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December 17, 1996, Tuesday

SECTION: Pg. 1

LENGTH: 1045 words

HEADLINE: Supreme Court Rules Child Concealment Not a Defense To Support Order Seeking to Recoup Public Assistance

BYLINE: By KENNETH OFGANG, Staff Writer/Appellate Courts

BODY: Child concealment is not a defense to enforcement of a support order by a government agency seeking to recoup public assistance payments, the California Supreme Court ruled yesterday.

Chief Justice Ronald George, writing for the high court, said the Fourth District Court of Appeal erred when it held that an Orange County resident couldn't be required to reimburse Arizona authorities for welfare payments to his ex-wife during a period that she was concealing his children from him.

The decision was unanimous, although it produced three opinions.

In other action, the high court unanimously ruled that in a wrongful termination action brought on contract, tort, and statutory grounds, the limitations period as to all three claims commenced when the employee was actually terminated, rather than on an earlier date when the worker learned of the impending firing. That case is *Romano v. Rockwell International, Inc.* 96 S.O.S. 9058.

In the child support case, George emphasized a provision in Family Code Sec. 4002, enacted as Civil Code Sec. 248 in 1955, declaring that a county which furnishes support to a child "has the same right as the child" to obtain reimbursement and enforce future support obligations.

The ruling overturns Orange Superior Court Commissioner Julian Cimbaluk's order denying, in part, the district attorney's petition to require Gerald Comer to pay arrearages of nearly \$ 30,000. The commissioner said Comer, who was divorced from his wife Donna in 1985, was only obligated to pay that portion of the support which accrued after he learned where Donna Comer and the children were.

The Comers' Arizona decree gave custody of their two sons to the former wife, with the former husband ordered to pay \$ 350 per child per month in support and allowed reasonable visitation.

After Gerald Comer moved to Orange County, the district attorney thereat the request of Gila County, Ariz. petitioned for an order for arrearages. Part of the funds were sought to be recovered on behalf of the county, and part on behalf of Donna Comer.

Cimbaluk found that the former wife had concealed the children's whereabouts from March 1985 to September 1992, and that Comer made diligent efforts to locate them. The jurist granted judgment for arrearages for the 11 months which had elapsed from the time the father became aware of the children's whereabouts as a result of a phone call from his older son to the date of the hearing, for a total of \$ 7,700.

The Fourth District's Div. Three affirmed, rejecting suggestions in earlier Court of Appeal cases that the public interest in recouping payments of public money justifies ignoring the concealment issue. Justice Sheila Sonenshine, writing for the panel, cited the high court's 1994 decision in *In re Marriage*

of Damico, 7 C.4th 673.

But George, writing yesterday for the high court, said the appellate misapplied Damico in two respects.

In Damico, the chief justice noted, the high court held that concealment was a defense to an action by the custodial parent in an action where the other parent was allegedly unable to determine the child's whereabouts until after the child had reached the age of majority.

"We expressed no opinion in Damico as to whether a similar rule of estoppel would apply "when the concealment ends while the child is still a minor and might yet benefit from payment of the arrearages," George noted, adding that Damico "did not involve public assistance payments or the assignment of child support rights to a governmental entity."

It is not unfair, George said, to require a parent to pay back support where the child's whereabouts are revealed before the child reaches the age of majority, since the beneficiary of the requirement is the child. The father, he reasoned, has had the benefit of the money, while "in contrast to most adults, children (particularly those in their early years) in fairness cannot be expected to raise themselves and pursue an education without the financial support of responsible adults."

Thus, he said, the "equities" in situations like that of the Comers must be balanced in favor of enforcing the support obligation.

The chief justice also noted that after the Fourth District handed down its decision, but prior to the grant of review, the president signed into law the Full Faith and Credit for Child Support Orders Act, which requires that state courts give "full faith and credit" to child support orders issued by sister states.

But George concluded that, although the court ordered supplementary briefing on the issue, it was unnecessary to consider the effect of the statute in order to decide the case.

The chief justice also observed that "[a] noncustodial parent who is unable to locate the custodial parent and the couple's child (or children) is not without recourse," since such a parent may complain to the district attorney and the California Parent Locator Service, and may make support payments to the district attorney or place them in a trust account.

Allowing a parent to avoid making reimbursement for support paid by the government, George added, is inconsistent with "the important public policy favoring protection of the public fisc."

Justice Stanley Mosk, concurring separately, emphasized his view that the court's ruling was consistent with Damico.

He explained:

"Under the law of California, when the child has not attained majority, the defense of estoppel is not available to the noncustodial parent against the custodial parent's demand for arrearages. As 'trustee,' the custodial parent may not lawfully prevent payment or refuse receipt of child support from the noncustodial parent against the interests of the child as 'beneficiary.' To allow the noncustodial parent to assert estoppel would unduly complicate matters. For he would nonetheless remain liable to the child himself.

"By contrast, when the child has attained majority, the defense of estoppel is available. In that case, the 'trust' may be deemed terminated by operation of law because its purposechild support has ceased to exist."

Justice Marvin Baxter, who dissented in Damico, argued that case should be overruled. Justice **Janice Rogers Brown** agreed.

The case is In re Marriage of Comer, 96 S.O.S. 9048.

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View Related Topics

December 17, 1996, Tuesday

SECTION: NEWS; PG. 2

HEADLINE: STATE COURT BACKS OFF FROM RULING ON CHILD CONCEALMENT

BYLINE: Scott Graham

BODY:

Backing off a controversial 1994 ruling, the California Supreme Court on Monday ruled that a divorced parent cannot be forgiven his child support obligations because his ex-spouse has concealed the children -- if the child support action is brought before the children turn 18.

Chief Justice Ronald George's opinion in In re Marriage of Comer, 96 C.D.O. S. 9048, stopped short of overruling In re Marriage of Damico, 7 Cal.4th 673, a 1994 decision baring a child support action because the mother had concealed the children until they became adults.

"In the present case, in contrast to the facts presented in Damico," George wrote, "the concealment terminated when the children still were minors and might benefit from father's payment of child support arrearages."

Justice Marvin Baxter wrote separately to say the distinction makes little sense. He noted that an action that begins during childhood may not conclude until well into adulthood.

"Damico should be overruled," wrote Baxter, who was joined by Justice **Janice Rogers Brown**. "Damico was wrong at the time it was decided and the amorphous 'active concealment' defense it created has since been superseded by federal legislation. . . ."

The immediate result of Monday's ruling is that Gerald Comer will have to come up with some \$29,000 in unpaid child support for his two sons. He argues he should not have to pay because his ex-wife, Donna, hid herself and the children from him for eight years. The government, which paid Donna Comer welfare benefits, is seeking reimbursement.

The Fourth District Court of Appeal, relying on Damico, had agreed with Gerald.

George's opinion reversed. Joining him were Justices Joyce Kennard, Kathryn Mickle Werdegar and Ming Chin. Justice Stanley Mosk wrote separately to contest Baxter's claim that Comer is logically inconsistent with Damico.

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December 13, 1996, Friday

SECTION: EDITORIALS; PG. 4

HEADLINE: INITIATIVE HASTE MAKES LITIGATION WASTE

BYLINE: Michael Gebhardt

BODY:

If the initiative process was any good at enacting viable law, the California Supreme Court would never have had to issue its latest "Three Strikes and You're Out" decision.

In People v. Hazelton, the court was asked to determine the "intent of the voters" in passing Proposition 184, the 1994 "Three Strikes" initiative. The court's Dec. 5 ruling found that the electorate was not trying to alter the legislative version of Three Strikes, and that "serious" or "violent" out-of- state convictions count as priors for sentencing purposes under the law.

Was this litigation really necessary?

This painfully obvious conclusion -- and the squandering of judicial resources required to reach it -- was apparently necessary because the Three Strikes initiative battle was more about anti-crime posturing than thoughtful lawmaking.

As Justice **Janice Rogers Brown's** majority opinion notes, the legislative analyst and even opponents of Prop 184 asserted in 1994 that it was identical to its previously enacted counterpart, amended Penal Code 667. Proponents argued that the ballot measure somehow strengthened the law.

But Prop 184's most notable feature was its failure to explicitly include out- of-state priors in the definition of "strikes," the basis of criminal defendant William Hazelton's protracted appeal.

Hazelton, then, is what happens when lawmaking is not left to elected lawmakers.

Concurring in the result but not the argument proffered by Justice Brown, a minority of the court noted that the question in Hazelton was obviated by yet another chink in Prop 184's armor. Justice Stanley Mosk argued that because the initiative did not supersede other laws, the clear inclusion of out-of-state priors in amended 667 ruled the day.

One flaw in the initiative spawned the litigation. Another one unintentionally provided a means to avoid it. The lesson: Californians with an ax to grind should stick to lobbying in Sacramento and let the lawmakers do their job.

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December 10, 1996, Tuesday, Orange County Edition

SECTION: Part A; Page 3; Metro Desk

LENGTH: 306 words

HEADLINE: STATE HIGH COURT UPHOLDS O.C. DEATH SENTENCE

BYLINE: ANNA CEKOLA, TIMES STAFF WRITER

BODY:

A divided California Supreme Court upheld a death sentence Monday for a Fullerton man, rejecting arguments that the defendant deserved a new penalty trial because his lawyer was incompetent.

John Louis Visciotti was convicted in 1982 of fatally shooting 22-year-old Timothy Dykstra and wounding another co-worker in the eye during a robbery.

Visciotti, 38, contended on appeal that his former lawyer, Roger J. Agajanian, was incompetent because he failed to tell jurors of Visciotti's severely troubled childhood before they sentenced him to death in 1983. Agajanian was later forced to resign from the State Bar of California and was convicted on two counts of criminal contempt, all relating to other cases.

In a 5-2 decision, the court majority acknowledged "multiple failings" on the lawyer's part, but said the errors did not represent a "total breakdown" of the process.

"It is not probable that had this evidence been presented, a more favorable result would have resulted at the penalty phase," Justice Marvin Baxter wrote for the majority.

Justices Stanley Mosk and **Janice Rogers Brown** disagreed, with one describing Visciotti's penalty phase as a "complete and utter farce."

Santa Ana attorney Richard Schwartzberg, one of Visciotti's lawyers on the appeal, said the defendant will now turn to the federal courts.

Defense lawyers had argued that jurors might have sentenced Visciotti to life in prison without parole instead of death had they known of his troubled family life.

While it is common for killers on Death Row to appeal their sentences claiming attorney incompetence, it is highly unusual for the Supreme Court to consider that possibility. Before reaching the decision, the court in 1994 had taken the unusual step of ordering a review of the case by the Orange County Superior Court.

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December 10, 1996, Tuesday

SECTION: Pg. 1

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HEADLINE: High Court Says Capital Defense Not Compromised by Fee Arrangement, Denies Habeas Corpus Relief

BYLINE: By KENNETH OFGANG, Staff Writer/Appellate Courts

BODY: The California Supreme Court yesterday denied habeas corpus relief to a defendant sentenced to death for a murder which occurred in the course of an Orange County ambush-robbery.

Justice Marvin Baxter, writing for the court, acknowledged "multiple failings" by Roger Agajanian in his defense of John Visciotti for the murder of Timothy Dykstra, who was lured to a remote area of the Anaheim Hills on Santiago Canyon Road, robbed, shot, and left at the scene.

Visciotti was convicted of the murder of Dykstra and the attempted murder of another victim, who survived his wounds and identified Visciotti as the shooter. A co-defendant was tried separately and sentenced to life imprisonment without possibility of parole.

But Baxter, writing for a majority of four justices, said the outcome of the guilt and penalty phases of Visciotti's trial would have been the same regardless of what defense was presented by Agajanian, who later resigned from the State Bar with unrelated disciplinary charges pending.

Justice Joyce Kennard concurred separately. Justices Stanley Mosk and **Janice Rogers Brown** dissented.

Baxter rejected the contention that Agajanian compromised his defense by entering into a fee arrangement with Visciotti's parents which left most of the \$ 25,000 fee unpaid at the time of trial. The defendant whose direct appeal was rejected by the high court, over Mosk's dissent, in 1992 claimed in his petition that because of that arrangement, Agajanian failed to present mitigating evidence relating to dysfunction within the family.

Orange Superior Court Judge Eileen Moore, appointed as referee by the Supreme Court, held a hearing on the petition, at which Visciotti's new counsel presented testimony regarding physical and verbal discord between the parents, physical punishment and verbal abuse of the children, and mistreatment and isolation of the defendant because he was born with severe club feet which required that he wear splints and braces.

None of that evidence was presented at trial, although new counsel asserted it would have been available had Agajanian conducted a reasonable investigation.

Although a defense expert testified before Moore that Agajanian had told him about "brutality" in the family, Agajanian insisted that he did not seek out such evidence because he had settled on a strategy of trying to convince the jury to spare Visciotti's life because of the impact his execution would have on his parents.

Agajanian's efforts to portray the Visciotti through argument rather than evidence, and by having family members present in court throughout trial as a "nice" family which didn't deserve such a fate were not refuted during the trial, but were attacked at the habeas corpus hearing. Evidence presented

there showed that several of the defendant's siblings had criminal records, as did his father.

Moore found that Agajanian's decision to forego presenting evidence at the penalty phase was "informed and knowledgeable" and was not affected by his fee arrangement with the family, which included a \$ 17,000 lien against the proceeds of a personal injury claim by a boyfriend of the defendant's sister.

The defendant's father testified that at the time of the trial, he believed his fee obligation had been discharged through a combination of cash payment, the lien claim, and some tile work he had done for Agajanian. Agajanian said there was no recovery from the injury claim, and that he was owed about \$ 15,000.

Baxter said Moore's findings were supported by the evidence.

The family, Baxter said, was a "paradox" whose members retained close relationships despite the difficulties of their interactions. It was, the justice explained, "a loving family in which petitioner's older sisters, although they left the home to marry in their midteens in order to avoid the turmoil, returned home regularly on Sundays for family meals."

Even assuming that the penalty phase defense was incompetently presented, the justice went on to say, it was unlikely a jury could have been convinced that the defendant's family problems were a sufficient mitigating factor to justify a life-without-parole sentence, given the "overwhelming" evidence in aggravation.

Not only did the prosecution prove Visciotti guilty of an execution-style killing in the course of a preplanned robbery attempt, Baxter noted, it also established that Visciotti had previously assaulted two persons one of them a pregnant woman with a knife.

Nor, the justice added, was there any evidence that Visciotti despite evidence of substance abuse, triggered in part by his family situation was under the influence of drugs at the time of the murder.

In her separate concurrence, Kennard said the issue of prejudice was "quite close," but concluded there was "no reasonable probability, given the deliberate and ruthless manner in which petitioner committed the murder, that the jury's verdict of death would have been different had trial counsel pursued the 'dysfunctional family' approach."

Mosk and Brown, however, argued that the defendant failed to subject the prosecution's penalty phase case to "meaningful adversarial testing." Mosk reiterated the argument he made in his dissent from the decision on direct appeal, in which he charged Agajanian with deficiencies which were "pervasive and serious...each competing with the rest for egregiousness."

Counsel, he said, had relied on a diminished capacity defense, even though such a defense had been abolished by Proposition 8, had openly conceded the applicability of a number of statutory aggravating factors and the inapplicability of mitigating factors, and had ignored mitigating evidence which "was extensive and of substantial weight."

In a footnote, Mosk expressed confidence that a federal district judge would find Visciotti's arguments "persuasive" on consideration of "petitioner's soon-to-be-filed petition for writ of habeas corpus."

The case is Visciotti, on Habeas Corpus, S031247.

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December 10, 1996, Tuesday

SECTION: NEWS; PG. 1

HEADLINE: HIGH COURT CITES NEED FOR DETAILED JURY INSTRUCTIONS

BYLINE: Bill Kisliuk;

Reporter Bill Kisliuk's e-mail address is kisliuk@counsel.com

BODY:

Attempting to settle an issue that has roiled the state's appellate courts, the California Supreme Court on Monday held that trial judges have a duty to give detailed jury instructions in some cases when prosecutors seek stiff penalties for accomplices to serious crimes.

"When the prosecutor relies on the 'natural and probable consequences' doctrine," wrote Justice Joyce Kennard, "the trial court must identify or describe the target crimes that the defendant might have assisted or encouraged."

But it's not clear that the majority's ruling will clear up questions surrounding the issue. While the court was unanimous in upholding the conviction of Debra Bray, three justices disagreed with the majority reasoning.

Kennard's opinion in People v. Prettyman and Bray, 040008, may have parsed tangled jury instruction and evidentiary problems, but it also elicited scathing criticism from two of her colleagues.

Justice **Janice Rogers Brown** concurred in part and dissented in part, stating that Prettyman "is likely to confuse jurors and hopelessly derail the central fact-finding task."

Justices Stanley Mosk and Marvin Baxter wrote separate concurrences, with Mosk chiding the majority for unnecessarily "loading yet another sua sponte instructional duty on the trial courts, which are already laden down under similar obligations."

In the case, appellant Bray sought to overturn a murder conviction stemming from a 1992 attack on a homeless San Diego man.

Bray's co-defendant, Richard Prettyman, was found guilty of beating Gaylord Van Camp to death with a metal pipe in the course of a robbery.

Bray faced murder charges as an aider and abetter because a witness heard her prompting Prettyman to "get" the victim. San Diego County Superior Court Judge J. Perry Langford instructed jurors on the "natural and probable consequences" theory but did not specifically indicate what offense Bray may have assisted or encouraged.

Neither the defense nor the prosecution had sought the instruction.

The Supreme Court held Monday that Langford should have given more complete instructions.

But the high court majority -- Kennard's opinion was joined by Chief Justice Ronald George and Justices Ming Chin and Kathryn Mickle Werdegar -- held that the failure to instruct was harmless and

so affirmed the conviction.

The majority's holding echoes a 1993 First District Court of Appeal opinion in People v. Mouton, 15 Cal.App.4th 1313.

Justices Werdegar and Chin were on the First District panel that decided Mouton. While some appellate courts had since followed Mouton, others sided with People v. Solis, 20 Cal.App.4th 264, a 1993 Fourth District opinion holding that courts need not specify and define underlying offenses when giving jury instructions because such instructions would overburden jurors.

Though the court took Prettyman to resolve the split, Monday's result met with some skepticism.

"It's a bright-line ruling, but they still have a problem they will have to address later," said Deputy Attorney General Nancy Palmieri, who argued Prettyman before the high court. "The trial courts without any further guidelines will simply fall back on existing jury instructions, and the attendant problems are still there."

In dissent, Justice Brown borrowed the legalese at the heart of the controversy to underscore her opposition.

"The majority needlessly contributes to what is now undoubtedly a much longer list of jury instructions already teeming with the potential for reversible error. Anticipating the natural and probable consequences, I decline to encourage or facilitate that enterprise."

The full text of the court's opinion will be published this afternoon on Cal Law (www.callaw.com) and in the California Daily Opinion Service on Wednesday.

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December 10, 1996, Tuesday

SECTION: NEWS; PG. 1

HEADLINE: JUSTICES BROADEN PROP 65'S REACH

BYLINE: Todd Woody;
Senior writer Todd Woody's e-mail address is twoody@counsel.com

BODY:

The California Supreme Court has extended the reach of the state's tough toxics law, ruling that Proposition 65's ban on discharging toxins into drinking water applies to faucets.

The 5-2 decision Monday prompted Justice Marvin Baxter to warn in a dissent that the ruling would expose business owners to "limitless penalties . . . each time a lead-leaching faucet is turned on."

But the immediate impact of *People v. Superior Court*, 96 C.D.O.S. 8856, will be limited: In 1995, the major faucet manufacturers settled suits brought by the California attorney general's office and environmentalists by agreeing to eliminate from their products significant amounts of lead, a substance linked to birth defects.

The Supreme Court's decision overturns a 1995 First District Court of Appeal ruling that restricted Prop 65's strict "discharge ban" to reservoirs, lakes and similar sources of drinking water.

Justice Stanley Mosk, writing for the majority in Monday's ruling, wrote that Prop 65's discharge ban applies to "any water that is part of the water supply and delivery system prior to coming out of the tap, from the mountain stream to the faucet."

"In sum, we consider Proposition 65 to be a remedial statute intended to protect the public from, among other things, toxic contamination of its drinking water. We construe the statute broadly to accomplish that protective purpose," Mosk added.

The ruling gives the state and environmentalists a powerful enforcement tool.

Unlike provisions of Prop 65 that allow companies to sell goods that violate toxics limits as long as they provide consumer warnings, the discharge ban prohibits the sale and distribution of any product that contaminates drinking water in excess of state standards.

Natural Resources Defense Council senior attorney Albert Meyerhoff said environmentalists will now move quickly to bring the remaining faucet manufacturers into compliance with Prop 65, which voters approved in 1986.

Producers of water meters, pipes and other components of water systems that violate Prop 65 also are liable, he said.

"Anything upstream that is leaching lead into drinking water is now fair game," Meyerhoff noted.

And cities facing strict federal lead standards can demand that manufacturers who supply pipes and other components of municipal water systems comply with Prop 65.

Said James Meeder, a Beveridge & Diamond partner who represented faucet maker Price Pfister Inc. throughout the faucet litigation: "I think with regard to the defendants in the case, they are more comfortable than ever today in having settled the matter."

"It cannot be the case that when voters voted for Prop 65 they understood that faucets were going to be regulated," he said. "It's not fair notice," he added, echoing Baxter's dissent.

COMMON SENSE WINS OUT

In reversing the First District, the high court also rejected a lower court holding that threatened to undermine the enforcement of other environmental and health and safety laws.

The First District found that because Prop 65 assesses penalties for violations, it is penal in nature. Thus, according to the First District, the courts must construe any ambiguity in the law in favor of defendants. The AG's office warned that such an interpretation would stymie the enforcement of some 289 laws that contain civil penalty provisions.

On Monday, Mosk wrote that "the rule of strict construction of penal statutes 'is not an inexorable command to override common sense.'"

Said Deputy Attorney General Edward Weil, who argued the case before the Supreme Court: "In the long run, that may be the most important thing to come out of the decision."

Whether private Prop 65 enforcers will take advantage of Monday's ruling to launch a new round of litigation against business owners is unknown. But Justice Baxter noted in a footnote that the opportunity to recover penalties and attorneys fees "will be obvious to private citizens."

The decision undoubtedly strengthens the hand of the state and environmentalists.

"The essential mandate of the statute has now been reaffirmed and the enforcement of the statute will put the burden squarely where it belongs: on the polluter, not the public," Meyerhoff said.

The litigation dates back to 1992, when the AG's office sued American Standard Inc., Price Pfister and other manufacturers whose brass faucets leach lead, claiming they violated Prop 65's "discharge ban." At the same time, the Natural Resources Defense Council and the Environmental Law Foundation filed a companion suit, which is pending in San Francisco Superior Court.

During the four-year fight, faucet manufacturers argued that Prop 65's ban on discharging carcinogens and reproductive toxins into sources of drinking water was never meant to apply to such mechanical devices as faucets. Both San Francisco Superior Court Judge Carlos Bea and the First District agreed.

On Monday, however, Mosk wrote, "There is nothing illogical about reading the statute to conclude that lead pipe contamination of faucet water is also a prohibited release of a toxic chemical directly into a 'source of drinking water.'"

"The seeming dissimilarities between water in plumbing fixtures and natural bodies of water become less significant than their similarities," he added. "Both pertain to water that will be used for drinking purposes, and both require regulation in order to ensure safe drinking water."

He was joined by Chief Justice **Ronald George** and Justices Joyce Kennard, Kathryn Mickle Werdegar and **Janice Rogers Brown**.

In his dissent, joined by Justice Ming Chin, Baxter called the majority's reasoning "tortured."

"Indeed, the electorate could not have intended such a strained and dissonant meaning," Baxter wrote.

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December 9, 1996, Monday

SECTION: Pg. 1

LENGTH: 137 words

HEADLINE: Judicial Appointments Panel Confirms Stockton Jurist Consuelo Callahan to Third District Court of Appeal

BYLINE: By KENNETH OFGANG, Staff Writer/Appellate Courts

BODY: San Joaquin Superior Court Judge Consuelo "Connie" Callahan has been unanimously confirmed by the Commission on Judicial Appointments and sworn in as a justice of the Third District Court of Appeal.

Confirmation came late Thursday following a commission hearing in San Francisco, a spokesperson for the Administrative Office of the Courts said.

Callahan succeeds Justice **Janice Rogers Brown**. The 46-year-old Stockton jurist fills a seat which has been vacant since Brown was elevated to the Supreme Court on May 2.

Callahan, a judge since 1992 and a San Joaquin County Municipal Court commissioner for six years before that, received votes of approval from all three members of the commission, Chief Justice Ronald George, Attorney General Dan Lungren, and Third District Presiding Justice Robert K. Puglia.

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View Related Topics

December 9, 1996, Monday

SECTION: NEWS; PG. 1

HEADLINE: GEORGE: MORE TO DRUG CASE THAN MEETS THE EYE
Proceeding reveals court's priorities under new chief

BYLINE: Scott Graham

BODY:

Although only seven months old, it's already clear that there are certain things that make the George court tick.

The California Supreme Court under Chief Justice Ronald George has made building public confidence in the judicial system a high priority. The justices also are worried about the state's trial courts becoming overwhelmed with "Three Strikes and You're Out" litigation.

Put those two sensitive issues together in one case, and the sparks are bound to fly.

That's what happened last week when the justices debated whether a juvenile delinquency case must be remanded simply because the trial judge forgot to state whether the crime was a felony or a misdemeanor.

The Dec. 3 argument in In re Manzy W., S051463, was so hotly contested, the court must have set some kind of record for justices interrupting each other to ask questions.

It also featured this ominous admonition from the chief justice to Deputy Attorney General Ward Campbell: "If you lose this case, you'll be far better off."

On paper, Manzy W. didn't look all that intriguing.

Manzy, as he is identified in court papers, has been something of a terror in rural Shasta County. According to the Third District Court of Appeal's opinion in the case, by the time he was 17, Manzy had been expelled from school for selling drugs; been placed on probation for battery and receiving stolen property; had threatened his family with physical violence; and had run away to Los Angeles after being arrested for purse snatching.

When Manzy was hauled into juvenile court (again) for joyriding and possessing methamphetamine, his own mother objected vehemently to Shasta County Superior Court Judge Gregory Caskey's suggestion that he be returned to his own home. Apparently, Mrs. W. felt she could no longer control her son, and that he needed to get off drugs and learn discipline.

Judge Caskey obliged, committing Manzy to the California Youth Authority for three years, where he would be enrolled in a heavy-duty drug treatment program.

There was just one problem. Possession of methamphetamine is a "wobbler" -- it can be charged as either a misdemeanor or a felony. And state law directs juvenile court judges to state which they're choosing when imposing punishment -- something Judge Caskey failed to do.

The attorney general's office says if ever there was a harmless error, this is it: By imposing the

maximum term of three years, the judge clearly considered the case a felony, even though he never explicitly said so. After all, misdemeanors are by definition punishable by no more than one year of incarceration.

That's not how some of the Supreme Court justices saw it, though.

Deputy AG Campbell had barely said good morning when Chief Justice George asked him to read aloud the words of the statute at issue, Welfare and Institutions Code 702.

Campbell dutifully obliged. "The court shall declare the offense to be a misdemeanor or a felony," he read.

"Doesn't seem to be equivocal or permissive does it?" George asked. "Pretty definite, isn't it?"

Justices Stanley Mosk, Marvin Baxter and Kathryn Mickle Werdegard all tried to cut in, but George continued, making what sounded like a personal plea to the AG's office. "Naturally, you'd like to win this case and all your cases," he said, "but isn't your interest and the whole process best served by a bright-line rule?"

George's concerns appeared twofold. As chief justice he wants to show the public that judges can do their jobs competently and efficiently. Remember that it was George who wrote the court's opinion two years ago opening more judicial discipline hearings to public view. And he also is worried about the crush of Three Strikes litigation in the trial courts. Earlier this year, he proposed the establishment of specialized Three Strikes judicial teams for overburdened counties.

As the argument progressed, George put the Three Strikes issue directly on the table: If a judge doesn't make a clear declaration of a felony, it could create confusion if the juvenile someday comes back to court charged as a repeat offender.

"Are you really wanting to have Three Strikes come up later, where there's not clarity about whether the judge intended to choose a felony?" George asked. "You're going to have litigation on appeal or collateral review over whether or not the judge knew what he or she was doing."

When Mosk finally got to speak, he sounded as if he disagreed with George. "Every law student knows the maximum term for a misdemeanor is one year," Mosk said. "All the court failed to do is utter magic words that the code requires."

Justice Baxter also sounded skeptical, asking if defense counsel wasn't at fault for failing to ask the juvenile judge to make an explicit choice.

Campbell agreed, prompting George to jump back in. "And doesn't that lead inevitably to claims of ineffective assistance of counsel?" George asked.

George did get some support from Werdegard, who said she would prefer to see some positive evidence of a deliberate choice. "To choose a felony sentence does not suggest to me that the court knew it could choose a misdemeanor," Werdegard said.

Disagreeing, Campbell put some pressure on the justices.

"It would be our position," Campbell said, "that it is presumed that the court is aware of its options, is aware of the applicable law, and has correctly performed its duty in making that choice."

It was a subtle warning: Don't insult the intelligence of the state's juvenile court judges.

Werdegard sounded incensed. "I find a little problem with that presumption in a case where the court by definition has not done what it's statutorily required to do," she told Campbell.

When it was defense lawyer William Parks' turn to argue, he tried to stoke the court's fears about litigating Three Strikes priors. Given the life sentences at stake, "any discrepancy or ambiguity in the record is going to be raised by competent counsel," he told the court.

But Parks, of Nevada City, didn't help his cause by pinballing back and forth on the question of whether the juvenile court judge must utter the word "felony."

"I don't believe there are magic words," he said early on. Then, as the justices bore in on him, he backpedaled: "This is a gray area. At some point a line has to be drawn." Still later he said, "The bottom line in this case is that there were no words."

