

CALENDAR CALL

"Georgia's Largest Law Firm"

GENERAL PRACTICE AND TRIAL SECTION STATE BAR OF GEORGIA

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The Tradition of Excellence Recipients for 2001 were presented their award at the General Practice and Trial Section breakfast June 14th in Kiawah Island, South Carolina, (from left to right) Robert M. Brinson, Rome, Judge Robert E. Flournoy, Jr., Marietta, Hon. Thomas B. Murphy, Bremen, J. Vincent Cook, Athens, and Section Chairman Sarah (Sally) B. Akins, of Savannah presented the awards.

Calendar Call is the official publication of the General Practice and Trial Section of the State of Georgia. Statements and opinions expressed in the editorials and articles are not necessarily those of the Section or the Bar. Calendar Call welcomes the submission of articles on topics of interest to the Section. Submissions should be double-spaced, typewritten and on letter-size paper and addressed to Susan L. Howick, Macey, Wilensky, Cohen, Wittner & Kessler, LLP, Marquis Two Tower, Suite 600, 285 Peachtree Center Avenue, NE, Atlanta, Georgia 30303. **Published by Appleby & Associates, Austell, Georgia.**

General Practice and Trial Section Celebrates its Thirtieth Anniversary

This bar year the General Practice and Trial Section celebrated its thirtieth anniversary. The section was founded in 1970. We began celebrating in January at the mid-year meeting in Atlanta with an excellent luncheon program put together by Lester Tate. Ben Weinberg and Morgan Akin, son of Warren Akin, hosted a round table discussion about "the way things were" when they began their law practices. In addition to sharing some wonderful stories of his own, Morgan shared some interesting and humorous anecdotes that he recalled about his father's law practice. Mr. Warren Akin is eighty seven years old and still comes to the office every day after over sixty five years practicing law.

The next part of our celebration was held during the Annual Meeting on Kiawah Island, South Carolina with "General Practice and Trial Section Thursday". We began with our annual Tradition of Excellence Awards Breakfast on Thursday morning June 14, 2001 at 7:30 a.m.. These awards are presented each year to four lawyers in the following categories: Plaintiff's attorney, Defense attorney, General Practitioner and Judge. The criteria is the recipient must be 1) a Georgia resident 2) have at least twenty years of outstanding achievement as a Trial Lawyer (Plaintiff or Defense), General Practitioner or Judge 3) be at least fifty years old 4) have made significant contribution to CLE or Bar activities 5) have a record of community service and 6) have a personal commitment to excellence.

The past Tradition of Excellence:

Edgar A. Neely, Jr.	Judge Marvin H. Shoob
Hamilton Lokey	Sidney O. Smith, Jr.
Bobby Lee Cook	Warren Aiken
Jack Helms	Harry L. Cashin, Jr.
Judge J. Robert Elliott	Edward T.M. Garland
Paul M. Hawkins	Justice Harold G. Clarke
James Charles Watkins	Irwin Stolz
Judge Anthony A. Alaimo	John Marshall
J.R. "Jake" Cullens	Rudolph Patterson
Kirk McAlpin	Judge Harold Murphy
Hugh G. Head, Jr.	Dennis T. Cathey
Judge Asa D. Kelley, Jr.	Albert G. Norman
G. Conley Ingram	Nickolas P. Chilivis
Ogden Doremus	Judge Dorothy Toth Beasley
Will Ed Smith	Manley F. Brown
Judge William W. Daniel	H. Sol Clark
Donald L. Hollowell	John Denney
Judge A. Richard Kenyon	Judge Marion I. Pope, Jr.
Alton D. Kitchings	Thomas R. Burnside, Jr.
Frank Love, Jr.	Judge A.W. Birdson, Jr.
Justice George T. Smith	Paul W. Painter, Jr.
Gene Mac Winburn	Scott Walters, Jr.
Judge Curtis V. Tillman	Justice George H. Carley
Frank Jones	Albert P. Reichert
Charles H. Hyatt	William S. Goodman
Hardy Gregory, Jr.	Thomas Wm. Malone
Judge James Barrow	Judge Faye Sanders Martin
H. Holcombe Perry, Jr.	Cubbedge Snow, Jr.
James I. Parker	Denmark Groover, Jr.
Bob Reinhardt	Joel O. Wooten, Jr.

This year's recipients were:

Plaintiff:

Vincent Cook

introduced by John Timmons and Mark Dehler

Defense:

Robert M. Brinson

introduced by J. Anderson Harp

General Practitioner:

Honorable Thomas B. Murphy

Speaker of the House of Representatives, introduced by Cathy Cox, Secretary of State.

Judge:

Judge Robert E. Flournoy, Jr

introduced by Judge Conley Ingram

As usual, the introductions and comments by the recipients were inspirational and laced with humor. If you have never attended a Tradition of Excellence Awards Breakfast, I encourage to join us next year. It is a very moving and delightful time each year.

At noon on Thursday we had a luncheon with Alexander Sanders as the keynote speaker. Mr. Sanders currently serves as the President of the College of Charleston. Prior to accepting that position, he served as the first Chief Judge of the Court of Appeals of South Carolina, he served in the South Carolina State House and began his career as a successful trial lawyer. President Sanders speech was worth the drive to Kiawah Island. You can read his speech at page 9 of this edition of *Calendar Call*.

We concluded "General Practice and Trial Thursday" with a reception honoring our Tradition of Excellence Award winners. This was truly a day to remember, made even more enjoyable by such an outstanding and prominent group of award winners.

As we look back over the last thirty

years of the section's history, we should be proud of what we have accomplished, thanks to the fine lawyers who founded this section and those who have led it.

The past chairs of the section are as follows:

Albert Fendig, Jr.
Paul M. Hawkins
Hamilton Lokey
Hugh G. Head
Edgar Neeley
Jack Helms
John C. Bell, Jr.
John Laney, III
Tommy Malone
William F. Underwood
Paul D. Hermann
Rudolph Patterson
Jim Pilcher
John James
Verlyn Baker
Paul W. Painter, Jr.
Joel O. Wooten, Jr.
Sherrod Taylor
Jim Webb
Bonnie Oliver
Kathleen Kessler
Joe Weeks
Bill Lundy
John Timmons

One of my favorite quotes is from John Quincy Adams in the movie *Amistad*, "Who we are is who we were." Let us hold this close to our hearts and be proud that "who we were" is personified by such fine lawyers as the past recipients of the Tradition of Excellence Awards, the founding members of our section and the past chairs of the section. These attorneys have given generously of their time and talents to enable those that come after them to carry on with the work of the section and to make our general and trial practices successful and more rewarding due to their leadership and example.

If you would like any additional information on the section or its activities or if you have an idea for something the section can do for you, please feel free to contact me. If you have an e-mail address that you have not provided to the section or The State Bar, please forward it to Betty Simms at bettygpt@mindspring.com.

Sally Akins
Chairman
June 2000 - 2001



**WE ARE PACKING OUR BAGS AND GOING TO ISLE OF PALMS
ANNOUNCING THE
GENERAL PRACTICE INSTITUTE
MARCH 21-23, 2002
WILD DUNES RESORT, ISLE OF PALMS, S.C.**

WATCH YOUR MAIL FOR MORE INFORMATION

MID YEAR MEETING LUNCHEON



Lauren Barrett, Director of Development for the Lawyers Foundation of Georgia presents a check to Chairman Sally Akins for matching grant funds to benefit the Mock Trial Program.



Chairman Sally Akins presents John Timmons with the Chairman's plaque for his leadership from January 99 to June 2000.



Guest speakers (L-R) William Akin and Ben Weinberg participated on a panel discussing "How the Practice of Law has changed in the last 20 years".

Introduction of Robert M. Brinson

By J. Anderson Harp



It is truly an honor and pleasure to introduce Bob Brinson as a Recipient of the Tradition of Excellence Award. Bob needs no introduction; he is a legend in his own mind, actually, he is a legend. I have had the privilege to practice with Bob for 17 years. When I was interviewing for the job, I was impressed that Bob had learned some rather revealing details about my college career. He must have believed we were kindred spirits or that I knew about the spirits. One of my closest friends in law school played a large role in my practicing with Bob. My friend had been offered the job with Bob, but chose instead to join an older more established firm. Thank goodness he did.

Of course the phrase most commonly used to describe the firm was "work hard, but play hard." I did not truly understand that phrase until I began working with Bob, and for 17

years I have watched him work harder than most and play harder than all. I quit trying to keep up years ago.

Bob Brinson was born May 4, 1940. He grew up in Summerville, Georgia and moved to Rome after his father, a lawyer, died. Rome is where he has lived and practiced law for thirty-eight (38) years. From Rome, Bob Brinson's name and reputation have spread far and wide across the State of Georgia, and other parts of the United States.

After graduating from college and law school at Emory, Bob began his legal career with Wright, Rogers, & Magruder in Rome. In 1975, he and King Askew formed Brinson & Askew. Their first announcement stated that "The King and I" was open for business. Six months later, Bob Berry joined Bob and King to form Brinson, Askew & Berry, now in its 26th year.

A consummate trial lawyer, Bob has always been held in highest regard by trial judges, appellate judges, plaintiffs' lawyers, defense lawyers, city lawyers, country lawyers and, most importantly, his clients. For example, after winning a case *against* the City of Rome, Bob was hired as City Attorney in 1968. He has served in that capacity ever since, making his tenure one of the longest in the State. In 1980, Bob argued before the United States Supreme Court, on behalf of Rome in *City of Rome vs. U.S.*, 446 U. S. 156 (1980). He has since represented numerous governmental entities and public officials in voting rights, civil rights, and zoning cases.

Apart from being City Attorney,

Bob has handled cases involving patent infringement, products liability, medical malpractice, business and commercial disputes, torts, professional malpractice, premises liability and toxic torts. Most recently, he served as lead attorney for a Fortune 20 corporation in a complex class action which he resolved, not surprisingly, in a favorable way for his client. He currently is involved in over half the class action cases pending before the Honorable Harold L. Murphy, United States District Court, Rome Division.

In 1986-87, Bob served as President of the State Bar of Georgia. He had previously been President of the Younger Lawyer Section of the State Bar. His contributions to the Bar are myriad, and his service record has always been impeccable. His peers and friends have often wondered how he managed to build a successful practice and law firm while at the same time doing so much for the Bar.

The answer is simple: Bob knows the art of enjoying his commitments and obligations. He has a knack for relishing what he does, and he is always "holding court" with his stories and humor. No one has ever accused Bob Brinson of being one-dimensional. To that end, he represents the very best in our profession.

He is a member of the American College of Trial Lawyers and has served as Master of the Bleckley Inn of Court. Throughout his career, he has written and spoken extensively at legal education seminars. He is a member of the Defense Research

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Introduction of Judge Robert E. Flournoy, Jr.

By Judge Conley Ingram



Big Bobby, as his wife Linda affectionately refers to him, is one of the funniest people you'll ever meet. He doesn't make a special effort to be funny, but he is just naturally funny. I should know because we have been friends for over 50 years and I have been around him in all kinds of circumstances. He is unflappable and unpredictable, but you can count on him - he is honest, loyal, smart and will give his best to whatever he undertakes. Judge Flournoy, and I mean the elder whom we honor this morning, and I were both born in September 1930 and are getting a little long in the tooth. I first met him at Emory when he was one of those loud rabble rousing KAs living next door to us genteel folks at the ATO House. He was active on the campus and in a lot of leadership roles and

close friends with lawyers-to-be Cubbedge Snow and his old high school buddy, C. B. Rogers. Here is how Big Bobby and C B Rogers looked during their big debate days some 50 years ago (show slide). They brought people like protestant preacher Billy Graham and Rep. Roy Harris to the campus just to stir up controversy. Big Bobby had been a Boy Governor of Georgia when he was in high school, so politics has been in his blood a long time - and I guess still is despite his non- partisan judicial mantle in later years.

Judge Flournoy went on to Georgia to law school and like many of us, in that era was a JAG officer during the Korean War. After clerking for the late Ralph Pharr, Superior Court Judge in Atlanta, and practicing for a short time with Hop Dunaway, he came to Marietta to practice law with Uncle Raymond Reed and me. And we haven't been able to run him off since then. He has been a huge success. We persuaded Mr. Reed to get rid of our linoleum floors for good carpets, swap out our aluminum furniture for fine wood and trade our pot belly stove and window air conditioners for central heat and air. Our clients liked it and we began to make more money. Later, Bob and I had a law firm called Ingram, Flournoy, Downey & Cleveland and we were doing well when I left to go on the Supreme Court. Bob continued successfully in the practice and also served in the Georgia legislature and subse-

quently as Mayor of Marietta before being appointed Superior Court Judge by Governor Joe Frank Harris, whom Bob calls our greatest governor at that time. Bob has just retired as Chief Judge and is now the junior Senior Judge in our circuit. I am pleased to recognize his beautiful and patient wife, Linda, who is here along with his 2 sons. Judge Robert E. Flournoy, III and plaintiff's lawyer, Matt Flournoy. He also has two daughters and six grandchildren, all by his former wife, Pam.

I wish I had time to tell you some of the many true funny stories about Big Bobby, but I don't. Let me leave you with a simple vignette that demonstrates his legal creativity. This happened several years ago when I was practicing law in Atlanta with Alston & Bird and Bob was still in private practice in Marietta. I was representing a big developer who had purchased a trailer park in Cobb with plans to build a huge apartment project on it and get rid of the substandard and somewhat undesirable trailers and the tenants in them. I had everything lined up to get the zoning smoothly I thought by giving a little moving money to each of the trailer park residents. Everything seemed fine until the day of the zoning hearing when I learned they had hired Bob to oppose the rezoning. Bob came up with the idea of comparing this simple rezoning to the infamous Cherokee Indian Trail of Tears

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Introduction of J. Vincent Cook

By John Timmons and Mark Dehler



Mark Dehler and I have the honor to present Jay Cook as the Recipient of this year's Tradition of Excellence Award to a Plaintiff's Lawyer. The Award is based upon a career of achievement in the profession and the community, and is aspirational to all members of the Bar. Jay is an outstanding recipient. I was chosen to give the serious side of Jay, and Mark will follow to lighten up the proceedings. It's just as well, because as I tried to extract some levity from Cook, Noell, Tolley, Bates & Michael, LLP, the well was dry. Perhaps it is coincidental that Jay's office is down the hall from Ed Tolley's. They stay abreast of what is happening in the General Assembly, and the ever present fear of yet another extension of the statutes of limitation may be responsible for the closed lips. At least everyone made me understand that the really bad

stuff did happen a long time ago. Whatever that means...

