Special Contribution

Georgia's New Evidence Code: After the Celebration, a Serious Review of Anticipated Subjects of Litigation to be Brought on by the New Legislation

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As January 1, 2013 approaches, the Georgia Bar is anticipating the new Georgia Evidence Code (GEC), House Bill 24,[1] due to take effect on

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1. Ga. H.R. Bill 24, Reg. Sess. (2011) [hereinafter "HB 24"] (codified as amended in scattered sections of O.C.G.A. tits. 24 to 35 (Supp. 2012)) (effective Jan. 1, 2013).

that day.[2] Several authors have canvassed the particular changes the GEC brings to the existing Georgia Rules of Evidence, as well as the differences between the new GEC and the Federal Rules of Evidence (FRE). Those articles are commended for your reading, as they drive not only lawyers' courtroom presentation but also their trial preparation. Rather than rehashing the changes the GEC brings, this Article will address the abbreviated history preceding the passage of House Bill 24 and the significant impact that some of those changes will have on cases outside the courtroom.

I. HISTORY OF HOUSE BILL 24 AND THE INFLUENCE OF THE JUDICIARY AND COMMON LAW ON THE NEW GEC

The enactment of House Bill 24 (the Bill) is an obviously significant event in Georgia legal history and worthy of acclaim. The FRE, the organizational template for the new Code and the source text for the language of the new GEC, has been in effect for over thirty years.[3] As with the Federal Rules of Civil Procedure, the FRE has effectively become the model code as most states adopted the FRE, in whole or part, soon after Congress accepted the FRE for federal courts.[4] The Georgia legislature unsuccessfully took measures to follow suit, but not until a decade after the FRE were implemented in the federal courts, and not until more than thirty other states had already done so.[5] Now, more than two decades after the General Assembly's initial attempt and failure to adopt the FRE, Georgia is finally joining the ranks of forty-three other states.[6]

Legislative reviews written by students at the Georgia State University College of Law detail the political course of the Bill from the 2009-2010 session of the General Assembly, where it died on the Senate floor,[7] to the 2010-2011 session when, after being revived by Representative Wendell Willard, it passed in the House and was carried to the Senate by Senator Bill Cowsert.[8]

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2. *Id.*

3. 28 U.S.C. § 2074 (2006).

4. Paul S. Milich, *Georgia's New Evidence Code–An Overview*, 28 GA. ST. U. L. REV. 379, 380 (2011).

5. *Id.*

6. *Id.* at 380 n.6; David N. Dreyer, F. Beau Howard & Amy M. Leitch, *Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence*, 63 MERCER L. REV. 1, 2 n.3 (2011) (indicating that Massachusetts, for all practical purposes, also operates under a form of the Federal Rules of Evidence).

7. Daniel Hendrix, Sofia Jeong & Warren Thomas, Legislative Review, *Evidence*, 27 GA. ST. U. L. REV. 1, 12 (2010).

8. Robert Steele, Legislative Review, *Evidence*, 28 GA. ST. U. L. REV. 1, 6, 10 (2011).

During its time in the legislature, the Bill was threatened by amendments introduced by its own sponsor that appeared to be poison pills intended to kill it.[9] Nevertheless, the Senate finally debated the Bill and voted 50–3 in its favor on April 14, 2011, the last day of the legislative session.[10] The 2011 Bill was "virtually identical" to the failed 2010 Bill,[11] with the only substantive change being an amendment to conform the GEC to the new language of FRE 804(b)(3)'s "statement against interest rule,"[12] revised pursuant to the Federal Rules Enabling Act[13] and designated to take effect on December 1, 2010.[14]

With the new Code now a *fait accompli*, the Authors believe it is important to reflect on the fact that this codification of Georgia evidence law overcame not only a generation of lawyer-legislator resistance but also was a significant event in the now centuries-long endeavor to codify common law principles. The generation of resistance to the FRE in the General Assembly, or as Professor Milich called it, the "long and winding road" to the enactment of the FRE as Georgia's evidence law,[15] runs straight through the heart of "codification" territory, a legal movement that dominated the attention of legal theorists in the nineteenth century.[16]

The enactment of the new GEC presents a prime opportunity for the legal community to revisit the profound issues raised by the now-ancient codification debate, and it is good to do so, as these questions strike at the very heart of the social contract.[17] To adequately address these

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9. *But cf. id.* at 10, 11 n.76, 12 n.85 (Rep. Wendell Willard defending Sen. Bill Cowsert against "poison pill" criticisms).