By the end of the argument, it appeared that George and Werdegard were on one side, with Justices Mosk, Baxter and Joyce Kennard on the other.

That would leave Justices Ming Chin and **Janice Rogers Brown**, neither of whom asked any questions, holding the decisive votes.

Brown's silence was not unusual, but Chin's was. It's a good bet he had not made up his mind going into argument and wanted to listen to what everyone had to say.

Defense lawyer Parks had better hope Chin listens to the most vigorous advocate in the case, Chief Justice Ronald George.

LOAD-DATE: December 9, 1996

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Sacramento Bee

December 7, 1996, METRO FINAL

SECTION: METRO; Pg. B2

LENGTH: 174 words

HEADLINE: PANEL OKS APPELLATE JUDGE

BYLINE: Bee staff and news services

BODY:

The state Commission on Judicial Appointments has unanimously confirmed Gov. Pete Wilson's appointment of Consuelo Callahan to the Sacramento-based 3rd District Court of Appeal.

Callahan, 46, a Stockton resident and San Joaquin County Superior Court judge, on Thursday became the only Latina now serving on the 10-member court, which hears appeals from trial courts throughout northeastern California. She succeeds **Janice Rogers Brown**.

A Republican, Callahan is a graduate of Stanford Law School and McGeorge School of Law.

LOAD-DATE: December 8, 1996

Copyright 1996 Times Mirror Company
Los Angeles Times

December 6, 1996, Friday, Home Edition

SECTION: Part A; Page 3; Metro Desk

LENGTH: 628 words

HEADLINE: HIGH COURT CLARIFIES THREE-STRIKES LAW;
RULING: CALIFORNIA JUSTICES SAY OUT-OF-STATE CONVICTIONS COUNT AS
STRIKES TOWARD LIFE SENTENCES.

BYLINE: MAURA DOLAN, TIMES LEGAL AFFAIRS WRITER

DATELINE: SAN FRANCISCO

BODY:

The California Supreme Court, in its second examination of the state's tough three-strikes law, handed prosecutors a victory Thursday by ruling that out-of-state convictions count as strikes toward life sentences.

The unanimous decision is likely to affect dozens of pending cases and potentially scores of criminals with convictions for serious or violent felonies from outside the state.

"It prevents California from being a haven for other states for people who move here to get a fresh start," said Contra Costa County Deputy Dist. Atty. L. Douglas Pipes.

The 1994 initiative, Proposition 184, did not clearly say that prior crimes outside the state would count toward three strikes. But the Supreme Court held that voters intended to include them.

"Without a doubt, the law gets a little bit worse, a little bit harsher with this interpretation," said defense attorney Ron Boyer, who represented the defendant in the case.

In its first three-strikes ruling in June, the court dealt the law a major blow by giving judges authority to disregard prior convictions and grant more lenient sentences.

While Thursday's ruling does not change that decision, it allows judges to count out-of-state crimes toward the harshest possible sentence under the law. There was no dispute that such convictions qualified toward a doubling of a sentence allowed for two strikes.

Justice **Janice Rogers Brown**, writing her first majority opinion since Gov. Pete Wilson appointed her to the court last spring, noted that a three-strikes law passed by the Legislature before the ballot vote included offenses outside California as among those that make a criminal eligible for a third strike and a life sentence.

"There is no evidence that voters intended to change the legislative version, or in particular, adopt a more lenient three-strikes law," Brown wrote.

The court unanimously agreed that William Royal Hazelton, who had a previous qualifying California conviction and an attempted rape offense in Nevada, could be sentenced to the harshest term possible for robbery committed more recently in Contra Costa County.

Boyer, a Contra Costa County deputy public defender, said Hazelton, if convicted of all charges, will

now face "a minimum term of something over two centuries." Boyer said his client still must be tried on some of the charges.

Justices Stanley Mosk, Kathryn Mickle Werdegard and Joyce Kennard wrote separate decisions, contending that they agreed with the result reached by Brown but for different reasons.

A concurring opinion written by Mosk and signed by Werdegard complained that the majority's decision was "not only unnecessary but also unsound."

They argued that the law passed by the Legislature is still in effect and clearly included out-of-state convictions as qualifying for a life sentence. Therefore, the court need not "construe" the initiative to say more than it did, they contended.

Kennard agreed that the initiative did not repeal the law passed by the Legislature.

The court also is grappling with other three-strikes cases, including how juvenile crimes should be handled under the law. Although Thursday's opinion did not deal specifically with juveniles, it indicated that the court will not rely on differences between the initiative and the Legislature-passed law to preclude juvenile crimes from being counted toward a life term.

Boyer, however, said disputes over how juveniles should be treated under the law will continue until further rulings are made. One of the main questions pending is whether convictions for offenses tried in juvenile court with the prosecution's consent can be counted toward a third strike. The court is now reviewing written arguments on that point in a different case.

LOAD-DATE: December 6, 1996

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The Recorder

View Related Topics

December 6, 1996, Friday

SECTION: NEWS; PG. 1

HEADLINE: OUT-OF-STATE PRIORS COUNT AS STRIKES, HIGH COURT RULES

BYLINE: Bill Kisliuk;

Reporter Bill Kisliuk's e-mail address is kisliuk@counsel.com

BODY:

Clearing up one of the more significant quandaries remaining from 1994's convoluted "Three Strikes and You're Out" law, the California Supreme Court on Thursday held that out-of-state felony convictions can be counted as strikes.

Citing the "unequivocal intent on the part of the voters" in passing the strict sentencing law, Justice **Janice Rogers Brown** wrote that prosecutors can use out-of-state felony convictions in seeking lengthy sentences for repeat felons.

"There is no evidence that the voters intended to change the legislative version, or in particular, adopt a more lenient 'Three Strikes' law," Brown wrote in *People v. Hazelton*, 96 C.D.O.S. 8780.

Hazelton is the first majority opinion Brown has written since joining the court in May. Chief Justice Ronald George and Justices Marvin Baxter and Ming Chin joined her opinion. Justices Stanley Mosk, Joyce Kennard and Kathryn Mickle Werdegard concurred separately.

The case arose in 1994 when Contra Costa prosecutors charged William Royal Hazelton with robbery and two prior "strikes," including a 1972 conviction for attempted rape in Nevada.

The charges were filed after legislators had enacted a version of the Three Strikes law, but before voters had approved a slightly different statewide initiative later in the year.

After he was convicted but before sentencing, Hazelton contended that the Three Strikes law passed by the voters superseded the legislative version, and that it did not specifically provide for out-of-state convictions to be charged in Three Strikes cases.

The language at issue is a muddle, to say the least. It says the law applies to defendants who have "two or more prior felony convictions as defined in paragraph (1) of subdivision (b) of Penal Code 1170.12." That paragraph refers to "any offense defined in subdivision (c) of Penal Code 667.5 as a violent felony or any offense defined in subdivision (c) of 1192.7 as a serious felony in this state."

Contra Costa County Superior Court Judge Richard Flier agreed that the language refers only to crimes set out in the California Penal Code. He tossed out the Nevada conviction, lowering Hazelton's potential sentence substantially.

But the First District Court of Appeal reversed in December 1995, finding that any out-of-state felony conviction that meets California's definition of "serious" or "violent" can be considered a strike.

The Supreme Court justices affirmed that stance Thursday, but took different paths.

The majority found that the initiative superseded the earlier version of the law, and that although the

language was ambiguous, there is "no evidence" voters intended to alter the prior law.

Mosk and Kennard wrote separately to contend that the initiative has not repealed the earlier law, and that the court need look only at the earlier measure in this case. Werdegar joined Mosk's opinion.

Contra Costa County Deputy District Attorney L. Douglas Pipes, who argued Hazelton, said, "We're satisfied that the result is correct. I would have preferred it if all seven justices adopted both theories, but you live with what you can get."

Pipes said he has already drafted a proposed ballot measure for the 1998 general election that would clean up language in the 1994 initiative and repeal the legislative version of Three Strikes.

Contra Costa County Deputy Public Defender Ronald Boyer, who argued the defendant's case, said he was "disappointed."

"I feel that Three Strikes is a bad law, and it just got a little bit worse."

LOAD-DATE: December 6, 1996

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Sacramento Bee

December 6, 1996, METRO FINAL

SECTION: MAIN NEWS; Pg. A12

LENGTH: 1174 words

HEADLINE: JUSTICES' DECISION BOLSTERS "3 STRIKES"

BYLINE: Claire Cooper, Bee Staff Writer

DATELINE: SAN FRANCISCO

BODY:

Out-of-state convictions can be counted as "strikes" under California's "three strikes and you're out" law, the state Supreme Court said Thursday.

While the language of the November 1994 ballot measure was ambiguous, the voters clearly had no intention of giving a break to felons who committed their prior crimes outside California, the court said.

The ruling was the second major interpretation of the "three strikes" law and the first big win for prosecutors. Two additional cases, on two other key aspects of the law, are still pending.

The decision Thursday also was the first Supreme Court majority opinion written by Justice **Janice Rogers Brown**, a Sacramentan who joined the court in May.

Last June, the justices, who generally rule conservatively on criminal justice issues, jolted the law enforcement community by shooting a giant hole in the "three strikes" law. To further the interests of justice and avoid imposing the law's long sentences for minor crimes, the Supreme Court said then, trial judges may refuse to count prior convictions as strikes.

The law requires sentences of 25 years to life in prison for anyone previously convicted of two violent or serious felonies who is convicted of a new felony of any kind. A felon with one previous "strike" must be given at least double the usual term for the new crime.

The June opinion reopened most of the "three strikes" sentences on the books statewide.

By contrast, said Contra Costa County Deputy Public Defender Ron Boyer, a "three strikes" authority, "probably fewer than 5 percent of strike cases involve out-of-state priors."

Boyer represented William Royal Hazelton in the case decided Thursday. Charged with robbery in Walnut Creek, Hazelton had two prior strikes -- a California burglary conviction and a Nevada conviction for attempted rape.

Under a "three strikes" law enacted by the Legislature in March 1994, it was clear that out-of-state convictions could be counted in determining eligibility for a third-strike penalty.

But in the "three strikes" initiative that followed, the language was inconsistent.

One section defined prior felony convictions to include "a conviction in another jurisdiction for an

offense that, if committed in California, is punishable by imprisonment in the state prison."

Yet a separate section, defining which people would be eligible for "third strike" penalties, pointed back to a section concerned only with in-state felonies.

Contra Costa County Superior Court Judge Richard Flier ruled that Hazelton's Nevada conviction could not be counted for "three strikes" purposes. The state Court of Appeal disagreed.

Now the Supreme Court has weighed in, settling the matter for Hazelton and all other defendants.

"The initiative's history demonstrates an unequivocal intent on the part of the voters to adopt a sentencing scheme identical to the legislative version of the 'three strikes' law," Brown wrote for the court's majority.

Her opinion was also signed by Chief Justice Ronald George and Justices Marvin Baxter and Ming Chin.

Justices Stanley Mosk and Joyce Kennard wrote separate opinions, agreeing with Brown's conclusion but not with her legal analysis. Justice Kathryn Mickle Werdegard joined in signing Mosk's opinion.

Reacting to the decision, Sacramento lawyer Charles Hobson, who filed a brief in the case for the Criminal Justice Legal Foundation, said it will avoid "a potential windfall" for defendants and will "advance the voters' intent."

Hobson also called the decision "a nice win after Romero," the June decision that lets trial judges refuse to impose "three strikes" penalties. "It shows most of (the initiative) will be upheld," he said.

But Boyer said the decision was a narrow one that would not affect the two test cases still pending. In those, the Supreme Court will decide how to count juvenile "strikes" and how much discretion trial judges have to treat certain crimes as misdemeanors rather than felonies.

LOAD-DATE: December 7, 1996

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DECEMBER 6, 1996, FRIDAY, FINAL EDITION

SECTION: NEWS; Pg. A21

LENGTH: 513 words

HEADLINE: Out-of-State Convictions Can Be 'Strikes'
First decision issued by California's new justice

BYLINE: Harriet Chiang, Chronicle Legal Affairs Writer

BODY:

In a victory for prosecutors, the California Supreme Court ruled yesterday that an out-of-state conviction can qualify as a "strike" under the state's tough three-strikes sentencing law.

Yesterday's ruling addressed a key issue that prosecutors and defense lawyers throughout the state have wrestled over since the statute went into effect.

The three-strikes law signed by the governor in March 1994 says that a prior out-of-state conviction counts as a strike. But the initiative passed by voters that November leaves out that language.

In her first decision since joining the high court, Justice **Janice Rogers Brown** said voters, in approving the initiative, intended to pass the same law that the governor signed earlier that year.

"We see no evidence in the legislative history that the voters intended to exclude out-of-state convictions from the purview of the initiative's third-strike penalty," Brown said.

Three justices disagreed with Brown's reasoning, although they came to the same conclusion. Justices Joyce Kennard and Stanley Mosk, who was joined by Justice Kathryn Mickle Werdegard, wrote separate opinions saying that Brown went too far in broadly interpreting the initiative. They said the legislation signed by the governor, which specifically includes out-of-state convictions, was not repealed by the initiative and is the law on the books.

The decision was a costly setback for William Hazelton of Contra Costa County, who challenged the law. Hazelton was arrested for robbery and charged as a three-strike candidate because he had a prior California robbery conviction and an attempted rape conviction in Nevada.

Defense lawyers argued that Hazelton should be charged only as a two-strikes candidate because they claimed the Nevada conviction did not count as a strike. With yesterday's decision, prosecutors said Hazelton now may be facing at least 110 years behind bars, instead of a 22-year sentence.

The decision "will expand the scope of people who are subject to sentences of life terms under three strikes," said Contra Costa County Deputy District Attorney L. Douglas Pipes.

Hazelton's attorney, Contra Costa Deputy Public Defender Ron Boyer, said the ruling is bad news but will not have a major impact. "From my perspective," he said, "three strikes is a bad law, and it got a little bit worse."

Under the three-strikes law, defendants receive a minimum sentence of 25 years to life for a third-strike conviction if the two prior convictions are for violent or serious felonies. Those sentenced as

two-strikes felons receive double the normal term.

About 21,000 felons in California have received two-strikes or three-strikes sentences since the law was passed.

Yesterday's decision was the court's second ruling on the three- strikes law since it was passed. In a blockbuster ruling in June, the high court said judges should be allowed to ignore the law and reduce sentences to avoid unduly harsh penalties for those convicted of petty thefts and other minor offenses.

LOAD-DATE: December 7, 1996

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November 6, 1996, Wednesday; Second Edition

SECTION: NEWS; Pg. A-36

LENGTH: 1294 words

HEADLINE: Retired Justice Broussard succumbs ;
Cancer claims pathfinding liberal

SOURCE: OF THE EXAMINER STAFF

BYLINE: SETH ROSENFELD

BODY:

Retired California Supreme Court Justice Allen Broussard, a compassionate public servant and liberal jurist who dissented often in favor of individual rights and the environment, has died of cancer. He was 67.

Justice Broussard, whose legal career spanned more than 40 years, died early Tuesday at his home in the Oakland hills after his prostate cancer, which had been in remission, spread to his bones, his friends said.

After resigning from the state Supreme Court in 1991, Justice Broussard worked as a private lawyer in San Francisco and was president of the Oakland Port Commission.

He rose from humble origins in the Deep South to break new ground as an African American lawyer and be appointed to California's highest court in 1981 by then-Gov. Jerry Brown. He was the second African American to serve on the high court and the first to be president of the California Judges Association.

Colleagues remembered him Tuesday as a dedicated judge and friend.

"He was a person who stood up for those with less power, those who were less popular," Brown said. "He was a breed that some of today's politicians are trying to run from. That's why his legacy will be missed even more."

Chief Justice Ronald George, who took Justice Broussard's seat on the court in 1991, said, "Although I have never had the honor and privilege of serving directly with him ... I have always had great respect for his fine work, his dedication and his warmth. His guidance and wisdom will be missed."

Former Chief Justice Rose Elizabeth Bird, who served on the court for five years with Justice Broussard, said, "He had a wonderful sense of humor ... salty. He went out of his way to be kind to people. He was intellectually one of the superior justices to sit on the court. He had a genuine interest in the law."

Justice Broussard was part of a liberal majority when he joined the court in 1981. He was elected to a 12-year term in 1982.

But voters in 1986 removed Bird and fellow Justices Joseph Grodin and Cruz Reynoso. Justice Broussard soon found himself dissenting frequently from a conservative majority led by now-retired

Chief Justice Malcolm Lucas.

"I think he'll be remembered more for his lone and courageous dissents," said Stephen Barnett, a professor at UC-Berkeley's Boalt Hall School of Law. "He was a lone liberal voice crying in the wilderness."

Justice Broussard dissented from several majority opinions upholding death sentences, and wrote an angry dissent in 1987 when the Lucas majority overturned one of his earlier decisions requiring that prosecutors prove defendants had the intent to kill before they could be sentenced to death.

He dissented from another ruling that barred employees from receiving compensatory damages for emotional pain and suffering due to on-the-job discrimination.

One of his majority opinions on the Lucas court upheld Proposition 103, a ballot measure that subjected insurance firms to regulation and created the elected post of state insurance commissioner. He also wrote a majority opinion affirming that public employees have the right to strike.

Justice Broussard repeatedly sided with environmentalists, said Bird, who recalled he was especially proud of his decision protecting Mono Lake from a plan to divert its water source.

Brown hailed the ruling as pioneering.

"His great decision on the Mono Lake case, which established a public trust in the streams and river ways of California in preference to private property rights, was a very important decision," Brown said in an interview. "It was really path-breaking and reflected his larger sense of things."

Allen Edgar Broussard was born April 13, 1929, in Lake Charles, La., where he graduated from Sacred Heart High School. He recalled in a 1993 interview that he often had to fight off dogs and rock-throwing white youths on his way to school there.

In 1945 his close-knit family brought him to the Bay Area in search of greater opportunities. His father worked as a longshoreman, his mother as a seamstress.

The future lawyer worked part-time at odd jobs, selling shoes, canning and clerking to help earn his way through San Francisco City College, UC-Berkeley and Boalt Hall.

He passed the State Bar in 1954 and was a research attorney for Presiding Justice Raymond Peters at the state Court of Appeal in San Francisco before serving in the Army in Germany.

Justice Broussard entered private law practice in 1956, and was appointed to the Oakland-Piedmont Municipal Court in 1964 by then-Gov. Pat Brown. He was a judge for the next 27 years.

He was appointed to the Superior Court in 1975, and was in his second term as presiding judge when Jerry Brown named him to the Supreme Court in 1981.

Along the way, Justice Broussard also was involved in community service, professional groups and Democratic politics. He was vice president of the East Bay Chapter of Big Brothers, a director of Alta Bates Medical Center and the National Association for the Advancement of Colored People, and taught law part-time at the University of San Francisco and Golden Gate University.

He served on the Alameda County Democratic Central Committee and was president of the East Bay Democratic Club. He was elected president of the California Judges Association in 1972 and served on the Commission on Judicial Performance.

In 1959, he married Odessa James, with whom he had three sons. Despite a busy professional life, he emphasized the importance of family.

"My greatest blessing is that I have a good family life," he once said. "The most important thing is to have a fundamentally happy, satisfying lifestyle. From there, you can do a lot of other things."

He surprised his colleagues in 1991 when he announced his retirement from the state high court, leaving the court without a black or Latino member for the first time since 1977. He called on Gov. Wilson to name an African American justice, and Wilson did so earlier this year in appointing **Janice Rogers Brown**.

Justice Broussard is survived by his wife and two sons, Keith of San Francisco and Craig of Oakland. Memorial services are to be announced.

GRAPHIC: PHOTO (EXAMINER / 1991)

Caption 1, Retired state Supreme Court Justice Allen Broussard, champion of the powerless, dies of prostate cancer at age 67.

LOAD-DATE: November 07, 1996

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November 4, 1996, Monday

SECTION: Pg. 3

LENGTH: 183 words

HEADLINE: Confirmation Hearing Set for Dec. 5 on Stockton Jurist's Nomination to Third District Court of Appeal

BYLINE: By KENNETH OFGANG, Staff Writer/Appellate Courts

BODY: A Dec. 5 confirmation hearing has been set for San Joaquin Superior Court Judge Consuelo "Connie" Callahan, nominated by Gov. Pete Wilson to the Third District Court of Appeal to succeed Justice **Janice Rogers Brown**.

The 46-year-old Stockton jurist would fill a seat which has been vacant since Brown was elevated to the Supreme Court on May 2.

Callahan, a judge since 1992 and a San Joaquin County Municipal Court commissioner for six years before that, must be confirmed by the Commission on Judicial Appointments.

When considering Third District nominations, the commission consists of Chief Justice Ronald George, Attorney General Dan Lungren, and Third District Presiding Justice Robert K. Puglia.

The hearing will begin at 1 p.m., the Administrative Office of the Courts said in a release.

Written comments on the nomination, or requests to speak at the hearing, must be received by 5 p.m. on Dec. 2, the AOC said, and should be addressed to:

Chief Justice Ronald George, Chairperson, Commission on Judicial Appointments, 303 Second Street, South Tower, San Francisco, CA 94107.

LOAD-DATE: November 4, 1996

Copyright 1996 Metropolitan News Company
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November 4, 1996, Monday

SECTION: Pg. 1

LENGTH: 601 words

HEADLINE: Head of Panel Probing JNE Sees Need for Numerous Changes

BYLINE: By a MetNews Staff Writer

BODY: The chair of a State Bar commission charged with sizing up the State Bar Commission on Judicial Nominations Evaluation has indicated that the probe has, so far, unveiled a need for numerous alterations.

"I do see a lot of changes that need to be made," Fourth District Court of Appeal Justice James Ward said Saturday at a meeting of the Los Angeles County Bar Assn. Conference of Local Bar Leaders.

Ward, who served on the JNE Commission from 1984-87, said his "hat's off to JNE," noting that it performs a useful function for the governor in resisting political pressure to appoint a particular candidate, as well as providing needed information about prospective appointees.

He did toss some barbs at the panel, however, commenting that it "takes its position too seriously," and adding:

"I know people rated unqualified by JNE who I know can do the job."

The commission came under scrutiny recently after rating then-Court of Appeal Justice **Janice Rogers Brown** "not qualified" for the Supreme Court. Gov. Pete Wilson nominated her, nonetheless, and she was confirmed in May by the Commission on Judicial Appointments.

JNE places a nominee in one of four categories: not qualified, qualified, well qualified and exceptionally well qualified.

Responding to a query from a member of the audience whether JNE should modify its labels, Ward related that his commission is "taking a hard look at" that question.

Some people feel that comments such as "not recommended" or "not recommended at this time" might be more appropriate, he said.

Modification of JNE is not what is needed, Third District Court of Appeal Presiding Justice Robert Puglia told the group.

"I think JNE should be disbanded," he said. "It's unconstitutional."

Puglia argued that the statute creating JNE purports to place limits on the governor's power to appoint, in contravention of Article VI of the state Constitution.

The JNE Commission is composed of attorneys and non-lawyers who are to be, according to the dictates of a statute, "broadly representative of the ethnic, sexual, and racial diversity of the population of California."

The effect of the commission's ratings constitutes a "de facto veto" over the governor's power to

appoint, Puglia argued. "The de facto veto is what essentially flaws the JNE Commission."

He continued:

"Should the State Bar have the power to veto? I can't vote for members of the State Bar, nor can anyone other than the 132,000 lawyers in the state. The State Bar should have a role, but what about others groups...who have a vested interest in judges?"

"The guy who ought to make the decision should be the guy I vote for."

Panelist Peter Appleton, a former JNE commissioner, countered that the fallacy with Puglia's argument is that it's predicated on the notion that JNE picks judges. If it rates 29 per cent of the nominees unqualified, Appleton, argued, that leaves a substantial balance from which the governor may make selections.

Appleton, of the Century City firm of Appleton, Pasternak & Pasternak remarked:

"I don't think there's anything wrong with a de facto veto, if there a sufficient pool left from which to select."

Referring to the limited state constitutional qualifications for judicial office (five years as a member of the State Bar for Municipal Court judges and 10 years for Superior Court judges), he said:

"I don't think its very good service to this state that the governor can appoint any attorney in this state with five years experience."

The JNE panel discussion was moderated by Los Angeles County Bar Association trustee Roland Coleman.

LOAD-DATE: November 5, 1996

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Sacramento Bee

October 31, 1996, STATE FINAL

SECTION: SUPCAL; Pg. B2

LENGTH: 187 words

HEADLINE: WILSON NOMINATES JUDGE

BYLINE: Bee staff and news services

BODY:

Gov. Pete Wilson on Wednesday nominated San Joaquin County Superior Court Judge Consuelo Callahan to the Sacramento-based 3rd District Court of Appeal.

If the nomination is confirmed by the state Commission on Judicial Appointments, Callahan will succeed **Janice Rogers Brown**, who was elevated to the state Supreme Court last spring.

Callahan, 46, of Stockton, is a former prosecutor and Municipal Court commissioner. A Stanford graduate, she received her law degree from McGeorge School of Law.

Court of Appeal justices earn \$ 122,893 a year.

LOAD-DATE: November 1, 1996

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October 28, 1996

SECTION: Pg. A6

LENGTH: 592 words

HEADLINE: CLE Courses Draw Them To Bar Confab

BYLINE: BY VICTORIA SLIND-FLOR, NATIONAL LAW JOURNAL STAFF REPORTER

DATELINE: LONG BEACH, CALIF.

HIGHLIGHT:

California lawyers go for nuts and bolts this year.

BODY:

What drew 4,000 of the state's 151,000 lawyers to the annual meeting here of their state's unified bar? Not what you'd think.

This year, notwithstanding opportunities to meet the state supreme court's new chief justice and to hear the likes of Morris Dees and Gerald Gunther, to dine and dance with bar leaders aboard the Queen Mary, or to participate in debates on hot ballot initiatives such as one that could effectively end affirmative action in California, the hot-ticket events were nuts-and-bolts law practice tune-up classes.

Four sections of a legal writing course taught by University of Florida Prof. Ronald H. Carpenter sold out before a single lawyer arrived at the Long Beach Convention Center for the Oct. 10-13 meeting. For those interested, key figures in the state's legal establishment did show up and speak to the assembled Conference of Delegates.

Castigating Jenny

California Attorney General Dan Lungren received only a polite response to a speech in which he castigated the State Bar committee that evaluated candidates for judicial office for its "arrogance." The attorney general was taking exception to widely published leaks of the Judicial Nomination Evaluation Commission's finding that the state supreme court's newest member, Justice **Janice Rogers Brown**, was unqualified for a high-court post.

He charged that the Jenny Commission, as the group is informally known, had attempted to "thwart and humiliate a superb jurist" and warned that the commission's future "may depend on whether it understands the nature of its purpose."

Mr. Lungren's remarks drew a sharp response from the immediate past president of the bar, James E. Towery, of San Jose's Hoge, Fenton, Jones & Appel. In an interview after the attorney general's speech, Mr. Towery said that the judicial-evaluation group is "far from arrogant."

In his first state-of-the-judiciary address at a state bar meeting, California Supreme Court Chief Justice Ronald George drew applause when he expressed concern about the growth of private judging in the state, and said that "without having a strong public system of law, the rule of law that underlies our society is at risk." His predecessor at the court, former Chief Justice Malcolm Lucas, had

surprised some observers by joining JAMS/Endispute Inc., of Irvine, following his retirement from the court last spring.

At a panel on the future of the California Supreme Court, three sitting justices and one retired justice discussed the burden of death-penalty cases the court faces, with more than 400 inmates presently on death row. One of the chief problems, court members said, is the difficulty of finding adequate appellate counsel for the condemned. Justice Brown suggested one possible solution would be for law schools with clinical programs to "take on this problem."

Attendance was surprisingly sparse at a presentation on the November ballot's Proposition 209, the California Civil Rights Initiative, which critics claim would effectively gut affirmative action programs in the state. Speaking as a proponent, Prof. Gail Heriot, of the University of San Diego School of Law, repeatedly said that race - and sex-based preferential treatment "is not the same as affirmative action."

In opposition, Constance L. Rice, of the Los Angeles office of the NAACP Legal Defense and Educational Fund Inc., condemned the initiative as a "cynical race-wedge issue" that implies that "Willie Horton wants your job, your contract and your place at [the University of California at] Berkeley."

GRAPHIC: Picture, Chill: State AG Dan Lungren received only polite applause for his comments on judges. RUSSELL D. CURTIS

LOAD-DATE: November 20, 1996

Copyright 1996 Metropolitan News Company
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October 24, 1996, Thursday

SECTION: Pg. 9

LENGTH: 534 words

HEADLINE: AFFAIRS OF STATE (Column): 'Jenny Commission' Provides No Useful Service to Californians

BYLINE: By David Kline

BODY: Do the people of California really need the Judicial Nominees Evaluation Commission? The answer is no, because the 27-member commission provides absolutely no useful service to the public.

The "Jenny" Commission, as it is popularly known, was created in 1979 as a reaction to then Lt. Gov. Mike Curb's habit of appointing judges while Gov. Jerry Brown was out of state running for president or carousing with Linda Ronstadt.

Legally, Curb had every right to make appointments, since the state constitution gives the lieutenant governor all the powers of the governor the instant the chief executive crosses the state border.

But the Democrat-controlled Legislature thought Curb was overstepping his bounds, and it created the Jenny Commission to thwart his appointing ability.

As created by the Legislature, the Jenny Commission has 90 days to consider the governor's judicial appointments, and then must report its determination of whether or not the appointee is qualified to fill the assigned post. The report is supposed to be given to the governor, and no one else.

The governor is not bound by the report, nor is the Commission on Judicial Appointments, which has the power to confirm or veto the governor's judicial appointees.

The basic idea was that nothing could happen during the 90 days that the Jenny Commission studied any given appointee, so Brown would have plenty of time to get back to California to rescind Curb's appointments and make his own.

