ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO

abtl REPORT

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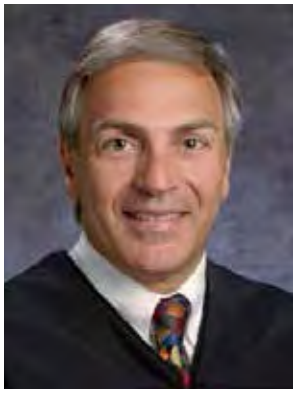
# Inefficient Use of the Jury's Time Can Threaten Your Client's Right to a Fair Trial



Judge Larry Alan Burns

*By Alexandra Preece*

Through his experience as both a prosecutor and a judge, the Honorable Larry Alan Burns has found that the right to a jury trial in both civil and criminal actions is "being threatened by the misuse of jurors." Judge Burns served as a Deputy District Attorney in San Diego for six years and an Assistant U.S. Attorney for the Southern District of California for twelve years prior to joining the bench. On March 26, 2015, Judge Burns sat down with local attorneys at a Brown Bag Luncheon and discussed the need to make trials more efficient and expedient.

According to Judge Burns, both counsel and the court share the responsibility to move cases along. Judge Burns detailed the pressure federal judges experience to keep their cases on track. A published list of all the cases pending more than three years in each courtroom is available to all federal judges, along with a list of motions pending more than six months. Judge Burns prides himself on not having a single case on either list.

Most jurors lose money when sitting on a jury. Despite this burden, there is now a strong stance against excusing a particular juror because of financial hardship. In an effort to decrease "the pervasive cloud of financial insecurity" that hangs over jurors, Judge Burns urges attorneys to make better use of the jury's time. Many jurors that are surveyed after having sat through a trial urge attorneys to "get to the

***(see "Inefficient Use of the Jury's Time..." on page 4)***

# The Future of the No-Rehire Clause in Employment Settlement Agreements: An Analysis of *Golden v. California Emergency Physicians Medical Group*

William P. Keith

*By William P. Keith*

**Introduction**

After enduring the expense, time, and distraction of an employment lawsuit, most employers understandably want to eliminate the possibility of coming into future contact with the former employee. "No-rehire" clauses traditionally provide the solution to this problem, preventing an employee from reapplying for a job with the defendant and limiting the possibility of another dispute. However, as demonstrated by a recent Ninth Circuit opinion, the bounds to which an employer can go in crafting such clauses is not without limitation.

***(see "The Future of the No-Rehire Clause..." on page 11)***

## Inside

## *President's Letter*

*By Jack Leer*


Jack Leer

This past spring the ABTL held its semi-annual joint board meeting in Los Angeles. Members of our San Diego Chapter Board of Governors met with representatives from the other four ABTL chapters to exchange ideas, compare notes, and discuss topics of common interest. A common theme throughout these discussions was the attributes that set the ABTL apart from other organizations.

Without question the active participation of our judicial members was the one thing that ABTL members across the State cited as a reason for ABTL's success. More than any other organization, ABTL truly bridges the gap between the bench and bar. It does so by bringing judges and lawyers together for continuing legal education and other programs that provide a forum for the open exchange of ideas, a pipeline for discussions that no other organization offers. For example, our September 9, 2015 dinner program will repeat last year's popular "Judges Roundtable" format, in which judges seated at each dinner table guide a discussion of common topics which are then reported back to the group as a whole. Such a program would not be possible without the active participation of our local judges and their willingness to contribute their time to promote such a dialog. We join our fellow chapters throughout the State in thanking our judges for their ongoing support and commitment to the ABTL.

The quality and variety of ABTL programs was another reason given for ABTL's success. Some ABTL members are proponents of high profile, entertaining dinner speakers. Others prefer more practical presentations focused on trial related skills and practices. Some like the social aspect of dinner programs, while others prefer the convenience of a one-hour lunch format. Regardless of which camp they fell into, everyone agreed that there were a variety of programs for everyone. Moreover, in a world where anyone can now complete much of their CLE requirement in the comfort of their own office, the ABTL continues to draw in members and attendees by consistently maintaining the highest standards in its programming.

