FOREWORD

The Institute is especially grateful to our outstanding Seminar Chairperson, Paul S. Milich, for providing the necessary leadership, organization and supervision that has brought this program into a reality. Indeed a debt of gratitude is particularly due our articulate and knowledgeable faculty without whose untiring efforts and dedication in the preparation of papers and in appearing on the program as speakers, this program would not have been possible. Their names are listed on the program at page iv of this book and their contributions to the success of this seminar are immeasurable.

I would be remiss if I did not extend a special thanks to each of you who are attending this seminar and for whom the program was planned. All of us hope your attendance will be most beneficial as well as enjoyable. Your comments and suggestions are always welcome.

November, 2012

Lawrence F. Jones
Executive Director
Institute of Continuing Legal Education in Georgia
<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
<th>Speaker/Location</th>
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<tr>
<td>7:45</td>
<td>REGISTRATION AND CONTINENTAL BREAKFAST</td>
<td>(All attendees must check in upon arrival. A jacket or sweater is recommended.)</td>
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<td>8:25</td>
<td>WELCOME AND OVERVIEW</td>
<td>Professor Milich</td>
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<td>8:30</td>
<td>OBJECTIONS AND TRIAL RULINGS</td>
<td>Professor Milich</td>
</tr>
<tr>
<td>8:45</td>
<td>AUTHENTICATION / BEST EVIDENCE</td>
<td>Thomas M. Byrne, Sutherland, Atlanta</td>
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<tr>
<td>9:30</td>
<td>IMPEACHMENT AND CROSS-EXAMINATION</td>
<td>Professor Milich</td>
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<td>10:30</td>
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<td>10:45</td>
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<td>W. Ray Persons, King &amp; Spalding LLP, Atlanta</td>
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<td>11:45</td>
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<td>12:15</td>
<td>HEARSAY</td>
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GEORGIA’S NEW EVIDENCE CODE

November 9, 2012

Paul S. Milich, Professor of Law and Director of the Litigation Program, Georgia State University, College of Law. Professor Milich was the Reporter for the State Bar Study Committee that drafted the new evidence code.

Thomas M. Byrne, Partner, the Sutherland firm. Served on the State Bar Study Committee that drafted the new evidence code as Vice Chair from 2003 – 2007 and as Chair from 2008 – 2011.

W. Ray Persons, Partner, King & Spalding. Served on the State Bar Study Committee that drafted the new evidence code as Chair from 2003 – 2007 and as a member until 2011.

8:55 – 9:15 Overview – Objections and Trial Rulings - Milich
9:15 - 10:05 Authentication / Best Evidence – Tom Byrne
10:05 - 10:20 Break
10:20 –11:15 Impeachment and Cross-Examination – Milich
11:15 –12:00 Expert Witnesses – Ray Persons
12:00 – 1:00 Lunch
1:00 – 2:30 Hearsay - Milich
2:30 – 2:45 Break
2:45 – 3:30 Hearsay - Milich
3:30 – 4:30 Character Evidence - Milich
The New 2013 Georgia Evidence Code - An Overview

Section I (from 2011 Ga. Law, Act 52) (excerpt from Preamble)

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. It is the intent of the General 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.

Preliminary fact finding by the trial court.

Under the pre-2013 rules, the trial court shared some evidence decisions with the jury and the jury was instructed, for example, how to apply the co-conspirator exception or the agent admission rule. Under the new 2013 rules, the trial judge decides all technical evidence questions. Marshall v. Planz, 145 F.Supp.2d 1258, 1275 (M.D.Ala. 2001) (“Rule 104 of the Federal Rules of Evidence requires the court, not a jury, to determine preliminary questions of admissibility.”)

The vast majority of evidence rules are technical, meaning they are not about the relevance of the evidence but about the legal rules that govern the admission of proof in our courts. In deciding such issues as whether a hearsay exception applies, an assertion of privilege is valid, or whether expert testimony satisfies Daubert standards, the trial judge must consider and decide preliminary questions of fact such as whether a record was made in the ordinary course of business, whether an attorney-client relationship existed, or whether an expert’s opinion is based on sufficient facts. The trial court is guided by New O.C.G.A. § 24-1-104(a) in deciding such preliminary questions of fact.

New O.C.G.A. §§ 24-1-104(a):

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. 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.

Under rule 104(a), the judge may consider any non-privileged evidence, without regard to the rules of evidence (including hearsay), and decides the matter using a preponderance of the evidence standard. For example, if a party asserts the attorney-client privilege and the opponent objects
that no attorney-client relationship existed at the time of the communication, the judge may consider any non privileged evidence, including hearsay, in deciding that question of fact.

In contrast to technical evidence rules, relevance based evidence rules focus on whether there is sufficient foundation to link the evidence to the facts of the case. Authentication rules are a prime example. If the prosecution cannot show that the tested drugs in court are the same as what was seized from the accused, the drugs and test results are irrelevant. Relevance based objections are guided by New O.C.G.A. § 24-1-104(b).

New O.C.G.A. §§ 24-1-104(b):
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.

Under rule 104(b), the judge considers only the evidence that the jury will hear at trial. If a reasonable jury could find the preliminary facts to be true then the judge admits the evidence with instructions to the jurors that they ultimately must decide the issue.

For example, if a party objects that a writing is a forgery, the judge decides, based on the evidence the jury will hear at trial, whether a reasonable jury could find that the writing is authentic. If the answer is “Yes,” the writing is admitted and the jurors are instructed that it ultimately is up to them to decide whether the writing is a forgery or is genuine. New O.C.G.A. §§ 24-9-901(a); 24-10-1008. If the answer is “No,” then the evidence is excluded on the basis that no reasonable jury could use it for the purpose for which it was offered.

See Huddleston v. U.S., 485 U.S. 681, 690, 108 S.Ct. 1496 (1988) (“In determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact ...”).

In determining whether a preliminary question of fact is a “subsection (a)” issue or a “subsection (b)” issue, apply this simple test: If the objection before the court is valid, would that destroy the relevance of the evidence for the purpose for which it is offered? If the answer is “Yes,” then it is a subsection (b) question. If the answer is “No,” then it is a subsection (a) question.
For example, when a party objects to a writing as not made in the ordinary course of business and thus inadmissible under the business record exception, ask: if this objection is valid, does it destroy the relevance of the evidence? The answer of course is “No.” The writing’s relevance is not based upon meeting the technical requirements of the hearsay exception for business records.

On the other hand, if the defense objects that a prior crime offered against the accused to prove motive was not, in fact, committed by the accused, ask: if this objection is valid, does it destroy the relevance of the evidence for the purpose for which it is offered? The answer of course is “Yes.” The relevance of the prior crime is based on the assumption that the accused committed the act. Thus this is a 104(b) issue.

Examples of issues subject to rule 104(a):
- whether a witness is competent to testify,
- whether a statement satisfies the co-conspirator admission rule,
- whether a statement satisfies the agent admission rule,
- whether the foundation exists for a hearsay exception,
- whether an expert’s opinion satisfies the evidence rules, including Daubert,
- whether the factual foundation for a privilege, or exception thereto, has been met.

Examples of issues subject to rule 104(b):
- the authentication of evidence, including chain of custody,
- whether a lay opinion is rationally based on the witness’s perception,
- whether the factual requirements for 404(b) evidence, (independent crimes or acts), have been met,
- whether a party adopted the statement of another by silence.

Some preliminary questions of fact, such as the voluntariness of a confession, are rooted in constitutional law and treated separate from rule 104(a) or (b). Under Jackson v. Denno, 378 U.S. 368 (1964) and its progeny, the prosecution must convince the trial court that a confession is voluntary by a preponderance of the evidence. Lego v. Twomey, 404 U.S. 477, 488, 92 S.Ct. 619, 626 (1972). See also, U.S. v. Matlock, 415 U.S. 164, 178 n.14 (1974) (fourth amendment suppression - preponderance standard)

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<td>Who makes the <strong>final</strong> decision?</td>
<td>Judge</td>
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<td>What evidence may the trial court consider?</td>
<td>any nonprivileged evidence (incl. hearsay)</td>
<td>same evidence the jury will hear</td>
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<td>Standard of proof for admission</td>
<td>preponderance of the evidence</td>
<td>could a reasonable jury find ...</td>
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Applicability of new rules

Suppression hearings - Preliminary fact questions at a suppression hearing are treated the same as preliminary fact questions generally and thus subject to New O.C.G.A. § 24-1-104(a); § 24-1-2(c)(1). See, U.S. v. Raddatz, 447 U.S. 667, 679, 100 S.Ct. 2406 (1980) (“At a suppression hearing, the court may rely on hearsay and other evidence, even though that evidence would not be admissible at trial. ... Fed.Rules Evid. 104(a)”)

Georgia cases have not always been clear regarding whether hearsay was admissible at a suppression hearing. Part of the problem was Georgia's unique position that hearsay was "illegal" evidence with no probative value -- a position that is rejected in the new 2013 rules. New O.C.G.A. § 24-8-801(c).

Under the new 2013 rules, out-of-court statements, whether offered at a suppression hearing for their truth or only to evaluate police conduct, are admissible. When offered for their truth, the trial court must decide whether their hearsay character so reduces their reliability that the facts are not proven by a preponderance of the evidence. In other words, the hearsay character of the evidence goes to weight, not admissibility.


Objections

“Once the court makes a definitive ruling on the record admitting or excluding any evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve such claim of error for appeal.” New O.C.G.A. § 24-1-103(a).

New O.C.G.A. § 24-1-103(b) provides: "The court shall accord the parties adequate opportunity to state grounds for objections and present offers of proof." This sentence is not in the Federal Rule and was added "to underscore the trial court’s duty to allow parties the opportunity to state their objections and offers of proof on the record."

O.C.G.A. § 9-11-46(b) applies to civil cases:

(b) When motion for mistrial or other like relief is made, the questions is thereby presented as to whether the moving party is entitled to the relief therein sought or to any lesser relief, and where such motion is denied in whole or in part, it shall not be necessary that the moving party thereafter renew his motion or otherwise seek further ruling by the court.
In criminal cases under the Federal Rules of Evidence, if the defendant does not renew a motion for mistrial after the curative instruction, the appellate court will review the denial of the motion but reverse only if “the evidence is so highly prejudicial as to be incurable by the trial court's admonition” *U.S. v. Dodd*, 111 F.3d 867, 870 (11th Cir.1997); *U.S. v. Slocum*, 708 F.2d 587, 598 (11th Cir.1983).

“Plain error” rule is available in all cases, civil and criminal. New O.C.G.A. § 24-1-103(d).

Under pre-2013 cases, if evidence excluded by a motion in limine nevertheless spilled out at trial in front of the jury, the objecting party could delay any motion for mistrial or other relief until able to do so outside the hearing of the jury. *Reno v. Reno*, 249 Ga. 855, 856, 295 S.E.2d 94 (1982). Under the Federal Rules, the objecting party cannot wait and must promptly make any motion for relief at the time the inadmissible evidence is heard. *Collins v. Wayne Corp.*, 621 F.2d 777, 784-786 (5th Cir. 1980). While it is not certain that Georgia appellate courts will follow the federal approach in this matter, counsel is well advised to alert the trial court promptly when a violation of the *in limine* ruling occurs with a motion for relief at sidebar.
The Hypothetical

In the bottom of the 9th inning of a Braves game at Turner Field two years ago, Chipper Jones hit a game winning home run over the left field fence. Dale Horner, age 57, was sitting in Row H of Section 140. Directly in front of him in Row G was Bob Murphy, age 26. As Jones’ home run ball sailed towards them, Dale and Bob both rose from their seats and lifted their hands to catch the souvenir. Sadly, neither could catch the ball and it ricocheted off an empty seat in Row G. Both Bob and Dale went after the ball and soon were involved in a scuffle.

Dale claims that he was the first to grab the ball but that Bob began punching him in the chest and face. Dale says Bob apparently lost his balance and fell backward and tumbled down the concrete stairs all the way to the wall at the bottom. Bob claims that Dale was the one who started throwing punches and that Dale intentionally pushed him down the stairs. Neither Dale nor Bob ended up with the ball. Dale was arrested at the scene and a search incident to the arrest turned up a quarter gram of cocaine.

The Civil Case

The plaintiff, Bob Murphy, is suing Dale Horner for his injuries arising out of the attack. Murphy suffered a broken right wrist, injuries to his neck and back and a concussion. Murphy also is suing the Atlanta Braves (actually Liberty Media, owners of the Braves and Turner Field), claiming that Horner was knowingly served too much alcohol at the game. Dale Horner has counterclaimed for his own injuries. This is a jury trial.

The Criminal Case

Dale Horner was charged with assault and battery and possession of cocaine.
AUTHENTICATION, BEST EVIDENCE RULE, AND RELATED ISSUES

“In respect to matters of authentication, the trial court serves a gatekeeping function. If the court discerns enough support in the record to warrant a reasonable juror in determining that the evidence is what it purports to be, then Rule 901(a) is satisfied and the weight to be given to the evidence is left to the jury.”¹

Provided the proponent of the evidence makes a prima facie showing of authenticity, the evidence should be admitted and the jury has the ultimate responsibility for deciding whether the evidence has been sufficiently authenticated in a way that would justify the jury placing weight and credit in the evidence.² The judge must merely determine whether that, as a matter of normal likelihood, the evidence has been adequately safeguarded. If so persuaded, the court should admit the evidence and the jury should consider and assess the evidence in light of the surrounding circumstances.³

The new Evidence Code is merely a restatement and reorganization of the law relating to authentication relating to real evidence and chain of custody issues. The new rules make authentication of telephone calls, electronic communications and similar communications much easier. The new Evidence Code also establishes a minimal burden for evidence to be introduced, expecting the jury to decide the weight and credit to be given to such evidence. Georgia lawyers and judges should feel free to look to existing case law as persuasive on the issue of authentication. However, the same cannot be said in all areas of the new Evidence Code because there are wholesale changes in other areas of the Evidence Code which would make reliance upon existing case law questionable. For example, in the area of the Best Evidence Rule, the new Evidence Code is a complete departure from existing Georgia law. Blanket reliance upon existing Georgia law relating to the Best Evidence Rule would be improper. The analysis must be directed to whether the new Evidence Code merely reorganized the evidence rules on a particular topic or whether it was a wholesale change of the law.

¹ U.S. v. Paulino, 13 F.3d 20, 23 (1st Cir. 1994)
² U.S. v. Sparks, 2 F.3d 574, 582 (5th Cir. 1993); U.S. v. Clark, 732 F.2d 1536, 1543 (11th Cir. 1984)
³ Ballou v. Henri Studios, Inc., 656 F.2d 1147, 1155 (5th Cir. 1981)
HYPOTHETICAL #1

In the hypothetical we are using for this presentation, assume the focus is now on the criminal prosecution of Dale Horner for alleged assault and battery and possession of cocaine.

Officer Jack Reardon testified that when he arrested Dale Horner at Turner Field, he searched Mr. Horner and found a small plastic, Ziploc baggie in Horner’s front pants pocket. The baggie contained white powder. Officer Reardon described how he placed the seized baggie in an evidence bag, sealed it, and filled out the information on the evidence bag label, and checked the evidence in at the police station with an order to have it tested at the crime lab. Reardon described the routine practice of the police department to store all evidence in locked, limited access areas at all times except for when the evidence is shipped out for testing or for use at trial. Officer Reardon was able to identify State’s Exhibit #3 by recognizing his handwriting on the evidence bag and his initials on the bag’s seal.

Frederica Freeman testified that she is employed as a chemist with the GBI, Division of Forensic Sciences, in the Drug Identification Section. Ms. Freeman described the standard operating procedures at the crime lab for the receipt, inventory control, and testing of suspected drug samples sent to the lab by law enforcement agencies. She explained that it is routine practice to complete at least two analytical examinations of suspected substances. She was able to identify State’s Exhibit #3 as containing a substance tested by Freeman at her lab by matching the lab’s control numbers on the evidence bag with the numbers on the lab’s testing report.

Ms. Freeman would testify that she personally performed the tests on the substance contained in State’s Exhibit #3, and she would testify that the substance tested was cocaine.

The defense object that the evidence of chain of custody is insufficient to authenticate State’s Exhibit #3 as containing the substance seized from the Horner.

OVERRULED

New O.C.G.A. §24-9-901 (in pertinent excerpts) provides:
(a) The requirement of authentication or identification as a condition precedent to admissibility shall be satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims.
(b) By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this Code section:
   (1) Testimony of a witness with knowledge that a matter is what it is claimed to be; ...
   (4) Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances; ...
   (9) Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result; or
(10) Any method of authentication or identification provided by law.

New O.C.G.A. §24-9-902 (pertinent sections only) provides:
Extrinsic evidence of authenticity as a condition precedent to admissibility
shall not be required with respect to the following:
(7) Inscriptions, signs, tags, or labels purporting to have been affixed in
the course of business and indicating ownership, control, or origin.

The officer can identify his markings on the evidence, his signature on evidence logs
and similar markings on the evidence container to ensure that this baggie is the same
that was taken from Horner. The scientist can also testify as to her markings once
the sample was received by the crime lab. Both the officer and the scientist make
those marks in the course of their business. Although another evidence clerk within
the crime lab may have actually signed a receipt for the evidence, the lab scientist
who tested the sample is the only witness whose testimony is required to prove chain
of custody on the crime lab side of the transaction.4

HYPOTHETICAL #2

Officer Jones of the Atlanta Police Department would testify that a few days after the
incident at Turner Field, he received a telephone call from someone identifying
himself as Dale Horner. The caller wanted to know how “the guy I pushed down the
stairs” was doing.

The defense objects that the phone call cannot be authenticated and the conversation
is therefore inadmissible hearsay.

SUSTAINED WITHOUT MORE.

Pre-2013 Georgia law requires that before the contents of a telephone call may be
used against a particular person, two prerequisites must be met: 1) the person
speaking is identified by competent evidence; and 2) the contents of the telephone
conversation must be admissible under a recognized hearsay exception.5

Under **New O.C.G.A. §24-9-901**: *(in pertinent part only)*

(a) The requirement of authentication or identification as a condition precedent to admissibility shall be satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this Code section:

(1) Testimony of a witness with knowledge that a matter is what it is claimed to be;

(4) Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances;

(5) Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker;

(6) Telephone conversations, by evidence that a call was made to the number assigned at the time by a telephone service provider to a particular person or business, if:

(A) In the case of a person, circumstances, including self-identification, show the person answering to be the one called; or

(B) In the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

In the example set forth above, the decision on the objection has been addressed many times in appellate litigation but never more succinctly stated: "... a telephone call out of the blue from one who identifies himself as X may not be in itself, sufficient authentication of the call as in fact coming from X." The self-identification may be one clue that supports authentication but there must be more than one such clue to support admission of the telephone call. There is no magic formula or specific number of clues that would always be sufficient if present or insufficient if lacking. However, in the case of a telephone call, there must be more than purported self-identification by the caller before the contents of the call would be admissible.

**HYPOTHETICAL #3**

Assume the same facts as in Hypothetical #2 but the “caller ID” at the police station showed a number that matches Dale’s cell phone number.

**OVERRULED**

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6 *U.S. v. Pool*, 660 F.2d 547, 560 (5th Cir. 1981)
In Hypothetical #3, we now have three “clues” to support admission of the evidence. 1) self-identification; 2) caller ID; and 3) content of statement refers to something Dale and few others would know. While it would be possible for someone other than Dale to know those facts and make the call from Dale’s cell phone, the likelihood is much less likely and the evidence should be admitted.

Under **New O.C.G.A. §24-9-901: (in pertinent part only)**

(a) The requirement of authentication or identification as a condition precedent to admissibility shall be satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this Code section:...

(9) Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

A caller ID readout is not hearsay under either existing Georgia law or under the new Evidence Code. However, the caller ID system is one of the systems anticipated under §24-9-901(b)(9). It is possible for the defense to present plausible arguments for how someone other than Dale made the call. However, the determination of whether the call was in fact made by Dale and what weight to give to the evidence is for the jury’s deliberation. The judge’s role as a gatekeeper in the arena of authentication cannot be overstated.

**HYPOTHETICAL #4**

Same situation as Hypothetical #2 but assume the telephone call was recorded (no caller ID involved). Officer Jones testifies that he dropped by Horner’s house the day after the call and chatted with him for about 5 minutes and then went back and listened to the recording of the phone call. Officer Jones would testify that he believes it was Horner’s voice on the phone. The defense objects.

_OVERRULED_

Under **New O.C.G.A. §24-9-901: (in pertinent part only)**

(b) By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this Code section:....

(5) Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances

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A witness’s familiarity with the speaker’s voice may be based on prior contacts with the person or on subsequent contacts, even if those contacts were made for the purpose of gaining familiarity with the voice in order to testify. The focus of the analysis is not how the witness became familiar with the voice but whether the witness has sufficient familiarity with the caller to identify the voice.

HYPOTHETICAL #5

Officer Jones testified that he needed to speak with Dale Horner about some personal property Horner had left in the police cruiser at the time of his arrest. He looked up Horner’s phone number, called it, and when Jones asked to speak with Horner, the person who answered said: “That’s me.” In the course of the conversation, the person admitted he was drunk and pushed the “young punk” down the stairs. The defense objects on grounds of insufficient authentication.

OVERRULED

Under New O.C.G.A. §24-9-901: (in pertinent part only)

(b) By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this Code section:...

(6) Telephone conversations, by evidence that a call was made to the number assigned at the time by a telephone service provider to a particular person or business, if:

(A) In the case of a person, circumstances, including self-identification, show the person answering to be the one called; or

(B) In the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone. ...

The call can be sufficiently authenticated because there is evidence that the Officer called the number assigned by the telephone company at the time the call was made and there was also self-identification by Horner. Again, there are only two “clues” but they would be sufficient to authenticate the call, justifying its admission.

HYPOTHETICAL #6

Assume Officer Jones testifies that he went to Horner’s home to speak with him. A
woman answered the door and identified herself as Dale’s wife and told the Officer
that Dale was not home. The Officer asked her to tell Dale to call him and left his
number.

Thirty minutes later, a person called Officer Jones and identified himself as Dale and
said “my wife said you wanted me to call you.” The caller told Officer Jones that he
had pushed a guy down the stairs at Turner Field.

Defense objects that the phone call is not authenticated and thus is hearsay.

OVERRULED

Authentication of anything can be accomplished with circumstantial evidence
that the thing is what the proponent claims it to be. There are several ways that a
person’s conduct may be used to establish that he was the person who made the
phone call (or wrote the letter, or sent the email, or posted the text on Facebook,
etc.).

Admission: If a party subsequently admits that he made the call, that admission will
suffice to authenticate the communication. The party need not have said “I spoke
with Officer Jones at precisely 6:32 p.m. and admitted that I pushed Bob Murphy
down the stairs at Turner Field.” It is enough if the party admitted some fact that
circumstantially supports a finding that he made the communication. For example,
it is sufficient authentication if the defendant said: “the police called the house and I
returned their call.”

Corroborative Conduct: In the communication, the person said he would do
something and we have admissible evidence that he subsequently acted in
accordance with the communication.

Content: The content of the message may support authentication when it relates to
matters that only the alleged sender and very few others would know. For example,
in our hypothetical, the caller said “My wife said you wanted me to call you.” The

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9 2 McCormick on Evidence, §226 (6th ed. 2006); Montgomery v. Villa, 655 N.E.2d
1342 (Ohio App. 1995)

App. 695, 617 S.E.2d 262 (2005) (defendant admitted to police that he engaged in
the online chat room conversation in question).

spoke with someone from caller’s agency sufficient to authenticate the call).

12 Jackson v. State, 677 S.W.2d 866 (Ark. App. 1984) ( caller said he would meet at a
particular time and place and subsequently the defendant did so).

fact that the caller knew that Officer Jones had contacted Dale’s wife and left a
message for Dale to call is something that only Dale and very few others would know.
The fact that Dale returned the call shortly after it was made is also another “clue” to
support admission of the evidence.

**HYPOTHETICAL #7**

Bill, a co-worker of Dale’s, would testify that he received a text message on his phone
the afternoon after the incident at Turner Field. He has a copy of the message. (Text
messages can be stored in and retrieved off a cell phone). The message indicates it
was sent from Dale’s phone number and in the message, Dale admits that he was
drunk and pushed a guy down the stairs at a Braves game.

The defense objects that the text message cannot be authenticated.

**SUSTAINED**

Under the Georgia Electronic Records and Signature Act, O.C.G.A. §10-12-1 to 10-12-
5, electronic records are to be treated like written (hard copy) documents. The mere
fact that a document or electronic message states that it is from a particular source is
never enough, by itself, to authenticate the document. The rules of evidence “adopt
the position that the purported signature or recital of authorship on the face of a
writing will not be accepted, without more, as sufficient proof of authenticity to
secure the admission of the writing in evidence.”

However, if the form of identification is a letterhead or label "affixed in the course of
business," this form of identification can authenticate the origin of the writing. See
O.C.G.A. §24-9-902(7). The proponent of the document is allowed to present
circumstantial evidence of authenticity beyond the mere fact that the document
bears the signature of a particular person.

**HYPOTHETICAL #8**

What if the witness can testify that he has caller ID and saw Dale’s phone number
when the message was received?

A phone text message is no different than a phone call in this respect. The issue is
not which phone sent or received a call or message but whether the defendant was
the person using that phone at that time. Phone text messages generally do not
require a password or user ID to send or receive a message. Even caller ID can be

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194 Ga. App. 464, 390 S.E.2d 671 (1990) (“Although the genuineness of a writing
may be proved by circumstantial evidence, this cannot be done solely by the face of
the letter itself.”)


spoofed with a cheap toll free service. (One of the sellers of this service, SpoofCard, has as its motto: "Be who you want to be!") "SMS Spoofing" - uses the short message service on most mobile phones and personal digital assistants (including Blackberry, IPhone, etc) to set who the message appears to come from by replacing the original sender ID (the mobile number) with chosen text.

The caller ID evidence is "some" evidence of authentication but alone is insufficient. Again, we look to conduct and/or content to help authenticate, absent an admission from Horner.

If the person subsequently acts in manner consistent with what the message said he would do, this is circumstantial evidence that he was the sender of the message.\(^\text{17}\) The content of the message may support authentication when it relates to matters that only the alleged author, or very few people including the alleged author, would know.\(^\text{18}\) The sender's use of a distinctive nickname may also add to the circumstantial evidence required to authenticate the message.\(^\text{19}\)

**Reply Letter Rule** - When the message in question appears to be in reply to an earlier message, if the author of that earlier message testifies that he sent the defendant the earlier message, this may help authenticate the message as coming from the defendant.\(^\text{20}\) The evidentiary concepts that apply to letters would also apply to text messages, emails and similar electronic communications.