To be certain, the Jenny Commission solved Brown's problem. But what did it do for the people of this state? Zilch.

Gov. Pete Wilson has made no secret of the fact that he doesn't give a darn about what the Jenny Commission thinks of his appointees especially since the commission gave a "not qualified" rating to Justice **Janice Rogers Brown**, whom Wilson knows is qualified based upon first-hand awareness of her work.

And Attorney General Dan Lungren, who will be the next governor of California, has complained that the commission has "soundly misconstrued its role."

"It was formed to be of assistance to the governor, not to be a check on the authority of the governor," Lungren said at this year's State Bar conference.

What it comes down to is that neither the governor nor governor-to-be are going to take advice from a commission which is legally barred from offering its opinions to anyone but the chief executive.

The logical conclusion would be for the state to simply abolish the Jenny Commission and allow the governor to rely on the expertise of his hand-picked appointments advisers.

But the State Bar opposes this remedy, because it would result in a loss of some of the association's political power. The State Bar gets to appoint the members of the Jenny Commission, and it enjoys having this power to be a thorn in the governor's side.

The State Bar and other supporters of the commission argue that it is needed as a check on the governor's appointing ability. But we already have the Commission on Judicial Appointments for that purpose, and we shouldn't forget that the people have the ultimate check on the governor and the lieutenant governors since they can vote a person in or out of office.

LOAD-DATE: October 24, 1996

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October 15, 1996, Tuesday

SECTION: Pg. 3

LENGTH: 1111 words

HEADLINE: Conference, Lungren Put State Bar Spotlight on JNE Commission

BYLINE: By ROBERT GREENE, Staff Writer

BODY: The Commission on Judicial Nominees Evaluation captured the spotlight at the annual State Bar Convention as the Conference of Delegates voted overwhelmingly to support the embattled panel while Attorney General Dan Lungren blasted the commission for misunderstanding its "humble" task.

"[I]t is absolutely the case that 'Jenny' has soundly misconstrued its role," Lungren said Friday in his address to the conference. "It was formed to be of assistance to the governor, not to be a check on the authority of the governor."

Lungren said he would not address the question of whether the JNE process is an unconstitutional infringement on the governor's power to appoint judges, but he added that there was "little doubt" that the panel had evolved into "an extra-constitutional body of immense authority" that has the potential to be abused.

The remarks came on the opening day of the three-day conference and followed several delegate actionsthe first of which was to accept for consideration a late-filed resolution in support of JNE. That resolution was authored by San Diego attorney Charles Bird of Luce, Forward, Hamilton & Scripps and Bar Association of San Francisco President Mark I. Schickman, and was sponsored as well by the Beverly Hills Bar Association.

The resolution was received the enthusiastic endorsement of the conference when it came to the floor for a vote Saturday.

On Friday, though, a two-thirds floor vote was necessary to keep the matter before the conference since the resolution was filed late and was not in compliance with emergency provisions for consideration. The delegates cheered when Chair Steven S. Wall surveyed the crowd of blue cards held aloft and declared that there was "clearly a two-thirds majority."

The 27-member JNE commission was created in 1979 to evaluate judicial nominees. Members are appointed by the State Bar Board of Governors. JNE recommendations go directly to the governor.

The commission was sharply criticized earlier this year after it found then-Court of Appeal Justice **Janice Rogers Brown** "not qualified" to serve on the state Supreme Court and its confidential findings, sent in a letter to Gov. Pete Wilson, were disclosed to a Los Angeles Times reporter and published.

Brown was later confirmed to the high court. A committee convened to investigate the leak was unable to find its source. Another panel, chaired by Fourth District Court of Appeal Justice James Ward, is reviewing all aspects of the JNE commission.

Even before the Brown nomination many critics charged that the panel is biased against conservative nominees.

The resolution states that the Conference of Delegates "supports the continued existence of the Commission on Judicial Nominees Evaluation with substantially its present authority, funding and rules of confidentiality and the continued requirement that an applicant for judicial office be evaluated by the commission being eligible for appointment."

The measure also calls upon the Board of Governors to pass a similar resolution.

But Lungren told the Conference of Delegates it was time to "reassess" the "existence and purpose" of JNE.

He asserted that the commission's action in Brown's case was "an arrogant attempt on the part of an unaccountable State Bar commission to thwart and then publicly humiliate a respected and superb jurist."

The attorney general said JNE first sent a draft letter disclosing its evaluation to Wilson, then sent the more critical evaluation that was published in the Times.

"The reputation of a respected jurist was literally destroyed on the front page of the newspapers," Lungren said.

Additionally, because the second letter contained different information than the draft, which had been publicly addressed by Wilson, Lungren said the governor was "put in the position of being called a liar." Brown's reputation, he added, was "besmirched."

Lungren said that while there is "little doubt" that members of the commission deserve "praise and thanks" for their service, "when an unelected and unaccountable entity acts as if it has the power to check a constitutional authority, and in the process publicly mortifies individuals and ruins careers, then it is time to reassess the entity's existence and purpose."

Lungren also aired his views on proposed changes to Three Strikes legislation, noting that the Conference of Delegates already had approved resolutions to weaken the law, which punishes serious repeat offenders with 25-years-to-life terms.

Lungren said his office conducted a study on the impact of third strike cases on the state's trial courts and found that over a two-year period from 1994-96, the number of civil cases set for trial on Los Angeles County courts actually increased by more than eight percent, and the median time for both jury and non-jury trials dropped.

"The hard facts do not support the contentions being made," Lungren stressed.

Largely because of Three Strikes, he asserted, the state's crime rate is declining.

Additionally, he said, more California parolees are seeking to leave the state, while less are seeking residency here.

"Let's not change gears now and put our falling crime rates in reverse," he said. "Let's keep on track and do everything we can to make the law work even better."

Before Lungren's speech, the Conference of Delegates overwhelmingly approved Resolution 1-5, which urges legislation to amend the Three Strikes Law to require that the third felony "strike" conviction, and not just the first two, be for serious or violent felonies.

Bar Association of San Francisco delegate Frank Leibman said "there is a consensus emerging that Three Strikes is wrong." The legislation, he said, would be a "first step" toward fixing it.

No one rose to speak against the resolution, and Wall said he saw "less than half a dozen" votes

against it.

A related resolution also was approved, but did garner some opposition. Prosecutor Terry A. Bork, who said he was speaking on his own behalf, said Three Strikes was a valuable tool "that takes into account the history of crime."

He said the Supreme Court's recent Romero decision already allows the Superior Court judge "to do much of what this resolution seeks."

But his colleague, Los Angeles Deputy District Attorney Danette Meyers, who spoke on behalf of the Los Angeles County Bar Association, contended that the most serious offenders who are sentenced for crimes other than third strikes only serve half their sentences.

The result, she said, is that "while your petty thieves are in state prison" on third strike sentences "your rapists and robbers are going to be living next to you."

LOAD-DATE: October 15, 1996

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The Recorder

October 15, 1996, Tuesday

SECTION: NEWS; PG. 1

HEADLINE: STATE BAR THEME: JUST GLAD TO BE HERE

BYLINE: Krysten Crawford

DATELINE: LONG BEACH

BODY:

California Supreme Court Chief Justice Ronald George summed up better than anyone this year's annual State Bar meeting when he addressed the convention floor Saturday morning.

"I didn't know if I'd be attending a wake or a celebration here today," confessed George, as he prepared to deliver his first State of the Judiciary address to the Bar and to swear in a new slate of Bar leaders. To the obvious delight of the California lawyers in attendance, George added, "And I'm thrilled that it's a celebration."

The statement -- a reference to last summer's plebiscite in which lawyers voted overwhelmingly to retain mandatory Bar membership -- was echoed throughout the weekend gathering here. Over the course of four days, Bar leaders repeatedly congratulated themselves for defeating state Sen. Quentin Kopp's campaign to abolish the Bar, which he and others contend is a costly and cumbersome institution. But Bar officials also pledged not to forget how perilously close they had come to losing control of the regulatory organization for the state's 120,000 active attorneys.

"There was a lot of soul-searching about what the mission of the State Bar was and we're not going back to business as usual," promised outgoing Bar president James Towery, whose one-year term was devoted mostly to defeating the plebiscite.

Towery's successor, Long Beach plaintiffs attorney Thomas Stolpman, continued the "soul-searching" theme in his inaugural speech Saturday morning by calling on lawyers to help reshape public perceptions. Stolpman, whose political ties in Sacramento are expected to give the Bar's image a much-needed boost, criticized colleagues who assume a take-no-prisoners approach to practicing law and who flagrantly disregard conflicts of interest.

"Is it any wonder that we have lost the respect of our fellow Americans, when we see lawyers who have become ethically blind put their clients' interests ahead of all others?" Stolpman asked.

Rather than blame others for their poor reputation, he said, lawyers should work to improve the profession's image by starting with their own actions.

"We must consciously ask ourselves, every time we give advice, draft a clause in a document, or sign a pleading, whether our representation of that client or that fact is consistent with what is fair, what is right, and with what is just," Stolpman said.

GRABBING CREDIT

But, in many respects, this year's annual Bar meeting was business as usual. Some 4,000 California lawyers showed up, most looking to rack up Mandatory Continuing Legal Education credits on the usual fare of courses (No. 10 of "10 Ways to Lose Your Appeal at Trial": "Don't file a timely notice of appeal"). They came to network amid the various exhibition booths and on the decks of the Queen

Mary, where the Bar held its annual dinner-dance Saturday night.

The meeting also featured the usual parade of awards ceremonies and cadre of guest speakers, among them Insurance Commissioner Charles Quackenbush, United Nations Ambassador Madeleine Albright, and Assemblywoman Sheila James Kuehl, D-Santa Monica.

The meeting of the Conference of Delegates, the Bar's legislative policy-making body, once again provided the most excitement. For three days, hundreds of representatives from various bar associations throughout California debated the State Bar's legislative agenda for the coming year. Much like a political party convention, delegates roamed the floor cajoling other delegations to come out in support of their pet proposals.

Resolutions approved by the Conference of Delegates are reviewed by the Bar's 23-member Board of Governors and then sent to the Bar's lobbying arm in Sacramento. The conference approved 39 resolutions during the session.

Last year, 22 of the 98 resolutions approved by the conference became law, according to chairman Steven Wall, a partner at San Diego's Luce, Forward, Hamilton & Scripps.

The Bar's political activism has been muted since the U.S. Supreme Court's 1990 decision in *Keller v. State Bar*, but this year's conference tackled a rash of hot-button issues. Topics ranged from the embattled Judicial Nominees Evaluation Commission and the "Three Strikes and You're Out" law to arbitrators' immunity from civil liability and MCLE exemptions for government lawyers who do pro bono work.

JNE STIRS THE POT

After delegates voted on resolutions calling for changes to Three Strikes, and tabled a Bar Association of San Francisco-sponsored resolution backing the JNE Commission, a minor protest erupted when state Attorney General Dan Lungren arrived to address the conference.

As Lungren entered the hall, all but a handful of BASF delegates walked out to demonstrate their opposition to the AG.

Lungren, unruffled by the gesture, proceeded to blast the JNE Commission, which evaluates judicial candidates for state court, for abusing its power during last spring's confirmation of California Supreme Court Justice **Janice Rogers Brown**.

The JNE Commission had rated Brown "not qualified" for the post -- a rating that was widely reported in the press and raised during Brown's confirmation hearings. As an unelected, unaccountable body, the commission had clearly overstepped its authority, Lungren charged.

"The JNE Commission has served both well and ill," declared Lungren. "It's time to reassess the entity's existence and purpose."

Lungren's attack on the JNE Commission, however, didn't sway the Conference of Delegates. The next day, the delegates voted overwhelmingly to approve a resolution supporting the continued existence of the commission. Several delegates, including former Attorney General John Van de Kamp and Morrison & Foerster partner Melvin Goldman, spoke out in favor of the 17-year-old commission.

But Orange County Superior Court Judge Eileen Moore, offering a judicial perspective, said the commission needs to be more accommodating to those it evaluates. Moore likened her experiences with the JNE evaluation process to an inquisition where the agenda is known only to interviewers.

"If there is going to be an agenda in the JNE process, at least be kind and gentle enough to tell people ahead of time what the agenda is going to be," Moore said.

RARE DEADLOCK

One of the more gut-wrenching moments for some delegates came when the conference deadlocked on a resolution for the first time in at least 20 years. The issue itself was fairly esoteric, having to do with expanding summary judgment motions to cover all damage claims and, according to conference chairman Steven Wall, unlikely to be included in the Bar's legislative package. But for the approximately 475 conference delegates -- including Santa Clara County Deputy Public Defender Robert Weeks, the incoming chairman who was forced to break the logjam -- the fact that there was a tie vote created quite a stir.

The conference also defeated a proposal to exempt government lawyers who do pro bono work from MCLE requirements. For three years, proponents have pushed without success to give government attorneys a pass, arguing that public interest causes need all the help they can get in this era of diminished federal funding. Opponents, however, warn that exemptions would undermine the goals behind MCLE.

For the conference delegates, the debates are serious business. Members of the San Mateo County Bar Association donned red visors bearing their logo while their Southern California counterparts from the Orange County Bar Association donned green T-shirts.

Asked why BASF didn't have a team uniform, Ian Sweedler, an associate at Rogers, Joseph, O'Donnell & Quinn, quipped, "We prefer substance over style." Indeed, BASF stuck to its reputation for being one of the more active delegations by sponsoring or opposing dozens of resolutions, including backing a proposal to allow domestic partners to sue for wrongful death.

BASF president Mark Schickman, a partner at Fox & Grove and a vocal critic of the California Civil Rights Initiative aimed at abolishing public affirmative action programs, rallied support for a resolution praising State Bar Executive Director Herbert Rosenthal for his efforts to diversify the legal profession. Under Keller, the Bar is prohibited from taking any position on CCRI, also known as Proposition 209.

ERRATA

The BASF delegates didn't spend all their time on politicking: Rallying participants for a late-night poker game at BASF's hospitality suite was also a top priority. . . . In the "Everyone else is doing it, why shouldn't lawyers?" Department: The Macarena made its State Bar convention debut when a Bay Area contingent including Frank Winston, Susan Rabin and Darrel Horsted wove the popular dance into their delivery of the official delegate count. . . . James Seff, a wine regulatory partner at Pillsbury Madison & Sutro, started his three-year term on the Bar's 23-member Board of Governors. . . . It appeared that Towery, the outgoing Bar president, is ready to return to his civil litigation practice at San Jose's Hoge, Fenton, Jones & Appel after a demanding year: Delivering his umpteenth introduction at his successor's swearing-in ceremony Saturday, Towery told Chief Justice George, "I'm going to ask Chief Justice Stolpman to administer to Mr. Stolpman the oath of office." Coming quickly to Towery's rescue, George quipped: "I'm not ready to switch jobs with you yet, Tom. You may have the tougher job."

Reporter Krysten Crawford's e-mail address is k.crawford@counsel.com

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The Recorder

View Related Topics

October 8, 1996, Tuesday

SECTION: NEWS; PG. 1

HEADLINE: PUTTING PRIVACY TO THE TEST

State high court to hear arguments in suit over city's drug-testing plans

BYLINE: Rinat Fried

BODY:

The California Supreme Court is about to take up a case that could determine whether thousands of applicants for municipal jobs will be required to undergo drug testing as a condition of employment.

The issue before the state high court Wednesday in Loder v. Glendale, S043548, is whether cities can expand permissible testing beyond the limited scope already established for so-called safety-sensitive positions, such as law enforcement and firefighting.

Cities and privacy rights advocates across the state are closely watching the 10-year-old case, in which Glendale resident Lorraine Loder is seeking to bar the city from implementing a pre-employment and pre-promotion drug-testing program for almost all municipal jobs.

More than 20 California cities and counties have filed amicus curiae briefs in support of the city's position, while the American Civil Liberties Union has taken up Loder's cause.

In 1989, the U.S. Supreme Court issued two seminal decisions upholding an employer's right to drug test employees under certain conditions. In National Treasury Union Employees v. Von Raab, 489 U.S. 656, the high court ruled the government could conduct pre-promotional drug testing of customs officials who carry firearms; and in Skinner v. Railway Labor Executives Association, 489 U.S. 602, the court held that railroad workers could be drug tested after train accidents.

Since those decisions, federal and state appellate courts around the country have upheld mandatory drug testing in a variety of situations, from private sector employment to college and high school athletics.

Loder is the first case to go before the state Supreme Court addressing whether public sector job applicants can be drug tested.

Glendale attorneys have so far been unsuccessful in arguing that the goal of keeping drug users off the city payroll trumps the privacy rights of job applicants. As a result, non-safety-sensitive public sector positions remain among the few jobs in California where applicants are not subject to such tests.

Beyond determining whether city employees can be drug tested, Loder could affect other hot-button employment privacy issues, including electronic surveillance in the workplace.

"Given that the case will say something about privacy rights of employees, this case is bound to have ramifications beyond drug testing itself," says ACLU of Northern California staff attorney Edward Chen. "Our hope is that the court will use the case to reaffirm the protection of privacy rights."

DRUG TESTING MEETS THE ADA

The appeal in Loder stems from a 1992 ruling by Los Angeles County Superior Court Judge Ernest Williams that Glendale could drug test applicants for some non-safety-sensitive city jobs, including custodial and parking meter collection positions. But he exempted applicants for other jobs, such as illustrators and city attorneys.

In partly overturning that ruling, the Second District Court of Appeal in 1994 barred pre-employment and pre-promotional drug testing for all non- safety-sensitive municipal jobs.

"The city failed to demonstrate sufficient justification for mass testing," the Second District stated.

Beyond privacy issues, the Supreme Court will likely address the nexus between drug testing and the federal Americans with Disabilities Act, which deeply concerned the Second District.

While drug testing requires subjects to disclose any medication they are taking, the ADA explicitly prohibits employers from asking such questions until after a conditional offer of employment has been made.

In her opinion for the Second District, Justice Arleigh Woods wrote that drug testing would inappropriately reveal, for example, that an applicant is taking AZT, a treatment for AIDS, or that a woman is sexually active, because she is taking birth control pills.

"This privacy intrusion is not only unnecessary," she concluded, "it is illegal."

DOUBLE STANDARD?

Ronald Braden, chief assistant city attorney for Glendale, concedes the Glendale municipal ranks probably aren't overrun by drug abusers. But, he says, even occasional illegal drug use can cause on-the-job accidents.

"Why should employers have to incur that risk?" he asks.

Braden also points out that the California Supreme Court's 1989 ruling in Wilkinson v. Times Mirror, 215 Cal.3d 1034, upheld a private employer's right to conduct pre-employment drug tests. Cities, he contends, shouldn't be held to a different standard.

"There is no difference between the government as an employer and a private employer," says Braden, who will argue the case before the Supreme Court. "When you are making an employment decision, the standard is the same."

Opponents of drug testing, however, say the problem of workplace drug abuse is overblown, and insist the government's interest in ensuring drug-free librarians and file clerks is minimal.

"We do have a lot of people in the U.S. who use and abuse drugs," concedes Los Angeles-based Krakow & Kaplan partner Marvin Krakow, a former staff attorney for the ACLU who is working on Loder pro bono and will be arguing the case Wednesday. "But one of the biggest problems this country has is an inability to distinguish between use and abuse of all kinds of things. . . . The result is that we engage in very expensive conduct like drug testing to deal with a much more limited problem: people who have severe medical and social problems because of addiction."

HANGING IN THE BALANCE

Most observers say the court's analysis in Loder is likely to hinge on a balance-of-interests test offered in a 1994 drug-testing case, Hill v. National College Athletics Association, 7 Cal.4th 1.

In that case, the court upheld the NCAA's right to randomly drug test student athletes, concluding that, although testing constitutes an invasion of privacy, it isn't unconstitutional because "the invasion

is justified by a competing interest" -- the NCAA's interest in protecting the integrity of athletic competition (in the case of steroid abuse, for example) and to protect the safety of student athletes.

Though the Supreme Court refused to comment on employment drug testing in Hill, lawyers familiar with the case say that the balance-of-interests test will likely still apply.

"Hill sets a basic framework for balancing the privacy interest," says Steven Mayer, a partner at Howard, Rice, Nemerovski, Canady, Falk & Rabkin, who, with other lawyers from his firm, filed briefs on behalf of the plaintiff in Hill. "I wouldn't think that they would just junk it."

Gerald Marer, a Jackson, Tufts, Cole & Black of counsel who is serving as an appellate lawyer to Glendale, concurs. "What the Supreme will really do in this case," he says, "is look at an individual's interest of privacy and balance the invasion of that interest to determine whether it is substantial or minor."

Given turnover on the bench since the 1994 decision, however, there is some uncertainty over how the court will apply Hill. Three of the four justices who voted in favor of Hill -- Armand Arabian, Edward Panelli and the author, Malcolm Lucas -- have retired. Stanley Mosk, who dissented, and Joyce Kennard, who wrote a partial dissent, remain on the bench. Lucas, Kennard, Marvin Baxter, Ronald George and Kathryn Mickle Werdegard voted to review Loder.

Lawyers on both sides of Loder agree that moderate-conservative newcomers **Janice Rogers Brown** and Ming Chin are wild cards.

"We don't know what Chin and Brown are going to say," says Krakow. "That should make it interesting."

Reporter Rinat Fried's e-mail address is r.fried@counsel.com

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View Related Topics

October 8, 1996, Tuesday
Correction Appended

SECTION: NEWS; PG. 1

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Reporter Rinat Fried's e-mail address is r.fried@counsel.com

CORRECTION:

Due to an error by reporter Rinat Fried, an article on Tuesday about a California Supreme Court drug-testing case mistakenly said that Howard, Rice, Nemerovski, Canady, Falk & Rabkin filed briefs on behalf of the plaintiff in an earlier Supreme Court drug-testing case, Hill v. National Collegiate Athletic Association. In fact, the firm represented Stanford University, the intervenor in the case, at oral arguments. We regret the error.

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View Related Topics

October 3, 1996, Thursday

SECTION: NEWS; PG. 1

HEADLINE: COURT TAKES CASE THAT UPHELD BAN ON ASSAULT RIFLES

BYLINE: Scott Graham

BODY:

The California Supreme Court decided Wednesday on its own motion to review an appellate opinion that broadly interpreted California's assault weapons ban.

The move is a boost to Attorney General Dan Lungren, whose office has been fighting efforts to expand the types of guns banned under the seven-year-old law.

In fact, Lungren's chief deputy urged the court to take the case and persuaded an assemblyman to write the court as well, even though the AG's office had bowed out of the case before the court of appeal.

Four justices -- the minimum necessary to take up a case -- voted to review People v. Dingman, 96 C.D.O.S. 5541, in which the Sixth District Court of Appeal upheld James Allen Dingman's conviction for illegal possession of an SKS rifle with a detachable magazine.

It's the second time in a week the Supreme Court has agreed to examine the assault weapons ban. But in the case accepted last week, Harrott v. County of Kings, 46 Cal.App.4th 592, the court of appeal had ruled in favor of gun owners.

The 1989 Assault Weapons Control Act bans a number of rifles, including the "SKS with detachable magazine," and charges the attorney general's office with promulgating a list of banned weapons.

Sixth District Justice William Wunderlich rejected Dingman's claim that the statute was vague, finding that "any ordinary person of reasonable intelligence" would understand that a Chinese-made SKS rifle with a detachable magazine is prohibited under the law.

But Lungren disagrees.

His office distinguishes between SKS rifles that are built to accept detachable magazines, and those that are modified after sale to accept detachable magazines. The latter, the AG's office argues, are legal.

A procedural problem threatened to stop the Dingman case cold when the defendant's attorney filed his petition for review late -- and the Supreme Court reused to accept it.

But Lungren's chief deputy, M. David Stirling, wrote to Chief Justice Ronald George on Sept. 16, pleading with the court to take the case. He urged the court to reject the Sixth District's "literal interpretation" of the SKS prohibition, and to instead read the statute "as a whole."

"According to the federal Bureau of Alcohol, Tobacco and Firearms, the SKS model that is designed to accept a detachable magazine has been banned from importation since 1989, while in excess of three million of the other model, designed with a magazine as an integral part of the firearm, have

been lawfully imported," Stirling explained. "Furthermore, domestic companies manufacture after-market accessories, including detachable magazines for those firearms. One such California company alone has produced and legally sold over five million of those after-market magazines since 1990. This, then, is the scope of the problem we are dealing with."

He continued, "Tens of thousands of California citizens may become criminals simply by using a perfectly lawful rifle with a lawfully purchased magazine without adequate notice that such activity brings them within the proscriptions of the weapons ban."

Republican Assemblyman Jim Battin of Palm Desert, meanwhile, wrote to Supreme Court Justice Marvin Baxter, making a similar plea.

On Wednesday, George, Baxter and Justices Kathryn Mickle Werdegard and **Janice Rogers Brown** voted to grant review.

DEPUBLICATION DENIED

Also on Wednesday the court unanimously denied a bid to depublish an appellate ruling that ripped social workers for using a father's denials of child molestation as evidence to break up his family.

Fourth District Justice David Sills' ruling in *Blanca P. v. Superior Court*, 45 Cal.App.4th 1738, had ordered a new hearing for a Garden Grove resident identified in court papers as Rogelio P. to determine whether he had molested his 3-year-old daughter. Sills and his colleagues were upset that social workers had refused to return the children to Rogelio or his wife based mostly on his persistent denials that he had molested his daughter.

In letters to the Supreme Court, counsel for Los Angeles and Orange counties said the ruling could impede efforts to protect children and rehabilitate parents who sexually abuse them.

DEAD AGAIN

The court also issued one of its most unusual orders of the year in one of the most bizarre cases of the year.

In July, the Fourth District upheld Thomas Edwin Keister's conviction for attempted lewd acts on children, even though Keister is dead and the "children" he attempted to molest don't exist.

Keister had been lured to a motel through a San Bernardino sheriff's sting operation, in which Keister thought he would have the opportunity to provide "special education" to two underage girls. When he entered the hotel room where the girls were said to be, he was arrested. There were no girls in the room.

While the appeal was pending, Keister's attorney notified the court that Keister had died. Fourth District Justice Manuel Ramirez wrote in the opinion that the court was deciding the case anyway because it "poses an issue of broad public interest that is likely to recur."

On Wednesday, the Supreme Court sent the case back to the Fourth District, "with directions to determine whether Thomas Edwin Keister has in fact died and, upon filing of a certified copy of the death certificate, to vacate its opinion and enter an order permanently abating all proceedings with respect to him."

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September 26, 1996, Thursday

SECTION: NEWS; PG. 1

HEADLINE: SUPREME COURT TO CLARIFY BAN ON ASSAULT WEAPONS

BYLINE: Scott Graham

BODY:

The California Supreme Court agreed Wednesday to determine the breadth of the state's assault weapons ban, granting review in the first of two conflicting opinions from the court of appeal.

Five justices voted to review Harrott v. County of Kings, 46 Cal.App.4th 592, in which the Fifth District Court of Appeal held in June that the ban applies only to assault weapons specifically mentioned in the statute or on a list developed by the attorney general. The Sixth District has ruled that the ban also applies to the functional equivalent of those weapons.

Gun control advocates have complained that under Harrott, manufacturers can circumvent the law by simply giving a weapon a new name.

Essentially, the case will settle a budding power struggle between the courts and Attorney General Dan Lungren over enforcement of the ban.

Some of Lungren's critics, including former San Francisco District Attorney Arlo Smith, have complained that Lungren's office doesn't enforce the ban vigorously because of political pressure from the gun lobby. Lungren has been blocked from adding more weapons to the list, pending a ruling from the Third District in another case.

Kings County Sheriff Ken Marvin said he welcomes the chance for a definitive ruling from the Supreme Court. "I don't want to be seizing weapons that are lawful," he said, adding that the issue is "important to the safety of our citizens and the safety of our officers."

In Harrott, attorney J.W. Harrott purchased a gun collection that had been seized by the sheriff's office. The sheriff turned over some of the weapons, but refused to release a Clayco rifle that is nearly identical to the banned AK-47 made in Russia.

The assault weapons ban applies to various specified weapons such as the AK series, and "all other models that are only variations, with minor differences."

However, the ban also directs the AG to promulgate an illustrated list of those weapons, and it states that specific models were included in the statute "because it was the most effective way to identify and restrict a specific class of semiautomatic weapons."

At a superior court hearing, expert witnesses -- including a criminalist from Lungren's office -- testified that the differences between the Clayco and the banned AK-47 were minor. Both also opined that the Clayco is not an "assault weapon" under the statute.

The criminalist, John Hamman, stated that he considered the ultimate factor "how the firearm is labeled or marked by the manufacturer," according to the Fifth District. He also testified that he had consulted with Deputy AG Paul Bishop, Lungren's point man on the weapons ban.

Superior Court Judge Peter Schultz disagreed with both experts, ruling that the Clayco falls under the ban because it is the functional equivalent of an AK-47.

The Fifth District reversed. Reading all of the statute together, Justice Timothy Buckley concluded that "unless the Legislature specifically identified a firearm as being an assault weapon in the statute, it delegated to the attorney general the exclusive authority to have a firearm designated as an assault weapon."

Leaving that determination up to individual superior court judges would create due process problems, Buckley added, because citizens need "clear and unequivocal notice which firearms have been declared to be assault weapons."

A month after the Fifth District ruled, the Sixth District disagreed in People v. Dingman, 96 C.D.O.S. 5541.

Affirming a criminal conviction for violating the ban, Sixth District Justice William Wunderlich concluded that the AG's list is advisory only. "The actual interpretation of the statute, i.e., what weapons are prohibited thereby, is a function for the courts once the Legislature has spoken," Wunderlich wrote.

Supreme Court Justices Stanley Mosk, Joyce Kennard, Kathryn Mickle Werdegar, Ming Chin and **Janice Rogers Brown** voted to review Harrott. The court is expected to decide next month whether to review Dingman.

