

### Q&A with the Hon. Kathleen E. O'Leary By Kate Santon



*Editor's Note: Justice Kathleen E. O'Leary was appointed to the California Court of Appeal, Fourth Appellate District, Division Three, in December 1999. Prior to her appointment to the appellate court, Justice O'Leary served on the Orange County Superior Court. She was in her third term as the Presiding Judge when she was elevated to the Court of Appeal. Justice O'Leary began her judicial career at the West Orange County Municipal*

*Court in 1981, where she also served as the Presiding Judge and the Assistant Presiding Judge. Justice O'Leary is on the ABTL's Board of Governors and actively involved in ABTL.*

Q: What drew you to law in the first place?

A: I wanted to go into foreign service or work with the State Department—that kind of thing—and I thought a legal background would be good. But then when I was in law school, I externed for the Los Angeles City Attorney's office and was in the courtroom and I got the litigation bug. I decided that there are other people that are probably better prepared to solve the world's problems than I was. As I

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### Harsh Lessons from the Rule 26 Trenches By Paul L. Gale and Gena B. Burns

#### Introduction

In the epic patent infringement battle fought in the Northern District of California between the two electronics titans, *Apple Inc. v. Samsung Electronics Co., Ltd.*, Samsung suffered the consequences of failing to follow the disclosure requirements mandated by Federal Rule of Civil Procedure 26 – its CEO was not allowed to testify at trial. Apple claimed that during discovery, Samsung did not disclose as a witness under Rule 26(a)(1)(A) (i) Mr. Dale Sohn, the President and Chief Executive Officer of Samsung Telecommunications America. After filing a motion to compel Mr. Sohn's deposition, the court allowed Apple a three hour deposition of Mr. Sohn. In spite of this, during trial, Apple moved to exclude Mr. Sohn as a witness under Rule 26 and its counterpart Rule 37. In its opposition, Samsung argued that the failure to disclose was harmless. Samsung highlighted the fact that indeed, Apple did depose Mr. Sohn. Samsung also argued that because Mr. Sohn appeared on one of Apple's own witness lists, Apple was aware that Mr. Sohn was a percipient witness and therefore did not suffer any prejudice. However, the district court determined that Samsung's failure to disclose Mr. Sohn was neither substantially justified nor harmless, that the deposition did not allow a full investigation into Mr. Sohn's knowledge of discoverable information, and therefore excluded Mr. Sohn from testifying at trial.



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## Message from the President:

By Melissa R. McCormick



As the saying goes, "Time flies when you're having fun."

It is hard for me to believe that this is my final President's Message and that my year as President of this wonderful organization is coming to a close. In my last President's Message, I would like to highlight a few of ABTL-OC's accomplishments in 2012 and thank the many people responsible for them.

In 2012, ABTL-OC achieved its highest membership count yet – 624 members. ABTL-OC reached this milestone through the concerted efforts of our Board members, under the leadership of Paul Gale.

In June, ABTL-OC held its 13<sup>th</sup> Annual Wine Tasting and Dinner Program, benefiting Orange County's Public Law Center. At our September dinner, I had the pleasure of presenting PLC's Executive Director Ken Babcock with – literally and figuratively – a big check, for an all-time high of \$28,000. Thanks are owed to our Board members, our law firm contributors, ABTL-OC's sponsors, and the many individuals who planned, attended, and contributed to this event and to PLC.

In September, many of our Orange County ABTL members attended ABTL's 39<sup>th</sup> Annual Seminar at the Grand Hyatt Kauai Resort & Spa. The seminar, which focused on the use of technology in the courtroom, featured presentations by several top-notch Orange County trial lawyers. ABTL-OC Board members Dan Sasse and Sheila Swaroop served as our chapter's representatives to the Annual Seminar Committee, putting in long hours planning this terrific event.

In November, ABTL-OC was 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 Dis-

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ASSOCIATION OF BUSINESS TRIAL LAWYERS

**abtl**  
ORANGE COUNTY

8502 E. Chapman Avenue, Suite 443  
Orange, CA 92869  
Phone: 714.516.8106 • Fax: 714.602.2505  
E-mail: [abtloc@abtl.org](mailto:abtloc@abtl.org)  
[www.abtl.org](http://www.abtl.org)

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## Grace Under Pressure: Proven Techniques for Keeping Your Cool Under Extreme Stress

By Michel Zelnick and John Stephens

*"Nothing gives one person so much advantage over another as to remain always cool and unruffled under all circumstances" – Thomas Jefferson*



Good advice Mr. Jefferson, but for a modern-day trial lawyer, it's easier said than done. In fact, does Jefferson's wisdom even really apply to the practice of trial law? Of course it does.

Unsophisticated clients often hold the belief that their lawyer should be an angry "bulldog."

In practice, however, the "bulldog" usually bites the client before the case concludes. Lawyers and clients should not confuse abrasiveness with aggressiveness. Nor should they confuse activity with achievement.

The lawyers who most regularly win their cases and satisfy their clients in the long run are those who are unflappable and display grace under pressure. The finest lawyers in our profession exhibit these qualities. When all is crumbling around them, time seems to slow down as they weigh many options to advance a cohesive strategy.



The aim of this article is to create awareness and techniques to help even a novice lawyer achieve the coveted qualities that veteran lawyers have acquired over many

years through the school of hard knocks. With an understanding of how the mind operates (or collapses) under extreme stress and conflict, any lawyer can achieve the admirable qualities approaching the best in our profession.

Below we will explain some neurological principles that can help our members become more effective attorneys in the most difficult circumstances and we sug-

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## Removed to Federal Court Against Your Will?

By Atticus N. Wegman

The federal officer removal statute allows for the removal of cases to federal court on the basis of federal question jurisdiction. This may come as a surprise to litigants who file an answer or complaint in state court on what was believed to be a case wholly left to the jurisdiction of state court. The language civil litigators ought to know is located at 28 U.S.C. § 1442(a)(1):



- (a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
  - (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue. 28 U.S.C. § 1442(a)(1).

The federal officer removal statute is often used as a tool to bring otherwise wholly state court actions under the purview of federal court. Unlike diversity jurisdiction, adding parties in an attempt to destroy diversity will not affect removal to federal court because the federal officer removal statute is based on federal question jurisdiction. Applying the federal officer removal statute can be difficult as there might not be a clear "federal officer (or any person acting under that officer) or agency" involved in a case, at least not at first glance. The use of the language "acting under that officer of the United States or of any agency thereof" has been the subject of much interpretation. For instance, assume a case involves several airplane manufacturers that must meet regulations imposed by the

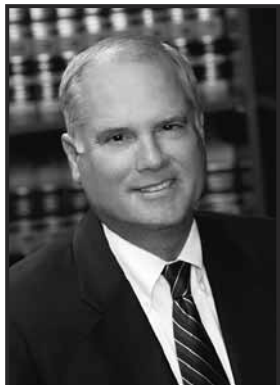
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**Employment Litigation Legislative Update**  
**By Christopher P. Wesierski, Laura J. Barns**  
**and Andrew Brown**



The California legislature had yet another busy year, sending hundreds of bills to Governor Jerry Brown for review. While Brown vetoed many (including bills regarding overtime and pay breaks for domestic care workers, protection from heat for agricultural workers, and discrimination

against job applicants based upon an unemployed status), he signed a myriad of bills into law that will

certainly affect California's businesses and thus the attorneys that represent them. This article provides a non-exhaustive review of pertinent laws that will take effect on January 1, 2013.

