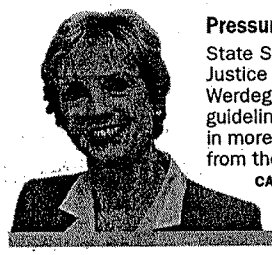

Pressure to Publish

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

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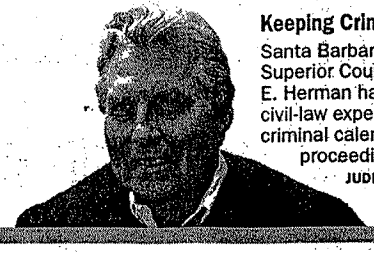

Keeping Criminal Civil

Santa Barbara County Superior Court Judge James E. Herman has brought his civil-law experience into his criminal calendar, to make the proceedings more efficient.

JUDICIAL SPOTLIGHT PAGE 5

Bucket of Confusion

A state appeals court was wrong to divide the Zankou Chicken trademark among three heirs, writes IP attorney Dylan Ruga.

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The changes, which go into effect April 1, represent a shift from previous standards that presumed opinions would not be published unless they helped to interpret cases or contributed to the development of the law.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