EXPERT TESTIMONY

6 CLE Hours including
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FOREWORD

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We would be remiss if we 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 at ICLE hope your attendance will be beneficial as well as enjoyable. We think that these program materials will provide a great initial resource and reference for you.

If you discover any substantial errors within this volume, please do not hesitate to inform us. Should you have a different legal interpretation/opinion from the speaker’s, the appropriate way to address this is by contacting him/her directly.

Your comments and suggestions are always welcome.

Sincerely,

Y our ICLE Staff

Jeff rey R. Davis
Executive Director, State Bar of Georgia
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Rebecca A. Hall
Associate Director, ICLE

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AGENDA

Presiding:
Mary Donne Peters, Program Chair, Author, The Admissibility of Expert Testimony In Georgia; Gorby Peters & Associates, LLC, Atlanta

7:30  REGISTRATION AND CONTINENTAL BREAKFAST
(All attendees must check in upon arrival. A jacket or sweater is recommended.)

8:10  PROGRAM OVERVIEW

8:15  A DAUBERT PRIMER AND FEDERAL LAW UPDATE ON EXPERT TESTIMONY
John Patterson Brumbaugh, King and Spalding LLP, Atlanta

8:55  ESSENTIAL UPDATE FOR EXPERT TESTIMONY IN STATE COURTS
J. Darren Summerville, The Summerville Firm, LLC, Atlanta

9:15  SUPER DAUBERT: ESSENTIAL UPDATE ON EXPERT TESTIMONY IN MEDICAL CASES
Taylor C. Tribble, Huff Powell & Bailey LLC, Atlanta

10:30  BREAK

10:40  CRACKING THE CODE ON “PEER REVIEW” FOR EXPERT PUBLICATIONS
Sonja Rasmussen, MD, Editor-in-Chief, Morbidity & Mortality Weekly Report; Director, Division of Public Health Information Dissemination, Centers for Disease Control & Prevention, Atlanta

11:25  ESSENTIAL TERMS FOR EVERY EXPERT CONTRACT (DON’T HAVE A CONTRACT? YOU MAY BE VIOLATING FEDERAL LAW!)
Amy C.M. Burns, Gorby Peters & Associates, LLC, Atlanta

12:00  THE PROFESSIONALISM HOUR: KEY TAKE-AWAYS ON MOTIONS AND DEADLINES IN FEDERAL COURT
Hon. Catherine M. Salinas, United States Magistrate Judge, U.S. District Court for the Northern District of Georgia, Atlanta

1:00  LUNCH (Included in the registration fee.)

1:20  EFFICIENT AND EFFECTIVE USE OF EXPERTS IN FAMILY LAW CASES
Randall M. Kessler, Kessler & Solomiany LLP, Atlanta; Author, Georgia Family Law Forms

1:50  EXPERT TESTIMONY IN PREMISES LIABILITY CASES
Michael J. Gorby, Gorby Peters & Associates, LLC, Atlanta; Author, Premises Liability In Georgia
2:10  BREAK

2:20  WHAT EVERY LAWYER NEEDS TO KNOW ABOUT THE DIFFERENCES BETWEEN THE GEORGIA EVIDENCE CODE AND THE FEDERAL RULES OF EVIDENCE
Ronald L. Carlson, Fuller E. Callaway Chair of Law Emeritus, University of Georgia School of Law, Carlson On Evidence, Co-Author, Athens
Michael Scott Carlson, Deputy Chief Assistant District Attorney, Cobb County District Attorney's Office; Carlson On Evidence, Co-Author, Marietta

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A DAUBERT PRIMER AND FEDERAL LAW UPDATE ON EXPERT TESTIMONY

John Patterson Brumbaugh, King and Spalding LLP, Atlanta
A *Daubert* Primer and Federal Law Update on Expert Testimony

David L. Balser
Lawrence A. Slovensky
K. Paige Nobles
King & Spalding LLP
Atlanta, Georgia
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A. Introduction

Twenty-four years have passed since the Supreme Court issued its landmark *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) opinion, yet *Daubert* challenges remain an integral part of nearly every federal case that proceeds beyond discovery. And for good reason. A successful *Daubert* motion has the power to exclude an expert from trial and, in an appropriate case, lead to summary judgment. *Daubert* solidified the trial court’s responsibility as “gatekeeper” to ensure that only relevant and reliable expert testimony reaches the jury, which led to the amendment of Federal Rule of Evidence 702. While the advisory committee’s note to Rule 702 cautions that the amendment was “not intended to provide an excuse for an automatic challenge to the testimony of every expert,” *Daubert* challenges are made as a matter of course in most cases. *Fed. R. Evid. 702, Advisory Committee’s Note.* This article reviews the “*Daubert Trilogy*” of Supreme Court decisions that discuss the trial court’s “gatekeeping” role, the subsequent amendment to Rule 702, and recent decisions from the Eleventh Circuit Court of Appeals and the Northern District of Georgia addressing motions to exclude expert testimony.

B. The *Daubert* Trilogy


*Daubert v. Merrell Dow Pharmaceuticals, Inc.* involved a claim by two minor children and their parents against a pharmaceutical company for damages for birth defects allegedly caused by their mother’s ingestion of an anti-nausea drug called Bendectin. 509 U.S. at 582. The pharmaceutical company moved for summary judgment on the grounds that Bendectin does not cause birth defects in humans and the plaintiffs would not be able to come forward with any admissible evidence to the
contrary. *Id.* The pharmaceutical company supported its motion with an affidavit from its expert who concluded, based on his review of “more than 30 published studies involving over 130,000 patients,” that maternal use of Bendectin has not been shown to be a risk factor for human birth defects. *Id.* In response, the plaintiffs offered testimony from “eight other well-credentialed experts” who claimed Bendectin *can* cause birth defects. *Id.* at 583. The plaintiffs’ experts based their conclusions on live and “in vitro” animal studies, pharmacological studies of the chemical structure of the drug, and “‘reanalysis’ of previously published epidemiological studies.” *Id.*

The trial court found that the plaintiffs’ experts did not meet the “general acceptance” standard and granted summary judgment for the pharmaceutical company. *Id.* at 583-84. The Ninth Circuit affirmed, citing *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) and concluding that “expert opinion based on a scientific technique is inadmissible unless the technique is ‘generally accepted’ as reliable in the relevant scientific community.” *Id.* at 584. The Supreme Court granted certiorari to determine the proper standard for the admission of expert testimony. *Id.* at 585.

On review, the Supreme Court considered what remained—if anything—of *Frye’s* “general acceptance” test following the enactment of the Federal Rules of Evidence. *Id.* at 585-88. It first noted that Rule 702 governs the admission of expert testimony. *Id.* at 588. Because “[n]othing in the text of this Rule establishes ‘general acceptance’ as an absolute prerequisite to admissibility” and there is no indication that “the Rules as a whole were intended to incorporate a ‘general acceptance’ standard,” the Court found that general acceptance was no longer a precondition to admissibility. *Id.* at 588, 598. Accordingly, it vacated the Ninth Circuit’s decision. *Id.* at 598.
The Court cautioned that this does not mean “the Rules themselves place no limits on the admissibility of purportedly scientific evidence . . . To the contrary, under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.” *Id.* at 589. The Court explained that when “[f]aced with a proffer of expert scientific testimony, [] the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.” *Id.* at 592. “This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology can be applied to the facts in issue.” *Id.* at 592-93.

The Court then provided the four now-infamous factors that courts may consider in their analysis of reliability: (1) whether the method can be (and has been) tested; (2) whether it has been subjected to peer review and publication; (3) the known or potential rate of error; and (4) whether it is generally accepted in the relevant scientific community. *Id.* at 593-94. But the Court cautioned that “[m]any factors will bear on the inquiry, and [it does] not presume to set out a definitive checklist or test.” *Id.* at 593. Finally, the Court reminded trial judges to be mindful of other applicable Rules of Evidence such as Rule 403 and noted that “[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.” *Id.* at 595-96.

b. *General Electric Co. v. Joiner*

Four years later, the Supreme Court revisited *Daubert* in *General Electric Co. v. Joiner*, 522 U.S. 136 (1997). In *Joiner*, an electrician who had been diagnosed with small-cell lung cancer alleged that his cancer was “promoted” by his exposure to “PCBs,”
“furans,” and “dioxins” in the workplace. *Id.* at 139-40. He brought suit against the manufacturers of chemical PCBs and other materials containing them. *Id.* at 139. The manufacturers moved for summary judgment on the grounds that there was no evidence the plaintiff suffered significant exposure to PCBs and no admissible scientific evidence that PCBs promoted his cancer. *Id.* at 140. In response, the plaintiff argued there was a fact issue, citing testimony from his experts that PCBs and their derivatives can promote cancer. *Id.* The plaintiff’s experts concluded that there was a causal link between the plaintiff’s exposure to PCBs and the cancer by relying on animal studies and epidemiological studies. *Id.*

The trial court found the experts’ testimony was nothing more than “subjective belief or unsupported speculation” and granted summary judgment for the manufacturers because the plaintiff failed to establish causation. *Id.* After applying what it described as “a particularly stringent standard of review,” the Eleventh Circuit reversed. *Id.* The Supreme Court granted certiorari “to determine what standard an appellate court should apply in reviewing a trial court’s decision to admit or exclude expert testimony under *Daubert.*” *Id.* at 138-39.

The Court held that abuse of discretion is the appropriate standard of review and reversed the Ninth Circuit’s decision. *Id.* at 143. The Court went on to find that the trial court did not abuse its discretion in excluding the experts’ testimony. *Id.* at 143-47. To start, the animal studies involved infant mice that were directly injected with highly concentrated levels of PCBs. *Id.* at 144-45. Plaintiff, in contrast, was an adult human who was not injected with PCBs, but rather exposed to a far less concentrated liquid containing PCBs and contracted an different form of cancer. *Id.* The Court agreed that the epidemiological studies also did not support the experts’ opinions because the
authors of those studies “were unwilling to say that PCB exposure had caused cancer among the workers they examined.” *Id.* at 145. The Court went on to say that “nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.” *Id.* at 146.

c. *Kumho Tire Co., Ltd. v. Carmichael*

The final installment in the *Daubert* Trilogy is *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). In *Kumho Tire Co.*, the plaintiffs brought suit against a tire manufacturer and distributor for injuries sustained in a car accident when one of the rear tires blew out. *Id.* at 142. The plaintiffs alleged that a defect in the tire caused it to fail. *Id.* The plaintiffs’ case, in large part, depended on their expert’s testimony that a defect in the manufacture or design of the tire caused the blowout. *Id.* The expert based his conclusion on a visual inspection of the tire, explaining that if the tire’s separation is not caused by “overdeflection,” then it is likely caused by a defect in the tire. *Id.* at 144. The expert testified that because he determined that at least two of the four signs of overdeflection were *not* present, he concluded that a defect caused the separation. *Id.* at 144-45. The expert did not identify any affirmative evidence of a defect. *Id.*

The trial court excluded the expert’s testimony because it found that “the methodology employed by the expert in analyzing the data obtained in the visual inspection, and the scientific basis, if any for such an analysis” was unreliable. *Id.* at 144-45, 153. In doing so, it rejected the plaintiffs’ argument that *Daubert* “was concerned solely with the ‘admissibility of purportedly scientific evidence.’” *Id.* at 145. The Eleventh Circuit disagreed and reversed. *Id.* at 146. The Supreme Court “granted
certiorari in light of uncertainty among the lower courts about whether, or how, *Daubert* applies to expert testimony that might be characterized as based not upon ‘scientific’ knowledge, but rather upon ‘technical’ or ‘other specialized’ knowledge.” *Id.* 146-47.

The Court concluded “that *Daubert’s* general principles apply to the expert matters described in Rule 702” even if they are not “scientific.” *Id.* at 149. The Court went on to address the applicability of the *Daubert* factors in cases involving non-scientific testimony, explaining that “[t]he conclusion, in our view, is that we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, no can we now do so for subsets of cases categorized by category of expert or by kind of evidence.” *Id.* at 150. “Too much depends upon the particular circumstances of the particular case at issue.” *Id.*

The Court therefore concluded “that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.” *Id.* at 152. “The trial court must have the same kind of latitude in deciding *how* to test an expert’s reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when its decides *whether or not* that expert’s relevant testimony is reliable.” *Id.* (emphasis in original). “Thus, whether *Daubert’s* specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine.” *Id.* at 153. Because the trial court based its decision on the expert’s failure to satisfy the *Daubert* factors or *any other* set of reasonable reliability criteria, the Supreme Court held that it did not abuse its discretion and reversed the appellate court’s decision. *Id.* at 158.
C. **Rule 702 After *Daubert***

Rule 702 was amended shortly after the *Kumho* decision in order to incorporate the relevance and reliability principles set forth in *Daubert* and the cases that followed. *See* **Fed. R. Evid. 702, Advisory Committee’s Note.** “The amendment affirms the trial court’s role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of the proffered expert testimony.” *Id.*

The amended rule, as it exists today, provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

b) the testimony is based on sufficient facts or data;

c) the testimony is the product of reliable principles and methods; and

d) the expert has reliably applied the principles and methods to the facts of the case.

**Fed. R. Evid. 702.**

The Advisory Committee’s Note also provides a list of other factors courts have found relevant in determining whether an expert’s opinion is sufficiently reliable, including:

1) **Whether experts are ‘proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying.’** *Daubert*, 43 F.3d at 1317;  

2) **Whether the expert has unjustifiably extrapolated from an accepted premise to an**
unfounded conclusion. See Joiner, 522 U.S. at 146 (citation omitted);

3) Whether the expert has adequately accounted for obvious alternative explanations. See Claar v. Burlington N.R.R., 29 F.3d 499 (9th Cir. 1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiff’s condition) . . .;

4) Whether the expert ‘is being as careful as he would be in his regular professional work outside his paid litigation consulting.’ Sheehan v. Daily Racing Form, Inc., 104 F.3d 940, 942 (7th Cir. 1997) . . .; and

5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. See Kumho Tire Co., 119 S.Ct. at 1175 (Daubert’s general acceptance factor does not ‘help show that an expert’s testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in so-called generally accepted principles of astrology or necromancy’).

Fed. R. Evid. 702, Advisory Committee’s Note.

D. Recent Eleventh Circuit and Northern District of Georgia Decisions Applying Daubert

In the Eleventh Circuit, expert testimony must satisfy the following requirements before it is admissible:

1) The expert must be qualified on the matter about which he intends to testify.

2) He must employ a reliable methodology.

3) The expert’s testimony must be able to assist the trier of fact through the application of expertise to understand the evidence or a fact in issue.

Hughes v. Kia Motors Corp., 766 F.3d 1317, 1329 (11th Cir. 2014) (internal citations omitted). “Although there is inevitable overlap among the three prongs of this analysis, trial courts must be cautious not to conflate them, and the proponent of expert
testimony bears the burden to show that each requirement is met.” United States v. Frazier, 387 F.3d 1244, 1250 (11th Cir. 2004).

The following cases provide an overview of how the Eleventh Circuit and the Northern District of Georgia have applied Daubert and the criteria described above over the past year.

a. Qualifications

Because Rule 702 allows witnesses to qualify as experts in a variety of ways, exclusion under the first prong of the analysis is not common. An expert may be “sufficiently qualified” through experience even if his or her qualifications are not narrowly tailored to the subject matter at issue. For example, in Polsinelli PC v. Genesis Biosciences, Inc., No. 1:14-CV-00873-ELR, 2016 WL 7403742, at *1 (N.D. Ga. Sept. 1, 2016), a law firm brought suit to recover unpaid legal fees. The defendants asserted counterclaims for legal malpractice or, alternatively, breach of fiduciary duty. Id. The plaintiff moved for summary judgment and to exclude the testimony of three experts under Daubert. Id.

Among other things, the plaintiff argued that one of the defendants’ experts was not qualified to testify about fermentation tanks and whether they complied with state regulations because he lacked experience in Georgia law. Id. at *11. The court disagreed, finding the expert sufficiently qualified due to his experience with the design and safety requirements of the American Society of Mechanical Engineers Boiler and Pressure Vessel Code, which had been incorporated into Georgia’s Administrative Code. Id. at *12. The court also noted that the expert had previous experience designing and installing hundreds of fermenters. Id.
If a witness does not qualify as an expert, a court may nevertheless allow the testimony as a lay opinion if the witness has personal knowledge. For example, in *Architects Collective v. Pucciano & English, Inc.*, No. 1:15-cv-00842-AT, 2017 WL 1483378 (N.D. Ga. Mar. 29, 2017), an architecture firm brought suit against a competing firm for copyright infringement. The defendant moved for summary judgment and to preclude plaintiff’s principal, Larry Kester, from testifying as an architectural expert. *Id.* at *4*. The plaintiff had offered Mr. Kester’s testimony to rebut the defendant’s expert testimony regarding the similarities and differences between the two firms’ architectural plans. *Id.* The defendant argued that the proposed testimony was an expert opinion subject to Rule 26(a)(2)(B)’s disclosure requirements and, further, that Mr. Kester was “unqualified to testify about copyright law and its applicability.” *Id.* In response, the plaintiff argued that Mr. Kester was not providing expert testimony in comparing the architectural plans. *Id.* Rather, he was “a percipient expert who was not specially retained to provide expert testimony” on this topic and relied on his personal knowledge about architecture. *Id.* The court agreed. *Id.* However, the court granted the defendant’s motion to the extent it asked the court to preclude Mr. Kester from offering a legal opinion—which he was not qualified to give—as to the ultimate issue of whether the allegedly infringing plans were “substantially similar.” *Id.* at *7-8.*

b. **Reliability**

The second prong of the Rule 702 analysis is more difficult to analyze. This difficulty is demonstrated by the recent opinions discussed below.

plaintiffs’ motion for class certification relied on testimony from two experts, including Anthony Mattina. *Id.* at *3*. Mr. Mattina opined that the “shingles fail early in their useful life by developing blisters, excessively lose their granules and exhibit highly visible thermal heat cracking.” *Id.* at *6*. He also concluded that “the premature failure is not caused by installation issues, but by the defects he observed.” *Id.* The court agreed with the defendant that Mr. Mattina failed to establish that his opinions are based on a reliable methodology, noting that “[o]ther than stating that Crist has replaced approximately 1,000 Chalet roofs, [] Mattina fails to explain in his affidavit how he developed his opinion.” *Id.* Although he testified in his deposition “that he observed many roofs where blistering caused a leak . . . he did not record the number of leaks he observed, nor did he investigate other possible causes of the leaks.” *Id.* Thus, the court concluded that Mattina “failed ‘to explain how [his] experience led to the conclusion[s] he reached, why that experience was sufficient basis for the opinion, and just how that experience was reliably applied to the facts of the case.’” *Id.* (quoting *Frazier*, 387 F.3d at 1265 (alteration in original). The court also noted that “because his opinions are based on roofs that have been replaced, Atlas will not have the opportunity to inspect the roofs and develop its own expert opinions.” *Id.* Accordingly, the court granted the defendants’ motion to exclude Mr. Mattina’s testimony. *Id.*

The court reached a similar result in *Fey v. Panacea Management Group, LLC*, No. 1:16-cv-2851-WSD, 2017 WL 2180672 (N.D. Ga. May 18, 2017). There, the plaintiff, who had been commissioned to create a drawing of the Old Vinings Inn restaurant, sued its subsequent owner for copyright infringement. *Id.* at *1-3*. The defendants moved for summary judgment and to exclude testimony from the plaintiff’s wife and proposed damages expert as unreliable. *Id.* at *3*. Based on her twenty-four years of experience in
licensing images, the plaintiff's wife had concluded that the “fair market value” of the defendants' “uses” of her husband's drawing of the restaurant was $33,000 to $36,000 per year. *Id.* at *4. Fey reached her conclusion by using “online ‘price calculators offered by stock licensing agencies’ to generate a “sampling” of prices that she then considered in light of her “historical knowledge” of various factors to calculate a “base price” for a licensing fee. *Id.* She “then tripled the base price to reflect the ‘exclusivity and brand premiums’ because, in her view, the Drawing ‘is inextricably and permanently associated with the restaurant in such a manner that [it] is no longer useful for relicense.’” *Id.* The court found this methodology unreliable. *Id.*

To start, “Fey d[id] not know how the price calculators work or what data they rely on,” nor did she “show[] the calculators [we]re reasonably relied on by experts in establishing licensing fees.” *Id.* The court also noted that “Fey also provide[d] only abstract definitions of several factors that she considered in conjunction with the calculator prices.” *Id.* But “[e]ven if Fey had adequately defined the factors she considered,” the court found that “she fail[ed] to meaningfully explain how those factors—and her ‘historical knowledge’—interacted with the calculator prices to produce [the] base price.” *Id.* at *5. Fey’s testimony that she “internally” matched the base price up with other factors to arrive at an appropriate licensing fee “too vague to establish the reliability of [her] methodology.” *Id.* The court also noted in a footnote that it was “troubled by Fey’s deposition testimony that she would receive $650 per hour for her work as an expert witness, and that she would receive this payment only if Plaintiff recovers money in this action,” noting that the “contingency arrangement is prohibited by Georgia’s Rules of Professional Conduct.” *Id.* at n. 5; see also Ga. R. Prof. Conduct 3.4(b)(3). Without Fey’s testimony, the plaintiff was left with no admissible evidence of
actual damages. *Id.* at *9. Accordingly, the court granted the defendants’ motion for summary judgment. *Id.*

In contrast, courts continue to deny *Daubert* motions based on vague allegations that an expert’s opinion is “unreliable” that are unsupported by the evidence. For example, in *Polsinelli PC*, the plaintiff also argued that the defendants’ expert’s opinion about whether tanks could be brought into compliance with Georgia law was unreliable because his inspection of the tanks was insufficient. 2016 WL 7403742, at *13. Because the plaintiff failed to “explain exactly what tests [the expert] should have conducted,” instead simply “assert[ing] that what [the expert] did was insufficient,” the court denied the motion to exclude his testimony. *Id.*

The court reached a similar result in *Portis v. State Farm Fire & Casualty Co.*, No. 1:15-CV-3949-MHC, 2017 WL 3499873 (N.D. Ga. Apr. 11, 2017). *Portis* involved a claim for breach of contract based on wrongful denial of an insurance claim. State Farm moved for summary judgment and to exclude the testimony of the plaintiff’s expert that the plaintiff’s roof was damaged by hail. *Id.* at *1, 4. “In its motion, State Farm argue[d] broadly (and with little elaboration) that [the] testimony is ‘speculative,’ and ‘inconclusive,’ and emphasizes that [the expert] ‘conducted no testing to support his opinions, nor provided any data or bases to support such opinions.” *Id.* at *6. The court disagreed, noting that “although State Farm protests that [the expert’s] testimony is unreliable and speculative, many (if not all) of State Farm’s criticisms could be applicable to the report prepared by its own expert: both documents are based not on any kind of systematic testing or measurement, but instead on visual observation and, ultimately, what is evidently the same uncontroversial methodology.” *Id.* at *8. “[B]oth
inspectors ultimately did no more than visually examine Portis’ property, and State Farm has pointed to no meaningful distinction in the methods used by the two.”  *Id.*

c. **Helpfulness**

The third prong of the Eleventh Circuit’s *Daubert* analysis considers whether the proposed testimony will assist the trier of fact. “This factor turns on whether the expert testimony ‘concerns matters that are beyond the understanding of the average lay person.’”  *Portis*, 2017 WL 3499873 at *9 (quoting *Frazier*, 387 F.3d at 1262). “Proffered expert testimony generally will not help the trier of fact when it offers nothing more than what lawyers for the parties can argue in closing arguments.”  *Id.*

For example, in *Advantor Systems Corp. v. DRS Technical Services, Inc.*, 678 Fed. Appx. 839, 860, n.13 (11th Cir. 2017), the Eleventh Circuit affirmed the district court’s exclusion of expert testimony quantifying the expenses that one of the parties incurred in prior litigation. The court agreed with the trial court’s finding that the testimony “would not be helpful to a jury” because it “merely performed ‘simple arithmetic of the numbers provided by [plaintiff] . . .’ which was ‘within the understanding’ of a jury.”  *Id.*

In *Krise v. SEI/Aaron’s, Inc.*, No. 1:14-CV-1209-TWT, 2017 WL 3608189, at *1 (N.D. Ga. Aug. 18, 2017), the plaintiffs filed a class-action suit alleging that defendants installed software on computers they leased or sold to plaintiffs that they then used to unlawfully access and collect the plaintiffs’ private information. Among other things, the plaintiffs alleged that the installation of the software constitutes a computer trespass because it made the computers “sluggish.”  *Id.* at *4. The defendants moved to exclude several opinions by the plaintiffs’ experts, including expert testimony on the software’s flaws, which plaintiffs alleged reduced the speed of the computers.  *Id.* The court granted the defendants’ motion to exclude the expert testimony regarding computer
performance. *Id.* The court found that the expert’s “equivocal statements with regard to the cause of the alleged computer damage do not assist the trier of fact to determine causation.” *Id.* “To assist the trier of fact, the evidence presented must be relevant” and the expert’s “consistent use of ‘may,’ ‘can,’ and ‘could’ makes [the] statements merely possible, not more probable.” *Id.* The court then concluded that “[a] statement that something is merely possible ‘does not ‘logically advance a material aspect of [the Plaintiffs’] case.’” *Id.*

Similarly, in *Polsinelli PC*, the court excluded expert testimony where the expert “did not truly derive his opinion from any of the[] sources; rather it appear[ed] he applied basic logic to reach the conclusion that, had the [contract] included additional provisions governing the Tanks, Defendants would have been in a better position to obtain a favorable result in their dispute with the Sellers.” 2016 WL 7403742, at *15. The court found that “[a]lthough the jury may ultimately reach the same conclusion, such an opinion does not fall within the realm of proper expert testimony.” *Id.* Accordingly the court excluded the expert’s testimony that absent the alleged malpractice, the defendants’ ability to recover from the sellers in the litigation would have been significantly strengthened. *Id.*

**E. Other Grounds for Exclusion**

a. **Improper Rebuttal Opinions**

If you find that an expert has raised improper “new” opinions in a rebuttal report, it is important to note that this is not a *Daubert* issue. The defendant made the mistake of moving to exclude an improper rebuttal opinion on *Daubert* grounds in *Georgia Power Co. v. Sure Flower Equipment, Inc.*, No. 1:13-CV-1375, 2016 WL 3870080, at *10, n.3 (N.D. Ga. Feb. 17, 2016). The court denied the request because “remedies for
failure to disclose are governed by the Federal Rules of Civil Procedure,” not Daubert. 

Id. Because the defendant sought to exclude the opinions under Daubert, the issue of whether the expert’s opinions were “inadmissible ‘new opinions’ [wa]s a discovery issue not properly before the court.” Id.

A party seeking to exclude an expert opinion raised for the first time in a rebuttal report will have a much better chance of success under Federal Rule of Civil Procedure 37. Rule 37 provides that when a “party fails to provide information or identify a witness as required by Rule 26(a) or 26(e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially harmless.” Fed. R. Civ. P. 37(c)(1).

For example, in Gaddy v. Terex Corp., No. 1:14-cv-1928-WSD, 2017 WL 3276684, at *5 (N.D. Ga. Aug. 2, 2017), the defendants were successful in challenging several paragraphs of the rebuttal report of plaintiff’s expert as improper rebuttal opinions. The court reminded the parties that “[a] rebuttal expert report is not the proper ‘place for presenting new argument, unless presenting those arguments is substantially justified and causes no prejudice.’” Id. at *3 (quoting STS Software Sys., Ltd. v. Witness Sys., Inc., No. 1:04-CV-2111-RWS, 2008 WL 660325, at *2 (N.D. Ga. Mar. 6, 2008)). “That is, a rebuttal opinion generally must rebut an opposing expert’s opinion. If an opinion restates one offered in an original expert report, it may not be offered in rebuttal unless it rebuts an opinion offered by the opposing expert.” Id.
b. Failure to Comply with Local Rules

Counsel should also be mindful of the Local Rules in the Northern District, which mandate the exclusion of expert testimony when a party fails to comply with Local Rule 26.2(C). Rule 26.2(C) provides:

Any party who desires to use the testimony of an expert witness shall designate the expert sufficiently early in the discovery period to permit the opposing party the opportunity to depose the expert and, if desired, to name its own expert witness sufficiently in advance of the close of discovery so that a similar discovery deposition of the second expert might also be conducted prior to the close of discovery.

Any party who does not comply with the provisions of the foregoing paragraph shall not be permitted to offer the testimony of the party's expert, unless expressly authorized by court order based upon a showing that the failure to comply was justified.

Recent opinions demonstrate that courts will not hesitate to enforce this rule. For example, in Luxottica Group, S.p.A. v. Airport Mini Mall, LLC, No. 1:15-cv-1422-AT, 2017 WL 1806384, at *3 (N.D. Ga. Feb. 1, 2017), trademark holders brought suit against the owners and operators of an indoor flea market for contributory infringement relating to counterfeit sunglasses. The defendants served an expert report on certain landlord/tenant issues four days after the close of discovery, but a year before the scheduled trial date. Id. at *1. The plaintiffs moved to exclude the expert’s testimony under Local Rule 26.2(C) “because Defendants failed to disclose his identity as an expert and provide his expert report before the close of the discovery period.” Id. The defendants argued that the report was timely under Federal Rule of Civil Procedure 26, which provides that expert disclosures must be made at least 90 days before trial absent a stipulation or court order providing otherwise. Id. The defendants further argued that
the expert’s testimony could not be excluded without a showing of harm to the plaintiffs. *Id.*

The court rejected the defendants’ arguments, reminding the defendants that “compliance with the requirements of Rule 26 is not merely aspirational.” *Id.* at *2 (quoting *Reese v. Herbert*, 527 F.3d 1253, 1264 (11th Cir. 2008)). In accordance with Local Rule 26.2(C), the court found that the expert’s testimony would be excluded unless the defendants’ failure to comply was justified. *Id.* “A party’s failure to comply with Local Rule 26.2(C)’s disclosure requirement is not justified when the party knew or should have known that an expert was necessary before the late stages of the discovery period.” *Id.* at *3. The court noted that “Plaintiffs’ claim for contributory liability as to the owners and operators of the flea market . . . is premised on Defendants’ role as landlords and their resultant ability to control the use of their property by tenants under the terms of their lease agreements.” *Id.* Because “Defendants ha[d] been aware of the basis of the lawsuit throughout the litigation, the need for an expert on ‘landlord/tenant’ issues was apparent during the discovery period.” *Id.*

The court further noted that the defendants “offer[ed] no excuse for the untimely disclosure of [the] expert testimony or their failure to seek a discovery extension so as to permit a proper disclosure.” *Id.* Finally, the court rejected the defendants’ argument that the plaintiffs must demonstrate prejudice in order to exclude defendants’ expert. *Id.* The court noted that nothing in Local Rule 26.2(C) requires a showing of prejudice and that, in any event, the delay created by defendants’ failure to disclose the expert during the discovery period is itself prejudice warranting exclusion. *Id.*
F. Conclusion

Expert testimony can be essential in complex litigation. Experts are routinely used to explain technical or scientific aspects of a case to a jury and to determine the amount of damages suffered by the plaintiff. The cost of having an expert excluded, therefore, is undoubtedly high. In *Fey*, for example, the plaintiff was left with no admissible evidence of damages after the trial court granted the defendants’ *Daubert* motion. 2017 WL 2180672, at *9. The exclusion resulted in summary judgment in the defendants’ favor. *Id.* Cases like *Fey* should serve as a cautionary tale to litigants about the importance of establishing an expert’s qualifications, reliability, and fit at the outset, rather than waiting until discovery has closed, when it is often too late.
ESSENTIAL UPDATE FOR EXPERT TESTIMONY IN STATE COURTS

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GEORGIA’S EVOLVING DAUBERT FRAMEWORK

Prepared for the Institute for Continuing Legal Education

Expert Testimony in Georgia
October 27, 2017

Georgia’s framework for the admissibility of expert testimony is, for the biology fans in the audience, a bit like a platypus – a hodgepodge of different rules for different cases, even though the exact same type of testimony might be at issue in each. Since its controversial addition to Georgia’s legal landscape as part of a larger 2005 “tort reform” package, the new Daubert rules have caused more than a bit of litigant and judicial grumbling. That said, as the body of Daubert case law within Georgia grows, some very general rules have appeared. As always, a bit of context and background assists.

I. SOME HISTORY: EXPERT EVIDENCE THROUGH 2005

The admission of expert opinion has almost always been fraught with controversy, for the quite understandable reason that juries often sway toward well-heeled experts giving ivory-tower testimony. One fundamental problem with that, though, is that opinions are – like it or not – often available for the bidding. Chaulk v. Volkswagen of Am., Inc, 808 F.2d 639, 644 (7th Cir. 1986) (“There is hardly anything, not palpably absurd on its face, that cannot now be proved by some so-called ‘experts.’”); see In re Air Crash Disaster at New Orleans, 795 F.2d 1230, 1234 (5th Cir. 1986) (“[E]xperts whose opinions are available to the highest bidder have no place testifying in a court of law.”).

Thus was necessary some limitation on the frivolous or baseless opinion; modern practitioners reflexively characterize that framework as “Daubert,” the eponymous reference to Daubert v. Merrill Dow Pharmaceuticals, 509 U.S. 579 (1993). But that body of case law is of comparatively recent vintage. For decades, the law governing the...
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admissibility of expert testimony was almost uniformly referred to as the “Frye test,” as set out in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *Frye* notably turned on the admissibility of polygraph evidence, many decades before that technology was in anything like widespread use. In a one-page opinion that is devoid of a single legal citation, the Circuit Court described that

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

293 F.3d at 1014. This so-called “general acceptance” test had one obvious flaw – it would operate as a *per se* exclusion of results obtained with theories and methodologies that are capable of producing accurate and reliable results, but are too cutting-edge to have undergone peer review and gained general acceptance.\(^1\) Another problem was that the *Frye* rule basically ignored any analytical weaknesses in the underlying science, or in the credentials of a given witness to apply science to a given set of facts – both such issues were deemed to go to weight, and not admissibility, of an opinion.


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\(^{1}\) Examples are quite easy on this point. Many of the accepted scientific methodologies of today were completely unknown in 1923, or too “newfangled” to be generally accepted – *e.g.*, radiocarbon dating, electrocardiograms (EKGs), the vast majority of modern genetic study, and the like. Seen from another angle, many scientific “facts” long outlive proof of fundamental flaws – *e.g.*, life was possible from spontaneous generation, phrenology allowed a person’s fundamental personality traits to be determined by feeling bumps on that person’s scalp, or even that bloodletting was good for releasing harmful vapors or demons in one’s body.
(polygraph case; citing Frye with approval). As a bit of transition from the “general acceptance” rule, Georgia’s Supreme Court expressly rejected Frye in Harper v. State, 249 Ga. 519 (1982), criticizing the “head counting” nature of the Frye exercise. In setting out an alterative framework, though, the Supreme Court seemingly did not provide a readily identifiable upgrade:

We hold that it is proper for the trial judge to decide whether the procedure or technique in question has reached a scientific stage of verifiable certainty, or . . . whether the procedure rests upon the laws of nature. The trial court may make this determination from evidence presented to it at trial by the parties; in this regard expert testimony may be of value. Or the trial court may base its determination on exhibits, treatises or the rationale of cases in other jurisdictions. The significant point is that the trial court makes this determination based on the evidence available to him rather than by simply calculating the consensus in the scientific community. Once a procedure has been recognized in a substantial number of courts, a trial judge may judicially notice, without receiving evidence, that the procedure has been established with verifiable certainty, or that it rests upon the laws of nature.

249 Ga. at 525-26 (internal punctuation and citations omitted; emphasis added). As might be obvious from the style, the Harper test was judicially created in a criminal case, which would have implications a bit down the line.

The decisive turn away from Frye began in 1975, when the Federal Rules of Evidence were updated and adopted. Specifically, Rule 702 then provided that “[i]f 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

An astute reader will question the several-decades gap between Frye and Georgia’s first citation to that case. For some reason, Frye and the expert admissibility question, generally, lay almost dormant for years. In the first fifty years after its issuance, Frye was cited in less than one hundred cases in the entire country (perhaps even more surprising, it was not until 1984 that Frye was cited in a civil case). However, just before the reworking of the Federal Rules of Evidence in 1975, Frye became the de facto rule in just about every state or federal court to examine it.
by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Notably absent from the Rule was any requirement of “general acceptance” as an admissibility threshold. In confronting that issue in Daubert, the Supreme Court recognized the rather noncontroversial baseline that the Frye test was a creature of judicial common law, which could be (and would be) superseded by a corresponding federal Rule. 509 U.S. at 587-89.

     Given the plain-language analysis, then, the Supreme Court held that Rule 702 had replaced the Frye test.

     Nothing in the text of this Rule establishes “general acceptance” as an absolute prerequisite to admissibility. Nor does respondent present any clear indication that Rule 702 or the Rules as a whole were intended to incorporate a “general acceptance” standard. The drafting history makes no mention of Frye, and a rigid “general acceptance” requirement would be at odds with the “liberal thrust” of the Federal Rules and their general approach of relaxing the traditional barriers to ‘opinion’ testimony. . . . Frye made "general acceptance" the exclusive test for admitting expert scientific testimony. That austere standard, absent from, and incompatible with, the Federal Rules of Evidence, should not be applied in federal trials.

