2 Ways Our State Courts Keep Decisions Under Wraps
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California, once again, is in the lead. But it may not be the kind of lead we want to be bragging about.

This state's courts have emerged as a national champion of secrecy and occasionally even erasing judicial decisions.

It may be a consequence of 16 years of Deukmejian and Wilson judicial appointments.

Both governors, of course, have consistently talked about naming judges who support the death penalty. As a result of their nearly two-decade effort, all of four Californians have been executed since capital punishment was restored.

But these same judges often also frequently side with big business. There hasn't been so much attention paid to that.

I'm not speaking here about judges sealing court settlements involving the reputation of big insurance or other companies. That is happening in most states.

Rather, this has to do with stopping publication of court decisions through ordering them "de-published," or, in extreme cases, vacating them altogether.

The last procedure is known as vacatur. Let's say someone wins $100,000 in a court decision that might be a precedent for other cases by injured consumers. But the defendant agrees to pay $150,000, on the condition that the plaintiff agrees to stipulate that the court decision be reversed. That way, no precedent.

As San Francisco lawyer Daniel Purcell put it last year in the California Law Review, "Any vacatur of a valid judgment destroys precedent, making it easier for a wrongdoer to escape liability."

That means a big, moneyed defendant can reduce the possibility that one decision will lead to a whole series of costly claims.

That's legal in California, thanks to a 1992 state Supreme Court decision designed to encourage private settlements during the appeals process. In most of the rest of the country, as the result of a unanimous 1994 U.S. Supreme Court decision written by conservative Justice Antonin Scalia, it is not.

Also, California is the only state whose Supreme Court may de-publish decisions. De-publication, a device only the Supreme Court can use, is even more common than vacatur.

In 1996, more than 90% of the decisions of appellate courts in California were not published, mostly in accord with standing rules that only something new or significant need be recorded.

De-publication goes beyond that, and the Supreme Court need not explain why it is taking the action. Some decisions, though, are de-published because the Supreme Court decides they are out of sync with the view of the law it prefers. Once a decision is de-published, it cannot be used as a precedent or even cited in briefs.

Los Angeles attorney Bernie Bernheim calls this "a judicial pocket veto." It takes a case out of the record without a full Supreme Court review.

Substantial lobbying also affects this system. Outside letters and petitions requesting de-publication are routine.

Gene Anderson, a New York trial attorney, asserts that if de-publication is added to vacatur, "the insurance people manage to vacate more than 50% of the California decisions against them."

In other words, these rulings cannot be used by others to build cases against the companies. But Anderson may be exaggerating.

He apparently drew his conclusion from a 1989 California Lawyer article citing industry attorney Ellis Horvitz as claiming an almost 50% success rate at getting adverse precedents de-published.

Horvitz's office said he was on vacation this week and unavailable for comment.

But Kent Richland, another insurance defense attorney quoted in the same article, this week called Horvitz's estimate "much too high," and Lynn Holton, a spokeswoman for the state Supreme Court, said de-publication is not that common a procedure.

While vacatur is invoked less often than de-publication, precise statistics are unavailable.

Six years after it was upheld by the state Supreme Court, however, vacatur is still controversial.

The court's 1992 decision upholding it by 6 to 1 drew a fierce dissent from Justice Joyce L. Kennard.

"Public respect for the courts is eroded," she wrote, "when this court decides that a party who has litigated and lost in the trial court can, by paying a sum of money, purchase the nullification of the adverse judgment."

The decision, she concluded, "will reinforce an already too common perception that the quality of justice a litigant can expect is proportional to the financial means at the litigant's disposal."

Appeals Court Justice Anthony Kline in San Francisco also assailed the decision in a 1994 opinion calling for striking down vacatur in cases where the public interest is adversely affected by its use.

"[Vacatur] will inevitably include the unknowing judicial effectuation of some highly questionable private bargains," Kline declared.

"We agree with the [U.S.] 7th Circuit [Court of Appeals] that a [judicial] opinion is a public act of the government, which may not be expunged by private agreement," he added.

The California Judges Assn. asked the Legislature to undo the state Supreme Court decision, and the Legislature passed a bill in 1994 doing so, only to have it vetoed by Gov. Wilson.

In an interview for this column, California Chief Justice Ronald M. George confirmed that he had written a letter to Wilson at the time urging the veto.

"It seemed to me then that settlements should be effectuated and this would be a means of doing it," George said.

But, without saying how he would rule in the future, the chief justice said if there develops a pattern of abuse, the Supreme Court might review its decision in another case in the future.

It's heartening to hear that the trend toward erasing decisions that may advance the public interest conceivably could be reversed.

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