**HYPOTHETICAL #9**

Al, another co-worker of Dale's, would testify that he received an email the afternoon

\(^{17}\) See, e.g., *In re F.P.*, 878 A.2d 91 (Pa. Super. 2005) (message made specific threats against recipient; fact that defendant carried out those threats supported a finding that the defendant was the person who sent the threats); *United States v. Tank*, 200 F.3d 627 (9th Cir. 2000) (where sender asked recipient to meet at a particular place and the defendant showed up for that meeting, this was evidence that the defendant was the sender of the message).

\(^{18}\) *Allstate Ins. Co. v. Reynolds*, 138 Ga. App. 582, 227 S.E.2d 77 (1976). See, e.g., *Massimo v. State*, 144 S.W.3d 210, 216-17 (Tex. App. 2004) (email message held properly authenticated where the email was sent to the victim's email address shortly after she and defendant had a physical altercation and the email referenced that altercation); *Dickens v. State*, 175 Md. App. 231, 927 A.2d 32 (2007) (where text message referred to motel where victim was staying, fact that defendant had only hours earlier found and confronted victim at that hotel helped establish that defendant sent the message).


\(^{20}\) See *United States v. Siddiqui*, 235 F.3d 1318 (11th Cir. 2000).
after the incident. He has a copy of the email. The email says it is: "From: Dale Horner"
The email states: "I pushed him down the stairs."
The defense objects that the email cannot be authenticated with just the "From" line.

**SUSTAINED**

Emails are treated like written (hard copy) documents. Again, the mere fact that a document or electronic message states that it is from a particular source is never enough, by itself, to authenticate the document. If a person gets access to another's computer and email program (which most people do not password protect) then emails can be sent by an unauthorized person in the name of the email account holder.

If the email is still in the "Sent" folder on Dale's computer, this may help authenticate the email. "[W]hile presence in a computer file will constitute some indication of a connection with the person or persons having ordinary access to that file, much will depend on the surrounding facts and circumstances, and it is reasonable to require that these include some additional evidence of authenticity."23

**HYPOTHETICAL #10**

Suppose the email in #8, above, was admitted. The defense makes a motion for the court to admit, at the same time, an email written and sent by Dale to the witness an hour before this one which stated: "He was punching me in the face so I pushed him away." The prosecution objects that the earlier email is self-serving hearsay and in any case should not be admitted at the same time as the subject email.

**OVERRULED**

21 *Hollis v. State*, 298 Ga.App. 1, 3, 679 S.E.2d 47 (2009) ("Though the email transmission in question appears to have come from P.M.'s email address, this does not prove genuineness").


23 See *Martin v. State*, 135 Ga. App. 4, 217 S.E.2d 312 (1975) (where a document is found at a business location where one would expect it to be if it were genuine, this is sufficient evidence of its authenticity to admit the document). Note that a "deleted" email is not really erased from the hard drive.
New O.C.G.A. § 24-1-106:
When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which, in fairness, should be considered contemporaneously with the writing or recorded statement.

New O.C.G.A. § 24-8-822 (formerly 24-3-38):
When an admission is given in evidence by one party, it shall be the right of the other party to have the whole admission and all the conversation connected therewith admitted into evidence.

"The obvious import of the rule is to allow a party to put a statement in context where, without the context, the meaning would be distorted. The touchstone for an admission under Rule 106 is that the evidence be necessary in order for some other evidence to be "fairly" considered."24

The defense can require that the entire conversation be admitted at the same time that the admission from Horner is offered. There is no requirement that the defense wait to introduce the remainder of the conversation as part of their case because Rule 106 specifically states that the adverse party can require that the remainder of the conversation be introduced at the same time that any part of the conversation is offered into evidence.

"Rule 106 does not automatically make the entire document admissible..., the rule permits introduction only of additional material that is relevant and is necessary to qualify, explain, or place into context the portion already introduced."25

HYPOTHETICAL #11

Officer Jones has a printed copy of a Facebook page that appears to be Dale's. Officer Jones would testify that he accessed the page by asking Cal, Dale's co-worker, to log on to the page. The page includes an entry, allegedly by Dale, in which Dale admits that he intentionally pushed a guy down the stairs at a Braves game.

The defense objects that the Facebook page is not authenticated since it merely states that it is Dale's page.

Authentication Issues - Facebook presents the familiar problem that we cannot authenticate a message or communication based solely on the fact that the message "says" it is from the alleged author. Although, the fact that a message “says” it is from the sender is some evidence of authenticity, that claim is insufficient by itself to prove authenticity.

High tech method — When a person creates a Facebook or other social network account, the service records the IP address of the sending computer and does this every time the user enters the system thereafter. So if Dale's Facebook page with the admission can be traced to an IP address assigned to his computer at the time the entry was made, then this should be sufficient because entry to a specific Facebook account requires entry of a user name and password. In other words, someone with access to Dale's computer created a Facebook account with a user name and password and used that computer and user name and password to post the message in question at a specific date and time.

A search of the purported author's computer likely would reveal internet history, caches, and other trace evidence of the computer owner's activity on Facebook.26

Low tech method - Conduct, content, reply letter rule ... Any conduct or comments by Dale acknowledging that he has a Facebook site along with evidence that there appears to be only one account on Facebook linked to Dale, would be evidence of authentication. Moreover, these "pages" are typically filled with information that only the author would likely know. The more specific the information posted on the site, the more unlikely that anyone other than Dale could be the author. Finally, these sites are used to post on other users' "walls", to chat, and to send personal messages back and forth. Thus, Dale might text message Cal to go view his Facebook page or mention a wall message he received on Facebook in an IM (Instant Messaging) chat. These cross-related communications can be used to identify the source.

Internet Chat Rooms

Increasingly cases are brought to court dealing with internet chat room "discussions," particularly in child sex abuse cases. In a case where the offender chatted with the victim in an internet chat room, it is sufficient for the victim to identify documents that have been prepared by printing out the conversation that occurred within an internet chat room. The fact that the victim could not remember technical details of how the print outs were created is not critical to admission of the evidence. The judge merely decides whether the prosecution has met its prima facie burden of proving authenticity, with the ultimate question of authenticity being left for the jury to determine.27 Where the victim testifies that the print outs accurately reflect the online communications between the offender and the victim, the prima facie case for authenticity has been made.28

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27 U.S. v. Lebowitz, 676 F.3d 1000 (11th Cir. 2012).
Other Web Sites

Think of the internet as a library filled with books and each Web site as an individual book in that library. The URL or web address is the name of the book. Authentication of a print out from a Web site requires the web address so that anyone can confirm that the print out came from that site. Web sites do change content, however, from time to time and if the print out material is no longer on the current site (or in the cache on the computer used to access the site) then the testimony of the person who printed out the Web site’s material will be required.

Courts generally permit authentication of a commercial website if a witness testifies that he routinely relies on the data on the site in the course of his business. The data on the website also falls under a hearsay exception.

New O.C.G.A. § 24-8-803(17):
The following shall not be excluded by the hearsay rule, even though the declarant is available as a witness: ...
(17) Market reports and commercial publications. Market quotations, tabulations, lists, directories, or other published compilations generally used and relied upon by the public or by persons in the witness’s particular occupation.

Courts generally are not allowing parties to use the web sites of public agencies to prove the contents thereof. To meet the requirements of new O.C.G.A. § 24-9-901(b)(7), the proponent must provide a certificate of authenticity from the public office or the testimony of an officer who is authorized to attest to custodianship and the accuracy of the records posted online. New O.C.G.A. § 24-9-902(5) should not be used for website material.

Summary

Every form of electronic communication can be "spoofed," "hacked," or "forged." But this does not and cannot mean that courts should reject any and all such communications. Indeed, the vast majority of these communications are just as they appear to be -- quite authentic.

The goal is to supply sufficient evidence as to the identity of the source such that a

reasonable jury could find that the source is who he claims to be. Various methods or "clues" can be combined to create a sufficient, circumstantial case for authentication. There may be counter arguments made but the decision as to whether the communication is authentic and what weight should be given that evidence is ultimately for the jury to decide.

**CHECKLIST FOR AUTHENTICATION OF COMMUNICATIONS**

(1) Is there admissible evidence that the person who allegedly made the communication later admitted making the communication? (sufficient by itself)

(2) Does the communication "say" who sent it? (insufficient by itself)

(3) Did the person's subsequent conduct suggest that he was the person who made the communication? (may or may not be sufficient by itself)

(4) Does the content of the communication disclose facts that only the purported sender and few other people would know? (may or may not be sufficient by itself)

(5) Can the communication be linked to a means of transmission that requires a username and password that can be independently tied to the purported sender? (sufficient by itself)

(6) Is there trace evidence of the communication on the purported sender's computer or cell phone? (This would require some foundation that the trace evidence was created at a time when the purported sender had sole access to the device). (may or may not be sufficient by itself)

**HYPOTHETICAL #12**

The State offers a copy of an ER report from Grady Hospital relating to the injuries sustained by Bob Murphy in his fall at the Brave game. The report is accompanied by a certification that the hospital records were 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 those matters; was kept in the course of a regularly conducted activity; and was made by the regularly conducted activity as a regular practice. The State had given the defense written notice a few days before trial of its intent to offer this certification in lieu of a live foundation witness.

The defense objects on both hearsay and authentication grounds.

**OVERRULED**

**New O.C.G.A. § 24-9-902**: (excerpts relating to non-public documents)

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

(6) Printed materials purporting to be newspapers or periodicals;

(7) Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin;
(8) Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments;

(9) Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law;

(10) Any signature, document, or other matter declared by any law of the United States or of this state to be presumptively or prima facie genuine or authentic;

(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; or

(12) In a civil proceeding, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under paragraph (6) of Code Section 24-8-803 if accompanied by a written declaration by 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 those 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. The declaration shall be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. 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.

New O.C.G.A. § 24-9-903:
The testimony of a subscribing witness shall not be necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.
A proper foundation for the business record exception to the hearsay rule also authenticates the document.33

The certification used to authenticate a business record is nontestimonial even though the record itself may be testimonial under the Confrontation Clause.34

The introduction of business records into evidence is a regular occurrence and the new Evidence Code attempts to streamline that process.

It is possible for forego the calling of a live record custodian under the new Evidence Code to lay the appropriate foundation for introduction of business records. The certification, if prepared appropriately, will satisfy both the hearsay exception and the authentication statute. The statute provides what must be contained within the written certification. While it is not required that the certification be sworn, a sworn affidavit would surely satisfy the rule. The written certification should include some language to the effect that the custodian “declares (or certifies or verifies or states) under the penalty of perjury that the foregoing is a true and correct copy of the documents made and kept in the ordinary course of business.” There is no magic language but to avoid the requirement of calling a live witness: 1) the custodian must state facts that satisfy the business records exception; 2) that the custodian states under the penalty of perjury that the documents are true and correct copies of the originals; and 3) the party offering the documents must provide advance written notice that they intend to offer to documents without calling a live witness. The advance written notice must be given sufficiently in advance of the proceedings to allow the adverse party a fair opportunity to challenge the record and declaration.

**HYPOTHETICAL #13**

Dale Horner testifies on his own behalf. The State wishes to impeach him with a prior conviction in Rockdale County, Georgia in 2004 for perjury and a 2007 conviction in Franklin County, Tennessee for theft by deception. The State offers a copy of the record of conviction from the Superior Court of Rockdale County with no seal but just the written certification of the clerk of court. The Tennessee record of conviction is not only certified but sealed. The defense objects to the certifications as insufficient.

OVERRULED


34 *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 2539 (2009) ("A clerk could by affidavit authenticate or provide a copy of an otherwise admissible record, but could not do what the analysts did here: create a record for the sole purpose of providing evidence against a defendant.")
New O.C.G.A. § 24-9-920: (formerly 24-7-20)
The certificate or attestation of any public officer either of this state or any
county thereof or any clerk or keeper of county, consolidated government, or
municipal records in this state shall give sufficient validity or authenticity to
any copy or transcript of any record, document, paper or file, or other matter
or thing in such public officer's respective office, or pertaining thereto, to
admit the same in evidence.

New O.C.G.A. § 24-9-924: (formerly 24-3-17)
(A) Any court may receive and use as evidence in any proceeding
information otherwise admissible from the records of the Department of
Public Safety or the Department of Driver Services obtained from any
terminal lawfully connected to the Georgia Crime Information Center without
the need for additional certification of such records.
(B) Any court may receive and use as evidence for the purpose of imposing
a sentence in any criminal proceeding information otherwise admissible from
the records of the Department of Driver Services obtained from a request
made in accordance with a contract with the Georgia Technology Authority
for immediate on-line electronic furnishing of information.

New O.C.G.A. § 24-9-902: (excerpts relating to public documents)
Extrinsic evidence of authenticity as a condition precedent to admissibility
shall not be required with respect to the following:
(1) A document bearing a seal purporting to be that of the United States or of
any
state, district, commonwealth, territory, or insular possession thereof or the
Panama Canal Zone or the Trust Territory of the Pacific Islands or of a
political subdivision, department, officer, or agency thereof or of a municipal
corporation of this state and bearing a signature purporting to be an
attestation or execution;
(2) A document purporting to bear the signature in the official capacity of an
officer or employee of any entity included in paragraph (1) of this Code section
having no seal, if a public officer having a seal and having official duties in the
district or political subdivision of the officer or employee certifies under seal
that the signer has the official capacity and that the signature is genuine;
(3) A document purporting to be executed or attested in an official capacity by
a
person authorized by the laws of a foreign country to make such execution or
attestation and accompanied by a final certification as to the genuineness of
the signature, official position of the executing or attesting person, or of any
foreign official whose certificate of genuineness of signature and official
position relates to such execution or attestation or is in a chain of certificates
of genuineness of signature and official position relating to such execution or
attestation. A final certification may be made by a secretary of embassy or
legation, consul general, consul, vice consul, or consular agent of the United
States or a diplomatic or consular official of the foreign country assigned or
accredited to the United States. If reasonable opportunity has been given to all
parties to investigate the authenticity and accuracy of official documents, the
court may, for good cause shown, order that such documents be treated as
presumptively authentic without final certification or permit such documents
to be evidenced by an attested summary with or without final certification;
(4) A duplicate of an official record or report or entry therein or of a
document
authorized by law to be recorded or filed and actually recorded or filed in a
public office, including data compilations in any form, certified as correct by
the custodian or other person authorized to make the certification by
certificate complying with paragraph (1), (2), or (3) of this Code section or
complying with any law of the United States or of this state, including Code
Section 24-9-920;
(5) Books, pamphlets, or other publications purporting to be issued by a
public
office; ...
(7) Inscriptions, signs, tags, or labels purporting to have been affixed in the
course of business and indicating
ownership, control, or origin; ...
(10) Any signature, document, or other matter declared by any law of the
United
States or of this state to be presumptively or prima facie genuine or authentic;
...

New O.C.G.A. § 24-9-904:
As used in this article, the term:
(1) 'Public office' shall have the same meaning as set forth in Code Section
24-8-801.
(2) 'Public officer' means any person appointed or elected to be the head of
any entity included in paragraph (1) of Code Section 24-9-902. ...

New O.C.G.A. § 24-10-1005:
The contents of a public record, or of a document authorized to be recorded or
filed and actually recorded or filed, including data compilations in any form, if
otherwise admissible, may be proved by duplicate, certified as correct in
accordance with Code Section 24-9-902 or Code Section 24-9-920 or testified
to be correct by a witness who has compared it with the original. If a duplicate
which complies with this Code section cannot be obtained by the exercise of
reasonable diligence, then other evidence of the contents may be given.

New O.C.G.A. § 24-9-901: (excerpts relating to public documents)
(a) The requirement of authentication or identification as a condition
precedent to admissibility shall be satisfied by evidence sufficient to
support a finding that the matter in question is what its proponent
claims.
(b) By way of illustration only, and not by way of limitation, the following
are examples of authentication or identification conforming with the
requirements of this Code section: ...
(1) Testimony of a witness with knowledge that a matter is what it is
claimed to be; ...  
(7) Evidence that a document authorized by law to be recorded or filed and in fact recorded or filed in a public office or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept; 
(8) Evidence that a document or data compilation, in any form:
(A) Is in such condition as to create no suspicion concerning its authenticity; 
(B) Was in a place where it, if authentic, would likely be; and
(C) Has been in existence 20 years or more at the time it is offered;  
(9) Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result; or
(10) Any method of authentication or identification provided by law.35

The obvious intent of the new Evidence Code is to enable admission of public documents that are made and kept by public officials and offices in the normal course of their duties. With the appropriate attestation, there is no requirement that the public official be called as a witness. As to Georgia public officials, written certification is all that is required without focusing on whether the document carries a particular seal. However, as to foreign documents, a seal is required before the record can be admitted into evidence.

**BEST EVIDENCE RULE**

The “Best Evidence Rule” has been widely misconstrued and applied to situations which are not actually covered by the rule. Under existing Georgia law, the Best Evidence Rule only applies to written documents and no other evidence.36 Under the new Evidence Code, the Best Evidence Rule also applies to recordings and photographs. The Best Evidence Rule, as set forth in the new Evidence Code, is a departure from existing Georgia law and reliance upon existing case law interpreting the old law is not advisable in all circumstances because the change is significant.

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35 See *U.S. v. Wilson*, 732 F.2d 404, 444 (5th Cir. 1984) (CIA chief signed affidavit — attached was certification, with seal, by CIA custodian of Agency's seal - "Extrinsic evidence of custody and of delegation is not necessary where, as here, there is a signed certification by the public officer having actual legal custody of the documents. We find no requirement in the Rule that such actual custodian of the records also secure further certification(s) of the delegation of custodial authority down from the head of the department or agency entrusted by law with custody of the document.")

The Best Evidence Rule addresses: 1) when an original writing/recording/photograph must be produced at trial; 2) when a substitute copy is a viable alternative to production of the original and; 3) when summaries are allowed to replace voluminous originals.37 Unless a timely objection is raised, the court is under no obligation to inquire about the original writing/recording/photograph and the objection is waived.38

**HYPOTHETICAL #14**

Officer Reardon would testify that Dale Horner signed a written confession in which he admitted he was drunk and pushed Bob Horner down the stairs. The defense objects that under the best evidence rule, the State must produce the written confession. The State responds that the term "best evidence rule" is nowhere found in the new Georgia code and therefore must have been abolished.

**SUSTAINED**

**New O.C.G.A. § 24-10-1001:**

As used in this chapter, the term:

1. 'Writing' or 'recording' means letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, magnetic impulse, or mechanical or electronic recording or other form of data compilation.

2. 'Photograph' includes still photographs, X-ray films, video recordings, and motion pictures.

3. 'Original' means the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An original of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an original.

4. 'Duplicate' means a counterpart produced by the same impression as the original or from the same matrix or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, chemical reproduction, or other equivalent techniques which accurately reproduce the original.

5. 'Public record' shall have the same meaning as set forth in Code Section 24-8-801.

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New O.C.G.A. § 24-10-1002:
To prove the contents of a writing, recording, or photograph, the original writing, recording, or photograph shall be required.

New O.C.G.A. § 24-10-1004:
The original shall not be required and other evidence of the contents of a writing, recording, or photograph shall be admissible if:
(1) All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith;
(2) No original can be obtained by any available judicial process or procedure;
(3) At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or
(4) The writing, recording, or photograph is not closely related to a controlling issue.

New O.C.G.A. § 24-10-1007:
The contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.

In Hypothetical #13, the officer sought to testify about what was contained within a writing, as opposed to merely introducing the writing itself. The Best Evidence Rule addresses this exact situation and the testimony, without the writing, would not be admissible because what is contained within the writing is “closely related to a controlling issue.” Witnesses may not testify to what a writing says without producing the writing itself and admitting the document into evidence.39

The officer could have testified to what Horner said if he did not reference the fact that the confession had been reduced to writing. The officer can testify to facts from his memory despite the fact that those “facts” ultimately were reduced to writing. However, the rule would prohibit the officer from bolstering his testimony by indicating that the confession was also reduced to writing. "Rule 1002 applies not when a piece of evidence sought to be introduced has been somewhere recorded in writing but when it is that written record itself that the party seeks to prove."40


Copies Under the New Rules

New O.C.G.A. § 24-10-1003:
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.

Under New O.C.G.A. ‘24-10-1003, a duplicate shall be admissible to the same extent that the original is admissible 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. The burden is on the party opposing the admission of copies to show that there is a genuine issue relating to the authenticity of the original that was not introduced, there is a genuine issue relating to the trustworthiness of the duplicate, or that introduction of the copies would be somehow unfair.41

In Hypothetical #13, assume that there was some legitimate question raised about the authenticity of the copy of the confession. For example, assume that there were corrections made by striking out one word and inserting another word. The defendant’s right against self incrimination would prevent asking the defendant, over his objection, whether he made those changes. In that case, the original must be introduced and the copy would not be allowed because a confession clearly goes to a controlling issue in the case.

Public Records

Parties cannot be expected to remove public records from their place of filing and introduce them into the record in a courtroom. Therefore, the new Evidence Code sets forth the manner in which public records can be introduced into evidence.

New O.C.G.A. § 24-10-1005:
The contents of a public record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by duplicate, certified as correct in accordance with Code Section 24-9-902 or Code Section 24-9-920 or testified to be correct by a witness who has compared it with the original. If a duplicate which complies with this Code section cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

41 U.S. v. Georgalis, 631 F.2d 1199, 1205 (5th Cir. 1980)
A witness may not testify to what an official public record states without producing a certified copy of the record. (New O.C.G.A. § 24-10-1005.) If the witness can state facts contained in a record without referring to the record, however, the testimony raises no best evidence issue.42

**Secondary Evidence of Writings/Recordings**

There are occasions when a writing or recording simply cannot be acquired due to reasons that are no fault of the parties. In those circumstances, the parties would be required to lay the foundation as to why the writing or recording was no longer available and other evidence would be allowed to prove the lost or destroyed writing or recording.

A party is excused from producing a writing or recording and may present secondary evidence of the writing or recording's contents if the party satisfies the court that the writing or recording is unavailable for reasons other than the party's bad faith.43 The rules that address whether a writing/recording/photograph should be inadmissible because of bad faith are completely separate from rules related to spoliation of evidence.44

**Continuing Witness Rule**

The "continuing witness rule" is unchanged by the new Georgia evidence code. A confession should not go out with the jury under existing case law.45 Where the evidence is an audio recording or video, the recording does not go out with the jury but if the evidence in question is a video recording (i.e. surveillance tape) that has no audio and merely records the actions of persons who appear on the video without testimonial components to the video, that video can go out with the jury.46

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44 See **Vodusek v. Bayliner Marine Corp.**, 71 F.3d 148, 156 (4th Cir. 1995)


Voluminous Documents

Courts are more frequently encountering cases which have voluminous documents as part of the evidence. Having a witness go through boxes of documents on the stand is wasteful of everyone’s time and does not assist the process of finding the truth. The new Evidence Code has addressed this issue within O.C.G.A. 24-10-1006.

New O.C.G.A. § 24-10-1006:
The contents of otherwise admissible voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that the contents of such writings, recordings, or photographs be produced in court.

The summaries allowed under this rule are substantive evidence of the matters summarized. Therefore, the summary would go out with the jury just as if each and every document that formed the basis of the summary was admitted into evidence. The summary must be compiled from admissible documents and this provision does not offer any exception to the normal rules pertaining to admissibility of documents.

The summaries cannot be prejudicial or highlighted in such a way that would skew the meaning of the matters summarized. The summaries allowed under this rule are not the same as demonstrative aids that lawyers might create to assist in closing argument. A witness who supervised the preparation of the summary must be called as a witness to introduce a summary exhibit.

The court must determine whether the documents that form the basis of the summary are so voluminous that they cannot conveniently be examined in court by the jury. The documents must be sufficiently numerous that comprehension of the documents by the jury would be difficult and inconvenient.

The proponent of the summary must also have made the other parties aware of its intent to introduce a summary sufficiently in advance of trial so that the other parties will have a meaningful opportunity to prepare for cross-examination of the summary and offer their own exhibits in rebuttal. While there is no specific rule which specifies the time required for advance notice, there must be sufficient notice to allow the other parties to examine the summary and the documents that form the basis of the summary.

47 U.S. v. Goss, 650 F.2d 1336, n.5 (5th Cir. 1981)
48 U.S. v. Bray, 139 F.3d 1104, 1109-10 (6th Cir. 1998)
49 U.S. v. Bray, 139 F.3d 1104, 1109-10 (6th Cir. 1998)
CONCLUSION

There is no doubt that the passage of the new Evidence Code will change some of the processes and procedures for Georgia judges and lawyers. However, the new Evidence Code will streamline several issues that will allow the parties to focus on the merits of the case as opposed to calling record custodians. Given that our existing evidence code was authored before electricity was available in homes, it was ill-equipped to address Facebook and Twitter. The patchwork of statutes falling in various sections of the Code has been replaced with a single reference point for all issues dealing with the introduction of evidence.

The law dealing with authentication is reorganized and renumbered but the substantive law is quite similar to existing Georgia law in many respects. The duty upon the trial judge is changed to merely serving as a gatekeeper in the area of authentication, shifting to the jury the obligation of determining whether the evidence is properly authenticated and what weight to attribute to the evidence.

The Best Evidence Rule has been expanded to include evidence other than writings. The law allows for the introduction of copies where there is no real question about whether the original is genuine. The Best Evidence Rule has also set forth other provisions which reflect the modern nature of litigation in allowing summaries to be produced which forego the need for the jury to search for the proverbial needle in a haystack.
Excerpt from the Direct Examination of Defendant Dale Horner:

[Q] Mr. Horner, did you have a little trouble with the law a few years ago?

[A] Yes, I’m ashamed to say.

[Q] Were you convicted in Rockdale County in 2004 for selling marijuana?

[A] I’m afraid I was. But I did my time and . . .

[DC] Objection. Counsel is impeaching his own witness. That’s my job.

Overruled.

The old “vouching rule” which prohibited counsel from impeaching his own witness has been abolished. New O.C.G.A. § 24-6-607 “The credibility of a witness may be attacked by any party, including the party calling the witness.”

New O.C.G.A. § 24-6-609 is a cleaned up version of current O.C.G.A. § 24-9-84.1 which was passed in 2005 and based on Federal Rule 609.

Any witness in a civil or criminal trial may be impeached with a prior conviction.

A criminal defendant who takes the stand may be impeached with his prior convictions subject to the following rules.

If the prior conviction is for a crimen falsi, i.e., any crime which has as an essential element of the offense some kind of deception (such as perjury, criminal fraud, theft by deception, etc.) see, Martin v. State, 300 Ga.App. 39, 684 S.E.2d 111 (2009); Clements v. State, 299 Ga.App. 561, 683 S.E.2d 127 (2009), then the prior conviction is admissible to impeach the accused without any sort of balancing and regardless of whether the prior crime was a felony or a misdemeanor.

