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the Briefs

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President's Message ● Professionalism and Independence ● at Work in Bush v. Gore

March 2011

Earlier this year the Trial Lawyers Section of The Florida Bar held its inaugural Summit at ChampionsGate outside of Orlando. The featured speaker was Jeffrey Toobin, who enjoys an exciting career as a legal affairs analyst for CNN, a staff writer for *The New Yorker*, and the author of best-selling books such as *The Nine* and *Too Close To Call*.¹

While listening to Toobin confess to being “the world’s biggest *Bush v. Gore* junkie” and opine that the Supreme Court had lurched to the left on some important cases in the years following the 5-4 *Bush v. Gore* decision, I thought about the connections that a number of us have with some of the major figures in those historically significant events which took place in courtrooms all over Florida. I also thought about two of the most distinctive and enduring qualities of our profession, and the role those qualities play in the successful operation of the judicial system and our Nation. I am talking about professionalism and independence.

Whether you refer to it as professionalism or courtesy that traditional quality is essential to the legal profession, and the same can be said for independence. The professionalism of our judiciary, and the respect they garner as a result of it, was on clear display ten years ago. The Chief Justice of the Florida Supreme Court during *Bush v. Gore* was long-time OCBA member and former OCBA president, Charley Wells, who has now come back home to continue his practice of law. Although a number of us might have been somewhat disappointed (given the Florida State v. Florida game taking place in Tallahassee) that during the proceedings he did not wear the orange and blue robe that the OCBA gave him upon being named to the Court, in hindsight we can all of course agree that Chief Justice Wells made the right decision with regard to maintaining the decorum of the Courtroom. While I am mainly joking about the orange and blue robe, I’m sure that folks will agree that Chief Justice Wells acquitted himself well during those stressful times. And I am also sure that the conduct of the Court, and its obvious respect for the litigants and legal practitioners before it, strengthened the faith of all those watching in the objectivity of our judicial system and the diligence and integrity with which they applied law to facts.

Major Harding was also then on the Florida Supreme Court, and happens to live next door to my mother, whom I was visiting during some of the *Bush v. Gore* proceedings. While it was somewhat surreal to watch that distinguished man walk out of his house and head to his office, knowing that he was involved in deciding appeals that could determine who would be the next president of the United States, I was mainly struck by the ordinariness of the scene and the graciousness that Judge Harding showed outside the courtroom. Regardless of the stress he might have been under, Justice Harding smiled and waived as he always did.

During that trip to Tallahassee, I went to the gym for some exercise and eventually played in a pick-up basketball game with a black-mustached man I recognized from watching the trials on CNN; he was Judge Terry Lewis, and he presided over numerous cases that made their way through the system to be tried in Tallahassee. Here was the trial judge that I had watched on CNN, playing basketball with whoever walked into the gym! Jeffrey Toobin eventually wrote very nice things about Judge Lewis’ handling of those presidential trials, and those who attend The Florida Bar’s Annual Convention will recognize Judge Lewis as a stimulating lecturer on professionalism.

the Briefs March 2011 Vol. 79 No. 3

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Frank M. Bedell

Current Florida Supreme Court Justice, Jorge Labarga, who spoke at last fall’s OCBA joint luncheon with the Hispanic Bar Association, also has a connection to *Bush v. Gore*. As it turns out, Justice Labarga was a trial judge in Palm Beach County – home of the “butterfly ballots” – and he now sits on the very Court that affirmed many of his rulings. As was evident during his speech, Justice Labarga is another example of a member of our judiciary who consistently displays the respect for others, which allow our system to thrive.

The independence of lawyers is another enduring quality of our profession that was also on display throughout the *Bush v. Gore* proceedings. George W. Bush’s main lawyer was Barry Richard, who has served as The Florida Bar’s outside counsel on litigation of importance, including the advertising rules and constitutional matters. Barry is also a lifelong Democrat, who served in the legislature before moving to Tallahassee, where he distinguished himself as an appellate advocate. Apparently, Barry’s political background caused enough consternation among Republican operatives that they chose a Washington, D.C. lawyer to argue the first *Bush v. Gore* appeal before the Florida Supreme Court despite Barry’s vast experience before that Court. Following that initial oral argument, and notwithstanding his political affiliation, the Republican team chose Barry to handle all remaining oral arguments, except for the ultimate appeal to the United States Supreme Court, which was argued by Ted Olson, while David Boies argued on behalf of Al Gore. Barry’s considerable skill, his ability to remain objective and independent in his representation of his client, and the professionalism he consistently displayed in his law practice won him the respect of his colleagues and the opportunity to help make history.