Please note, however, that this article does not aim to address all of the substantive requirements of each amended or newly enacted

law—it focuses on the major changes thereto. (All citations are to California statutes effective January 1, 2013, unless otherwise indicated. The session year, chapter, and section numbers enacting the changes have been omitted for brevity.)

#### Employer Use of Social Media

Governor Brown signed Assembly Bill No. 1844, which enacts Labor Code § 980 and provides more protections for job applicants and employees regarding their personal social media pages and passwords. Specifically, the newly-added section forbids employers from either requesting or requiring an employee or applicant to: (1) "disclose a username or password for the purposes of accessing personal social media," (2) "access personal social media in the presence of the employer," or (3) "divulge any personal social media..." (Lab. Code § 980(b).) In addition, employers may not

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**Brown-Bag Lunch with Judges Andrew Banks and Thierry Patrick Colaw**  
**By Michael Sapira**

On August 9, 2012, the Hon. Andrew Banks and the Hon. Thierry Colaw hosted the ABTL's young lawyers for a "Brown Bag" lunch. I found the event to be both terrific and informative.

Judge Banks opened the "Brown Bag" lunch with a blunt assessment of the state of the Orange County Superior Court (the "OCSC") system. He compared the judicial crisis looming in the OCSC to the current crisis in the Los Angeles Superior Court (the "LASC"). With budget cutbacks straining resources, and in an effort to keep family, criminal, and mental health courts open, the LASC closed over fifty courtrooms and completely shut down its small claims courts. These events reminded Judge Banks of the pains he experienced in his past life as a practicing attorney in Los Angeles, where civil cases often took up to five years to get to trial. Judge Banks worries that his previous experiences in the LASC could become a reality in the OCSC.



After this discussion, Judge Banks and Judge Colaw discussed matters that they felt every young lawyer needed to know, and also opened up the floor to questions on any legal-related topic. As a young lawyer, the insight and candid responses from Judge Banks and Judge Colaw were invaluable. I will share a few of those insights here.

With respect to discovery, both judges emphasized "reasonableness," and put the word into practice in the context of interrogatory responses. The judges recommended that lawyers fully answer non-objectionable parts of an interrogatory and object only to the objectionable parts. Judge Banks does not consider general objections to interrogatories valid, and such objections have no effect on his rulings on interrogatory responses. Following good faith objections, lawyers should meet and confer re-

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got older and appreciated the complexity of nations' relationships in the world, I thought that practicing law would maybe be a good idea.

Q: Do you remember your first trial?

A: I remember my first jury trial. I started first in the public defender's office in Orange County and, for the first nine months, I did back-to-back court trials. None of those stand out in my mind, but I do remember my first jury trial because it was a misdemeanor trial at the North Municipal Court. In those days, there really weren't that many women trying cases and so I had a number of lawyers from the public defender's office who were at North Court all sitting in the back row. They asked if it made me nervous and said that they would be there in case I needed help. I said no, no, no, it's fine; I'm good. And then I selected the jury and we had a break. My supervisor then asked if I could talk for a minute. I said sure and asked if there was a problem already with my jury voir dire. And he said "no, you didn't draw any objections, but jury voir dire is supposed to be questions. You have informed the jury of a lot of things and they're all nodding and smiling and they clearly like you, but the [District Attorney, "DA"] could object for not asking questions. You're just talking to them." And I said okay, I'll do better. And then I made my opening statement, and then the DA made an opening statement. I reserved, and then the DA asked if we could talk while the jury was on a recess. I said sure and we went out in the hall and they made me an offer that I thought was very good. It was a much better offer than before trial and so I talked to my colleagues and they agreed and advised me to tell my client that it was a good deal. So I did. Then, six months later, I was talking to the DA and I asked what had happened and if perhaps the DA didn't have a witness lined up. He said no, he just thought that because there were all these people watching me that I must be some hot shot. I told him that they were watching me because it was my first trial. So my first trial was memorable because instead of thinking that the people that were watching me were there to help me, the DA thought they were watching me because I was a super star.

Q: How long did you practice criminal law?

A: I spent five years at the Public Defender's office and then spent six months with a small firm that practiced criminal and civil work. I was then appointed to the municipal court. In those days, you could be appointed with five years experience.

Q: How did you feel about joining the bench after such a short time in practice?

A: Nervous, but I had tried so many cases as a Public Defender. I was in court every single day. But I remember that the first day was a little daunting because the bailiff asked if we were ready to begin. That was never my decision as the lawyer. I said, "oh, yeah, I guess; is everybody here?" And he said "yeah, we're ready to go." I said "okay, well then let's go."

Q: How did you feel deciding on objections and evidentiary issues? Did that feel second nature for you at that point in time?

A: Yes, it was really second nature for me because I was making objections and I was in court every day. It really was an easy transition. The hard part was when I thought "oh, that's objectionable," but no objection was made. I was not a judge who made her own objection and commented on the testimony. I let the lawyers try their cases. Unless I thought in a criminal case that the defendant really was not being well represented then I might say, "counselor, approach the sidebar; I'm wondering why we're doing this or that." But typically I tried to let the lawyers just try their cases.

Q: In your brief stint with private practice or civil work, how do you feel about the differences between civil practice and criminal practice?

A: I was a bit astounded at the paper in civil practice. In criminal cases, we filed very few pretrial motions. And, it was not unusual at all for criminal practitioners to write down authority on a yellow sticky note and orally provide that authority to the court in chambers. That was just the nature of the practice. When I went to Superior Court and I heard a judge say, "well I'm just going to tell the lawyers to brief it for me," it was surprising. One other thing that was surprising to me

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about civil practice was confirming letters. I had to continue a matter and my partner told me, “okay, well let’s make sure we send a confirming letter.” I said, “a confirming letter? Well that’s insulting.” And he said, “Oh no, no, no; you always do that.” And I think the difference was the civil bar was larger, it’s always been. In the criminal bar I would see the same DAs over and over again, and so, if we continued a matter for a week, we didn’t need a formality. And I think the other thing is that attorneys in the criminal bar are forced to be pretty civil because they see each other next week or next month. Whereas in civil practice an attorney might be able to scorch the earth with someone and maybe never see them again, or not see them again for years.

Q: Do you have a particularly notable experience you would like to share from your career on the bench in trial court?

A: The best trial lawyers are the lawyers that could argue to me on an intellectual level about an evidentiary objection or some legal issue and then turn around and argue effectively to a jury in very plain-spoken English. Jurors are not going to raise their hand and say “I don’t understand what ‘subsequent to’ means.” I was always amused by police officers who would say that they “exited their vehicles.” Well, the rest of us get out of our cars. Some lawyers were very bright and had this tremendous literary knowledge and so they would draw some analogy to Shakespeare or some classic. Well, I look at the jury and can tell that they have no clue. Trial judges spend a lot of time looking at juries; more time than the lawyers do because the lawyers spend a lot of time looking at the witnesses. I would watch jurors’ eyes glaze over. Trial lawyers need to multitask. They need to be thinking about that jury, looking over at the jury, making eye contact with them from time to time, to see if a juror is lost or grimacing or confused.

Q: In your appellate practice, do you have any words of wisdom for lawyers regarding appellate briefing or oral argument?

