

SIZING UP JUSTICE MORENO

By Gerald F. Uelmen*

In October, 2001, Justice Carlos Moreno was sworn in to replace Justice Stanley Mosk on the California Supreme Court. The replacement of a single Justice on the seven-judge court can bring about a substantial realignment of voting patterns, but it takes at least a year before the impact can accurately be measured. This article will analyze Justice Moreno's published opinions and his voting record for the eighteen month period ending April 1, 2003 to assess the impact of his appointment upon the work of the court. During that period, he participated in the decision of 148 published cases, and authored 14 majority opinions, 12 concurring opinions and 10 dissents.

Voting Patterns.

Justice Moreno has quickly emerged as a pivotal vote that can determine the outcome when the court divides. Since he joined the court, it has split 4-3 in a total of 14 cases. Justice Moreno was with the majority in 11 of those cases, and in all nine of the cases decided during the past year. In half of these fourteen cases, five of which were civil cases, Moreno was allied with Chief Justice George and Justices Kennard and Werdegar to form

the majority. In two of the splits, both criminal cases, he lined up with Justices Baxter, Brown and Chin to form the majority, and in another criminal case, he joined Chief Justice George and Justices Baxter and Chin to form the majority. Several of the criminal cases would have come out the other way if Justice Stanley Mosk were still on the court. While Justice Moreno's voting record clearly mirrors that of Justice Mosk in civil cases, he appears to be more conservative than Mosk when it comes to criminal cases.

Justice Moreno's highest rate of disagreement is with Justice Janice Rogers Brown (23%) and Justice Joyce Kennard (21%). His lowest rate of disagreement is with Chief Justice Ron George (11%) and Justice Marvin Baxter (17%). In the current line-up of voting patterns, Justice Moreno's orbit is close to the center positions occupied by Chief Justice George and Justice Werdegar. Justice Kennard is left of center, while Justices Baxter, Chin and Brown are ordinarily right of center. (Justice Brown can often be a libertarian "wild card" in criminal cases, though). When Justice Moreno leans left, as he does in civil cases, a majority of George, Werdegar, Kennard and Moreno will often emerge. When he leans right, as he is more likely to do in criminal cases, a majority of Baxter, Chin, Brown and Moreno may appear.

It must be noted, however, that only 10% of the cases are currently splitting the court 4-3. Since Justice Moreno joined the court, 70% of its opinions have been unanimous.

Majority Opinions.

Justice Moreno has authored fourteen majority opinions, all but two of them in civil cases. Eight of them were unanimous decisions. A total of ten dissenting votes were cast to majority opinions authored by Justice Moreno, giving him an “agreement rate” of 89.8%. In terms of the degree of acquiescence by other Justices in his majority opinions, Justice Moreno thus ranks fourth on the court, close to the fifth spot occupied by Justice Mosk. The highest rates are posted by Chief Justice George and Justice Brown. The most frequent dissenter to Moreno’s majority opinions (four dissents) is Justice Brown, with whom he has his highest rate of disagreement.

Unlike his dissents, Justice Moreno’s majority opinions are devoid of passion, almost boring. They are concise and well-organized, as most staff-produced opinions are, but show little evidence of any personal literary flair. They are shorter than average, and rarely go off on tangents. For 2002, Justice Moreno ranked fourth on the court for average length of opinions (13.1 pages) and fourth for average time from grant of review to opinion (522 days). See Stephen R. Barnett, “Rays of Light,” Calif. Lawyer

Magazine, April, 2003, p. 13. While he does resort to footnotes, their use is not excessive.

A good example of Moreno's majority style, and one of the more interesting opinions to read, is *Little v. Auto Steigler*, 29 Cal.4th 1064 (2003), a 4-3 decision concerning the applicability of the procedural requirements of *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal.4th 83 (2000) to arbitration of claims that an employee was terminated in violation of public policy. Justice Moreno clearly identifies the policy issues at stake, and makes persuasive arguments why they should compel the result he reaches. The dissenters, Justices Baxter, Brown and Chin, are more inclined to follow the lead of the U.S. Supreme Court in limiting protection for employees subject to arbitration agreements. The case thus presents a classic conflict between the rights of employers and employees.

