GEORGIA LAW REVIEW

VOLUME 47 SPRING 2013 NUMBER 3

ARTICLES

SYMPOSIUM ON EVIDENCE REFORM

FOREWORD[1]

Ray Persons[*]

Thank you to the Georgia Law Review and the University of Georgia School of Law for inviting me to discuss evidence reform in the State of Georgia. As a trial lawyer, it is both an honor—and a daunting task—to address such a distinguished group of evidence scholars as have gathered here today.

More than 150 years ago, the author of Georgia's first evidence code, Judge David Irwin, began with a simple principle: "The object of all legal investigation is the discovery of truth."[2] If that is so, and I believe that it is, then an evidence code is a lens that focuses the discovery and that brings truth into perspective. The rules of evidence filter information, controlling what evidence a jury may, and may not, hear as it weighs the claims before it. They focus the jury's perception of the evidence before it, setting the parameters of what a given piece of evidence does, or does not, establish. They are fundamental to our system of justice and affect, in a very real way, the manner in which legal proceedings are conducted and whether the ultimate outcome is fair and just.

---

[*] Partner, King & Spalding, LLP in Atlanta, Georgia. J.D., The Ohio State University, Moritz College of Law. B.S., *cum laude*, Armstrong State College.

[1] Adapted from Mr. Persons' Keynote Address, delivered at the *Georgia Law Review* Symposium on Evidence Reform, January 18, 2013.

[2] O.C.G.A. § 24-1-1 (2013).

But there is no one set of evidence rules that will allow a legal proceeding to be conducted fairly and efficiently. The rules of evidence were not handed down to us as if from Mount Sinai, etched in stone, for us simply to follow and apply. To the contrary, they must be derived and shaped, worked and reworked, based on our common experience as we attempt to fashion a set of rules that will govern all legal proceedings and the myriad issues they present. As these rules are developed, we are forced to make sometimes difficult choices and to balance competing considerations, and the choices we make and the balances we strike often say much about our values as a society.

I was, therefore, greatly honored when I was asked to serve as the Chairman of the State Bar of Georgia's Evidence Study Committee. Made up of practicing attorneys, judges, and academics from across the state, some of whom are here today, the Committee was tasked with studying and proposing reforms to Georgia's outdated evidence code. In the end, the Committee brought to a close a process that had been initiated more than two decades before, ultimately leading to the enactment of the first wholesale revision of Georgia's evidence code in more than 150 years.

To say that Georgia's evidence code was antiquated would be an understatement. The Committee's study report, which Professor Paul Milich authored, explains the development of Georgia's evidence code this way:

> In 1858, the Georgia Legislature appointed three commissioners, Richard Clark, Thomas R. Cobb, and David Irwin, to prepare a code which should "as near as practicable, embrace in a condensed form, the laws of Georgia," including the common law and principles of equity then recognized by the courts of this state. It was a massive task for the commissioners, and they were given less than two years to finish it. To Judge Irwin fell the task of preparing the Code of Practice, which included civil procedure, equity practice, and the rules of evidence. The work was completed in 1860

> and adopted by the legislature with only a few minor changes in December of that year. Due to the war, publication was delayed until 1863, and thus, the code has been referred to ever since as the Code of 1863.[3]

Judge Irwin's work, enacted in the Code of 1863, remained the primary source of Georgia's evidence code until only last year.

Of course, trial practice has changed dramatically over the past 150 years. Pretrial discovery has been liberalized. Courtroom proceedings and trial, with witnesses testifying under oath, are no longer the principal means by which we gather information, and trial lawyers are no longer forced to learn the facts and present their cases simultaneously. Today, we serve interrogatories and subpoena documents. We have "e-discovery," where we sift through hundreds of thousands of pages of documents and electronic messages, using sophisticated computer algorithms to winnow terabytes of information. We hire investigators and take deposition after deposition, all in an effort to know as much as we possibly can about our case before we ever step foot in the courtroom. At the same time, the use of experts has grown significantly. Unlike when Judge Irwin set his quill to paper in the days before the Civil War, experts today testify about every subject imaginable, and they present scientific and forensic evidence that was simply unthinkable even a few years ago. And finally, the level of the average juror's education and experience has increased. Jurors today are simply more sophisticated and more able to absorb, assimilate, and evaluate information.

Collectively, these factors created pressures to open up trials, to allow the evidence to be presented more efficiently and to rely increasingly on judges' and juries' good sense and ability to evaluate evidence presented to them. Georgia's courts were not immune to these pressures, and they struggled to broaden the admissibility of probative evidence within the framework created by an increasingly antiquated evidence code. Their ability to modernize Georgia's evidence rules was limited, however, because

---

[3] Paul S. Milich, *Georgia's New Evidence Code—An Overview*, 28 GA. ST. U. L. REV. 379, 380 (2012).

