PROPOSED EVIDENCE CODE REVISION

-Prosecutor Comments-

(*With Professor Milich's Responses in Italics - Dec. 21, 2008*)

The prosecutors of the State of Georgia are generally concerned that the evidence code revision has proven to be an overwhelming piece of legislation that needs more extensive debate and evaluation. The stated purpose of the revision was to adopt the Federal Rules of Evidence. However, the bill as it stands is a unique combination of Georgia and Federal Rules that is not supported by caselaw in many areas. [*In reality, the proposed new code is about 98% Federal Rules of Evidence with the remaining 2% reflecting highly favored current Georgia rules. Interestingly, one of the biggest departures from the Federal Rules is the retention of Georgia's "Gibbons" rule regarding prior inconsistent statements. Gibbons is much more favorable to the prosecution than the Federal Rules, particularly in domestic violence cases where the Federal Rule would often lead to dismissal of the case when the victim recants at trial. No states have slavishly adopted the Federal Rules verbatim. Most have done what we have done, adopted the Federal Rules with a few changes for state use.*]

Minimal changes in the language of a law can be enough to make all of the prior cases about that law inapplicable. We are now unable to rely on Federal or State cases for guidance on the application of much of our proposed code. [*A tremendous exaggeration. Again, 98% of the proposed code is the Federal Rules and there is a ton of case law on those rules as applied in federal courts and the courts of 42 other states. Most actively practicing Georgia trial lawyers are more familiar with the Federal Rules of Evidence, from studying them in law school, than the corresponding hodgepodge of current Georgia statutory provisions, many of which are at odds with Georgia case law. If the current bill is enacted, Georgia lawyers and judges will have more precedents to work with, not fewer, and will be able to locate and apply the correct law far more readily, avoiding needless errors in the trial court and improving the quality of justice throughout the state.*]

Therefore, we are left to speculate as to how the courts will interpret and apply the new provisions.

We are also concerned that well established Georgia law and precedent is being changed after only a few hours worth of debate on a given issue. Such policy changes should be debated individually and thoroughly before they are made. Due to the size of the bill, legal issues that have recently been debated for entire legislative sessions are being changed after an hour of debate. The following is a list of some of the concerns that prosecutors have expressed during the review process. This is not an exhaustive list as the review process is still underway. [*The current bill originated with a proposal that was exhaustively studied and debated within the State Bar for nearly three years. A number of prosecutors, led principally by Bob Keller, contributed to the careful analysis and critique of the proposal within the Bar. After the proposal was approved by the State Bar of Georgia's Board of Governors it went to the General Assembly's legislative study committee which held weeks of hearings throughout the summer and fall of 2008. These hearings were an open process in which numerous prosecutors and solicitors were probably the most active participants. Many changes were made to address their concerns. Chuck Olson of the Prosecuting Attorneys Council served as an advisory member of the legislative committee to represent the prosecutors and attended every hearing session.*]

24-4-404(b) **Character Evidence**

This subsection covers what has been known in Georgia as similar transactions, prior difficulties and independent crimes or acts.

A special balancing test is created that is not found in the current Georgia or Federal rules governing such evidence. [*Not true. Many Georgia cases have embraced a specific balancing test for similar transactions. A sampling of the cases ... Curtis v. State, 282 Ga. App. 322 (2006) ("In exercising [its] discretion, the court should consider whether the [s]tate's need for the similar transaction evidence outweighs the prejudice inherent to the defendant."); Brunson v. State, 207 Ga. App. 523 (1993) ("... evidence of*

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

The evidence described above is only admitted "if the probative value of admitting such evidence outweighs the danger of unfair prejudice." This test is different than the test outlined in 24-4-403 and seems to involve a presumption that such evidence will not be admitted. [*Again, there is nothing new about this balancing as described in the cases cited above so including the current balancing test in the statute should not change anything from that standpoint.*]