Jay was raised in Savannah, graduating from Savannah High School in 1958. He attended Armstrong Junior College and transferred to the University of Georgia, graduating in 1962. While in law school, he supported himself through graduate assistantships teaching business communications and economics. He graduated from the University of Georgia School of Law in 1964 and was admitted to the Bar the same year. He has practiced law in Athens ever since, having founded what is his present firm in 1970 with John Noell.

Jay's practice was initially general, taking everything that walked in. He did criminal law, collections, divorce, general business and corporate and personal injury. Over the years he developed a specialty representing plaintiffs in personal injury work, taking on the difficult medical negligence and product liability cases. His work has taken him to courts all over the state, both state and federal. He has excelled and his efforts have been noted. But they have been noted because he is a hard, dedicated, and effective worker.

He has worked for the profession and for the citizens who need representation. His memberships in professional organizations are numerous, and I will not mention them all. He has been president of the Western Circuit Bar Association. He has been President of the Georgia Trial Lawyers Association. He has been selected to be an ATLA Governor. He has been President of the Georgia Civil Justice

Foundation, American Board of Trial Advocates.

He has shared his knowledge as an author, writing chapters on negligence, nuisance, privacy and trespass for Lawyers Cooperative Publishing's series on Georgia Jurisprudence. He has been Editor of The Verdict. He has been on the Speaker's Bureau for GTLA for over fifteen years. He was CLE Chairman for five years.

A purpose of this Award is to recognize not just the professional side of the recipient, but also the community side. A lawyer's non-professional interaction with the larger community contributes to society's well-being by the application of time and talent, and brings credit to the profession. Jay has certainly given the legal profession credit with his numerous community activities. He is a past president and member of the Board of Directors of Athens Rotary. He was recognized as Athens Young Man of the Year. (You must know the most thrilling thing about receiving this award to Jay was when Betty called him to be sure he was over 50. We usually don't tell recipients that is SOP to boost their egos.) He is a past president of Athens Jaycees. The American Red Cross has awarded him the Medal for Humanity for his volunteer activities. He has coordinated community fund raising for the American Heart Association and the Empty Stocking Fund. He has been county campaign chairman for the Boy Scouts.

He has been a member of the boards of directors of the Athens

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Introduction of Honorable Thomas B. Murphy

By Cathy Cox, *Secretary of State*



The recipient of the General Practitioner's Tradition of Excellence Award is probably the most deserving—and most unassuming—lawyer I've ever known.

He probably knows Georgia law better than any other lawyer or judge in this state—because he's presided over most of the *writing* of that body of law, as well as a couple of Georgia constitutions!

Thomas B. Murphy graduated from North Georgia college and the University of Georgia School of Law, and was admitted to the practice of law here in 1949. He hasn't slowed down since. He holds a record in his home circuit for trying cases for five straight weeks. During that time, the judges changed out, new juries were picked, and opposing counsel rotated in and out—but Mr. Murphy stayed put, as his associates brought in a new crop of witnesses and clients every

few days—for five consecutive weeks. That included a murder trial and an assortment of other criminal and civil cases. Just think about that!

He has handled cases of every kind imaginable. From serious murder trials to car wreck cases to cow cases. He even tried a \$425 cow case *twice* against the railroads, who were represented by the distinguished (and no doubt expensive) Griffin Bell. Mr. Murphy won twice, too.

Tom Murphy started practicing law when it was a lot more fun than it is today. Although "fun" is a relative term, his colleagues vividly remember that as a young lawyer (back when some judges used to refer to him as "Little Tommy") he was appointed to represent a fellow charged with a crime. Mr. Murphy's cousin Harold Murphy, who is now a federal judge, also got involved (and I'm not quite sure whether he was on the same side or not). But during this trial, the two Murphys almost came to blows, literally, in a bare knuckles fight. Now, some compared it to the world's great mis-match, the Dempsey-Tunney prize fight, but lots of onlookers never saw anything like it. In those days, you would duke it out in the courtroom, then everyone went to the one restaurant in Buchanan, the county seat, for lunch. Opposing attorneys would stare each other down across the tables at lunch for a little extra drama—then they would all shake hands at the end of the day. All agreements in those days were by handshake—writing was rarely necessary.

Tom Murphy has always been known by his peers as a zealous advo-

cate—one who absolutely became furious when he saw an injustice—and he would do whatever it took to right a wrong.

His longtime friend, Judge Donald Howe, said about Tom Murphy, "He could cut your throat *in* court, but never out of court. He would fight to his last breath over every wrong he saw."

As strong and as passionate an advocate as Tom Murphy has always been, you need to know more to understand the full measure of this man.

He started practicing law in 1949 with his brother James, who has been confined to a wheelchair and crutches because of severe arthritis. For years, Tom picked up his brother at his house in the morning, loaded his wheelchair onto the top of their station wagon, lifted his brother into the car and then into his office. If they had a trial, he carried his brother up the steep old courthouse stairs, then brought the wheelchair up. He then repeated this scenario afterwards back to the car. He took him home to lunch every day. For years and years, Tom Murphy carried out this routine every day.

He worshipped his brother James, and often referred to him as the smartest person he ever knew.

Perhaps because of his brother's difficulties, perhaps because of his "raising," Tom Murphy has always had a huge soft spot for the weak, the oppressed, the disabled, the needy, the mistreated, the elderly, the quintessential "little man." Over and over

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The Good Old Days

By Alex Sanders

President, College of Charleston

General Practice & Trial Section Luncheon
Kiawah, South Carolina



Welcome to South Carolina. I have always thought Georgia lawyers and South Carolina lawyers have a special relationship. We are separated by the Savannah River and not much else. Stonewall Jackson's last words were: "Let us cross over the river and rest in the shade of the trees." My grandfather - not my great-grandfather, my father's father-scouted for Stonewall Jackson in Northern Virginia.

Poet-songwriter Robin Williams expanded on his last words to reflect his final thoughts:

*I leave this world surrounded
By friends and kindred dear.
I leave this world in victory
With the sound of the battle near.*

*From misery and temptation
I'll be forever freed.
Let us cross over the river
And rest in the shade of the trees.*

I think about Georgia lawyers as my brothers and sisters, and today, at this elegant venue, I feel like I am surrounded today by friends and kindred dear. Thank you for coming to visit us in South Carolina, although I sometimes feel like Kiawah Island is not quite South Carolina. Somebody said Kiawah and Hilton Head are what 250,000 Confederates died to prevent. Of course. I don't feel that way about these beautiful places. Still, there are a lot of Yankees. suppose they improve our gene pool.

The College of Charleston - where I have been safely ensconced for the past nine years - was founded two hundred and thirty-one years ago by three men who signed the Declaration of Independence and three other men who were authors of America's first Constitution. All six were lawyers. One of them was John Rutledge, Chief Justice of the United States when George Washington was President. He died in the President's House at the College of Charleston.

The Spoleto tourists come through the house every Saturday morning, and sometimes my bed isn't made up. We tell them, "That's the bed John Rutledge died in. We leave it like that in his memory." Yankees will believe anything. They present us with the grand opportunity, in the words of Lincoln, to "fool some of the people all of the time."

I hope you have a chance to visit the College of Charleston sometime. The faculty is brilliant, the

administration is efficient, and like the children of Lake Woebegone, all the students are above average. Without a doubt, the College is the most elegant institution of higher learning since the 12th century. I sent my daughter to the University of Virginia. I thought I should. The First President of UVA was Thomas Jefferson. He sent his children to the College of Charleston - at least some of his children.

When my daughter was at the University of Virginia, she had an unusual roommate, a member of the Royal Family of Hungary in exile. She was a beautiful girl. She looked just like Grace Kelly. Her name was "Viva." "Viva," in Hungarian, means "paper towel." Do you believe that? That's a joke. But the rest of the story is true.

Needless to say, I was mightily impressed. And, I was even more impressed when, at parents weekend. I had the opportunity to meet her mother, a bona fide Hungarian princess. Frankly, I was somewhat at a loss for words. I didn't know what to say. What do you say to a Hungarian princess?

In the South, when we meet somebody, we always say, "Where are you from?" You can't say that to a Hungarian princess. "Where are you from?" So I said what people in the North say when they meet somebody for the first time. I said, "What do you do?" That turned out to be an even worse question "What do you do?"

"That is an embarrassing question," she replied. "I don't do any-

thing. I am a princess. Princesses don't do anything. But, no one understands that in a democratic society. So, ever since we have lived in America, that has been a very embarrassing question for me - a question with no good answer. At least it doesn't have an answer anyone in America can understand."

In a desperate effort to redeem myself, I gave her some advice. "The next time anyone in America asks you what you do, say 'I play the harp.' That is my advice. No one will ever have a harp. If, by chance, they do have one, someone will be playing it. So, I promise you will be safe. And the answer will be perfectly acceptable, even in so egalitarian a society as a democracy. And, what's more - if I may presume to say so - the answer is also entirely suitable for a Hungarian princess."

She thanked me - a little perfunctorily I thought - and terminated our conversation. I never saw her again. That was in 1988. That circumstance - not knowing what to say to somebody - only happened one other time to me. Almost exactly five years later, there was a conference at the College of a distinguished group of nuclear scientists from all over the world.

I had a reception for them at the President's House. One of the best things about the job I have is the chance to meet so many interesting people, but on this occasion I found myself, once again, at a loss for words. What do you say to a nuclear scientist from a foreign country?

So, I was delighted to find that one of the nuclear scientists came from Hungary. I had something to say. "You might be interested to know," I said, "I once had the great privilege of meeting a Hungarian princess."

His eyes lit up. "Oh," he said, "the Royal Family, for many years in exile, has just returned to

Hungary. And, the people are thrilled," he said. "National pride has returned," he said. "And, the princess is so beautiful," he said. "And so brilliant," he said. And he said, "she plays the harp"

What has that got to do with anything? I tell you what lawyers like you were always telling me when I was a judge: "Bear with me your honor, I'll connect it up eventually." Okay?

The name of this speech is "The Good Old Days." Of all the several things I have done in my life, being a lawyer is the only one I miss, and I am greatly looking forward to resuming the practice of law again soon. Whenever I say that, somebody always pipes up with the tiresome complaint that the practice of law has changed. I hear that dreary lament repeated, over and over wherever I go: The practice of law has changed. The practice of law has changed.

Of course, the practice of law has changed. Times change. When I first became a lawyer, Jane Fonda was leading sit-ins and demonstrations against the war in Vietnam. Then she became an exercise guru, swapped sit-ins for sit-ups, jogging for protest marches, and married an Atlanta boy. Now she's left him and apologized for opposing the war in Vietnam. As I say, times change. The law shapes the future through change.

*New occasions teach new duties,
Time makes ancient good uncouth:
[We] must upward still and onward
Who would keep abreast of truth.*

Perhaps, it's necessary to step back for a while to appreciate the changes that have occurred. Believe me, I have had the chance to step back. When I began practicing law almost forty years ago, criminal defendants were almost never represented by lawyers. Gideon's trumpet had not sounded. On the civil side, discovery in the state courts was virtually nonexistent.

Interrogatories were unheard of, and depositions were rarely allowed. Trial was by ambush.

There was no such thing in South Carolina or Georgia as rape by a husband of his wife. Husbands had a property right in their wives, but not vice versa. The custody of a child could be transferred by a deed. Attempted murder was a misdemeanor in South Carolina.

Admission to the only law school in South Carolina was based in large part on the family background of the applicant. The Dean of the University of South Carolina Law School had never attended law school himself. Very few women had ever attended any law school, and there were no women judges in South Carolina. Women were excluded from South Carolina juries.

The anti-lynching law had been defeated in Congress as a result of a filibuster by a South Carolina senator - with the help of a Georgia senator. Blacks were not allowed to use the bathrooms in the courthouses where I practiced. The water fountains were segregated, and even the plaques in the courthouses memorializing World War II veterans, who died fighting for their country, listed their names in separate columns, one labeled "White" and the other "Colored." Only three black lawyers practiced in Columbia, South Carolina, the capitol of the state. They were not allowed to join the county Bar Association or the state Bar Association.

One of them, his name was Matthew Perry - remember that name - told me about returning from World War II and being made to eat in the kitchen of a restaurant in North Carolina, while German prisoners of war were served in the main diningroom. You can't tell me things were better then. Better for whom? Those who complain about change in the practice of law are nostalgic for a grand era in the

law that never was.

Today, a woman is Chief Justice of the South Carolina Supreme Court, and a woman is Chief Judge of the South Carolina Court of Appeals. An African American has been elected President of the State Bar, and a woman will become President of the State Bar next year. Matthew Perry remember him - is a senior federal judge, and the new federal courthouse in Columbia is named for him. The federal courthouse in Columbia was previously named for Strom Thurmond. Indeed, times have changed.

In the dreadful Civil War prison camp, named Andersonville, the Confederates did one thing very well: They kept good records. The cause of death of each of the thousands who perished there was meticulously recorded. One cause recorded was "nostalgia." The only thing they know is what they don't like. "Died of nostalgia," the records say. There are lawyers today who are dying of nostalgia. They long for a grand time in the law that never was. They want a life of unrelenting sameness. They want to live life in a rut. Life is comfortable there for some people, but that is a hopeless ambition.