The joint board meeting this year provided a great opportunity to remind ourselves what it is that we like about ABTL, and what we can all do to promote those qualities in the future. It was a pleasure to represent San Diego and to report on all of the fantastic work our chapter has accomplished to date, and all the great programs that we have planned for the rest of the year. I look forward to seeing you all soon at an ABTL function near you!

## *Inefficient Use of the Jury's Time...*

*(continued from cover)*

point," and complain that summations are frequently too long and useless because "the jury heard and understood the attorney's point the first time."

Judge Burns gave examples from various high-profile cases of the inefficient manner in which attorneys use juror's time. For example, in the infamous OJ Simpson trial, one of the attorneys discredited a witness on the witness stand the first day he testified. However, instead of concluding his examination of that witness, the attorney continued questioning the witness and dragged out the testimony for another nine days. In the more recent Jodi Arias case, Judge Burns broke it down even further and analyzed the prosecution's questioning of Arias herself. Judge Burns noted the prosecution needed Arias to testify regarding her relationship with her ex-boyfriend Travis Alexander and how she killed him. The description of the relationship could have logically been completed in about two days, and it should have only taken about an hour to describe how Arias stabbed and shot her ex-boyfriend to death. Instead, Arias testified for 18 days. This type of inefficient examination, Judge Burns stated, jeopardizes the right to a jury trial.

In discussing Irving Younger's "Ten Commandments of Cross Examination," Judge Burns highlighted multiple commandments attorneys frequently forgo that ultimately have an effect on the efficient use of juries. For example, the first commandment requires attorneys conducting cross examination to "be brief." Judge Burns stressed that after sitting through unnecessarily long trials, many jurors do not care about the actual outcome and end up wanting to simply be done with the case. This in turn threatens a party's right to a fair jury trial.

Judge Burns frequently sees attorneys unnecessarily "wind up" when attempting to impeach a witness. The attorneys spends so much time questioning the witness before actually introducing a prior inconsistent statement, that by the time they reach the inconsistent statement the attorney has lost track of the purpose of their questioning. Judge Burns urges attorneys to "get right to the point," and suggests that the best way to impeach a witness is to simply orient the jury to the statement – make clear when and where the statement was made – and then ask a few direct questions regarding the prior statement.

Judge Burns also noted that efficiently using a juror's time is critical given the "Google effect" suffered by society today. Our brains have changed because of the simplicity of web browsing, and our attention spans have suffered. This must be taken into account by all attorneys trying cases in front of juries. Judge Burns attempts to help attorneys in his courtroom by setting time limits in civil cases. He meets with the attorneys to set the time limits, and while their first reaction is usually resistance, they frequently end up presenting in a much shorter amount of time than they had planned and delivering a more effective argument.

The thesis of Judge Burn's presentation was simplicity – focus on one or two important issues, and that's it. Consider time-saving options such as reading a joint statement to the jury about the case and/or avoiding the use of sidebars. As Judge Burns stated, "95 percent of sidebars are a total waste of time." Ultimately, Judge Burns hopes attorneys and courts alike will realize the efficient use of juror's time is a concern that everyone should share. As officers of the court, we must work guarantee the constitutional right to a trial by jury is protected.

*Alexandra Preece is an attorney with the California Department of Transportation. Her practice involves construction contract disputes, inverse condemnation, employment litigation, and imminent domain.*

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# Articles of Interest in Other ABTL Reports

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- Are You Your Subsidiary's Keeper? "Control" Standards for Corporate Affiliates
  - Mark Blake and Meredith Williams
- President Obama Signs Needed Executive Order Bolstering Security Measures for Federal Credit Cards and Signals Increased Federal Regulation Over Data Breaches
  - Robert Cattanach and Kate Santon

### *Los Angeles, Vol. 34 No. 5, Spring 2015*

- Navigating Between "Hypothetical Negotiation" and Real World Facts in Proving Patent Damages
  - Jeanne Irving
- Attorney Competence and Social Media in Aid of Juror Investigation and Monitoring
  - Justices (Ret.) J. Gary Hastings

### *Northern California, Vol. 23 No. 3, Spring 2015*

- Federal Trade Secrets Legislation and California: Resolving the Conflicts Within and Without
  - Jaideep Vankatesan
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  - Kyung Lee

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# Eat, Pray, Appeal: Lessons In Discovery And Appellate Strategy

*Rupa G. Singh*

Rupa G. Singh

With rare exceptions, there is generally no right of appeal from a discovery ruling until after final judgment. This is a settled principle of appellate law in state and federal court. A rather elementary one at that. What more, then, is left to say?