Barry Richard will speak at The Florida Bar Annual Convention this year, where his theme will be the “The Independence of the American Lawyer.” Professional independence allows a member of one political party to represent a presidential candidate from the other party. Barry had represented different political figures for years, and I feel confident that he knew his party affiliation and past history as a candidate would never compromise his ability to provide first-class representation, with the highest degree of professionalism. Some non-lawyers might not understand how David Boies and Ted Olson could argue opposing sides in *Bush v. Gore* in 2000, and then ten years later serve as co-counsel for the plaintiffs in a famous California civil rights case, but those of us in the profession know that it is because they respect each other and respect the rule of law. Our independence in the practice and on the bench, and the respect we show each other, consistently set us apart as attorneys and judges. I urge all who are engaged in the practice of law or in any other sort of public endeavor to protect and nurture these enduring qualities in ourselves and in others.

Frank M. Bedell is a shareholder with Winderweedle, Haines, Ward & Woodman, P.A. He has been a member of the OCBA since 1987.

¹ *The Nine* is a book authored by Toobin about the United States Supreme Court, and *Too Close to Call* focuses on the thirty-six days of litigation that took place all over Florida and culminated with the Supreme Court deciding *Bush v. Gore* on December 12, 2000.

Killinger v. Guardianship of Grable,
983 So. 2d 30 (Fla. 5th DCA 2008)

Denied certiorari petition contesting
extensive discovery in guardianship
proceeding.

Caiazza v. Tuff Realty Corp.,
805 So. 2d 29 (Fla. 5th DCA 2001)

Protected ownership of two multi-million
dollar Florida corporations.

McGhee v. Volusia County,
679 So. 2d 729 (Fla. 1996)

Clarified sovereign immunity/scope of
employment rules for deputy sheriffs.

Whigham v. Shands Teaching Hospital,
613 So. 2d 110 (Fla. 1st DCA 1993)

Reinstated multi-million dollar medical
malpractice action against blood bank.

Pixton v. Scotsman,
924 So. 2d 37 (Fla. 5th DCA 2006)

Reversed dismissal of negligence action
for failure to comply with RCP 1.070(j).

Acadia Partners, L.P. v. Tompkins,
759 So. 2d 732 (Fla. 5th DCA 2000)

Prevented multi-million dollar judgment
addition in complex business litigation.

Petry v. Pettry,
768 So. 2d 8 (Fla. 5th DCA 2000)

Reversed conversion of rehabilitative
alimony to permanent alimony.

GEICO v. Krawzak,
675 So. 2d 115 (Fla. 1996)

Required disclosure of uninsured motorist
insurance carrier as a party defendant.

***Marriott International, Inc. v.
Perez-Melendez,***
855 So. 2d 624 (Fla. 5th DCA 2003)

Affirmed million dollar personal injury
verdict based on the "two issue rule".

Thomas v. Fusilier,
966 So. 2d 1001 (Fla. 5th DCA 2007)

Reversed forfeiture of \$250,000 payment
required by marital settlement agreement.

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OCBA Professionalism Awards Luncheon

March 24, 2011

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The Best of the Best: OCBA 2011 Professionalism Award Recipients

Each year the Orange County Bar Association formally recognizes three of its members for outstanding professionalism. Each award given bears the name and honors the memory of past members of the bench and bar who exemplified professionalism in their own right: William B. Trickle, Jr. Professionalism Award (attorneys practicing more 15 years or more), Lawrence G. Mathews, Jr. Young Lawyers Professionalism Award (attorneys practicing less than 15 years), and the James G. Glazebrook Memorial Bar Service Award (member of the judiciary).

Given the extremely high level of professionalism demonstrated daily by all members of the OCBA, choosing the Best of the Best for each award classification is both challenging and enlightening. The OCBA Professionalism Committee solicits, receives, and carefully considers written nominations in each category in order to determine who among the members of the OCBA have shown the way towards achieving and furthering professionalism in our legal community. The Professionalism Committee's recommendations are then submitted to the OCBA's Executive Committee for final approval.



Patrick M. Magill

The 2011 William B. Trickle, Jr. Professionalism Award recipient is the late **Patrick M. Magill**, whose outstanding service to the Legal Aid Society and its Guardian Ad Litem Program were legendary. Pat Magill not only cared about those who needed legal assistance, he did all that he could personally and professionally to make sure that it was provided and delivered with compassion and competency.

Pat Magill's word was his bond, period. If you reached an agreement with him, it was iron clad and undisputed. His service to the legal community also included serving for many years as member and chair of the OCBA Professionalism Committee, writing numerous articles on professionalism, and presenting many seminars dealing with professionalism issues. His warm, kind, and welcoming personality was a gift to all who knew him. In a special, private ceremony Patrick Magill received the 2011 William B. Trickle, Jr. Professionalism Award, which he kept near at hand before passing away this past fall.



