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Georgia's New Evidence Code - An Overview

Paul S. Milich
pmillich@gsu.edu

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GEORGIA'S NEW EVIDENCE CODE – AN OVERVIEW

Paul S. Milich[1]

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On May 3, 2011, Governor Nathan Deal signed into law House Bill 24 (HB 24) bringing a new set of evidence rules to the State of Georgia.[2] The new rules[3] will go into effect on January 1, 2013. The author of this article was the Reporter for the State Bar Evidence Study Committee when new rules were first proposed back in the mid-1980s, and again throughout the recent, successful effort to reform the rules. Part I of this article will give a brief history of the twenty-six-year effort to bring new evidence rules to Georgia. Part II will provide a structural overview of the new rules. Part III will then describe thirty-eight significant changes that judges and trial lawyers will find in the new rules. Finally, Part IV will mention a few evidentiary issues that still need attention.

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1. Professor of Law and Director of the Litigation Program, Georgia State University, College of Law. Professor Milich was the Reporter for the State Bar of Georgia Evidence Study Committee that proposed the new rules of evidence Law. Professor Milich was the Reporter for the State Bar of Georgia Evidence Study Committee that proposed the new rules of evidence.

2. 2011 Ga. Laws 52 (to be codified in GA. CODE ANN.).

3. For the purposes of this article, "new rules" refers to the rule that will go into effect January 1, 2013. "Current rules" refers to the rules in effect prior to January 1, 2013.

I. A BRIEF HISTORY – A LONG AND WINDING ROAD

Georgia's current rules of evidence are mostly contained in Title 24, and most of Title 24 is based on the Code of 1863. 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.[4] 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 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.

Although a few rules were added or changed over the years, the core of Title 24 remains a product of nineteenth century views on trial procedure. To state that these antiquated rules poorly address the needs and realities of twenty-first century courtrooms is an understatement.[5] In 1975, Congress passed the Federal Rules of Evidence and this inspired many states to modernize their own rules. By 1985, more than thirty states had adopted new rules of evidence based on the Federal Rules.[6]

In 1985, the Board of Governors of the State Bar of Georgia "approved in principle" a proposal to study whether Georgia should adopt new rules of evidence based more or less on the Federal Rules of Evidence. In 1986, Robert Brinson, the president of the State Bar,

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4. Richard H. Clark, *The History of the First Georgia Code*, *in* REPORT OF THE SEVENTH ANNUAL MEETING OF THE GEORGIA BAR ASSOCIATION, 144 (1890).

5. *See* PAUL S. MILICH, GEORGIA RULES OF EVIDENCE § 1.1, at 1–3 (2011–2012 ed. 2011).

6. That number has since grown. Georgia is the forty-fourth state to adopt new rules based on the Federal Rules of Evidence. 6 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE ch. T, notes (Joseph M. McLaughlin ed., 2d ed. 2011) (listing forty-two of the states). The forty-third state, Illinois, adopted new rules in late 2010. *See* Chris Bonjean, *Supreme Court Approves Illinois Rules of Evidence*, ILL. ST. B. ASS'N (Sept. 27, 2010), http://iln.isba.org/2010/09/27/supreme-court-approves-illinois-rules-of-evidence.

appointed Frank C. Jones chairman of the Evidence Study Committee. The committee's mission was to explore reform of Georgia's old evidence code. The committee undertook an intensive review of the differences between the Federal Rules and Georgia's rules.

In 1987, the General Assembly adopted a joint resolution encouraging the study of Georgia's evidence rules. In 1988, the State Bar Evidence Study Committee completed its report to the Bar with a full draft of the proposed new rules. The Board of Governors approved the new rules and they were introduced, with the State Bar's support, in the 1989 legislative session.

The proposed new rules were warmly received in the Senate where then-Senator Nathan Deal sponsored them. They passed the Senate twice, unanimously in 1990, but with a few negative votes in 1991. The reception in the House, however, was less warm. Speaker Tom Murphy, a trial lawyer, was initially ambivalent about adopting new evidence rules. With his characteristic humor, he told this author that he was an old dinosaur and that old dinosaurs don't like to learn new tricks. After numerous efforts to convince him that the new rules were right for Georgia, the Speaker told Chairman Jones and this author, "Georgia will someday have new rules of evidence—just not while I am Speaker." The proposed new rules of evidence were never scheduled for a vote in the House Judiciary Committee.

Taking the Speaker at his word, the State Bar backed off the project until 2002 when Speaker Murphy was defeated in his bid for reelection. State Bar President Bill Barwick reactivated the Evidence Study Committee in 2003 with Ray Persons as chair and Thomas M. Byrne as vice chair.[7] The committee produced a detailed analysis and draft of the proposed new rules in 2005, but progress on the political front faltered as the Bar received mixed messages from key legislators as to their appetite for undertaking evidence reform.

In 2008, the State Bar Board of Governors approved the new rules. The Chair of the House Judiciary Committee, Wendell Willard, welcomed the proposal to advance new rules with one important

7. Thomas Byrne eventually succeeded Ray Persons as chair in 2009.

proviso: the new rules could not attempt to alter any of the policies that were part of the 2005 tort reform efforts. A few parts of the State Bar's proposal that addressed areas affected by the 2005 tort reform were withdrawn.[8]

In the summer of 2008, a Joint House and Senate Legislative Study Committee, chaired by Representative Wendell Willard and assisted by members of the State Bar Evidence Study Committee, met in fourteen sessions that undertook a line-by-line examination of the proposed rules. These sessions were open to the public and included input from a wide variety of legal and nonlegal organizations. This exhaustive review resulted in House Bill 24 (HB 24), introduced in the 2009 session.

It is difficult to get trial lawyers from so many different interest groups to agree on a wide-ranging set of evidence rules. One of the great advantages of a unified state bar is its ability to bring together all of these varied, and at times antagonistic, interests into constructive dialog. Personal injury lawyers argue with insurance defense lawyers; creditors' rights advocates fence with debtors' rights attorneys; prosecutors duel with criminal defense lawyers; and so on. The evidence proposal exposed generational differences as well. Some older trial lawyers, particularly those who practice rarely, if at all, in federal courts, naturally were not thrilled at the prospect of having to learn new evidence rules. Most younger litigators, on the other hand, were taught the Federal Rules in law school and were impatient for Georgia to adopt the new rules. Almost all of these differences were ironed out in the slow and steady course of negotiations, education, and compromise. But in 2009, it was apparent that one group was not yet convinced—Georgia prosecutors.

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8. The State Bar's proposal would have provided some procedural guidance for the handling of *Daubert* motions and would have extended *Daubert* to criminal, as well as civil cases. *See* EVIDENCE STUDY COMM., STATE BAR OF GA., PROPOSED NEW RULES OF EVIDENCE 76–80 (2005), *available at* http://www.gabar.org/public/pdf/news/proposed_new_evidence_rules.pdf [hereinafter EVIDENCE STUDY]. The State Bar proposal also would have amended the "medical apology" statute, GA. CODE ANN. § 24-3-37.1(c) (2010), to delete the exclusion of a defendant's admission of "mistake" or "error." *Id.* at 49–50.

Of all the trial lawyers in Georgia, prosecutors have the least experience in federal courtrooms. For many prosecutors, particularly the more senior ones, the Federal Rules of Evidence represented unknown territory. It took the patient efforts of a handful of highly respected, forward-looking prosecutors to convince their brothers and sisters that there was more to like than to dislike, more to embrace than to fear, in the proposed new rules. After further negotiations and some amendments to the proposal, the prosecutors withdrew their opposition to the new rules in March of 2010. HB 24 passed the House by a vote of 150–12. Time ran out in the Senate, however, as HB 24 was voted favorably out of the Senate Judiciary Committee but died in the Rules Committee.

As the 2011 session began, it appeared that the stars were finally aligned in favor of passing the new Georgia Rules of Evidence. All organized opposition was gone. Speaker David Ralston, one of the original sponsors of HB 24, was supportive. The new Chair of the Senate Judiciary Committee, Bill Hamrick, also was supportive. The new Governor, Nathan Deal, had supported the evidence reform when he was a senator more than twenty years earlier and reaffirmed his support for the latest effort. The Council of Superior Court Judges came out in favor of the bill and the State Bar was pushing harder than ever to get the bill passed. On February 28, 2011, the House voted 162–5 in favor of HB 24. The Senate passed the bill on the last day of the session, by a vote of 50–3.

One of the fears going into the legislative process was that the Bar's proposal would be carved up by amendments and distorted into something worse than no new rules at all. Thanks mainly to the resolute efforts of House Judiciary Committee Chairman Wendell Willard, this did not happen. Although there were compromises along the way, the core integrity of the rules—as proposed by the State Bar—remained.[9]

9. For more information regarding the history behind the Georgia Evidence Code, see generally MILICH, *supra* note 5, § 1:1.

II. A STRUCTURAL OVERVIEW OF THE NEW EVIDENCE CODE

Current Title 24 is completely replaced by the new rules. Many stray evidence provisions from other titles of the Georgia Code have been moved into the new Title 24, others have been stricken. So the first benefit of the new Code is accessibility—nearly all pertinent evidence rules are now contained in the new Title 24.

The new rules are based on the Federal Rules of Evidence with a few changes to address known problems with the current Federal Rules[10] or to retain particularly desirable Georgia policies. For example, the wide-open cross-examination rule is retained,[11] as is the *Gibbons* rule that makes all prior inconsistent statements of testifying witnesses admissible as substantive evidence.[12]

The numbering of the new rules is based on the Federal Rules. The new citation will first identify the Georgia Title (24), then the Federal Rule of Evidence Article (e.g., 8 for Hearsay), and then the Federal Rule number. For example, the new cite to Georgia's business record exception is 24-8-803(6). The new cite to Georgia's rule on impeachment by prior conviction is 24-6-609.

Section I of HB 24 states:

> It is the intent of the General Assembly in enacting this Act to adopt the Federal Rules of Evidence, as interpreted by the Supreme Court of the United States and the United States circuit courts of appeal as of January 1, 2013, to the extent that such interpretation is consistent with the Constitution of Georgia. Where conflicts were found to exist among the decisions of the various circuit courts of appeal interpreting the federal rules of evidence, the General Assembly considered the decisions of the 11th Circuit Court of Appeals.[13] It is the intent of the General

10. *See* discussion *infra* Part III.
11. GA. CODE ANN. § 24-6-611(b) (effective Jan. 1, 2013).
12. Gibbons v. State, 286 S.E.2d 717 (Ga. 1982).
13. The legislators were mindful that they could not dictate the legal sources that courts must use in interpreting and applying the rules of evidence because of the separation of powers issues that such a dictation would entail. *See* Mason v. Home Depot U.S.A., Inc., 658 S.E.2d 603, 608–10 (Ga. 2008).