In the second of this four-part series, I discuss the exceptions that, for once, do not swallow the rule. And, without traveling to three continents with a journal and a Mac book, I address how appellate review principles at the discovery stage should inform a savvy litigator's discovery and appellate strategy.

**"Eat" Your Objections and Your Pride**

Unless otherwise stated, the principles apply in both California state court and federal court. To begin, the standard of review for most discovery rulings, regardless of when they are reviewed on appeal, is abuse of discretion. In other words, the appellant must make the clearest of showings that the denial of discovery or other adverse discovery ruling not only exceeded the trial judge's discretion, but resulted in actual and substantial prejudice.

*"The appellant must make the clearest of showings that the denial of discovery or other adverse discovery ruling not only exceeded the trial judge's discretion, but resulted in actual and substantial prejudice."*

In this lies the first and most important lesson for litigators. Given the deference to the trial court's broad discretion in the discovery arena, reversals of fortune on the merits typically do not turn on even the most righteous and well-argued of appeals from a discovery ruling. So, as a litigator, omit those six-sentence long boilerplate objections in your discovery responses; stop making lengthy objections at depositions unrelated to clarifying the form of the question or protecting privilege; and seek discovery that tracks the claims and defenses in the action to avoid motions to compel over peripheral information or documents.

As a corollary, don't be too proud to continue the meet-and-confer process well after consensus seems possible. In initiating meet and confer, examine your motives—are you really willing to compromise, which, by definition, leaves both sides with less than all that they want, or are you just trying to check the meet-and-confer box with no intention of finding middle ground? Before ending meet-and-confer discussions, be mindful of your multidimensional obligations to the court, your clients, and the profession to elevate substance over form, provide zealous yet honorable representation, and maintain the integrity of the adversarial process.

**"Pray" for Perspective And Good Judgment**

Next, there are a limited number of discovery rulings that might be immediately reviewable under the rationale that meaningful review will be denied if it occurs after final judgment. A well-known one is the denial of an assertion of attorney-client privilege over documents or information sought in discovery, or an order unsealing previously sealed documents. Because information cannot be made secret once published, such orders may be reviewable immediately if the trial court certifies the issue for appeal, under the collateral order doctrine in federal court, or through a petition for an extraordinary writ in California state courts. Interestingly, if such orders are not complied with before the entry of final judgment, they become unappealable because they could not have affected the outcome of the case or be material to the judgment.

***(see "Eat, Pray, Appeal" on page 7)***

## *Eat, Pray, Appeal*

*(continued from page 6)*

Another illustration is third party discovery—for example, an order requiring a third party (such as a bank or a psychiatrist) to produce evidence (a party's financial or medical records) can be challenged immediately because the third party is not expected to risk contempt in order to protect the interests of the person whose property it is ordered to produce. Notably, this rationale applies only if immediate review would avert some harm, such as avoiding the disclosure of confidential information; if the information is already disclosed, then the matter becomes appealable only after final judgment.

In this era of national practice groups, it is also comforting to know that an immediate appeal may be taken from a discovery order that is ancillary to litigation in another jurisdiction, but operates as the last word by a local trial court on the matter. For example, a California trial court or a federal district court's discovery order (say, to quash a subpoena on a third party) is immediately appealable if (a) the action is being litigated in another jurisdiction which would (b) lack jurisdiction to review the out-of-jurisdiction discovery order after final judgment.

Unlike civil contempt orders, criminal contempt orders and sanctions against nonparties (including a party's former attorney) are immediately appealable if they finally resolve all issues as to the nonparty. This is because the former is inherently punitive, with no recourse for the party but to accept punishment absent appeal, while as to the latter, there is no way for the appellant to purge the contempt other than to appeal. In California, pretrial orders imposing (but not denying) sanctions of more than $5,000 are also immediately appealable by statute.

So, what lesson can the discerning litigator glean from these seemingly haphazard collection of exceptions to an otherwise reassuringly bright line principle? That whether you believe in a celestial higher power, or as my favorite yoga teacher instructs, the light that is within you, you may want to tap into that resource to put the particular discovery dispute in the context of the entire litigation before pursuing interlocutory review, when allowed. In other words, examine the possibility that the issue will remain ripe for meaningful review after final judgment even where interlocutory review is available, and, if not, pray for clarity on whether interlocutory review really furthers the overall litigation.