A: It depends. If you are an appellate practitioner, you really understand what the process is in the appellate court. If you are a trial lawyer who now wants to handle the appeal on a trial matter, my advice would be different because you really need to understand that the focus is very different at the court of appeal. We give great deference to the trial court. We presume the trial court is correct other than in very limited de novo reviews and we draw every inference in favor of supporting the judgment. When I first started as an appellate judge, I thought, “well, how is that fair?” The cards are just stacked against the appellant. If you are not familiar with appellate practice, make sure you understand what your burden is and what the standard of review is because we look at cases differently depending on the standard of review. Highlight the errors of law and why those errors are prejudicial. Know the record because we may ask you a question like, “oh counselor, that’s interesting but was that document ever admitted?” or “in that document, was there a paragraph or a phrase or something that addressed this issue?” And if you say, “hmm, I don’t know,” that is not a good thing. But even if you don’t know, you can say: “Your Honor, I’m sorry, I don’t know as I stand here right now. So, if the court would like, I can file a letter brief in five days directing the court’s attention to where that appears in the record.”

Q: Do you have advice for lawyers who are interested in becoming judges someday?

A: Yes. I think that for anyone that wants to become a judge, you want to get as much courtroom experience as you can. Get involved in arbitrations and take depositions. You may not be able to get trials, but try to second chair a trial. Volunteer to be a pro tem judge. The Superior Court is always looking for qualified people to be pro tems in civil, small claims and traffic cases. Get involved in a bar association through its programs. Network with people because if you ultimately apply for the bench, the people reviewing your application will send out hundreds of evaluation forms. And if people don’t know you, they will just throw away the evaluation form. And even if you have not had many trials, you may have demonstrated some of the same skills that we look for in trial lawyers. You need some command presence. You need some knowledge of the law. You can’t have temperament problems. You can demonstrate a lot of those

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attributes in arenas outside the trial court. DAs and PDs have a big advantage because they are in trial all of the time. But we don't want a bench that's all just criminal practitioners.

Q: What was your biggest challenge in becoming the Presiding Justice?

A: My biggest challenge in becoming Presiding Justice is overseeing a complete review of everything we do with an eye towards modernization and greater efficiency. Some of the practices that we have engaged in through the last 20 years have been practices that are just not efficient. If there is a more efficient way to do it, if we can modernize it and do it in a less costly way, we try to implement that. I think we have produced decisions on appeals faster so appellants are not waiting as long. We have reduced paper in the court. We are doing more things electronically. And we are announcing panels. That was one of the things appellate practitioners specifically requested. I think knowing a panel can make a difference. Some Justices have backgrounds in plaintiff-side litigation, some business-side, and mine is criminal practice. Suppose an appellant is arguing a business case. She might tailor her argument differently if I am on the panel versus another justice. Or she might want to look and see how long the Justices on her panel have been on the court. She might also want to research my unpublished opinions and maybe discover that there is a particular issue that is important to me. And if that issue goes her way, she will want to hammer home the reasoning without citing the opinion. Advising attorneys in advance of their panels has been really helpful, and that has been a big change. I try not to be afraid of change and believe that change is an opportunity and not a threat. It does not necessarily mean that we were doing things wrong in the past, but there's always room to change. That is what I have been spending the last eight months on. It is good and it is exciting.

♦ *Kate Santon is an associate at the law firm of Dorsey & Whitney LLP*

As all parties do, Samsung had the duty to disclose to Apple evidence on which Samsung planned to rely at trial, including names of witnesses, the evidence that those witnesses may possess, documents necessary to support a party's claims or defenses, computations of each category of damages, as well as insurance agreements which may be used to satisfy a judgment rendered in the case. Fed. R. Civ. P. 26(a)(1)(A)(i)-(iv). Importantly, Samsung's disclosure obligations did not end there. Rule 26(e) requires parties to continuously supplement previously disclosed evidence and responses to discovery requests "whenever a party learns that its prior disclosures or responses are in some material respect incomplete or incorrect." Fed. R. Civ. Proc. 26, 1993 Adv. Comm. Notes. Samsung's failure to follow these rules was punished by the severe, but widely applied, evidence preclusion sanction under Rule 37(c).

#### Putting Teeth in the Disclosure Rule

Rule 37(c), adopted in 1993, was "a recognized broadening of the sanctioning power." *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001). *See also, Gagnon v. Teledyne Princeton, Inc.*, 437 F.3d 188, 191 (1st Cir. 2006) (Rule 37(c) "contemplate[d] stricter adherence to discovery requirements, and harsher sanctions for breaches."). The Rule was "explicitly designed to punish negligent or elusive behavior during discovery and to prevent any party from gaining an advantage as a result of discovery antics. And indeed, its proscribed penalty is severe." *Sanchez v. Stryker Corp.*, 2012 U.S. Dist. LEXIS 62465, at \*7 (C.D. Cal. May 2, 2012) (internal citation omitted). It gave "teeth" to the disclosure requirements "by forbidding the use at trial of any information required to be disclosed by Rule 26(a) that is not properly disclosed." *Yeti by Molly, Ltd.*, 259 F.3d at 1106.

Parties who fail to abide by Rule 26's disclosure duties will often be subject to the evidence preclusion sanction under Rule 37, as "Federal courts apply this rule strictly and require exclusion of such evidence absent harmless error or substantial justification." *Harris v. United States*, 2003 U.S. Dist. LEXIS 28058, at \*11 (C.D. Cal. Jan. 7, 2003) (citing *Yeti by Molly, Ltd.*, 259 F.3d at 1106). While the value of Mr. Sohn's testimony to Samsung's case is unknown, courts are certainly will-

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ing to use Rule 37(c) to deal a harsh, and even devastating blow to a party's case. On the offense, as demonstrated by *Apple*, the rules are an immensely valuable tool for a party seeking to preclude the opposing party's key evidence from trial. Accordingly, in order to ensure compliance with the disclosure requirements, attorneys are well-advised to update opposing parties on evidence and witnesses throughout the litigation.

### Presumption of Evidence Preclusion

The plain language of Rule 37(c) reflects that the exclusionary sanction is discretionary, providing that instead of evidence preclusion, the court may choose from several milder sanctions, such as payment of attorneys' fees, informing the jury of the party's failure to disclose, or "other appropriate sanctions." Fed. R. Civ. P. 37(c)(1)(A)-(C); *Southern States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 596 (4th Cir. 2003). However, these alternative sanctions are typically applied when the non-disclosing party attempts to hide evidence that is helpful to the opposing party. In that situation, evidentiary preclusion would clearly not be an effective sanction, as it would be precisely what the non-disclosing party was seeking. *Id.* Otherwise, however, courts freely use the evidentiary preclusion sanction when a party attempts to introduce non-disclosed evidence helpful to its own case. In doing so, several courts take heed of the Advisory Committee Notes to Rule 37 and describe the sanction as "automatic" and "self-executing." See e.g., *Goodman v. Staples the Office Superstore, LLC*, 644 F.3d 817, 827 (9th Cir. 2011).

However broad a court's discretion under Rule 37 may be, courts usually will not apply the preclusion sanction when doing so obliterates a party's entire case. See *R&R Sails, Inc. v. Ins. Co. of the State of Penn.*, 673 F.3d 1240, 1246-47 (9th Cir. 2012) (holding that if the Rule 37 sanction was used to preclude a party's entire claim, then the district court must first make a finding that the party's non-compliance with the disclosure procedures constituted willfulness, fault or bad faith and that the court also must consider the availability of lesser sanctions); *U.S. v. \$8,221,877.16 in United States Currency*, 330 F.3d 141, 161 (3d Cir. 2003) ("[T]he

sanction of dismissal is disfavored absent the most egregious circumstances.")