Penelope B. Perez-Kelly

The 2011 Lawrence G. Mathews, Jr. Young Lawyers Professionalism Award recipient is **Penelope B. Perez-Kelly**. She graduated from the University of Florida College of Law and became a member of The Florida Bar in 2000. In addition to practicing trademark, copyright, and commercial litigation with the firm of McClane Partners, she has been very active in various bar activities. She is a member of the Hispanic Bar Association of Central Florida and served as its president in 2007. Ms. Perez-Kelly led the efforts of the HBACF to bring top-notch speakers to its Pathway to the Bench series, which educated and encouraged its members to seek judicial service opportunities. She has been very successful in gaining financial support among local businesses to assist the HBACF's *pro bono* provision of legal assistance and guidance to Hispanic community members. She served on the Executive Committee of the Florida Bar's International Law Section and is a member of the Central Florida Association for Women Lawyers and the Central Florida Inns of Court. Penelope Perez-Kelly's willingness to mentor new lawyers is well known and an example to us all.

The 2011 James G. Glazebrook Memorial Bar Service Award recipient is the **Honorable John Marshall Kest**. After graduating from Florida State University College of Law, Judge Kest practiced law in Orlando for 31 years with Wooten, Honeywell, Kimbrough, Gibson & Daugherty, specializing in complex personal injury and wrongful death cases. He received the William B. Trickle, Jr. Professionalism Award in 1997 for his many contributions to professionalism as an attorney, including



The Honorable John Marshall Kest

continued page 6

The Ballroom at Church Street

11:30 a.m. - 1:00 p.m.

225 S. Garland Avenue • Orlando, FL 32801

Co-hosted by the OCBA Professionalism Committee

Please RSVP to reservations@ocbanet.org by Friday, March 18, 2011.

Main Entrance: Garland Avenue between Church Street and South Street

To ensure a proper luncheon count, RSVPs and CANCELLATIONS are requested no later than Friday, March 18, 2011. The OCBA is happy to provide 10 luncheons as part of your member benefits, but no-shows incur additional charges for the Bar and walk-ins cannot be guaranteed a seat.

Please keep us up-to-date on your reservation status!

March Awards Luncheon

continued from page 5

president of the Orange County Bar Association and of the Legal Aid Society, and repeated recognition for outstanding *pro bono* legal service to the community.

Since becoming a Circuit Judge, John Kest's dedication to professionalism in the legal community and service to the community as a whole have increased unbelievably. He is an active member of the OCBA's Professionalism Committee, frequently volunteering to speak at seminars, authoring numerous articles, and encouraging forward-thinking projects in the realm of professionalism. Mentoring young lawyers has always been important to Judge Kest, as evidenced by his service in the Inns of Court, many presentations at Bridge the Gap seminars, and his current project of Brown Bag Lunch Seminars, which provide practical advice to younger lawyers on how to conduct themselves professionally at hearings, depositions, and trials. Judge Kest has served on numerous judicial committees at the

local and state level, including several that involve judicial education and mentoring of incoming judges. The Central Florida Chapter of the American Board of Trial Advocates recognized Judge John Kest as the Jurist of the Year in 2010. John Kest was a lawyer's lawyer and the Honorable John M. Kest is known as a judge's judge.

We thank year's Best of the Best in Professionalism for their service and congratulate them and their families for the well-deserved honors. We also offer special thanks to the families of William Trickel, Larry Mathews and Judge James Glazebrook, for whom the awards are named, and to the past recipients of these awards. All members of the bar should follow the examples set by this year's and past years' recipients as you resolve to practice law or serve on the bench professionally, courteously and proudly in 2011.

James A. Edwards, chair of the OCBA Professionalism Committee, and partner with Zimmerman, Kiser and Sutcliffe in Orlando.

Luncheon Speakers:



Leon H. Handley



Robert T. Magill

Past Awards Recipients

William Trickel, Jr. Professionalism Award

- 2010 Leon H. Handley
- 2009 Mary Anne De Petrillo
- 2008 Council "Butch" Wooten, Jr.
- 2007 Kirk N. Kirkconnell
- 2006 William B. Wilson
- 2005 Michael P. McMahon
- 2004 Warren W. Lindsey
- 2003 Bruce B. Blackwell
- 2002 Ava K. Doppelt
- 2001 Hon. Sally D.M. Kest
- 2000 R. Lee Bennett
- 1999 Chandler R. Muller
- 1998 Darryl B. Bloodworth
- 1997 Hon. John M. Kest
- 1996 Hon. Gregory A. Presnell
- 1995 Jules S. Cohen
- 1994 David B. King

Lawrence G. Mathews, Jr. Young Lawyers Professionalism Award

- 2010 Cara M. Dobrev
- 2009 Heather Pinder-Rodriguez
- 2008 Elizabeth F. McCausland
- 2007 Diego "Woody" Rodriguez
- 2006 Thomas A. Zehnder
- 2005 Nicholas A. Shannin
- 2004 Tad A. Yates

James G. Glazebrook Memorial Bar Service Award

- 2010 The Honorable Lawrence R. Kirkwood
- 2009 The Honorable Alice Blackwell
- 2008 The Honorable Emerson R. Thompson, Jr.

