

## **Law clerks at the state high court: then and now**

**Richard Mosk**

**Myron Moskovitz**

Daily Journal

May 13, 2015

[www.dailyjournal.com](http://www.dailyjournal.com)

We each were fortunate to serve a one-year stint in 1964 as clerks for justices of the California Supreme Court. That court was among the great state courts, comparable to the famous New York Court of Appeals of the 1920s.

In those days, the law clerks had myriad duties. We were the first stop for petitions for hearing ("petitions for review" today). The clerk of the court divided all the petitions into seven stacks and gave one to each justice. On Monday, a couple petitions waited for each law clerk. By the end of the week, we had to give our justice a "conference memorandum" on each petition, with a recommendation to grant or deny. If our justice approved, he would send it to the other justices, who sent him their conference memos.

We had other duties, meaning we had little time to read the petitions, oppositions and replies; do legal research; and write the memoranda. Often, the subjects were new to us. Who knew that California also had Military and Veterans Code, a Water Code, a Financial Code, an Elections Code, and even a Harbors and Navigation Code? Our standard law school courses had never touched on such matters.

We had resources, though. Not Westlaw nor Lexis - but the smart people around us. We would visit the court's law library and ask the librarian for help. We would peruse books he provided us to learn enough to understand the petition. We also used the Decennial Digests of cases, which often meant going through volumes of digests to find applicable law.

Although we had taken procedure in law school, those classes did not cover all the state writs or state pleading and appellate requirements we faced as clerks. So we would head to the office of Don Barrett, Chief Justice Roger Traynor's permanent clerk. Some justices had a permanent clerk who worked with us youngsters. Don gave us the answer - with cites - off the top of his head.

Clerks often exchanged ideas with each other. (One clerk was our present governor. Others included now Harvard Law School professor Gerald Frug and Steve Umin, a later U.S. Supreme Court clerk and well known Washington litigator. Harvard Law School professor Laurence Tribe came a year or so later.) And the justices themselves were very accessible. No appointment needed - just knock.

Like today, we mostly recommended denials. The court received over 1,100 petitions our year, but granted only 148 - a higher percentage than today. If we recommended a grant, and our justice agreed, he would recommend a grant to the other justices. As now, it took four votes to grant a petition. Justice Stanley Mosk wanted to adopt the U.S. Supreme Court procedure so three votes were sufficient (four out of nine in U.S. high court), but he could not sell that idea. If the court granted a petition, we would draft a "calendar memo" for the justice. This was the

prequel to a full draft opinion. Preparing a calendar memo was arduous, but rewarding. We drafted memos on some of the most important issues of the day.

At any given time, each of us might be working on several petitions for hearing and calendar memos. We also wrote conference memos on death penalty appeals. Those appeals go directly to the Supreme Court; they are "automatic" - the court *must* take them. Each law clerk worked on a few of those during our year. These involved long briefs and records, because each trial was really two trials: on guilt and on the penalty. Because so much was at stake, we read the records for ourselves, and raised issues that might not have been raised by the lawyers.

Occasionally our justices would ask us to review a calendar memo prepared by some other justice's chambers. Sometimes we would draft a concurring or dissenting opinion, though rarely. From our experience, we not only learned the law, but how to write. Our justices were active in ensuring proper grammar and good writing.

As time went on, the process changed. The number of justices didn't grow - seven then, seven now - but the state's population did - 18 million then, 39 million now. All these additional people generate more litigation, some of which filters up to the Supreme Court. Today, a little over 4,000 petitions are filed each year, on top of death penalty appeals, State Bar matters, and other writs. The number of petitions for review has, however, been declining recently.

For the increased population, new laws were deemed necessary and enacted - some complex. When we clerked, for instance, we didn't have to deal with the California Environmental Quality Act, the Coastal Commission, Proposition 13, "three strikes" cases, or complicated sentencing statutes with multiple enhancements and fines. Also, there was little jurisprudence under the Fair Employment and Housing Act during our time.

The court dealt with the increased workload with more staff and more specialization. Today each justice has five law clerks - not three as in our day - with the chief justice having a few more. Most of these law clerks have been permanent employees, although some justices hire recent law school graduates as annual clerks.

Law clerks no longer handle petitions for review, although they may review memoranda written by the central staff. The current court has a criminal central staff of about 20 lawyers that prepares memoranda on petitions for review in criminal cases. It also has a civil central staff of about 14 lawyers that prepares memos for civil cases. These lawyers assign each petition to an "A" list or a "B" list. The "B" list gets little attention. Those petitions are not discussed at conferences, although a justice may request to elevate one to the "A" list. The "A" list receives serious consideration. This dichotomy did not exist when we were there. Finally, there is also a central staff of seven permanent lawyers dealing with death penalty cases. Today, law clerks for individual justices spend more time than we did challenging calendar memos from other justices' chambers.

In our years, the Supreme Court produced about 158 written opinions - including for writs. In recent years, the Supreme Court has issued less than 100 opinions per year, and the number seems to be dropping.

Some complain today of the lengthy opinions and yearn for the days of concise, tight opinions. In our day, several of the justices had been trial judges. They understood that the opinions were not only about developing the law, but also to give guidance to trial judges and lawyers. Opinions were dealt with promptly, while today it may take years to get a case to the oral argument stage.

Today opinions generally are longer and sometimes written in a law review style. There are, of course, more legal precedents and theories available that can explain this. Moreover, our Supreme Court must deal with U.S. Supreme Court opinions, which are often fractured and confusing to lower courts and lawyers. Perhaps computer research and word processing contribute to longer opinions. In our day, manual research and typing seemed to deter excess wordiness. Today's law clerks presumably work mostly on calendar memos - i.e., draft opinions. Is this why opinions today are longer than they were in our day? The chief justice always had administrative duties, but nothing comparable to what the chief justice faces today.

Some of the newer justices seem to be hiring young law clerks like us. We wonder how even the most brilliant law school graduate will be able to deal with the complications of lengthy and Byzantine statutes that require years of experience to master. On the other hand, having a few short-term clerks might be an antidote to the bureaucratization of the appellate system. Also, whether the lack of trial experience of today's justices will have any effect is unknown. Certainly not all great justices have had trial experience. (Contrary to myth, Traynor was not just an academic, but had practiced in both state and federal governments, including in the state attorney general's office, and had drafted legislation and authored famous law review articles.)

Serving as a law clerk was a great way to begin a legal career. It gave us a close-up look into the most important factor a litigator must know: how judges think. And it trained us to learn a new area of the law quickly and well enough to present a coherent memo on it. Both of us think of ourselves as more or less generalists - something unusual in this era of specialization. We believe our clerkships helped us in this regard. In our view, the clinical programs or training sessions a law school or law firm might offer are no substitute for the clerkship experiences we had.

**Richard Mosk** served as law clerk to Justice Matthew O. Tobriner. He is now an associate justice of the California Court of Appeal, 2nd District.

**Myron Moskovitz** ([www.myron moskovitz.com](http://www.myronmoskovitz.com)) served as law clerk to Justice Raymond E. Peters. He now handles civil appeals, is of counsel to California Appellate Law Group, and is author of "Winning An Appeal" (4th ed., Lexis).