     509 U.S. at 588-89 (internal citations and some punctuation omitted).

     But that did not mean that the evidentiary gate was flung completely open. Instead, the Supreme Court set out the now-familiar three-prong test for admissibility of expert testimony: an expert must be qualified to give an opinion, which is based upon reliable principles and methods, and also assist the jury. Practitioners and courts often refer to the Daubert triad as requiring “qualification,” “reliability,” and “helpfulness/fit.” An expert’s qualification is a generally straightforward inquiry – does the proposed witness has the requisite knowledge, based upon education, training and experience – to give an opinion in a given areas of dispute?
The “reliability” prong is based upon traditional views of the scientific method—that is, science, generally, is a thing of hypothesis, testing, deduction, hypothesis reformation, and conclusion. On this point, the Supreme Court made clear that there were some guideposts that might guide a court’s admissibility inquiry, but that, importantly, there was no definitive checklist. The Daubert opinion set out the now familiar factors:

- whether the theories and techniques employed by the scientific expert have been tested;
- whether they have been subjected to peer review and publication;
- whether the techniques employed by the expert have a known error rate;
- whether they are subject to standards governing their application; and
- whether the theories and techniques employed by the expert enjoy widespread acceptance.\(^3\)

As a bit of a catchall, the Court also stressed that a gatekeeper must focus on the methods a would-be expert utilizes, rather than the conclusions generated. To guard against argument that a loosened admissibility standard would result in “junk science” darkening a courtroom’s door, the Court emphasized that traditional adversarial tools, such as the presentation of contrary evidence, a thorough cross-examination, and instructions on the burden of proof, would largely control any attempts to mislead a jury with “absurd and irrational pseudoscientific assertions.”

As to what “fit” means, or as some courts use it, “helpfulness,” the inquiry is really

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\(^3\) Many courts collapse the fourth and fifth factors, proclaiming the framework to be testability, peer review, error rate, and acceptance (which would, by nature, incorporate standards of application).
one of relevance or necessity. An expert’s opinion can “fit” the parameters of a given case if it involves a subject matter beyond the normal jury’s understanding; or, put another way, is necessary and helpful to the jury’s assessment of a given issue in dispute. Given that relatively succinct summary of how expert opinion was to be vetted, then, the post-*Daubert* world emerged.4

II. THE NEW FRAMEWORK – O.C.G.A. § 24-7-702

Since many states had already adopted evidentiary rules that paralleled the Federal Rules, acceptance of the *Daubert* approach quickly followed. Georgia engrafted *Daubert* principles onto this state’s law in 2005, as part of a larger tort reform package (the famous, or infamous, SB5). Though the statutory numbering has changed with the wholesale revision of the Georgia Evidence Code, *Daubert* has not; it appears that in federal and state courts, *Daubert* is here to stay. O.C.G.A. § 24-7-702(f).5

After an initial attempt at declaring the new *Daubert* statute unconstitutional failed in the Georgia Supreme Court, *Mason v. Home Depot U.S.A., Inc.*, 283 Ga. 271 (2008), Georgia courts settled into deciding gray-area disputes under the new framework.6 That

4 Congress soon amended Federal Rule of Evidence 702 to track the *Daubert* decision’s language. The Supreme Court also decided *General Electric Co. v. Joiner* (establishing the standard of review for *Daubert* challenges) and *Kumho Tire Co., Ltd. v. Carmichael* (applying *Daubert* framework to nonscientific testimony by experts that rely on “skill or experience-based observation,” rather than traditional “hard science” methods. *Kumho Tire*, in particular, made clear that the five-factor reliability inquiry was a flexible one, and that trial courts had substantial discretion in deciding which of the factors, or other factors, applied to a reliability challenge.

5 The initial “Daubert” statute in Georgia was codified at O.C.G.A. § 24-9-67.1. With the January 1, 2013 adoption of most of the Federal Rules of Evidence, the new statutory section is § 24-7-702.

6 The admission or exclusion of expert testimony is almost always governed by an abuse of discretion standard, which no party losing at the trial court level wants to
hardly meant that determining Daubert applicability was easy, or even straightforward. Notably for both niche and general practitioners, Daubert's application and requirements largely depend upon what kind of case you might be litigating. There seem to be at least six or seven “levels” of Daubert applicability:

<table>
<thead>
<tr>
<th>Type of Case/Litigation</th>
<th>Does Daubert Apply?</th>
<th>Relevant Code Section</th>
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<tbody>
<tr>
<td>Criminal</td>
<td>Not at all – default is Harper standard</td>
<td>O.C.G.A. § 24-7-702(a) (“[T]he provisions of this Code section shall apply in all civil proceedings.”), (g) (summarizing legislative intent, to apply “in all civil proceedings”)</td>
</tr>
<tr>
<td>Civil (general)</td>
<td>Yes</td>
<td>O.C.G.A. § 24-7-702(a), (b)</td>
</tr>
<tr>
<td>Condemnation proceedings (valuation only)</td>
<td>Not at all</td>
<td>O.C.G.A. § 22-1-14(b) (If any party to a condemnation proceeding seeks to introduce expert testimony as to the issue of just and adequate compensation, Code section 24-7-702 shall not apply.”); accord § 24-7-702(a) (excepting O.C.G.A. § 22-1-14 from broader Rule 702 requirements)</td>
</tr>
<tr>
<td>Administrative Proceedings</td>
<td>Sort of</td>
<td>O.C.G.A. § 24-7-702(g)</td>
</tr>
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confront. Given that deferential standard, Georgia’s appellate courts went the better part of a decade after the adoption of Daubert before finally reversing a trial court’s decision on an expert issue. L-3 Communs. Titan Corp. v. Patrick, 317 Ga. App. 207, 209 (2012) (reversing; “We also note that defendants were unable to direct us to an apposite case in which an appellate court in Georgia has reversed a trial court's ruling on the admissibility of expert testimony under OCGA § 24-9-67.1 (b), nor has our research found such a case.”).
So, to clarify at least somewhat, in criminal cases, *Daubert* does not apply and litigants need to apply the *Harper* “scientific certainty” framework. In general civil cases, general Rule 702/*Daubert* principles apply. Two exceptions to those cases include worker’s compensation actions and administrative proceedings. In such actions, O.C.G.A. § 24-7-702 is not to be “strictly applied,” though there is no statutory guidance (or judicial guidance) on what that means, exactly. Another exception is in property valuation cases, in which pure lay opinions, shorn of any reliability or qualifications concerns, are admissible as a matter of law.

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<thead>
<tr>
<th>Category</th>
<th>Application</th>
<th>Notes</th>
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<tbody>
<tr>
<td>Worker’s compensation</td>
<td>Sort of</td>
<td>(O.C.G.A. § 24-7-702(g) (“This Code section shall not be strictly applied in proceedings conducted pursuant to Chapter 9 of Title 34.”))</td>
</tr>
<tr>
<td>Professional malpractice actions, generally</td>
<td>Yes, with a small kicker</td>
<td>O.C.G.A. § 24-7-702(c)(1) (professional malpractice action, generally, requires compliance with traditional <em>Daubert</em> criteria, plus professional licensure at time of alleged negligence)</td>
</tr>
<tr>
<td>Medical malpractice actions</td>
<td>Yes, with a vengeance</td>
<td>O.C.G.A. § 24-7-702(c)(2) (requirements too detailed for a tabular summation)</td>
</tr>
</tbody>
</table>
valuation cases, in which pure lay opinions, shorn of any reliability or qualifications concerns, are admissible as a matter of law.

Other civil cases, termed “professional malpractice” actions, require the Daubert framework, plus raise the fairly pedestrian hurdle that an opining expert hold an active license in his or her profession, at the time of the event giving rise to the standard of care opinion. Finally, in medical malpractice actions, an expert must satisfy several qualification requirements before being permitted to give an opinion. These qualifications – what experience is sufficient, what it means to have practiced a procedure with “sufficient frequency to establish an appropriate level of knowledge,” and even which years count toward the “three of five” requirement, have all been the subject of extensive litigation.

There remain, of course, large gaps in the body of Georgia Daubert law.

III. THE LAST YEAR’S HIGHLIGHTS

While history is important, recent developments are likely more crucial. Georgia courts, both trial and appellate, still struggle with the proper application of Daubert.

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7 Although the General Assembly specifically carved out “medical malpractice actions” for elevated scrutiny under Rule 702, the same statute requires any affiant in a professional negligence action – those governed by O.C.G.A. § 9-11-9.1 – to meet “the requirements of this Code section.” Whether that means that an accounting or legal expert must meet the daunting requirements of subsection 24-7-702(c)(2), seemingly reserved for medical malpractice actions, is unclear.

8 Note, the subsection (c)(2) requirements only apply to experts submitting standard of care opinions, and not medical opinions on other subjects (like, say, causation). Why the General Assembly made such a distinction was not particularly clear during the 2005 debates or presentation of SB5, and has not been illuminated in subsequent judicial consideration.

9 E.g., Craigo v. Azizi, 301 Ga. App. 181, 687 S.E.2d 198 (2009) (years spent as a resident physician can count as years of "active practice" for purposes of Daubert qualification).
Some baseline thoughts (working toward truths), as formulated through the eyes of the author:

- aside from a few federal trial court judges, *Daubert* motions are received somewhere along of spectrum ranging from “tolerable, though not preferred” to something along the lines of “I hate this, and will put it on the corner of my desk for the next two years.”

- Expert challenges are wildly overused. Juries are free to determine whether an expert is qualified enough to give an opinion despite not publishing a pinpoint-specific peer-reviewed, nationally-awarded piece on a given set of facts; so, too, is a jury cognizant of whether an expert conveniently believes one set of fact witnesses over another. Neither such argument is a winning *Daubert* challenge, but that does not stop many practitioners from filing motions to that effect anyway.

- “Boomerang” motions are all too common as well. If the other side filed a *Daubert* motion, wouldn’t another be better? General answer: probably not.

- Practitioners often risk having their own expert excluded or limited by bringing *Daubert* challenges that are equally applicable to their own side’s experts.

Though thankfully those types of approaches to expert disputes are gradually decreasing (almost certainly because of lack of success), the reach of practitioners in *Daubert* disputes can be quite bold. A few near-term examples hopefully assist.

**Roadside sobriety tests – Mitchell v. State, 301 Ga. 563**

A bit of crossover between the criminal and civil realm was memorialized in *Mitchell v. State, 301 Ga. 563* (2017), which involved a myriad of challenges to a common roadside sobriety exercise, called the Romberg test. As outlined in *Mitchell*, that exercise requires a person suspected of driving while impaired to close his eyes, tilt his head back, and estimate the passage of 30 seconds. Apparently, most unimpaired
people can come within five seconds of the 30-second mark, plus or minus; an observer
also watches for so-called “eyelid tremors.”

*Mitchell* addressed a question relevant in almost every DUI case – is there a “fit”
requirement for expert testimony in criminal cases, given the lack of strict *Daubert*
criteria, and (2) is O.C.G.A. § 24-7-707 constitutional?

*Daubert* requires an expert’s opinions be helpful to a factfinder; that is, opinions
must “fit” the issues in dispute. In the criminal context, though, there is no statutory
mandate on that point, but *Mitchell* reiterated a line of caselaw stating what is at least
somewhat obvious – the *Harper* test does apply to the Romberg exercise, because it is
“a scientific test which must meet standards of validity and reliability,” rather than falling
into a simple physical dexterity exercise observable by the average layperson.” *Id.* at 566.

The Court helpfully distinguished between those two concepts, pointing to prior
precedent that required *Harper* analysis for roadside tests such as the horizontal gaze
nystagmus exercise, but declining to erect any such admissibility hurdle for other
roadside tests, such as age-old favorites like standing on one leg, or walking along a
line and turning. In sum, then, the unanimous Court held that the Romberg test must
pass *Harper* scrutiny to be admissible.

**Takeaway:** Prosecutors need to present expert testimony or other evidence as
to the reliability of the Romberg test going forward.

A recent Court of Appeals case contains one of the best examinations of what a reliable methodology looks like – or, more accurately, doesn’t look like. The Cash v. LG Electronics, Inc. litigation arose from a deadly home fire, which debatably started from a flat screen television. The cause and origin expert “opined that an internal component in the television's power supply board failed due to a manufacturing defect or mechanical damage, triggering a chain reaction that caused a fire.” 2017 Ga. App. LEXIS 412 at *2.

To get to that opinion, the expert attempted to recreate the events, but the trial court and Court of Appeals rejected that process as unreliable. For one, the “expert's methodology required repeated manipulation to achieve his desired results” – put plainly, when the recreation did not support the expert’s chain-reaction opinion, he kept manipulating the experiment until he got the results he wanted. Id. at *7. As the Court of Appeals put it, “[a]t every step of the expert’s experiment, the results failed to trigger the next event of his expected chain reaction unless he forced the result he desired and proceeded to the next step.”

That failing aside, the expert’s efforts to validate his methodology could charitably be termed subpar, and deserving of a lengthy quote:

Not only did the expert's methodology include unrealistic manipulation, he also failed to establish that his methodology has been peer-reviewed or used by others, or had otherwise obtained approval in the scientific community. When asked if his methods were generally accepted in the scientific community, the expert averred that he was a member of the scientific community, and he had created the test, and then he boldly claimed that his test “will pass muster.” Yet, he could name only one other person who has approved of it. Moreover, although
the expert claimed that his testing was published in an article, he could not name the publication.

Id. at *9-10. Rounding out the criticisms of the expert’s methodology, the Court also held that conducting the re-creation under circumstances that indisputably did not exist at the time of the actual fire was problematic. Id. at *10 (expert used different component parts than were used in the television, and also removed a safety fuse in order to conduct his experiment).

**Takeaway:** Sometimes, you just need to find and pay for a better expert.


Back in 2013, the Court of Appeals handed down Padgett v. Baxley & Appling County Hospital Authority, 321 Ga. App. 66 (2013). That decision, disposing of a case litigated under the “old” evidence Code, reiterated that affidavits from medical experts are not sufficient to create an issue of fact unless (1) they attach sworn or certified medical records or (2) are based on personal knowledge. Since most (all?) retained experts are not personally involved in a given patient’s care, the medical records requirement is the more central one.

The requirement that an affidavit attach sworn or certified records is a throwback to the days in which hearsay was “incompetent” evidence, deserving of no credit or weight. Id., 321 Ga. App. at 70; Hailey v. Blalock, 209 Ga. App. 345, 347 (1993) (“The requirement that a plaintiff's expert opinion be based on certified medical records or matters of record, or based on personal knowledge of the facts, responds to the question of hearsay as the foundation for an opinion, and conforms to the rule that mere
conclusions are not sufficient to create issues of fact.”); see O.C.G.A. § 9-11-56(e)
(“Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall
be attached thereto or served therewith.”).

Now, under the new evidence Code, hearsay is perfectly “competent” evidence if
not objected to. O.C.G.A. § 24-8-802 (“[I]f a party does not properly object to hearsay,
the objection shall be deemed waived, and the hearsay evidence shall be legal
evidence and admissible”). In addition, and more pertinent to an “expert evidence” CLE,
the factual or evidentiary bases for an expert’s opinion do not have to be admissible in
order for an expert to voice his or her opinion:

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.

O.C.G.A. § 24-7-703. The keen reader will thus see a bit of tension in the “sworn or
certified records” concept and the new expert statutes. Then came Fields v. Taylor, 340

Fields involved the admissibility of expert medical testimony, as do so many of
Georgia’s Daubert cases. Instead of a summary judgment posture, though, Fields
simply involved a motion to exclude the experts, which was based upon Padgett and the
bar against expert opinions “based . . . on unsworn and uncertified medical records.”

The trial court rejected that challenge, and the Court of Appeals did the same
(and affirmed). The appellate court walked through the governing framework, including
Rule 703’s provision that otherwise inadmissible hearsay evidence could properly be a basis for an expert’s opinion testimony. Confronting what now seems like an outdated rule from Padgett, though, the Court of Appeals sidestepped the issue:

In the instant case, both of Fields’s experts were deposed by counsel for Taylor, and it was this testimony that created a genuine issue of material fact . . . . Had the only opposition to Taylor’s motion for summary judgment been based off of both experts’ affidavits, then Padgett may have controlled. Yet, because both experts provided sworn testimony which created a genuine issue of material fact for a jury, the question of the admissibility of their affidavits becomes moot. Therefore, while the medical records relied upon by Fields’s experts were uncertified and thus inadmissible, because they were facts and data of a type reasonably relied upon by experts in their field in forming opinions, their testimony is admissible and the trial court did not abuse its discretion by denying Taylor’s motion to exclude it.

Id. at 711 (emphasis added). As is, then, the expert testimony in Affidavit form would have been inadmissible, but deposition testimony (including opinions based upon the same uncertified records) would properly be considered and admissible. Rule 56(e) and Rule 703 apparently still do not get along.

**Takeaway:** Just get certified records for everything.


Also worth noting is the Barko case, which reversal a trial court’s denial of summary judgment in a toxic mold case. Sudduth was the plaintiff, who alleged injuries from Barko Response Team’s failure to remediate “black mold” in his home. Barko asked for summary judgment, based upon a lack of evidence of any causal relationship between Sudduth’s alleged injuries and anything that the defendant did wrong.

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10 Sudduth claimed a wide range of physical injuries from mold exposure, including “back pain, bruising, headaches, muscle and joint aches, numbness and tingling in the
The medical evidence seemed at least enough to create a dispute of fact as to causation – Sudduth had an Affidavit from his treating physician, who averred that he suffered from “severe mold allergies arising from exposure to high amounts of mold in his home.”  339 Ga. App. at 899-900. Perhaps less persuasive was Sudduth’s own testimony as to the cause of his various maladies, which he claimed was “common knowledge. … It is common knowledge that people get sick from exposure to mold.”  *Id.*

Given that constellation of potential causation evidence, the trial court denied summary judgment; the Court of Appeals concluded otherwise and reversed. Some of the law involved is well established, some not so much. At a baseline, “an expert’s opinion on causation in a toxic tort case is admissible only if the expert concludes that the plaintiff’s exposure to a toxic substance made at least a ‘meaningful contribution’ to his injuries.”  *Id.*  Sudduth’s medical evidence – the Affidavit of a treating physician – fell short, though, on a number of levels. The Court held that the Affidavit did not “give any opinion on the degree to which Sudduth’s exposure to mold contributed to his injuries,” nor did the physician “give the factual basis for his opinion that the mold caused Sudduth’s illnesses.”  As to the last, the Court did list some possible types of evidence that might have assisted, but were absent, including clinical examination notes, blood tests, other clinical tests, analysis of mold spores, epidemiological data, animal studies, toxicology data, experiment results, an medical literature.  339 Ga. App. at 900–01. In sum, the appellate court held that the actual medical evidence was insufficient.

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legs, insomnia, dizziness, depression, irritability, blurred vision, memory loss, fibromyalgia, a heightened allergic reaction to various substances, and general weakness.”  339 Ga. App. at 899.
Going farther, the Court also rejected the “probative nonexpert testimony” on causation – that is, Sudduth’s claim that common knowledge could carry the day. The problem that is that Sudduth suffered from a number of health concerns prior to his exposure to mold in his home, including from working in mold-contaminated environments. *Id.* at 902. For those versed in classic language, the Court’s citation to the Latin *post hoc, ergo propter hoc* (after that, because of this) is likely welcome – Sudduth banked on his claim that his injuries arose after his exposure, thus providing evidence of causation. But that fallacy has long been rejected under Georgia law, in *Daubert* contexts and otherwise. *E.g.*, *Truelove v. Hullette*, 103 Ga. App. 641, 653 (1961) (Felton, C.J., dissenting) (“The mere fact that one thing happens before or simultaneously with a second, does not mean that the former caused or contributed to the latter. ‘Post hoc ergo propter hoc’ leads down blind alleys.”)

**Takeaway:** Never bet your case on lay scientific testimony that begins “Everybody knows . . .” or words to that effect.

A concluding thought. *Daubert* occupies an important part in many Georgia litigations, and the vast world of case law from which to draw makes it comparatively easy to find a “case for any proposition.” And that playing field Georgia’s *Daubert* statute expressly codifies the General Assembly’s intent 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.

O.C.G.A. § 24-7-702(f). Given the legislatively blessed use of foreign precedent in shaping Georgia’s expert admissibility law, it is quite the task to stay abreast of every potentially relevant *Daubert* development.
SUPER DAUBERT: ESSENTIAL UPDATE ON EXPERT TESTIMONY IN MEDICAL CASES

Taylor C. Tribble, Huff Powell & Bailey LLC, Atlanta
“Super Daubert”
Admissibility of Expert Testimony in Medical Malpractice Cases
2017 Update

Taylor Tribble • Huff, Powell & Bailey, LLC

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INTRODUCTION
It is a basic principle of Georgia law that a claim for medical malpractice must be supported by expert testimony. Georgia law requires that plaintiffs in a medical malpractice action offer testimony from a qualified expert that the defendant deviated from the medical standard of care and proximately caused the plaintiffs' injuries. Without expert testimony to this effect, a medical malpractice action cannot survive.

In a medical malpractice action, a plaintiff must prove each of three essential elements: (1) the duty inherent in the doctor-patient relationship; (2) a breach of that duty by failing to exercise the requisite degree of skill and care; and (3) that the breach of duty was the proximate cause of the sustained injury. O.C.G.A. § 51-1-27; see also Goggin v. Goldman, 209 Ga. App. 251, 252 (1993); Hawkins v. Greenberg, 166 Ga. App. 574, 575 (1983). To prove these elements, a plaintiff must present expert testimony establishing a breach of the medical standard of care and a causal connection between the breach and the plaintiffs' alleged injuries. Zwiren v. Thompson, 276 Ga. 498, 500 (2003) (holding that a medical malpractice plaintiff must bring forth expert testimony to establish that the alleged negligence caused the injury); see also Pilzer v. Jones, 242 Ga. App. 198, 201 (2000); Abdul-Majeed v. Emory University Hospital, 225 Ga. App. 608, 609 (1997) (overruled on other grounds).

Under Georgia law, O.C.G.A. § 24-7-702 governs whether an expert is permitted to offer medical opinions. Two requirements must be met. First, the statute requires that the expert's opinions must be scientifically reliable. Specifically, O.C.G.A. § 24-7-702 provides:

(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
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(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.

. . .

(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.

Second, the Georgia Code requires that, for an expert witness to be qualified to testify in a particular case the expert must have “actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given.” O.C.G.A. § 24-7-702(c)(2). In order to demonstrate actual knowledge and experience, the expert must have either been regularly engaged in:

(A) The active practice of such area of specialty of his or her profession for at least three of the last five years, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in performing the procedure, diagnosing the condition, or rendering the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; or

(B) The teaching of his or her profession for at least three of the last five years as an employed member of the faculty of an educational institution accredited in the teaching of such profession, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in teaching others how to perform the procedure, diagnose the condition, or render the treatment which is
alleged to have been performed or rendered negligently by the defendant whose conduct is at issue.

O.C.G.A. § 24-7-702(c)(2)(A) and (B).

A. Reliability of Medical Expert Testimony

1. Overview

In Georgia, the decision as to whether a qualified medical expert’s opinions are scientifically reliable and therefore admissible is governed by O.C.G.A. § 24-7-702(b) as well as Daubert and its progeny. Since 2005, when the Georgia Code embraced Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), trial courts have been empowered to function as gatekeepers for the admissibility of scientifically reliable testimony from competent experts. Section 702 explicitly permits trial courts to look to the Daubert decision and other like federal decisions when making the determination as to whether a medical expert’s testimony is admissible. In Daubert, the United States Supreme Court addressed the admissibility of expert testimony in a case in which the plaintiffs alleged that a drug ingested during pregnancy caused their children to be born with limb reduction defects. Daubert, 509 U.S. at 586-589. The Court established rules designed to ensure that expert testimony is based upon “scientific knowledge,” implying “a grounding in the methods and procedures of science” and something more than just “subjective belief or unsupported speculation.” Id., 509 U.S. at 589. Daubert requires the trial judge to act as a gatekeeper to ensure that speculative and unreliable opinions do not reach the jury. Daubert, 509 U.S. at 589, n.7. The Eleventh Circuit Court of Appeals described the trial court’s gatekeeping responsibility as follows:

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1 On remand, the Ninth Circuit Court of Appeals applied the standard announced in Daubert and concluded that the testimony of eight experts offered by the plaintiffs was insufficient to establish a causal connection between the drug at issue and the plaintiffs’ injuries. Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1319 (9th Cir. 1995).
As a gatekeeper, the court must do a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue. The proposed testimony must derive from the scientific method; good grounds and appropriate validation must support it.


“The importance of Daubert’s gatekeeping requirement cannot be overstated.” Frazier, 387 F.3d at 1260. Expert testimony “can be both powerful and misleading because of the difficulty in evaluating it.” Daubert, 509 U.S. at 595. The objective of the gatekeeping requirement is to ensure the reliability and relevancy of expert testimony and to make sure that an expert “employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” Kumho Tire Co., Ltd. V. Carmichael, 526 U.S. 137, 152 (1999). Expert testimony may be assigned “talismanic significance in the eyes of lay jurors” and trial judges must conduct an exacting analysis of the foundations of expert testimony to ensure that it meets the prevailing standards for admissibility. Frazier, 387 F.3d at 1263. The Eleventh Circuit has warned lower courts as follows:

Given time, information, and resources, courts may only admit the state of science as it is. Courts are cautioned not to admit speculation, conjecture, or inference that cannot be supported by sound scientific principles. The courtroom is not a place for scientific guesswork, even of the inspired sort. Law lags science, it does not lead it.”

Hendrix v. Evenflo Co., 609 F.3d 1183, 1194 (2010) (internal citations omitted). Thus, “[t]hat even limited screening by the trial judge, on occasion, will prevent the jury from hearing of authentic scientific breakthroughs is simply a consequence of the fact that the Rules are not designed to seek cosmic understanding but, rather, to resolve legal disputes.” Daubert, 509 U.S. at 580.
For expert testimony to be admissible under O.C.G.A. § 24-7-702(b) and Daubert, the burden is on the party presenting the expert testimony to show by a preponderance of the evidence that the experts’ opinions are reliable and relevant. McClain, 401 F.3d at 1238 n.2; McDowell v. Brown, 392 F.3d 1283, 1298 (11th Cir. 2004). In Daubert, the Supreme Court listed the following four non-inclusive factors that trial judges should consider when evaluating the reliability of expert testimony: (1) whether the experts’ theories have been tested; (2) whether the theories have been subjected to peer review and publication; (3) the known or potential rate of error of the particular scientific technique,\(^2\) and (4) whether the theories are generally accepted in the scientific community. An additional “very significant factor” to consider is whether the expert’s opinion has been formed solely for the purpose of testifying in litigation. Daubert v. Merrell Dow Pharmaceuticals, 43 F.3d 1311, 1317-1318 (9th Cir. 1995) (“Daubert II”). Courts also may consider whether the expert has relied on improper extrapolation, as in animal studies, to support the proposed theory. Allison v. McGhan Medical Corp., 184 F.3d 1300, 1312 (11th Cir. 1999).

2. Recent Appellate Decisions


The plaintiffs filed this medical malpractice case against several defendants, alleging the negligent performance and interpretation of a carotid artery ultrasound in May of 2009 that resulted in Dennis Fender suffering a massive stroke and brain damage in April of 2010. The trial court denied, among other motions, the radiology defendants’ motion to exclude the

\(^2\) The third criteria—known or potential rate of error—does not typically apply to the type of causation testimony offered by experts in medical malpractice cases.
testimony of one of the plaintiffs’ medical experts.\footnote{There were companion appeals filed by different defendants dealing with other legal issues that are not discussed herein.} The defendants argued that the opinions of plaintiffs’ neuroradiologist expert, Dr. Evans were not reliable pursuant to O.C.G.A. § 24-7-702(b). Specifically the radiology defendants challenged Dr. Evans’s testimony that Mr. Fender had “significant stenosis” in his left internal carotid artery and that was greater severity than diagnosed by radiologist Dr. Spell. They further alleged that Dr. Evans’s opinions were based solely on his interpretation of some, but not all, of the ultrasound images taken of Mr. Fender’s carotid artery in 2009.

The Court of Appeals, like the trial court, was not persuaded by the radiology defendants’ arguments. Dr. Evans based his opinions on more than just some of the ultrasound images, including the fact that in April of 2010 Mr. Fender’s carotid ultrasound showed 100% stenosis and that based on his education, training and experience, progression to 100% stenosis in 11 months most likely reflected a stenosis greater than 50% in May of 2009. Thus, the Court of Appeals determined Dr. Evans’s opinions were reliable and that the trial court did not abuse its discretion in denying the radiology defendants’ motion to exclude his testimony.


The \textit{Smith} case involved allegations that a baby’s ischemic strokes, diagnosed a few days after delivery, were caused by “mechanical compressive forces” on the baby’s head during labor (i.e. contractions, pushing, use of Pitocin and malposition of the baby’s head). The plaintiff’s obstetrician expert, Dr. Barry Schifrin, coined this mechanism of injury “cranial compression ischemic encephalopathy.” The plaintiff identified three other causation experts, including a pediatric neuroradiologist, pediatric neurologist and neonatologist – all who opined that it was compressive forces that caused the baby’s ischemic strokes, but relied on Dr. Schifrin’s
testimony, as the obstetrician, to explain exactly how the mechanics of labor could result in this compression.

Following a hearing, the trial court, in a thorough order, concluded that Dr. Schifrin’s theory had not been reliably tested, had not been subjected to peer review, was not generally accepted in the scientific community and had not been clinically diagnosed in another other patients. The plaintiff appealed and argued that the trial court erred in excluding Dr. Schifrin’s testimony and that it failed to consider the testimony of two of her other causation experts – Dr. Duane MacGregor, a pediatric neurologist, and Dr. Thomas Naidich, a pediatric neuroradiologist. The Court of Appeals noted that the trial court, however, did consider the testimony of all of the plaintiff’s causation experts and more significantly both Dr. MacGregor and Dr. Naidich testified that neither was an expert in the mechanics of labor and were deferring to other experts (Dr. Schifrin) as to the specific events during labor that could have caused or contributed to the injuries. The Court of Appeals then went on to evaluate the evidence and testimony regarding Dr. Schifrin’s compression theory. The sum of the plaintiff’s causation experts’ testimony demonstrated that this compression theory was a hypothesis proposed by Dr. Schifrin that had not been scientifically studied or tested. There also was no peer review literature to support the specific theory. Dr. Schifrin admitted in a book chapter he published discussing this theory that it was not an accepted theory in the obstetric community. The plaintiff’s neonatology expert also agreed the theory was not well known among his neonatology colleagues. Finally the Court of Appeals noted that none of the plaintiff’s experts could identify a patient who had been diagnosed with suffering ischemic strokes caused by this proposed
mechanism of injury. Thus, the Court of Appeals held that the trial court did not abuse its discretion in excluding the plaintiff’s causation theory and dismissing the case.⁴

B. Medical Expert Qualifications

1. Overview

To file a medical malpractice lawsuit O.C.G.A. §9-11-9.1 requires an accompanying expert affidavit. Since the enactment of this statute, Georgia’s appellate courts have continued to evaluate the meaning of section 9-11-9.1, generating multitudes of opinions on what constitutes as a malpractice action, who may serve as an expert in a given case, who qualifies as an expert, what constitutes a proper affidavit and what happens when the plaintiff fails to satisfy the affidavit requirement. Mastering the case law that accompanies section 9-11-9.1 is crucial for any attorney intending on filing a medical malpractice case.

Arguably, one of the most litigated issues surrounding section 9-11-9.1 is what constitutes a “competent” expert in a medical malpractice action. The competency requirement in section 9-11-9.1 hinges on the provisions of section 24-7-702. Pursuant to subsection (e), “[a]n affiant shall meet the requirements of this Code section in order to be deemed qualified to testify as an expert by means of the affidavit required under Code Section 9-11-9.1.”

Section 24-7-702(c) lays out the specific requirements an expert must meet to be competent or qualified in a medical malpractice action. There are two categories in which an expert may be deemed qualified – (1) as a practicing expert or (2) as a teaching expert. To qualify as a practicing expert under section 702(c)(2)(A), the expert must have been in “the active practice of such area of practice . . . for at least three of the last five years, with sufficient frequency to establish an appropriate level of knowledge . . . in performing the procedure,

⁴ The plaintiff has filed a Petition for Writ of Certiorari with the Supreme Court, but the Supreme Court has yet to decide to accept this petition.
diagnosing the condition, or rendering the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue.” In the alternative, under section 702(c)(2)(B), an expert may be qualified as a teaching expert as long as he or she has taught the profession “for at least three of the last five years as an employed member of the faculty of an educational institution accredited in the teaching of such profession, with sufficient frequency . . . as determined by the judge, in teaching others how to perform the procedure” at issue.

An expert witness must have “actual professional knowledge and experience in the area of practice or specialty” that is relevant to the actions that the plaintiff alleges were negligent. O.C.G.A. § 24-7-702(c); Nathans v. Diamond, 282 Ga. 804, 806 (2007); Spacht v. Troyer, 288 Ga. App. 898, 900 (2007); Cotten v. Phillips, 280 Ga. App. 280, 284-285 (2006). “[T]he General Assembly intended to require a plaintiff to obtain an expert who has significant familiarity with the area of practice in which the expert opinion is to be given.” Hope v. Kranc, 304 Ga. App. 367, 369 (2010) (internal citations omitted). “Whether a witness is qualified to render an opinion as an expert is a legal determination for the trial court and will not be disturbed absent a manifest abuse of discretion.” Mason v. Home Depot USA, Inc., 283 Ga. 271, 279 (2008).

In 2015, the Georgia Supreme Court focused on the appropriate framework to evaluate an expert’s qualifications in the Dubois v. Brantley, 297 Ga. 575 (2015). Dubois involved a patient who suffered a coma following a laparoscopic procedure to repair an umbilical hernia in March of 2011. Days after the surgery, Mr. Dubois returned to the hospital with a fever and other symptoms and was diagnosed with acute pancreatitis. Dr. Brantley performed an exploratory laparotomy, which revealed that Mr. Dubois’s pancreas had been punctured – likely the cause of
Mr. Dubois was admitted for over a month, underwent numerous additional surgeries and suffered complications, including a coma.

Mr. Dubois and his wife filed a medical malpractice lawsuit in January of 2012 against Dr. Brantley and the hospital, claiming that Dr. Brantley was negligent in puncturing Mr. Dubois’s pancreas with a trocar during the laparoscopic procedure to repair the hernia. In support of their complaint, the Duboises filed an expert affidavit from Dr. Steven Swartz, a practicing general surgeon. Dr. Swartz also gave a deposition. According to his testimony, Dr. Swartz had only performed on laparoscopic umbilical hernia repair one time in the last five years and typically performs the procedure by open surgery.

Following Dr. Swartz’s deposition, the defendants filed a motion to dismiss the complaint or, in the alternative, for summary judgment, contending that Dr. Swartz was not a competent expert to support the complaint. The trial court denied the defendants’ motion and the defendants appealed. The Georgia Court of Appeals overturned the trial court’s holding, finding that the plaintiff’s expert affiant was not qualified as a matter of law.

The Georgia Supreme Court reversed. The Supreme Court’s opinion centered around how to define “procedure” so as to determine whether the expert was qualified, noting that section 24-7-702(c) did not define this term. The defendants defined the procedure as a “laparoscopic procedure to repair an umbilical hernia,” but the Supreme Court did not agree with this general characterization. Instead, the Supreme Court focused on the limited scope of the allegations of negligence – that Dr. Brantley was negligent only in his insertion of the trocar. Although Dr. Swartz had not performed laparoscopic umbilical hernia repairs, he had sufficient experience in performing other abdominal procedures involving the placement of a trocar. Thus, the Supreme Court held that there was evidence that Dr. Swartz had sufficient experience
to establish a reliable basis for the opinions he rendered. Thus, now when challenging the qualifications of an expert, counsel must consider what specific allegations of negligence and whether the expert is qualified in that procedure/treatment or part of the procedure/treatment at issue.

2. Recent Appellate Decisions


The Zarate-Martinez case involved allegations of negligence surrounding the performance of a tubal ligation. Specifically, Ms. Zarate-Martinez alleged that on April 24, 2006 Dr. Echemendia was negligent in performing the tubal ligation, causing a bowel perforation that required repair. Initially, in support of her complaint, Ms. Zarate-Martinez attached an affidavit of Dr. Errol Jacobi, an obstetrician gynecologist. Defense counsel took the deposition of Dr. Jacobi and subsequently Ms. Zarate-Martinez identified Dr. Charles Ward, an obstetrician gynecologist and defense counsel deposed Dr. Ward. Defendants then filed a motion to strike expert testimony and motion for summary judgment, arguing that both Dr. Jacobi and Dr. Ward were not qualified. The trial court granted defendants’ motion, but allowed Ms. Zarate-Martinez an additional 45 days to identify a “competent” expert. Ms. Zarate-Martinez filed an affidavit of Dr. Nancy Hendrix. The defendants filed a motion to strike that affidavit and motion to dismiss and in response, Ms. Zarate-Martinez filed a supplemental affidavit of Dr. Hendrix. The trial court granted the defendants’ motion and Ms. Zarate-Martinez appealed.