* Current Georgia law does not require prosecutors to provide notice of intent to offer evidence of prior difficulties between parties in a case. This is because the relationship of the parties is always relevant to the case and any bias that may exist. The proposed rule requires a 10 day notice of intent to offer such evidence. In domestic violence cases it will be impossible to comply with such notice because new evidence comes to light when parties are testifying and their entire relationship is being explored. It would

be challenging to provide notice regarding every argument that a couple has experienced in their relationship. The notice requirement is a policy change in Georgia law that was made after a few minutes of debate. [*Actually, no one from the prosecutor's group pointed out this problem at the hearings. I think the prosecutors raise a good point here and I'd go even further and amend the rule to state that notice is not necessary when the prosecution is offering the evidence of prior crimes, wrongs or acts to prove the circumstances immediately surrounding the charged crime (what we currently call res gestae), motive, or prior difficulties between the accused and the alleged victim. This would mirror current practice*]

* The proposed rule constitutes a major policy change in Georgia law on the issue of similar transactions. The "bent of mind" and "course of conduct" uses for similar transactions have been eliminated. Representatives of the State Bar admit that similar transactions, that have long been admissible in DUI and drug cases, would be substantially harder to admit under the new section. This policy change was made after less than an hour of debate on the issue. [*There have been many debates on this issue, both within and outside the Bar.* ***Neither the Federal Rules nor any other evidence rules in America recognize "bent of mind" or "course of conduct" as exceptions to the 350 year old rule against character evidence in criminal cases.*** *See, Wade v. State, __ Ga. App. __ (2008 WL 5062429) (court critiques Georgia's "unique" rule but holds that it is "constrained" to follow it until the Supreme Court or General Assembly changes it). The "bent of mind" or "course of conduct" exceptions are actually of very recent vintage in Georgia. They first appeared in sex offense cases (where the proposed new rules follow the special Federal Rules allowing admission ... see 24-4-413, 414) and migrated without analysis to other areas of the law. As one Georgia Supreme Court Justice noted, "bent of mind" and "course of conduct" are "dangerously close to being ... character." Farley v. State, 265 Ga. 622 (1995). Not surprisingly, the "bent of mind" or "course of conduct" exceptions are swallowing the character rule. I cite dozens of cases in my treatise, GEORGIA RULES OF EVIDENCE, where "bent of mind" is admitted to prove what is essentially the defendant's propensity to commit the charged crime. See, e.g., Cain v. State, 268 Ga.*

App. 39 (2004) (defendant's prior theft of cars admissible to show his "bent of mind to steal cars."); Tanner v. State, 243 Ga. App. 640 (2000) (accused charged with possession of cocaine, 10 year old prior conviction for sale of cocaine admitted to show "bent of mind and course of conduct.") As one trial judge explained to me,"bent of mind" is an invitation to lazy judging ... you don't have to make the hard discriminations between illegitimate character evidence and legitimate non-character relevance to prove motive, intent, identity, absence of mistake or accident, etc. ... you simply shout "bent of mind!" and let it in. We are kidding ourselves if we think that adding "bent of mind" and "course of conduct" to Rule 404(b) is not essentially repealing the rule against character evidence in criminal cases. I would note that the members of the Bar Committee who represented the criminal defense lawyers were adamant that "bent of mind" and "course of conduct" not be added to Federal Rule 404(b). I doubt that they would have supported the new rules if they had been added. I don't think I could have supported the new rules in that case either. If Georgia is going to be the first jurisdiction in the common law world to repeal the character rule in criminal cases, we should do so openly, after thorough debate. We should not do so simply because some appellate cases took a weird turn 20 years ago and, without discussion or analysis, hugely expanded the scope of "exceptions" to the rule.]