### Dodging the Sanctions Bullet

Rule 37 offers only limited defenses to avoid the preclusion sanction. A party may show that its actions were substantially justified, or that the nondisclosure was harmless. Fed. R. Civ. P. 37(c)(1). A party may also demonstrate that the evidence was "otherwise made known" to the opposing party, as explained in the Advisory Committee Notes to Rule 26. While these standards seem simple on their face, courts have required that parties meet a very high burden to avoid evidentiary preclusion.

Courts will scrutinize evidence in great detail to determine if the challenged evidence was sufficiently disclosed to the opposing parties. See e.g., *Castro v. City of Mendota*, 2012 U.S. Dist. LEXIS 138699, at \*25 (E.D. Cal. Sept. 25, 2012) (unable to find the opinions which plaintiff asserted were disclosed in its expert witness report, the court stated that "searching within the shadows of the report for opinions that were never expressed will not do"); *Mee Indus. v. Dow Chem. Co.*, 608 F.3d 1202, 1221-1222 (11th Cir. 2010) (court rejected appellant's argument that loss of goodwill category of damages was made known to opposing party where appellant disclosed lost sales information, reasoning that while "there may be evidentiary overlap between the alleged lost sale and a claim of loss of goodwill, considerable differences exist between the two theories.").

Likewise, nondisclosure will not be excused by a lone mention of or reference to the evidence during discovery. See e.g., *Newark Group, Inc. v. Dopaco, Inc.*, 2012 U.S. Dist. LEXIS 35456 (E.D. Cal. Mar. 14, 2012) ("merely because [a witness'] name . . . appeared, among numerous other names, somewhere in the thousands of pages of documents produced by Plaintiff, does not mean that Defendant should have anticipated that Plaintiff would call the witness as a trial witness and depose him accordingly"); *Design Strategy, Inc. v. Davis*, 469 F.3d 284, 293 (2d Cir. 2006) (rejecting plaintiff's contentions that because it turned over its financial documents, this was sufficient disclosure of its damage calculations). In addition, as in the *Apple* case, even where the evidence

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appears on the objecting party's own disclosures, courts have found this insufficient to avoid the adverse consequences of the disclosure requirements.

Further, some courts weigh a number of factors to determine whether a party's nondisclosure is excused. For instance, the Ninth Circuit has considered the following: (1) prejudice or surprise to the party against whom the evidence is offered; (2) the ability of that party to cure the prejudice; (3) the likelihood of disruption of the trial; and (4) bad faith or willfulness involved in not timely disclosing the evidence. *Lanard Toys, Ltd. v. Novelty, Inc.*, 375 Fed. Appx. 705, 713 (9th Cir. 2010). A court's consideration of these or similar factors, however, does not make implementation of the preclusion sanction any less frequent. See e.g., *Design Strategy, Inc.*, 469 F.3d at 296 (where the only factor that weighed in favor of the non-disclosing party was the importance of the evidence, the district court did not abuse its discretion in excluding evidence from trial).

Conversely, cases in which parties have successfully argued against the preclusion sanction demonstrate that the non-disclosing party has a very high hurdle to clear. For example, in *Lanard Toys, Ltd.*, the court excused the plaintiff for failing to strictly follow the disclosure requirements regarding its expert witness, because the plaintiff served a detailed "preliminary" expert declaration, a list of materials reviewed in support of the expert's declaration, a copy of the expert's curriculum vitae, a list of representative cases in which the expert had testified, and a statement of his scope of work. 375 Fed. Appx. at 713. The plaintiff also served a supplemental expert declaration more than seven months before trial. *Id.* See also, *Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985, 993 (10th Cir. 1999) (affirming district court's decision not to exclude a theory of damages because opposing party knew the numbers on which the theory was based, was given an opportunity to examine the damages witness outside the presence of the jury, yet declined to do so, and the nondisclosure was not done in bad faith). Other cases reveal that where the failure to disclose was at least partially the fault of the party seeking the exclusion, courts are more likely not to preclude the evidence. See e.g., *Westefer v. Snyder*, 422 F.3d 570, 584 (7th

Cir. 2005) (court reversed district court's preclusion of evidence because the nondisclosure of evidence in affidavits used in opposition to a motion for summary judgment was partially due to opposing party's late disclosure of its own evidence). Courts have also taken into account special circumstances, such as where the non-disclosing party was a *pro se* plaintiff. See e.g., *Fonseca v. Sysco Food Servs. of Ariz., Inc.*, 374 F.3d 840, 846 (9th Cir. 2004) (finding error in exclusion of *pro se* litigant's witness, the court stated, "[d]istrict courts must take care to insure that *pro se* litigants are provided with proper notice regarding the complex procedural issues involved in summary judgment proceedings.")

### Practice Tips

To avoid the adverse consequences of nondisclosure, we offer the following practice tips:

- When a new case comes to your desk, set a recurring monthly calendar reminder to consider Rule 26(e) supplementation.
- Search for and retain experts early in the case. Other than a potential retainer, not a great deal of fees will be incurred, and you will reduce the potential for mistakes caused by waiting until the last minute when the disclosure deadline approaches.
- Communicate with your experts about the specific requirements of Rule 26(a)(2) and confirm that all aspects of the expert's testimony are vetted.
- Don't assume anything. Disclose the information even if the opposing party has already disclosed it or you think the information is obvious or apparent without explicit disclosure.
- Don't wait until the last day to draft the Rule 26(a) disclosures. Treat this task as one of the most important events of the case.

### Conclusion

While harsh, the district court's decision to exclude Mr. Sohn from testifying in the *Apple* case represents a likely outcome for a failure to comply with the disclosure requirements of Rule 26. Courts have shown that they are not only willing to preclude evi-

**-Continued on page 10-**

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***-Rule 26: Continued from page 9-***

dence from being introduced at trial, but go so far as to consider the sanction automatic. To avoid sanctions, attorneys should pay close attention to the witnesses and documentary evidence important to their cases and ensure that such information has been provided to opposing parties as soon as it is known. Likewise, attorneys are well-advised to keep these rules in their litigation arsenal in order to preclude the opposing party from relying on important witnesses or evidence at trial that were not disclosed in accordance with Rule 26.

♦*Paul L. Gale is a partner in the Irvine office of Troutman Sanders LLP specializing in intellectual property and complex business litigation. Gena B. Burns is an associate in the Irvine office of Troutman Sanders LLP specializing in business litigation.*

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***-President's Page: Continued from page 2-***

trict, Division Three, discussing practice before the California courts of appeal. The justices provided "do's and don'ts" of written and oral advocacy in the appellate courts, as well as answered questions submitted by attendees. ABTL-OC thanks Justices O'Leary, Aronson, and Fybel for presenting this always popular program.

In addition to the individuals above, there are many other people responsible for ABTL-OC's success in 2012. First, my fellow 2012 officers: President-Elect Mark Erickson, Treasurer Jeff Reeves, and Secretary Michele Johnson. Each has been a pleasure to work with and each is committed to ABTL-OC's continued success. They will be joined next year by Scott Garner, who will join our chapter's Executive Committee in 2013 as Secretary. Our chapter is in great hands.

Thanks are also owed to the many judicial officers who actively support our chapter, serve on ABTL-OC's Board of Governors and Judicial Advisory Council, participate in ABTL-OC's Brown Bag Lunch programs, speak at ABTL-OC's pro-

grams and seminars, and attend ABTL events. The participation of the judiciary has long been one of ABTL's greatest assets and this past year was no different.

