

# THE PROPOSED NEW GEORGIA RULES OF EVIDENCE

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

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

**Res Gestae** - The proposed rules retire the term “*res gestae*.” Nearly every jurisdiction in the U.S. has replaced this maddeningly malleable doctrine with specific rules covering several classes of statements that experience (primarily with the *res gestae* concept) has proved are especially trustworthy. *See*, proposed O.C.G.A. 24-8-803 (1),(2),(3).

**Admissions by Agents** - Georgia’s agency admission rule has a confusing history, due in large part to the overlap of two, inconsistent statutes - one in the Evidence Code and one in the Title on Agency - that both speak to the admissibility of an agent’s statements against his principal. Most cases limit agent admissions to those that were authorized by the principal. The proposed rules require that the statement have been made during the agency relationship and that the subject matter of the statement fall within the scope of the agent’s duties. *See*, proposed O.C.G.A. 24-8-801(d)(2)(D).

**Business Record Exception** - Current Georgia law and the proposed rules differ in two respects. (1) The current Georgia rule does not allow opinions in the record. The proposed rules do. Thus, for example, an appraiser’s report as to the value of certain property could be admissible under the new rule but not under current Georgia law. Lay or expert opinions in the record still would have to qualify under the rules governing opinion testimony. Moreover, the court can exclude a business record when “the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.”

(2) Georgia requires that a witness at trial lay any foundation necessary to the admission of a business record. The proposed rules allow the use of an affidavit to lay this foundation if the proponent gives opposing parties notice and an opportunity to examine the records before trial. *See*, proposed O.C.G.A. 24-8-803(6); 24-9-902(11).

**Public Records Exception** - Georgia has dozens of statutes regarding the admissibility of specific public records scattered all over the Official Code of Georgia.

Together, their coverage is similar to proposed O.C.G.A. 24-8-803(8)(A), admitting the routine records of any public agency.

Georgia uses its general business record exception for admitting public records not specifically covered by statute. Again, this does not permit statements of opinion in the record. Proposed O.C.G.A. 24-8-803(8)(B) and (C) admit matters observed and reported pursuant to duty as well as factual findings resulting from duly authorized investigations, though these provisions are unavailable to the prosecution in criminal cases.

**Learned Treatises** - In Georgia, an expert may refer to treatises and other learned publications on direct but the expert may not disclose or show the pertinent contents of the publication to the jury. The contents may be inquired into on cross. The proposed rule allows relevant portions of a treatise to be read or shown to the jury on direct if the work is considered a reliable authority in the particular field. See, proposed O.C.G.A. 24-8-803(18).

**Expert Opinion Testimony** - Since 2005, Georgia has applied its version of Federal Rule 703 in civil cases which allows an expert to base an opinion on facts, otherwise inadmissible, that are reasonably relied upon by other experts in the field. The new rules would apply this same rule in criminal cases. See, proposed O.C.G.A. 24-7-703. The current rule applying *Daubert* to expert opinions in civil cases but not in criminal cases would remain unchanged.

**Statements of Co-Conspirators** - Georgia does not require that a co-conspirator's statement have been in furtherance of the conspiracy in order to be admissible under this exception. Georgia's law is very unusual in this respect. The proposed rule is based on the requirement at common law and carried forward in the Federal Rules that any statements admissible as a co-conspirator admission must have been in furtherance of the conspiracy. See, proposed O.C.G.A. 24-8-801(d)(2)(E).

**Statements Against Interest** - In Georgia criminal cases, statements against penal interest are inadmissible. Under the proposed rules, a statement against penal interest would be admissible if the declarant is unavailable and there exists corroborating circumstances that indicate the trustworthiness of the statement. See, proposed O.C.G.A. 24-8-804(b)(3).

**Character Witnesses** - Current Georgia law allows reputation testimony, but not opinion testimony. The new rules allow both. As one Georgia court wrote, "[I]t is an evidentiary anomaly that in proving general moral character [Georgia] law prefers hearsay, rumor, and gossip, to personal knowledge of the witness." See, proposed O.C.G.A. 24-4-405, 24-6-608.