MAJOR INSURANCE CASE DOCKETED

The high court also agreed to review the First District's harmless error finding in a massive insurance coverage dispute worth more than \$100 million to the litigants.

First District Justice Zerne Haning III concluded in Aerojet-General v. Transport Indemnity, 45 Cal.4th 1192, that despite being read faulty instructions, a jury properly found that a Sacramento rocket laboratory -- and not its insurers -- was responsible for the cleanup of 8 trillion gallons of contaminated groundwater.

Justices Mosk, Kennard, Brown and Marvin Baxter voted to take the case.

The court's order continues a trend of taking up major insurance cases since the appointment of Ronald George as chief justice. But interestingly, neither Justice George nor Justice Chin -- who is expected to act as the court's "expert" on insurance issues -- voted to grant review in Aerojet.

In his petition for review, Aerojet counsel Scott DeVries of Nossaman, Guthner, Knox & Elliott argued that the error Haning found harmless -- instructing jurors that Aerojet's insurance policy did not cover negligence -- went to the heart of the case.

The instruction was made before and after the presentation of evidence, DeVries wrote, and the insurers' attorneys displayed it on an overhead projector during closing argument. "Despite all of this, the court of appeal held that the crucial instructional error was non-prejudicial!" DeVries wrote.

Haning had concluded that there was sufficient evidence that Aerojet knew it was damaging the environment to trump any negligence defense.

The insurers in the case also petitioned for review, objecting to part of the ruling that held them responsible for the cost of certain investigations. The court granted both petitions.

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September 11, 1996, Wednesday

SECTION: NEWS; PG. 1

HEADLINE: LIVELY DEBATE OVER REACH OF TOXICS LAW

BYLINE: Scott Graham

BODY:

Voicing a wide array of concerns, California Supreme Court justices on Tuesday questioned whether the state's 1986 toxics control law should apply to plumbing that leaches lead into tap water.

Before a packed courtroom, state attorneys and advocates for faucet manufacturers argued over the meaning of Proposition 65, which prohibits the release of toxic chemicals into any "source of drinking water."

The case has been fiercely litigated, with manufacturers arguing that "source" refers to lakes and other reservoirs, and environmentalists and the attorney general's office insisting it must include tap water in order to effectuate the voters' intent.

Tuesday's hearing produced a lively debate, with all seven justices firing off questions. At times they appeared to be jousting with each other as much as with counsel.

Deputy AG Edward Weil began by arguing that if you asked the average voter to name his source of drinking water, he'd say the tap.

"I question your statement," Justice Kathryn Mickle Werdegard told him. "I would think they'd say Hetch Hetchy or the lakes in Marin or the Russian River."

Later in the argument, Chief Justice Ronald George presented a hypothetical scenario in which a restaurant patron orders bottled water but receives what he thinks is tap water. "If you asked the waiter what was the source of that water," George asked, "could he be expected to say Hetch Hetchy?"

The case, *People v. Superior Court (American Standard)*, 44 Cal.App.4th 972, has been closely watched in the California environmental bar. Prop 65, officially known as the Safe Drinking Water and Toxic Enforcement Act of 1986, bans the "discharge or release of a chemical known to the state to cause cancer or reproductive toxicity" where it "probably will pass into any source of drinking water."

San Francisco Superior Court Judge Carlos Bea concluded that "source" did not include the taps that deliver water, and a bitterly divided panel of the First District Court of Appeal agreed last year.

Weil and environmental groups involved in the case were particularly alarmed at the First District's holding that, because Prop 65 contains a provision for civil penalties of up to \$2,000 per violation, it is "penal in nature" and so ambiguities must be resolved in favor of defendants.

The Supreme Court granted review last September, but not before seven of the 11 defendant

manufacturers had agreed to provide warnings and reduce the lead in their products. Three more manufacturers settled and a fourth, Kohler Co., struck a partial settlement over the winter. Kohler then moved to dismiss the appeal, but the Supreme Court refused.

On Tuesday it appeared the manufacturers perhaps shouldn't have been so eager to get rid of the case. Justices Werdegar, Ming Chin and **Janice Rogers Brown** all sounded skeptical of the environmentalists' interpretation of the statute.

Brown and Chin asked Deputy AG Weil about a 1988 letter from the state Department of Health Services advising industry that the agency would not interpret "sources" as including tap water.

Weil argued that the agency had never formally adopted that interpretation.

"This sounds like a bureaucratic nightmare to me," Chin replied. "Citizens come to the state agency and say, 'Does this apply to me?' The state agency writes back, 'No, it doesn't apply to you.' And then they get to court and they say, 'Well, we didn't formally adopt it.'"

Justice Stanley Mosk, on the other hand, seemed receptive to Weil's argument that the court should read the statute broadly to effectuate the voters' intent.

"The title of this initiative," he told Shirley Hufstedler, representing the California Manufacturers Association, is "'Restrictions on Toxic Discharges into Drinking Water.' It doesn't say it has to be at Hetch Hetchy. It could be anywhere, including pipes that go into your kitchens." Hufstedler is of counsel in the Los Angeles office of Morrison & Foerster.

Chief Justice George and Justice Joyce Kennard appeared to be leaning toward the state's position, but George also expressed concern about fining businesses \$2,000 for millions of violations already committed.

In a hint of what may be to come, Mosk suggested that the court's opinion would be prospective only -- faucets already manufactured and installed would be exempt.

FAILING GRADES

In another case argued Tuesday, the justices sounded extremely skeptical of a Sixth District Court of Appeal opinion that held criminal convictions reversible per se when defense lawyers haven't maintained compliance with the State Bar's MCLE program.

Justice Eugene Premo held in *People v. Ngo*, 42 Cal.App.4th 291, that because MCLE requirements are directly related to professional competence, the representation of any criminal defendant by an attorney who is not in compliance violates the right to counsel guaranteed by the California Constitution.

Deputy Attorney General Juliet Haley argued that the Sixth District had improperly created a presumption of incompetence for members of the State Bar, and that the better approach would be to examine the trial record to see whether the attorney actually provided incompetent counsel.

The court sounded sympathetic. Justice Kennard pointed out that many attorneys who work for the state government are exempt from MCLE requirements.

Haley finished the thought. "So according to the court of appeal, I am incompetent," she said.

"As are all of our attorneys," Kennard said, drawing a round of laughter from her colleagues.

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September 5, 1996, Thursday

SECTION: NEWS; PG. 1

HEADLINE: HOW FREE IS SPEECH IN THE WORKPLACE?

Supreme Court to decide if racist comments can be subject to prior restraint

BYLINE: Scott Graham

BODY:

The California Supreme Court on Wednesday agreed to examine a case that pits a manager's free speech guarantees against an employee's right to be free from racist invective while on the job.

A divided First District Court of Appeal ruled in May that the courts could enjoin racist speech if it creates an abusive work environment. The dissenting judge blasted the ruling as an unconstitutional prior restraint on free speech in the name of political correctness.

"These directives would export middle-class manners, appropriate to a court or an office, into the vigorously physical, more frank and less euphemistic workaday world," Justice J. Clinton Peterson complained in *Aguilar v. Avis Rent-a-Car System*, 45 Cal.App.4th 933.

Now all of the Supreme Court justices except Stanley Mosk have voted to review the case.

Aguilar presents a provocative issue of first impression for the California Supreme Court, which numbers three minority members with the appointments of Justices Ming Chin and **Janice Rogers Brown** earlier this year. Several justices, including Chin and Chief Justice Ronald George, have examined the issues of racial and gender sensitivity in the courts on behalf of the California Judicial Council.

Aguilar stems from an injunction against Avis and John Lawrence, a manager at the company's San Francisco airport location. Seventeen Hispanic employees sued the company, Lawrence and other Avis managers in 1993. They accused Lawrence of routinely cursing and demeaning them on the basis of their race and poor English; according to the First District, Lawrence reportedly called them "wetbacks" and other "racial epithets in Spanish."

A San Francisco Superior Court jury awarded the employees \$135,000, much of it based on Lawrence's conduct. Judge Carlos Bea then enjoined Lawrence from "using any derogatory racial or ethnic epithets directed at, or descriptive of, Hispanic/Latino employees of Avis" and ordered Avis to make sure Lawrence didn't continue making such comments.

The First District upheld the injunction to the extent it applied within the workplace. Justice Donald King concluded there was no First Amendment violation because Lawrence's racist speech had the secondary effect of creating an abusive work environment, in violation of California's Fair Employment and Housing Act.

"We are guided by the obvious analogy to sexual harassment in the workplace, which the U.S. Supreme Court tells us may likewise have the secondary effect of creating an abusive work environment," wrote King, who was joined by Justice Zerne Haning III.

"This is much more than free expression in a rude or impolite manner," King explained. "This is

employment discrimination."

Peterson called the majority's ruling unprecedented. "The trial court's injunction and the majority's dicta seemingly require that an automobile service worker who addresses his co-workers on the job do so at his peril, unless he addresses them in some vaguely defined, politically correct manner."

Avis' attorney, Donna Rutter of McKenna & Cuneo, echoed Peterson's arguments in her petition for review.

"Left unchecked," Rutter wrote, "the court of appeal's erroneous 'secondary effects' analysis could well be applied to proscribe a wide variety of protected expression in the media, and in schools, universities, and other organizations outside the workplace that have heretofore escaped the pen of the censor."

While on the First District two years ago, Chin addressed a similar issue in a criminal law context in *In re Steven S.*, which upheld a California statute that outlaws the burning of crosses when done to terrorize people.

Chin rejected a free speech challenge to that law based on the same U.S. Supreme Court precedent that Avis is relying on in *Aguilar*. "An unauthorized cross burning on another person's property . . . does more than convey a message," Chin wrote. "It inflicts immediate injury by subjecting the victim to fear and intimidation, and it conveys a threat of future physical harm."

Justice Kathryn Mickle Werdegarr, also on the Supreme Court now, signed Chin's opinion in *Steven S.*

'FULL EMPLOYMENT ACT' STANDS

In a huge disappointment to insurance companies, the Supreme Court on Wednesday declined to review an appellate ruling that cleared the way for "bad faith" type suits brought under the state's unfair competition law.

Critics called the Second District Court of Appeal's ruling in *State Farm v. Superior Court (Allegro)*, 96 C.D.O.S. 3713, a full employment act for lawyers. Insurance lawyers were joined by the California Chamber of Commerce and the Association for California Tort Reform in pleading for Supreme Court review, but not one justice voted to hear the case.

Second District Justice H. Walter Croskey's May opinion in *Allegro* concluded that California's ban on statutory fraud and bad faith claims under the Unfair Competition Act does not preclude policyholders from suing their insurers for common law fraud and bad faith violations.

But recovery would be limited to injunctive relief or restitution, Croskey noted.

That was small comfort to State Farm Fire & Casualty Co., which is facing claims from 165 policyholders in connection with damage from the Northridge earthquake of 1994. The policyholders accuse the company of having revised their policies before the quake without giving them proper notice.

State Farm -- whose petition for review was signed by eight lawyers from Los Angeles' Horvitz & Levy and Robie & Matthai and the Palo Alto office of Heller Ehrman White & McAuliffe -- accused the plaintiffs of running an "end-around" past a 1988 Supreme Court ruling that limited fraud and bad faith actions against insurers.

They said the ruling opens the door to "thermonuclear" discovery efforts, attaching a copy of a request for documents submitted in the case.

The Association for California Tort Reform warned that the court of appeal had created "a virtual 'Omnibus Act,' conferring upon anyone who feels aggrieved about some practice that is arguably unfair, fraudulent . . . or unlawful, an independent action for equitable relief."

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September 3, 1996, Tuesday

SECTION: COURT WATCH; PG. 4

HEADLINE: DISSENT GROWING ROUTINE IN SUPREME COURT CONFERENCES

BYLINE: Scott Graham

BODY:

Justices of the California Supreme Court were often criticized during Chief Justice Malcolm Lucas' reign for voting in "lockstep." Dissent -- both in opinions and the court's weekly conference votes on petitions for review -- was limited for the most part to Justices Stanley Mosk and Joyce Kennard.

That began to change toward the end of Lucas' tenure. And while the court hasn't issued many opinions yet under new Chief Justice Ronald George, it's clear from the conference orders that the trend toward diverging views is alive and well.

Four-to-three splits have become fairly commonplace on those orders, which determine which cases the court will hear. New justices Ming Chin and **Janice Rogers Brown** have joined Mosk, Kennard and Kathryn Mickle Werdegard as regular dissenters.

One of those splits came last week in the interesting case of Bonner v. City of Santa Ana, 45 Cal.App.4th 1465.

Marshone Bonner was a homeless man who kept all his possessions in a trash bag, according to the Fourth District Court of Appeal's opinion in the case. He and other homeless people hid their bags behind bushes near the Santa Ana city hall. In 1989 city workers loaded the bags in a truck and sent them off to a trash dump.

Bonner, who says the bag contained "cherished photographs of his daughters," sued the city for violating his equal protection and due process rights under the California Constitution. A jury awarded him \$9,300.

But the Fourth District threw out the award, ruling that damages are not available for those constitutional violations. The court cited Gates v. Superior Court, 32 Cal.App.4th 481 (1995), in which Los Angeles business owners unsuccessfully sought to recover damages because of the police's failure to protect their property during the 1992 Rodney King riots.

Bonner's counsel, Irvine practitioner Richard Derevan, asked the California Supreme Court for review.

"This case," he wrote, "raises an issue at the core of our constitutional system of government: the remedies available for breach of the California Constitution."

Derevan, who said the opinion creates "a bias against enforcing the state constitution," argued that the L.A. case was different because it involved inaction, rather than affirmative misconduct.

He added that Bonner would have sued for conversion if he knew the Fourth District was going to disallow the constitutional damages on its own motion.

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September 3, 1996, Tuesday

SECTION: COURT WATCH; PG. 4

HEADLINE: GEORGE BACKS JNE COMMISSION

BYLINE: Scott Graham

BODY:

Disagreeing with a former colleague of his, Chief Justice Ronald George said last week he did not favor abolishing the State Bar's Commission on Judicial Nominees Evaluation.

Conservatives led by former state Supreme Court Justice Armand Arabian have been calling for the elimination of the JNE commission, as it is known, ever since it rated **Janice Rogers Brown** not qualified for the high court.

Conservatives were further outraged when someone leaked details of the commission's criticisms to the press, and the commission chairwoman disclosed at Brown's confirmation hearing that Brown previously had been rated not qualified.

As chairman of the Commission on Judicial Appointments, George ignored the JNE commission's advice and voted along with Attorney General Dan Lungren and Third District Court of Appeal Justice Robert Puglia to confirm Brown to the high court.

George was asked about the JNE commission at a press luncheon Thursday organized by the Associated Press. "I think it serves a valid function and I don't think it should be abolished," he said.

The chief justice said that appointments secretaries to various governors have told him that not only does the commission help them learn more about judicial candidates, it also helps them eliminate unqualified candidates being promoted by legislators or other powerful interests. The governor submits their names, knowing they aren't qualified, and when the JNE Commission turns thumbs down, the governor and the appointments secretary are "off the hook," George said.

George did say that some "fine-tuning" may be in order. He noted that confidentiality is not always honored, and suggested that the commission develop more specific criteria for evaluating candidates.

George also spoke about another kind of judicial evaluation -- elections.

The chief justice said he was pleased that the Legislature has agreed to change the ballot for appellate judges' retention elections by eliminating the number of years remaining in their terms.

Many citizens appeared to be voting against judges simply because their remaining terms were longer than their colleagues', George said.

He added that he wants to get more information about judges to the public, although he acknowledged judges are divided on whether it should include items like which governor appointed them or the judges' "track records" on the court.

But he said most agree it should at least include experience and training. If that information can't be added to the ballot, he said, the Judicial Council might consider making it available on the Internet.

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August 30, 1996, Friday, Home Edition

SECTION: Part A; Page 1; Metro Desk

LENGTH: 1225 words

HEADLINE: COURT RULING AIDS WOMEN WHO KILL BATTERERS;
TRIALS: BY CLEARING WAY FOR EXPERT TESTIMONY ON SYNDROME, JURISTS MAKE
IT EASIER FOR DOMESTIC VIOLENCE VICTIMS TO WIN ACQUITTALS.

BYLINE: MAURA DOLAN, TIMES LEGAL AFFAIRS WRITER

DATELINE: SAN FRANCISCO

BODY:

In a victory for domestic violence victims who fight back, the California Supreme Court made it easier Thursday for battered women who kill to prove they acted in self-defense and to win acquittals at trial.

The court held, in a unanimous decision that reversed the conviction of a Fresno woman who shot her live-in companion, that judges must allow juries to consider expert testimony about "battered women's syndrome" in deciding whether to acquit a woman who killed a spouse or partner.

Previously, juries could use such evidence only to determine whether the woman honestly feared for her life, a finding that could justify a verdict of manslaughter rather than murder but was not a basis for acquittal.

Under Thursday's ruling, juries in California can consider expert testimony in deciding whether a "reasonable person" in the defendant's position would have felt such danger, the legal hurdle that must be met for acquittal.

"Battered women's syndrome" is a behavioral condition that experts say afflicts women who are systematically abused. The pattern of violence destroys their self-esteem, leaves them feeling powerless and may eventually lead women to respond violently. Victims may move from one batterer to another in their lives, with the violence often escalating.

The women may try to help themselves by contacting police or running away, but they often stay in abusive situations because they feel responsible for the problem or because of lack of money, social isolation, fear of reprisals and lack of self-confidence. Although Thursday's decision affects relatively few defendants, the cases often pose difficult issues for juries and draw public attention.

"This is a very important decision in California and it is a great victory for battered women," said Minouche Kandel, who represented supporters of battered women before the court. "For the first time there is a clear message that expert testimony on domestic violence is relevant to the reasonableness of the battered person's belief that they were in danger."

The justices overturned the voluntary manslaughter conviction of Evelyn Humphrey, who in 1992 shot and killed her companion, Albert Hampton, at their Fresno home. Humphrey was released from prison earlier this week after serving nearly four years and is living with her mother in Fresno, her attorney said. The ruling will wipe her conviction from the books.

The high court said that the trial judge erred in refusing to allow the jury to consider expert testimony to evaluate whether Humphrey met the legal requirements for an acquittal.

"Because evidence of battered women's syndrome may help the jury understand the circumstances in which the defendant found herself at the time of the killing," wrote Justice Ming W. Chin, author of the majority opinion, "it is relevant to the reasonableness of her belief" about the danger she faced.

Prosecutors complained that the court's decision was too sweeping and may be used to expand defenses for less sympathetic defendants, including gang members.

"It just opens the door to testimony by experts against other experts about what the psychological state of the defendant was at the time they committed the murder," said Deputy Atty. Gen. Janet E. Neeley.

Signing the opinion with Chin were Justices Ronald George, Stanley Mosk, Joyce Kennard and Kathryn Mickle Werdegard.

Justices Marvin Baxter, Werdegard and **Janice Rogers Brown** agreed, in separate concurrences, that Humphrey's conviction should be voided. But they expressed concerns that the court's decision was too broad. Baxter, for instance, said a lot of testimony about battered women's syndrome might be irrelevant to a self-defense claim, and jurors should be so instructed.

Humphrey said she killed her live-in companion because she thought he would kill her. She said Hampton had been drinking the day before the shooting, hit her repeatedly and at one point shot at her. The bullet went through a bedroom window and struck a tree outside.

On the day of the killing, Humphrey told police, Hampton got drunk, swore at her and started hitting her again. She said she pointed the gun at him and told him, "You're not going to hit me anymore." Fearing that Hampton was going to strike her or try to grab the gun, she shot him, she said.

Tests showed that Hampton had no drugs or alcohol in his blood when he was killed and found that Humphrey was very drunk.

Evidence also showed that Humphrey had a history of being abused by older men, including her father, and witnesses confirmed that Hampton had repeatedly battered her.

Dr. Lee Bowker, who testified as an expert in "battered women's syndrome," told the jury that a batterer's violence often escalates over time, and the victim senses this. The victim tends to watch the batterer for signs of accelerating abuse, noticing slight changes in behavior or expressions that might indicate violence is coming. Humphrey, the expert said, suffered from "battered women's syndrome" in "about as extreme pattern as you can find." Justice Chin, writing for the court, said this testimony was important in determining whether a reasonable person in Humphrey's situation would have feared imminent danger to her life.

"As violence increases over time, and threats gain credibility, a battered person might become sensitized and thus able reasonably to discern when danger is real and when it is not," Chin wrote.

Jim Fahey, Humphrey's lawyer, said the ruling will affect only battered women who kill in confrontation, not when their husbands or partners are sleeping. "It does not change the standard of self-defense in California, which is the person has to actually and reasonably fear grave imminent harm of lethal force," he said.

He noted that Humphrey probably would have been out of prison a year ago had she decided not to appeal the case to the state Supreme Court. A lower appellate court had ordered a new hearing on a gun conviction that lengthened her three-year manslaughter sentence, but the trial court would not hold that hearing while the Supreme Court case was pending.

Attorneys in the case were uncertain about whether the ruling would be applied retroactively. Deputy Atty. Gen. Neeley said Supreme Court rulings generally do not affect cases already decided unless the court specifically says the decision is retroactive, which it did not in this case.

Gov. Pete Wilson has received about 50 applications for commutations from persons convicted of killing in domestic violence situations. He has acted on about 19 of the cases, reducing the sentence of two inmates.

He gave full executive clemency to Frances Mary Caccavale, who served six years after stabbing her husband of 49 years, citing her advanced age. In a second action, he reduced the 15-years-to-life sentence of Brenda Aris, convicted of killing her husband in his sleep, to 12 years to life. Wilson said he felt compassion for the "pain and terror" she endured from her husband over the years.

In 1995, California logged 60,279 arrests for spousal abuse, according the state attorney general, and 179 murders were blamed on domestic violence. Women were generally the victims.

A previous federal study found that of 540 spousal murder cases in the nation's largest counties, women were the defendants in 41%.

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August 30, 1996, Friday

SECTION: NEWS; PG. 1

HEADLINE: SUPREME COURT RULES FOR BATTERED WOMEN

BYLINE: Scott Graham

BODY:

Handing a victory to battered women's advocates, the California Supreme Court on Thursday made it easier for women who kill their abusive mates to win acquittals on the basis of self-defense.

But the justices seemed to disagree on just how much easier it should be

In a unanimous decision on a politically charged issue, the court orderenew trial for Evelyn Humphrey, who was convicted of voluntary manslaughter for a 1992 murder. The court held that Humphrey's jury should have been allowed to consider expert testimony about the effects of battered women's syndrome in deciding whether Humphrey reasonably believed she was in imminent danger of death or serious harm when she shot Albert Hampton to death in 1992.

In so doing the justices disapproved two appellate opinions that had effectively limited the battered women's syndrome defense in many cases to a finding of manslaughter.

Those opinions, Justice Ming Chin wrote in Thursday's ruling, "failed to consider that the jury, in determining objective reasonableness, must view the situation from the defendant's perspective." Instead, the jury had based its decision on what an objective person would consider reasonable.

In three separate concurrences, other justices suggested that the court should be more specific about what kinds of expert testimony on battered women's syndrome would be admissible on the issue of reasonableness.

One opinion came from Justice **Janice Rogers Brown**, the court's newest me

"For years the lower courts, poised precariously upon the slippery slopepersonalized defenses, have tried valiantly not to ski down it," Brown wrote. The majority ruling, she said, leaves them in the same spot. "This only begins, rather than ends, the discussion."

Minouche Kandel, a San Francisco attorney who filed an *amicus curiae* on behalf of 34 battered women's advocacy groups, called Chin's opinion "a wonderful, wonderful ruling."

Kandel said the court had not created a special rule for battered women. Instead, the court had simply ensured that "battered women have the same ability to present a defense as any other defendant."

Elizabeth Bader, a San Francisco appellate attorney who advocates frequently on women's issues, agreed. "It really brought this whole concept of voluntary manslaughter up to date and sort of leveled the playing field" for men and women, she said.

Humphrey's attorney, Arcata solo practitioner Jim Fahey, also was pleaseCoincidentally, he said, Humphrey's sentence was completed Thursday.

GANG MEMBER ANALOGY

People v. Humphrey, S045985, stems from Humphrey's fatal shooting of Hampton in Fresno on March 28, 1992. She testified that the day before, Hampton had struck her twice and fired a gun at her, then vowed not to miss next time. (The ruling will be published in Tuesday's California Daily Opinion Service.)

The next day, she testified, Hampton became intoxicated, swore at her and hit her again. Thinking he was about to grow more violent, Humphrey picked up a gun and told him she would not let him hit her again. When he made a threatening move, she shot him.

At trial, family members testified that Hampton had beaten Humphrey repeatedly. The defense also called a physician to testify about battered women's syndrome and how women behave in abusive relationships. He said battered women are aware of the escalating violence inherent in a battering relationship, and are particularly sensitive to the danger it represents to them.

But Fresno Superior Court Judge A. Dennis Caeton limited the use of the expert's testimony. The jury could use it only to determine whether Humphrey honestly believed she was in imminent danger of great bodily injury. Such a finding entitles a defendant to a finding of voluntary manslaughter.

However, the jury could not use the expert evidence to determine whether a reasonable person would have acted as Humphrey did. Such a finding is necessary to acquit a defendant altogether.

The Fifth District Court of Appeal affirmed Caeton's instruction and upheld the voluntary manslaughter conviction in an unpublished opinion.

Before the Supreme Court, Deputy Attorney General Janet Neeley argued that the question of reasonableness calls for an objective evaluation of whether a reasonable person -- not necessarily the defendant -- would have acted as she did.

She warned that broadening the rule for battered women would invite similar defenses from youths who blame their crimes on abusive environments. "I particularly see that happening in gang cases," she said.

Chin disagreed. "Our decision would not, in another context, compel adoption of a 'reasonable gang member' standard," he wrote. "The jury must consider defendant's situation and knowledge, which makes the evidence relevant, but the ultimate question is whether a reasonable person, not a reasonable battered woman, would believe in the need to kill to prevent imminent harm."

Specifically, Chin concluded that Humphrey's jurors could have considered expert testimony that battered women develop a heightened sense of when their mates are about to become violent, and are "thus able reasonably to discern when danger is real and when it is not."

Neeley did not return a phone call Thursday afternoon seeking comment.

In her 16-page concurrence, Brown suggested other circumstances where the testimony might be admissible: for example, when there have been prior threats and a cycle of escalating abuse.

But, she added, "In many circumstances, battered women's syndrome will be irrelevant to the question of objective reasonableness because the facts raise a traditional and therefore readily assessable self-defense claim, for example, when the victim threatens or approaches the defendant with a gun or knife or when the two struggle over a weapon."

In addition, "the jury must not confuse the question whether a reasonable person in the defendant's circumstances would have perceived a threat of imminent injury or death with the notion that killing the abuser would be a 'reasonable,' i.e., understandable, response to ongoing physical and psychological abuse."

Chin agreed in his opinion that such an instruction "might be appropriat

Brown's opinion was joined by Chief Justice Ronald George -- who also siChin's opinion -- and Justice Marvin Baxter.

Baxter wrote separately to say he disagreed with the "broad proposition"that battered women's syndrome testimony is "generally relevant" without regard to the facts of the particular case or the content of the testimony. " As Justice Brown explains," Baxter said, "some evidence regarding battered women's syndrome may be relevant in a particular case."

Justice Kathryn Mickle Werdegarr agreed with Brown in her own concurrencethat the issue "calls for a more specific analysis of the relationship between expert testimony and a claim of reasonable self-defense."

LOAD-DATE: August 30, 1996

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Sacramento Bee

August 30, 1996, METRO FINAL

SECTION: MAIN NEWS; Pg. A1

LENGTH: 1080 words

HEADLINE: STATE'S ABUSED WOMEN WHO KILL MAY GO FREE

BYLINE: Claire Cooper, Bee Legal Affairs Writer

DATELINE: SAN FRANCISCO

BODY:

The California Supreme Court paved the way Thursday for juries to acquit more battered women who kill their abusers.

The court said evidence of battered women's syndrome may be considered in determining whether a woman killed in reasonable self-defense. One characteristic of the syndrome is acute sensitivity to danger from a longtime abuser. An other is inability to walk away from an abusive situation.

Until now, California courts have allowed such evidence only to prove that a woman's fear for her own life was genuine -- meaning that if the jury was convinced, it could convict her of manslaughter but not murder.

With the new ruling, trial courts must allow in battering evidence as proof that the fear was also reasonable -- and, therefore, was sufficient for a complete acquittal.

The Legislature in 1991 changed the law to permit expert testimony on battered women's syndrome where relevant but did not say whether it could be used to exonerate a defendant completely.

The Supreme Court said it could.

The decision, which is likely to affect hundreds of future trials, came in the case of Evelyn Humphrey, a Fresno woman sentenced to eight years in prison for manslaughter in the 1992 shooting death of Albert Hampton.

Hampton repeatedly had threatened Humphrey's life, according to the trial testimony. The day before she killed him, he hit her twice and shot at her, striking a tree. The next day, he began hitting her again and reached for his gun. She grabbed it first.

An expert on battering testified that Humphrey had "about as extreme a pattern as you could find" of battered women's syndrome.

But Superior Court Judge A. Dennis Caeton told a Fresno jury that it could not consider the battering testimony in evaluating the "objective reasonableness" of Humphrey's action. The Court of Appeal agreed.

In Thursday's decision, the Supreme Court threw out Humphrey's conviction on a 7-0 vote.

In determining objective reasonableness, Justice Ming Chin wrote, a jury "must view the situation

from the defendant's perspective." That may involve consideration of expert testimony on battered women's syndrome.

The court expressly reserved judgment regarding "other possible syndromes in support of a claim of self-defense." It did not single out any.

While the court was unanimous in reversing Humphrey's conviction, it issued four separate opinions, and some justices signed more than one.

