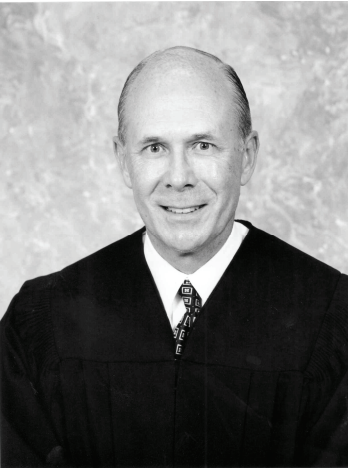


Q&A with the Honorable Franz E. Miller By Dean J. Zipser



[For this judicial interview, we met with the Honorable Franz E. Miller of the Orange County Superior Court. Judge Miller was originally appointed by Governor Gray Davis in 2002 and was the OCBA President in 1997.]

Q: How have you found the transition to the Civil Panel?

A: The transition to the civil panel has been fine. Our supervising judge, Judge Fred Horn, has been very helpful and supportive, as have my colleagues on the panel. Judge Michael Brenner, whose calendar I inherited, spent time with me to educate me on some of the more complex cases and how he ran his calendar. To reduce judge-switch shock to the lawyers, I adopted most of his procedures and found I liked them.

The variety of cases in unlimited civil is both exciting and a bit daunting. On the whole, the exciting part prevails. There have been a number of changes in civil procedure

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Non-Competition Clauses: The California Supreme Court Clarified in *Edwards* that B&P Section 16600 Is To Be Strictly Interpreted By Kathleen O. Peterson

Any California lawyer with clients who operate in more than one state has no doubt had to provide advice on how – or whether -- non-competition clauses would be enforced in California. Recently, the California Supreme Court provided long-needed guidance on the interpretation of these provisions in employment contracts. In *Edwards v. Arthur Andersen*, 44 Cal. 4th 937, 81 Cal.Rptr.3d 282 (2008), decided August 7, 2008, the Court confirmed what employment lawyers in the state predicted all along – the prohibition on non-competition clauses set forth in California Business and Professions Code Section 16600 is to be taken at face value and attempts to prevent former employees from seeking to work for competitors will be seen as a restraint of trade unless they fit into specific statutory exceptions. The Court also expressly rejected the “narrow restraint” doctrine that had been adopted in several decisions in the Ninth Circuit and which has been used by many former employers to prevent departed employees from taking positions with competitors.



California has had statutory provisions protecting employee mobility since the late 1800's, which embody a strong public policy of protecting employees' freedom to change jobs and compete with a former employer. Business and Professions Code Section 16600 contains the key provision: “Except as provided in this chapter, every contract by which anyone is restrained from engaging in any lawful profession, trade or business of any kind is to that extent void.”

The most often used exception, set forth in Section 16601, allows an employee who is selling his or her entire ownership in a business entity, including goodwill, to enter into a reasonable non-competition agreement. This is a mis-

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The President's Message

By Martha K. Gooding



Tempus fugit. No kidding. It is hard to believe that my year as President of this terrific organization has come so quickly to an end. And what a rewarding year it has been. Since I am sitting down to write this just before the Thanksgiving holiday, it is particularly fitting that I take the opportunity, in this final President's letter, to publicly count my blessings by thanking those who are responsible for the successes we have had this year.

First, of course, are my fellow officers, President-Elect Richard Grabowski, Treasurer Sean O'Connor and Secretary Darren Aitken. All are a delight to work with; all are committed to ensuring that our ABTL Chapter is as strong and vibrant as any in the state. The best organizations are those that work hard and have fun doing it: this group fits that bill. They already have plans in the works for some new initiatives next year. The first few programs for next year are already planned, including Dean Erwin Chemerinsky analyzing on February 4th the recent business decisions by the Supreme Court and Professor Laurie Levenson speaking on April 1st on "Trying the High Profile Case." So stay tuned. The organization clearly is in good hands.

Darren Aitken gets an additional thank you for the great work he – and his committee – did in planning our Tenth Anniversary Celebration at the Mission San Juan Capistrano. Most of the prior presidents – and several hundred of our members – helped celebrate our first fabulous decade and raise a toast to the decades to come. We are all grateful for the vision of the attorneys and judges who more than a decade ago saw the need for an organization such as this, got the right folks together, rolled up their sleeves and made it happen. The evening was definitely a highlight of the year: those of you who were there will know what I mean when I say that, although it is possible to envision a somewhat *warmer* venue on that particular evening, it is not possible to imagine a more *beautiful* venue for that very special evening.

Melissa McCormick deserves kudos for planning
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ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl
ORANGE COUNTY

1100 Irvine Boulevard, # 717
Tustin, CA 92780
Phone/Fax: 714.602.2505
E-mail: abtloc@abtl.org
www.abtl.org

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**A “Brown Bag Lunch” With The Honorable
Andrew J. Guilford**
By Jared Bunker



This quarter, we were fortunate enough to meet with the Honorable Andrew Guilford in his courtroom for a “brown bag lunch.” Judge Guilford was gracious enough to share his experience as a civil litigator, the application and vetting process to become a United States District Court Judge, and his experience so far on the bench.

