

Primary Concerns

- What are fundamental changes?
- What law would apply to new provisions?
- What are the guiding principles?
3 Basic Types of GRE’s

- Federalized (vast majority)
  - No prior Georgia authority but vast federal case law
- Hybrid but leaning federal
  - No prior Georgia authority but vast federal case law
- Carried over from former code
  - Prior Georgia authority may be conflicting and may be impacted by adoption of other rules
  - In the case of “double covered,” GASCT has expressed a preference for federalized version
24-1-1/100’s: GENERAL PROVISIONS
24-2-200’s: JUDICIAL NOTICE
24-3-3’s: PAROL EVIDENCE
24-4-400’s: RELEVANT EVIDENCE AND ITS LIMITS
24-5-500’s: PRIVILEGES
24-6-600’s: WITNESSES
24-7-700’s: OPINIONS AND EXPERT TESTIMONY
24-8-800’s: HEARSAY
24-9-900’s: AUTHENTICATION AND IDENTIFICATION
24-10-1000: BEST EVIDENCE RULE
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4 Scenarios for Georgia’s New Evidence Rules

- New Evidence Rules
- No Prior Statute
- Prior Statute Replaced
- Prior Statute Modified
- Prior Statute Repeated
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Georgia’s New Evidence Code
Philosophical Upgrades
“Three rules [401, 402, and 403] provide a backdrop for Georgia's new Evidence Code...By standardizing rules concerning both the presumptive admissibility of relevant evidence and the judicial exclusion of certain otherwise admissible evidence, Rules 401, 402, and 403 overlay the entire Evidence Code, and are generally applicable to all evidence that a party seeks to present.”

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Preamble; 24-1-1; 24-4-401 to 403

• “...the Rules' pervasive bias in favor of admitting logically relevant evidence...The bias is sculpted into the key trilogy of provisions, Federal Rules of Evidence 401-03.”

• **24-4-402**

  • All relevant evidence shall be admissible, except as limited by **constitutional requirements or as otherwise provided by law or by other rules**, as prescribed pursuant to constitutional or statutory authority, applicable in the court in which the matter is pending. Evidence which is not relevant shall not be admissible.

“’All relevant evidence shall be admissible,’ unless constitutional or other legal authority renders it inadmissible.” *Redcedar, LLC v. CML-GA Social Circle, LLC*, 341 Ga. App. 110 (2017)
“Properly construed, Rule 402 abolishes uncodified exclusionary rules of evidence.”

“But the problem with Chrysler's argument is twofold: First, the ‘longstanding common law rule’ on party wealth does not apply precisely because it is a longstanding common law rule that has been abrogated by Georgia's current evidence statutes....” *Chrysler Group LLC v. Walden*, 303 Ga. 358 (2018)
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Davis Violations
Persistent Use of Improper Authority
Opponent of evidence files a motion in limine citing numerous new evidence rules that were not present in Georgia’s prior code. Proponent replies, focusing on prior Georgia authority. Opponent posits that old law deficient. Proponent responds: “I don’t see what the big deal is all about. Everybody I know has been using those motions for years.”
• “Where provisions of the new Evidence Code are borrowed from the Federal Rules of Evidence, we look to decisions of the federal appellate courts construing and applying the Federal Rules, especially the decisions of the United States Supreme Court and the Eleventh Circuit.” *Kemp v. State*, 303 Ga. 385 (2018)

• **Only** “[w]here a provision of the new Evidence Code *differs in substance* from the counterpart federal rule, as interpreted by federal courts, ... must [we] correspondingly presume that the General Assembly meant the Georgia provision to be different.” *Revere v. State*, 302 Ga. 44 (2017)
Modeling of New GRE’s

- General Provisions (1’s and 100’s): FRE based
- Judicial Notice (200’s): FRE based
- Parol Evidence Rule (300’s): Former GRE based
- Relevance (400’s): FRE based
- Privileges (500’s): Former GRE based
- Witnesses Generally (600’s): FRE based
- Expert Witnesses (700’s): FRE based (former GRE based for criminal standard)
- Hearsay (800’s): FRE based
- Authentication (900’s): FRE based
- Best Evidence (1000’s): FRE based
Georgia Supreme Court’s Resolution

- **Federalized:**
  - “…look to decisions of the federal appeals courts construing and applying the Federal Rules, especially the decisions of the Eleventh Circuit.”

- **Former Georgia:**
  - “…they may rely on Georgia decisions under the old Code.”

- **Original Creation:**
  - “…the usual principles that inform our consideration of statutory meaning.”

*State v. Frost, 297 Ga. 296 (2015)*
“Georgia lawyers do this Court no favors — and risk obtaining reversible evidence rulings from trial courts — when they fail to recognize that we are all living in a new evidence world and are required to analyze and apply the new law. It may be hard to comprehend that, when it comes to trials and hearings held after January 1, 2013, the most pertinent precedent to cite on an evidentiary issue may be a decades-old decision of the Eleventh Circuit (or even the old Fifth Circuit), instead of a week-old unanimous decision of this Court...We trust that this shortcoming will not be repeated in future cases coming to this Court.” *Davis v. State*, 299 Ga. 180 (2016)
• “To the extent the widow argues that the statements were admissible under the ‘necessity’ exception, she improperly relies on decisions that applied the former Evidence Code... Because the hearing on the executor's motion for summary judgment took place after January 1, 2013, however, the provisions of Georgia's new Evidence Code apply.”

This preamble, though not codified, is a clear instruction manual for courts trying to decipher what the new Evidence Code purports to do and what precedent to apply. Like any instructions, it is best to read them, and they must be read in order. First, the General Assembly stated that the primary aim of the new Code was to "adopt the Federal Rules of Evidence" as "interpreted by" federal appellate courts "as of January 1, 2013[.]

Second, if a conflict exists among the federal appellate courts, we look to the "decisions of the 11th Circuit."

