ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

ORANGE COUNTY

Volume XIV No. 3 **Summer 2012**

Q&A with the Hon. Jean P. Rosenbluth

By Taylor R. Dalton

[*Editorial Note: United States Magistrate Judge Rosenbluth was appointed in September 2011 to the U. S. District Court for the Central District of California. She previously served as director of legal writing for USC Gould School of Law, where she had also graduated. Prior to enrolling at USC, she was a respected music industry reporter for the Los Angeles Times and Rolling Stone. After graduating from USC, Judge Rosenbluth served as a former assistant U.S. attorney and senior litigation counsel for the U.S. attorney's office in Los Angeles. Judge Rosenbluth also clerked for the Hon. Ferdinand F. Fernandez, of the U.S. Court of Appeals for the Ninth Circuit, and the Hon. Alicemarie H. Stotler of the U.S. District Court for the Central District of California.*]

Q: Knowing that you started as a journalist, how did you choose to go to law school?

A: I really went to law school for two reasons, neither of which had anything to do with wanting to be a lawyer.

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Mediation Practice Tips From An Insider

By Hon. David H. Brickner (Ret.)

I. Preparation

As Coach Wooden said "Failing to prepare is preparing to fail." Take your upcoming mediation seriously with an eye to making real progress toward settlement. Spending the time necessary to "tee it up" for best results will yield dividends. Below are a few things you should consider when thinking about and preparing for a mediation:

- **When to mediate**: Mediation can be undertaken any time: pre-litigation, during litigation but before discovery, after discovery, eve of trial, even after trial and verdict. Each case is different. You should evaluate when you think mediation would be most effective for your case and keep mediation and alternative dispute resolution generally in mind throughout the lifecycle of the case.

- **Choosing a mediator**: What type of mediator is right for your case? Facilitative? Evaluative? A facilitative mediator primarily focuses on the emotional needs of the parties. An evaluative mediator, on the other hand, means unflinchingly frank though, one hopes, tactful, comments to both sides describing case weaknesses and risks. In other words, as many counsel have told me over the years, "Beat up on the other guy, then beat up on me." One way of selecting a mediator is to let the other attorney send YOU a list. Thus, you are selecting a mediator with credibility in your opponent's eyes, so when the mediator gives BOTH of you the bad news, the impact in the other room is that much greater.

- **The mediation brief**: There is usually no point in making your brief confidential. Why hide your arguments from the other side? (Who knows, maybe your opponent will silently agree with you!) Indeed, all the information

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Message from the President:
By Melissa R. McCormick

Welcome back from summer and to some excellent ABTL-OC fall programs.

On September 12, ABTL-OC presented "Olympics, Sports, and the Law," an inside look at legal issues and groundbreaking cases involving elite athletes. This timely presentation featured three of the world's leading practitioners in the area of sports law: Richard W. Pound, a former Olympic swimmer, former Vice-President of the International Olympic Committee, and former head of the World Anti-Doping Agency; Howard L. Jacobs, one of the leading sports lawyers in the United States; and Jeffrey G. Benz, an arbitrator for the Court of Arbitration for Sport and the former General Counsel of the United States Olympic Committee. The panelists' insightful comments about the unique issues that arise where sports and the law intersect fascinated the audience.

ABTL's 39th Annual Seminar also took place in September, at the Grand Hyatt Kauai Resort & Spa. Seminar attendees were honored to have California's Chief Justice Tani Cantil-Sakauye deliver the keynote address on Saturday, September 22, and California Associate Justice Ming W. Chin address the seminar on September 19. Many ABTL-OC attorneys attended the seminar, which focused on the use of technology in the courtroom and featured presentations by several terrific Orange County trial lawyers.

On November 7, 2012, and back by popular demand, ABTL-OC is honored to present Presiding Justice Kathleen E. O'Leary, Justice Richard M. Aronson, and Justice Richard D. Fybel of the California Court of Appeal, Fourth Appellate District, Division Three, addressing practice before the California Court of Appeal. The justices will provide "do's and don'ts" of written and oral advocacy in the appellate courts. This program drew a full house audience when ABTL-OC last presented it and ABTL-OC thanks Justices O'Leary, Aronson, and Fybel for offering this popular program again this fall.

ABTL-OC will also continue its annual holiday gift giving opportunity this year. During the November 7 program, ABTL-OC will be accepting monetary donations to support the Camp Pendleton Armed Services

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Complex Litigation for Complex Molecules: An Introduction to the Biologics Price Competition and Innovation Act

By Jonathan Bachand and Mark Metzke

I. INTRODUCTION

Biologics are therapeutic drugs that are generally derived from living cells or produced by biotechnological techniques. (*See* 42 U.S.C. § 262(i)(1).) In the last 30 years, breakthroughs in the development of biologics have caused a dramatic upswing in their clinical use. Biologics are currently used to treat a number of diseases and ailments, including arthritis, autoimmune disease, metabolic disorders, degenerative diseases, and cancers. Biologics, however, are extremely expensive with treatment averaging $16,000 per year. The high cost and increased popularity of biologics led to the passage of the Biologics Price Competition and Innovation Act ("BPCIA") as part of the Affordable Care Act. In an attempt to increase market competition and lower biologics prices, the BPCIA sets forth a shortened pathway to market for biosimilar products ("262(k) products") and a litigation framework that encourages patent challenges for makers of 262(k) products.

The BPCIA is modeled in part on the Hatch-Waxman Act as amended by the Medicare Prescription Drug Improvement, & Modernization Act of 2003 (MMA). The Hatch-Waxman Act, which applies to pharmaceutical drug products, provides, *inter alia*, an abbreviated pathway to approval for generics and a litigation framework to encourage generics to challenge patents covering both brand name drugs and their uses. The Hatch-Waxman Act has been of enormous importance to intellectual property litigators and has had a profound effect on the availability of generic drugs. Indeed, since the passage of Hatch-Waxman in 1984, the generic drug industry's share of the market has increased from twelve percent to 50 percent of all prescriptions sold.

In many ways biologics are more complex than chemically synthesized pharmaceuticals. For example, unlike chemically synthesized pharmaceutical drugs which typically consist of small molecules, biologics are often large, complex molecules with important secondary and tertiary structures. The complex nature of biologics makes it potentially challenging to determine their exact structure and composition and to synthesize them reproducibly. Given these

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Crossing the Line: Limitations on Defense Counsel's Communications with Putative Class Members

By Jennifer Bagosy and Ami Mody

Introduction

Attorneys defending clients in a class action have the right to contact members of the putative class, at least until the class is certified. Defendants' attorneys must take care, however, to avoid communicating with the class in a misleading or coercive way, particularly when there is a pre-existing relationship (such as employer-employee) between the defendant and the individual class members.