War Stories and Practice Tips

The Brown Bag Breakfast took place on Thursday, October 9, 2008, with Judge Guilford hosting a lunch discussion about best practices for trial attorneys. Judge Guilford centered his comments in the context of his experience as a civil litigator. One such experience was the last case Judge Guilford tried before joining the bench. In his final trial, Judge Guilford represented the City of Anaheim in its case against Angels Baseball, L.P to remove “Los Angeles” from the name of the team. The Judge emphasized the importance of reading the individuals of the jury and directing the presentation toward the individuals. He remarked that some jurors respond more favorably to dramatic attorneys, while others respond more favorably to under-stated attorneys. His conclusion was that attorneys need to be flexible during trial, and be willing to alter the presentation if the jury is not responding.

Judge Guilford also discussed more practical aspects of litigation practice such as courtroom demeanor. Regarding courtroom demeanor, Judge Guilford cautioned the attorneys to refer to the lectern as a “lectern” and not a “podium.” The Judge informed us that some judges, not including himself, take issue when attorneys refer to the lectern as a “podium.” Judge Guilford also cautioned the attorneys that some judges require attorneys to stay close to the lectern when presenting to the judge or the jury. According to the Judge, one practical reason for staying close to the lectern is the presence of the microphone.

Finally, Judge Guilford provided some helpful tips for brief writing. First, the Judge expressed some distaste for footnotes. He even emphasized that, out of the handful

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**California Supreme Court Broadens
Review of Arbitration Awards**
By Anthony M. Stiegler and Sarah R. Boot

I. Introduction

In a significant opinion affecting all parties who arbitrate cases in California and who expect certainty and finality from the arbitral process, the California Supreme Court recently changed the rules by considerably broadening the grounds upon which a court may review the validity of an arbitration award. Under the California Supreme Court opinion in *Cable Connection, Inc. v. DirectTV, Inc.*, 44 Cal.4th 1334 (decided Aug. 25, 2008), an aggrieved party may now ask a court to review an arbitration award for errors of law and legal analysis where the parties agree in their contract that an arbitral panel does not have the power to commit errors of law or legal reasoning.



Although parties electing arbitration generally expect an efficient, expedited, and abbreviated litigation process that is unburdened by lengthy appeals, the Court’s opinion in *Cable Connection* authorizes a lengthy *de novo* review of legal issues. Such a review may ultimately defeat the parties’ original goal of prompt, inexpensive, and final closure to their disputes as the losing party drags out the appellate process while seeking to correct or vacate an award. Accordingly, parties drafting contracts with arbitration clauses must be aware of *Cable Connection* and make a deliberate and reasoned choice regarding their desired scope of review.



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since I was a practitioner, primarily in discovery, but our fine staff attorneys (I used to be one of those at the Court of Appeal) have been invaluable in helping me face the learning curve.

Q: Why did you decide to become a judge?

A: As I noted, I worked as a senior staff attorney at the Court of Appeal – for 13 years in what started out as a two-year sabbatical from my practice. During my tenure there, I learned I enjoyed trying to get to the right result under the law in a case even more than I enjoyed acting as an advocate during my first 15 years as a lawyer.

Also, my grandfather Claude Wood, was a lawyer who practiced in Oklahoma in the first half of the last century. He was an inspiration to me. He believed judging was not only the highest, but the *finest* calling in the law.

Q: What do you like most and least about being a judge?

A: One word answer: the lawyers. Seriously. Nothing is more rewarding and exciting than dealing with highly competent *and ethical* advocates. They make working through legal issues interesting and challenging because they frame and brief the issues well. They fight for their clients' positions while maintaining a genteel decorum.

They understand good lawyering involves “picking your spots,” i.e., taking the time to decide which facts/issues really matter. They know the lawyer who talks the longest and loudest may not have the best chance of winning. They savor victory and suffer defeat with equal grace.

They never, ever, ever come close to misrepresenting anything. They do not engage in petty spats. Obviously, the lawyers I don't care for so much are the opposite. They are not enjoyable.

Q: Is there a particular type of case that you personally enjoy handling more than others? Why?

A: I probably enjoy the diversity of cases more than any particular kind of case, but if I had to pick an area, it would be cases involving numbers and/or scientific evidence. I suppose I like those cases partly because my dad was a comptroller and partly because those types of cases come closer to having *an answer*.

Q: What, if any, trends do you see in business litigation matters?

A: I'm not sure I'm qualified to voice an opinion on this from the bench perspective, since I've only been on the panel for about a year and a half. That said, and drawing on my experience from the practice of law, it seems many business cases are more over-litigated these days.