ABTL-OC's 2012 Dinner Program Chair, Mark Finkelstein, deserves recognition for planning outstanding programs over the past year. Without exception, the programs Mark organized drew crowds and follow up commendations from attendees.

This past year ABTL-OC continued its popular Brown Bag Lunch programs, organized by Michael Penn. In addition, Adina Witzling served again as Editor of the ABTL-OC Report, producing with assistance from Will O'Neill and Atticus Wegman four great issues in 2012.

Last, but by no means least, ABTL-OC's Executive Director Linda Sampson deserves special thanks. Linda's hard work, savvy, organization, and constant good cheer benefit our chapter and all of our members, and made my job an easy one.

Thank you for the opportunity to serve as ABTL-OC's President and thank you for your continued support of ABTL-OC.

♦*Melissa R. McCormick is a litigation partner at Irell & Manella in Newport Beach.*

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*-Grace Under Pressure: Continued from page 3-*

gest specific, simple techniques for keeping our cool under extreme pressure.

To get your heart racing and palms sweating, let's posit a few stress-filled scenarios:

- You have thoroughly prepared your client to testify by going over the facts of the case, the documents and testimonial nuances such as non-verbal communication and body language. Despite your best efforts, your client blurts out testimony that is contrary to what you had discussed in the prep session and is damaging to your case.
- You are in the final stages of trial preparation when your client finds a document that has not been produced in discovery. The document is harmful to your case and changes your trial strategy.
- Your opposing counsel acts unprofessionally in a deposition, objecting to virtually every question and improperly instructing his client not to answer based upon non-privilege grounds.
- Your associate informs you that she did not calendar discovery responses and the due date for the responses has passed.

Clients need and deserve a lawyer who stays cool under these difficult circumstances. Knowing how the mind responds to stress will help you respond effectively to these and similar scenarios rather than “flying off the handle” as some lawyers are known to do.

*The Two “Battles” – Win the Important One*

Any dispute is fought on two battlegrounds. The obvious one is between the adverse attorneys. It is this battle on which we generally focus. But the fight between adversaries often is not the important

battleground. The more important battle is the one going on *in our own minds*, as our best version of our self is fighting for control over our destructive, primal instincts. Attorneys (and their clients) who win *that* battle have a decided advantage.

*Our “Three” Brains*

Most of us have been blessed with good minds, which we have filled with vast knowledge and useful experiences upon which we can draw in our work. However, as we address problems and conflict, we are managing three distinct “brains.”

The first brain is the “Lizard Brain.” It is our oldest and most powerful brain. It is also the most dangerous and destructive. The Lizard Brain is the first to develop (in utero). It activates when we are born, and drives our experience in our early infancy. It is primal, involuntary, instinctual, and generally considers only three problem-solving options: fight, flight, and freeze. It is called the Lizard Brain because even the least evolved creatures possess its capacity.

The second is the human part of our brain. It's the part of our brain that takes up the largest surface area. This “Big Brain” provides us logic, language, motor skills and our observational senses. This brain matures over time as we fill it with information and accumulate experiences. It is the one that we are usually most aware of in our day-to-day life. We use this part of our brain to sign contracts and write legal briefs. And, while it can process information and controls our bodies, it does not apply judgment to a situation. It is pretty raw and unfiltered; it merely thinks and acts.

The third brain is our “Wise Mind.” It is the small area in our brains where our good judgment and patience reside. When we are using this brain, we are at our best. We see options that others cannot perceive. We solve problems. We serve our clients. We impress judges and juries. We win.

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The Wise Mind is located in a specific location right above our eyes in the small area in the front of the brain called the “prefrontal cortex,” and is roughly the size and shape of two walnuts. It is the source of our patience and restraint, where we consider different perspectives, the consequences of our actions and words, and carefully weigh our options. It’s where we reflect, apply compassion, and remember what’s important. It’s the Big Brain’s “quarterback.” The Wise Mind is at work when seasoned, effective lawyers puzzle through the scenarios like those described above.

Brain scans show that the walnuts of our Wise Mind generally do not fully develop and mature until our mid-twenties. Therefore, it should come as no surprise to parents that this brain is not generally accessible to children and teenagers. Most lawyers, however, have the neurological maturity to deploy the Wise Mind to their clients’ advantage.

This “three brain” segmentation is important because, while our Big Brain sits in the middle, our Lizard Brain and Wise Mind are fighting for control over it. And, it’s not a fair fight – the old lizard has a decided advantage.

Neuro-physiologically, the lizard part of our brains is very strong. It engages involuntarily when we feel threatened, tired, agitated, or impatient. Once our adrenalin kicks in, it fires up. We don’t choose to turn on our Lizard Brain. It turns on instinctually. And, when it does, we turn into ten-year-olds (and, no one wants to problem-solve with a ten-year-old – not even another ten-year-old).

The other unfortunate neurobiological phenomenon is that, when our Lizard Brain takes over, our walnuts physiologically detach. Our Wise Mind’s “walnuts” are connected to the rest of our brain with thin fibers that disengage when we become upset.

Therefore, we lose access to our Wise Mind and our Lizard Brain takes control. We, in effect, have given a “ten year old” control over our Big Brain.

Because in litigation we must be both strategic and tactical in our approach, we have to exercise mental and emotional self-control regarding our thoughts, words, and actions. The maintenance of mental and emotional awareness and flexibility is essential to addressing the complex issues we encounter.

By its very nature, the Lizard Brain becomes very narrow in focus, disregarding any information, thoughts, and strategies that are not related to primal survival. In other words, if there are twenty options or ways to look at a situation, our Lizard Brain will only consider the ones that involve “fight, flight, or freeze.” These are usually not the best options out of the many others that would be available to our Wise Mind if our “walnuts” were attached.

Again, we all have experienced circumstances when we or our clients, opponents, or co-counsel have emotionally devolved in a heated moment and lost valuable perspective. Who hasn’t observed themselves “losing it” in a situation that, in retrospect, resulted in a poor set of decisions and counterproductive conduct? Later, you are left asking yourself: Why did I do that? Why didn’t I see that option that now, in cool retrospect, seems so obvious? It is because your Wise Mind shut down and lost the battle for control to the dreaded lizard.

#### *How Do You Know You Are In “Lizard” Mode?*

Knowing the triggers that cause you to operate at a lower capacity is the first step to achieving grace under pressure. Over time, you will be able to anticipate the specific stressors that trigger you to lose focus and cause your Wise Mind to disengage. As the noted psychologist Ice Cube once said: *you should “check yourself before you wreck yourself.”* However-

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er, since our Lizard brain activates involuntarily, often it appears before you know it.

How do you know when your Wise Mind is losing the battle? There are physical cues such as a racing heartbeat, sweaty palms, dry mouth, or trouble articulating. There are also linguistic cues. Besides being in an agitated state, you find yourself saying or thinking words like: *always, never, you are or he/she is (something negative), unfair, you don't understand, you don't get it, you must, or you should*. Curse words may fly in this state of mind. If this happens, slow down. Nothing good is going to come from this place. You are likely going to say or do something disadvantageous to you and your client.

