

SCOCA Chambers Staff: Annual Clerks or Staff Attorneys - or Both?

We revisit a conversation of ancient vintage about the relative merits of judicial staff attorneys versus annual law clerks in the chambers of California Supreme Court justices. The staff attorneys are long-term professionals, while the annual law clerks are typically recent law school graduates who serve just a year or so (thus the name). This is distinct from the related debate about the role these attorneys play in the court's decisionmaking process. That discussion is for another day - today we only compare staff attorneys and annual clerks.

This conversation has been going on for many years - most recently our colleagues at the Daily Journal (Emily Green) and Horvitz & Levy (atthelectern.com) have weighed in. In the past, former Berkeley Law Professor Stephen Barnett directed some tart comments at the court's use of staff attorneys, describing it as a "bureaucourt" with over-reliance on staff attorneys to crank out over-long opinions.

First, some facts.

Although the practice has varied over time, the California appellate courts have long been assisted by staff attorneys. Currently, in the California Supreme Court, there are several groups of staff attorneys: the civil, criminal, and capital central staffs, and the staff attorneys in the chambers of the individual justices. Similarly, in the courts of appeal there are central, writ, and chambers staff attorneys.

Powerful practical considerations militate in favor of the state's appellate justices having this kind of professional legal support staff. Justices of the California Supreme Court might have only 200 or so working days a year, and given that the court in recent years has issued approximately 100 written opinions each year, that would require the justices to issue an opinion every other day on average. According to the 2014 Court Statistics Report, last year the California Supreme Court issued 94 decisions arising from more than 4,000 petitions for review (and around 3,000 original writ petitions) in the previous fiscal year. With the court's membership fixed by the state constitution at seven justices, at the very least the volume of cases to

decide means two things: there is only so much work that the justices themselves can do, and the court cannot produce many more opinions than it already does. These productivity numbers become even more stark given that at least 25 percent of the court's time and energy is spent on nondiscretionary review of death penalty matters that come directly and automatically to the court. Former Chief Justice George frequently assailed the capital case docket for its numerous adverse effects, and current Chief Justice Cantil-Sakauye recently spoke on this issue on KQED and KNBC broadcasts. The bottom line is that, unless fewer cases are to be resolved or a long backlog is to be tolerated, the justices *must* have assistance.

In his oral history published by the California Supreme Court Historical Society, Peter J. Belton (who served 41 years as a staff attorney for the court) notes that when he started there in 1960, each associate justice was allotted three legal staff positions, with two or three extra positions for the Chief Justice. Two positions were for staff attorneys, and one for an annual law clerk. In 1973 the court added a new program to assist with its workload: legal externships for law students, on average three per chambers. The interest at the court in the extern program has waxed and waned to a degree over the years, primarily based on the preferences of individual justices. One factor here may be that the inexperience of the law students causes them to generate more work for the court staff - the opposite of the program's intended purpose.

Over the course of Mr. Belton's tenure, the central staffs developed. These are groups of long-term professional judicial staff attorneys not attached to an individual justice's chambers. The criminal central staff came into existence around 1969. The civil central staff was formed in 1988 — which coincided with a reduction in the use of externs. The capital central staff came began in about 2001-2002, to handle about half of the court's annual capital case work, the remainder being done directly in chambers.

During this time the annual clerks also were phased out, and the court gradually changed to an all-staff attorney model for each justice's chambers during the Chief Justice Lucas era. One factor was the court's heavy capital caseload, which is composed of complex cases to which annual clerks are not well suited. By the time of Chief Justice George the transition was complete, and none of the justices used

annual clerks (the one exception was Justice Moreno). But it seems that this was less an express policy decision than a matter of collective convention driven by the practicalities of handling the capital caseload in each chambers, as staff composition is always at an individual justice's discretion.

Now the associate justices each have 5 chambers slots, and the Chief Justice continues to have three more due to that position's greater administrative responsibilities. Each justice can fill their slots as they wish. And the externs seem to be back. Currently:

- The chambers of the Chief Justice, and Justices Werdegarr, Chin, and Corrigan are all staff attorneys, no annual clerks.
- Justice Liu has 1 staff attorney and 4 clerks.
- Justice Cuéllar has 3 staff attorneys and 2 clerks.
- Justice Kruger has 4 staff attorneys and 1 open slot – possibly for an annual clerk.

Now, the debate.

In favor of staff attorneys are institutional knowledge collectively, and deep learning and wisdom individually. Although the staff attorneys lack civil service job protection, it is common for the staff of a departing justice to stay with the court – either on the staff of the new occupant of those chambers, or on one of the central staffs. Again, convention. This practice means that many of the current staff attorneys have been with the court for decades, outlasting two or even three or more justices. And that longevity naturally tends to produce long institutional memories and a comprehensive knowledge of the court's practices and jurisprudence. One expects that a ready-made staff familiar with the court's workflow and history would be invaluable to an incoming justice, particularly one with no prior judicial experience.