Felonies that are not crimen falsi may be used to impeach the testifying criminal defendant only if the trial court determines that the probative value of the prior conviction for its impeachment use outweighs its prejudicial effect.
The probative value of a prior conviction for impeachment use is not to be confused with the use of a prior conviction to prove motive, identity, intent, or other “404(b)” purposes. Tate v. State, 289 Ga. App. 479, 657 S.E.2d 531 (2008) (trial court must focus on whether the prior conviction “indicated a probable lack of veracity rather than a propensity to commit the crime of which he is charged”)

U.S. v. Preston, 608 F.2d 626, 639 (5th Cir.1979) (“It is important to emphasize that evidence of prior convictions is admitted under Rule 609(a)(1) solely for purposes of attacking credibility. The assumption that a prior conviction demonstrates a propensity on the part of the defendant to have acted on the present occasion in conformity with the criminal character suggested by the previous conviction is impermissible. The danger that a jury will think ‘once a criminal, always a criminal’ makes it important that the Trial Judge focus on prejudice as well as probative value.”)

It must be clear from the record that the trial judge has performed a balancing though the judge need not make specific findings on the record of the factors that went into the balancing. Clay v. State, 290 Ga. 822, 725 S.E.2d 260 (2012)

Pre-2013 Georgia cases required that a party offer a certified copy of the record of conviction before impeaching a witness with a prior conviction. Although this is recommended as a matter of practice, it is not strictly required under the new 2013 rules. Wilson v. Attaway, 757 F.2d 1227, 1244 (11th Cir. 1985) (“However, under Fed.R. Evid. 609(a) a certified copy of the conviction is not required if evidence of the conviction is elicited during cross-examination.”)

If the certified record is offered, it should not include the indictment or any other details of the prior conviction. Willett v. Stookey, 256 Ga. App. 403, 568 S.E.2d 520 (2002) (error to include copy of indictment with record of conviction for child molestation where indictment contained “the highly prejudicial specific details of the crimes”). The evidence should be limited to the number, nature, time, place of, and punishment for each conviction.
Switching to the civil case of Murphy v. Horner ..... 

Excerpt from the Cross-Examination of Plaintiff witness Stoney Dawson:

[Q] Mr. Dawson, can I call you Stoney?


[Q] Stoney, you testified on direct examination that you are a mechanic at the Bolinga Ford dealership, isn’t that right?

[A] Yes sir.

[Q] But as a matter of fact, you are not a mechanic at all. In fact, you are a janitor at the Bolinga Ford dealership, isn’t that right?


[Pr] Objection. This is all irrelevant.

[DC] I’m allowed to confront the witness on cross with facts contrary to his direct testimony.

Overruled.

Excerpt from the Cross-Examination of Stoney Dawson:

[Q] Now Stoney, you don’t like my client, Mr. Horner, much do you?

[A] Hey, I don’t even know your client.

[Q] You called him on the phone, didn’t you?

[A] I don’t remember.

[Q] You asked him for $500, didn’t you?

[A] It was a long time ago. I don’t really remember.

[Q] You can’t recall telling him that if he gave you $500 that you would change your testimony to favor him in this case?

[A] No sir. I never did that.

[PC] We must object, your Honor. Counsel is raising facts not in evidence.

Overruled.

The cross-examiner may confront a witness with any relevant facts as long as the cross-examiner has a good faith basis to believe that:

(1) the fact is true;
(2) this witness would have personal knowledge of the fact; and
(3) the fact is admissible in evidence.


O.C.G.A. § 24-6-622 (former 24-9-68): “The state of a witness's feelings towards the parties and the witness's relationship to the parties may always be proved for the consideration of the jury.”

Bias is never collateral and if a witness is confronted with facts on cross-examination indicative of the witness’s bias and the witness denies those facts, the cross-examiner may offer extrinsic evidence to prove those facts. New O.C.G.A. § 24-6-608(b); Simmons v. State, 266 Ga. 223, 466 S.E.2d 205 (1996).
**Excerpt from the Cross-Examination of Stoney Dawson:**

[Q] Stoney, it is true, is it not, that you were arrested just last month for possession of methamphetamine?

[PC] Objection. This is irrelevant.

[DC] It’s impeachment, your Honor.

**Sustained.**

Only a criminal conviction is admissible for impeachment purposes. The fact that the witness was arrested, charged, indicted, or otherwise spent time being investigated by the criminal justice system is not admissible to impeach the witness under this rule.


**Excerpt from the Cross-Examination of Stoney Dawson:**

[Q] Okay now Mr. Dawson, I want to turn your attention to an incident about two months ago when you borrowed the car of your co-worker, Mr. Lemke, and you returned the car with some major damage to the fender, do you recall that?

[A] Yes.

[Q] And you told Mr. Lemke that you had parked the car in a Piggly Wiggly parking lot and when you came out of the store, you discovered that someone must have hit the car, isn’t that right?


[Q] But in fact, you got drunk and ran Mr. Lemke’s car into a tree, didn’t you?

[PC] Objection! Even if any of this were true, your Honor, it is completely irrelevant to this case.

[DC] I have the right to a thorough and sifting cross-examination and this incident shows that Stoney Dawson is a liar.
Under pre-2013 Georgia rules, a cross-examiner could not use collateral events to impeach, no matter how indicative they were of the witness’s veracity.

**New O.C.G.A. § 24-6-608(b)** gives the trial court discretion to allow a cross-examiner to confront a witness with prior, unrelated conduct by the witness that is probative of the witness’s untruthfulness. Courts operating under this rule allow such cross-examination only when the credibility of the witness is critical to the case and the cross-examiner has a good faith basis for believing the prior conduct occurred. In any event, the cross-examiner may only confront the witness with the prior conduct and then move on. Counsel must accept the witness’s answer and may not later offer extrinsic evidence to prove the prior, unrelated conduct.

*U.S. 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.”)

Counsel must have a good faith basis for any specific instances of conduct raised during the examination of the witness. *U.S. v. Nixon*, 777 F.2d 958, 970 (5th Cir. 1985)

The prior conduct must be probative of truthfulness. *U.S. v. Novaton*, 271 F.3d 968, 1006 (11th Cir. 2001) (not just any unlawful conduct is “probative of untruthfulness” – looking at “such acts as forgery, perjury, and fraud.”)

Evidence that the alleged victim in a sex offense case has made prior, false allegations of sex offenses against the defendant or others does not fit squarely under rule 608(b) since it is not totally unrelated to the case. The accused first must show the trial court evidence establishing a “reasonable probability” that the complainant’s prior accusations were in fact false before the evidence will be admitted. *Roberts v. State*, 286 Ga. App. 346, 347, 648 S.E.2d 783 (2007). If admissible, the accused does not have to accept the alleged victim’s denial of the prior false allegation and may present extrinsic evidence to support the charge.
**Excerpt from the Cross-Examination of Stoney Dawson:**

[Q] Mr. Dawson, do you know Ryan Sheets?

[A] Don’t know that I do.

[Q] Well, Mr. Sheets was sitting just a few seats away from you at the game and he said Mr. Murphy attacked my client without provocation. Are you calling Mr. Sheets a liar?

[PC] Objection. First, counsel is testifying to hearsay. Second, he can’t ask whether this witness considers another witness a liar.

**Sustained.**

**Cross-examination and Hearsay** -- The cross-examiner may not ask a witness what someone else said (or wrote) unless:

--- the out-of-court statement or document has already been admitted into evidence; or,

--- the cross-examiner has a good faith basis to believe that:
  (1) the out-of-court statement qualifies as nonhearsay or under a hearsay exception; and,
  (2) the witness on cross has sufficient personal knowledge regarding the statement and the circumstances of its making to lay any foundation required to admit the statement over a hearsay objection. See, Cowards v. State, 266 Ga. 191, 465 S.E.2d 667 (1996); Lewis v. State, 279 Ga. 69, 608 S.E.2d 602 (2005).

"Are you calling my witness a liar?"

When a witness is asked why a person who has given a conflicting story would lie, one of three things is going on -- all of them improper: (1) the cross-examiner wants the witness to give his unqualified opinion of the other person’s credibility; (2) the cross-examiner expects the witness to admit he has no basis to doubt the other person’s credibility, which is improper bolstering of that credibility; or (3) counsel is really asking a rhetorical question and the question is simply, but improperly, argumentative. The practical problem with such questions is that they too often lead to unexpected and inadmissible answers.

In Manzano v. State, 282 Ga. 557, 651 S.E.2d 661 (2007), our Court allowed the prosecution to confront a testifying criminal defendant with the contrary testimony of other witnesses and ask whether they were lying as “a rhetorical device intended to challenge the defendant’s credibility and ... not [as] an effort to bolster other witness’ credibility.”
It is doubtful that *Manzano* survives the adoption of the new rules. *U.S. v. Schmitz*, 634 F.3d 1247, 1268 (11th Cir. 2011) (“We hold that it is improper to ask a testifying defendant whether another witness is lying.”)

*U.S. v. Harris*, 471 F.3d 507, 511-12 (3d Cir. 2006) (“Of the federal courts of appeals that have examined the propriety of questions posed to a criminal defendant about the credibility of government witnesses, it appears nearly all find that such questions are improper. ... Such questions invade the province of the jury and force a witness to testify as to something he cannot know, i.e., whether another is intentionally seeking to mislead the tribunal. In addition, ... such questions force defendants into choosing to either undermine their own testimony or essentially accuse another witness of being a liar. ... such questions would obviously be proper if a defendant opened the door by testifying on direct that another witness was lying.”)

**Excerpt from the Cross-Examination of Stoney Dawson:**

[Q] Mr. Dawson, you testified on direct examination that Mr. Horner was punching Mr. Murphy and Mr. Murphy wasn’t doing anything, isn’t that right?

[A] That’s right.

[Q] Murphy wasn’t fighting back, he was just getting beaten up, was that your testimony?

[A] I guess so.

[Q] I don’t want you to guess, Mr. Dawson. Was your testimony on direct that Murphy wasn’t fighting back, he was just getting beaten up? I can have the court reporter look it up and . . .

[A] Yeah, that’s what I said and that’s the way it went down.

[Q] And you’re clear in your mind on that, right?

[A] Yes sir.

[Q] You’ve never told anybody anything different because it is so clear in your mind exactly what happened, is that right?

[A] Uh huh.

[Q] But isn’t it true that you told John Hudson that Murphy was, and I quote, “giving as good as he was getting” and probably would have won the fight if he hadn’t slipped and fell down the stairs?
I don’t recall that.

Objection. Improper foundation for impeachment by prior inconsistent statement.

Overruled.

New O.C.G.A. § 24-6-613(a) and (b) provide:

(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.

The new rule steps away from the Rule of Queen Caroline’s Case, embodied in pre-2013 O.C.G.A. 24-9-83, which required that a witness’s attention be drawn to the time, place, person, and circumstances of the prior statement. The new Georgia rule allows a witness to be confronted with a prior inconsistent statement without such foundation. It is enough if the witness is simply asked: “didn’t you tell so and so such and such?” Even this minimal foundation is not required when the prior inconsistent statement is a party admission. Written prior statements should be shown to the witness.

The prior inconsistent statement must be the witness’s statement. U.S. v. Saget, 991 F.2d 702, 710 (11th Cir. 1993) (“A witness may not be impeached with a third party’s characterization or interpretation of a prior oral statement unless the witness has subscribed to or otherwise adopted the statement as his own.”)

It also must be relevant to the case. U.S. v. Roulette, 75 F.3d 418, 423 (8th Cir. 1996). (If its not relevant to the case, it may qualify as a specific instance of conduct probative of untruthfulness under rule 608(b), discussed above.)

The new rules do not change the holding of Gibbons v. State, 248 Ga. 858, 286 S.E.2d 717 (1982) that the prior inconsistent statements of a testifying witness are admissible not only for their impeachment use but also as substantive evidence. See, New O.C.G.A. § 24-8-801(d)(1)(A).
Excerpt from Direct Examination of David Lemke:

[Q] Mr. Lemke, do you know Stoney Dawson?

[A] Yes I do.

[Q] How do you know Mr. Dawson?

[A] We work at the same company.

[Q] How long have you known Mr. Dawson?

[A] About 4 years.

[Q] Have you had an opportunity to talk with other workers at your company about Mr. Dawson’s general reputation for truthfulness or untruthfulness?

[A] Yes, I have.

[Q] And based on those conversations with other workers, what is Stoney Dawson’s general reputation for truthfulness?

[A] Stoney Dawson has a reputation as an untruthful person.

[Q] And do you personally have an opinion as to whether Stoney Dawson is a truthful person?

[A] I do. I believe he is an untruthful person.

[Q] Are there any particular incidents that led you to this opinion?

[A] There was the time he borrowed my car and . . .


Sustained.

New O.C.G.A. § 24-6-608(a):

(a) 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.
Expert Witnesses

(1) On the issue of damages, Bob Murphy is 33 years old and claims the fall down the stairs at Turner Field caused a broken wrist and extensive injuries to his neck and back.

Dr. Aaron, an orthopedic surgeon who treated Bob Murphy, would testify that his diagnosis was aided by the statements of a bystander who described the fall and Murphy’s position at the bottom of the stairs. Assume that this bystander’s statement is inadmissible hearsay. Dr. Aaron would summarize what the bystander said and explain how that effected his diagnosis.

Plaintiff objects that the doctor is basing his opinion on and attempting to disclose inadmissible hearsay.

The doctor’s opinion is admissible but the bystander’s statement probably is not.

New O.C.G.A. § 24-7-703:

The facts or data in the particular proceeding upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, such facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Such facts or data that are otherwise inadmissible 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. (emphasis added)

Differences Between the New Georgia Rule and the Pre-2013 Georgia Rule

In the 2005 Tort Reform Act, Federal Rule 703 was adopted for use in civil cases. (See, pre-2013 O.C.G.A. 24-67.1(a)). The new rules extend the application of Rule 703 to both criminal and civil cases.
(1) Are there any limitations on the nature and quality of the hearsay upon which the expert relies in forming an opinion?

O.C.G.A. § 24-7-703 requires that any inadmissible hearsay upon which the expert relies be “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject.” The testimony of the expert that others in his field reasonably rely upon the types of factual bases on which he relied in forming his opinion is this case is admissible, though it ultimately is up to the trial judge whether this condition is met. Smith v. Ortho Pharm. Corp., 770 F. Supp. 1561 (N. Ga. 1991).

If the expert relied upon inadmissible hearsay that is not reasonably relied upon by experts in that field, the trial court must decide whether the expert’s opinion can logically stand without reliance on the inadmissible facts. If the inadmissible facts are essential to the expert reaching her opinion, then the expert may not testify to that opinion. See, Smith v. Ortho Pharm. Corp., 770 F. Supp. 1561 (N. Ga. 1991).

If the inadmissible facts are not essential, if they only add support to an otherwise sustainable opinion, then the expert may go ahead and testify to the opinion. In re Paoli R.R. Yard PCB Litigation, 35 F.3d 717 (3d Cir. 1994).

See also, Soden v. Freightliner Corp., 714 F.2d 498 (5th Cir.1983) (opinion of expert properly excluded where expert relied solely on statistics of questionable validity given him by a third party); Faries v. Atlas Truck Body Mfg. Co., 797 F.2d 619 (8th Cir.1986) (opinion of state trooper relying heavily on opinion of milk truck driver as to cause of accident inadmissible); United States v. Gardner, 211 F.3d 1049, 1052, 1054 (7th Cir.2000) (expert’s reliance upon eyewitness accounts of fire and fire investigators’ reports was reasonable and common in the field); United States v. Marine Shale Processors, 81 F.3d 1361, 1370 (5th Cir.1996) (fact that inadmissible data upon which expert relied was prepared in anticipation of litigation, while not dispositive, weighs heavily against admitting the opinion).

(2) May the expert disclose the inadmissible hearsay upon which she relied?

Under O.C.G.A. § 24-7-703, any inadmissible evidence upon which the expert relied in forming her opinions may not be disclosed to the jury by the proponent of the expert’s testimony “unless the court determines that the probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs” its prejudicial effect (that the jury may misuse it as substantive evidence). As the Advisory Committee’s Note to Federal Rule 703 states, this rule provides “a presumption against disclosure.” Even when this presumption is overcome and the inadmissible facts are disclosed to the jury, the trial court must give a limiting instruction, if requested, explaining that the hearsay facts are admitted solely for the purpose of “assisting the jury to evaluate the expert’s opinion” and not to prove the truth of those facts. See, Advisory Committee Note, Federal Rule of Evidence 703, 2000 Amendments; Brennan v. Reinhart Institutional Foods, 211 F.3d 449 (8th Cir. 2000).
See, Raines v. Maughan, 312 Ga. App. 303, 307, 718 S.E.2d 135 (2011) (“But the inadmissible facts and data upon which an expert relies are not rendered admissible simply because an expert has relied upon them. To the contrary, such facts and data remain inadmissible ‘unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.’”)

Of course, the adverse party may ask in cross-examination about any and all facts upon which the expert relied in reaching her opinions. See, Advisory Committee Report to 2000 amendments to Federal Rule 703 (“Nothing in this Rule restricts the presentation of underlying expert facts or data when offered by an adverse party.”); see also, Austin v. State, 275 Ga. 346, 566 S.E.2d 673 (2002).

The limitation in O.C.G.A. § 24-7-703 on an expert disclosing inadmissible hearsay upon which she reasonably relied applies only to jury trials.

Even though the expert usually may not disclose the contents of the inadmissible sources upon which she reasonably relied, the expert may “point” to those sources, without revealing their contents, as a way of explaining to the jury that she did her homework. For example, a physician might testify that she spoke with other doctors who treated similar conditions without revealing what those doctors said or what she learned from those conversations. See, Marsee v. U.S. Tobacco Co., 866 F.2d 319, 322-24 (10th Cir. 1989).

**New Case:**

**Williams v. Illinois,** ___ U.S. ___, ___ S.Ct. ___ (2012 WL 2202981). Bench trial where state crime lab expert was allowed to say that written report containing DNA profile from a private lab (Cellmark) matched to DNA of Defendant.

(“... if such evidence is disclosed, the trial judges may and, under most circumstances, must, instruct the jury that out-of-court statements cannot be accepted for their truth, and that an expert's opinion is only as good as the independent evidence that establishes its underlying premises.”) Dissent notes that drafting an intelligible limiting instruction may be quite a challenge. Trial courts should avoid admitting otherwise inadmissible factual bases of an expert’s opinion in jury trials whenever such facts are the only “evidence” the jury will hear on a material issue.
**Summary:**

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(2) Dr. Aaron also would testify that he shared his diagnosis and prognosis of Bob Murphy’s injuries with Dr. Justice, the Chair of Occupational Medicine at Emory Medical School, and Dr. Justice concurs entirely with Aaron’s findings.

The defense objects on grounds of hearsay. Dr. Justice has not been listed as an expert for the plaintiff nor is she scheduled to testify at this trial.

**Sustained.**

Note that the witness is not testifying that he based his opinion on what Dr. Justice told him, he is merely repeating Dr. Justice’s out-of-court opinion that she concurs in his diagnosis.

Under both “old” Georgia cases and Federal Rule of Evidence 703, an expert may not be a mere conduit for the opinions of other experts not called to testify. *Horton v. Hendricks*, 291 Ga. App. 416, 662 S.E.2d 227 (2008) (“A testifying expert is not to serve as a conduit for the opinions of others.”)

However, an expert may consider the opinions of others and use them in reaching her own conclusions. See, *Life Ins. of Georgia v. Dodgen*, 148 Ga. App. 725, 252 S.E.2d 629 (1979) (“The fact that other expert opinions were considered by the physician in reaching his ultimate conclusion does not render the evidence inadmissible.); *In re Polypropylene Carpet Antitrust Litigation*, 93 F. Supp. 2d 1346 (11th Cir. 2002) (although expert witness consulted with outside expert, his opinion was not merely a restatement of what the other expert said but was his own, based on a combination of sources and his own analysis).

See also, *U. S. v. Grey Bear*, 883 F.2d 1382, 1392-93 (8th Cir. 1989) (medical expert not allowed to testify that two other doctors - who did not testify at trial - agreed with his conclusions); *U.S. v. Floyd*, 281 F.3d 1346 (11th Cir. 2002).

(3) Dr. Aaron wishes to read to the jury two paragraphs from “Fractures of the Distal Radius” by Doctors Fernandez and Jupiter which he testifies is an authoritative treatise in the field of orthopedics. He would also show the jury a diagram from that treatise to illustrate his testimony.

The defense objects that the treatise is inadmissible hearsay.

**Sustained as to the text – Overruled as to the diagram.**

Although Federal Rule 803(18) admits the contents of authoritative treatises and other expert literature on direct examination as well as cross-examination of an expert, the new rules retain the current Georgia approach and admit such contents only on cross-examination. New O.C.G.A. § 24-8-803(18) provides:

*Learned treatises.* To the extent called to the attention of an expert witness upon cross-examination, statements contained in published treatises, periodicals, or pamphlets, whether published electronically or in print, on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness, by other expert testimony, or by judicial notice. If admitted, the statements may be used for cross-examination of an expert witness and read into evidence but shall not be received as exhibits.

An expert can base his opinions at trial on authoritative treatises, journal articles, professional guidelines and the like, and disclose his reliance upon them, but the contents of the treatises or other literature are not admissible on direct examination. *Cantrell v. Northeast Georgia Med. Ctr.*, 235 Ga. App. 365, 508 S.E.2d 716 (1998).

Again, the expert must be more than a mere conduit for the opinions of non-testifying experts as found in the literature. See, e.g., *Jordan v. Georgia Power Co.*, 219 Ga. App. 690, 466 S.E.2d 601 (1995) (expert not allowed to testify that the consensus in the scientific community is that magnetic fields from power lines do not cause lymphomas).
An expert may use diagrams and other illustrative material from treatises as
demonstrative evidence if they are fair and accurate and will aid the finder of fact in

**4** Dr. Aaron also would testify that the trauma of the fall “may have” caused the
subsequent onset of Bob Murphy’s scleroderma.

Defendant objects that the expert’s testimony is irrelevant and legally insufficient on
the issue of causation.

**Sustained.**

An expert’s testimony that there is a mere possibility that \( x \) caused \( y \) is insufficient, *standing alone*, to prove that causation. *Cannon v. Jeffries*, 250 Ga. App. 371, 551
S.E.2d 777 (2001); *see also, Cowart v. Widner*, 296 Ga. App. 712, 675 S.E.2d 591
(2009) (*"A jury is authorized only to resolve conflicts in the evidence, and cannot
supply evidence where none exists"*); Milich, GEORGIA RULES OF EVIDENCE, §
15.6.

But if the expert’s testimony regarding possibilities is offered in conjunction with
other evidence and, together, the evidence would authorize a finding by a
preponderance of the evidence, the expert’s testimony is admissible. *Georgia Cas. &
testimony regarding “possible” cause
supported by additional evidence of causation then the testimony is admissible).

*See also, Bailey v. Edmundson*, 280 Ga. 588, 630 S.E.2d 390 (2006) (doctor’s
opinion that drugs which testator took “can cause” altered mental states and
agitation was admissible even though it was not, by itself, sufficient to sustain
burden of proof on this issue)

*See also, Zwiren v. Thompson*, 276 Ga. 498, 578 S.E.2d 862 (2003) (while an expert
need not use the phrase “to a reasonable degree of medical certainty,” the testimony
must assert more than a bare possibility that the defendant’s negligence caused the
plaintiff’s injury).

When a party does *not* have the burden of persuasion, as a defendant does not when
simply trying to disprove the plaintiff’s theory of causation, an expert may testify to
“possibilities” that might cast doubt on the strength of the plaintiff’s evidence.
testimony as to possible causation which witness conceded was not based “on a
reasonable degree of medical certainty” admitted to “cast doubt” on plaintiff’s expert’s conclusions).

(5) Dale Horner is 64 years old and has liver cancer. His cancer condition has worsened considerably since the incident at the ballpark. Horner's counterclaim seeks damages for the worsening of his cancer condition due to the physical and emotional trauma of the assault at Turner Field.

Horner has listed, and Murphy has deposed, Dr. Mark Smoltz. Dr. Smoltz will testify that Horner was doing well with his cancer therapy before the assault but that his condition significantly deteriorated immediately after the assault. Dr. Smoltz believes that the physical and emotional trauma of the assault substantially reduced Mr. Horner's chances of recovering from the cancer and his life span.

The defense has brought a pre-trial motion *in limine* to exclude any expert testimony that suggests that the physical and emotional trauma of the assault could have had an impact on Mr. Horner's liver cancer. The defense claims that plaintiff's expert testimony on this issue fails to satisfy *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), as adopted by new O.C.G.A. § 24-7-702.

In all probability .... Sustained.

New O.C.G.A. § 24-7-702(a),(b),(d),(f),(g) (based on pre-2013 O.C.G.A. 24-6-67.1)

(a) Except as provided in Code Section 22-1-14 and in subsection (g) of this Code section, the provisions of this Code section shall apply in all civil proceedings. The opinion of a witness qualified as an expert under this Code section may be given on the facts as proved by other witnesses.

(b) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if:

(1) The testimony is based upon sufficient facts or data;

(2) The testimony is the product of reliable principles and methods; and

(3) The witness has applied the principles and methods reliably to the facts of the case which have been or will be admitted into evidence before the trier of fact.

...

(d) Upon motion of a party, the court may hold a pretrial hearing to determine whether the witness qualifies as an expert and whether the expert's testimony satisfies the requirements of subsections (a) and (b) of this Code section. Such hearing and ruling shall be completed no later than the final pretrial conference contemplated under Code Section 9-11-16. ...
(f) It is the intent of the legislature that, in all civil proceedings, the courts of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other states. Therefore, in interpreting and applying this Code section, the courts of this state may draw from the opinions of the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); General Electric Co. v. Joiner, 522 U.S. 136 (1997); Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137 (1999); and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases.

(g) This Code section shall not be strictly applied in proceedings conducted pursuant to Chapter 9 of Title 34 or in administrative proceedings conducted pursuant to Chapter 13 of Title 50.

In Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), the U.S. Supreme Court ruled that the Federal Rules of Evidence had rejected the test of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) in which expert scientific testimony was admissible only if it had received “general acceptance” as valid and reliable in the relevant scientific community. In its place, Daubert offered what the Court termed a new approach to admitting expert testimony that focused on the relevance and scientific validity of the evidence. Daubert was followed by General Electric Co. v. Joiner, 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997) and Kumho Tire Company, Ltd. v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

Daubert involved a claim that Bendectin, a medication given to pregnant women to control morning sickness, caused birth defects. The Supreme Court affirmed the exclusion of the plaintiff’s expert testimony that there was a causal link between Bendectin and birth defects. The Court pointed to two requirements for admissibility under Federal Rule 702, relevance and reliability, and assigned to trial judges a “gatekeeper” role for screening expert testimony to assure that the evidence is sufficiently relevant and reliable to assist the trier of fact.