10. *Id.* at 10-12.

11. *Id.* at 7.

12. *Id.*

13. 28 U.S.C. §§ 2071-2077 (2006).

14. Steele, *supra* note 8, at 14.

15. Milich, *supra* note 4, at 380.

16. *See generally* Lewis A. Grossman, *Langdell Upside-Down: James Coolidge Carter and the Anticlassical Jurisprudence of Anticodification*, 19 YALE J.L. & HUMAN. 149 (2007); Paul F. Kirgis, *A Legisprudential Analysis of Evidence Codification: Why Most Rules of Evidence Should Not be Codified–But Privilege Law Should Be*, 38 LOY. L.A. L. REV. 809 (2004); Aniceto Masferrer, *Defense of the Common Law Against Postbellum American Codification: Reasonable and Fallacious Argumentation*, 50 AM. J. LEGAL HIST. 355 (2008-2010); Mathias Reimann, *The Historical School Against Codification: Savigny, Carter, and the Defeat of the New York Civil Code*, 37 AM. J. COMP. L. 95 (1989); Catherine Skinner, *Codification and the Common Law*, 11 EUR. J.L. REFORM 225 (2009); Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT'L L. 435 (2000).

17. *See* THOMAS HOBBES, LEVIATHAN 191 (Cambridge Univ. Press 1904) (1651) ("Law was brought into the world for nothing else, but to limit the naturall liberty of particular

questions, however, one must first clarify what is meant by the term "codification." The term has fallen into casual usage, effectively gutting its substantive or nomenclative significance.[18]

Jeremy Bentham, a British utilitarian philosopher and legal theorist, is perhaps better known today for his invention and promotion of the *Panopticon*, a building design allowing for the unknown and constant surveillance of all inhabitants, and the resulting implications for modern surveilled society.[19] But he also coined the term "codification" in his June 1815 letter to Tsar Alexander I.[20] "Codification," when it is properly used in the sense intended by Bentham, is "altogether different . . . from . . . *ordinary* legislation" in which "business is . . . carried on in the *close* mode."[21] Bentham used the term codification to connote when an "entire field . . . for ages has . . . lain covered with law [and] is to receive an entire new covering all at once."[22] In an attempt to craft a definition for the word, Catherine Skinner points out that "[c]odification is not a term of art in the common law vocabulary."[23] Skinner defines "code"

> as an instrument enacted by the legislature which forms the principal source of law on a particular topic. It aims to codify all leading rules derived from both judge-made and statutory law in a particular field .... [C]odification is the process of drafting and enacting such an instrument.

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men, in such manner, as they might not hurt, but assist one another, and joyn together against a common Enemy.").

18. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012). This publication, co-written by United States Supreme Court Justice Scalia, roughly defines "code" as follows: "For ease of reference, legislatures often consolidate their statutes at large into a code divided by topic–criminal law, court jurisdiction, etc." and state and federal codifications dealing with particular areas of law often contain a definition provision applicable to the entire codified field. *Id.* at 257. Although the authors provide no definition for the term "code," their operative definition can be discerned roughly as follows: A code is a legislative consolidation of statutes and division of those statutes by topic, sometimes with a section that provides definitions for terms used in the code that applies to the statutes collected under a particular topic. *Id.* Scalia and Garner's usage does not comport with the ideal notion of a code, but their operational definition is more or less consistent with what Weiss called an "administrative index for legislation." Weiss, *supra* note 16, at 517.

19. *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 200 (Alan Sheridan trans., 1977) (1975).