> Assembly to revise, modernize, and reenact the general laws of this state relating to evidence while adopting, in large measure, the Federal Rules of Evidence. The General Assembly is cognizant that there are many issues regarding evidence that are not covered by the Federal Rules of Evidence and in those situations the former provisions of Title 24 have been retained. Unless displaced by the particular provisions of this Act, the General Assembly intends that the substantive law of evidence in Georgia as it existed on December 31, 2012, be retained.[14]

Among the Georgia rules of evidence that are not significantly changed by HB 24 are the following:

— Evidentiary Privileges (Attorney-Client, Psychotherapist-Patient, Accountant Client, Both Marital Privileges, News Gatherer Privilege, Clergy Privilege, Informant Privilege, Self-Incrimination Privileges, Medical Records and Confidences Protections, Work Product Protections)[15]

— Evidentiary Presumptions in Civil and Criminal Cases[16]

— Rape Victim Shield Statute[17]

— Admission of Accused's Prior Similar Sex Offenses in Sex Crime Cases[18]

— Child Competency to Testify in Abuse Cases[19]

— Admission of a Child's Statements Reporting Abuse[20]

— Admission of Subsequent Remedial Measures in Product Liability Cases[21]

— Inadmissibility of Liability Insurance, Collateral Benefits[22]

— "Apology Statute" in Medical Malpractice Cases[23]

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14. H.R. 24, 151st Gen. Assemb., Reg. Sess. (Ga. 2009), *available at* http://www1.legis.ga.gov/legis/2011_12/fulltext/hb24.htmhttp://www1.legis.ga.gov/legis/2011_12/fulltext/hb24.htm.
15. *See* MILICH, *supra* note 5, Part 6: Evidentiary Privileges.
16. *See id*, pt. 5.
17. *See id*, § 11:6.
18. *See id*, § 11:13.
19. *See id*, § 12:2.
20. *See id*, § 19:31.
21. *See* MILICH, *supra* note 5, § 18:6.
22. *See id*, § 9:3.

— *Daubert* Applies in Civil Cases but Not Criminal Cases[24]
— Judicial Notice[25]
— Sequestration of Witnesses[26]
— Lay Opinion Rules[27]
— Rules for Proving Value[28]
— Rule of Completeness[29]
— Continuing Witness Rule[30]
— Wide Open Cross-Examination Rule[31]
— Character Rule in Civil Cases[32]
— Rules Regarding Demonstrative Evidence[33]
— Proving Chain of Custody[34]
— Rules Regarding Use of Polygraph Evidence[35]
— Rules Regarding Use of Hypnotically Refreshed Recollections[36]
— Rules Regarding Out-of-Court Identifications of the Accused[37]
— Impeachment by Prior Conviction[38]
— Distinction Between Offers of Direct and Collateral Benefits in Evaluating Confessions[39]
— "Silent Witness" Rule (Admissibility of Automated Video Recordings)[40]
— Basic Definition of Hearsay[41]

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23. *See id*, § 18:7.
24. *See id*, § 15:9.
25. *See id*, § 4:2.
26. *See id*, § 13:6.
27. *See* MILICH, *supra* note 5, § 15:2.
28. *See id*, § 15:11.
29. *See id*, §§ 6:3, 19:8.
30. *See id*, § 19:8.
31. *See id*, § 13:3.
32. *See id*, § 11:9.
33. *See* MILICH, *supra* note 5, §§ 10:1–4.
34. *See id*, § 7:1.
35. *See id*, § 15:10.
36. *See id*, § 12:6.
37. *See id*, § 17:8.
38. *See id*, § 14:4.
39. *See* MILICH, *supra* note 5, § 18:8.
40. *See id*, § 7:3.
41. *See id*, § 16:5.

— Rules Regarding Use of Prior Consistent Statements[42]

— Personal Admission Rule[43]

— Hearsay Exceptions for Past Recollection Recorded, Statements for Medical Diagnosis or Treatment, Medical Narratives, Reputation Evidence, Former Testimony, Deposition Testimony, Dying Declarations, Necessity Exception (though pre-trial notice required).[44]

III. A BRIEF OVERVIEW OF THIRTY-EIGHT SIGNIFICANT CHANGES WROUGHT BY THE NEW RULES

The following overview is organized in three sections: General Rules Applying to Both Civil and Criminal Trials, Rules Relating Only to Criminal Trials, and Rules Relating Only to Civil Trials.

(A) General Rules Applying to Both Civil and Criminal Trials

(1) *Specific Directions for Making Evidence Rulings*—There currently are no Georgia statutes that spell out how the trial court is to approach evidence issues. While most judges have little problem navigating such issues in most cases, the addition of uniform, specific directions makes it easier for both lawyers and judges to work through preliminary matters.

New sections 24-1-104(a) and (b) clarify the roles of the judge and the jury in preliminary questions of fact. Currently, Georgia juries are instructed to determine whether evidence is admissible under a host of situations.[45] The new rules assign these decisions, with few exceptions, solely to the trial judge.[46] The judge may consider any non-privileged evidence in making these preliminary determinations and the court uses a preponderance of the evidence standard in

42. *See id*, § 17:15.
43. *See id*, § 18:3.
44. *See id*, ch. 19.
45. *See* MILICH, *supra* note 5, § 3.7.
46. 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 subsection (b) of this Code section.

GA. CODE ANN. § 24-1-104(a) (effective Jan. 1, 2013).

considering whether the preliminary facts have been proven.[47] For example, before admitting a document under the business record exception, the judge must determine whether the record was made in the ordinary course of business. The judge may consider any non-privileged evidence, including hearsay, in making this determination and decide whether the proponent has shown, by a preponderance of the evidence that the record was made in the ordinary course of business.

When the evidence rule in question is not technical in nature (like the business record exception) but goes to the relevance of the underlying evidence, the trial judge takes a different approach that preserves the ultimate issue for the jury. For example, if the substance seized from the defendant is not in fact cocaine, it is irrelevant in a trial for possession of that illegal drug. Where the relevance of evidence depends upon a preliminary question of fact, the judge must admit the evidence if a reasonable jury could find that the preliminary fact is proven.[48] In making this determination, the judge considers only such evidence as the jury will hear at the trial.

(2) *Broader Application of "Plain Error" Review*—Currently, "plain error" review is limited in Georgia to capital cases and allegations that the trial judge improperly commented on the evidence in a jury trial,[49] though some court of appeals panels have applied it more broadly.[50] The new rules codify the basic requirement that a party must object to a trial court ruling in order to preserve

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47. In making its determination, the court shall not be bound by the rules of evidence except those with respect to privileges. Preliminary questions shall be resolved by a preponderance of the evidence standard.

Id. This last sentence of subsection (a) was added to the language of 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, 175–76 (1987).

48. 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.

GA. CODE ANN. § 24-1-104(b) (effective Jan. 1, 2013). This is consistent with current Georgia law which views most authentication issues as jury issues and the judge should admit the evidence for jury consideration if it is legally sufficient to support a jury finding that it is what the proponent claims it to be. *See* Jones v. State, 401 S.E.2d 322, 323 (Ga. Ct. App. 1991).

49. Paul v. State, 537 S.E.2d 58, 61 (Ga. 2000).

50. *See, e.g.*, *In re* M.F., 623 S.E.2d 235, 236 (2005). *But see* Delgado v. State, 651 S.E.2d 201, 206 (Ga. Ct. App. 2007) (deferring to Supreme Court's limitation on plain error review).

error,[51] but clarifies that this does not prevent the appellate courts from considering plain error in all instances.[52] The standard for what constitutes plain error was not changed. Georgia courts have defined it as error "so clearly erroneous as to result in a likelihood of a grave miscarriage of justice or which seriously affects the fairness, integrity or public reputation of a judicial proceeding."[53]

(3) *Clarifies the "Balancing Test"*—Although Georgia courts have recognized the power of a trial judge to exclude relevant evidence when its probative value is outweighed by unfair prejudicial effects, our courts have described the balancing test inconsistently. Some cases state that the court may exclude the evidence only if the unfair prejudicial effects "substantially outweigh" the probative value, while many other cases do not include the word "substantially" and permit exclusion if the prejudice simply outweighs the probative value of the evidence.[54] The new rules adopt the language of Federal Rule 403 that the prejudicial effects must substantially outweigh the probative value.[55]

(4) *Definition of Hearsay*—Georgia's current definition of hearsay[56] and the federal definition[57] (adopted by the new rules)

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51. 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.

GA. CODE ANN. § 24-1-103(a) (effective Jan. 1, 2013).

52. Nothing in this Code section shall preclude a court from taking notice of plain errors affecting substantial rights although such errors were not brought to the attention of the court.

Id. § 24-1-103(d).

53. Thorne v. State, 542 S.E.2d 157, 159 (Ga. Ct. App. 2000) (citation omitted); *see* United States v. Rodriguez, 398 F.3d 1291, 1298–99 (11th Cir. 2005).

54. *See* MILICH, *supra* note 5, § 6.4, at 110 n.1 (citing cases).

55. 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.

GA. CODE ANN. § 24-4-403 (effective Jan. 1, 2013).

56. 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.

GA. CODE ANN. § 24-3-1 (2010).

57. *Compare* FED. R. EVID. 801(c) ("'Hearsay' is a statement, other than one made by the declarant

serve much the same function. The main difference is that Georgia's current definition does not include the out-of-court statements of a testifying witness.[58] This makes more sense than the federal approach. The primary problem with hearsay is the inability to cross-examine the hearsay declarant, to raise questions that could help the trier of fact determine if the declarant was lying or mistaken when the statement was made.[59] If the hearsay declarant is on the stand and available for cross-examination, these problems are not present and the witness's prior out-of-court statements should be admissible if they are relevant and not merely cumulative of the witness's in-court testimony. Such statements are relevant when they are prior inconsistent statements of the witness or prior consistent statements that rebut an attack on the witness's credibility.[60]

Georgia's new rules retain Georgia's current approach to a testifying witness's prior out-of-court statements. Such statements are not hearsay.[61] Normally, such statements are inadmissible, not because they are *hearsay*, but because they are cumulative and improper bolstering of the witness's in-court testimony.[62] If the

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while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."), *with* GA. CODE ANN. § 24-8-801(c) (effective Jan. 1, 2013) ("'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.").

58. *See, e.g.*, Carroll v. State, 408 S.E.2d 412, 413 (Ga. 1991) ("In *Cuzzort*, we held that the concerns of the rule against hearsay are satisfied where the witness whose veracity is at issue is present at trial, under oath, and subject to cross-examination."). In *Bowers v. State*, a defendant claimed that the witness's testimony about her own prior out-of-court statements was hearsay and the court disagreed, stating: "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. Here, the witness was the declarant. . . . Her statements were not dependent upon the competency and veracity of other persons."). Bowers v. State, 526 S.E.2d 163, 166 (Ga. Ct. App. 1999) (citation omitted) (internal quotation marks omitted).

59. *See* MILICH, *supra* note 5, § 16.4.

60. *See* MILICH, *supra* note 5, §§ 16.5, 17.14, 17.16.

61. An out-of-court statement shall not be 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 otherwise admissible under this chapter.

GA. CODE ANN. § 24-8-801(d)(1)(A) (effective Jan. 1, 2013).

62. *See* Parker v. State, 290 S.E.2d 518, 521 (Ga. Ct. App. 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

witness's prior out-of-court statements are admissible as prior inconsistent statements to impeach him or as prior consistent statements to rehabilitate his credibility after attack, then they are admissible on that basis without regard to the hearsay rule.

