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California Supreme Court In 2015: A Year In Transition

2015 was a year of transition for the California Supreme Court as two new justices appointed by Gov. Jerry Brown, Justices Mariano-Florentino Cuellar and Leondra R. Kruger, took office in early January. Because the new justices replaced Republican appointees, there has been widespread speculation that the court's decisions might move in a more liberal direction. One year into the new justices' tenure, the statistical evidence for any marked shift at the court is decidedly mixed.



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For 2015, the court decided 32 civil cases and 44 cases from the criminal, quasi-criminal, juvenile and disciplinary side of the docket. Final judgments made up 46.88 percent of the court's civil docket; an additional 15.63 percent arose from petitions for writs of administrative mandate, with 6.25 percent involving petitions for writ of mandate taken from decisions of the lower courts. Appeals from orders relating to arbitration and workers' compensation appeals amounted to 6.25 percent of the civil docket apiece. The criminal docket was dominated by review of final decisions (45.45 percent of the docket) and review of death penalty judgments (38.64 percent). An additional 9.09 percent of the docket arose from petitions for writs of habeas corpus.

Not surprisingly, Los Angeles dominates the court's civil docket, producing 34.48 percent of the caseload. Orange County was next, with 15.63 percent of the civil docket, followed by Alameda and San Diego counties, which accounted for 9.38 percent each. San Francisco and the Workers' Compensation Board accounted for 6.25 percent of the court's civil docket apiece.

The criminal docket this past year was more widely dispersed than the civil docket was. Riverside County was the leading source of criminal cases, but accounted for only 15.91 percent of the criminal docket. Another 13.64 percent of the docket arose from Los Angeles County Superior Court. Orange County accounted for 11.36 percent of the criminal docket, with Santa Clara and San Diego counties providing 9.09 percent each. San Bernardino, Contra Costa and Alameda counties contributed 6.82 percent apiece of the criminal docket.

The court's civil docket was dominated by government and administrative law cases — 43.75 percent of the total caseload. Sixty-four percent of those cases were won by the plaintiffs below, and the court reversed in two-thirds. This is in line with the court's recent history — between 2010 and 2014, the court reversed 62.5 percent of government and administrative law decisions where the plaintiff won below. The court decided two cases each in a variety of subject areas, including arbitration, constitutional law, workers' compensation, insurance, commercial law and employment law. All four cases the court heard in insurance and commercial law were won by the defendants below, and the court reversed in all four. The death penalty was the largest single share of the criminal docket, comprising 38.64 percent of the total. Sentencing issues contributed another 22.73 percent of the cases, followed by 18.18 percent in criminal procedure.

Conventional wisdom has it that a successful petition for review to the California Supreme Court requires a dissent at the Court of Appeal from a published opinion. But in fact, only one of the court's civil decisions this past year drew a dissent below. There's considerably more truth to the second part of that adage — only 12.5 percent of the civil docket arose from unpublished Court of Appeal opinions. Not surprisingly, 54.54 percent of the criminal docket arises from unpublished Court of Appeal opinions.

Lag times between the Supreme Court granting review and a final decision have become a subject of increasing discussion in recent years in the California appellate bar. Our data analytics research on the Illinois Supreme Court has found that the amount of time a case is pending can be a reasonably accurate predictor of whether the court's decision will be unanimous or divided. California, however, is different. Non-unanimous civil decisions in 2015 were pending an average of 700.75 days, and cases decided unanimously were pending only slightly less — an average of 699.54 days.

Lag times have increased significantly since 2000. Between 2000 and 2005, lag times tended to average between 500 and 600 days, 100-200 days less than today. Non-unanimous civil decisions reached a low in 2005, averaging 543.18 days pending. In 2002 and 2003, unanimously decided civil cases were pending an average of only 490 days from grant to decision — more than 200 days less than the average for 2015. But since that time, average lag times for civil decisions have bounced around between 600 and 800 days. In fact, the 2015 lag time for non-unanimous civil decisions is a substantial improvement over 2014, when such cases were pending an average of 858.67 days. Curiously, lag times on unanimous civil cases in 2015 increased by 100 days over 2014. Measuring lag times from oral argument to decision is not especially informative given that opinions in California generally must be issued within ninety days of argument. For 2015, non-unanimous civil cases took an average of 87 days from oral argument to opinion. Unanimous cases were pending for an average of 70 days.