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Legal Aid Society Board of Trustees 2007 – present

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OCBA Secretary 2005 – 2006

OCBA Gala Chair 2004

OCBA Foundation Board 2006 – 2007

OCBA Judicial Relations Committee, Secretary, 2010 – 2011

OCBA Appellate Practice Committee, Founding Chair, 2007

OCBA Young Lawyers Section, President, 2001 – 2002

CFAWL Executive Council 2006 -2007, 2008 - 2009

Ninth Judicial Circuit Grievance Committee 2006 – 2009, Chair 2009

OCBA Outstanding Substantive Law Committee Chair 2007 – 2008

IAS New Attorney Award of Excellence 2001

OCBA YLS Outstanding Board Member 1997

The Florida Bar Young Lawyers Division, President, 2005-2006

The Florida Bar Board of Governors 2004 – 2006

The Florida Bar Appellate Court Rules Committee 2003 – present (currently Vice Chair)

Florida Supreme Court Historical Society Board of Trustees 2008 – present

Florida Bar Foundation Fellow 2004 – present

The Florida Bar YLD Most Productive Board Member – 2003



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on the occasion of its 50th Anniversary
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Celebrating 50 Years of Service
1961 - 2011



In 2010, Legal Aid received a total of 20,538 requests for assistance, but disappearing funding is impacting Legal Aid's ability to continue providing the level of legal services it does today. To accommodate requests for assistance as quickly as possible, we continue to take applications at the main office, five outreach sites throughout Orange County, homeless shelters, feeding sites and other local social service agencies. We also continue to provide community education. This year, for the first time, we partnered with the Orange County Library System to host a series of seminars on family law issues with an emphasis on decreasing family violence and elder abuse. All told, in 2010, we conducted thirty-eight educational events and reached 1,323 individuals.

During the past year, Legal Aid staff served clients struggling with a variety of legal issues, the majority of which resulted from the economic changes taking place in our community. Legal Aid saw grandchildren being raised by grandparents in need of court orders for custody in order to get medical assistance for their grandchildren; domestic violence survivors in need of custody and timesharing arrangements in order to provide children a sense of normalcy; tenants in foreclosed, single-family homes in need of representation in order to prevent wrongful eviction; and homeowners in foreclosure in need of information and counsel in order to try to save their home. Legal Aid attorneys also assisted individuals wrongfully denied their unemployment compensation benefits in need of representation in order to maintain an income, and single parents who qualified for the head-of-household tax exemption, and needed help in order to reclaim wages wrongfully being garnished.

Legal Aid is doing more with less, but we still need your help. Legal Aid often uses the slogan, "When all other doors are closed...ours is open." Soon, we may not be able to say this. Each year, Legal Aid faces deeper cuts in federal, state, county and foundation grant funds than the year before. The reality is that Legal Aid's doors *will* remain open, but they will be open to fewer and fewer clients. Lack of funds will eventually force the elimination of positions held by Legal Aid attorneys and support staff, resulting in our inability to provide services to a significant segment of our community. We may have to cut a GAL courtroom attorney, and those of you have served as a GAL understand the critical value of those attorneys.

The Florida Bar Foundation, our main funding source, has advised that over the next two years Legal Aid's funding will be drastically reduced. Jane E. Curran, Executive Director of the Foundation, noted that the Foundation's revenue had fallen eighty-eight percent since 2008. Although the Foundation planned for hard times, and set aside reserves to last for four years, Ms. Curran noted that even though they almost made it, they "didn't anticipate what the recession [would do] to interest rates." Falling interest rates have a devastating impact on programs, such as Legal Aid, whose grant monies come from the interest earned on investments. Until interest rates go up, Ms. Curran stated, "It is going to be tough."

The anticipated cuts could cost Legal Aid more than one staff attorney. On average, a Legal Aid staff attorney handles more than 1,000 clients. Think about what that means to our community! Children without child support may not have food, housing and stability. An elderly person, maybe someone you know, may have the lights or heat turned off by an unscrupulous landlord. More people will be homeless.

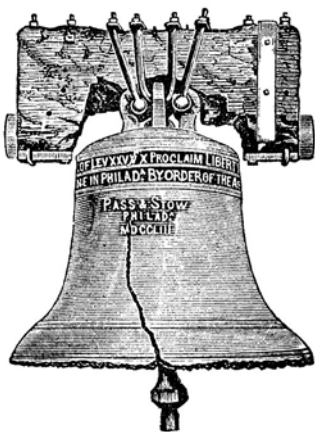
But this doesn't have to happen. You can help prevent this potential loss of services. Please partner with us by making a financial investment in the ongoing work of the Legal Aid Society. Help support the day-to-day operations of our programs.

The Legal Aid Society was established nearly 50 years ago by leaders of the Orange County Bar Association, and its continuing success over the years can be directly attributed to the support it receives from members of the OCBA. Please be vigilant in continuing the vision of those founders by ensuring the poor in our community have access to legal assistance each and every day. To make a donation please visit our website at www.legalaidocba.org, and go to the contribution tab on the lower left corner. To help with fundraising, or for more information about

Legal Aid, please contact Donna (Graf) Haynes at 407-841-8310, ext. 3150, or dhaynes@legalaidocba.org.