In her initial affidavit, Dr. Hendrix averred that she had “regularly practiced for more than 5 years before the performance of the tubal ligation performed by Dr. Echemendia in this case.” She further averred she had performed “open laparoscopies on patients over the course of years of [her] internship, residency and private practice” and that she was “experienced in the
procedure.” In the Supplemental Affidavit, Dr. Hendrix stated that she had used the method of an “open laparoscopy” in many of the tubal ligations she performed during the five years prior to April 24, 2006.

The Court of Appeals held that the trial court did not abuse its discretion by finding that merely stating that the physician had performed a procedure, without more specificity as to frequency or type, is insufficient to qualify as a competent expert under section 24-7-702(c). Although in the supplemental affidavit, Dr. Hendrix averred she performed the procedure “many” times in each of the five years prior to the surgery at issue, she failed to qualify what she meant by many and therefore the Court of Appeals held that the trial did not abuse its discretion in determining that the affidavit failed to demonstrate an appropriate level of knowledge in performing the procedure in three of the five years prior to Ms. Zarate-Martinez’s surgery.

Ms. Zarate-Martinez also challenged the constitutionality of the statute on various grounds. The Court of Appeals found that the trial court did not distinctly rule on these issues and therefore they were not properly preserved for appeal. The Supreme Court issued a writ of certiorari, and determined that section 24-7-702(c) is constitutional. It affirmed the trial court’s decision to strike the testimony of two of the experts – Dr. Ward and Dr. Jacobi. Finally, the Supreme Court vacated the trial court’s decision regarding Dr. Hendrix and remanded the case back to the trial court to consider its decision under the parameters set forth in Dubois - whether Dr. Hendrix has an appropriate level of knowledge in performing the procedure at issue in order to be qualified under the statute.


In McKuhen, the plaintiff sued various entities claiming medical malpractice and § 1983 violations stemming from the death of Carol McKuhen at an Effingham County jail in January of
2012. With regard to the medical malpractice claims, the plaintiff alleged that the physician and nurses caring for Ms. McKuhen were negligent in failing to properly treat her alcohol withdrawal symptoms and detoxification complications, causing her death. The plaintiff retained an expert, Dr. Kern, a physician with impressive national accolades and accomplishments, but who lacked the requisite experience mandated by O.C.G.A. § 24-7-702(c). He did not qualify as a teaching or a practicing expert because during the five years preceding Ms. McKuhen’s death he did not teach anyone how to monitor or treat inmates going through alcohol withdrawal and did not provider daily or even regular patient care during that time. Thus, the Court of Appeals upheld the trial court’s determination that Dr. Kern was not qualified.

In an enlightening concurrence by Judge McFadden he answered a rhetorical question proffered in the appellant’s brief: “If Dr. Kern is not an expert about the treatment of inmates undergoing alcohol withdrawal, who is?” Judge McFadden noted that “as the trial court went on to explain, O.C.G.A. § 24-7-702(c) ‘seeks to greatly narrow the pool of experts the law deems worthy of testifying in medical malpractice suits, and it seems self-evident that experts with sterling overall qualifications will be excluded in cases based on the perimeters of frequency and specialty that are statutorily pronounced.’” In answering the rhetorical question, Judge McFadden stated “an expert with less stellar qualifications.”


The Yugeros case involved allegations of medical malpractice surrounding the post-operative care and treatment of Ms. Iselda Moreno. Dr. Patricia Yugeros of Artisan Plastic Surgery, LLC performed various plastic surgeries, including an abdominoplasty on Ms. Moreno on June 24, 2009 and subsequently Ms. Moreno had some complaints of pain, was seen and treated at different hospitals by different physicians, including Dr. Yugeros, and unfortunately
died. The case centered on the decision not to get a post-operative CT scan. During discovery, the plaintiff noticed a 30(b)(6) deposition from Dr. Yugeros’s medical practice and the practice identified Dr. Diane Alexander, the founder and co-owner of the practice, as the appropriate witness. During her deposition, Dr. Alexander testified in sum that the standard of care required ordering a CT scan in these circumstances. The defendants moved to exclude Dr. Alexander’s opinions from trial, arguing that her qualifications had not be established, that she had not been identified as an expert and that her testimony contained hearsay. The trial court granted this motion. The trial proceeded and resulted in a defense verdict. The plaintiff appealed and the Court of Appeals reversed the trial court’s ruling, holding that the testimony was offered as an admission against interest under O.C.G.A. § 9-11-32(a)(2) and not as expert testimony pursuant to O.C.G.A. § 24-7-702, and therefore should not have been excluded.

The Georgia Supreme Court reversed the Court of Appeals’ decision, holding that O.C.G.A. § 9-11-32(a)(2) does not create a rule that allows any Rule 30(b)(6) deposition to be admitted at trial in its entirety as an admission against interest, but instead allows for the admission of the deposition only when the admission is permitted under the rules of evidence. The Court further held that any time medical standard of care testimony is offered, O.C.G.A. § 24-7-702 is a relevant rule of evidence that must be considered. Under that statute, the Georgia Supreme Court held that the trial court still maintains its role as a gatekeeper of expert testimony, even when testimony has been secured by Rule 30(b)(6). The issue of Dr. Alexander’s qualifications were not addressed by the Court of Appeals and therefore beyond the scope of the Supreme Court’s writ of certiorari. Thus, the Court reversed the Court of Appeals’ decision and remanded the case back to the trial court.

The Everson case surrounded claims of medical malpractice against hospital emergency room nurses and Dr. Brian Jordan, an emergency room physician who saw Benjamin Everson in the Phoebe Sumter emergency room on April 29, 2008. Mr. Everson complained of hallucinations and that he was hearing voices. Dr. Jordan diagnosed Mr. Everson with Obsessive Compulsive Disorder, discharged and him with an appointment to see a mental health care provider in two days. A few days later, he was riding in the car with his father when Mr. Everson jumped out of the moving car, ran in front of a moving vehicle was struck and killed. His parents then sued Dr. Jordan and the hospital for wrongful death and medical malpractice, alleging Dr. Jordan failed to properly evaluate and treat Mr. Everson’s condition, misdiagnosed him and failed to order a psychiatric evaluation. The plaintiffs further alleged that the hospital nurses failed to determine that Dr. Jordan’s diagnosis was incorrect and prevent Mr. Everson from being discharged. The plaintiffs identified two expert witnesses – a psychiatrist and emergency room physician who criticized the care and treatment of Dr. Jordan and the hospital nurses. The trial court deemed both experts unqualified pursuant to O.C.G.A. § 24-7-702 (b) as to the hospital nurses. The plaintiffs appealed as to the emergency room physician expert.5

The Court of Appeals found no abuse of discretion on behalf of the trial court in excluding the physician expert from testifying against the nurses. The Court reasoned that the deviations from the standard of care alleged by the physician expert “pertain[ed] to conduct that was outside the scope of nursing care allowed by Georgia law,” because a nurse cannot legally diagnose a medical condition. The Court held that “the failure of an expert’s testimony to comport with Georgia law is a ground for exclusion of that testimony under O.C.G.A. § 24-7-702 (b).”

5 There were other decisions by the trial court that were appealed by both the hospital and Dr. Jordan that are not discussed herein.
CONCLUSION

Section 24-7-702 is a rule of evidence that applies to standard of care and medical causation testimony in medical malpractice cases. All counsel should consider the Daubert criteria as well as the expert qualifications requirements in retaining their own experts and in deposing opposing experts. Failure to adhere to these criteria and requirements can lead to a protracted appellate course and even the dismissal of the entire case.
CRACKING THE CODE ON “PEER REVIEW” FOR EXPERT PUBLICATIONS

Sonja Rasmussen, MD, Editor-in-Chief, Morbidity & Mortality Weekly Report; Director, Division of Public Health Information Dissemination, Centers for Disease Control & Prevention, Atlanta
Sonja A. Rasmussen, MD, MS

Sonja Rasmussen, MD, MS is Editor-in-Chief of CDC’s *Morbidity and Mortality Weekly Report (MMWR)* Series and Director of the Division of Public Health Information Dissemination. Since joining CDC in 1998, Dr. Rasmussen has held several positions in the National Center on Birth Defects and Development Disabilities including Medical Officer, Associate Director for Science, and Senior Scientist. While there, she worked collaboratively with other experts across CDC on pandemic planning efforts for pregnant women, which guided CDC recommendations for pregnant women during the 2009 H1N1 pandemic. From 2011-2014, she served as Deputy Director of the Influenza Coordination Unit, which is responsible for CDC’s pandemic influenza preparedness. Before her current position, Dr. Rasmussen served for six months as the Acting Director of the Office of Public Health Preparedness and Response, the office responsible for CDC’s public health preparedness and response activities, including its Emergency Operations Center. Dr. Rasmussen has played leadership roles in several CDC emergency responses to infectious diseases, including 2009 H1N1 influenza, Middle East Respiratory Syndrome (MERS) coronavirus, Ebola virus, and Zika virus. She also served as the lead author of the *New England Journal of Medicine* article that identified Zika virus as a cause of serious birth defects.

Dr. Rasmussen received her BS in Biology and Mathematics with magna cum laude honors from the University of Minnesota-Duluth, her MS degree in Medical Genetics from the University of Wisconsin, and her MD degree with honors from University of Florida. She is board certified in pediatrics and clinical genetics and is an author on over 200 peer-reviewed papers.
**CURRICULUM VITAE**

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**Place of Birth:** Mankato, Minnesota

**Security Clearance:** Top Secret/Sensitive Compartmented Information

**Education:**

- **1981**  
  BS in Biology and Mathematics (magna cum laude honors), University of Minnesota Duluth
- **1983**  
  MS in Medical Genetics, University of Wisconsin, Madison
- **1990**  
  MD with honors, University of Florida College of Medicine, Gainesville

**Postdoctoral Training:**

- **1990-1993**  
  Resident in Pediatrics, Massachusetts General Hospital, Boston
- **1993-1994**  
  Fellow in Clinical Genetics, Center for Medical Genetics, Johns Hopkins University, Baltimore
- **1994-1996**  
  Fellow in Clinical Genetics, Department of Pediatrics, Division of Genetics, University of Florida Health Science Center, Gainesville

**Professional Experience:**

1/2015-present  
Editor-in-Chief, *Morbidity and Mortality Weekly Report (MMWR)*, CDC  
Director, Division of Public Health Information Dissemination, CDC - >40 hours/week

- Provides overall direction, editorial leadership and expertise on the development and execution of CDC’s *Morbidity and Mortality Weekly Report (MMWR)* series of publications - the MMWR series is CDC’s principal mechanism for communicating official CDC information and is a widely respected journal in the field of public health with an impact factor of 11.483 (2017)
- Identifies and solicits appropriate content for the MMWR series of publications as a critical component of the Agency’s efforts to translate scientific knowledge into public health practice, policy, and urgent action
- Collaborates with state and local health departments, other federal agencies, and the public health professionals across CDC to ensure that critical time-sensitive public health information is immediately communicated to those groups who need
to take public health action

- Provides strategic leadership to Division of Public Health Information Dissemination, which includes the MMWR series, Community Guide, Vital Signs, CDC Library, Informatics Innovation Unit, and Office of Public Health Genomics
- Served as Senior Consultant (January 2016–September 2017) and Acting Co-Lead (for four weeks) for the Pregnancy and Birth Defects Task Force for CDC's Zika Response - authored several manuscripts on Zika virus and pregnancy, including lead author of manuscript published in New England Journal of Medicine that confirmed Zika as a cause of microcephaly and other serious brain defects
- Served as Co-Lead for Epidemiology and Surveillance Task Force (for six weeks) for CDC's Zika Response. Managed team of epidemiologists and transitioned response from Emergency Operations Center to program.

6/2014-12/2014
Acting Director (602 - GP15), Office of Public Health Preparedness and Response, CDC - >40 hours/week

- Led CDC’s Office of Public Health Preparedness and Response (OPHPR), which is responsible for CDC’s public health preparedness and response activities for all hazards and provides strategic direction, support, and coordination for these activities across CDC as well as with local, state, tribal, national, territorial, and international public health partners
- Responsible for planning, direction and management of OPHPR, including responsibility for an annual operating budget of $1.3 billion and a workforce of >900 employees and contract staff
- Developed relationships with key partners including Association of State and Territorial Health Officials, Council for State and Territorial Epidemiologists, Association of Public Health Laboratories, and National Association of County and City Health Officials to improve public health preparedness and response
- Initiated Impact Measures Project, with goal of better measuring impacts of public health preparedness and response efforts
- Responsible for activities of CDC’s Emergency Operations Center, including those associated with level 1 activation for 2014 Ebola response
- Collaborated with National Center for Environmental Health to develop CDC-wide plan for radiologic emergency
- Worked with Division of Select Agents and Toxins to develop a plan to upgrade the National Select Agent Registry and to increase staffing, with the goal of improving regulatory oversight of select agents and toxins in the United States
- Collaborated with National Center for Chronic Disease Prevention and Health Promotion and National Center on Birth Defects and Developmental Disabilities on National Preparedness Month (September 2014) to include focus on Vulnerable Populations (e.g., pregnant women, children, older adults, persons with disabilities, and persons with chronic diseases)
- Worked with Center for Global Health and Office of Safety, Security and Asset Management to improve deployer preparedness for international deployments as part of 2014 Ebola response
- Developed relationships with state and local health department leadership to improve public health preparedness and response
- Coordinated activities with other federal agencies, including the Food and Drug Administration, National Institutes of Health, and the Office of the Assistant Secretary for Preparedness and Response
- Represented CDC as part of the Public Health Emergency Medical Countermeasure
Enterprise to make recommendations for medical countermeasure purchases for the Strategic National Stockpile

4/2014-6/2014
Deputy Director (602 - GP15), Influenza Coordination Unit, CDC - >40 hours/week

- Served as Deputy Incident Manager for Middle East Respiratory Syndrome Coronavirus (MERS-CoV) Response, including serving as Acting Incident Manager in Incident Manager’s absence
- Supervised activities in the Emergency Operations Center, including approving slides for daily meetings, reviewing daily situation reports, reviewing requests for staff deployments and for additional staff, drafting daily email updates to CDC leadership
- Developed high-level briefings, including presentation to brief the new HHS Secretary on MERS (presentation was given by CDC Director)
- Assisted Emergency Operations Center staff with development of the Incident Action Plan for the 2014 MERS response
- Reviewed manuscripts, key points, and guidance documents for CDC website

1/2014-4/2014
Acting Director (602 - GP15), Influenza Coordination Unit, CDC - >40 hours/week

- Led CDC’s efforts related to pandemic planning and response
- Coordinated efforts related to pandemic planning across CDC, including making decisions about allocating $156M budget and providing direction for pandemic preparedness focus areas (domestic epidemiology/surveillance/laboratory, international, vaccine planning and delivery, medical care and countermeasures, community and border protection measures, state and local support/coordination, at-risk and vulnerable populations, communications, and response readiness)
- Coordinated CDC pandemic response activities with other HHS agencies, including Assistant Secretary for Preparedness and Response, Biomedical Advanced Research and Development Authority, National Vaccine Program Office, Food and Drug Administration, and National Institutes of Health
- Served as author and in a coordinating role on an update to the Intervals, Triggers and Actions Pandemic Influenza Framework, a framework anticipated to improve US government pandemic planning and response - in this coordinating role, plans to ensure that key partners within and outside CDC (including state and local health department leadership and other federal departments and agencies) provided input on framework were developed and implemented
- Worked with other staff to develop plan to use additional funds targeted for pandemic preparedness to purchase medical countermeasures for Strategic National Stockpile
- Worked across CDC and with other federal agencies at the National Security Council to develop guidelines for stockpiling of antiviral medication stockpiling for federal agencies
- Developed and presented CDC briefing as part of the Public Health Emergency Medical Countermeasure Enterprise (PHEMCE) Pandemic Influenza Portfolio Review to the Assistant Secretary for Preparedness and Response
- Supervised planning for Pandemic Influenza Functional Exercise planned for August 2014
- Supervised Influenza Coordination Unit staff and worked with leads from all focus areas to assure continued progress on pandemic preparedness issues
Served as CDC liaison to the White House National Security Council (NSC) on issues related to pandemic preparedness, H7N9 influenza, MERS-CoV, and global health security, including ensuring that (1) CDC was represented at key NSC meetings, (2) requests from the NSC were promptly addressed, and (3) key members of CDC leadership were kept up-to-date regarding NSC activities.

Deputy Director (602 - GP15), Influenza Coordination Unit, CDC - >40 hours/week

- Served as senior medical advisor to the Director of the Influenza Coordination Unit (ICU) on scientific and programmatic aspects of influenza activities
- Advised ICU Director in developing priorities and allocating CDC’s $156 million budget for influenza activities
- Developed and coordinated new initiatives related to pandemic preparedness activities
- Facilitated interactions with investigators across CDC working on influenza and pandemic preparedness
- Served as Acting ICU Director in Director’s absence
- Coordinated research activities for pandemic influenza preparedness-related work of interest to CDC, including serving as lead for Pandemic Influenza Scientific Agenda activities
- Provided supervision and mentoring for members of the ICU Scientific Resource and Policy teams
- Interacted with professional organizations about CDC’s pandemic preparedness activities
- Served as liaison between CDC and HHS colleagues regarding pandemic influenza preparedness and response efforts
- Reviewed manuscripts related to pandemic preparedness for quality of science and appropriateness for publication as part of CDC clearance process
- Served as CDC lead of HHS Public Health Emergency Medical Countermeasures Enterprise (PHEMCE) All-hazards Respiratory Protective Device Capabilities Assessment Working Group, the group tasked with setting requirements for stockpiling of respiratory protective devices for future public health emergencies, including an influenza pandemic - group includes members from other federal departments and agencies, including Food and Drug Administration and the Occupational Safety and Health Administration
- Served as lead for CDC Office of Infectious Diseases Joint NCIRD - NCEZID Modeling Unit Steering Committee
- Served as CDC liaison to the White House National Security Staff on issues related to pandemic preparedness, H7N9, Middle Eastern Coronavirus, and global health security
- Collaborated with colleagues at FDA on issues related to safety of medical countermeasures during public health emergencies
- Collaborated with Division of Microbiology and Infectious Diseases Consultative Conference on Enrolling Pregnant Women in Clinical Trials of Vaccines and Antimicrobials sponsored by the NIH’s National Institute of Allergy and Infectious Diseases
- Established CDC Influenza and Pregnancy Collaborative Workgroup, a cross-agency workgroup with interest in influenza and its prevention and treatment among pregnant women
- Established and led CDC Human Influenza Transmission Collaborative Workgroup, a cross-agency workgroup with interest in improving the understanding of influenza
transmission

- Led Vulnerable Populations (including pregnant women, children with special health care needs, and minority populations) focus area for pandemic preparedness
- Led decision analysis regarding need for production of vaccine to novel variant influenza virus (H3N2v) working with colleagues from CDC and other HHS agencies (BARDA, NIH and FDA)
- Served as Deputy Incident Manager during three-day pandemic influenza functional exercise in September of 2012
- Served as Deputy Incident Manager during agency’s two-month response to H7N9 influenza, including serving as Acting Incident Manager in Incident Manager’s absence

Senior Scientist (602 - GP15), National Center on Birth Defects and Developmental Disabilities, CDC - >40 hours/week

- Conducted research on birth defects risk factors, including medications and maternal conditions during pregnancy
- Conducted research on morbidity/mortality of birth defects/genetic conditions, and effects of infections (e.g., influenza) on the pregnant mother and fetus as lead investigator, collaborator, and supervisor using intramural and extramural data
- Collaborated with scientists inside (NCEH, NCIRD, NCEZID, and NCCDPHP) and outside CDC (universities, other federal agencies) on a wide variety of analyses and public health issues
- Prepared manuscripts for publication in peer-reviewed journals
- Provided invited presentations to national conferences
- Led CDC pandemic planning efforts for pregnant women prior to 2009 H1N1, including planning of meeting of experts and public health partners held in April 2008 - meeting focused on weighing risks and benefits of treatment and prophylaxis of pregnant women with antiviral medications and use of influenza vaccine during pregnancy - results of this meeting guided CDC’s recommendations during 2009 H1N1 related to pregnant women
- Served as subject matter expert on treatment and prophylaxis with antiviral medications of pregnant women during 2009 H1N1 response
- Responded to media inquiries related to pregnant women during 2009 H1N1 response
- Provided training to obstetric health care providers regarding 2009 H1N1 influenza through meeting presentations, Clinician Outreach and Communication Activity calls, and Medscape training videos
- Developed clinical guidelines for treatment/prophylaxis of pregnant women during 2009 H1N1 response
- Analyzed surveillance data on pregnant women with 2009 H1N1 influenza to evaluate its impact (including serving as principal investigator of follow-up study of infants born to 2009 H1N1-infected women)
- Performed studies to evaluate 2009 H1N1 influenza communication efforts related to pregnant women (e.g., assessed vaccine coverage among pregnant women and surveys of obstetricians and pharmacists)
- Served as scientific co-lead for meeting “Pandemic Influenza Revisited: Special Considerations for Pregnant Women and Newborns” held in August 2010 to plan for future pandemics and influenza seasons
- Served as co-lead of Maternal Health team for Pandemic Influenza Functional
Exercise - March 2011
- Led planning of meeting “Setting a Public Health Research Agenda for Down Syndrome” to gain input from partners and other federal agencies (e.g., NIH, HRSA) on CDC’s research plans
- Served as CDC liaison to American Academy of Pediatrics Committee on Genetics
- Represented CDC at national meetings
- Served as consultant to Advisory Committee on Immunization Practices Pertussis Working Group on pregnancy
- Served as scientific/clinical consultant to several CDC cooperative agreements and contracts with universities
- Reviewed project reports from grantees to ensure adequate progress and compliance with study protocols
- Served as consultant on effects of varicella vaccine during pregnancy to CDC Varicella Vaccine Pregnancy Registry
- Served as Member to the Subcommittee on Newborn Screening Guidelines for Premature/Sick Newborns, Clinical and Laboratory Standards Institute, 2007-2009
- Supervised fellows, students, and EIS officers on epidemiologic analyses, including an examination of maternal and neonatal vitamin B12 deficiency detected through expanded newborn screening
- Served as Guest Co-Editor of special issue of Birth Defects Research Part A - Festschrift issue to honor Dr. Lewis B. Holmes
- Served as Guest Co-Editor of special issue of Birth Defects Research Part A issue to celebrate 50th anniversary of Teratology Society
- Served as Guest Co-editor for special issue of Seminars in Medical Genetics (Am J Med Genet C) issue entitled “Emerging Issues in Teratology”

Medical Officer (602 - GS14), National Center on Birth Defects and Developmental Disabilities, CDC - >40 hours/week

- Conducted research on birth defects as lead investigator, collaborator, and supervisor
- Served as lead investigator on epidemiologic research studies related to newborn screening, risk factors for birth defects, including medications and maternal conditions (obesity), and mortality related to genetic conditions (e.g., Down syndrome)
- Developed protocols for approval by CDC’s institutional review board
- Prepared manuscripts for publication
- Provided invited oral presentations at national meetings
- Provided clinical genetics expertise for Metropolitan Atlanta Congenital Defects Program (birth defects surveillance program) and the National Birth Defects Prevention Study (multi-site case-control study)
- Led CDC cross-CIO workgroup on "Preventing Infections in Pregnancy: Communications and Outreach", which developed comprehensive educational materials for women and their health care providers about preventing infections during pregnancy
- Led CDC's Down Syndrome activities -- provided consultation to Division leadership on funding priorities, generated new hypotheses and strategies to test those hypotheses, and planned long-range scientific programs
• Organized course on Medical Embryology for Division staff
• Provided clinical/medical consultation and expertise to several epidemiologic projects of different risk factors for birth defects
• Supervised and mentored MPH students, medical students, fellows, EIS officers, and other staff
• Served as CDC liaison to American Academy of Pediatrics Committee on Genetics
• Represented CDC at NIH meetings, including meeting on obesity and adverse pregnancy outcomes, and on birth defects and cancer
• Provided clinical, epidemiologic, and human subjects expertise to two NIH Data and Safety Monitoring Boards for large NIH studies, including for NIH’s Rare Diseases Clinical Research Network
• Led planning for meeting of experts and partners entitled Prioritizing a Public Health Research Agenda for Craniosynostosis to identify priorities for funding for craniofacial disorders
• Participated in evaluation of NBDPS sites through site visit and review of renewal applications

Associate Director for Science (602 - GS14), Division of Birth Defects and Developmental Disabilities, National Center on Birth Defects and Developmental Disabilities, CDC - >40 hours/week

• Reviewed abstracts, manuscripts, book chapters, protocols, webpages, and brochures to ensure medical, ethical and scientific quality of Division products and to provide recommendations regarding study design and methodology, policy implications and programmatic impact
• Advised Division Director on medical and scientific issues in birth defects and pediatric genetics
• Represented Division of Birth Defects and Developmental Disabilities at national meetings
• Served as CDC liaison to American College of Obstetricians and Gynecologists Committee on Genetics (2003-2004)
• Served as CDC liaison to American Academy of Pediatrics Committee on Genetics (2004-2011)
• Participated in discussions regarding program planning and policy formulation for Division
• Collaborated with other Centers on issues related to birth defects and developmental disabilities (e.g., collaboration with members of Vector-Borne Infectious Diseases Branch, NCID, on West Nile Virus as possible cause of birth defects, resulting in expert meeting and publication of recommendations in MMWR, and collaboration with members of Division of Reproductive Health on issues related to assisted reproductive technology and birth defects)
• Developed RFA for cooperative agreement to train genetics professionals in public health at CDC (subsequently funded to American Society of Human Genetics)
• Represented National Center on Birth Defects and Developmental Disabilities on CDC Futures Initiative Public Health Research Workgroup
• Served as Guest Co-Editor of Seminars in Medical Genetics (Am J Med Genet C) issue entitled “Public Health Approach to Birth Defects, Developmental Disabilities, and Genetic Conditions”

Acting Associate Director for Science (602 - GS14), Division of Birth Defects and
Developmental Disabilities, National Center on Birth Defects and Developmental Disabilities, CDC - >40 hours/week

- Reviewed abstracts, manuscripts, book chapters, protocols, webpages, and brochures to ensure medical, ethical and scientific quality of Division products
- Advised Division Director on medical and scientific issues in birth defects and pediatric genetics
- Represented Division of Birth Defects and Developmental Disabilities at national meetings
- Participated in discussions regarding program planning and policy formulation for Division
- Responded to media inquiries regarding birth defects and genetics issues

Medical Officer (602 - GS14), National Center on Birth Defects and Developmental Disabilities, CDC - >40 hours/week

- Conducted epidemiologic research on birth defects and genetics topics as lead investigator, collaborator, and supervisor
- Worked with analysts to study questions of public health interest (e.g., survival among persons with Down syndrome and association between preterm birth and birth defects)
- Prepared protocols for human subjects committee review
- Provided clinical genetics expertise for review of case abstractions for MACDP
- Reviewed Atlanta clinical records for NBDPS
- Served as chair of Biologics Committee for NBDPS -- in this role, reviewed DNA collection, extraction and quality control procedures in multiple study sites to ensure standardized implementation of study protocol and made recommendations for corrective action when deviations from standard protocol were identified
- Worked with CDCs institutional review board to ensure ethical utilization of biological specimens collected by NBDPS
- Served as chair of Clinicians Committee for NBDPS (until 9/2000) -- in this role, implemented inter-reviewer reliability study for clinical reviewers in multiple study sites to ensure that all reviewers were following study protocol, provided feedback and assistance to sites not following study procedures
- Worked on revision of birth defects and genetic disease coding system consistent with ICD-10, which will be used for birth defects surveillance activities in MACDP, as well as in birth defects registries nationally
- Supervised Epidemic Intelligence Service (EIS) officers and medical students on epidemiologic research projects to inform public health decisions about newborn screening
- Provided presentations at national meetings on birth defects and genetics topics
- Provided lectures to medical students at Emory University in medical genetics
- Consulted with CDC’s Division of Reproductive Health regarding possible risk for birth defects associated with assisted reproductive technologies
- Participated in Primary Immunodeficiency Working Group to plan meeting entitled “Applying Genetics and Public Health Strategies to Primary Immunodeficiency Diseases” held in November, 2001
- Represented NCBDDD at national meetings (e.g., on tandem mass spectrometry in newborn screening, maternal phenylketonuria (PKU), specific birth defect-related topics)
- Participated in 2002-2003 Leadership and Management Institute sponsored by CDC
as member of Pediatric Genetics team (team goal was to develop a plan for integration of genetics into NCBDDD)

Senior Staff Fellow, Birth Defects and Pediatric Genetics Branch, Centers for Disease Control and Prevention (CDC) - >40 hours/week

- Conducted research on birth defects and genetics topics
- Provided clinical genetics expertise for review of case abstractions for Metropolitan Atlanta Congenital Defects Program (MACDP), CDC’s birth defects surveillance system
- Reviewed Atlanta clinical records for National Birth Defects Prevention Study (NBDPS), large multi-site case-control study of genetic and environmental risk factors for birth defects
- Served as chair of Biologics Committee for NBDPS, which set guidelines for collection of biological specimens for a large multi-site case-control study
- Served as chair of Clinicians Committee for NBDPS, which set guidelines for ascertainment, clinical analysis, and case classification of Centers cases
- Assisted with development of informed consent form and protocol for institutional review board (IRB) review
- Served as consultant to National Center for Health Statistics regarding International Statistical Classification of Diseases and Related Health Problems (10th Revision-ICD-10) coding of birth defects and genetic diseases
- Served as member of CDC Working Group to revise Birth Defects section of US Standard Birth Certificate
- Provided lectures to medical students at Emory University in medical genetics

Clinical Instructor, Division of Genetics, Department of Pediatrics, University of Florida - >40 hours/week

- Evaluated patients in genetics clinic
- Provided lectures for medical students in epidemiology and medical genetics courses
- Provided lectures to health care providers on cancer genetics and molecular genetics topics
- Conducted molecular genetics research on neurofibromatosis 1
- Presented research results at national meetings
- Prepared manuscripts for publication
- Supervised undergraduate and medical students in clinical and molecular genetics research projects
- Developed several successful grant applications.

Fellow in Clinical Genetics, University of Florida Pediatrics/Genetics - >40 hours/week

- Completed subspecialty training in clinical, biochemical and molecular genetics
- Provided care for patients in subspecialty clinics
- Counseled families regarding complex genetic conditions
- Performed clinical research on genetic conditions
- Performed molecular genetics research analyses
• Developed several successful grant applications
• Authored several publications on molecular genetics research related to neurofibromatosis 1
• Provided lectures to medical students and professional audiences on genetics topics

7/1993-7/1994
Fellow in Clinical Genetics, Johns Hopkins Center for Medical Genetics - >40 hours/week
• Initiated subspecialty training in clinical, biochemical and molecular genetics
• Provided care for inpatients with metabolic genetic conditions
• Performed genetics specialty inpatient consultations
• Provided care for patients in subspecialty clinics
• Counseled families regarding complex genetic conditions

6/1990-6/1993
Intern/Resident, Children’s Service, Massachusetts General Hospital - >40 hours/week
• Completed training in general and specialty pediatrics
• Provided care for children in general and subspecialty pediatrics clinics, emergency ward, and in hospital (general wards and neonatal and pediatric intensive care units)

Genetic Counselor, Division of Genetics, Department of Pediatrics, University of Florida - >40 hours/week
• Counseled patients/families with genetic conditions and teratogenic exposures
• Conducted clinical research projects on birth defects and genetic conditions
• Developed educational slide presentations and brochures on genetic conditions and teratogenic disorders, including fetal alcohol syndrome

Certification:

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Honors and Awards:

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<thead>
<tr>
<th>Year</th>
<th>Award</th>
</tr>
</thead>
<tbody>
<tr>
<td>1980</td>
<td>Mathematical Sciences Service Award, Department of Mathematics, University of Minnesota Duluth</td>
</tr>
<tr>
<td>1981</td>
<td>Phi Kappa Phi national honor society, University of Minnesota Duluth</td>
</tr>
<tr>
<td>1989</td>
<td>Albert King Memorial Award for Scientific Achievement in Research, University of Florida</td>
</tr>
<tr>
<td>1989</td>
<td>Alpha Omega Alpha Honor Medical Society, University of</td>
</tr>
</tbody>
</table>
Florida College of Medicine (elected as junior)

1989

Bythewood and Baker Scholarship for Women, University of Florida College of Medicine (awarded to highest ranking woman in third year class)

1990

Alpha Omega Alpha Award for Excellence in Research, University of Florida College of Medicine

1990

American Medical Women’s Achievement Citation for academic achievement

1990

The Edward R. Woodward Award, University of Florida Department of Surgery

1990

Hugh and Cornelia Carithers Award in recognition of excellence in Child Health and Human Development, University of Florida Department of Pediatrics

1990

University of Florida Memorial Award for academic excellence, University of Florida Medical Guild

1990

W.C. Thomas Award for outstanding achievement in the study of obstetrics and gynecology, Florida Obstetric and Gynecology Society

1996

Southern Society for Pediatric Research Trainee Travel Award

1997

National Neurofibromatosis Foundation Young Investigator Award

2000, 2001

Special Act or Service Award, National Center for Environmental Health, CDC

2002

Nominee for Shepard Award for demonstrated excellence in science (Assessment and Epidemiology category), National Center on Birth Defects and Developmental Disabilities, CDC for manuscript by Yang et al. (#30 under articles)

2002

Arthur S. Flemming Award in honor of outstanding men and women in the Federal Government, Scientific Category

2003

Special Act or Service Award, National Center on Birth Defects and Developmental Disabilities, CDC

2003

Director’s Award for Working Group on the Mortality of Genetic Diseases, National Center on Birth Defects and Developmental Disabilities, CDC

2003

Director’s Award for Mentoring, National Center on Birth Defects and Developmental Disabilities, CDC


Special Act or Service Award, National Center on Birth Defects and Developmental Disabilities, CDC

2006

Nominee for Shepard Award for demonstrated excellence in science (Assessment and Epidemiology category), National Center on Birth Defects and Developmental Disabilities, CDC for manuscript by Williams et al. (#47 under articles)

2007

Nominee for Shepard Award for demonstrated excellence in science (Assessment and Epidemiology category), National Center for Chronic Disease Prevention and Health Promotion, CDC for manuscript by Callaghan et al. (#57 under articles)

2007

Nominee for Shepard Award for demonstrated excellence in science (Assessment and Epidemiology category), National Center on Birth Defects and Developmental Disabilities, CDC for manuscript by Rasmussen et al. (#48 under articles) and Kenneson et al. (#53 under articles)

2007

F. Clarke Fraser New Investigator Award, Teratology Society

2007

Inducted into University of Minnesota Duluth Academy of Science and Engineering for distinguished alumni
2008 Nominee for Shepard Award for demonstrated excellence in science (Assessment and Epidemiology category), National Center on Birth Defects and Developmental Disabilities, CDC for manuscript by Alwan et al. (#68 under articles)

2008 CDC and ATSDR Honor Award for Public Health Epidemiology and Laboratory Research Group as part of National Birth Defects Prevention Study Group

2008 Highlighted as an “American Public Health Hero” by Research! America as part of Public Health Thank You Day

2010 Special Act or Service Award, National Center on Birth Defects and Developmental Disabilities, CDC

2010 Nominee for Shepard Award for demonstrated excellence in science (Assessment and Epidemiology category, National Center for Chronic Disease Prevention and Health Promotion, CDC for manuscript by Jamieson et al. (#103 under articles)

2010 National Center for Emerging and Zoonotic Infectious Diseases Excellence in Partnership Award (group award) for CDC and Medscape Working Group

2010 National MCH Epidemiology Award for Effective Practice: Improving public health practice through effective use of data, epidemiology and applied research (group award) for the H1N1 Maternal Health Team

2010 CDC/ATSDR Honor Award for “Excellence in Emergency Response” awarded to 2009 H1N1 Maternal Health Team (group award)

2010 National Center for Immunization and Respiratory Diseases “Excellence in Communications” award (group award) for Communication Strategy - 2009 H1N1 Influenza Pandemic

2011 Nominee for Shepard Award for demonstrated excellence in science (Assessment and Epidemiology category, National Center on Birth Defects and Developmental Disabilities, CDC for manuscript by Hinton et al. (#111 under articles)

2011 Nominee for Shepard Award for demonstrated excellence in science (Assessment and Epidemiology category, National Center on Birth Defects and Developmental Disabilities, CDC for manuscript by Reefhuis et al. (#127 under articles)

2014 Nominee for Shepard Award for demonstrated excellence in science (Assessment and Epidemiology category, National Center on Birth Defects and Developmental Disabilities, CDC for manuscript by Honein et al. (#154 under articles)

2014 Robert L. Brent lecturer at 2014 Teratology Society meetings

2014 Bock Prize in appreciation of contributions in the area of vaccines and outstanding contribution to the education of pediatric health care professionals, Nemours Foundation

2015 National Center for Immunizations and Respiratory Diseases Honor Award for Emergency Response (International), Middle East Respiratory Syndrome Coronavirus Team (I served as Deputy Incident Manager for this response)