* This subsection leaves out the Federal rule requiring the defendant to request notice of such evidence and removes a provision that allows such notice to take place during trial under certain circumstances. [*The proposed rule does in fact allow the trial judge to excuse pretrial notice upon good cause shown.*]

<u>24-6-606</u> Witnesses (Jurors as Witnesses)

* This rule prevents a juror from testifying as a witness in a case in which the juror is sitting. Although this rule seems appropriate on its face, it is a change in Georgia law and has an impact on prosecutions in small, less populated jurisdictions. Some jurisdictions are so small that this can't be avoided and a provision allowing for such testimony in certain circumstances is needed.

[*Again, the prosecutors want to change the Federal Rule. But the Georgia Supreme Court has already been heard on this issue. In Lively v. State, 262 Ga. 510 (1992) the Court noted Georgia's curious statute allowing a witness to sit as a juror and essentially overruled it: "In the future, jurors known by the parties to be prospective witnesses about matters material to the case should be excused on proper motion."*)

24-6-608 **Witnesses (Truthful Character)**

* This section makes opinion evidence admissible to prove character for truthfulness. Currently in Georgia, only reputation evidence is admissible to prove such character. This opens the door for any witness to take the stand to say "In my personal opinion the defendant is truthful." [*Again, the prosecutors want to change the Federal Rule which has provoked no controversy whatsoever in federal courts or in the 42 states that have adopted this rule. Our own Georgia courts have long criticized Georgia's preference for reputation over opinion evidence. In Simpkins v. State, 149 Ga. App. 763 (1979), the court wrote: "It is an evidentiary anomaly that in proving general moral character, [Georgia] law prefers hearsay, rumor, and gossip to personal knowledge."]*

24-6-609 **Witnesses (Impeachment by prior Conviction)**

* Subsection (f) allows for the impeachment of a witness by prior conviction without a certified copy of that conviction. Historically in Georgia this has not been allowed. There is still uncertainty about the issue after the changes to impeachment law in 2005. The subsection as proposed allows for a witness to be impeached without a certified copy but does not specifically provide for a defendant to be impeached without a certified copy of the conviction. This section brings the inequality that was corrected in 2005 back to the criminal justice system. If a victim can be impeached on the stand without a certified copy of their conviction then a defendant should be subjected to the same scrutiny. [*First of all, there is no intent to treat the accused different than an ordinary witness regarding proof by certified copy of conviction. If the prosecutors want to amend subsection (f) to add "or the accused" after "witness" in the first line, no one would object to that. As for dispensing with the requirement in general, every other court*

seems to do fine without the requirement so we kept the federal approach which seems more efficient and less costly for all parties.]

* The United States Supreme court has held that a conviction, in which the defendant was not represented by counsel or shown to have waived counsel, should not be used to impeach said defendant. Loper v. State, 450 U.S. 473. The result is that a defense attorney would be allowed to impeach any state witness including a victim if he had a good faith basis to believe the witness had a conviction. There is no test for what constitutes a good faith basis. On the other hand, a defendant can only be impeached by conviction when a certified copy of said conviction is offered. That is the only way to comply with the Supreme Court's rationale in Loper. This is fundamentally unfair and contrary to the policies of fairness and equality adopted in 2005. [*Note comments above regarding amending subsection (f).*]

24-6-611 **Witnesses (Leading Questions)**

* Subsection (c) as written will bring confusion to the law governing the use of leading questions in a direct examination. It states that leading questions "shall" not be used in direct examinations while the Federal rule and current Georgia law allow for a little more discretion on the issue. Federal Rule 611 says leading questions "should" not be used. The result could be a plain error standard that would obviate the requirement that a party object to such testimony at trial. [*The last sentence regarding the "plain error" standard is simply not accurate. Legislative counsel Jill Travis tries to use "shall" whenever possible and then allow for exception language, as we have in 24-6-611(c) ... "except as may be necessary to develop the witness's testimony."]*

* Subsection (c) could also cause confusion in the area of leading questions on cross examination. It states that such questions shall "ordinarily" be used whereas Georgia law clearly and unambiguously allows for leading questions on cross examination. [*Not actually true. Under current Georgia law, when the opponent calls your client, a party, to the stand, courts have discretion to require that you to ask non-*

leading questions on "cross." Thomas v. Baxter, 234 Ga. App. 663 (1998). In any event, I know of not one single case in the nation where this concern has come up.]