Money spent on litigation could be used elsewhere, and I'm often at a loss to see how even the outside value of the case justifies the fees incurred. And, of course, trial – and the potential attorney fees award – is always a crap shoot. In other words, I'm seeing several cases that seem bereft of a cost/benefit analysis.

Q: When you are in trial, do you employ any strategies to keep the trial flowing?

A: I don't think I'm a terribly tough taskmaster in trial. If I'm going to err, it will be on the side of making sure both sides have a fair chance to present their cases.

I do want the attorneys to make efficient use of time, however. I expect they will always be on time and have witnesses queued up. And, if some point is being done to death, I don't hesitate to invoke the time consumption aspect of Evidence Code section 352.

Q: Do you follow any procedures to try to encourage settlement?

A: I believe a firm trial date is the best settlement tool. I *rarely* continue a trial to give the parties more time to settle. I rarely set MSCs because most cases settle on their own and I do not believe there is a strong chance of settlement unless both sides express a willingness to talk. On the other hand, I am a big fan of VSCs. Parties can set a VSC with our court simply by calling our clerk. (By the way, we don't have electronic phone menus in our court. If we are there, we answer our phones.)

We can virtually always get parties in for a VSC within 30 days. I'm happy to be the settlement officer, but if any party objects, I can always get a colleague to do it. We also have the court's mediation and early-neutral-evaluation programs.

Q: What advice would you give to lawyers appearing in your court for the first time, or any time for that matter?

A: Be obsequious. (At least that's Marge Fuller's advice.) Seriously, do be polite, especially to our staff. They work very hard, and they don't get paid a lot to do it.

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-Q&A: Continued from page 4-

When arguing a matter before the court, be succinct and moderate in tone, and do not argue directly with the other attorney. Also, before you push to get in the last word, consider that the lawyer who argues last in my court, generally loses on that point.

Q: This is the time of year when many new litigation associates are just starting out their legal careers. What advice do you have for these young lawyers, and particularly those who practice business litigation (besides joining ABTL, of course)?

A: Be scrupulously honest at all costs. A stellar reputation for honesty is a crucial tool for success as a lawyer, and a damaged reputation is the hardest thing in the law to fix.

Hang out with lawyers who share the same values. Seek mentors who stress that virtue.

Q: Do you have any pet peeves on the bench?

A: Pets are not allowed in court. Seriously, as you might surmise from my other comments, I do not like to see lawyers bicker or treat anyone in the courtroom discourteously. Specifically, I do not like to hear lawyers refer to their opponent as “counsel” – the opponent has a name.

Also, I’m not thrilled with the currently prevalent practice of ambushing opposing counsel on the record and trying to get them to make some admission or representation in the presence of the court. I can’t think of a time where the result gained more than the instigator lost by using the tactic in the first place.

Q: People often say, “If I only knew then what I know now.” Would there be anything to fall into that category in terms of effective advocacy, either written or oral?

A: When I took the bench and began hearing cases, I came to this startling conclusion: Judges’ brains are not that much bigger, if at all, than jurors’ brains. So, with written and oral advocacy, keep it as simple as possible.

Tell the judge at the outset tersely and exactly what you want the court to do and why – i.e., use introductions that are a roadmap of what is to come. Recount facts chronologically. Pick a manageable number of points to stress. Never be redundant.

Q: What do you enjoy doing when you’re not working?

A: At last an easy question. My wife and I do a sport called dog agility. It’s like a steeplechase or obstacle course for dogs.

The course is always different, and the handler has about 10 minutes to walk the course – without the dog – and decide on a strategy to get the dog through the course correctly.

My wife is one of the best in the country at the sport and I, well, I really enjoy the sport. It’s good exercise, and unlike children, the dogs are always grateful.

Q: If you could have any job in the world besides being a judge, what would it be and why?

A: Fantasy job or real job? Re the latter, I would certainly want to be a lawyer. My adult life has been filled with the law, I’ve enjoyed every minute of it, and I can’t think of anything I would rather do. Sad, huh?

Dean, thanks for the interview and a chance to share some of my thoughts with ABTL members.

♦ *Dean J. Zipser is a litigation partner at Manatt, Phelps & Phillips, LLP and an ABTL Past President.*

2009 DINNER PROGRAM DATES

Westin South Coast Plaza

Cocktails 6:00 p.m.

Dinner and Program 7:00 p.m. - 9:00 p.m.