General Legal Standards Governing Communications with Class Members

After a class action is filed, but before the class is certified, the parties – including defendants and their counsel – have a First Amendment right to communicate with unnamed class members about the lawsuit. *See, e.g.*, *Mevorah v. Wells Fargo Home Mtg., Inc.*, No. C 05-1175, 2005 U.S. Dist. LEXIS 28615, at *10 (N.D. Cal. Nov. 17, 2005), *subsequent certification order reversed, In re Wells Fargo*, 571 F.3d 953 (9th Cir. 2009) ("Pre-certification communications to potential class members by both parties are generally permitted, and also considered to constitute constitutionally-protected speech."). Consequently, the courts may limit such communications only if there is evidence that a party's prior communications have been misleading, coercive, or otherwise improper. A limiting court order must be "based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101 (1981); *see also Eshelman v. Orthoclear Holdings, Inc.*, No. C 07-01429, 2007 U.S. Dist. LEXIS 67857 (N.D. Cal. Sept. 4, 2007).

Defense counsel's right to communicate with absent class members ends at class certification. Once a class action is certified under Federal Rule of Civil Procedure 23, the "no contact" rule (California Rule of Professional Conduct 2-100) bars defendants from communicating with class members regarding the litigation because the class members are now represented by Plaintiffs' counsel. (There is at least one exception to this rule. Collective actions under the Fair Labor Standards Act ("FLSA"), which are similar to Rule 23 class actions, are opt-in class actions. In those cases, the "no contact" rule applies, not as

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Brown-Bag Lunch with United States District Court Judge Andrew J. Guilford
By Sydney J. Blaauw

The Ronald Reagan Federal Building and U.S. Courthouse is a remarkable building with beautiful views overlooking the entire city. However, the welcoming and personable judges who preside there are far more impressive than the architecture.

On July 24, 2012, fourteen ABTL Young Lawyers Division members met with United States District Judge Andrew J. Guilford in his courtroom for an animated brown-bag lunch including a tour of his chambers and engaging discussions on effective oral advocacy and communication.

Judge Guilford began the afternoon by discussing issuing tentative rulings, calling it the "tentative culture" of the Central District, and how those rulings affect the art of effective oral advocacy in his courtroom. Judge Guilford advised lawyers preparing for law and motion hearings to read the tentative rulings issued every Friday afternoon and tailor their oral arguments accordingly. He suggested attorneys grab his attention by directing argument to specific issues in the tentative ruling and cite to page and line numbers where necessary. Focusing oral argument on select issues and implications of the tentative ruling will help avoid an adversarial tone or posture towards the Court. Frank discussion of a ruling's implications can be particularly persuasive. Judge Guilford put it simply: "Don't argue, discuss. Invite me to join you for an enjoyable walk through the vineyards of the law in search of truth."

Judge Guilford also stressed that successful oral advocacy and courtroom presentation begins with effective communication. He suggests lawyers pay more attention to tonal nuances, message delivery, and the listener's reception. He also suggested awareness of one's surroundings, eye contact, and effective use of courtroom technologies. Many attorneys unconsciously move away from the podium microphone without realizing that doing so renders their words inaudible. Judge Guilford demonstrated ways to use and move the podium microphone to accomplish effective microphone confidence.

Judge Guilford echoed a common and important piece of advice dispensed at brown-bag lunches: be respectful and courteous toward court staff. Word of an attorney's failure to show appropriate levels of respect and courtesy ultimately filter up.

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First, I had been working most recently at *Daily Variety*. I was the one person covering the music industry there. It's mainly a movies- and TV-type publication. They had me cover some trials and I realized that because I wasn't a lawyer and wasn't familiar with the law, my reporting sometimes suffered. I didn't quite know what was going on with these trials. I went to law school with the notion that I would go back to journalism and be a better journalist as a result of having a law degree. Also, before working for *Daily Variety*, I had been discriminated against. I had been up for a job that I really, really wanted and I was (if I say so myself) eminently qualified for. I knew a person who worked for that publication. He told me that he had told the people in charge of hiring that I was not good at my job (we had worked together previously) because he was married and felt attracted to me. I just felt so powerless. I didn't know any lawyers and I knew this was unfair, but I just had no idea if there was anything I could do to prevent it. I went to law school thinking that I was not ever going to let something like that happen again.

Q: So *Daily Variety* could not lure you back after graduation?

A: While I was in law school I learned about clerkships – judicial clerkships. I had no idea what a judicial clerkship was before I went to law school and I thought. "Wow that sounds like a wonderful opportunity." I also decided that if I could be so fortunate as to get a clerkship, I would do that for a year or two and then go back to journalism school. I was lucky enough to obtain a clerkship and, during the clerkship, I watched criminal trials and I saw what the Assistant United States Attorneys and the Deputy Federal Public Defenders did. They were like little mini soap operas and yet they were real. I thought that if I could do what they do, maybe I would do that for a while and then go back to journalism. I thought about it and I decided that being a prosecutor was probably more along my line simply because they are more autonomous – they don't have a client – and I liked the notion of not directly having to report back to somebody. So I was again lucky enough to get a job at the U.S. Attorney's office. And then, at the same time, journalism was rapidly changing from what it was when I had worked in the field. The advent of the internet meant traditional journalism jobs were dying. I was lucky enough to get law jobs that I enjoyed so much that I never wound up going back to journalism.

Q: What is the biggest difference for you between practicing law and now being on the bench?

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A: Simply shouldering the responsibility that, at least to some degree, I have the last say. With certain cases, some people might assume that Magistrate Judges think that a mistake will be caught by the District Judge or the Ninth Circuit. But the cases that we handle are so important to the litigants and we have a responsibility to ensure that mistakes do not happen and that we are giving them a fair shake. That is a lot of responsibility. As a prosecutor, obviously you have a lot of responsibility too, but prosecutors are not the ultimate decision makers. The judge is or the jury is. Here, it is never in another person's hands unless my decision is appealed. I should also note that I took 10 years off between practicing law and taking the job [as a magistrate judge] to work as a professor at USC. So coming back to having an occupation where you spend your days reading cases and writing or reading briefs, to writing opinions required an adjustment. My life was very different as a law professor.

Q: How did your role as a professor influence your approach to judging?