2015 CDC/ATSDRR Honor Award for “Excellence in International Emergency Response” awarded to 2014 Middle East Respiratory Syndrome (MERS) Coronavirus Team for excellent performance in responding to the Middle East Respiratory Syndrome Coronavirus (group award) (I served as Deputy Incident Manager for this response)
2015 National Center for Emerging and Zoonotic Infectious Diseases Honor Award Certificate for superlative public health support during the humanitarian response to unaccompanied children crossing the United States border

2015 CDC/ATSDR Honor Award for “Excellence in Frontline Public Health Service” awarded to 2014 Unaccompanied Children Response for superlative public health support (group award)

2015 9th Annual Benenson Distinguished Lecturer, San Diego Epidemiology Research Exchange, San Diego State University School of Public Health

2015 Notable Alumnus Lecturer, University of Florida College of Medicine Alumni Reunion

2015 Dean’s Award for Leadership, University of Florida College of Medicine

2015 CSELS Director’s Award (group award) for outstanding achievements and contributions on the MMWR, Center for Surveillance, Epidemiology, and Laboratory Services, CDC

2016 National Center for Emerging and Zoonotic Infectious Diseases Honor Award Certificate for outstanding support and leadership in CDC’s response to the Ebola epidemic in West Africa, 2014-2015 (group award)

2016 March of Dimes Lecturer, 2016 American College of Obstetricians and Gynecologists Annual Meeting


2017 2017 Hurley Distinguished Lecturer for outstanding work in emergency response to infectious disease. University of California, Davis

2017 CDC/ATSDR Honor Award for “Excellence in Emergency Response (Domestic)” awarded to Zika Pregnancy and Birth Defects Surveillance (group award) for excellence in rapidly establishing pregnancy and birth defects surveillance systems for CDC’s Zika Emergency Response

2017 CDC/ATSDR Honor Award for “Excellence in Program Delivery (Domestic)” awarded to Zika Pregnancy and Birth Defects Clinical Team (group award) for excellence in leadership, scientific rigor, communication, and outreach in support of CDC’s Zika Emergency Response

2017 Commencement Speaker, University of Florida College of Medicine, May 20, 2017

Memberships:

1983-present American Society of Human Genetics
1989-present Alpha Omega Alpha honor medical society
1999-present Federal Physicians Association
1999-present National Birth Defects Prevention Network
2003-present Teratology Society
2004-present Society for Pediatric Research
2005-present Organization of Teratology Information Specialists
2006-present American Academy of Pediatrics
2015-present Council of Science Editors
2017-present American College of Medical Genetics
2017-present American Medical Association
2017-present Georgia Public Health Association

Courses/Training:

1994 Short Course in Medical and Experimental Mammalian Genetics, sponsored by Johns Hopkins University and Jackson Laboratory, Bar Harbor, Maine
1999 SAS Fundamentals Course, sponsored by CDC
2002-2003 Leadership and Management Institute, sponsored by CDC
2007 Current Concepts in Embryology (instructor: Dr. Tom Sadler), sponsored by CDC
2007 Genetic Epidemiology (instructor: Dr. John Witte), sponsored by CDC
2008 Team Leader Certificate course (instructor: Harry Chambers), sponsored by CDC
2008 An Overview of Statistical and Epidemiological Methods for Public Health Research (instructor: Dr. Laura Lee Johnson), sponsored by CDC
2010 Leadership’s Role in Effectively Leading Organizational Change and Increasing Accountability (instructor: Harry Chambers), sponsored by CDC
2010 Successfully Managing Employee Attitudes, Morale and Performance (instructor: Harry Chambers), sponsored by CDC
2011 Supervisor Development Challenge, sponsored by CDC
2012 Creating High-Performance Teams (2-day course), sponsored by CDC
2012 Basic Employee Relations (2-day course), sponsored by CDC
2012 Dealing with Difficult Employees (1-day course), sponsored by CDC
2015 Deployment Safety and Resilience Team Training (3-day course), sponsored by CDC
2017 Incident Management Training and Development Program’s (IMTDP) inaugural response leader cohort, sponsored by OPHPR at CDC

Associate Editor


Guest Editor


Journal Reviewer

American Journal of Epidemiology
American Journal of Human Genetics
American Journal of Medical Genetics
American Journal of Obstetrics and Gynecology
Birth Defects Research Part A
Cleft Palate-Craniofacial Journal
Clinical Infectious Diseases
Emerging Infectious Diseases
Genetics in Medicine
Human Reproduction
Influenza and Other Respiratory Viruses
Journal of the American College of Nutrition
Journal of the American Medical Association
Journal of Medical Genetics
Journal of Pediatrics
Journal of Rheumatology
New England Journal of Medicine
Paediatric and Perinatal Epidemiology
Pediatrics
Vaccine

Teaching Responsibilities

Lecturer, Medical Genetics course, University of Florida, 1995-1997
Lecturer/discussion leader, Junior Honors Medical Genetics course, University of Florida, 1995-1997
Small group leader, Epidemiology course (medical students), University of Florida, 1997-1998
Lecturer, Medical Genetics course, Emory University, 1999-2007

Service to Committees at CDC

Public Health Research Workgroup, CDC Futures Initiative, 2003-2004
CDC Clinical Trials Workgroup, NCBDDD representative, 2005-2006
CDC Clinical Trials Workgroup, Coordinating Center for Health Promotion representative,
2006-2007
Preventing Infections and Pregnancy: Communications and Outreach Committee lead, 2005-2009
Pandemic Influenza Vulnerable Populations Workgroup, 2006-2009
Secondary Review Panel, Division of Reproductive Health, National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), February 17, 2005
Secondary Review Panel, Division of Reproductive Health, NCCDPHP, March 13, 2006
Secondary Review Panel, Small Business Innovation Research Announcement, Coordinating Center for Health Promotion (CoCHP), April 24, 2007
Secondary Review Panel, Small Business Innovation Research Announcement, CoCHP, April 2, 2009
Secondary Review Panel, Health Promotion and Disease Prevention Research Centers: Special Interest Project Competitive Supplements, CoCHP, August 21, 2009
Secondary Review Panel, Small Business Innovation Research Announcement, NCBDD and NCCDPHP, April 12, 2010
Advisory Committee on Immunization Practices Pertussis Vaccine Working Group (consultant on pregnancy issues), 2010-2011
Secondary Review Panel, Small Business Innovation Research Announcement, NCBDD and NCCDPHP, April 25, 2011
Member, CDC Office of Infectious Diseases Joint NCIRD - NCEZID Modeling Unit Steering Committee, 2012-2015
Member, Office of Public Health Preparedness and Response Incident Management Program Advisory Committee, 2015-present
Secondary Review Committee, DP-15-007 Effectiveness of Teen Pregnancy Prevention Programs Designed Specifically for Young Males, NCCDPHP, June 10, 2015
Advisory Committee on Immunization Practices Pertussis Vaccine Working Group (consultant on pregnancy issues - discussions to update ACIP recommendations), 2016
Recruitment Committee, Director, National Center for Emerging and Zoonotic Infectious Diseases, 2017

Service to Committees Outside of CDC

CDC Liaison, American College of Obstetricians and Gynecologists Committee on Genetics, 2002-2004
CDC Liaison, American Academy of Pediatrics Committee on Genetics, 2004-2011
Member, Data and Safety Monitoring Board, National Institutes of Health Rare Diseases Clinical Research Network, 2005-2009
Member, Teratology Society Public Affairs Committee, 2005-2008
Member, Data and Safety Monitoring Board, National Institutes of Health, National Institute of Dental and Craniofacial Research Clinical Trials Program, Oral Clefts Prevention Study, 2006-2009
Member, Subcommittee on Newborn Screening Guidelines for Premature and/or Sick Newborns, Clinical and Laboratory Standards Institute, 2007-2009
Advisory Board, Down Syndrome Association of Atlanta Educational Awareness Campaign, 2007-2008
Member, Teratology Society Clarke Fraser Award Committee, 2007-2010
Participant, Teratology Society Strategic Planning Session, San Diego, CA April 18-20, 2007
Member, Teratology Society Program Committee for 2008 meeting
Chair, Teratology Society Clarke Fraser Award Committee, 2008-2009
Member, Teratology Society Program Committee for 2009 meeting
Member, Subcommittee on Maternal Serum Screening Guidelines (Revision), Clinical and Laboratory Standards Institute, 2009-2011
Member, Teratology Society Council, 2009-2012
Member, Teratology Society Program Committee for 2010 meeting
Member, Teratology Society Program Committee for 2011 meeting
Member, Teratology Society Program Committee for 2012 meeting
Member, Steering Committee for Drug Information Association-sponsored Maternal and
Pediatric Safety Symposium, held October 13-14, 2010
Member (ad hoc), Teratology Society Education Committee, 2010-2011, 2011-2012
Co-Chair, PKU and Pregnancy Working Group, NIH PKU Scientific Consensus Conference, 2010-2011
Reviewer, RFA HD-10-019 “Natural History of Disorders Identifiable by Newborn Screening”,
National Institute of Child Health and Human Development, National Institutes of
Health, November 2, 2010
Steering Committee Member, for meeting entitled “Progress in Overcoming Barriers to
Influenza Vaccination for Pregnant Women” sponsored by National Vaccine Program
Office, Rockville, MD, October 27, 2011
Member, Review Panel for Phentermine/Topiramate, Food and Drug Administration, February
22, 2012
Participant, Teratology Society Strategic Planning Session, Albuquerque, NM, April 10-12, 2012.
Consultant, Division of Microbiology and Infectious Diseases Consultative Conferences on
Enrolling Pregnant Women in Clinical Trials of Vaccines and Antimicrobials sponsored by the
National Institute of Allergy and Infectious Diseases, May 23, 2011; October 3, 2011; March 19, 2012; September 27, 2013
Chair, Teratology Society Nominations and Elections Committee, 2012-2013
Member, Drug Safety and Risk Management Advisory Committee meeting on Management of
Drug-Related Teratogenic Risk, December 12-13, 2012
Participant, In Process Review for Novavax, Biomedical Advanced Research and Development
Authority. December 19, 2012
Co-Chair, National Down Syndrome Society Scientific and Clinical Advisory Board, 2013-present
March of Dimes Grant Review Panel, Social and Behavioral Sciences Research (Committee B),
Member, 2013-present
Facilitator, The Successful Manuscript: from Conception to Delivery Training Workshop,
sponsored by the National Birth Defects Prevention Network, February 24, 2013
Co-Chair, HHS Public Health Emergency Medical Countermeasures Enterprise (PHEMCE) All-
Hazards Respiratory Protective Device Capabilities Assessment Working Group, 2013-present
Member (Past Chair), Teratology Society Nominations and Elections Committee, 2013-2014
Member, Technical Evaluation Panel for Food and Drug Administration Broad Agency
Announcement (BAA) - Advancing Regulatory Science and Innovation: Facilitating
Development of Medical Countermeasures to Protect against Threats. September 24, 2013
Member, Teratology Society CME Program Committee for 2014 Teratology Society Annual
meeting
Member, HHS Public Health Emergency Medical Countermeasures Enterprise (PHEMCE) Medical
Countermeasure Monitoring and Assessment Working Group, 2013-2014
Chair, HHS H7N9 Adverse Events Workgroup, 2013-2014
Member, Systematic Observational Method for Narcolepsy and Influenza Immunization
Assessment (SOMNIA) Oversight Committee, 2013-2015
Member, Teratology Society CME Program Committee for 2015 Teratology Society Annual
meeting
Member, Steering Committee, UPMC Center for Health Security Emerging Leaders in
Biosecurity, 2014-2015
Member, Maternal Immunization Panel (to provide guidance to the Advisory Committee on
Immunization Practices), 2014-2015
Member, Teratology Society Program Committee for 2015 Annual meeting
Chair, Teratology Society Program Committee for 2016 Annual meeting
Vice-President (President-elect), Teratology Society, 2015-2016
Member, Site visit team, Ohio Collaborative March of Dimes Transdisciplinary Center, July 9, 2015
Member, Nonprescription Drugs Advisory Committee for review of supplemental new drug application for over-the-counter marketing of adapalene gel 0.1%, April 15, 2016.
Member, Teratology Society Program Committee for 2017 Annual meeting.
Member, University of Florida College of Medicine Alumni Board, 2016-present.
Member, Adult Medical Disability Home Board, 2016-present.
Member, Teratology Society Nominations and Elections Committee, 2017-2018.
Member, Teratology Society Education Committee, 2017-2018.
Member, Sanford Children’s Genomic Medicine Consortium External Advisory Committee, 2017-present.
Member, Advisory Board, University of Haifa International MPH in Global Health Leadership Program, 2017-present.
Member, Teratology Society CME Program Committee for 2018 Teratology Society Annual meeting.

Organizing Roles at Scientific Meetings

Organized session (with Dr. Jan Friedman) entitled “Impact of Human Genetic Diseases: Population-Based Approaches” at the American Society of Human Genetics meeting, Toronto, Canada, October 28, 2004
Organized session entitled “Emerging Infections and Pregnancy: From Being Forgotten to Counting for Two” at the Epidemiologic Intelligence Service meeting, Atlanta, GA, April 12, 2005
Co-Organizer (with Dr. Jeffrey C. Murray), 26th Annual David W. Smith Workshop on Malformations and Morphogenesis, Iowa City, IA, August 2-7, 2005
Organized session entitled “Emerging Infections: Viruses beyond Rubella”, joint session of Organization of Teratology Information Services/Teratology Society meetings, Tucson, AZ, June 27, 2006
Organized session (with Drs. Jan Friedman and Anne Slavotinek) entitled “Submicroscopic Chromosomal Duplications and Deletions: Medical Consequences and Population Genetics”, American Society of Human Genetics meetings, San Diego, CA. October 26, 2007
Co-Organizer (with Drs. Angela Lin and Barbara Pober), Planning Committee, Festschrift to Honor Dr. Lewis B. Holmes, Boston, MA, May 10, 2008
Organized and moderated session entitled “Update on Teratogens” at American College of Medical Genetics meetings in Albuquerque, NM, March 28, 2010
Organized and moderated session on Pregnancy and Pediatric Issues at the International Conference on Emerging Infectious Diseases (ICEID 2010) meeting, Atlanta, GA, July 13, 2010
Co-Organizer (with Dr. Michael Bamshad), 31st Annual David W. Smith Workshop on Malformations and Morphogenesis, Seattle, WA - August 27-September 1, 2010
Organized session (with Dr. Jan Friedman) entitled “March of Dimes Symposium: Challenges to Epidemiologic Studies of Medications during Pregnancy: SSRIs as an Example” at the Teratology Society Annual meeting, Coronado, CA, June 26, 2011

Previous Grant Support

National Institutes of Health - National Research Service Award Reference #: 1F32CA72199, Title: Genetic Studies of Tumorigenesis in Neurofibromatosis, PI - S.A. Rasmussen, MD, Dates: 7/23/96-6/22/98, Direct costs: $35,300/year, Status: Completed
National Neurofibromatosis Foundation Young Investigator Award, Title: Genetic Studies of Tumorigenesis in Neurofibromatosis type 1, PI - S.A. Rasmussen, MD, Dates: 7/1/97-6/30/98, Direct costs: $30,000/year, Status: Completed
1997 Children’s Miracle Network Award 97F-010, Title: “Genetic Studies of Tumorigenesis in Neurofibromatosis type 1”, PI - S.A. Rasmussen, MD, Dates: 12/1/97-11/30/98, Direct costs: $14,045/year, Status: Completed
National Institutes of Health - Mentored Clinical Scientist Development Award (1K08CA74976-01A1), Title: Genetic Studies of Tumorigenesis in Neurofibromatosis 1, PI - S.A. Rasmussen, MD, Dates: 7/1/98-6/30/03, Direct costs: $73,000/first two years, $83,000/next three years, Status: Funded, but declined (left University of Florida)
Previous Grant Support

National Institutes of Health - National Research Service Award Reference #: 1F32CA72199, Title: Genetic Studies of Tumorigenesis in Neurofibromatosis, PI - S.A. Rasmussen, MD, Dates: 7/23/96-6/22/98, Direct costs: $35,300/year, Status: Completed
National Neurofibromatosis Foundation Young Investigator Award, Title: Genetic Studies of Tumorigenesis in Neurofibromatosis type 1, PI - S.A. Rasmussen, MD, Dates: 7/1/97-6/30/98, Direct costs: $30,000/year, Status: Completed
1997 Children’s Miracle Network Award 97F-010, Title: "Genetic Studies of Tumorigenesis in Neurofibromatosis type 1", PI - S.A. Rasmussen, MD, Dates: 12/1/97-11/30/98, Direct costs: $14,045/year, Status: Completed
National Institutes of Health - Mentored Clinical Scientist Development Award (1K08CA74976-01A1), Title: Genetic Studies of Tumorigenesis in Neurofibromatosis 1, PI - S.A. Rasmussen, MD, Dates: 7/1/98-6/30/03, Direct costs: $73,000/first two years, $83,000/next three years, Status: Funded, but declined (left University of Florida)

Volunteer Activities

Volunteer (various positions including coach, assistant coach, and team manager), Norcross Soccer Association, 1999-2008
Volunteer (various positions), Gwinnett County Summer Swim League, 1999-present.
Atlanta Bike MS 150 rider, National Multiple Sclerosis Society, September 2008, 2009, and 2010. Top 100 Club (top fundraiser) in 2009 and 2010
Vice-President for Track, Norcross PHD Running Club (booster club for Norcross High School Cross Country and Track teams), 2010-2011
Team in Training participant, Ironman 70.3 (half-ironman) - Augusta - raised over $3000 for Leukemia and Lymphoma Society, September 24, 2011
Vice-President for Fundraising, Norcross PHD Running Club, 2011-2012
Co-lead, University of Minnesota Duluth Dr. Vernon Opheim Choral Scholarship fund, raised >$10,000 for UMD scholarship
University of Florida College of Medicine Alumni Board, 2016-present.
BIBLIOGRAPHY

Articles

Infectious Diseases, Vaccines, and Public Health Preparedness and Response Topics


34. Jamieson DJ, Rasmussen SA. The safety of adjuvants in influenza vaccines during


48. Rasmussen SA, Gerber SI, Swerdlow DL. Middle East Respiratory Syndrome-Coronavirus


60. Rasmussen SA, Watson AK, Swerdlow DL. Middle East Respiratory Syndrome (MERS). Microbiol Spectr 4(3), 2016. (also included as book chapter by publisher - see #13 under Book Chapters)


Birth Defects, Genetics, and Teratology Topics


85. **Rasmussen SA**, Colman SD, Ho VT, Abernathy CR, Arn PH, Weiss L, Schwartz C, Saul...


103. Gutmann DH, Rasmussen SA, Wolkenstein P, MacCollin MM, Guha A, Inskip PD, North KN, Poyhonen M, Birch PH, Friedman JM. Gliomas presenting after age ten in


Honein MA, Devine O, Sharma AJ, Rasmussen SA, Park S, Kucik JE, Boyle C. Modeling


**Morbidity and Mortality Weekly Report (MMWR) Articles**

**Infectious Diseases, Vaccines, and Public Health Preparedness and Response Topics**


Birth Defects, Genetics, and Teratology Topics


Book Chapters


**Contributor**


**Invited Presentations:**

8. “Molecular and Clinical Updates in Neurofibromatosis”, Medical Genetics Seminar, Emory University, Atlanta, GA, August 3, 1998.
40. “Contribution of Rare Syndromes to Our Understanding of Orofacial Clefts” as part of a symposium entitled “Gene/Environment Interactions in Rare Disease that Include Common Birth Defects”, Teratology Society conference, St. Petersburg Beach, FL, June 28, 2005.
44. “Understanding Prematurity and Its Relation to Birth Defects”, Texas Birth Defects Epidemiology and Surveillance Technical Training meeting, Austin, TX, April 18, 2006.
47. “Advancing our Understanding of the Etiology of Birth Defects and Developmental
49. “Maternal Obesity and Adverse Perinatal Outcomes” at the CityMatCH/AMCHP Women’s Health Partnership’s Action Learning Collaborative, Atlanta, GA, December 4, 2006.
58. “Preparing for Pandemic Influenza: Special Considerations for Pregnant Women” (with Dr. Denise Jamieson), Modeling for Pandemic Influenza: Hospital and Community Preparedness for Pregnant Women, Atlanta, GA, October 3, 2007.
74. “Protecting the Health of Vulnerable Populations during an Influenza Pandemic: A Strategic Imperative” as part of session entitled “Pandemic Influenza Planning: Addressing the Needs of Pregnant Women and Children” at the Epidemic Intelligence Service meeting, Atlanta, GA, April 24, 2009.
76. “Maternal and Child Health Issues Call related to the Current Outbreak of the New Influenza Virus of Swine Origin” webinar through CDC’s Clinician Outreach Communication Activity system, May 1, 2009.
84. “Pandemic (H1N1) 2009 influenza and pregnancy” at the Robert Wood Johnson University Hospital system webinar, September 11, 2009.
86. “2009 H1N1 Influenza: Pregnant Women and Newborns” webinar through CDC’s Clinician Outreach Communication Activity system, November 17, 2009.
91. “Birth Defects Prevention: Challenges and Opportunities” at the National Birth Defects
Preparation Network meeting, National Harbor, MD, March 9, 2010.
111. “Influenza Disease among Pregnant Women and Infants in the United States”, at meeting to discuss “Progress in Overcoming Barriers to Influenza Vaccination for Pregnant Women” sponsored by National Vaccine Program Office, Rockville, MD, October 27, 2011.
112. “Emerging Infections as Potential Teratogens”, Emory University Department of Human

“Increased Morbidity in Pregnancy in Infectious Disease with a Focus on 2009 H1N1” at “Public Workshop: Development of animal models of pregnancy to address medical countermeasures in the “at risk” population of pregnant women: Influenza as a case study”, sponsored by Food and Drug Administration, Silver Spring, MD, April 30, 2012.


“Pandemic and Seasonal Influenza: CDC’s Support of States and Territories”, at the State Health Leadership Initiative Networking Meeting and Public Policy Training, Session on Preparedness Leadership, Washington, DC, March 5, 2013.


“Update on Avian Influenza A(H7N9)”, Office of Infectious Diseases Board of Scientific Counselors meeting, Atlanta, GA, May 8, 2013.


“Influenza Update”, CDC Foundation’s Corporate Roundtable on Global Health Threats, Atlanta, GA, March 27, 2014.


“Influenza and Pregnancy: Before and After the 2009 H1N1 Pandemic”, Slone Memorial lecture, Slone Epidemiology Center, Boston University, Boston, MA, April 26, 2014.


“Protecting Pregnant Women and their Babies from Seasonal and Pandemic Influenza”,


“Protecting Pregnant Women and their Babies from Influenza: Five Years after the H1N1 Pandemic”, Pediatric Grand Rounds, Yale University School of Medicine Department of Pediatrics, New Haven, CT, December 10, 2014.


“Down Syndrome: Perspectives of a Sibling and Medical Researcher”, 2015 Down Syndrome Research Awareness Weekend, Emory University, Atlanta, GA, April 18, 2015.


“Public Health Leadership: A Personal Perspective”, Leadership in Public Health Summer Partnership Program between the University of Georgia and University of Haifa, Israel, provided by webinar, August 3, 2015.


“Emerging Infection in Pregnancy”, Department of Obstetrics and Gynecology Combined Grand Rounds Lecture Series, The Dr. Bernard Gonik Lectureship, Wayne State School of Medicine and Detroit Medical Center, Detroit, MI, September 8, 2015.


156. “Pandemic Influenza, Zika Virus, and Other Emerging Infectious Diseases: A Public Health Perspective”, Department of Epidemiology Seminar Series, University of Georgia College of Public Health, Athens, GA, February 26, 2016.
158. “Pandemic Influenza, Zika Virus, and Other Emerging Infectious Diseases: A Personal Perspective”, University of Haifa, Haifa, Israel, provided by webinar, March 16, 2016.
160. “Pandemic Influenza, Zika Virus Disease, and Other Emerging Infectious Diseases: A Public Health Perspective”, University of Michigan Medical School Department of Internal Medicine Grand Rounds, Ann Arbor, MI, April 8, 2016.
169. “Exploring the Link Between Zika Virus and Adverse Pregnancy and Birth Outcomes” Teratology Society Annual meeting, San Antonio, TX, June 29, 2016.
170. “Dealing with Professional Disappointment”, University of Haifa, Haifa, Israel, provided by webinar, August 8, 2016.
175. “Zika Virus Infection and Microcephaly”, IDWeek (combined annual meeting of the Infectious Diseases Society of America, the Society for Healthcare Epidemiology of America, the HIV Medicine Association, and the Pediatric Infectious Diseases Society), New Orleans, LA, October 28, 2016.
177. “Zika Virus: Emerging Concerns for Pregnant Women and Infants”, Elia M. Ayoub Lectureship, University of Florida College of Medicine, Gainesville, FL, December 1, 2016.
179. “Pandemic Influenza, Ebola and Zika - or My Path from Birth Defects to Emergency Response . . . and Back Again”, University of Florida College of Medicine (lecture to medical students), December 2, 2016.
184. “Zika Virus: What We Know and What We Need to Know”, Department of Epidemiology and Biostatistics Seminar Series, University of Georgia College of Public Health, February 17, 2017.
188. “An Update on Zika Virus as a Cause of Microcephaly and Other Birth Defects”, Hot Topics in Perinatal Genetics session, American College of Medical Genetics meeting, Phoenix, Arizona, March 22, 2017.
191. “Zika Virus: Update on a New Cause of Birth Defects”, Public Health Rounds, Senior University of Greater Atlanta, Atlanta, Georgia, April 19, 2017.
192. “Zika Virus: Update on a New Cause of Birth Defects”, Infectious Diseases Seminar, Emory University, Atlanta, Georgia, April 20, 2017.
195. Commencement Address, University of Florida College of Medicine, May 20, 2017.
196. “Proving Causation: How Do We Prove than an Infectious Agent is a Teratogen?”, National Birth Defects Prevention Network Virtual Meeting, Atlanta, GA, July 26, 2017.
198. “Zika and Infants: What Do We Know and Where Do We Go From Here?”, Diagnosis, Evaluation, and Management of Zika Virus Infection in Pregnant Women and Infants, Atlanta, GA, August 30-31, 2017.
ESSENTIAL TERMS FOR EVERY EXPERT CONTRACT (DON’T HAVE A CONTRACT? YOU MAY BE VIOLATING FEDERAL LAW!)

Amy C.M. Burns, Gorby Peters & Associates, LLC, Atlanta
THE
ADMISSIBILITY OF
EXPERT TESTIMONY
IN GEORGIA

2016-2017 Edition

Issued in October 2016

By
MARY DONNE PETERS

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APPENDIX  M

Sample Business Associate Agreement Regarding Protected Personal Health Information

SPECIAL DUTIES OF EXPERT PERTAINING TO PROTECTED PERSONAL HEALTH INFORMATION

Sample Business Associate Agreement Provisions

Words or phrases contained in brackets are intended as either optional language or as instructions to the users of these sample provisions.

Definitions

Catch-all definition:

The following terms used in this Agreement shall have the same meaning as those terms in the HIPAA Rules: Breach, Data Aggregation, Designated Record Set, Disclosure, Health Care Operations, Individual, Minimum Necessary, Notice of Privacy Practices, Protected Health Information, Required By Law, Secretary, Security Incident, Subcontractor, Unsecured Protected Health Information, and Use.

Specific definitions:

(a) Business Associate. “Business Associate” shall generally have the same meaning as the term “business associate” at 45 C.F.R. 160.103, and in reference to the party to this agreement, shall mean [Insert Name of Business Associate].

(b) Covered Entity. “Covered Entity” shall generally have the same meaning as the term “covered entity” at 45 C.F.R. 160.103, and in reference to the party to this agreement, shall mean [Insert Name of Covered Entity].

(c) HIPAA Rules. “HIPAA Rules” shall mean the Privacy, Security, Breach Notification, and Enforcement Rules at 45 C.F.R.


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For Educational Purposes Only
Obligations and Activities of Business Associate

Business Associate agrees to:
(a) Not use or disclose protected health information other than as permitted or required by the Agreement or as required by law;
(b) Use appropriate safeguards, and comply with Subpart C of 45 C.F.R. Part 164 with respect to electronic protected health information, to prevent use or disclosure of protected health information other than as provided for by the Agreement;
(c) Report to covered entity any use or disclosure of protected health information not provided for by the Agreement of which it becomes aware, including breaches of unsecured protected health information as required at 45 C.F.R. 164.410, and any security incident of which it becomes aware;

[The parties may wish to add additional specificity regarding the breach notification obligations of the business associate, such as a stricter timeframe for the business associate to report a potential breach to the covered entity and/or whether the business associate will handle breach notifications to individuals, the HHS Office for Civil Rights (OCR), and potentially the media, on behalf of the covered entity.]
(d) In accordance with 45 C.F.R. 164.502(e)(1)(ii) and 164.308(b)(2), if applicable, ensure that any subcontractors that create, receive, maintain, or transmit protected health information on behalf of the business associate agree to the same restrictions, conditions, and requirements that apply to the business associate with respect to such information;
(e) Make available protected health information in a designated record set to the [Choose either “covered entity” or “individual or the individual’s designee”] as necessary to satisfy covered entity’s obligations under 45 C.F.R. 164.524;

[The parties may wish to add additional specificity regarding how the business associate will respond to a request for access that the business associate receives directly from the individual (such as whether and in what time and manner a business associate is to provide the requested access or whether the business associate will forward the individual’s request to the covered entity to fulfill) and the timeframe for the business associate to provide the information to the covered entity.]
(f) Make any amendment(s) to protected health information in a designated record set as directed or agreed to by the covered entity pursuant to 45 C.F.R. 164.526, or take other measures as
SAMPLE BUSINESS ASSOCIATE AGREEMENT

necessary to satisfy covered entity's obligations under 45 C.F.R. 164.526;

The parties may wish to add additional specificity regarding how the business associate will respond to a request for amendment that the business associate receives directly from the individual (such as whether and in what time and manner a business associate is to act on the request for amendment or whether the business associate will forward the individual's request to the covered entity) and the timeframe for the business associate to incorporate any amendments to the information in the designated record set.

(g) Maintain and make available the information required to provide an accounting of disclosures to the [Choose either "covered entity" or "individual"] as necessary to satisfy covered entity's obligations under 45 C.F.R. 164.528;

The parties may wish to add additional specificity regarding how the business associate will respond to a request for an accounting of disclosures that the business associate receives directly from the individual (such as whether and in what time and manner the business associate is to provide the accounting of disclosures to the individual or whether the business associate will forward the request to the covered entity) and the timeframe for the business associate to provide information to the covered entity.

(h) To the extent the business associate is to carry out one or more of covered entity's obligation(s) under Subpart E of 45 C.F.R. Part 164, comply with the requirements of Subpart E that apply to the covered entity in the performance of such obligation(s); and

(i) Make its internal practices, books, and records available to the Secretary for purposes of determining compliance with the HIPAA Rules.

Permitted Uses and Disclosures by Business Associate

(a) Business associate may only use or disclose protected health information

[Option 1—Provide a specific list of permissible purposes.]

[Option 2—Reference an underlying service agreement, such as “as necessary to perform the services set forth in Service Agreement.”]

[In addition to other permissible purposes, the parties should specify whether the business associate is authorized to use protected health information to de-identify the information in accordance with 45 C.F.R. 164.514(a)-(c). The parties also may wish to specify the manner in which the business associate will de-]
App. M

THE ADMISSIBILITY OF EXPERT TESTIMONY IN GEORGIA

identify the information and the permitted uses and disclosures by the business associate of the de-identified information.)

(b) Business associate may use or disclose protected health information as required by law.

(c) Business associate agrees to make uses and disclosures and requests for protected health information

[Option 1] consistent with covered entity's minimum necessary policies and procedures.

[Option 2] subject to the following minimum necessary requirements: [Include specific minimum necessary provisions that are consistent with the covered entity's minimum necessary policies and procedures.]

(d) Business associate may not use or disclose protected health information in a manner that would violate Subpart E of 45 C.F.R. Part 164 if done by covered entity [if the Agreement permits the business associate to use or disclose protected health information for its own management and administration and legal responsibilities or for data aggregation services as set forth in optional provisions (e), (f), or (g) below, then add "except for the specific uses and disclosures set forth below."]

(e) [Optional] Business associate may use protected health information for the proper management and administration of the business associate or to carry out the legal responsibilities of the business associate.

(f) [Optional] Business associate may disclose protected health information for the proper management and administration of business associate or to carry out the legal responsibilities of the business associate, provided the disclosures are required by law, or business associate obtains reasonable assurances from the person to whom the information is disclosed that the information will remain confidential and used or further disclosed only as required by law or for the purposes for which it was disclosed to the person, and the person notifies business associate of any instances of which it is aware in which the confidentiality of the information has been breached.

(g) [Optional] Business associate may provide data aggregation services relating to the health care operations of the covered entity.

Provisions for Covered Entity to Inform Business Associate of Privacy Practices and Restrictions

(a) [Optional] Covered entity shall notify business associate of any limitation(s) in the notice of privacy practices of covered entity under 45 C.F.R. 164.520, to the extent that such limitation may affect business associate's use or disclosure of protected health information.

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SAMPLE BUSINESS ASSOCIATE AGREEMENT

(b) [Optional] Covered entity shall notify business associate of any changes in, or revocation of, the permission by an individual to use or disclose his or her protected health information, to the extent that such changes may affect business associate’s use or disclosure of protected health information.

(c) [Optional] Covered entity shall notify business associate of any restriction on the use or disclosure of protected health information that covered entity has agreed to or is required to abide by under 45 C.F.R. 164.522, to the extent that such restriction may affect business associate’s use or disclosure of protected health information.

Permissible Requests by Covered Entity

[Optional] Covered entity shall not request business associate to use or disclose protected health information in any manner that would not be permissible under Subpart E of 45 C.F.R. Part 164 if done by covered entity. [Include an exception if the business associate will use or disclose protected health information for, and the agreement includes provisions for, data aggregation or management and administration and legal responsibilities of the business associate.]

Term and Termination

(a) Term. The Term of this Agreement shall be effective as of [Insert effective date], and shall terminate on [Insert termination date or event] or on the date covered entity terminates for cause as authorized in paragraph (b) of this Section, whichever is sooner.

(b) Termination for Cause. Business associate authorizes termination of this Agreement by covered entity, if covered entity determines business associate has violated a material term of the Agreement [and business associate has not cured the breach or ended the violation within the time specified by covered entity]. [Bracketed language may be added if the covered entity wishes to provide the business associate with an opportunity to cure a violation or breach of the contract before termination for cause.]

(c) Obligations of Business Associate Upon Termination.

[Option 1—if the business associate is to return or destroy all protected health information upon termination of the agreement]

Upon termination of this Agreement for any reason, business associate shall return to covered entity [or, if agreed to by covered entity, destroy] all protected health information received from covered entity, or created, maintained, or received by business associate on behalf of covered entity, that the business associate still maintains in any form. Business associate shall retain no
copies of the protected health information.

[Option 2— if the agreement authorizes the business associate to use or disclose protected health information for its own management and administration or to carry out its legal responsibilities and the business associate needs to retain protected health information for such purposes after termination of the agreement]

Upon termination of this Agreement for any reason, business associate, with respect to protected health information received from covered entity, or created, maintained, or received by business associate on behalf of covered entity, shall:

1. Retain only that protected health information which is necessary for business associate to continue its proper management and administration or to carry out its legal responsibilities;

2. Return to covered entity [or, if agreed to by covered entity, destroy] the remaining protected health information that the business associate still maintains in any form;

3. Continue to use appropriate safeguards and comply with Subpart C of 45 C.F.R. Part 164 with respect to electronic protected health information to prevent use or disclosure of the protected health information, other than as provided for in this Section, for as long as business associate retains the protected health information;

4. Not use or disclose the protected health information retained by business associate other than for the purposes for which such protected health information was retained and subject to the same conditions set out at [Insert section number related to paragraphs (e) and (f) above under “Permitted Uses and Disclosures By Business Associate”] which applied prior to termination; and

5. Return to covered entity [or, if agreed to by covered entity, destroy] the protected health information retained by business associate when it is no longer needed by business associate for its proper management and administration or to carry out its legal responsibilities.

[The agreement also could provide that the business associate will transmit the protected health information to another business associate of the covered entity at termination, and/or could add terms regarding a business associate’s obligations to obtain or ensure the destruction of protected health information created, received, or maintained by subcontractors.]

(d) Survival. The obligations of business associate under this Section shall survive the termination of this Agreement.

Miscellaneous [Optional]

App. M-6
What Every Georgia Lawyer Needs to Know About Privacy Law and Data Security Breaches

OCTOBER 27, 2017
Mary Donne Peters
Amy C. M. Burns
Gorby Peters Law
Atlanta, Georgia 30346

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Ethics and Professionalism

– Understand what is protected;
– Develop and document privacy plans;
– Develop and implement data breach protocols;
– Train employees;
– Hold vendors accountable;
– Sign and keep business associate agreements; and
– Test!

Lawyers have a professional, ethical and now legal duty to:

SAMPLE BUSINESS ASSOCIATE AGREEMENT

App. M

(a) [Optional] Regulatory References. A reference in this Agreement to a section in the HIPAA Rules means the section as in effect or as amended.

(b) [Optional] Amendment. The Parties agree to take such action as is necessary to amend this Agreement from time to time as is necessary for compliance with the requirements of the HIPAA Rules and any other applicable law.