### "Appeal" Sparingly And Strategically, Not Early Or Often

Finally, what seems like a failing of the system, and a wresting of control from the parties and their counsel, is anything but. Discovery is left mostly to the parties and their counsel to work out without the coercive threat of immediate appellate review to encourage expeditious adjudication of the action on the merits. The hands-off approach is also a vote of confidence in the parties' ability to rise to the occasion, and not punt all dispute resolution to the trial or the appellate court.

In other words, the reason why there is generally no right of immediate appeal from pretrial discovery orders or subpoenas is the policy of expediting a trial of the action on the merits. Not coincidentally, this is also the professed purpose of discovery. Interlocutory challenges to adverse discovery rulings thwart this policy and this purpose.

Thus, the final lesson comes in the form of a clarion call to litigators to dial back the battle-ready instinct to go to war over every setback. Some rulings, such as discovery, will go against your client, possibly unfairly and erroneously so. But, they are not likely to be fatal to the case, so know when to let go. And, understanding the principle behind the lack of immediate review, and the few exceptions, be selective in choosing which discovery rulings to appeal, and when.

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# How to Perform at Your Best Under Pressure

*Kate Mayer Mangan*

Kate Mayer Mangan

Cases often turn on our performance in intense, high-stakes situations. Taking a masterful deposition or eliciting crisp testimony from a key witness can change the course of a case. It's no wonder, then, that lawyers often feel acutely stressed in these critical situations. Even seasoned litigators suffer from dry mouth and shaking hands during opening statements. The problem with these intense situations is that, all too often, we perform well below our best despite hours of dedicated preparation. We don't ask the right follow-up questions or devise pithy responses to judges' questions. We may forget facts, exhibit numbers, or speak inartfully.

The good news is that there is a growing body of research on choking under pressure. Scientists have demonstrated that there are simple exercises that can help you perform at your best, even when the pressure is on. Here is a rundown on some of the most effective practices.

### Write About Your Feelings Before the High-Stakes Event

Whether we want to admit it or not, few of us really have ice in our veins. Acknowledging the nerves in writing may be one of the more effective ways to prevent choking under pressure. A University of Chicago study showed that people who journaled about their feelings for ten minutes before a big test scored higher than people who wrote about something else or wrote about nothing.[1] People who reported a history of text anxiety showed the most improvement.[2] Researchers theorize that writing about fear and other feelings may ease anxiety because it allows people to express and name their emotions, which may calm them and free up working memory to focus on the test.[3] Working memory is essential for any litigator working under pressure. The next time you have an important hearing or event, consider devoting a few minutes to jotting down how you're feeling about the upcoming event. You're very likely to perform better, and there's no risk.

*"Every litigator knows preparation is critical. The twist that may help reduce your propensity to freeze up is to add extra stress to your preparation."*

### Add Extra Stress to Your Preparations

Every litigator knows preparation is critical. The twist that may help reduce your propensity to freeze up under pressure is to add extra stress to your preparation. In one study, a group of golfers was told their practices would be filmed for later examination by experts.[4] A second group just practiced. The people who practiced with the extra pressure performed better when tested.

The stressful practice acclimates your body and brain to pressure, so when stressors strike during a big event, you will know how to respond. You might consider practicing an argument in front of a camera and asking more seasoned lawyers to review the footage with you. Try doing more moot courts if you can. Simulate negotiations and ask critical colleagues to observe. To be sure, all of these practice scenarios cost money and time, but if the stakes are high, the stressful practice will be worth it.

### Meditate

Yes, I know, sitting quietly and focusing on your breathing may feel unnatural to hard-driving litigators. Yet meditating for just 10 minutes before a big event helps improve performance and ease nerves, even if you have no meditation experience. In one study, University of Chicago researchers gave people 10 minutes of medita-

***(see "Perform at Your Best" on page 9)***

## *How to Perform at your Best Under Pressure*

*(continued from page 8)*

tion training training before a big exam.[5] The people who received the training scored an average of 87 whereas the people who received no training scored an average of 82 even though the two groups had the same ability. This finding is consistent with the numerous other studies indicating that meditation reduces stress[6] while improving memory[7] and focus.[8] You can even take a calming breath in the middle of a hearing or deposition, something that can go a long way towards re-engaging the smartest parts of your brain.