Third, courts are to look to the "substantive law of evidence in Georgia as it existed on December 31, 2012," only when not displaced by the new code. ”State v. Almanza, 2018 Ga. LEXIS 656 (October 9, 2018)
Carlsons on Evidence
Preamble; 24-1-1

• “[a]lthough the Court of Appeals recognized the applicability of the new Georgia Evidence Code, it overlooked OCGA § 24-4-401's definition of ‘relevant evidence’ and mistakenly applied a definition applicable in cases tried prior to the new Code's effective date.” State v. Jones, 297 Ga. 156 (2015)
“This provision [Rule 707] was carried forward from former OCGA § 24-9-67 of the old Evidence Code and does not have any equivalent provision in the federal rules, and thus it is appropriate to rely on decisions under the old Code.” Watson v. State, 303 Ga. 758 (2018)
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Carlson on Evidence
Preamble; 24-1-1

• 2017 Article
  • *Davis Violations Dissected: “New” Georgia Law and the Crisis in Evidence*
  • Michael Scott Carlson and Ronald L. Carlson
  • IX John Marshall Law Journal 1
  • https://www.johnmarshall.edu/lawreview/current-volume/volume-9-number-1/
  • https://drive.google.com/file/d/0B1eA3aJ1Q2BjVFg1RjNLbnFDbm8/view
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24-1-103

Evidentiary Objections
• Proponent of evidence attempts to introduce testimony from a witness identifying a person from a surveillance video. Opponent of evidence objects, “lack of foundation and traditionally barred from evidence.” Trial judge inquires if there is further detail. Opponent rises, “We stand on our objection. That is sufficient under the new code.”
Carlsons on Evidence
24-1-1; 2; 103-106

- 24-1-1/100’s
  - 24-1-1. Purpose and construction of the rules of evidence
  - 24-1-2. Applicability of the rules of evidence
  - 101. Reserved
  - 102. Reserved
  - 103. Rulings on evidence
  - 104. Preliminary questions
  - 105. Limited admissibility
  - 106. Introduction of remaining portions of writings or recorded statements
(a) Error shall not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and:

(1) 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) In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by an offer of proof or was apparent from the context within which questions were asked.
“An issue that is not presented or ruled on by the trial court is not preserved for appellate review.”


“Because Watkins did not object to Dr. Frist's testimony, we review Watkins's claim for plain error only.”

• “...objections to the admission of evidence ... are preserved only if they are timely and state the specific ground of objection, if the specific ground was not apparent from the context...” Wilson v. Attaway, 757 F.2d 1227 (11th Cir. 1985)

• “…the substance of the evidence that Williams sought to elicit from Carson was not sufficiently apparent from the discussion at trial to preserve the issue for ordinary review.” Lupoe v. State, 300 Ga. 233 (2016)
“Motions in limine to exclude purportedly prejudicial evidence must be properly particularized so as to identify what the evidence in questions is and why the opponent believes it should be excluded.”

*U.S. v. Gulley*, 722 F.3d 901 (7th Cir. 2013)

“...under the Federal Rules of Evidence, it is no longer necessary for a party to renew an objection to evidence when the district court has definitively ruled on the party's motion in limine...Because the district court's ruling in this case was sufficiently definitive, we will consider the merits of TBW's position. *Tampa Bay Water v. HDR Eng'g, Inc.*, 731 F.3d 1171 (11th Cir. 2013)
• Particularizing Objections and Proffers
  • “Where an appellant challenges the admission of evidence, we are concerned with the sufficiency of the appellant's objection; here, however, where the appellant challenges the exclusion of evidence, we are concerned with the sufficiency of the showing that the appellant, as proponent of the evidence, made at trial.” Williams v. State, 302 Ga. 147 (2017)
Incorporating Rule Numbers

“We need not parse the exact contours of Georgiadis's argument in order to locate what he has not: the specific Federal Rule of Evidence that he contends was violated.”  

_U.S. v. Georgiadis_, 819 F.3d 4 (1st Cir. 2016)
“In denying the motions in limine to exclude Lewis's testimony regarding Watkins's statements, the trial court did not make any express factual findings, but we can infer from its denial of the motions that it implicitly found that Watkins's statements were made in the course of and in furtherance of a conspiracy...Kemp and Hogans have failed to show that these implicit factual findings are clearly wrong.” Kemp v. State, 303 Ga. 385 (2018)

  • “Thus, we conclude that the trial court did not abuse its discretion in permitting lay witnesses to give testimony identifying Glenn as one of the people in the motel surveillance video.”

  • “By using language nearly identical to Federal Rule of Evidence 701 (a), which case law shows addressed the matter at issue, the enactment of OCGA § 24-7-701 (a) was a statutory modification to the admissibility of such evidence and displaced prior precedent on the matter.”
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24-2-201

Judicial Notice
Proponent seeks to have the trial judge take judicial notice of a Google map in order to admit it into evidence. Opponent objects, “Not without someone from Google here, you don’t!”
24-2-201

• 201. Judicial notice of adjudicative facts
• 220. Judicial notice of legislative facts
• 221. Judicial notice of ordinance or resolution
(a) This Code section governs only judicial notice of adjudicative facts.

(b) A judicially noticed fact shall be a fact which is not subject to reasonable dispute in that it is either:

   (1) **Generally known** within the territorial jurisdiction of the court; or

   (2) Capable of **accurate and ready determination** by resort to sources whose accuracy cannot reasonably be questioned.
“A judicially noticed [adjudicative] fact shall be a fact which is not subject to reasonable dispute in that it is either: (1) Generally known within the territorial jurisdiction of the court; or (2) Capable of accurate and ready determination...” *McCoy v. State*, 341 Ga. App. 216 (2017)

“At the hearing on the motion, the trial court noted on the record, and the parties did not dispute, that the court reporter had significant health problems during the time period in question that affected his ability to work.” *Atlantic Geoscience, Inc. v. Phoenix Development & Land Investment, LLC*, 341 Ga. App. 81 (2017)
“This photograph was taken from Google Maps, a website that ‘is so well known and enjoys such broad use that it may have achieved a status akin to Webster's Dictionary, permitting judicial notice of the accuracy of the site itself.’... Like other courts, this Court takes judicial notice of the information displayed on Google Maps.”