<u>24-6-612</u>   Witnesses (Refreshing Recollection)

*   This section requires prosecutors to turn over any and all reports or writings that a witness reviewed prior to their testimony at any proceeding after indictment. This is a significant policy change to Georgia law. As it stands, we are required to turn over any writing that a witness has used to refresh their recollection on the stand. The problem is that the proposed law completely undermines the reciprocal discovery requirements of OCGA 17-16-1 et al. To get such writings, under current law, a defendant must opt into the discovery statute thereby obligating the defense to submit certain parts of their evidence to the prosecutor. There are many motions that take place after Indictment on many complicated issues. This provision would require the prosecutor to turn over all of the reports in a case that were reviewed by a witness before the motion. In many situations that would include virtually every report in a case. This provision is unfair and will place a tremendous burden on prosecutors. [*Again, this would change the Federal Rule. The Legislative Study Committee, at the request of DA Pat Head, modified the Federal Rule to the form that is in the current bill. First of all, the Comment misstates current Georgia law. The prosecution currently is required to turn over any writings that a witness has used to refresh his or her recollection* ***since the inception of the trial.*** *Bailey v. State, 254 Ga. App. 420 (2002). Second, the requirement in the Federal Rule that the prosecution turn over writings applies only if (1) a witness who testifies, (2) used the writing to refresh her recollection before testifying, and (3) the judge determines it is "necessary in the interests of justice" that the defense see a copy of the writing before cross-examining the witness.]*

<u>24-6-613</u>   Witnesses (Prior Inconsistent Statement)

*   This section provides for the impeachment of a witness with a prior inconsistent statement. Such evidence is currently allowed in Georgia. However, under the current

law, such inconsistent statement is admissible for impeachment purposes and as substantive evidence. The proposed law does not provide for the admission of such a statement as substantive evidence. [*Actually, the proposed bill clearly does so. See, 24-8-801(d)(1)(A) (lines 966-971 of HB24) which state quite explicitly: "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 ..." This is exactly the same as the current "Gibbons rule" in Georgia. It is a departure from the Federal Rules that former prosecutor Bob Keller fought for, and won, over the staunch resistance of the defense bar.*]

<u>24-6-614</u> Witnesses (Court Calling Witnesses On Its Own)

* This section allows the court to call witnesses on its own motion. This makes it nearly impossible for the court to retain its appearance of impartiality as it will be advocating for one side or the other. [*Well, the judge can do this under current Georgia law so we are not changing anything here. See, Shields v. State, 272 Ga. 31 (2000); Henry v. State, 265 Ga. 732 (1995) (trial judge may "summon and examine witnesses of his own choosing").*]

<u>24-8-801</u> Hearsay (Adoptive Admission)

* Subsection d(2)(B) adopts the unclear Georgia standard on adoptive admissions. The current Georgia statute provides that acquiescence or silence, when the circumstances require an answer, a denial or other conduct, may amount to an admission. There is conflict in the caselaw when the adoptive admission is that of the accused. One line of cases prohibits evidence of adoptive admissions from the accused and one line of cases allows it. The federal rule is very clear and it makes no sense to adopt a standard that is already questionable. [*The proposed rule will actually benefit the prosecutors by clarifying that statements made in the presence of the accused, but not in the presence of the police, may be admissible as admissions by silence (see my comment on the Jarrett case in my memo regarding the benefits to prosecutors of adopting the proposed new*

rules). The Jarrett case (which has caused the problems) is not based on any language in any statute but upon an over-extension of a constitutional principle. We added language to the Federal Rule on adoptive admissions to make it clearer that it applied to admissions by silence (a benefit to prosecutors which they approved earlier). If, however, the prosecutors want just the language of the Federal Rule, no one would object to that.]