(5) *Self-Serving Statement Rule Retired*—Under current Georgia law, an out-of-court statement is inadmissible if deemed "self-serving," that is, if the statement is "of benefit to or in the interest of the one who made it . . . and does not include testimony which he gives as a witness."[63] This is a rather antiquated rule that originated at a time when parties were deemed incompetent to testify. This rule prevented them from circumventing that incompetency by having witnesses offer the parties' out-of-court, self-serving statements.[64] Since it really is nothing more than an application of the hearsay rule, it is no longer needed.[65]

(6) *Hearsay No Longer "Illegal" Evidence*—Under current Georgia law, hearsay is "illegal" evidence without probative value, and even if admitted without objection, cannot sustain a finding or verdict.[66] Georgia is the only jurisdiction in the United States that still deems hearsay illegal evidence.[67] The rule is little more than a trap for the unwary and an incentive to sandbag.[68] The new rules specifically state: "Hearsay shall not be admissible except as provided by this article; provided, however, that if a party does not properly object to hearsay, the objection shall be deemed waived, and the hearsay evidence shall be legal evidence and admissible."[69]

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proves its truth is contrary to common observation and experience that a falsehood may be repeated as often as the truth.'" (quoting 4 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1124, at 258 (James H. Chadbourn ed., 1976))); *see also* Boyt v. State, 649 S.E.2d 589, 592 (Ga. Ct. App. 2007).

63. Ga. Ports Auth. v. Mitsubishi Int'l Corp., 274 S.E.2d 699, 702 (Ga. Ct. App. 1980).

64. *See* 1 GEORGE E. DIX ET AL., MCCORMICK ON EVIDENCE § 270 (Kenneth S. Broun ed., 6th ed. 2006) [hereinafter MCCORMICK ON EVIDENCE].

65. Chrysler Motor Corp. v. Davis, 173 S.E.2d 691, 693 (Ga. 1982).

66. *See* Woodruff v. Woodruff, 531 S.E.2d 714, 716 (Ga. 2000); Cabrera v. State, 694 S.E.2d 720, 723–24 (Ga. Ct. App. 2010).

67. *See* MILICH, *supra* note 5, § 16.7.

68. *See, e.g.*, Patterson v. State, 650 S.E.2d 770, 774 (Ga. Ct. App. 2007); Anton Int'l Corp. v. Williams-Russell & Johnson, Inc., 377 S.E.2d 688, 689 (Ga. Ct. App. 1989); *see also* Roebuck v. State, 586 S.E.2d 651, 659, 660 (Ga. 2003) (Fletcher, C.J., concurring) ("[W]e should overrule our prior cases holding that hearsay has no probative value even when admitted without objection.").

69. GA. CODE ANN. § 24-8-802 (effective Jan. 1, 2013).

(7) *The Term "Original Evidence" Retired*—Georgia's nineteenth century evidence statutes use the term "original evidence" to refer to out-of-court statements that are offered for a nonhearsay purpose.[70] 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 the arcane terminology in this area.[71] Adopting the federal definition of hearsay introduces a more modern and descriptive vocabulary for distinguishing hearsay from nonhearsay. Such widely used and familiar terms as "effect on hearer" and "verbal act" replace "original evidence." In the end, the goal is the same under the old and new rules: To distinguish the use of statements that depend upon the credibility of the out-of-court declarant (hearsay) from statements that are relevant for the mere fact that they were said (nonhearsay).

(8) *Res Gestae Retired*—The much-maligned doctrine of "res gestae" is finally put to rest.[72] As Professor Morgan wrote nearly a hundred years ago: "The marvelous capacity of a Latin phrase to serve as a substitute for reasoning, and the confusion of thought inevitably accompanying the use of inaccurate terminology, are no where better illustrated than in the decisions dealing with the admissibility of evidence as '*res gestae*.'"[73]

As a hearsay exception, the problem with res gestae is its vagueness, its lack of direction. Too often, the term is invoked more as a "shibboleth" than as a product of analysis or reasoning.[74] As one

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70. 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.

GA. CODE ANN. § 24-3-2 (2010).

71. *See, e.g.*, White Missionary Baptist Church v. Trustees of First Baptist Church of White, 492 S.E.2d 661, 669 (Ga, 1997); Teague v. State, 314 S.E.2d 910, 910–12 (Ga. 1984); *see also* MILICH, *supra* note 5, §§ 17.1–.6.

72. 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.

GA. CODE ANN. § 24-3-3 (2010).

73. Edmund M. Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229, 229 (1922).

74. *See* 6 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1745, at 191–92 (James H. Chadbourn ed., 1976) ("There has been such a confounding of ideas, and such a profuse and

prominent Georgia trial lawyer explained to me years ago: "Res gestae is very simple. If the judge likes you, it gets in. If the judge doesn't like you, it doesn't get in."

The new rules replace res gestae with three descriptive hearsay exceptions that have worked well in federal and state courts for the past thirty-plus years: 803(1), (2), and (3).

Subsection (1) admits statements that are contemporaneous, or nearly so, with the declarant's perception of the events or conditions described.[75] Subsection (2), the excited utterance exception, admits statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."[76]

Subsection (3) admits statements of the declarant's then-existing mental, emotional, or physical condition when relevant to some issue in the case.[77] 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.[78]

Subsection (3) also 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

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indiscriminate use of the shibboleth res gestae, that it is difficult to disentangle the real basis of the principle involved.").

75. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.

GA. CODE ANN. § 24-8-803(1) (effective Jan. 1, 2013); *e.g.*, Miller v. Crown Amusements, Inc., 821 F. Supp. 703 (S.D. Ga. 1993).

76. GA. CODE ANN. § 24-8-803(2) (effective Jan. 1, 2013); *e.g.*, United States v. Belfast, 611 F.3d 783, 817 (11th Cir. 2010).

77. 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 the declarant's will and not including a statement of belief as to the intent of another person.

GA. CODE ANN. § 24-8-803(3) (effective Jan. 1, 2013); *e.g.*, United States v. Samaniego, 345 F.3d 1280, 1282 (11th Cir. 2003).

78. § 24-8-803(3); *e.g.*, *Samaniego*, 345 F.3d at 1282.

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 United States Supreme Court case, *Mutual Life Insurance Co. v. Hillmon*, where the declarant's statement that he intended to travel to Colorado with Hillmon was admitted.[79] The result in *Hillmon* has been criticized,[80] and Georgia courts have not allowed a declarant's statement of belief as to the intent of another.[81] The new rules retain current Georgia policy and expressly limit statements of intent to the declarant's own intent and not that of third persons.[82]

(9) *Business Record Exception Allows Opinions*—Under Georgia's current business record exception, "conclusions, opinions, estimates, and impressions of third parties not before the court" are inadmissible.[83] The new rules reject these limitations,[84] though lay or expert opinions in the record still require qualification under the opinion rules.[85]

(10) *Business Record Exception Foundation by Affidavit*—Current Georgia law requires a "qualified witness" to appear at trial and lay

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79. Mut. Life Ins. Co. v. Hillmon, 145 U.S. 285, 299–300 (1892).

80. *See, e.g.*, Paul S. Milich, *Hearsay Antinomies: The Case for Abolishing the Rule and Starting Over*, 71 OR. L. REV. 723 (1992).

81. *See*, *e.g.*, Mallory v. State, 409 S.E.2d 839, 841 (Ga. 1991) (finding declarant's statement that she intended to meet the defendant later for coffee was inadmissible to prove that the two probably met for coffee); *see also* H.R. REP. NO. 93-650, at 13–14 (1st Sess. 1973) ("[T]he Committee intends that the Rule be construed to limit the doctrine of *Mutual Life Ins Co. v. Hillmon*, so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person."(citation omitted)).

82. GA. CODE ANN. § 24-8-803(3) (does not include "a statement of belief as to the intent of another person").

83. Turner v. State, 541 S.E.2d 641, 645 n.2 (Ga. 2001) (citing Duncan v. State, 515 S.E.2d 388 (Ga. 1999)).

84. *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 (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 . . . .

GA. CODE ANN. § 24-8-803(6) (effective Jan. 1, 2013).

85. *Id.*; *see id.* § 24-7-701 (lay opinions); *id.* § 24-7-702 (expert opinions).

the requisite foundation for a business record.[86] The new rules offer an additional option.[87] A party can acquire a certification from the custodian or other person qualified to lay foundation for the record under the business record exception. The party must give all opposing parties advanced written notice of its intent to use the certification in lieu of live testimony and make the record available for inspection prior to trial.[88]

This certification procedure is available in criminal cases for domestic records though nothing in the new rules changes any Confrontation Clause issues that might affect, in certain cases, the prosecution's offer of records without the testimony of a live witness.[89]

(11) *Business Record Exception—"Integrated Records Rule"*—Georgia courts have struggled under the current business record statute with the problem of one business laying foundation for records received from a different business. The cases are inconsistent and have permitted, in some cases, a witness to "lay foundation" for a business record without any evidence that the witness has a clue as to how the record was produced.[90]

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86. *See* MILICH, *supra* note 5, § 19:15.

87. *See* GA. CODE ANN. § 24-8-803(6).

88. Extrinsic evidence of authenticity as a condition precedent to admissibility shall not be required with respect to the following: . . .

> (11) 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.

Id. § 24-9-902. New Code section 24-9-902(12) is to the same effect regarding foreign records though it applies only in civil cases.

89. *See generally* Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009) (offering of records without live testimony).

90. *See, e.g.*, Walter R. Thomas Assoc., Inc. v. Media Dynamite, Inc., 643 S.E.2d 883, 886 (Ga. 2007); *see also* MILICH, *supra* note 5, § 19.15.

The new business record exception is based on the Federal Rule and takes advantage of the "integrated records rule" as developed by federal courts to address this problem. The basic requirements for the integrated records rule are (1) a business relationship between the business that initially made the record and the one who received it, (2) the recipient business routinely relies upon the accuracy of the record and integrates it into its own files, (3) the recipient business has a witness who is sufficiently familiar with how the originating business routinely prepared the record to establish that the record was made and kept in the ordinary course of business at or near the time of the events described in the record, and (4) circumstances support the trustworthiness of the record.[91]

(12) *Public Records Hearsay Exception*—Under current Georgia law, public records offered to prove the truth of the matters asserted in the records[92] 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 or office. [93] The new rules provide a set of generic provisions governing the admission of public records,[94] though these are still subject to specific statutes. Thus, for example, accident reports filed with the Department of Motor Vehicle Safety would continue to be inadmissible under current Georgia Code Section 40-9-41.

There are three generic categories of public records under the new rules.[95] The first, activities of the office or agency itself, is admissible without restriction in civil and criminal cases.

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91. *See* Air Land Forwarders, Inc. v. United States, 172 F.3d 1338, 1342–45 (Fed. Cir. 1999); *see also* Kolmes v. World Fibers Corp., 107 F.3d 1534, 1542–43 (Fed. Cir. 1997); United States v. Bueno-Sierra, 99 F.3d 375, 379 (11th Cir. 1996); NLRB v. First Termite Control Co., 646 F.2d 424, 427 (9th Cir. 1981).

92. The very existence of certain documents, such as deeds or licenses, has a legal effect apart from any hearsay use. A deed, for example, is not "true or false," but "valid or invalid." When a public record is offered only for its legal effect, it is not hearsay and requires no exception. *See* MILICH, *supra* note 5, § 19.15, at 693 n.19.

93. *Id.* § 19.19.