“We acknowledge this undisputed fact in the Supreme Court of Georgia's opinion pursuant to OCGA § 24-2-201 (b) (2)...appellate court can take ‘judicial notice of subsequent developments in cases that are a matter of public record and are relevant to the appeal.’” Serdula v. State, 344 Ga. App. 587 (2018)
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24-4-403

*Unfair Prejudice Objection*
Prior to Proponent calling a key witness, Opponent objects, “Judge before this witness takes the stand, opposing counsel needs to prove to the court that this testimony will not be overly prejudicial.”
Carlsons on Evidence
24-4-401 to 418

• 24-4-400’s
  • 401. "Relevant evidence" defined
  • 402. Relevant evidence generally admissible; irrelevant evidence not admissible
  • 403. Exclusion of relevant evidence on the grounds of prejudice, confusion, or waste of time
  • 404. Character evidence not admissible to prove conduct; exceptions; other crimes
  • 405. Methods of proving character
  • 406. Habit; routine practice
  • 407. Subsequent remedial measures
  • 408. Compromises and offers to compromise
  • 409. Payment of medical and similar expenses
  • 410. Inadmissibility of pleas, plea discussions, and related statements
  • 411. Liability insurance
  • 412. Complainant's past sexual behavior not admissible in prosecutions for certain sexual offenses; exceptions
  • 413. Evidence of similar transaction crimes in sexual assault cases
  • 414. Evidence of similar transaction crimes in child molestation cases
  • 415. Evidence of similar acts in civil or administrative proceedings concerning sexual assault or child molestation
  • 416. Statements of sympathy in medical malpractice cases
  • 417. Evidence of similar acts in prosecutions for violations of Code Section 40-6-391
  • 418. Admissibility of criminal gang activity, disclosure
Carlsons on Evidence
24-4-401 to 403

401
Relevance

402
Presumptive Admissibility

403
Unfair Prejudice
• **24-4-401:**
  • “Regardless of how one views the language of Rule 401, however, it is clear that the relevance **standard codified therein is a liberal one.**” *State v. Jones*, 297 Ga. 156 (2015)

• **24-4-402:**
  • “**All relevant evidence shall be admissible**, except as limited by constitutional requirements or as otherwise provided by law or by other rules...” *State v. Smith*, 329 Ga. App. 646 (2014)

• **24-4-403:**
  • ““**Rule 403 is an extraordinary remedy which should be used only sparingly** since it permits the trial court to exclude concededly probative evidence.”” *Bradshaw v. State*, 296 Ga. 650 (2015)
“Rule 402, allowing the admission of relevant evidence, is the ‘keystone of the Rules of Evidence.’...Unless the opponent of the proffered evidence can point to a specific rule of exclusion, or the judge exercises discretion to exclude the evidence based on countervailing concerns pursuant to [Rule] 403, relevant evidence is admissible.” Reinhart v. E.I. Dupont de Nemours, 147 N.J. 156, 164 (1996)
Relevant evidence may be excluded if its probative value is substantiably 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.
“But in a criminal trial, inculpatory evidence is inherently prejudicial; ‘it is only when unfair prejudice substantially outweighs probative value that the rule permits exclusion.’”  

_Anglin v. State, 806 S.E.2d 573 (Ga. 2017)_
“’These words alone were unlikely to induce the jury to return a conviction based on a generalized assessment of character.’... Accordingly, we cannot say that the derogatory terms used by Smith created a risk of unfair prejudice that substantially outweighed the recording's probative value...”  *Smith v. State*, 302 Ga. 717(2017)
“The application of the [OCSA § 24-4-403] test is a matter committed principally to the discretion of the trial courts, but as we have explained before, the exclusion of evidence under [OCSA § 24-4-403] is an extraordinary remedy which should be used only sparingly. The major function of [OCSA § 24-4-403] is to exclude matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect.” Dixon v. State, 341 Ga. App. 255(2017)
“After the offering party shows that some evidence is relevant, it is the resisting party's burden to show that prejudice substantially outweighs the evidence's probative value...The resisting party likewise bears the burden of furnishing a limiting instruction once the court determines that it will admit evidence under Rule 404(b).” *Gallegos v. City of Espanola*, 2015 U.S. Dist. LEXIS 114444 (D.N.M. Mar. 3, 2015)
• “There has been no showing that the evidence would confuse the issues, mislead the jury, waste time, or be cumulative of other evidence, or that the probative value of the evidence would otherwise be ‘substantially outweighed’ by its prejudicial impact.” *State v. McPherson*, 341 Ga. App. 871 (2017)
• Error to Invoke Non-Textual Grounds
  • “The court excluded the evidence of the murder ‘out of an abundance of caution.’ Rule 403 provides a list of reasons authorizing a trial court to exclude otherwise admissible and relevant reasons. ‘An abundance of caution’ is not one of those enumerated grounds. Rule 404 (b) is a rule of inclusion and Rule 403 is an extraordinary exception to that inclusivity...The court's basis for excluding the murder was thus unsound.” State v. Atkins, S18A0770 (Ga. 2018)
Error to Apply Former Prejudice Standard

“Prior to the enactment of the new evidence code, Georgia had no direct statutory equivalent to Rule 403, but case law on the issue generally required that a trial court merely balance the probative value of evidence with its prejudicial effect without requiring that the objecting party establish substantial prejudice. **In stark contrast, the plain meaning of OCGA § 24-4-403’s text makes clear that the trial court may only exclude relevant evidence when its probative value is ‘substantially outweighed’ by one of the designated concerns.”** *Williams v. State*, 328 Ga. App. 876 (2014)
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24-5-500’s

Privilege Issues
Because a related criminal case is pending, a party refuses to respond to discovery or testify. Proponent seeks to introduce this fact in a civil proceeding. Opponent objects, stating that the right against self-incrimination cannot be used against a person in any context.
Carlsons on Evidence
24-5-501 to 510

• 24-5-500’s
  • 501. Certain communications privileged
  • 502. Communications to clergyman privileged
  • 503. Husband and wife as witnesses for and against each other in criminal proceedings
  • 504. Law enforcement officers testifying; home address
  • 505. Party or witness privilege
  • 506. Privilege against self-incrimination; testimony of accused in criminal case
  • 507. Grant of immunity; contempt
  • 508. Qualified privilege for news gathering or dissemination
  • 509. Communications between victim of family violence or sexual assault and agents providing services to such ...
  • 510. Privileged communications between law enforcement officers and peer counselors
Carlsons on Evidence
24-5-506; 24-8-824

• 24-5-506
  • (a) No person who is charged in any criminal proceeding with the commission of any criminal offense shall be compellable to give evidence for or against himself or herself.