Change almost always represents progress to the human condition. Constancy almost always represents stagnation. In any event, change is certain. There's no point in complaining about it. Natural history teaches that survival in a changing world does not depend on physical strength or on high intelligence. Survival depends on the ability to change.

The search for static security is misguided. Security can only be achieved through adapting old ideas to current facts. Life is under no obligation to give us what we expect, and expecting the world to treat you fairly because you are a good person is like expecting a bull not to charge you because you are a vegetarian.

Now the strange-sounding year 2001 is here, a new millennium is upon us, and in South Carolina and in Georgia, we tenaciously adhere to the faith of our fathers - and mothers. Old times here are not forgotten. That is not always such a bad thing. At the same time, we must recognize that we have a long, long way to go, and wishes will not make us improve.

The human condition is not "one damn thing after another." We are not sleep walkers. Free will gives us both choice and responsibility. The law is not an independent branch of thought, static like mathematics or physics. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices lawyers and judges share with their fellow human beings have a good deal more to do than precedent in determining the rules by which men and women are governed.

Properly practiced, the law stands against any winds that blow, as havens of refuge for those who suffer because they are helpless, weak, outnumbered, or because they are nonconforming victims of prejudice and public excitement. Properly practiced, the law is a tool for the alleviation of human misery and human suffering. Properly practiced, the law makes possible the processes of commerce that bring realization to the twin goals of prosperity and peace in the world. Properly practiced, the law is the most noble pursuit of humankind. I look forward to rejoining you in that grand endeavor.

As lawyers, we are a part of a rich heritage - the profession of the founders of the College of Charleston. We are each the sum total of generations of growing, yearning, of planning and failing, of building and destroying and building again, unrelenting change. If we look back far enough - to our

founders and beyond - within each of us is the entire history of the Western World. Nobody - not generals or admirals, not preachers, not journalists, not legislators, not governors, not even presidents - have shaped America as profoundly as lawyers. The path of the law, like the path of life, has few signposts but many footprints.

We contain within each of us the potential, the energy, the dreams of all who have gone before; and if we are to discover our own unique role on earth, we must look back at those dreams and try to understand why they failed and how they succeeded, so that we may dream more clearly and act more nobly in our own lives.

We can't be like the Hungarian Princess. We have to actually do something. (See, I told you I would connect it up.)

Thank you.

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A Brief Introduction to The Georgia Rules of Professional Conduct

Office of the General Counsel
State Bar of Georgia
50 Hurt Plaza
800 The Hurt Building
Atlanta, Georgia 30303
(404) 527-8720 (in Atlanta)
1-800-682-9806 (toll-free Ethics Helpline)

THE NEW RULES

On June 12, 2000, the Supreme Court of Georgia entered an order adopting new Georgia Rules of Professional Conduct ("GRPC"). When the rules go into effect on January 1, 2001, they will replace the existing disciplinary Standards [Bar Rule 4-102(d)] as well as the aspirational Georgia Code of Professional Responsibility currently found at Part 3 of the Bar Rules.

The new rules are based on the American Bar Association Model Rules of Professional Conduct. Since at least 45 states and the District of Columbia use some version of the ABA Model Rules, there will now be a body of relevant case law to use when you research ethics issues. There are also ethics opinions from the ABA and from other states which Georgia lawyers may find helpful in situations where there is no other guidance.

The Bar's Disciplinary Rules and Procedures Committee worked for two years to develop the GRPC. The Committee included a diverse group of lawyers from all practice areas and all parts of the state. There were three non-lawyer committee members representing the public. The Committee went rule by rule through the ABA Model and compared its provisions to the current Georgia rules. In many instances the Committee decided to adopt the ABA rule with few, if any, revisions. In a few cases the Committee substituted the current

Georgia rule for the ABA model, or changed the ABA version.

Format--Table of Contents

The new document is organized into nine "parts." Each part deals with a different subject matter.

n Part One is called "Client/Lawyer Relationship." It deals with just that--the lawyer's obligation to communicate with the client, to represent the client competently, to keep the client's secrets, to be free from conflicts which would compromise the lawyer's loyalty, and to safeguard the client's property.

n Part Two deals with the lawyer's role as a counselor. The rules in Part Two provide guidance for a lawyer serving as an advisor or an intermediary.

n Part Three is titled "Advocate." It covers the lawyer's duties when litigating a case, or when representing a client before a legislative or other nonjudicative body. The rules in Part Three include the obligation to be truthful with a tribunal, to expedite litigation, and to refrain from bringing groundless claims. Part Three also includes rules regarding trial publicity, the special duties of prosecutors and the role of a lawyer who is called as a witness in a case.

n Part Four, "Transactions with Persons Other Than Clients,"

includes rules requiring the lawyer to be truthful in statements to others, and rules governing the lawyer's dealings with adverse parties.

n Part Five deals with law firms and associations. Those rules set forth the ethical obligations of supervisory and subordinate lawyers within a firm or organization, responsibilities regarding non-lawyer staff, and the lawyer's obligations when rendering law-related services as well as legal services.

n Part Six is titled "Public Service." The rules in Part Six set forth the lawyer's obligation to render *pro bono* service and to engage in other activity designed to improve our system of justice.

n Part Seven, "Information about Legal Services," is the section regarding advertising and solicitation. These rules are the same as the current Georgia rules. The Disciplinary Rules and Procedures Committee substituted Georgia's rules for the ABA Model since the current Georgia rules survived a federal constitutional challenge.

n Part Eight is called "Maintaining the Integrity of the Profession." It includes rules requiring truthfulness in the bar admissions process and prohibiting unethical conduct by candidates for

judicial office. The rule governing criminal conduct by lawyers and the aspirational rule which encourages a lawyer to report unethical conduct to disciplinary authorities are also in Part Eight.

n **Part Nine** is called "Miscellaneous." The Georgia Committee created Part Nine as a catchall. There were several Georgia rules that did not have a counterpart in the ABA model. Part Nine includes rules about reciprocal discipline and the requirement that a lawyer respond to disciplinary authorities investigating a grievance.

As the Georgia Supreme Court amends these rules, they will be placed in the appropriate "part," ensuring the document remains organized in a logical way.

Format-Preamble, Scope and Terminology

The new rules contain a preliminary section titled "Preamble, Scope and Terminology." The section serves as a useful orientation to the entire document. The Preamble includes language suggesting these rules are not intended to form the basis for civil liability; *i.e.*, there is no presumption that a violation of a rule means a lawyer has breached a legal duty.

Paragraph 13 of the Scope section clarifies that the new document combines aspirational and mandatory rules. As you recall, the current Georgia rules contain the aspirational Code of Professional Responsibility at Part 3, while the mandatory disciplinary Standards are contained in Bar Rule 4-102 at Part 4. Currently there is no disciplinary penalty for violating an aspirational rule; disciplinary penalties only apply when a lawyer has violated one of the 74 mandatory Standards. Paragraph 13 makes it clear that some of the rules, cast in terms of "shall" or "shall not," are imperatives. Those rules define

proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has professional discretion. No **disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion.**" (emphasis added)

The "Terminology" section attempts to define some of the legal terms found in the rules.

Format-The Rules and Comments

The rules are printed in a format which the Disciplinary Rules and Procedures Committee hopes will be user-friendly. The text of each rule is printed in boldface. At the end of the rule is a statement of the maximum penalty for a violation of the rule. If an entire rule is aspirational, there is a statement at the end of that rule that there is no disciplinary penalty for a violation of that rule.

Following each rule is a section titled "Comment." The purpose of the comment is to explain the rule. The comment cannot change the meaning of the rule, and there is no disciplinary penalty for acting contrary to the advice of a comment. For ease in conducting research, Georgia has numbered the comments to track the comments in the ABA Model Rules. In instances where the Georgia committee added comments or decided not to adopt an ABA comment, they distinguished their variations by labeling the comments A and B. See rule I.I, Comments I A (Georgia language) and IB (ABA language) as an example. When the Georgia committee chose not to adopt the ABA comment, it used the label "reserved" in order to preserve the numbering system. See Paragraph 20 of the *Scope* section, or comments 2 and 3 of Rule 3.8 as examples.

Implementation

The new rules go into effect January 1, 2001. They will appear in the 2000-'01 edition of the State Bar of Georgia Directory and Handbook, which every Bar member will receive. In the meantime, you can obtain a copy of the rules from the State Bar of Georgia's web site, www.gabar.org.

Lawyer conduct can only be governed by the rules in effect when the conduct occurred. In screening grievances the Office of the General Counsel will use the new rules for conduct which occurs after January 1, 2001. Conduct occurring prior to January 1, 2001 will still be governed by the 74 disciplinary Standards. The 2000-'01 Bar Directory and Handbook will not contain the Standards, but they will continue to be available on the Bar's web site. Since there is a four-year statute of limitations for filing a disciplinary grievance, the Office of the General Counsel recommends that lawyers keep both sets of rules on hand through 2004.

The Office of the General Counsel does not anticipate that these substantive changes to the disciplinary rules will have much impact on other bar rules. The procedural rules governing disciplinary cases will not change. The Formal Advisory Opinion Board is reviewing its opinions to see whether any should be rewritten based upon the new rules. Any necessary changes will be brought before the Bar's Board of Governors in keeping with the regular procedure for amending the Bar Rules.

Where to Get Help

The Ethics Helpline is available to lawyers who have questions about the new rules. The Helpline operates 9:00 a.m.-5:00 p.m. Monday through Friday and is staffed by lawyers in the Office of General Counsel. The lawyers can provide guidance in dealing with

ethical quandaries; however, their advice is informal only and is not binding on the Office of General Counsel, the State Disciplinary Board, the State Bar of Georgia, or the Supreme Court of Georgia if a disciplinary investigation results

from a given situation. The calls are kept confidential, and the Bar does not take action against any lawyer based upon information learned in a Helpline call. Bar Rule 4-401 describes the scope of the informal ethics advice offered by

the Office of the General Counsel. **To reach the Ethics Helpline, call (404) 527-8741 in Atlanta or 1-800-682-9806 toll free.**

Standard-to-Rule Comparison Chart

This chart was prepared by the Office of the General Counsel and is not part of the Supreme Court Order adopting the new rules. The new Georgia Rules of Professional Conduct are far more comprehensive than the old rules. For this reason, this chart is only a very basic guide. Please be aware that certain concepts are discussed in several different Rules.

Standard	Rule	Standard	Rule	Standard	Rule
1	8.1				
2	8.1	31 (d)	1.5 (c)	62	1.15 (1) (a)
3	8.4(a)(3)	32	1.8 (e)	63	1.15 (1) (a)
4	8.4(a)(4)	33	1.8 (a)	64	8.4(a)(5)
5	7.1 (a)	34	1.8(d)	65(a)	1.15 (1) (a)
6(a)	7.2(a)	35	1.7	65(b)	1.15(l)(a) and 1.15(11)(c)
6(b)	7.3 (b)	36	1.7	65(c)	none
6(c)	7.2(b)	37	1.7	65(d)	1.15(II)(a), (b)
6(d)	7.3 (a)	38	1.10	65.1	1.15(III)(a)
7	7.1 (b)	39	1.8 (g)	65.2	1.15(III)(b)
8	7.5(a)	40	1.8 (f)	65.3	1.15(III)(c),(d)
9(a)	7.5(e)	41	5.4(c)	65.4	1.15(111)(e)
9(b)	7.5(c)	42	5.4(d)	66	8.4
10	7.5 (d)	43	1.1	67	9.4
11	7.5(b)	44	1.3	68	9.3
12	7.3 (d)	45(a)	3.3(a)(4); (c)	69	1.9
13	7.3(c)(1)	45(b)	3.3(a)(1) & 4.1 (a)	70	4.2(b)
14	7.3 (c) (2)	45(c)	14(b)(1) & 3.3(a)(4)	71	5.1
15	none	45(d)	1.2(d)	72	5.2
16	7.3 (e)	45(e)	8.4(a)(1)	73	5.3 (d)
17	7.3 (e)	45(f)	1.2(a)	74	8.2
18	7.4	46	3.4(a)		
19	7.4	47	4.2(a)		
20	1.5(e)	48	4.3 (a) and (b)		
21	1.16(a)	49	3.4(h)		
22	1.16	50	3.5(c)		
23	1.16(d)	51	3.5		
24	5.5(b)	52	3.5		
25	5.5(a)	53	4.4		
26	5.4	54	3.5		
27	5.4(b)	55	none		
28	1.6	56	3.4(a)		
29	5.3	57	3.4(f)		
30	1.7(a)	58	3.4(b)(3)		
31 (a)	1.5 (a)	59	15(a)		
31 (b)	1.5 (a)	60	3.5 (b)		
31 (c)	1.80)	61	1.15(1)(b)		

Legal Technology and the 21st Century Lawyer

By Natalie R. Thornwell



Natalie R. Thornwell is the Director of the State Bar of Georgia's Law Practice Management Program, which assists law firms with office management and technology concerns. She is a certified consultant on several legal-specific software packages. She is also a Practice Management Advisor for the ABA's Law Practice Management Section. A graduate of Spelman College, she has attended law school at the University of Miami and Georgia State University.

A good friend of mine declares, "It's not your great-grandfather's law practice." In his great wisdom, Jim Calloway, Director of the Oklahoma Bar Association's Management Assistance Program, has with this statement paved the way for understanding the tremendous amount of change that has taken place in the legal industry over the past 100 or so years.

A major factor contributing to the

change in the lives of lawyers has been and will continue to be the advancements made in computer technology, and more specifically, those changes occurring in the area of legal-specific computer technology. We need only look to the 21st Century Lawyer and the tools she uses to handle her clients' affairs. Who is this 21st Century Lawyer?