Reliability is concerned not with the ultimate “correctness” of the proffered testimony, but whether the expert’s conclusions are based on valid scientific principles or techniques. In re TMI Litigation, 193 F.3d 613, 665 (3d Cir.1999) (“If the methodology and reasoning are sufficiently reliable to allow the fact finder to consider the expert's opinion, it is that trier of fact that must assess the expert's conclusions. The inquiry is a factual one, not a legal one.”); see also, Advisory Committee Note to 2000 Amendment to Federal Rule 702: “A review of the caselaw after Daubert shows that the rejection of expert testimony is the exception rather than the rule. ... and 'the trial court’s role as gatekeeper is not intended to serve as a replacement for the adversary system.'”

A Daubert motion is not ordinarily appropriate to attack the qualifications of the expert. Mays v. Ellis, 283 Ga. App. 195, 641 S.E.2d 201 (2007) (“... under Daubert, disputes as to an expert’s credentials are properly explored through
cross-examination at trial and go to the weight and credibility of the testimony, not its admissibility.”); Agri-Cycle LLC v. Conch, 284 Ga. 90, 663 S.E.2d 175 (2008).

*Daubert* set forth four factors the trial court should consider. The four factors are not exhaustive and each need not be satisfied in every case. The court is supposed to take a flexible approach targeted on the ultimate question of whether the expert has used valid and reliable principles or techniques in reaching his conclusions. The Supreme Court held that even questionable scientific conclusions, as long as they are based on a valid scientific foundation, are admissible and can be attacked at trial by cross-examination and rebuttal evidence.

*HNTB Georgia, Inc. v. Hamilton-King*, 287 Ga. 641, 697 S.E.2d 770 (2010) (“ ... the test of reliability is a flexible one, the specific factors neither necessarily nor exclusively applying to all experts in every case.”); *DOT v. Miller*, 300 Ga. App. 857, 686 S.E.2d 455 (2009) (*Daubert* analysis should not be based on a “rigid set of factors” which are only “suggestive” and not subject to a “strict, narrow application.”). *See also*, *Heller v. Shaw Indus. Inc.*, 167 F.3d 146, 155 (3d Cir. 1999) (“each stage [of the expert’s testimony] must be evaluated practically and flexibly without bright line exclusionary (or inclusionary) rules.”); *United States v. Brown*, 415 F.3d 1257, 1268 (11th Cir. 2005) (“... expert testimony that does not meet all or most of the *Daubert* factors may sometimes be admissible.”)

The four factors: (1) testability, (whether the theories or principles the expert is using are capable of being tested and have in fact been tested); (2) rate of error, (the acceptable rate of error depends on what the evidence is offered to prove and the reasons for the error rate); (3) peer review and publication; and, (4) general acceptance in the scientific community.

Other factors have emerged through subsequent case law. For example, although the expert may have used reliable data, did he over-extrapolate from that data to reach unfounded conclusions? *General Electric Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997). For example, in our hypothetical, one might find significant empirical support for the proposition that if a cancer patient reduces emotional stress and takes a positive attitude towards recovery, his outcome is likely to be better than those who do not. But it does not follow from this that an emotionally traumatic incident more probably than not would aggravate or worsen a patient’s cancer condition.

Has the expert considered and accounted for alternative explanations for the data? *Claar v. Burlington RR*, 29 F.3d 499 (9th Cir. 1994).

Has the expert used “in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field?” *Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).
The year 2000 amendments to Federal Rule 702, integrated into new O.C.G.A. 24-7-702, organized the application of a *Daubert* analysis using three requirements:

**(1) “The testimony is based on sufficient facts or data”** -- The opinions cannot be based on speculation or conjecture or the expert’s bare assertion that he knows what he is talking about. Both the principles and techniques the expert uses and the application of those principles and techniques to the instant case must be based on sufficient facts. *See also, McDowell v. Brown*, 392 F.3d 1283, 1301 (11th Cir. 2004) (expert’s guess, no matter how educated a guess, is inadmissible when not supported by existing data); *American Southern Ins. Co. v. Goldstein*, 291 Ga. App. 1, 660 S.E.2d 810 (2008) (economist’s opinion excluded as based on insufficient data). *See also, U.S. v. Frazier*, 387 F.3d 1244, 1260-1267 (11th Cir. 2004) (en banc) (excellent discussion).

A principle or technique is not testable until a minimum amount of useable data is acquired. Likewise, a minimum amount of data is required to make a reliable estimate of error rates. The term “sufficient” here does not refer to legal sufficiency (could a reasonable jury, based on the evidence, find a fact to be true) but scientific or technical sufficiency (would a reasonable scientist or expert in the technical field in question conclude that the facts or data acquired are enough to exclude contrary hypotheses and permit reliance on the theory or principles supported by the data or is more testing (more data) required)?

Anecdotal evidence, for example, is a great starting place for scientific inquiry but is not a valid basis for reaching firm scientific conclusions. Individual case studies may raise questions and suggest promising research options but controlled studies are the currency of scientific proof. *See, e.g.*, *Hall v. Baxter Healthcare*, 947 F. Supp. 1387 (D. Or. 1996).

**(2) “The testimony is the product of reliable principles and methods”** -- The expert must be able to defend the principles and methods she used as capable of producing consistent results. This can be proved quantitatively (with testing data) or by reliance on other proven scientific principles. *Giannotti v. Beleza Hair Salon, Inc.*, 296 Ga. App. 636, 675 S.E.2d 544 (2009) (where expert chemist did not attempt to reproduce the conditions under which certain chemicals were applied to plaintiff’s hair, no error in excluding the expert’s testimony that the application of the chemicals caused the damage to plaintiff’s hair); *Moran v. KIA Motors America, Inc.*, 276 Ga. App. 96, 622 S.E.2d 439 (2005).

Neither *Daubert* nor new O.C.G.A. 24-7-702 alters the basic rule that a trial court may take judicial notice of the reliability of scientific principles and techniques and other specialized knowledge that have been widely accepted. *See, Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167 (1999).

**(3) “The witness has applied the principles and methods reliably to the facts of the case”** -- When there are minor departures from the prescribed methods and procedures for applying a principle or test, those departures go to weight, not

The Georgia legislature added to the language of the Federal Rule the phrase “which have been or will be admitted into evidence before the trier of fact” at the end of subsection (b)(3). This simply clarifies that the “facts of the case” are not what the expert or counsel believe the case is about but are tied to the evidence admitted at trial. This is sometimes referred to as “fit.” Fit is a relevance issue – an expert’s opinion is not truly relevant if it is based on facts that are materially different than the case on trial. A courtroom is not the place for academic exercises. For the expert’s testimony to be useful to the trier of fact, it must be reliably relatable to the facts the jury are learning at trial.

**Procedure ....**

New O.C.G.A. § 24-7-702(d) allows a party to move to exclude an expert’s testimony on the grounds that the expert is not qualified or that the testimony is inadmissible under *Daubert*. The court “may” hold a hearing.

The trial court has broad discretion in how to handle a *Daubert* motion. *Kuhmo*, 526 U.S. at 152-53. The court does not have to hold a pretrial hearing in every case. *United States v. Nichols*, 169 F.3d 1255 (10th Cir 1999). However, the court must conduct a “suitable inquiry;” that is, suited to the scope and complexity of the issues raised. *Tuscaloosa v. Harcros Chem., Inc.*, 158 F.3d 548, 565, n.21 (11th Cir. 1998). The more complicated and controverted the expert evidence, the more a hearing may assist the trial court in sorting through and evaluating the issues. *United States v. Hansen*, 262 F.3d 1217, 1234 (11th Cir. 2001).

The trial court has the discretion to avoid “unnecessary ‘reliability’ proceedings in ordinary cases where the reliability of an expert’s methods is properly taken for granted.” *Kuhmo*, 526 U.S. at 152.

At a *Daubert* hearing, the judge may consider any evidence that is not privileged even if it otherwise would be inadmissible under the rules of evidence. New O.C.G.A. 24-1-104(a); *Jones v. State*, 277 Ga. 36, 586 S.E.2d 224 (2003). The judge may consider what courts in other jurisdictions have written and ruled in regard to the issues before it. *See, Daubert v. Merrill Dow Pharm., Inc.*, 43 F.3d 1311, 1322 n. 19 (9th Cir. 1995)(on remand).

A trial judge’s “gatekeeping” role is somewhat relaxed in a bench trial. *See, United States v. Brown*, 415 F.3d 1257, 1268 (11th Cir. 2005) (“There is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself.”) (*Note that Daubert will no longer be strictly applied in administrative hearings or workers comp proceedings*). New O.C.G.A. 24-7-702(g).


The original State Bar proposal would have extended the application of *Daubert* to criminal cases. This proposal did not survive objections by the prosecutors and thus Georgia will continue to apply *Daubert* only in civil cases. Criminal cases will continue to be governed by the *Harper* line of cases which require that expert scientific theories, procedures, and techniques offered at trial have “reached a scientific stage of verifiable certainty.” *Harper v. State*, 249 Ga. 519, 525-526, 292 S.E.2d 389 (1982).

(6) On the issue of whether Bob Murphy simply fell down the stairs or was pushed, Murphy intends to call an usher, Phyllis, as a witness. Phyllis has been an usher at Turner Field ever since it opened in 1997 and throughout that time her responsibilities have included section 140.

Phyllis would testify that she has seen a few dozen people fall on the stairs in section 140, either as a result of trying to retrieve a home run ball or simply carrying too many beers or hot dogs and losing their step. Phyllis would say that in none of those instances did the patron fall and then tumble down the steps as Bob Murphy apparently did in this instance. The other patrons who fell landed where they fell or perhaps a step or two below where they fell – but they didn’t bounce or roll to the bottom of the stairs. Phyllis would testify that a person would roll to the bottom of the stairs from Row G (a total of 14 steps) only if the person was pushed with some force.

Plaintiff has brought a pre-trial motion in limine to exclude Phyllis’ testimony on grounds it fails to satisfy *Daubert* in that the testimony is not based on reliable methodologies or techniques *and* it violates the ultimate issue rule.
Overruled in part. Sustained in part.

In *Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999), the Supreme Court extended *Daubert* to non-scientific expert testimony. The Supreme Court noted that the language of Rule 702 explicitly includes not only scientific evidence, but all expert evidence of a “technical or other specialized” nature and thus the *Daubert* case applied.

The expert’s testimony must be well grounded in an accepted body of learning or experience. An accountant’s testimony, for example, must be evaluated by reference to established accounting standards. The field of expertise must be “accepted.” Thus an expert wine taster, with proper foundation, would be allowed to testify while a Tarot card reader would not. *Kuhmo*, 526 U.S. at 149.

The expert’s testimony must be well reasoned and not speculative. “If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court’s gatekeeping function requires more than simply ‘taking the expert’s word for it.’” Advisory Committee’s Report on 2000 Amendment to Federal Rule 702.

In our hypothetical, it is not at all clear that any expertise is being applied to the issue of whether Murphy fell or was pushed down the stairs. This violates *Daubert* since the witness’s testimony is not grounded in an accepted body of learning or experience.

However, the witness’s fact testimony that the fans she has seen fall on the stairs in Section 140 have not bounced or rolled down those stairs is admissible as relevant to the nature or properties of the stairs. See, e.g., *Reed v. Heffernan*, 171 Ga. App. 83, 318 S.E.2d 700 (1984).

In *Moran v. KIA Motors America, Inc.*, 276 Ga. App. 96, 622 S.E.2d 439 (2005), the plaintiff sued for breach of warranty. Her expert testified to the value of the defective auto using a methodology that he and two others had developed and used for about a year. The Court of Appeals held that it was not an abuse of discretion for the trial court to reject the expert’s testimony under *Daubert*.

“Although the witness testified that he found his method reliable based on his experience in the industry, there was no evidence that the witness’s methods had been relied upon more widely in the automotive field, nor of the method’s known rate of error, nor whether it had been reviewed by qualified experts other than its creators.”
Ultimate Issue Rule

New O.C.G.A. § 24-7-704:

(a) Except as provided in subsection (b) of this Code section, testimony in the form of an opinion or inference otherwise admissible shall not be objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of an accused in a criminal proceeding shall state an opinion or inference as to whether the accused did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

As explicitly stated in the Rule itself, except where the mental state of the criminal defendant is disputed, THERE IS NO LONGER A PROPER OBJECTION FOR “ULTIMATE ISSUE.”

However, the legal theory behind the ultimate issue rule still remains a viable area for objection. The new Code requires the objection to be phrased under a different Rule, not Rule 704.

Proper objection may be made under:

Rule 104: not relevant;
Rule 403: unduly prejudicial/waste of time;
Rules 701/702: requested opinion not helpful to jury.

This last area under opinion evidence (Rule 701/702) has two concepts which lawyers should remember;

(1) Witness opinion testimony should not invade province of the jury;
(2) Witness should not opine as to legal terms and legal conclusions when they are the issues to be determined in the case.

Province of the Jury:

Generally, if attorney can make same argument in closing without the opinion testimony, the jury probably does not need the testimony. Thus, an objection to the opinion as “not helpful” should be sustained. For example, Defendant “acting suspicious” (with proper basis from arresting officer) would be allowed; but “defendant was hiding his guilt” by the way he acted would not be allowed. See, U.S. v. Steed, 548 F.3d 961 (11th Cir. 2008); and Dix v. State, 238 Ga. 209, 232 S.E.2d 47 (1977).
But, if an opinion is beyond the ken of the average juror, the expert opinion should be allowed. For example, testimony that a quantity of drugs "would be indicative of distribution, and not merely personal use" would be helpful to average juror. U.S. v. Lipscomb, 14 F.3d 1236 (7th Cir. 1994)

**Legal conclusions/legal terminology in opinion**

When the legal conclusion is the issue that the jury is to decide, a witness may not offer a suggestion of a verdict disguised as an opinion. For example, witnesses interpretation of partnership agreement is not helpful to jury. See, Hayden v. Sigari, 220 Ga. App. 6, 467 S.E.2d 590 (1996).

An expert may refer to industry standards or professional codes as a way of explaining his opinion, Dayoub v. Yates-Astro Termite Pest Control Co., 239 Ga. App. 578, 521 S.E.2d 600 (1999), but if the standards or codes are also incorporated in applicable laws or ordinances, the expert should avoid any reference to that fact or any suggestion that he is testifying about the status or application of the law to the facts of the case. R. O. H. Properties, Inc. v. Westside Elec. Co., Inc., 151 Ga. App. 857, 261 S.E.2d 767 (1979); Georgia Power Co. v. City of Macon, 228 Ga. 641, 187 S.E.2d 262 (1972).

Also, remember that witness credibility is not generally a matter for opinion of other witnesses. New O.C.G.A. § 24-6-620 (formerly § 24-9-80). No witness, lay or expert, may give opinion testimony concerning another person’s credibility for the purpose of showing that that person should or should not be believed. Shelton v. State, 251 Ga. App. 34, 553 S.E.2d 358 (2001) (“Georgia does not allow witnesses to opin that a party or victim is lying or telling the truth”).

However, in certain circumstances, the reliability of witness testimony may be a matter for expert opinion when the expert's opinion is based on reliable science, pertinent to the evaluation of critical evidence, and beyond the ken of the average juror. See, e.g., Johnson v. State, 272 Ga. 254, 526 S.E.2d 549 (2000) (expert on eyewitness identification allowed); Barlow v. State, 270 Ga. 54, 507 S.E.2d 416 (1998) (expert on child victim interview techniques allowed in sex offense cases); Smith v. State, 247 Ga. 612, 277 S.E.2d 678, 18 A.L.R.4th 1144 (1981) (expert testimony regarding battered spouse syndrome allowed). No expert, however, may testify that a person is or is not telling the truth.

**When mental state is in issue in a criminal intent defense, the Rule still allows opinion testimony to place the defense before the trier of fact even though it may relate to the ultimate legal conclusion to be made by the trier of fact.** See, U.S. v. Thigpen, 4 F.3d 1573 (11th Cir. 1993) (experts may testify in general terms as to the effect various mental disorders have on a patient's capacity to understand or appreciate what he is doing, but may not tailor the testimony to make it appear the expert is referring to the defendant). See also, U.S. v. Manley, 803 F.2d 1221, 1223 (11th Cir. 1990) (“Rule 704(b) does nothing to alter this Court’s longstanding tradition of liberally permitting the introduction of
evidence on the issue of insanity. Psychiatric testimony may include the expert's 
diagnosis, the characteristics of the particular mental disease or defect, and the 
expert's opinion as to the defendant's mental state and motivation at the time of the 
alleged crime.

Miscellaneous cases on opinion evidence involving ultimate issues:

The following list of cases is not an exhaustive list, but provides insight as to what 
types of opinions are not allowed in disputed cases. (See, Milich, Courtroom 

— as to the contractual obligations of the parties, Hayden v. Sigari, 220 Ga. App. 6, 
800 (1978); See also, Montgomery v. Aetna Cas. & Sur. Co., 898 F.2d 1537 (11th Cir. 
1990) (improper to allow expert to testify to an insurer's duties under a contract);
— that certain actions were "fraudulent," Allen v. Columbus Bank & Trust Co., 244 
Ga. App. 271, 534 S.E.2d 917 (2000);
— that a person "failed to act in good faith," Michaels v. Gordon, 211 Ga. App. 470, 
439 S.E.2d 722 (1993);
— that a shooting was "accidental," Grude v. State, 189 Ga. App. 901, 377 S.E.2d 731 
(1989);
— that a death was a "homicide," Maxwell v. State, 262 Ga. 73, 414 S.E.2d 470 
(1992);
App. 167, 270 S.E.2d 349 (1980); though a qualified expert could testify that a 
person's wounds appeared to be "defensive" as opposed to self-inflicted, Caldwell v. 
State, 245 Ga. App. 630, 538 S.E.2d 531 (2000);
— that defendant's conduct constituted "aggravated stalking," Shafer v. State, 285 
Ga. App. 748, 647 S.E.2d 274 (2007);
App. 264, 671 S.E.2d 290 (2008);
— that a person was "negligent," Garner v. Salter, 168 Ga. App. 520, 309 S.E.2d 638 
(1983); See also, Haney v. Mizell Memorial Hosp., 744 F.2d 1467 (11th Cir. 1984) 
(no error in excluding expert's testimony that defendant was "negligent");
— that a driver's alcohol intoxication caused an accident, Deloach v. Deloach, 258 Ga. 
App. 187, 573 S.E.2d 444 (2002);
— that a child was "abused," Allison v. State, 256 Ga. 851, 353 S.E.2d 805 (1987), or 
qualified therapist who interviewed the victim may testify that her psychological 
findings were "consistent with" abuse or molestation, Williams v. State, 266 Ga. 
App. 578, 597 S.E.2d 621 (2004);
— that a person was "raped," when the defense claims consent, Stewart v. State, 259 
138, 587 S.E.2d 602 (2003), though a doctor who examined the victim may testify 
that her physical findings were "consistent with" rape, Harris v. State, 261 Ga. 386, 
405 S.E.2d 482 (1991);
— that a particular driver "caused" an auto accident, McMicken v. Moattar, 221 Ga. 
App. 230, 470 S.E.2d 800 (1996); or that a driver was or was not given a citation,
Cross-Examination of the Expert - A Few Notes

• A cross-examiner may ask opinions of an expert, even if they are beyond the scope of direct examination, as long as they are relevant and within the expert’s qualified scope of expertise. *Weeks v. State*, 187 Ga. App. 307, 370 S.E.2d 344 (1988).

**New O.C.G.A. § 24-6-611(b):**

(b) A witness may be cross-examined on any matter relevant to any issue in the proceeding. The right of a thorough and sifting cross-examination shall belong to every party as to the witnesses called against the party. If several parties to the same proceeding have distinct interests, each party may exercise the right to cross-examination.

• The cross-examiner may confront an expert with a treatise or similar professional literature if it is relevant to impeach the expert and the source is accepted as reliable and authoritative in the field, as established by the testimony or admission of the witness, by other expert testimony, or by judicial notice. O.C.G.A § 24-8-803(18). The testifying expert need not have relied on the literature for it to be used in cross-examining him. *Brannen v. Prince*, 204 Ga. App. 866, 421 S.E.2d 76 (1992).

**New O.C.G.A. § 24-8-803(18):**

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

(18) *Learned treatises.* To the extent called to the attention of an expert witness upon cross-examination, statements contained in published treatises, periodicals, or pamphlets, whether published electronically or in print, on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness, by other expert testimony, or by judicial notice. If admitted, the statements may be used for cross-examination of an expert witness and read into evidence but shall not be received as exhibits.

The fact that a professional failed a licensing exam or similar evidence raising questions about his competence would be admissible to impeach the expert's qualifications as an expert witness, even though such evidence could not be used against the defendant in a professional malpractice case to suggest the defendant was negligent. *See, Snider v. Basilio*, 281 Ga. 261, 637 S.E.2d 40 (2006).

Cross-examination may explore any potential bias of an expert in favor of one party or prejudice against another. *Blige v. State*, 264 Ga. 166, 441 S.E.2d 752 (1994).


Hearsay and Its Exceptions
(Professor Milich)

Excerpt from the Direct Examination of Officer Jack Reardon who was working security at Turner Field on the day in question. He was one of two APD officers who investigated the incident.

[Q.] Now Officer Reardon, in the course of investigating this case, did you receive any phone calls concerning what happened that day up in Section 140 of Turner Field?

[A.] Yes, the day after the incident I received a telephone call from a woman. She didn’t give me her name. She said: “I saw the whole thing. The old guy deliberately pushed the young man down the stairs.”

[DC] Objection your Honor. I have a feeling that might be hearsay.

[PC] But we have the phone call on tape your Honor.

Sustained.

New O.C.G.A. § 24-8-801(c):

(c) ‘Hearsay’ means a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

New O.C.G.A. § 24-8-802:

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.

Hearsay is no longer “illegal” evidence with no probative value. With the adoption of the new rules, Georgia joins the rest of America in holding that if a hearsay objection is not raised, it is waived and the hearsay evidence “shall be legal evidence and admissible.”

The hearsay rule, Fed.Rule Evid. 802, is premised on the theory that out-of-court statements are subject to particular hazards. The declarant might be lying; he might have misperceived the events which he relates; he might have faulty memory; his words might be misunderstood or taken out of context by the listener. And the ways in which these dangers are minimized for in-court statements—the oath, the witness’ awareness of the gravity of the proceedings,
the jury's ability to observe the witness' demeanor, and, most importantly, the
right of the opponent to cross-examine—are generally absent for things said
out of court.

If an out-of-court statement is offered for a purpose that requires the
jury to assume that the declarant was not lying or mistaken when he
made the statement, then it is hearsay. Armstead v. State, 255 Ga. App. 385,

Excerpt from the Direct Examination of Officer Jack Reardon:

[Q.] Officer Reardon, tell the jury what led you to investigate this disturbance.

[A.] Well, I received a call on my radio that there was a problem in Section 140 --
they said one fan had pushed another down the stairs.

[DC] Objection! Hearsay.

[PC] Its not hearsay. We are only offering the radio call to explain the officer's
conduct in going to Section 140 to investigate.

Sustained.

Once upon a time, Georgia courts routinely admitted incriminating statements made
to investigators, not as hearsay, but as “original evidence” to explain the
investigator's conduct in pursuing the investigation. The Georgia Supreme Court
severely limited this “exception” to those rare instances when the conduct of the
investigator is at issue or requires explanation. See, e.g., Momon v. State, 249 Ga.
(“Prosecutors and trial judges would be well advised to walk wide of error in the
proffer and admission of such evidence.”)

The radio call contains the assertion that someone was “pushed” down the stairs - an
assertion the defense surely contests. Since it is completely irrelevant why Officer
Reardon went to Section 140 (because that is not at all in issue), the call is not
admissible as nonhearsay to explain his conduct. U.S. v. Arbolaez, 450 F.3d 1283,
1290 (11th Cir. 2006) (statements offered to explain subsequent police conduct are
ordinarily inadmissible).

Of course, the officer can “explain his conduct” -- that is, tell his story, without
including hearsay assertions of disputed facts. For example, the Officer Reardon
could testify that he received a radio call about a problem in Section 140 and
immediately went to investigate.
See also, Cauley v. State, 287 Ga. App. 701, 652 S.E.2d 568 (2007) (“Police conduct is not an issue in need of explanation by means of hearsay testimony merely because a confidential informant has provided information which initiates an investigation”)


Excerpt from the Direct Examination of Officer Jack Reardon:

[Q] When you went down to the bottom of the stairs to check on Mr. Murphy’s condition, was he conscious at that time?

[A] Yes. I was telling him that help was on the way. At that time, a gentleman approached us, identifying himself as a physician. He looked at Mr. Murphy’s wrist and then said it was broken in several places and that he, Murphy, would be lucky if they didn’t have to amputate. At that point, Mr. Murphy passed out.

[DC] Objection! Hearsay as to what this supposed doctor said.

[PC] We are not offering it as hearsay, your Honor. Mr. Murphy thankfully did not lose his hand. We offer this statement as nonhearsay -- effect on hearer.

[DC] It is irrelevant.

[PC] It is relevant to damages.

Overruled.

If an out-of-court statement has a relevant nonhearsay use it is admissible. Pre-2013 Georgia rules referred to this as “original evidence.” That term is retired but the underlying concept is the same. If offered for a relevant purpose that does not ask the trier of fact to assume the speaker was not lying or mistaken, it is admissible as nonhearsay.

The most common kind of nonhearsay is a statement offered for its objective effect (to explain conduct, for effect on the hearer, to prove notice, etc.) See, e.g., Bull Street Church of Christ v. Jensen, 233 Ga. App. 96, 504 S.E.2d 1 (1998) (statements to church counselor regarding sexual molestation incident were not hearsay but offered to prove that the church had notice of the problem); Harrison v. Jenkins, 235 Ga. App. 665, 510 S.E.2d 345 (1998) (in proving lost wages, statements of plaintiff’s doctor telling her not to go back to work were admissible for the nonhearsay purpose of explaining the plaintiff’s subsequent conduct); In re: B.H., 295 Ga. App. 297, 671 S.E.2d 303 (2008) (in a molestation case, mother's statements
to child that if she answered "No" to all of the authorities’ questions, daddy would come home and bring her a kitten were admissible as nonhearsay).