20. Weiss, *supra* note 16, at 448.

21. JEREMY BENTHAM, WORKS OF JEREMY BENTHAM, vol. IV, at 518 (Simplkin, Marshall, & Co. 1843).

22. BENTHAM, *supra* note 21, at 518-19.

23. Skinner, *supra* note 16, at 228.

> A code . . . is distinct from an ordinary statute because it is designed to be a comprehensive and coherent presentation of the law. Thus it has an organizing and indexing role that an ordinary statute does not share. A code is also intended to provide a framework for the law's development into the future, and is not a temporary legislative measure.[24]

Similarly, Gunther Weiss explored several definitions drawn from the "Continental" experience, where the codification movement had much greater success, and which more closely tracks Bentham's ideals.[25] Acknowledging that a code may be "a *book* of law [that] claims to regulate not only *without contradiction* but also *exclusively* and *completely* the whole of the law or at least a comprehensive part of it,"[26] or "a regulation that is meant to be lasting, comprehensive, and concluding, and that leaves no scope in adjudication for shaping the law."[27] Weiss settles on a working definition of the term that identifies six core elements, one of which is expanded into three sub-elements.[28] Weiss argues that when scholars discuss codification, they are more or less discussing the degree to which a code is: (1) authoritative; (2) complete, in the sense that the code is (a) exclusive, (b) gapless, and (c) comprehensive; (3) systematized; (4) effectuating at least some degree of reform in both the form and substance of the law; (5) promotive of national legal unification; and finally, (6) simple.[29]

The element of authoritativeness speaks to the notion that a code is positive law as opposed to "found" or natural law.[30] The legislator, a being "competent to make law," affirmatively creates a code, the authority of which is derived from the legislative power to create law, and which therefore does not have to refer to other sources of law external to itself.[31] This goes hand-in-hand with the element of completeness, the interweaving of the notions of an exclusive, gapless, and comprehensive law.[32] "The *ideal* was that the code could answer all legal questions and that it would not be necessary to fall back on

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24. *Id.*
25. Weiss, *supra* note 16, at 448-49.
26. *Id.* at 449 (alteration in original) (quoting MANFRED REHBINDER, EINFÜHRUNG IN DIE RECHTSWISSENSCHAFT 207 (1995)) (translation by author).
27. *Id.* (quoting FRIEDRICH KÜBLER, ÜBER DIE PRAKTISCHEN AUFGABEN ZEITGEMÄBER PRIVATRECHTSTHEORIE 31 (1975)) (translation by author).
28. *Id.* at 454.
29. *Id.*
30. *Id.* at 456.
31. *Id.*; *see also* HOBBES, *supra* note 17, at 190.
32. Weiss, *supra* note 16, at 456, 458, 462.

judges' opinions, customs, or scholarly wisdom."[33] Ideally, the code itself forbade judges from looking beyond the parameters of the code, thus reducing them to "legal calculating machines."[34] Weiss suggests that this element was especially appealing to the absolutist Continental powers of the late eighteenth and nineteenth centuries.[35] The final four elements, though not unimportant, have minimal relevance to this discussion.

With a clearer understanding of what codification means, we see the issue is that codification, if properly understood, or at least on an ideal level, stands in dichotomous opposition to the common law. A code is positive law, created and imposed by the legislature upon the legal community, which is bound by its own oath to the law to discern and enforce the letter, meaning, and intent of this written rule, rather than engage in the constant evolution of common law, which is derived from the ever-evolving analysis of accumulated precedent.[36]

Bentham was a major proponent of codification in the early nineteenth century in England, on the Continent, and in the Americas.[37] Bentham's hubris in his advocacy for codification seems to have known no bounds. In an October 1811 letter to President James Madison, Bentham offered to write a unifying and authoritative code for the United States that would be "very short and simple, that it would be unnecessary from then on to have any other law books except [the] code, and that the entire legal profession could safely be abolished since, to quote [Bentham's] own language, 'seldom would there be any such thing as a question of law.'"[38] Bentham's clear hostility to the common law is palpable. Referring to it as "*unwritten* . . . but much more properly . . . *uncomposed* and *unenacted* law,"[39] Bentham wrote:

> this impostrous law . . . the perpetual fruits, are—in the *civil* or *non-penal* branch . . . *uncertainty, uncognoscibility, particular disappointments*, without end, *general sense of insecurity* against similar disappointment and loss; [and]–in the *penal* branch, *uncertainty* and *uncognoscibility*, as before; and, instead of compliance and obedience, the *evil of transgression*, mixed with the *evil of punishment*:–in both branches, in the breast and in the hands of the judge, *power* every-

33. *Id.* at 456.
34. *Id.* at 458-59.
35. *Id.* at 452.
36. *See supra* notes 16-27.
37. Marion Smith, *The First Codification of the Substantive Common Law*, 4 TUL. L. REV. 178, 180-81 (1929-1930); Weiss, *supra* note 16, at 475.
38. Smith, *supra* note 37, at 181 (quoting BENTHAM, *supra* note 21, at 453).
39. BENTHAM, *supra* note 21, at 460.

> where *arbitrary*, with the semblance of a set of rules to serve as a *screen* to it.[40]

It is obvious Bentham's dislike for common law was directly correlated with the problems he perceived in the judiciary. His quarrel with the common law rules of evidence is particularly instructive. Writing that "the customary *exclusionary rules* . . . are not, in the law of any country, either *consistent* with one another, or *adhered to* with any tolerable degree of constancy," he proposed to remedy the problem with "[i]nstructions . . . from the *legislator* to the *judge*" that point out the characteristics of an item of evidence that would subject it to exclusion, and with the words "absolute and inexorable [exclusion]," indicated that he would allow the judiciary no discretion whatsoever in making evidentiary decisions.[41]

Over the course of the twentieth century, the American legal landscape transformed from "a legal system dominated by the common law, divined by courts, to one in which statutes, enacted by legislatures, have become the primary source of law."[42] However, lawyers practicing in such an "Age of Statutes" understand the fallacy of Bentham's repeated and strident assurances of codified law's "simplification" of human disputes. Not only is Bentham's dream of an incorruptible codified law that needs no external interpretation pragmatically infeasible, but such a concept runs roughshod over the American principle of separation of powers, especially in the context of a trial court's evidentiary rulings.[43]

Frustration with some of the more persistent shortcomings of common law, however, was not isolated to social and political reformers like Bentham. Professor Thomas F. Green, Jr., a key player in the development of the FRE, identifies Joseph Henry Lumpkin, the first justice of

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40. *Id.*

41. *Id.* at 465. Bentham's complaints about the arbitrary application of common law principles and proposed solution are somewhat reminiscent of Henry II's attempts to regain secular control of the English judiciary from ecclesiastical courts. *See* Constitutions of Clarendon (1164), *available at* http://avalon.law.yale.edu/medieval/constcla.asp.

42. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (The Lawbook Exchange, Ltd. 1999) (1982).

43. *See* Mason v. Home Depot U.S.A., Inc., 283 Ga. 271, 276, 658 S.E.2d 603, 608 (2008). Professor Milich referenced *Mason* in his remarks to the Judiciary Committee on March 9, 2010. Video: *Georgia House of Representatives Judiciary Committee Proceedings* (Mar. 9, 2010), 7m30s, http://media.legis.ga.gov/hav/09_10/2010/committees/judi/judi030910EDITED.wmv. He pointed out that care was taken in drafting the new evidence code, and its preamble, to avoid the separation of powers issue that the court considered in *Mason*. The language of the preamble is advisory, or preparatory, rather than mandatory. This probably resolves the concerns expressed by Dreyer et al., *supra* note 6, at 17-19.

the Georgia Supreme Court, as voicing concerns not so dissimilar from those of Bentham's about the effect of common law on evidentiary issues.[44] Reviewing a trial court's decision to admit an item of evidence that might have been excluded under a stricter application of evidence law, Justice Lumpkin wrote that "[t]ruth, common sense, and enlightened reason, alike demand the abolition of all those artificial rules which shut out any fact from the jury, however remotely relevant, or from whatever source derived, which would assist them in coming to a satisfactory verdict."[45] In 1847, Justice Lumpkin, along with the two other justices, served on the committee that made recommendations to the Georgia General Assembly, which ultimately led to Georgia becoming one of the first states to adopt a comprehensive code that included procedural, evidentiary, penal, and civil law.[46]