Together, we can make a difference.

Donna A. Haynes is Manager of Development for the Legal Aid Society. She has been an OCBA member since 2008.



The Liberty Bell Award Nominees Sought

The Orange County Bar Association invites you to submit your nomination today for a person or organization in our community that best demonstrates a deep commitment to the rule of law and has worked to promote civic responsibility among our citizens. The honoree will be awarded the Liberty Bell award at a ceremony held during the OCBA Law Week Luncheon on April 21, 2011. As you make your nomination, please consider those whose work meets the following criteria:

- Promoted a better understanding of the rule of law;
- Encouraged a greater respect for law and the courts;
- Stimulated a sense of civic responsibility; and
- Contributed to good government within the community.

Please submit a **one- to two-page** nomination letter that enumerates the ways your nominee exemplifies the qualities above. **Submission deadline:** _____, **2011**. Please mail your nomination to Christine Stram, Broad & Cassel, 390 N. Orange Ave., Ste. 1400, Orlando, FL 32801. For further information, contact Christine at 407-839-4200, or cstram@broadandcassel.com.



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Vanessa J. Skinner

The latest statistics from the Centers for Disease Control show that an average of one in 110 children in the United States is diagnosed with autism each year. Parents of adult children with autism and other disabilities such as Down syndrome and cerebral palsy who are not able to support or care for themselves are faced with unique challenges when preparing their estate plans.

In addition to the typical considerations parents face when developing their estate plans, such as the timing and amount of distributions of assets, parents of disabled children must also consider whether such distributions will affect their child's ability to receive means-tested government benefits, such as Medicaid and Supplemental Security Income (SSI).¹ A disabled adult child who has countable assets in excess of \$2,000 will be disqualified from receiving both SSI and Medicaid benefits.² Additionally, distribution of income directly to SSI and Medicaid recipients can reduce or eliminate benefits.

There are limited estate planning options available to parents of a disabled or special needs child. If the estate plan provides that assets are to be distributed outright to the disabled child, the child may not be capable of managing the assets, and such distribution of assets may disqualify the child from receiving government benefits. The government will require the child to spend the money he or she has before it will pay for residential care or other services. The costs of care for a disabled adult child are often quite high and can rather quickly exhaust what might seem like a large inheritance. Once the inheritance is exhausted, the child will be entirely dependent on government programs for food, shelter and clothing, and there will be nothing available to provide for quality of life, such as visits to relatives or a motorized wheelchair.

Alternatively, in order to avoid such a disqualification, parents may consider disinheriting a special needs child. However, this is not recommended in the event the government benefits are reduced or eliminated and the parents' assets will be needed to benefit the child.

Rather than disinherit the special needs child, some parents inquire about the feasibility of leaving the disabled child's share of their assets to the child's sibling, with

the understanding that such assets are to be used for the benefit of the disabled sibling. However, such arrangements are not legally enforceable, and the assets would then be subject to any bankruptcy, divorce, creditors, seizure or litigation against the sibling. Additionally, the sibling may die before the special needs child, in which case the assets would be subject to the terms of the sibling's will, which may not provide for the disabled sibling. Therefore, this option would not guarantee that the assets are ultimately used for the special needs child's benefit.

The recommended estate planning option for parents of a disabled child is to create and fund a third-party special needs trust (SNT). This type of trust will not prevent or disqualify the child from receiving public benefits since money or assets pass to the third-party SNT rather than the disabled child and are, therefore, not available to the special needs child for determining the child's financial eligibility for means-tested government benefits. The assets held in the trust never become a countable resource and are used to supplement, but not replace, public benefits. The public benefits pay for medical care and placement in a facility, if necessary, while the trust pays for living expenses such as transportation, home health aides, education, rehabilitation, computer equipment, and medical and dental care that are not already covered by private policies, Medicare or Medicaid.

Since a third-party SNT is both established and funded by someone other than the disabled child, it is not subject to the same level of federal regulation as are other types of SNTs (a first party trust or pooled trust). For example, when the special needs child dies or the trust terminates during the special needs child's lifetime, there is no requirement that the state be repaid from the remaining trust assets up to an amount equal to the total medical assistance paid for the child under a state Medicaid plan. Instead, a third-party SNT allows parents to control the ultimate disposition of the trust assets after the death of the disabled child, giving them the flexibility to distribute such assets to other children, to other descendants, or to charities of their choice. There are also no restrictions on the age of the disabled child who is the beneficiary of the third-party trust.

Third-party SNTs can be established as

standalone, *inter-vivos* trusts or under the parents' last will and testament or revocable living trust. The standalone third-party SNTs allow a convenient opportunity for other family and friends to contribute. For example, a parent's standalone third-party SNT can be structured to receive gifts, bequests and inheritances from the grandparents of a disabled child. This prevents the grandparents from having to prepare a separate third-party SNT by allowing them to name the existing standalone third-party SNT as the beneficiary of the assets. This also allows for simpler trust administration in that one trustee can be used and only one trust estate needs to be managed.

