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Note Taking – A Foil or Foible -*October 17, 2001*

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H.S. Grace & Company, Inc. provides litigation consulting services to a number of clients, both plaintiffs and defendants, especially in areas involving business disputes or bankruptcies. We have found that one of the real threats to successful litigation is information obtained in discovery being used against the person who originated notes about a facet of the case. Often the notes were prepared for the best of reasons but not enough thought was given to potential damage if the information contained in them fell into the wrong hands.

As a service to our clients, we asked Richard W. Simmons Esq. to prepare a paper examining this issue. Mr. Simmons is former Deputy General Counsel and Director of Litigation of NationsBank (now Bank of America), and also former General Counsel of Fortis Insurance Company. Following are some of the key points he suggests that firms think about and try to put into practice.

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Among the trial bar, there is no more contentious argument than that surrounding the issue and consequent advantages and disadvantages of taking notes. Attorneys, as a group, are very risk adverse and therefore discourage clients from taking notes that can be used against them in the future. The reason attorneys frown on note taking is that they know from experience that few of us are diligent about doing what is necessary to make our notes useful and bullet proof. Certainly, if you or your staff is unwilling to put forth the effort necessary to protect yourself from sloppy note taking, you should follow the majority view and not retain notes on sensitive matters.

As a contrarian, however, Mr. Simmons champions the regimen of extensive note taking in almost all significant conversations – this not only ensures orderly follow-up on the representations of others, but also creates a record of critical background information for future use. For over 15 years, Mr. Simmons has kept extensive notes on all significant conversations and negotiations and has found them extremely useful. His clients and co-counsels were often amazed at how helpful they were in achieving successful outcomes. Over time it became common practice for others to call to inquire if he had kept notes on meetings where their initiatives were discussed. However, Mr. Simmons makes it abundantly clear that taking notes is an art and must be done in a way that establishes their veracity. To create the aura of authenticity for your notes, you must be religious about the quality of your notes and ensure that other meeting attendees agree with your notes. If you do this by habit, you will undoubtedly cultivate a crop of "believers" who will always attest to the quality

of your note taking.

Just writing down conclusions will not be sufficient in this process. You must also memorialize the individuals' concerns and identify the speaker, reflect all options considered and list recommendations made, options generated, and any critical assumptions. The diligence of your note taking will translate into the power of your notes. As you can see, you are creating a perception of yourself and your notes. A positive perception results in power to persuade, especially as you build your case and try to achieve consensus.

As a 27-year trial attorney, Mr. Simmons says without hesitation that well taken notes are invaluable. Not only can they assist in a formal setting, but accurate notes, the veracity of which is borne out by clients and others in your organization, will help you derail disputes and enable you to bring closure - often without mediators or arbitrators – remembering always that the best negotiated "deal" is one struck by the interested parties.

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Following are Mr. Simmons' "Rules of the Road" to guide you as you take notes:

Rule No. 1. Note takers must always ask themselves "am I willing to defend this communication in front of 12 uninterested jurors or a slightly biased judge?" If you are able to remember only one rule, let it be this one.

Rule No. 2. Avoid using inflammatory or baiting words in your notes. Stick to the facts and demonstrate the civility with which you have conducted yourself. However, you should take note of others who may have crossed over from civility.

Rule No. 3. Think through your conclusions and continually challenge those conclusions and those of your peers. Trial attorneys will demand to know the basis for your conclusions: you should be ready to support them and, in fact, have already included such support in your notes. This support should demonstrate the validity of your conclusions by reciting facts, assumptions and hypotheses upon which you relied, and the relative weight given to each.

Rule No. 4. Direct your communication at what you perceive the facts to be, always remembering that your perception is unlikely to exactly match that of others.

You are obligated to provide the reader with your reasoning and how you arrived at the assumptions. Make sure your notes provide a foundation for this reasoning.

Rule No. 5. The character and motives of individuals should be avoided at all costs unless you possess irrefutable facts. Remember, although character and motives seem to repeat themselves in the same individual, his or her current circumstances may either exacerbate or mitigate them. Remember always, perceptions viewed as reality by you will be perceived differently by others.

Rule No. 6. Always check any numbers used in your notes. Nothing can undermine your credibility more quickly than an error in a schedule or table in your notes.

Last Rule: Before filing your notes away, take a few minutes to re-read them with a critical eye. Remember Rule 1 about a jury looking at your notes, but also ask yourself, Will the average reader understand what I am trying to communicate? Have I assumed that the recipient has a certain level of knowledge? Is this assumption valid? If not, cut out the jargon and techno-babble. Using trite hackneyed expressions and jargon will not make your communications powerful.

********** *H.S. Grace & Company, Inc. provides specialized operational, financial, and litigation consulting services, and is committed to helping its clients avoid minefields that would create unforeseen problems. The proper preparation of notes is just one of the many things that can be helpful in avoiding those potential minefields.*

H. Stephen Grace, Jr. is President of both H.S. Grace & Company, Inc. and its sister company, Grace & Co. Consultancy, Inc., a strategic think tank. John E. Haupert is a member of the Board of Advisors of Grace & Co. Consultancy, Inc. Prior to his retirement, Mr. Haupert was Treasurer of The Port Authority of New York and New Jersey. Richard W. Simmons, Esq. is an independent consultant and informal advisor to Grace & Co. Consultancy.

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