#### *How To Regain Control?*

The answer is to literally re-engage your pre-frontal cortex (the walnuts). How? Believe it or not, the mere act of simply calming your body down will often get you there. If possible, disengage physically from the encounter. Take a break in the deposition. Go outside or go to your office and close the door. Ask for a recess if you are in trial. Talk the issue through with a colleague if time permits. In other words, call “time out.” These tactics have a positive neurobiological effect. The act of calming yourself down physiologically reconnects your Wise Mind. Your options for resolving the problem will multiply. You and your client will reap the benefits.

If a “time out” is not possible (at trial, for instance), simply recognize that you are in a circumstance where your Lizard Brain is prone to take over. This awareness in itself can interrupt your negative and destructive course of thinking and action. From that place, take a moment to collect yourself – don’t overthink it. You are not going to be able to “think” or “talk” your way out of it. Remember, you’re mind has been hijacked and the lizard is not going to give up without a fight.

When time is a factor, use a few *simple words or phrases* to reengage your Wise Mind, such as, “*my lizard is driving here*” or “*beware of the lizard.*” Take deep breaths through the nose and out the mouth. Say a short and simple “mantra” to yourself (a sound or word). Perhaps say a little prayer. Focus on your breathing. Take a sip of water like Tom Cruise did before he cross-examined Jack Nicholson in *A Few Good Men*. Use these techniques to “heal” your mind and you will remain calm in even the most heated moments.

#### *The Key: Three Simple Steps*

Now, this may sound almost too simple. After all, we are sophisticated and educated people. Certainly there is more to it than that! Perhaps so, but we find that this approach works *BECAUSE* it’s simple. When you or your client is under the gun and the lizard has taken over, complex interventions will fail. You need a way to reliably get your walnuts back in the game. What does work is a simple three-step approach:

*Check Your Lizard, Engage Your Walnuts,  
Now Attend To The Issue.*

It is repeatable, reliable, and gives one confidence that, under pressure and when it counts, the best version of our self is in charge of a situation (and not some immature ten-year old). And, when you think about it, if you are in command and your opponents (your lizard and opposing counsel) are not, who has the advantage? You do. And so does your client.

Interestingly, triggers themselves can be quite predictable. We all have a history where certain specific circumstances easily cause us to lose emotional control. They generally fall into three categories: *people, activities, or subjects*. Often the mere *anticipation* of one of these circumstances (such as meet-

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ing an individual you have a history with or returning to a place or activity where you had a bad experience) can be a trigger. It represents a kind of vulnerability that should be accounted for (like if you had a fever or bum knee – you would compensate for that, wouldn't you?). You can prepare by calming yourself down before you engage directly in the matter and be ready to quickly perform the three-step process described above.

Finally, you might want to share this approach with your clients. It will give you both a vocabulary to collaborate around situations that are unfamiliar, intimidating, and emotional for them. We find that telling our clients to “bring your walnuts” before a challenging or emotional meeting is a helpful way to give them control over their reactivity and prevents a lot of potential damage to their cause. Again, it keeps their internal “ten year olds” at bay and keeps their Wise Mind engaged.

### *Conclusion*

The best lawyers are those who keep their cool in stressful, sometimes chaotic, circumstances. Knowledge and awareness of how our mind reacts to such instances is the first step in achieving grace under pressure. The next step is to employ some simple techniques to enter the state of mind in which we can best serve our clients by recognizing and evaluating options other than “fight, flight or freeze.” At that point, we are in a position to achieve the best result possible under the most difficult circumstances, which is the very objective of an experienced trial lawyer.

♦*Michel Zelnick is a CPA, attorney, and clinical psychotherapist. He advises business leaders, partners, and families who are in economic conflict on how to constructively engage with one another. John Stephens is a partner in Stephens Friedland, LLP, who specializes in business litigation.*

Federal Aviation Administration (FAA). This might seem to call into play the federal officer removal statute. To answer this question, a court will have to determine what is meant by “acting under” a federal officer or agency. If a court determines that the defendant was “acting under” a federal officer or agency, the case may be subject to removal to federal court. One such case illustrates what is meant by “acting under:” *Watson v. Philip Morris Cos.*, (2007) 551 US 142.

In *Watson*, the plaintiffs filed a civil lawsuit in Arkansas state court claiming that a highly regulated tobacco manufacturer violated state laws prohibiting unfair and deceptive business practices. The complaint alleged that the defendant, Philip Morris, manipulated the design of its cigarettes to register lower levels of tar and nicotine that would be delivered to the consumers of the product. The defendant, using the federal officer removal statute, removed the case to federal court. The federal court upheld the removal and the United States Court of Appeals for the Eighth Circuit affirmed on interlocutory review. The United States Supreme Court accepted review shortly thereafter.

The *Watson* Court addressed the history of § 1442(a)(1) by first noting that it was passed near the end of the War of 1812. Ship owners from New England filed numerous state court claims against federal customs officials charged with enforcing a trade embargo with England. “Congress responded with a provision that permitted federal customs officers and ‘any other person aiding or assisting’ those officers to remove a case filed against them ‘in any state court’ to federal court.” *Id.*

The United States Supreme Court reviewed the plain language of the statute and noted that it permits a defendant to remove to federal court a state court action brought against “any officer (or any person acting under that officer) of the United States or of any agency thereof.” 28 U.S.C. § 1442(a)(1). The Court explained that the initial federal officer removal statute was “obviously an attempt to protect federal officers from interference by hostile state courts.” (Citation omitted) *Id.* at 148. The Court

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found that prior cases interpreting this statute illustrate that its basic purpose is to protect the federal government from the interference with its operations that would ensue when a state brings officers and agents of the Federal Government to trial for alleged offenses of state law. *Id.* at 150.

The Court applied the language “acting under” to determine if the private defendant, Philip Morris, acted under an officer or agency of the United States. The Court concluded that a private person “acting under” an officer of the United States or agency thereof must involve an *effort to assist* or to *help carry out* the duties or tasks of the federal superior. *Id.* at 152 (emphasis added). The Court also concluded that the help or assistance necessary to bring a private person within the scope of this statute does not include simply complying with the law. *Id.* The Court noted:

“a private firm’s compliance (or noncompliance) with federal laws, rules, and regulations does not by itself fall within the scope of the statutory phrase ‘acting under’ a federal ‘official.’ And that is so even if the regulation is highly detailed and even if the private firm’s activities are highly supervised and monitored. A contrary determination would expand the scope of the statute considerably potentially bringing within its scope state court actions filed against private firms in many highly regulated industries.... Neither language, nor history, nor purpose lead us to believe that Congress intended any such expansion.” *Id.*

The defendant, Philip Morris, argued that its activities constituted more than mere compliance with regulatory laws, rules, and order. The defendant argued that the Federal Trade Commission (FTC) delegated authority for the testing of its cigarettes to an industry financed testing laboratory. As such, the FTC extensively supervised and closely monitored the manner at which the defendant tested its cigarettes to the point where defendant was acting under officers of the FTC. *Id.* at 154.

The Court disagreed and stated that there is “no evidence of any contract, any payment, any employer/employee relationship, or any principal/agent ar-

rangement.” *Id.* at 155. The Court addressed the level of detail of the rules and orders followed by the defendant as follows: “FTC’s detailed rules about advertising, specification for testing, requirements about reporting results, and the like...sounds to us like regulation, not delegation. If there is a difference between this kind of regulation and, say, that of the Food and Drug Administration (FDA)...that difference is one of degree, not kind.” *Id.* at 157 (emphasis added). The Court concluded that “the difference in the degree of regulatory detail or supervision cannot by themselves transform Philip Morris’ regulatory compliance into the kind of assistance that might bring the FTC within the scope of the statutory phrase ‘acting under’ a federal officer...we can find nothing that warrants treating the FTC/Philip Morris relationship as distinct from the usual regulator/regulated relationship.” *Id.*, see cf. *Winters v. Diamond Shamrock Chemical Co.*, 149 F.3d 387 (1998) (finding a government contractor relationship with a private company to produce agent orange for the military in order to help conduct a war was sufficient to meet the “acting under” language of the federal officer removal statute).