• 24-8-824
  • To make a confession admissible, it shall have been made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury.
“We find unconvincing Loveless's argument that the privilege set out in the Fifth Amendment and in OCGA § 24-5-506 overrides the clear and well-settled requirement that, to be sufficient, an answer in a civil forfeiture proceeding...” Loveless v. State of Ga., 337 Ga. App. 250 (2016)

“And if an accused in a criminal proceeding chooses to testify, he or she shall be sworn as any other witness and, with certain exceptions, may be examined and cross-examined as any other witness.” Tran v. State, 340 Ga. App. 546 (2017)
“Anglin also argues that the warrant was improper because compelling Anglin to lift up his shirt to be photographed violated his right against self-incrimination...Assuming Anglin even preserved this ground for we previously have rejected an indistinguishable argument in another case... right against self-incrimination was not violated by requiring defendant to strip to the waist to allow police to photograph tattoos on his body.” Anglin v. State, 302 Ga. 333 (2017)
• “It is beyond dispute that the Constitution does not protect Defendant from giving non-testimonial evidence...Federal courts have therefore held that photographing a defendant's tattoos for display to the jury or requiring a defendant to reveal his tattoos to a jury does not run afoul of the Fifth Amendment.” United States v. Nixon, 2015 U.S. Dist. LEXIS 93628 (E.D. Mich. July 20, 2015)

• “Regardless of how the Government acquired the photo, however, the trial court could, if it so concluded, direct Defendant to display his scar to the jury, bypassing the photograph altogether.” United States v. Spencer, 2015 U.S. Dist. LEXIS 174240 (D. Minn. Dec. 11, 2015)
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24-6-613

Use of Prior Inconsistent Statements
Proponent of evidence attempts to impeach Opponent’s witness with a prior inconsistent statement. Opponent objects, “Judge, this was not taken under oath, so it cannot be considered substantively. Furthermore, our witness must be confronted with the time, place, persons present, and the substance of an impeaching statement before this cross can begin.”
24-6-600’s

- 601. General rule of competency
- 602. Lack of personal knowledge
- 603. Oath or affirmation
- 604. Interpreters
- 605. Judge as witness
- 606. Juror as witness
- 607. Who may impeach
- 608. Evidence of character and conduct of witness
- 609. Impeachment by evidence of conviction of a crime
- 610. Religious beliefs or opinions
- 611. Mode and order of witness interrogation and presentation
- 612. Writing used to refresh memory
- 613. Prior statements of witnesses
- 614. Calling and interrogation of witnesses by court
- 615. Exclusion of witnesses
- 616. Presence in courtroom of victim of criminal offense
• 24-6-600’s (continued)
  • 620. Credibility a jury question
  • 621. Impeachment by contradiction
  • 622. Witness's feelings and relationship to parties provable
  • 623. Treatment of witness
  • 650. State policy on hearing impaired persons
  • 651. Definitions
  • 652. Appointment of interpreters for hearing impaired persons interested in or witness at agency proceedings
  • 653. Procedure for interrogation and taking of statements from hearing impaired persons arrested for ...
  • 654. Indigent hearing impaired defendants to be provided with interpreters
  • 655. Waiver of right to interpreter
  • 656. Replacement of interpreters unable to communicate accurately with hearing impaired persons; appointment ...
  • 657. Oath of interpreters; privileged communications; taping and filming of hearing impaired persons' testimony
  • 658. Compensation of interpreters
(a) 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; provided, however, upon request the same shall be shown or disclosed to opposing counsel.

(b) Except as provided in Code Section 24-8-806, extrinsic evidence of a prior inconsistent statement by a witness shall not be admissible unless the witness is first afforded an opportunity to explain or deny the prior inconsistent statement and the opposite party is afforded an opportunity to interrogate the witness on the prior inconsistent statement or the interests of justice otherwise require. This subsection shall not apply to admissions of a party-opponent as set forth in paragraph (2) of subsection (d) of Code Section 24-8-801.
“Appellant cannot meet this test because the detective's testimony concerning Pearsall's and Zakiya's prior inconsistent statements was not hearsay. On the contrary, the detective's testimony was admissible to impeach the witnesses, or as substantive evidence.”


“*The failure of a witness to remember making a statement, like the witness's flat denial of the statement, may provide the foundation for calling another witness to prove that the statement was made.*”

“Given Gurley's **inconsistent testimony** at trial and her **convenient memory lapses** about the portions of her conversation with the police that implicated Appellant, her earlier statements were **not hearsay but rather were properly admitted as prior inconsistent statements.**” *Thompson v. State*, 2018 Ga. LEXIS 459 (June 29, 2018)
“F.R.E. 613(b) and subsequent case law interpreting that rule reflect that the strict sequencing procedure established in Queen Caroline's Case is now unnecessary under the Federal Rules of Evidence. Nevertheless...[i]t is equally clear, however, that Rule 613(b) does not supplant the traditional method of confronting a witness with his inconsistent statement prior to its introduction into evidence as the preferred method of proceeding.” *Robinson v. State*, 3 A.3d 257 (Del. 2010)

“Rule 613(b) contains no bar, beyond foundation requirements, to extrinsic evidence of prior inconsistent statements....Rule 613, largely a relaxation of the rule in The Queens Case..., specifies the foundation which must be laid for introduction of extrinsic evidence.” *U.S. v. Higa*, 55 F.3d 448 (9th Cir. 1995)
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24-4-608(b)

Dishonest Act Impeachment
Proponent cross-examines Opponent’s expert witness, “In your deposition, didn’t you admit to being disciplined in grad school falsifying your time sheets?” Opponent objects. Proponent then asks, “And, by the way, isn’t true that you advertise that in a divorce cases, you are every husband’s best friend, and you never work for wives?” Opponent objects and moves to strike as improper impeachment.
(b) Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than a conviction of a crime as provided in Code Section 24-6-609, or conduct indicative of the witness's bias toward a party may not be proved by extrinsic evidence. Such instances may however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness:

1. Concerning the witness's character for truthfulness or untruthfulness; or
2. Concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
“As for Rule 608 (b) ... with certain exceptions, ‘[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, ... may not be proved by extrinsic evidence.’ ... But such instances may, ‘in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness[ ] ... [c]oncerning the witness's character for truthfulness or untruthfulness[.]’”