### Talk to Yourself in the Third Person

As I wrote in the winter issue of the ABTL Report, new research shows that the way we talk to ourselves can influence the quality of our performance. That same research suggests that self-talk can affect how well we perform under pressure.

*How* we talk to ourselves affects both our anxiety levels and the quality of our work. University of Michigan scientists discovered that if you talk to yourself in the third-person, as opposed to the first-person, your anxiety will drop, and you will speak better in public.[9] In one experiment, people were told to give a speech to interviewers about why they are qualified for their dream jobs. They were given just five minutes to prepare and were not permitted to make any notes. Before the participants delivered their speeches, one group reflected on their feelings using the third-person, and the other group used the first-person. Those who talked to themselves using third-person references (like "you" or their names) performed better according to judges. The people who used the third-person also felt less anxious about their speeches. So go ahead, talk to yourself. Just be sure to say positive statements like, "You are going to do great! You're ready." Don't say, "I'm sure I'll be great."

The next time you have to perform at your peak and the stakes are high, build in some extra time to try some of these practices. You will likely perform better and feel more confident, too.

*Kate Mayer Mangan is the owner of Donocle, a company that helps lawyers work at their best. Before founding Donocle, she had a successful career as a litigator. Her work has appeared in The Huffington Post, The LA Daily Journal, and Ms. JD.*

(ENDNOTES)

1 Gerardo Ramirez, Sian Beilock, "Writing About Testing Worries Boosts Exam Performance in the Classroom," *Science* 14 January 2011 at 211-213.

2 *Id.*

3 Sara Reardon, "Want to Ace Your Test? Share Your Feelings," available at http://news.sciencemag.org/education/2011/01/want-ace-your-test-share-your-feelings.

4 Sian L. Beilock, Thomas H. Carr, "On the Fragility of Skilled Performance: What Governs Choking Under Pressure," *Journal of Experimental Psychology* (2001) Vol. 130 No. 4, 701, 716-719.

5 *See* William Harms, "Psychologist shows why we "choke" under pressure—and how to avoid it," *UChicago News*, September 21, 2010, available at http://news.uchicago.edu/article/2010/09/21/psychologist-shows-why-we-choke-under-pressure-and-how-avoid-it.

6 *See, e.g.,* Shapiro, Shauna L.; Astin, John A.; Bishop, Scott R.; Cordova, Matthew, "Mindfulness-Based Stress Reduction for Health Care Professionals: Results From a Randomized Trial," *International Journal of Stress Management*, Vol 12(2), May 2005, 164-176.

7 *E.g.,* Fadel Zeidana, Susan K. Johnson, Bruce J. Diamond, Zhanna David, Paula Goolkasian, "Mindfulness meditation improves cognition: Evidence of brief mental training," *Consciousness and Cognition*,Volume 19, Issue 2, June 2010, Pages 597–605.

8 *See, e.g.,* Amishi P. Jha, Jason Krompinger, Michael J. Baime, "Mindfulness training modifies subsystems of attention," *Cognitive, Affective, & Behavioral Neuroscience*

June 2007, Volume 7, Issue 2, pp 109-119.

9 Ethan Kross, et al., "Self-Talk as a Regulatory Mechanism: How You Do It Matters," *Journal of Personality and Social Psychology*, 2014, Vol. 106, No. 2, 304–324.

# ABTL Brown Bag Luncheon with the Hon. David B. Oberholtzer

Hon. David B. Oberholtzer

*By Tyler Krentz*

On April 30, 2015, the Honorable David B. Oberholtzer shared both his courtroom and his lunch hour with members of ABTL and the Litigation Section of the State Bar of California. Over the course of the hour, Judge Oberholtzer reflected on his years of experience as a civil, juvenile, and family law judge. The Brown Bag Luncheon gave insight into some of the ways attorneys can improve their work on a regular basis.