Before identifying the 21st Century Lawyer, it is necessary to review the key technological advancements that have had a major impact on the legal industry thus far. The advancements that come immediately to mind are those that deal with managing information. Because lawyers process information, it stands to reason that any advancement in the systems used to manage information will have an impact on the way lawyers practice law. Manual systems aside, the invention or introduction of the following items into the legal workplace has made the 21st Century Lawyer what he is today.

- n Telephones
- n Typewriters
- n Keyboards
- n Carbon Paper
- n VCRs
- n Fax Machines
- n Voice Mail
- n Personal Computers
- n Computer Networks
- n Scanners
- n Legal Software
- n The Internet
- n Laptop Computers
- n E-mail
- n Digital Cameras
- n Palm Devices
- n Cellular Phones

With all of these advancements, the lawyer is now a very flexible, accessible, and efficient being. But exactly how is this accomplished you ask? Why is there still a great number of attorneys who only wish to one day reach the level of efficiency that the 21st Century Lawyer has attained? Is it their lack of understanding the purpose of technology? Or, is it their failing to fully utilize the technological advancements outlined here?

How can she be so smart? How can he be so efficient? Simply put, the 21st Century Lawyer keeps up. As the technology changes, she evaluates her current position and moves when the technology proves itself to be of benefit to the expedition of completing tasks, saving time, and making money. In the long run, she can't afford not to keep up.

So, exactly how does this work? Well, first she begins with an honest assessment of her current technological state. This takes time and the ability to be critical of oneself, but it is necessary. The assessment involves noting any breakdowns or weaknesses in the systems and procedures she uses. In the assessment, she covers not only the technology, but the way she uses the technology as well. Her review looks at what she has in place for case management, document assembly, litigation support, knowledge management, time and billing, trust accounting, general ledger accounting, and practice-specific tasks. If these systems are automated, she looks to see if they need to be upgraded. If they are

not, she asks whether automating the systems will make her work easier, faster, and more profitable. Of course, she knows if and when she will need to work with a consulting professional, and includes this in her strategy. She devises an implementation plan that includes everything from purchasing to training, and then makes her move forward.

The 21st Century Lawyer understands the impact of networks and capitalizes on the technology. She knows the Internet, intranets, and extranets were all created from this basic technological concept of linking computers and devices together to make the flow of information more efficient.

He takes advantage of the connected communities that can be developed over computer networks. He includes access to his co-workers via an intranet, and then opens up the network further and includes outside parties on an extranet. He is a master at the utilization of e-mail, document management, and knowledge management solutions. His collaboration skills are the best. He even understands the need to be continually connected to the networked communities and the information on the networks. So, he is the ultimate mobile lawyer as well.

The PC itself was so important to moving along the mechanization of the delivery of legal documents that one rarely speaks of typewriter ribbons, carbon paper, white out, or the first electronic word processors anymore. Oh, the horror stories about how long it took to create and deliver a clean document! To understand the network is just as vital. The impact of being able to immediately share information and resources has been phenomenal. Being able to access documents, messages, faxes, printers, and copiers, via a computer network has transformed many core elements of law practice.

The lawyer seeking to be like the 21st Century Lawyer fails to grasp the importance of networks and continues to try and compete with pen and pad. "I can do the same thing," or "I have always done it like this," are heard as the initial excuses. Followed by, "I don't have time to be bothered with that." Then, augmented with the comments of unmotivated, untrained staff looking to continue to operate in the same old way – "He's not going to use that," the pitiful firm continues to use old systems and inefficient procedures. They "blindly" remain slower, less efficient, and inaccessible.

Beyond technology, the 21st Century Lawyer is shrewd in her marketing and management efforts. The 21st Century Lawyer takes advantage, once again, of a network, but this time the network is human in form. Clients and their needs are the priority. She builds networks both inside and outside of the office focusing on the client.

In the 21st Century Lawyer's office, the staff operates under written policies and procedures that make them feel they are part of a team. The firm's purpose is carried out as solutions are found for the problems of clients. This internal network is constantly tested and monitored. The 21st Century Lawyer knows this network should never break down. To ensure smooth operation, the policies and procedures are implemented and followed consistently. When changes need to be made, they are made and evaluations for success are regularly conducted. The office network for the 21st Century Lawyer runs smoothly.

Using innovative marketing strategies focused on the client, the 21st Century Lawyer meticulously maintains the network external to the office network. Starting with clients, he makes sure they know who is working for them. They too are encouraged to belong to the

"network" that will help solve their legal problems. Via ethical and professional counseling, the 21st Century Lawyer's clients are informed and educated about key decisions regarding their legal woes. The process is revealed, and they are invited to take an active part in it. They then become a part of the network.

Further along the network, the 21st Century Lawyer adds prospects, former clients, and colleagues, and works to constantly demonstrate expertise in the area of law in which he specializes. He is "well-connected," and stays that way by staying in constant touch. Participation in civic activities and concern for the community are just a part of marketing for the 21st Century Lawyer. He does pro bono work. You can find him at local bar association meetings or involved in Continuing Legal Education programs.

You will hear of him via newsletters, radio and television appearances, office brochures, and other marketing packages. He is not likely to blend into the background. Instead, he will stand out as a leader looking for yet another cause to make a benefactor of his efforts.

Many lawyers fail miserably when it comes to office and community networking. You know them because of the reputation that precedes them. They are not good bosses. Their office is in shambles. Internal distress and disorganization is the norm. They often find themselves in trouble and involved in unethical situations. They are not concerned about their clients, and fail to keep them abreast of their matters. They don't return phone calls, and they don't treat other attorneys with civility. They can not be counted on for active participation in any civic or local concern. Their failure to properly "network" haunts the profession.

Well, this is certainly not the case

of the 21st Century Lawyer! The 21st Century Lawyer looks enthusiastically to the future for even better ways to deliver quality legal services. She looks to technology, marketing, and office management advancements for ways of making her law practice more productive and more profitable.

What solutions are on the horizon? What legal technology will lead the industry next? Will it be the 2nd version of the Internet currently being tested by several universities that is said to be ten times faster than the current Internet?

Or will it be the continuation of the digital revolution being led by the further development of digital mobile text messaging? Have you checked your e-mail on your pager yet? Or the next wave of handheld devices? Did you "beam" your business card to other attendees at a recent conference? What about software? Can your staff now enter information into one software program, and have it "seamlessly" appear in the case management, litigation support, time and billing, and general ledger accounting applications too?

What revolution will spark the way for lawyers next? The 21st Century Lawyer does not know for sure, but she keeps a close watch over her office, over her client base, and over her outside connections. She looks ahead already knowing that the practice of law, while much different than that of her great-grandfather's, will be even more different for her great-granddaughter. So, she continues to lead the way. Next destination – 22nd Century Lawyering.

Rogert M. Brinson *continuation*

Institute, Georgia Defense Lawyers Association, American Board of Trial Advocates, and numerous other associations.

Outside his profession, he has served a seven year term on the State of Georgia Board of Education. He is a member of the Exchange Club of Rome, where he is a fixture at the Annual Fall Coosa Valley Fair, and a member of the Georgia Chamber of Commerce and the Greater Rome Chamber of Commerce. He is an avid Georgia Bulldog and member of Gridiron Secret Society.

What makes Bob Brinson a deserv-

ing recipient of this prestigious award was recently displayed in an unfortunate matter presently pending. Basically one of the firm's clients came by the office one afternoon to meet with one of our partners to discuss the status of his cases when the client received a call to learn that the District Attorney had filed a Civil RICO forfeiture action against him, freezing all accounts and seizing his assets, including his home, while his wife and children were home. After we learned of this tragedy, Bob began to look into the case, reviewing the Complaint and the ex parte Order.

He researched for hours on end. For four days straight he worked almost around the clock. I would wake up to his phone calls and go to sleep with his calls, as we bounced strategy and ideas back and forth, or mostly from him. At age 60, he outworked every lawyer in our office. Bob is an excellent, hard working, dedicated, determined and dependable lawyer.

So, it gives me great pleasure to introduce and congratulate my mentor, my partner, and my friend Bob Brinson to receive the Tradition of Excellence Award.

Robert Flournoy, Jr. *continuation*

relocation to Oklahoma. You recall when literally thousands of Indians were lost to starvation, exhaustion and disease. Well, Bob had the residents hold up homemade signs reading "Not another trail of tears" and "We will not be forced from our homes at gunpoint" and "It's our homes this time, next time it could be yours". Bob had the residents softly humming religious hymns. It became so emotional that I asked the Commissioner's to continue the hearing so that I could resolve the

controversy. It's really amazing what a little green back poultice can do for a problem. I just had the developer pay the residents a little more money to cover their relocation expenses and miraculously the trail of tears became a trail of opportunity. Only Bob Flournoy could have turned a simple rezoning into a major and fundamental assault on the American way of life.

Big Bobby is one of the very few people I know who has served successfully in all three branches of our

government - the State Legislature, the Executive Branch as Mayor of Marietta and as an exemplary Superior Court Judge in the Cobb Circuit. Thank you Judge Flournoy for your many years of service and leadership in this great profession of the law. You are a very worthy recipient of the award you receive today embodying a tradition of excellence as an outstanding Superior Court Judge. I congratulate you.

Discovery of Electronic Evidence: Strategies and Guidelines For Litigators, Corporate Counsel and Their Clients

Hilary Harp

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Hilary Harp is a Partner in the Litigation Department in the Atlanta office of Powell, Goldstein, Frazer & Murphy, LLP. Ms. Harp concentrates in commercial litigation and corporate counseling, with an emphasis in intellectual property. Ms. Harp has represented clients at both the trial and appellate level in cases involving patents, trademarks, copyrights, domain names, trade secrets, unfair competition, false advertising, restrictive covenants, and general commercial disputes. Ms. Harp received both her B.A. degree and her J.D. degree from the University of Georgia.

I. Overview Over the last several years, courts around the country have confirmed that computerized data is discoverable if the information is relevant. Laptops, file servers, backup tapes, optical disks, hard disks, and floppy disks are considered discoverable electronic media and email and voice mail messages are considered legal documents. As businesses become increasingly dependent on electronic communication and data storage, it is essential for litigators and their clients to understand and appreciate the advantages and pitfalls of offensive and defensive discovery of electronic evidence.

II. Prevalence and Permanence of Electronic Evidence in the Work Place

Because routine discovery of electronic evidence is a fairly recent development, many litigators and their clients often fail to recognize the relative permanence of email and other electronic documents. Pressing the delete button, in most cases, does not result in the actual deletion of the document.

For example, in most corporations with computer networks, when a user sends an email, the original document is stored in the user's computer and a copy is sent to a file server. The file server stores the copy it receives and makes another copy to send to the recipient. The email message may go through more than one server, and each

server will store a copy and make a new copy, thus generating and storing several copies. Even if the recipient deletes the message, only the recipient's copy will be deleted while the other copies will continue to reside on other recipients' servers and may ultimately be saved in the backup files.

Moreover, when a user deletes electronic media from a computer, the document is not actually removed. Instead, only the indexing for the document is removed, and the file is marked as reusable. The document will remain unchanged on the computer until it is written over or until a software program is used to permanently discard old messages. However, by the time this occurs, multiple copies of the message may exist on the mainframe, other PCs, laptops, or floppy disks, making the message retrievable and discoverable.

Moreover, every document created, received, or opened on a computer terminal is typically saved on the hard drive without the user's knowledge in order to protect the user from a system failure. Archival programs automatically download copies of everything off of the mainframe at certain time intervals (usually daily) with additional monthly backup protocols. Therefore, not only is there usually a copy of the document on the user's terminal hardware, but there is also a version on a backup tape.

As a result, the documents saved on the mainframe server may not be exactly what the user intended to become the permanent record since changing a document the next day will not erase what has already been backed up.

III. Significance of Electronic Evidence

A. Email

Although there are many types of electronic evidence, email has probably received the most attention in recent years. Email played a prominent role in the Justice Department's antitrust case against Microsoft, with Bill Gates eating his own words regarding his efforts to persuade Intuit's CEO from distributing Netscape's browser: "I was quite frank with him that if he had a favor we could do for him that would cost us something like \$1M to do that in return for switching browsers in the next few months I would be open to doing that."¹

Email also played a role in the recent proposed \$3.75 billion settlement of the class action against American Home Products Corp. arising from the diet drug Fenphen. According to a recent article in the Wall Street Journal, one of the emails uncovered by the plaintiffs' computer consultants revealed a less than sympathetic view of one of AHP's employees who was "concerned about spending the rest of her career paying off 'fat people who are a little afraid of some silly lung problem.'"²

Email has also developed into a powerful tool for plaintiff's lawyers in discrimination cases. The spontaneity of email typically causes employees to be more cavalier with the emails they send as compared to the memos they write. As a result, email has proved to be fertile ground for evidence supporting claims of discrimination or sexual harassment. For example, in a widely reported sexual discrimination case filed against Chevron, an

email describing "25 reasons why beer is better than women," which was circulated by Chevron employees, was uncovered during discovery.³ The case later settled.

Given the prevalence of email in the workplace, it will play an increasing role in all types of cases and should be a component of most discovery plans.

B. Other Electronic Records With Independent Evidentiary Significance or Other Relevance

In addition to email, other electronic records, including hard drives, back up files, file histories of documents, electronic copies of hard copies of documents produced, may have independent evidentiary significance or other relevance and should therefore be a potential target for discovery. Depending on the type of case, counsel should consider the desirability or necessity of pursuing discovery of other types of electronic evidence. For example, hard drives, back up tapes, and file histories of a given document may reveal:

1. Access to a document by a given individual. This may be important, for example, in a case where an officer or employee of the opposing party denies having seen or been involved in the drafting of a contract or other document. In other types of cases, counsel should consider whether his or her own client's electronic files should be reviewed for evidence to support the client's claims. For example, in a theft of trade secrets case against a former employee, the client's own file histories may reveal that the former employee accessed proprietary customer lists or technical plans on the eve of his departure.