Here, the fact that the plaintiff was told by someone whom he reasonably believed was a doctor that his hand might require amputation would be relevant to plaintiff’s pain and suffering (mental anguish). See, Marchbanks v. Blanton, 139 Ga. App. 368, 228 S.E.2d 287 (1976) (doctor’s statement to plaintiff that a large hollow needle might be inserted into his chest was admissible not to prove the truth of the matter asserted but for its effect on the patient’s emotions -- relevant to pain and suffering).

A simple test for whether an out-of-court statement is truly offered for its objective effect as “original evidence”: Assume that the person who made the out-of-court statement had no idea what he was saying (or writing) -- that unbeknownst to the listener, the declarant had no idea if what he was saying was true. Now ask, with that assumption in place, whether the statement is still relevant. If “Yes,” then the statement qualifies as true nonhearsay; its relevance does not depend upon the credibility of the declarant. If the answer is “No,” this means the relevance of the statement depends upon the credibility of the out-of-court declarant and this is hearsay.

**Categories of Nonhearsay**

“Effect on hearer (or reader)” – to prove motive, notice, knowledge, fear, etc.

“Verbal act” – when the out-of-court statement is relevant because the mere making of the statement created legal rights or obligations such a making an offer to a contract. Stubbs v. Dubois, 306 Ga. App. 171, 702 S.E.2d 32 (2010).

“Verbal part of an act” – when a person’s conduct is ambiguous from a legal standpoint and the words that accompanied that conduct resolve that ambiguity. For example, I see Art handing Barb a $100 bill. Is it a gift? A loan? A repayment of a loan? A payment for services? (E.g., Art said, while handing Barb the cash: “Here’s your graduation present.”)

“False statements” – when the fact that a person made a false statement is relevant, its nonhearsay.

“Demonstrates a physical, mental, or emotional condition” – when the mere making of the statement demonstrates something about the speaker's physical, mental, or emotional condition. For example, one spouse is heard screaming at the other: “I hate your guts and wish you were dead!” This goes beyond a mere assertion such as “I hate my wife” (which is hearsay but admissible under the rule 803(3) exception, discussed below) and demonstrates some serious problems in the marital relationship. Another example: Witness testifies that when she asked Art for a job Art replied: “I don’t hire women.” Regardless of whether this statement is true, it demonstrates Art’s discriminatory state of mind. Wright v. Southland Corp., 187 F.3d 1287, n.21 (11th Cir. 1999).
Excerpt from the Direct Examination of Officer Jack Reardon:

[Q] And then what happened?

[A] The medical guys arrived and began checking out Mr. Murphy. I told them: “This guy looks hurt pretty bad.”

[DC] Objection, your Honor. The witness’s prior out-of-court statement is hearsay.

[PC] It’s the witness’s own statement.

Overruled.

The Federal Rules treat prior out-of-court statements of a testifying witness as hearsay. This is a confusing and unnecessary complication of the rule. The new rules depart from the Federal Rules by retaining Georgia’s pre-2013 rule that a prior consistent statement of a testifying witness is not hearsay and is admissible if it logically rebuts an attack on the witness’s credibility. As the Court wrote in Carroll v. State, 261 Ga. 553, 408 S.E.2d 412 (1991) (“... the concerns of the rule against hearsay are satisfied when the witness whose veracity is at issue is present at trial, under oath, and subject to cross-examination.”)

New O.C.G.A. §§ 24-8-801(d)(1)(A):

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.

Prior consistent statements are inadmissible on direct to bolster the credibility of a witness before that credibility has been attacked. Thus the proper objection to a testifying witness repeating her own prior consistent statements is “improper bolstering,” not “hearsay.” Moore v. State, 280 Ga. App. 897, 635 S.E.2d 233 (2006) (“... where a party objects to evidence only on grounds of hearsay, an objection on the ground of improper bolstering has been waived.”)

See, Parker v. State, 162 Ga. App. 271, 274-75, 290 S.E.2d 518 (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 not under oath ... The idea that the mere repetition of a story gives it any force or proves its truth is contrary to common observation and experience that a falsehood may be repeated as often as the truth.”)

A prior consistent statement is relevant and admissible when the prior consistent statement is offered to rebut an attack on the witness’s credibility, particularly an
express or implied charge of recent fabrication or improper influence or motive.  

Other specific attacks on a witness’ credibility also may open the door to rehabilitation with a prior consistent statement. For example, if the cross-examiner impeaches a witness’ testimony at trial with suggestions that the witness’ memory is faded or weak, prior consistent statements by the witness closer in time to the events described would be admissible to rehabilitate.

\textit{Excerpt from the Direct Examination of Officer Jack Reardon:}

\[Q\] Did you speak to defendant, Dale Horner, at the scene?

\[A\] Yes I did. I said to Mr. Horner, “You pushed the guy down the stairs.” Horner replied, “He was beating me up. Beside, he ain’t hurt. He’s faking it.”

\[DC\] Objection! I actually have two objections. First, what the officer said to my client is hearsay and my client’s response regarding whether the plaintiff was in fact injured is impermissible lay opinion.

\[PC\] Your Honor, the officer’s statement is admissible to place the defendant’s reply in context. And the defendant’s reply is a party admission.

\textbf{Both Objections Overruled.}

As to the first objection, statements that are offered only to put the response to the statements in context (when that response is relevant and admissible in its own right) are not hearsay. \textit{Bundrage v. State}, 265 Ga. 813, 462 S.E.2d 719 (1995); \textit{Perez v. State}, 254 Ga. App. 872, 564 S.E.2d 208 (2002); \textit{U.S. v. Price}, 792 F.2d 994, 997 (11th Cir. 1986). But if it appears that the so-called “context statements” are really offered to prove the truth of the matters asserted, they are inadmissible hearsay. \textit{Axelburg v. State}, 294 Ga.App. 612, 669 S.E.2d 439 (2008).

As to the second objection, any voluntary statement by a party in a civil case or the accused in a criminal case to anyone at any time is an admission when offered by the opposing party and is admissible. O.C.G.A. § 24-8-801(d)(2). The admission must, of course, be relevant. \textit{American Southern Ins. Grp. v. Goldstein}, 291 Ga. App. 1, 660 S.E.2d 810 (2008).

\textit{U.S. v. Reed}, 227 F.3d 763, 770 (7th Cir. 2000) (admissions “... need neither be incriminating, inculpatory, against interest, nor otherwise inherently damaging to the declarant’s case.”)

Nor does a party admission need to be based on the party’s personal knowledge, *Mahlandt v. Wild Canid Survival & Research Ctr.*, 588 F.2d 626, 630-31 (8th Cir. 1978); *Brooks v. Sessoms*, 47 Ga. App. 554, 171 S.E.2d 222 (1933) (“To be admissible in evidence, admissions do not necessarily have to be founded on the personal knowledge of the party making them.”)

*Excerpt from the Direct Examination of Officer Jack Reardon:*

[Q] Did you speak to Jason Bourn, a beer vendor, who served that section of Turner Field?

[A] Yes I did. About an hour after the incident, I asked Mr. Bourn if he served any beer to Mr. Horner and he said: “That guy [meaning Horner] was one thirsty dude. I must have sold him at least a half dozen beers by the 5th inning.”


[PC] Your Honor, the vendor is an employee of the defendant Atlanta Braves and thus his statements are agent admissions.

[DC] With all due respect to Mr. Bourn, he was hired to sell beer, not to make statements on behalf of the Atlanta Braves.

**Overruled.**

Major change. **New O.C.G.A. § 24-8-801(d)(2)(D)** defines an agent admission as:

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.

The new rule sets forth two simple requirements for an agency or employee admission: (1) the statement was made during the agency or employment relationship; and, (2) the subject matter of the statement concerns a matter the agent or employee would know about by virtue of his agent or employee duties. The beer vendor was an employee of the defendant Atlanta Braves at the time he made the statement and the subject matter of the statement (serving beer to fans) falls within the scope of his employment.

The definitions of “agent” and “employee” follow the common law meanings of those terms. *U.S. v. Bonds*, 608 F.3d 495, 504-05 (9th Cir. 2010) (finding that Barry Bonds’ trainer was not his agent or employee for purposes of rule 801(d)(2)(D), an independent contractor is not generally an “agent” or “employee” though the contractor may act as an agent in specific circumstances)
The content of the statement must concern subject matter that the declarant would know by virtue of her duties as agent or employee. This is a subject matter test not an authorization test and thus even though an employee is acting illegally or outside the scope of employment in making the statement, it is still admissible against the employer if the subject matter of the statement relates to what the employee would know because of the employee’s job duties. *U.S. v. Riley*, 621 F.3d 312, 338 (6th Cir. 2010) (deputy mayor’s statements were illegal but still qualified as agent admissions). This requirement excludes rumors and “water cooler” gossip.

*Excerpt from the Direct Examination of Officer Jack Reardon:*

[Q.] Officer Reardon, did you speak to any witnesses at the scene?

[A.] Yes. Several. I spoke with a Mr. Hank Pendelton who saw the entire incident.

[Q.] How long after the incident did you speak with Mr. Pendelton?

[A.] I’d guess I talked with Mr. Pendelton about 15-20 minutes after the incident.

[Q.] What did Mr. Pendelton tell you?


[PC] It’s an excited utterance, Judge.

[DC] Your Honor, may I voir dire the witness?

[CT] Yes you may.

[DC] Officer Reardon, isn’t it true that when you approached Mr. Pendelton to take his statement, he was sitting and talking with a group of other fans?

[A.] Yes, now that you mention it. He was.

[DC] I must object to anything Mr. Pendelton said to Officer Reardon as hearsay.

[PC] Your Honor, it’s clearly an excited utterance. It was only 15 - 20 minutes after this very startling event.

[DC] But look at what Mr. Pendelton probably was doing for those 15 - 20 minutes. He was swapping impressions with other witnesses.

{Assume that Pendelton told Officer Reardon that he saw the defendant, Dale Horner, “intentionally push the plaintiff down the stairs.”}
Sustained.

The *res gestae* exception to hearsay is not recognized under the Federal Rules of Evidence and will no longer exist in Georgia starting January 1, 2013.

The three hearsay exceptions derived from *res gestae* cases are:

- 803(1) – present sense impressions;
- 803(2) – excited utterances; and
- 803(3) – statements of then existing mental, physical, or emotional conditions.

The trial judge, not the jury, makes all the decisions regarding whether a hearsay exception applies and the evidence is admitted. The judge decides any preliminary factual questions under New O.C.G.A. § 24-1-104(a). Thus, for example, if there is a question whether a hearsay declarant was still under the stress of an exciting event such as to qualify his statements under the excited utterance exception, the trial judge decides that issue by a preponderance of any non privileged evidence at her disposal.

**Present Sense Impression**

**New O.C.G.A. § 24-8-803(1):**

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

1. **Present sense impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.

“Courts have agreed on three principal criteria for the admission of statements pursuant to this rule: (1) the statement must describe an event or condition without calculated narration; (2) the speaker must have personally perceived the event or condition described; and (3) the statement must have been made while the speaker was perceiving the event or condition, or immediately thereafter.” *U.S. v. Ruiz*, 249 F.3d 643, 646 (7th Cir. 2001).
**Excited Utterances**

New O.C.G.A. § 24-8-803(2):

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

(2) **Excited utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

“This exception may be applied only if each of three conditions is met:

1) a startling event or condition occurred;
2) the statement was made while the declarant was under the stress of excitement caused by the event or condition; and
3) the statement relates to the startling event or condition.”

*U.S. v. Moore*, 791 F.2d 566, 570 (7th Cir. 1986).

In determining whether the conditions for the exception are met, the trial court may consider the statement itself as well as surrounding circumstances.

The window of time in which statements qualify for the exception is related to the nature of the startling event and how long the declarant continued to be excited by what she witnessed. *Idaho v. Wright*, 497 U.S. 805, 820, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990) (“The basis for the ‘excited utterance’ exception ... is that such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation ...”). When it appears that the declarant had calmed down enough to reflect on what happened, his statements are no longer within this exception. *U.S. v. Moore*, 791 F.2d 566, 571-72 (7th Cir. 1986) (“... [T]he court must be able to determine that the declarant’s state at the time the declaration was made excluded the possibility of conscious reflection.”)

If the declarant had a motive to fabricate this is a factor in determining whether his statement was free of deliberation. *U.S. v. Marrowbone*, 211 F.3d 452, 454-55 (8th Cir. 2000) (teen had motive to fabricate story about sexual assault to avoid being jailed for intoxication – statements rejected).

It must appear that the declarant observed the startling event and is speaking from personal knowledge. If prior to making the offered statement the declarant had been talking about the event with other witnesses, there is the danger that the statement was influenced by others and thus was not entirely based on the personal knowledge of the declarant. See, *Thomas v. State*, 284 Ga. 540, 544, 668 S.E.2d 711 (2008); *Cartwright v. State*, 242 Ga. App. 825, 531 S.E.2d 399 (2000).
Statements of Then Existing Mental, Emotional, or Physical Conditions

New O.C.G.A. § 24-8-803(3):

The following shall not be excluded by the hearsay rule, even though the declarant is available as a witness: ...
(3) Then existing mental, emotional, or physical condition. 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.

The statement must describe a “then existing” mental, emotional or physical state. U.S. v. Carmichael, 232 F.3d 510, 521 (6th Cir. 2000) (declarant must not have had time to deliberate or fabricate). Backward looking statements do not qualify under this exception. Nor do statements of memory or belief if offered to prove the matter remembered or believed. Without this caveat, this exception would devour the hearsay rule.

The exception “refers to the state of mind of the declarant, not to the state of mind of the listener or hearer of the statement” or other third parties. U.S. v. Arbolaez, 450 F.3d 1283, 1290 n. 6 (11th Cir. 2006)

Only descriptive statements are admissible, not statements that explain why the declarant feels a certain way. Thus for example, a statement that the declarant was afraid of her husband would be admissible under this exception but that part of her statement in which she expressed her belief that he intended to kill her would not. U.S. v. Joe, 8 F.3d 1488, 1492-93 (10th Cir. 1993).

Statements of then existing intent are admissible, if relevant, not only to prove the declarant’s intent but also as evidence that the declarant subsequently did what she intended. Thus the statement: “I plan to drive to Savannah tomorrow” is admissible if relevant to prove that the declarant was planning to drive to Savannah the next day and/or to prove that he probably did drive to Savannah the next day.

Federal courts have split over whether a statement of intent that incorporates a belief as to the intent of another is admissible. The new Georgia rule added language to the Federal Rule to resolve any controversy. Any portion of a statement of intent that incorporates the speaker’s belief as to the intent of a third person is not covered by this exception. Thus the statement: “I am going to go have coffee with Dr. Mallory” is admissible only as to the speaker’s intent to go have coffee and not her belief that Dr. Mallory intends join her. This is consistent with prior Georgia law. Mallory v. State, 261 Ga. 625, 409 S.E.2d 839 (1991). The trial court may redact the statement to remove the inadmissible portions.
Excerpt from the Direct Examination of Officer Jack Reardon:

[Q.] Now Officer Reardon, did you have any assistance in investigating this incident.

[A.] Yes. Sergeant Wohlers joined me at the scene and supervised the investigation.

[Q.] Who prepared the police report?

[A.] That would be Sergeant Wohlers, with my input of course.

[Q.] Where is Sergeant Wohlers at this time?

[A.] He is on active duty with the Army in Afghanistan.

[Q.] Handing you what has been marked for identification as Plaintiff’s Exhibit # 16, could you identify it?

[A.] Yes. This is the police report that Sergeant Wohlers completed regarding the incident in Section 140 at Turner Field.

[Q.] Are you familiar with the police department’s policies and procedures for filling out police reports for incidents such as this one.

[A.] Yes, of course.

[Q.] Now this report includes observations made by you and Sgt. Wohlers at the scene. Were you and Sgt Wohlers acting pursuant to legal duty in observing and reporting these observations.


[PC] Your Honor, at this time we offer Plaintiff’s Exhibit # 16 into evidence under the public record exception.

Assume that the report includes, among other things:

-- reports of statements given by several witnesses;

-- observations of Sgt. Wohlers and Officer Reardon regarding the physical layout of Section 140 including the number of stairs and the distance from where the altercation occurred to the bottom of the stairs;

-- Sgt. Wohler’s own summary of the incident, based on his investigation, and his opinions on who started the fight.
Your Honor, the defense has a number of objections:

First, counsel has laid insufficient foundation for the public records exception.

Second, the report is double hearsay since it contains the statements of other witnesses.

Third, Sgt. Wohler’s summary of the incident is inadmissible as are his opinions.

Georgia traditionally used the business record exception to admit both public and private records. The new rules include separate provisions for public records. The new rules liberalize the admission of public records in civil cases and when offered by the defense in a criminal case.

New O.C.G.A. § 24-8-803(8):

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

(8) 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 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;

Mundane Records -- Subsection (A) - Admissible in both civil and criminal cases, mundane records maintained and kept in the ordinary course of the public agency’s activities are admissible. Authentication is all the foundation that is required.

Rule 803(8)(A) “is designed to allow admission of official records and reports prepared by an agency or government office for purposes independent of specific litigation.” U.S. v. Stone, 604 F.2d 922, 925 (5th Cir. 1979). See, e.g., Christopher Phelps & Assoc. v. Galloway, 492 F.3d 532, 542 (4th Cir. 2007) (county tax assessment record); U.S. v. Johnson, 722 F.2d 407, 410 (8th Cir. 1983) (firearm serial number kept by government); U.S. v. King, 590 F.2d 253 (8th Cir. 1978) (certificate of car title).
Such records are nontestimonial for Confrontation Clause purposes in a criminal case. *Rackoff v. State*, 281 Ga. 306, 309, 637 S.E.2d 706 (2006) (breathalyzer inspection certificate not testimonial: “An inspection certificate is a record made and promulgated in the regular course of business. It is not made in an investigatory or adversarial setting; nor is it generated in anticipation of the prosecution of a particular defendant.”)

**O.C.G.A. § 24-8-803(9)** provides:

*Records of vital statistics.* Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

**New O.C.G.A. §24-9-924** (based on former § 24-3-17) provides:

(a) Any court may receive and use as evidence in any proceeding information otherwise admissible from the records of the Department of Public Safety or the Department of Driver Services obtained from any terminal lawfully connected to the Georgia Crime Information Center without the need for additional certification of such records.

(b) Any court may receive and use as evidence for the purpose of imposing a sentence in any criminal proceeding information otherwise admissible from the records of the Department of Driver Services obtained from a request made in accordance with a contract with the Georgia Technology Authority for immediate on-line electronic furnishing of information.

This is not a hearsay exception but only an authentication provision. However, most of the routine information contained in these databases concerning driving and criminal records are admissible under New O.C.G.A. § 24-8-803(8)(A).

**Matters Observed Pursuant to Duty – Subsection (B)**

**New O.C.G.A. § 24-8-803(8)(B)** covers:

Matters observed pursuant to duty imposed by law as to which matters there was a duty 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.

When a report of “matters observed” was not prepared by law enforcement personnel in connection with an investigation, the report is nonadversarial and thus nontestimonial for Confrontation Clause purposes.
Other public records that were prepared in the course of the investigation or prosecution of a particular defendant are testimonial even if they were not prepared by law enforcement personnel and thus might qualify under rule 803(8)(B). For example, a report by an analyst at the state drug lab is testimonial and inadmissible when offered by the prosecution unless the analyst testifies and is available for cross-examination. Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009). See also, Bullcoming v. New Mexico, ___ U.S. __, 131 S.Ct. 2705 (2011) (improper for lab analyst to testify based only on findings and report of absent analyst who actually tested the substance).

A public official’s recording of witness statements in a report are “matters observed” and if the witness’s statements fall under a hearsay exception the double hearsay problem (“the report states, the witness said”) is satisfied. For example, if a police report in a civil case includes the statement of a bystander, taken 10 minutes after an explosion: “I saw a huge fireball behind the barn!” the report is admissible under rule 803(8)(B) as a “matter observed” by the officer and the eyewitness’s statement is admissible under rule 803(2) as an excited utterance. See, U.S. v. Sallins, 993 F.2d 344, 347 (3d Cir. 1993); U.S. v. De Peri, 778 F.2d 963, 977 (3d Cir. 1985).

The report is typically authenticated under New O.C.G.A. 24-9-902 or 24-9-920 which establishes that it is a public record. The question of whether it was prepared pursuant to legal duty or authorization is a preliminary question of fact that the trial can determine using O.C.G.A. § 24-1-104(a), considering any non-privileged evidence, including hearsay.

A police report in an auto accident case may be inadmissible under O.C.G.A. § 40-9-41 which provides:

Neither any accident report filed with the Department of Transportation, the action taken by the Department of Driver Services pursuant to this chapter, the findings, if any, of the department upon which such action is based, nor the security filed as provided in this chapter shall be referred to in any way, nor shall they be any evidence of the negligence or due care of either party, at the trial of any action at law to recover damages.

Under pre-2013 Georgia law, “narrative portions” of a police report were inadmissible in civil and criminal cases. The new public record exception is somewhat broader. However, “matters observed” refers only to descriptive statements. While mundane, descriptive opinions may qualify, such as a person was “belligerent” or “in pain,” evaluative statements are not admissible under subsection (B) and must qualify under subsection (C), “factual findings.”
Factual Findings – Subsection (C)

New O.C.G.A. 24-8-803(8)(C) covers:

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

This exception creates the opportunity to admit in civil cases (and against the government in criminal cases) investigative reports by public agencies, including the opinions and conclusions of the author of the report even though the author does not testify at trial. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 162, 109 S.Ct. 439 (1988) (“... factually based conclusions or opinions are not on that account excluded from the scope of Rule 803(8)(C).”) I say “opportunity” because the rule has an important caveat. If “the sources of information or other circumstances indicate lack of trustworthiness,” the report is inadmissible under this exception. As the U.S. Supreme Court stated in *Beech Aircraft Corp. v. Rainey*: “a trial judge has the discretion, and indeed the obligation, to exclude an entire report or portions thereof - whether narrow “factual” statements or broader “conclusions”- that she determines to be untrustworthy.”

The kind of agency investigation contemplated by the exception is one with a high degree of competence, fairness, and comprehensiveness. Cursory investigations of a traffic accident by a police officer, for example, do not qualify.

The factors the trial court should review in determining whether the report should be admitted include:
- the competence of the fact finder;
- the neutrality of the fact finder and the public agency the fact finder represents;
- whether the sources upon which the fact finder relied were biased or had an interest in the outcome of the investigation;
- whether the sources used in the investigation were basing their input on personal knowledge;
- the fact finder’s access to all material information;
- whether formal hearings were held with accompanying earmarks of due process (witnesses under oath, opportunity for interested parties to examine witnesses);
- the timeliness of the investigation;
- whether the report is stale or out of date;
- whether the report is final.
Lack of trustworthiness refers to the sources of information or circumstances of preparation, not to whether the trial judge agrees with the findings.

Reports prepared by private parties under contract to a public agency and subject to the agency’s oversight may qualify under this exception.

Subsection (C) (“factual findings”) by definition implies that the investigator’s findings may be based on statements taken from witnesses or experts. Thus reliable hearsay may be included in the report. This is precisely why subsection (C), unlike subsection (B), has a special provision giving the trial court discretion to reject the report if “the sources of information or other circumstances indicate lack of trustworthiness.” (emphasis added).

However, if all the report is used for is to place otherwise inadmissible hearsay before the trier of fact, the report should be excluded on that basis. Toole v. McClintock, 999 F.2d 1430, 1435 (11th Cir. 1993) (agency report based primarily on research by third parties inadmissible under this exception).

Back to the objections ...

[DC] Your Honor, the defense has a number of objections:

First, counsel has laid insufficient foundation for the public records exception. (overruled)

Second, the report is double hearsay since it contains the statements of other witnesses. (overruled if the eyewitness statements qualify under the excited utterance exception)

Third, Sgt. Wohler’s summary of the incident is inadmissible as are his opinions. (sustained – a cursory “investigation” does not qualify as a “factual finding”)
Excerpt from the Direct Examination of Dr. Larry Heyward:

[Q.] Now Dr. Heyward, did you treat Mr. Bob Murphy at the ER on the date of this incident?

[A.] No. That was Dr. Uggla, my colleague. He is out of the country right now.

[Q.] Handing you what has been marked for identification as Plaintiff’s Exhibit 16, do you recognize it?

[A.] Yes, this is the ER report regarding your client, Bob Murphy.

[Q.] Are you personally familiar with the record keeping procedures in your ER?

[A.] Of course.

[Q.] Is Plaintiff’s Ex. 16 the type of record regularly made and kept in the course of the ER’s business?

[A.] Yes.

[Q.] Who prepared this report?

[A.] Dr. Danny Uggla.

[Q.] Is Dr. Uggla licensed to practice medicine in the State of Georgia?

[A.] Yes.

[Q.] Does Dr. Uggla base this report on information provided by others in the ER?

[A.] Yes. He includes information from the ER nurses concerning the patient’s vital signs.

[Q.] Is it the routine practice of the ER where you work that nurses are acting in the regular course of the ER’s business in observing and reporting medical information?

[A.] Yes it is.

[Q.] And is it the routine practice for those in the ER to make reports based on their personal knowledge?


[Q.] And is it the routine practice to record these facts in the ER at or about the time of the events described?
[A] Yes.

[PC] Your Honor, plaintiff offers Exhibit 16 into evidence as a business record.

[DC] We object that record contains opinions of an expert who will not testify and includes double hearsay.

Both objections Overruled.

**New O.C.G.A. § 24-8-803(6) provides:**

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

(6) *Records of regularly conducted activity.* Unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness and subject to the provisions of Chapter 7 of this title, a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, if (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, all as shown by the testimony of the custodian or other qualified witness or by certification that complies with paragraph (11) or (12) of Code Section 24-9-902 or by any other statute permitting certification. The term 'business' as used in this paragraph includes any business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. Public records and reports shall be admissible under paragraph (8) of this Code section and shall not be admissible under this paragraph.

The new rule replaces pre-2013 O.C.G.A. § 24-3-14. Three major changes:

(1) The new rule allows properly qualified statements of opinion, including medical diagnoses, in the record;
(2) The rule allows the proponent to use a certification in lieu of a live witness to lay foundation; and
(3) The trial judge has discretion to reject business records when the sources of information or methods of preparation indicate a lack of trustworthiness.
Foundation:

(1) The record is of the type routinely made in the regular course of the business;
(2) The record was kept in the ordinary course of business;
(3) The record was made at or near the time of the occurrences set forth in the record;
(4) The record was based on sources who were acting in the regular course of the business in making the report; and
(5) the sources were basing their reporting on their personal knowledge.

The new rule allows opinions, including medical diagnoses, in the record. Opinions in a business record still must satisfy the rules governing lay and expert opinions. This is a rule 104(a) determination by the trial court. Thus the court may consider any nonprivileged evidence, including hearsay, in determining whether, by a preponderance of the evidence, the conditions of the rule are met.