Given the practical realities of today's courtroom, clarity has become more important than ever. The judiciary currently faces shrinking budgets and declining numbers of support staff. Because of the increased workload for each judge, attorneys seeking to deliver the best result for their clients must make every effort to write with clarity. In particular, Judge Oberholtzer emphasized using all available methods to guide a reader through a logical argument. Attorneys should use accurate and descriptive headings to help signpost throughout a brief. For motions over seven pages, attorneys may wish to consider also adding a table of contents.

Judge Oberholtzer also spoke about the different ways brevity can be a tool to achieve better results. Attorneys should also take a hard look at the quantity and length of submissions to the court. For example, Judge Oberholtzer has noted an increase in the number of unnecessary evidentiary objections filed against declarations. Many of the objections serve little benefit and attack extraneous issues with little relevance. At times, they can also obscure the important objections that the party needs a judge to focus additional time on.

Beyond clarity and brevity, Judge Oberholtzer shared that as an attorney, he favored a strong approach that occasionally presented a hardline argument. However, as a member of the judiciary, Judge Oberholtzer noted that he has grown to appreciate the value of a nuanced approach that concedes necessary points or admits the weaknesses of particular aspects of an argument. By presenting arguments in a more objective manner, attorneys gain credibility with the court and are more likely to be persuasive. Judge Oberholtzer commented, "it is important to instruct experts to be willing to concede a point now and then." In addition, when a fact is in dispute, it may help during oral argument to note explicitly that the other party disputes your contention rather than making the contention and then allowing opposing counsel to inform the judge that you have presented only part of the facts.

Throughout the luncheon, Judge Oberholtzer emphasized the destructive effect that rudeness or a lack of civility has on a counsel's reputation before the court. Given the small legal community in San Diego, Judge Oberholtzer recommended adopting an approach of "respect creates respect." Although a scorched earth litigation strategy may deliver results in the short term, it will harm both the client and counsel in the long term. By adopting a more consistent focus towards clarity, brevity, nuance, and civility, attorneys will accomplish more for themselves and their clients.

*Tyler Krentz is an attorney with the California Department of Transportation. His practice involves construction contract disputes, inverse condemnation, employment litigation, and imminent domain.*

## *The Future of the No-Rehire Clause...*

*(continued from cover)*

**The Ninth Circuit's Opinion in *Golden***

In *Golden v. California Emergency Physicians Medical Group*, --- F.3d ----, Case No. 12–16514, 2015 WL 1543049 (9th Cir. Apr. 8, 2015), the Court of Appeals for the Ninth Circuit examined one such no-rehire clause under the lens of California's Bus. & Prof. Code § 16600. That law states simply that "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." Although courts have for years applied section 16600 to determine whether contracts are enforceable, this appears to be the first decision, state or federal, to analyze the statute in the context of a no-rehire clause.

In the *Golden* case, Donald Golden, M.D. was an emergency-room doctor working for the California Emergency Physicians Medical Group ("CEP"). *Id.* at *1. Following his loss of staff membership at one of CEP's facilities, he filed suit against CEP, alleging various state and federal causes of action, including racial discrimination. *Id.* An important fact in the case was CEP's size and plans to grow. CEP was a large consortium of over 1,000 physicians that managed or staffed emergency rooms, inpatient clinics, and other facilities in California and other states, mostly in the west—it had a large presence in emergency medicine, and intended to expand its geographic footprint. *Id.* at *1, *5.

Dr. Golden orally agreed to a settlement in open court that involved a monetary payment from CEP in exchange for his release of all current and future claims, and a waiver to all rights to employment with CEP "or at any facility that CEP may own or with which it may contract in the future." *Id.* at *1. When the terms of the agreement were reduced to writing, Dr. Golden refused to sign, ultimately leading his counsel to move to withdraw and enforce the settlement. *Id.*

The no-rehire provision in the final version of the settlement agreement not only prohibited Dr. Golden from working at CEP's current facilities, but permitted CEP to terminate him at

***(see "The Future of the No-Rehire Clause..." on page 12)***

## *The Future of the No-Rehire Clause...*

***(continued from page 11)***

will, with no liability, from any facility in which they acquired or contracted with in the future. *Id.* at *2. Reasoning that the settlement terms did not prohibit Dr. Golden from competing with CEP, the District Court concluded that section 16600 did not void the agreement. Therefore, the district court enforced the agreement and dismissed the case. *Id.*

On appeal, the Ninth Circuit focused on the breadth of section 16600. The Court noted that the statute does not specifically target covenants not to compete between employers and their employees—it does not use the words "compete" or "competition," nor does it constrain itself to contracts involving employment. *Id.* at *6. Instead, it simply voids "every contract" that "restrain[s]" someone "from engaging in a lawful profession, trade, or business." *Id.* (quoting Bus. & Prof. Code § 16600).