2. Timing of Access: Electronic file histories and other records will also reveal WHEN a given individual accessed a document. Again, the timing of access may be critical depending on the type of claim

involved.

3. Evolution of Documents:

Electronic backup files may reveal the evolution of a document, the nature of the revisions made, the timing of the revisions, etc. These records may be useful in a variety of settings. For example, the electronic files of an opposing expert witness may reveal drafts of reports and other work product that undermines the expert's final conclusions. Archival tapes containing backup files of drafts of a contract may shed light on the evolution of the contract and the meaning of any ambiguous provisions.

4. Document Tampering: Electronic files may also reveal whether documents have been altered or tampered with. For example, in Momah v. Albert Einstein Medical Center, 164 F.R.D. 412 (E.D. Pa. 1996), a discrimination case, the court allowed discovery into the defendant's file histories based on the plaintiff's argument that certain documents supporting the discharge had been intentionally backdated.

In addition, the following other types of electronic files may be useful and therefore the subject of discovery:

1. Electronic Versions of Hard Copies of Documents Produced or Where No Hard Copy Exists:

Electronic documents have the benefit of being subject to manipulation without re-inputting the data. For example, obtaining the electronic version of an Excel spreadsheet or other accounting model may save a significant amount of time if the data is voluminous and counsel or an expert needs to manipulate it. In addition, electronic files have the obvious benefit of supplying data where no hard copy exists or can be found in a desk file.

2. Litigation Databases: Document databases and other types of databases generally constitute work product and therefore have some

protection from discovery. In recent years, however, some courts have allowed discovery of such materials where one party can show a substantial need for the materials and where any "opinion" work product can be redacted. See, e.g., Minnesota v. Philip Morris, Inc., 10.7 Tobacco Prod. Litig. Rep. 2.275 (1995); Washington Bancorporation v. Said, 145 F.R.D. 274 (D.D.C. 1992); but see Shipes v. Bic Corp., 154 F.R.D. 301 (M.D. Ga. 1994).

IV. What Electronic Evidence Is Discoverable and Who Pays for the Discovery

A. Rules 26 and 34

Courts have uniformly held that email, as well as other forms of electronic evidence, is discoverable so long as it meets the standards of Fed. R. Civ. P. 26(b) and 34. Fed. R. Civ. P. 26(b)(1) provides for the discovery of "any matter . . . which is relevant to the subject matter involved in the pending action . . . including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things . . ." Rule 34(a) further specifies that a party may request the production of "any designated documents (including . . . other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form)." The Advisory Committee Notes to the 1970 amendment to Rule 34 confirm that the definition of document was revised to include electronic data, including printouts and the electronic source itself.

Since the 1970 amendment to Rule 34, courts have uniformly held that computerized data may be a proper subject for discovery. See, e.g., Bills v. Kennecott Corp., 108 F.R.D. 459, 461 (D. Utah) ("It is now axiomatic that electronically stored information is discoverable under Rule 34 of the Federal Rules

of Civil Procedure . . ."); In re Brand Name Prescription Drugs Antitrust Litigation, 1995 WL 360526 (N.D. Ill. June 15, 1995); Crown Life Ins. Co. v. Craig, 995 F.2d 1376, 1382 (7th Cir. 1993). Electronic evidence, like any other type of documentation, must still satisfy the relevancy standard of Rule 26(b)(1), and courts have the power and discretion under Rule 26(c) to impose reasonable limitations and protections against overly intrusive or burdensome discovery. See Fed. R. Civ. P. 34(b)(1) Advisory Committee Note ("courts have ample power under Rule 26(c) to protect respondent against undue burden and expense, either by restricting discovery or requiring that the discovering party pay costs"); Murlas Living Trust v. Mobil Oil Corp., 1995 WL 124186 (N.D. Ill. 1995).

B. Guidelines Governing Allocation of Burden and Cost

The production, reconstruction and analysis of electronic evidence potentially involves a significantly greater burden on the producing party as compared to the production of conventional paper documents. Printing emails offline from a few personal computers is a relatively easy task. Reviewing backup tapes and restoring "destroyed" or "deleted" records is not. As a result, courts have typically analyzed discovery disputes involving electronic evidence within the traditional framework of Rule 26 and Rule 34, with an eye toward balancing the respective benefits and burdens of obtaining discovery of the information at issue. The following case summaries provide an overview of some of the issues raised and results obtained in recent years:

1. In re Air Crash Disaster at Detroit Metropolitan Airport on August 16, 1987, 130 F.R.D. 634 (E.D. Mich. 1989).

Responding party required to pro-

duce computer tape in order to reduce unnecessary costs and delays that would result if the requesting party were required to manually load the program and data. However, since the material did not previously exist, discovering party was required to pay all reasonable and necessary costs associated with the manufacture of computer tape.

2. Anti-Monopoly, Inc. v. Hasbro, Inc., 94 Civ. 2120, 1995 U.S. Dist. LEXIS 16355 (S.D. N.Y. Nov. 3, 1995).

According to the court, computerized data is discoverable even if paper copies have been produced. The producing party can be required to design a computer program to extract data from its computerized business records, although the court may allocate costs in its discretion. The court will examine the burden on the responding party of collecting all of the electronic data against the benefit to the requesting party.

3. Bills v. Kennecott Corp., 108 F.R.D. 459 (C.D. Utah 1985).

The requesting party may discover data in both traditional and electronic form. Although the responding party is usually in the best and most economical position to access its computer data, the court may consider the following factors to determine who has the burden to pay for the production: 1) the cost of discovery (excessive or inordinate); 2) the relative expense and burden in obtaining the data (whether the burden is greater for the requester or the responder); 3) whether the cost is a substantial burden; and 4) whether the responder is benefited by the discovery.

4. In re: Brand Name Prescription Drugs Antitrust Litigation, 94 C 897, MDL 997, 1995 U.S. Dist. LEXIS 8281 (N.D. Ill. June 13, 1995).

The court ordered the producing party to locate and produce email at its own expense, but that the discovering party should pay copying

charges and should narrow the scope of the request. According to the court, the substantial expense of producing computerized data is not a sufficient justification for imposing the costs of production on the requesting party. Courts should consider whether the cost is inordinate or excessive and whether the expense and burden in obtaining the data is greater for the requesting party than the responding party and whether the responding party will benefit to some degree in producing the data. The Court reasoned that a party should not be forced to bear the burden caused by the opposing party's choice of electronic storage.

5. Daewoo Elec. Co. v. United States, 10 Court. Int'l Trade 754 (1986).

The court ordered the Department of Commerce to provide the discovering party with copies of computer tapes used in an administrative proceeding. The Department refused to provide certain data sets, claiming that the original order did not specifically include the sets. The court found that the government erroneously took the most literal reading possible of the court's order to produce "computer tapes" because the court intended to include all forms of data subject to computer manipulation. The court concluded that an order to disclose computer tapes should be understood to include disclosure of all further refined forms of electronic storage of data. The normal and reasonable translation of electronic data into a form usable by the discovering party should be the burden of the respondent unless the respondent is able to show an extraordinary hardship. 6. Fennell v. First Step Designs, Ltd., 83 F.3d 526 (1st Cir. 1996).

Title VII suit where an employee requested inspection of employer's hard drive to determine when a memo was written. The employer produced a disk indicating that the memo had been "autodated." The

employee's expert proposed that the original date of creation could be determined by reviewing the file on the hard drive rather than on the diskette that had been provided. The expert, however, did not claim that the memo was created or modified, only that it was possible that it may have been. The employer's computer consultant stated that the system could not reveal the date that the document was created or modified. The district court directed both parties to submit a protocol for accessing the hard drive. The district court recognized the employer's concerns regarding the scope of the hard drive analysis, confidentiality, and the increase in legal and expert fees. After the district court reviewed the protocols, the court determined that further discovery would involve a "fishing expedition" and would involve "substantial risks and costs" and subsequently denied further discovery.

7. Playboy Enterprises v. Welles, 60 F.Supp.2d 1050 (S.D.Cal. 1999).

Plaintiff sought access to defendant's hard drive to recover electronic versions of emails that had been "deleted." The court recognized the need to protect the producing party "against undue burden and expense and/or invasion of privileged matter" and ordered that a special protocol be followed in accessing information through the appointment of a special computer expert as an "Officer of the Court" to create a mirror image of the hard drive. The copy would then be reviewed by the defendant's attorney who could screen documents for responsiveness and privilege. The plaintiff would be required to pay all costs associated with the information recovery.

8. Strasser v. Yalamanchi, 669 So. 2d. 1142 (Fl. 1996).

Appeal of an order allowing unrestricted access to defendant's computer system to retrieve "purged" data. The court held that

a computer data search may be appropriate if there is not a less intrusive way to obtain information. However, the order allowing inspection must place sufficient access restrictions to prevent compromising confidentiality and to avoid harm to the computer and databases.

9. Strauss v. Microsoft Corp., 856 F.Supp. 821 (S.D. N.Y. 1994).

Gender discrimination suit where the email messages of the supervisor who was responsible for making promotion decisions were deemed discoverable and admissible to show discriminatory motives.

10. Zapata v. IBP, 93-2366-EEO WL 649322 (Kan., Nov. 10 1994).

Discrimination suit where employees sought discovery of computer data containing personnel information. The court found the information relevant and overruled the objection that production of the data was unduly burdensome. The court noted that all discovery is burdensome to some extent.

C. Summary of ABA Standards

The American Bar Association recently adopted the black letter of the Civil Discovery Standards dated August 1999, relating to the discovery of electronic evidence. To a large extent, these standards mirror the standards that have evolved through the case law and include the following:

1. When a lawyer who has been retained to handle a case learns that litigation is probable or has commenced, the lawyer should inform the client of the duty to preserve potentially relevant documents, including information contained or stored in an electronic medium, and the possible consequences of failing to preserve such documents.

2. A request for "documents" should be construed to include information contained or stored in

an electronic medium or format.

3. A party does not have a duty to restore electronic information that has been deleted or discarded in the ordinary course of business unless the requesting party can demonstrate a "substantial need" for such information.

4. A party may request the production of electronic information in hard copy, in electronic form, or in both forms as well as the production of ancillary electronic information.

5. A party may request the software necessary to retrieve, read, or interpret electronic information.

6. Courts shall consider the following factors when resolving motions to compel or to protect against the production of electronic information:

- a. the burden and expense of the discovery;
- b. the need for the discovery;
- c. the complexity of the case;
- d. the attorney-client or attorney work product privilege;
- e. the confidentiality of the information;
- f. the breadth of the discovery request; and
- g. the resources of each party.

7. The discovering party generally should bear "any special expenses" incurred by the responding party, including the cost of acquiring or creating software to retrieve responsive information.

8. The court should determine which party bears the cost of production by considering the following factors:

- a. whether the cost of producing the information is disproportional to the potential benefit of the information;
- b. the relative expense and burden on each side;
- c. the relative benefit to the parties of producing it; and
- d. whether the responding party has a special system for storing or retrieving the information.

V. Beware the Risk of Sanction and Spoliation Claims

The routine destruction or recycling of electronic media may render your client vulnerable to sanctions, claims of spoliation and adverse inferences if litigation is pending or likely. The risk of sanctions is obviously greater if there are outstanding discovery requests or court orders that cover the data. In Shaw v. Hughes Aircraft Co., U.S. Dist. LEXIS 14053 (E.D. Pa. Sept. 17, 1996), a discrimination suit, the plaintiff's lawyer faxed a letter to defense counsel on the day the suit was filed instructing the defendant to preserve all documents, including email and other electronic materials, relating to the plaintiff. The defendant failed to produce any responsive emails. At trial, the defendant's information manager testified that all email was overwritten after 90 days pursuant to the Company's retention policy. The court instructed the jury to draw an adverse inference that evidence favorable to the plaintiff had been destroyed, and the jury awarded the Plaintiff \$10,000 for negligent spoliation of evidence, \$20,000 for intentional spoliation of evidence, and \$60,000 in punitive damages.

Similarly, in Applied Telematics, Inc. v. Sprint Communications Co., L.P., 1996 U.S. Dist. LEXIS 14053 (E.D. Pa. 1996), a patent infringement suit relating to a telephone routing system, ATI sought historical records relating to the system, which were maintained only on Sprint's back-up tapes. These tapes were routinely rotated on a weekly basis, and the majority of responsive records were destroyed. The court held that Sprint had an affirmative duty to preserve the back-up files after having been served with a document request and granted ATI's motion for an adverse inference of spoliation,

sanctions and attorney's fees.

The Court reached a similar result in Linnen v. A. H. Robins Company, Inc. 1999 W.L. 462015 (Mass. Super. Ct. July 16, 1999). In Linnen, the plaintiff obtained an ex parte order requiring the preservation of documents, which was later vacated. During the pendency of the order and for three months after service of document requests, the defendant continued to recycle its back-up tapes every three months. The court held that both the preservation order and the outstanding document requests imposed an affirmative obligation on the defendant to preserve the back-up tapes and granted sanctions for spoliation. See also Proctor & Gamble Co. v. Haugen, 179 F.R.D. 622 (D. Utah 1998) (monetary sanctions appropriate for plaintiff's failure to preserve its corporate email communications particularly given plaintiff's insistence that defendant preserve its emails).