(c) [Optional] Interpretation. Any ambiguity in this Agreement shall be interpreted to permit compliance with the HIPAA Rules.

For Educational Purposes Only
What Every Georgia Lawyer Needs to Know Now About Privacy Law and Data Security Breaches

OCTOBER 27, 2017

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Ethics and Professionalism

Lawyers have a professional, ethical and now legal duty to:

- Understand what is protected;
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- Develop and implement data breach protocols;
- Train employees;
- Hold vendors accountable;
- Sign and keep business associate agreements; and
- Test!
The Threat Is Real
And Growing

For Failure to Manage Leaks or Hacks:

• New Federal Laws (HIPAA-HITECH) increase sanctions ($1.5 M penalties possible and jail time) for “covered entities” that don’t follow data security laws.
• New rules make the HIPAA-HITECH laws applicable to many more companies (Business Associate Rules).
• Lawyers and vendors may be “business associates” if they access, store, handle medical records.
• Lawyers now sued by clients for data breaches!

HIPAA/HITECH
March 2016 New Enforcement!

• HHS begins audits of “business associates” of healthcare entities.
• $1.55 million dollar settlement with a non-profit healthcare provider for failing to enter into business associate agreement with a major contractor and failing to institute an organization wide risk analysis to address risk and vulnerabilities to patient information.
HIPAA/HITECH
October 2016

• HHS announces $2.14 million dollar settlement with St. Joseph Health for failing to conduct accurate and thorough analysis of potential risks and vulnerabilities.

HIPAA/HITECH—HHS Follows Up On BAA Requirement April, 2017

• Tiny pediatric subspecialty practice is penalized for failing to produce an executed BAA with a vendor.
• Vendor=record storage company.
• Settlement= $34k.
• Do YOU have a BAA with your record storage company?
HIPAA/HITECH  Costly Delays


• $475K Fine by HHS for failing to timely disclose potential breach.

• PHI located on Blackberry device that was lost.

• Device had no encryption, no password.

EQUIFAX TIME LINE

• July 29, 2017 breach occurs (over 100-million impacted!);
• Sept. 7, 2017 company reveals breach;
• Sept. 9, 2017 Former Gov. Barnes files class action lawsuit in GA;
• Sept. 12, 2017 MA AG says state suit to be filed;
• Sept. 25, 2017 CEO Resigns; and
• Oct. 3, 2017 GA AG announces he is part of a multi-state AG investigation into Equifax.
Reality Check!

- Employers are *one click away* from having an employee or vendor release private or protected information.

- Equifax data breach blamed on *one employee’s* failure to manually patch software.

- Employers have been fined when employees’ laptops or mobile devices are lost or stolen (if not secure).

- *You* may face heavy fines if no business associate agreement is signed even if there was no breach.

Reality Check!

- You may be subject to HIPAA rules if:
  - *you hold or store medical records;*
  - *you hold or store employee health information;*
  - or
  - *you have access to a client’s records which contain medical records!*
Reality Check!

• You must have a Business Associate Agreement in place with any vendor that can access Protected Health Information (PHI):
  ▫ IT companies;
  ▫ Experts;
  ▫ Copy Centers;
  ▫ Record Storage Centers;
  ▫ Temporary Workers.

Data Privacy in the US is Governed by a Series of Federal Privacy Laws, Including:

• The Health Insurance Portability & Accountability Act of 1996 (HIPAA).
• Children’s Online Privacy and Protection Act of 1998 (COPPA).
• Fair and Accurate Credit Transactions Act of 2003 (FACTA).
• The Patient Safety and Quality Improvement Act of 2005 (PSQIA).
• Health Information Technology for Clinical and Economic Health (HITECH) Act of 2009.
State & Local Laws

47 states, including Georgia, have privacy laws that govern data breaches:

- California’s “Shine the Light Statute.”
- Nevada has even stricter encryption rules than PCI DSS.
- Georgia makes it a crime to commit computer “invasion of privacy” punishable by a fine and jail time.
- Brand new NY laws!

Georgia’s Data Breach Notification Laws

- O.C.G.A. §10-1-910 through §10-1-912.
- Applies to most governmental entities, individuals and companies.
- Protected personal information (i.e., information that could put a third party at risk for cyber crime or identity theft).
- Must report theft/improper access in the most “expedient” time possible and without “unreasonable” delay.
Georgia’s Data Breach Notification Laws

• Special 24-hour requirement for notice if company stores data on behalf of a third party (for example, data centers).
• Carve out for some governmental entities (i.e., traffic safety, law enforcement, licensing, etc.).
• Additional notice requirements for breach affecting more than 10,000.
• No statutory penalty, no statutory right of private action.

HIPAA/HITECH Rules

• Federal law now covers “business associates” of entities covered by HIPAA rules.
• March 2016 HHS announced it is now auditing business associates.
• Business Associates must protect data by:
  1) conducting risk/threat assessments, training employees and contractors, adopting written privacy policies, testing for compliance; and
  2) ensuring compliance by vendors through signed business associate agreements.
• Breach notification rules apply.
Professional Ethics Rules

- Ethical Duty to maintain client confidences.
- Lawyers are increasing targets of cyber attacks.
- What have you done to protect your systems from intrusion?
  - Security Analysis?
  - Training?
  - Software Patches? (Equifax)
  - Vendor management? (Home Depot)

Clients Create “Model Rules”

2017 Association of Corporate Counsel (ACC) develop ”Model Rules” for outside counsel in the handling of client data.

2016 national law firm survey estimates 25% law firms have experienced data breach.

Model Rules + Known Threat= Consideration For Breach of Standard of Care Lawsuits.
**Employees and Guests**

Do you monitor email? Take video? Record calls?

Georgia is a “one party” state for telephone and in person conversations but must warn employees and guests that there is no expectation of privacy and post signs if video taping is occurring.

---

**Ignorance is not bliss, it’s expensive!**

- Class action law suits—Home Depot, Target.
- “Chatbot” suits in magistrate court—Equifax.
- Regulatory agency fines and investigations:
  - HHS, CFPB
- Possible criminal penalties.
Be Aggressively Proactive

• “Private” usually means info is not generally in the public space and divulging the information could harm or embarrass a third party.
• “Protected” usually means data that would allow a third party to steal information or identity or improperly benefit from use, most health records, most data that relates to children.
• **BUT** “protected” means anything a statute or regulator deems protected or which private parties agree to protect in a contract.

Some Encouraging News!

• If your team member loses a cell phone or laptop, do you have to report? Maybe not if password protected and encrypted.
• Beware — contrary contractual obligations to report.
• Risk — regulators will see it differently!
Federal Cybersecurity “Tips”

1. Train employees in security principles;
2. Protect information, computer & networks from cyber attacks;
3. Provide firewall security for your Internet connection;
4. Create a mobile device action plan; and
5. Make backup copies of important business data and information.


Federal Cybersecurity “Tips” (cont.)

6. Control physical access to computers & create use accounts for each employee.
7. Secure Wi-Fi networks.
8. Employ best practices on payment cards.
9. Limit employee access to data and information & limit authority to install software.

Threats & Safeguards: Office Equipment

- Fax/copy machines
- Printers
- Phone system
- Surveillance equipment
- Credit card machine
- Disposal
  - GA has a data disposal law (O.C.G.A. § 10-15-2)
- Company vehicle

Threats & Safeguards: Mobile Devices & Technology

Encryption Tips:
1. Use the longest encryption key length—128 in most cases.
2. Is password to modify an encrypted password?
3. If you forget a password to an encrypted workbook, you’re locked out!
Breach Notification/Reporting

- What constitutes a breach?
- Who decides how/when to report?
  - Timing
  - Process
  - State-by-state
- Vulnerability Study
- Audit

Review

Create and maintain a culture of respecting privacy in your organization:
1. Assess threats (physical, technological, human).
2. Designate privacy leadership roles.
3. Adopt and enforce privacy policies & procedures.
4. Create and enforce contractual rights with employees, vendors, and contractors.
5. Acquire adequate & appropriate insurance.
6. Training for managers and staff.
Insurance

- Most insurance policies do NOT cover cyber threats.
- Cyber insurance is available, but must purchase separately.
- Watch for special requirements that may void policy (i.e., duty to report cyber crime to law enforcement in very short time; duty for annual independent penetration testing).
- Carefully review employee dishonesty policies and coverage (who is an employee?).

Tips and Resources

U.S. Department of Health and Human Services (HHS)

**Breach Reporting:**
http://www.hhs.gov/hipaa/for-professionals/breach-notification/breach-reporting/index.html

**Audits:**
http://www.hhs.gov/hipaa/for-professionals/compliance-enforcement/audit/index.html

**Suggested Language for BA Agreements:**

**Training:**
http://www.hhs.gov/hipaa/for-professionals/training/index.html
Tips and Resources

U.S. Department of Homeland Security

Cyber Crime Notification:
Stop.Think.Connect.
https://www.dhs.gov/stopthinkconnect

Tips and Resources

• OCRS summary of the HIPAA Security Rule:

Tips and Resources
Office of the National Coordinator for Health Information Technology

Guide to Privacy and Security of Electronic Health Information


Questions?

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12:00  THE PROFESSIONALISM HOUR: KEY TAKEAWAYS ON MOTIONS AND DEADLINES IN FEDERAL COURT

Hon. Catherine M. Salinas, United States Magistrate Judge, U.S. District Court for the Northern District of Georgia, Atlanta
APPENDIX H

REVISED ELECTRONIC CASE FILING STANDING ORDER AND ADMINISTRATIVE PROCEDURES
STANDING ORDER
No. 16-01

IN RE:

REVISED ELECTRONIC CASE
FILING STANDING ORDER AND
ADMINISTRATIVE PROCEDURES

ORDER

Federal Rules of Civil Procedure 5 and 83 and Federal Rule of Criminal Procedure 57 authorize the Court to establish practices and procedures for filing, signing, and verifying documents by electronic means.

IT IS THEREFORE ORDERED:

1. Absent good cause shown and the permission of the Court, attorneys in good standing admitted to practice before the Bar of this Court, to include attorneys admitted pro hac vice, must file, sign, and verify documents only by electronic means to the extent and in the manner authorized by this Standing Order, Local Rule 5.1 A. NDGa., and the administrative procedures attached hereto as Exhibits A and B, Administrative Procedures for Filing, Signing, and Verifying Pleadings and Papers by Electronic Means in Civil and Criminal Cases in the United States District Court for the Northern District of Georgia (Administrative Procedures).

2. The Administrative Procedures are intended to be consistent with the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and this Court’s Local Rules. Any conflicts should be brought to the Court’s attention immediately.

3. The official record of the Court shall be the electronic file maintained by the Court and such paper files as are permitted by the Administrative Procedures.
4. The Clerk of Court will implement and publish the Administrative Procedures, and will register attorneys and issue individual logins and passwords consistent with those procedures to permit electronic filing and notice of pleadings and other documents.

5. Pro se litigants who are not attorneys in good standing admitted to the Bar of this Court must file all documents with the Court in paper form.

6. The electronic filing of a petition, pleading, motion, or other paper by an attorney who is a registered participant in the Court’s Electronic Case Filing System shall constitute the signature of that attorney under the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. The attorney whose login and password are used to accomplish an electronic filing certifies that the attorney and the attorney’s law firm have authorized the filing.

7. No attorney shall knowingly permit or cause to permit his/her login or password to be used by anyone other than an authorized employee of his/her law firm.

8. No person shall knowingly use or cause another person to use the login or password of a registered attorney unless such person is an authorized employee of the law firm.

9. The electronic filing of a pleading or other paper in accordance with the Court’s Administrative Procedures shall constitute entry of that pleading or other paper on the docket kept by the Clerk under the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure.

10. The fact that a party files a document electronically does not alter the filing deadline for that document.

11. The Clerk’s Office shall enter all orders, decrees, judgments, and proceedings of the Court in accordance with the Administrative Procedures, which shall constitute entry of the orders, decrees, judgments, and proceedings on the docket kept by the Clerk under the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. Any order filed electronically without the original signature of a judge shall have the same force and effect as if the judge had
affixed his or her signature to a paper copy of the order and it had been entered in a conventional manner.

12. Whenever a pleading or other paper is filed electronically in accordance with the Administrative Procedures, the Clerk’s Office shall serve the filing party with a “Notice of Electronic Filing” by electronic means at the time of docketing.

13. The filing party shall serve the pleading or other document upon all persons entitled to receive notice or service in accordance with the applicable rules and Administrative Procedures.


15. A pleading or document that a person signs and thereby verifies, certifies, declares, affirms, or swears under oath or penalty of perjury concerning the truth of the matters set forth in that pleading or document is a “Verified Pleading.” An attorney filing a Verified Pleading shall thereafter maintain in his or her office the original Verified Pleading in its entirety for a period ending two (2) years after expiration of the time for filing a timely appeal. The filing of a Verified Pleading constitutes a representation by the attorney who files it that the attorney has in his or her possession at the time of filing the fully executed original Verified Pleading.

16. This Revised Order is effective December 1, 2016, and shall be published together with Exhibits A and B as Appendix H to the Local Rules for the Northern District of Georgia.
Dated this 27th day of October, 2016.

BY THE COURT:

s/Thomas W. Thrash, Jr.
THOMAS W. THRASH, JR.
Chief United States District Judge
Northern District of Georgia
EXHIBIT A

CIVIL CASES

ADMINISTRATIVE PROCEDURES
FOR FILING, SIGNING, AND verifying
PLEADINGS AND PAPERS BY ELECTRONIC MEANS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

Revised effective
December 1, 2016
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ADMINISTRATIVE PROCEDURES
FOR FILING, SIGNING, AND VERIFYING PLEADINGS AND PAPERS
BY ELECTRONIC MEANS IN CIVIL CASES

DEFINITIONS

1. “Electronic Case Filing System” (ECF) refers to the court’s automated system that receives documents filed in electronic form. The program was developed for the Federal Judiciary by the Administrative Office of the United States Courts.

2. “Electronic filing” means uploading a pleading or document directly from the registered user’s computer, using the Court’s ECF system, to file that pleading or document in the Court’s case file. Sending a document or pleading to the Court via email does not constitute “electronic filing”.

3. “Notice of Electronic Filing” (NEF) is a notice automatically generated by ECF at the time a document is filed, setting forth the time and date of filing, the name of the party and attorney filing the documents, the type of document, the text of the docket entry, the name of the party and/or attorney receiving the notice, and a hyperlink to the filed document, which allows recipients to retrieve the document automatically. The NEF also contains a security code of the document filed which can be used to ensure that the document as it was filed is not tampered with in any way.

4. “Public Access to Court Electronic Records” (PACER) is an automated system that allows an individual to view, print and download court docket information over the internet.

5. “Portable Document Format” (PDF). A document created with a word processor or a paper document which has been scanned must be converted to portable document format to be filed electronically with the Court. Converted files contain the extension “.pdf”. The program takes a “picture” of the original document and allows anyone to open the converted document across a broad range of hardware and software, with layout, format, links and images intact. For information on PDF, users may visit the websites of PDF vendors, such as www.adobe.com or www.fineprint.com.
6. “Technical failure” is defined as a malfunction of Court owned/leased hardware, software, and/or telecommunications facility which results in the inability of a filer to submit a document electronically. Technical failure does not include the malfunctioning of a filer’s equipment or internet connection.

7. “Proposed Order” is a draft document submitted by an attorney for a judge’s signature. A proposed order shall accompany a motion or other request for relief as an electronic attachment to the document.
I. THE ELECTRONIC CASE FILING SYSTEM

A. IN GENERAL. All documents submitted for filing in civil cases in this district shall be filed electronically using the Electronic Case Filing system (“ECF”) or shall be scanned and uploaded to ECF, unless otherwise permitted by these administrative procedures or unless otherwise authorized by the assigned judge. Although permitted by these procedures, scanning and uploading a document should be used by filers only as a last resort when conversion of the document into .pdf format from a word processing program is not feasible.

All members of the bar must register for a login and password in order to facilitate the Court and other electronic filers’ use of electronic noticing.

Unless otherwise specified by the presiding judge, a paper courtesy copy of all summary judgment motions, to include exhibits, and any response to such motions must be delivered to the assigned judge. Similarly, a paper courtesy copy, including all exhibits, will accompany any request for a temporary restraining order.

1. Absent good cause shown, attorneys in good standing admitted to practice before the Bar of this Court, to include attorneys admitted pro hac vice, must file civil pleadings electronically using the ECF System.

   a. Electronically filed documents may contain the following types of hyperlinks:

      (A) Hyperlinks to other portions of the same document;

      (B) Hyperlinks to other documents in CM/ECF in this court, or any other CM/ECF court; and

      (C) Hyperlinks to a location on the Internet that contains a source document for a citation.

   Hyperlinks to cited authority may not replace standard citation format. Complete citations must be included in the text of the filed document. Neither a hyperlink, nor any site to which it refers, shall be considered part of the record.

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Hyperlinks are simply convenient mechanisms for accessing material cited in a filed document.

The court accepts no responsibility for, and does not endorse, any product, organization, or content at any hyperlinked site, or at any site to which that site may be linked. The court accepts no responsibility for the availability or functionally of any hyperlink.

2. A party proceeding pro se shall not file electronically unless the party is an attorney in good standing admitted to practice before this Court. (See III(A) of these procedures).

3. The filing of social security cases shall be subject to the limitations imposed in III(B) of these procedures.

4. An attorney may apply to the assigned judge for permission to file documents conventionally. Even if the assigned judge initially grants an attorney permission to file documents conventionally, the assigned judge may withdraw that permission at any time and require the attorney to file documents electronically using ECF.

5. An attorney seeking the Court’s permission to file conventionally rather than electronically will file a paper “Request for Leave to File Conventionally” setting forth in detail the reasons supporting the request, together with a “Proposed Order Granting Leave to File Conventionally.” Such requests will be provided to the judge to whom the filer’s case is assigned, or, in those cases in which a case has not been filed or the case has not yet been assigned, to the duty judge.

6. The Clerk’s Office or any judge of this court may deviate from these procedures in specific cases, without prior notice, if deemed appropriate in the exercise of discretion, considering the need for the just, speedy, and inexpensive determination of matters pending before the court. The court may also amend these procedures at any time without prior notice.

B. LOGINS & PASSWORDS. Each attorney admitted to practice in the Northern District of Georgia shall be entitled to one ECF login. The login and associated password permits the attorney to participate in the electronic retrieval and filing of pleadings and other papers.
1. No attorney shall knowingly permit or cause to permit his or her login to be utilized by anyone other than an authorized employee of his or her office.

2. Once registered, the attorney shall be responsible for all documents filed with his or her login.

3. Registration for a login is governed by Paragraph I(C).

4. An attorney admitted pro hac vice must register for a login in accordance with these Administrative Procedures.

5. The login and password of an attorney constitutes a signature on the document being filed. Thus, the login and password of the filing attorney must match the attorney whose signature block appears on the document filed.

C. REGISTRATION.

1. Attorneys admitted to the bar of this Court, including attorneys admitted pro hac vice, must complete and submit an Attorney Registration Form online from the Court’s web page (www.GAND.uscourts.gov), or may use the Registration Form attached to these procedures as Form A and mail or deliver the Registration Form to the Clerk’s Office. An ECF login and password will be mailed back to the attorney, and he/she may then access ECF to file pleadings electronically.

   The court will issue logins and passwords only to attorneys in good standing. To be in good standing, an attorney must meet the requirements in Local Rule 83.1.

2. If the registration was not completed online, the Clerk’s Office will send the attorney an email message after assigning the attorney a login and password to ensure that the Clerk’s Office has correctly entered a registered attorney’s email address in ECF. The Clerk’s Office will then either mail login information to the attorney by regular, first-class mail, or the attorney may arrange to pick up his/her login information at the Clerk’s Office.

3. After registering, attorneys may change their passwords. If at any time an attorney believes that the security of an existing password has been compromised and/or that a threat to ECF exists, the attorney must change his/her password immediately. In addition, the attorney must immediately notify the Clerk’s Office by telephone of the security issue.

   An attorney whose email address, mailing address, telephone, or fax number has changed from that of the original Attorney Registration Form shall timely file a notice of a change of address and serve a copy of the notice on all other parties of the cases in which the attorney was counsel of record. The attorney is responsible for keeping his/her email address updated in ECF.

II. ELECTRONIC FILING AND SERVICE OF DOCUMENTS

A. FILING GENERALLY

1. Complaints and Other Initial Filings.
   a. A party may not electronically serve a complaint or summons but instead must perfect service according to Federal Rule of Civil Procedure 4.
   b. New cases are deemed filed the day the Clerk's Office receives the complaint and any required filing fee.

2. All motions, pleadings, applications, briefs, memoranda of law, deposition transcripts, transcripts of proceedings, or other documents in a case to include attachments to the extent feasible shall be electronically filed on ECF except as otherwise provided by these administrative procedures.

3. Emailing a document to the Clerk's Office or to the assigned judge shall not constitute “filing” of the document. A document shall not be considered filed for purposes of the Federal Rules of Civil Procedure until the filing party receives an ECF-generated “Notice of Electronic Filing” described in II(B)1 of these procedures.

4. The Notice of Electronic Filing reflects the time the electronic transmission of a document is completed. Accordingly, a document will be deemed timely filed if the Notice of Electronic Filing reflects a time prior to

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compromised and/or that a threat to ECF exists, the attorney must change his/her password immediately. In addition, the attorney must immediately notify the Clerk’s Office by telephone of the security issue.

4. An attorney whose email address, mailing address, telephone, or fax number has changed from that of the original Attorney Registration Form shall timely file a notice of a change of address and serve a copy of the notice on all other parties of the cases in which the attorney was counsel of record. The attorney is responsible for keeping his/her email address updated in ECF.

II. ELECTRONIC FILING AND SERVICE OF DOCUMENTS

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3. Emailing a document to the Clerk’s Office or to the assigned judge shall not constitute “filing” of the document. A document shall not be considered filed for purposes of the Federal Rules of Civil Procedure until the filing party receives an ECF-generated “Notice of Electronic Filing” described in II(B)1 of these procedures.

4. The Notice of Electronic Filing reflects the time the electronic transmission of a document is completed. Accordingly, a document will be deemed timely filed if the Notice of Electronic Filing reflects a time prior to
midnight. However, the assigned judge may order that a document be filed by a time certain, which then becomes the filing deadline.

5. If filing a document requires leave of the court, such as an amended complaint or a sur-reply brief, the attorney shall attach the proposed document as an exhibit to the motion according to the procedures in IV(B). If the court grants the motion, the order will direct the attorney to file the document electronically with the court.

6. Attachments and exhibits larger than 15 MB may be filed electronically in separate 15 MB (or smaller) segments.

7. The Clerk’s Office shall not maintain a paper court file in any case begun after July 15, 2005, except as otherwise provided herein. The official court record shall be the electronic file maintained on the court’s servers. The official record shall include, however, any conventional documents or exhibits filed in accordance with these procedures that are not converted to electronic format.

   a. Except as provided above, the Clerk’s Office will discard all original documents brought to the Clerk’s Office for filing after they are scanned and uploaded to ECF.

   b. Documents that are electronically filed and require an original signature other than that of the filer should be maintained in paper form by the filer until five (5) years after the expiration of the time for filing a timely appeal.

   c. An attorney who wishes to have an original document returned after the Clerk’s Office scans and uploads it to ECF may, prior to submitting the document to the Clerk’s Office, seek authorization from the assigned judge for the document’s return. If return is granted by the judge, the attorney must provide a self-addressed, stamped envelope for the return of the documents. Authorization will be granted on a case-by-case basis. No standing authorizations

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1 If an attorney believes a document with original signatures has some intrinsic value, the attorney is encouraged to retain the original document and submit to the Clerk’s Office a copy of the document with faxed or photocopied signatures for scanning and uploading.
for the return of all original documents filed by an attorney or office will be allowed.

8. Official and contract court reporters will submit to the Clerk’s Office the official recordings of transcribed proceedings and original notes, if applicable. Official and contract court reporters must also either file the certified transcript of those proceedings electronically on ECF or email a file containing the certified transcript of the proceedings in PDF format to the Clerk’s Office for uploading. For information on the public access and redaction procedures for transcripts, please see Section VI of these procedures.

9. The parties must individually label all electronically uploaded files according to their content. For example, documents should be uploaded as Ex. A: Smith Deposition, Ex. B: Employment Contract, and Ex. C: Jones Letter, instead of Ex. A, Ex. B, and Ex. C.

B. SERVICE

1. Whenever a pleading or other paper is filed electronically in accordance with these procedures, ECF shall generate a “Notice of Electronic Filing” to the filing party and any other party who is a registered user and has requested electronic notice in that case.2

   a. If the recipient is a registered participant of ECF, the “Notice of Electronic Filing” shall constitute service of the pleading or other paper under Fed.R.Civ.P. 5(b)(2)(E).

   b. Service of the “Notice of Electronic Filing” on a party who is not a registered participant in ECF may be accomplished by email, subject to the additional service requirements of B(3) below.

2. A certificate of service on all parties entitled to service or notice is still required when a party files a document electronically. The certificate must state the

   2 To determine whether another party is a registered user, the filer can select ECF’s “Utilities” category, then click on “Mailings” on the pull-down menu, and then “Mailing Information for a Case”. The filer then enters the case number and the ECF information will appear, stating whether or not the filer must mail a copy or if ECF will electronically generate one.
manner in which service or notice was accomplished on each party so entitled. Sample language for a certificate of service is attached to these procedures as Form B.

3. A party who is not a registered participant of ECF is entitled to a paper copy of any electronically filed pleading, document, or order. The filing party must therefore provide the non-registered party with the pleading, document, or order according to the Federal Rules of Civil Procedure. When mailing paper copies of documents that have been electronically filed, the filing party must include the “Notice of Electronic Filing” to provide the recipient with proof of the filing.

4. Attorneys should be aware that the submission due date, which appears when either electronically filing a motion or querying deadlines, is for court use only and should not be relied upon as an accurate computation of the response date.

5. A filer who elects to bring a document to the Clerk’s Office for scanning and uploading to ECF must serve conventional copies on all parties to the case and should expect some delay in the uploading and subsequent electronic noticing of the document.

C. SIGNATURES

1. Attorney Signature

   a. A pleading or other document requiring an attorney’s signature shall be signed in the following manner, when filed electronically: “s/(attorney name).” The correct format for an attorney signature is as follows:

   s/ John Doe, Esq.
   Attorney Bar Number: xxxxxx
   Attorney for (Party Name)
   ABC Law Firm
   123 South Street
   Atlanta, Georgia 30303
   Telephone: (xxx) xxx-xxxx
   Email: john_doe@abclaw.com

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The attorney’s signature must match the login and password of the filing attorney.

b. Any party challenging the authenticity of an electronically filed document or the attorney’s signature on that document must file an objection to the document within ten days of receiving the Notice of Electronic Filing.

A person, not a party, who neither receives notice (actual or through counsel) of the document nor reasonably should have known of the contents of the documents and who can show that he or she was adversely impacted by the document and has reason to believe either that the signature on the document or the document itself is not authentic must challenge the document within ten days of the time they receive notice or should reasonably have known of the document’s contents.

2. Multiple Signatures

a. The filing attorney shall initially confirm that the content of the document is acceptable to all persons required to sign the document and shall obtain the signatures of all parties on the document. For purposes of this rule, physical, facsimile, or electronic signatures are permitted.

b. The filing attorney then shall file the document electronically, indicating the signatories, e.g., “s/ Jane Doe,” “s/ John Doe,” etc. The correct format for each signature is as follows:

s/ Jane Doe, Esq.
Attorney Bar Number: xxxxxx
Attorney for (Party name)
ABC Law Firm
123 South Street
Atlanta, Georgia 30303
Telephone: (xxx) xxx-xxxx
Email: jane_doe@abclaw.com
One of the attorney’s signatures must match the login and password of the filing attorney.

c. A non-filing signatory or party who disputes their acceptance of the contents of the document, the authenticity of an electronically filed document containing multiple signatures, or the authenticity of the signatures themselves must file an objection to the document within ten days of receiving the Notice of Electronic Filing.

A person, not a party, who neither receives notice (actual or through counsel) of the document nor reasonably should have known of the contents of the documents and who can show that he or she was adversely impacted by the document and has reason to believe either that the signature on the document or the document itself is not authentic must challenge the document within ten days of the time they receive notice or should reasonably have known of the document’s contents.

3. Non-Attorney Signature

a. If the original document requires the signature of a non-attorney, the filing party or the Clerk’s Office shall scan the original document and then electronically file it on ECF.

b. The electronically filed document as maintained on the court’s servers shall constitute the official version of that record. The court will not maintain a paper copy of the original document.

c. A non-filing signatory or party who disputes the authenticity of an electronically filed document with a non-attorney signature or the authenticity of the signature on that document must file an objection to the document within ten days of receiving the Notice of Electronic Filing.

A person, not a party, who neither receives notice (actual or through counsel) of the document nor reasonably should have known of the contents of the documents and who can show that he or she was adversely impacted by the document and has reason to believe
either that the signature on the document or the document itself is not authentic must challenge the document within ten days of the time they receive notice or should reasonably have known of the document’s contents.

D. FEES PAYABLE TO THE CLERK. Any fee required for filing a pleading or paper in District Court is payable to the Clerk of the Court by cash, check, U.S. Postal money order, or cashier’s check. The Clerk’s Office will accept payment by credit card (MasterCard, Visa, American Express, and Discover). Debit cards with a MasterCard or Visa logo are acceptable and treated as a credit card transaction. Checks, money orders, and cashier checks are to be made payable to "Clerk, U.S. District Court". A law firm check will be accepted for payment by attorneys. The Clerk's Office will note the receipt of fees on the docket. The court will not maintain electronic billing or debit accounts for attorneys or law firms.

Fees for Applications for Admission Pro Hac Vice must be paid by credit card through the Pay.gov system concurrent with the electronic filing of the application in CM/ECF. Fees for filing a Notice of Appeal may be paid through the Pay.gov system, as well.

E. ORDERS.

1. The assigned judge or the Clerk’s Office shall electronically file all orders. Any order entered electronically has the same force and effect as if the judge had affixed his/her signature to a paper copy of the order and it had been entered on the docket conventionally.

2. When filing a motion for which no supporting brief is required, a proposed order granting the motion and setting forth the requested relief shall be included with the electronic filing as an attachment.

3. When mailing paper copies of an electronically signed order to a party who is not a registered participant of ECF, the Clerk’s Office will include the Notice of Electronic Filing.

4. The assigned judge or the Clerk’s Office, if appropriate, may grant routine orders by a text-only entry upon the docket. In such cases, no PDF document will issue; the text-only entry shall constitute the court’s only order on
the matter and will have the same force and effect as if the judge had issued a conventional paper order. ECF will generate a “Notice of Electronic Filing” as described in II(B)(1) of these procedures.

**F. TITLE OF DOCKET ENTRIES.** The party electronically filing a pleading or other document shall be responsible for designating a docket entry title for the document by using one of the docket event categories prescribed by the court.3

**G. CORRECTING DOCKET ENTRIES.**

1. Once a document is submitted and becomes part of the case docket, corrections to the docket are made only by the Clerk’s Office. ECF will not permit the filing party to make changes to the document(s) or docket entry once the transaction has been accepted.

2. A document incorrectly filed in a case may be the result of posting the wrong PDF file to a docket entry, selecting the wrong document type from the menu, or entering the wrong case number and not detecting the error before the transaction is completed.

3. If the docket entry is correct, but the document filed is incorrect, the filing party will be advised to refile the document electronically. Refiling the document does not entitle the filer to an extension of filing deadlines. If the docket entry is incorrect, but the attached document is correct, the Clerk’s office may make the appropriate corrective changes to the docket entry consistent with Clerk’s Office internal procedures. No substitution of documents by Clerk’s Office staff is permissible.

If the entry was made in the wrong case, the document should be refiled in the correct case.

As soon as possible after an error is discovered, the filing party should contact the Clerk’s Office with the case number and document number for which the correction is being requested. In the event that the incorrectly attached

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3 Readers may view an event listing in CM/ECF under the Utilities function or search for a particular event in CM/ECF through the Search function.
document contains sensitive information, the filing party may request that electronic access to the information be limited to Court personnel until he or she can petition the presiding judge for other relief as appropriate. The Clerk’s Office also has the discretion to limit access to documents it perceives contain sensitive information and were incorrectly filed. In those instances when the Clerk’s Office exercises its discretion, the filing party will be notified immediately to confirm that the document was filed incorrectly and that the party desires that the limited access continue so that he or she may seek appropriate relief from the Court. If appropriate, the Court will make a corrective entry indicating the original error.

**H. TECHNICAL FAILURES.** The Clerk’s Office shall deem the Northern District of Georgia ECF site to be subject to a technical failure on a given day if the site is unable to accept filings continuously or intermittently over the course of any period of time greater than one hour after 10:00 a.m. that day. Known systems outages will be posted on the web site, if possible. An attorney may timely file a declaration seeking relief from the court for not meeting the deadline as a result of a technical failure. (Form C).

Problems on the filer’s end, such as telephone line problems, problems with the filer’s Internet Service Provider (ISP), or hardware or software problems, will not constitute a technical failure under these procedures nor excuse an untimely filing. A filer who cannot file a document electronically because of a problem on the filer’s end must file the document conventionally.

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I. PRIVACY.

1. Redacted Documents. To comply with the policy of the Judicial Conference of the United States and the E-Government Act of 2002, Pub. L. No. 107-347, filing parties shall omit or, where inclusion is necessary, partially redact the following personal data identifiers from all filings, whether filed electronically or on paper, unless the assigned judge orders otherwise.

   a. **Minors’ names:** Use the minors’ initials;
   b. **Financial account numbers:** Identify the name or type of account and the financial institution where maintained, but use only the last four numbers of the account number;
   c. **Social Security numbers:** Use only the last four numbers;
   d. **Dates of birth:** Use only the year; and
   e. **Home addresses:** Use only the city and state.

   Filing parties should review the Court’s Standing Orders on the Court’s web page for a complete statement of the Court’s privacy policy.

2. The responsibility for redacting personal data identifiers rests solely with counsel and the parties. The Clerk’s Office will not review documents for compliance with this rule, seal on its own motion documents containing personal data identifiers, or redact documents, whether filed electronically or on paper.

3. Please see Section VI for procedures regarding redaction of personal identifiers in electronic transcripts.

J. FILING DOCUMENTS UNDER SEAL IN CIVIL CASES

1. Policy. It is the general policy of this Court not to allow the filing of documents under seal without a Court order, even if all parties consent to the filing under seal. Agreements between or among the parties to protect documents from public disclosure, whether through designation under a confidentiality agreement or protective order or otherwise, will not prevent their disclosure in the event the Court denies sealed filing for the documents. Documents filed in court are presumptively public, and counsel are expected to exercise appropriate discretion in requesting sealing for any filing. Counsel generally should not request sealing of an entire filing but only those portions of the filing for which there is legal
authority to seal, including but not limited to scientific formulas, confidential pricing calculations, trade secrets, and sensitive security data. Counsel need not seek leave to redact items identified in subsection II(I)(1) of these procedures. Except in rare circumstances, motions and settlement agreements may not be filed under seal. A party may request that a brief or other document in support of a motion be filed under seal consistent with this policy. Except as set forth in subsection 2(e) below, the party moving to file a document under seal shall bear the burden of establishing good cause for sealing.