February 4, 2009

*United States Supreme Court’s
Review of Business Law Cases
Featuring Erwin Chemerinsky*

April 1, 2009

*Trying the High Profile Case
Featuring Laurie L. Levenson*

June 3, 2009

10th Annual
PLC Fundraiser & Wine Tasting

September 9, 2009

November 4, 2009

-Non-Competition: Continued from page 1-

understood and often abused provision. In order for the exception to apply the employee must have a legitimate ownership interest and the restriction is limited to the scope of the business sold and the geographical territory. The restraint must also only be enforced as long as the buyer conducts a like business. For example in *Vacco Industries v. Van Den Berg*, 5 Cal. App. 4th 34 (1992), an employee/officer with a three percent ownership interest received \$500,000 for the sale of that interest and was required to comply with the terms of a non-compete. However, in *Hill Medical Corporation v. Wycoff*, 86 Cal. App. 4th 895; 103 Cal. Rptr. 2d 779 (2001), a stock redemption agreement with a departing physician was found insufficient to comply with the Section 16601 exception. In rejecting the non-competition clause entered into as part of that agreement, the Court of Appeal analyzed whether the stock being sold constituted a substantial interest in the business, whether the repurchase price was at market value and whether the parties valued or considered goodwill as a component of the sales price. The Court concluded that there were no facts to demonstrate that the departing doctor was compensated to relinquish his rights to continued business with patients and doctors he had worked with. Thus, this exception clearly cannot be used in the majority of situations.

Overall, California courts have only upheld post-termination employee restrictions when the provisions can be interpreted to protect legitimate trade secrets of the former employer. In *Gordon v. Landau*, 49 Cal.2d 690 (1958), an agreement not to use an employer's confidential lists to solicit customers for a period of one year following termination of the employment was found to be valid and enforceable and not a violation of Section 16600. See also *American Credit Indemnity v. Sacks*, 213 Cal.App.3d 622 (1989); *Thompson v. Impaxx*, 113 Cal.App.4th 1425 (2003).

However, a number of federal cases addressing the interpretation issue followed a "narrow restraint" rule and enforced restrictions that were narrowly tailored to protect a legitimate business interest and which did not prohibit a former employee from engaging in his or her preferred profession. For example, in *General Commercial Packaging v. TPS Package Engineering*, 126 F.3d 1131 (9th Cir. 1997), a restriction that prohibited a former employee from working for only one particular customer was upheld. In *IBM V. Bjorek*, 817 F.2d 499 (9th Cir. 1987), a provision in a stock option agreement that prevented an employee from working for a competitor within six months of exercising his options was enforced. See also *Campbell v. Trustees of Leland Stanford Jr. Univ.*, 817 F.2d 499 (9th Cir., 1987).

California courts also developed an expansive view of which employees should benefit from the protections of Section 16600. In *Applications Group v. Hunter Group*, 61 Cal. App. 4th 881 (1998), the Court of Appeals determined that a Maryland company violated California law by seeking to enforce a Maryland non-competition agreement against a Maryland resident who changed jobs to service customers in California for a California-based employer, all the while maintaining residency in Maryland. The pinnacle of these disputes came in *Advanced Bionics Corp. v. Medtronic*, 29 Cal. 4th 697 (2002), which addressed the issue of competing lawsuits in two different states on the same issue. The Court of Appeals decided that the former employee who filed the first action in California would be able to use the protections of California law and accept employment with a competitor, but that the trial court could not enjoin the litigation commenced by the former employer in Minnesota. These potential conflicts in law and differing rules of interpretation in different states or court systems resulted in time-consuming and expensive forum shopping by parties, often accompanied by flurries of removal applications, motions to stay lawsuits and other procedural maneuvers which delayed reaching the key issues and left both employees and employers in limbo.

Against this background, the *Edwards* case provided almost a perfect storm of facts sympathetic to the former employee. Edwards had been employed by Arthur Andersen in California. In the pre-Enron days when he was first hired he entered into an employment agreement which contained three different prohibitions on Edwards' activities after he left employment with Arthur Andersen: (1) for 18 months post-employment he was prohibited from performing professional services of the type he provided for any client for which he worked during his last 18 months of employment; (2) for 12 months post-employment he could not solicit to perform professional services for any client of the office to which he had been assigned in the last 18 months of his employment and (3) for 18 months post-employment he was prohibited from soliciting any professional personnel away from Arthur Andersen.

In 2002, after the Enron debacle, Arthur Andersen negotiated the sale of the division where Edwards worked to HSBC. He was offered employment at HSBC subject to his providing a release of the post-employment restrictions from Arthur Andersen. Arthur Andersen offered to release Edwards from the restrictions but only if he entered into a general release of all employment-related claims and agreed to cooperate in the Enron investigations and litigation if needed. Edwards refused to sign the release but went ahead and signed his offer letter with HSBC. HSBC then revoked its offer of employment and Arthur Andersen terminated Edwards and refused to pay him severance. Ed-

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wards filed suit against Arthur Andersen claiming that the post-employment restrictions in his employment agreement were void and unenforceable under California law and that it was impermissible for Arthur Andersen to require him to agree to additional obligations as a condition for releasing him from invalid restrictions. Arthur Andersen argued that the post-employment restrictions were valid under the Ninth Circuit's "narrow restraint" doctrine.