For example, if a Georgia medical record appeared to be signed by Dr. Danny Uggl a and a party raised an objection that it was not proved that Dr. Uggl a was a licensed physician, the court could simply look up Dr. Uggl a on the Georgia Composite Medical Board website and confirm that he had an active license to practice medicine in Georgia.

Opinions may be excluded if the trial court finds that “the source of information or the method or circumstances of preparation indicate lack of trustworthiness.”

The new Georgia rule expressly states that public records and reports shall not be admissible under the business record exception.

When nonpublic records are offered against the accused in a criminal case they are typically nontestimonial under the Confrontation Clause, though if the report is prepared at the request of law enforcement in the course of prosecution of a specific defendant, as for example the report of a private drug testing lab, it is testimonial. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527, 2538, 2540 (2009).

“It is significant, and essential to admissibility under this exception, that the record be the product of a “regular practice” of the business, in the “usual course” of that business. U.S. v. Jacoby, 955 F.2d 1527 (11th Cir. 1992). A report prepared for litigation is inadmissible. U.S. v. Arias-Izquierdo, 449 F.3d 1168, 1183-84 (11th Cir. 2006).

“Double hearsay exists when a business record is prepared by one employee from information supplied by another employee. If both the source and the recorder of the information, as well as every other participant in the chain producing the record, are acting in the regular course of business, the multiple hearsay is excused by Rule 803(6). However, if the source of the information is an outsider, Rule 803(6) does not, by itself, permit the admission of the business record. The outsider’s statement
must fall within another hearsay exception to be admissible because it does not have the presumption of accuracy that statements made during the regular course of business have.” *U.S. v. Baker*, 693 F.2d 183, 188 (D.C.Cir. 1982)

*T. Harris Young & Assocs., Inc. v. Marquette Elecs., Inc.*, 931 F.2d 816, 828 (11th Cir.1991) (“For this exception to be available, all persons involved in the process must be acting in the regular course of business - otherwise an essential link in the trustworthiness chain is missing.”)

If the sources of information in the report do not qualify under the business record exception, they must qualify independently under some other exception or be deleted from the record.

Ordinarily, only an employee or agent of the business that created a record can lay foundation for the record since the foundation requires knowledge of how such records were generated in the ordinary course of that business. However, the rule does not require that the “qualified witness” work for the business. “All that is required is that the witness be familiar with the record keeping system.” *U.S. v. Hathaway*, 798 F.2d 902, 906 (6th Cir. 1986).

The basic requirements for the admission of **integrated records** 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 prepares the record to lay foundation under the business record exception, and
4. circumstances support the trustworthiness of the record.

*See, e.g.*, *Tubbs v. State*, 283 Ga. App. 578, 642 S.E.2d 205 (2007) (a GBI custodian of records laid foundation for a copy of a fingerprint card that was originally made and kept by a local law enforcement agency with a copy sent to the GBI. The GBI witness knew how such cards are made and kept in the ordinary course of the local agency's business, and that the copies are transmitted to and relied upon by the GBI in the ordinary course of its business).

What makes the integrated records rule work is that the trial court may consider any nonprivileged evidence, including hearsay, in deciding whether the foundation for the business record exception has been satisfied. *U.S. v. Franco*, 874 F.2d 1136, 1139 (7th Cir. 1989) (“It is within the trial court's discretion to determine whether a proper foundation was laid for application of the business records exception to a particular document and whether the circumstances of the document's preparation indicate trustworthiness. When making preliminary factual inquiries about the admissibility of evidence under a hearsay exception, the district court must base its findings on the preponderance of the evidence. That evidence, however, may include hearsay and other evidence normally inadmissible at trial.”)
Whether to present the foundation in front of the jury is a matter left to the discretion of the trial judge. When the witness needs to reference substantial hearsay in the course of explaining her knowledge of the originator’s recordkeeping, the court may want to hear that evidence outside the presence of the jury. Once the trial judge admits the record, there is no need to lay the foundation again in front of the jury, though the witness may testify that the records were produced in the ordinary course of business by persons with personal knowledge of the information recorded. Cross-examination, of course, may inquire into any factors that may effect the reliability of the records.

**Foundation by Certification**

New O.C.G.A. § 24-9-902(11) and (12) describe the contents of and procedure for using a certification in lieu of a live witness to lay foundation for the business record exception. A party intending to offer a record into evidence by way of certification must provide written notice of such intention to all adverse parties and make the underlying record and certification available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge the record and certification. Only private records, not public records, may be qualified under this rule.

The rule does not require that the certification be sworn, though certainly a sworn affidavit meets the requirement. Ideally, if the certification is not sworn, it should contain the following language: “I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)” (This language is taken from 28 U.S.C. 1746 which is directly referenced in Federal Rule 902(11)).

The certification used to authenticate the record is nontestimonial even though the record itself may be testimonial under the Confrontation Clause. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 2539 (2009) (“A clerk could by affidavit authenticate or provide a copy of an otherwise admissible record, but could not do what the analysts did here: create a record for the sole purpose of providing evidence against a defendant.”)

Pre-2013 § 24-7-8(b), relating to the authentication of medical records by certification, was repealed and such records are now treated like all business records which may be authenticated by certification under New O.C.G.A. § 24-9-902(11). This method of authentication will simultaneously satisfy the foundation requirements for the business record exception.

Former O.C.G.A. § 24-3-18, the medical narrative exception, has been renumbered New O.C.G.A. § 24-8-826.
Excerpt from the Direct Examination of Stoney Dawson:

[Q] Mr. Dawson, did you see this scramble over the home run ball?  
[A] I sure did. It was pretty intense.  
[Q] Tell us what you saw.  
[A] Well like Chipper hit a home run and we were all standing up to, you know, catch it. We were way out in left field, you know?  
[Q] Yes.  
[A] Well, nobody catches it. The ball starts bouncing around and these two guys go after it. And then they are going after each other, you know what I mean?  
[Q] Not exactly.  
[A] The guy with the hat, he was like punching the other guy.  
[Q] You said “the guy with the hat.” Can you remember what kind of hat?  
[Q] Can you recall if it was a particular team’s hat?  
[A] Whew. I don’t know. It was a very long time ago.  
[Q] Your Honor, may I approach the witness and attempt to refresh?  
[CT] Yes, you may. (Counsel hands the witness a baseball cap)  
[Q] Taking away what I handed you, Mr. Dawson, did that refresh your recollection of what kind of baseball hat the man who was punching the other guy was wearing?  
[A] It sure did.  
[Q] And what kind of hat was the man who was punching the other guy wearing?  
[A] It was a Yankees cap.  
[DC] Objection! This is a farce. He can’t do that ... can he?  

Overruled.
New O.C.G.A. § 24-6-612:

(a) If a witness uses a writing to refresh his or her memory while testifying, an adverse party shall be entitled to have the writing produced at the hearing or trial, to inspect it, to cross-examine the witness on such writing, and to introduce in evidence those portions of such writing which relate to the testimony of the witness.

(b) If a witness uses a writing to refresh his or her memory before testifying at trial and the court in its discretion determines it is necessary in the interests of justice, an adverse party shall be entitled to have the writing produced at the trial, to inspect it, to cross-examine the witness on such writing, and to introduce in evidence those portions of such writing which relate to the testimony of the witness. 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. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the court shall examine the writing in camera, excise any portions of such writing not so related, and order delivery of the remainder of such writing to the party entitled to such writing. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to an order under this Code section, the court shall make any order justice requires; provided, however, that in criminal proceedings, when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

Counsel can use anything to refresh a witness’s memory. U.S. v. Scott, 701 F.2d 1340, 1346 (11th Cir. 1983) (item used to refresh need not be admissible in evidence – neither counsel nor the witness may disclose the contents of the item used to refresh, though opposing counsel may examine the witness on the item and offer it into evidence); Green v. State, 242 Ga. 261, 249 S.E.2d 1 (1978) (“A witness may use any source to refresh his memory, so long as he testifies from his memory thus refreshed . . . [H] is memory may be refreshed by any kind of stimulus, 'a song, or a face, or a newspaper item”).

See also, Hall v. State, 272 Ga. App. 204, 612 S.E.2d 44 (2005) (counsel must first ask whether the document or item shown to the witness has refreshed the witness’s recollection - - if the answer is “no” then counsel may not persist in asking the witness about the document or item).

Some pre-2013 Georgia cases did not allow an opposing party to see what was used to refresh a witness on the stand in a civil case. The new rules give the opposing party the right “to inspect it, to cross-examine the witness on such writing, and to introduce in evidence those portions of such writing which relate to the testimony of the witness.” New O.C.G.A. § 24-6-612.
Materials Used to Refresh Before Testifying

A cross-examiner may always ask a witness if she reviewed anything before testifying to refresh her memory or otherwise prepare for trial. The issue here is whether the cross-examiner may examine the materials identified by the witness.

There are three conditions before a party may obtain documents used to refresh a witness before testifying:

1. The witness used the document to refresh her memory;
2. the witness used the document for the purpose of testifying; and
3. the court determines that production is necessary in the interests of justice.

The trial court may review the documents in camera. The issue is whether the cross-examiner, in fairness, should see what could have influenced the witness's testimony and whether the cross-examiner could use the document in exploring the witness's credibility. If the document contains facts that are inconsistent with the witness's testimony, for example, the cross-examiner should see that and be allowed to confront the witness with the inconsistencies. See, e.g., U.S. v. Ramirez-Perez, 166 F.3d 1106, n. 9 (11th Cir. 1999).

Georgia’s new rule makes it clear that a party does not waive the attorney-client privilege or work product protection over documents by showing them to a witness before the witness testifies. New O.C.G.A. § 24-6-612(b).

However, New O.C.G.A. § 24-6-612(a) which relates to refreshing a witness while the witness is testifying has no such provision and a party waives the privilege and work product protection over documents used to refresh a testifying witness. See, James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 144 (D.C.Del. 1982) (“...settled rule that the use of a privileged document to refresh a witness’ memory only constituted a waiver of the privilege if it occurred at the time of testimony”)

Past Recollection Recorded

No changes. New O.C.G.A. § 24-8-803(5) admits ...

Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately shown to have been made or adopted by the witness when the matter was fresh in the witness’s memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but shall not itself be received as an exhibit unless offered by an adverse party.
Excerpt from the Direct Examination of Javier Mazzone, insurance adjuster:

[Q] Mr. Mazzone, did you interview Eddie Matthews, the plaintiff’s nephew and a witness to this incident?

[A] Yes I did.

[Q] Did he tell you what he heard the defendant, Mr. Horner, say as your uncle lay at the bottom of the stairs, screaming in unimaginable pain?

[A] Yes. He said . . .


[Q] Your Honor, may we approach?

[CT] Yes.

[At sidebar]

[PC] We are offering Eddie Matthews’ statement to Mr. Mazzone under the necessity exception to hearsay. Mr. Matthews is a student, currently studying in Russia and is unavailable for trial. He gave this statement to Mr. Mazzone just two weeks after the incident. He told Mr. Mazzone that he clearly heard the defendant, Mr. Horner, say: “The punk got what was coming to him.”

[DC] This does not qualify for the necessity exception. He is the plaintiff’s nephew. He has every reason to lie.

Probably Sustained.

New O.C.G.A. § 24-8-807:

A statement not specifically covered by any law but having equivalent circumstantial guarantees of trustworthiness shall not be excluded by the hearsay rule, if the court determines that:

(1) The statement is offered as evidence of a material fact;

(2) The statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(3) The general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence.

However, a statement may not be admitted under this Code section unless 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.
Elements:

(1) Unavailability of the declarant’s in-court testimony;
(2) The statement is evidence of a material fact;
(3) No comparable evidence is available to the proponent through reasonable efforts;
(4) The statement shows circumstantial guarantees of trustworthiness;
(5) The proponent provides pre-trial notice of intent to offer the statement under this exception; and,
(6) The general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence.

The new rule requires that the proponent give pre-trial notice of intent to offer a hearsay statement under this exception. The pre-2013 Georgia rule had no notice requirement.

Failure to provide pre-trial notice “may” result in the exclusion of the statement. If there are good reasons why providing notice was not feasible then the statement still is admissible.

“Unavailability”

The declarant is “unavailable” if:

— the declarant asserts a privilege not to testify,
— deceased at the time of trial, or so ill that the witness’s testimony is unlikely to be available in the future,
--- refuses to testify even without a valid privilege despite the court’s order to do so, or testifies to a lack of memory,
— the declarant cannot be located, despite the due diligence of the proponent,
— the declarant is beyond the subpoena power of the court and will not voluntarily appear,

The federal cases suggest that the proponent must pursue all viable legal means to procure the attendance of the witness. This would include the Uniform Act to Secure the Attendance of Witnesses from Without the State, New O.C.G.A. § 24-13-90 et seq.

See also, Lance v. State, 275 Ga. 11, 19, 560 S.E.2d 663 (2002) (“The trial court did not err by refusing to apply the necessity exception to the hearsay rule to appellant’s proffer of the hearsay statements of a witness living in Arizona whom Lance had not attempted to subpoena under interstate subpoena procedures.”)
Trustworthiness

“Congress intended the residual hearsay exception to be used very rarely, and only in exceptional circumstances ... it applies only when certain exceptional guarantees of trustworthiness exist and when high degrees of probativeness and necessity are present” United Technologies Corp. v. Mazer. 556 F.3d 1260, 1279 (11th Cir. 2009).

Since hearsay is presumptively unreliable, the mere fact that the statement is not obviously untrustworthy does not amount to a showing of trustworthiness. U.S. v. Accetturo, 966 F.2d 631, n.9 (11th Cir. 1992) (“... the indicia of reliability [must be] strong enough to overcome the presumption against the admissibility of hearsay evidence”)

Negative factors:
-- any motives to lie or mislead;
-- any suggestion that the declarant was not serious or may have been joking;
-- declarant has made inconsistent statements on this matter;
-- any significant competency issues (general or specific) that might effect the accuracy of the statement.

Positive factors:
-- any special deterrents to lying in this situation; (e.g., likelihood that a lie would be detected; severity of consequences if caught lying, etc.)
-- a special relationship of trust and confidence may be a positive factor if there is no apparent motive for the declarant to lie in this particular situation.

A Few Other New Rules ...

Dying declarations are now admissible in civil cases.

New O.C.G.A. § 24-8-804(b)(2) provides:

(b) The following shall not be excluded by the hearsay rule if the declarant is unavailable as a witness: ...
(2) In a prosecution for homicide or in a civil proceeding, a statement made by a declarant while believing that his or her death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.
**Subsequent Remedial Measures**

New O.C.G.A. § 24-4-407:

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.


The Federal Rule appears to admit subsequent remedial measures in a case where the measure was taken after an incident causing injury or loss but before the incident causing the plaintiff’s injury or loss in the subject case. Georgia’s new rule was clarified to exclude remedial measures in all cases subsequent to the initial injury or loss that led to the remedial measure.

**Offers to Compromise**

New O.C.G.A. § 24-4-408:

(a) Except as provided in Code Section 9-11-68, evidence of:
   (1) Furnishing, offering, or promising to furnish; or
   (2) Accepting, offering, or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount shall not be admissible to prove liability for or invalidity of any claim or its amount.

(b) Evidence of conduct or statements made in compromise negotiations or mediation shall not be admissible.

(c) This Code section shall not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations or mediation. This Code section shall not require exclusion of evidence offered for another purpose, including, but not limited to, proving bias or prejudice of a witness, negating a contention of undue delay or abuse of process, or proving an effort to obstruct a criminal investigation or prosecution.
New O.C.G.A. § 24-4-409:

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.

New O.C.G.A. § 24-4-408 provides broader and surer protection of settlement discussions. The new rule clarifies that compromise discussions regarding damages are protected even if one of the parties has already admitted liability. New O.C.G.A. § 24-4-409 does away with any requirement that the party who paid medical or similar expenses was acting with humanitarian motives.

The rule requires some dispute regarding the validity or amount of a claim. If a party is simply trying to exact a concession on price from another party in return for prompt payment of an admitted liability, the rule is not involved. Dallis v. Aetna Life Insurance Co., 768 F.2d 1303, 1307 (11th Cir.1985) (distinguishing between a frank disclosure during the course of negotiations—such as, “All right, I was negligent. Let’s talk about damages” (inadmissible) -and the less common situation in which both the validity of the claim and the amount of damages are admitted—“Of course, I owe you the money, but unless you're willing to settle for less, you'll have to sue me for it” (admissible).”

A few other changes to the hearsay rules in Criminal Cases ...

Co-Conspirator Admissions

New O.C.G.A. § 24-8-801(d)(2)(E):

(2) Admissions by party-opponent.
Admissions shall not be excluded by the hearsay rule. An admission is a statement offered against a party which is: ... (E) 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.

In regard to both agent admissions and co-conspirator admissions, the trial judge (not the jury) decides if the preliminary foundation facts are proven by a preponderance of the evidence. New O.C.G.A. § 24-1-104(a); Bourjaily v. U.S., 483 U.S. 171, 175 (1987).

“The contents of the statement shall be considered but shall not alone be sufficient to establish” the agency relationship or the existence of the conspiracy and the declarant’s participation in it. New O.C.G.A. § 24-8-801(d)(2). The trial court may provisionally admit the statement upon a satisfactory offer of proof by the prosecution.
In order to admit a co-conspirator’s statement, the court must determine, by a preponderance of the evidence:

(1) that a conspiracy existed,
(2) that the co-conspirator and the defendant against whom the co-conspirator’s statement is offered were members of the conspiracy, and
(3) that the statement was made during the course and in furtherance of the conspiracy.

U.S. v. James, 590 F.2d 575 582-83 (5th Cir. 1979) (en banc).

The conspiracy ends when the parties are no longer acting in concert to achieve their common purposes. After the commission of a crime, the conspiracy usually ends, but not always. The conspirators might continue the conspiracy to commit additional crimes, all as a part of an ongoing criminal enterprise.

The parties also might (or might not) conspire to conceal the crime. Pre-2013 Georgia cases took the “concealment phase” of the conspiracy to illogical extremes, holding that such a phase always occurred and continued until the conspirators were caught or turned themselves in. Given that all criminals try to avoid getting caught, it does not follow that they work together to accomplish that purpose. It makes no sense to speak of a “conspiracy to conceal” if the actors are not, in fact, acting in concert to avoid capture. Grunewald v. U.S., 353 U.S. 391, 401-02, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957) (“[A]fter the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment.”)

Statements made during and in furtherance of an active conspiracy to conceal the crime or avoid successful prosecution are admissible with proper foundation. See, U.S. v. Blakey, 960 F.2d 996, 998 (11th Cir. 1992) (“Statements which serve a necessary part of a conspiracy by concealing it or impeding an investigation are admissible as statements made during and in furtherance of the conspiracy.”)

Georgia’s new coconspirator rule, based on Federal Rule 801(d)(2)(E), expressly requires that any statement admitted under the rule must have been “in furtherance of the conspiracy.” U.S. v. Miles, 290 F.3d 1341, 1351 (11th Cir. 2002) (“The statement need not be necessary to the conspiracy, but must only further the interests of the conspiracy in some way.”)

The fact that the statements were made to an undercover officer does not disqualify them. If the conspirators thought their conversations were advancing the conspiracy, they were “in furtherance” even though the officer planned to bring them down. U.S. v. Frazier, 280 F.3d 835 (8th Cir. 2002).
“Statements which simply implicate one co-conspirator in an attempt to shift the blame from another, however, cannot be characterized as having been made to advance any objective of the conspiracy. On the contrary, statements that implicate a co-conspirator, like statements that ‘spill the beans’ concerning the conspiracy, are not admissible.” *U.S. v. Blakey*, 960 F.2d 996, 998 (11th Cir. 1992).

A conspirator’s statements to the police implicating other conspirators are clearly inadmissible under the coconspirator exception and also the Confrontation Clause. *Lilly v. Virginia*, 527 U.S. 116, 119 S. Ct. 1887 (1999) (“we have over the years spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants”)


Statements that do not meet the requirements for the co-conspirator admission rule still may be admissible as statements against criminal interest, discussed below. *See, U.S. v. Harrell*, 788 F.2d 1524, 1536 (11th Cir. 1986).

**Statements against criminal interest** are admissible in criminal cases.

New O.C.G.A. § 24-8-804(b)(3):

(b) The following shall not be excluded by the hearsay rule if the declarant is unavailable as a witness: ...
(3) A statement against interest. A statement against interest is a statement: (A) Which a reasonable person in the declarant’s position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant’s proprietary or pecuniary interest or had so great a tendency to invalidate a claim by the declarant against another or to expose the declarant to civil or criminal liability; and (B) Supported by corroborating circumstances that clearly indicate the trustworthiness of the statement if it is offered in a criminal case as a statement that tends to expose the declarant to criminal liability.

“To be admissible under Rule 804(b)(3), a statement must satisfy three elements: (1) the declarant must be unavailable; (2) the statement so far tends to subject the declarant to criminal liability that a reasonable person in his position would not have made the statement unless he believed it to be true; and (3) the statement is corroborated by circumstances clearly indicating its trustworthiness.”

*U.S. v. Westry*, 524 F.3d 1198, 1214 (11th Cir. 2008).
The statement must have “had so great a tendency to ... expose the declarant to ... criminal liability” that the declarant “would have made [it] only if the person believed it to be true.” This requires some level of specificity in the statement. For example: “Joe and I like cocaine” is not the kind of statement that would expose the speaker to criminal liability, while the statement: “Joe and I bought an ounce of cocaine yesterday” would.

Most controversial under this exception are statements in which the declarant admits some criminal activity but the statement is not offered to prove that fact but because the statement includes allegations that others (including the criminal defendant) also were involved in the crime. The argument that the trustworthiness of the declarant’s statement against his own interest somehow carries over to statements accusing others of criminal activity is strained, to say the least. This is why trial courts must approach such statements skeptically. Particular skepticism is warranted for statements that although self-inculpatory, seem designed to shift blame or curry favor.

*Williamson v. U.S.*, 512 U.S. 594, 600, 114 S.Ct. 2431, 2435, 129 L.Ed.2d 476 (1994) (the rule “does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory.”)

A confession in which the confessor also implicates the accused should never be admitted under this exception against the accused at the accused’s trial. Such confessions in any event also would constitute testimonial hearsay and violate the Confrontation Clause rights of the accused if the confessor did not testify.

“[I]t is unnecessary that the declarant know he was speaking to a person who could cause his prosecution. Thus, for example, courts have held that the mere fact that the recipient of the information was a confidante of the declarant does not rule out admissibility of a statement as against interest.” *U.S. v. Westry*, 524 F.3d 1198, 1215 (11th Cir. 2008).

**Forfeiture Exception**

**New O.C.G.A. § 24-8-804(b)(5):**

(b) The following shall not be excluded by the hearsay rule if the declarant is unavailable as a witness: ...

(5) A statement 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.

This exception has three requirements:

(1) the hearsay is offered against a party who engaged or acquiesced in wrongful conduct;
(2) the wrongful conduct was intended to keep the declarant from testifying;
(3) the wrongful conduct caused the declarant to be unavailable as a witness.
The hearsay exception is coextensive with the forfeiture exception to the accused’s rights to confront his accuser under the Sixth Amendment. *Giles v. California*, 554 U.S. 353, 128 S. Ct. 2678 (2008).

Wrongful conduct designed to keep the declarant from going to the police would qualify under this exception.

The text of the exception makes clear that third party acts designed to prevent a declarant from testifying may trigger the exception if the defendant acquiesced in the actions.

**Child’s Out-of-Court Statements Reporting Abuse**

**New O.C.G.A. § 24-8-820:**

A statement made by a child under the age of 14 years describing any act of sexual contact or physical abuse performed with or on the child by another shall be admissible in evidence by the testimony of the person to whom made if the child is available to testify in the proceedings and the court finds that the circumstances of the statement provide sufficient indicia of reliability.

This statute was based on pre-2013 § 24-3-16. In *Bunn v. State* 291 Ga. 183, 728 S.E.2d 569 (2012), the Georgia Supreme Court overruled that portion of *Woodard v. State*, 269 Ga. 317, 496 S.E.2d 896 (1998) which had held that the part of the pre-2013 statute that permitted admission of out-of-court statements by a child under age 14 who witnessed acts of sexual abuse upon child victim but who was not victim himself or herself did violated equal protection. However, the legislature did not include the clause that *Woodard* struck down in the new version, above.

In *Hatley v. State*, 290 Ga. 480, 722 S.E.2d 67 (2012) the Court mandated a new procedure for handling a child’s statements regarding abuse. The prosecution must provide pre-trial notice to the defense of intent to offer a child’s statements reporting abuse.

If the defense makes a valid objection on Confrontation Clause grounds, (that is, the child’s statement was made to police or similar state agents and thus is testimonial), the prosecution must call the child witness at trial and the child must be available for cross-examination in the stricter sense required by the Constitution. The child’s statements are then admissible if “the circumstances of the statements provide sufficient indicia of reliability” or the statement qualifies under some other hearsay exception.
If the child’s statement is not testimonial (or if the defense does not object on Confrontation Clause grounds and thereby waives any Confrontation Clause issues), the child's statements are admissible under new O.C.G.A. § 24-8-820 if the child is “available to testify” in the more lenient, nonconstitutional sense developed by cases interpreting the statute, and “the circumstances of the statements provide sufficient indicia of reliability” The statement also might be admissible as an excited utterance or as a statement for medical diagnosis or treatment, or some other hearsay exception in which case the child need not be available to testify nor must the statements satisfy any separate reliability requirements under O.C.G.A. § 24-8-820.
In the criminal trial against Dale Horner for assault and battery and possession of cocaine, the prosecution offers evidence in its case-in-chief that Mr. Horner was arrested a month ago for possession of a grenade at an illegal dog fighting match sponsored by the American Nazi Party.

The defense objects that this just might be inadmissible character evidence.

**Sustained.**

New O.C.G.A. § 24-4-404(a) provides, in part:

(a) Evidence of a person's character or a trait of character shall not be admissible for the purpose of proving action in conformity therewith on a particular occasion

Evidence of the defendant's past conduct, lifestyle, attitudes, associations, and so forth is generally inadmissible character evidence and quite prejudicial when it paints a portrait of the accused as a person the jury would naturally fear or loath, regardless of whether he was involved in the crime charged, or invites the jury to simply presume that since the defendant broke the law before he probably broke it again.