94. GA. CODE ANN. § 24-8-803(8) (effective Jan. 1, 2013).

95. *Public records and reports.* Except as otherwise provided by law, public records, reports, statements, or data compilations, in any form, of public offices, setting forth:

(A) The activities of the public office;

(B) Matters observed pursuant to duty imposed by law as to which matters there was a duty

The second category, matters observed pursuant to duty (subsection (B)), is unavailable to the prosecution in a criminal case when the author or sources of the information are law enforcement acting in an investigative capacity. When a law enforcement official prepares a report as a mundane, ministerial function, and not in the course of an investigation, the report is admissible in a criminal case. Thus, for example, an intoxilyzer inspection certification is admissible without the testimony of the inspector under this exception,[96] and this is consistent with current law.[97]

The third category, investigative reports (subsection (C)), is completely unavailable to the prosecution in a criminal case. For example, a drug analysis report is inadmissible in a criminal trial without the testimony of someone from the drug lab.[98] Of course, if the author of or sources in the report testify at trial, the report may be used, with proper foundation, to refresh recollection[99] or as past recollections recorded.[100]

"Factual findings," in subsection (C), is broader than "matters observed," in subsection (B), in that it implies that the preparer of the report relies on sources of information other than his own personal knowledge. In this respect, subsection (C) may admit what otherwise might constitute multiple hearsay. It also may include opinions.[101] However, factual findings should not extend to include legal conclusions of the preparer.[102] As with business records,[103] if the

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> to report, excluding, however, against the accused in criminal proceedings, matters observed by police officers and other law enforcement personnel in connection with an investigation; or
>
> (C) In civil proceedings and against the state in criminal proceedings, 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.

Id.

96. *E.g.*, Commonwealth v. Roberts, 122 S.W.3d 524, 528–29 (Ky. 2003); State v. Smith, 675 P.2d 510, 512 (Or. Ct. App. 1984); State v. Dilliner, 569 S.E.2d 211, 215 (W. Va. 2002).
97. *See* Rackoff v. State, 637 S.E.2d 706, 709 (Ga. 2006); Ritter v. State, 703 S.E.2d 8, 10 (Ga. Ct. App. 2010).
98. *See* Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2540 (2009); Herrera v. State, 702 S.E.2d 854, 857 (Ga. 2010).
99. GA. CODE ANN. § 24-6-612 (effective Jan. 1, 2013).
100. *Id.* § 24-8-803(5).
101. *See* Rainey v. Beech Aircraft, 488 U.S. 153, 170 (1988).
102. *E.g.*, Hines v. Brandon Steel Decks, Inc., 886 F.2d 299, 303 (11th Cir. 1989).
103. GA. CODE ANN. § 24-8-803(6) (effective Jan. 1, 2013).

sources of information or other circumstances indicate a lack of trustworthiness of an investigative report offered under subsection (C), the court may exclude it.

(13) *Necessity Exception Adds a Notice Requirement*—The current Georgia necessity exception is the same as the new one, based on Federal Rule 807, with one difference. Current Georgia law does not require pretrial notice of intent to invoke the exception.[104] Under the new rule, a statement may not be admitted:

> [U]nless 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.[105]

(14) *Refreshing Recollection*—Under both current law and the new rules, counsel can use anything to refresh the recollection of a witness.[106] But Georgia cases are inconsistent on when the opposing lawyer can demand to see any writing used to refresh a witness's recollection, either before or during the witness's examination. Some Georgia cases state that the opponent has this right only in criminal, not civil, cases, though why the two should be treated differently is never explained.[107] Other Georgia cases extend this right to civil, as well as criminal, cases.[108]

The new rules end any confusion. In both civil and criminal cases, opposing counsel has the right to see any writing used to refresh a witness on the stand, to question the witness regarding the writing, and to introduce any portions of the writing that "relate to the testimony of the witness."[109] As for writings shown to a witness to

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104. *See* MILICH, *supra* note 5, §19:32.
105. GA. CODE ANN. § 24-8-807 (effective Jan. 1, 2013).
106. *E.g.*, United States v. Darden, 70 F.3d 1507, 1540 (8th Cir. 1995); Miller v. State, 561 S.E.2d 810, 814 (Ga. 2002); Green v. State, 249 S.E.2d 1, 5 (Ga. 1978).
107. *See, e.g.*, Schofield v. Meders, 632 S.E.2d 369, 369 (Ga. 2006).
108. *E.g.*, Lester v. S. J. Alexander, Inc., 193 S.E.2d 860, 862 (Ga. Ct. App. 1972); State Highway Dep't v. Godfrey, 164 S.E.2d 340, 341 (Ga. Ct. App. 1968).
109. GA. CODE ANN § 24-6-612(a) (effective Jan. 1, 2013).

refresh his recollection before testifying, "if the court in its discretion determines it is necessary in the interests of justice," the opposing party may see the writings, question the witness regarding them, and introduce any portions of the writing that "relate to the testimony of the witness."[110]

The new Georgia rule also has an additional sentence, not in the Federal Rule, that codifies current Georgia practice regarding showing a witness, prior to her testifying, materials that might be protected under the attorney-client privilege or work product rule. "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 trial shall not constitute a waiver of that privilege or protection."[111]

(15) *Authentication Made Easier*—The new rules make the authentication of evidence (documents, things, voices, photos, etc.) easier in three ways. First, the new rules make explicit the lenient standard for admissibility: "[E]vidence sufficient to support a finding that the matter in question is what its proponent claims."[112] This standard underscores that, ultimately, it is a question for the trier of fact whether evidence is authentic, and thus, the judge should admit the evidence if a reasonable fact finder could find it authentic.[113]

Second, the new rules collect and park in one place all the rules for authenticating every type of evidence.[114] This increased accessibility will make the resolution of authentication issues quicker and easier. Finally, the new rules relax some of the requirements for authenticating certain kinds of evidence. For example, authenticating phone calls is easier under the new rules.[115] Notarized documents are

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110. *Id.* § 24-6-612(b). Current Georgia law, at least in criminal cases, allows opposing counsel to examine writings used to refresh a witness's testimony after the trial began. Baxter v. State, 331 S.E.2d 561, 571 (Ga. 1985).

111. GA. CODE ANN. § 24-6-612(b) (effective Jan. 1, 2013) (citation omitted); *see, e.g.*, McKinnon v. Smock, 445 S.E.2d 526, 528 (Ga. 1994) (upholding work product protection when witness used attorney materials to prepare testimony before trial).

112. GA. CODE ANN. § 24-9-901(a) (effective Jan. 1, 2013).

113. *Id.* § 24-10-1008.

114. *See id.* §§ 24-9-901 to -924.

115. *Compare id.* § 24-9-901(b)(6), *with* Tidwell Co. v. Robley Hats, Inc., 186 S.E.2d 489, 494–95 (Ga. Ct. App. 1971).

self-authenticating under the new rules.[116] The rules regarding proof of chain of custody in criminal cases are unchanged.[117]

(16) *Best Evidence Rule Applies to All Recordings, Not Just "Writings"*—Although the new rules do not use the term "best evidence," the substance of the rule remains—a party may not testify to the contents of a writing or other recording without producing it.[118] Georgia's current best evidence rule is from the Code of 1863 and applies only to "writings," not photos, video, or any other recordings.[119] The new rules apply to any form of recorded facts or data.[120]

(17) *Best Evidence Rule—Copies Presumptively Acceptable*—Under Georgia's current best evidence rule, a party must either produce the original of a writing or account for its nonproduction before the party may use a copy.[121] The new rules provide:

> A duplicate shall be admissible to the same extent as an original unless:
>
> (1) A genuine question is raised as to the authenticity of the original; or
>
> (2) A circumstance exists where it would be unfair to admit the duplicate in lieu of the original.[122]

(18) *The Ultimate Issue Rule Abolished . . . Nominally*—Current Georgia law embraces a limited form of the "ultimate issue rule" by prohibiting lay or expert opinion that mixes law and fact.[123] 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

116. GA. CODE ANN. § 24-9-902(8) (effective Jan. 1, 2013).
117. *Compare* Hurst v. State, 676 S.E.2d 165, 167 (Ga. 2009), *and* Johnson v. State, 519 S.E.2d 221, 229–30 (Ga. 1999), *with* United States v. Jackson, 345 F.3d 59, 65 (2d Cir. 2003).
118. GA. CODE ANN. § 24-10-1002 (effective Jan. 1, 2013); *see* MILICH, *supra* note 5, § 8.2.
119. *See, e.g.*, Perkins v. State, 392 S.E.2d 872, 876 (Ga. Ct. App. 1990).
120. GA. CODE ANN. § 24-10-1001 (effective Jan. 1, 2013).
121. *See* MILICH, *supra* note 5, § 8.3.
122. GA. CODE ANN. § 24-10-1003 (effective Jan. 1, 2013).
123. *Id.* § 24-9-65; *see* Metro Life Ins. Co. v. Saul, 5 S.E.2d 214, 214 (Ga. 1939).

ordinary lawyer practicing in Georgia.[124] 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.[125] However, current Georgia law does not allow a witness to testify in legal terms or state legal conclusions.[126]

The ultimate issue rule has been a source of more than its fair share of debate and confusion.[127] The new rules adopt Federal Rule 704, which states that evidence "is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."[128] Federal Rule 704 was amended in 1984 to revive the prohibition against a witness testifying to an ultimate issue of whether an accused in a criminal case did or did not have a relevant mental state.[129]

Although abolished by name, federal courts still will not allow witnesses to present opinions in legal terms or to invade the province of the jury by drawing inferences that the jurors are fully capable of drawing on their own.[130] Rather than stating that such opinions violate the ultimate issue rule, courts exclude them on the grounds that they are not helpful or will not assist the trier of fact.[131]

(19) *Hypothetical Questions Never Required*—The hypothetical question was required at common law so that the trier of fact could more clearly understand the factual bases of the expert's opinion.[132]

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124. *See, e.g.*, Bilt Rite of Augusta, Inc. v. Gardiner, 472 S.E. 2d 709, 710 (Ga. Ct. App. 1996).

125. *See, e.g.*, *id.*

126. *See, e.g.*, Allen v. Columbus Bank & Trust Co., 534 S.E.2d 917, 924 (Ga. Ct. App. 2000).

127. *See* MILICH, *supra* note 5, § 15.1.

128. FED. R. EVID. 704.

129. David P. Leonard, *The Federal Rules of Evidence and the Political Process*, 22 FORDHAM URB. L.J. 305, 317-18 (1994). This was called the "Hinkley Amendment" because it was motivated by reaction to experts testifying in the trial of John Hinkley for his attempted assassination of President Ronald Reagan.

130. *See, e.g.*, Montgomery v. Aetna Cas. & Sur. Co., 898 F.2d 1537, 1541 (11th Cir. 1990) (holding an 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, 1547–48 (6th Cir. 1989) (holding an expert's testimony that police officer was negligent was inadmissible).

131. These requirements that opinion testimony be helpful or assist the trier of fact are contained in Federal Rules 701(b) (lay opinions) and 702 (expert opinions). *See* FED. R. EVID. 701–02; *see also* GA. CODE ANN. §§ 24-7-701 to -702 (effective Jan. 1, 2013).

132. MCCORMICK ON EVIDENCE, *supra* note 64, §16; *see* Metro. Life Ins. Co. v. Saul, 5 S.E.2d 214, 214–15 (Ga. 1939).

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.[133]

The new Georgia rules adopt Federal Rule 705, eliminating any requirement that an expert be questioned by way of hypothetical questions.[134] This 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 any limitations of an expert's testimony.