“The statute also addresses the use of specific instances of conduct to attack (or support) a witness's character for truthfulness...or conduct indicative of the witness's bias toward a party’ such specific instances ‘may not be proved by extrinsic evidence.’” *Gaskin v. State*, 334 Ga. App. 758 (2015)
“Under this Rule, we have upheld, for example, cross-examination into an attorney's disbarment... into a witness's failure to disclose a prior arrest on his bar application... and into a prior finding by an Immigration Judge that the witness's testimony in a deportation proceeding was not credible... cross-examination into a defendant's alleged acts of fraud, bribery, and embezzlement.” *Hynes v. Coughlin*, 79 F.3d 285 (2d Cir. 1996)
• “However, other hospital records prepared by a nurse and introduced without objection during the trial reflect that Mrs. Dean was in her hospital room and could have been examined by Dr. Davis, had he in fact chosen to do so on August 2, and Mrs. Dean confirmed that she did not leave her hospital room that day.” *Cent. Ga. Women's Health Ctr., LLC v. Dean*, 342 Ga. App. 127 (2017)
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24-6-608; 24-6-622
Bias Impeachment
• On cross, Proponent inquires of Opponent’s expert witness about the amount of her fees and whether she advertises her services. Opponent objects as prejudicial, irrelevant, and improper impeachment.
Carlsons on Evidence
24-6-608; 622

24-6-608(b):
- Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than...conduct indicative of the witness's bias toward a party may not be proved by extrinsic evidence.

24-6-622:
- The state of a witness's feelings towards the parties and the witness's relationship to the parties may always be proved for the consideration of the jury.
“Bias is a term used in the ‘common law of evidence’ to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest. Proof of bias is almost always relevant...”

“...as a general principle, the jury is entitled to consider a witness's financial interest in a case.”


“...evidence concerning a financial incentive in the outcome of trial may be permitted on cross-examination to show witness bias.” Pandora Jewelers 1995, Inc. v. Pandora Jewelry, LLC, 2011 U.S. Dist. LEXIS 62969 (S.D. Fla. June 7, 2011)
“Kritlow has failed to point to anything in the record supporting his pure speculation that the victim's financial status motivated her to fabricate the sexual assault. A witness may not be impeached based on a wholly immaterial matter, and the victim's financial status was wholly immaterial to the issue of [Kritlow's] guilt." *Kritlow v. State*, 339 Ga. App. 353 (2016)
“The right to inquire into partiality and bias, however, is not without limits... On the record in this case, we cannot say that the trial court abused its discretion when it disallowed cross-examination of A. L. about his immigration status.” *Lucas v. State*, 303 Ga. 134 (2018)
• **Rules 401, 402, and 403 Apply**
  
  “Because the common law party-wealth rule was itself a rule of relevance, and because there is no specific exclusionary rule in the new Evidence Code carrying forward the common law's general exclusionary rule for that type of evidence, **Georgia courts must consider party-wealth evidence under the parameters of the new Evidence Code.** This is yet another example of the ‘new evidence world’ in which we live.” *Chrysler Group LLC v. Walden*, 303 Ga. 358 (2018)
Foundational Requirements

“There are similarities between bias and capacity to observe, remember, and recollect. Both are grounds for impeachment, and both may be proven by extrinsic evidence. However, before the proponent may introduce evidence under either theory, he or she must lay a foundation that establishes the legal and logical relevance of the impeaching evidence.” *U.S. v. Sojfer*, 47 M.J. 425 (C.A.A.F. 1998)
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24-7-704

Expert Opinion Parameters
Carlsons on Evidence
24-7-701 to 707

- Proponent of evidence calls expert witness and begins to inquire opinion on key issue in case. Opponent objects that no ultimate issue testimony is allowed. Proponent claims that under Georgia’s New Evidence Code, the ultimate issue objection is a “thing of the past.”
Carlsons on Evidence
24-7-701 to 707

• 24-7-700’s
  • 701. Lay witness opinion testimony
  • 702. Expert opinion testimony in civil actions; medical experts; pretrial hearings; precedential value of ...
  • 703. Bases of expert opinion testimony
  • 704. Ultimate issue opinion
  • 705. Disclosure of facts or data underlying expert opinion
  • 706. Court appointed experts
  • 707. Expert opinion testimony in criminal proceedings
(a) Except as provided in subsection (b) of this Code section, testimony in the form of an opinion or inference otherwise admissible shall not be objectionable because it embraces an ultimate issue to be decided by the trier of fact.
Because Rule 704 is modeled on the Federal Rules of Evidence, we interpret it by looking “to decisions of the federal appellate courts…” Eller v. State, 303 Ga. 373 (2018)

In addition, the testimony of an expert in the form of an opinion is not objectionable on the grounds that it embraces an ultimate issue to be decided by the trier of fact.” In the Interest of R. S. T., 345 Ga. App. 300 (2018)

The new Evidence Code eliminates the former ultimate issue rule ‘except as to certain expert witness testimony’ as set out in OCGA § 24-7-704 (b).” Percell v. State, 346 Ga. App. 219 (2018)
• “...testimony in the form of an opinion or inference otherwise admissible shall not be objectionable because it embraces an ultimate issue to be decided by the trier of fact. *State v. Cooper*, 324 Ga. App. 32 (2013)