Chin's opinion had five signatures. A concurring opinion by the court's newest justice, **Janice Rogers Brown**, had three signatures. It was her first on the Supreme Court and was somewhat narrower than the majority opinion.

The impact on other cases can't be predicted without examining the details of each case, said Janet E. Neeley, the deputy attorney general in charge of domestic violence appeals.

"They are basically saying we'll have a different standard for battered women," she said. "That may be just in some cases. In other cases it may allow acquittal of a person who most people would think was not acting reasonably."

Jim Fahey, who represented Humphrey in the case, said the new standard would have been helpful to three of the four battered women he has defended.

But Tiffany Franchetti, the sponsor of a new bill for battered women that has passed the state Senate, predicted that despite the court's ruling, it will still be hard to convince juries that it's reasonable when a battered woman kills.

In recent years advocates for battered killers have been fighting on several fronts. In addition to legislative bills and court cases, there have been 34 clemency petitions to Gov. Pete Wilson.

A Wilson spokesman said Thursday that of 18 petitions decided, 16 were denied, one resulted in release from prison and another earned a reduced sentence.

GRAPHIC: Ming Chin and other state justices voted 7-0.

LOAD-DATE: August 31, 1996

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The Recorder

View Related Topics

August 27, 1996, Tuesday

SECTION: NEWS; PG. 1

HEADLINE: STATE HIGH COURT REJECTS EXTENSION OF 'WENDE' REVIEW
Holds controversial rule is only valid in criminal cases

BYLINE: Mike McKee

BODY:

California appellate justices have never been fond of the Wende rule, which forces them to conduct exhaustive reviews of trial records when court-appointed attorneys for indigent criminal defendants can't find arguable issues to raise on appeal.

Calling the process "redundant" and "wasteful," they've all but begged tCalifornia Supreme Court to repeal the rule it propagated 17 years ago in People v. Wende, 25 Cal.3d 436.

The high court's justices haven't gone that far, but on Monday they offetheir appellate court brethren an olive branch by refusing to expand Wende -- and the U.S. Supreme Court case on which it's based, Anders v. California -- beyond the criminal realm. The justices rejected claims by lawyers for two sets of indigent Los Angeles parents who argued that they deserved Wende - style reviews in cases involving child dependency and termination of parental rights.

"By its very terms, Anders 's 'prophylactic' procedures are limited in their applicability to appointed appellate counsel's representation of an indigent criminal defendant -- and there only in his first appeal as of right," Justice Stanley Mosk wrote in In re Sade C., S048796. "An indigent parent adversely affected by a state-obtained decision on child custody or parental status is simply not a criminal defendant."

Chief Justice Ronald George and Justices Marvin Baxter, Kathryn Mickle Werdegar, Ming Chin and **Janice Rogers Brown** concurred.

In what might be a disappointment to many appeal court justices, Mosk chnot to engage in a long-simmering debate about whether 1979's Wende -- with its wording about reviewing the entire trial record -- is at odds with 1967's Anders, which commands only "a full examination of all the proceedings." But he acknowledged the debate, saying Wende goes further than the U.S. Supreme Court required in Anders, and hinted that the court might welcome an opportunity to weigh in sometime.

"The issue of Wende 's conformity with Anders . . . is not presented this cause," Mosk wrote in a footnote. "We leave its resolution to another day."

Second District Court of Appeal Justice H. Walter Croskey, whose originaMarch 1995 ruling in Sade was upheld by the high court Monday, had strongly urged the court to use the case to reevaluate Wende.

"We have come to the conclusion," he wrote, "that Wende 's mandate of a independent judicial review in criminal cases is a wasteful and redundant procedure of very little value and should be reconsidered by the Supreme Court."

Attorneys representing the Los Angeles County Department of Children's Services, which removed Sade C. and Vanessa R. from the custody of drug- abusing parents with long criminal records, couldn't be reached for comment Monday. Neither could the parents' attorney -- Judy Weissberg-Ortiz, of Orange -- or Jonathan Steiner, a lawyer with L.A.'s California Appellate Project who argued as amicus curiae on the parents' behalf.

But Justice Joyce Kennard, who filed the lone dissent in Sade, argued Anders, 386 U.S. 738, requires that a judicial system that appoints attorneys for indigent parents has a duty to ensure that those lawyers are competent.

"If an appellate counsel's ineffective representation or failure to act competent advocate results in the affirmance of a juvenile court's judgment erroneously depriving a parent of the custody of the child," Kennard wrote, " that judgment results in a loss to both the parent and the child that can never be undone."

She also pointed out that the court's ruling clashes with holdings in several other states, including Alabama, Illinois, Ohio, Pennsylvania, Oregon and Wisconsin.

Mosk and the other members of the court were unswayed by Kennard's argum

"Criminal defendants and parents are not similarly situated," Mosk wrote. By definition criminal defendants face punishment. Parents do not. . . . Criminal defendants, as such, are expressly given protections in the United States Constitution itself. . . . Parents are not. . . . All this is not to magnify criminal defendants and diminish parents. It is only to show that, for present purposes, they are not similarly situated."

The full text of In re Sade C. will be published in Wednesday's CalifoDaily Opinion Service.

Associate editor Mike McKee's e-mail address is mmckee@counsel.com

LOAD-DATE: August 27, 1996

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The Recorder

View Related Topics

August 20, 1996, Tuesday

SECTION: COURT WATCH; PG. 4

HEADLINE: JANICE ROGERS BROWN, CIVIL LIBERTARIAN?

BYLINE: Scott Graham

BODY:

Court watchers got an intriguing little glimpse of Justice **Janice Rogers Brown's** thinking with her vote last week on a routine conference order.

Brown, who joined the Supreme Court in May as a relatively unknown quantwas the only judge who voted to review a firearms conviction that was obtained on pretty flimsy evidence.

The defendant, Jorge Albert Rojas, got into trouble when he walked away a Sacramento police officer who had commanded him to stop. Two officers found Rojas moments later hiding in some bushes next to a house.

After Rojas was detained, police found a loaded handgun under a rag 15 tfeet from where Rojas had been hiding.

The gun, however, did not have Rojas' fingerprints on it.

As they drove to the police station, Rojas told an officer, "You better remember my face. I'm going to shoot you in the head," and "If I ever see you walking down the street even with your family, I am going to shoot you."

A Sacramento jury convicted Rojas of being a felon in possession of a firearm and threatening an officer, and he was sentenced to three years in state prison.

The Third District Court of Appeal -- Brown's alma mater -- affirmed. Thappellate court concluded there was sufficient circumstantial evidence to convict Rojas: The gun was near where he had been hiding, it appeared to be intentionally concealed, no one else was in the vicinity, and Rojas' statements suggested he's "a person who would use a gun."

"Most strongly," Justice Richard Sims III wrote, "defendant is the only available candidate with a motive to conceal the gun. . . . His flight and concealment permit the inference that he wanted to avoid the officers because he had engaged or was engaging in unlawful activity. However, the only candidate for unlawful activity on the part of defendant would be the possession of a gun by a felon. . . . No drugs or other illegal contraband were found on defendant."

The court's opinion incensed defense attorney Steven Barnes, who said Rocould have been avoiding the police because of outstanding parking tickets, unpaid child support -- or maybe just because he fears police.

"How many law-abiding citizens cringe when approached by police, try to inconspicuous, drop out of sight if possible, and hope the police pass them by?" the Chula Vista solo wrote in his petition for review. "Avoiding the police is not enough to convict someone of possession of anything that might be found near them in a public area. If it is, we are all in trouble."

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CALIFORNIA ENVIRONMENTAL COMPLIANCE MONITOR

AUGUST 19, 1996.

SECTION: Volume 6, Issue 17

LENGTH: 321 words

HEADLINE: State Supreme Court Votes to Review Lead- Poisoning Prevention Fee

BYLINE: Landels Ripley & Diamond, LLP

BODY:

The California Supreme Court has voted to review a lower court decision that found unconstitutional a fee imposed on a paint manufacturer to fund a childhood lead-poisoning prevention program.

The main issue presented by the case is whether a two-thirds vote of the Legislature was required when the fee was enacted in 1991. On April 30, the court of appeal in Sacramento concluded the fee is really a tax that required a two-thirds vote, not the simple majority approval it received (see the May 27, 1996, issue of California Environmental Compliance Monitor, p. 135).

The key funding mechanism for the Childhood Lead Poisoning Prevention Act, the fee has been imposed on businesses determined by the Department of Health Services to be "in the stream of commerce of lead," including present and former manufacturers of leaded paints. The fee was challenged by Sinclair Paint Co., which was assessed \$ 97,825 in 1993 by DHS. Sinclair paid the assessment but petitioned for a refund, arguing the fee violates Article XIII A of the state constitution, which requires new taxes to be enacted by a two-thirds vote of the Legislature.

The appellate court's opinion was written by Associate Justice **Janice Rogers Brown**, who has since been appointed to the state supreme court. She did not participate in the vote to grant review of the case. In her opinion for the appellate court, Brown noted that fees imposed primarily to raise revenue, and not to ensure regulatory compliance, are subject to the two-thirds vote requirement. The fee revenue was not used to regulate Sinclair or other businesses, she observed, but was used to fund programs to screen and evaluate children for lead exposure.

The fee raises about \$ 12 million per year to support a lead-poisoning prevention program administered by DHS.

Sinclair Paint Co. v. Board of Equalization, 96 Daily Journal D.A.R. 9313, 96 C.D.O.S. 5758, July 31, 1996.

LOAD-DATE: October 4, 1996

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August 16, 1996, Friday

SECTION: Pg. 9

LENGTH: 396 words

HEADLINE: AFFAIRS OF STATE (Column): You Know You're A California Liberal If...

BYLINE: By David Kline

BODY: Earlier this year, nationally syndicated columnist Don Feder wrote a brilliant column in which he described ways that people can tell if they are liberals. Stuff like, "You know you're a liberal if ... you think sexual harassment is rampant, date rape pervasive, domestic violence common and Paula Jones is lying."

Today, we borrow Feder's premise with a Golden State twist. You know you're a California liberal if .

You think businesses should be fined for allowing people to smoke cigarettes, that tobacco companies should be sued for the costs of lung cancer, and that the Cannabis Buyers' Club shouldn't have been busted for allowing people to smoke pot around infants and children.

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You believe that the First Amendment should be widely interpreted to offer vast protection for the people against government oppression, and that the Second Amendment should apply only to government-sanctioned militia.

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You think that there should be more black people in places of power, and that Ward Connerly, Eloise Anderson and **Janice Rogers Brown** should never have been picked for their posts.

Finally, you know you're a California liberal if you still haven't figured out what this column is trying to say.

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SECTION: Pg. 1

LENGTH: 1016 words

HEADLINE: JNE Panel Says It Can't Find Source of Leak on Brown Nomination

BYLINE: By ROBERT GREENE, Staff Writer

BODY: A special panel investigating an alleged leak of confidential information regarding **Janice Rogers Brown's** nomination to the Supreme Court has been unable to determine the source of the leak, State Bar President James Towery said yesterday.

The three-member committee recommended no further action to address the leak, which resulted in an April 26 Los Angeles Times story revealing that the Commission on Judicial Nominees Evaluation had found Brown "not qualified" for the state high court.

Brown was confirmed despite the negative rating, the only justice to win a seat on the court under those circumstances.

The panel also concluded that JNE Commission chair Rita Gunasekaran did not breach her commission's confidentiality rules at Brown's May 2 confirmation hearing, where Gunasekaran disclosed an earlier Brown not-qualified rating.

But the committee, chaired by former First District Court of Appeal Presiding Justice Harry W. Low, issued a list of six recommendations it said should be considered by another group currently engaged in a broader examination of the JNE Commission.

Low's group called for more precise standards for rating nominees and said the role of the JNE chair, when appearing at confirmation hearings, should be more clearly defined.

Brown, a former justice of the Third District Court of Appeal, was confirmed to the Supreme Court in May.

Her JNE Commission rating the lowest of three possible evaluations for nominees was supposed to be confidential, and was meant to be reported only to Gov. Pete Wilson.

The Times story revealing the rating led to a hail of protests about the commission, which some have alleged carries a bias against conservative nominees. The State Bar in response commissioned the investigatory panel.

John Davies, judicial appointments secretary to Gov. Pete Wilson, also asked for a probe into Gunasekaran's unsolicited statement that Brown had been considered for the high court several years earlier, and that the commission then, too, found her not qualified.

Davies said yesterday he was puzzled by the panel's finding that Gunasekaran's remark at Brown's confirmation hearing "should have been avoided" but was not a breach of the rules.

"I suppose the conclusion is that she did it with no ill motives," Davies told the MetNews.

The committee's report was submitted last Friday to Towery, the JNE Commission and eight

members of the Board of Governors who were designated liaisons to the commission.

Towery said the matter should now be considered closed.

"I am pleased that after such a thorough investigation, the committee found no evidence of any leak by any member of JNE," he said. "The dedicated volunteers who serve on the JNE Commission will no doubt be gratified as well. And the public should continue to have confidence in the integrity of the judicial evaluation process."

But Wilson spokesman Sean Walsh blasted the report.

Speaking from San Diego, where Wilson is representing California as part of the state's delegation to the Republican National Convention, Walsh called the report a "whitewash."

"It appears [the State Bar] merely swept a large pile of dirt under the carpet, and though the floor looks clean you can still see the lump in the carpet," Walsh said. He asserted that the State Bar's press release on the report contradicted itself, claiming first that the panel found no leak, and later that it simply failed to identify the source of the leak.

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August 16, 1996, Friday

SECTION: Pg. 9

LENGTH: 401 words

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"1996, Capitol News Service

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August 16, 1996, Friday

SECTION: Pg. 1

LENGTH: 1016 words

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The Recorder

August 16, 1996, Friday

SECTION: NEWS; PG. 3

HEADLINE: PANEL UNABLE TO IDENTIFY SOURCE OF JNE LEAKS

BYLINE: Krysten Crawford;
Reporter Krysten Crawford's e-mail address is k. crawford@counsel.com

BODY:

Consider the confidentiality breach surrounding the confirmation of state Supreme Court Justice **Janice Rogers Brown** an unsolved mystery.

Despite an extensive three-month inquiry, State Bar investigators have cup empty in their efforts to determine who divulged details of the "not qualified" rating issued by the Bar's Commission on Judicial Nominees Evaluation.

In a report made public Thursday, a special investigative committee headby retired appellate Justice Harry Low also recommended that no action be taken against JNE Commission chairwoman Rita Gunasekaran. Gunasekaran was accused of violating the commission's confidentiality rules when she publicly disclosed during the May 2 confirmation hearings that Brown had once before received a "not qualified" grade while under consideration for the state's high court. The committee did, however, criticize Gunasekaran for giving "unsolicited" testimony.

State Bar president James Towery expressed relief Thursday at the committee's findings, adding that he hopes they restore public confidence in the much-maligned JNE Commission.

But John Davies, Gov. Pete Wilson's appointments secretary, said he was disappointed" the committee failed to identify the source of the leak and was "puzzled" by its kid-gloves treatment of Gunasekaran.

"This raises some question as to whether they Bar officials can policethemselves," Davies said in an interview.

Indeed, when asked how the committee's inconclusive findings would help mitigate some of the controversy surrounding the JNE Commission, Towery replied: "If people wish to say this does not answer their question, that is their prerogative. I am satisfied that the State Bar has discharged its responsibility."

Brown did not return a phone call seeking comment.

The JNE Commission's deliberations on judicial candidates and its advisoreport to the governor are confidential unless disclosed by the governor's office. In announcing Brown's nomination, Gov. Wilson disclosed that the JNE Commission had rated Brown not qualified -- because, Wilson said, she lacked sufficient experience as a judge.

A few weeks later, the Los Angeles Times reported details of the commission's evaluation, including its criticisms that Brown was insensitive to precedent and injected her political philosophy into opinions.

Towery responded by appointing a special panel to look into whether the information came from Bar officials. Towery did so after a complaint from Davies and a request by JNE commissioners anxious

to clear their names.

The committee, which included San Mateo County District Attorney James Fand Fresno County Municipal Court Judge Robert Oliver, also was asked to investigate Gunasekaran's statements.

Over the course of three months, investigators interviewed 63 witnesses, including all 27 JNE commissioners, former commissioners, Bar governors, and staff who handled the draft report's copying and printing.

Violators of JNE's confidentiality rules, according to Towery, would have been subject to discipline that included the possibility of criminal prosecution.

'NOT DIRECTLY RESPONSIVE'

Gunasekaran hailed the committee's report as a vindication of her and the commission.

"It was unthinkable to me that any one of those individuals would have been the source of the leak," said Gunasekaran, a partner at Santa Monica's Haight, Brown & Bonesteel.

The committee did fault Gunasekaran for revealing information that was "directly responsive to the Commission on Judicial Appointment's questions and should have been avoided."

While being questioned about the JNE Commission's positive evaluation of Brown prior to her appointment to the Third District Court of Appeal, Gunasekaran disclosed the "not qualified" rating Brown had received during her first bid for the Supreme Court. Gunasekaran said she did so in order to paint a complete picture.

Declaring the Brown debacle a "closed chapter," Towery, a partner in San Jose's Hoge, Fenton, Jones & Appel, has set his sights on the panel that is conducting a sweeping review of JNE Commission rules and procedures. That seven-member panel, headed by Fourth District Court of Appeal Justice James Ward, met for the first time last week in San Francisco.

The report issued Thursday gives Ward's panel a helping hand, issuing a set of recommendations to prevent similar debacles in the future. Among other things, it recommends that:

- Only the final JNE report -- and not drafts -- be delivered to the governor.
- Circulation of JNE evaluations be limited by not sending final report commissioners.
- A clearer understanding of how JNE weighs or evaluates criteria used judge candidates be developed.
- Better guidelines be developed to establish the scope of the commission's role in confirmation hearings. The committee noted that JNE ratings are for the governor's benefit and not for discussion in public hearings.

Towery, who said he favors a more public judicial evaluation process, pledged to pass the proposals on to Ward's task force.

LOAD-DATE: August 16, 1996

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View Related Topics

AUGUST 16, 1996, FRIDAY, FINAL EDITION

SECTION: NEWS; Pg. A21

LENGTH: 640 words

HEADLINE: No Answer on Who Leaked Report on Judge
Newspaper got hold of reasons she was rated 'not qualifi

BYLINE: Harriet Chiang, Chronicle Legal Affairs Writer

BODY:

After a three-month investigation, a special committee has failed to discover who leaked information about the "not qualified" rating of California Supreme Court Justice **Janice Rogers Brown**, the State Bar announced yesterday.

Although Brown, an appointee of Governor Pete Wilson, ultimately won confirmation to the court, the leak caused widespread criticism of the bar's evaluation process, with some critics calling for an overhaul of the panel that investigates the qualifications of judicial appointments.

Wilson was the first to reveal the negative rating for Brown when he nominated her for the high court in March. But the following month, the Los Angeles Times, citing unnamed sources, revealed the highly critical reasons for the negative rating, which were contained in a confidential report to Wilson from the 27-member commission that evaluates judicial candidates.

In the report, the commission concluded that Brown tended to insert her personal conservative views into opinions, was insensitive to legal precedent, had difficulty grasping complex law and lacked compassion and tolerance for opposing views. Despite the bad grade, Wilson went through with the appointment and Brown was confirmed in May.

Angry over the not-qualified rating and the disclosure of the report's confidential details, the governor and other conservatives said they suspected that the leak came from a member of the panel that evaluated Brown, called the Commission on Judicial Nominees Evaluation.

James Towery, president of the State Bar, which oversees the commission, appointed a blue-ribbon committee in May to look into the mystery.

But after interviews with all the commission members as well as State Bar staff, representatives of the governor's office and even workers in the print shop, the three-member committee announced that it was stumped.

The investigating committee included retired state Court of Appeal Justice Harry Low of San Francisco, San Mateo County District Attorney James Fox and Fresno Municipal Court Judge Robert Oliver.

In releasing the report yesterday, Towery said he was "extremely gratified" by the committee's recommendation that no further action should be taken in the matter. "I hope this will help restore public trust" in the judicial evaluation commission, he said.

However, Towery said he supports a more open process for the commission, which currently keeps

the names of nominees and its evaluation of them confidential. A separate committee appointed by the State Bar is now looking at possible reforms of the commission's procedures.

Towery also was pleased with the blue ribbon panel's conclusion that the chair of the commission, Rita Gunasekaran, did not breach confidentiality rules during Brown's confirmation hearing in May. At one point during the hearing, when she was questioned about Brown's prior qualified rating for the state Court of Appeal, Gunasekaran mentioned that Brown was found "not qualified" for the state Supreme Court prior to her going to the appeals court.

John G. Davis, the governor's judicial appointments secretary, filed a complaint against Gunasekaran, accusing her of "gratuitously" revealing the information at the hearing.

The committee said the information "should have been avoided," but concluded that Gunasekaran made the disclosure "believing that it was necessary to completely respond" to the question posed to her.

Davies said he is disappointed but not surprised by the committee's report. "We in the governor's office believe that the commission was responsible for the leak" he said. "There's no other possibility."

He said he is also baffled how the committee could conclude that Gunasekaran shouldn't have made the disclosure but didn't violate any rules.

GRAPHIC: PHOTO, Supreme Court Justice Janice Rogers Brown

LOAD-DATE: August 16, 1996

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August 12, 1996, Monday

SECTION: Pg. 3

LENGTH: 168 words

HEADLINE: Panel Created to Review Rules, Procedures of JNE Commission Conducts First Meeting

DATELINE: SACRAMENTO (CAPITOL)

BODY: A seven-member advisory committee created to review the rules and procedures of the State Bar Commission on Judicial Nominees Evaluation held its first meeting Friday in San Francisco, but took no significant action.

The committee, chaired by Justice James D. Ward of the Fourth District Court of Appeal, Div. Two, used the orientation meeting to go over past reports on the JNE Commission and outline its general goals, a State Bar spokeswoman said.

The advisory panel, which also includes Los Angeles attorney Rex Heinke, was formed in June by the State Bar Board of Governors. Its purpose, State Bar President James Towery said, is to take a broad look at the commission and suggest changes.

"There is no subject related to JNE which is out of bounds to your committee," Towery said in a letter to Ward.

The panel is distinct from the three-member task force created to probe an alleged leak of the JNE Commission rating of Supreme Court Justice **Janice Rogers Brown** to The Los Angeles Times.

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The Ethnic NewsWatch
Los Angeles Sentinel

August 8, 1996

SECTION: Vol. 62; No. 19; Pg. A4

LENGTH: 618 words

HEADLINE: Affirmative Action Authority Restricted By State Court

BODY:

Affirmative Action Authority Restricted By State Court.

A new state court action has restricted local governments' authority to enforce goals for ethnic minorities and women in public works contracts.

Last week (Wednesday), the state Supreme Court allowed a 4-month-old appellate ruling against part of a Sacramento County agency's affirmative action program to become final as a binding precedent for trial courts statewide.

The ruling said local agencies, in setting goals for contractors to seek help from firms owned by ethnic minorities or women, must follow the standards set by state law and cannot establish their own criteria that could be interpreted as preferential bidding.

It was the first ruling by an appellate court on the scope of the state law, which tells local agencies how to measure a contractor's "good faith" in meeting diversity goals for subcontractors. That law is among many that will be overturned by Proposition 209, a November ballot measure to prohibit state and local affirmative-action programs.

California law requires competitive bidding for major contracts but allows local agencies to set percentage goals for bidders' recruitment of subcontractors owned by ethnic minorities and women. Agencies cannot require firms to guarantee that the goals will be met but can require good-faith efforts.

Among other things, the law says an agency can consider whether contractors informed ethnic minority - and female-owned companies of contract opportunities, negotiated with them in good faith, did not "unjustifiably reject" their bids, and made recruitment efforts that the agency could reasonably expect to meet their goals.

However, the Sacramento County Regional Sanitation District established some additional standards and used them two years ago to reject the low bidder for a waste-water treatment plant project. That company, Monterey Mechanical Co., bid \$65.8 million; the next lowest bidder, Hoffman/Marmalejo, came in \$675,000 higher but satisfied the district's standard's and got the contract.

The district's actions were ruled illegal on April 29 by the 3rd District Court of Appeal. The court said state law prohibited the district's requirement that "only significant price differences" would justify rejecting a bid from an ethnic minority -or female-owned sub contractor.

Using that requirement, the district said Monterey Mechanical had failed to justify its rejection of 11 subcontracting bids. The company said it had ethnic minority participation of 1.4 percent to 5.6 percent and female participation of 0.2 percent, compared to the district's goals of 12.5 percent for ethnic minorities and 9.5 percent for women.

The court said the district's standard was invalid for two reasons. It was a bidding preference, unauthorized by state law, and the word "significant" is vague.

The 3-0 ruling was written by Presiding Justice Robert Puglia and joined by Justice **Janice Rogers Brown**, who later was appointed to the state Supreme Court by Gov. Pete Wilson.

Brown did not take part in the high court's decision Wednesday to let the ruling stand as a precedent.

The appellate court ordered the district to reconsider the contract under state standards. But with the work well underway, the district instead settled Monterey Mechanical's suit for \$3.2 million, an amount that includes lost profits and attorneys' fees, said the company's lawyer, William McInerney.

The district also withdraw its appeal but asked the state Supreme court to withdraw the ruling as a precedent and was joined by the Sacramento Municipal Utility district.

The case is Monterey Mechanical Co. vs. Sacramento Regional County Sanitation District, S054188.

ETHNIC-GROUP: African/Caribbean

LOAD-DATE: October 10, 1996

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The Recorder

View Related Topics

August 1, 1996, Thursday

SECTION: NEWS; PG. 1

HEADLINE: STATE HIGH COURT TO WEIGH FEES ON LEAD PRODUCERS

Newest justice had ruled that they're an illegal tax

BYLINE: Scott Graham

BODY:

Could the California Supreme Court's newest member, **Janice Rogers Brown**, also be its most conservative justice?

On Wednesday, the court gave a hint that the answer may be yes, as it agto review an opinion Brown wrote while on the court of appeal striking down the Childhood Lead Poisoning Prevention Act as unconstitutional.

Brown had held that the act, which is funded by fees on manufacturers of products containing lead, violates Proposition 13 because the "fees" are actually taxes that were not passed by a two-thirds vote of the Legislature.

Chief Justice Ronald George and Justices Joyce Kennard, Kathryn Mickle Werdegard and Ming Chin voted to review Brown's ruling in Sinclair Paint v. Board of Equalization, 44 Cal.App.4th 1434. Brown recused herself from the vote, as is routine when a judge has previously adjudicated a case for another court.

It's not a foregone conclusion that the Supreme Court will disagree with Brown, of course. The justices may have granted review simply because of the statewide interest in the case: Fifteen lawyers appear on the Third District Court of Appeal opinion, representing medical, oil, manufacturer, taxpayer and children's interest groups.

"The case will have a significant impact on the state fisc, involving in excess of \$50 million," Deputy Attorney General William Carter noted in his petition for review.

The law at issue was enacted in 1991. It provides evaluation, screening other medical services for children at risk for lead poisoning, according to Brown's opinion. Sinclair Paint Co. challenged its \$97,825 fee, and was opposed by the state Department of Health and a class of children suffering from lead poisoning. A Sacramento Superior Court judge agreed with Sinclair that the fee was an illegal tax, and Brown, joined by Third District Justices Richard Sims III and Fred Morrison, affirmed.

Brown began by observing that Prop 13 does not specify what constitutes tax. But courts have held that when payments are not directly connected to the right to carry on a business without further conditions, they are considered a tax.

"The problem in the case before us is that no part of the fee paid by Sinclair was used to regulate Sinclair," Brown wrote.

In his petition for review, Deputy AG Carter unabashedly stressed the imof Brown's ruling on children. "A reasonable way to achieve Proposition 13's goal of tax relief is to shift the costs of

controlling lead-poisoned children from the taxpaying public to the industries that manufactured the product that resulted in the lead-poisoned children," he wrote.

He compared the scheme to developer fees that residential builders pay tschools to relieve overcrowding. And Joyce Wang, a Long & Levit partner representing two lead-poisoned children, compared it to an Oakland ordinance that collects money from liquor stores to fight crime and violence near the stores. That ordinance was approved by the First District earlier this year.

LOAD-DATE: August 14, 1996

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July 31, 1996, Wednesday

SECTION: Pg. 9

LENGTH: 3071 words

HEADLINE: END OF THE MONTH: Former Attorney Hunt to Appear on Charges of Defrauding Clients...Torres Named Alhambra Municipal Court Administrator...Matz to Be Sworn In as Glendale Municipal Court Judge

BODY: Judicial Elections

Today is the deadline for candidates, including those elected or eliminated in the primary, to report campaign contributions and expenditures for the period from March 1 through June 30.

The Nov. 6 general election ballot will include a runoff contest for an open Los Angeles Superior Court seat and races for open Municipal Court seats in the East Los Angeles and Citrus judicial districts.

Los Angeles Superior Court

Citrus Municipal Court Judge Patrick Murphy and Los Angeles Municipal Court Judge Karl Jaeger will vie in November to succeed Judge Beauford Phelps. Jaeger won his runoff spot by less than a percentage point over Los Angeles Municipal Court Judge Stephen Marcus. Jaeger is represented by the consulting firm of Cerrell Associates Inc.

Municipal Courts

Citrus-Deputy District Attorney Tom Falls, who is also a Covina councilman, and West Covina lawyer Nida Brinkis Alex are vying to succeed Judge Michael Rutberg, who is stepping down at the end of his term. Alex was advised during the primary campaign by the Cerrell firm, but is not using the firm in the general election.

East Los Angeles-A commissioner of the court, Anthony Luna, faces Deputy Federal Public Defender Teresa Sanchez-Gordon in a runoff for the seat being vacated by Judge Bernard Kemper.

Sanchez-Gordon's campaign consultant is Skelton, Grover and Associates.