Counsel still may use hypothetical questions on direct or cross if counsel desires.[135] If a hypothetical question is used, the traditional rules apply—it must be based upon evidence that has or will be admitted at trial plus reasonable inferences from that evidence.[136]

(20) *Character Witnesses Used for Impeachment: Reputation and Opinion Evidence*—Current Georgia law limits a character witness who testifies regarding the credibility of another witness to stating the reputation of the subject and does not allow opinion testimony. Georgia courts have criticized this limitation.[137] The new rules expressly allow a qualified witness to testify not only to a person's reputation for truthfulness but also to express an opinion concerning that person's character for truthfulness.[138]

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133. MCCORMICK ON EVIDENCE, *supra* note 64, §16; *see, e.g.*, Hyles v. Cockrill, 312 S.E.2d 124, 130 (Ga. Ct. App. 1983).

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

GA. CODE ANN. § 24-7-705 (effective Jan. 1, 2013).

135. *See, e.g.*, Taylor v. Burlington Northern R.R. Co., 787 F.2d 1309, 1317 (9th Cir. 1986).

136. *See, e.g.*, Toucet v. Mar. Overseas Corp., 991 F.2d 5, 10 (1st Cir. 1993).

137. *See* Simpkins v. State, 256 S.E.2d 63, 65 (Ga. Ct. App. 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.").

138. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, subject to the following limitations:

(1)The evidence may refer only to character for truthfulness or untruthfulness; and

(2)Evidence of truthful character shall be admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

GA. CODE ANN. § 24-6-608(a) (effective Jan. 1, 2013).

The current Georgia statute on using a character witness to impeach another witness[139] is an unhappy combination of the pre-2005 Georgia statute and Federal Rule 608.[140] Part of the rule states that the witness "may refer only to character for truthfulness or untruthfulness" of the subject.[141] Another part of the same statute states that the witness should be asked about the "general character" of the subject.[142] The new rule is based solely on Federal Rule 608, and the character witness is limited to testifying regarding the subject's character for truthfulness.[143]

There is no change to the current rule[144] that a character witness may not testify on direct to specific instances of the subject's conduct that illustrate the subject's character for truthfulness. However, in the discretion of the court, a character witness may be asked on cross-examination if he has heard or knows of specific instances of conduct that rebut the character witness's reputation or opinion testimony on direct.[145]

Current Georgia rules never allow a cross-examiner to question a witness about past acts of untruthfulness, unrelated to the case, to impeach that witness's credibility.[146] The new rule gives the court discretion to allow such questions.[147]

(21) *Impeachment by Prior Inconsistent Statement*—The new rule relaxes the foundation requirements somewhat. When impeaching a witness with a prior oral inconsistent statement, the new rule does not require that counsel draw the witness's attention to "the time, place,

139. GA. CODE ANN. § 24-9-84 (2010).
140. *See* MILICH, *supra* note 5, § 14.5; *see also* FED. R. EVID. 608.
141. GA. CODE ANN. § 24-9-84(1) (2010).
142. *Id.* § 24-9-84(4).
143. *Id.* § 24-6-608(a) (effective Jan. 1, 2013).
144. *Id.* § 24-9-84(4).
145. GA. CODE ANN. § 24-6-608(b)(2) (effective Jan. 1, 2013).
146. *See, e.g.*, Pruitt v. State, 514 S.E.2d 639, 649 (Ga. 1999).
147. GA. CODE ANN. § 24-6-608(b)(1) (effective Jan. 1, 2013); *see, e.g.*, United States v. Matthews, 168 F.3d 1234,1244 (11th Cir. 1999) ("Rule 608(b) provides that the trial court may in its discretion permit questioning about a witness' prior bad acts on cross-examination, if the acts bear on the witness' character for truthfulness. If the witness denies the conduct, such acts may not be proved by extrinsic evidence and the questioning party must take the witness' answer, unless the evidence would be otherwise admissible as bearing on a material issue of the case." (citations omitted)).

person, and circumstances attending the former statement."[148] Nor must counsel show the witness a prior written inconsistent statement before asking if the witness made the prior statement.[149] The new rule still requires, however, that the witness be given an opportunity to explain or deny the prior inconsistent statement before any extrinsic evidence of the statement is offered into evidence.[150]

In a departure from the Federal Rules, Georgia's new rules retain the holding in *Gibbons v. State* that a prior inconsistent statement of a witness is admissible both to impeach the witness and, if the witness is available for cross-examination, as substantive evidence.[151]

(22) *Sequestration of Witnesses*—Georgia's current statute[152] technically only prohibits witnesses from the same side sitting in the courtroom together, though Georgia courts typically expand the order to prohibit witnesses from one side remaining in the courtroom while opposing witnesses testify.[153] The new rule orders "witnesses excluded so that they cannot hear the testimony of other witnesses."[154]

Current Georgia practice discourages, but does not always prohibit, sequestering a party in a civil case.[155] The new rule prohibits sequestration of a party,[156] but the trial court still has

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148. GA. CODE ANN. § 24-9-83 (2010). *Compare id.*, *with* GA. CODE ANN. § 24-6-613 (effective Jan. 1, 2013). New Georgia Code section 24-6-613 provides:

> (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.

GA. CODE ANN. § 24-6-613 (effective Jan. 1, 2013).

149. GA. CODE ANN. § 24-6-613 (effective Jan. 1, 2013).

150. *Id.* § 24-6-613(b).

151. Gibbons v. State, 286 S.E.2d 717, 721 (Ga. 1982).

152. GA. CODE ANN. § 24-9-61 (2010).

153. *See, e.g.*, Gray v. State, 476 S.E.2d 12, 16 (Ga. Ct. App. 1996).

154. GA. CODE ANN. § 24-6-615 (effective Jan. 1, 2013).

155. *See, e.g.*, Barber v. Barber, 360 S.E.2d 574, 575 (Ga. 1987).

156. This Code section shall not authorize exclusion of:

> (1) A party who is a natural person;
>
> (2) An officer or employee of a party which is not a natural person designated as its

discretion under new Georgia Code Section 24-6-611(a) to require that a party testify before other witnesses.[157]

(23) *Jurors May Not Testify in Cases on Which They Serve*—Believe it or not, current Georgia statutes still permit jurors to testify in a case on which they sit,[158] though the practice has been judicially repudiated.[159] The new rules strictly forbid a juror from testifying.[160]

(B) Rules Relating to Criminal Trials

(24) *Evidence of the Accused's Good Character*—The accused in a criminal case has the option of presenting evidence of his good character. Under current Georgia rules, the accused usually is limited to presenting evidence of his general good character,[161] though some cases have permitted evidence of specific character traits.[162] The new rules clarify that the accused may present evidence of any "pertinent trait of character," general or specific.[163] For example, although such general character traits as "law abiding" are always pertinent in a criminal case, evidence that the accused has a peaceful disposition 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.[164] If the accused presents evidence of his reputation for being law abiding, the door is opened

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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.

GA. CODE ANN. § 24-6-615 (effective Jan. 1, 2013).

157. 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.

Id. § 24-6-611(a).

158. GA. CODE ANN. §§ 9-10-6, 17-9-20 (2010); *see* Tumlin v. State, 77 S.E.2d 555, 556 (Ga. Ct. App. 1953).

159. *See, e.g.*, Lively v. State, 421 S.E.2d 528, 529 (Ga. 1992).

160. GA. CODE ANN. § 24-6-606(a) (effective Jan. 1, 2013).

161. *See, e.g.*, Brooks v. State, 512 S.E.2d 693, 694 (Ga. Ct. App. 1999).

162. *See, e.g.*, Walker v. State, 449 S.E.2d 845, 847 (Ga. Ct. App. 1994).

163. GA. CODE ANN. § 24-4-404(a)(1) (effective Jan. 1, 2013).

164. *Id.*

wide for rebuttal.[165] But if the accused limits his character evidence to the trait of honesty, the prosecution can respond only with evidence rebutting that specific character trait.[166] The new rule does not change existing Georgia law concerning instructing the jury regarding evidence of the accused's good character in a criminal case.[167]

The new rules clarify that if an accused testifies, he may present, during his direct examination, specific instances of his conduct that evidence a pertinent character trait.[168] This retains current Georgia practice.[169]

There is no change to the rule that, regardless of whether the accused presents evidence of his good character, if the defendant 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.[170]

(25) *Character Witnesses Concerning the Accused's Character: Reputation and Opinion Evidence*—Current Georgia law limits a character witness to the reputation of the subject and does not allow opinion testimony.[171] Georgia courts have criticized this limitation.[172] The new rules expressly allow a qualified witness to express an opinion concerning the defendant's character.[173]

There is no change to the current rule that a character witness may not testify on direct to specific instances of the subject's conduct that illustrate the subject's character,[174] but a character witness may be

165. *See id.*
166. *See id.*
167. *See* Kurtz v. State, 652 S.E.2d 858, 861 (Ga. Ct. App. 2007).
168. GA. CODE ANN. § 24-4-405(b) (effective Jan. 1, 2013).
169. *See, e.g.*, Harris v. State, 615 S.E.2d 532, 536 (Ga. 2005).
170. GA. CODE ANN. § 24-6-621 (effective Jan. 1, 2013) ("A witness may be impeached by disproving the facts testified to by the witness."); Jones v. State, 363 S.E.2d 529, 534 (Ga. 1988). Current Georgia Code section 24-9-82 was retained and renumbered as new Georgia Code section 24-6-621.
171. *See* Simpkins v. State, 256 S.E.2d 63, 65 (Ga. Ct. App. 1979).
172. *See id.* ("[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.").
173. In all proceedings in which evidence of character or a trait of character of a person is admissible, proof shall be made by testimony as to reputation or by testimony in the form of an opinion.
GA. CODE ANN. § 24-4-405(a) (effective Jan. 1, 2013)
174. *See, e.g.*, Thomas v. State, 655 S.E.2d 599, 601 (Ga. Ct. App. 2008).

asked on cross-examination if she has heard or knows of specific instances of conduct that rebut the character witness's direct testimony.[175]

(26) *"Similar Transaction Rule" Renovated*—Every American jurisdiction permits prosecution evidence of other crimes, wrongs, or acts of the accused that are not offered merely to prove the accused's bad character or propensity to crime,[176] but instead are specifically relevant to an issue in the case. Georgia's version of this rule, misleadingly labeled the "similar transaction" rule,[177] has gone further than most in admitting the accused's prior crimes or acts to prove his criminal propensity.[178] Georgia is the only jurisdiction that admits evidence of the accused's unrelated past crimes and other bad acts to prove his "bent of mind" or "course of conduct."[179] Georgia cases do not explain where bent of mind came from or how it comports with the statutory rule against character evidence.[180] Oddly, the only substantive discussion of bent of mind in Georgia cases is critical.[181]

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175. On cross-examination, inquiry shall be allowable into relevant specific instances of conduct.
GA. CODE ANN.§ 24-4-405(c) (effective Jan. 1, 2013).

176. *See* Smith v. State, 501 S.E.2d 523, 525 (Ga. Ct. App. 1998) ("The primary aim of [the character] rule is to avoid the forbidden inference of propensity. Just because a defendant has committed wrongful acts in the past is not alone legal grounds to believe he has done so on the occasion under scrutiny.").

177. *See* Barrett v. State, 436 S.E.2d 480, 481 n.2 (Ga. 1993); Young v. State, 642 S.E.2d 806, 808 (Ga. Ct. App. 2007).

178. *See* MILICH, *supra* note 5, §§ 11.10, 11.13.

179. *See* Wade v. State, 670 S.E.2d 864, 867 (Ga. Ct. App. 2008); MILICH, *supra* note 5, § 11.13.