2. Rules and Procedures. A party seeking to file a document under seal in a civil case must follow any specific procedures of the presiding judge. Procedures of individual judges are available on the Court’s website under the heading “For Attorneys” and then “Trial Instructions / Preparation” or by contacting the Clerk’s Office. The following rules and procedures govern the filing of documents under seal in a civil case, unless the presiding judge has specific policies, procedures, or orders that are inconsistent with these rules and procedures. In summary, the party seeking to file a document under seal must electronically file a motion to file under seal, a supporting brief, and a proposed order granting the motion, in addition to the document(s) for which sealing is sought:

a. The document(s) for which sealing is sought must be electronically filed as a provisionally sealed filing using the applicable event in the Court’s CM/ECF system. Step-by-step instructions for filing provisionally under seal are available on the Court’s website under the heading “For Attorneys” and then “Trial Instructions / Preparation” or by contacting the Clerk’s Office. A document containing any material for which sealing is sought must be provisionally filed under seal in its entirety. In addition, the party must file as a typical public filing all documents and/or portions of documents that the party does not seek to seal. Unless previously specified by the presiding judge, the party must contact chambers to determine whether to provide a paper courtesy copy of the provisionally sealed filing to the judge.

b. Electronic provisionally sealed filings will be served through the Court’s CM/ECF system consistent with other electronic filings and will be viewable only by Court staff and attorneys registered with
CM/ECF who have appeared in the matter, unless otherwise specified by the Court. If the filing party believes that an attorney who has appeared in the matter should not be permitted to view the provisionally sealed filing (such as an attorney for a non-party or a party that is not subject to a protective order), the filer must make advance arrangements with the Court to restrict that attorney’s ability to view provisionally sealed filings.

c. A provisionally sealed electronic filing that complies with these procedures constitutes a completed filing for purposes of meeting deadlines but will not be considered by the Court for any substantive purpose unless and until the Court gives it permanently sealed status.

d. The party desiring to file under seal also must electronically file a motion for leave to file under seal, together with a supporting brief and a proposed order granting the motion. Except as set forth in subsection (e) below, the moving party shall bear the burden of establishing good cause for sealing, and the brief must: (i) identify, with specificity, the document(s) or portion(s) thereof for which sealing is requested; (ii) explain (for each document or group of documents) the reasons sealing is necessary; (iii) explain (for each document or group of documents) why less drastic alternatives than sealing will not provide adequate protection; and (iv) address the factors governing sealing of documents reflected in controlling case law. See e.g., Romero v. Drummond Co., 480 F.3d 1234, 1245-48 (11th Cir. 2007). Unless previously specified by the presiding judge, the party must contact chambers to determine whether to provide a paper courtesy copy of the motion and supporting brief to the judge.

e. If any document is included in the provisionally sealed filing because a non-movant has requested protection of the document from public disclosure, including but not limited to documents designated pursuant to a protective order, then for each such document, the non-movant shall bear the burden of establishing good cause for sealing and must provide the information required by subsections 2(d)(ii) through 2(d)(iv) above in its response to the

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motion for leave to file under seal. As to each such document, the motion for leave to file under seal and supporting brief need only: (i) identify, with specificity, the documents or portions thereof for which sealing is requested by the non-movant and (ii) briefly explain the nature of the request or designation made by the non-movant. The movant must serve the motion and brief on all persons and entities (including non-parties) who have requested protection from public disclosure for one or more of the documents in the provisionally sealed filing.

f. If the Court enters an order granting a party’s motion to seal as to all matters included in a provisionally sealed filing, the Clerk’s Office will modify the original, “provisional” docket entry to reflect its permanently sealed status, and no further action will be required from the parties for sealing.

g. If the Court enters an order granting a party’s motion to seal as to some but not all of the matters included in a provisionally sealed filing, that party must refile the documents approved for sealing under seal (not provisionally) within three days of the date of the order on the motion to seal using the “Notice of Court Ordered Sealed Filing” event in CM/ECF. This event is permanently sealed without further action of the parties or the Clerk’s Office.

h. Document(s) from a provisionally sealed filing that the Court did not approve for sealing will be treated as withdrawn and will not be considered by the Court except for any document(s) the party refiles as a typical public filing within three days of the date of the order on the motion to seal using the “Notice of Public Filing Consistent with Order on Motion for Leave to File Under Seal” event. A party, in its discretion, publicly may file any document as to which the Court denied sealing without violating any protective order or confidentiality agreement that otherwise would have required the document to be filed under seal, provided that the parties to the protective order or confidentiality agreement had notice and an opportunity to be heard on the motion to file under seal.
i. The Clerk’s Office or any judge of this Court may deviate from these procedures in specific cases, without prior notice, if deemed appropriate in the exercise of discretion, considering the need for the just, speedy, and inexpensive disposition of matters before the Court. The Court may amend these procedures at any time without prior notice.

III. CONVENTIONAL FILING OF DOCUMENTS

The following procedures govern documents filed conventionally. The court, upon application, may also authorize conventional filing of other documents otherwise subject to these procedures. Paper documents should be printed on only one side of the page.

When a document has been filed conventionally, a “Notice of Manual Filing” (Form D) should be electronically filed, naming the document that was filed conventionally and stating the reason for conventional (rather than electronic) filing. (In the event that a party cannot file the requisite Notice of Manual Filing electronically, the party must file the Notice conventionally.)

A. PRO SE FILERS. Pro se filers shall file paper originals of all complaints, pleadings, motions, affidavits, briefs, and other documents. The Clerk’s Office will scan these original documents and upload them into ECF but will also maintain a paper file.

B. SOCIAL SECURITY CASES. Absent a showing of good cause, all documents, notices, and orders in Social Security reviews filed in the District Court after ECF is implemented shall be filed and noticed electronically, except as noted below.

1. All Social Security documents and cases will be filed and served according to II(A)(2) of these procedures.

2. Social Security transcripts will be electronically filed and served, when feasible.
3. To address the privacy issues inherent in a Social Security review, access to most of the individual documents will be limited to counsel and court staff. Court orders and docket sheets, however, will be available over the Internet to non-parties. Further, non-parties will continue to have direct access to the documents on file at the Clerk’s Office.

C. ELECTRONIC MEDIA. Any party presenting electronic media to be filed, including but not limited to a CD-ROM, DVD-ROM, or flash drive, will also present a paper “Notice of Filing of Electronic Media” signed by the party and describing the contents of the electronic media. (See Form E to these Procedures.)

IV. EXHIBITS

A. EVIDENCE IN SUPPORT OF OR IN OPPOSITION TO A MOTION. In general, evidence in support of or in opposition to a motion should be filed electronically, rather than conventionally. (Exhibits that are not filed but are submitted in conventional form during a hearing will be maintained in conventional format.)

1. A party electronically submitting evidentiary materials to the Clerk’s Office in support of or in opposition to a motion shall also file electronically a document indexing each item of evidence being filed. Each item of evidence should be filed as a separate attachment to the motion to which it relates.

2. Whenever feasible a filing party must scan a paper exhibit that is less than 15 MB and submit the exhibit as a PDF file. Similarly, filing parties are expected to electronically file an exhibit greater than 15 MB as separate attachments of 15 MB or smaller whenever feasible. Only when division of the document into separate attachments is not feasible may the party file the document in conventional format.

3. Because documents scanned in color or containing graphics take much longer to upload, filing parties generally should configure their scanners to scan documents at 300 dpi and in black and white rather than in color. If a color document is critical to the case, an original color copy can be filed conventionally or may be scanned in color and then uploaded to ECF.
4. The filing party is required to verify the readability of scanned documents before filing them electronically with the court. (Similar to the copy process, images of scanned documents could contain pages which skewed during scanning or were omitted altogether.)

5. A party submitting evidentiary materials in conventional format shall also file in conventional format an index of evidence listing each item of evidence being filed and identifying the motion to which it relates.

6. Copies of conventionally filed supporting materials shall be served on other parties pursuant to section II(B)(3) of these Procedures governing service of conventional documents.

B. EVIDENCE NOT IN SUPPORT OF OR IN OPPOSITION TO A MOTION.

1. Whenever feasible a filing party must scan a paper exhibit that is less than 15 MB and submit the exhibit as a PDF file. Similarly, filing parties are expected to electronically file an exhibit greater than 15 MB as separate attachments of 15 MB or smaller whenever feasible. Only when division of the document into separate attachments is not feasible may the party file the document in conventional format.

2. A party may conventionally submit exhibits which are not available in electronic form. The Clerk’s Office will note on the docket its receipt of the document(s) or exhibit(s) with a text-only entry. Any document filed conventionally will be noted in a Notice of Manual Filing.

3. Because documents scanned in color or containing graphics take much longer to upload, filing parties generally should configure their scanners to scan documents at 300 dpi and in black and white rather than in color. If a color document is critical to the case, an original color copy can be filed conventionally or may be scanned in color and then uploaded to ECF.

4. The filing party is required to verify the readability of scanned documents before filing them electronically with the court. (Similar to the copy process, images of scanned documents could contain pages which skewed during scanning or were omitted altogether.)

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5. Exhibits submitted conventionally shall be served on other parties pursuant to section II(B)(3) of these Procedures governing service of conventional documents. Exhibits filed conventionally will be listed in an electronically filed Notice of Manual Filing.

V. PUBLIC ACCESS TO CM/ECF

A. PUBLIC ACCESS AT THE COURT. Access to the electronic docket and documents filed in ECF is available to the public at no charge at the Clerk’s Office during regular business hours. A copy fee for an electronic reproduction is required in accordance with 28 U.S.C. §1914.

Conventional copies and certified copies of electronically filed documents may be purchased at the Clerk’s Office. The fee for copying and certifying will be in accordance with 28 U.S.C. §1914.

Please see Section VI regarding public access to electronic transcripts.

B. INTERNET ACCESS. Remote electronic access to ECF for viewing purposes is limited to subscribers to the Public Access to Court Electronic Records (“PACER”) system. The Judicial Conference of the United States has determined that a user fee will be charged for remotely accessing certain detailed case information, such as filed documents and docket sheets in civil cases, but excluding review of calendars and similar general information.4

4 Non-judiciary CM/ECF users will be charged a per page fee to access electronic data such as docket sheets and case documents obtained remotely through the PACER system. A per document cap does not apply to transcripts. Transcripts may be obtained following a minimum 90 day restriction period for a per page fee, with no per document cap. Fees will be charged for each access regardless of whether or not the attorney has been given access to the transcript by the court through CM/ECF. The access fee does not apply to official recipients of electronic documents, i.e., parties legally required to receive service or to whom service is directed by the filer in the context of service under Federal Rules of Civil Procedure. Official recipients will receive the initial electronic copy of a document free to download as they see fit, but if they remotely access the document again, they will be charged the standard per page PACER fee.
VI. ELECTRONIC TRANSCRIPTS

A. OFFICIAL TRANSCRIPTS. Official Transcripts of proceedings, or parts of proceedings, before United States District and Magistrate Judges that are ordered by a party will be filed electronically in CM/ECF. For the first 90 days after filing, the electronic version of a transcript will be available to the public for viewing only and only at the Clerk’s public counters.

Parties desiring a copy of the transcript during the first 90 days from the date of filing (or from the date of the filing of a redacted copy) must obtain the transcript from the respective court reporter.

B. REDACTION

1. Parties shall refrain from including, or shall redact where inclusion is necessary, the following personal identifiers from all court proceedings, unless otherwise ordered by the Court:

   a. **Names of minor children.** If the involvement of a minor child must be mentioned, only the initials of the child should be used.

   b. **Financial account numbers.** If financial account numbers are relevant, only the last four digits of these numbers should be used.

   c. **Social Security numbers.** If an individual’s Social Security number must be included, only the last four digits of that number should be used.

   d. **Dates of birth.** If an individual’s date of birth is relevant, use only the year of birth.

   e. **Home addresses.** If a home address must be mentioned, only the city and state should be used.

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2. Counsel or parties must review the transcript and determine whether redaction of the listed personal identifiers is necessary. Sentencing transcripts must be reviewed by both defense counsel and the government. If redaction is necessary, counsel must electronically file a Request for Redaction within 21 calendar days of the transcript filing date. The request should list, by page and line, each redaction to be made. Remote electronic access to the Request for Redaction will be limited to court staff and counsel. The Request for Redaction must be served by the filing party on the court reporter through U.S. Mail or hand delivery.

3. Failure to request the redaction within the 21-day time period, or seek extension of time to do so from the Court, will result in the transcript being made electronically available, without redaction, 90 days after the transcript was initially filed with the Clerk.

4. The responsibility for omitting or redacting personal identifiers rests solely with counsel and the parties. The Clerk will not review filings for compliance with this rule. Counsel and the parties are cautioned that failure to redact these personal identifiers may subject them to sanctions or other disciplinary proceedings as appropriate.

5. If a party requests redaction, the transcript will not be made remotely available to other parties through PACER until the redactions have been made. A copy of the official transcript will be available for review in the Clerk’s Office or purchase from the court reporter during this time. Redacted transcripts must be filed within ten (10) days of the Request for Redaction absent further direction from the court.

6. Redaction of information other than the personal identifiers listed herein will require the electronic filing of a separate motion served on all of the parties and the court reporter within the 21-day notice period.

C. REMOTE ACCESS TO TRANSCRIPTS. Transcripts will be made remotely available through PACER, subject to standard PACER fees, as follows:

1. Transcripts in which no redaction was requested: 90 days from the filing date of the official transcript.
2. Transcripts in which a redaction was requested: 90 days from the filing date of the official transcript OR date of filing redacted transcript, whichever is later. Although the unredacted transcript will remain on record and be available for public viewing at the Clerk’s Office, only the redacted transcript will be released for remote public access through PACER.
FORM A

United States District Court - Northern District of Georgia

ELECTRONIC FILING

ATTORNEY REGISTRATION FORM

This form is used to register for an account on the Northern District of Georgia Electronic Filing System (ECF). Registered attorneys will have privileges to electronically file documents and to view the electronic docket sheets and documents. By registering, you consent to receiving electronic notice of filings through ECF.  

PLEASE TYPE

Mr. / Ms. (circle one) Last name: ___________________________ If appropriate circle one: Sr. / Jr. / II / III

First name: ___________________________ Middle name: ___________________________ Bar ID #: ___________________________

Are you currently active and in good standing with the State Bar of Georgia?  Yes____  No____  Last 4 digits of SS#__________

Highest state court admitted to: ______________________________________________________

Firm name: ________________________________________________________________

Address: _________________________________________________________________

City: ___________________________ State: ___________________________ Zip Code: ___________________________

Have you relocated to this address within the past year?  Yes _____  No_____  

Firm Telephone Number (____)___________________________  Direct Line: (____)__________________________

Internet Address: _______________________________________________________________

Attorneys seeking to file documents electronically must be admitted to practice in the United States District Court for the Northern District of Georgia pursuant to Local Rule 83.1. Please complete whichever of the following applies to you:

Date admitted to practice in this Court: ___________________________

If U.S. Dept. of Justice Attorney, check here: ______________________

If admitted pro hac vice: Date phv granted: _______________ in case number: ___________________________

(If more than one, note only the most recent.)

If attorney of record in MDL action, indicate case number: ___________________________

(If more than one, note only the most recent.)

By submitting this registration form, the undersigned agrees to abide by all Court rules, orders and policies and procedures governing the use of the Electronic Case Filing System. The undersigned also consents to receiving notice of filings pursuant to Fed.R.Civ.P. 5(b) and 77(d) via the Court’s Electronic Filing System. The combination of login and password will serve as the signature of the attorney filing the documents. Attorneys must protect the security of their login and immediately notify the Court if they learn that their login has been compromised.

________________________________________  ____________________________
Signature of Registering Attorney  Date

Submit completed Registration Form to:
United States District Court
Attn: Electronic Filing System Registration
2211 U.S. Courthouse
75 Ted Turner Drive, SW
Atlanta, Georgia  30303-3362

Once your registration is complete, you will receive your user id and password needed to access ECF by U.S. Mail. Procedures for using the system will be available for downloading when you access ECF via the Internet. You may contact the Electronic Filing Help Desk in the Clerk’s Office at 404-215-1600 if you have any questions concerning the registration process or the use of the Electronic Case Filing System.
CERTIFICATE OF SERVICE

Sample 1

I hereby certify that on (Date), I electronically filed (Name of Document) with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

List of attorney names

I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants:

Attorney names
Address to which mailed

s/ (Name of ECF-Registered Attorney)
Georgia Bar No. xxxxxxx
Attorney for (Name of Party)

Firm Name
Firm Address
City, State, Zip
Telephone: (xxx) xxx-xxxx
Email: xxxxxx@xxxx.xxx
Sample 2

I hereby certify that on (Date) , I presented (Name of Document) to the Clerk of the Court for filing and uploading to the CM/ECF system, which will automatically send email notification of such filing to the following attorneys of record:

List of attorney names

I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants:

Attorney name
Address

s/ (Name of ECF-Registered Attorney)
Georgia Bar No. xxxxxxx
Attorney for (Name of Party)

Firm Name
Firm Address
City, State, Zip
Telephone: (xxx) xxx-xxxx
Email: xxxxxx@xxxx.xxx
DECLARATION OF TECHNICAL DIFFICULTIES

Please take notice that [Plaintiff / Defendant / Name of Party] was unable to file the attached [Title of Document] in a timely manner due to technical difficulties. The deadline for filing this document was [Filing Deadline Date]. The reason(s) that I was unable to file the document in a timely manner and the good faith efforts I made prior to the filing deadline to both file in a timely manner and to inform the Court and the other parties that I could not do so are set forth below.

[Statement of reasons and good faith efforts to file and to inform (including dates and times)]

I declare under penalty of perjury that the foregoing is true and correct.

Respectfully submitted,

s/ (Name of ECF-Registered Attorney)
Georgia Bar No. xxxxxx
Attorney for (Name of Party)

Firm Name
Firm Address
City, State, Zip
Telephone: (xxx) xxx-xxxx
Email: xxxxxx@xxxx.xxx
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
______________ DIVISION

Plaintiff Name

Plaintiff,

vs.

Civil Action No.

Defendant Name

Defendant.

NOTICE OF MANUAL FILING

Please take notice that [Plaintiff / Defendant] has manually filed the following document or thing:

[Title of document or thing.]

This document was not filed electronically because [the document or thing cannot be converted to an electronic format /[Plaintiff/Defendant] is excused from filing this document or thing electronically by Court order.]

The document or thing has been manually served on all parties.

Respectfully submitted,

s/ (Name of ECF-Registered Attorney)
Georgia Bar No. xxxxxx
Attorney for (Name of Party)

Firm Name
Firm Address
City, State, Zip
Telephone: (xxx) xxx-xxxx
Email: xxxxxx@xxxx.xxx
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

Plaintiff Name

Plaintiff,

vs.

Defendant Name

Defendant.

CIVIL ACTION NO.

NOTICE OF FILING ELECTRONIC MEDIA

Please take notice that [Plaintiff / Defendant] has filed the following document on [description of electronic media]:

[Title of document.]

The document has been served on all parties.

Respectfully submitted,

s/ (Name of ECF-Registered Attorney)
Georgia Bar No. xxxxxx
Attorney for (Name of Party)

Firm Name
Firm Address
City, State, Zip
Telephone: (xxx) xxx-xxxx
Email: xxxxxx@xxxx.xxx
EXHIBIT B

CRIMINAL CASES

ADMINISTRATIVE PROCEDURES FOR FILING, SIGNING, AND VERIFYING PLEADINGS AND PAPERS BY ELECTRONIC MEANS

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA
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ADMINISTRATIVE PROCEDURES
FOR FILING, SIGNING, AND VERIFYING PLEADINGS AND PAPERS
BY ELECTRONIC MEANS IN CRIMINAL CASES

DEFINITIONS

1. “Electronic Case Filing System” (ECF) refers to the court’s automated system that receives documents filed in electronic form. The program was developed for the Federal Judiciary by the Administrative Office of the United States Courts.

2. “Electronic filing” means uploading a pleading or document directly from the registered user’s computer, using the Court’s ECF system, to file that pleading or document in the Court’s case file. Sending a document or pleading to the Court via email does not constitute “electronic filing”.

3. “Notice of Electronic Filing” (NEF) is a notice automatically generated by ECF at the time a document is filed, setting forth the time and date of filing, the name of the party and attorney filing the documents, the type of document, the text of the docket entry, the name of the party and/or attorney receiving the notice, and a hyperlink to the filed document, which allows recipients to retrieve the document automatically. The NEF also contains a security code of the document filed which can be used to ensure that the document as it was filed is not tampered with in any way.

4. “Public Access to Court Electronic Records” (PACER) is an automated system that allows an individual to view, print and download court docket information over the internet.

5. “Portable Document Format” (PDF). A document created with a word processor or a paper document which has been scanned must be converted to portable document format to be filed electronically with the Court. Converted files contain the extension “.pdf”. The program takes a “picture” of the original document and allows anyone to open the converted document across a broad range of hardware and software, with layout, format, links and images intact. For information on PDF, users may visit the websites of PDF vendors, such as www.adobe.com or www.fineprint.com.

6. “Technical failure” is defined as a malfunction of Court owned/leased hardware, software, and/or telecommunications facility which results in the
inability of a filer to submit a document electronically. Technical failure does not include the malfunctioning of a filer’s equipment or internet connection.

7. “Proposed Order” is a draft document submitted by an attorney for a judge’s signature. A proposed order shall accompany a motion or other request for relief as an electronic attachment to the document.
I. THE ELECTRONIC CASE FILING SYSTEM

A. IN GENERAL. All documents submitted for filing in criminal cases in this district shall be filed electronically using the Electronic Case Filing system (“ECF”) or shall be scanned and uploaded to ECF, unless otherwise permitted by these administrative procedures or unless otherwise authorized by the assigned judge. Although permitted by these procedures, scanning and uploading a document should be used by filers only as a last resort when conversion of the document into .pdf format from a word processing program is not feasible.

All members of the bar, must register for a login and password in order to facilitate the Court and other electronic filers’ use of electronic noticing.

1. Absent good cause shown, attorneys in good standing admitted to practice before the Bar of this Court, to include attorneys admitted pro hac vice, must file criminal pleadings electronically using the ECF System.

   a. Electronically filed documents may contain the following types of hyperlinks:

      (A) Hyperlinks to other portions of the same document;

      (B) Hyperlinks to other documents in CM/ECF, in this court, or any other CM/ECF court; and

      (C) Hyperlinks to a location on the Internet that contains a source document for a citation.

   Hyperlinks to cited authority may not replace standard citation format. Complete citations must be included in the text of the filed document. Neither a hyperlink, nor any site to which it refers, shall be considered part of the record. Hyperlinks are simply convenient mechanisms for accessing material cited in a filed document.

   The court accepts no responsibility for, and does not endorse, any product, organization, or content at any hyperlinked site, or at any site to which that site may be linked. The court accepts no responsibility for the availability or functionally of any hyperlink.
2. A party proceeding pro se shall not file electronically unless the party is an attorney in good standing admitted to practice before the Bar of this Court. (See III(B) of these Procedures).

3. Juvenile criminal matters shall not be filed electronically unless the court rules that the juvenile shall be tried as an adult.

4. Matters filed under 18 U.S.C. § 3607 shall not be filed electronically unless ordered by the Court.

5. Registered attorneys of record and the public will have remote access to documents in criminal cases. Members of the public may also view electronic criminal files at the public terminals in the Clerk’s Office.

6. An attorney may apply to the assigned judge for permission to file documents conventionally. Even if the assigned judge initially grants an attorney permission to file documents conventionally, the assigned judge may withdraw that permission at any time and require the attorney to file documents electronically using ECF.

   An attorney seeking the Court’s permission to file conventionally rather than electronically will file a paper “Request for Leave to File Conventionally” setting forth in detail the reasons supporting the request, together with a “Proposed Order Granting Leave to File Conventionally.” Such requests will be provided to the judge to whom the filer’s case is assigned, or, in those cases in which a case has not been filed or the case has not yet been assigned, to the duty judge.

7. The Clerk’s Office or any judge of this court may deviate from these procedures in specific cases, without prior notice, if deemed appropriate in the exercise of discretion, considering the need for the just, speedy, and inexpensive determination of matters pending before the court. The court may also amend these procedures at any time without prior notice.

B. LOGINS & PASSWORDS. Each attorney admitted to practice in the Northern District of Georgia shall be entitled to one ECF login. The login and associated password permits the attorney to participate in the electronic retrieval and filing of pleadings and other papers.
1. No attorney shall knowingly permit or cause to permit his or her login to be utilized by anyone other than an authorized employee of his or her office.

2. Once registered, the attorney shall be responsible for all documents filed with his or her login.

3. Registration for a login is governed by Paragraph I(C).

4. An attorney admitted pro hac vice must register for a login in accordance with these Administrative Procedures.

5. The login and password of an attorney constitutes a signature on the document being filed. Thus, the login and password of the filing attorney must match the attorney whose signature block appears on the document being filed.

C. REGISTRATION.

1. Attorneys admitted to the bar of this Court, including attorneys admitted pro hac vice, must complete and submit an Attorney Registration Form online from the Court’s web page (www.gand.uscourts.gov), or may use the Registration Form attached to these procedures as Form A and mail or deliver the Registration Form to the Clerk’s Office. An ECF login and password will be mailed back to the attorney, and he/she may then access ECF to file pleadings electronically.

   The court will issue logins and passwords only to attorneys in good standing. To be in good standing, an attorney must meet the requirements in Local Rule 83.1.

2. If the registration was not completed online, the Clerk’s Office will send the attorney an email message after assigning the attorney a login and password to ensure that the Clerk’s Office has correctly entered a registering attorney’s email address in ECF. The Clerk’s Office will then either mail login information to the attorney by regular, first-class mail, or the attorney may arrange to pick up his/her login information at the Clerk’s Office.
3. After registering, attorneys may change their passwords. If at any time an attorney believes that the security of an existing password has been compromised and/or that a threat to ECF exists, the attorney must change his/her password immediately. In addition, the attorney must immediately notify the Clerk’s Office by telephone of the security issue.

4. An attorney whose email address, mailing address, telephone, or fax number has changed from that of the original Attorney Registration Form shall timely file a notice of a change of address and serve a copy of the notice on all other parties of the cases in which the attorney was counsel of record. The attorney is responsible for keeping his/her email address updated in ECF.

II. ELECTRONIC FILING AND SERVICE OF DOCUMENTS

A. FILING.

1. Charging Documents.
   The filing of the initial papers, including the complaint, information, and indictment in a criminal case will be filed in paper form, not electronically.

2. Other criminal documents (in addition to charging papers, mentioned above) exempted from the electronic filing requirement are as follows:
   a. Affidavits for search warrants and related papers;
   b. Fed. R. Crim. P. 20 and Fed. R. Crim. P. 40 papers received from another court;
   c. Appearance bonds;
   d. Any pleading or document in a criminal case containing the signature of a defendant, such as a waiver of indictment or plea agreement;
   e. Petitions for violations of supervised release; and
   f. Other documents filed under seal or ex parte.

3. All motions, pleadings, applications, briefs, memoranda of law, deposition transcripts, transcripts of proceedings, or other documents in a case to include attachments to the extent feasible shall be electronically filed on ECF except as otherwise provided by these administrative procedures.
4. Emailing a document to the Clerk’s Office or to the assigned judge shall not constitute “filing” of the document. A document shall not be considered filed for purposes of the Federal Rules of Criminal Procedure until the filing party receives an ECF-generated “Notice of Electronic Filing” described in II(B)1 of these procedures.

5. The Notice of Electronic Filing reflects the time the electronic transmission of a document is completed. Accordingly, a document will be deemed timely filed if the Notice of Electronic Filing reflects a time prior to midnight. However, the assigned judge may order that a document be filed by a time certain, which then becomes the filing deadline.

6. If filing a document requires leave of the court, such as a motion to submit a sur-reply brief, the attorney shall attach the proposed document as an exhibit to the motion according to the procedures in IV(B). If the court grants the motion, the order will direct the attorney to file the document electronically with the court.

7. Attachments and exhibits larger than 15 MB may be filed electronically in separate 15 MB (or smaller) segments or may be submitted to the Clerk’s Office in conventional format.

8. The Clerk’s Office shall not maintain a paper court file in any case begun after July 15, 2005, except as otherwise provided herein. The official court record shall be the electronic file maintained on the court’s servers. The official record shall include, however, any initiating documents and other conventional documents or exhibits filed in accordance with these procedures that are not converted to electronic format.

   a. The Clerk’s Office will retain all original indictments, petitions to enter plea of guilty, plea agreements, and other original documents containing original signatures as described in section II(A) of these procedures.
b. Except as provided above, the Clerk’s Office will discard all other original documents brought to the Clerk’s Office for filing after they are scanned and uploaded to ECF.  

5

If an attorney believes a document with original signatures has some intrinsic value, the attorney is encouraged to retain the original document and submit to the Clerk’s Office a copy of the document with faxed or photocopied signatures for scanning and uploading.

6

To determine whether another party is a registered user, the filer can select ECF’s “Utilities” category, then click on “Mailings” on the pull-down menu, and then “Mailing Information for a Case”. The filer then enters the case number and the ECF information will appear, stating whether or not the filer must mail a copy or if ECF will electronically generate one.
b. Service of the “Notice of Electronic Filing” on a party who is not a registered participant in ECF may be accomplished by email, subject to the additional service requirements of B(3) below.

2. A certificate of service on all parties entitled to service or notice is still required when a party files a document electronically. The certificate must state the manner in which service or notice was accomplished on each party so entitled. Sample language for a certificate of service is attached to these procedures as Form B.

3. A party who is not a registered participant of ECF is entitled to a paper copy of any electronically filed pleading, document, or order. The filing party must therefore provide the non-registered party with the pleading, document, or order according to the Federal Rules of Criminal Procedure. When mailing paper copies of documents that have been electronically filed, the filing party must include the “Notice of Electronic Filing” to provide the recipient with proof of the filing.

4. Attorneys should be aware that the submission due date, which appears when either electronically filing a motion or querying deadlines, is for court use only and should not be relied upon as an accurate computation of the response date.

5. A filer who elects to bring a document to the Clerk’s Office for scanning and uploading to ECF must serve conventional copies on all parties to the case and should expect some delay in the uploading and subsequent electronic noticing of the document.

C. SIGNATURES.

1. Attorney Signature

   a. A pleading or other document requiring an attorney’s signature shall be signed in the following manner, when filed electronically: “s/(attorney name).” The correct format for an attorney signature is as follows:

   s/ John Doe, Esq.
   Attorney Bar Number: xxxxxx
   Attorney for (Party Name)
b. Any party challenging the authenticity of an electronically filed document or the attorney’s signature on that document must file an objection to the document within ten days of receiving the Notice of Electronic Filing.

A person, not a party, who neither receives notice (actual or through counsel) of the document nor reasonably should have known of the contents of the documents and who can show that he or she was adversely impacted by the document and has reason to believe either that the signature on the document or the document itself is not authentic must challenge the document within ten days of the time they receive notice or should reasonably have known of the document’s contents.

2. **Multiple Signatures**

a. The filing attorney shall initially confirm that the content of the document is acceptable to all persons required to sign the document and shall obtain the signatures of all parties on the document. For purposes of this rule, physical, facsimile, or electronic signatures are permitted.

b. The filing attorney then shall file the document electronically or submit it to the Clerk’s Office on disk, indicating the signatories, e.g., “s/ Jane Doe,” “s/ John Doe,” etc. The correct format for each signature is as follows:
One of the attorney’s signatures must match the login and password of the filing attorney.

c. A non-filing signatory or party who disputes their acceptance of the contents of the document, the authenticity of an electronically filed document containing multiple signatures, or the authenticity of the signatures themselves must file an objection to the document within ten days of receiving the Notice of Electronic Filing.

A person, not a party, who neither receives notice (actual or through counsel) of the document nor reasonably should have known of the contents of the documents and who can show that he or she was adversely impacted by the document and has reason to believe either that the signature on the document or the document itself is not authentic must challenge the document within ten days of the time they receive notice or should reasonably have known of the document’s contents.

3. Non-Attorney Signature

a. Several documents in criminal cases require the signature of a non-attorney, such as a grand jury foreperson, a defendant, a third-party custodian, a U.S. Marshal, an officer from Pretrial Services or Probation, or some other federal officer or agent. In general, the Clerk’s Office will scan these documents and upload them to ECF. The electronically filed document as maintained on ECF shall constitute the official version of that record.

b. If any other original document requires the signature of a non-attorney, the filing party or the Clerk’s Office shall scan the original document and then electronically file it on ECF.
c. The electronically filed document as maintained on the court’s servers shall constitute the official version of that record. The court will not maintain a paper copy of the original document.

d. A non-filing signatory or party who disputes the authenticity of an electronically filed document with a non-attorney signature or the authenticity of the signature on that document must file an objection to the document within ten days of receiving the Notice of Electronic Filing.

A person, not a party, who neither receives notice (actual or through counsel) of the document nor reasonably should have known of the contents of the documents and who can show that he or she was adversely impacted by the document and has reason to believe either that the signature on the document or the document itself is not authentic must challenge the document within ten days of the time they receive notice or should reasonably have known of the document’s contents.

D. FEES PAYABLE TO THE CLERK. Any fee required for filing a pleading or paper in District Court is payable to the Clerk of the Court by cash, check, U.S. Postal money order, or cashier’s check. The Clerk’s Office will accept payment by credit card (MasterCard, Visa, American Express, and Discover). Debit cards with a MasterCard or Visa logo are acceptable and treated as a credit card transaction. Checks, money orders and cashier checks are to be made payable to "Clerk, U.S. District Court". A law firm check will be accepted for payment by attorneys. The Clerk's Office will note the receipt of fees on the docket. The court will not maintain electronic billing or debit accounts for attorneys or law firms.

Fees for Applications for Admission Pro Hac Vice must be paid by credit card through the Pay.gov system concurrent with the electronic filing of the application in CM/ECF. Fees for filing a Notice of Appeal may be paid through the Pay.gov system, as well.
E. ORDERS.

1. The assigned judge or the Clerk’s Office shall electronically file all orders. Any order entered electronically has the same force and effect as if the judge had affixed his/her signature to a paper copy of the order and it had been entered on the docket conventionally.

2. When filing a motion for which no supporting brief is required, a proposed order granting the motion and setting forth the requested relief shall be included with the electronic filing as an attachment.

3. If a judge enters an order during a hearing, copies of the order will be distributed electronically after the hearing.

4. When mailing paper copies of an electronically signed order to a party who is not a registered participant of ECF, the Clerk’s Office will include the Notice of Electronic Filing.

F. TITLE OF DOCKET ENTRIES. The party electronically filing a pleading or other document shall be responsible for designating a docket entry title for the document by using one of the docket event categories prescribed by the court.

G. CORRECTING DOCKET ENTRIES.

1. Once a document is submitted and becomes part of the case docket, corrections to the docket are made only by the Clerk’s Office. ECF will not permit the filing party to make changes to the document(s) or docket entry once the transaction has been accepted.

2. A document incorrectly filed in a case may be the result of posting the wrong PDF file to a docket entry, selecting the wrong document type from the menu, or entering the wrong case number and not detecting the error before the transaction is completed.

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7 Readers may view an event listing in CM/ECF under the Utilities function or search for a particular event in CM/ECF using the Search function.
3. If the docket entry is correct, but the document filed is incorrect, the filing party will be advised to refile the document electronically. Refiling the document does not entitle the filer to an extension of filing deadlines. If the docket entry is incorrect, but the attached document is correct, the Clerk’s office may make the appropriate corrective changes to the docket entry consistent with Clerk’s Office internal procedures. No substitution of documents by Clerk’s Office staff is permissible.

If the entry was made in the wrong case, the document should be refiled in the correct case.

As soon as possible after an error is discovered, the filing party should contact the Clerk’s Office with the case number and document number for which the correction is being requested. In the event that the incorrectly attached document contains sensitive information, the filing party may request that electronic access to the information be limited to Court personnel until he or she can petition the presiding judge for other relief as appropriate. The Clerk’s Office also has the discretion to limit access to documents it perceives contain sensitive information and were incorrectly filed. In those instances when the Clerk’s Office exercises its discretion, the filing party will be notified immediately to confirm that the document was filed incorrectly and that the party desires that the limited access continue so that he or she may seek appropriate relief from the Court. If appropriate, the Court will make a corrective entry indicating the original error.

H. TECHNICAL FAILURES. The Clerk’s Office shall deem the Northern District of Georgia ECF site to be subject to a technical failure on a given day if the site is unable to accept filings continuously or intermittently over the course of any period of time greater than one hour after 10:00 a.m. that day. Known systems outages will be posted on the web site, if possible. An attorney may timely file a declaration seeking relief from the court for not meeting the deadline as a result of a technical failure. (Form C).

Problems on the filer’s end, such as telephone line problems, problems with the filer’s Internet Service Provider (ISP), or hardware or software problems, will not constitute a technical failure under these procedures nor excuse an untimely filing. A filer who cannot file a document electronically because of a problem on the filer’s end must file the document conventionally.
I. PRIVACY.

1. Redacted Documents. To comply with the policy of the Judicial Conference of the United States and the E-Government Act of 2002, Pub. L. No. 107-347, filing parties shall omit or, where inclusion is necessary, partially redact the following personal data identifiers from all filings, whether filed electronically or on paper, unless the assigned judge orders otherwise.

   a. Minors’ names: Use the minors’ initials;
   b. Financial account numbers: Identify the name or type of account and the financial institution where maintained, but use only the last four numbers of the account number;
   c. Social Security numbers: Use only the last four numbers.
   d. Dates of birth: Use only the year; and.
   e. Home addresses: Use only the city and state.

Filing parties should review the Court’s Standing Orders on the Court’s web page for a complete statement of the Court’s privacy policy.

2. The responsibility for redacting personal data identifiers rests solely with counsel and the parties. The Clerk’s Office will not review documents for compliance with this rule, seal on its own motion documents containing personal data identifiers, or redact documents, whether filed electronically or on paper.

3. Please see Section VI for procedures regarding redaction of personal identifiers in electronic transcripts.

III. CONVENTIONAL FILING OF DOCUMENTS

The following procedures govern documents filed conventionally. The court, upon application, may also authorize conventional filing of other documents otherwise subject to these procedures. Paper documents should be printed on only one side of the page.

When a document has been filed conventionally, a “Notice of Manual Filing” (Form D) should be electronically filed, naming the document that was filed conventionally and stating the reason for conventional (rather than electronic) filing. (In the event that a party cannot file the requisite Notice of Manual Filing electronically, the party may file the Notice conventionally.)
A. DOCUMENTS TO BE FILED UNDER SEAL. A motion or application to file documents under seal must be filed in paper form, not electronically, along with a proposed order and the documents the party is seeking to seal. Sealed documents will not be publicly accessible on ECF. No Notice of Manual Filing is required for sealed documents.

B. PRO SE FILERS. Pro se filers shall file paper originals of all complaints, pleadings, motions, affidavits, briefs, and other documents. The Clerk’s Office will scan these original documents and upload them into ECF, but will also maintain a paper file.

C. ELECTRONIC MEDIA. Any party presenting electronic media to be filed including but not limited to a CD-ROM, DVD-ROM, or flash drive, will also present a paper “Notice of Filing of Electronic Media” signed by the party and describing the documents on the disk or CD. (See Form E to these Procedures.)