This area of the law is continuing to evolve, and courts differ as to when the duty to preserve evidence arises and whether sanctions can be imposed for mere negligent, as opposed to intentional, destruction of documents. See, e.g. Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 72 (S.D.N.Y. 1991); William T. Thompson Co. v. General Nutrition Corp., 593 F. Supp. 1443, 1455 (C.D. Cal 1984); Barkovich v. Hicks, 922 F. 2d 1018, 1023-24 (2d Cir. 1991); Quaker State Oil Refining Corp., 72 F. 3d 326, 332-34 (3d Cir. 1995). Courts generally consider four factors in determining whether sanctions are appropriate for spoliation of evidence: (1) whether the party had a duty to preserve the evidence; (2) the culpability of the destroying party; (3) the relevance of the destroyed evidence; and (4) the prejudice resulting from the destruction. The Eleventh Circuit has typically

required a finding of bad faith before adverse inferences can be drawn from a party's failure to preserve evidence. See, e.g., Bashir v. Amtrak, 119 F.3d 929 (11th Cir. 1997); ABC Home Health Services, Inc. v. IBM Corp., 158 F.R.D. 180 (S.D. Ga. 1994) (deletion of electronic files in anticipation of litigation but prior to receipt of discovery requests might warrant jury instruction of adverse inference upon showing of bad faith). Georgia has rejected the adoption of an independent tort of spoliation, but had long recognized that sanctions, including adverse inferences, may be appropriate for intentional destruction or alteration of evidence. See, e.g., Sharpnack v. Hoffinger Industries, Inc., 499 S.E.2d 363 (Ga. App. 1998); Chapman v. Auto Owners Insurance Co., 469 S.E.2d 783 (Ga. App. 1996).

VI. Guidelines for Effective Document Retention Policies

A document retention/destruction policy which provides for the routine destruction of data may help parties avoid sanctions and adverse evidentiary inferences, particularly with regard to the routine destruction of electronic materials before notice of potential litigation and receipt of a document request. See, e.g., Tritchler v. Consolidation Coal Co., 1996 U.S. App. LEXIS 15600 (4th Cir. June 28, 1996); Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 156 (4th Cir. 1996).

Document retention policies, however, must be reasonable in order for a company to minimize the likelihood of sanctions and adverse evidentiary inferences arising from the destruction of documents. See, e.g., Lewy v. Remington Arms Co., 836 F.2d 1104 (8th Cir. 1988). A policy adopted with the stated purpose of "elimination of documents that might be detrimental [in a lawsuit]" is not

deemed to be reasonable. Carlucci v. Piper Aircraft Corp., 102 F.R.D. 472 (S.D. Fla. 1984). Generally, in determining reasonableness courts consider: (1) the facts and circumstances surrounding the relevant documents; (2) the extent to which the destroyed documents are relevant to potential or pending lawsuits; (3) the frequency and magnitude of similar lawsuits against the company; and (4) whether the retention policy was instituted in bad faith. Lewy v. Remington Arms, 836 F.2d at 112.

The following guidelines are useful in designing an effective retention policy which balances the need for the corporation to streamline and reduce the volume of its business records with the potential need for the documents at a future date:

1. The policy should address both procedural aspects of retention and a specific retention schedule for categories of documents.
2. Companies should consult with internal and/or outside technology consultants to assess and analyze the company's hardware, software and electronic data, develop reasonable procedures for handling electronic documents, e-mail, rotation of back-up tapes and other issues raised by storage and use of electronic media.
3. Companies should retain records for at least the minimum period required in any applicable statute or regulation – e.g., employment/personnel records, tax records, environmental records.
4. Records substantiating corporate compliance with relevant laws should be maintained for so long as may be relevant.
5. All records affecting obligations of the company should be retained for a period of time assuring their availability when needed.
6. Companies should assess what must and should be retained, while discarding older data that is other-

wise unnecessary.

7. The policy must provide for a reliable mechanism that enables management to suspend the destruction of documents upon notice of potential litigation, receipt of subpoenas, or an existing or potential government inquiry.

8. The policy should incorporate appropriate control and management provisions to insure that it is being followed or adapted as necessary to address any new developments.

9. Companies should require appropriate written approvals for all record retention schedules.

10. Companies should retain all documentation relating to the development and implementation of the policy.

11. Companies should conduct periodic audits to assess compliance with the policy.

Finally, corporations should consider adopting separate policies regarding both the use and retention of e-mail. Employees should be educated regarding the appropriate and inappropriate use of e-mail, and corporations should take appropriate action against employees who violate the policy and use e-mail for inappropriate purposes.

VII. Guidelines for Effective Discovery of Electronic Information

Not every case will justify an exhaustive search and review of electronic records. The potential benefits of far-ranging electronic discovery must obviously be weighed against the costs and burdens to both parties. The following general guidelines and recommendations should be considered in developing strategy:

A. Request information promptly after action commences to avoid the loss or destruction of relevant information.

B. Advise opposing counsel in writing of the duty to preserve specific records, such as email and backup tapes. If necessary, request

a court order for the preservation of all computer files.

C. Be specific in the document requests since broad discovery requests will generate more objections and disputes than narrowly tailored requests.

D. Include a definition of "document" in your request such as the following: "As used in this request, 'document' means all writings and other tangible things from which information may be obtained or derived, and also includes electronic, magnetic, or machine-readable media, information on such media, and computer-stored information."

E. Discover your opponent's hardware configurations, operating software, storage locations, and backup protocols by taking depositions of the Systems Administrator and employees, by seeing the systems, and by hiring an expert, if necessary.

F. Ask all witnesses about home use, remote access, how information is saved and stored, their level of computer knowledge, and whether there are any privileged, password protected, and/or encrypted files.

G. Draft interrogatories when dealing with large amounts of technical data, since a well-drafted interrogatory may produce a better result than a document request for computer records.

H. If the case justifies the cost, consider hiring a computer expert to retrieve or restore information from archived tapes.

I. Request a copy of the document retention/deletion policy.

J. Request directory information and file histories where access, timing, and document evolution issues are relevant.

K. Pursue protective orders and/or sanctions if you believe that data is being or has been destroyed.

L. Carefully preserve the collected data.

M. Ensure that your client's materi-

als can comply readily with the requests you are making of your opponent.

VIII. Suggestions for Responding to Discovery Requests for Electronic Information and Avoiding Problems Before Litigation Arises

A. If litigation is likely or has been filed, advise your client of the duty to preserve evidence and the consequences for failure to do so.

B. Submit a written response to letters from opposing counsel demanding preservation of evidence and make objections where appropriate.

C. Learn your client's computer system in the same manner you would learn an opponent's, including touring the system and talking to the users of the system.

D. When producing information, retain a backup copy that is properly marked and secured to ensure the integrity of the data.

E. Apply for a protective order to protect the confidentiality of information.

F. Avoid producing data on disks, drives, or any other form that the opposing party may alter. If you produce data in machine-readable form, code the data so that it is "read-only."

G. Instruct clients to exercise the same level of caution with email messages that they use with formal paper documents.

H. Have your clients educate their employees of the confidentiality, longevity, and potential liability regarding electronic documents.

I. Assist clients in establishing and implementing a detailed email policy, or describing examples of improper communications.

J. To avoid charges of destroying discoverable evidence, urge your clients to create and implement a periodic retention and destruction policy before they are forced into litigation. Procedures should include creating, storing, locating,

retrieving, and purging electronic documents.

K. Instruct your clients to physically destroy backup files and other documents that have exceeded their useful life.

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Sample Letter Requesting Preservation of Electronic Evidence

Smith & Jones, P.A.

October 30, 2000

ABC Corporation
c/o Jane Doe, Senior Vice-President
501 Ocean Boulevard
Miami, Florida

RE: Davis v. ABC Corporation
A. Our File No.: 0759-0000

Dear Ms. Doe:

This firm represents John Davis, who has filed charges of age discrimination against ABC Corporation.

In the event that this matter is not resolved pre-suit, I will serve with the complaint a request for the following documents, among others:

1. Mr. Davis' complete personnel and payroll files, including any and all files kept by individuals or departments;

2. Copies of all EEOC or other agency charges of age discrimination made against the company, as well as the pleadings and final disposition in any litigation involving such charges, and the personnel files of the person making the charge and each person named as a decision-maker.

In order to avoid a problem, with record retention, I would like to remind you of the provisions of 29 C.F.R. § 1602.14, which provides as follows:

Any personnel or employment record made or kept by an employer (including but not necessarily limited to requests for reasonable accommodation, application forms submitted by applicants and other records having to do with hiring, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship) shall be preserved by the employer for a period of one year from the date of the making of the record or the personnel action involved, whichever occurs later.

In the case of involuntary termination of an employee, the personnel records of the individual termination shall be kept for a period of one year from the date of termination.

Where a charge of discrimination has been filed, or an action brought by the Commission or the Attorney General against an employer under Title VII or the ADA, the respondent employer shall preserve all personnel records relevant to the charge or the action. The term "personnel records relevant to the

charge," for example, would include personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person and application forms or test papers completed by an unsuccessful applicant and by all other candidates for the same position as that which the aggrieved person applied and was rejected. The date of the final disposition of the charge or the action means the date of expiration of the statutory period within which the aggrieved person may bring an action in a U.S. District Court, or where an action is brought against an employer either by the aggrieved person, the Commission, or by the Attorney General, the date on which such litigation terminated.

(Emphasis added.) Please ensure that your company keeps all documents, including "electronic data compilations" (computer data) pursuant to Federal Rule of Civil Procedure 34(a), as required by this provision.

We consider electronic data to be a valuable and irreplaceable source of discovery and/or evidence in this matter. The laws and rules prohibiting the destruction of evidence apply to electronic data with the same force as they apply to other kinds of evidence. Printouts to paper form of text from an electronic file do not preserve the totality of information which is in the electronic file and therefore do not suffice to fully preserve evidence.

Pending resolution of this matter, further agreement of the parties as to the preservation of electronic evidence, or formal discovery concerning the layout and configuration of your computer system, the following safeguards against the destruction of evidence should be

maintained.

1. Electronic Data to be Preserved: The following types of electronic data should be preserved, in accordance with the steps set forth in paragraphs 2-8 below:

a. All electronic mail and information about electronic mail (including message contents, header information and logs of electronic mail system usage) sent or received by John Davis, Maria Fuentes, Mary Yates, Candy Snider, Richard Cunningham, Angel Young and Charles Graham from 1997 to date.

b. All other electronic mail and information about electronic mail (including message contents, header information and logs of electronic mail system usage) containing information about the hiring and placement of Candy Snider, and Maria Fuentes, including any employment decisions regarding John Davis.

c. All data bases (including all records and fields and structural information in such databases), containing any reference to and/or information about that the defendant maintains or has maintained from 1993 to the date of your response that contain information on any present or former employee (hourly, salaried, management, professional, operative, etc.) (including applicants) concerning any employment data such as name, current or last known address, race and sex, social security number, seniority dates, date of hire for each time the employee was hired, jobs held, rates of pay, gross earnings, identification, clock, or badge number, any disciplinary actions against the employee.

d. Any and all documents and other sources of information that are necessary in order to interpret

all coded fields within each data base referred to in the previous item. (A coded field contains an abbreviated entry representing other information and cannot be used or understood without a key to the translation or meaning of the entry. An example would be a field for sex, with possible coded entries, "1" and "2," etc., representing "white," "black," etc.)

e. All logs of activity on computer systems which may have been used to process or store electronic data containing information about the matters described in items a through d above.

f. For the period from 1997 to date, all word processing files and file fragments containing information about:

i. the elimination of Mr. Davis' position as Vice-President of Operations;

ii. the replacement of Mr. Davis with Candy Snider;

iii. the placement of Maria Fuentes as Vice-President;

iv. the elimination of Angel Young's position as Manager of Facilities; and

v. the resignation of Charles Graham.

g. With regard to electronic data created by application programs which process financial, accounting and billing information, all electronic data files and file fragment containing information relating to the elimination of Mr. Davis' position as Vice-President of Operations, and the hiring and placement of Candy Snider and Maria Fuentes.

h. All electronic data files and fragments created or used by electronic spreadsheet programs,

where such data files contain information relating to the elimination of Mr. Davis' position as Vice-President of Operations, and the hiring and placement of Candy Snider and Maria Fuentes.

i. All electronic data files and file fragments created or used by electronic calendaring or scheduling programs relating to the elimination of Mr. Davis' position as Vice-President of Operations, and the hiring and placement of Candy Snider and Maria Fuentes.

j. All electronic data files and file fragments created by electronic calendaring or scheduling used by and/or reflecting the appointments and/or "to do" list of John Davis, Candy Snider, Maria Fuentes, Richard Cunningham, Angel Young and Charles Graham.

k. All other electronic data containing information relating to the elimination of Mr. Davis' position as Vice-President of Operations, and the hiring and placement of Candy Snider and Maria Fuentes.

2. On-Line Data Storage on Mainframes and Minicomputers:

With regard to on-line storage and/or direct access storage devices attached to defendants' mainframe computers and/or minicomputers: do not modify or delete any electronic data files existing at the time of this letter's delivery, which meet criteria set forth in paragraph 1 above, unless a true and correct copy of each such electronic data file has been made and steps have been taken to assure that such a copy will be preserved and accessible for purposes of litigation.

3. Off-Line Data Storage, Backups and Archives, Floppy Diskettes, Tapes and Other Removable Electronic Media:

With regard to all electronic media used for off-line storage, including magnetic tapes and cartridges and other media, which, at the time of this letter's delivery, contained any electronic data meeting the criteria listed in paragraph 1 above: stop any activity which may result in the loss of such electronic data, including rotation, destruction, overwriting and/or erasure of such media in whole or in part. This request is intended to cover all removable electronic media used for data storage in connection with defendants' computer systems, including magnetic tapes and cartridges, magneto-optical disks, floppy diskettes, and all other media, whether used with personal computers, minicomputers or mainframes or other computers, and whether containing backup and/or archive data sets and other electronic data, for all of defendants' computer systems.

4. Replacement of Data Storage Devices: Do not dispose of any electronic data storage devices and/or media which may be replaced due to failure and/or upgrade and/or other reasons that may contain electronic data meeting the criteria listed in paragraph 1 above.

5. Fixed Drives on standalone Personal Computers and Network Workstations: With regard to electronic data meeting the criteria listed in paragraph 1 above, which existed on fixed drives attached to stand-alone microcomputers and/or network workstations at the time of this letter's delivery: do not alter or erase such electronic data, and do not perform other procedures (such as data compression and disk de-fragmentation or optimization routines) which may impact such data, unless a true and correct copy has been made of such active files and of completely

restored versions of such deleted electronic files and file fragments, copies have been made of all directory listings (including hidden files) for all directories and subdirectories containing such files, and arrangements have been made to preserve copies during the pendency of this litigation.