Judges, Lawyers Under Scrutiny

A. Thomas Hunt

Former Los Angeles Attorney

Hunt, a onetime civil rights attorney accused of defrauding clients by taking fees for work he didn't perform and had no intention of performing, is due to appear before Los Angeles Superior Court Judge Michael Cowell today for a status conference.

He was arraigned June 13 following unsealing of a grand jury indictment. Hunt, who resigned from the State Bar in 1993, entered not guilty pleas on all seven counts.

Deputy District Attorney Anthony Sousa said his office had gathered "additional information" that he

said would show Hunt, who was suspended from the State Bar for failure to pay dues when he was retained at least seven clients, had the requisite intent to defraud each of them.

Eight criminal counts were filed against Hunt over the last year arising from his transactions with four clients, but were dismissed on various grounds.

A five-day jailing for contempt in April 1995, ordered for Hunt's failure to live up to an agreement with the State Bar to reimburse clients, became the basis of a successful double-jeopardy defense. Two unlicensed-practice charges were reduced to misdemeanors in March after Hunt's attorney, Mark Werksman, pointed out that a 1939 Supreme Court decision specifies that the offense is a misdemeanor when the suspension is for non-payment of State Bar membership fees.

Those counts, and a new one added later in March, were then dropped because the one-year statute of limitations for misdemeanors had expired.

The felony grand theft charges were stricken in April when Superior Court Judge Jacqueline Connor ruled that there was sufficient evidence that Hunt did at least some work for his clients to negate the intent element.

In other proceedings, Los Angeles Superior Court Judge Owen Lee Kwong has granted a former Hunt client, Howard Bennett, liens on fees due the ex-lawyer from cases still in litigation.

Kwong yesterday awarded Bennett \$ 200,000 in fees due on a 1993 case. Bennett, a retired teacher, has a \$ 1.575 million default judgment entered in October 1995 in a malpractice suit.

Hunt had failed to oppose a motion to dismiss Bennett's wrongful discharge lawsuit against the Culver City Unified School District. Bennett was one of the Hunt victims alleged in the indictment.

Added to two previous liens, Bennett is now entitled to collect a total of \$ 940,000 due Hunt. Bennett has vowed to give any civil damages he wins to more than 130 other Hunt "victims."

Judiciary: Vacancies, Appointments

Federal Courts

Ninth U.S. Circuit Court of Appeals

There are five vacancies on the 28-judge court.

Awaiting action by the full Senate is the nomination of Boalt Hall School of Law professor William Fletcher to succeed Judge William A. Norris, who took senior status in 1994. The Judiciary Committee approved the nomination in May on a 12-6 vote, with all of the negative votes coming from Republicans.

Awaiting committee action, are the nominations of U.S. District Judge Richard Paez of the Central District of California to succeed Judge Cecil Poole, who took senior status in January, and Seattle attorney M. Margaret McKeown to replace Judge Jerome Farris, who took that status last year.

Judiciary Committee Chairman Orrin Hatch, R-Utah, agreed to move the Fletcher nomination after the nominee's mother, Ninth Circuit Judge Betty B. Fletcher, said she would take senior status upon her son's confirmation.

Action on his nomination, the initial hearing on which occurred in December, was delayed after questions were raised as to whether his appointment would violate the judicial anti-nepotism law enacted in 1877.

The administration contends that the anti-nepotism law only bars the hiring of a judge's relatives as

court employees, and that any interpretation which would bar the appointment of related persons as judges would place an unconstitutional restriction on the presidential appointment power. A spokesperson noted that Judges Richard and Morris Arnold, who are brothers, both sit on the Eighth Circuit.

Nominations have not been made to fill the two most recent vacancies, which occurred when former Chief Judge J. Clifford Wallace took senior status April 8 and Judge William Canby Jr. took senior status May 23.

William Fletcher, 51, is a Rhodes Scholar who attended Oxford with Bill Clinton and served as Northern California director for his primary and general election campaigns.

Paez, 48, is a former presiding judge of the Los Angeles Municipal Court who was appointed a district judge two years ago by Clinton.

McKeown, 45, is a partner in the large Seattle firm of Perkins Coie. She is a former White House Fellow who has served as president of the Federal Bar Association and the Washington Legal Foundation.

U.S. District Court

Dean D. Pregerson, a Los Angeles litigator and the son of Ninth U.S. Circuit Court of Appeals Judge Harry Pregerson, was confirmed last Wednesday to succeed Judge A. Wallace Tashima. Tashima was elevated last year to the Ninth Circuit.

The nomination of former State Bar President Margaret M. Morrow to succeed Judge Richard A. Gadbois Jr., who assumed disability status in January, was approved by the Judiciary Committee and sent to the full Senate June 27.

Christina A. Snyder, of the Mid-Wilshire firm of Corinblit & Snyder, was nominated May 15 to fill the vacancy created by Judge Edward Rafeedie Jr.'s decision to take senior status.

Morrow and Pregerson were recommended by Sen. Barbara Boxer, and Snyder by Sen. Dianne Feinstein. The two Democrats have an agreement to split recommendations for district judgeships throughout the state.

Magistrate Judge Joseph Reichmann will retire Aug. 12.

State Courts

California Supreme Court

There are no vacancies.

Court of Appeal

This District

Legislation enacted this month created two new positions, one in Div. Six and one in Div. Seven, effective Jan. 1. Among those seeking appointment to those or any other vacancies that occur are Los Angeles Superior Court Judges Dan Curry, Fred Lower, Robert Mallano, Richard Neal and George Schiavelli.

Third District

There is a vacancy resulting from Justice **Janice Rogers Brown's** elevation to the California Supreme Court.

Fourth District

Three new positions, one in each division, have been created under AB 1818, enacted this month and effective Jan. 1. These are the first new judgeships authorized by the Legislature since 1987.

Seats in other districts are filled.

Los Angeles Superior Court

Judge David Rothman, known as the "guru" of judicial ethics, will retire Friday after 20 years on the bench. Rothman, 59, said he will offer his services as a private judge and will spend time oil painting.

Judge Jack Newman retires Oct. 1.

Municipal Courts

Alhambra-Clerk/Administrator Dominic Polimeni is retiring Sept. 4 and will be replaced by Judi E. Torres.

Antelope-A vacancy exists as a result of Judge Chesley N. McKay Jr.'s appointment to the Superior Court last month.

Judge Richard Spann is serving as chairman of the Municipal Court Judges Association. Commissioner Ernest Lopez is sitting in for Spann.

Beverly Hills-Court Administrator Jose Guillen left May 3 to become executive officer of the consolidated trial courts of Napa County.

Citrus-There will be one vacancy, a newly created position under AB 1818, as of Jan. 1.

Glendale-Laura A. Matz, appointed last month after Judge Joseph DeVanon was elevated to the Superior Court, will be sworn in tomorrow.

Inglewood-Judge Eudon Ferrell, appointed last month to succeed retired Judge Roosevelt Robinson Jr., took office July 1.

Los Angeles-Judge Robert Swasey, whose last workday was May 24, is taking accrued vacation until his retirement date of Sept. 11.

Pomona-Judge Jack Hunt is serving a second year as chairman of the Municipal Court Presiding Judges Association. Judge S. Clark Moore, who retired two years ago from the Santa Anita Municipal Court, remains assigned to sit in place of Hunt.

Seats in other judicial districts in the county are filled.

Bills Affecting Legal Community

The following legislation relating to the legal profession was acted upon in the Legislature in July:

AB 883, by Assemblyman James Rogan, R-Glendale, was rejected by the Senate Criminal Procedure Committee on July 9, by a vote of 1-5. This bill would have authorized the admission of a witness's prior misdemeanor conviction for an offense involving moral turpitude for the purpose of attacking the credibility of a witness.

AB 988, by Assemblyman Phil Hawkins, R-Long Beach, would provide the same type of immunity

in misdemeanor cases as is provided in felony proceedings under the law, and that this wouldn't prohibit the district attorney from requesting an order to grant use immunity or transactional immunity to a witness compelled to give testimony or produce evidence. This bill was passed by the Senate on July 8 by a vote of 31-4, and cleared the Assembly on July 11 with a 54-18 vote. The bill is on the governor's desk awaiting further action.

AB 1818, by Assemblyman Joe Baca, D-San Bernardino, which creates five new appellate court positions and 21 trial court judgeships, was approved on July 11 by a 30-0 vote of the Senate and a 55-0 vote of the Assembly. Among the new positions are one each on Divs. Six and Seven of this district's Court of Appeal, one in each division of the Fourth District Court of Appeal, and one on the Citrus Municipal Court. The bill was signed by Gov. Pete Wilson on July 23, and will become law Jan. 1.

AB 1936, by Assemblyman Richard Rainey, R-Walnut Creek, changes the ballot pamphlets to pre-1993 form for appellate justices' retention elections, so the length of the justices' sought-after terms would not be included directly under their names. This bill passed the Senate Elections and Reapportionment Committee on a 3-0 vote July 3, and cleared the Senate on July 11 by a vote of 22-10. The bill was signed by the governor on July 20.

AB 2008, by Assemblyman Kevin Murray, D-Los Angeles, was passed by the Senate Criminal Procedure Committee by a vote of 4-1 on July 2, and was referred to the Senate Appropriations Committee later the same day. This bill would eliminate the exception in existing law requiring the court to appoint counsel other than the state public defender for a defendant following the rendering of a judgement of death.

AB 2014, By Assemblywoman Paula Boland, R-Granada Hills, would specify the statutory limitation on sex crimes applies to causes of action arising before, on or after the effective date of the provisions, thereby reviving and extending already expired statute of limitations periods. The bill was signed into law by Gov. Pete Wilson on July 7, and will take effect Jan. 1.

AB 2068, by Assemblyman Bernie Richter, R-Chico, was passed by the Senate Judiciary Committee on July 2 by a vote of 9-0. This bill would create a new exception to the hearsay rule for evidence of a statement made by a declarant which purports to narrate, describe or explain the infliction or threat of physical injury upon the declarant by the party against whom the statement is offered. The bill, which is intended to allow courts to accept victims' diary entries as testimony, faces its next vote on the Senate floor.

AB 2117, by Assemblyman Gary Miller, R-West Covina, was rejected by the Senate Criminal Procedure Committee on July 9 by a vote of 2-4. This bill would have allowed juvenile traffic hearing officers to hear cases involving infractions or any misdemeanors.

AB 2208, by Murray, which clarifies the procedure for replacing a city attorney who has recused himself from prosecuting a criminal case, was signed into law by Gov. Pete Wilson on July 1 and will become law Jan. 1.

AB 2247, by Miller, was rejected by the Senate Judiciary Committee on July 2 by a vote of 2-6. This bill would have authorized a court that has purchased a transcript to make copies of it as an exhibit, for internal use, or for use by county counsel or court-appointed counsel, or for sale to any other party or person.

AB 2462, by Assemblyman Bill Morrow, R-Oceanside, which would provide that contentions raised and rejected on direct appeal shall not be cognizable on petition for a writ of habeas corpus, was passed by the Senate Criminal Procedure Committee on July 9 by a vote of 4-2.

AB 2667, by Assemblywoman Susan Davis, D-San Diego, which would require indigent litigants applying for fee waivers to swear under the penalty of perjury that they are eligible, and to file financial statements on forms promulgated by the Judicial Council. The bill was sent to the Senate

floor without a vote July 10 by the Senate Appropriations Committee.

AB 2966, by Assemblyman Jim Brulte, R-Rancho Cucamonga, would require the Judicial Council to prepare a reply form for unlawful detainer. The bill was passed by the Senate Judiciary Committee on July 9 by a vote of 6-0, and was referred to the Senate Appropriations Committee for future hearing.

SB 331, by Sen. Rob Hurtt, R-Garden Grove, would have limited the discretion of a judge or magistrate to strike or dismiss any prior felony convictions alleged for purposes of sentencing under the 1994 three strikes initiative. The bill was approved by the Assembly Appropriations Committee on July 3 by a vote of 13-5 and cleared the Assembly on a 56-19 vote July 9. The bill was referred back to the Senate for concurrence in Assembly amendments and was rejected by the Senate Criminal Procedure Committee on July 16 by a vote of 1-4.

SB 825, by Sen. David Kelley, R-San Diego, passed the Senate on July 7 by a vote of 38-0 and was signed by Wilson on July 20. This bill authorizes the governor to turn a municipal court seat into a superior court seat upon a municipal court judge's retirement, even if the judge is not 65 years old or older.

SB 1321, by Sen. Charles Calderon, D-Montebello, would revise provisions relating to the appointment of State Bar Examining Committee members, allowing the Senate Rules Committee, the speaker of the Assembly and the governor to appoint three public members each to the committee. This bill was passed by the Assembly Judiciary Committee on July 3 by a vote of 13-0, and cleared the Assembly on July 10, by a vote of 76-0. The bill was returned to the Senate for concurrence with Assembly amendments, and is scheduled to be heard when the Legislature reconvenes in August.

SB 1494, by Sen. Ralph Dills, D-Gardena, would provide that judges who leave office before becoming eligible to retire, and work on assignment, shall be eligible for continued health benefit coverage if they pay both the employee and employer costs. This bill was passed by the Assembly Public Employees Committee on July 3 by a vote of 7-0, and was referred to the Assembly Appropriations Committee.

SB 1540, by Calderon, D-Montebello, was approved by the Assembly Judiciary Committee on July 10 by a vote of 14-0 and was sent to the Assembly floor. This bill would direct the Judicial Council to establish the Jury Instruction Advisory Council, which would assist in the review and revision of jury instructions.

SB 1561, by Sen. Diane Watson, D-Los Angeles, would require the Judicial Council to establish judicial training programs on domestic violence to be conducted in conjunction with the annual training on family law. The bill was rejected by the Assembly Public Safety Committee on July 2 by a vote of 4-0, with eight votes needed for passage.

SB 1876, by Sen. Hilda Solis, D-El Monte, was approved by the Assembly by a vote of 76-0 on July 8, and was signed by the governor July 20. This bill would allow the admission of evidence that a person committed a crime, civil wrong, or other act, when relevant to prove the disposition of a defendant in a criminal action to engage in criminal conduct against a particular individual.

SB 1950, by Sen. Henry Mello, D-Gilroy, would give students at nonaccredited law schools three chances to pass the "Baby Bar" exam before they would face the loss of credit for their studies. This bill was signed by Wilson on July 15, and will become law on Jan. 1.

SCA 4, by Senate President Pro Tem Bill Lockyer, D-Hayward, was passed by the Assembly on July 11 by a vote of 58-1, and the Senate approved the Assembly amendments on July 11 with a 38-0 vote. The proposed constitutional amendment, which now goes to the voters, would authorize county trial court judges to independently consolidate municipal courts and superior courts. Due to the lateness of the measure's passage, it will appear on the June 1998 ballot unless the Legislature takes special action to put in on the November ballot this year.

SCA 19, by Sen. Tim Leslie, R-Roseville, which would put court commissioners and other subordinate judicial officers under the authority of the Commission on Judicial Performance, was passed by the Assembly Appropriations Committee on July 10 by a vote of 16-1 and was sent to the Assembly floor.

LOAD-DATE: July 31, 1996

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The Christian Science Monitor

July 30, 1996, Tuesday

SECTION: UNITED STATES; Pg. 1

LENGTH: 912 words

HEADLINE: Growing Number Of Women Wield State Court Gavels

BYLINE: Scott Baldauf, Staff writer of The Christian Science Monitor

DATELINE: BOSTON

BODY:

Here's a saying for the 1990s: A woman's place is on the bench.

Over the past decade, a subtle shift has taken place in courts across America. In 1985, 23 women were serving on the highest courts in their states, according to the National Center for State Courts in Williamsburg, Va. That number has jumped to 70 - and seven of these are chief justices.

The trend has been highlighted in recent weeks by the appointments of women to the California and New Jersey high courts, and news that governors in New York and Massachusetts may appoint women to such posts. Moreover, the growing presence of women justices has changed courthouse culture in a number of ways - from the adjudication of cases affecting women to consciousness-raising seminars for judges.

"It's important for the judiciary to reflect the people," says Lynn Hecht Shafran of the National Organization for Women Legal Defense Fund in Washington. "As a general rule, women judges on the whole are more sensitive on sexual-assault and family issues because their life experience gives them insight."

While women now represent about 20 percent of state high-court justices, some women's rights activists say more women are needed on the nation's court benches to help make the justice system fairer to women. Ms. Shafran cites a recent case in Puerto Rico, in which a male judge ruled that the defendant, who raped a woman at gunpoint during a carjacking, did not deserve a longer sentence because of the rape. Quoting federal guidelines in a new carjacking law, he found that rape did not qualify as "serious bodily injury."

When the First Circuit Court of Appeals voted not to reconsider the case last month, one panel member, Judge Sandra Lynch of Boston, wrote a blistering dissent: "I doubt that Congress intended the [federal carjacking] statute to be applied in such a way that a brutal rape could fail to constitute 'serious bodily injury.'"

But some legal scholars say such cases hinge more on the interpretation of laws than on the gender of judges. Gender, they say, is only one factor in the equation.

"It is simplistic to say that all women lawyers are a particular kind of lawyer," says Roger Dennis, a law professor at Rutgers University in Camden, N.J. "Would a Reagan-appointed woman judge deal with a set of facts differently than a male Clinton appointee? There's more than gender going on here." He also points out that all judges, whether men or women, are trained lawyers who tend to look at issues through the same legal lens.

Still, women on the bench have incrementally changed the tenor of the courthouse, regardless of their

political stripes.

"Judges used to call women lawyers by their first name, but they called male lawyers 'counselor,' " says Justice Ruth Abrams of the Massachusetts Supreme Judicial Court, who was first appointed to the bench in the late 1970s. "Not anymore. Here in Massachusetts, gender bias was brought to the forefront. People could see that there was a problem."

The state now holds regular all-court seminars on gender fairness, where judges at all levels can gather to discuss how to squelch discrimination in their courtrooms.

But still, she says, discrimination exists. "You see it in a lot of different ways, where the economic value of injuries is being decided. Juries often return verdicts that men's livelihoods are more valuable," because men generally earn more.

The rising numbers of women on the bench can be attributed largely to their strides in the legal field. As more women go to law school and move up the career ladder, more are positioned to be chosen for judicial posts.

But the trend is also being driven in part by politics.

"For governors, it is politically advantageous to choose a woman if there is an available pool of qualified candidates," says Sherry Bebich Jeffe, political scientist at the Claremont School in Claremont, Calif. "Democrats are more consumed with the issue of gender and race, but Republicans are being forced to head in that direction, too. You can't appoint just white males - it just doesn't work anymore."

Consequently, women judges don't come from a single mold and sometimes face vehement opposition from women's advocacy groups. California's most recent Supreme Court justice, **Janice Rogers Brown**, is a black former appellate judge known for her conservative views on crime. New Jersey's new chief justice, Deborah Poritz, has shifted the balance in the state Supreme Court from an activist Democratic leadership to a restrained Republican one.

"I would far rather be judged by a fair judge - black or white, male or female - than by someone with an ax to grind," says Anita Blair, president of the conservative-leaning Independent Women's Forum in Washington. "I think justice is sex-blind, as well as color-blind and class-blind. I'm not concerned how many women are judges, just that they are qualified and fair."

To be sure, America's courtrooms have a perception problem. A 1988 study by the American Bar Association states: "Women [attorneys] report that they are often treated with a presumption of incompetence, to be overcome only by flawless performance, whereas they see men attorneys treated with a presumption of competence overcome only after numerous significant mistakes." In Nebraska, where only 7 percent of judges are women, lawyers said in a survey said that judges treat property crimes as more serious than crimes against women and children.

GRAPHIC: PHOTO: NEW FACE ON THE BENCH: Janice Rogers Brown, a justice on the California Supreme Court, is one of the most recent women appointees to state high courts., RICH PEDRONCELLI/AP

LOAD-DATE: July 30, 1996, Tuesday

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July 30, 1996, Tuesday

SECTION: State and Regional News

DISTRIBUTION: TO STATE AND LEGAL AFFAIRS EDITORS

LENGTH: 552 words

HEADLINE: JUDICIAL COUNCIL SEEKS STATEWIDE INPUT ON PROPOSAL TO IMPROVE QUALITY OF JUSTICE IN FAMILY LAW CASES;
Los Angeles to Host Final Public Hearing August 7 on 'Family Court 2000'

DATELINE: SAN FRANCISCO, July 30

BODY:

Los Angeles will host the final in a series of six statewide public hearings being held this summer to obtain feedback on a proposal designed to improve the quality of justice in family law cases, the Judicial Council of California has announced. The hearing will be held on Wednesday, August 7, from 1 to 8 p.m. at the Ronald Reagan Building, 300 South Spring Street.

The proposal, "Family Court 2000," was developed by the Family Law Subcommittee of the council's Family and Juvenile Law Advisory Committee. Besides improving the quality of justice in family law cases, "Family Court 2000" is designed to simplify the procedures while protecting the parties' rights; increase family law litigants' access to legal services; provide assistance when appropriate for unrepresented parties; and encourage settlement of disputes through alternative means when possible.

Placer County Superior Court Judge James D. Garbolino, subcommittee chair, emphasizes that "Family Court 2000" is a discussion draft document. It addresses procedural issues only and does not change the underlying substantive law. "The subcommittee is seeking the widest possible feedback to "Family Court 2000" from persons and organizations that are likely to be affected so that the various interests can be accommodated," says Judge Garbolino.

The discussion draft proposal has not been approved by the subcommittee, the full committee, or the Judicial Council. The council, chaired by Chief Justice Ronald M. George, is the policy-setting agency for the state courts.

Other hearings have been held in Sacramento (July 9), San Francisco (July 11), and Redding (July 18). A hearing in Fresno is scheduled for August 6.

Subcommittee Members

Members of the subcommittee are San Diego County Superior Court Judge Marguerite Wagner, vice-chair; Supreme Court Justice **Janice Rogers Brown**; Sacramento Superior Court Judge Charles C. Kobayashi; Santa Clara County Superior Court Judge Mary Ann Grilli; Riverside County Superior Court Judge William A. Anderson, Jr.; Monterey County Superior Court Clerk/Administrator Sherri Pedersen; Orange County Family Court Services Director Jan Shaw; Attorney Don Mike Anthony, Pasadena; Attorney Deanna Jang, San Francisco; Attorney George O. Nielsen, San Francisco; Attorney Ron Rosenfeld, Los Angeles; and Attorney Kate Yavenditt, San Diego.

How to Participate

Persons interested in participating in the public hearings should submit written requests that include the speaker's name, title, address, and phone number; the organization the speaker is representing, if applicable; the location at which the speaker wishes to participate; and the preferred time to speak (1 to 3 p.m.; 3-5 p.m.; or 6-8 p.m.).

The written requests should be sent to Michael A. Fischer, Committee Counsel, Family Law Subcommittee, Administrative Office of the Courts, 303 Second Street, South Tower, San Francisco, CA 94107, FAX: 415-396-9358; or e-mail to fc2000@courtinfo.ca.gov. Online registration is available at:

<http://www.courtinfo.ca.gov/jcc/jccomms/famlaw/famlaw.html>.

For information or copies of the proposal, contact the Administrative Office of the Courts at the above address.

CONTACT: Karen Ringuette of Judicial Council of California, 415-396-9118

LOAD-DATE: July 31, 1996

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July 9, 1996, Tuesday

SECTION: State and Regional News

DISTRIBUTION: TO STATE EDITOR

LENGTH: 551 words

HEADLINE: JUDICIAL COUNCIL SEEKS STATEWIDE INPUT ON PROPOSAL TO IMPROVE QUALITY OF JUSTICE IN FAMILY LAW CASES;
San Diego is Site for July 16 Public Hearing on "Family Court 2000"

DATELINE: SAN FRANCISCO and SAN DIEGO, July 9

BODY:

San Diego is the location for the third in a series of statewide public hearings being held this summer to obtain feedback on a proposal designed to improve the quality of justice in family law cases, the Judicial Council of California has announced.

The hearing in San Diego will be held on Tuesday, July 16, from 1 to 8 p.m. at the Doubletree Hotel, 910 Broadway Circle.

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For information or copies of the proposal, contact the Administrative Office of the Courts at the above address.

CONTACT: Karen Ringuette of the Judicial Council of California, 415-396-9118

LOAD-DATE: July 10, 1996

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The Fresno Bee

July 8, 1996 Monday, HOME EDITION

SECTION: METRO, Pg. B2, IN COURT

LENGTH: 594 words

HEADLINE: Strong emotions in Nieto case show up in courtroom factions

BYLINE: Pablo Lopez

BODY:

The criminal case against suspended Clovis schoolteacher Joseph Nieto has caused a rift between his supporters and local law enforcement.

The Lincoln Elementary School teacher is accused of 16 counts of child molestation involving 14 female students in the fourth, fifth and sixth grades.

His supporters, who wear white ribbons and pack the courtroom at every hearing, say Nieto is innocent.

Tempers flared last week when defense lawyer Len Holt wanted television cameras barred from Nieto's arraignment, saying pretrial publicity would hurt Nieto's chances for a fair trial.

Prosecutor Rudy Carrillo countered that any undue publicity should be blamed on Nieto's "groupies and followers" who speak to reporters after every hearing.

He also accused the supporters of harassing the victims to prevent them from testifying.

Since Nieto's arrest in May, his supporters -- family, friends and parents -- have called news conferences and held fund-raisers to help defray Nieto's defense costs.

They have asked the District Attorney's Office to drop the charges.

Fresno Judge Michael Feinberg denied Holt's request to bar cameras, and Nieto's supporters said afterward they were insulted by Carrillo's "groupie" remark.

"They want us to back down, but we can't. We feel an injustice is being done," Nieto supporter Dianne Edmunds said.

Nieto's supporters also took issue with three Fresno police officers who wore yellow ribbons in the courtroom in support of the children who said Nieto molested them.

The officers and others received yellow ribbons from staff and volunteers of Rape Counseling Service of Fresno.

They also had yellow buttons that said "Believe the children" but were not allowed to wear them in court.

"We're unhappy because they (the three police officers) are taking sides," said Nieto supporter Bob Lewellen.

"They should not be sitting in the courtroom," he said, "especially at taxpayers' expense."

Fresno police detective Chuck Mart, who investigated the Nieto case and was one of the three officers, said he has a moral obligation to support the children.

"I'm not going to be intimidated by a group of parents who don't know what they are talking about," he said.

"I am honored to support the children who said they have been molested and have the courage to stand up and testify."

Oliver named: Fresno Municipal Court Judge Robert Oliver has been named to a three-member panel that will investigate the state Commission of Judicial Nominees Evaluation, which has been accused of leaking a confidential evaluation of Supreme Court Justice **Janice Rogers Brown** to the news media.

JNE (pronounced "Jenny") was created in 1979 to help the governor appoint judicial candidates. JNE's 27 members swear to keep their deliberations secret.

The commission came under attack when the Los Angeles Times published details of the commission's evaluation of Brown, whom Gov. Wilson appointed to the state Supreme Court in May.

JNE found Brown, an appellate court judge from Sacramento, unqualified because of her limited experience on the bench and her tendency to inject her political views into her rulings.

When Wilson appointed Brown to the state high court it marked the first time a governor has named a justice rated "not qualified" by JNE members.

In naming Brown to the high court, Wilson cited her lengthy work in the Attorney General's Office and her life experience as a daughter of a sharecropper.

Pablo Lopez is The Bee's Fresno County Courthouse reporter. His column appears Monday.

GRAPHIC: Joseph Nieto

LOAD-DATE: July 10, 1996

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The Recorder

July 3, 1996, Wednesday

SECTION: LETTERS TO THE EDITOR; Pg. 2

HEADLINE: Bar Battle Continues

BYLINE: Peter Appleton, Los Angeles

BODY:

SB 60 was a resounding success for California lawyers ("Bar Wins Solid Vote of Confidence," June 26).

Those 21,000 lawyers who voted "yes" forced the State Bar to take them seriously. Jim Towery has promised a \$ 20 dues decrease and, based on the audit, we may be able to double that. The Committee to Save the Bar spent at least \$ 200,000 (\$ 5 for every vote they got), compared to the \$ 0.25 per vote the "yes" proponents spent.

The plebiscite also kicked some of the institutional arrogance out of the State Bar. The powers that be now know that not all lawyers are sheep who, without question, bleat at whatever tune they choose. We lawyers must make sure that the State Bar does not forget that message.

Those lawyers who voted "no" based on the argument that we should not lightly surrender "independent regulation of ourselves," should keep a close watch on how that independence works. For example within the last several months, for reasons of political expediency, the State Bar left the JNE Commission hanging out to dry. Not one member of the Board of Governors attended the Judicial Appointments Commission hearing on Justice [Janice Rogers] Brown. Rather than express outrage at the way JNE Chair Rita Gunasekaran was. trashed, the State Bar actually added credibility to the ridiculous complaint filed against her by John Davies, by "investigating it." By (in Jim Towery's words) having "attempted at all times to react in a measured and responsible fashion," the State Bar sent the clear message that there is no adverse consequence to ignoring JNE and there is no reason for any governor to pay any attention to any JNE evaluation. Is our State Bar more concerned about "influential sources in our state government" (Towery's words) than it is with the quality of Supreme Court judges; is the State Bar a pathetic toothless tiger that tippee toes around for fear of offending anyone or is it a zealous advocate for lawyers? You be the judge.

Those lawyers who did not vote at all because, although they do not like the State Bar, they were concerned that the alternative could be worse, should keep their eyes peeled on how our "independent" State Bar acts in the future. Will the Board of Governors continue the wimpy attitude that it took when the Legislature challenged the Supreme Court's budget or will it honor its commitment to be accountable to lawyers now that the plebiscite is over? Will we see the reforms the Board of Governors promised? I hope the State Bar remembers that the Founding Fathers of this country started a revolution because, although they did not know exactly what the alternative to British Rule was, they knew that they did not like British Rule. The time may come when the lawyers have also had enough. We must make sure that the Board of Governors continues to hear our footsteps.