The new 2013 Georgia rules adopt the Federal Rules' approach to character evidence. For the most part, these new rules do not differ significantly from pre-2013 Georgia law. There are six main changes:

(1) When the accused chooses to present evidence of his character, he may choose to present evidence of his general good character or may limit the evidence to specific, pertinent character traits (and thereby limit rebuttal evidence as well).
(2) When character is admissible, the pre-2013 rules generally limit the evidence on direct examination to reputation evidence – opinion evidence is not allowed. The new rules allow both opinion and reputation evidence.
(3) The term “res gestae” is retired in the context of the character rule, though its essence lives on under the label “intrinsic” evidence.
(4) The “similar transaction” rule is restored to its common law roots and brought back in line with the rest of the nation. Idiosyncratic and unexplained “exceptions” such as “bent of mind” or “course of conduct,” completely unknown outside of Georgia, are no longer viable.
(5) When the accused claims self defense, prior acts of violence by the victim are now inadmissible unless the defendant knew about them at the time of the incident in question.
(6) A person’s habit may be proved by testimony of a third party.
There are no changes to the basic scope and operation of the character rule in civil cases.

**The Purpose Behind the Character Rule in Criminal Cases**

The rule prohibiting evidence of the defendant’s bad character, including prior crimes and other bad acts, is over 350 years old. The primary purpose of the rule in criminal cases is to protect the presumption of innocence. *U.S. v. Daniels*, 770 F.2d 1111, 1118 (D.C. Cir. 1985) (character rule “gives meaning to the central precept of our system of criminal justice, the presumption of innocence”)

The presumption of innocence resonates with jurors to the extent that the jurors can identify with the defendant. If it was them, or their spouse, or their son or daughter who was standing trial, they would want the prosecution to dot every “i” and cross every “t.” The fear of wrongful conviction is, as it should be, a weight upon the jury’s brow.

But evidence of the defendant’s bad character or past crimes tells the jury that the defendant is not really like them. The defendant has broken the law before and therefore probably broke the law again. The fear of wrongful conviction relaxes and is pushed aside by the fear of wrongful acquittal. The presumption of innocence turns into a presumption of guilt. See, *Jones v. State*, 257 Ga. 753, 756, 363 S.E.2d 529 (1988) (“It would clearly be difficult to maintain the presumption of innocence in the minds of the jurors if testimony were given of a long list of crimes alleged to have been committed by the accused.”)

Evidence of the defendant’s past crimes is not excluded because it is irrelevant. It is simple and persuasive logic that tells us that a person who has committed a crime in the past is more likely than the average citizen to have committed the crime charged, particularly when the two crimes are of the same kind. (This is called “the propensity inference.”) But is it precisely because this simple inference weighs so heavily on the presumption of innocence that such evidence must be excluded.

*Cardell v. State*, 119 Ga. App. 848, 850, 168 S.E.2d 889, 891 (1969) (“It goes without saying that testimony that the defendant has engaged in other criminal transactions is prejudicial to him in the case for which he is on trial, not because it has no probative value but because it has too much, as tending to indicate that he is of a criminal bent of mind and therefore more likely than the average citizen to have committed the act of which he is accused.”).

Of course it is necessary sometimes to admit evidence that reflects poorly on the defendant’s character. The State may need the evidence to prove motive, or opportunity, identity, knowledge, or absence of mistake or accident. But each time such evidence is admitted the court should do so with the sober recognition that the presumption of innocence has been compromised; that such evidence does not come without a high price.
The heart of the rule against character evidence is the rejection of the use of the **propensity inference**: because the accused did “x” in the past, he is more likely to have committed the crime(s) charged.

Includes both general inferences (because Dale hangs out at dog fights with Nazis, he is more likely to commit crimes) ...

and specific inferences (because Dale possessed an illegal item (a grenade) on a prior occasion, he is likely to have possessed another illegal item (cocaine) on this occasion).

*Williams v. State*, 261 Ga. 640, 409 S.E.2d 649 (1991) (“The rationale for the [character] rule is that evidence of an independent offense or act committed by the accused is highly and inherently prejudicial, raising, as it does, an inference that an accused who acted in a certain manner on one occasion is likely to have acted in the same or in a similar manner on another occasion .... An accused is entitled to be tried for the offense charged in the indictment, independently of any other offense not connected with the transaction upon which the indictment was based.”)

*Smith v. State*, 232 Ga. App. 290, 501 S.E.2d 523 (1998) (“The primary aim of this 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.”)

### Exceptions and Exemptions

1. **Accused’s good character** (and rebuttal of same).
2. Character is an **essential element** of a charge or defense (rare).
3. Pertinent character trait of the **victim** (and rebuttal of same)
4. Character evidence “**intrinsic**” to or “**inextricably intertwined**” with events.
5. **Independent crimes, wrongs, or acts**. (404(b) evidence)
6. **Impeachment** of a witness with a prior conviction.
(1) Accused’s good character (and rebuttal of same).

New O.C.G.A § 24-4-404 provides an exception for: “Evidence of a pertinent trait of character offered by an accused or by the prosecution to rebut the same ...”

(A) Dale offers the testimony of Bobby, his co-worker, that he has known Dale for 10 years and:

-- Dale has a reputation as a law abiding person (OK) (405(a)): “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.”

Advisory Committee Note to Federal Rule 803(19): “The ‘world’ in which the reputation may exist may be family, associates, or community. This world has proved capable of expanding with changing times from the single uncomplicated neighborhood, in which all activities take place, to the multiple and unrelated worlds of work, religious affiliation, and social activity, in each of which a reputation may be generated.”

-- in Bobby’s personal opinion, Dale is a peaceful person (OK) (405(a)) – pertinent trait in this assault case

-- in Bobby’s personal opinion, Dale is no thief (NO – not a “pertinent” trait)

-- “Why just last week, Dale walked away from a fight with some drunk Phillies fans.” (NO)

NO SPECIFIC INSTANCES OF CONDUCT ON DIRECT EXAMINATION OF A CHARACTER WITNESS. (405)

(B) The prosecution asks Bobby on cross-examination if he had heard or if he knew that:

-- Dale was convicted of possession of cocaine in 1999? (OK) rebuts “law abiding” Rule 405(c): “On cross-examination, inquiry shall be allowable into relevant specific instances of conduct.”
(10 year rule for impeachment by prior conviction does not apply to prosecution rebuttal evidence ..... though rule 403 balancing does)

-- Dale was arrested for possession of methamphetamine a month ago? (NO) (may rebut with specific instances of accused’s conduct, not what the police did)
"We reject the government's contention that arrests prove anything. An arrest shows only that the arresting officer thought the person apprehended had committed a crime, assuming that the officer acted in good faith, which will usually but not always be the case. An arrest does not show that a crime in fact has been committed, or even that there is probable cause for believing that a crime has been committed."

(C) What if Bobby only testified that it was his opinion that Dale was a peaceful person. Could the prosecution rebut by asking Bobby if he knew that Dale was convicted of possession of cocaine in 1999? (NO) Dale only opened the door to his character for peacefulness.

U.S. v. Bynum, 566 F.2d 914, 919 (5th Cir. 1978) (“Once a witness has testified concerning a defendant's good character, it is permissible during cross-examination to attempt to undermine his credibility by asking him whether he has heard of prior misconduct of the defendant which is inconsistent with the witness' direct testimony . . . Courts have imposed two important limitations upon judicial discretion in admitting inquiries concerning such prior misconduct: first, a requirement that the prosecution have some good-faith factual basis for the incidents inquired about and second, a requirement that the incidents inquired about are relevant to the character traits involved at the trial.”)

(D) Could the prosecution ask Bobby:

“If it’s proved beyond a reasonable doubt that Dale committed this assault and battery on Bob Murphy, would that change your opinion that he is a peaceful person?” (NO)

U.S. v. Guzman, 167 F.3d 1350, 1352 (11th Cir. 1999) (“The government may not ... pose hypothetical questions that assume the guilt of the accused in the very case at bar.”)

(E) The prosecution offers a certified record of Dale’s conviction in 1999 for possession of cocaine. The defense objects and the prosecution explains that since the defense put Dale’s character in issue, the state is allowed to present evidence of his prior criminal record. (NO – not under the new rules) U.S. v. Reed, 700 F.2d 638, n.11 (11th Cir. 1983)

-- on cross, the prosecutor may ask the “have you heard or did you know” questions but must accept the witness’s answer

-- in its rebuttal case, the prosecution is limited to presenting its own character witnesses who may testify only to reputation and opinion
Dale takes the stand and says:

“I am a law abiding person.” (OK)

“I am president of the Anti-Bullying Society of Georgia.” (OK)

(the accused may testify to specific instances of his conduct related to a pertinent character trait) (405(b))

Dale does not refer to his character generally or specifically on direct. But this happens on cross:

Prosecutor: “You shoved him down those stairs, didn’t you?”

Dale: “No I did not. I’m a lover, not a fighter.”

Has Dale “put his character in issue” such that the prosecution may rebut with evidence of his bad character? (NO – but the prosecution may follow up on anything false that the accused volunteers on direct or cross. So the prosecution could ask Dale: “Isn’t it true you were convicted of aggravated assault in Clayton County five years ago?” See, New O.C.G.A. § 24-6-621: “A witness may be impeached by disproving the facts testified to by the witness.” U.S. v. Pierson, 544 F. 3d 933, 941 (8th Cir. 2008) (accused claimed on direct that he would never act on any impulse to have sex with a minor --- opening door to prior conviction for child molestation).

How about this ....

Prosecutor: “You testified that you did not push Murphy down the stairs. Are you saying you are a lover, not a fighter?”

Dale: “That’s right.”

May the prosecution now ask him about his prior assault conviction? (NO)

U.S. v. Hands, 184 F.3d 1322, 1328 (11th Cir. 1999) (“the government could not bootstrap irrelevant evidence into the trial by using it to impeach the answers to irrelevant questions.”)

Nor may the prosecution force the defendant’s character into issue by asking non character witnesses about the defendant’s character and then, when the witness answers positively, rebut the witness’s testimony. U.S. v. Gilliland, 586 F.2d 1384, 1389 (10th Cir. 1978).
In the civil case against Dale Horner, could Horner present evidence of his good character? (NO)

-- Pre-2013 Georgia cases allowed a defendant in a civil case where the defendant was sued for criminal conduct to present evidence of his good character if he so chose. The new rules do not permit this.

(2) Character is an essential element of a charge or defense (405(b))

Rarely, a party’s character may be an essential element of a claim, charge or defense. For example, when a criminal defendant claims entrapment, he places his propensity to commit the crime charged in issue. *Haralson v. State*, 223 Ga. App. 787, 789, 479 S.E.2d 115 (1996). Likewise, character was an essential element in a defamation case where the defense was that the disparaging publication was true. *Schafer v. Time, Inc.*, 142 F.3d 1361 (11th Cir. 1998) (“Character evidence does not constitute an ‘essential element’ of a claim or charge unless it alters the rights and liabilities of the parties under the substantive law.”)

But just because the accused puts his character in issue does not mean that character thereby becomes as “essential element” of either the charge or the defense. Georgia courts have held that the defendant’s good character is not a substantive defense under criminal law but simply a fact that can create a reasonable doubt as to the defendant’s guilt. *Kurtz v. State*, 287 Ga.App. 823, 825, 652 S.E.2d 858 (2007).

(3) Pertinent character trait of the victim (and rebuttal of same)

**New O.C.G.A § 24-4-404(a)(2) - Character Evidence**

(a) Evidence of a person’s character or a trait of character shall not be admissible for the purpose of proving action in conformity therewith on a particular occasion, except for: ...

(2) Subject to the limitations imposed by Code Section 24-4-412 [rape victim shield rule], evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused or by the prosecution to rebut the same; or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor.
(A) Dale claims self-defense. He offers the following evidence:

Testimony of Freddie that he knows Bob Murphy (the alleged victim) who has lived in Freddie’s neighborhood for 10 years.

In Freddie’s opinion, Bob is a violent person. (OK – 404(a)(2))

“Why just last week, Bob beat up a nun in a wheelchair for no good reason.” (NO)

NO SPECIFIC INSTANCES OF CONDUCT ON DIRECT EXAMINATION OF A CHARACTER WITNESS. (405)

The new rules do not admit specific instances of conduct of the victim to prove the victim’s propensity to violence. (No Chandler evidence)

(B) What if Dale testifies that he has seen Bob Murphy at Braves games on many prior occasions and a week before the incident in question, he saw Bob Murphy “sucker punch” another fan who spilled his beer on Murphy. (OK)

If the defendant knew of the victim’s violent character, including the victim’s prior violent acts, before the incident in question, this evidence is admissible as relevant to the defendant’s state of mind, apprehension of imminent danger, and the reasonableness of his defensive measures. U.S. v. Gregg, 451 F.3d 930, 935 (8th Cir. 2006); U.S. v. Smith, 230 F.3d 300, 308 (7th Cir. 2000) (“[W]hen the specific instances of conduct are known to the one claiming self-defense, and thus could have factored into the decisionmaking process that resulted in the act, ... such instances should be admissible as essential elements of the claim.”) See also, Hodges v. State, 311 Ga. App. 46, 714 S.E.2d 717 (2011) (fact that defendant had heard that victim had shot at other people was not hearsay since the evidence was not offered to prove that the victim in fact shot at others but for its effect on the defendant’s state of mind and fears regarding the victim).

(C) May the prosecution ask Freddie on cross-examination if he knew that Bob Murphy was a Quaker, committed to nonviolence? (OK – pertinent specific instances of conduct raised on cross – must accept the witness’s answer)

(D) May the prosecution, in its rebuttal case, offer its own character witness:

that Bob is a peaceful person? (OK)

that Dale is a violent person? (OK – what’s good for the goose is good for the gander)
Although courts applying the Federal Rules of Evidence still require some prima facie evidence of self defense, the pre-2013 Georgia approach is more restrictive than these courts. Perhaps Georgia’s more restrictive approach was due to its more expansive position on admission of the victim’s prior violent acts. In any event, the new rule requires only that the defendant show that its evidence is of a “pertinent” trait of the victim’s character and “pertinent” simply means relevant. *U.S. v. Hewitt*, 634 F.2d 277 (5th Cir. 1981) (“... evidence may be offered only of ‘pertinent’ traits, a term apparently synonymous with ‘relevant’”)

(4) Character evidence “**intrinsic**” to or “**inextricably intertwined**” with events (the old *res gestae* rule applied to character evidence)

The Federal Rules of evidence retired the term “*res gestae*” in both the hearsay and character rule contexts and the new 2013 Georgia rules do so as well. However, the essence of the doctrine in the context of the character rule remains the same with new terminology. Evidence is “intrinsic” when it is “(1) an uncharged offense which arose out of the same transaction or series of transactions as the charged offense, (2) necessary to complete the story of the crime, or (3) inextricably intertwined with the evidence regarding the charged offense.” *U.S. v. Edouard*, 485 F.3d 1324, 1344 (11th Cir. 2007)

*U.S. v. Bowie*, 232 F.3d 923, 929 (D.C Cir. 2000) (“uncharged acts performed contemporaneously with the charged crime may be termed intrinsic if they facilitate the commission of the charged crime.”)

Evidence that is intrinsic to the crime is not subject to the pre-trial notice provisions governing the use of independent crimes or acts, offered under New O.C.G.A. § 24-4-404(b):

> 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.

Courts should limit the use of the term “intrinsic” to its most obvious expression -- facts that bear directly on the charged conduct. Refusing to label evidence “intrinsic” by no means results in the exclusion of the evidence. Indeed, if the evidence truly is logically relevant and necessary to prove something other than the accused’s propensity to commit the crime charged, it will pass muster as admissible “extrinsic” evidence under 404(b).
If offered to explain the accused’s conduct in committing the charged crime, the evidence is admissible. But evidence offered to explain the conduct of the police is inadmissible unless the defense has placed the police’s conduct in issue. *U.S. v. Arbolaez*, 450 F.3d 1283, 1290 (11th Cir. 2006) (statements offered to explain subsequent police conduct are ordinarily inadmissible); *U.S. v. Hernandez-Cuartas*, 717 F.2d 552, 555 (11th Cir. 1983) (testimony that defendant fit drug courier profile was inadmissible character evidence); *U.S. v. Baldwin*, 418 F.3d 575, 581 (6th Cir. 2005) (cannot use profile evidence to “explain” the police’s interaction with the defendant unless that interaction has been questioned or otherwise placed in issue by the defense).

Nor are the “circumstances surrounding the arrest” admissible unless particularly relevant to the charged offenses. *U.S. v. Reed*, 700 F.2d 638, n.11 (11th Cir. 1983) (error to admit evidence that accused had marijuana in his possession at the time of his arrest); *Benford v. State*, 272 Ga. 348, 349–350, 528 S.E.2d 795 (2000) (“circumstances surrounding an arrest” cannot be basis for admitting evidence of other criminal behavior when it is “wholly unrelated to the charged crime, the arrest is remote in time from the charged crime, and the evidence is not otherwise shown to be relevant”)

**5) Independent crimes, wrongs, or acts. (404(b) evidence)**

New O.C.G.A § 24-4-404(b):

(b) 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.

**11th Circuit’s 3-Part Test: U.S. v. Edouard**, 485 F.3d 1324, 1344 (11th Cir. 2007).

For evidence of other crimes or acts to be admissible under Rule 404(b):

(1) it must be relevant to an issue other than defendant’s character;
(2) there must be sufficient proof to enable a jury to find by a preponderance of the evidence that the defendant committed the act(s) in question; and
(3) the evidence must satisfy Rule 403 — the probative value of the evidence cannot be substantially outweighed by undue prejudice.
There are actually two aspects to Part 1: the evidence must be relevant to some issue in the case (“motive, opportunity, intent,” etc.) plus the relevance must not logically rest solely on a propensity inference from the defendant’s character or conduct.

For example, it is not enough to say that a defendant’s prior conviction for burglary is admissible in a case in which he is charged with robbery because it proves “motive” if the only way it proves motive is through the inference: the prior burglary shows his propensity (and thus his motive) to steal; that is, thieves (being thieves) are motivated to steal. On the other hand, evidence that the defendant has an expensive drug addiction and no apparent way to pay for it logically proves a motive for robbery without drawing on the defendant’s character or propensity. In other words, the motive is established objectively – even if we accepted for the sake of argument that this specific defendant had no character propensity to rob anyone, the motive to steal money would still exist.

_Huddleston v. U.S._, 485 U.S. 681, 686, 108 S.Ct. 1496 (1988) (“The threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether that evidence is probative of a material issue other than character.”); _U.S. v. Commanche_, 577 F.3d 1261, 1267 (10th Cir. 2009) (“evidence is admissible under Rule 404(b) only if it is relevant for a permissible purpose and that relevance does not depend on a defendant likely acting in conformity with an alleged character trait.”)

“Bent of mind” – There is no precedent anywhere in the United States for using “bent of mind” as an exception to the character rule under rule 404(b). Experience with its use in Georgia under the old rules nearly destroyed the character rule and obscured the true purpose of offering evidence of independent crimes and acts. _See, Nicholson v. State_, 125 Ga. App. 24, 26, 186 S.E.2d 287 (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_, 113 Ga. App. 127, 147 S.E.2d 510, 511 (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_, 95 Ga. App. 455, 98 S.E.2d 42, 45 (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.”)

During the Georgia legislature’s consideration of the new rules, efforts were made to add “bent of mind” to the list of uses under § 24-4-404(b). These efforts were rebuffed, signaling the legislative intent that Georgia stick with the Federal Rules on this issue. _See also_, Section I from 2011 Ga. Law, Act 52: “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.”

_See, McMullen v. State_, 2012 WL 2688713, n.30 (Ga.App. 2012) (“We note in

**Similarity** - Georgia’s old “similar transaction” rule often used the concept of similarity rather indiscriminately. The similarity of the prior, extrinsic offence or act and the charged conduct is only pertinent for some, not all, uses of 404(b) evidence. When the evidence is used to prove identity, as discussed below, similarity plays a huge role.

Likewise, use of 404(b) evidence to prove intent requires a showing of relevant similarities. But using 404(b) evidence to prove motive, opportunity, plan, or knowledge typically does not require any proof that the prior act and the charged offense are similar.

As the court wrote in *U.S. v. Beechum*, 582 F.2d 898, n. 15 (5th Cir. 1978) (en banc): “the meaning and nature of the ‘similarity’ requirement in extrinsic offense doctrine are not fixed quantities. Each case must be decided in its own context, with the issue to which the offense is directed firmly in mind.” *See also, U.S. v. Davis*, 154 F.3d 772, 779 (8th Cir. 1998) (“...the degree of similarity required necessarily depends on the purpose for which the past acts evidence is admitted.”)

**Suggested Method**

Discriminating between the illegitimate propensity use of evidence of the accused’s other crimes or acts and the legitimate 404(b) use is not always easy. It helps if one first isolates the illegitimate use by describing how the evidence impugns the accused’s character in a way that suggests the accused has a propensity to commit the crime charged. Next, ask what other relevance the evidence has, if any, apart from that propensity use. *U.S. v. Spikes*, 158 F.3d 913, 929 (6th Cir. 1998) (“the trial court is ... obliged to ask, ‘Is the evidence in any way relevant to a fact in issue otherwise than by merely showing propensity?’”)

For example, the accused is charged with robbing a liquor store and the prosecution wants to offer evidence that the accused purchased cocaine an hour after the robbery: (1) isolating the illegitimate use, the evidence suggests the accused uses illegal drugs and therefore has a propensity to break the law; but (2) the evidence also is relevant to prove the accused’s motive for the robbery.

Suppose, in the same case, the prosecution offered evidence that the accused sold drugs to school children a year ago: (1) isolating the illegitimate use, the evidence suggests that the accused is a drug dealer and thus has a propensity to break the law. ... Note that there is no other relevance to this evidence. *U.S. v. Baker*, 432 F.3d 1189, 1207 (11th Cir. 2005) (“... the extrinsic evidence must have at least some plausible non-character relevance to the charged conduct to be admissible under 404(b). ... this incident is only relevant to show that [the accused] ... is more
likely to commit crimes because he has done so in the past, which is exactly the inference that Rule 404(b) forbids.”)

A few more examples of how the test works: The defendant is charged with burglary of a pharmacy by disabling the alarm system. The prosecution offers evidence that a few years earlier, he burglarized a hardware store after disabling the alarm system. First, isolate the character/propensity use: (1) he is a criminal with a propensity to commit burglaries. (2) Next, determine if there is an additional relevance apart from character/propensity: it proves he knows how to disable an alarm system — a specialized skill that most people do not possess. Therefore, it is admissible, subject to a balancing under rule 403.

Suppose the defendant is charged with assaulting the victim with a straight razor. Although the defendant was near the victim, there is no direct evidence that the defendant cut the victim and the defendant denies the act. The prosecution offers evidence of a prior incident in which the defendant threatened a person with a straight razor. Applying the test described above, (1) isolate the character/propensity use: the defendant is a scary person with a propensity to violence. (2) Next, determine if there is an additional relevance apart from character/propensity: the use of a straight razor as a weapon is rather rare and thus serves as a signature making it more likely, for that reason, that the accused committed the assault as charged, and thus the evidence has a relevant, non propensity use.

Suppose the defendant is charged with attempted robbery. He and an accomplice held a knife to a man’s throat and demanded his money. On a prior occasion, the defendant and another perpetrator grabbed a woman in a parking lot, stole her purse, and drove her around in the trunk of their car. Applying the test described above, (1) isolate the character/propensity use: the defendant has a propensity to commit armed robbery and thus probably committed the subject robbery. (2) Next, determine if there is an additional relevance apart from character/propensity. There is none. The similarity of such mundane facts as that the defendant acted in concert with another and used intimidation to rob both victims is not nearly sufficient to serve as defendant’s personal signature. The similar facts are very common and do not distinguish the defendant from most other robbers or prove a motive for this crime. “Accordingly, it was error to admit the evidence of the prior transaction, and since it cannot be said that the error was harmless, the conviction must be reversed.” *Banks v. State*, 216 Ga. App. 326, 328, 454 S.E.2d 784 (1995).

**Potential Uses**

**Motive** – Evidence that suggests the accused’s specific motive for committing the crime charged is admissible. (no pre-trial notice required); *U.S. v. Kerr*, 778 F.2d 690 (11th Cir. 1985) (defendant charged with arson – prosecution allowed to prove that the arson was motivated by defendant’s need to destroy evidence of his illegal prescriptions)

**Opportunity** – This is probably the most rarely used purpose of those listed in
404(b). It admits evidence that relates to the defendant’s specific ability or wherewithal to commit the crime charged. Thus, for example, the fact that the defendant possessed a .38 caliber revolver was admissible to prove his opportunity to commit a robbery in which that type of weapon was used. *U.S. v. Woods*, 613 F.2d 629, 636 (6th Cir. 1980).

**Preparation** – Usually, acts in preparation leading up to the charged offense are admitted as “intrinsic” to the offense (discussed above) but they also may be admitted here. For example, where the accused is charged with bank robbery, evidence that he stole a car the day before the robbery and that car was used in the robbery is admissible. *U.S. v. Nolan*, 910 F.2d 1553, 1562 (7th Cir. 1990).

**Plan** – When the other crime or act is part of a common scheme to achieve a specific objective which includes the charged offense, the other crime is admissible usually to prove either motive, intent, or identity. Such evidence also is sometimes admitted as “intrinsic” to the charged offense (discussed above). 404(b) evidence to prove a common plan, scheme, or design “is admissible only if it is so linked together in point of time and circumstances with the crime charged that one cannot be shown without proving the other. (cite omitted)” *U.S. v. Dothard*, 666 F.2d 498, 502 (11th Cir. 1982). Courts must not overextend the use of “plan” to include other crimes that are merely of the same sort as the crime charged. For example, where the defendant is charged with burglary, a prior burglary, otherwise unrelated to the charged offense, must not be admitted to prove the defendant’s “plan” to support himself by burglary. *U.S. v. Goodwin*, 492 F.2d 1141, 1153 (5th Cir. 1974).

**Intent** – Courts must use care in admitting 404(b) evidence to prove intent lest this exception swallow the whole rule. There are four provisos that, if followed, can restrain this use to its proper scope.

First, when dealing with crimes of general intent, there is no need to admit independent crimes or acts to prove intent. For example, DUI is a crime of general intent and the jury is never asked to find that the driver intended to drive under the influence. Nor can the driver raise lack of intent as a defense. *Prine v. State*, 237 Ga. App. 679, 515 S.E.2d 425 (1999). Thus it makes no sense to admit 404(b) evidence to prove intent in such a case.

Second, even when specific intent is an element of the crime charged, the court should ask whether intent is an issue in the case. Some cases simply state that intent is an issue whenever the defendant pleads not guilty to a crime requiring proof of intent. This oversimplification invites trouble by masking situations in which intent is not, practically speaking, at issue and the 404(b) evidence is actually used for its illegitimate purpose of proving propensity. For example, suppose the accused is charged with being a felon in possession of a firearm, a crime requiring proof of intent. The defendant admits that someone clearly was in possession of the gun and discharged it at others, but that that person was not him. There is no room here to argue that whoever possessed the gun did not intend to do so and thus 404(b) evidence of the defendant’s prior unlawful firearm possession should not be
admitted to prove intent. If 404(b) evidence is admitted under such circumstances “to prove intent,” it obviously is doing something else -- showing the defendant’s propensity to carry a gun. U.S. v. Linares, 367 F.3d 941 (D.D. Cir. 2004).