6. Programs and Utilities: Preserve copies of all application programs and utilities which may be used to process electronic data covered by this letter.

7. Log of system Modifications: Maintain an activity log to document modifications made to any electronic data processing system that may affect the system's capability to process any electronic data meeting the criteria listed in paragraph 1 above, regardless of whether such modifications were made by employees, contractors, vendors and/or any other third-parties.

8. Personal Computers used by all Management Personnel

a. As to fixed drives attached to such computers: (1) a true and correct copy should be made of all electronic data on such fixed drives relating to the matters specified in item 8 including all active files and completely restored versions of all deleted electronic files and file fragments, (ii) full directory listings (including hidden files) for all directories and subdirectories (including hidden directories) on such fixed drivers should be written; and (iii) such copies and listings should be preserved until this matter reaches its final resolution.

b. All floppy diskettes, magnetic tapes and cartridges, CD-rom disks, and other media used in connection with such computers prior to the date of delivery of this letter containing any electronic data

relating to matters specified in item 8 should be collected and put into storage for the duration of this lawsuit.

9. Evidence Created Subsequent to this Letter: With regard to electronic data created subsequent to the date of delivery of this letter, relevant evidence should not be destroyed and defendants should take whatever steps are appropriate to avoid destruction of evidence.

I specifically bring the requirement to retain records pursuant to 29 C.F.R. § 1602.14 and Federal Rules of Civil Procedure to your attention not only because it is your company's legal obligation, but also because Florida law recognizes the tort of spoliation of evidence where such a legal duty exists and is breached. Please understand that we consider that this notice of our claim gives rise to a legal duty on your part to preserve the evidence listed above and any other of which you may be aware.

Please do not hesitate to contact me if you have questions.

Very truly yours,

MARY SMITH
For the Firm

1 United States v. Microsoft Corp., Civ. Action No. 98-1232 (D.D.C. May 18, 1998).

2 Richard B. Schmitt, The Cybersuit: How Computers Aided Lawyers In Diet Pill Case, The Wall Street Journal, October 8, 1999, art. B1.

3 Alex Markels, Management: Managers Aren't Always Able to Get the Right Message Across With Email, The Wall Street Journal, August 6, 1996, art B1.

Thomas B. Murphy. *continuation*

in conversations I've had with his friends, they told stories of how he helped those ordinary people that no one else would help.

He took their cases, even when they couldn't pay.

He represented them when insurance companies were clearly abusing people, knowing that a lawyer couldn't make money on the case and therefore would never fight for their position. It's like a recent case I know he took to fight an inadequate property damage offer in an automobile wreck case. It was a case he couldn't make any money on, but he knew the people were being wronged and he stepped in to make it right.

U.S. District Court Judge Harold Murphy said, "Tom would represent people for 10 percent of what he should have gotten if he believed they had been wronged. Their color, religion or social status didn't matter to him. He is an extraordinary man, an extraordinary person, an extraordi-

nary lawyer."

Judge Donald Howe said simply, "He practices law to help people, not to make money."

And he has carried the same perspective into his unique roll as a lawmaker and as Speaker of the House of Representatives. Over and over, I've seen with my own eyes his focus on making sure that the laws written under his watch did not overreach to hurt the little guy—the average unsophisticated Georgian. He has stood beside me to fight for issues that were not "politically correct," like the warped child abuse registry that the Supreme Court ultimately struck down, because he knew there was a wrong to be righted..

There is not an area of law practice today—no section of the Georgia Code—that has not been molded by his influence. And we are all the beneficiaries of his wise leadership in the Georgia General Assembly, where he now stands as the longest serving

Speaker of the House in the entire United States.

Tom Murphy is a zealous advocate, a consummate professional, a prudent and caring lawyer, a defender of the common man—but more than anything, he is a family man..

You cannot be in a room with him for more than 15 minutes without hearing a story about his children or grandchildren. He raised four children with his wife of 37 years before her death, and he now dotes on five grandchildren. He is here today with the person he calls his very best friend, his son Mike, Superior court Judge of the Tallapoosa Circuit.

Please join me in congratulating the recipient of the Traditions of Excellence Award, a man who has truly practiced law as a profession and as a public servant. For 52 years of excellence in practice, I give you my dear friend Thomas B. Murphy.

SIGN UP A NEW MEMBER TODAY

Help your Section grow by signing up a new member. Copy the membership form from the back of this magazine and give it out at your local Bar Meetings.

Personal Liability for State Trust Fund Taxes in Georgia

By Richard C. Litwin



Mr. Litwin is a partner at Macey, Wilensky, Cohen, Wittner & Kessler, LLP, in Atlanta. He represents businesses and individuals in State Department of Revenue matters. Prior to joining Macey, Wilensky, Mr. Litwin served as an Assistant Attorney General, in the Tax Division of the Georgia Attorney General's Office and represented the State Department of Revenue, in tax controversies. Currently, Mr. Litwin is Chair of the Section of Taxation of the State Bar of Georgia and a Board Member of the Section of Taxation of the Atlanta Bar Association. Mr. Litwin speaks frequently throughout the state on state and local tax issues. He received his B.S., cum laude, in Economics, from the University of South Carolina, and his J.D. from Emory University.

I. Introduction

Businesses that experience financial instability typically include the State Department of Revenue as a major creditor. Surrogates and owners, as well as most attorneys who represent such entities, may not realize that the State Department of Revenue can seek payment from responsible individuals, employees and owners despite the existence of the limited liability commonly associated with corporations and limited liability companies.

In times of financial unrest, deciding what creditors to pay depends upon which creditors are demanding payment and whether the particular creditor's goods or services are vital to the health of the business. A landlord or the telephone company, or an important supplier, may take priority over other creditors, such as the State Department of Revenue.

Corporations and LLC's, their employees, and their advisors must have insight into the State Department of Revenue's rights with regard to collection of unpaid state sales and use taxes and state employer withholding taxes. Such insight is helpful both before a decision is made regarding payment to creditors and after the business fails.

II. Responsible Person Liability Statute

Advantages of limited liability.

Lawyers learn early in their career that the corporate form of business shields the officers and directors from liability for the entity's debts.¹

Within the past several years, lawyers have also found similar protections using the "limited liability company."² Thus, where a creditor has not obtained a personal guaranty from the individual owner, the creditor cannot seek payment of the business' debts from the individual owner, officer or member.

State law imposing personal liability for trust fund taxes. By state statute, an individual can be liable for certain unpaid taxes owed by the business to the State Department of Revenue. In particular,

any officer or employee of any corporation, any member, manager, or employee of any limited liability company, or any partner or employee of any limited liability partnership who has control or supervision of collecting from purchasers or others amounts required under [the Georgia Revenue Code] or of collecting from employees any taxes required under [the Georgia Revenue Code] and of accounting for and paying over the amounts or taxes to the [State Revenue] commissioner, and who willfully fails to collect the amounts or taxes or truthfully to account for and pay over the amounts or taxes to the commissioner, or who willfully attempts to evade or defeat any obligation imposed under [the Georgia Revenue Code], shall be personally liable for an amount equal to the amount evaded, not collected, not accounted for, or not paid over.

O.C.G.A. § 48-2-52.³

Often referred to as the responsible party liability statute, O.C.G.A. § 48-2-52 allows the State Department of Revenue to collect state trust fund taxes directly from someone other than the business, namely the individual(s) responsible for the entity's failure to pay such taxes.

Trust fund taxes. As indicated by the statute's language, personal liability arises only where the tax debt is for unpaid "trust fund taxes." These are taxes collected or withheld by a business as an agent of the State Department of Revenue. They include sales taxes - taxes that are required to be collected from purchasers. See O.C.G.A. § 48-8-30(b)(1). They do not include "use taxes" accrued for out-of-state purchases.⁴

Employer withholding taxes, too, are trust fund taxes. Georgia law requires an employer to deduct and withhold state income taxes from employee wages. O.C.G.A. § 48-7-101(c). The amount of tax deducted and withheld by an employer from an employee's wages is held to be a special fund in trust for the state, and the employer's liability is discharged only by payment of the tax to the state revenue commissioner. O.C.G.A. § 48-7-108(b). The employer remits withholdings quarterly, via Department of Revenue Form GA-V.

III. Establishing Liability

The State Department of Revenue can impose personal liability only on corporate officers or employees, LLC members, managers or employees, or LLP partners or employees who are responsible persons within the business enterprise. The responsible person is not liable, unless he willfully failed to collect, withhold, or remit the taxes.⁵ In determining whether a person is "responsible," and "willful," case law addressing the Federal responsible party statute,

I.R.C. § 6672 applies. See *Blackmon v. Mazo*, 125 Ga. App. 193, 196, 186 S.E.2d 889, 891 (1971).

Responsible Person Element. The person assessed must be a "responsible" person within the business. This term is given broad meaning. *Denbo v. U.S.*, 988 F.2d 1029, 1032 (10th Cir. 1993); *Williams v. U.S.*, 931 F.2d 805, 810 (11th Cir. 1991). Indeed, "person" includes an officer or employee of a corporation or a member or employee of a partnership who, as such, is under a duty to perform the act in respect of which the violation occurs. I.R.C. § 6671(b).

Typically, a responsible person is an official charged with the general control over business affairs and who participates in decisions concerning payment of creditors and disbursements of funds. See *Monday v. U.S.*, 421 F.2d 1210, 1214-1215 (7th Cir.), cert. denied, 400 U.S. 821 (1970). A responsible person is one "with ultimate authority over expenditure of funds, since such a person can fairly be said to be responsible for the entity's failure to pay over its taxes" or, more explicitly, one who has "authority to direct payment of creditors." *Gephart v. U.S.*, 818 F.2d 469, 473 (6th Cir. 1987)(per curiam) (citations omitted) (quoting *Barrett v. U.S.*, 217 Ct. Cl. 617, 580 F.2d 449, 452 (1978)).

Liability depends upon the existence of significant, as opposed to absolute, control of the business' finances. Determining the responsible person requires a factual inquiry. The crucial question is whether the person against whom liability is asserted had effective power to pay the taxes. *Turnbull v. U.S.*, 929 F.2d 173, 178 (5th Cir. 1991).

Check signing authority, alone, is not sufficient for determining responsible person status. *Barrett v. U.S.*, 217 Ct. Cl. 617, 580 F.2d 449, 453-454 (Ct. Cl. 1978) (mere check

signing authority did not support a finding of liability, where taxpayer had no authority to allocate funds to creditors and had no other indicia of a responsible person, including shareholder or executive officer status, authority over payment of salaries or the ability to hire and fire employees and where, at times, the taxpayer was beaten into following instructions by her husband, the controlling shareholder and executive officer of the company and had never signed a company check without prior authorization). The right to sign corporate checks is, however, a strong indicator of responsible person status.

Holding corporate office, alone, does not result in responsible person status. *Graunke v. U. S.*, 711 F. Supp. 388 (N.D.Ill.1989) (the taxpayer was merely an accountant, despite his position as treasurer, and he did not have sufficient authority over corporate decision making to be held responsible, as he had no financial interest in the business and was not involved in its day-to-day operations or responsible for issuing payroll checks, and, moreover, was an employee for only a brief time). *Schwinger v. U. S.*, 652 F. Supp. 464, 467 (E.D.N.Y. 1987). See *Monday v. U.S.*, 421 F.2d 1210, 1214 (7th Cir. 1970) ("Corporate office does not, per se, impose the duty to collect, account for and pay over the withheld taxes. On the other hand, an officer may have such a duty even though he is not the disbursing officer").

To the extent that a responsible person delegates the responsibility to pay withheld income taxes, he does so at his own risk, where the responsible person has had clear notice that the person delegated with responsibility has wrongfully failed to pay taxes in the past. *Thomsen v. U.S.*, 887 F.2d 12, 19 (1st Cir. 1989). Thus, a responsible person may not escape liability by

pointing to an assistant or book-keeper.⁶

A secured creditor may get power of attorney to operate a business and may exercise significant control (hire and fire; check signing authority; ability to become owner by exercising stock option; close business down by simply foreclosing on debt owed) over the business. When this happens, the secured creditor can be held liable as a responsible party.

In sum, several factors determine whether a person is a "responsible" person. They include (1) holding corporate office, (2) control over financial affairs, (3) having authority to disburse funds, (4) stock ownership and (5) ability to hire/fire employees. *Denbo v. U.S.*, 988 F.2d 1029, 1032 (10th Cir. 1993); *Thibodeau v. U.S.*, 828 F.2d 1499, 1503 (11th Cir. 1987); *Causey v. U.S.*, 683 F. Supp. 1381, 1383 (M.D. Ga. 1988). Moreover, the State Department of Revenue is not limited to assessing only one person. Indeed, more than one person may be assessed as a "responsible" person of a business. *Denbo v. U.S.*, 988 F.2d 1029, 1032 (10th Cir. 1993)(Cits. omitted); *Gephart v. U.S.*, 818 F.2d 469, 473 (6th Cir. 1987); *Roth v. U.S.*, 779 F.2d 1567, 1571 (11th Cir. 1986); *Peterson v. U.S.*, 758 F. Supp. 1209, 1215 (N.D.Ill. 1990). Each responsible person is jointly and severally liable for the trust fund taxes due. *Brown v. U.S.*, 591 F.2d 1136, 1142 (5th Cir. 1979).⁷

Willfulness Element. Although a person may be "responsible," he is not liable, unless he acted willful in failing to pay over the trust fund taxes. Willfulness, in this context, is a voluntary, conscious and intentional decision to prefer other creditors over the government. *Denbo v. U.S.*, 988 F.2d 1029, 1033 (10th Cir. 1993). Establishing "willfulness" does not require showing of bad motive, fraud, or intent to deprive taxing authority of taxes. *Williams*

v. U.S., 931 F.2d 805, 810 (11th Cir. 1991); *Blackmon v. Mazo*, 125 Ga. App. 193, 196, 186 S.E.2d 889, 891 (1971). Rather, it is shown by the voluntary preference of other creditors over the taxing authority, with knowledge of the unpaid tax claim. *Denbo v. U.S.*, 988 F.2d 1029, 1033 (10th Cir. 1993); *Collins v. U.S.*, 848 F.2d 740, 742 (6th Cir. 1988); *Blackmon v. Mazo*, 125 Ga. App. 193, 196, 186 S.E.2d 889, 891 (1971). See *Schwinger v. U. S.*, 652 F.Supp. 464, 468 (E.D.N.Y. 1987); *U.S. v. Hill*, 368 F.2d 617, 621 (5th Cir. 1966)(Even where the expenditures were necessary to stay in business). Finally, a responsible person's failure to investigate or correct mismanagement after being informed that taxes have not been paid satisfies the willfulness requirement.