*Watson* lays the necessary groundwork to define the terms “acting under” a federal officer or agency; at least in the FTC context. Due to the large number of government agencies, the ability to determine whether the federal officer removal statute applies can be difficult. Determining whether there is any involvement with a government agency is the logical first step. The answer to this question is almost always “yes” because most companies must follow government regulations in their respective industries one way or another. For example, a waste disposal company is most likely regulated by the Environmental Protection Agency. As noted in *Watson*, however, to fall under the auspices of the federal officer removal statute, one must do more than simply comply with the law.

Furthermore, whether the federal officer removal statute applies to a case often is based on a person’s or entity’s scope of involvement with that particular governmental agency or officer of the United States. Using the airplane manufacturer example, the fact that airplane manufacturers are required by the FAA to certify the airworthiness of an aircraft may arguably be enough to qualify as “acting under” a federal officer or agency. See 14 CFR §183.1.

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In *Aig Eur. P'Ship v. McDonnell Douglas Corp.*, (2003) 2003 U.S. Dist. LEXIS 1770, a plaintiff alleged that an aircraft accident was caused by the defendant aircraft manufacturer's act of improperly certifying the aircraft as airworthy. *Id.* at 8. The defendant thereafter removed the case to federal court based on the federal officer removal statute. *Id.* at 3. The court held that the defendant aircraft manufacturer was "acting under" a federal officer within the meaning of Section 1442(a)(1) when the plane at issue was certified. *Id.* at 8.

As another example, in *Magnin v. Teledyne Cont'l Motors*, (1996) 91 F.3d 1424, the estate of a pilot killed in a crash brought a product liability action against the engine's manufacturer and its employee who had certified the engine according to federal regulations. *Id.* at 1426. The *Magnin* plaintiff alleged that negligent inspection and wrongful certification caused the deadly disaster at issue. *Id.* at 1427. The *Magnin* court found that while operating under the FAA delegation, the removing defendants were "sufficiently 'controlled' by a government official to qualify as persons 'acting under' a federal officer within the meaning of § 1442(a)(1)." *Id.* at 1429.

The *Magnin* and *Aig Eur. P'Ship* decisions decisions involved different government bodies than the *Watson* case, however, they still provide direction regarding whether a case is subject to removal based on the federal officer removal statute. Put simply, the less regulation or delegation by a governmental agency, the less likely the federal officer removal statute will apply.

After review, it is clear that these cases are just a few examples of how the federal officer removal statute was applied initially. It is clear that this statute has come a long way in terms of its application—from federal revenue officers to Phillip Morris and airplane manufacturers—the application of "acting under" a federal officer or agency has *withstood* the test of time.

♦ *Atticus Wegman is an associate at the law firm of Aitken \* Aitken \* Cohn.*

"discharge, discipline, threaten to discharge or discipline, or otherwise retaliate against an employee or applicant for not complying with a request" for social media information. (Lab. Code § 980(e).)

Significantly for employers, an exception to the new prohibition applies in situations where the employer has a reasonable belief that the social media content is "relevant to an investigation of allegations of employee misconduct or employee violation of applicable laws and regulations." Under the investigative exception, the employer may only use the social media content for the purpose of that investigation or a subsequent, related proceeding. (Lab. Code § 980(c).) Once this new law takes effect, employers should halt any requests for employee or applicant social media information, and only resort to such when there is a bonafide investigation of employee misconduct. Screening publicly available profiles, however, remains permissible so long as other discrimination laws are followed.

#### Privilege Logs Now Mandatory

Assembly Bill No. 1354 will amend California Code of Civil Procedure § 2031.240, which deals with objections to inspection demands. The amendment adds the following language to that section: "If an objection is based on a claim of privilege or a claim that the information sought is protected work product, the response shall provide sufficient factual information for other parties to evaluate the merits of that claim, including, if necessary, a privilege log." (Code Civ. Pro. § 2031.240(c)(1).)

On its face, this new language appears to require either a factual statement of grounds or a privilege log in certain discovery responses asserting the above -privileges. The legislature, however, hedged their bets as to the effect of the law by expressly noting in the statutory language that their intent was merely "to codify the concept of a privilege log as that term is used in California case law," and that the amendment does not "constitute a substantive change in case law." (Code Civ. Pro. § 2031.240(c)(2).) This is significant because at least two California cases support the proposition that a privilege log is not mandatory

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merely because an attorney-client privilege or work product objection is interposed. (*People ex rel. Lockyer v. Superior Court* (2004) 122 Cal.App.4th 1060, 1073; *Best Products, Inc. v. Superior Court* (2004) 119 Cal.App.4th 1181, 1188-1189.)

Regardless of this disclaimer, the statute appears to require that objections based upon attorney work product or attorney-client privilege be interposed with factual information or a privilege log with information sufficient to evaluate the merits of the objection. This change may lead to an increase in the willingness of courts to sanction parties for their failure to provide sufficient factual grounds with privilege or work product objections.

#### FEHA Protection for Religious Grooming and Clothing

Assembly Bill No. 1964 amends and expands Government Code § 12926, which defines the various suspect classes that are protected from discrimination under the California Fair Employment and Housing Act ("FEHA"). The expanded provisions include protections for "religious dress and grooming practices" in addition to protections for a person's religious creed. Under the revised statute, "religious dress practice" is protected and must be "construed broadly to include the wearing or carrying of religious clothing, head or face coverings, jewelry, artifacts, and any other item that is part of the observance by an individual of his or her religious creed." "Religious grooming practice" must also be construed broadly "to include all forms of head, facial, and body hair that are part of the observance by an individual of his or her religious creed." (Govt. Code § 12926(p).)

Assembly Bill No. 1964 also amends Government Code § 12940, which makes it unlawful for an employer to hire, refuse to hire, refuse to promote, or discharge an employee based on race, religious creed, color, national origin, ancestry, physical or mental disability, medical condition, genetic information, marital status, sex, gender, identity, gender expression, age, and sexual orientation. (Govt. Code § 12940(a).) The amendment expands the prior law to make it unlawful for an employer to discriminate based upon "religious dress practice and religious grooming practice as described in subdivision (p) of

Section 12926." (Govt. Code § 12940(l)(1).) The amendment also places restrictions upon what constitutes a proper accommodation for the newly protected status: "An accommodation of an individual's religious dress practice or religious grooming practice is not reasonable if the accommodation requires segregation of the individual from other employees or the public." (Govt. Code § 12940(l)(2).) The amendment also states that an accommodation is not required under this amendment if it would result in a violation of other discrimination laws. (Govt. Code § 12940(l)(3).)

Such changes will obviously impact employers in the hiring arena, and they may affect work relationships with current employees who wish to change their dress or appearance on religious grounds after the amendment is effective.