• “However, an expert may not merely tell the jury what result to reach and may not testify to the legal implications of conduct.” *Clayton County v. Segrest*, 333 Ga. App. 85 (2015)
• “Under Federal Rule of Evidence 704, ‘[a]n expert may testify as to his opinion on an ultimate issue of fact,’ provided that he does not ‘merely tell the jury what result to reach’ or ‘testify to the legal implications of conduct.’” *U.S. v. Grzybowicz*, 747 F.3d 1296 (11th Cir. 2014)

• “...to be admissible under Rule 704 an expert's opinion on an ultimate issue must be helpful to the jury and also must be based on adequately explored legal criteria.” *Haney v. Mizell Memorial Hosp.*, 744 F.2d 1467 (11th Cir. 1984)

• “A witness may give otherwise admissible opinion testimony that affects an ultimate issue in a case unless that opinion concerns the *mens rea* of a criminal defendant.” *U.S. v. Cowan*, 2012 U.S. App. LEXIS 23687 (11th Cir. 2012)
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24-8-801

Hearsay: Self-Quotation
Proponent asks witness, “Will you please tell us what you told my client about who is at fault?” Opponent objects as hearsay.” Proponent responds, “It is not hearsay is someone is quoting themselves.”
24-8-800’s

- 801. Definitions
- 802. Hearsay rule
- 803. Hearsay rule exceptions; availability of declarant immaterial
- 804. Hearsay rule exceptions; declarant unavailable
- 805. Hearsay within hearsay
- 806. Attacking and supporting credibility of a declarant
- 807. Residual exception
- 820. Testimony as to child's description of sexual contact or physical abuse
- 821. Admissions in pleadings
- 822. Right to have whole conversation heard
- 823. Admissions and confessions received with care; no conviction on uncorroborated confession
- 824. Only voluntary confessions admissible
- 825. Confessions under spiritual exhortation, promise of secrecy, or collateral benefit admissible
- 826. Medical reports in narrative form
Hearsay: Classifications of Out-of-Court Statements

- **Admissions (801’s):** Party Opponent
- **Statements (803’s):** Non-party (available and not available)
- **Declarations (804’s):** Non-party (unavailable)
Hearsay Analysis

1. Is the evidence hearsay?
2. Is the evidence admissible for a non-hearsay purpose?
3. Is the evidence subject to an exemption?
4. Is the evidence subject to an exception?
5. Is the evidence only admissible for a limited purpose?
As used in this chapter, the term:

(a) “Statement” means:
   (1) An oral or written assertion; or
   (2) Nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) “Declarant” means a person who makes a statement.

(c) “Hearsay” means 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.
“Under the new Evidence Code, hearsay is defined as ‘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.’ OCGA § 24-8-801(c). This provision uses similar language to Federal Rule of Evidence 802 (c) (2), so we properly look to federal appellate decisions when interpreting it.” Watson v. State, 303 Ga. 758(2018)
“The fact that past out of court statements were made by a witness testifying at trial does not remove them from the reaches of the hearsay rule if they are offered to prove the truth of the matter asserted.” *U.S. v. Lewis*, 436 F.3d 939 (8th Cir. 2006)

“...a defendant's self-serving extra-judicial declarations are inadmissible unless they fall within a hearsay exception. That is, a defendant cannot get self-serving hearsay statements into evidence without first waiving the Fifth Amendment and testifying...” *Cisneros v. Paramo*, 2015 U.S. Dist. LEXIS 168978 (C.D. Cal. 2015)
“...blanket exclusion from the hearsay rule [is] only for statements by a party-opponent, not for a party's out-of-court statements offered by the party himself.”


“...prior statement by that witness ‘is pure hearsay evidence, which cannot be admitted merely to corroborate the witness, or to bolster the witness's credibility...’”

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24-8-801

• “In the absence of such an affirmative attack, any prior statement by that witness ‘is pure hearsay evidence, which cannot be admitted merely to corroborate the witness, or to bolster the witness's credibility in the eyes of the jury.’” *Silvey v. State*, 335 Ga. App. 383(2015)
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24-8-803(4)

Hearsay: Medical Diagnosis and Treatment
In a child sexual abuse case, the child was taken by her mother to the family doctor. During the examination, daughter describes abuse and identifies mother’s live-in boyfriend as the abuser. At trial, mother and daughter are unavailable. Proponent calls doctor who testifies that identity of abuser is pertinent to treatment. State then asks doctor what daughter described and who she identified. Opponent objects, “Judge, this has never been allowed in Georgia. Our ‘new’ rule is the same at the old one. This is bar complaint material!”
“The Georgia precedent upon which the Court of Appeals relied did not survive the adoption of the new Evidence Code. The Eleventh Circuit decisions that the Court of Appeals alternatively relied upon did not decide the question before us regarding the application of Rule 803 (4) in the context of child sexual abuse; the federal precedent the Court of Appeals rejected did decide that question. We apply that federal precedent and conclude that the Court of Appeals' categorical bar on the admissibility of identification under Rule 803 (4) in child sexual abuse cases was error.” *State v. Almanza*, 2018 Ga. LEXIS 656 (October 9, 2018)
“The Renville test is a straightforward but rigorous two-step test for the admissibility of hearsay statements under Federal Rule 803 (4) generally… First, "the declarant's motive in making the statement must be consistent with the purpose of promoting treatment[.]." Second, "the content of the statement must be such as is reasonably relied on by a physician in treatment or diagnosis." These two prongs ensure that the hearsay statement has a sufficient guarantee of trustworthiness while excluding statements beyond the scope of the rule.”