IV. EXHIBITS

A. EVIDENCE IN SUPPORT OF OR IN OPPOSITION TO A MOTION. In general, evidence in support of or in opposition to a motion should be filed electronically, rather than conventionally. (Exhibits that are not filed but are submitted in conventional form during a hearing will be maintained in conventional format.)

1. A party electronically submitting evidentiary materials to the Clerk’s Office in support of or in opposition to a motion shall also file electronically a document indexing each item of evidence being filed. Each item of evidence should be filed as a separate attachment to the motion to which it relates.

2. Whenever feasible a filing party must scan a paper exhibit that is less than 15 MB and submit the exhibit as a PDF file. Similarly, filing parties are expected to electronically file an exhibit greater than 15 MB as separate attachments of 15 MB or smaller whenever feasible. Only when division of the document into separate attachments is not feasible may the party file the document in conventional format.

3. Because documents scanned in color or containing graphics take much longer to upload, filing parties generally should configure their scanners to scan documents at 300 dpi and in black and white rather than in color. If a color
document is critical to the case, an original color copy can be filed conventionally or may be scanned in color and then uploaded to ECF.

4. The filing party is required to verify the readability of scanned documents before filing them electronically with the court. (Similar to the copy process, images of scanned documents could contain pages which skewed during scanning or were omitted altogether.)

5. A party submitting evidentiary materials in conventional format shall also file in conventional format an index of evidence listing each item of evidence being filed and identifying the motion to which it relates.

6. Copies of conventionally filed supporting materials shall be served on other parties pursuant to section II(B)(3) of these Procedures governing service of conventional documents.

B. EVIDENCE NOT IN SUPPORT OF OR IN OPPOSITION TO A MOTION

1. Whenever feasible a filing party must scan a paper exhibit that is less than 15 MB and submit the exhibit as a PDF file. Similarly, filing parties are expected to electronically file an exhibit greater than 15 MB as separate attachments of 15 MB or smaller whenever feasible. Only when division of the document into separate attachments is not feasible may the party file the document in conventional format.

2. A party may conventionally submit exhibits which are not available in electronic form. The Clerk’s Office will note on the docket its receipt of the document(s) or exhibit(s) with a text-only entry. Any document filed conventionally will be noted in a Notice of Manual Filing.

3. Because documents scanned in color or containing graphics take much longer to upload, filing parties generally should configure their scanners to scan documents at 300 dpi and in black and white rather than in color. If a color document is critical to the case, an original color copy can be filed conventionally or may be scanned in color and then uploaded to ECF.

4. The filing party is required to verify the readability of scanned documents before filing them electronically with the court. (Similar to the copy process, images of scanned documents could contain pages which skewed during scanning or were omitted altogether.)

5. Exhibits submitted conventionally shall be served on other parties pursuant to section II(B)(3) of these Procedures governing service of conventional documents. Exhibits filed conventionally will be listed in an electronically filed Notice of Manual Filing.

V. PUBLIC ACCESS TO CM/ECF

A. PUBLIC ACCESS AT THE COURT.

Access to the electronic docket and documents filed in ECF is available to the public at no charge at the Clerk’s Office during regular business hours. A copy fee for an electronic reproduction is required in accordance with 28 U.S.C. §1914.

Conventional copies and certified copies of electronically filed documents may be purchased at the Clerk’s Office. The fee for copying and certifying will be in accordance with 28 U.S.C. §1914.

B. INTERNET ACCESS.

Remote electronic access to ECF for viewing purposes is limited to subscribers to the Public Access to Court Electronic Records (“PACER”) system. The Judicial Conference of the United States has determined that a user fee will be charged for remotely accessing certain detailed case information, such as filed documents and docket sheets in Criminal cases, but excluding review of calendars and similar general information.8

VI. ELECTRONIC TRANSCRIPTS

A. OFFICIAL TRANSCRIPTS.

Official Transcripts of proceedings, or parts of proceedings, before United States District and Magistrate Judges that are

8Non-judiciary CM/ECF users will be charged a per page fee to access electronic data such as docket sheets and case documents obtained remotely through the PACER system. A per document cap has been approved, however this cap does not apply to transcripts. Transcripts may be obtained following a minimum 90 day restriction period for the standard per page fee. Fees will be charged for each access regardless of whether or not the attorney has been given access to the transcript by the court through CM/ECF. The access fee does not apply to official recipients of electronic documents, i.e., parties legally required to receive service or to whom service is directed by the filer in the context of service under Federal Rules of Criminal Procedure. Official recipients will receive the initial electronic copy of a document free to download as they see fit, but if they remotely access the document again, they will be charged the standard per page PACER fee.
process, images of scanned documents could contain pages which skewed during scanning or were omitted altogether.)

5. Exhibits submitted conventionally shall be served on other parties pursuant to section II(B)(3) of these Procedures governing service of conventional documents. Exhibits filed conventionally will be listed in an electronically filed Notice of Manual Filing.

V. PUBLIC ACCESS TO CM/ECF

A. PUBLIC ACCESS AT THE COURT. Access to the electronic docket and documents filed in ECF is available to the public at no charge at the Clerk’s Office during regular business hours. A copy fee for an electronic reproduction is required in accordance with 28 U.S.C. §1914.

Conventional copies and certified copies of electronically filed documents may be purchased at the Clerk’s Office. The fee for copying and certifying will be in accordance with 28 U.S.C. §1914.

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ordered by a party will be filed electronically in CM/ECF. For the first 90 days after filing, the electronic version of a transcript will be available to the public for viewing only and only at the Clerk’s public counters.

Parties desiring a copy of the transcript during the first 90 days from the date of filing (or from the date of the filing of a redacted copy) must obtain the transcript from the respective court reporter.

B. REDACTION

1. Parties shall refrain from including, or shall redact where inclusion is necessary, the following personal identifiers from all court proceedings, unless otherwise ordered by the Court:

   a. **Names of minor children.** If the involvement of a minor child must be mentioned, only the initials of the child should be used.

   b. **Financial account numbers.** If financial account numbers are relevant, only the last four digits of these numbers should be used.

   c. **Social Security numbers.** If an individual’s Social Security number must be included, only the last four digits of that number should be used.

   d. **Dates of birth.** If an individual’s date of birth is relevant, use only the year of birth.

   e. **Home addresses.** If a home address must be mentioned, only the city and state should be used.

2. Counsel or parties must review the transcript and determine whether redaction of the listed personal identifiers is necessary. Sentencing transcripts must be reviewed by both defense counsel and the government. If redaction is necessary, counsel must electronically file a Request for Redaction within 21 calendar days of the transcript filing date. The request should list, by page and line, each redaction to be made. Remote electronic access to the Request for Redaction will be limited to court staff and counsel. The Request for Redaction must be served by the filing party on the court reporter through U.S. Mail or hand delivery.

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3. Failure to request the redaction within the 21-day time period, or seek extension of time to do so from the Court, will result in the transcript being made electronically available, without redaction, 90 days after the transcript was initially filed with the Clerk.

4. The responsibility for omitting or redacting personal identifiers rests solely with counsel and the parties. The Clerk will not review filings for compliance with this rule. Counsel and the parties are cautioned that failure to redact these personal identifiers may subject them to sanctions or other disciplinary proceedings as appropriate.

5. If a party requests redaction, the transcript will not be made remotely available through PACER until the redactions have been made. A copy of the official transcript will be available for review in the Clerk’s Office or purchase from the court reporter during this time. Redacted transcripts must be filed within ten (10) days of the Request for Redaction absent further direction from the court.

6. Redaction of information other than the personal identifiers listed herein will require the electronic filing of a separate motion served on all of the parties and the court reporter within the 21-day notice period.

C. REMOTE ACCESS TO TRANSCRIPTS. Transcripts will be made remotely available through PACER, subject to standard PACER fees, as follows:

1. Transcripts in which no redaction was requested: 90 days from the filing date of the official transcript.

2. Transcripts in which a redaction was requested: 90 days from the filing date of the official transcript OR date of filing redacted transcript, whichever is later. Although the unredacted transcript will remain on record, only the redacted transcript will be released for remote public access through PACER.
This form is used to register for an account on the Northern District of Georgia Electronic Filing System (ECF). Registered attorneys will have privileges to electronically file documents and to view the electronic docket sheets and documents. By registering, you consent to receiving electronic notice of filings through ECF.

**PLEASE TYPE**

Mr. / Ms. (circle one) Last name:_________________________ If appropriate circle one: Sr. / Jr. / II / III

First name:_________________________ Middle name:_________________________ Bar ID #:_________________________

Are you currently active and in good standing with the State Bar of Georgia? Yes____ No____ Last 4 digits of SS#:_________________________

Highest state court admitted to:_______________________________________________________________

Firm name:_______________________________________________________________

Address:_______________________________________________________________

City:_________________________ State:_________________________ Zip Code:_________________________

Have you relocated to this address within the past year? Yes ____ No____

Firm Telephone Number (___)_________________________ Direct Line: (___)_________________________

Internet Address:_______________________________________________________________

Attorneys seeking to file documents electronically must be admitted to practice in the United States District Court for the Northern District of Georgia pursuant to Local Rule 83.1. Please complete whichever of the following applies to you:

Date admitted to practice in this Court:______________________________________________________

If U.S. Dept. of Justice Attorney, check here:________________________________________________

If admitted pro hac vice: Date phv granted:_________________________________________ in case number:_________________________

(If more than one, note only the most recent.)

If attorney of record in MDL action, indicate case number:________________________________________

(If more than one, note only the most recent.)

By submitting this registration form, the undersigned agrees to abide by all Court rules, orders and policies and procedures governing the use of the Electronic Case Filing System. The undersigned also consents to receiving notice of filings pursuant to Fed.R.Civ.P. 5(b) and 77(d) via the Court’s Electronic Filing System. The combination of login and password will serve as the signature of the attorney filing the documents. Attorneys must protect the security of their logins and immediately notify the Court if they learn that their login has been compromised.

_____________________________ __________________________
Signature of Registering Attorney Date

Submit completed Registration Form to: United States District Court
Attn: Electronic Filing System Registration
2211 U.S. Courthouse
75 Ted Turner Drive, SW
Atlanta, Georgia 30303-3362

Once your registration is complete, you will receive your user id and password needed to access ECF by U.S. Mail. Procedures for using the system will be available for downloading when you access ECF via the Internet. You may contact the Electronic Filing Help Desk in the Clerk’s Office at 404-215-1600 if you have any questions concerning the registration process or the use of the Electronic Case Filing System.
FORM A

United States District Court - Northern District of Georgia

ELECTRONIC FILING

ATTORNEY REGISTRATION FORM

This form is used to register for an account on the Northern District of Georgia Electronic Filing System (ECF). Registered attorneys will have privileges to electronically file documents and to view the electronic docket sheets and documents. By registering, you consent to receiving electronic notice of filings through ECF.

PLEASE TYPE

Mr. / Ms.  (circle one)  Last name:     If appropriate circle one:   Sr.  /  Jr.  /  II  /  III
First name:    Middle name:  Bar ID #

Are you currently active and in good standing with the State Bar of Georgia?  Yes____   No____   Last 4 digits of SS#__________

Highest state court admitted to:

Firm name:
Address:
City:  State:  Zip Code:

Have you relocated to this address within the past year?  Yes ____ No____

Firm Telephone Number (             )   Direct Line: (               )

Internet Address:

Attorneys seeking to file documents electronically must be admitted to practice in the United States District Court for the Northern District of Georgia pursuant to Local Rule 83.1. Please complete whichever of the following applies to you:

Date admitted to practice in this Court:

If U.S. Dept. of Justice Attorney, check here:

If admitted pro hac vice: Date phv granted:  in case number:  
(If more than one, note only the most recent.)

If attorney of record in MDL action, indicate case number:  
(If more than one, note only the most recent.)

By submitting this registration form, the undersigned agrees to abide by all Court rules, orders and procedures governing the use of the Electronic Case Filing System. The undersigned also consents to receiving notice of filings pursuant to Fed.R.Civ.P. 5(b) and 77(d) via the Court's Electronic Filing System. The combination of login and password will serve as the signature of the attorney filing the documents. Attorneys must protect the security of their logins and immediately notify the Court if they learn that their login has been compromised.

Signature of Registering Attorney Date

Submit completed Registration Form to: United States District Court
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Atlanta, Georgia   30303-3362

Once your registration is complete, you will receive your user id and password needed to access ECF by U.S. Mail. Procedures for using the system will be available for downloading when you access ECF via the Internet. You may contact the Electronic Filing Help Desk in the Clerk’s Office at 404-215-1600 if you have any questions concerning the registration process or the use of the Electronic Case Filing System.

FORM B

SAMPLE FORMATS

CERTIFICATE OF SERVICE

Sample 1

I hereby certify that on (Date) , I electronically filed (Name of Document) with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

List of attorney names

I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants:

Attorney names
Address to which mailed

s/ ___
Attorney’s Name and
Bar Number
Attorney for (Party Name)

Law Firm Name
Law Firm Address
Law Firm Phone Number
Law Firm Fax Number
Attorney’s Email Address

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Sample 2

I hereby certify that on (Date), I presented (Name of Document) to the Clerk of the Court for filing and uploading to the CM/ECF system, which will automatically send email notification of such filing to the following attorneys of record:

List of attorney names

I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants:

Attorney name
Address

s/ (Name of Registered Attorney)
Georgia Bar No. xxxxxx
Attorney for (Party Name)

Firm Name
Firm Address
City, State, Zip
Telephone: (xxx) xxx-xxxx
Email: xxxxxx@xxxx.xxx
FORM C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

Plaintiff Name


vs.

Criminal Action No.

Defendant Name


DECLARATION OF TECHNICAL DIFFICULTIES

Please take notice that [Plaintiff / Defendant / Name of Party] was unable to file the attached [Title of Document] in a timely manner due to technical difficulties. The deadline for filing this document was [Filing Deadline Date]. The reason(s) that I was unable to file the document in a timely manner and the good faith efforts I made prior to the filing deadline to both file in a timely manner and to inform the Court and the other parties that I could not do so are set forth below.

[Statement of reasons and good faith efforts to file and to inform (including dates and times)]

I declare under penalty of perjury that the foregoing is true and correct.

Respectfully submitted,

s/ (Name of Registered Attorney)
Georgia Bar No. xxxxxx
Attorney for (Party Name)

Firm Name
Firm Address
City, State, Zip
Telephone: (xxx) xxx-xxxx
Email: xxxxxx@xxxx.xxx

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FORM D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
_____________ DIVISION

Plaintiff Name

Plaintiff,

vs.

Criminal Action No.

Defendant Name

Defendant.

NOTICE OF MANUAL FILING

Please take notice that [Plaintiff / Defendant] has manually filed the following document or thing:

[Title of document or thing.]

This document was not filed electronically because [the document or thing cannot be converted to an electronic format/ [Plaintiff/Defendant] is excused from filing this document or thing electronically by Court order.]

The document or thing has been manually served on all parties.

Respectfully submitted,

s/ (Name of Registered Attorney)
Georgia Bar No. xxxxxx
Attorney for (Party Name)

Firm Name
Firm Address
City, State, Zip
Telephone: (xxx) xxx-xxxx
Email: xxxxxx@xxxx.xxx

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Plaintiff Name

Plaintiff,

vs.

Defendant Name

Defendant.

NOTICE OF FILING ELECTRONIC MEDIA

Please take notice that [Plaintiff / Defendant] has filed the following document on [description of electronic media]:

[Title of document]

The document has been manually served on all parties.

Respectfully submitted,

s/ (Name of Registered Attorney)
Georgia Bar No. xxxxxx
Attorney for (Name of Party)

Firm Name
Firm Address
City, State, Zip
Telephone: (xxx) xxx-xxxx
Email: xxxxxx@xxxx.xxx
EFFICIENT AND EFFECTIVE USE OF EXPERTS IN FAMILY LAW CASES

Randall M. Kessler, Kessler & Solomiany LLP, Atlanta; Author, Georgia Family Law Forms
Randy Kessler is the founding partner of Kessler & Solomiany Family Law Attorneys, a 30 person family law firm in Atlanta and is the author of many family law books including Divorce: Protect Yourself, Your Kids and Your Future (www.divorceprotect.com), The GA Library of Family Law Forms and How to Mediate a Divorce. He teaches Family Law Litigation at Emory School of Law and is the former Chair of the Family Law Sections of the American Bar Association and the State Bar of Georgia.

Mr. Kessler has 30 years of experience in domestic relations and family law matters including divorce, custody, paternity, prenuptial agreements and child support. He has lectured often for groups such as the ABA, AAML, AICPA, NACVA, IAAR, NFLPA, NBPA and many other local and non-local bar associations and groups in over twenty states and six different countries. Mr. Kessler is the Editor Emeritus of the Family Law Review for the State Bar of Georgia.

He is a LinkedIn “Influencer” with over 325,000 followers and often appears as a contributor for national media such as Fox News, CNN, NBC and others. He is a graduate of Brandeis University and Emory University School of Law.
BONUS MATERIALS

Deposition Questions of Opposing Business Valuation Expert
(Medical Practice)

Randall M. Kessler, Esq.

SUITE 3500
101 MARIETTA TOWER
ATLANTA, GEORGIA 30303
TEL. 404.688.8810  FAX. 404.681.2205
WWW.KSFAMILYLAW.COM

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1 This portion of the materials has also been adapted (with full permission of the author) from materials prepared for an American Bar Association seminar in San Diego, California by Plano, Texas, family law attorney Kathryn J. Murphy.

2 Randy Kessler is the founding partner of Kessler & Solomiany Family Law Attorneys, a 30 person family law firm in Atlanta and is the author of many family law books including Divorce: Protect Yourself, Your Kids and Your Future (www.divorceprotect.com), The GA Library of Family Law Forms and How to Mediate a Divorce. He teaches Family Law Litigation at Emory School of Law and is the former Chair of the Family Law Sections of the American Bar Association and the State Bar of Georgia.

Mr. Kessler has 30 years of experience in domestic relations and family law matters including divorce, custody, paternity, prenuptial agreements and child support. He has lectured often for groups such as the ABA, AAML, AICPA, NACVA, IAAR, NFLPA, NBPA and many other local and non-local bar associations and groups in over twenty states and six different countries. Mr. Kessler is the Editor Emeritus of the Family Law Review for the State Bar of Georgia.
I. BACKGROUND

A. Name
B. Address
C. Employer and current position
D. Educational Background (college major, Degree, what year)
E. Professional designations
F. Continuing education
G. Employment history, detail each position (incl. how long, why left, etc.)
H. Have you ever taught or presented lectures to other persons regarding the practice of valuing professional practices or business entities?
I. Who sponsored this?
J. Who was your audience?
K. Have you ever written any articles? What?
L. Have you ever published any journals? Which ones?
M. What is your specialty?
N. Are you licensed by the State of _______ for anything? What?
O. How long has your firm been in business?
P. Who does your staff consist of?

II. PRIOR TESTIMONY

A. How many times testified? (breakdown trials, depositions, arbitrations, hearings, etc.)
B. Have you ever testified for [opposing attorney]?
C. How many trials did you testify as an expert witness?
D. For each, discuss the subject of testimony, whether the value was disputed, the opinion of the value from the other side, who testified for the other side, who did the cross examination, and the decision (if applicable).

III. BIAS

A. Who retained you in this case?
B. Have you ever worked for [opposing attorney] before? If so, discuss case?
   How many cases?
C. Are you social friends?
D. Has anyone else in your firm worked for either [opposing party] or [opposing attorney] before?
E. Do you expect additional business in the future from [opposing attorney]?
F. Do you hope for additional business in the future from [opposing attorney]?
G. How are you compensated by your firm?
H. Is your compensation tied to directly or indirectly to marketing success?
I. What percentage of your time do you spend involved in litigation services?

J. What percentage of time in divorce cases?

K. What percentage of your firm’s total billings relate to litigation services?

L. How many open litigation engagements does your firm presently have?

M. How many total open engagements does your firm presently have?

N. What are your firm’s annual consulting revenues?

O. What are your fee arrangements with [opposing party]?

P. How much have you been paid to date?

Q. How much are you presently owed?

IV. CREDIBILITY

A. You stated that you have testified numerous times. Has your opinion ever been accepted 100% by judge or jury in a decision?

B. How many times?

C. Has a judge or jury ever returned a verdict that differed from the opinion you offered by more than 10%?

D. Has a judge or jury ever returned a verdict that differed from the opinion you offered by more than 20%?

E. Has a judge or jury ever returned a verdict that differed from the opinion you offered by more than 50%?

F. Can you rule out the possibility that a verdict was reached that differed from your conclusion by more than 50%?

G. Has a case been settled based on a value which differed from the opinion you offered by more than 10%?

H. Has a case been settled based on a value which differed from the opinion you offered by more than 20%?

I. Has a case been settled based on a value which differed from the opinion you offered by more than 50%?

J. Can you rule out the possibility that a case settled at a value which differed from your conclusion by more than 50%?

K. Do you prepare valuations of business for purchase or sale purposes?

L. Have any businesses ever been sold (within a reasonable time period) for an amount which differs from your conclusion by more than 10%?

M. Have any businesses ever been sold (within a reasonable time period) for an amount which differs from your conclusion by more than 20%?

N. Have any businesses ever been sold (within a reasonable time period) for an amount which differs from your conclusion by more than 50%?

O. Can you rule out the possibility that a business was sold at a value which differed from your conclusion by more than 50%?

P. In conjunction with these services, do you prepare forecasts of revenues and expenses?

Q. In any cases, have you had an opportunity to review these forecasts subsequently and compare them to actual financial results?

R. In these cases, were your forecasts exactly correct?

S. In any cases, were your forecasts of revenue ever off by more than 10%?
T. In any cases, were your forecasts of revenue ever off by more than 20%?
U. In any cases, were your forecasts of revenue ever off by more than 50%?
V. Can you rule out the possibility that forecasts you prepared were off by more than 50%?
W. You knew the circumstances and the position of [opposing party] before preparing your analysis, correct?
X. You knew a lower value conclusion would be preferred to a higher conclusion by [opposing party], didn’t you?

V. SPECIFIC QUALIFICATIONS (PHYSICIAN PRACTICES/SHAREHOLDER AGREEMENTS)

A. How many valuations of business entities?
B. How many valuations have you completed involving physician practices?
C. Have you ever testified as to the value of physician practices?
D. If so, have you ever used any other methodology?
E. Have you ever done a valuation in a shareholder derivative situation?
F. If so, describe each in detail.
G. Have you ever valued a company that had a shareholders agreement before?
H. How many times?
I. Have you ever disregarded the agreement in any of these valuations?
J. How many times?
K. Describe the circumstances in detail.
L. What percent of the work on this project did you actually do?
M. Who else was involved and in what capacity?
N. What are the job titles of each of those persons?
O. What are the qualifications of each of those persons?
P. How many hours have you and your employees billed on this project?
Q. Did you bring a copy of your bills?
R. What made the decision about what type of analysis to utilize?
S. (If appropriate) Given that you did not do the work, do you guarantee the accuracy of the analysis?

VI. ENGAGEMENT

A. Who initially contacted you about this case?
B. When were you first contacted?
C. What was your relationship to that person?
D. Did you take notes during this conversation and other conversations?
E. Have you produced all notes and correspondence in relation to this case?
F. Have you thrown away any notes or materials related to this case?
G. Have you brought all of the documentation in response to the Subpoena duces tecum?
H. Have you brought everything they provided to you?
I. How many meetings/conversations with your client and his/her attorney have you had?
J. During the course of these meetings, what did they say about [client’s] interest in [business]?
K. During the course of these meetings, what did they say about the value of the interests in this entity?
L. During the course of these meetings, what did they say about their legal position?
M. Did you talk to [opposing party]?
N. What did each say about the interests in the practices?
O. Did you talk to [client]?
P. Why not?
Q. Don’t you think his input would be helpful in understanding the background of the deal and related negotiations?
R. Did you talk with anyone else involved in [name of business]?
S. Did you talk with anyone else that helped form an opinion?
T. Who have you discussed this case with?
U. What did they each say about the interest in the practice?

VII. VALUE OF BUSINESS

A. What is your opinion of the value of [client’s] interest in [business]?
B. State each and every reason upon which you base that opinion.
C. What approach was used in the valuation? Explain the methodologies.
   - Asset value
   - Discounted future earnings
   - Capitalization of earnings
   - Comparable sales
   - Liquidating value

D. What business documents did you review to form your opinion?
E. Who did you interview?
F. [Specifically go through analysis]

VIII. MINORITY INTEREST

A. Did you determine a value of the minority interest?
B. What factors were used?
   - Nature of business
   - Economic outlook
   - Book value
   - Earning capacity of company
   - Dividend paying capacity
   - Goodwill

C. What adjustments were made for minority interests?
D. How was that determined? What factors were considered? Why?
E. What appraisal techniques were used?

IX. GOODWILL

* Are you familiar with the term goodwill?
B. Is goodwill present in this case?
C. Do you have an opinion as to whether or not there is any personal “goodwill” vested in [client]? What?
D. Is that separate from goodwill attached to [business]?
E. Are you familiar with the recognized, accepted standards for the proper valuation of business entities such as this in the State of ________________?
F. How did you become familiar with those standards?
G. What are the standards? Where do you derive your knowledge (what source do you use to research from?)
H. Are these local, regional or national standards for business valuation experts?

X. BOOKS

A. What treatises (title, author, dates), books or publications do you consider authorities in the business valuation practice?
B. As part of your preparation in this case, did you review or consult professional or trade publications to provide you with information in this case?
C. What were these publications?
D. To what extent did you rely upon the information you received from those publications in forming your opinion?
E. What reference books do you have in your library regarding business valuations?

XI. BUSINESS AT ISSUE

A. What do you know regarding this entity?
B. Is a Shareholders Agreement standard in the industry?
C. Is there anything unusual about it?
D. Does the Shareholders Agreement include a formula for valuing the stock?
E. In spite of the shareholder’s reliance on the agreement, you elected to deviate from the formula when determining fair market value?
F. Have you previously valued another doctor’s interest in a medical practice such as this? How many times? Was there a report made? What was the result?
G. Do you know of any articles which discuss whether agreements should be interpreted as you have?
H. Do you know of any case law that interprets this case as you have?

XII. COVENANTS NOT TO COMPETE
A. How are they usually treated in valuing a business?
B. Why?
C. How did you treat it?
1:50  EXPERT TESTIMONY IN PREMISES LIABILITY CASES

Michael J. Gorby, Gorby Peters & Associates, LLC, Atlanta; Author, Premises Liability In Georgia
Federal Courts applying Georgia law have held that expert testimony is not required in slip and fall cases.\(^1\) In *Evans v. Mathis Funeral Home*, the Eleventh Circuit, applying Georgia law in a slip and fall case, upheld the district court's decision to exclude the testimony of an architect and a human factors expert with regard to the cause of the fall. The appellate court agreed with the district court's conclusion that the relationship between uneven stairs, certain surfaces and handrail height and falls were matters within the common knowledge of jurors.\(^2\)

The same holds true in Georgia state courts. In *Self v. Executive Comm. of the Ga. Baptist Convention of Ga., Inc.*, the plaintiff was injured after slipping in a puddle of water while at the hospital for treatment. The defendant moved for summary judgment and in support thereof offered expert medical opinion regarding causation and the relationship of the plaintiff's injuries to the fall. The trial court granted the motion. In reversing the trial court, the Supreme Court held that the action was not based on professional malpractice, but on simple negligence. The court held that “[t]here is no

\(^1\) This paper borrows heavily from *Premises Liability In Georgia, 2nd Edition*, by Michael Gorby and published by Thompson/West/Reuters.
\(^2\) 996 F.2d 266, 39 Fed. R. Evid. Serv. 440
requirement that expert testimony must be produced by a plaintiff to a negligence action to prevail at trial.\textsuperscript{3} In slip and fall cases, experts are most often used in ramp cases and cases where some technological device was relevant to the slip and fall. See Hall v. Cracker Barrel Old Country Store, Inc., (expert testimony regarding the floor's finish, the type of chemicals used to treat it, or even the composition of the plaintiff's own shoes and their interaction with the floor finish).\textsuperscript{4} See also Emory University v. Smith, (plaintiff must produce competent evidence of uneven slope or slipperiness; mere speculation that a ramp is hazardous is insufficient to create an issue of fact).\textsuperscript{5}

Although not required, if a party chooses to use an expert in a slip and fall case, it must be remembered that such expert testimony must comply with the Daubert standards which now apply in Georgia to all expert testimony. For instance, in Brady v. Elevator Specialists, Inc., plaintiff retained an elevator maintenance expert who opined that had the defendant followed a more aggressive maintenance schedule, the condition in the elevator that led to a mis-leveling would have been discovered and corrected before the plaintiff was injured. The plaintiff, a paraplegic, was injured when he fell backwards in his wheelchair while exiting the building's elevator because of the mis-leveling of the elevator. The trial court held that the testimony of the elevator maintenance expert was admissible. The Court of Appeals reversed and held that although the maintenance expert, based on his experience and training, could be qualified as an expert in elevator maintenance, his opinion was not admissible under Daubert. The expert could not point to any study or publication which would support his hypothesis that a more aggressive elevator maintenance schedule would have increased the likelihood that the mis-leveling

\textsuperscript{3} 245 Ga. 548, 266 S.E.2d 168
\textsuperscript{4} 223 Ga. App. 88, 476 S.E.2d 789
\textsuperscript{5} 260 Ga. App. 900, 902–903, 581
condition would have been recognized and remedied.\textsuperscript{6} Therefore, it is important to remember that under \textit{Daubert}, experts in slip and fall cases must not only show they have the experience and training to qualify as an expert, but their specific opinions must be based on methodology that has been tested and found credible.

In a negligent security case where the plaintiff is trying to recover from a property owner for the criminal acts of a third party, a critical element for the plaintiff is to show that the criminal act was foreseeable to the property owner. In establishing foreseeability, expert testimony may prove vital to the plaintiff, not only in convincing the jury of foreseeability, but in establishing that a jury issue exists to preclude summary judgment. Expert testimony is generally offered not only to establish that the defendant failed to exercise the appropriate level of care, but also to establish that the defendant's negligence caused the plaintiff's injuries.

While expert opinion testimony cannot alone support summary judgment, the opinion testimony of an expert can be sufficient to defeat summary judgment. \textit{Shoney's, Inc. v. Hudson.}\textsuperscript{7} See also \textit{Plunkett v. H.J. Motels, Inc.}\textsuperscript{8}

However, in opposing summary judgment, it is insufficient for the plaintiff to offer evidence from an expert that the defendant failed to take appropriate security measures. Rather, the expert testimony must also establish the way in which additional security measures would have prevented the litigated crime. \textit{Hillcrest Foods, Inc. v. Kiritsy.}\textsuperscript{9}

Thus, if the evidence does not establish how the litigated crime was committed, any testimony given by the plaintiff's security expert that the negligence of the defendant

\textsuperscript{6} 287 Ga. App. 304, 653 S.E.2d 59
\textsuperscript{7} 218 Ga. App. 171, 460 S.E.2d 809, 812
\textsuperscript{8} 176 Ga. App. 160, 335 S.E.2d 449
\textsuperscript{9} 227 Ga. App. 554, 489 S.E.2d 547, 551–552
proximately caused the plaintiff's injuries must necessarily be based upon speculation and will not be sufficient to defeat a motion for summary judgment. Post Properties, Inc. v. Doc. See generally Patrick v. Macon Housing Authority (finding that an inference based on mere possibility, conjecture, or speculation is not a reasonable inference sufficient to establish a genuine issue of fact and preclude summary judgment). In a Dram Shop case, one of the issues is whether the provider of the alcoholic beverages had knowledge that the intoxicated patron was soon to be driving an automobile. The courts have held that actual knowledge is not required. Riley v. H & H Operations, Inc. Rather, if a provider in the exercise of reasonable care should have known both that the recipient of the alcohol was noticeably intoxicated and that the recipient would be driving soon, the provider would be deemed to have knowledge of that fact." Baxley v. Hakiel Industries, Inc. However, whether or not constructive knowledge on the part of the provider can be shown by expert testimony is questionable in light of the Georgia Supreme Court's opinion in Sugarloaf Café v. Willbanks. In Wilbanks, the plaintiff presented the affidavit of a real estate expert who testified that the defendant restaurant was located at an intersection which was not conducive to pedestrian traffic; that residence of a nearby housing development were not accustomed to walking to the shopping center where defendant's restaurant was located; and that public transportation did not serve that area. The plaintiff argued, therefore, the defendant restaurant should have known that his customers came and left in private automobiles. The Supreme Court held that such expert evidence did not establish that the defendant

10 230 Ga. App. 34, 495 S.E.2d 573, 578–579
11 250 Ga. App. 806, 552 S.E.2d 455
12 263 Ga. 652, 436 S.E.2d 659
13 280 Ga. App. 94, 633 S.E.2d 360
14 279 Ga. 255, 612 S.E.2d 279
restaurant knew or should have known that the patron who was intoxicated would be
driving an automobile soon after she left the restaurant. The Court noted there was direct
evidence to show that the intoxicated patron was actually driven from the restaurant a
short distance to where her automobile was parked and that she then drove her
automobile and was involved in the collision injuring the plaintiff. The Court held that
the Dram Shop Act does not place an affirmative duty on the providers of alcohol to
determine the method by which a patron plans to depart the business establishment and
how that patron eventually plans to get home.

The Eleventh Circuit in Sorrels v. NCL (Bahamas) Ltd., reversed the trial judge’s
exclusion of plaintiff’s expert in a slip and fall case. In Sorrels, plaintiff made her way
onto one of the exterior pool decks. The deck was wet from rain. After walking
approximately 100 feet on the deck, Ms. Sorrels slipped and fractured her wrist.
Plaintiff’s expert tested the COF (coefficient of friction) for several spots on the deck of
cruise ship 520 days after the accident. Defendant’s expert also tested the pool deck at the
same time as Plaintiff’s expert using the same measuring equipment and testing protocol
as Plaintiff’s expert. Plaintiff’s expert however was excluded. The trial court excluded all
the Plaintiff’s expert testimony with respect to COF. In reversing, the Eleventh Circuit
held that if no material change to the scene has occurred, a delay, even of 520 days, in
viewing or inspecting a place where an accident occurred goes to the weight, and not the
admissibility of the expert’s testimony.

15 796 F.3d 1275
WHAT EVERY LAWYER NEEDS TO KNOW ABOUT THE DIFFERENCES BETWEEN THE GEORGIA EVIDENCE CODE AND THE FEDERAL RULES OF EVIDENCE

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WHAT EVERY LAWYER NEEDS TO KNOW
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FEDERAL RULES OF EVIDENCE
EXPERT TESTIMONY IN GEORGIA
FRIDAY, OCTOBER 27, 2017
State Bar of Georgia Conference Center
104 Marietta St. NW Atlanta, Georgia

Today’s Presentation
Speaker Introductions
Carlsons on Evidence

• Presenters
  • Ronald L. Carlson
    • Fuller E. Callaway Professor Emeritus, University of Georgia School of Law
  • Michael Scott Carlson
    • Deputy Chief Assistant District Attorney, Cobb Judicial Circuit
    • Judge, Georgia Court Martial Review Panel
    • Adjunct Professor of Law, Atlanta’s John Marshall Law School

Carlsons on Evidence
WHAT EVERY LAWYER NEEDS TO KNOW ABOUT THE DIFFERENCES BETWEEN THE GEORGIA EVIDENCE CODE AND THE FEDERAL RULES OF EVIDENCE
EXPERT TESTIMONY IN GEORGIA FRIDAY, OCTOBER 27, 2017

Today’s Presentation
Presentation and Materials
Carlsons on Evidence
Presentation and Materials

• Evidence Program Goals
  1. Further Develop “Code Wide” Approach
  2. Underscore Fundamental Principles of Interpretation
  3. Analyze and Consider Specific Applications

Carlsons on Evidence
Presentation and Materials

• Will use experience, scholarship, and mock case scenarios as a vehicle to illustrate rules and cases in context
• Consider objections
• Materials and discussion will feature New GRE and FRE authority
• Where no new GA case available, focus placed on relevant federal and related state authority
• Using actual quotes from cases
• Please hold questions until presentation is concluded
• Remain in contact with civil lawyers and judges for key areas of interest
• Slides and discussion will contain actual decisions
• Sometimes only advance citations are available

**WATCH FOR RECENT DECISIONS**

• A few slides may repeat—please follow the action

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• We should encourage debate over what statues, rules and cases “mean”
• We should never argue over what statutes, rules and cases “say”

• Therefore we focus on:
  1. Using actual quotations from cases and language from the statutes
  2. Leaving the policy determinations to legislatures and courts
  3. “Content heavy” presentations
Carlsons on Evidence
WHAT EVERY LAWYER NEEDS TO KNOW
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Georgia’s New Evidence Code
Fundamental Considerations

Carlsons on Evidence
Preamble; 24-1-1

• January 1, 2013
  Georgia’s new evidence code goes into effect
• Numerous issues remained to be addressed

• Primary Concerns
  ➢ What are fundamental changes?
  ➢ What law would apply to new provisions?
  ➢ What are the guiding principles?
Carlsons on Evidence
Preamble; 24-1-1

• 3 Basic Types of GRE's
  • Federalized (vast majority)
    • No prior Georgia authority but vast federal case law
  • Hybrid but leaning federal
    • No prior Georgia authority but vast federal case law
  • Carried over from former code
    • Prior Georgia authority may be conflicting and may be impacted by adoption of other rules
    • In the case of “double covered,” GASCT has expressed a preference for federalized version

Carlsons on Evidence
Preamble; 24-1-1

• 24-1-1/100's: GENERAL PROVISIONS
• 24-2-200’s: JUDICIAL NOTICE
• 24-3-3’s: PAROL EVIDENCE
• 24-4-400’s: RELEVANT EVIDENCE AND ITS LIMITS
• 24-5-500’s: PRIVILEGES
• 24-6-600’s: WITNESSES
• 24-7-700’s: OPINIONS AND EXPERT TESTIMONY
• 24-8-800’s: HEARSAY
• 24-9-900’s: AUTHENTICATION AND IDENTIFICATION
• 24-10-1000: BEST EVIDENCE RULE
Carlsons on Evidence
4 Scenarios for Georgia’s New Evidence Rules

Carlsons on Evidence
WHAT EVERY LAWYER NEEDS TO KNOW ABOUT THE DIFFERENCES BETWEEN THE GEORGIA EVIDENCE CODE AND THE FEDERAL RULES OF EVIDENCE
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Davis Violations
Persistent Use of Improper Authority
**Carlsons on Evidence**  
**Preamble; 24-1-1**

- Opponent of evidence files a motion in limine citing numerous new evidence rules that were not present in Georgia’s prior code. Proponent replies, focusing on prior Georgia authority. Opponent posits that the response is deficient. Proponent responds: “I don’t see what the big deal is all about. I have been using those motions for years.”

