

## How To Work With Ga.'s New Evidence Code

*Law360, New York (September 04, 2013, 12:35 PM ET)* -- On Jan. 1 of this year, Georgia's revamped evidence code went into effect. The new code, a work in progress by the Georgia State Bar since the mid-1980s, is modeled on the Federal Rules of Evidence (though some differences remain).



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Georgia State University College of Law Professor Paul Milich writes of the process, "It is difficult to get trial lawyers from so many different interest groups to agree on a wide-ranging set of evidence rules. One of the great advantages of a unified state bar is its ability to bring together all of these varied, and at times antagonistic, interests into constructive dialog."

Discussed below are select examples of specific changes that may impact insurance cases. One of the most important effects, however, is more general. Georgia state courts will likely now be more amenable to considering federal precedent when making evidentiary rulings. Therefore, now, it is more important than ever that insurance litigators practicing in Georgia state courts be aware of federal decisions on evidentiary issues.

### Authentication and Best Evidence

Under the new rules, the authentication of documents becomes more lenient and straightforward. O.C.G.A. §§ 24-9-901 to 924. A party must merely provide a basis "sufficient to support a finding that the matter in question is what its proponent claims." O.C.G.A. § 24-9-901(a).

Appropriately for this age of multiple electronic copies, under the new rules, copies are presumed authentic. O.C.G.A. § 24-10-1003. Under the older "best evidence" rules, a party was required to produce an original document or account for its nonproduction before it could use a copy.

These revisions will ease the admission of such documents as insurance policies, adjustment documents and accounting records, especially when such documents are kept only in electronic form as many insurers and policyholders do these days.

### Hearsay Exception: Public Records

In some instances, a public record is an important piece of evidence in an insurance case. For example, police records regarding an arson investigation would likely be relevant in related property insurance litigation.

Georgia's previous evidence code often required the content of public records to be admitted under a specific statute for a particular agency or under a general business records rule. Under the new O.C.G.A. § 24-8-903(8), public records are a hearsay exception if they set forth the activities of the office; matters observed pursuant to duty imposed by law; or factual findings resulting from an investigation made pursuant to authority granted by law, unless the circumstances indicate a lack of trustworthiness.

This would likely make the admission of an arson detective's report much more straightforward. Under part C, "factual findings" could potentially include opinions and reliance on sources other than the detective's own observation.

Milich writes that this subsection "may admit what otherwise might constitute multiple hearsay. It may also include opinions. However, factual findings should not extend to include legal conclusions of the preparer."

It should be noted, however, that accident reports filed with the state Department of Motor Vehicle Safety remain inadmissible. O.C.G.A. § 40-9-41. A liability insurer providing a defense remains unable to introduce an accident report to show a party's negligence or lack thereof.

### **Character Evidence**

It may, at times, be tempting in an insurance case for parties to refer to past events. For example, in a case where an insurer suspects arson, a previous arson conviction would be relevant to show that a policyholder deliberately burned his property.

Both the previous and the current Georgia statute preclude use of such evidence, but the new rule makes the standard clearer. O.C.G.A. § 24-4-404(a) states that the "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." Therefore, an insurer cannot argue that a previous arson makes arson more likely in this instance, although there may be other grounds for admissibility of a prior conviction.

Georgia's previous character evidence statute stated that the character of the parties is generally irrelevant unless it was "necessary and proper" to the nature of the case. The new rule removes the unclear "bent of mind" and "course of conduct" exceptions that had been criticized by the judiciary as dangerously similar to propensity evidence.

There are some exceptions, modeled on the federal rule. O.C.G.A. § 24-4-404(b). These include "absence of mistake or accident." For example, in a liability case involving an act of violence, an insurer may invoke an exclusion for intentional acts by the policyholder. Testimony regarding a history of shootings by the policyholder could be introduced to show that the policyholder acted intentionally (e.g., a gun was shot deliberately rather than accidentally).

### **Compromise Negotiations**

The previous Georgia statute excluded statements made "with a view to a compromise," but case law generated some confusion on how far this protection extended. This could be especially problematic given the prolonged settlement negotiations that are common in large insurance disputes.

For example, an older Georgia case held that an insurer's offer to settle a fire loss was admissible as evidence of the property value. *Pacific Nat'l Fire Ins. Co. v. Beavers*, 87 Ga. App. 294 (1952). In that case, the court held that "the admissions of a party who may desire a settlement are not to be excluded where, so far as appears from the evidence, the opposite party did nothing to induce the statement and

did not contemplate a compromise or abatement of his demand.”

The new rule broadly excludes a range of statements made “in compromising or attempting to compromise a claim ... to prove liability for or invalidity of any claim or its amount.” O.C.G.A. § 24-4-408. This wider scope provides additional assurance for parties that offers to settle a claim will be protected.

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