<u>24-8-801</u> Hearsay (Coconspirators Statements)

* Subsection (2)(E) significantly changes Georgia law governing the admission of statements of a coconspirator by adding a requirement that the statement be made in furtherance of the conspiracy. The majority of coconspirator statements are not made in furtherance of the actual conspiracy. Representatives of the State Bar argue that this new limitation is offset by the addition of a statement against interest exception. As explained below, the statement against interest exception as applied to defendants is almost meaningless because of a requirement that the statement be supported by other evidence of truthfulness. [*Again, this Comment wants to change the Federal Rule. As argued at length in the Legislative Study Committee, Georgia is the only jurisdiction in America that does not have a requirement that a co-conspirator statement be "in furtherance" of the conspiracy. Why is that? No reason. In fact, Georgia did have the "in furtherance" requirement for a hundred years before it simply wandered off without notice or analysis. Like most of the 1863 evidence code, the language of the current statute was taken directly from Professor Greenleaf's 1853 Treatise of the Law of Evidence. In section 111 of his treatise, Greenleaf states not once, but three times in the same section that the statements must be in furtherance of the conspiracy and cites a long line of English and Amercian cases. Indeed, this was the understanding of Georgia courts for a long time. For example, in Lance v. State, 166 Ga. 15 (1928), our Supreme Court wrote: "Acts and declarations of a codefendant or alleged conspirator are admissible against the other only when made and done during the pendency of the criminal enterprise* ***and in furtherance of its object."*** *As with many of the 1863 Code provisions, 145 years provides ample opportunity for cases to slowly and inexorably become unhinged from the statutes. This is why adopting the Federal Rules brings new clarity and accessibility to*

our rules of evidence. In the case of of co-conspirator exception, adopting the Federal Rule will actually restore the original legislative intent of the Code of 1863.]

**<u>24-8-804</u>	Hearsay (Statements Against Interest)**

* Subsection (b)(3) allows for the admission of statements against interest over hearsay objection. However, in criminal proceedings, a statement tending to expose the declarant to criminal liability shall not be admissible unless corroborative circumstances clearly indicate the trustworthiness of the statement. This limiting provision comes from the Federal rule, however, the Federal rule only puts the limitation on evidence that is offered to exculpate the accused. The proposed rule is the direct opposite of the Federal rule because the proposed rule would force the state to offer corroborating circumstances of truthfulness in order to admit a defendant's statement against interest. [*Actually, it is not opposite at all: the Rule would require **anyone**, prosecution or defense, who would offer a statement against criminal interest to show corroborating evidence.*] This is unfair and legally senseless. The reason that statements against interest are admitted over hearsay objection is because they are inherently reliable. The theory is that a person would not make a statement which is against their interest unless it was true. Requiring the state to have some other evidence of truthfulness is a veiled attempt to prevent the state from offering such evidence. The proposed rule is not the Federal or Georgia standard. [*Georgia currently does not have a viable hearsay exception for statements against penal interest so the new rules actually benefit the prosecution. The proposed new rules do follow the rule in the 11th Circuit and most other Circuits that a statement against penal interest, whether offered by the defense or the prosecution, must have corroborating evidence. Keep in mind that a statement against penal interest is usually not offered to prove the <u>speaker</u> committed a crime ... it is offered because when the speaker admitted he committed a crime he also said someone else committed the crime with him. This helps the prosecution when the "other person" is the defendant. It helps the defense when the "other person" is a third party, not the defendant. I have reviewed many cases in which the corroboration requirement is applied to the prosecution. Not surprisingly, the prosecution's total case*

almost always has enough evidence to corroborate the defendant's participation in the crime charged. Current Georgia law does not allow the uncorroborated statements of a co-conspirator to convict the defendant. The proposed rule simply carries that principle forward.]

As I stated above, this is not an exhaustive list. Please do not hesitate to contact me to arrange for any further discussion that is necessary. Thank you for your time and consideration.

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