The Supreme Court rejected Arthur Andersen's arguments and refused to acknowledge any post-employment non-compete restrictions other than those that fall within express statutory exceptions. The Court stated: "The Agreement restricted Edwards from performing work for Andersen's Los Angeles clients and therefore restricted his ability to practice his accounting profession.... [Citation omitted.] The noncompetition agreement that Edwards was required to sign before commencing employment with Andersen was therefore invalid because it restrained his ability to practice his profession." *Edwards* at 948. Thus, even though the agreement would only prevent Edwards from performing services for *some* clients, it was impermissible.

The Court also expressly rejected the federal "narrow restraint" doctrine: "Contrary to Andersen's belief, however, California courts have not embraced the Ninth Circuit's narrow-restraint exception. Indeed, no reported California state court decision has endorsed the Ninth Circuit's reasoning, and we are of the view that California courts 'have been clear in their expression that section 16600 represents a strong public policy of the state which should not be diluted by judicial fiat.' (*Scott v. Snelling and Snelling, Inc. (N.D. Cal. 1990) 732 F.Supp. 1034, 1042*) [footnote omitted]. Section 16600 is unambiguous, and if the Legislature intended the statute to apply only to restraints that were unreasonable or overbroad, it could have included language to that effect. We reject Andersen's contention that we should adopt a narrow-restraint exception to section 16600 and leave it to the Legislature, if it chooses, either to relax the statutory restrictions or adopt additional exceptions to the prohibition-against-restraint rule under section 16600." *Edwards* at 949-50.

It is important to note two key points that the Supreme Court did not address. The Court did not directly address the argument that a trade secret interest can save a non-competition agreement or the provision that prevented Edwards from soliciting former Arthur Andersen employees. In a footnote the Court stated: "We do not here address the applicability of the so-called trade secret exception to section 16600, as Edwards does not dispute that portion of his agreement or contend that the provision of the noncompetition agreement prohibiting him from

recruiting Andersen's employees violated section 16600." *Id.*, footnote 4 at 946. However, elsewhere in the decision the Court did cite to *Thompson v. Impaxx, Inc.* 113 Cal.App.4th 1425, 1429 (2003), which distinguished "trade route" trade secrets cases from solicitation cases that protect trade secrets or confidential proprietary information. This may suggest that a "no solicit" clause that prohibits the solicitation of employees from a former employer that goes beyond what is needed to protect trade secrets may go too far. Thus, a prohibition clearly and legitimately tied to trade secrets protections is most likely acceptable.

The lesson to be drawn from *Edwards* is that any agreement which contains any type of post-employment restriction on an employee's ability to practice his or her profession, trade or business, such as a prohibition on performing work for a competitor or providing services to a particular customer, regardless of the length of time of the restriction, will be void under Section 16600 and held to be unlawful and against California's public policy. Broad, non-solicitation clauses regarding customers that are not specifically limited to protecting trade secrets or other confidential information would also likely be looked at with a high level of suspicion. As always, labeling a piece of information as "confidential" does not mean that it is worthy of trade secret protection and we should expect a great deal of scrutiny of what does and does not fall within confidentiality provisions.

The biggest impact of the decision will be on companies which use standardized employment agreements which are developed or reviewed by attorneys outside of California. There is great resistance by out-of-state employers in accepting how far the provisions of California law go in protecting employees. Every employer should undertake a careful review of its agreements and a fresh analysis of how the agreements are likely to be interpreted. Partnerships and businesses who are relying on non-competition clauses in buy-sell or stock repurchase agreements should also consider how water-tight those provisions are. While careful attorneys have no doubt been striving to prepare enforceable agreements for many years now, we have all seen clauses that our clients or opposing parties just won't sacrifice. Now, with *Edwards*, we not only have clarity about interpretation but we have a tool to persuade contracting parties that now, more than ever, it doesn't make sense to rely on a clause that will not be enforced.

♦ *Kathleen O. Peterson is a litigation attorney in Orange County.*

President: Continued from page 2-

and organizing our programs this year. I was thrilled to close out the year with our November program on *United States v. Hamdan*, the first Guantanamo Bay case to go to trial. It matters not what your personal views about the Guantanamo detention program are: Harry Schneider gave a riveting account of the trial and some of the factual and legal challenges faced by his trial team, complete with photographs that allowed us to see the circumstances under which the trial took place – a far cry from our comfortable state and federal courthouses. The success of the program was evidenced by the fact that, although Mr. Schneider's presentation went over our normally inviolate 9:00 p.m. sign off, not a soul left the room. I was gratified to hear Mr. Schneider's praise for the experienced military judge who presided over the trial and obviously brought not only wisdom, intelligence and patience to the process, but also a keen appreciation for the historical significance of what was unfolding before him. Programs like this are always among my favorites: it is exciting to hear trial stories told by talented trial lawyers. I invariably walk away with a renewed appreciation for the lawyer's craft and, particularly in a case such as this, renewed admiration for lawyers who take time away from their busy practices (not to mention home and family) to take on pro bono work. They truly make a difference in the lives of their clients. It heightens the pride that all of us take in being members of this profession.