*State v. Almanza*, 2018 Ga. LEXIS 656 (October 9, 2018)
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24-8-803(18)

Hearsay: Leaned Treatises
During direct examination, Proponent has expert witness identify a learned treatise as authoritative. Proponent then reads pertinent quotes from text and asks expert if she agrees. Opponent objects, “This is hearsay judge. Learned treatises are only admissible for impeachment purposes.”
The following shall not be excluded by the hearsay rule, even though the declarant is available as a witness:

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-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, by other expert testimony, or by judicial notice. If admitted, the statements may be used for cross-examination of an expert witness and read into evidence but shall not be received as exhibits;
“The rationale for this exception is self-evident: so long as the authority of a treatise has been sufficiently established, the factfinder should have the benefit of expert learning on a subject, even though it is hearsay.” *Costantino v. David M. Herzog, M.D., P.C.*, 203 F.3d 164 (2nd Cir. 2000)

“The Notes of the Advisory Committee counsel a liberal interpretation of Rule 803(18), favoring admissibility...” *Allen v. Safeco Ins. Co. of America*, 782 F.2d 1517 (11th Cir. 1986)
“...Federal Rule of Evidence 803(18) exempts such statements from the rule against hearsay if: (A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and (B) the publication is established as reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.” Lyons v. Aguinaldo, 2018 U.S. Dist. LEXIS 136938 (N.D. Ill. 2018)
“Evidence must be authenticated or identified prior to being admitted... For a learned treatise to be admitted as documentary evidence, it must be established as a reliable authority by the testimony of the expert who relied upon it or to whose attention it was called... Not being a qualified expert, Ms. Ehret cannot establish the authority of this evidence as a learned treatise.”

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24-8-803(18)

• “In Georgia there is an additional barrier to the use of treatises on direct examination. The Georgia statute limits the use of learned treatises to cross-examination and impeachment.”

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24-9-901

Authentication of Social Media
Proponent of evidence attempts to introduce social media evidence in the form of Facebook postings from the opponent’s client. Proponent’s witness describes them of being in the same style, mentions personal information, and comes from the page of the opponent’s client. Opponent objects, **arguing that authentication of social media evidence requires testimony from the webmaster.**
Carlsons on Evidence
24-9-901 to 924

- 24-9-900’s
  - 901. Requirement of authentication or identification
  - 902. Self-authentication
  - 903. Subscribing witness's testimony
  - 904. Definitions
- 920. Authentication of Georgia state and county records
- 921. Identification of medical bills; expert witness unnecessary
- 922. Proof of laws, records, nonjudicial records, or books of other states, territories, or possessions; ...
- 923. Authentication of photographs, motion pictures, video recordings, and audio recordings when witness ...
- 924. Admissibility of records of Department of Driver Services; admissibility of computer transmitted records
(a) The requirement of authentication or identification as a condition precedent to admissibility shall be satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

• “We also note that prior to the enactment of Rule 901, our Supreme Court held that a handwriting exemplar can be any voluntary writing...That precedent is of limited utility, however, because prior to the enactment of the new Evidence Code, *Georgia had no comprehensive authentication statute*...Because OCGA § 24-9-901 closely tracks its federal counterpart, we look to federal appellate case law until a Georgia appellate court decides the issue under the new Code. See *State v. Almanza*, 2018 Ga. LEXIS 656 (2018).
“Addo contends that an exhibit, purporting to be a text message from Vasile to Addo with a photo of an envelope allegedly containing a copy of the lawsuit, attached to Addo's response to appellants' first motion to set aside proves that appellants received a copy of the lawsuit via mail...Simply attaching an exhibit to a motion, however, does not prove its genuineness or authenticity.” Vasile v. Addo, 341 Ga. App. 236 (2017)
“Social media has been defined as forms of electronic communications through which users create online communities to share information, ideas, personal messages, and other content (as videos)...Often these posts will include relevant evidence for a trial, including party admissions, inculpatory or exculpatory photos, or online communication between users. But there is a genuine concern that such evidence could be faked or forged, leading some courts to impose a high bar for the admissibility of such social media evidence.”

Parker v. State, 85 A.3d 682 (Del. 2014)
“Exhibits depicting online content may be authenticated by a person's testimony that he is familiar with the online content and that the exhibits are in the same format as the online content...Such testimony is sufficient to provide a rational basis for the claim that the exhibits properly represent the online content....”  

_U.S. v. Needham_, 852 F.3d 830 (8th Cir. 2017)
“Hale testified that the picture on the Facebook page was of Appellant and confirmed that his hometown was Gary, Indiana, as listed on the page. The Facebook page included the cell phone number from which Appellant had called Hale. Hale and other witnesses testified that Appellant went by the nickname “Crown” or “Crown Hood,” and the Facebook page profile name was listed as “Patrick Crown Hood Moore.” Appellant's Facebook page contained details about his life that were not public knowledge and made references to Appellant's other girlfriend and his brothers. Hale also testified that the structure and style of the comments posted on the page matched the structure and style of the texts Appellant had sent Hale. Finally, Appellant admitted to Hale that the Facebook page belonged to him. Based on this direct and circumstantial evidence, we find that the Facebook page was properly authenticated.” Moore v. State, 295 Ga. 709 (2014)
“A fact finder could well conclude that (1) Meshach Thompson sent the text messages from the name ‘Mee$h,’ and (2) Shadrach Thompson sent the messages from the name ‘$had.’ These text messages—along with other evidence presented at trial—readily establish that Meshach Thompson engaged in a conspiracy with Shadrach Thompson and Omar Wadley to possess oxycodone with intent to distribute. The text messages were attempts to set up and negotiate the purchase of oxycodone.” U.S. v. Thompson, 568 Fed. Appx. 812 (11th Cir. 2014)
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24-9-902(11) ; 24-8-803(6)

Authentication of Business Records
Proponent tenders business records with a certificate from the firm records custodian. Opponent objects, “Judge, they need a live witness to authenticate, not a piece of paper. Moreover, these contain opinions. That makes them per se inadmissible.”
The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under paragraph (6) of Code Section 24-8-803 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 such 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 shall provide written notice of such intention to all adverse parties and shall 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 such record and declaration;
24-8-803