Judge Irwin's evidence rules were embedded in Georgia's statutory code, and those statutes could not be completely disregarded. So they struggled on.

One hundred and fifty years of incremental and ad hoc changes created basic weaknesses in the substance and structure of Georgia's evidence code. Substantively, Georgia simply had too many old rules that we did not need and too few modern rules that we did need. At times, this has left courts no alternative but to reject what was plainly authorized by the old Georgia law, sometimes without even acknowledging the law's existence. For example, Georgia law explicitly authorized jurors to serve as witnesses in cases on which they sat, providing that a "juror shall not act on his private knowledge respecting the facts, witnesses, or parties *unless he is sworn and examined as a witness in the case*."[4] The Georgia Supreme Court rejected this practice and held that a potential witness should be disqualified for cause from serving as a juror in the case.[5] It reached this conclusion, however, without citing—much less discussing—the Georgia statute.[6]

The presence of such anachronisms forced courts to "interpret" the evidence statutes in awkward attempts to shape them to modern times. For example, Georgia's best evidence rule, which was enacted when photography was in its infancy, applied only to documents and not to photographs or videos.[7] In one case, the prosecution wished to prove that the defendant assaulted the victim in a prison melee.[8] The State offered the testimony of a prison guard, who explained that he had watched a videotape of the incident and saw the defendant strike the victim. The witness did not produce the videotape he had described, and Georgia's ancient best evidence rule did not require production of the video. The Court of Appeals, recognizing the problems created by this

---

[4] O.C.G.A. § 17-9-20 (2012) (emphasis supplied).

[5] Lively v. State, 421 S.E.2d 528, 529 (Ga. 1992) ("[J]urors known by the parties to be prospective witnesses about matters material to the case should be excused for cause on proper motion.").

[6] *Id.*

[7] *See, e.g.*, Perkins v. State, 392 S.E.2d 872, 876 (Ga. 1990) ("[T]he best evidence rule applies only to writings.").

[8] *In re* C.G., 584 S.E.2d 33, 33 (Ga. Ct. App. 2003).

unfair presentation, creatively declared that the guard's testimony as to what he saw on the videotape was hearsay and, thus, inadmissible.[9] Of course it was not hearsay, but this was the court's best effort to remedy the obviously unfair result of a best evidence rule developed when silver plates were the photographic medium of choice.

As another example, the "vouching rule"—which prohibits a party from impeaching his own witness's credibility—was still reflected in Georgia's evidence code,[10] despite the fact that nearly every jurisdiction in the United States has abandoned it. Thus, while courts recognized long ago that there was "no good reason for the rule"[11] and had accordingly "pruned" the statute to the point that it did "not mean what it was formerly construed to mean,"[12] the vouching rule survived, and courts continued to apply it in Georgia cases.

Georgia continued to follow the nineteenth-century rule allowing juries to resolve certain evidentiary questions of fact. For example, if a witness testified that he heard an employee of a party make a statement, the jury would be instructed that the statement was offered as an agency admission and that, before the jury could consider the statement, it must first decide whether the witness was an agent of the party and whether he was acting within the scope of his agency at the time the statement was made.[13] This not only added unnecessary complexity to the jury's task but also exposed the jury to the evidence in question, relying on the jury's ability to "disregard" the evidence it had already heard if it was ultimately deemed inadmissible. Of course, modern rules of evidence wisely leave questions of admissibility such as

---

[9] *Id*. at 34 ("Since the videotape was not made available to the court by being placed into evidence for the defendant to see and mount a defense, there was no competent evidence of C.G. being the perpetrator. The officer involved in the incident had no idea who had kicked him. The alleged identification of C.G. was therefore based entirely on out-of-court hearsay and could not be properly considered.").

[10] O.C.G.A. § 24-9-81 (2012).

[11] Outlaw v. State, 546 S.E.2d 327, 329 (Ga. Ct. App. 2001).

[12] Jackson v. Ensley, 310 S.E.2d 707, 710 (Ga. Ct. App. 1983).

[13] *See, e.g.*, Ga. Power v. Busbin, 283 S.E.2d 647, 650–51 (Ga. Ct. App. 1981); Papas v. Robinson, 137 S.E.2d 684, 689 (Ga. Ct. App. 1964).

this to the trial judge rather than the jury, yet Georgia persisted in assigning these admissibility determinations to the jury.