180. The general character of the parties and especially their conduct in other transactions are irrelevant matter unless the nature of the action involves such character and renders necessary or proper the investigation of such conduct.
GA. CODE ANN. § 24-2-2 (effective Jan. 1, 2013); *see* Nicholson v. State, 186 S.E.2d 287, 289 (Ga. Ct. App. 1971) ("This is the very purpose of the general rule—to prevent a conviction for a particular crime based upon a showing of a criminal 'bent of mind'."); Shinall v. State, 147 S.E.2d 510, 511 (Ga. Ct. App. 1966) ("That evidence of other crimes offers an inference of a criminal bent of mind which makes it easier to believe the defendant has committed the crime for which he is on trial is exactly the reason for excluding such testimony."); Story v. State, 98 S.E.2d 42, 45 (Ga. Ct. App. 1957) ("To permit the introduction of such evidence . . . merely to show 'bent of mind'; that is to say, to permit the introduction of such evidence to show that the defendant is more likely to commit again a crime of which he has previously been guilty is the precise reason for excluding such testimony.").

181. *See, e.g.*, Farley v. State, 458 S.E.2d 643, 650 (1995) (Sears, J., concurring) ("First, 'bent of mind' and 'course of conduct' have evolved into amorphous catch-phrases, difficult to define and slippery in application. While they may be legitimate purposes for introducing independent crime evidence under some circumstances, careful analysis of the relevance of the evidence is especially

The new rules "reboot" the law in this area by adopting Federal Rule 404(b), which follows the traditional common law approach of admitting evidence of the accused's other crimes, wrongs, or acts when specifically relevant to the necessary proof of "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[182] Terms like bent of mind and course of conduct, which essentially invite admitting the accused's past crimes to prove his criminal character, are gone and hopefully forgotten.

The new rules retain the current requirement that the prosecution provide pretrial notice of its intent to offer "other crimes, wrongs, or acts" evidence.[183] Also retained is the rule dispensing with such notice when the other crimes, wrongs, or acts evidence is offered to prove the circumstances surrounding the charged offense, motive, or prior difficulties between the accused and the victim, when relevant.[184]

The similar transaction rule in Georgia "has been most liberally extended in cases involving sexual offenses."[185] The new rules continue this policy with the adoption of Federal Rules 413, 414, and 415.[186]

In DUI cases, the routine use of the bent of mind slogan has resulted in the nearly automatic admission of the driver defendant's

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important when those purposes are claimed. Such careful scrutiny is essential because a person's bent of mind is dangerously close to being his character, and a person's course of conduct could easily show nothing more than a mere propensity to act in a certain manner."); Payne v. State, 674 S.E.2d 298 (2009) (Hunstein, J., dissenting) ("[u]sing phrases like 'bent of mind' or 'course of conduct' totally obscures the distinction between legitimate evidence and the prohibited evidence of character") (quoting Paul S. Milich, Georgia Rules of Evidence, § 11.13, p. 189-190 (2d. ed. 2002)).

182. Evidence of other crimes, wrongs, or acts shall not be admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The prosecution in a criminal proceeding shall provide reasonable notice to the defense in advance of trial, unless pretrial notice is excused by the court upon good cause shown, of the general nature of any such evidence it intends to introduce at trial. Notice shall not be required when the evidence of prior crimes, wrongs, or acts is offered to prove the circumstances immediately surrounding the charged crime, motive, or prior difficulties between the accused and the alleged victim.

GA. CODE ANN. § 24-4-404(b) (effective Jan. 1, 2013).

183. *Id.*; *see also* GA. UNIF. SUP. CT. R. 31.3.

184. *See* GA. CODE ANN. § 24-4-404(b) (effective Jan. 1, 2013); MILICH, *supra* note 5, § 11.11.

185. Kingsley v. State, 603 S.E.2d 78, 79 (Ga. Ct. App. 2004).

186. GA. CODE ANN. §§ 24-4-413 to -415 (effective Jan. 1, 2013).

prior DUI offenses,[187] despite the fact that the driver's intent is not an issue in DUI prosecutions.[188] With the loss of the bent of mind exception upon the adoption of new rules of evidence, prosecutors were concerned that a defendant's prior DUIs would be inadmissible regardless of their specific relevance to an issue in the case.[189] New Georgia Code Section 24-4-417 was added to describe two situations in which a DUI defendant's prior DUI would be admissible, as well as to confirm that a court could admit a prior DUI under section 24-4-404(b) if it meets the requirements of that section.[190]

(27) *Factual Bases of an Expert's Opinion in Criminal Trials*—The 2005 tort reform package included a provision adopting versions of Federal Rules 702 (the *Daubert* rule) and 703 (bases of expert testimony).[191] Prosecutors opposed any adoption of *Daubert* in criminal cases and lawmakers responded by limiting both of Georgia's versions of 702 and 703 to civil cases.[192] This probably was inadvertent since 703 has nothing to do with 702 or *Daubert*. The two provisions just happened to be in the same proposed code

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187. *See, e.g.*, Lowenthal v. State, 593 S.E.2d 726, 729 (Ga. Ct. App. 2004); Fields v. State, 512 S.E.2d 19, 23 (Ga. Ct. App. 1999).

188. *See, e.g.*, Prine v. State, 515 S.E.2d 425, 427 (Ga. Ct. App. 1999).

189. Daniel Hendrix et al., Note, *Evidence,* 27 GA. ST. U. L. REV. 1, 8 (2010).

190. (a) In a criminal proceeding involving a prosecution for a violation of Code Section 40-6-391, evidence of the commission of another violation of Code Section 40-6-391 on a different occasion by the same accused shall be admissible when:

(1) The accused refused in the current case to take the state administered test required by Code Section 40-5-55 and such evidence is relevant to prove knowledge, plan, or absence of mistake or accident;

(2) The accused refused in the current case to provide an adequate breath sample for the state administered test required by Code Section 40-5-55 and such evidence is relevant to prove knowledge, plan, or absence of mistake or accident; or

(3) The identity of the driver is in dispute in the current case and such evidence is relevant to prove identity.

(b) In a criminal proceeding in which the state intends to offer evidence under this Code section, the prosecuting attorney shall disclose such evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that the prosecuting attorney expects to offer, at least ten days in advance of trial, unless the time is shortened or pretrial notice is excused by the judge upon good cause shown.

(c) This Code section shall not be the exclusive means to admit or consider evidence described in this Code section.

GA. CODE ANN. § 24-4-417 (effective Jan. 1, 2013).

191. SB 3 (SCS), 2005 Ga. Gen. Assem.

192. MILICH, *supra* note 5, § 15.5, at 435 n.1.

section.[193] The new rules apply Georgia's version of Federal Rule 703 to criminal, as well as civil, trials.[194]

The current rules in criminal cases regarding the permissible factual bases of an expert witness's opinion are inconsistent and confusing. Although it is often stated that an expert may rely on some hearsay in forming her opinion, it is far from clear what quantitative or qualitative limitations there are on such hearsay and, more importantly, whether the expert may disclose the otherwise inadmissible hearsay upon which she relied to the jury.[195]

Under the new rules, an expert witness may base her opinion on inadmissible evidence, including hearsay, if the facts are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."[196] In a jury trial, the otherwise inadmissible facts upon which the expert relied "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."[197] Opposing counsel may inquire into any and all factual bases of an expert's opinion.[198]

There is no change in the basic rule that an expert may not be a mere conduit for the opinions of other experts not before the court.[199] Although an expert may base her opinion, in part, on what she learned from other experts, the testifying expert must have, and be able to defend, her own opinion, arrived at independently.[200]

(28) *Admissions by Silence in Criminal Cases*—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

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193. *See* GA. CODE ANN. § 24-9-67.1(a)–(b) (effective Jan. 1, 2013). New Code Section 24-9-67.1(a) corresponds to Federal Rule 702 and new Code Section 24-9-67.1(b) corresponds to Federal Rule 703.

194. GA. CODE. ANN. § 24-7-703 (effective Jan. 1, 2013).

195. *See* MILICH, *supra* note 5, § 15.5.

196. GA. CODE ANN. § 24-7-703 (effective Jan. 1, 2013).

197. *Id.*

198. *Id.* § 24-7-705.

199. *See, e.g.*, United States v. Grey Bear, 883 F.2d 1382, 1392–93 (8th Cir. 1989); Horton v. Hendrix, 662 S.E.2d 227, 234 (Ga. Ct. App. 2008).

200. *See, e.g.*, United States v. Floyd, 281 F.3d 1346, 1349 (11th Cir. 2002); Watkins v. State, 676 S.E.2d 196, 200 (Ga. 2009).

in the presence of the police.[201] The Georgia Supreme Court repudiated this rule in *Jarrett v. State*,[202] and broadly held that "a witness in a *criminal* trial may not testify as to a declarant's statements based on the acquiescence or silence of the accused."[203] This decision 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.[204] This goes further than most applications of the Federal Rule,[205] which admit a defendant's silence, not made in the presence of the police, when "under the circumstances, an innocent defendant would normally be induced to respond, and [when] . . . there are sufficient foundational facts from which the jury could infer that the defendant heard, understood, and acquiesced in the statement."[206]

Georgia's rule was based on a balancing of probative value against unfair prejudice under Georgia's current tacit admission statute.[207] Whether Georgia courts will construe new Code Section 24-8-801(d)(2)(B)[208] the same way as the old Georgia statute or the way federal courts construe it remains to be seen.

(29) *Co-Conspirator Exception Clarified*—Georgia's current hearsay exception for co-conspirator's statements comes from the Code of 1863.[209] For well over a half century, this statute was construed to conform to the common law rule that only statements made by a conspirator in furtherance of the conspiracy were

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201. *See, e.g.*, Jarrett v. State, 441 S.E.2d 843 (Ga. Ct. App. 1994), *aff'd on other grounds*, 453 S.E.2d 461, 463 (Ga. 1995).

202. *Jarrett*, 453 S.E.2d at 463.

203. *Id.*

204. *See* Reynolds v. State, 673 S.E.2d 854, 855 (Ga. 2009).

205. FED. R. EVID. 801(d)(2)(B).

206. United States v. Carter, 760 F.2d 1568, 1579 (11th Cir. 1985).

207. Acquiescence or silence, when the circumstances require an answer, a denial, or other conduct, may amount to an admission.

GA. CODE ANN. § 24-3-36 (effective Jan. 1, 2013); *see* Reynolds v. State, 673 S.E.2d 854, 855 (Ga. 2009); Mallory v. State, 409 S.E.2d 839, 843 (Ga. 1991).

208. New Code Section 801(d)(2)(B) defines a tacit admission simply as: "A statement of which the party has manifested an adoption or belief in its truth." GA. CODE ANN. § 24-8-801(d)(2)(B) (effective Jan. 1, 2013).

209. After the fact of conspiracy is proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all.

GA. CODE ANN. § 24-3-5 (2010).

admissible.[210] No Georgia cases have expressly dropped the "in furtherance" requirement, and it still appears in a few cases[211] and in the pattern jury instruction approved by the Georgia Council of Superior Court Judges.[212] Yet there are dozens of reported cases in which a co-conspirator's statements were admitted even though there was no possible sense in which they were in the furtherance of any conspiracy; indeed, in many of the cases the statements were adverse to the interests of the conspiracy.[213] Yet these cases include no discussion of that fact, leading to the impression that the in furtherance requirement for co-conspirator's statements is forgotten, if not gone.