EDITOR-NOTE:

Appleton is Southern California coordinator of the Lawyers for a "Yes" Vote Committee.

LOAD-DATE: July 12, 1996

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The Recorder

View Related Topics

July 2, 1996, Tuesday

SECTION: COURT WATCH; Judges and the Justice System; Pg. 4

HEADLINE: Bleak Outlook for Plaintiffs On Premises Liability Law

BYLINE: Scott Graham

BODY:

The law of premises liability in California maybe going the way of the dodo.

In 1993, the California Supreme Court made it tougher to hold landlords responsible for the acts of violent criminals on their property. The next year the court-appeared set to reduce the amount of damages for those plaintiffs who could still meet the tougher criteria, but then dropped the issue for unexplained reasons.

However, the court continues to send signals that the next time it does decide a premises case, plaintiffs lawyers won't get good news.

Last Wednesday, the court left intact a divided Second District Court of Appeal ruling that had shot down a \$ 300,000 jury award to a woman assaulted on the street in front of her apartment. Me woman blamed her landlord for the attack, saying that if her building's parking garage had not been kept in a dangerous condition, she would have parked there instead of on the saw.

More ominously for plaintiffs, the court also on Wednesday depublished a divided First District ruling that had been decided in favor of two women attacked and raped while working at a shopping mall.

In *Lisa P. v. J. Gordon Bingham*, 43 Cal.App.4th 372, plaintiffs attorneys argued that Previous armed robberies at other stores in the same mall made the July 1992 attack at the Clothestime store foreseeable, and had thus created a duty for the store owners to hire extra security.

First District Justice Carl Anderson pointed out that only one of the previous crimes was in a shop owned by the same landlord -- a yogurt shop and it did not include rape. Therefore, there had been no series of prior similar incidents to render foreseeable the rape at the clothing store.

But Anderson was out-voted by Justices Marcel Poche and Timothy Reardon. "Were the next yogurt shop crime to be an ax murder it presumably would not operate to trigger a duty because it would not be an armed robbery and therefore not a similar incident as that term is used by the dissent," Poche wrote. "Unlike the dissent, we understand the test enunciated by the Supreme Court . . . to require foreseeability, not dead bang inevitability."

Anderson had the last laugh, though, when the Supreme Court depublished *Lisa P.*

In a further warning sign for plaintiffs, the courts newest member, Justice **Janice Rogers Brown**, cast one of two votes to grant review in the case rather than depublish.

Brown has no track record yet on premises liability, but given her public statements about the nation's culture of victimization and overreliance on the deep pockets of government, it's hard to imagine her outlook will be particularly sympathetic.

LOAD-DATE: July 11, 1996

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California Journal

View Related Topics

July 1, 1996

SECTION: Feature

LENGTH: 2986 words

HEADLINE: End of the Lucas Era

BYLINE: Bob Egelko;
Bob Egelko writes about legal issues for Associated Press in San Francisco.

HIGHLIGHT:

Chief Justice Malcolm Lewis retired this spring, bringing to a close a Supreme Court era that began with the ouster of his predecessor, Rose Bird. Did voters get what they bargained for when they voted Bird off the bench?

BODY:

A decade ago, California voters ousted three Supreme Court judges after a bitter campaign centered on the death penalty. Malcolm Lucas became chief justice after that election. Did voters get what they bargained for?

The state Supreme Court of Chief Justice Malcolm Lucas was unique in modern California history: It was a court installed by the voters.

For the first time since the state instituted non-partisan, yes-or-no retention elections for Supreme Court and appellate justices in 1934, voters said "no" in 1986, ousting Chief Justice Rose Bird and liberal colleagues Cruz Reynoso and Joseph Grodin. In the same election, Governor George Deukmejian was returned to office after pledging to overhaul the court. He then elevated Lucas, his former law partner and the leading dissenter on the Supreme Court since 1984, to chief justice and promoted appeals court Justices John Arguelles, David Eagleson and Marcus Kaufman to the high court, giving conservatives a majority for the first time in 30 years.

Lucas' recent retirement, more than nine years after Bird was ousted, provides an occasion to ask whether voters got what they wanted.

First and foremost, the public wanted the death penalty. The focus of the campaign against Bird was her court's reversal of 64 of the 68 death sentences it had considered. The Lucas court turned the numbers around,

upholding 85 percent of its capital cases overall, and nearly 95 percent in the last four years -- the nation's highest affirmance rate during that period. But implementing capital punishment has proven to be a more complex problem than the 1986 campaign slogans ("Cast Three Votes for the Death Penalty") suggested. Only three Lucas court defendants have been executed; scores of cases are bottled up in the federal courts, which have set aside at least a half-dozen California death sentences; meanwhile, the state court struggles with a seemingly intractable backlog and a growing shortage of lawyers willing to take capital cases.

One segment of the public, contributors to the anti-Bird and pro-Deukmejian campaigns, also wanted a court more friendly to business. Liberal courts had expanded consumers' rights, interpreted environmental and civil rights laws broadly, and opened the courthouse doors to a wide array of liability suits on topics ranging from product defects to employee firings and denials of insurance coverage.

The Lucas court was more receptive to business concerns. Early rulings that restricted suits against insurers and employers voiced fears about the harmful effects of litigation on the business climate. But employees have regained some ground in recent years as the membership of the court changed, and the justices, while discouraging liability suits against insurance companies, have upheld regulation of insurers by ballot initiative. The court has left previous environmental rulings largely intact, rejecting property-rights doctrines embraced by the U.S. Supreme Court. The justices anticipated current anti-smoking litigation by allowing a suit against the Joe Camel ad campaign under state false-advertising laws. And civil-rights precedents, though narrowed, have fared better than their national counterparts before a hostile U.S. Supreme Court.

The Bird court also was attacked for overturning voter initiatives. The Lucas court has been far more deferential, upholding ballot measures to limit legislative terms, regulate insurance rates, restrict criminal defendants' procedural rights and limit local tax authority. It has also given a broad reading to the tax-curbing power of Proposition 13, the 1978 initiative that the Bird court upheld but interpreted narrowly. One notable exception to the Lucas courts' relaxed scrutiny of initiatives was its scuttling of efforts to revise two 1988 ballot measures restricting campaign contributions, a subject that will be back before the voters in November.

Another theme of the 1986 campaign was the need to restore public confidence in the court by removing it from politics -- an odd goal of the most political campaign in court history, but one that seems to have been accomplished. Though Lucas court rulings were occasionally controversial, the court itself dropped out of the political spotlight. The justices have been routinely confirmed at the polls without a single organized opposition campaign, and their appointments have gone unmentioned in campaigns for governor and other state offices.

"Re-establishing the court as not such a politically polarizing court probably was the chief justice's main objective ... and it's the objective that he most clearly accomplished," says attorney and legal commentator

Steven Lucas, a former law clerk to Malcolm Lucas, who is not related. "When you have a court that's affirming the death penalty regularly, you have a court that's of little interest to the public."

"They've gone a long way toward restoring confidence in California courts from an all-time low," says Kent Scheidegger, director of the pro-prosecution Criminal Justice Legal Foundation.

Not surprisingly, some criminal defense lawyers and civil-liberties advocates have a different perspective, viewing the Lucas court as politically oriented from birth.

Lucas "sat silently by" while his political patron attacked Bird, and thereafter became "the direct beneficiary of the politicization of the Supreme Court," says James S. Thomson, former president of California Attorneys for Criminal Justice, a defense lawyers' group. He says Lucas was just as activist in capital cases as Bird was accused of being, and was hypocritical in invoking the independence of the judiciary when his court later came under attack in the Legislature.

One change voters were probably not seeking, after removing three justices, was a high rate of voluntary turnover on the new court, dubbed the "turnstile court" by Santa Clara University law professor Gerald Uelmen. At least partly for financial reasons, and perhaps also because the court has become less prestigious and its death penalty-oriented workload less satisfying, justices have taken to retiring as soon as they were eligible for maximum pension benefits. Arguelles, Kaufman and Eagleson left after two, three and four years respectively, and Kaufman's successor, Armand Arabian, retired after five and a half years. Forty years ago, the average justice's tenure was 12 years, but since the early 1980s it has dropped to less than five years, Uelmen says. With Lucas' departure, only 83 year-old Justice Stanley Mosk, a 1964 appointee of Governor Pat Brown and the only Democrat on the court, remains from the original Lucas court.

With start-up time required for each new justice, the turnover has been disruptive and may be responsible for a decline in the court's output, to fewer than 100 rulings a year. On the other hand, it has brought in a new group of justices who are unconnected to the 1986 election and are a more diverse lot than the middle-aged white male business lawyers who made up most of Deukmejian's early appointees.

The court, which lost its first-ever female justice when Bird was removed, now has three: Deukmejian appointee Joyce Kennard and Wilson appointees Kathryn Mickle Werdegard and **Janice Rogers Brown**. Kennard and Wilson appointee Ming Chin are of Asian descent, and Brown is the court's first black member since 1991 and its first-ever black woman. There is a modest amount of ideological diversity as well: Kennard is a centrist and the court's most frequent dissenter after Mosk; the newly appointed Chin frustrated prosecutors as an appellate justice by striking down DNA evidence; and Werdegard and new Chief Justice Ronald George, while conservative by most definitions, seem more moderate than their Deukmejian-appointed predecessors.

In fact, the term "Lucas court" probably became a misnomer toward the end of Lucas' tenure. The chief justice clearly was the leader of the court in its early years, setting its agenda and writing some of its most important rulings: the 1988 decisions that barred third-party suits against insurance companies for bad-faith practices and severely limited suits by fired employees, and the 1991 rulings that upheld term limits and extended Proposition 13's two-thirds vote requirement to local agencies created to finance special projects. All those were split votes, with conservatives lined up behind Lucas. But by the last year or two of his tenure, he often could no longer command a majority in close cases.

The most striking example was the July 1995 ruling that banned sex discrimination at a private country club. The case would have been a tossup in the 1987 court, but this time Lucas was alone in dissenting from George's majority opinion, which later survived a repeal attempt in the Legislature. Lucas was again in dissent this May when the court ruled 4-3 that a landlady could not refuse to rent to an unmarried couple on religious grounds. That case almost certainly would have been decided the opposite way by the early Lucas court, which issued rulings weakening the state Fair Employment and Housing Commission and restricting the scope of the law that bans discrimination by businesses. (The spirit of those early rulings reappeared in last year's decision upholding some local anti-homeless ordinances.)

Lucas was among the majority May 4, 1996, in a 4-3 ruling by Mosk, upholding the state's never-enforced parental consent law for minors' abortions -- the only victory for anti-abortion forces before the court, which repeatedly refused to reconsider a 1981 Bird court ruling maintaining Medi-Cal abortions for poor women. But before the parental consent decision became final, the majority lost Arabian and Lucas to retirement, and their successors, Chin and Brown, cast the deciding votes to grant a rehearing -- a step that in the past has virtually always led to a reversal.

Another hallmark of the early Lucas court, its resistance to suits by employees, was undercut by recent rulings that allowed suits for wrongful demotion and for fraud in an employer's promise that induced a prospective employee to relocate.

If the later Lucas court proved more flexible in some areas of civil law, however, it stood firm in criminal law in general, and the death penalty in particular. Remarkably, the justices claimed to be applying much the same legal framework as their predecessors. They overturned only one major Bird court ruling, which required proof of intent to kill in most types of capital murder, and one lesser precedent, which prevented defendants from abandoning their case and asking the jury for death. The dramatic shift in results has been largely due to the court's expanded view of "harmless error," a flaw in a trial that did not affect the outcome.

The Bird court rarely found an error in a capital case to be harmless. In

one case often cited by prosecutors, a man who had to reload his gun before each of several killings was given a new penalty trial because jurors had not been asked to decide whether he had intended to kill. The Lucas court, on the other hand, took harmlessness to its outer limits. One jury heard inadmissible evidence that a defendant had raped an elderly woman with a wine bottle; another jury wrongly found that a prisoner who killed a fellow inmate had also murdered a guard; one defendant's lawyer was drunk; a trial was conducted under the wrong version of the death-penalty law, and a defendant was prevented by the trial judge from telling jurors why he deserved to live. In each case, the court found that no reasonable juror would have been influenced by the error in sentencing the defendant to death.

How those rulings will ultimately fare in federal court is unclear; a pattern of early reversals by federal judges may be halted by a new law restricting U.S. court review of state rulings in criminal cases. But regardless of the outcome in individual cases, Lucas' effort to solve the court's death penalty problems was not wholly successful.

Despite a sometimes frantic pace, with 56 rulings in a single year, the court was unable to clear a massive backlog of capital cases. The number of death sentences each year usually exceeds the number of rulings, but the chief problem is a shortage of appellate lawyers; despite taking over lawyer recruitment and increasing pay scales, the court has been unable to find lawyers for 125 of the 440 death row prisoners, who now must wait three years or more for an attorney. It's getting harder to find private lawyers or firms who will undertake a commitment of many years with little hope of saving their client's life. The situation may have been aggravated by the recent cutoff of federal funds for death penalty resource centers, including the California Appellate Project, the backbone of capital defense in the state for a decade. The Legislature may respond by expanding the state public defender's office, whose 50 percent reduction by Deukmejian a decade ago forced the shift to private lawyers. Capital cases, meanwhile, continue to take up a considerable share of the court's workload. A commission appointed by Lucas early in his tenure recommended shifting portions of the cases to the appellate courts, but the proposal faded after the chief justice declined to endorse it.

Criminal-law issues outside the death penalty area were largely driven by two ballot initiatives, a 1982 measure curbing pro-defense rulings on evidence and increasing sentences, and a 1990 measure narrowing defendant's procedural rights in preliminary hearings and other pretrial proceedings. The Lucas court interpreted both measures broadly; whether the "three strikes" law, which cuts closer to the heart of judicial authority, will get an equally sympathetic reading remains to be seen. Individual rulings allowed convictions to be upheld despite coerced confessions, broadened the evidence of past crimes that could be used to prove guilt, and upheld police roadblocks for drunken drivers.

A few important rulings favored defendants by preserving the status quo: a refusal to expand murder prosecutions to cases of unintentional drug overdoses, preservation of a defense based on an unreasonable fear of harm, and a reaffirmance of the need for scientific consensus before DNA and other new types of evidence can be admitted -- a Lucas opinion that affects civil

as well as criminal cases.

Another area of significant change was damage suits. Plaintiffs' lawyers, long accustomed to enlisting the court's aid in bringing about social change, now were told to take their disputes elsewhere. Complaints about insurers' foot-dragging were referred to long ineffectual state regulators (whose increased powers the court was later to uphold in Proposition 103). Fired workers were told to trust in the marketplace. Crime victims who blamed property owners for lax security were redirected, in most cases, to police. Parents who blamed a church counselor for their son's suicide were reminded of the separation of church and state (a principle the court also cited in banning high school graduation prayers). And a little more than a decade after a more liberal court used the Lee Marvin case to allow an unmarried partner to enforce a promise of support, the Lucas court invoked the sanctity of marriage in refusing to let a man sue for emotional distress after seeing his lover killed in a car crash.

Some of the rulings were harder to pigeonhole: a 1990 decision allowing a medical patient to sue for lack of consent when an organ removed during surgery became the basis of a commercial product while but denying him a share of the profits; a 1993 ruling making it difficult for residents to sue for fear of illness from exposure to toxics, easing the standard when the pollution was deliberate or reckless. But the justices also made it clear that they preferred arbitration to lawsuits; a 1992 ruling made arbitrators' decisions virtually unreviewable.

One problem Lucas leaves his successor is relations with the Legislature, which were frayed by the 1991 ruling upholding term limits. In language that did not seem necessary to the decision, the chief justice wrote that the initiative was justified by the dangers of "an entrenched, dynastic legislative bureaucracy," and that it was "speculative" to claim that a 38 percent cut in the Legislature's operating budget would hurt the legislative process. Lawmakers briefly proposed cutting the court's budget by 38 percent and made it clear that they would be slow to forget. Though many have since departed as a result of term limits, George has some fences to mend as he seeks legislative support for increased state funding of trial courts, his top declared priority.

Yet Lucas' principal achievement may also have been in the political sphere: The court has won, if not acclaim, at least acceptance from much of the public. The justices can therefore expect some degree of political protection if the court, after swinging from left to right, is now starting to inch back toward the center. Making that shift possible would be a final, ironic part of Lucas' legacy.

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July 1, 1996, Monday

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HEADLINE: JUDICIAL COUNCIL TO HOLD HEARINGS ON PROPOSAL TO IMPROVE
QUALITY OF JUSTICE IN FAMILY LAW CASES;

First Hearings Are in Sacramento on July 9 and San Francisco on July 11

BODY:

Sacramento and San Francisco will host the first in a series of statewide public hearings to obtain feedback on a proposal designed to improve the quality of justice in family law cases, the Judicial Council of California has announced.

The proposal, "Family Court 2000," was developed by the Family Law Subcommittee of the council's Family and Juvenile Law Advisory Committee.

The hearings will be held from 1 to 8 p.m. at the following locations:

* July 9, Tuesday: Sacramento, PERS auditorium, 400 "P" Street,
Lincoln Plaza

* July 11, Thursday: San Francisco, University of San Francisco
Lone Mountain Conference Center

Besides improving the quality of justice in family law cases, "Family Court 2000" is designed to simplify the procedures while protecting the parties; rights; increase family law litigants' access to legal services; provide assistance when appropriate for underrepresented parties, and encourage settlement of disputes through alternative means when possible.

"Family Court 2000" is a discussion draft document, emphasizes Placer County Superior Court Judge James D. Garbolino, subcommittee chair. It addresses procedural issues only and does not change the underlying substantive law. "The subcommittee is seeking the widest possible feedback to 'Family Court 2000' from persons and organizations that are likely to be affected so that the various interests can be accommodated" says Judge Garbolino.

SAN FRANCISCO, July 1

The discussion draft proposal has not been approved by the subcommittee, the full committee, or the Judicial Council. The council, chaired by Chief Justice Ronald M. George, is the policy-setting agency for the state courts.

Other hearings are scheduled for San Diego, July 16; Redding, July 18; Fresno, August 6; and Los Angeles, August 7.

Subcommittee Members

Members of the subcommittee are San Diego County Superior Court Judge Marguerite Wagner, vice-chair; Supreme Court Justice **Janice Rogers Brown**; Sacramento Superior County Superior Court Judge Charles C.

Kobayashi; Santa Clara County Superior Court Judge Mary Ann Grilli; Riverside County Superior Court Judge William A. Anderson, Jr.; Monterey County Superior Court Clerk/Administrator Sherri Pedersen; Orange County Family Court Services Director Jan Shaw; Attorney Don Mike Anthony, Pasadena; Attorney Deanna Jang, San Francisco; Attorney George O. Nielsen, San Francisco; Attorney Ron Rosenfeld, Los Angeles; and Attorney Kate Yavenditt, San Diego.

How to Participate

Persons interested in participating in the public hearings should submit written requests that include the speaker's name, title, address, and phone number; the organization the speaker is representing, if applicable; the location at which the speaker wishes to participate; and the preferred time to speak (1-3 p.m.; 3-5 p.m.; or 6-8 p.m.).

The written requests should be sent to Michael A. Fischer, Committee Counsel, Family Law Subcommittee, Administrative Office of the Courts, 303 Second Street, South Tower, San Francisco, CA 94107, FAX 415-396-9358; or e-mail to fc2000@courtnfo.ca.gov. Online registration is available at:

<http://www.courtnfo.ca.gov/jcc/jccomms/famlaw/famlaw.html>.

For information or copies of the proposal, contact the Administrative Office of the Courts at the above address.

CONTACT: Karen Ringuette of Judicial Council of California, 415-396-9118

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June 28, 1996, Friday

SECTION: Pg. 9

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HEADLINE: END OF THE MONTH: Senate Panel Reviews Former State Bar President Margaret Morrow for a U.S. District Court Seta...Panel Approves Bill to Create Friend of Court Office in All Superior courts...Committee Measure to Limit Judicial Discretion on Three-Strikes Law

BYLINE: on Three-Strikes Law

BODY: ***Judicial Elections

The Nov. 6 general election ballot will include a runoff contest for an open Los Angeles Superior Court seat and races for open Municipal Court seats in the East Los Angeles and Citrus judicial districts.

*Los Angeles Superior Court

Citrus Municipal Court Judge Patrick Murphy and Los Angeles Municipal Court Judge Karl Jaeger will vie in November to succeed Judge Beauford Phelps. Jaeger won his runoff spot by less than a percentage point over Los Angeles Municipal Court Judge Stephen Marcus. Jaeger is represented by the consulting firm of Cerrell Associates Inc.

*Municipal Courts

Citrus Deputy District Attorney Tom Falls, who is also a Covina councilman, and West Covina lawyer Nida Brinkis Alex are vying to succeed Judge Michael Rutberg, who is stepping down at the end of his term. Alex is advised by the Cerrell firm.

East Los AngelesA commissioner of the court, Anthony Luna, faces Deputy Federal Public Defender Teresa Sanchez-Gordon in a runoff for the seat being vacated by Judge Bernard Kemper.

Sanchez-Gordon's campaign consultant is Skelton, Grover and Associates.

**Judges, Lawyers Under Scrutiny

Robert Aguilar

U.S. District Judge

Aguilar resigned from the bench after federal prosecutors on June 24 agreed to drop their 7-year-old criminal case against him.

Aguilar's last remaining criminal conviction, for disclosing wiretap information, was overturned by the Ninth Circuit in January. The judge and the Clinton administration's Justice Department struck the deal on the last day for the prosecutors to decide whether to appeal to the Supreme Court.

Aguilar acknowledged learning and disclosing wiretap information but did not admit any criminal wrongdoing. With 16 years as a judge and no conviction on his record, he is eligible for a pension.

His attorney, Paul Meltzer, cited the judge's poor health as one reason for his willingness to step down.

Aguilar, a judge in the Northern District of California since 1980, was indicted in 1989 on federal racketeering charges, and also accused of attempting to influence a criminal proceeding on behalf of a former union official. Those charges were dropped after jurors deadlocked, but Aguilar was convicted in a second trial of the wiretap charge, and of obstruction of justice.

Chief U.S. District Judge Louis C. Bechtle of the Eastern District of Pennsylvania, sitting by designation, had sentenced Aguilar to six months imprisonment.

The Ninth Circuit, sitting en banc, had earlier thrown out both the obstruction-of-justice and wiretap convictions. The U.S. Supreme Court affirmed as to the former, but said the Ninth Circuit erred in ruling that a defendant could not be convicted of disclosing a wiretap if the order had expired by the time of the revelation.

In its January decision, the Ninth Circuit ruled 10-1 that jurors at Aguilar's second trial were erroneously instructed that the defendant could be convicted of disclosing a wiretap if he told the subject he was being eavesdropped upon and there was a "high degree of probability" Aguilar actually knew of a wiretap application.

Aguilar retained his judge's title and \$ 133,600 salary throughout the legal process. A resolution calling for his impeachment was introduced in the U.S. House of Representatives, but no action was taken while the matter was pending in the courts.

Ray Newman

Los Angeles Attorney

Newman was acquitted June 11 on a charge of overbilling the county on court-appointed cases.

The grand theft charge was the only remaining count of a five-count indictment, handed up in April 1991, accusing the lawyer of grossly overcharging the county for representation of indigents in first degree murder cases and swearing falsely that he performed all of the services claimed.

Newman was acquitted in November 1993 of one count of grand theft and one count of perjury, but a mistrial was declared after jurors were unable to reach a verdict on the remaining grand theft count or on two counts of perjury.

The perjury charges were dismissed at Deputy District Attorney Richard Healey's request after jurors disclosed they were deadlocked 10-2 for acquittal. Some of them told the prosecutor they had doubts about the credibility of his chief witness on those charges, a former secretary with whom Newman had an affair, Healey explained.

"They felt she clearly had an ax to grind," he said.

The vote on the grand theft charge was 6-6.

Newman was removed from the County Bar's Criminal Indigent Defense Appointment Panel after receiving more than \$ 777,000 for indigent defense work in 1987 and 1988, billing more than 8,800 hours in the two-year period.

A. Thomas Hunt

Former Los Angeles Attorney

Hunt was arraigned on June 13 following unsealing of a grand jury indictment charging him with

taking money from clients without intending to perform work for them. Hunt, who has resigned from the State Bar, entered not guilty pleas on all seven counts. Criminal courts Supervising Judge James Bascue set a July 31 status and trial-setting conference in Dept. 107 before Judge Michael Cowell.

Deputy District Attorney Anthony Sousa said his office had gathered "additional information" that he said would show Hunt, who was suspended from the State Bar for failure to pay dues when he was retained at least seven clients, had the requisite intent to defraud each of them.

Eight criminal counts were filed against Hunt over the last year arising from his transactions with four clients, but were dismissed on various grounds.

A five-day jailing for contempt in April 1995, ordered for Hunt's failure to live up to an agreement with the State Bar to reimburse clients, became the basis of a successful double-jeopardy defense. Two unlicensed-practice charges were reduced to misdemeanors in March after Hunt's attorney, Mark Werksman, pointed out that a 1939 Supreme Court decision specifies that the offense is a misdemeanor when the suspension is for non-payment of State Bar membership fees.

Those counts, and a new one added later in March, were then dropped because the one-year statute of limitations for misdemeanors had expired.

The felony grand theft charges were stricken in April when Superior Court Judge Jacqueline Connor ruled that there was sufficient evidence that Hunt did at least some work for his clients to negate the intent element.

Hunt resigned from the State Bar in 1993.

In another proceeding, Los Angeles Superior Court Judge Owen Lee Kwong ordered Hunt to pay former client Howard Bennett his fees from a case, still in litigation, filed in 1988. The payment to Bennett, a retired teacher, is on account of a \$ 1.575 million default judgment entered against Hunt October 1995 in Bennett's malpractice suit. Hunt had failed to oppose a motion to dismiss Bennett's wrongful discharge lawsuit against the Culver City Unified School District.

Bennett was one of the Hunt victims alleged in the indictment.

In May, Kwong ordered Hunt to pay Bennett \$ 240,000 in fees from a 1993 case.

Bennett has vowed to give any civil damages he wins to more than 130 other Hunt "victims."

***Judiciary: Vacancies, Appointments

**Federal Courts

*Ninth U.S. Circuit Court of Appeals

U.S. Senate Minority Leader Tom Daschle, D-S.D., said this month he is hopeful that an agreement can be reached with the Republican majority which would allow consideration of President Bill Clinton's judicial nominees. No federal judges have been confirmed this year.

Among the nominations awaiting action by the full Senate is that of Boalt Hall School of Law professor William Fletcher to fill one of four vacancies on the 28-member Ninth Circuit. The Judiciary Committee approved the nomination on May 16 on a 12-6 vote, with all of the negative votes coming from Republicans.

Committee Chairman Orrin Hatch, R-Utah, agreed to move the nomination after the nominee's mother, Ninth Circuit Judge Betty B. Fletcher, said she would take senior status upon her son's confirmation.

Action on his nomination, the initial hearing on which occurred in December, was delayed after questions were raised as to whether his appointment would violate the judicial anti-nepotism law enacted in 1877.

The administration contends that the anti-nepotism law only bars the hiring of a judge's relatives as court employees, and that any interpretation which would bar the appointment of related persons as judges would place an unconstitutional restriction on the presidential appointment power. A spokesperson noted that Judges Richard and Morris Arnold, who are brothers, both sit on the Eighth Circuit.

The most recent vacancy occurred when former Chief Judge J. Clifford Wallace took senior status April 8. U.S. District Judge Richard Paez of the Central District of California has been nominated to fill one of the slots, and the president is expected to nominate Seattle attorney M. Margaret McKeown to fill another.

William Fletcher, 50, is a Rhodes Scholar who attended Oxford with Bill Clinton and served as Northern California director for his primary and general election campaigns.

Paez, 48, is a former presiding judge of the Los Angeles Municipal Court who was appointed a district judge two years ago by Clinton.

Besides Wallace, six judges have taken senior status in recent years: Arthur Alarcon in 1992, Thomas Tang in 1993, William A. Norris in 1994, Dorothy W. Nelson and Jerome Farris last year, and Cecil Poole in January.

Tang, who died July 18, 1995, was from Arizona, while Farris is from Washington state and Poole from San Francisco. Wallace is from San Diego, and the other three from the Los Angeles area.

Three judges: A. Wallace Tashima of Los Angeles, Sidney Thomas of Montana, and Michael Daly Hawkins of Arizona have been confirmed to the court during the Clinton presidency.

*U.S. District Court

Former State Bar President Margaret Morrow was nominated May 9 to fill a vacancy on the court. Also pending before the U.S. Senate Judiciary Committee is the nomination of Los Angeles litigator Dean Pregerson, the son of Ninth Circuit Judge Harry Pregerson.

Dean Pregerson was tapped by Bill Clinton in January. Democratic Sen. Barbara Boxer had recommended in September that Pregerson and Morrow be appointed to the court when seats became available.

Boxer and her Democratic colleague, Dianne Feinstein, have an agreement to split recommendations for district judgeships throughout the state. Feinstein has recommended Christina Snyder of the Mid-Wilshire firm of Cornblit & Snyder for the next vacancy.

Magistrate Judge Carla Woehrle, formerly of Talcott, Lightfoot, Vedevelde, Woehrle & Sadowsky, took office June 10. She succeeded Judge George H. King, named a district judge last year.

Also, Magistrate Judge Joseph Reichmann announced this month he will retire Aug. 12.

Court administration was restructured this month. Executive Officer/Clerk Frank E. Goodroe's job was split, with Goodroe retaining the position of court executive. Sherrie Carter, who since 1994 was Goodroe's chief deputy for operations, was named clerk of the court. Chief Judge Wm. Matthew Byrne Jr. released a statement explaining the decision was due to "the increasingly complex nature of the non-judicial administrative function" and the requirement of full attention for both operations and administration.