A: It was a wonderful training ground for me because it taught me so much about being patient and explaining why somebody needs to do what they need to do. Now, if you talk to some of my students they will tell you I was not always the most patient person and that I was rather demanding. But I felt it was important to hold the students to high expectations. If they wanted to be lawyers, they had to learn what people were going to expect of them. So I was demanding as a professor, but at the same time I tried to really sit down with the students who wanted to improve. Being a professor taught me a lot about being more articulate and listening and working with people who maybe are not as well-versed as you are in what's going on. Magistrate Judges have a lot of *pro-per* plaintiffs and petitioners so my experiences as a professor have been helpful. Really, I am still as opinionated as ever, but I am a better listener and more patient than I use to be before I was a professor.

Q: From journalist to practitioner/professor/judge, writing is obviously important to you. What are the most frustrating things you read and do you have tips to correct them?

Some of them are obvious. I understand that certain issues in particular fields of law come up all time. For instance, we handle a lot of Social Security appeals so I understand that, to some degree, there is certain boilerplate language from past briefs that attorneys are going to insert in a new brief that deals with the same issue. Completely understandable. But please just change the gender of the client or at least get their name right. I receive a fair number of briefs (not just in the Social Security field) with those mistakes. That sends a signal that the person writing the brief has not been careful. I cannot trust necessarily the analysis or anything else about the brief because I know that they have not even taken the time to make sure that little things like that are correct. That is an easy fix to just make sure that you have little things like that correct.

I believe strongly that there are some people out there who think that writing cannot be taught. I don't think that is correct. I think that it is certainly true that some people are innately better writers than others, but I think that anyone, if they are willing to put the time in, can improve. I suggest if you feel or have been told that you are not perhaps the world's best writer, then take the time to self-edit and review authorities on writing. I recognize this is very time consuming and I recognize that people at law firms cannot bill clients for this, but if you force yourself to make sure you have the little things done correctly, then writing slowly becomes second nature. Then, finally at the 57th time you are dealing with a particular syntax or usage, you don't have to look it up because you know it.

Q: This may be difficult, but who inspires you in your career?

The two judges that I clerked for were both inspirational and, in particular, Judge Stotler here in the Central District. After I clerked for her and gained some perspective by practicing in this District, I realized just how fortunate I had been to learn from her and what an amazing judge she was. Judge Stotler has continued to be such a great mentor and if I can be half the judge that she is I will be doing at least something right. She has been so giving of her time and really her life to the Court. She serves on a number of committees, gives speaking engagements, served her stint as the Chief Judge; she truly is inspirational. And Judge Fernandez on the Ninth Circuit, he was just everything you would want a judge to be. He works so hard and he read every case that was cited by the parties. He also wrote anything that was to be published from scratch. He was inspirational also in terms of his devotion to the job. Both of them have just been wonderful examples for me. Also, I have encountered many wonderful attorneys who are so dedicated to what they do. I think there are a lot of really great, dedicated, interesting people in our profession and I am fortunate to know them.

The ABTL thanks Judge Rosenbluth for her time.

♦ *Taylor R. Dalton is a business litigation associate at Rutan & Tucker, LLP.*

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Judge Guilford advocates using plain language in motions and briefs. He constantly tries to instill this value in his law clerks. For example, use the word "before" instead of "prior to." Write the word "regarding" and not "with respect to." Go with "said," not "indicated." Take this to heart when submitting a motion to his courtroom. Also, a motion's point should be stated quickly and clearly, preferably in the first paragraph.

Judge Guilford sees effective communication as indicia of intelligence. On the wall of Judge Guilford's chambers hangs a clipboard with the "Words of the day," a running list of words and phrases taken directly from briefs and motions submitted to him that are better classified as "gobbledygook." One goal for attorneys practicing before Judge Guilford is to avoid the "Words of the day" clipboard.

Thank you, Judge Guilford, for this informative discussion and fun walk.

♦*Sydney J. Blaauw is a law clerk with Aitken * Aitken * Cohn in Santa Ana and is a 3L at Chapman University School of Law.*

Want to Get Published?

Looking to Contribute An Article?

The ABTL Report is always looking for articles geared toward business trial lawyers.

If you are interested, please contact our Editor-In-Chief, Adina L. Witzling, at AWitzling@Manatt.com

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is likely to come out in the mediation anyway. Instead of a confidential mediation brief, consider adding a confidential final paragraph setting forth your settlement thoughts. Exhibits are important and helpful. Highlight relevant portions. If there is an important case upon which your matter turns, copy it, attach it to the brief and highlight the relevant portions. Also, remember that faxing of your papers wipes out the tabs separating the exhibits (making them virtually impossible for the mediator to find) and ruins the highlighting. Therefore, if at all possible, send your papers by FedEx or "snail mail."

- **Before the mediation:** It should go without saying -- don't come to the mediation if you are not truly willing to earnestly discuss settlement. The lawyer's input is crucial to the deal, and there will be no deal if you are not on board with the process.

- You might want to call the mediator the day before if he/she has not called you. The more your mediator knows about your case, the better job he/she will do, and it's a chance to get acquainted with your mediator, whom you may not have met personally. Finally, the telephone call is a good opportunity to tell the mediator about special aspects of the case or insights into the client's needs, and to inform the mediator of other "below the line" (i.e., personal/emotional) factors.

- Make sure you are up to date on all the facts, including prior deposition testimony. Settlement will turn on *facts* (and the personalities of the lawyers and parties). Rarely will a settlement turn on pure issues of law.

- Spend time with your client and ensure that your client understands the dynamics of mediation:

  - Be ready to deflate your client's expectations, which may have been nurtured by him/her over many months, as the mediator will probably be delivering a frank, and probably not terribly encouraging, view of your case.

  - It's not about winning, it's about settlement, not "justice" or "principle" etc. The client will probably pay more and/or receive less that he/she desires.

  - Everything turns on evaluating the demand/offer in light of the cost and risk of trial.

  - Everything is confidential and inadmissible in evi-

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dence (Evid.Code § 1115 *et seq*), so some degree of frankness during the mediation should not be too threatening.

- Keep emotions under control. Angry outbursts only move the process backward. However, if you feel the mediator needs to know of your client's need to vent, privately, tell the mediator so this can happen without impeding the process.

- Make sure your own emotions are under control as well.

- Discuss client's needs, both financial and emotional. Check verdict sheets for similar cases and the CACI instructions.

- Tell the client about the personality or style of the mediator, which you, presumably know, or should know.

- Prepare client for joint session; explain the need to be polite, even though, by now, your client is thoroughly fed up with the guy on the other side.

- Prepare client for long periods while the mediator talks to the other side.

- Bring pictures, schematics, diagrams and anything else that will help the participants understand your case.

- Power points and videos? Obviously, use of these devices to communicate the important facts of your case is reasonable. However, don't assume you will be able to show these in the joint session, because they present this problem: when YOU are doing your power point, the other lawyer has to sit there quietly while you advocate your case. This puts the other lawyer on the defensive as he/she sits there mute while you put on your show. Why start off with an irritated, defensive opponent? The best way to use this information is for the mediator to show the power point to the opposing attorney and client privately.

