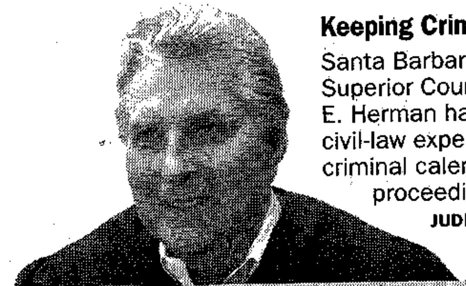
Pressure to Publish

State Supreme Court Justice Kathryn Mickle Werdegar helped develop guidelines that will result in more published opinions from the Court of Appeal.

CALIFORNIA PAGE 3



Keeping Criminal Civ

Santa Barbara County Superior Court Judge E. Herman has brough civil-law experience in criminal calendar, to r proceedings mor

JUDICIAL SPOT

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Legal Briefing

DAILY APPELLATE REPORT

Summaries and full texts appear in supplement

CIVIL LAW

Environmental Law: Endangered Species Act imposes no duty to consult about activities conducted by private party pursuant to previously issues, valid license from FERC. *California Sportfishing Protection Alliance v. FERC*, U.S.C.A. 9th., DAR p. 16109

Immigration: Alien who arrives in United States as refugee may be removed, even if his refugee status has not been terminated. *Kaganovich v. Gonzales*, U.S.C.A. 9th., DAR p. 16107

CRIMINAL LAW

Criminal Law and Procedure: Good faith exception to exclusionary rule did not apply where warrant to search suspected drug manufacturer's residence was clearly lacking in probable cause. *U.S. v. Luong*, U.S.C.A. 9th., DAR p. 16115

Criminal Law and Procedure: Court's refusal to grant defendant credit against sentence is proper where it lacked statutory authority to do so. *U.S. v. Peters*, U.S.C.A. 9th., DAR p. 16113

Briefly

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Conservative Legal Group Comes

Pacific Justice Institute Hopes to Defend Religious-Liberty Cases Througho

By Don J. DeBenedictis
Daily Journal Staff Writer

SANTA ANA — Karen Milam heard the news of a minister in trouble in the desert at 3 p.m., and quickly headed out to help him, driving from Orange County and praying for a little divine help with traffic during the 100-mile rush-hour trip.

By 6:30 p.m., Milam was in Palmdale to defend Audie Yancey, a Baptist pastor and former Marine, before the Antelope Valley Human Relations Task Force. A member of the task force had accused Yancey of an anti-Muslim hate crime for a religious tract the Baptist minister had distributed.

The panel could have asked the district attorney's office to prosecute, but Milam, the director of the new Orange County office of the Pacific Justice Institute, convinced the members there was no crime. In fact, she pointed out, the tract was protected by the First Amendment.

"They were ready to eat me alive," Yancey recalled. "After she finished her speech, they were very meek."

Milam is a staff attorney with the Pacific Justice Institute, a five-lawyer public-interest legal

ters from Southern California, and, in particular, to rebut the American Civil Liberties Union before local governmental bodies, Dacus said.

"We can go head to head with the ACLU at virtually every city council and school board meeting in Southern California," Dacus said.

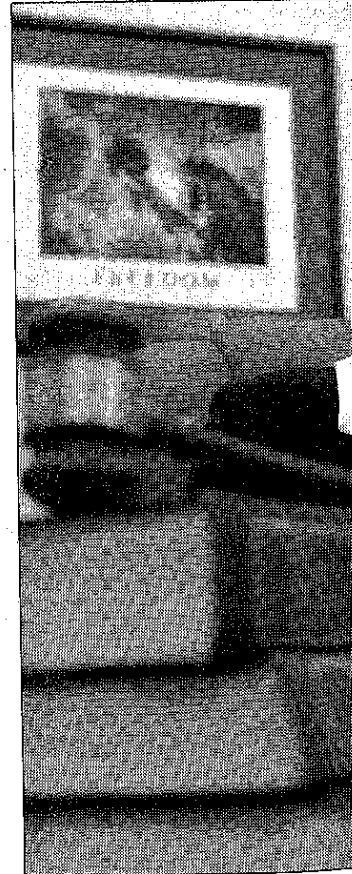
If a school wants to give students "homosexual indoctrination training," institute representatives oppose ACLU representatives' argument that parental consent isn't needed, Dacus said.

"We think rights of parents trump a social agenda," he said.

So far, however, the year-old Orange County branch of the ACLU Foundation of Southern California hasn't confronted the Pacific Justice Institute, Milam, Dacus or any of the 500 affiliate lawyers who take on matters for the public-interest group.