****State Courts*****California Supreme Court**

There are no vacancies.

***Court of Appeal**

This District

Among those seeking appointment to any vacancies that occur are Los Angeles Superior Court Judges Dan Curry, Fred Lowrer, Robert Mallano, Richard Neal and George Schiavelli.

Third District

There is a vacancy resulting from Justice **Janice Rogers Brown's** elevation to the California Supreme Court.

Fourth District

James Ward was elevated from the Riverside Superior Court June 6. He fills the vacancy in Div. Two, caused by the September 1995 retirement of Justice Howard Dabney. Dabney died April 16.

Also confirmed by the Commission on Judicial Appointments and sworn in June 6 was James McIntyre, elevated from the San Diego Superior Court to fill the Div. One vacancy stemming from Justice Charles Froehlich Jr.'s retirement in June of last year.

Fifth District

The clerk of the court, Kevin A. Swanson, retired May 13. Eve Sproule became the district's court administrator/clerk on June 11.

Seats in other districts are filled.

***Los Angeles Superior Court**

The governor this month elevated Los Angeles Municipal Court Judge Linda Lefkowitz, Antelope Municipal Court Judge Chesley N. McKay Jr., and Glendale Municipal Court Judge Joseph DeVanon to the court.

Lefkowitz succeeded Judge Jacqueline Weisberg, who retired at the end of April. McKay and DeVanon replaced Judges Martha Goldin and Cecil Mills, who retired at the end of May.

Judge David Rothman, known as the "guru" of judicial ethics, said this month he will retire Aug. 2 after 20 years on the bench. Rothman, 59, said he will offer his services as a private judge and will spend time oil painting.

Judge Jack Newman retires Oct. 1.

***Municipal Courts**

Alhambra Clerk/Administrator Dominic Polimeni is retiring in August. The county Board of Supervisors on May 28 requested that the court not hire a replacement pending a study on administrative consolidation alternatives. The study is due next month.

Antelope A vacancy exists as a result of Judge Chesley N. McKay Jr.'s appointment to the Superior Court this month.

Judge Richard Spann is serving as chairman of the Municipal Court Judges Association. Commissioner Ernest Lopez is sitting in for Spann.

Beverly Hills Court Administrator Jose Guillen left May 3 to become executive officer of the consolidated trial courts of Napa County.

Glendale Judge Joseph DeVanon was sworn in as a Superior Court judge following his elevation June 12, and Laura Matz, a business litigator at Jones, Day, Reavis & Pogue, was named to succeed him.

Inglewood The governor this month named Eudon Ferrell, a Los Angeles deputy city attorney, to succeed Judge Roosevelt Robinson Jr. Robinson retired in January after 20 years on the bench, but has been sitting on assignment.

Los Angeles Torrance sole practitioner and former pro football player Michael K. Kellogg was named this month to succeed Judge Linda Lefkowitz, elevated to the Superior Court.

Judge Robert Swasey, whose last workday was May 24, is taking accrued vacation until his retirement date of Sept. 11.

Pomona Judge Jack Hunt is serving a second year as chairman of the Municipal Court Presiding Judges Association. Judge S. Clark Moore, who retired two years ago from the Santa Anita Municipal Court, remains assigned to sit in place of Hunt.

South Bay Judge Benjamin Aranda III is on assignment to Div. Four of the Court of Appeal through July 26.

Seats in other judicial districts in the county are filled.

***Bills Affecting Legal Community

The following legislation relating to the legal profession was acted upon in the state Legislature in June:

AB 988, by Assemblyman Phil Hawkins, R-Long Beach, would grant the same type of immunity in misdemeanor cases as is granted in felony proceedings under the law, and would provide that the statute doesn't prohibit the district attorney from requesting an order to grant use immunity or transactional immunity to a witness compelled to give testimony or produce evidence. This bill passed the Senate Criminal Procedure Committee on June 11 by a vote of 4-2, and cleared the Senate on a 32-3 vote June 24. The bill was returned to the Assembly for concurrence with Senate amendments.

AB 1815, by Assemblywoman Debra Bowen, D-Torrance, was rejected by the Senate Criminal Procedure Committee on June 4 by a vote of 1-0. The measure may be reheard at a future committee session. This measure would state the Legislature's intent to abrogate the holding of *People v. Wende* to the extent that it requires an appellate court to conduct a review of the entire record of a non-capital criminal case if the appointed counsel has determined that no meritorious issues exist for appeal.

AB 1994, by Assemblyman John Burton, D-San Francisco, was rejected by the Senate Criminal Procedure Committee on June 11 by a vote of 2-3. This bill would have prohibited civil compromise in domestic violence cases.

AB 2007, by Assemblyman Kevin Murray, D-Culver City, would provide that any minor who, after having been declared a ward by the juvenile court because of habitual disobedience or truancy, fails to obey any lawful order of the juvenile court, is within the jurisdiction of the juvenile court, which may adjudge the person to be a ward pursuant to certain provisions. This measure passed the Senate

Criminal Procedure Committee on June 11 by a vote of 6-0, and passed the Senate with a 34-0 vote on June 20. The measure is now on the governor's desk.

AB 2008, by Murray, was referred to the Senate Criminal Procedure Committee on June 1, and is scheduled to be heard by the committee July 2. This bill would eliminate the exception in existing law requiring the court to appoint counsel other than the state public defender for a defendant following the rendering of a judgment of death.

AB 2014, by Assemblywoman Paula Boland, R-Granada Hills, would specify that statutory limitations on sex crimes apply to causes of action arising before, on or after the effective date of the provisions, thereby reviving and extending already expired statute of limitations periods. The bill passed the Senate Criminal Procedure Committee on June 11 by a vote of 4-1, and the Senate floor on June 20 by a vote of 33-1. The Assembly approved the bill June 24 by a vote of 67-0, and the bill was sent to the governor.

AB 2057, by Murray, would require the court to order the immediate disclosure of all information required during criminal discovery, and to sanction attorneys in criminal actions who knowingly and willfully violate discovery statutes. The measure was rejected by the Senate Criminal Procedure Committee on June 25 by a vote of 1-4.

AB 2117, by Assemblyman Gary Miller, R-West Covina, was referred to the Senate Criminal Procedure Committee on June 3, and is scheduled to be heard by the committee on July 9. This bill would provide for the compensation, appointment, powers and duties of juvenile court commissioners, who may hear and dispose of any case in which a minor under the age of 18 is charged with an infraction or misdemeanor.

AB 2155, by Assemblywoman Sheila Kuehl, D-Los Angeles, would allow a minor 13 years of age or older to appear in court without a guardian, counsel, or guardian ad litem, for the purpose of obtaining a protective order against a person with whom he or she has had a dating or engagement relationship. This bill was approved by the Senate Judiciary Committee on June 25 by a vote of 7-2, and advanced to the Senate Appropriations Committee for future hearing.

AB 2208, by Murray, which would provide a procedure for replacing a city attorney who is disqualified from prosecuting a criminal case due to conflict of interest, passed the Senate Criminal Procedure Committee on June 11 by a vote of 6-0, and the Senate floor on June 20 by a vote of 34-0. The bill is now on the governor's desk.

AB 2247, by Miller, was referred to the Senate Judiciary Committee on June 3. This bill would authorize a court that has purchased a transcript to make copies of the transcript as an exhibit, for internal use, or for use by county counsel or court-appointed counsel, or for sale to any other party or person.

AB 2296, by Assemblyman Martin Gallegos, D-Irwindale, which would allow the testimony of witnesses who recall events with the assistance of uncertified hypnotists, was approved by the Senate Criminal Procedure Committee on June 4 by a vote of 5-0, and passed the Senate on June 10 by a vote of 38-0. The bill was signed by the governor on June 21 and will become law on Jan. 1, 1997.

AB 2667, by Assemblywoman Susan Davis, D-San Diego, which would require that indigent litigants applying to proceed in forma pauperis must provide proof of receiving federal benefits, was passed by the Senate Judiciary Committee on June 18 by a vote of 9-0. The bill advanced to the Senate Appropriations Committee.

AB 2897, by Assemblyman Larry Bowler, R-Elk Grove, would provide that if a photograph used as evidence is derived from a videotape, the term "original" would include the videotape or any print therefrom. This bill was passed by the Senate Judiciary Committee on June 25 by a vote of 6-0.

AB 2966, by Assemblyman Jim Brulte, R-Rancho Cucamonga, would require the Judicial Counsel to

prepare a reply form for unlawful detainer. The bill was referred to the Senate Judiciary Committee on June 1.

AB 3092, by Gallegos, was signed by the governor on June 5 and will take effect on Jan. 1, 1997. The new law will delete an obsolete reference to the Judge of the Justice Court in section 13109 of the Elections Code, which specifies the order in which offices appear on the ballot.

AB 3412, by Assemblyman Dick Ackerman, R-Orange, would require the court to impose sanctions and award reasonable expenses and attorney fees for purposes of present law relative to bad faith actions or tactics. The measure was referred to the Senate Judiciary Committee on June 3.

AJR 54, by Assemblyman Howard Kaloogian, R-San Diego, passed the Assembly Judiciary Committee on June 5 by a vote of 9-2. This resolution would urge Congress to propose an amendment to the Constitution to provide that the courts do not have the power to instruct or order a state or local government to levy or increase taxes.

SB 56, by Sen. Robert Beverly, D-Los Angeles, was rejected by the Assembly Judiciary Committee on June 19 by a vote of 3-10. The bill would have required a jury to consist of eight people in a civil action in municipal court in which the contested amount is less than \$ 25,000.

SB 183, Sen. Quentin Kopp, I-San Francisco, would prohibit a justice of the Court of Appeal from endorsing a candidate for superior court. The bill was rejected by the Assembly Elections and Reapportionment Committee on June 10 but was passed by the same committee on June 17 by a vote of 4-0. It is pending in the Assembly.

SB 331, by Sen. Rob Hurtt, R-Garden Grove, passed the Assembly Public Safety on June 26 by a vote of 11-3. The bill would amend the three-strikes law to disallow judicial discretion to strike a prior conviction if the date of the current charged crime occurred less than five years since release from custody, or conviction, for the last prior felony; the current charged crime is for a serious or violent felony; or any of the prior convictions was for a violent felony.

SB 506, by Sen. Charles Calderon, D-Los Angeles, which would create an office of the friend of the court in each superior court of the state, was passed by the Assembly Judiciary Committee on June 19 by a vote of 12-0, and was referred to the Assembly Appropriations Committee.

SB 825, by Sen. David Kelley, R-San Diego, passed the Assembly on June 24 by a vote of 73-0 and was sent back to the Senate for concurrence in Assembly amendments. This bill would authorize the governor to convert municipal court judgeships into superior court judgeships when a municipal court judge retires, regardless of whether the retiring judge is over 65 years old.

SB 1457, by Kopp, was referred to the Assembly Local Government Committee on June 13 for a scheduled hearing on July 3. The bill would provide that a public agency could not respond to grand jury questions with "no comment," and would set guidelines and a time frame for response.

SB 1540, by Sen. Charles Calderon, D-Montebello, was referred to the Assembly Judiciary Committee on June 3. This bill would direct the Judicial Council to establish the Jury Instruction Advisory Council, which would assist in the review and revision of jury instructions.

SB 1561, by Sen. Diane Watson, D-Los Angeles, would require the Judicial Council to establish judicial training programs on domestic violence to be conducted in conjunction with the annual training on family law. The bill was approved by the Assembly Judiciary Committee on June 19 by a vote of 8-2, and was referred to the Assembly Appropriations Committee.

SB 1589, by Calderon, would allow a judge to accept gifts in any amount from any person whose relationship with the judge would require the judge's recusal if the gift-giver were to appear in court. This bill was approved by the Assembly Judiciary Committee on June 19 by a vote of 10-1.

SB 1697, by Kopp, which would put new restrictions of gifts and honoraria for judicial candidates in the amount of \$ 280 in a single calendar year from any single source, was approved by the Senate Judicial Committee on June 18, by a vote of 5-0 and advanced to the Senate Appropriations Committee for future hearing.

SB 1876, by Sen. Hilda Solis, D-El Monte, was approved by the Assembly Public Safety Committee on June 25 by a vote of 12-0. This bill would permit the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove the disposition of a defendant in a criminal action to engage in criminal conduct against a particular individual.

SB 1950, by Sen. Henry Mello, D-Gilroy, would eliminate the requirement that a student at a non-accredited law school pass the "Baby Bar" exam at the end of the first year to receive credit for the first year's studies. This bill was passed by the Assembly Judiciary Committee on June 19 by a vote of 15-0.

SCA 4, by Senate President Pro Tem Bill Lockyer, D-Hayward, was passed by the Assembly Judiciary Committee on June 19 by a vote of 9-0 and was referred to the Assembly Appropriations Committee. This measure would authorize local governments to merge their municipal courts into the superior court.

SCA 19, by Sen. Tim Leslie, R-Roseville, which would put court commissioners under the authority of the Commission on Judicial Performance, passed the Assembly Elections and Reapportionment Committee on June 17 by a vote of 5-0.

SCR 43, by Kopp, passed the Assembly Judiciary Committee on June 19 by a vote of 15-0 and was referred to the Assembly Appropriations Committee. This bill would give legislative approval to the California Law Revision Commission to continue its study of previously authorized topics, and would direct the commission to study whether the California law of contracts should be revised.

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HEADLINE: IN MY OPINION (Column): Judicial Nomination Process Is A Downhill Run

BYLINE: By Armand Arabian

BODY: (The writer is a retired justice of the California Supreme Court.)

Many of you will recall 1979, the war between Lt. Gov. Mike Curb, a Republican, and Gov. Edmund G. Brown, Jr., a Democrat, over the constitutionally delineated powers of the governor's office when the governor was "absent from the state." Curb nominated me, then a judge of the superior court, as presiding justice of the court of appeal during a time when Gov. Brown, was in Washington, D.C. testifying about the sophio pipeline. After the news of Curb's activity reached his ears, Gov. Brown flew back to the state and withdrew my nomination.

Swords were drawn and a lawsuit was filed to settle the question of gubernatorial powers.

At year's end, when In Re the Governorship was decided by the California Supreme Court, the rescission was allowed to stand but Curb could wield full powers of the office every time Brown left the state.

To eliminate Curb's political agenda and ability to fill judicial vacancies, the Legislature, driven by Assemblyman Leo McCarthy, codified judicial review activities by enacting Government Code Section 12011.5, which required the governor to submit names of all prospective nominees to a newly created Judicial Nominees Evaluation Commission. Section 1 1979 c. 534 stated:

"It is the intent of the legislature in enacting this act to assist the governor in the evaluation of appointees or nominees to judicial office by providing the governor with as much information and valued judgment regarding the judicial qualifications of a candidate as is possible prior to the time such appointment of nomination takes effect. It is the further intent of the legislature to preserve the confidentiality of information gathering and evaluation procedures for the purpose of ensuring the ability of the State Bar to assist the governor by making the fullest investigation possible concerning the qualifications of a candidate for judicial office and in order to encourage persons to come forward and provide information without fear of legal reprisal or other consequences for their candid expression of views and comments concerning the qualifications of any candidate. It is also the intent of the legislature to encourage members of the State Bar and sitting judges to be available for judicial appointment without undue risk of attendant publicity from surprise adverse criticism after an appointment to judicial office is made."

The section provides that within 90 days of submission of the name of a potential appointee, the State Bar shall report its recommendation in confidence to the governor. No candidate may be appointed until the report is issued or until 90 days after submission of the name. Ultimately it allowed Gov. Brown's political agenda and liberal ideology to withstand any internal assault by Lt. Gov. Curb. Successor governors have acquiesced in this assertion of State Bar opinion.

Although never challenged in court, these requirements facially violate the governor's unfettered power of appointment under subdivision (d) of section 16 of article VI of the California Constitution.

Apparently troubled by this invasion into gubernatorial responsibilities, the following language was inserted by the drafters.

"(1) Nothing in this section shall be construed as imposing an additional requirement for an appointment or nomination to judicial office, nor shall anything in this section be construed as adding any additional qualifications for the office of a judge."

In retrospect, this was a pure unadulterated use of smoke and mirrors and an effort to deflect criticism and analysis. It worked for 16 years.

Then, the debacle. the confirmation hearing of Justice **Janice Rogers Brown** to the California Supreme Court resulted in the formation and appointment of two committees of the State Bar which are charged with heretofore unprecedented responsibilities.

First, Harry W. Low, a retired justice of the Court of Appeal, has been named chair of a special investigation committee whose narrow charge is limited to the statements made by Ms. Rita Gunasekaran, chair of the Commission on Judicial Nominees Evaluation during the May 2, 1996 public hearing before the Commission on Judicial Appointments. They are also to investigate and determine if any State Bar representative was responsible for the unauthorized disclosure of information to the Los Angeles Times of the confidential evaluation rating and report regarding Justice Brown. The Los Angeles Times, sole recipient of the private report carried forth the effort by printing three front page stories and an editorial opinion.

The first task of the investigators should be relatively simple. The clear rule of confidentiality under Section 3 of Rule III mandates no breach of silence concerning a prior unpublicized evaluation.

The colloquy between Chief Justice Ronald George, Attorney General Dan Lungren, Court of Appeal Presiding Justice Robert Puglia and the chair concerned the "not qualified" rating of the commission went as follows:

George: Are you aware that for the last time, for the Court of Appeal, she was superior, is that correct?

Gunasekaran: That would be an incomplete answer. Can I give you the entire history, then?

George: Well, certainly the rating we'd be interested in, and anything needed to explain it, but I know in our files

Gunasekaran: Because the candidate was considered initially for the Supreme Court.

Lungren: No, for the Court of Appeal.

Gunasekaran: Because we are talking about the Supreme Court, now, so the evaluations .

George: No, I'm talking, as I indicated, about the Court of Appeal [reading] "the commission has reviewed Ms. Brown's qualifications for appointment to the California third appellate district, and has found her to possess qualities and attributes considered indicative of a superior fitness to perform the judicial function with a high degree of skill and effectiveness," signed by the chair of the Judicial Nominees Evaluation Commission October 26, 1994.

Gunasekaran: That is correct, after she was evaluated initially for the Supreme Court and found not qualified.

Puglia: Well, that wasn't the question that the chief justice asked you. The question the chief justice asked you was about the report of your commission relative to their report for the Court of Appeal.

Gunasekaran: I agree, and I said I would have to give an incomplete answer, and I assumed I had

permission to give a more complete answer.

What is clear from the record is that the pressing force of advocacy to make her case for the pronounced "not qualified" rating by reaching outside the precise inquiry breached all the rules and placed the previously protected rating into the public arena. Loose lips sink ships.

This transgression was clear and is not defensible was no permission, no privilege, no waiver, no entrapment as an aggressive non-responsive answer it inflicted a deep and irreversible harm upon the nominee and the commission itself.

What can the investigators do about it? The same section states:

(1) No person or entity shall be liable for any injury caused by any act or failure to act, be it negligent, intentional, discretionary, or otherwise, in the furtherance of the purpose of this section, including, but not limited to, providing or receiving any information making any recommendations and giving any reasons therefore as used in this section, the term "State Bar" means its governing board members thereof, the designated agency of the State Bar and members thereof, and employees and agents of the State Bar.

In short, the respondent enjoys complete immunity. There are no meaningful sanctions. Justice Brown is a victim without remedy. The investigators are tigers without teeth.

The next area of inquiry, which concerns the leak of the confidential report to the L.A. Times, presents a more difficult problem. On May 17, 1996 in a speech in Los Angeles before the Federalist Society I stated: "The gang that can't shoot straight, having fired hollow point bullets, will now be pursued by blank shooters who will never hit their well hidden target. As legal observers, we will go from a blackening of character to a total whitewash."

This search will bear no fruit. So much for phase one!

On the second front, a seven member advisory committee has been named to review the operations and procedures employed by the commission. Court of Appeal Justice James D. Ward, who served on the commission from 1984 to 1987, the final year as its leader was named chairman of the oversight group. They have a broad mandate in conducting their analysis.

They will also do their best, but knowing that the cure they yearn for is all but impossible, I am of the view that they should recommend its abolition for the following reasons.

First, as stated I believe the statute represents an unconstitutional curtailment of the governor's powers and should never have been enacted.

Second, there are five systems throughout the U.S. for selecting state appellate judges. They are non-partisan elections, appointment by the governor and/or the legislature, appointment without merit selection, appointment with merit selection and selection by other judges. Not one state has emulated the intrusive mandatory authority of the Bar in the California paradigm. This should tell the committee something!

Third, the commission serves no purpose which cannot be fulfilled by various bar association input, a governor's judicial selection advisory board and/or investigation by the office of the attorney general.

Fourth, throughout their history, while the word confidential or confidentiality is mentioned seven times in the subject code, breach has been the rule, rather than the exception. The L.A. Times affair simply moved these activities to a new level because the stakes were deemed high enough by the opposition.

Fifth, it is a fleecing of the fisc on a grand scale. The commission's budget for 1993-1995 was \$ 941,383; They spent \$ 827,232. At that rate, by the time you read this, they will have spent more than

\$ 1 million for our enlightenment and their sub par performance.

Actual travel expenses including housing and dining at hotels, such as the Clift in San Francisco, where discounted rooms bring extra luxury, have occasioned in the same three-year period the expenditure of \$ 285,763 of Bar dues. To, date, more than a third of a million dollars for these junkets across our state. What a price to pay.

In summary, to paraphrase attorney Johnny Cochran: "If it has no use, just cut it loose" The sooner, the better.

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Sacramento Bee

June 27, 1996, STATE FINAL

SECTION: MAIN NEWS; Pg. A4

LENGTH: 173 words

HEADLINE: HIGH COURT TO TAKE AIDS CASE

BYLINE: Bee staff and news services

DATELINE: SAN FRANCISCO

BODY:

The state Supreme Court agreed Wednesday to decide whether a \$ 275,000 damage award against Delta Air Lines, for disclosing an employee's AIDS infection, survives him.

A state appeals court overturned the damages to Joseph A. Sullivan's estate in March, saying damages for emotional distress cannot be awarded if the plaintiff dies while the case is on appeal.

But Chief Justice Ronald George and Justices Stanley Mosk, Joyce Kennard, Kathryn Mickle Werdegar, Ming Chin and **Janice Rogers Brown** voted for review by the high court.

LOAD-DATE: June 28, 1996

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Sacramento Bee

June 27, 1996, METRO FINAL

SECTION: MAIN NEWS; Pg. A4

LENGTH: 1002 words

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Sacramento Bee

June 25, 1996, METRO FINAL

SECTION: METRO; Pg. B3

LENGTH: 187 words

HEADLINE: BAR TO HONOR RIDGEWAY AS JUDGE OF YEAR

BYLINE: Bee Metro Staff

BODY:

Judge William R. Ridgeway, presiding judge of Sacramento County Superior and Municipal courts, will be honored Thursday as judge of the year by the county Bar Association.

Also honored will be California Supreme Court Justice **Janice Rogers Brown**, Chief Judge William B. Shubb of U.S. District Court, Municipal Court Judge Patricia C. Esgro and Commissioner Philip Stanger.

The Bar Association's reception for the judges is scheduled from 5:30 to 7 p.m. Thursday in the courtyard of the Secretary of State Building, 1550 11th St. Cost is \$ 20 if paid by today and \$ 25 on Thursday. Reservations can be made by calling 448-1087.

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June 21, 1996, Friday

SECTION: Pg. 1

LENGTH: 1308 words

HEADLINE: Judicial Discretion to Strike Prior Survives Three-Strikes Law-S.C.

BYLINE: Staff Writer

BODY: California's three strikes law, which requires a sentence of 25 years to life for repeat felons, does not override a judge's power to strike a prior felony conviction allegation and impose a lesser sentence, the state Supreme Court ruled yesterday.

In an opinion that could affect thousands of criminal cases, the court ruled that a judge who considers a life term too harsh, based on the circumstances of the crime and the defendant's background, retains the discretion to impose a lesser term "in the furtherance of justice."

"Three Strikes," which was approved by the Legislature in March 1994 and by voters as a ballot proposition in November of that year, defines certain violent or serious crimes as "strikes." Anyone with one strike who is convicted of a new felony must be sentenced to at least twice the usual term. A person with two strikes who is convicted of any felony must get 25 years to life.

But in a 43-page opinion, Justice Kathryn Mickle Werdegard said the law doesn't explicitly supersede Penal Code Sec. 1385(a), which grants judges discretion in sentencing should justice require it.

"Although the Legislature may withdraw the statutory power to dismiss in furtherance of justice, we conclude it has not done so in the Three Strikes law," Werdegard said.

The ruling means any prisoner sentenced under "three strikes" could ask the sentencing judge for reconsideration.

Five justices, including retired Chief Justice Malcolm Lucas, joined Werdegard's opinion. Lucas heard the case before his retirement last month and before Justice **Janice Rogers Brown** joined the court.

Justice Ming Chin wrote a separate concurring opinion in which he complained that a lengthy discussion on the separation of powers doctrine was unnecessary.

The decision by a court with six Republican appointees among its seven members appeared likely to become its most hotly disputed ruling in a criminal case since the days of Chief Justice Rose Bird, who was voted out of office in 1986 for her court's frequent reversals of death sentences.

Republican leaders in the Legislature immediately announced plans to overturn the decision. Werdegard's separation-of-powers analysis suggests that such action would require a voter-approved constitutional amendment.

Assembly Speaker Curt Pringle, R-Garden Grove, called the ruling "a direct contradiction to the will of the people." he said the decision was "outrageous" and "high-handed."

Pringle and Secretary of State Bill Jones, a Republican, said they would immediately study new legislation. Jones said in a statement that by "granting judges the unilateral ability to impose weak sentences, the Justices have ignored the mandate from the voters that repeat felons be held

accountable for their entire criminal careers."

Assemblyman Richard Rainey, R-Walnut Creek, complained, "This is something that really strikes at the heart of three strikes and blows a tremendous hole in it."

But the state Senate's Democratic leader, President pro tem Bill Lockyer of San Leandro, said the Legislature should not "lightly change the fundamental...balance between the three branches of government" with a hastily passed constitutional amendment. Such an amendment would need some Democratic support for a two-thirds majority.

Ramona Ripston, director of the ACLU of Southern California, praised the ruling.

"The ACLU of Southern California has always believed that the 'three- strikes law' was not only unconstitutional, but an obstruction to judicial discretion in appropriate sentencing, which is a bedrock of our justice system," said .

"Today's wise ruling ensures that judicial discretion will not be eliminated in sentencing," she said.

Los Angeles District Attorney Gil Garcetti released a statement saying that he is studying the opinion and would be unable to comment on it until today.

The law, passed by the Legislature in March 1994 and reaffirmed by the voters that November, was fueled by the kidnapping and murder of 12-year-old Polly Klaas by Richard Allen Davis, a paroled ex-convict, in 1993. Davis was convicted of murder on Tuesday and could be sentenced to death.

Twenty states have some version of a three strikes law. The ruling is based on California law and does not affect other states, though its reasoning could be influential elsewhere.

Supporters, including Gov. Pete Wilson, credit the law with a substantial drop in the crime rate. Critics say crime was dropping before the law passed and has been falling in states without such laws.

They cite state statistics showing that 85 percent of the second and third strikes have been for nonviolent crimes, including burglary, drug offenses and shoplifting. Normally a misdemeanor, shoplifting, or petty theft, is a felony for anyone with a previous theft-related conviction.

The mandatory nature of the third-strike sentence was a central provision of the law, touted during the campaign as a curb on lenient judges.

"The whole idea of this was to keep repeat felons with serious and violent priors from being allowed back on our streets," said Mike Reynolds, the Fresno photographer who sponsored the 1994 initiative after his daughter was killed by an ex-convict.

"Part of the responsibility for their return back to our streets has been in the hands of soft-on-crime judges."

On the other hand, defense lawyers said voters who endorsed the law never intended life terms for shoplifters or other minor criminals, who have been subjected to lengthy terms in some well-publicized cases. The ruling gives judges flexibility in such cases.

"Judges at the trial level are crime-conscious," said John Philipsborn of California Attorneys for Criminal Justice, a defense lawyers' group. "They have been responsive to what they take to be the voters' mandate. We're really talking about a few cases."

The law says a judge may disregard a strike, and impose a lesser sentence, at the prosecutor's request. It does not say whether judges can take such actions on their own.

The Supreme Court case involves Jesus Romero, 32, of San Diego, whose five previous convictions included two "strikes": a 1984 attempted residential burglary and a 1986 residential burglary. He pled guilty in 1994 to possessing two rocks of cocaine, weighing .13 grams.

Over the prosecutor's objections, San Diego Superior Court Judge William Mudd struck the two burglary priors and sentenced Romero to six years in prison. Mudd explained that 25 years to life would be cruel and unusual punishment and that the three strikes law "basically castrates a judge."

The Fourth District Court of Appeal last year invalidated the sentence in an opinion by Justice Richard Huffman of Div. One. Huffman pointed out that Sec. 1385 explicitly provides that it does not authorize a judge to strike enhancements under Sec. 667the legislative version of three strikes. By inserting the three strikes provisions into Sec. 667, he reasoned, the Legislature indicated an intent to prevent judges from exercising their discretion under Sec. 1385 with respect to three-strikes priors.

But the high court justices disagreed, upholding Mudd's authority to determine the sentence. They sent the case back to the judge to reconsider the case and state his reasons for reducing the sentence, which the prosecutor could appeal.

Werdegar said that the "disposition of a charge is a judicial responsibility."

A unanimous 1970 ruling by the court established that "when the Legislature does permit a charge to be dismissed, the ultimate decision whether to dismiss is a judicial, rather than a prosecutorial or executive, function," Werdegar said. "To require the prosecutor's consent to the disposition of a criminal charge pending before the court unacceptably compromises judicial independence."

The case is People v. Superior Court, Romero, RPI, S045097.

LOAD-DATE: June 24, 1996