II The Process

The mediation itself, of course, is where "the rubber meets the road." Go with a willingness to work with a constructive, flexible, optimistic attitude, anticipating a reasonable resolution of your case consistent with the best interests of your client.

- **The joint session**: Some mediators use it, some don't. I believe it has value because when everyone talks about the case in the presence of everyone else, everyone learns something. However, there are pitfalls. If one of the parties or lawyers decides to vent on the other side, or the lawyers or parties fail to maintain civility, it can poison the process. The joint session should not consist of lawyers arguing their cases or questioning opponents. It should be a controlled and civil conversation *guided by the mediator*. When the joint session is successful, nobody is mad AND the REAL issues stand out in stark relief.

- **Be prepared to "do the dance."** Why? It's psychologically critical. For example, supposing, as a competent attorney, you have thoughtfully and reasonably concluded your case is worth a certain amount. Why not simply tell the mediator at the outset something like "Let's just cut to the chase. My demand is $50,000.00. We all know that's reasonable, I won't take less. Just tell them that number and we're done." Let us further assume you're actually RIGHT and the mediator agrees that is a reasonable sum. Nine times out of ten, this will *not work*. Why?

  - First, because you will want to make sure you aren't leaving money on the table (maybe they will pay $75,000.00.) And THEY want to make sure they are paying the least number of dollars; "will he take $45,000.00?" As a result the negotiations always start BEYOND (but not too far beyond) the borders of the reasonable to ensure that, as we edge toward one another, neither feels he's missing the possibility to get out in better shape. Imagine this: suppose your first demand is $50,000.00 and they immediately say DEAL! Would you not be more than a little concerned that you could have gotten more and now will never know?

  - Second, there is a huge psychological advantage to both sides to "doing the dance." The incremental approach gives both parties a comfort level because no one is being asked to submit outright to the other's demand. Each party, in effect, gets to say "no" a lot without de-railing the process.

- Another reason not to tell the mediator your "bottom line" or "final demand" at the outset of the mediation is because sure as heck, he/she will be asking you to move beyond it, forcing you to back down.

- **Remember the sacred rule of mediation**: never place your opponent in the position of having to *lose face* in order to agree with you. There is more than a little truth in the old adage "You catch a lot more flies with honey than with vinegar."

  - Civility pays HUGE dividends.

  - Be courteous to the other side.

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- Say something nice about the opposing attorney (even though it might make you choke).
- After the joint session, leave the bad news delivery to the mediator, who will, one hopes, tactfully, handle it in private caucus.
- Don't ever EVER make denigrating remarks about the opposing counsel, the client, or the case in their presence.
- Always avoid emotional outbursts.

- **Bring a person with authority**. Nothing is worse than working for four hours to hammer out a deal, only to have the party say "I have to call my wife." However, a mediation can still be successful if that person can't attend, if for good reason, but is available by telephone. If this is the case, be sure to tell the other counsel ahead of time. It is very irritating to the other side to show up only to hear the crucial person is not there.

- **Don't bring the deal breaker.** Not infrequently, the client will want a third person to attend the mediation for moral support or, worse, because that third person (a dad or a boyfriend etc.) is the one who's REALLY driving the bus. This person will persistently de-rail the discussion and, as often as not, question your advice. Result? Mediation wrecked. Leave the deal breaker out.

- Keep in mind **the beauty of the mediation process** is that the mediator plays the role of a *foil.* It works like this: Suppose your opponent met with you one-on-one and demanded "X" dollars. As sure as the sun rises in the east, your first, and entirely natural reaction, is to say no EVEN IF THE DEMAND IS REASONABLE. Why? Because agreement feels like surrender. *However*, suppose the mediator, tactfully, of course, suggests the very same thing to you in private session? The chances are overwhelming you will consider it more favorably because AGREEING WITH THE MEDIATOR DOES NOT SIGNAL WEAKNESS, WHEREAS AGREEING WITH YOUR OPPONENT DOES. This is the key reason mediation works.

- **The secret "smoking gun" evidence**. Occasionally counsel will tell me "Judge, we have the such-and-such great evidence, which positively kills the other side. They don't know we have it and you CAN'T TELL OR REFER TO IT WHEN TALKING TO THEM!" This evidence may consist of a video, damning email, "secret" witness etc. When this happens, it immediately de-rails the mediation. Now the plaintiff and defendant are talking about *different* cases. How can the mediator move the other side when the *reason* they should move is being hidden from them? Moreover, I invariably find there is really no point in keeping this evidence secret after all. Either it is obvious that the other side already knows about the evidence or the evidence is such that the opponent cannot possibly overcome it if it is revealed or, on the other hand, the evidence is, in fact, just not that important. In mediation, you should keep your secrets about the weaknesses in your case, but don't keep secrets about its strengths.

III The Deal

We all know, if it isn't written down and signed, it doesn't count. Chances are you will be tired by the time it comes to writing up the settlement. But remember, this is *the* critical time, so be thoughtful and thorough, even though it may test everyone's patience.

- Don't leave until you have a signed writing of some kind, even if the parties agree they will do a more formal settlement agreement later.
- Ensure your settlement agreement states it is "binding or enforceable," or words to that effect, otherwise it would be barred from any future court proceeding as violative of the mediation confidentiality.
- Don't forget *Code of Civil Procedure* Section 664.6.
- "Binding mediation?" Admittedly, this is an oxymoron. However, I see "binding mediations" from time to time. My view is in such cases the lawyers are implicitly saying "Judge, the cost-benefit of either prosecuting or defending this case has gotten way out of whack. Please find a way to gracefully put us out of our misery!"
- Finally, be willing to undertake further efforts toward settlement if the mediation fails.

♦ *Judge David Brickner (Ret.) was formerly on the bench for the Orange County Superior Court and now conducts meditations and arbitrations through JAMS.*

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YMCA Bicycle Giveaway Program, which last year gave away more than 1,100 bicycles to children of enlisted persons serving overseas. Also during the November 7 program, ABTL-OC will be collecting new stuffed animals for the Orange County Superior Court's adoption program. The program provides newly adopted children with a stuffed animal at the time the adoption is finalized. We thank ABTL-OC's members for their generous support of the annual holiday gift giving opportunity.

I look forward to seeing you at our November 7 dinner program. Thank you for your continued support of ABTL-OC.

♦*Melissa R. McCormick is a partner at Irell & Manella.*

On June 6, ABTL–OC hosted its 13th Annual Wine Tasting Fundraiser and Dinner Program to support Orange County's Public Law Center. The event was incredibly well attended and at the September 12th Dinner Program we publicly announced the final fundraising number – a record high $28,000!