Against staff attorneys is the view that they might form a powerful “shadow court” that can unduly influence the judicial function. (As a historical aside, similar charges were leveled against the commissioners employed by the court between 1885 and 1904.) True, the appellate courts, particularly the state high court, simply could not function as currently constituted without the assistance of staff attorneys due to the

volume of work. But as a semi-permanent entrenched bureaucracy that outlives individual jurists, the concern is that the unelected staff attorneys exert an untoward influence on the cases that should be decided solely by the justices of the court. “Justices come and go, but the attorneys tend to stay,” as Itir Yakar wrote in a 2006 Daily Journal article on this subject.

This concern seems overblown. Professor Joseph Grodin, a former justice of the court, dismisses it, and no former member of the court (justice or staffer) has publicly endorsed such a view. Staff attorneys serve at the pleasure of the justices – and some have been dismissed over the years. Could anyone doubt that a justice of the state’s high court would have little difficulty in being unbowed by a few staffers whose employment exists at whim?

In favor of annual clerks, Justice Liu has described the practice of rotating clerks as providing fresh thinking and maintaining the mentoring opportunities he enjoyed as an academic. He also points out that a clerkship program advantages the court by creating an appellate bar of clerk alumni, who can be ambassadors of the court and add to its institutional capital. Professor Barnett speculated that annual clerks would bring new ideas and new trends to an otherwise insular and isolated court. And Professor Gerald Uelmen thinks that the quality of the bar suffers if it lacks young attorneys trained by the court. It certainly benefits the bar generally to have members with knowledge of the court’s inner workings, and presumably former clerks will be better advocates before the court. True, some annual clerks may be fresh from law school graduation, but at least some of the recent annual clerks at the court have experience from practice or from clerking with other courts, an echo of the trend among federal judicial clerks.

Against annual clerks is the view that their inexperience means that they can be comparatively slower and less productive, and this diverts chambers resources to training them and revising their work. That seems to have been the court’s experience in the past, by Mr. Belton’s account. And the work product of annual clerks may *create* work within the court by diverting the resources of other chambers to rewriting the resulting memos. Although he acknowledges that it takes time to train annual clerks and get them up to speed, Justice Liu opines that it is a worthwhile effort. But however worthwhile it may be, surely there must be an

efficiency effect caused by annual turnover in a chambers that (as all must) handles capital cases – when the cases can last for 20 years, and the opinions take 6 months or more to write. Finally, former Chief Justice George felt that the absence of practical legal experience and lack of life experience in recent law graduates was a problem.

The analysis.

Perhaps this “debate” is no real dispute at all. Fundamentally those with an interest in the court – and the court itself – surely must be most concerned with the most effective means of obtaining just results. If that is true, is it not best for the individual justices to (as they do now) decide for themselves how to assemble their teams? As the court and its justices have shifted their staffing models over time, it is fair to compare that dynamic to the development of the court’s composition itself, and even more broadly, to the evolution of the state court system as a whole. California’s courts have historically shown an ability to adapt to changing present needs, and from this broader perspective the fluctuation over time in the state high court’s staffing model looks more like pragmatic flexibility, and less like evidence of some shift in a philosophical paradigm. At some times, for some tasks, and for some justices, staff attorneys may simply be preferable – whether for efficiency or mere personal preference. But it is not inherently unreasonable for some justices (present and past) to find that their chambers function best with seasoned attorneys, and for others to prefer the energy of annual clerks. And still others may find a mix of both is optimal. If on the whole the court is producing good decisions in a timely manner on issues needing resolution at the state level, does it really matter who assisted the justices in that effort?

It is interesting (but perhaps not demonstrating a causal relationship) that the three newest justices, all Governor Brown appointees, are using at least one slot for annual clerks, while the pre-Brown justices (all appointed by Republican governors) are using an all-staff-attorney model. This may merely be a matter of convention – before Justice Liu joined the court, annual clerks had been practically extinct for many years. To the two newest members of the court, it may seem as if annual clerks are the new normal – or it may simply be that as a former academic (Cuéllar) or a former government lawyer (Kruger) they were used to working with a constant

stream of law students and recent graduates. And it is not necessarily true that justices who do not employ annual clerks are *opposed* to them. For example, the Chief Justice has spoken favorably about the prospect of hiring an annual clerk (résumés to 350 McAllister Street, San Francisco CA 94102). Again, the question is one of finding the optimal balance. Should a chambers be all professional staff, mostly annual clerks, or some of both? That is the debate.

It will be even more interesting to see what, if any, long-term effects of the new normal at the court are observable from the outside. Due to the variety of staff compositions in the court as a whole, and within individual chambers, it may be that *no* effects become visible. But if some are, these questions occur. Will it be possible, for example, to empirically determine that the chambers of justices with annual clerks are any more or less productive than the others – or whether the presence of annual clerks reduces the productivity of other chambers? Or whether the clerk chambers are slower (or faster) in producing opinions? Or – and this is perhaps the ultimate question – whether the opinions from chambers with clerks are *better* than opinions from staff chambers? Obviously it will take time for a pattern, if any, to emerge.

But it is much more likely that this is merely a point in a cyclical trend. That the wheel will turn again. And this debate will go on.