The adoption of the new GEC has been extolled as the eradication of all ambiguities in evidentiary matters through the collection, conformation, and modernization of the evidence rules. An often-cited example of this purported restoration of logic to the evidence code is the replacement of Georgia's traditional res gestae exception with three new rules that will, according to proponents, address more concretely the admissibility of such evidence.[47] But, given the historical failure to yet master human nature through the imposition of legal devices, one must ask whether the new GEC will in fact simplify the practice of law in Georgia, or merely create an exponentially expanded body of Georgia case law, the creation and knowledge of which practitioners and judges will be charged with making. In other words, the admission of evidence must always be based on the context of the case and the discretion of the trial court, regardless of whether the rule of law is derived from a uniform code or naturally-evolved common law.

This conclusion comports with Oliver Wendell Holmes, Jr.'s belief in the common law. According to Holmes, any codification is just a beginning of a new development of law: "However much we may codify the law into a series of seemingly self-sufficient propositions, those propositions will be but a phase in a continuous growth."[48] Rather than rigidly applying a written rule for the sake of legal purity, Holmes believed a learned jurist discerns the law based on

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44. Thomas F. Green, Jr., *Highlights of the Proposed Federal Rules of Evidence*, 4 GA. L. REV. 1, 1(1969-1970).

45. *Id.* (quoting Johnson v. State, 14 Ga. 55, 62 (1853) (misquoted in original)).

46. Erwin C. Surrency, *The Georgia Code of 1863 and Its Place in the Codification Movement*, 11 J. S. LEGAL HIST. 81, 87 (2003).

47. *See* Milich, *supra* note 4, at 392-94.

48. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 37 (1881).

> [t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, [and who is aware that these] have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.[49]

Holmes also did not adhere to rigid notions of interpreting the common law:

> [J]ust as the clavicle in the cat only tells of the existence of some earlier creature to which a collar-bone was useful, precedents survive in the law long after the use they once served is at an end and the reason for them has been forgotten. The result of following them must often be failure and confusion from the merely logical point of view.
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> On the other hand, in substance the growth of the law is legislative. And this in a deeper sense than that what the courts declare to have always been the law is in fact new. It is legislative in its grounds. The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but [nonetheless] traceable to views of public policy in the last analysis. And as the law is administered by able and experienced men, who know too much to sacrifice good sense to a syllogism, it will be found that, when ancient rules maintain themselves in the way that has been and will be shown in this book, new reasons more fitted to the time have been found for them, and that they gradually receive a new content, and at last a new form, from the grounds to which they have been transplanted.[50]

Like the FRE, which was itself "born in controversy,"[51] the new GEC is no different. Although the GEC may bring more long-term uniformity between Georgia and federal evidence law, it will likely bring a great deal of short-term uncertainty. The General Assembly's adoption of a

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49. *Id.* at 1.

50. *Id.* at 35-36.

51. Edward J. Imwinkelried, *Moving Beyond "Top Down" Grand Theories of Statutory Construction: A "Bottom Up" Interpretive Approach to the Federal Rules of Evidence*, 75 OR. L. REV. 389, 389 (1996).

"tweaked" version of the FRE, which retains many of Georgia's existing evidence statutes, has resulted in a new GEC that contains nearly twice as many evidence rules as the FRE.[52] Also, as with Georgia's adoption of certain federal civil procedure rules, such as Federal Rule of Civil Procedure 23's incorporation into section 9-11-23 of the Official Code of Georgia Annotated (O.C.G.A.),[53] all pertinent federal case law will soon be citable authority within Georgia for any portion of the new GEC substantially derived from the FRE.[54] The Authors suggest that the only workable construct for tackling both substantive statutory changes and a sudden influx of interpretive authority is for Georgia courts and practitioners to strive to emulate Holmes's ideals while remaining keenly aware of Bentham's fears.