The test is to ask: if the prosecution is not allowed to present this 404(b) evidence (here, a prior unlawful firearm possession), is there any danger that a rational jury could find that although he committed the objective, charged acts (here, possession of a firearm) he did not intend to do so or did not do so knowingly. If the answer is “No,” this shows that the only work that the prior firearm possession incident is doing is bolstering proof of the underlying predicate fact --- that it was the defendant, not someone else, who possessed the firearm at the time in question and this, of course, has nothing to do with intent or knowledge and everything to do with propensity to act a certain way.

Suppose, on the other hand, the defendant was in possession of a bag of white powder and charged with intent to distribute cocaine. If the prosecution were not allowed to present as 404(b) evidence the defendant’s prior conviction for sale of cocaine, one can conceive of a jury finding that although the defendant possessed the cocaine, the prosecution did not prove that he knew that it was cocaine or that he intended to distribute it and thus the 404(b) evidence of a prior sale of cocaine truly helps the prosecution prove the intent element.

“If the defendant’s intent is not contested, then the incremental probative value of the extrinsic offense is inconsequential when compared to its prejudice; therefore, in this circumstance the evidence is uniformly excluded.” U.S. v. Beechum, 582 F.2d 898, 914 (5th Cir. 1978) (en banc). See also, U.S. v. Baker, 432 F.3d 1189, 1205 (11th Cir. 2005) (“... if intent is undisputed by the defendant, the evidence is of negligible probative weight compared to its inherent prejudice and is therefore uniformly inadmissible.”)

Third, an independent crime or act of the accused only proves his intent at the time in question if the independent crime or act involved the same specific intent at a time relatively close enough to the acts in question that one can reasonably draw the inference.
U.S. v. Matthews, 431 F.3d 1296, 1318 (11th Cir. 2005) (Tjoflat concurring) (“The intent necessary to possess an illegal drug is no more relevant to the intent to either conspire to distribute illegal drugs or to distribute them than any other criminal act.”)

Fourth, the jury instruction must include the admonition that the 404(b) evidence may not be used to prove that the defendant committed the objective acts he is charged with (shooting the gun, possessing the cocaine, selling the stolen property, etc.) but only his state of mind. Thus the jury is instructed not to use the 404(b) evidence to prove intent unless and until the jury first finds beyond a reasonable doubt that the defendant committed the objective acts. U.S. v. Arbane, 446 F.3d 1223, n.4 (11th Cir. 2006).
**Knowledge** – When the other crime or act proves that the defendant has special knowledge that the perpetrator of the charged crime would need to know, this 404(b) evidence is admissible. For example, if the charged crime involved safecracking, the defendant’s prior act of cracking a safe would be admissible. *See, e.g., U.S. v. Garcia*, 880 F.2d 1277, 1278 (11th Cir.1989) (defendant’s skill in forging documents relevant to show identity). Likewise, where the accused’s knowledge helps prove the element of malice or callous indifference, the prior crime or act that supplied that knowledge is admissible. *See, e.g., U.S. v. Tan*, 254 F.3d 1204 (10th Cir. 2001) (accused charged with second degree homicide – prior DUI admitted to prove he had been warned of dangers of DUI – went to malice).

**Identity** - When specific, distinctive details of the other crime or act are the same as details of the charged offense, this 404(b) evidence may be admissible to prove identity; that is, that the person who committed the other act is likely the same person who committed the charged offense.

  -- Identity must be in issue. If the defendant admits he committed the predicate act but has some other defense (consent, self defense, etc.) then the evidence cannot be admitted for this purpose.

  -- Proof of the perpetrator’s “modus operandi” is admissible only if it so unusual as to qualify as a signature crime. *U.S. v. Phaknikone*, 605 F.3d 1099 (11th Cir. 2010) (“The extrinsic act must be a ‘signature’ crime, and the defendant must have used a modus operandi that is uniquely his. The signature trait requirement is imposed to insure that the government is not relying on an inference based on mere character -- that a defendant has a propensity for criminal behavior simply because [the defendant] has at other times committed the same commonplace variety of criminal act.”)

**Absence of Mistake or Accident** – When the defense claims or the jury might otherwise find that the charged offense was the result of innocent mistake or accident, the other crime or act that rebuts or undercuts such a finding is admissible under 404(b). *U.S. v. Kapordelis*, 569 F.3d 1291, 1313 (11th Cir. 2009) (where the accused claimed that child porn on his computer was there as a result of accident or mistake, evidence of his prior improper contact with boys was admissible)

**Prior Difficulties Between the Accused and the Victim** – Similar to motive, proof of prior difficulties between the accused and the victim may be admissible to explain their rocky relationship and account for why defendant harmed the victim. *Government of Virgin Islands v. Harris*, 938 F.2d 401 (3d Cir. 1991). No pre-trial notice required.

**Coverup** – When the other crime or act was part of an attempt to cover up or prevent being caught or convicted of the charged offense, it is admissible as proof of the defendant’s own consciousness of guilt. *U.S. v. Rocha*, 916 F.2d 219, 241 (5th Cir. 1990)
**Rebuttal of Defense of Duress** – If the defendant claims that he was forced to commit the charged offense, the fact that he previously committed a similar offense voluntarily is admissible to rebut the claim of duress. *U.S. v. Holman*, 680 F.2d 1340, 1349 (11th Cir. 1982).

**Rebuttal of Defendant’s Testimony** – If the defendant testifies to a fact and that fact may be contradicted by evidence of other otherwise unrelated crimes or acts, the evidence is admissible under 404(b). *U.S. v. Bradley*, 644 F.3d 1213, 1273 (11th Cir. 2011) (pre-trial notice required); *U.S. v. Pierson*, 544 F. 3d 933, 941 (8th Cir. 2008) (accused claimed on direct that he would never act on any impulse to have sex with a minor --- opening door to prior conviction for child molestation).

**Sex Crimes** – There are three new statutes that directly address the admission in sex offense cases of prior, similar sexual misconduct by the defendant. New O.C.G.A §§ 24-4-413, 414, 415. No substantial differences from current Georgia case law.

**DUI Cases** – Under pre-2013 rules, a driver’s prior DUIs were often admitted to prove “bent of mind” to drive while intoxicated. Under the new rules, a defendant’s prior DUI would have to qualify under New O.C.G.A. § 24-4-404(b) or § 24-4-417 (see below).

A prior DUI is usually inadmissible under Rule 404(b). See, e.g. *Ex parte Sparks*, 730 So.2d 113 (Ala. 1998) (DUI conviction reversed for prosecutor asking accused about prior DUI – curative instruction insufficient – court should have ordered mistrial); *State v. Fleece*, 925 S.W.2d 558 (Tenn. Crim. App. 1995) (prosecution’s reference to defendant’s prior DUI deprived defendant of fair trial – conviction reversed); *Com. v. Ramsey*, 920 S.W.2d 526, 528 (Ky. 1996) (“Previous DUI convictions do not fall within either the exceptions outlined by KRE 404(b) or those recognized by this Court.”) A prior DUI is inadmissible to prove intent in an ordinary DUI case since intent of the driver is never at issue. *Prine v. State*, 237 Ga. App. 679, 515 S.E.2d 425 (1999).

New O.C.G.A. § 24-4-417 states:

(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.

This statute was passed to clarify that the defendant’s prior DUIs may be relevant and admissible in a DUI case in two specific situations. First, when the defendant took and failed the test in the prior DUI and the defendant refused the test in the subject case, if the defendant at trial attempts to suggest that he did not take the test because he did not understand it, or he did not know that he could take a test, or that he would never take such a test, the prior DUI in which the defendant took and failed the test would be admissible to prove “knowledge, plan, or absence of mistake or accident.”

Second, when the defendant claims that someone else was driving the car (as, for example, where the police arrive at the scene of an accident and the defendant claims to have been a passenger), the defendant’s prior DUI may be admissible to prove identity.

Part 2 of 11th Circuit Test - Proof That Defendant Committed the Other Crime or Act – The second part of the three part test for admission of 404(b) evidence is that the proponent must have sufficient evidence that a reasonable jury could find by a preponderance of the evidence that the defendant committed the other crime or act. Huddleston v. U.S., 485 U.S. 681, 690, 108 S.Ct. 1496, 1501 (1988). New O.C.G.A. § 24-1-104(b).

Part 3 of 11th Circuit Test – Balancing -- The trial court must determine whether the probative value of the 404(b) evidence for its legitimate use (to prove motive, intent, knowledge, etc.) is substantially outweighed by the negative effects (unfair prejudice, confusion of the issues) from its illegitimate use (as evidence of the defendant’s bad character or propensity to commit the charged offense). Huddleston v. U.S., 485 U.S. 681, 691-692, 108 S.Ct. 1496 (1988).

Factors that influence the legitimate probative value of 404(b) evidence:
---- the persuasive power (or not) of the 404(b) evidence to prove motive, intent, identity, etc. For example, if the other crime is offered to prove identity and both the other crime and the charged crime involved the defendant using a very distinctive weapon and modus operandi, the probative power of the evidence to prove identity is strong. But if the only similarity between the other crime and the charged crime is that both were robberies involving similar, common pistols, the probative value to prove identity is very weak.
---- the strength or weakness of the evidence that the defendant committed the prior crime or act
---- the amount of time that has passed between the other crime or act and the charged offense
---- the prosecution’s need for the evidence – to the extent the purpose for which the evidence is offered (motive, intent, identity, etc.) is not really contested by the defense, the probative value of the evidence is diminished. *U.S. v. Daraio*, 445 F.3d 253, 265 (3d Cir. 2006) (“... courts should generally deem prior bad acts evidence inadmissible to prove an issue that the defendant makes clear he is not contesting”). Likewise, if the defense is clearly based on lack of motive, intent, misidentification, etc., the probative value soars.

Although the prosecution does not have to accept a defense offer to stipulate to any evidence or proof of any element, *Old Chief v. U.S.* , 519 U.S. 172, 189 (1997), the trial court, in its balancing, should take into account statements by the defense that it does not plan to contest certain evidence or raise certain defenses. For example, if the defense tells the court that it will not dispute that it was the defendant who committed the act charged but will argue that his actions were not intentional then there is no apparent need for 404(b) evidence to prove the identity of the person who committed the act charged. Of course, if the defense later changes its mind at trial and disputes identity, the court can allow the prosecution to present its 404(b) evidence on that issue.

Factors that influence the degree of **unfair prejudice** from the 404(b) evidence:
---- if the other crime or act is the only evidence that the jury will hear that reveals the defendant’s criminal past, the unfair prejudice side of the balancing test is strong since the evidence likely will cost the defendant the presumption of innocence in the minds of the jurors. If, however, the jury will learn through other, non-404(b) evidence, that the defendant has a criminal past, the additional unfair prejudice from the 404(b) evidence is marginal
---- the more the other crime or act would frighten or repulse the jury, the greater the prejudicial impact on the defendant; that is, the more likely the jurors will allow that fear or revulsion to influence their judgment. *U.S. v. Beechum*, 582 F.2d 898, 914 (5th Cir. 1978) (en banc) (“One of the dangers inherent in the admission of extrinsic offense evidence is that the jury may convict the defendant not for the offense charged but for the extrinsic offense.”)
---- although the similarity between the other crime or act and the charged offense may contribute to certain legitimate uses of the 404(b) evidence, (as in proving intent or identity when those are in issue), such similarity also increases the unfair prejudice to the accused from the propensity use of the evidence. *U.S. v. Beechum*, 582 F.2d 898, n. 20 (5th Cir. 1978) (en banc) (“It is true as well that the more closely the extrinsic offense resembles the charged offense, the greater the prejudice to the defendant. The likelihood that the jury will convict the defendant because he is the kind of person who commits this particular type of crime ... increases with the increasing likeness of the offenses.”)
**Procedure** – No significant differences from current practice.

**New O.C.G.A. § 24-4-404(b)** retains the requirement that the prosecution 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.” *U.S. v. Perez–Tosta*, 36 F.3d 1552, 1561 (11th Cir.1994) (“The policy behind 404(b) is to reduce surprise and promote early resolution on the issue of admissibility.”) “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.” 24-4-404(b)

The trial court must hold a hearing on the admissibility of the 404(b) evidence at which the prosecution bears the burden of proof and persuasion. Unif. Sup. Ct. Rule 31.3(B); *Sheppard v. State*, 294 Ga. App. 270, 669 S.E.2d 152 (2008) (hearing and findings by trial court are mandatory).

**Other Uses of 404(b) Evidence** – Although 404(b) evidence is most often offered against the accused at a criminal trial, it is admissible when relevant and offered by the accused, see, e.g., *U.S. v. Ellisor*, 522 F.3d 1255 (11th Cir. 2008);

or by parties in a civil case; see, e.g., *Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 75 Fed. R. Evid. Serv. 601 (11th Cir. 2008) (discrimination case).

**(6) Impeachment** of a witness with a prior conviction.

The new rule, **O.C.G.A. § 24-6-609** is a cleaned up version of current O.C.G.A. § 24-9-84.1 which was passed in 2005 and based on Federal Rule 609. We covered it earlier in the session on impeachment.
Character rule in civil cases – no major changes.

*Kamensky v. Southern Oxygen Supply Co.*, 127 Ga. App. 343, 344, 193 S.E.2d 164 (1972) (“The courts of this State have consistently held that in controversies between two persons regarding a given subject-matter, evidence as to what occurred between one of them and a third person with reference to a similar, though entirely distinct transaction is irrelevant.”)

*Snider v. Basilio*, 281 Ga. 261, 637 S.E.2d 40 (2006) (fact that nurse failed state licensing exam three times was not admissible as to whether she complied with the standard of care in this case)


Prior Incidents Admissible to Prove Notice - The prior incident must have been sufficiently similar to the event in question that the occurrence of the prior incident naturally would draw the party’s attention to the same defect or condition that is claimed to have caused injuries in the subject case.


Rule 404(b) applies to civil as well as criminal cases. *See, e.g.*, Goldsmith v. Bagby Elevator Co., Inc., 513 F.3d 1261 (11th Cir. 2008) (discrimination case)

*Kothari v. Patel*, 262 Ga. App. 168, 170–171, 585 S.E.2d 97 (2003) (“In civil cases involving allegations of fraud, other transactions may be admissible to show motive or intent. To be admissible, the other transactions must be close in time and part of a common scheme, because frequently the state of mind accompanying the doing of an act is illustrated by other acts of a similar nature, done or proposed by the defendant in such a way as to indicate a general practice or course of conduct.”)

Regarding the plaintiff’s character and damages – Character traits are admissible to the extent they throw light on life expectancy, future earning capacity, or, in a wrongful death case, “the intangible element of the full value of the life of the deceased.” *Consolidated Freightways Corp. of Delaware v. Futrell*, 201 Ga. App. 233, 234, 410 S.E.2d 751, 753 (1991).

BUT, must be carefully balanced against any unfair prejudicial effect.
See e.g., Brock v. Wedincamp, 253 Ga. App. 275, 558 S.E.2d 836 (2002) (evidence that decedent, who was unmarried, had had several abortions and had given children up for adoption was irrelevant to damages and “inflammatory”)

Cornelius v. Macon-Bibb County Hosp. Authority, 243 Ga. App. 480, 533 S.E.2d 420 (2000) (fact that decedent in wrongful death action was having marital problems does not reduce the damages recoverable and thus is irrelevant and inadmissible)

Taylor v. RaceTrac Petroleum, Inc., 238 Ga. App. 761, 519 288 S.E.2d 282 (1999) (evidence of decedent’s drug use insufficient to prove that such use would have had an impact on life expectancy or earnings)

Clement v. Consolidated Rail Corp., 130 F.R.D. 530, 540 (D.N.J. 1990) (evidence of decedent’s prior drug and alcohol use inadmissible where there was a “relevancy gap” between that character evidence and the determination of earning capacity or health).

Character evidence may be admissible in punitive damages case to prove callous indifference. See, e.g., Craig v. Holsey, 264 Ga. App. 344, 590 S.E.2d 742 (2003) (in punitive damages stage of trial in which defendant found liable for car accident during which he was under the influence of alcohol and drugs, defendant’s pattern of using drugs and driving, both before and since the accident, admissible to prove wanton conduct)

Court must bifurcate punitive liability and damages O.C.G.A. § 51-12-5.1(d) May trifurcate: (1) liability and damages on compensatory claims, (2) liability on punitive claims, (3) amount of punitive damages. Webster v. Boyett, 269 Ga. 191, 496 S.E.2d 459 (1998).

Character rule applies only to “persons.” Evidence of other transactions, occurrences, or claims regarding a thing are governed by the “substantial similarity” test and the rule of relevance.

Ramos v. Liberty Mut. Ins. Co., 615 F.2d 334, 338-39 (5th Cir. 1980) (“Evidence of similar accidents might be relevant to the defendant’s notice, magnitude of the danger involved, the defendant’s ability to correct a known defect, the lack of safety for intended uses, strength of a product, the standard of care, and causation. . . . Whether a reasonable inference may be drawn as to the harmful tendency or capacity (of a product) from prior failures depends upon whether the conditions operating to produce the prior failures were substantially similar to the occurrence in question.”)
Cooper Tire & Rubber Co. v. Crosby, 273 Ga. 454, 456, 543 S.E.2d 21 (2001) (the evidence must show that (1) the “other” products and the product on trial suffered a common defect, (2) the “other” products and the product on trial shared a common design and manufacturing process, and (3) any common defect shared the same causation)

Habit / Routine Practice

New O.C.G.A. § 24-4-406:

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with such habit or routine practice.

The pre-2013 Georgia rules did not allow a third party to testify to another person’s habit except when the subject was deceased. The new rule has no such restriction.

U.S. v. Holman, 680 F.2d 1340, 1350 (11th Cir. 1982) (“[Habit] describes one's regular response to a repeated specific situation.”)

See e.g., Babcock v. General Motors Corp., 299 F.3d 60, 66 (1st Cir. 2002) (testimony of several witnesses that decedent drive always fastened his seat belt when he got behind wheel admissible as circumstantial evidence that driver was wearing seat belt at time of accident).

Routine Practice - no changes

See e.g., Benedict v. State Farm Bank, FSB, 309 Ga. App. 133, 709 S.E.2d 314 (2011) (to prove that credit card agreement and terms were mailed to the consumer, evidence of the routine practice of the business admitted)

Shoemake v. State, 266 Ga. App. 342, 596 S.E.2d 805 (2004) (police officer testimony regarding routine practice of reading implied consent warning to driver suspected of DUI is sufficient evidence to establish that warning was given even if officer cannot recall the specific instance)
Conversion Table – Pre-2013 Georgia Statutes that Have Been Retained and Renumbered *(some with modifications)*

*(If a pre-2013 code section from Title 24 is not on the list below, it was abolished)*

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<tr>
<th>Pre-2013 Statute</th>
<th>New 2013 Statute</th>
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<tr>
<td>24-1-4</td>
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<td>24-2-3</td>
<td>24-4-412</td>
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<td>24-3-4</td>
<td>24-8-803(4)</td>
</tr>
<tr>
<td>24-3-16</td>
<td>24-8-820</td>
</tr>
<tr>
<td>24-3-17</td>
<td>24-9-924</td>
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<td>24-3-18</td>
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<td>24-7-24 to 25</td>
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<td>24-7-701(b)</td>
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<td>24-9-67</td>
<td>24-7-707</td>
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<td>24-9-67.1</td>
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<td>24-9-84.1</td>
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## Old Term / New Term Table

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<thead>
<tr>
<th>Old Term</th>
<th>New Term</th>
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<tbody>
<tr>
<td>Best evidence rule</td>
<td>Contents of recordings rule</td>
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<tr>
<td></td>
<td>(most everyone still says “best evidence”)</td>
</tr>
<tr>
<td></td>
<td>OCGA § 24-10-1001 to 1007</td>
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<tr>
<td>Original evidence</td>
<td>Nonhearsay</td>
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<td></td>
<td>OCGA § 24-8-801</td>
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<tr>
<td>Res Gestae (in hearsay context)</td>
<td>Hearsay exceptions for:</td>
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<tr>
<td></td>
<td>present sense impression, OCGA § 24-8-803(1)</td>
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<td>excited utterances, OCGA § 24-8-803(2)</td>
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<td>then-existing mental, emotional or physical condition, OCGA § 24-8-803(3)</td>
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<tr>
<td>Res Gestae (in character evidence context)</td>
<td>Intrinsic to or</td>
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<td>Inextricably intertwined with the offense</td>
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<td>OCGA § 24-4-401, 404</td>
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<td>Self-serving statement rule</td>
<td>Hearsay rule</td>
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<td>OCGA § 24-8-801</td>
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<td>Similar transactions</td>
<td>404(b) evidence or</td>
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<td>Independent crimes or acts evidence</td>
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<td>OCGA § 24-4-404(b)</td>
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<td>Ultimate issue rule</td>
<td>Opinions must be “helpful” to the trier of fact</td>
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<td>OCGA § 24-7-701 to 702</td>
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</tbody>
</table>
Some Georgia Rules That Will Not Change

Evidentiary Privileges.
Inadmissibility of Liability Insurance, Collateral Benefits.
“Apology Statute” in Medical Malpractice Cases.
Authentication of Public Records.
Wide Open Cross-Examination Rule.
Impeachment by Prior Conviction.
Rape Victim Shield Statute.
Admission of Accused’s Prior Similar Sex Crimes in Sex Crime Cases.
Child Competency in Abuse Cases.
Distinction Between Offers of Direct and Collateral Benefits in Evaluating Confessions.
Daubert Applies in Civil Cases but Not Criminal Cases.
Lay Opinion Rules.
Proving Value.
Parol Evidence Rules
Evidentiary Presumptions.
Basic Definition of Hearsay.
Personal Admission Rule.
Routine Practice Rule.
Prior Inconsistent Statements Admissible as Substantive Evidence (the Gibbons rule)
Hearsay Exceptions for Past Recollection Recorded, Statements for Medical Diagnosis or Treatment, Medical Narratives, Reputation Evidence, Former Testimony, Dying Declarations, Statements by Victim of Child Abuse, Necessity Exception (though pre-trial notice required).

The new Georgia Rules of Evidence will go into effect on January 1, 2013.

Professor Milich’s books:

COURTROOM HANDBOOK ON GEORGIA EVIDENCE
(2012 edition with the new rules is now available)

and

GEORGIA RULES OF EVIDENCE (2012 edition)

West Publishing  1-800-328-4880.
APPENDIX
The State Bar of Georgia and the Law Schools of The University of Georgia, Emory University and Mercer University established the Institute of Continuing Legal Education in Georgia in August 1965. In 1984, Georgia State University College of Law was added to the consortium, and in 2005, John Marshall Law School was added. The purpose of the Institute is to provide an outstanding continuing legal education program so that members of the legal profession are afforded a means of enhancing their skills and keeping abreast of developments of the law. The Institute is governed by a Board of Trustees composed of twenty-eight members consisting of the Immediate Past President, the President, the President-elect, the Secretary, and the Treasurer, all of the State Bar of Georgia; the President, President-elect and the Immediate Past President of the Young Lawyers Division; nine members to be appointed by the President of the State Bar of Georgia, each for a term of three years (the President has three appointments each year); two representatives of each of the participating law schools; and the Immediate Past Chairperson of the Institute. The Immediate Past President of the State Bar of Georgia serves as Chairperson of the Board of Trustees of the Institute.

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• Every “active” attorney in Georgia must attend 12 “approved” CLE hours of instruction annually, with one of the CLE hours being in the area of legal ethics and one of the CLE hours being in the area of professionalism. Furthermore, any attorney who appears as sole or lead counsel in the Superior or State Courts of Georgia in any contested civil case or in the trial of a criminal case in 1990 or in any subsequent calendar year, must complete for such year a minimum of three hours of continuing legal education activity in the area of trial practice. These trial practice hours are included in, and not in addition to, the 12 hour requirement. ICLE is an “accredited” provider of “approved” CLE instruction.

• Excess creditable CLE hours (i.e., over 12) earned in one CY may be carried over into the next succeeding CY. Excess ethics and professionalism credits may be carried over for two years. Excess trial practice hours may be carried over for one year.

• A portion of your ICLE name tag is your ATTENDANCE CONFIRMATION which indicates the program name, date, amount paid, CLE hours (including ethics, professionalism and trial practice, if any) and should be retained for your personal CLE and tax records. DO NOT SEND THIS CARD TO THE COMMISSION!

• ICLE will electronically transmit computerized CLE attendance records directly into the Official State Bar Membership computer records for recording on the attendee’s Bar record. Attendees at ICLE programs need do nothing more as their attendance will be recorded in their Bar record.

• The Commission on Continuing Lawyer Competency staff will mail a prescribed affidavit form to each active attorney at the end of the year. The form will show the CLE courses attended and the number of credit hours that are entered in the Bar records. Each attorney will swear or affirm that the CLE credits claimed on the affidavit were ACTUALLY ATTENDED. Attorneys who are late attending or have to leave a seminar for a period of time will have to strike the CLE hours shown on the affidavit and enter the hours actually attended and claimed; or inform the ICLE staff at the seminar to reduce the hours in the ICLE records before transmitting the credit hours in the ICLE record!

• If the affidavit is correct, the member need only sign the form confirming actual attendance and return it to the Commission.

• If the affidavit is incorrect, the member should enter the corrections, sign the form, and return it to the Commission.

• Do not mail anything to the Commission other than the affidavit. No receipts or other evidence of attendance are required to support the affidavit unless requested by the Commission.

• Should you need CLE credit in a state other than Georgia, please inquire as to the procedure at the registration desk. ICLE does not guarantee credit in any state other than Georgia.

• Any questions concerning attendance credit at ICLE seminars should be directed to Linda Howard Toll Free: 1-800-422-0893 x306; Athens Area: 706-369-5664 x306; Atlanta Area: 770-466-0886 x306
TO: ICLE Seminar Attendee

Thank you for attending this seminar. We hope that these program materials will provide a great initial reference and resource for you in the particular subject matter area. There is a chance, however, that you might find an error(s) in these materials, like a wrong case citation or a typographical mistake that results in an obvious misstatement of black-letter law, such as an incorrect length for the applicable statute of limitations.

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Thank you for your help. It is truly appreciated.

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Seminar Title: __________________________ Seminar Date: ____________

Page(s) Containing Error(s): ____

Text of Error(s): __________________________________________________________

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Suggested Correction(s): __________________________________________________

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