**Admissions By Silence** - In *Jarrett v. State*, 265 Ga. 28 (1995), the Supreme Court held that a witness "may not testify as to a declarant's statements based on the acquiescence or silence of the accused." The new rules would allow admissions based on the accused's silence if the statements are made in the presence of the accused, the

police or other authorities are not present, and there is no good reason for the accused's silence other than the statements are true. *See*, proposed O.C.G.A. 24-8-801(d)(2)(B).

**“Bent of Mind” in Proving “Similar Transactions”** - Georgia is the only jurisdiction in the U.S. that allows a court to admit a criminal defendant's past crimes or acts to prove the accused's “bent of mind” toward the criminal conduct with which he is charged. The bent of mind exception is not in Georgia's statute but crept quietly into Georgia cases starting in the 1980's. As one Supreme Court Justice has wrote, a defendant's “bent of mind” is really no different than his “character” and thus the bent of mind exception has been slowly swallowing the 350 year old rule that prohibits using proof of the defendant's character against him at trial. The proposed rule is based on Federal Rule 404(b). *See*, proposed O.C.G.A. 24-4-404(b).

**Offers to Compromise - Settlement Negotiations** - Georgia law and the proposed rules are substantially similar though the proposed rules are simpler in two respects. (1) Georgia courts have made some arduous distinctions between “offers to settle” and “offers to compromise.” The proposed rules simply require that liability or damages be in dispute. (2) Georgia has struggled with “collateral admissions” - - statements made in the course of presenting an offer to compromise but not themselves made with a view to a compromise. The proposed rules cover such statements if they are part of the settlement negotiations or a mediation. *See*, proposed O.C.G.A. 24-4-408.

**Prior Inconsistent Statements** - Georgia follows the rule of Queen Caroline's case, requiring that a witness be shown his prior written statement or have his attention drawn to the time, place and circumstances of a prior oral statement before he can be impeached upon it. The proposed rules do not require this foundation. The proposed rules only require that the witness have an opportunity to explain or deny the prior statement. In practice, this means the prior statement must be introduced on cross-examination of the declarant. *See*, proposed O.C.G.A. 24-6-613.

**Competency of Juror to Impeach Verdict** - In Georgia, a juror is competent only to sustain, never to impeach, a verdict. An exception exists for when the jury was exposed to external information or influence. This exception applies only in criminal, not civil cases. Georgia is the only jurisdiction in the U.S. with such a distinction. The proposed rules extend this exception to civil cases. *See*, proposed 24-6-606(b).

**Authentication and Identification** - Existing Georgia law and the proposed rules are consistent, though the proposed rules are broader in some areas, such as identification of parties to a phone conversation and self-authentication of commercial paper, notarized documents, etc. The proposed rules pull together all authentication rules into one, clear set. *See*, proposed O.C.G.A. 24-9-901, 902.

**Best Evidence Rule** - Georgia's best evidence rule consists mainly of 19<sup>th</sup> Century statutes. Georgia's rule, for example, does not apply to photos or videos but only writings. The proposed rules apply to all forms of recordation. Georgia requires that in most cases in which an writing or recording must be produced, the proponent must produce the original or else account for why the original cannot be produced before

being allowed to use a copy. The proposed rules allow the use of copies unless the opponent cites specific reasons why the court should insist on production of the original. *See*, proposed O.C.G.A. 24-10-1001 through 1008.

**Exclusion of Evidence Because of Prejudice, Confusion, or Waste of Time.**

Although Georgia cases have recognized the trial court's authority to balance the probative value of the evidence against its unfairly prejudicial effect, the cases are inconsistent on the standard and scope of the trial court's authority. The proposed rules give the trial court discretion to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion, or undue delay. This standard applies to all evidence except where specific evidence rules expressly set a different standard. *See*, proposed O.C.G.A. 24-4-403.

**Habit Routine Practice** - Georgia case law has slowly recognized the admissibility of habit evidence but it generally does not allow a third party to testify to another's habit. The proposed rule has no such restriction. If adequate foundation is laid showing how the witness would be familiar with the subject's habit or routine, the witness may testify to it. *See*, proposed O.C.G.A. 24-4-406.