Examining *Chamberlain v. Augustine*, 172 Cal. 285, 156 P. 479 (Cal. 1916), the seminal California Supreme Court case on section 16600's predecessor, the Ninth Circuit reasoned that the crux of the inquiry under section 16600 is not whether the contract constituted a covenant not to compete—the analysis the district court had performed—but whether it imposes "a restraint of substantial character" regardless of the "form in which it is cast." *Id.* at *7.

Because the district court's decision was predicated on an answer to the wrong question, held the majority, it had erred. *Id.* at *9. However, citing the limited record on the issue, the majority remanded for the district court to address the application of section 16600 in the first instance, allowing it to conduct further factual finding and order additional briefing. *Id.* The dissent, written by Judge Dkozinski, criticized the majority holding, arguing if this type of settlement "violates section 16600, few employment disputes could ever be settled." *Id.* (Dkozinski, J., Dissenting). In his opinion, whether the contract ran afoul of section 16600 should be addressed if and when Dr. Golden was terminated from a facility in the future. *Id.* at *10 (Dkozinski, J., Dissenting).

### Will *Golden* Gain Acceptance In California Courts?

At first blush, the *Golden* Court's opinion seems to embrace the far-reaching interpretation of section 16600 laid down by the California Supreme Court. But a closer look at the test the majority settled on reveals weaknesses that may well come under fire when the issue is considered by California appellate courts.

The trouble lies in the fact that *Golden*'s analysis still frames the question of restraint as a matter of degree. Relying on language from *Chamberlain*, the opinion asserts that the starting point should be whether the clause at issue is "a restraint of substantial character." *Golden*, 2015 WL 1543049 at *7. This was not, precisely speaking, the analysis endorsed in *Chamberlain*. There, the Court analyzed the question in black and white terms, holding that the clause at issue violated section 16600 because the plaintiff would not have been as free to engage in his business under the contract as he would be without it. *Chamberlain*, 172 Cal. at

***(see "The Future of the No-Rehire Clause..." on page 13)***

***(continued from page 12)***

288. Only then did the Court comment that the restriction in question was "clearly a restraint of substantial character." *Id.* The phrase "substantial character," therefore, was dicta.

*Golden's* "substantial character" test also appears to be but a reformulation of the "narrow restraint" exception endorsed by the Ninth Circuit until it was rejected by the California Supreme Court in *Edwards v. Arthur Andersen LLP*, 44 Cal.4th 937, 189 P.3d 285, 291 (Cal. 2008) (rejecting "narrow restraint" test adopted in *Campbell v. Board of Trustees of the Leland Stanford Junior University*, 817 F.2d 499, 502 (9th Cir. 1987)). Although *Golden* uses a differently-worded threshold—asking whether the contract term is "a restraint of substantial character" as opposed to whether it "completely restrain[s]" the employee—it is hard to tell the significance of this difference, and why the new test would not be at odds with the binary analyses employed by the California Supreme Court.

**What This Means**

Even though there are no clear answers at this point, it is too soon to abandon no-rehire clauses. For one, in most cases no-rehire clauses still serve a valuable deterrent effect. An employee is likely to observe them, leading to less chance of the employer and employee ever meeting again. The procedural posture of *Golden* notwithstanding, litigation over the validity of no re-hire clauses will normally only arise in the unlikely event the plaintiff reapplies for employment, at which time the employer can chose whether to try and enforce the provision.

Secondly, the logical appeal and practical necessity of no-rehire clauses makes it likely that California courts will find them acceptable under section 16600 at least on some level. Although it is hard to imagine how a clause conferring the powers given to the employer in *Golden* would not be an invalid restraint under section 16600, narrower clauses that simply prohibit the employee from seeking reemployment with the defendant employer are far less problematic.