We thank all of you for your continued support. Quite simply, this event would not be successful without the consistent support of the various law firms, companies, and individuals who help the ABTL-OC thrive and flourish.

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challenges, the Hatch-Waxman scheme for chemically synthesized drugs is not a perfect fit for biologics and their follow-on biologic counterparts.

Just as biologics are in many ways more complex than chemically synthesized pharmaceuticals, so too is the litigation framework of the BPCIA when compared to the Hatch-Waxman Act. In light of its complexity and potential importance to intellectual property litigators, this Article seeks to educate litigators on the general structure of the BPCIA. This Article begins with a brief description of the Hatch-Waxman Act and the BPCIA to provide context for those not familiar with these statutes. As this article is geared towards educating intellectual property litigators, the latter half of this Article is spent contrasting the well understood Hatch-Waxman litigation framework with that of the more complex BPCIA framework.

II. Approval Under the Hatch-Waxman Act and the BPCIA

Brand Name and Generic Approval Under the Hatch-Waxman Act

To market traditional small molecule drugs, a brand name manufacturer (*i.e.* the first company to market a drug), must file a New Drug Application (NDA). As a reward for going through the expensive clinical trials to show a drug is safe and effective, the pharmaceutical NDA sponsor is given five years of new chemical entity exclusivity ("NCE") by the Hatch-Waxman Act.

In exchange for this exclusivity, the Hatch-Waxman Act allows generic producers to file Abbreviated New Drug Applications ("ANDA") four years into the NCE exclusivity period. In an ANDA, the generic producer may rely on safety and efficacy data from the NDA if it can show that its generic drug contains the same active ingredient(s) and is "bioequivalent" to the brand name drug. (21 U.S.C. § 355(j)(2)(A)(iv).) Because an ANDA filing is less expensive and less time consuming than an NDA filing, it allows generic manufacturers to develop an approved drug at a lower cost, thus, incentivizing market entry.

Reference and 262(k) Product Approval Under the BPCIA

Under the BPCIA, the reference product producer has two types of exclusivity: data and market. (*See* 42 U.S.C. § 262(k)(7).) The data exclusivity period precludes a 262(k) applicant from filing an application until

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four years after the approval of the reference biologic. (*Id*. § 262(k)(7)(B).) The market exclusivity period precludes market entry by a 262(k) applicant until 12 years after the approval of the reference biologic. (*Id*. § 262(k)(7)(A).) This long period of market exclusivity may be subject to change as President Obama has recently fought to reduce the period to seven years.

262(k) products are related to reference biologics by two designations: "biosimilarity" or "interchangeability." (42 U.S.C. § 262(i)(3).) A product is biosimilar if it is "highly similar to the reference product" and has no "meaningful differences . . . in terms of the safety, purity, and potency of the product." (*Id*. § 262(i)(2).) Biosimilarity is shown through analytical studies, animal studies, and clinical studies. (*Id*. § 262(k)(2)(A)(i)(I)(aa)-(cc).) Interchangeability requires not only that the 262(k) product qualify as biosimilar, (*id*. § 262(k)(4)(A)(i) & (2)(A)(i)(I)), but also that the 262(k) product can be expected to produce the same clinical results from one patient to another when compared to the reference biologic. (*Id*. § 262(k)(4)(A)(ii).) Importantly for commercial sales, a pharmacist can substitute an interchangeable biosimilar for the reference biologic without a doctor's prescription; 262(k) products that are only biosimilar must be specifically prescribed by a doctor. Thus, 262(k) applicants must spend additional resources marketing drugs that are only biosimilar.

III. THE LITIGATION FRAMEWORKS

The Hatch-Waxman Litigation Framework

The Hatch-Waxman Act provides ANDA filers with a method to seek pre-patent expiration approval of their drugs through litigation. (21 U.S.C. § 355(j).) Under the Hatch-Waxman Act, NDA-related pharmaceutical patents are listed by the FDA in the publicly accessible Orange Book. (*Id*. § 355(b).) To list a patent in the Orange Book, the NDA sponsor must submit the patent number and expiration date of any patent that claims the drug or method of using the drug that could reasonably be asserted in an infringement action. (*Id*. § 355(b)(1)(G).) Four years into an NDA sponsor's period of data exclusivity, an ANDA filer may challenge the NDA sponsor's patent(s) relating to the marketed drug and its use(s).

A generic producer can file a Paragraph IV Certification after filing an ANDA. The Paragraph IV Certification states that the pertinent NDA patent(s) listed in the Orange Book is either not infringed or that the patent(s) is invalid. The NDA sponsor then has a 45-day period in which it can file a patent infringement suit against the generic producer. (*Id.* § 355(c)(3)(C).) If no suit is filed, then under the MMA amendments, the first ANDA applicant to file a Paragraph IV certification receives a 180-day period of exclusivity during which only the generic producer and the brand-name manufacturer are allowed to market their drug versions. (*Id.* § 355(j)(5)(B).) This duopoly period provides an incentive for generic drug makers to challenge invalid or non-infringed patents.

If a suit is filed by the brand name manufacturer after the Paragraph IV certification, then an automatic 30-month stay for the ANDA filer's approval is initiated. (*Id*.) If ultimately successful in the patent challenge, the generic producer is granted a 180-day period of market exclusivity, subject to potential forfeiture provisions. (*See, e.g., id*. § 355(j)(D)(i)(I).) If unsuccessful, other ANDA filers may still challenge the patent, but will not qualify for the 180-day exclusivity period.

The BPCIA Litigation Framework

Like the biologics products themselves, compared to Hatch-Waxman, the BPCIA has a much more complex litigation scheme. First, there is no Orange Book listing for biologics and thus, there is nothing comparable to the Paragraph IV certification required to challenge patents under Hatch-Waxman. Second, the BPCIA requires an extensive pre-litigation exchange and anticipates, in some circumstances, two waves of litigation. Finally, the BPCIA provides a different market exclusivity period with its own unique requirements. (*See* 42 U.S.C. § 262.)

Under the BPCIA, after the FDA accepts a 262(k) product application, the 262(k) applicant has 20 days to provide a copy of the application and any "other information that describes the process or processes used to manufacture the biological product" to the reference sponsor. (*Id*. § 262(l)(2)(A).) The 262(k) applicant is not initially required to submit any information regarding patents that might potentially cover the reference product. If the 262(k) product applicant fails to provide the information, the reference product sponsor may bring an action for a declaratory judgment "of infringement, validity, or enforceability of any patent that claims the biological product" or a use thereof. (*Id.* § 262(l)(9)(C).)