The new rule is based on Federal Rule 801(d)(2)(E) and expressly includes the in furtherance requirement.[214] This restores Georgia's co-conspirator exception to its original common law form.[215] The new rule adds two sentences to the language of the Federal Rule. The first clarifies that if the conspirators, after the commission of the crime, continue to conspire to conceal the crime and the statement is in furtherance of that conspiracy to conceal, the statement is admissible under the exception.[216] The second clarifies that the exception is available regardless of whether the accused was charged with conspiracy.[217]

Under current Georgia law, the jury ultimately decides whether the foundation for a co-conspirator statement has been met and is instructed accordingly.[218] The offered statement may not be

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210. *See* MILICH, *supra* note 5, § 18.11.

211. *See*, *e.g.*, Castillo v. State, 642 S.E.2d 8, 12 (Ga. 2007).

212. 2 COUNCIL OF SUPERIOR COURT JUDGES OF GA., SUGGESTED PATTERN JURY INSTRUCTIONS § 2.02.40 (3d ed. 2003) [hereinafter PATTERN JURY INSTRUCTIONS].

213. *See* MILICH, *supra* note 5, § 18.11 at n. 33 (citing cases).

214. A statement by a coconspirator of a party during the course and in furtherance of the conspiracy, including a statement made during the concealment phase of a conspiracy. A conspiracy need not be charged in order to make a statement admissible under this subparagraph.

GA. CODE ANN. § 24-8-801(d)(2)(E) (effective Jan. 1, 2013).

215. *See* MILICH, *supra* note 5, § 18.11.

216. This is consistent with federal cases. *See,* United States v. Carter, 721 F.2d 1514, 1524–25 (11th Cir. 1984).

217. This is also consistent with federal cases. *See* United States v. Maldanado-Rivera, 922 F.2d 934, 962 (2d Cir. 1990).

218. *See, e.g.*, Roberson v. State, 493 S.E.2d 697, 704 (1997); *see also* PATTERN JURY INSTRUCTIONS, *supra* note 212, § 2.02.40.

considered in making this determination.[219] Under the new rules, the judge alone decides whether, by a preponderance of the evidence, the foundation exists,[220] and the offered statement can be considered, along with other evidence, in making this determination.[221] However, the offered statement alone is not sufficient to establish the basis for its admissibility but must be supported by independent evidence.[222]

(30) *Statement Against Interest Hearsay Exception Liberalized*—The current Georgia rule limits the statements against interest exception to when the declarant is dead.[223] The new rule only requires that the declarant be unavailable as a witness at trial.[224] Current Georgia law does not admit statements against penal interest when offered by the defendant in a criminal case[225] and allows the prosecution to offer such statements only when the declarant is dead and the statement was not made with a view to pending legal proceedings.[226]

The new rule admits statements against penal interest in criminal cases on equal terms for the prosecution and the defense. As a condition to using the exception, the proponent (whether the prosecutor or defense counsel) must show that the statement is "[s]upported by corroborating circumstances that clearly indicate the trustworthiness of the statement."[227]

(31) *Forfeiture Hearsay Exception*—The new rules provide a hearsay exception for statements made by a person who is "unavailable" to testify at trial and the "statement [is] 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."[228] Thus, for example, in a domestic violence case where the

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219. *See* PATTERN JURY INSTRUCTIONS, *supra* note 212.
220. GA. CODE ANN. § 24-1-104(a) (effective Jan. 1, 2013).
221. *Id.* § 24-8-801(d)(2).
222. *Id.*
223. GA. CODE ANN. § 24-3-8 (2010).
224. GA. CODE ANN. § 24-8-804 (effective Jan. 1, 2013).
225. *See*, *e.g.*, Timberlake v. State, 271 S.E.2d 792, 796 (Ga. 1980).
226. Crowder v. State, 227 S.E.2d 230, 239 (Ga. 1976); *see* MILICH, *supra* note 5, § 19.29.
227. GA. CODE ANN. § 24-8-804(b)(3)(B) (effective Jan. 1, 2013).
228. *Id.* § 24-8-804(b)(5). A very early Georgia case recognized the common law exception for forfeiture, but it has not appeared again in Georgia cases for over 150 years. *See* Williams v. State, 19

spouse-victim asserts a privilege not to testify and thus becomes unavailable as a witness at trial, if the prosecution can convince the trial judge, by a preponderance of the evidence,[229] that the defendant used wrongful means to get the spouse to invoke the privilege, the court could admit the spouse's out-of-court statements over a hearsay objection.[230]

(32) *Application of Rules to Probation Revocation Hearings*—Currently, the exact extent to which the rules of evidence apply to probation revocation hearings is a bit fuzzy. Currently, hearsay is inadmissible at a probation revocation hearing,[231] and the probationer is entitled to due process[232] and "fundamental fairness."[233] The stakes at a probation revocation hearing are high enough that the rules of evidence ought to be clear and consistent from court to court and not left to the vagueness of generalized fairness requirements.

The new rules expressly state that the rules of evidence apply to probation revocation hearings.[234] There is no change to the standard of proof at such hearings, which is preponderance of the evidence.[235] Nor is there any change to parole revocation hearings, which are administrative matters handled by the Board of Pardons and Parole. The rules of evidence traditionally have not been applied in such proceedings.[236]

(C) Rules Relating to Civil Trials

(33) *Subsequent Remedial Measure Rule in Product Liability Cases*—Courts and scholars have debated whether the subsequent

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Ga. 402, 403 (1856).

229. GA. CODE ANN. § 24-1-104(a) (effective Jan. 1, 2013).

230. The court could also admit the statements over a Confrontation Clause objection since forfeiture applies to that Sixth Amendment right as well. Crawford v. Washington, 541 U.S. 36, 61 (2004); *see also* Davis v. Washington, 547 U.S. 813, 833 (2006).

231. *See, e.g.*, Brown v. State, 668 S.E.2d 490, 493 (Ga. Ct. App. 2008).

232. *See* Black v. Romano, 471 U.S. 606, 611 (1985).

233. Meadows v. Settles, 561 S.E.2d 105, 108–09 (Ga. 2002).

234. GA. CODE ANN. § 24-1-2(b) (effective Jan. 1, 2013).

235. GA. CODE ANN. § 42-8-34.1(b) (2010).

236. Williams v. Lawrence, 540 S.E.2d 599, 601–02 (Ga. 2001); *see* GA. CODE ANN. § 24-1-2(c)(4) (effective Jan. 1, 2013) (stating the rules of evidence do not apply to "[p]roceedings for revoking parole").

remedial measure rule should apply in product liability cases. In 1997, Federal Rule 407 was amended to clarify that, at least in federal courts, subsequent remedial measures would not be admitted in product liability cases.[237] Georgia courts, on the other hand, sided with the view that it is not necessary to exclude evidence of subsequent remedial measures in product liability cases because product manufacturers have a host of other incentives to remedy defects in their products, regardless of whether such efforts might be used against them in a lawsuit.[238] The new rules retain Georgia policy in this respect and thus depart from the current Federal Rule.[239] Georgia's version of Federal Rule 407 also clarifies that the rule excludes remedial measures that follow an injury or harm but without the apparent limitation in the Federal Rule that the remedial measure must have followed the injury or harm to the plaintiff in the subject lawsuit.[240]

(34) *Compromise Negotiations and Offers of Settlement*—Although current Georgia law excludes statements made "with a view to a compromise,"[241] the protections afforded by the rule are not always as reassuring as participants in settlement negotiations would like. Vague distinctions between offers "to compromise" and offers "to settle,"[242] questions about whether the protection extends to negotiations over damages where liability is admitted,[243] and doubts about coverage of statements that are collateral to actual offers to

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237. FED. R. EVID. 407.

238. John Crane, Inc. v. Jones, 586 S.E.2d 26, 31 (Ga. Ct. App. 2003), *aff'd*, 604 S.E.2d 822 (Ga. 2004); General Motors Corp. v. Moseley, 447 S.E.2d 302, 310 (Ga. Ct. App. 1994).

239. In civil proceedings, when, after an injury or harm, remedial measures are taken to make such injury or harm less likely to recur, evidence of the remedial measures shall not be admissible to prove negligence or culpable conduct but may be admissible to prove product liability under subsection (b) or (c) of Code Section 51-1-11. The provisions of this Code section shall not require the exclusion of evidence of remedial measures when offered for impeachment or for another purpose, including, but not limited to, proving ownership, control, or feasibility of precautionary measures, if controverted.

GA. CODE ANN. § 24-4-407 (effective Jan. 1, 2013).

240. *Id.*

241. GA. CODE ANN. § 24-3-37 (2010).

242. *See*, *e.g.*, Teasley v. Bradley, 35 S.E. 782, 787 (Ga. 1900); Stover v. Candle Corp. of Am., 520 S.E.2d 7, 8 (Ga. Ct. App. 1999).

243. *See* Pac. Nat'l Fire Ins. Co. v. Beavers, 73 S.E.2d 765, 768–69 (Ga. Ct. App. 1952).

compromise[244] all contribute to a less-than-certain environment for discussing settlement. The new rule provides broader and more definitive protection for such discussions. As long as the parties are engaged in compromise negotiations or mediation, all of their statements and conduct, as well as the statements of nonparties who participate in the discussions, are protected from disclosure.[245]

(35) *Payment of Medical and Similar Expenses*—At one time in Georgia, a party's offer to pay medical or similar expenses was considered an offer to settle, not an offer to compromise, and thus was admissible.[246] Later Georgia cases softened this rule to provide that if the trial judge determined that the offer to pay expenses was made on an impulse of benevolence or sympathy, it should not be considered an admission of liability.[247] The new rule ends any uncertainties or caveats in this area: "Evidence of furnishing, offering, or promising to pay medical, hospital, or similar expenses occasioned by an injury shall not be admissible to prove liability for the injury."[248]

(36) *Agent Admission Rule Liberalized*—Current Georgia law on vicarious admissions by agents is burdened by the presence of two overlapping statutes, one from Title 24 (the Evidence Code)[249] and the other from Title 10 (the Commerce and Trade Code).[250] This has led to confusing and inconsistent applications of the rule.[251] Generally, an agent's or employee's statements are admissible under

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244. *See, e.g.*, Nevitt v. CMD Realty Inv. Fund IV, L.P., 639 S.E.2d 336, 339–40 (Ga. Ct. App. 2006); Bounds v. Coventry Green Homeowners' Ass'n, 601 S.E.2d 440, 442–43 (Ga. Ct. App. 2004).

245. *See, e.g.*, Blu-J, Inc. v. Kemper C.P.A. Grp., 916 F.2d 637, 642 (11th Cir. 1990).

246. Monson v. Brown, 292 S.E.2d 486, 486 (Ga. Ct. App. 1982).

247. *See*, *e.g.*, Neubert v. Vigh, 462 S.E.2d 808, 809 (Ga. Ct. App. 1995); White v. Front Page, Inc., 213 S.E.2d 32, 33 (Ga. Ct. App. 1975).

248. GA. CODE ANN. § 24-4-409 (effective Jan. 1, 2013).

249. Admissions by an agent or attorney-in-fact, during the existence and in pursuance of his agency, shall be admissible against the principal.

GA. CODE ANN. § 24-3-33 (2010)

250. 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.

Id. §10-6-64.

