

## **Archaic or Esoteric: The Practice of Law**

**By: Frances Kuo**

A Judge once said, “The practice of law is an art as well as knowing what is in the Code book. It’s a relationship as well as the law.” The new Georgia Evidence Code went into effect on January 1, 2013. As of the date of this writing, it is October 1, 2016. If you haven’t read it lately, take a look. If you’re a practitioner and a statute doesn’t make sense, perhaps you should challenge it on constitutional grounds. If you’re a Judge and a statute doesn’t make sense, you should pray that someone does. A lawyer did this recently in DeKalb County and Judge Seeliger to his credit ruled that the Violation of Street Gang Terrorism and Prevention Act, O.C.G.A. § 16-15-9, was unconstitutional. That’s progress. The take away: some laws should not be on the books.

Sometimes, a different approach in each case is desirable, in light of the facts, evidence and the new Georgia Evidence Code. For instance, under the old Georgia Evidence Code, it was considered permissible for the State to proffer evidence of similar transactions in lieu of live witnesses in an evidentiary hearing. But under the new Georgia Evidence Code, is this still prudent practice? Or is a party entitled to demand live witnesses and an evidentiary hearing? Since O.C.G.A. § 24-4-404 (b) and similar statutes affect a defendant’s liberty and substantial rights, they should be strictly construed against the State. A proffer is not the same thing as evidence. A trial is not comprised of proffers and statements of counsel; it consists of witnesses taking the stand and real and physical evidence.

An attorney should demand live witnesses and/or present evidence regarding a preliminary question of law such as the admissibility of evidence so that everyone is on the same playing field and knows what will be introduced at trial. The new Georgia Evidence Code expressly provides for this. *See*, O.C.G.A. § 24-1-104 (a), (e). Why wouldn’t you want to see the other side’s evidence before they actually put it up? When was the last time the State presented evidence at a motion to suppress evidence hearing or Jackson Denno hearing by proffer? It’s unfathomable, right?

An evidentiary hearing on an O.C.G.A. § 24-4-404(b) motion serves several purposes, actually: 1) clarity, 2) preview of the opposition’s actual evidence and 3) it makes a record. The Judge then decides whether the movant has met his burden by a preponderance of the evidence. O.C.G.A. § 24-1-104 (a).

Surprisingly, I still have a 1997 Donald Samuel Georgia Criminal Law Case Finder, 2<sup>nd</sup> Edition. Because the law has changed since then, I also have a 2016 Edition. Confucius said, “Study the past if you would divine the future.” We can understand the current state of the law if we know how it developed. Prior versions of a statute, the legislative history, and appellate decisions interpreting a statute provide valuable insights and perspectives and are helpful in understanding the current law, its application and/or misapplication. In enacting the new Georgia Evidence Code, the General Assembly pointedly remarked that it was “cognizant that there are

many issues regarding evidence that are not covered by the Federal Rules of Evidence and in those situations, the former provision of Title 24 have been retained. Unless displaced by the particular provisions of the Act, the General Assembly intends that the substantive law of evidence in Georgia as it existed on December 31, 2012 be retained.”

Still, the answers are not often clear because the rules of evidence are like algorithms. It’s difficult to understand certain statutes absent application, some contextual detail or example. This is true of the law as well. I remember when Judge Billy Ray was a new Judge in Gwinnett Superior Court. He read the advance sheets daily. That’s discipline. We can’t possibly know or understand every aspect of the law, but we can prepare for the future. It’s a beginning. You never know when you’ll need it. As Joy Elmer Morgan once said, “Wisdom comes not from experience, but from meditating on experience and assimilating it.” Then and only then can you connect the dots.