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**Carlsons on Evidence**  
**Preamble; 24-1-1**

- **Modeling of New GRE’s**
  - General Provisions (1’s and 100’s): **FRE based**
  - Judicial Notice (200’s): **FRE based**
  - Parol Evidence Rule (300’s): **Former GRE based**
  - Relevance (400’s): **FRE based**
  - Privileges (500’s): **Former GRE based**
  - Witnesses Generally (600’s): **FRE based**
  - Expert Witnesses (700’s): **FRE based (former GRE based for criminal standard)**
  - Hearsay (800’s): **FRE based**
  - Authentication (900’s): **FRE based**
  - Best Evidence (1000’s): **FRE based**
Carlsons on Evidence  
Preamble; 24-1-1

• Georgia Supreme Court’s Resolution
  • Federalized:
    • “…look to decisions of the federal appeals courts construing and applying the Federal Rules, especially the decisions of the Eleventh Circuit.”
  • Former Georgia:
    • “…they may rely on Georgia decisions under the old Code.”
  • Original Creation:
    • “…the usual principles that inform our consideration of statutory meaning.”


• “It may be that the result of this case would be the same if we applied the old Evidence Code and our decisions interpreting it, but if so, that is happenstance, at least without careful comparison of the old and new law. Georgia lawyers do this Court no favors — and risk obtaining reversible evidence rulings from trial courts — when they fail to recognize that we are all living in a new evidence world and are required to analyze and apply the new law. It may be hard to comprehend that, when it comes to trials and hearings held after January 1, 2013, the most pertinent precedent to cite on an evidentiary issue may be a decades-old decision of the Eleventh Circuit (or even the old Fifth Circuit), instead of a week-old unanimous decision of this Court (if we were deciding the appeal of a case tried before 2013 and governed by the old rules, as still frequently occurs). We trust that this shortcoming will not be repeated in future cases coming to this Court.”
  • Davis v. State, 299 Ga. 180 (2016)
Carlsons on Evidence
Preamble; 24-1-1

• “To the extent the widow argues that the statements were admissible under the ‘necessity’ exception, she improperly relies on decisions that applied the former Evidence Code... Because the hearing on the executor's motion for summary judgment took place after January 1, 2013, however, the provisions of Georgia's new Evidence Code apply.”

Carlsons on Evidence
Preamble; 24-1-1

• 2017 Article
  • *Davis Violations Dissected: “New” Georgia Law and the Crisis in Evidence*
    • Michael Scott Carlson and Ronald L. Carlson
    • IX John Marshall Law Journal 1
    • https://www.johnmarshall.edu/lawreview/current-volume/volume-9-number-1/
    • https://drive.google.com/file/d/0B1eA3aJ1Q2BjVFg1RjNLbnFDbm8/view
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24-1-103
Evidentiary Objections

Carlsons on Evidence

24-1-1; 2; 103-106

• Proponent of evidence attempts to introduce exhibit. Opponent of evidence objects, “lack of foundation.” Trial judge inquires if there is further detail. Opponent rises, “We stand on our objection. That is all that is sufficient under the new code.”
Carlsons on Evidence
24-1-1; 2; 103-106

• 24-1-1/100's
  • 24-1-1. Purpose and construction of the rules of evidence
  • 24-1-2. Applicability of the rules of evidence
  • 101. Reserved
  • 102. Reserved
  • 103. Rulings on evidence
  • 104. Preliminary questions
  • 105. Limited admissibility
  • 106. Introduction of remaining portions of writings or recorded statements

Carlsons on Evidence
24-1-103

• 24-1-103
  • (a) Error shall not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and:

    (1) In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

    (2) In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by an offer of proof or was apparent from the context within which questions were asked.

    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.

    (b) The court shall accord the parties adequate opportunity to state grounds for objections and present offers of proof. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The court may direct the making of an offer of proof in question and answer form.
Carlsons on Evidence
24-1-103

• “...objections to the admission of evidence ... are preserved only if they are timely and state the specific ground of objection, if the specific ground was not apparent from the context...” Wilson v. Attaway, 757 F.2d 1227 (11th Cir. 1985)
• “...the substance of the evidence that Williams sought to elicit from Carson was not sufficiently apparent from the discussion at trial to preserve the issue for ordinary review.” Lupoe v. State, 300 Ga. 233 (2016)

Carlsons on Evidence
24-1-103

• “Motions in limine to exclude purportedly prejudicial evidence must be properly particularized so as to identify what the evidence in questions is and why the opponent believes it should be excluded.” U.S. v. Gulley, 722 F.3d 901 (7th Cir. 2013)
• “...under the Federal Rules of Evidence, it is no longer necessary for a party to renew an objection to evidence when the district court has definitively ruled on the party's motion in limine...Because the district court's ruling in this case was sufficiently definitive, we will consider the merits of TBW's position. Tampa Bay Water v. HDR Eng'g, Inc., 731 F.3d 1171 (11th Cir. 2013)
Carlsons on Evidence
24-1-103

• Incorporating Rule Numbers
  • “We need not parse the exact contours of Georgiadis's argument in order to locate what he has not: the specific Federal Rule of Evidence that he contends was violated.” U.S. v. Georgiadis, 819 F. 3d 4 (1st Cir. 2016)

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24-2-201
Judicial Notice
Proponent seeks to have the trial judge take judicial notice of a Google map in order to admit it into evidence. Opponent objects, “Not without someone from Google here, you don’t!”

**24-2-201**

- 201. Judicial notice of adjudicative facts
- 220. Judicial notice of legislative facts
- 221. Judicial notice of ordinance or resolution
Carlsons on Evidence  
24-2-201

• 24-2-201

• (a) This Code section governs only judicial notice of adjudicative facts.

(b) A judicially noticed fact shall be a fact which is not subject to reasonable dispute in that it is either:

1. **Generally known** within the territorial jurisdiction of the court; or

2. Capable of **accurate and ready determination** by resort to sources whose accuracy cannot reasonably be questioned.

Carlsons on Evidence  
24-2-201

• “**A judicially noticed [adjudicative] fact shall be a fact which is not subject to reasonable dispute** in that it is either: (1) Generally known within the territorial jurisdiction of the court; or (2) Capable of accurate and ready determination...” *McCoy v. State*, 2017 Ga. App. LEXIS 168 (Apr. 11, 2017)

• “**At the hearing on the motion, the trial court noted on the record, and the parties did not dispute, that the court reporter had significant health problems during the time period in question that affected his ability to work.**” *Atlantic Geoscience, Inc. v. Phoenix Development & Land Investment, LLC*, 2017 Ga. App. LEXIS 160 (Mar. 16, 2017)
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24-4-403
Unfair Prejudice Objection

Carlsons on Evidence
24-4-401 to 418

• Prior to Proponent calling a key witness, Opponent objects, “Judge before this witness takes the stand, opposing counsel needs to prove to the court that this testimony will not be overly prejudicial.”
Carlsons on Evidence
24-4-401 to 418

• **24-4-400’s**
  - 401. “Relevant evidence” defined
  - 402. Relevant evidence generally admissible; irrelevant evidence not admissible
  - 403. Exclusion of relevant evidence on the grounds of prejudice, confusion, or waste of time
  - 404. Character evidence not admissible to prove conduct; exceptions; other crimes
  - 405. Methods of proving character
  - 406. Habit; routine practice
  - 407. Subsequent remedial measures
  - 408. Compromises and offers to compromise
  - 409. Payment of medical and similar expenses
  - 410. Inadmissibility of pleas, plea discussions, and related statements
  - 411. Liability insurance
  - 412. Complainant’s past sexual behavior not admissible in prosecutions for certain sexual offenses; exceptions
  - 413. Evidence of similar transaction crimes in sexual assault cases
  - 414. Evidence of similar transaction crimes in child molestation cases
  - 415. Evidence of similar acts in civil or administrative proceedings concerning sexual assault or child molestation
  - 416. Statements of sympathy in medical malpractice cases
  - 417. Evidence of similar acts in prosecutions for violations of Code Section 40-6-391
  - 418. Admissibility of criminal gang activity, disclosure

Carlsons on Evidence
24-4-403

401
Relevance

402
Presumptive Admissibility

403
Unfair Prejudice
Expert Testimony
250 of 288

Carlsons on Evidence
24-4-401

• 24-4-401:
  • “Regardless of how one views the language of Rule 401, however, it is clear that the relevance standard codified therein is a liberal one.” State v. Jones, 297 Ga. 156 (2015)

• 24-4-402:
  • “All relevant evidence shall be admissible, except as limited by constitutional requirements or as otherwise provided by law or by other rules...” State v. Smith, 329 Ga. App. 646 (2014)

• 24-4-403:
  • “Rule 403 is an extraordinary remedy which should be used only sparingly since it permits the trial court to exclude concededly probative evidence.” Bradshaw v. State, 296 Ga. 650 (2015)

Carlsons on Evidence
24-4-403

• 24-4-403
  • Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.
Carlsons on Evidence
24-4-403

• “The application of the [OCGA § 24-4-403] test is a matter committed principally to the discretion of the trial courts, but as we have explained before, the exclusion of evidence under [OCGA § 24-4-403] is an extraordinary remedy which should be used only sparingly. The major function of [OCGA § 24-4-403] is to exclude matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect.” Dixon v. State, 2017 Ga. App. LEXIS 176 (Ga. Ct. App. Apr. 19, 2017)

Carlsons on Evidence
24-4-403

• “After the offering party shows that some evidence is relevant, it is the resisting party's burden to show that prejudice substantially outweighs the evidence's probative value... The resisting party likewise bears the burden of furnishing a limiting instruction once the court determines that it will admit evidence under Rule 404(b).” Gallegos v. City of Espanola, 2015 U.S. Dist. LEXIS 114444 (D.N.M. Mar. 3, 2015)
Carlsons on Evidence
24-4-403

• “…we find no basis in the record to support the ‘extraordinary remedy’ of excluding this evidence as unduly prejudicial under OCGA § 24-4-403, particularly given the strong statutory presumption of admissibility and in light of the close similarities between the crimes at issue. There has been no showing that the evidence would confuse the issues, mislead the jury, waste time, or be cumulative of other evidence, or that the probative value of the evidence would otherwise be ‘substantially outweighed’ by its prejudicial impact.”


Carlsons on Evidence
24-4-403

• Error to Apply Former Prejudice Standard

• “Prior to the enactment of the new evidence code, Georgia had no direct statutory equivalent to Rule 403, but case law on the issue generally required that a trial court merely balance the probative value of evidence with its prejudicial effect without requiring that the objecting party establish substantial prejudice. In stark contrast, the plain meaning of OCGA § 24-4-403’s text makes clear that the trial court may only exclude relevant evidence when its probative value is ‘substantially outweighed’ by one of the designated concerns.”

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24-5-500’s
Privilege Issues

Carlsons on Evidence
24-5-506; 24-8-824

• Because a related criminal case is pending, a party refuses to testify. Proponent seeks to introduce this fact in a civil proceeding. Opponent objects, stating that the right against self-incrimination cannot be used against a person in any context.
Carlsons on Evidence
24-5-501 to 510

- **24-5-500's**
  - 501. Certain communications privileged
  - 502. Communications to clergyman privileged
  - 503. Husband and wife as witnesses for and against each other in criminal proceedings
  - 504. Law enforcement officers testifying; home address
  - 505. Party or witness privilege
  - 506. Privilege against self-incrimination; testimony of accused in criminal case
  - 507. Grant of immunity; contempt
  - 508. Qualified privilege for news gathering or dissemination
  - 509. Communications between victim of family violence or sexual assault and agents providing services to such ...
  - 510. Privileged communications between law enforcement officers and peer counselors

Carlsons on Evidence
24-5-506; 24-8-824

- **24-5-506**
  - (a) No person who is charged in any criminal proceeding with the commission of any criminal offense shall be compellable to give evidence for or against himself or herself.

- **24-8-824**
  - To make a confession admissible, it shall have been made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury.
Carlsons on Evidence
24-5-506; 24-8-824

• “We find unconvincing Loveless's argument that the privilege set out in the Fifth Amendment and in OCGA § 24-5-506 overrides the clear and well-settled requirement that, to be sufficient, an answer in a civil forfeiture proceeding...” Loveless v. State of Ga., 337 Ga. App. 250 (2016)

• “And if an accused in a criminal proceeding chooses to testify, he or she shall be sworn as any other witness and, with certain exceptions, may be examined and cross-examined as any other witness.” Tran v. State, 2017 Ga. App. LEXIS 100 (Ga. Ct. App. 2017)

Carlsons on Evidence
24-5-506; 24-8-824

• “It is beyond dispute that the Constitution does not protect Defendant from giving non-testimonial evidence...Thus, the Fifth Amendment's protection against self-incrimination does not extend to physical characteristics such as giving a blood sample or handwriting exemplar...Federal courts have therefore held that photographing a defendant's tattoos for display to the jury or requiring a defendant to reveal his tattoos to a jury does not run afoul of the Fifth Amendment.” United States v. Nixon, 2015 U.S. Dist. LEXIS 93628 (E.D. Mich. July 20, 2015)

• “Regardless of how the Government acquired the photo, however, the trial court could, if it so concluded, direct Defendant to display his scar to the jury, bypassing the photograph altogether.” United States v. Spencer, 2015 U.S. Dist. LEXIS 174240 (D. Minn. Dec. 11, 2015)
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24-6-613
Use of Prior Inconsistent Statements

• Proponent of evidence attempts to impeach Opponent’s witness with a prior inconsistent statement. Opponent objects, “Judge, this was not taken under oath, so it cannot be considered substantively. Furthermore, our witness must be confronted with the time, place, persons present, and the substance of an impeaching statement before this cross can begin.”
Expert Testimony

Carlsons on Evidence
24-6-601 to 658

• 24-6-600’s
  • 601. General rule of competency
  • 602. Lack of personal knowledge
  • 603. Oath or affirmation
  • 604. Interpreters
  • 605. Judge as witness
  • 606. Juror as witness
  • 607. Who may impeach
  • 608. Evidence of character and conduct of witness
  • 609. Impeachment by evidence of conviction of a crime
  • 610. Religious beliefs or opinions
  • 611. Mode and order of witness interrogation and presentation
  • 612. Writing used to refresh memory
  • 613. Prior statements of witnesses
  • 614. Calling and interrogation of witnesses by court
  • 615. Exclusion of witnesses
  • 616. Presence in courtroom of victim of criminal offense

• 24-6-600’s (continued)
  • 620. Credibility a jury question
  • 621. Impeachment by contradiction
  • 622. Witness’s feelings and relationship to parties provable
  • 623. Treatment of witness
  • 650. State policy on hearing impaired persons
  • 651. Definitions
  • 652. Appointment of interpreters for hearing impaired persons interested in or witness at agency proceedings
  • 653. Procedure for interrogation and taking of statements from hearing impaired persons arrested for ...
  • 654. Indigent hearing impaired defendants to be provided with interpreters
  • 655. Waiver of right to interpreter
  • 656. Replacement of interpreters unable to communicate accurately with hearing impaired persons; appointment ...
  • 657. Oath of interpreters; privileged communications; taping and filming of hearing impaired persons’ testimony
  • 658. Compensation of interpreters
• **24-6-613**

(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.

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• “Appellant cannot meet this test because the detective’s testimony concerning Pearsall’s and Zakiya’s prior inconsistent statements was not hearsay. On the contrary, the detective’s testimony was admissible to impeach the witnesses, or as substantive evidence.” *Harvey v. State*, 300 Ga. 598 (2017)

• “The failure of a witness to remember making a statement, like the witness’s flat denial of the statement, may provide the foundation for calling another witness to prove that the statement was made.” *Hood v. State*, 299 Ga. 95 (2016)
Carlsons on Evidence
24-6-613

- “F.R.E. 613(b) and subsequent case law interpreting that rule reflect that the strict sequencing procedure established in Queen Caroline's Case is now unnecessary under the Federal Rules of Evidence. Nevertheless...[i]t is equally clear, however, that Rule 613(b) does not supplant the traditional method of confronting a witness with his inconsistent statement prior to its introduction into evidence as the preferred method of proceeding.” Robinson v. State, 3 A.3d 257 (Del. 2010)
- “Rule 613(b) contains no bar, beyond foundation requirements, to extrinsic evidence of prior inconsistent statements....Rule 613, largely a relaxation of the rule in The Queens Case..., specifies the foundation which must be laid for introduction of extrinsic evidence.” U.S. v. Higa, 55 F.3d 448 (9th Cir. 1995)

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24-4-608(b)
Dishonest Act Impeachment
Expert Testimony
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Carlsons on Evidence
24-6-608

• Proponent cross-examines Opponent’s expert witness, “In your deposition, didn’t you admit to being disciplined in grad school falsifying your time sheets?” Opponent objects. Proponent then asks, “And, by the way, isn’t true that you advertise that in a divorce cases, you are every husband’s best friend, and you never work for wives?” Opponent objects and moves to strike as improper impeachment.

Carlsons on Evidence
24-6-608

• 24-6-608(b)
  ➢ (b) Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’s character for truthfulness, other than a conviction of a crime as provided in Code Section 24-6-609, or conduct indicative of the witness’s bias toward a party may not be proved by extrinsic evidence. Such instances may however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness:
    (1) Concerning the witness's character for truthfulness or untruthfulness; or
    (2) Concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
• “The statute also addresses the use of specific instances of conduct to attack (or support) a witness's character for truthfulness...or conduct indicative of the witness's bias toward a party’ such specific instances ‘may not be proved by extrinsic evidence.”” *Gaskin v. State*, 334 Ga. App. 758 (2015)

• “Under this Rule, we have upheld, for example, cross-examination into an attorney's disbarment...into a witness's failure to disclose a prior arrest on his bar application...and into a prior finding by an Immigration Judge that the witness's testimony in a deportation proceeding was not credible... cross-examination into a defendant's alleged acts of fraud, bribery, and embezzlement.” *Hynes v. Coughlin*, 79 F.3d 285 (2d Cir. 1996)
Carlsons on Evidence
24-6-608

• “However, other hospital records prepared by a nurse and introduced without objection during the trial reflect that Mrs. Dean was in her hospital room and could have been examined by Dr. Davis, had he in fact chosen to do so on August 2, and Mrs. Dean confirmed that she did not leave her hospital room that day.” Cent. Ga. Women’s Health Ctr., LLC v. Dean, 2017 Ga. App. LEXIS 202 (Ga. Ct. App. May 10, 2017)
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Carlsons on Evidence
24-7-701 to 707

• Proponent of evidence calls expert witness and begins to inquire opinion on key issue in case. Opponent objects that expert was not *Daubert* qualified and that no ultimate issue testimony is allowed. Proponent claims that under Georgia’s New Evidence Code, there is no need to Daubert qualify experts and the ultimate issue objection is a thing of the past.”

Carlsons on Evidence
24-7-701 to 707

• 24-7-700’s
  • 701. Lay witness opinion testimony
  • 702. Expert opinion testimony in civil actions; medical experts; pretrial hearings; precedential value of ...
  • 703. Bases of expert opinion testimony
  • 704. Ultimate issue opinion
  • 705. Disclosure of facts or data underlying expert opinion
  • 706. Court appointed experts
  • 707. Expert opinion testimony in criminal proceedings
(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, expertise, training, or education may testify thereto in the form on 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;
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.

“Reliability is examined through consideration of many factors, including whether a theory or technique can be tested, whether it has been subjected to peer review and publication, the known or potential rate of error for the theory or technique, the general degree of acceptance in the relevant scientific or professional community, and the expert's range of experience and training. There are many different kinds of experts and many different kinds of expertise, and it follows that the test of reliability is a flexible one.” *Ga. DOT v. Owens*, 330 Ga. App. 123 (2014)
Carlsons on Evidence
24-7-702

• “In determining property and maintenance issues, the family court is authorized by statute to consider certain relevant factors...To help explain the impact of the abuse on plaintiff, she offered expert testimony on PTSD and battered-woman...We conclude that the family court judge properly exercised his discretion in admitting the evidence after finding the expert's opinions helpful to understand the evidence bearing on property distribution and maintenance.” Soutiere v. Soutiere, 163 Vt. 265, 657 A.2d 206 (1995)

Carlsons on Evidence
24-7-704

• 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.
Expert Testimony
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Carlsons on Evidence
24-7-704

• “...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. State v. Cooper, 324 Ga. App. 32 (2013)

• “However, an expert may not merely tell the jury what result to reach and may not testify to the legal implications of conduct.” Clayton County v. Segrest, 333 Ga. App. 85 (2015)

Carlsons on Evidence
24-7-704

• “Under Federal Rule of Evidence 704, ‘[a]n expert may testify as to his opinion on an ultimate issue of fact,’ provided that he does not ‘merely tell the jury what result to reach’ or ‘testify to the legal implications of conduct.’” U.S. v. Grzybowicz, 747 F.3d 1296 (11th Cir. 2014)

• “...to be admissible under Rule 704 an expert's opinion on an ultimate issue must be helpful to the jury and also must be based on adequately explored legal criteria.” Haney v. Mizell Memorial Hosp., 744 F.2d 1467 (11th Cir. 1984)

• “A witness may give otherwise admissible opinion testimony that affects an ultimate issue in a case unless that opinion concerns the mens rea of a criminal defendant.” U.S. v. Cowan, 2012 U.S. App. LEXIS 23687 (11th Cir. 2012)
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24-8-801
Hearsay: Self-Quotation

Proponent asks witness, “Will you please tell us what you told my client about who is at fault?”
Opponent objects as hearsay.”
Proponent responds, “It is not hearsay is someone is quoting themselves.”
Carlsons on Evidence
24-8-801 to 24-8-826

• 24-8-800’s
  • 801. Definitions
  • 802. Hearsay rule
  • 803. Hearsay rule exceptions; availability of declarant immaterial
  • 804. Hearsay rule exceptions; declarant unavailable
  • 805. Hearsay within hearsay
  • 806. Attacking and supporting credibility of a declarant
  • 807. Residual exception
  • 820. Testimony as to child’s description of sexual contact or physical abuse
  • 821. Admissions in pleadings
  • 822. Right to have whole conversation heard
  • 823. Admissions and confessions received with care; no conviction on uncorroborated confession
  • 824. Only voluntary confessions admissible
  • 825. Confessions under spiritual exhortation, promise of secrecy, or collateral benefit admissible
  • 826. Medical reports in narrative form

Carlsons on Evidence
24-8-801 to 24-8-826

• Hearsay: Classifications of Out-of-Court Statements
  ➢ Admissions (801’s): Party Opponent
  ➢ Statements (803’s): Non-party (available and not available)
  ➢ Declarations (804’s): Non-party (unavailable)
• Hearsay Analysis
  1. Is the evidence hearsay?
  2. Is the evidence admissible for a non-hearsay purpose?
  3. Is the evidence subject to an exemption?
  4. Is the evidence subject to an exception?
  5. Is the evidence only admissible for a limited purpose?

Carlsons on Evidence
24-8-801 to 24-8-826

24-8-801
As used in this chapter, the term:
(a) “Statement” means:
  (1) An oral or written assertion; or
  (2) Nonverbal conduct of a person, if it is intended by the person as an assertion.
(b) “Declarant” means a person who makes a statement.
(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.
Carlsons on Evidence
24-8-801

• “The fact that past out of court statements were made by a witness testifying at trial does not remove them from the reaches of the hearsay rule if they are offered to prove the truth of the matter asserted.” U.S. v. Lewis, 436 F.3d 939 (8th Cir. 2006)

• “…a defendant's self-serving extra-judicial declarations are inadmissible unless they fall within a hearsay exception. That is, a defendant cannot get self-serving hearsay statements into evidence without first waiving the Fifth Amendment and testifying...” Cisneros v. Paramo, 2015 U.S. Dist. LEXIS 168978 (C.D. Cal. 2015)

Carlsons on Evidence
24-8-801

• “In the absence of such an affirmative attack, any prior statement by that witness ‘is pure hearsay evidence, which cannot be admitted merely to corroborate the witness, or to bolster the witness's credibility in the eyes of the jury.’” Silvey v. State, 335 Ga. App. 383(2015)
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24-8-803(6)
Admission of Business Records

• Proponent of evidence attempts to introduce hospital records through the business records exception via a declaration or certificate of the company records custodian. Opponent objects, arguing that live testimony is required.
### Carlsons on Evidence

#### 24-8-803(6)

- **24-8-803**
  - 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.

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- **And, as the trial court noted, the subsection specifically applicable, OCGA § 24-9-902 (11), places no such requirement on a certificate of authenticity...we must presume that the General Assembly meant that the certificate of authenticity required through the operation of OCGA §§ 24-8-803(6) and 24-9-902(11), need not be notarized or signed under a penalty of perjury.” Hayes v. State, 298 Ga. 98 (2015)**
Carlsons on Evidence
24-8-803(6)

• “... the advisory committee note to the 2014 amendments plainly indicates that a blanket, unspecific objection...is not sufficient...Clearly, however, the opponent bears the burden of articulating some reason for objecting to authenticity. The rules and advisory committee notes do not expressly state that such a showing must be made in advance of trial, but a key purpose of Rule 803(6) is to relieve the proponent of the need to produce custodians as witnesses at trial. The rationale of the rule would be undermined if an opponent of a record were permitted to wait until trial to state its grounds for challenging the record.” U.S. v. Palin, 98 Fed. R. Evid. Serv. 704 (W.D. Va. 2015)

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24-9-901

Authentication of Social Media
Expert Testimony
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Proponent of evidence attempts to introduce social media evidence in the form of Facebook postings from the opponent’s client. Proponent’s witness describes them of being in the same style, mentions personal information, and comes from the page of the opponent’s client. Opponent objects, **arguing that authentication of social media evidence requires testimony from the webmaster.**

**Carlsons on Evidence**
24-9-901

- **24-9-900’s**
  - 901. Requirement of authentication or identification
  - 902. Self-authentication
  - 903. Subscribing witness’s testimony
  - 904. Definitions
  - 920. Authentication of Georgia state and county records
  - 921. Identification of medical bills; expert witness unnecessary
  - 922. Proof of laws, records, nonjudicial records, or books of other states, territories, or possessions; ...
  - 923. Authentication of photographs, motion pictures, video recordings, and audio recordings when witness ...
  - 924. Admissibility of records of Department of Driver Services; admissibility of computer transmitted records
• 24-9-901
  • (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.

“Social media has been defined as forms of electronic communications . . . through which users create online communities to share information, ideas, personal messages, and other content (as videos). Through these sites, users can create a personal profile, which usually includes the user’s name, location, and often a picture of the user. On many sites such as Facebook or Twitter, a user will post content—which can include text, pictures, or videos—to that user’s profile page delivering it to the author’s subscribers. Often these posts will include relevant evidence for a trial, including party admissions, inculpatory or exculpatory photos, or online communication between users. But there is a genuine concern that such evidence could be faked or forged, leading some courts to impose a high bar for the admissibility of such social media evidence.” Parker v. State, 85 A.3d 682 (Del. 2014)
**Carlsons on Evidence**

24-9-901

- “Exhibits depicting online content may be authenticated by a person's testimony that he is familiar with the online content and that the exhibits are in the same format as the online content...Such testimony is sufficient to provide a rational basis for the claim that the exhibits properly represent the online content....Special Agent O'Donnell testified that he personally viewed the boy2kid group and rezchub61's profile page and that the screenshots accurately represented the online content of both sites. Thus, the district court did not abuse its discretion by admitting the screenshots.” *U.S. v. Needham*, 2017 U.S. App. LEXIS 5585 (8th Cir. Minn. Mar. 31, 2017)

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**Carlsons on Evidence**

24-9-901

- “Hale testified that the picture on the Facebook page was of Appellant and confirmed that his hometown was Gary, Indiana, as listed on the page. The Facebook page included the cell phone number from which Appellant had called Hale. Hale and other witnesses testified that Appellant went by the nickname “Crown” or “Crown Hood,” and the Facebook page profile name was listed as “Patrick Crown Hood Moore.” Appellant's Facebook page contained details about his life that were not public knowledge and made references to Appellant's other girlfriend and his brothers. Hale also testified that the structure and style of the comments posted on the page matched the structure and style of the texts Appellant had sent Hale. Finally, Appellant admitted to Hale that the Facebook page belonged to him. Based on this direct and circumstantial evidence, we find that the Facebook page was properly authenticated. *Moore v. State*, 295 Ga. 709 (2014)
**Carlsons on Evidence**

24-9-901

- “A fact finder could well conclude that (1) Meshach Thompson sent the text messages from the name ‘Mee$h,’ and (2) Shadrach Thompson sent the messages from the name ‘$had.’ These text messages—along with other evidence presented at trial—readily establish that Meshach Thompson engaged in a conspiracy with Shadrach Thompson and Omar Wadley to possess oxycodone with intent to distribute. **The text messages were attempts to set up and negotiate the purchase of oxycodone.**” *U.S. v. Thompson*, 568 Fed. Appx. 812 (11th Cir. 2014)

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24-9-902(11)

*Authentication of Business Records*
• Proponent tenders business records with a proper certificate. Opponent objects, “Judge, these contain opinions. That makes them per se inadmissible.”

• 24-9-902(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;
• “The computer-generated inspection report, which reflects the date of the incident and was printed the day after the incident, indicates the time of each inspection stop during each hourly inspection, the identity of the employee, the number and location of the sensors, and the condition of the inspected areas...The obvious purpose of the monitoring system was to contemporaneously document compliance with the store’s inspection procedure. Nothing about the computer report suggests any lack of trustworthiness, and the co-manager's affidavit sufficiently authenticated the inspection report.” Johnson v. All American Quality Foods, Inc., 2017 Ga. App. LEXIS 117 (Mar. 10, 2017)

• “And those courts have held that hospital records, including medical opinions, are ... admitted under [Federal Rule of Evidence 803 (6)], which expressly permits ‘opinions’ and ‘diagnoses.’ Given this construction of Federal Rule of Evidence 803 (6), the fact that OCGA § 24-8-803 (6) is nearly identically worded, and, as previously noted, the fact that these records were made to facilitate Samuels's treatment and not in anticipation of prosecution, the trial court did not err in admitting the hospital records under OCGA § 24-8-803 (6).” Samuels v. State, 335 Ga. App. 819 (2016)
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24-10-1001 to 1006

Best Evidence Rule (lost evidence and summaries)

• Proponent introduces a chart summarizing hospital records to assist the jury in understanding the raw notes and entries. Opponent objects under the best evidence rule.
Carlsons on Evidence  
24-10-1001 to 1008

• 24-10-1000’s
  • 1001. Definitions
  • 1002. Requirement of original
  • 1003. Admissibility of duplicates
  • 1004. Admissibility of other evidence of contents of a writing, recording, or photograph
  • 1005. Public records
  • 1006. Summaries
  • 1007. Testimony or written admission of party
  • 1008. Functions of court and jury

Carlsons on Evidence  
24-10-1004

• 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.
Carlsons on Evidence
24-10-1004

• “Indeed, as previously noted, under OCGA § 24-10-1004 (1), an original recording or photograph is not required at trial and secondary evidence of its contents is admissible if “[a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith.” And here, it is undisputed that the relevant videos and photographs were destroyed when the hard drive used in Peluso's 2008 investigation “crashed.” Moreover, there is no evidence (and Patch has not even alleged) that the State intentionally destroyed the videos and photographs in bad faith. As a result, Peluso's testimony regarding the contents of the lost or destroyed photographs and video recordings was admissible under the plain language of OCGA § 24-10-1004 (1).” Patch v. State, 337 Ga. App. 233 (2016)

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• 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 a reasonable time and place. The court may order that the contents of such writings, recordings, or photographs be produced in court.
“Indeed, as previously noted, under OCGA § 24-10-1004 (1), an original recording or photograph is not required at trial and secondary evidence of its contents is admissible if “[a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith.” And there, it is undisputed that the relevant videos and photographs were destroyed when the hard drive used in Peluso’s 2008 investigation “crashed.” Moreover, there is no evidence (and Patch has not even alleged) that the State intentionally destroyed the videos and photographs in bad faith. As a result, Peluso’s testimony regarding the contents of the lost or destroyed photographs and video recordings was admissible under the plain language of OCGA § 24-10-1004 (1).”

“Federal Rule of Evidence 1006 allows parties to use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court...To comply with this Rule, therefore, a chart summarizing evidence must be an accurate compilation of the voluminous records sought to be summarized. Moreover, the records summarized must otherwise be admissible in evidence...Thus, summary exhibits under Rule 1006 function as a surrogate for voluminous writings that are otherwise admissible.” Krakauer v. Dish Network L.L.C., 2016 U.S. Dist. LEXIS 160512 (M.D.N.C. Sept. 19, 2016)

“Arguably, the requirement that the underlying records supporting that summary were made available for examination or copying, or both, by other parties at a reasonable time and place has been met. As acknowledged by D'Agnese, neither party conducted any discovery in this case. D'Agnese cannot complain that documents were not available to him if he never asked for them...However, Wells Fargo offered no evidence — and has made no argument — that the underlying records are too voluminous to be examined in court conveniently, a clear requirement under the text of the rule...This is a necessary precondition for admission of a document as a summary.” D'Agnese v. Wells Fargo Bank, N.A., 335 Ga. App. (2016)
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• “Rule 1006 of the Federal Rules of Evidence permits a proponent to use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court... Additionally, parties may use a ‘pedagogic device,’ such as a summary of witness testimony and/or trial exhibits, to organize testimony and other evidence for the jury... The government introduced a chart containing the information that Special Agent O’Donnell gathered during his investigation of the 11 images that rechub61 uploaded to the boy2kid group... We find no reversible error in the district court’s admission of Government’s Exhibit 51. Government’s Exhibit 51 consists mostly of properly admitted evidence contained elsewhere in the record.” U.S. v. Needham, 2017 U.S. App. LEXIS 5585 (8th Cir. Minn. Mar. 31, 2017)

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• “...the party desiring to introduce voluminous material in summary form must make ‘[t]he originals, or duplicates, ... available for examination or copying, or both, by other parties at a reasonable time and place’...this requirement must be satisfied ‘prior to the admission of the summary’...” Tafel v. Lion Antique Cars & Invs., Inc., 297 Ga. 334 (2015)
“To qualify under Evidence Rule 611(a), a pedagogical summary must only organize or aid the jury’s examination of testimony or documents which are themselves admitted into evidence...To qualify under Evidence Rule 1006, an evidence summary must fairly represent and be taken from underlying documentary proof which is too voluminous for convenient in-court examination, and [it] must be accurate and nonprejudicial...As to both types of evidence, the district court has considerable leeway in deciding what to do....One difference between the two turns on whether the jurors can take the evidence into the deliberation room. Rule 1006 summaries can be brought into the deliberation room, while Rule 611(a) pedagogical summaries cannot be, save by mutual agreement of the parties.” United States v. Whitfield, 2016 U.S. App. LEXIS 18126 (6th Cir. 2016)
Carlsons on Evidence
Review

• Evidence Program Goals
  1. Further Develop “Code Wide” Approach
  2. Underscore Fundamental Principles of Interpretation
  3. Analyze and Consider Specific Applications

EVIDENCE FUNDAMENTALS
FOR THE FAMILY LAWYER
NUTS AND BOLTS OF FAMILY LAW
THURSDAY, SEPTEMBER 28, 2017
State Bar of Georgia Conference Center

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WHAT EVERY LAWYER NEEDS TO KNOW
ABOUT THE DIFFERENCES BETWEEN
THE GEORGIA EVIDENCE CODE AND THE
FEDERAL RULES OF EVIDENCE
EXPERT TESTIMONY IN GEORGIA
FRIDAY, OCTOBER 27, 2017
State Bar of Georgia Conference Center
104 Marietta St. NW Atlanta, Georgia
Appendix
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