"I haven't heard a peep from them," said Orange County ACLU chief Hector O. Villagra, who wasn't familiar with the Pacific Justice Institute until he read about its Santa Ana opening in a local paper. "We took it as a compliment... that we must be doing something right."

Other entities in the county



"We defend all people of faith, pa Karen D. Milam of the Pacific Ju

institute busy involves efforts to preserve a large cross on pub

Top Court Presses Appellates to Publish More

By Amy Yarbrough
and Itir Yakar
Daily Journal Staff Writers

SAN FRANCISCO — After two years of research, the state Supreme Court announced new guidelines Tuesday that will put significant pressure on appellate courts to publish opinions and clarify instances when they should.

The changes, which go into effect April 1, represent a shift from previous standards that presumed opinions would not be published unless they helped to interpret cases or contributed to the development of the law.

Justice Kathryn Mickle Werdegar, who chaired an advisory committee that drafted the new standards, said the amendments "might very well result in the publication of more opinions than are worthy of publication" and tip the balance in favor of publication if a judge has doubts.

The new standards state, among other things, that an opinion "should" be published "whether it affirms or reverses a trial court order or judgment" if the opinion:

- Establishes a new rule of law;
- Applies an existing rule of law to a set of facts significantly different from those stated in published opinions;
- Modifies, explains or criticizes, with reasons given, an existing rule of law; or
- Advances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule.

The standards further state that the court should not consider workload and whether it would be an embarrassment to attorneys, litigants, judges or others in deciding whether to publish an opinion.

Werdegar said courts' workload and potential embarrassment of a litigant or judge was "sometimes a factor" in the publication of decisions.

She said the committee also found a correlation between districts with higher workloads and lower numbers of published opinions. But she warned that the lower numbers might be a result of neutral factors such as the types of cases that come before a certain district.

Daily Journal
Justice Kathryn Mickle Werdegar helped draft new standards for publishing appellate opinions.

"One striking feeling after we circulated the first draft [of the report] was how deeply a certain percentage of the attorneys felt ... [about] the initial presumption regarding publication," Werdegar said.

The amendments were based on the work of the 13-member advisory board assigned two years ago to look at the criteria for publication in rule 976. The group reviewed practices in other jurisdictions, looked at statistical information on the appellate courts' rate of publication, and surveyed jurists, attorneys and accepted public comment.

The committee noted that the current rule provided "useful guidance for litigants and the public ... however ... some important adjustments should be made."

The committee said the changes also were necessary "to improve public confidence in the publication process."

Werdegar said most attorneys surveyed said the language of the existing rule must be changed to encourage publication. Most judges interviewed for the report, on the other hand, thought that opinions worthy of publication were already being published.

Stephen Barnett, professor of law emeritus at Boalt Hall, said the amendments to the rules were an improvement, but do not go far enough. Barnett, like others, have been pushing for years to make all appellate cases citable.

Barnett said while the court outlined new standards for when opinions "should" be published they "ignored the deeper question of whether all opinions may be cited." On Dec. 1, that became a rule for federal appellate courts, which are now required to make all their opinions citable.

"To tell lawyers and litigants that they may not cite a court opinion that helps their case is no way to increase public confidence in the judicial process," Barnett said.

"I think it ought to be up to the attorneys to decide whether a previous decision will help their case."

Werdegar said, although the committee was not asked to make recommendations on the citation issue, it considered it. The reality of the state procedural system is clearly different from the federal one, and judges can't be asked to publish all of nearly 10,000 opinions that are handed down in the state every year, she said.

Attorney Kenneth J. Schmier, who along with his brother, Michael K. Schmier, has been pushing to reform publication guidelines for 10 years, said not making all opinions citable gives the "nefarious license to hide opinions."

"We're very pleased to see the progress but we note that the new rule still allows judges to trump the rule of law by deciding (whether) to publish their opinion," he said.

Werdegar said the committee will monitor the impact of the changes and that they are not intended to "inflict on the Bar and the justices."

Suspended Lawyer Stirs Up More Trouble

By Laura Ernde
Daily Journal Staff Writer

An Orange County lawyer whose suspension was due to be lifted early next year has gotten himself into more hot water for questionable tactics in trying to collect fees.

Orange County Superior Court Judge William M. Monroe ruled that Heurlin was not entitled to any direct payments, and Judge Michael Brenner ordered that the class action settlement money be placed in trust. Heurlin appealed.

The 4th District dismissed the

DeRose v. Heurlin, 100 Cal.App.4th 158 (2002).

In that case, which also stemmed from a fee dispute, Heurlin was fined $6,000 after calling an attorney he got into a fee dispute with a "diminutive shit."

On Tuesday, the appellate panel

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