#### Protections for Breast Feeding and Related Conditions

In what constitutes a declaration of existing law, Assembly Bill No. 2386 amends Government Code § 12926 to include "breastfeeding or medical conditions related to breastfeeding" as part of the discrimination protections afforded to men and women based upon their sex. Discrimination based upon breast feeding is now clearly a violation of FEHA. Previously, an employee could file a claim with the Department of Labor Standards Enforcement for such discrimination. This amendment merely makes it clear that discrimination based on "sex" includes breastfeeding and related conditions under FEHA.

#### Employee Records and Wage Statement Information

Assembly Bill No. 2674 amends Labor Code §§ 1198.5 and 226. Labor Code § 1198.5 increases an employer's responsibility to make employment records accessible to employees upon written request. Previously, employers were required to retain certain employee records for 3 years, and to allow employees to inspect those records upon reasonable request. Once effective, the amendment will require employers to make the records available for inspection to current and former employees within 30 days of a written request, and to provide a *written copy* of the records to current or former employees within 30 days of a request. (Lab. Code. § 1198.5(b)(1).) Any charge for the records cannot exceed the actual cost of reproduction.

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*-Legislative Update: Continued from page 17-*

(*Id.*) While employers are not required to make the records available to employees when the employee is on the clock, this exception does not apply if the requester is an employee's representative. (*Id.*) Under the new law, employers are also required to either furnish a form to employees and employee representatives so that they may make the written request, or the employer must accept verbal requests. (Lab. Code § (b)(2)(B).) Employers are also required to maintain a copy of all employees records for 3 years after termination. (Lab. Code § 1198.5(c)(1).)

Importantly, employers only have to comply with one request per year from former employees, and the statute caps the number of requests that an employer must respond to within any one calendar month at 50 requests. (Lab. Code §§ 1198.5(d) and 1198.5(p).) The amended statute also exempts records relating to investigation of possible criminal offenses, letters of reference, and ratings, reports, or records that were either obtained prior to the employee's employment, prepared by identifiable examination committee members, or obtained in connection with a promotional examination. (Lab. Code § 1198.5(h).)

The amendment to Labor Code § 226, overrules the holding in *Price v. Starbucks*, (2011) 192 Cal.App.4th 1136. Previously, *Price* enabled employers to argue that employees were required to show an "actual injury" if an employer failed to include information on their wage statement such as regular hours worked, overtime worked, or other required information. This argument was based upon Labor Code § 226(e)(1), which at the time provided that an "employee suffering injury as a result of a knowing and intentional failure by an employer to comply...is entitled to recover the greater of all actual damages or...\$50 for the initial pay period...and...\$100 per employee for each violation in a subsequent pay period, not to exceed...\$4,000," in addition to reasonable attorneys' fees.

Now, an employee is deemed to "suffer injury" for purposes of Labor Code §§ 226(e) and (f) if an employer fails to provide a wage statement. (Lab. Code § 226(2)(A).) For imposition of the penalty, "an employee is [also] deemed to suffer injury...if an employer fails to provide accurate and complete in-

formation" as required in items 1 through 9 of section 226(a) and the employee cannot "promptly and easily determine from the wage statement alone" either the amount of gross or net wages paid to the employee during the pay period (along with other specified information), deductions the employer made from the gross wages to determine the net wages paid to the employee, the name and address of the employer (with additional information for farm contractors), the name of the employee, and only the last 4 digits of the employee's Social Security number or identification number. (Lab. Code § 226(b).)

Due to these amendments, it is now more important than ever for employers to issue proper wage statements and to comply with any and all record requests from current or former employees.

#### Commissioned Employee Requirements

Assembly Bill No. 1396, approved in 2011, amends Labor Code § 2751 to require that all contracts of employment for services within the state where the method of payment involves commissions be in writing and set forth "the method by which the commissions shall be computed." (Lab. Code § 2751(a).) The amendment also clarifies that "commissions" requiring the new written agreements do not include short-term productivity bonuses, (such as bonuses paid to retail clerks), temporary variable incentive payments that increase but do not decrease payment under the written contract, and bonus and profit-sharing plans, unless there has been an offer by the employer to pay a fixed percentage of sales or profits as compensation for work to be performed. (Lab. Code § 2751(a)(c).)

#### Overtime Excluded from Fixed Salaries

Assembly Bill No. 2103 amends Labor Code § 515 to prohibit fixed salaries from including both regular and overtime pay. In 2011, *Arechiga v. Dolores Press, Inc.*, (2011) 192 Cal. App. 4th 567 held that an explicit mutual wage agreement could set forth an employees entire salary, including both regular and overtime hours. The amendment alters § 515 so that "payment of a fixed salary to a nonexempt employee shall be deemed to provide compensation only for the employee's regular, nonovertime hours, notwithstanding any private agreement to the contrary." (Lab. Code § 515 (d)(2).) In doing so, the legislature explicitly stated that

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**-Legislative Update: Continued from page 18-**  
the amendment was intended to overturn *Arechiga v. Dolores Press*.

### Conclusion

Governor Jerry Brown signed hundreds of bills into law, many of which were not discussed in this article. Many bills implement changes that will directly affect employers and their counsel, including amendments that limit the use of credit reports by employers (see Assembly Bill No. 22), changes to rules governing consumption of alcoholic beverages on charter buses (see Assembly Bill No. 45), increased restrictions on tobacco sales (see Assembly Bill No. 1301), relaxed restrictions on private parties by some alcohol manufacturers' agents (see Assembly Bill No. 252), and increased restrictions on claims stemming from disability access complaints (see Senate Bill No. 1186). Employers and their counsel should be aware of California's new laws and plan accordingly to achieve the goal of minimizing litigation and other associated costs.

♦ *Christopher P. Wesierski is the founding partner of Wesierski & Zurek LLP, a civil litigation defense firm with offices in Irvine and Los Angeles, California. Laura J. Barns is a junior partner in the firm's Irvine office specializing in employment matters, and Andrew Brown is an associate in the firm's Irvine office practicing business litigation.*

### **-Brown Bag: Continued from page 4-**

garding those interrogatories. When dealing with a confusing or unintelligible interrogatory, the judges suggested that lawyers begin meet and confer efforts to address assumptions about what is being asked. Following that, lawyers can decide whether to further object to the interrogatory or issue a further response.

In the context of arguing tentative rulings, the judges recommended that lawyers submit on the tentative where necessary. Trial on the merits is the goal of the justice system. For example, a judge will almost never sustain an initial demurrer without leave to amend a complaint unless a clear statute of limitations issue exists, and will give the plaintiff one or two chances to amend. To most effectively argue tentatives, the judges recommended that lawyers hit one point of the tentative where they think that the judge may have it wrong, and point out the error in the ruling. To be clear, lawyers should not attempt to reargue the motion.

Regarding trial, Judge Banks discussed cross-examination, stating that lawyers should cross-examine a witness for only one of three purposes of impeachment: (1) prior felony conviction, (2) impeachment on an issue within scope of direct, and (3) prior inconsistent statements that negate a cause of action or establish an element of an affirmative defense. Judge Banks emphasized that lawyers should never regurgitate and repeat direct examination questions.

These are just a few of the tips the judges provided that day. Clearly, the "Brown Bag" lunch is an extremely valuable tool, and I thank the ABTL for putting on these events. I also encourage other young lawyers to attend in the future.

Of course, these events would not be possible without the volunteer efforts of our Orange County judicial officers. Thank you Judge Banks and Judge Colaw for your time, and for sharing your knowledge with us.

♦ *Michael Sapira is an associate at Connor, Fletcher & Williams LLP.*

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