II. PRACTICE CONSIDERATIONS CONCERNING THE NEW GEORGIA EVIDENCE CODE

The coming changes in Georgia evidence law have been discussed at length elsewhere. Georgia State University Law Professor Paul S. Milich discusses significant changes that the new GEC makes in Georgia's substantive evidence law,[55] while notable differences between the GEC and the FRE have been addressed as well.[56] Knowing that the GEC cannot seamlessly take effect, and knowing that it will not displace the importance of a trial court's discretion, the Authors turn briefly to address issues that the GEC presents for lawyers in the discovery phase and in preparation of cases.

A. Credibility Attacked by Specific Instances of Prior Conduct

Unless quickly and carefully defined, one of the most sweeping changes brought by the GEC will be its approach to impeachment evidence, which could itself alone multiply litigation exponentially. Under Georgia's prior evidentiary code, a witness could not be "impeached by [prior] instances of specific misconduct unless that misconduct has resulted in the conviction of a crime."[57] However, the new

52. Dreyer et al., *supra* note 6, at 19, 21.

53. *Compare* O.C.G.A. § 9-11-23 (2006) *with* FED. R. CIV. P. 23.

54. *See* HB 24 (noting that the General Assembly considered the FRE as interpreted by the United States Supreme Court and the Circuit Courts of Appeals). While not codified, the Authors assure that the adoption of the FRE will work a hardship on smaller law firms that previously had not subscribed to a "national" Westlaw or Lexis plan.

55. Milich, *supra* note 4, at 387-419; *see also* Dreyer et al., *supra* note 6, at 19-25.

56. *See* Dreyer et al., *supra* note 6, at 26-45.

57. Colzie v. State, 289 Ga. 120, 123, 710 S.E.2d 115, 119 (2011) (quoting McClure v. State, 278 Ga. 411, 412, 603 S.E.2d 224, 227 (2004)).

GEC specifically permits impeachment of witnesses, in the discretion of the trial court, by inquiry into specific instances of misconduct where those instances demonstrate untruthfulness.[58]

Because Georgia's Civil Practice Act[59] permits discovery of any matter "reasonably calculated to lead to the discovery of admissible evidence,"[60] volumes of discovery, endless hours of depositions, and a barrage of books will be filled with arguments regarding prior "bad" acts of parties and witnesses. Opposing lawyers will inquire of every instance where some prior transaction could be spun as dishonest, even if not germane to the case at bar. For example, even in the most simple of personal injury cases, counsel should prepare for discovery seeking the names of every acquaintance of their client, or answering interrogatories that ask for the disclosure of every act, or any person aware of any act, demonstrating the client's untruthfulness, or the untruthfulness of any other witness in the case. Opposing lawyers serving such discovery will argue that the same must be answered because it may reveal the name of someone who knows the opposing party and could provide testimony regarding prior acts of untruthfulness. Witnesses will be subjected to deposition questions regarding their intimate and personal life histories, the names of their former spouses, the circumstances of an old divorce, the legitimacy of their tax payment history, or any prior disputes with neighbors, even if their only connection to the litigation was that of a bystander at the scene of a slip and fall.

Whether trial courts will constrain parties who aggressively seek discovery regarding prior bad acts remains to be seen. Certainly, trial judges retain the authority to control discovery and protect parties and witnesses from "harassment" and "oppression," but with the new GEC, foreclosing such discovery may risk reversal on appeal. It is possible that after a few years, this provision of the GEC will be reigned in by our appellate courts or the legislature so as to make discovery and litigation manageable.

B. Business Records Exception

With the adoption of O.C.G.A. § 24-8-803(6),[61] another monumental change in the way personal injury cases are prepared has arrived. Under prior Georgia law, opinions and conclusions in medical records were inadmissible unless the person making the declaration was present

58. O.C.G.A. § 24-6-608(b) (Supp. 2012).
59. O.C.G.A. tit. 9, ch. 11 (2006).
60. O.C.G.A. § 9-11-26(b)(1) (2006).
61. O.C.G.A. § 24-8-803(6) (Supp. 2012).

in court.[62] That rule prevented counsel from using a statement in a medical record out of context.[63] For example, frequently, a statement that is not fully explained, or which may have been placed mistakenly, will make its way into a provider's medical record. To gain an advantage, counsel may be tempted to use such a statement, knowing that as long as the original author of the statement is not present to testify regarding the record, an argument could be made to the jury that the statement means something it may not. Under the old law, that gamesmanship was precluded with good reason–to prevent juries from reaching decisions about medical and scientific issues based upon medical records explained by lawyers and not doctors.[64]