With a testamentary third-party SNT, the share intended for the disabled child is redirected to the SNT rather than directly to the child. Funds from other trusts may also be added to a testamentary third-party SNT.

A properly drafted third-party SNT is critical for preserving public benefits. The trust does not have to be irrevocable to maintain such benefits as long as the disabled child does not have the legal authority to revoke the trust. For SSI purposes, the third-party SNT must contain a spendthrift clause, which restrains both voluntary and involuntary transfer of the beneficiary's interest. Without this, the third-party SNT will be counted as a "resource" under the SSI rules. The trust terms cannot require mandatory distributions from the trust of either income or principal. The trustee must have sole discretion with regard to distributions for the disabled child. The third-party SNT cannot include ordinary support trust language. Instead, the trust should include provisions that provide the trust funds are to be used to supplement but not supplant government benefits, including SSI and Medicaid. Although a third-party SNT does not have to be a sole beneficiary trust and numerous additional beneficiaries may be named, the trust must clearly state that the disabled child's share is governed by the special needs trust provisions. A third-party SNT does not have to be submitted to the Social Security Administration (SSA) for review at the time of creation, but only when the trust is funded. At such time, the SSA will check to see if the trust has, in fact, been properly drafted.

Since the trustee of a third-party SNT has complete discretion in making distributions to or for the benefit of the special needs child, the selection of an appropriate trustee is a critical decision parents must face when establishing the SNT. From both a tax and public benefits standpoint, neither the special needs child nor his or her spouse should serve as trustee of the SNT. In selecting a trustee for a third-party SNT, parents are not only faced with the typical considerations for the trustee's age, health, integrity, reliability and expertise with regard to finances, but they must also take into

account the trustee's ability to understand and address the ongoing needs of the special needs child as well as understand the nuances of the various public benefits programs and how trust distributions will affect the disabled child's benefits. Typically, parents appoint as trustee a trusted family member, often the disabled child's sibling, who will likely know more about the beneficiary's needs and will not charge a fee. If the sibling is a current or remainder beneficiary of the trust, however, there is the potential for conflict of interest issues as well as adverse income and transfer tax consequences. If a family member

does not serve as trustee, an attorney or financial institution may be appointed.

A properly drafted third-party SNT will provide the trustee with maximum flexibility to meet the needs of the disabled child and maintain the child's eligibility for means-tested government benefits. This includes changes in the amount of government benefits that may be available to the disabled child in the future as a result of factors such as changes in SSI or Medicaid funding, budget cuts or eligibility requirements. Even if their disabled child is not currently receiving means-tested public benefits, parents are advised to establish a third-party SNT if there is any possibility their child could receive such benefits in the future. In the event the special needs child does not receive means-tested government benefits during his or her lifetime and only receives entitlement-based government benefits such as Medicare and Social Security Disability Income, the child will still benefit from the third-party SNT in that it protects the disabled child from his or her disabilities, disabilities, predators and creditors.

In conjunction with establishing a third-party SNT for their adult disabled child, parents must also review the titling and beneficiary designations

of their assets to ensure that the child is not named in his or individual capacity. For example, parents should review IRA, 401(k) and other retirement benefits, life insurance policies, annuities, transfer on death (TOD), pay on death (POD) and in trust for (ITF) designations on accounts, savings bonds or securities, joint accounts, and tangible personal property items such as collectibles, antiques and family heirlooms. Parents can fund the third-party SNT by naming it as the beneficiary of such assets.

Winter Park resident Dan McNutt followed the advice of an estate planning attorney and established a standalone *inter-vivos* third-party SNT for his 39-year-old autistic daughter in 1993. At the time, she was 21 years old and he and his wife were preparing to apply for SSI benefits on her behalf. "Creating this trust was the way in which our daughter could receive government benefits and also have funds accumulated to take care of her in the future," states McNutt. "We knew she would never be able to live on her own. After my wife and I are gone, she will move in with her sister, who will also serve as trustee of the SNT. Hopefully, our younger daughter could either add onto her home or move into a larger home with trust proceeds."

Between the trust assets and the government benefits she receives, McNutt says his daughter should be financially independent and not have to rely on her sister for financial assistance. He knows the trust can be used for expenses not covered by the government.

McNutt knows that day-to-day life with a disabled child requires careful planning. Family situations change, so it is important for parents to plan for the future in this way.



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¹ Medicare and Social Security Disability Insurance (SSDI) are not considered means-tested government benefits.

² Some assets, such as a home, one automobile and a burial plot are not counted toward the \$2,000 limit.

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- **A lack of security staff**, or security personnel who may not have been properly trained, or who took inappropriate action in a violent crime situation.

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Navigating the Metadata Minefield

Adam C. Losey

If you practice law, you are already navigating the metadata minefield. You could conceivably traverse it for years without triggering an explosion, or tomorrow you could blow your career and reputation to pieces with the unwittingly negligent click of a button. This article serves as a map to help you steer safely through.