Of course, our organization would not be what it is without the support of our state and federal judges. I certainly count them – and their willingness to devote countless hours to assisting us as Board members, members of our Judicial Advisory Council, participants in our intimate brown bag lunch programs, and panelists at both our dinner programs and our annual seminar – as one of the organization's great assets. They remind us how strong and dedicated our judiciary in Orange County is. Our judges have a great many demands on their times – and more than a few other legal organizations in the county that also seek their involvement – and we are grateful beyond measure for the support they continue to provide us, year in and year out.

I am equally grateful to all of the members of the Board for all they have done to help guide the organization and implement our initiatives throughout the year. A few are deserving of special mention: Kathleen Petersen, who chaired our PLC Fundraiser Committee and took us to an all-time high contribu-

tion to the PLC; Mark Erickson, who as Membership Chair took our membership to a new high; and Michele Johnson, who chaired our Brown Bag Lunch Series and – you will note the pattern here – planned and implemented more lunches than ever before. It truly has been an extraordinary year.

No recitation of thank yous could be complete without recognizing the extraordinary talent and dedication of our Executive Director, Linda Sampson. Linda shifted her role earlier this year from a board member to our Executive Director, and we are thrilled to be working with her in this new capacity. She brings endless energy and creativity to this effort, and I know she will help all the presidents, officers and board members who come after me continue to take this organization to greater heights.

Finally, my heartfelt thanks go to the most important people of all: our members. This is your organization; it is you whose interests and needs we serve; and I have no hesitation speaking for the entire Board when I say that we are grateful for the unwavering support from you and your firms.

Thank you for the opportunity to serve as president of the ABTL/Orange County. I wish for all of you a successful year end, warm and loving holidays, and a 2009 filled with every blessing.

♦ *Martha K. Gooding is a litigation partner at Howrey LLP.*

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of the published opinions he has authored, there is not one footnote. Second, Judge Guilford encouraged the attorneys to file briefs the Friday before a Monday holiday. He cautioned the attorneys not to wait until the Tuesday after the holiday.

About the Judge

Judge Andrew Guilford graduated from the University of California, Los Angeles School of Law in 1975, after serving on Law Review. Judge Guilford spent about 32 years in private practice at Sheppard, Mullin, Richter & Hampton. Judge Guilford spent many years serving in numerous professional organizations, including President of the State Bar of California and President of the Orange County Bar Association. The ABTL and all attorneys in attendance at this lunch are deeply grateful to Judge Guilford for sharing so graciously of their time and insights.

♦ *Jared Bunker is an associate in the Irvine office of Knobbe, Martens, Olsen & Bear.*

-Arbitration: Continued from page 3-

II. The Traditional Limited Grounds for Judicial Review of Arbitration Awards

Under both the Federal Arbitration Act (“FAA”) and the California Arbitration Act (“CAA”), a party may seek to vacate an arbitration award only on very limited grounds, including that the award was (1) procured by corruption, fraud, or undue means; (2) issued by corrupt arbitrators; (3) affected by prejudicial misconduct on the part of the arbitrators; or (4) in excess of the arbitrators’ powers. Cal.Code Civ. Proc. § 1286.2(a); 9 U.S.C. § 10(a). An award may only be corrected for (1) evident miscalculation or mistake; (2) excess of the arbitrators’ powers; or (3) imperfection in form. Cal. Code Civ. Proc. § 1286.6; 9 U.S.C. § 11.

Parties have relied on these limited grounds to ensure the prompt, cost-effective, and efficient resolution of their disputes, without significant concern about protracted, post-arbitral proceedings.

III. The Facts in *Cable Connection v. DirectTV*

In *Cable Connection*, defendant DirectTV, Inc. contracted with its retail dealers to provide end-user customers with the equipment required to view DirectTV’s nationwide satellite television broadcasts. *Cable Connection*, at 44 Cal.4th at 1341. The contract included an arbitration clause that provided for judicial review of legal errors in the issuance of arbitral awards, but it did not mention class-wide arbitration. *Id.*

In 2001, retail dealers from four states sued DirectTV asserting that it had “wrongfully withheld commissions and assessed improper charges.” *Id.* DirectTV moved to compel arbitration and that motion was granted. Under the U.S. Supreme Court decision, *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003), it became the arbitrators’ decision as to whether class-wide arbitration was authorized under the parties’ contract. *Id.* The arbitration panel found that arbitration on a class-wide basis was authorized notwithstanding that the contract was silent as to the class action issue. *Id.* at 1342.