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

(6) Records of regularly conducted activity. Unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness and subject to the provisions of Chapter 7 of this title, a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, if 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 paragraph (11) or (12) of Code Section 24-9-902 or by any other statute permitting certification....
“And, as the trial court noted, the subsection specifically applicable, OCGA § 24-9-902 (11), places no such requirement on a certificate of authenticity...we must presume that the General Assembly meant that the certificate of authenticity required through the operation of OCGA §§ 24-8-803(6) and 24-9-902(11), need not be notarized or signed under a penalty of perjury.” *Hayes v. State*, 298 Ga. 98 (2015)
• “An ‘otherwise qualified witness’ may lay the foundation for records' introduction despite lacking personal knowledge of the preparation of the records, but he or she must be familiar with the creation and record keeping procedures of the organization in order to establish the records' trustworthiness.” *Jones v. State*, 345 Ga. App. 14 (2018)
“[the federal courts] interpret the term ‘qualified witness’ [in the similar federal rule] broadly, requiring only someone familiar with the creation and maintenance of the records. An ‘otherwise qualified witness’ may lay the foundation for records' introduction despite lacking personal knowledge of the preparation of the records, but he or she must be familiar with the creation and record keeping procedures of the organization in order to establish the records' trustworthiness.” Jones v. State, 345 Ga. App. 14 (2018)
“... the advisory committee note to the 2014 amendments plainly indicates that a blanket, unspecific objection...is not sufficient...Clearly, however, the opponent bears the burden of articulating some reason for objecting to authenticity. The rules and advisory committee notes do not expressly state that such a showing must be made in advance of trial, but a key purpose of Rule 803(6) is to relieve the proponent of the need to produce custodians as witnesses at trial. The rationale of the rule would be undermined if an opponent of a record were permitted to wait until trial to state its grounds for challenging the record.” U.S. v. Palin, 98 Fed. R. Evid. Serv. 704 (W.D. Va. 2015)
“The computer-generated inspection report, which reflects the date of the incident and was printed the day after the incident, indicates the time of each inspection stop during each hourly inspection, the identity of the employee, the number and location of the sensors, and the condition of the inspected areas...The obvious purpose of the monitoring system was to contemporaneously document compliance with the store's inspection procedure. **Nothing about the computer report suggests any lack of trustworthiness, and the co-manager's affidavit sufficiently authenticated the inspection report.**” *Johnson v. All American Quality Foods, Inc.*, 340 Ga. App. 664 (2017)
And those courts have held that hospital records, including medical opinions, are ... admitted under [Federal Rule of Evidence 803 (6)], which expressly permits ‘opinions’ and ‘diagnoses.’ Given this construction of Federal Rule of Evidence 803 (6), the fact that OCGA § 24-8-803 (6) is nearly identically worded, and, as previously noted, the fact that these records were made to facilitate Samuels's treatment and not in anticipation of prosecution, the trial court did not err in admitting the hospital records under OCGA § 24-8-803 (6).” Samuels v. State, 335 Ga. App. 819 (2016)
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24-10-1006

*Best Evidence Rule: Summaries*
Proponent introduces a chart summarizing hospital records to assist the jury in understanding the raw notes and entries. Opponent objects under the best evidence rule.
Carlsons on Evidence
24-10-1001 to 1008

• 24-10-1000’s
  • 1001. Definitions
  • 1002. Requirement of original
  • 1003. Admissibility of duplicates
  • 1004. Admissibility of other evidence of contents of a writing, recording, or photograph
  • 1005. Public records
  • 1006. Summaries
  • 1007. Testimony or written admission of party
  • 1008. Functions of court and jury
• **24-10-1006**

  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 the contents of such writings, recordings, or photographs be produced in court.
Best Evidence Rule Federalized

“Our Supreme Court has emphasized that, when a provision of the new Evidence Code has been adopted from the Federal Rules of Evidence, we must consider the meaning of that provision by looking to ‘the decisions of the federal appeals courts construing and applying the Federal Rules, especially the decisions of the Eleventh Circuit.” Patch v. State, 337 Ga. App. 233 (2016)
“Federal Rule of Evidence 1006 allows parties to use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court...To comply with this Rule, therefore, a chart summarizing evidence must be an accurate compilation of the voluminous records sought to be summarized. Moreover, the records summarized must otherwise be admissible in evidence...Thus, summary exhibits under Rule 1006 function as a surrogate for voluminous writings that are otherwise admissible.” Krakauer v. Dish Network L.L.C., 2016 U.S. Dist. LEXIS 160512 (M.D.N.C. Sept. 19, 2016)
“Arguably, the requirement that the underlying records supporting that summary were made available for examination or copying, or both, by other parties at a reasonable time and place has been met. As acknowledged by D'Agnese, neither party conducted any discovery in this case. D'Agnese cannot complain that documents were not available to him if he never asked for them...However, Wells Fargo offered no evidence — and has made no argument — that the underlying records are too voluminous to be examined in court conveniently, a clear requirement under the text of the rule...This is a necessary precondition for admission of a document as a summary.” D'Agnese v. Wells Fargo Bank, N.A., 335 Ga. App. (2016)
“Rule 1006 of the Federal Rules of Evidence permits a proponent to use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court… The government introduced a chart containing the information that Special Agent O'Donnell gathered during his investigation of the 11 images that rezchub61 uploaded to the boy2kid group…We find no reversible error…” *U.S. v. Needham*, 852 F.3d 830 (8th Cir. 2017)
“...the party desiring to introduce voluminous material in summary form must make ‘[t]he originals, or duplicates, ... available for examination or copying, or both, by other parties at a reasonable time and place’...this requirement must be satisfied ‘prior to the admission of the summary’...” Tafel v. Lion Antique Cars & Invs., Inc., 297 Ga. 334 (2015)
“To qualify under Evidence Rule 1006, an evidence summary must fairly represent and be taken from underlying documentary proof which is too voluminous for convenient in-court examination, and [it] must be accurate and nonprejudicial... {

Rule 1006 summaries can be brought into the deliberation room...

United States v. Whitfield, 663 Fed. Appx. 400 (6th Cir. 2016)
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Today’s Presentation
Review
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Review

• Evidence Program Goals

1. Further Develop “Code Wide” Approach

2. Underscore Fundamental Principles of Interpretation

3. Analyze and Consider Specific Applications
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  (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
  
  (2) the nature of the copyrighted work;
  
  (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
  
  (4) the effect of the use upon the potential market for or value of the copyrighted work.

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