**Conclusion**

The *Golden* case highlights that, like many other facets of contracts between employers and employees, no-rehire clauses can run afoul of section 16600. While only time will tell whether California state courts will embrace *Golden's* reasoning, practitioners can minimize the impact of this uncertainty by avoiding overly broad no-rehire provisions that may become lightening rods for future controversies between the parties.

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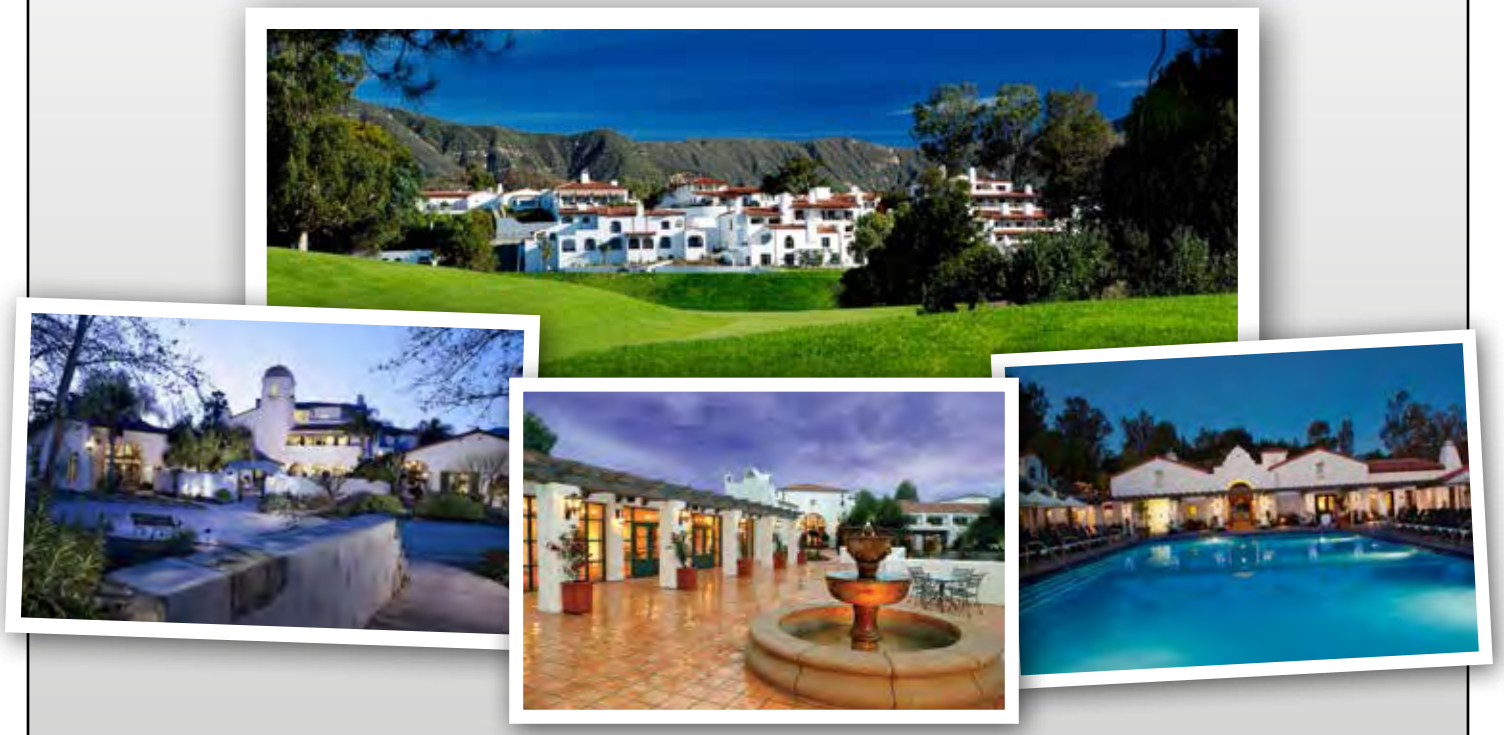

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*All accommodations are at* ***The Ojai Valley Inn & Spa*** *in Ojai, California.*

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Welcome Dinner on Thursday, October 1, 2015
Two (2) Buffet Breakfasts (Friday and Sunday)
Dinner on Friday October 2, 2015 & Saturday, October 3, 2015
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