DirectTV petitioned the California Superior Court in Los Angeles (Judge Chirlin) to vacate the award arguing, among other things, that “even if the

majority of the panel had not exceeded the authority generally granted to arbitrators, the award reflected errors of law.” The trial court vacated the arbitral award on the ground that the arbitrators exceeded their powers by rewriting the parties’ agreements to allow for class-wide arbitration. *Id.* at 1342-47.

The Court of Appeal reversed, holding that the trial court exceeded its jurisdiction by reviewing the merits of the arbitrators’ decision. *Id.* at 1342-42. “Although in the trial court [plaintiffs] did not question whether a contract may provide for an expanded scope of judicial review, the Court of Appeal deemed it an important matter of public policy, suitable for consideration for the first time on appeal.” *Id.* The Court of Appeal found the arbitration clause unenforceable, and DirectTV then appealed to the California Supreme Court. *Id.*

IV. The California Supreme Court Opinion

A. The Logic Behind The General Rule Of Arbitral Finality

The California Supreme Court began by noting that the CAA and FAA “provide only limited grounds for judicial review of an arbitration award.” *Id.* These limited grounds for judicial review were enacted partly to overcome what used to be perceived as “an anachronistic judicial hostility to agreements to arbitrate,” and partly to ensure compliance with the parties’ contractual intentions. *Id.*

Parties contractually agree to arbitrate in order to save time and money. “Because the decision to arbitrate grievances evinces the parties’ intent to bypass the judicial system and thus avoid potential delays at the trial and appellate levels, arbitral finality is a core component of the parties’ agreement to submit to arbitration.” *Id.* at 1355. “Thus, an arbitration decision is final and conclusive because the parties have agreed that it be so.” *Id.* (emphasis in original). The Court explained that “[b]y ensuring that an arbitrator’s decision is final and binding, courts simply assure that the parties receive the benefit of their bargain.” *Id.* citing *Moncharsch v. Heile & Blaise*, 3 Cal. 4th 8-10 (1982).

The Court noted that another reason courts are typically not permitted to review the merits of arbitral awards is that arbitrators are not required to adjudicate according to the rule of law. “[A]rbitrators, unless specifically required to act in conformity with rules of law, may base their decision upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might

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successfully have asserted in a judicial action.” *Id.* at 1359. According to the Court,

“[a]rbitrators do not ordinarily exceed their contractually created powers simply by reaching an erroneous conclusion on a contested issue of law or fact, and arbitral awards may not ordinarily be vacated because of such error, for ‘the arbitrator’s resolution of these issues is what the parties bargained for in the arbitration agreement.’” *Id.* at 1360-61 (citing *Moncharsch, supra*, 3 Cal. 4th at 28); *Gueyffiel v. Arial Services Ltd.*, 43Cal. 4th 1179-1184 (2008).

B. The Court Analyzed And Then Bypassed The U.S. Supreme Court Opinion in *Hall Street Associates, LLC v. Mattel, Inc.*

Prior to *Cable Connection*, the U.S. Supreme Court, in *Hall Street Associates, LLC v. Mattel, Inc.*, -U.S.-, 128 S. Ct. 1396 (2008), re-affirmed the general rule of arbitral finality and settled a federal circuit split by holding that the FAA “does not permit parties to expand the scope of review by agreement.” *Cable Connection, supra*, 44 Cal. 4th at 1341. (citing *Hall Street*, 128 S.Ct. at 1404-05). The *Hall Street* Court found that an arbitration agreement permitting a court to vacate an award based on unsupported findings of fact or erroneous conclusions of law was unenforceable.

In *Hall Street*, the parties negotiated an arbitration agreement that provided as follows: “The Court shall vacate, modify, or correct any award: (i) where the arbitrator’s findings of facts are not supported by substantial evidence, or (ii) where the arbitrator’s conclusions of law are erroneous.” *Hall Street, supra* 128 S. Ct. at 1400-1401. According to the Court in *Cable Connection*, the federal statutory grounds for review are only “remedies for ‘egregious departures from the parties’ agreed-upon arbitration,’ such as corruption and fraud.” *Id.* 1349 (quoting *Hall Street*, 128 S. Ct. at 1404). The Court reasoned that, “[a]ny other reading opens the door to the full-bore legal and evidentiary appeals that can render informal arbitration merely a prelude to a more cumbersome and time consuming judicial review process. . .” *Id.* (quoting *Hall Street*, 128 S. Ct. at 1405).

Despite the U.S. Supreme Court’s “strict reading of the FAA,” the California Supreme Court noted “the *Hall Street* majority left the door ajar for alternate routes to an

expanded scope of review.” *Id.* at 1349. The Court observed that “*Hall Street* was a federal case governed by federal law” and that “the court considered no question of competing state law.” *Id.* at 1353-54. The California Supreme Court then found that *Hall Street* does not preclude “other avenues for judicial review, including those provided by state statutory or common law.” *Id.* Thus, the Court concluded “that the *Hall Street* holding is restricted to proceedings to review arbitration awards under the FAA, and does not require state law to conform with its limitations.” *Id.* at 1354.