Many observers have argued that the lag times at the court are driven by the court's heavy docket of death penalty cases. Criminal cases as a whole average a much longer lag time than civil cases. Non-unanimous decisions average 1854.27 days from grant to decision, and unanimous decisions average 1905.76 days. Death penalty appeals were pending an average of 3587.5 days (measured from appointment of appellate counsel to decision) in non-unanimous cases, and 3767.08 days for unanimous decisions. Non-unanimous criminal cases not involving the death penalty were pending an average of 863.86 days, while unanimous nondeath criminal cases averaged 695.9 days.

Like civil cases, lag times in criminal cases have drifted upward since 2005. In 2004, for example, non-unanimous criminal cases were pending only 870.6 days, less than half the average today. For most years between 2000 and 2005, criminal cases averaged somewhere between 1000 and 1400 days. Death penalty appeals are taking at least somewhat longer as well. Between 2000 and 2005, death appeals were pending an average of 2,500-3,500 days. Although average lags were down significantly from 2014 to 2015 — the average death penalty appeal was pending for 4028.87 days in 2014 — the numbers from 2015 are roughly comparable to most years since 2005.

The unanimity rate at the court was substantially up in 2015, with the court deciding 87.5 percent of its civil cases unanimously. This is an increase over the court's trend in civil cases during the past 10 years, when unanimity rates in civil cases tended to be in the low 70s. It represents a sharp increase from the court's record in the years 2000-2005, when the unanimity rate in civil cases was generally between 55 and 65 percent. In fact, in 2000, the California Supreme Court decided less than half of its civil cases unanimously.

On the other hand, the unanimity rate was slightly down from historic trends on the criminal side of the docket. The court decided 75 percent of its criminal, quasi-criminal and disciplinary cases unanimously, following eight straight years with a criminal unanimity rate in the 80s. Only 81 percent of the court's criminal cases in 2015 were decided by lopsided margins, with zero or one dissenters. Unanimity was down on the death penalty docket as well. The court decided 76.47 percent of its death cases unanimously — with the exception of a single-year dip in 2011, the lowest unanimity rate on the court in death cases since 2002. Although reversal of a death penalty remains a very high mountain to climb before the court, the court reversed more death penalties in 2015 than in any single year since 2000.

Overall, the court reversed in 71.88 percent of its civil cases. This is a significant increase over its recent trend; the three-year weighted average reversal rate in civil cases is 61.25 percent. Indeed, the court's reversal rate in civil cases has been remarkably stable for quite some time. With the exception of the two-year blip in 2012 and 2013, the three-year weighted average reversal rate has been between 57 and 66 percent for the past 16 years.

A substantial share of the court's docket arises from San Diego and Los Angeles. In 2015, the three divisions of the Fourth District (San Diego) accounted for 37.5 percent of the civil docket, while the

Second District (Los Angeles) produced 34.38 percent of the civil caseload. That's a substantial increase for the Fourth — the court heard only one civil case from the Fourth District in 2014, and only four in 2013.

The court reversed the divisions of the Second District 81.82 percent of the time, up significantly from 2014, when the court reversed the divisions of the Second District in only 54.55 percent of civil cases. In fact, the three-year weighted average reversal rate for decisions arising from Division Three of the Second District is only 42.86 percent. San Francisco's First District was the next biggest portion of the civil docket, producing 15.63 percent of the caseload and being reversed every time. This represents a departure from the court's recent history; the three-year weighted average reversal rate for the First District is 50 percent or less for four of the five divisions.

