

OVERVIEW

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

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

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

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

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

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

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

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

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

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

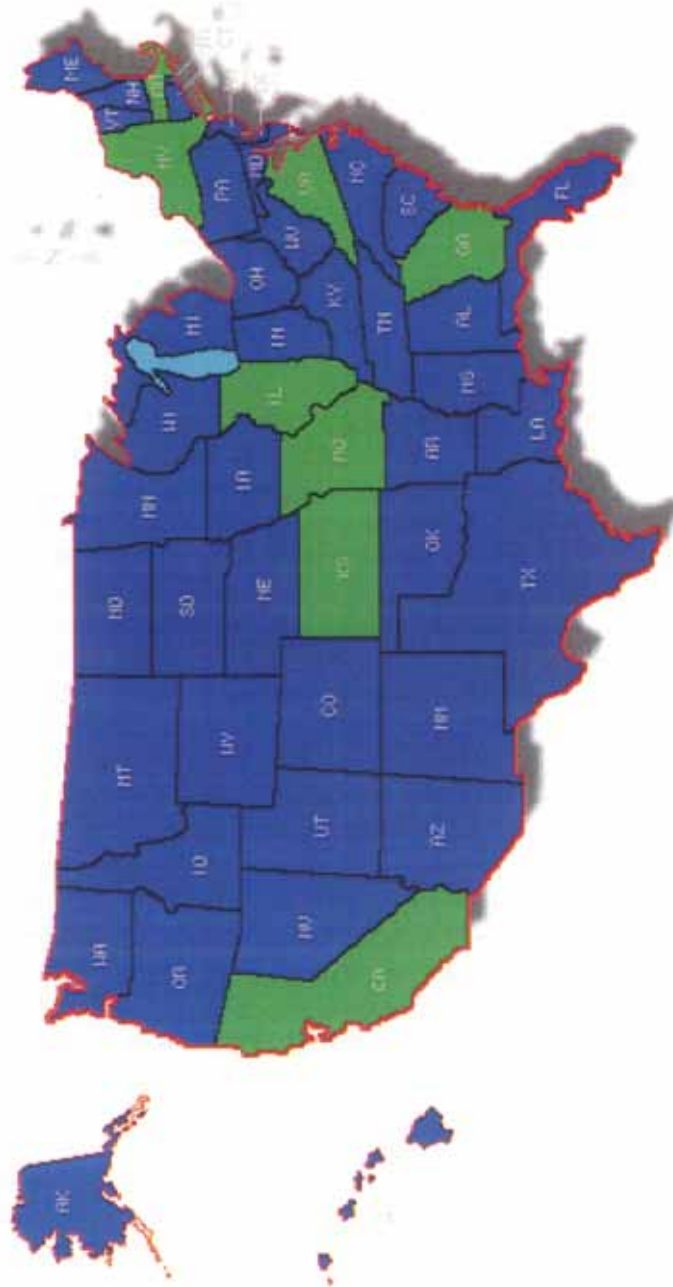
Adoption of new rules of evidence would bring two changes to Georgia practice. The first, the substantive changes in the law of evidence, is briefly summarized in the following section. The second change relates to accessibility. Compared with existing

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

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

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

Adoption of the Federal Rules of Evidence



NOTES:
Blue: States that adopted the Federal Rules of Evidence. Green: States that have not adopted the Federal Rules of Evidence. Forty-two states have adopted the Federal Rules of Evidence. The majority of those states followed the Federal rules as worded after Congress completed its revision in 1975. However, other states followed the Rules promulgated by the Supreme Court in 1972, while others adopted rules resembling the 1974 Uniform Rules of Evidence. States vary as to how they handle amendments to the Federal Rules.