I. Metadata, Scrubbing & Mining

Metadata is information about other pieces of information. Dictionary definitions are metadata, as dictionary definitions describe underlying words. The copyright information in the front cover of a book is metadata- and you likely look at metadata on a daily basis in a variety of contexts.

Metadata is embedded in most electronically stored information. The “author” field in a Word document is an example of metadata (i.e., the hidden part of the file that stores information on who created the document), as are the time and date records associated with a computer file (e.g., date of creation, date of the last modification to the file), records of “track changes” in a Word document (i.e., showing comments and revisions added to various versions of a document), mathematical formulas in an Excel spreadsheet, and embedded copyright information in an electronically stored photograph.

Scrubbing and mining are two colloquial terms oft heard in conjunction with metadata. Scrubbing is the process where the metadata entwined with a piece of electronically stored information is deleted. Scrubbing a Word document of metadata is similar to ripping out the front few pages of a book to remove the copyright and authorship information.

Mining refers to viewing the metadata associated with or embedded in electronically stored information. Although the term mining implies that metadata is hard to find, metadata is generally not secret or hidden. It is normally accessible with a few clicks of a mouse. For example, viewing the properties of a Word document will reveal the title, subject, and author of the Word document, along with the date the Word document was created, last accessed, and last modified.

Simple enough concepts. But in everyday practice, there is a veritable minefield of issues associated with metadata. Failing to scrub metadata in communications with opposing counsel can easily lead to dis-

sure of privileged information.

Scrubbing metadata in discovery documents constitutes spoliation and is often sanctionable. Mining metadata in opposing counsel’s communications is unethical and impermissible in Florida, but is permissible in other states. Failing to mine metadata in discovery is a major mistake for a variety of reasons.

II. Mining: Yes in Discovery, No in Other Communications

Metadata is often the smoking gun in litigations like those involving trade secrets or copyright infringement where chronology, distribution or authorship are dispositive of a critical issue. In most - if not all - litigation, metadata is helpful but not dispositive in itself. In all cases, you can and nearly always should mine metadata in the discovery process.

It is a relatively settled question that if a litigant requests discovery in native format, then a litigant is entitled to discovery in native format. Native format is simply the file format the application used to create the document normally reads and writes. The native formats of the vast majority of documents are Word documents, emails, Excel spreadsheets, and other pieces of electronically stored information with accompanying metadata. Pen-and-ink originals are rare. If you fail to request and receive discovery in native format, and fail to look at the metadata accompanying electronically stored information, you are ignoring potentially critical information that you are entitled to receive.

However, outside of the discovery context, in Florida “[a] lawyer receiving an electronic document should not try to obtain information from metadata that the lawyer knows or should know is not intended for the receiving lawyer. A lawyer who inadvertently receives information via metadata in an electronic document should notify the sender of the information’s receipt.” Florida Bar Ethics Opinion 06-2 (Sept. 15, 2006). While jurisdictional rules regarding mining opposing counsel’s communications vary, the rule in Florida is clear. If you receive a document from opposing counsel, you can not mine the document’s metadata for information that might have been inadvertently transmitted to you.



III. Scrubbing: No in Discovery, Yes in Other Communications

Electronically stored information attached to an email, like all other electronically stored information, contains metadata. Sharing documents internally via email and exchanging “red line” edits or “track changes” comments is a great way to collaborate, but sometimes documents are sent externally without removing intra-office comments or other metadata that should remain confidential. This can lead to career-jarring slip ups, such as sending a settlement communication to opposing counsel without removing embedded “track changes” comments from a client indicating the maximum amount the client is willing to settle for.

In Florida, “[a] lawyer who is sending an electronic document should take care to ensure the confidentiality of all information contained in the document, including metadata.” *Id.* Thus, outside of discovery, scrub whatever you send externally (and make sure your employees do the same on your behalf). There are a variety of free and low-cost metadata scrubbing programs available on the Internet. Simply download and use one to ensure you maintain confidentiality.

However, you should not scrub documents in the discovery process. Scrubbing discovery documents destroys potentially relevant and discoverable information. Scrubbing is deletion, and it is often sanctionable as spoliation. Even converting a document to another file format will effectively scrub a document of its original metadata. Converting files to PDF or TIFF images when a party has requested documents in native format is sanctionable. See e.g., *Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co.*, 2009 WL 54629 (M.D. Fla. 2009). If a party requests (in discovery) a document in native format, you can not convert the file from its native format or otherwise scrub the document before production (with the exception of redaction with an accompanying privilege log).



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The Novartis Decision and Its Effect on Employers of Sales Representatives

Sally R. Culley

On July 6, 2010, the U.S. Court of Appeals for the Second Circuit ruled that approximately 2,500 pharmaceutical sales representatives employed by Novartis Pharmaceuticals Corporation were entitled to the payment of overtime wages. *In re Novartis Wage and Hour Litigation*.¹ This ruling turns on its head the general thought that pharmaceutical sales representatives are exempt from the overtime requirements of the Fair Labor Standards Act (FLSA). Any employer of sales representatives, particularly pharmaceutical sales representatives, will want to be familiar with this case.