Within 60 days of receiving the 262(k) applicant's information, the reference product sponsor must provide the 262(k) applicant with, *inter alia*, a list of patents owned or licensed by the sponsor that could "reasonably be asserted" against the 262(k) applicant if it "engaged in the making, using, offering to sell, selling, or importing into the

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United States" of its 262(k) product. (*Id.* § 262(l)(3)(A)(i).) The sponsor must also identify any patents that it would be prepared to license to the 262(k) applicant. (*Id.* § 262(l)(3)(A)(ii).) Notably, unlike under the Hatch-Waxman Act, patents that cover the process of making the drugs can be litigated under the BPCIA. (*Id.* § 262(l)(3)(A)(i).) For relevant patents that are issued to or licensed by the reference product sponsor after providing this initial list, the reference sponsor can amend the list within 30 days of issuance or licensure. (*Id.* § 262(l)(7)(B).) Such later listed patents can only be litigated, however, in the second wave of litigation described below. (*Id.* § 262(l)(7)(B).)

After receiving the list of patents, the 262(k) product applicant has 60 days to respond. The response has multiple components as follows: (1) it may include a list of patents that the 262(k) applicant believes could "reasonably be asserted" against its product, (2) it must include a response regarding each of the patents cited by either party that includes either a detailed statement on a claim by claim basis of why the patent is invalid, unenforceable, or will not be infringed, or a statement that the 262(k) applicant will not begin marketing the product until the termination of the sponsor's patents, and (3) it must include a response to any offer to license patents from the sponsor. (*Id.* § 262(l)(3)(B).) Given the short time frame to respond, 262(k) applicants will necessarily have to monitor the reference product sponsor's patent portfolio, including any known licensed patents, prior to submitting an application for a 262(k) product. Such monitoring will allow the 262(k) applicant to develop invalidity and non-infringement positions prior to submission of the 262(k) application.

The receipt of the 262(k) applicant's communication starts a final 60-day window in which the sponsor must respond with a detailed statement that describes on a claim by claim basis the "factual and legal basis of the opinion of the [sponsor] that such patent will be infringed" by the 262(k) applicant's marketing of the product. (*Id.* § 262(l)(3)(B).) The reference product sponsor must also respond to any statement concerning the validity and enforceability made by the 262(k) applicant.

After this exchange of information, the reference sponsor and 262(k) applicant must engage in "good faith negotiations" to determine which patents the infringement suit will include. (*Id.* § 262(l)(4)(A).) If the 262(k) product applicant and sponsor cannot reach an agreement within 15 days of beginning negotiations, the BPCIA provides a mechanism for choosing patents for the first wave of litigation. (*Id.* § 262(l)(4)(B)-(5).) First, the 262(k) applicant notifies the reference product sponsor of the number of patents it intends to litigate. (*Id.* § 262(l)(5)(A).) Then, within five days, the 262(k) applicant and product sponsor must simultaneously exchange the list of patents each believes should be litigated. (*Id.* § 262(l)(5)(B)(i)(I)-(II).) The number of patents selected by the reference product sponsor cannot exceed the number selected by the 262(k) applicant unless the 262(k) product applicant does not list any patents, in which case the sponsor may select one patent to litigate. (*Id.* § 262(l)(5)(B)(ii)(I)-(II).) The entire pre-litigation process is confidential. (*Id.* § 262(l)(1).)

Within 30 days of the selection of patents for litigation (either by agreement or the mechanism described above), the product sponsor must bring a patent infringement suit regarding the patent(s) listed. (*Id.* § 262(l)(6)(A)-(B).) If at any point in this pre-litigation process the 262(k) product applicant fails to comply with its obligations, the reference product sponsor may bring a declaratory judgment action for any patent contained in its exchanged list (including later issued or licensed patents). (*Id.* § 262(l)(9)(B).) The BPCIA does not provide other specifics on how the first wave of litigation proceeds from this stage.

In some circumstances, a second wave of litigation may occur under the BPCIA. The 262(k) applicant must notify the references product sponsor of an impending product launch 180-days prior to commercial marketing. (*Id.* § 262(l)(8)(A).) After receiving notice, the product sponsor can seek a preliminary injunction on the patents identified during the initial patent exchanges that are not the subject of the first wave of litigation. (*Id.* § 262(l)(8)(B).) This includes any patents issued or licensed after the initial patent exchange if new lists are provided to the 262(k) applicant within 30 days of issuance or licensure. If the product sponsor is unsuccessful in obtaining a preliminary injunction, the 262(k) applicant may market its 262(k) product.

While the first wave of litigation will start soon after the submission of a 262(k) application (at the earliest four years after the reference product is approved), the second wave of litigation will not be initiated until at least 180 days before the commercial launch of the 262(k) product (at the earliest 12 years after the reference product is approved). Therefore, the time between the first wave of litigation and the second wave of litigation could span almost eight years. Given this long time frame, there may be little strategic reason for either the reference product sponsor or the 262(k) applicant to not litigate relevant patents during the first wave of BPCIA litigation—both parties would likely prefer certainty of a full litigation over the uncertainty of a preliminary injunction hearing. For some currently

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marketed biologics, however, this time frame will be condensed and intellectual property litigators will need to carefully consider whether relevant patents should be challenged in the first or second wave of litigation. Such strategy will necessarily vary on a case by case basis given the number and strength of relevant patents.

The BPCIA offers the first approved interchangeable 262(k) product a period of market exclusivity as the only interchangeable product on the market—the FDA will not approve any other interchangeable 262(k) product applications for 1 year after commercial marketing begins. (*Id.* § 262(k)(6).) No exclusivity is awarded for a 262(k) product that is only "biosimilar." It is important to note that unlike the Hatch-Waxman Act which gives exclusivity to the "first to file" a Paragraph IV certification, the BPCIA gives market exclusivity to the first interchangeable approved 262(k) product. While the FDA will not approve other interchangeable products during this 12 month period, it can approve additional 262(k) applications for "biosimilars." As with the Hatch-Waxman Act, the 262(k) applicant can forfeit this exclusivity under certain conditions.

IV. CONCLUSION

How prevalent BPCIA litigation will be in the near future is unclear. Intellectual property drug litigators, however, are well served in having a basic working knowledge of the BPCIA and how it differs from the Hatch-Waxman Act before being confronted with a biologics manufacturer in need of legal advice. While this article cannot provide a comprehensive review of the BPCIA or the Hatch-Waxman Act, it hopefully will provide a starting point for further investigation.