Georgia was also the only jurisdiction in the United States that continued to follow the nineteenth-century rule that hearsay evidence was "illegal" evidence that could not sustain a verdict—even if no objection was made at trial.[14] This rule invited nothing but trouble. In one notable case, for example, the plaintiff presented his damages evidence using documents, but failed to lay a proper foundation for their admission under the hearsay rule.[15] The defendant essentially sandbagged the plaintiff, making no objection and instead waiting until the jury returned a plaintiff's verdict.[16] At that point, the defendant then moved for judgment on grounds that the only evidence of damages was illegal hearsay and thus not evidence at all.[17] The trial court granted the motion, and the court of appeals affirmed.[18] Yet, despite results like this, the rule persisted in Georgia—and Georgia alone.

Likewise, Georgia's rule against character evidence in criminal cases had drifted over time far away from its common law moorings until it had become just a shadow of its former self. Georgia was the only jurisdiction in the United States that routinely allowed evidence of other crimes to show the defendant's "bent of mind" toward the criminal conduct in question.[19] How "bent of mind" differs from impermissible "bad character" evidence was never clear, and it created an obvious risk that the jury would infer that defendants were more likely to have committed the crime charged simply because they had committed other crimes in the past.[20] This is, of course, precisely why evidence of bad character should be excluded from criminal trials and why the Federal Rules do not permit the introduction of other bad acts to prove conduct in conformity therewith. Nevertheless, admission of

---

[14] Milich, *supra* note 3, at 391.

[15] Anton Int'l Corp. v. Williams–Russell & Johnson, Inc., 377 S.E.2d 688, 689 (Ga. Ct. App. 1989).

[16] *Id.* at 689.

[17] *Id.*

[18] *Id.*

[19] *See* Milich, *supra* note 3, at 407.

[20] *Id.*

other bad acts to show "bent of mind" was common in Georgia, no doubt to the prejudice of many criminal defendants.

While the foregoing examples demonstrate the substantive flaws in Georgia's former evidence code, the second basic weakness in the code was structural: the rules of evidence were simply hard to find and apply. In the 150 years since Judge Irwin drafted the Code of 1863, new evidence statutes were enacted and scattered throughout the laws of the State of Georgia. In fact, by the time the Committee submitted its study report, there were more than 100 evidence related statutes located outside of Title 24, where Georgia's evidence laws were codified.[21] At the same time, 150 years of case law had applied a heavy gloss to many of the rules. Thus, "the rule" frequently was not found in the evidence code itself, but rather in the reported decisions of Georgia's appellate courts. Moreover, the case law was not always consistent, such that both sides could argue over evidentiary concepts in Georgia like *res gestae* or the ultimate issue rule and cite cases that seemed to support opposite positions.[22] And as a result, a tremendous amount of time was wasted searching for rules that should have been be plain and simple. There were inconsistencies in the application of the rules from court to court, and certain parties seemed to be unfairly penalized by rules that had long outlived their original justifications.

I am certain that scholars, judges, and practitioners alike will find things to like, and things to dislike, in the revised evidence code. And while there is not time for me to detail all the changes to the code, I am equally certain that much will be written about the wisdom of changing what has been changed and preserving what has not. I am, however, a trial lawyer at the core, and it is from this perspective that I view the changes wrought by the new rules, aspects of which are worthy of particular note.

First and foremost, with the location of nearly all the rules in Title 24, and numbering them based on the federal rules, the new

---

[21] David N. Dreyer et al., *Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence*, 63 MERCER L. REV. 1, 5 (2011).

[22] *See, e.g.*, Milich, *supra* note 3, at 392–96 (discussing the vagueness of the *res gestae* doctrine).

evidence code is more accessible and, therefore, more useful. This has broad implications for the litigants and trial courts because it will make the litigation process more efficient and reduce the likelihood of error. Also to be applauded is the new code's abandonment of such outmoded, nebulous, and peculiar concepts such as "illegal hearsay" and *res gestae*, thereby promoting fair play and alleviating traps for the unwary. Another laudable feature of the new code is that it eases the authentication, accessibility, and admissibility of evidence. This, too, will improve efficiency at trial. And, by clarifying and broadening the scope and making more definitive the protection of statements made by parties and nonparties in the course of compromise, negotiations, and mediation, the new rules facilitate alternative dispute resolution.

In conclusion, this Symposium asked whether evidence reform had turned a "grotesque structure" into a "rational edifice."[23] I will leave it to those gathered here today to answer that question for themselves and to form their own conclusions about whether Georgia's evidence code now forms a rational edifice. But I will say this: I believe that evidence reform in Georgia has greatly improved the rules of evidence that govern civil and criminal proceedings in courts throughout this state. And I believe this will facilitate and enhance the search for truth that Judge Irwin rightly recognized is the object of all legal inquiry. And that, I believe, can only be a positive development.

Thank you.

---

[23] Michelson v. United States, 335 U.S. 469, 486 (1948) (observing in response to litigant's suggestion that the Court adopt a new rule for cross-examinations about prior arrests that "[t]o pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice").