Evidence

by Hardy Gregory, Jr.*

I. Character—Similar Crimes

Twenty-eight years separate two instances of conflict between the Georgia Court of Appeals and the Georgia Supreme Court. Their relative positions have reversed. The subject is the same and the issue is no more finally resolved in one instance than in the other. The lively debate goes on.

Every criminal practitioner is familar with *Bacon v. State*,[1] in which the supreme court reversed the court of appeals' opinion[2] that allowed evidence of six previous burglaries to be admitted in defendant's burglary trial. In that case, the court of appeals recognized the general rule that when one is on trial for a given offense, evidence of independent and separate offenses is not admissible because it would place defendant's character in issue. An exception was recognized. The other six burglaries were admissible to show defendant's intent to steal. Not so, said the supreme court. The other crimes were not logically connected to the charged offense. This connection is necessary before intent can be shown.

Bacon has been cited down through the years and was cited by both courts in a recent case. Judge Deen was the author of the court of appeals' opinion in *Johnson v. State*.[3] Defendant was charged with selling marijuana. The trial court admitted testimony of two other drug sales by defendant to the same undercover agent who was involved in the trial. The majority opinion examined the history of the rule leading up to *Bacon* and observed that there has been an increasing tendency to broaden the application of the rule. Holding that the courts have gone too far in

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1. 209 Ga. 261, 71 S.E.2d 615 (1952).
2. 85 Ga. App. 630, 70 S.E.2d 54 (1952).
3. 154 Ga. App. 793, 270 S.E.2d 214, *rev'd*, 246 Ga. 654, 272 S.E.2d 321 (1980). Judges Quillian, Smith, Shulman, Banke, and Sognier joined in the opinion. Judge Carley concurred in the judgment only, while Judges McMurray and Birdsong dissented.

permitting this type of evidence, the court of appeals reversed the trial court.[4] There was no connecting up of the other crimes with the offense for which defendant was on trial.

The supreme court disagreed[5] in an opinion written by Justice Bowles.[6] The majority opinion held that the other crimes were probative on the issue of identity.

> Drug cases are no different from any other cases. If the defendant is proven to be the perpetrator of another drug crime and the facts of that crime are sufficiently similar or connected to the facts to the crime charged, the separate crime will be admissible to prove identity, motive, plan, scheme, bent of mind, or course of conduct.[7]

Justice Hill's dissent asserted that the majority had not applied *Bacon*, but had overruled it.[8]

Justice Jordan dissented from another opinion of the supreme court, *Robinson v. State*,[9] because he felt the other crimes had "no logical connection or relevance to the issues at trial."[10] The point may be simply to realize that with a change in court personnel since the *Johnson* opinion, someone is bound to try for another reversal in court positions in less than twenty-eight years.

II. Authentication of Writings

Authentication has been defined as the process of demonstrating a person's connection with a writing (or any other tangible object).[11] It is often a matter of relevancy in that the connection between the person and the writing must be shown before the writing is relevant to any issue.[12] In some cases authentication is proved by direct evidence. The author may testify as to his authorship, or another witness may testify that he saw the writing made by its author. However, there are times when circumstantial evidence is relied on to establish authenticity. McCormick states

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4. Judge Deen had given warning six months earlier in Anglin v. State, 151 Ga. App. 570, 260 S.E.2d 563 (1979), and had reversed the trial court's admission of evidence of similar crimes but without the in depth analysis of *Johnson*.

5. 246 Ga. 654, 272 S.E.2d 321 (1980).

6. Justices Undercofler, Nichols, Marshall, and Clarke joined in the opinion while Justices Hill and Jordan dissented.

7. 246 Ga. at 655, 272 S.E.2d at 322-23.

8. *Id.* at 658, 272 S.E.2d at 324 (Hill, J., dissenting).

9. 246 Ga. 469, 471, 271 S.E.2d 786, 788 (1980) (Jordan, J., dissenting).

10. *Id.* at 471, 271 S.E.2d at 788 (Jordan, J., dissenting).

11. *See* C. McCormick, McCormick's Handbook of the Law of Evidence § 218, at 543 (2d ed. 1972).

12. *Id.*

that "proof of any circumstances which will support a finding that the writing is genuine will suffice to authenticate the writing."[13]

Two rather interesting factual situations resulted in opinions demonstrating the use of circumstantial evidence to authenticate writings. One was a criminal case,[14] the other civil.[15] In the criminal case, three men burglarized a residence. One of the three, Danny Smith, pled guilty. In his statement to the police he implicated two men from Valdosta whom he referred to as "Donny Herring" and "Cooty". The State began prosecution against the two named men, but dropped the case when it was discovered that there was a lack of any corroborating evidence. Certain other evidence resulted in the arrest and trial of Smith's two brothers, Gene and Donald. During the search of Gene Smith's person, a writing was found in his pocket bearing the signature "Danny". It read:

> I just thought I'd let you know what is going on. I'm trying to clear the other two. I think we've figured out, I've figured out how. They just picked up another person and his name is Donny Herring, and he's from Valdosta. He's also a paid informant so, I think I'm going to let him get some time. Because he's already ratted on a couple up here.

This writing was introduced in evidence at the trial of the Smith brothers. After their conviction, the case went to the court of appeals[16] where the trial court was reversed for admitting the writing without authentication. The court of appeals recognized the rule that authentication may be shown by circumstantial evidence, but found that the only circumstance tending to authenticate the writing was the evidence that the writing was in the possession of Gene Smith. That was insufficient. The supreme court took the view that there were other circumstances in addition to possession by Gene Smith. The evidence that Danny Smith had implicated a Donny Herring from Valdosta in his statement to the police, and the presence of this same name and place in the statement together with the signature "Danny" were additional circumstances. These circumstances, together with possession, made a prima facie showing that the writing was authentic. Accordingly, the judgment of the court of appeals was vacated, and the case remanded.

In the civil case, *Bodrey v. Bodrey*,[17] (a divorce, alimony, and child custody case) certain "love letters" from a woman friend were found by the wife in the husband's office desk drawer. The supreme court held that, inasmuch as the letter was admitted for the limited purpose of explaining

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13. *Id.* § 222, at 548.
14. State v. Smith, 246 Ga. 129, 269 S.E.2d 21 (1980).
15. Bodrey v. Bodrey, 246 Ga. 122, 269 S.E.2d 14 (1980).
16. Smith v. State, 154 Ga. App. 102, 267 S.E.2d 629 (1980).
17. 246 Ga. 122, 269 S.E.2d 14 (1980).

the wife's subsequent conduct toward the husband, the only proof of authenticity required was that which would support its relevancy for that limited purpose. The wife's testimony that she found the letter in her husband's desk was sufficient proof. However, the author of this article, who presided over the trial of the case, points out that there were circumstances within the writing itself analagous to those in the previously discussed criminal case that would have justified a conclusion similar to that reached in the criminal case.

III. OPINION

In most malpractice cases against medical doctors, an accepted standard of practice in the pertinent geographical area must be established before the court. This standard is then used to measure the defendant doctor's conduct. That standard is ordinarily established through the opinion of a doctor who testifies as an expert witness.[18] In *McCormick v. Avret*,[19] the defendant doctor was alleged to have failed to measure up to the required medical standard when he caused an infection in plaintiff's wrist as a result of using a nonsterile hypodermic needle. A nurse had unsuccessfully attempted to draw a blood sample from the patient by inserting the hypodermic needle first in the right arm, and then in the left arm near the elbow. The defendant doctor then used the same hypodermic needle and successfully withdrew blood from the patient's wrist area. At trial, the nurse was called by plaintiff and, had she been permitted to do so, would have testified about procedures used in sterilizing needles, based upon her education and experience. Since the record is not quoted in the court of appeals' opinion, the precise testimony that would have been given is unknown. The nurse was not allowed to testify on the ground that this type of opinion could be given only by a medical doctor and, therefore, the nurse was not properly qualified to render an opinion.

The court of appeals, in a decision written by Judge Smith, reversed the trial court. The rationale of the opinion was that drawing blood is not a procedure performed exclusively by doctors. As the majority viewed the case, the excluded testimony related only to the correct procedure for keeping a hypodermic needle sterile. This obviously falls short of testimony relating to a standard of care in the actual drawing of blood. The nurse, through training and experience, was qualified in the procedures of keeping hypodermic needles sterile. A concurring opinion written by Judge Shulman carefully limited the ruling to the peculiar facts of this

18. Shea v. Phillips, 213 Ga. 269, 271, 98 S.E.2d 552, 555 (1957). Notice that Justice Mobley in his dissent indicated that the special area of a medical doctor's expertise is in diagnosis, choice of remedy, and method of care or treatment. *Id.* at 273, 98 S.E.2d at 556.

19. 154 Ga. App. 178, 267 S.E.2d 759 (1980).

case.[20] He indicated fear that the opinion might be read to permit paraprofessionals to testify concerning matters that only professionals had previously been qualified to testify about. Judge Birdsong dissented,[21] reasoning that the omitted testimony was offered to establish a standard of care as opposed to merely demonstrating a procedure. He admitted that the testimony might very well have shown what procedure was followed in the experiences of the witness, but that such a showing would be irrelevant to the issue of the standard of care in the profession. Some fine distinctions are drawn in the various opinions of the court of appeals judges. The supreme court[22], however, unanimously affirmed the majority view expressed in the court of appeals. From this case it can be seen that not all procedures used by a medical doctor in dealing with patients come within the exclusive purview of the profession. Those procedures that do not come within this purview do not require establishment of the professional standard. One then asks, since testimony like that offered here is not relevant to the question of the proper standard, what is its relevance? Is it objectionable because what may be done on other occasions simply has no relevance to what took place in the instant case? If a standard of care is not established, what is established?

Lay witness opinion concerning the mental condition of a person should be liberally allowed. A good example is *Leonard v. State*.[23] Defendant entered a restaurant in Manchester wearing only shorts and tennis shoes. He had been in the restaurant only briefly, acting in a strange manner, when suddenly he grabbed a customer's wallet and ran. At trial there was expert testimony that defendant was insane, and there was evidence of his prior committal to mental institutions. This evidence failed to convince the jury, and defendant was convicted of robbery. He managed, however, to persuade the court of appeals to reverse the trial court for its refusal to allow two customers of the restaurant, who observed defendant during the brief episode, to give their opinion that defendant was insane. The specific objection sustained by the trial court was: "I don't think that is sufficient time for him to base an opinion or be able to form an opinion whether the fellow was crazy or not."[24] The question is, therefore, how long does it take to formulate an opinion on another person's insanity? The answer, according to the court, is not very long. Except in extreme cases, when the witness gives a factual basis for his opinion it is for the jury, and not the judge, to weigh that basis. Quoted in the court of appeals' opinion was language used by Justice Lumpkin in 1860, which

20. *Id.* at 179, 180, 267 S.E.2d at 760, 761 (Shulman, J., concurring specially).
21. *Id.* at 180, 267 S.E.2d at 761 (Birdsong, J., concurring in part and dissenting in part).
22. Avret v. McCormick, 246 Ga. 401, 271 S.E.2d 832 (1980).
23. 157 Ga. App. 37, 276 S.E.2d 94 (1981).
24. *Id.* at 38, 276 S.E.2d at 96.

has not since been improved upon in expressing the idea.

> "One who has seen and conversed with an insane person, and observed his countenance and behavior, has an impression made upon his mind which is incommunicable. This court is committed to the rule, that the jury, in such a case, is entitled to the benefit of this impression. It may be said that [the witness'] opportunity of observing and judging of the capacity of [the defendant] was too limited. But . . . so different are the powers and habits of observation in different persons, that no general rule can be laid down as to what shall be deemed a sufficient opportunity of observation, other than, in fact, it has enabled the observer to form a belief or judgment thereon."[25]

A circumstance that is both a matter of opinion evidence and a matter of procedure (summary judgment) presents an issue that has divided the courts considerably. Over a decade ago, the supreme court announced in *Ginn v. Morgan*[26] that a summary judgment could not be granted solely upon opinion evidence. In *Howard v. Walker*,[27] however, the court held that one special situation required a contrary result. When a plaintiff is required to produce an expert opinion at trial in order to prevail (the typical medical malpractice case), and a defendant produces a contrary expert opinion on motion for summary judgment, the defendant will be entitled to summary judgment if the plaintiff does not produce an expert opinion in opposition to the motion. The court was divided on this issue. In due course, a case came along in which the expert opinion offered by defendant in support of his motion for summary judgment was his own opinion.[28] The court of appeals concluded that this peculiarity was sufficient to distinguish *Howard*. On certiorari, the supreme court disagreed[29] and held that even defendant's own expert opinion given on motion for summary judgment was enough to meet the *Howard* rule. After all, reasoned the court, the rule that a party cannot be a witness was eliminated 114 years ago.[30] The court was again divided. The same issue was raised in *Payne v. Golden*,[31] which was decided accordingly and produced the same division in the court.

IV. HEARSAY

If hearsay is an out-of-court declaration testified to by an in-court wit-

25. *Id.* at 39, 276 S.E.2d at 96 (quoting Choice v. State, 31 Ga. 424, 466 (1860)).
26. 225 Ga. 192, 167 S.E.2d 393 (1969).
27. 242 Ga. 406, 249 S.E.2d 45 (1978).
28. Knight v. Parker, 152 Ga. App. 467, 263 S.E.2d 248 (1979).
29. Parker v. Knight, 245 Ga. 782, 267 S.E.2d 222 (1980).
30. GA. CODE ANN. § 38-1603 (1981).
31. 245 Ga. 784, 267 S.E.2d 211 (1980).

ness, and offered to prove the truth of the matter asserted therein, is it nonetheless hearsay when the out-of-court declarant and in-court witness are the same person? This is, of course, a long debated subject. The modern trend seems to be to permit such testimony primarily on the theory that the declarant, when testifying, would then be before the court and subject to cross-examination.[32] Georgia is among those jurisdictions that accept the modern trend and, accordingly, this evidence is admissible. *Webb v. State*[33] presented a good factual situation for an analysis because it quite pointedly focused the issue. Defendant, Bobby Webb, was convicted for assault with intent to rape his ex-fiancee. At trial, the fiancee testified that shortly after the event she called her father and told him, "Bobby had tried to kill me." Identity of the assailant was the only real issue in the case. Bobby denied his presence at the scene of the crime and produced alibi witnesses. The fiancee-victim could obviously testify at trial that she recognized defendant, but it significantly strengthened her testimony when she was able to testify that she called her father right after the event and identified defendant to her father. At the time of the phone call the fiancee was not under oath, not subject to cross-examination, nor was the fact finder present to observe her demeanor. During the trial, however, she was before the court, and all those safeguards were present. Under the modern rule, that is enough to override the traditional untrustworthiness of hearsay.

A. Dying Declarations

Georgia Code Ann. section 38-307 states that, "[d]eclarations by any person in the article of death, who is conscious of his condition, as to the cause of his death and the person who killed him, shall be admissible in evidence in a prosecution for the homicide."[34] In a murder trial,[35] which involved the contemporary drug culture and testimony that would be suitable for a Hollywood production, the victim lived long enough to identify his attacker. It was clear that the deceased was aware of his impending death when he made the statement offered at trial. Part of defendant's attack against the admissibility of this statement was that such a statement must be made within the time limits usually applied to "res gestae" statements. Two old supreme court cases[36] were pointed to as posing this requirement. Those cases were distinguished, however, and

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32. *See* C. McCormick, McCormick's Handbook of the Law of Evidence § 251, at 601 (2d ed. 1972).

33. 154 Ga. App. 395, 268 S.E.2d 438 (1980).

34. Ga. Code Ann. § 38-307 (1981).

35. McAllister v. State, 246 Ga. 246, 271 S.E.2d 159 (1980).

36. Bush v. State, 109 Ga. 120, 34 S.E. 298 (1899); Taylor v. State, 120 Ga. 857, 48 S.E. 361 (1904).

this requirement was not imposed.

B. *Deceased Witnesses*

Not to be confused with dying declarations are those situations in which a witness made a statement during life but died before the trial. In *Irby v. Brooks*,[37] a party wished to inject this type of statement into evidence but there was a hearsay objection. The proponent of the testimony contended the statement was admissible "out of necessity" and cited *Moore v. Atlanta Transit System*[38] for that position. If *Moore* did lay down such a rule, it is not now the law of Georgia. Necessity is but half the rule. The other half is trustworthiness. "The two underlying reasons for any exception to the hearsay rule are a necessity for the exception and a circumstantial guaranty of the trustworthiness of the offered evidence. . . ."[39]

C. *Business Records*

There are usually many cases that illustrate a general difficulty with the application of the business records statute.[40] A common occurrence is one in which records made in one business are transmitted to another. Do the records become the "business records" of the receiving business? A recent supreme court case suggests that, to a limited extent, they can.[41] However, as one might readily suspect, not every record qualifies. Only "[w]here routine, factual documents are made by one business, transmitted or delivered to a second business, and there entered or kept by the second business in the regular course of the business of the receiving business"[42] can the records become business records under the statutory meaning. In *Moore v. State*,[43] the court of appeals made it clear that there must be a relationship between the two businesses regarding the transaction and a reliance upon the records by the receiving business. In the language of the opinion, the records

> become business records of the [receiving business] *not because they [are] received by the second business and put or kept in its files* (such will always be "in the course of business"); but *because they are routine factual documents made by the first business and transmitted to the*

37. 246 Ga. 794, 273 S.E.2d 183 (1980).
38. 105 Ga. App. 70, 123 S.E.2d 693 (1961).
39. 246 Ga. at 795 (quoting Chrysler Motors Corp. v. Davis, 226 Ga. 221, 173 S.E.2d 691 (1979)).
40. GA. CODE ANN. § 38-711 (1981).
41. Lewis v. United Cal. Bank, 240 Ga. 823, 242 S.E.2d 581 (1978).
42. *Id.* at 824, 242 S.E.2d at 582.
43. 154 Ga. App. 535, 268 S.E.2d 706 (1980).

second business as part of a related or symbiotic business relationship—almost as if the two firms were headquarters and branch in the same large corporation—in which the business of the receiving firm relies upon these records.[44]

In *Moore*, defendant was prosecuted for welfare fraud. It was necessary for the State to prove that defendant's husband received certain Veterans Administration payments. The files of the Department of Family and Children Services contained letters received from the Veterans Administration which asserted that the payments had been made. The State sought to introduce these letters as business records of the Department. In reversing the lower court, the court of appeals held that the letters were not "routine factual documents" that were "regularly transmitted in the mutually operative course of the two businesses."[45] These letters were characterized as "extracts, summaries or transcripts" furnished by one business purely as information to another business.[46]

Georgia recognizes the "summary of voluminous documents" rule of evidence. When the facts can be determined only by examining extensive records, an auditor or other person may examine the records and place a summary into evidence.[47] The records must be readily accessible to the court and to the parties. Hence, there is a requirement for authentication or expert identification and there is a requirement for accessibility. One must remember, however, that some documents which might constitute summaries also completely qualify as business records and thus, need not meet the criteria of the summary of documents rule. A good example of the operation of this rule was provided in *Wickes Lumber v. Energy Efficient Homes, Inc.*[48] In that case, the document offered into evidence was a monthly statement of account prepared in the party's business. The document satisfied the elements of the business record statute. Nevertheless, the opponent of the evidence contended that because the document was a summary, there was need of authenticity by an auditor and a showing of accessibility of the records from which the summary was prepared. The court held that since the summary itself was a qualified business record, no further showing was required.

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44. *Id.* at 540, 268 S.E.2d at 710 (emphasis in original); *accord*, Grogins v. State, 154 Ga. App. 606, 269 S.E.2d 98 (1980).

45. 154 Ga. App. at 540, 268 S.E.2d at 710.

46. *Id.*

47. DOT v. Delta Mach., 157 Ga. App. 423, 426, 278 S.E.2d 73, 77 (1981); Stewart v. State, 246 Ga. 70, 73-74, 268 S.E.2d 906 (1980).

48. 157 Ga. App. 303, 277 S.E.2d 298 (1981).

V. OTHER

A. *Motion in Limine—Motion to Suppress*

In two procedural matters relating to evidence the Georgia Supreme Court has laid down significant rules. In an earlier decision, *Harley-Davidson Motor Co. v. Daniel*,[49] the court held that once a motion *in limine* has been overruled, the party filing the motion is not required to make any further objection when that same evidence is offered at trial. In *Kilgore v. State*,[50] a criminal case, the court applied this same rule to a motion to suppress. In its opinion, which was rendered during the January, 1981 term, the supreme court reversed a contrary opinion of the court of appeals.[51]

B. *Jury View*

Jordan v. State[52] arose out of a prison break from Georgia State Prison in Reidsville and resulted in a conviction for murder and mutiny in a penal institution. For our purposes the opinion is significant because it sheds light on the subject of juries viewing evidence and scenes outside the courtroom as part of the trial. The jury was taken to the prison to view the scene where the alleged offenses occurred so that they could better understand the testimony of witnesses. Although defendant was not allowed to be present for security reasons, the supreme court found this to be a proper procedure. A distinction should be made between a jury view for the purpose of observing evidence and a jury view for the purpose of acquainting the jurors with the scene of a particular occurrence. In the former, there is usually an item of evidence such as an automobile that is simply too large to be brought into the courtroom. The latter, which occurred in this case, is designed simply to allow the jury to better understand the testimony, and is not itself considered "evidence." At least in the latter situation, this is not a stage of the proceedings that requires the defendant's presence either as a matter of federal constitutional law or as a matter of state law. The court stated the rule as follows:

> We hold that a jury view of the premises relevant to the case made for the purpose of enabling the jury to better understand the testimony and not made for the purpose of allowing the jury to see evidence introduced in the case, which view is conducted without the presence of the defendant, does not violate the defendant's right of confrontation. . . . We

49. 244 Ga. 284, 260 S.E.2d 20 (1979).
50. 247 Ga. 70, 274 S.E.2d 332 (1981).
51. Kilgore v. State, 155 Ga. App. 739, 272 S.E.2d 505 (1980).
52. 247 Ga. 328, 276 S.E.2d 224 (1981).

further hold that it is within the trial judge's discretion to allow the defendant on trial in a criminal case to attend the view of the alleged crime scene, or to refuse to allow the defendant to do so for cause.[53]

C. Competency

Georgia Code Ann. section 38-1606 provides that in an action instituted in consequence of adultery, neither party is competent to testify to facts showing or tending to show adultery.[54] In *Owens v. Owens*,[55] the supreme court held that an extra-marital homosexual relationship constitutes adultery. Therefore, the rule of incompetence attached.

In *Herron v. State*,[56] the court of appeals held that a seven year old child who was able to understand the nature of an oath was a competent witness. *Herron* demonstrates that trial judges have considerable discretion in applying the competency rule and in determining whether the oath is understood.

D. Reopening Evidence After Deliberation Begins

In Georgia, a trial judge is vested with discretion to allow a party to reopen the case after resting or closing for the purpose of introducing additional evidence. Until recently, however, it was not clear what should happen when a party attempted to do this after the jury had already begun the process of deliberation. There is danger of overemphasizing the additional evidence in the minds of the jurors and there is danger of disrupting orderly trial procedures since, obviously, the litigation must end at some point in time. The opinion of the supreme court in *State v. Roberts*[57] announced the rule that, at least when the jury requests additional evidence after beginning deliberation, the trial judge is vested with sound discretion to allow or disallow the request. Whether a different rule will apply when the request comes not from the jury but from a party remains for another day. Nothing in the *Roberts* opinion indicated that there should be any distinction.