Dissenting Opinions.

Justice Moreno's dissent rate so far is 11.5%, which is third highest on the George Court. Only Justices Kennard (19.6%) and Brown (14.6%) have higher rates of dissent. Justice Moreno has authored ten dissenting opinions, and 6 of them were solo dissents in cases decided by 6-1 margins. He is more likely to write dissents in criminal cases than civil cases, and four of his solo dissents were in criminal cases, including one death penalty case.

Just reading his dissents, one might conclude he is more strongly pro-defense than his overall voting record suggests.

In *City of Los Angeles v. Superior Court*, 29 Cal.4th 1 (2002), for example, the court upheld the five year limit on “*Pitchess* motion” discovery of citizen complaints against police officers contained in Evidence Code §1045(b)(1). Justice Moreno authored a spirited solo dissent arguing that the time limit is arbitrary and violates due process. Then, in *Alford v. Superior Court*, 29 Cal.4th 1033 (2003), the court ruled in favor of the prosecution to uphold a protective order prohibiting sharing of *Pitchess* motion discovery within a public defenders’ office, while ruling against prosecutors’ claims of standing to participate in *Pitchess* motions and discover the information disclosed to the defendant. Justices Baxter, Brown and Chin dissented from the second holding, and would have ruled for the prosecution on both issues. Justice Moreno authored a solo dissent on the first holding, arguing that defense lawyers should be allowed to share *Pitchess* discovery.

Justice Moreno’s dissenting opinions reflect more passion and personality than his majority opinions. They also reflect his many years of experience as a trial judge, displaying a refreshing familiarity with the practical realities of trial court proceedings.

Concurring Opinions.

Thus far, Justice Moreno has authored twelve concurring opinions. He adds his own concurring opinion to 9% of the decided cases. While his rate of concurring opinions falls below that of Justices Brown, Kennard and Werdegar, that is not company he should seek to emulate. The rate of concurring opinions is astronomically high on the George Court, and the object of legitimate complaint by lawyers and law students. Last year, the court produced 59 separate concurring opinions in 110 published cases, the highest proportion in nineteen years. Many of the concurrences add little to the holding, going off on tangents not really raised by the case. A good (bad?) example is Justice Moreno's concurring opinion in *People v. Loyd*, 27 Cal.4th 997 (2002), discussing the federal law governing the monitoring of prison inmates' conversations.

Death Penalty

Since Justice Moreno joined the court, it has decided 22 death penalty cases, affirming 19 of them, for an overall affirmance rate of 86%. All three reversals were unanimous, as were 12 of the affirmances. Of the seven affirmances that drew any dissent at all, Justice Moreno dissented in three of them. Thus, his rate of dissent in death cases is significantly lower than Justice Mosk's was, and lower than that of Justice Kennard. Justice Moreno

has authored only one death penalty decision so far, and his opinion drew a sharp dissent from Justice Kennard and Chief Justice Ron George. *In Re Larry Roberts*, 29 Cal.4th 726 (2003). Although a referee found that three inmate witnesses gave false testimony against the defendant, the opinion by Justice Moreno concludes the perjured testimony did not undermine the Court's confidence in his guilt. The dissent makes a compelling case that, where the entire prosecution was based upon the testimony of five prison inmates, the fact that three of them perjured themselves might have given a jury a reasonable doubt.

Conclusion.

As the Court's only "rookie," Justice Moreno has settled in after a remarkable smooth transition. He is likely to play a key role, along with Chief Justice George and Justice Werdegar, in defining the Court's center. When the court divides, as it does in about 10% of its cases, Justice Moreno's position is pivotal and will often determine the outcome of the case. In criminal cases, especially death penalty cases, his voting pattern is more conservative than was Justice Mosk's, but in civil cases, his voting pattern is very similar to Mosk's. Justice Moreno broke new ground on the court by allocating two of his attorney research positions to annual law clerks. Surprisingly, he is the only appellate Justice in California to do so.

His willingness to innovate bodes well for his independence, as does his willingness to stand alone in dissenting. While the Chief Justice appears to be his closest ally on the Court, his rate of agreement with the Chief in deciding cases is lower than what is usual for a rookie.

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