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of the date of certification, but as of the date the plaintiffs opt in. *See McElmurry v. US Bank Nat'l Ass'n*, No. CV-04-642, 2005 U.S. Dist. LEXIS 45199, at *15-*18 (D. Or. Dec. 1, 2005).) *See Hernandez v. Vitamin Shoppe Indus., Inc.*, 174 Cal. App. 4th 1441, 1459-60 (2009); *accord Parks v. Eastwood Ins. Servs., Inc.*, 235 F. Supp. 2d 1082 (C.D. Cal. 2002) (after certification, defendants' attorneys are subject to the "anti-contact rule" and may not discuss the litigation with class members). Per Rule 2-100, an attorney may not communicate with a represented party about the subject of the representation without the consent of the party's counsel, and that prohibition includes communications with individual class members post-certification. *Kirola v. San Francisco*, No. C 07-03685, 2010 U.S. Dist. LEXIS 97634, at *5 (N.D. Cal. Sep. 7, 2010). As *Hernandez* held, "[t]he court's duty to protect the rights of all parties is particularly pronounced once a class has been certified and notified of a potential class settlement, because class members must decide whether or not to opt out." *Id*. at 1454. The no-contact rule applies regardless of whether the class has been certified for litigation or whether it has been "conditionally" certified for settlement purposes. *Id*. at 1458.

What are Improper Communications by Defense Counsel?

Defense counsel's right to contact putative class members pre-certification is not absolute, but rather is limited by legal precedent and by the California Rules of Professional Conduct, which forbid defendants' attorneys from communicating with individual class members in a way that is either misleading or coercive.

Misleading Communications

First, a defendant's attorney wishing to convey information to the prospective class must do so in a manner that does not mislead potential class members. Attempts to "spin" the class action's merits and potential effects in a negative light are likely to be found misleading. For instance, in *Belt v. Emcare, Inc*., 299 F. Supp. 2d 664, 668 (E.D. Tex. 2003), a FLSA collective action on behalf of nurses and physician's assistants for overtime pay, defendants' letters were found misleading, in part, because they argued that the class action was an attack on class members' status as "professionals." Telephone interviews by defense counsel in another wage-related case also were found to be misleading where they gave class members the mistaken impression that, if the class action succeeded, they would be paid on an hourly basis rather than by commission. *Mevorah*, 2005 U.S. Dist. LEXIS 28615, at *13.

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Attacks on the ethics of class counsel or the plaintiffs' bar are likewise inappropriate. As such, the court in *Wright v. Adventures Rolling Cross Country, Inc.*, No. C-12-0982, 2012 U.S. Dist. LEXIS 83505, at *3-*4, *9 (N.D. Cal. June 15, 2012), found that defense counsel's letters to class members were improper when they misleadingly claimed that the case was a "fishing expedition," that plaintiffs' lawyers "generally get paid 25-35% of whatever deal they negotiate," that plaintiffs' firm was "attacking [the] industry," and urging class members not to "associate with a law firm that dances along the ethical line."

Given the risks associated with characterizing the class action to potential plaintiffs, defense attorneys may wonder if it is better not to mention the litigation at all. Yet this approach may also be misleading depending on the circumstances. Courts have found that it is not *per se* misleading to omit mention of the class action in communications with class members. Thus, where an employer sought declarations from its employees using a questionnaire format, and where that form was not otherwise misleading or coercive, the court found that the defendant had no obligation to mention the class action in conjunction with the questionnaire. *Rosales v. El Rancho Farms*, No. 1:09-cv-00707, 2011 U.S. Dist. LEXIS 142772, at *16-*17 (E.D. Cal. Dec. 12, 2011); *see also Munoz v. Giumarra Vineyards Corp.*, No. 1:09-cv-00703, 2012 U.S. Dist. LEXIS 93003, at *22-*23 (E.D. Cal. July 5, 2012) (defendants' requests to putative class members for declarations were "'entirely permissible and appropriate'") (internal citations omitted).

However, if a defendants' attorney wishes to solicit from potential class members a settlement or release of claims, courts have held the communications ***must*** include sufficient information about the class action to enable the class members to make an informed decision about whether to accept the defendant's offer. The court in *Eshelman*, 2007 U.S. Dist. LEXIS 67857, at *9-*10, found nothing misleading in defendants' written settlement offer, which included notice of the class action, notice that class members' rights would be affected if they accepted the settlement, and a copy of the complaint. By contrast, in *County of Santa Clara v. Astra USA, Inc.*, No. C 05-03740, 2010 U.S. Dist. LEXIS 78312 (N.D. Cal. July 8, 2010), the court intervened to protect the class where defense counsel had sent a check with a sparsely-worded "accord and satisfaction" letter that mentioned plaintiffs' claims but did not explain them, and did not attach a copy of the complaint. *Id*. at *6, *15-*16. The court held that defendant "had no First Amendment right to extract a release" from class members. *Id*. at *20. Similarly, in *Balasanyan v. Nordstrom*, No. 11-cv-2609, 2012 U.S. Dist. LEXIS 30809 (S.D. Cal. Mar. 8, 2012), the court found that the mandatory arbitration agreement defendant's counsel sent to putative class members was misleading, because it was written in a way that concealed its nature and did not mention the pending class action.

Finally, attorneys representing a company in ***any*** context must take care not to mislead its employees as to the nature of the representation. California Rule of Professional Conduct 3-600(D) requires that an attorney representing an organization, when interacting with the organization's employees, must "explain the identity of the client for whom the member acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing." An attorney who interviews a corporate client's employees should explicitly state that he or she represents the company and not the employee, that information learned in the interview will be shared with the company, and that any attorney-client privilege belongs to the company and may be waived by the company. *See, e.g., United States v. Ruehle*, 583 F.3d 600, 604 (9th Cir. 2009) (discussing "corporate *Miranda*" warnings prescribed by *Upjohn Co. v. United States*, 449 U.S. 383, 393-96 (1981)); *see also Mevorah*, 2005 U.S. Dist. LEXIS 28615, at *14-*15 (finding defense counsel's statements to class members misleading because he failed to explain that information they provided could be used in defendant's interest if defendant became adverse to the class members).

Coercive Communications

The court in *Kleiner v. First National Bank*, 751 F.2d 1193 (11th Cir. 1985) recognized that a defendant's *ex parte* communication with putative class members "is rife with potential for coercion." 751 F.2d at 1202. Indeed, "[u]nsupervised, unilateral communications with the plaintiff class sabotage the goal of informed consent by urging exclusion on the basis of a one-sided presentation of the fact, without opportunity for rebuttal. The damage from misstatements could well be irreparable." *Id.* at 1203. The Eleventh Circuit held that defendant's opt-out campaign was not only coercive, but that it was also illegal because it violated court orders that were already in place governing the parties' communications with the class. *Id.* at 1200. The critical question with potentially coercive communications by defense counsel to putative class members is "***whether there is a realistic danger that the communications will chill participation in the class action***." *Wright*, 2012 U.S. Dist. LEXIS 83505, at *14 (emphasis added).