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53. *Id.* at 346, 276 S.E.2d at 239 (citation omitted).

54. GA. CODE ANN. § 38-1606 (1981); *see* Lowry v. Lowry, 170 Ga. 349, 153 S.E. 11 (1930). For a relaxation of the rule, see Bodrey v. Bodrey, 246 Ga. 122, 269 S.E.2d 14 (1980).

55. 147 Ga. 139, 274 S.E.2d 484 (1981).

56. 155 Ga. App. 791, 272 S.E.2d 756 (1980).

57. 247 Ga. 456, 277 S.E.2d 644 (1981), *rev'g* Roberts v. State, 156 Ga. App. 405, 274 S.E.2d 772 (1980). Note: Justice Gregory wrote the opinion for State v. Roberts, 247 Ga. 456, 277 S.E.2d 644 (1981).

E. Ultimate Jury Issue

Georgia clearly belongs to those jurisdictions that allow opinion testimony, otherwise admissible, even if it embraces an ultimate issue to be decided by the fact finder. This procedure is in accord with the trend of the last four decades. One still hears the complaint that this type of evidence "invades the province of the jury" but that objection no longer will suffice to exclude testimony that is otherwise admissible. Two cases that dealt with this subject were published during the survey period. The opinion in *Smith v. State*[58] represents a rather complete analysis by Justice Hill and the opinion in *Security Life Insurance Co. v. Blitch*[59] by Judge Carley is a compatible opinion with emphasis on the difference between ultimate factual issues and ultimate legal issues. These two cases clearly illustrate that Georgia courts now agree with Wigmore on whether opinion evidence should be allowed "on the issue before the jury." Wigmore's position, simply stated, is that exclusion of evidence on this ground is "impracticable, misconceived, and lacking any justification in principle."[60]

F. Attorney-Client Privilege

The opinion in *Marriott Corp. v. American Academy of Psychotherapists, Inc.*,[61] written by Judge McMurray, is an important decision concerning the attorney-client privilege in the corporate setting. This opinion deals with communications between the in-house counsel of one division of a corporation and a director of another division of the same corporation. The federal courts have had considerable litigation in this area and in *Marriott* the court of appeals turned to the federal opinions and found two tests that had been developed earlier. One was the "control group" test.[62] Under this test, an employee's statement is not considered a corporate communication (and hence not subject to privilege) unless the employee is in a position to control or take a substantial part in a decision to be made upon advice of an attorney, or is in a group or body with that authority. The second one was the "subject matter" test.[63] Under this test, in order for the employee to be identified with the corpo-

58. 247 Ga. 612, 277 S.E.2d 678 (1981). This opinion is also important in recognizing the admissibility of an expert's opinion regarding the "battered woman syndrome."

59. 155 Ga. App. 167, 270 S.E.2d 349 (1980).

60. 247 Ga. at 615, 277 S.E.2d at 680 (quoting VII WIGMORE, EVIDENCE §§ 1920-21 (3d ed. 1940)).

61. 157 Ga. App. 497, 277 S.E.2d 785 (1981).

62. *See* City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483 (E.D. Pa. 1962).

63. *See* Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970).

ration, the employee must make the communication at the direction of his superiors in the corporation. Furthermore, the subject matter upon which an attorney's advice is sought by the corporation and which is dealt with in the communication must be the performance by the employee of the duties of his employment. The court rejected both these tests and adopted yet a third, more recent test known as the "modified subject matter" test.[64] The test was stated as follows:

> [T]he attorney-client privilege is applicable to an employee's communication if (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.[65]

64. *See* Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977).

65. 157 Ga. App. at 505, 277 S.E.2d at 791-92 (quoting Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1977)).