Under the FLSA, employers are generally required to pay their employees overtime (calculated as time and a half) for all time worked over 40 hours in a week. However, there are several exemptions to this, and if an employee falls into one of the exemptions, then the employer is not required to pay that employee overtime.

In the *Novartis* case, approximately 2,500 current and former pharmaceutical sales representatives employed by Novartis sought millions of dollars in back pay for overtime allegedly worked by the sales representatives. On a motion for summary judgment, Novartis argued that the sales representatives were exempt from the requirements of the FLSA under both the “outside sales” and “administrative” exemptions. The district court agreed and entered summary judgment in favor of Novartis and against the plaintiffs.

On appeal to the Second Circuit Court of Appeals, the district court’s decision was vacated. Relying on the regulations promulgated under the FLSA by the Department of Labor, the court determined that the pharmaceutical sales representatives were not exempt under either the outside sales or the administrative exemptions.

With regard to the outside sales exemption, the court took a very narrow view and held that the sales representatives did not make sales as required by the regulations. Although there was evidence that the sales representatives met with physicians, explained their products, and attempted to obtain statements from the physicians that they would prescribe those products where appropriate, the representatives did not sell anything to the physicians. The court found that “a person who merely promotes a product that will be sold by another person does not...make the sale.”²

With regard to the administrative exemption, the relevant issue was whether the “primary duty” of the pharmaceutical sales representatives included the “exercise of discretion and independent judgment.”³ The court noted that the sales representatives were heavily regulated and controlled insofar as what they could say or do. Novartis argued that, even so, the sales representatives exercised discretion in when and how to visit physicians, how to allocate their budgets for promotional events, and how to allocate their samples. However, the court minimized those things and held that the sales representatives were not “sufficiently allowed to exercise either discretion or independent judgment in the performance of their primary duties.”⁴

Because the court found the outside sales and administrative exemptions to be inapplicable to the pharmaceutical sales representatives, the summary judgment entered in favor of Novartis was vacated and the case was sent back to the district court for further proceedings. Unless Novartis can prove that its pharmaceutical sales representatives are exempt from the requirements of the FLSA under one of the other available exemptions, then it is facing a multi-million dollar judgment in favor of its pharmaceutical sales representatives for payment of back wages (in the form of overtime), interest, and attorneys’ fees.

The *Novartis* decision is in conflict, at least on its face, with the Third Circuit’s recent decision in *Smith v. Johnson & Johnson*.⁵ In the *Smith* case, it was determined that a pharmaceutical sales representative was exempt from the FLSA under the administrative exemption. The court specifically noted, however, that the plaintiff “executed nearly all of her duties without direct oversight,” and that she had described herself as “the manager of her own business who could run her own territory as she saw fit.”⁶ Based on her testimony, the court found that the plaintiff exercised discretion and independent judgment in the performance of her primary duties, and that the administrative exemption was, therefore, applicable. Had the testimony of the plaintiff been different in that case, there may have been a different decision.

The Ninth Circuit has also very recently issued an opinion that conflicts with Novartis’s analysis of the outside sales

exemption.⁷ In that case, the court found that the plaintiff pharmaceutical sales representatives were exempt from the FLSA under the outside sales exemption, determining that the “sale” was “the exchange of non-binding commitments between the [pharmaceutical sales representative] and physician at the end of a successful call,” even if there was no actual sale of anything tangible from the representative to the physician. The court was critical of the Department of Labor’s seeming acquiescence in failing to challenge for decades the outside sales exemption for pharmaceutical sales representatives.

The Eleventh Circuit has not yet spoken to the issue of whether a pharmaceutical sales representative is exempt from the FLSA, and it may not get a chance to do so before the United States Supreme Court has its say. A petition for a writ of certiorari was filed by Novartis on October 4, 2010.

Employers of sales representatives who wish to claim exemption from the FLSA should take a close look at all three of the cases discussed here. Based upon those decisions, if an employer wishes to take advantage of the outside sales exemption, it is possible that the courts will require the sales representatives to be engaged in actual sales of a product or service. Further, in order for the administrative exemption to apply, the sales representatives must be allowed discretion and independent judgment in the performance of their primary duties. As shown by *Novartis*, too much regulation and control by the employer can defeat that exemption.

Sally R. Culley, Rumberger, Kirk & Caldwell, P.A.?????



¹*In re Novartis Wage and Hour Litigation*, 611 F.3d 141 (2nd Cir. 2010)

²*Id.* at 153.

³*Id.* at 155.

⁴*Id.* at 157.

⁵*Smith v. Johnson & Johnson*, 593 F.3d 280 (3d Cir. 2010)

⁶*Id.* at 285.

⁷*Christopher v. SmithKline Beecham Corp.*, 2011 WL 489708 (9th Cir. Feb. 14, 2011).]

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