C. The Court Created An Exception To The General Rule Of Arbitral Finality.

The California Supreme Court’s primary focus centered on “the parties’ intent and the powers of the arbitrators as defined in the agreement.” *Id.* at 1355. “If the parties constrain the arbitrators’ authority by requiring a dispute to be decided according to the rule of law, and make plain their intention that the award is reviewable for legal error, the general rule of limited review has been displaced by the parties’ agreement.” *Id.* (emphasis in original). The Court explained that the parties’ “expectation is not that the result of the arbitration will be final and conclusive, but rather that it will be reviewed on the merits at the request of either party.” *Id.* The Court then interpreted the CAA to permit this contractual expansion of judicial review by stating that the parties’ contractual “expectation has a foundation in the statutes governing judicial review, which include the ground that “[t]he arbitrators exceeded their powers.”” *Id.* at 1355-56. (quoting Cal. Code Civ. Proc. §§ 1286.2(a)(4), 1286.6(b)).

The Court described many advantages to be gained by upholding parties’ agreement to submit arbitral awards to judicial review on their merits, such as: (1) relieving pressure on court dockets by sparing courts the burden of trial, pretrial proceedings, and discovery disputes; (2) developing the common law; and (3) developing alternative dispute resolution “by enabling private parties to choose procedures with which they are comfortable.” *Id.* at 1363-64. Ultimately the Court held that “[t]he Court of Appeal erred by refusing to enforce the parties’ clearly expressed agreement in this case.” *Id.* at 1364.

V. Conclusion

Parties entering into contracts with arbitration clauses need to understand the consequences of agreeing to judicial review on the merits and they must be clear in expressing their intentions in the arbitration clause.

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The Court was clear in its respect for the arbitral process, and noted that the outcome on this issue was exclusively in the parties' control at the time the agreement was drafted and signed. The Court held that "to take themselves out of the general rule that the merits of the award are not subject to judicial review, the parties must clearly agree that legal errors are an excess of arbitral authority that is reviewable by the courts." *Id.* at 1361. In *Cable Connection*, "the parties expressly so agreed, depriving the arbitrators of the power to commit legal error." *Id.* The *Cable Connection* parties "also specifically provided for judicial review of such error." *Id.*

The Court made it clear that its decision leaves for another day "whether one or the other of these clauses alone, or some different formulation, would be sufficient to confer an expanded scope of review." *Id.* The Court thus "emphasize[d] that parties seeking to allow judicial review of the merits, and to avoid additional dispute over the scope of review, would be well advised to provide for that review explicitly and unambiguously." *Id.*

It is incumbent on the lawyers advising clients about the arbitral process to explain the Court's holding and the practical ramifications of agreeing to a review on the merits. That judicial review could encompass any legal issue and ruling, whether it be the admissibility of evidence, the interpretation of a statute or case, or an ultimate dispositive conclusion of law. Such a review of the legal merits of an arbitral award could realistically last for years and cost the parties resources rivaling that which they would have spent on actual judicial litigation. That kind of review has the potential to practically and fundamentally defeat the primary arbitral objective of a speedy, cost-effective, final and efficient resolution to disputes.


♦ *Anthony M. Stiegler and Sarah R. Boot are litigation attorneys at Cooley Godward Kronish LLP in San Diego. This article was reprinted from the ABTL-San Diego Report.*

Thank You for Making Our Second Annual Holiday Gift Giving Program a Success

The Orange County Chapter of ABTL collected gift cards totaling over \$1,000 for donation to the Orangewood Children's Home. In early December, Jaime Muñoz (Orangewood's Program Director) very gratefully accepted the gift cards from Martha Gooding.



We also had a wonderful showing of support for the Orange County Superior Court's adoption program and we wanted to show how much the Court (and, ultimately, the children) appreciated your generosity.



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341 THE CITY DRIVE
P.O. BOX 14169
ORANGE, CALIFORNIA 92668
PHONE: (714) 935-7257
FAX: (714) 935-6310
rsherman@occourts.org

Linda Sampson, Esq.
Association of Business Trial Lawyers of Orange County
1100 Irvine Boulevard, Suite 717
Tustin, California 92780

Dear Linda:

Please accept my thanks to ABTL for the new batch of stuffed animals which ARTL and its members donated to our court for children being adopted. It has been a few months since we had any stuffed animals to give out, so we are very happy to have a fresh supply. The children are very happy when I tell them they get to pick out a stuffed animal, and we again will be able to make many more children very happy with your generous gifts. I will email two photographs of the toys, one with my clerks Maria Haskins and Jodi Gamboa in the background, and one with me in the background. Thanks again for ABTL's ongoing generosity.

Sincerely Yours,

Randall J. Sherman

Enclosures
cc: Presiding Judge Nancy Wieben Stock
Supervising Judge Marjorie Laird Carter

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