The new GEC departs from this safeguard and expressly permits "opinions" and "diagnoses" from any profession to be admitted at trial upon proper certification of the medical record and notice to the opposing party.[65] This single change will increase litigation because, now, the practical burden of combating the misuse of medical records will fall to the aggrieved party to chase down the author of each stray comment and incur the expense of calling such person as a witness at trial. Further,

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62. Nichols v. State, 278 Ga. App. 46, 49, 628 S.E.2d 131, 134 (2006) ("Diagnostic opinions and conclusions contained in medical records are generally inadmissible as hearsay unless the person who made them testifies as to their factual basis."). *See also* Cannon v. Jeffries, 250 Ga. App. 371, 375, 551 S.E.2d 777, 781 (2001) ("[I]f a hospital record contains diagnostic opinions and conclusions, it cannot, upon proper objection, be admitted into evidence unless and until the proper foundation is laid, i.e., the person who entered such diagnostic opinions and conclusions upon the record must qualify as an expert and relate the facts upon which the entry was based.") (alteration in original) (quoting Stoneridge Properties, Inc. v. Kuper, 178 Ga. App. 409, 412, 343 S.E.2d 424, 427 (1986)).

63. 250 Ga. App. at 375, 551 S.E.2d at 780-81.

64. The Authors recently handled a personal injury case where the plaintiff had suffered a back injury in 1980 to an intervetebral disc at L3-4. Some twenty-five years later, the client suffered an intervetebral disc injury at L5-S1. Even though the current treating physicians testified the old back injury was at a different level and had "absolutely nothing to do with the current injury," opposing counsel sought to use the records from the 1980 injury. The argument was essentially that a "back injury was a back injury" and thus the jury should be presented with such evidence. The trial court excluded the evidence recognizing the danger of inviting the jury to reach medical conclusions devoid of any medical evidence and based solely on the arguments of lawyers. Potts v. YRC, Inc. No. 2008EV006225H (Fulton Cnty. State Ct., settled Aug. 2012). The wisdom of that decision is ignored by the new GEC.

65. O.C.G.A. § 24-8-803(6). Counsel should insist that opposing counsel identify with specificity which statements and records they intend to introduce under O.C.G.A. § 24-8-803(6) and not permit a general notice to "use any and all medical records." Allowing such "notices" to stand unrefined will result in a significant disadvantage to meet any out-of-court statements at trial.

even if the declarant is deceased and cannot be questioned regarding the statement, the new GEC will apparently admit the record.[66]

C. *Juror Testimony Regarding "Extraneous Evidence"*

The new GEC liberalizes the rule for impeaching a jury verdict, which could quickly turn into an additional source of appeals for civil jury verdicts. Per O.C.G.A. § 24-6-606(b),[67] the new GEC will permit a juror to testify concerning "whether extraneous prejudicial information was improperly brought to the juror's attention."[68] Practioners and courts should prepare for the intense assault of jurors following verdicts by the losing party seeking reversal of any verdict. Any juror who can be persuaded will be asked to give testimony that other jurors discussed "extraneous prejudicial information" during deliberations, and that information will be argued to be "inadmissible" evidence.

These three provisions in the new GEC underscore the need for our judges and justices to be vigilant in examining evidentiary issues and using their discretion to be sure that our laws and litigation achieve their lofty purpose of resolving disputes with truth, all the while protecting litigants from abuse.

III. CONCLUSION

The ramifications of the new GEC are multi-faceted. Certain "growing pains" will undoubtedly occur while initially implementing the new GEC and its accompanying federal interpretive authority into the Georgia courts. However, Georgia courts will continue to have a profound impact on Georgia's evidentiary law and may significantly ease this process through measured, thorough, and thoughtful opinions.

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66. *See id.* (lacking any provision that would exclude statements by deceased declarants).

67. O.C.G.A. § 24-6-606(b) (Supp. 2012).

68. *Id.*

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