251. *See* MILICH, *supra* note 5, § 18.10.

current Georgia law only if the agent or employee was authorized to speak on behalf of the principal.[252]

The new rules clarify and broaden the scope of agency admissions in contrast to prior Georgia law. New Code Section 24-8-801(d)(2)(D) sets forth two simple requirements for an agency or employee admission: First, the statement was made during the agency or employment relationship. Second, the subject matter of the statement concerns a matter the agent or employee would know about by virtue of his agent or employee duties.[253]

The new rule does not purport to redefine substantive law regarding when a principal is legally bound by the actions or words of his agent but only defines an agency admission for purposes of clearing a hearsay objection. Thus, even though an employee may not have been authorized to make the statement in question, the court may admit it over a hearsay objection if it meets the requirements of this subsection.[254]

Under current Georgia law, the jury ultimately decides whether the foundation for an agency admission is met and is instructed accordingly.[255] The offered statement is not considered in making this determination.[256] Under the new rules, the judge alone decides whether, by a preponderance of the evidence, the foundation exists,[257] and the offered statement is considered along with other evidence in making this determination.[258] However, the offered

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252. *Id.*; *see, e.g.*, Taylor v. Golden Corral Corp., 567 S.E.2d 109, 111 (Ga. Ct. App. 2002); McDevitt & Street Co. v. K-C Air Conditioning Serv., Inc., 418 S.E.2d 87, 93–94 (Ga. Ct. App. 1992).

253. A statement by the party's agent or employee, but not including any agent of the state in a criminal proceeding, concerning a matter within the scope of the agency or employment, made during the existence of the relationship.

GA. CODE ANN. § 24-8-801(d)(2)(D) (effective Jan. 1, 2013).

254. *See, e.g.*, Corley v. Burger King, 56 F.3d 709, 709 (5th Cir. 1995) (holding that although an employee was not authorized to speak for his employer, the subject matter of the employee's statement as to what he was doing at time of a car accident fell within the scope of his employment and was an agent admission).

255. *See, e.g.*, Ga. Power Co. v. Busbin, 283 S.E.2d 647, 650–51 (Ga. Ct. App. 1981).

256. McDevitt & Street Co. v. K-C Air Conditioning Serv., Inc., 418 S.E.2d 87, 93–94 (Ga. Ct. App. 1992).

257. GA. CODE ANN. § 24-1-104(a) (effective Jan. 1, 2013).

258. *Id.* § 24-8-801(d)(2).

statement alone is not sufficient to establish the basis for its admissibility but must be supported by independent evidence.[259]

The federal courts have overwhelmingly held that Federal Rule 801(d)(2)(D) does not allow the accused in a criminal trial to offer the out–of–court statements of police officers or other agents of the State as agent admissions.[260] Likewise, Georgia has never permitted such statements as admissions of the State. The new rule makes this explicit.[261]

(37) *Impeaching the Verdict in Civil Cases*—Current Georgia law does not allow a juror to testify in court or by affidavit as to the internal discussions and deliberations of the jury after the jury has rendered its verdict and been excused.[262] The new rules are to the same effect. However, the new rules include an exception for when "extraneous prejudicial information was improperly brought to the juror's attention" or "any outside influence was brought to bear upon any juror."[263] This exception currently is recognized in criminal cases in Georgia,[264] but for inexplicable reasons does not apply in civil cases.[265] The new rule applies to all jury trials, civil or criminal.[266]

(38) *Evidence Rules Do Not Apply to Custody and Dispositional Hearings in Juvenile Courts*—Most cases construe current Georgia Code Sections 15-11-56(a) and 15-11-65(b) to significantly relax the rules of evidence, including the hearsay rule, in custody and dispositional hearings in juvenile court,[267] though a few cases have held otherwise.[268] The new rules make it clear that the rules of

259. *Id.*
260. *See, e.g.*, United States v. Prevatte, 16 F.3d 767, 779 n.9 (7th Cir. 1994).
261. GA. CODE ANN. § 24-8-801(d)(2)(D) (effective Jan. 1, 2013).
262. GA. CODE ANN. §§ 9-10-9, 17-9-41 (2010).
263. GA. CODE ANN. § 24-6-606(b) (effective Jan. 1, 2013).
264. *See*, *e.g.*, Spencer v. State, 398 S.E.2d 179, 184 (Ga. 1990).
265. *See*, *e.g.*, Newson v. Foster, 581 S.E.2d 666, 668 (Ga. Ct. App. 2003).
266. GA. CODE ANN. § 24-6-606 (effective Jan. 1, 2013).
267. *See, e.g.*, *In re* J.C., 251 S.E.2d 299, 302 (Ga. 1978); *In re* M.D., 503 S.E.2d 888, 889 (Ga. Ct. App.1988).
268. *In re* A.R., 673 S.E.2d 586, 588 (Ga. Ct. App. 2009); *In re* K.I.S., 669 S.E.2d 207, 209 (Ga. Ct. App. 2008).

evidence do not apply[269] and thus, hearsay may be considered "to the extent of its probative value."[270]

IV. UNFINISHED BUSINESS—A FEW ISSUES TO ADDRESS IN THE FUTURE

Despite the considerable breadth of this year's changes to the evidence rules in Georgia, a few issues remain unresolved and deserve some future attention. For example, the spousal witness privilege allows a spouse to refuse to testify in criminal proceedings involving the other spouse.[271] There is an exception for cases in which a spouse is charged with a crime against a minor.[272] Many states extend that exception to crimes against the spouse, such as spousal abuse.[273] Proponents of extending the exception argue that the law should make it more difficult for a victim spouse to decline to testify against the defendant spouse.[274] Opponents point out that if the victim spouse cannot claim the privilege, but nevertheless refuses to testify, the victim spouse faces a contempt of court charge, victimizing the victim a second time.[275] It is not an easy issue. While there was debate in the State Bar Committee and legislature about the pros and cons of extending the exception, the consensus was that the issue deserved separate discussion and treatment, apart from the general reform of the evidence code.[276]

The State Bar proposed updating Georgia's current "clergy privilege," which by its terms applies only to clergy and members of the Christian and Jewish faiths.[277] The proposed changes got lost

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269. GA. CODE ANN. § 24-1-2(c)(7) (effective Jan. 1, 2013).
270. GA. CODE ANN. §§ 15-11-56(a), 15-11-65(b) (2010).
271. *Id.* § 24-9-23(a).
272. *Id.* § 24-9-23(b).
273. MCCORMICK ON EVIDENCE, *supra* note 64, § 84.
274. *See e.g.*, Kenneth J. Lewis, Note, *The Marital Crime Exception: Why Georgia's Marital Privilege Law Should be Changed*, 4 J. MARSHALL L.J. 235, 250–51 (2011).
275. R. Michael Cassidy, *Reconsidering Spousal Privileges After Crawford*, 33 AM. J. CRIM. L. 339, 355 (2006).
276. *See* H.R. 840, 150th Gen. Assemb., Reg. Sess. (Ga. 2009), *available at* http://www1.legis.ga.gov/legis/2009_10/fulltext/hb840.htm.
277. Every communication made by any person professing religious faith, seeking spiritual comfort, or seeking counseling to any Protestant minister of the Gospel, any priest of the Roman Catholic

along the legislative path over debate on how to define "religions." The current limitations on the privilege are constitutionally questionable.[278]

Current Georgia law requires that certain professionals report evidence of child abuse, notwithstanding any evidentiary privileges that otherwise apply.[279] What is unclear is whether the professionals covered by evidentiary privileges—such as psychologists, clinical social workers, therapists, etc.—are free not only to report the child abuse but also to testify in subsequent proceedings related to that report. At least one state with a statute like Georgia's has held that allowing the disclosure of privileged information for reporting purposes does not abrogate the testimonial privilege.[280] Florida has clarified its statute to allow the reporting professional to testify.[281] Georgia should decide how it wants to handle this issue and proceed accordingly.

The State Bar proposed some changes to the rape victim shield rule, but the legislature decided to leave it alone.[282] The effort to reform Georgia's rape victim shield rule has become a victim of political demagoguery,[283] which is a shame since there are

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> faith, any priest of the Greek Orthodox Catholic faith, any Jewish rabbi, or to any Christian or Jewish minister, by whatever name called, shall be deemed privileged. No such minister, priest, or rabbi shall disclose any communications made to him by any such person professing religious faith, seeking spiritual guidance, or seeking counseling, nor shall such minister, priest, or rabbi be competent or compellable to testify with reference to any such communication in any court.

GA. CODE ANN. § 24-9-22 (2010). The State Bar proposal would have changed the statute to read:

> 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.

See supra note 8, at 52.

278. MCCORMICK ON EVIDENCE, *supra* note 64, § 76:2.

279. Suspected child abuse which is required to be reported by any person pursuant to this Code section shall be reported notwithstanding that the reasonable cause to believe such abuse has occurred or is occurring is based in whole or in part upon any communication to that person which is otherwise made privileged or confidential by law.

GA. CODE ANN. § 19-7-5(g) (2010).

280. State v. Snell, 714 A.2d 977, 981 (N.J. Super. Ct. App. Div. 1998).

281. FLA. STAT. § 39.204 (2010).

282. Hendrix et al., *supra* note 189, at 19.

283. *See, e.g.*, Larry Peterson, *Barnes, Deal Bash Each Other with Hard-Hitting Ads*, SAVANNAHNOW.COM (Oct. 16, 2010, 3:19 AM), http://savannahnow.com/news/2010-10-16/barnes-

inconsistencies in judicial construction of the statute that have little to do with policy but should be resolved simply as a matter of providing clarity and certainty in the application of the rule.[284] Moreover, Georgia's current rape victim shield act does not apply to several kinds of sexual assault cases.[285] The proposed State Bar rule would have applied to all crimes involving sexual assault.[286]

Finally, Georgia currently applies *Daubert* and its provisions for judicial review of the reliability of expert testimony in civil cases but not in criminal cases.[287] On its face, this distinction is puzzling. *Daubert* was designed to improve the overall reliability of scientific and other expert testimony in the courtroom.[288] It is unclear why a state would want that improved reliability only in civil, not criminal, cases. Particularly in light of recent major studies that raise serious concerns about the reliability of expert testimony in criminal cases,[289] the legislature should look at extending the judicial scrutiny that *Daubert* requires to criminal cases.

V. CONCLUSION

Adoption of new rules of evidence will bring two changes to Georgia practice. The first, the substantive changes in the law of evidence, are briefly summarized in this article. The second change is

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284. *See* MILICH, *supra* note 5, § 11.6, at 245–48 (discussing impeachment and res gestae).

285. Current Georgia Code Section 24-2-3 does not apply to cases of child molestation, sexual battery, or statutory rape. *See* Robinson v. State, 708 S.E.2d 303, 306 (Ga. Ct. App. 2011) (en banc).

286. The State Bar's proposed rule would have applied to all criminal cases 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. *See supra* note 8, at 42.

287. GA. CODE ANN. § 24-9-67.1 (2010).

288. *See generally* Daubert v. Merrel Dow Pharm., Inc., 509 U.S. 579, 597 (1993) (summarizing its holding as follows: "'General acceptance' is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence . . . do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands.").

289. *See e.g.*, NAT'L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009).

accessibility. 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. Compared with existing Georgia law, the new rules provide a clearer, simpler, more comprehensive approach to evidentiary issues. The new Code states:

> The object of all legal investigation is the discovery of truth. Rules of evidence shall be construed to secure fairness in administration, eliminate unjustifiable expense and delay, and promote the growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.[290]

290. GA. CODE ANN. § 24-1-1 (effective Jan. 1, 2013).