The Second District accounted for a much smaller proportion of the criminal docket — only 9.3 percent. The court was reversed in 40 percent of those cases. The Fourth District accounted for 23.26 percent, and was reversed in 60 percent of those cases. Although the First District historically has played a relatively minor role in the court's criminal docket, 11.63 percent of the criminal caseload arose from there in 2015. The First District was reversed in whole or in part in only 40 percent of those cases, and indeed, the First has fared relatively well on the Supreme Court's criminal docket in recent years. Two of the five divisions of the First District have a three-year weighted average reversal rate in criminal cases of 50 percent, and two of the five have weighted average reversal rates of zero.

The court reversed, at least in part, in 41.18 percent of its death cases in 2015, following up on a 43.48 percent reversal rate in 2014. These are the highest single-year reversal rates for the court in direct appeals from death judgments since our data begins in 2000. Looking at the rest of the criminal docket without taking the death appeals into account, we find that the court reversed in 57.69 percent of its nondeath criminal cases. The three-year floating average for reversal rates in nondeath criminal cases at the court is only slightly higher — 59.3 percent.

For a number of years, the court has tended to write somewhat longer opinions than other state supreme courts. In civil cases for 2015, the average majority opinion in a non-unanimous decision was 31.25 pages. The average unanimous opinion was 27.14 pages long. Dissents averaged 12 pages in civil cases.

The data for criminal cases is dramatically affected by the death penalty appeals. Overall, the average majority opinion in a non-unanimous criminal decision was 42.91 pages. The average unanimous decision was 36.66 pages long. Breaking the docket up between death and non-death cases, we find that the average majority opinion in a non-unanimous death penalty case was 68.75 pages long, and 60.46 pages in a unanimously decided death case. The average majority opinion in a non-death criminal case decided with dissenters was 28.14 pages, and the average unanimous decision was 19.35 pages long — in both cases, shorter on average than the civil cases. The average dissent in criminal cases was 14.14 pages long.

For many years, the California Supreme Court has been quite hospitable to amicus curiae briefs. Between 2000 and 2015, the court has accepted 2,618 amicus briefs in civil cases — an average of 4.16 briefs per case. The court's average was somewhat down in 2015 over recent years, as the court accepted 3.78 amicus briefs per case on the civil side of the docket, the lowest number since the court averaged 3.45 in 2010. The court's heaviest year since 2000 for amicus briefs was 2008 at 5.93, but that number is substantially skewed by litigation regarding same-sex marriage. Excluding the marriage cases from our calculations yields averages for 2008 and 2009 right in line with the court's trends. The court's second-heaviest year for amicus briefs was 2003, when an average of 5.68 amicus briefs per civil case were filed. Not surprisingly, amicus briefs were far less common in criminal cases, although by no means unheard of. The court averaged 0.48 amicus briefs per case in 2015 on the criminal docket. The court's lightest year in our data was 2006, when the court received only 0.13 amicus briefs per criminal case; its heaviest was 2002, when the court averaged 0.83 amicus briefs per case.

Chief Justice Tani Cantil-Sakauye led the court with seven majority opinions on the civil side. Next were Justices Carol Corrigan and Kathryn Werdegar, who wrote six each. Justices Ming Chin and Cuellar wrote for the Court three times each in civil cases, Justice Liu twice and Justice Kruger once. The Chief Justice averaged the longest majority opinions at 38.86 pages, followed by Justices Chin

and Werdegar at 31.25 and 31.14 pages, respectively. Justice Liu was next at an average of 24.25 pages per majority opinion, and then Justice Cuellar at 23 pages.

On the criminal side, Justice Werdegar was the most frequent writer, with nine majority opinions. Justice Chin was next, writing for the Court in eight criminal cases. Justice Liu was third, writing the majority opinion in seven criminal cases. Chief Justice Cantil-Sakauye wrote six majorities on the criminal side, as did Justice Corrigan. Retired Justice Marvin Baxter wrote for the court in three criminal cases, and Justice Cuellar wrote two criminal majority opinions. The chief justice wrote the longest majority opinions in criminal cases (including death penalty cases) at 46.67 pages, followed by Justices Werdegar (41.56), Liu (40.29) and Corrigan (38.33 pages).