IV. Issuance of Tax Assessments under O.C.G.A. § 48-2-52

Who and When. The State Department of Revenue uses a variety of information to identify persons from whom to collect unpaid trust fund taxes. The Department of Revenue agent reviews business records, such as articles of incorporation, bylaws, LLC operating agreements and minute books. The revenue agent may also examine bank account signature cards and cancelled checks, to find out who has authority to sign, and who actually signs, the checks. Further, the agent may try to identify the person with responsibility for the business' other financial affairs, to wit: who applied for business loans, who prepares and/or signs financial statements, who signs tax returns (income, sales and use tax, withholding).⁸

Statute of Limitations. The period within which the assessment must be issued depends upon the status of the returns. By statute, the liability must "be assessed and collected in the same manner as the [under-

lying] tax." O.C.G.A. § 48-2-52(b). Thus, where a sales tax return has been filed by the entity, the Department of Revenue may not issue a responsible person assessment for liability stemming from the return after the limitations period has expired for assessment of the entity. In Georgia, the Department of Revenue must issue an assessment (against the entity) within three years of the filing date of the return. O.C.G.A. § 48-2-49(b).⁹

Burden in Challenging Responsible Person Assessments. Unlike most civil cases, where the burden of proof is on the creditor to establish the debt, challenging a responsible person assessment in court requires a showing of the impropriety of the assessment. Specifically, in superior court, a responsible person assessment is deemed *prima facie* correct. See *Hawes v. LeCraw*, 121 Ga. App. 532, 174 S.E.2d 382 (1970); *Blackmon v. Ross*, 123 Ga. App. 89, 179 S.E.2d 548 (1970). Thus, where the assessed person pursues the appeal procedure to superior court, he has the burden of proof. *Blackmon v. Ross*, 123 Ga. App. at 90; *Hawes v. LeCraw*, 121 Ga. App. at 533.¹⁰

V. Criminal Liability for Failure to Pay Trust Fund Taxes

A person who fails to account for or to pay over trust fund taxes is subject to criminal liability in Georgia. Specifically, it is unlawful for any person knowingly and willfully to convert funds collected for benefit of state (under Title 48, Georgia Revenue Code) to his own use or to any other person's use, with the intention to deprive the state of the funds. O.C.G.A. § 48-1-5. A person found guilty of such an offense shall be guilty of theft by conversion, punishable as provided in O.C.G.A. § 16-8-12.¹¹

VI. Advising Clients

Several planning points should be

considered when counseling a client who is vulnerable to assessment under O.C.G.A. § 48-2-52. Using the standards set out in this article, conduct your own analysis, to confirm whether the client is a "responsible" person within the business, and always identify any other person who may be liable. Where your client resigns or sells

his/her portion of a business, remove your client's name from the entity's listing at the Georgia Secretary of State's Office. Request from the business a resolution that your client is no longer an officer, owner or member of the business. Write to the Georgia Department of Revenue, referencing all tax identification numbers and notifying the

Department of your client's resignation from company or business. Have the letter hand-delivered, with a copy stamped "received." Otherwise, if the business fails and has a sufficient trust fund liability, your client is certain to be assessed as a responsible party.

ENDNOTES

¹ See, e.g., *Commonwealth Financial Corp. v. Sherrill*, 197 Ga. App. 403, 398 S.E.2d 438 (1990). See *US. v. Fidelity Capital Corp.*, 920 F.2d 827 (11th Cir. 1991) (even where individual owner directs every corporate decision).

² O.C.G.A. § 14-2-303 limits liability for debts, obligations or liability of the LLC, and such limitation applies to a member, manager, agent or employee of the LLC.

³ House Bill 582, passed during the 2001 Georgia General Assembly, and effective April 27, 2001, amended O.C.G.A. § 48-2-52, to include a member, manager, or employee of any limited liability company, or any partner or employee of any limited liability partnership. House Bill 582 also amended O.C.G.A. § 14-8-15, relating to the liability of a partner in a limited liability partnership, for debts and other obligations of the partnership, by adding that a partner may be personally liable for tax liabilities of the limited liability partnership as provided in O.C.G.A. § 48-2-52, and O.C.G.A. § 14-2-303, relating to the liability of a member, manager, agent or employee of a limited liability company, for debts or obligations of the LLC (whether in tort or contract), by adding that a member, manager, or employee may be personally liable for tax liabilities of the LLC as provided in O.C.G.A. § 48-2-52.

⁴ For example, a business may buy machinery and equipment or other tangible person-

al property from an out-of-state supplier that does not collect the Georgia sales tax from the business. Georgia law requires the business to accrue and remit the tax, which is known as a use tax. See O.C.G.A. § 48-30(a), (c); *Law Lincoln Mercury, Inc. v. Strickland*, 246 Ga. 237, 271 S.E.2d 152 (1980) (section imposes a tax on a Georgia purchaser who purchases personal property outside the state from an out-of-state seller, where the seller is not required to collect and remit a sales tax on the purchase to this state); *Independent Publishing Co. v. Hawes*, 119 Ga. App. 858, 168 S.E.2d 904 (1969) (ultimate liability for use tax is upon purchaser).

⁵ In order to be liable for the taxes, the person assessed must be an individual (2) responsible for collecting and paying over the tax (2) who willfully failed to perform the duty to collect, account for; or pay over the taxes. *George v. U.S.*, 819 F.2d 1008, 1011 (11th Cir. 1987); *Mazo v. U.S.*, 591 F.2d 1151, 1153 (5th Cir.), cert. denied, 444 U.S. 842 (1979).

⁶ On occasion, however, the principal of a business may argue successfully that the a bookkeeper embezzled money that was designated as payments to the State Department of Revenue and, in that vein, the State Department of Revenue may opt to withdraw the assessment against the responsible person. Typically, pursuit of the bookkeeper through a criminal action is required.

⁷ Where more than one person pays the trust

fund tax, each has the right of contribution from the other, for the amount in excess of the person's proportionate share of the taxes; must be filed as a separate civil action. See I.R.C. § 6672(d).

⁸ If necessary, the revenue agent can use the State Department of Revenue's subpoena power to obtain such information. See O.C.G.A. § 48-2-8(a).

⁹ In case of a fraudulent or false return, filed with intent to evade tax, tax may be assessed at any time, and if no return is filed, tax may be assessed at any time.

¹⁰ Where the assessed party chooses to challenge the assessment by demanding a hearing under the Georgia Administrative Procedures Act, O.C.G.A. § 50-13-12, then, arguably, the Department bears the burden to show liability. State Reg. 616-1-2-.07(1) ("[t]he Referring Agency shall bear the burdens of persuasion and going forward with the evidence in all matters [before the Office of State Administrative Hearings]").

¹¹ Amounts less than \$500.00, punished as a misdemeanor. Amounts exceeding \$500.00, punished by imprisonment for between 1 and 10 years, or, in the discretion of judge, as for a misdemeanor.

J. Vincent Cook *continuation*

Community Council on Aging, the Athens Symphony, the Athens Emergency Food Bank, the Sandy Creek Nature Center, and the Athens Area Chamber of Commerce. He has also been Past Master of the Mt. Vernon Masonic Lodge #22.

None of this is yet to mention his spiritual side. He is active in St. Gregory's Episcopal Church, having served as Youth Coordinator. He is a graduate of the University of the South's EFM Program.

I trust this demonstrates he is well qualified by his life's accomplishments to receive this award. But remember this is only part of the picture. Before Mark begins I must tell you that Jay has had some difficulty keeping up with the technology. His staff denies he can turn on the computer, but they are proud that he has mastered the cell phone. They only wish he would learn that he does not need to move the phone from his ear to his mouth when he wants to speak. But I have spoken enough, and I now give you Mark Dehler who will tell how Jay has really contributed to the practice of law in our state.

John Timmons

Participating in the introduction of Jay Cook is quite an honor. While it is obvious from what John has had to say that Jay has served his community and his profession with tireless work, it is his investment of time and talent in the development of at least a generation of lawyers that makes him deserving of this Tradition of Excellence Award. In addition to winning multi-million dollar medical malpractice verdicts. Jay has taken the time to invest in a great number of younger lawyers. These days the word "mentor" gets used a lot and, I am afraid, its meaning has eroded. But being a mentor, in the fullest sense of the word is what Jay does. It is the reason he is being honored here today. More than a generation of lawyers have been trained at the

University of Georgia since Jay set up practice in Athens. From the beginning he has worked with law students, as students and clerks at Cook Noel Tolley Bates & Michael, younger lawyers just starting out in practice, and more experienced lawyers in transition. What people learn from working with Jay is a tireless work ethic, a passionate belief in the representation of injured people, and uncompromised personal and professional ethic. He doesn't teach these qualities by lecturing about them, he teaches them by doing them, by showing younger lawyers and students how those qualities are integrated into, and are the basic foundation, of the practice of law. I am fortunate to be able to count myself among those who have benefited by working with Jay Cook.

Jay is not, however, without his lighter side. Jay recognizes that life and the practice of law need to include a certain level of frivolity. His antics at firm parties, fishing and boating trips, and Georgia football games are the stuff of legend. Unfortunately, the details are sketchy and often clouded by the effects of the beverages consumed and the fear of self-incrimination of the witnesses. In fact, the unavailability and professed lack of recollection of a number of the witnesses made me wonder if Ed Tolley didn't get to them first. The physical evidence is equally missing. Except for a picture of Jay jogging through downtown Athens in skimpy running shorts, nothing appears to remain of what everyone who would talk assured me were some really great and funny times.

Jay is also not without his vain side. As John mentioned, Jay was much more impressed with the report that some members of the selection committee for this award doubted that he had attained the requisite age of 50. (Jay, those who doubted your age were all men, so don't get too pumped up. All the women knew you were older.) Jay's frequent after-

noon work-out sessions leave his office speculating: "What is Jay having done today?" Rumor is they even have an occasional office pool where the options range from a massage with manicure and pedicure to a light work out and steam bath.

Finally, no one could introduce Jay without including his family. He and his wife Frankie have been married 38 years. She was obviously a child bride. Ask Jay about his son, Jay, his daughter, Lea Anne, and her children and you will see his face light-up and his whole demeanor brighten. They are with him today and are always with him in spirit.

On behalf of all of the members of the Bar who have benefited from his leadership, his friendship, and his professionalism, it is an honor to introduce to you Jay Cook, the 2001 Recipient of the General Practice and Trial Sections Traditions of Excellence Award for Plaintiffs Attorneys.

Mark Dehler

PLEASE NOTE

We can reach you fast by broadcast e-mail but we need your e-mail address. You can go to the State Bar website at gabar.org and click on membership then on the address change form and register your e-mail address.

From Our Annual Meeting...

Over 100 people attended the "Tradition of Excellence" breakfast to hear the introduction of the award recipients and their acceptance speeches.



Keynote speaker, Alex Sanders, President of the College of Charleston, is congratulated after his speech by Section Chairman Sally Akins and Chairman Elect Lester Tate.



The Tradition of Excellence reception was a big hit and fun was had by all.



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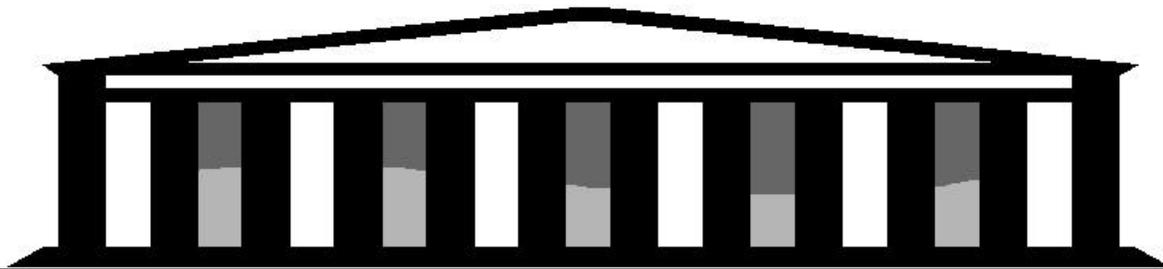
Thomas K. Kahn
Clerk of Court

Wednesday, October 24, 2001

8:30 a.m. to 10:00 a.m.

En Banc Courtroom, Eleventh Circuit Court of Appeals
Complimentary pasteries and coffee beginning at 8:00 a.m.

CLE credit may be available



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1) APPELATE ADVOCACY

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Tradition of Excellence



CFA Celebrates Thirty Years. This month, the California Faculty Association (CFA), an AAUP affiliate, celebrated the thirtieth anniversary of its recognition as the collective bargaining representative of faculty in the California State University and of its first contract. Over the past three decades CFA, which represents twenty-four thousand librarians, counselors, coaches, and tenured, tenure-track, and non-tenure-track faculty, has grown into one of the most powerful and influential faculty unions in the country. CFA's contract is a model for the protection of the rights of contingent facu