There are particular circumstances that California courts have identified that increase the likelihood of coercion, including the following:

Ongoing business relationships. When the defendant

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and putative class members have a preexisting relationship, particularly an employer-employee relationship, there is a greater likelihood of coercion in the defendants' communications. *See e.g., Mevorah*, 2005 U.S. Dist. LEXIS 28615, at *13; *Kleiner*, 751 F.2d at 1202-03; *Belt*, 299 F. Supp. 2d at 667. However, this relationship alone does not automatically render defendants' communications coercive. *In re: M.L. Stern Overtime Litigation*, 250 F.R.D. 492, 498 (S.D. Cal. 2008). In *Mevorah*, the defendant, through counsel, made misleading pre-certification communications to solicit signed declarations, and one employee testified that she felt "forced" to sign to keep her job. 2005 U.S. Dist. LEXIS 28615, at *14-*16. "The opportunity for mischief is compounded by the relationship between the employer and the employee and the coerciveness an employee may feel. Employers and their attorneys need to be cautious about placing themselves in an untenable position." *Id.*

One-on-one communications. Courts have held that one-on-one communications between defendant (or defendants' counsel) and putative class members, either in person or over the telephone, may be inherently coercive. *See e.g., Guifi Li v. A Perfect Day Franchise, Inc*., 270 F.R.D. 509 (N.D. Cal. 2010) ("*Perfect Day*"); *Kleiner* (*ex parte* telephone calls to a defendant bank's customers were coercive); *Rosales*, 2011 U.S. Dist. LEXIS 142772, at *16. In *Perfect Day*, defendant spa owner presented opt-out forms to workers during required, one-on-one meetings with managers during work hours and at the workplace. 270 F.R.D. at 518. Defendants failed to give copies of the opt-out forms to workers to take home or to provide a written translation of the form in the workers' primary language. *Id.* The *Perfect Day* court found these meetings to be inherently coercive. *Id*. Similarly, the *Stern* court noted that in *Mevorah*, where employees were personally contacted by defense counsel by telephone for interviews, "the fact that employees were singled out for one-on-one contact by Defendant's counsel…was an utterly improper tactic." 250 F.R.D. at 498 (internal citation omitted). However, not all courts agree that one-on-one meetings are inherently coercive. *See e.g., Munoz v. Giumarra Vineyards Corp*., No. 1:09-cv-00703, 2012 U.S. Dist. LEXIS 93003, at *25-*26 (E.D. Cal. July 3, 2012) (Court admitted declarations that defense counsel obtained by meeting with employees because there was no evidence of misleading communications or that class members felt threatened).

Threats of financial harm. Defendants and their counsel may not state or imply that putative class members will suffer adverse financial consequences if they remain in the class or if the class action succeeds. It is highly improper for an employer or counsel to threaten employee class members with firing or demotion as a consequence of joining the class action. *See e.g., Wang v. Chinese Daily News, Inc*. 236 F.R.D. 485, 488 (C.D. Cal. 2006); *Wright*, 2012 U.S. Dist. LEXIS 83505. For example, in *Wang*, defendant employer terminated lead class representatives after class certification, during the opt-out period, and threatened other putative class members with termination if they remained in the suit. 236 F.R.D. at 487-88. In fact, the table on which the opt-out forms were located had signs above it that read: "Don't Tear the Company Apart! Don't Act Against Each Other!" *Id.* Due to this improper duress, current employees opted out at a vastly higher rate than former employees. *Id.* Similarly, in *Wright*, defendant employer's pre-certification e-mails to employee putative class members were coercive because they included threats such as that the class action could drive defendant out of business, that class members' "transgressions [would] become very public" and their lives would become "public sideshow[s]," that they should not plan "any significant travel for the foreseeable future" because litigation "can put your life into a holding pattern for years," and that the lawsuit would cost them more money than they stood to gain. *Wright*, 2012 U.S. Dist. LEXIS 83505, at *5, *12-*15.

Consequences of Improper Communications

Once a court determines that a defendant's pre-certification communications with putative class members were improper, the court will formulate an appropriate response including, for example: (1) a corrective notice to be sent to the class; (2) prohibiting future pre-certification communications with potential class members unless pre-approved by the court; (3) fines to counsel; and (4) disqualification of counsel. *See e.g*., *Wang*, 236 F.R.D. at 491 (court invalidated opt-outs, issued post-judgment curative notice, and restricted defendants' communications with class members); *Perfect Day*, 270 F.R.D. at 518 (corrective notice prepared by the court to be sent to class members in English and with Chinese translation, at defendant's expense); *Kleiner*, 751 F.2d at 1210 (affirming district court's disqualification of bank's counsel finding that the "Bank was not an innocent victim of disqualification. The covert communications scheme was of its own devise and execution.").

Conclusion

In communicating with putative class members, defendants' attorneys should take care to comply not only with any court orders in place regarding contact with the class, but also with the California Rules of Professional Conduct, and to avoid making any statements that might mislead the class members or coerce them into opting out of the class.

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ABTL Volunteers: Habitat for Humanity

Habitat for Humanity welcomed the ABTL this year to place the finishing touches on a beautiful new home at the corner of East 3rd Street and North Lacy Street in Santa Ana. Coordinated by current ABTL Vice President Mark Erickson, this marked the second time that ABTL has joined Habitat for Humanity's cause. Like last year, volunteers from six ABTL member firms participated. Unlike last year, the work this year required a whole lot more dirt, shovels, and planting.

By the time the volunteers arrived, the foundation was laid and the house was built. But the landscaping required serious work, which ABTL members were more than happy to provide. Whether members were digging trenches for sprinklers or rose bushes, everyone appeared to be having a good time. Of course, the pizza provided by ABTL member Haynes and Boone LLP was a welcome sight and allowed the volunteers an opportunity to interact with colleagues outside their typical suit-and-tie environments.

Readers who are curious about what the house looks like will enjoy special treats at the Habitat for Humanity OC website (www.habitatoc.org), including pictures of the work in progress as well as a video showing construction from beginning to end in less than two minutes. Obviously don't miss the landscaping!

We thank the following firms for their time and financial contributions: *Haynes and Boone; Paul Hastings*; *Gibson Dunn*; *Latham & Watkins*; *Crowell and Moring*; and *Newmeyer & Dillion.*

♦ *William C. O'Neill is an associate in Haynes and Boone's Orange County office.*

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