We've argued in our work on the Illinois Supreme Court that one measure of the dynamics of a state supreme court is how often justices tend to be in the majority when the court is divided. Four justices — the chief justice and Justices Werdegar, Cuellar and Kruger — voted with the majority in all of the court's non-unanimous civil decisions. Justice Goodwin Liu voted with the majority in three-quarters of the non-unanimous civil cases, and Justices Corrigan and Chin did so in half. Only Justices Kruger and Cuellar were in the majority in all the court's non-unanimous criminal decisions. Justice Corrigan was with the majority in 90.91 percent of those cases. Justice Liu was next at 81.82 percent. The chief justice and Justice Werdegar voted with the majority in 72.73 percent of the non-unanimous criminal cases, and Justice Chin did so in 45.45 percent.

So far, evidence that the court is shifting in a more liberal direction is sparse on the civil side of the docket. Justices Cuellar and Kruger voted together in every non-unanimous civil case in 2015, but their agreement rates were 100 percent with the chief justice and Justice Werdegar as well — both Republican appointees. Cuellar and Kruger voted with Justice Liu, the third Gov. Jerry Brown appointee, in 75 percent of the non-unanimous civil decisions this past year. The two newest justices voted only half the time with Justices Corrigan and Chin.

Agreement rates among the Republican appointees to the court are somewhat lower. Between 2013 and 2015 in non-unanimous civil cases, the chief justice has agreed with Justice Corrigan 75 percent of the time, with Justice Werdegar in 70.59 percent of cases, and with Justice Chin two-thirds of the time. Although Justices Corrigan and Chin have agreed in 93.33 percent of split civil cases during that three year period, she has voted the same way as Justice Werdegar in only 43.75 percent of non-unanimous civil cases. Meanwhile, Justice Werdegar has agreed with Justice Chin in only one-third of the non-unanimous civil decisions during that time. Justice Liu has maintained a centrist position in the court's voting dynamics, agreeing with the chief justice in 76.47 percent of non-unanimous civil cases since 2013, with Justice Werdegar 70.59 percent of the time, with Justice Chin in 53.33 percent of cases, and with Justice Corrigan in half.

There is somewhat more evidence of a relatively consistent liberal voting wing of the court in criminal matters. Justices Cuellar, Kruger, Liu and Werdegar agreed in every one of the non-unanimous criminal cases decided in 2015. Justices Cuellar and Kruger agreed with Justice Corrigan in 85.71 percent of such cases last year. In contrast, the two Brown appointees agreed with the chief justice in only 57.14 percent of criminal cases, and with Justice Chin in only 14.29 percent.

Turning to the Republican appointees, the chief justice and Justice Chin have agreed in 89.29 percent of non-unanimous criminal cases since 2013. The chief justice has agreed with Justice Corrigan in 75 percent of cases during that same period, and with Justice Werdegar 67.86 percent of the time. Justices Corrigan and Chin have agreed in 71.43 percent of non-unanimous criminal cases since 2013, and Justices Corrigan and Werdegar have agreed 64.29 percent of the time. Justices Werdegar and Chin have agreed in only 57.14 percent of the court's non-unanimous criminal decisions in the past three years. Justice Liu, the only Brown appointee to serve the entire three-year period, has agreed with Justice Werdegar 82.14 percent of the time, with Justice Corrigan in 71.43 percent of non-unanimous criminal cases, and with the chief justice in 60.71 percent of such cases.

We can draw a number of conclusions from our review of the California Supreme Court's decisions in 2015: (1) the court continues to have a strong interest in government and administrative law; (2) although unanimity at the Court of Appeal is not fatal to one's chances of persuading the Supreme Court to grant review, an unpublished appellate decision very nearly is; (3) both the court's unanimity rate and its reversal rate may be edging upward; (4) there is significant evidence that the court may be taking a more liberal approach in criminal law; and (5) although the margin for error

for civil defense counsel may have decreased with the retirement of two Republican justices, there remains a viable center on the court, consisting of the chief justice and Justices Corrigan, Chin and Werdegar.

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