

A Brief History of the Court of Appeal for the Third Appellate District

BY LEVIN

General Norton Parker Chipman, the first Presiding Justice of the Third District Court of Appeal, understood well the need for an intermediate appellate court in California. By the late nineteenth century, the California Supreme Court could no longer keep up with the increased litigation that accompanied California's growth, resulting in, according to Justice Chipman, "so grievous a burden to litigants."

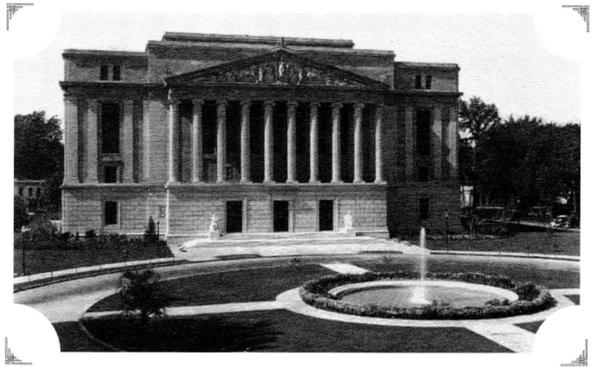
The state tried first to alleviate the burden without creating an additional court system, establishing the office of Supreme Court Commissioner in 1885. Those appointed operated as de facto justices; their decisions were published (in the "Cal.Unrep." series) and remain citable authority. Eventually, the Legislature chose to replace the commissioner system with the Court of Appeal, divided into three districts. To that end the California Constitution was amended by the People in 1904, the proposal receiving seventy-two percent of the vote.

THE "WORKHORSE" DISTRICT

Originally, in 1905, the Third District comprised thirty-five of California's fifty-eight counties, and nearly forty-four percent of its land, an immense area covering over 68,000 square miles. Today, although it has lost nearly a third of its territory, the district still includes thirty percent of the state – nearly 46,400 square miles comprising twenty-three counties. It stretches from the Oregon border south to Mono County and west to the coastal range.

The Third District encompasses most of California's water, supplied by runoff from the Sierra Nevada; some of the richest farmland in the world; and portions of the nation's greatest forests and timberlands. But it also includes areas long urbanized (e.g., Sacramento County) and rapidly urbanizing (e.g., Placer and San Joaquin Counties). This varied geography and demography gives rise to complex zoning, water, and environmental cases, as well as more traditional grazing and mining cases. (Those jurists who hail from the less-developed regions still gather under the moniker "Cow Counties Judges Association.")

Despite the vast area it covers, the Third District has successfully resisted the creation of divisions, geographic or administrative. When the late former Presiding Justice Robert K. Puglia learned of one serious proposal that had been quietly introduced by a legislator, he spiked it with the help of retired Fifth District Presiding Justice George Zenovich, then a leader in the California Senate.



The Library and Courts Building, circa 1930

The lack of divisions in the Third District proved unexpectedly beneficial in 1992. When a case came before the Supreme Court involving that court's temporary landlord, all of those justices recused themselves. The fact the court did not have divisions made it administratively expedient for the Supreme Court to appoint seven justices from the Third District, chosen by lot, to sit as an acting Supreme Court. (See *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.*, 2 Cal.4th 342 (1992).)

However, the size of the district has often resulted in a relatively high caseload for its justices, leading the legal newspaper *The Daily Journal* to describe the Third District as a "workhorse." Proud of the court's high productivity as reflected in an annual statistic of opinions-per-judge, Justice Puglia one year took issue with the Administrative Office of the Court's conclusion about the Third District, that "high rates of disposition are not necessarily desirable" and a justice should "decide only a specific maximum number of cases." Puglia sent a letter explaining that he needed to know what that "specific maximum number" ought to be so the Third District justices and staff could schedule their extended vacations! Apparently chastened, the AOC clarified its next report to state that the Third District's "high rates of disposition indicate overload and a need for additional judgeships."

A UNIQUE COURT

The Third District's location in the political heart of the state has made this court unique among California's intermediate appellate courts. With most state agencies headquartered in the capital and many statutes requiring or encouraging suits to originate in Sacramento County Superior Court, the court hears a disproportionate number of appeals involving governmental powers and administration. As a result, the Third District has been likened to the United States Court of Appeals for the District of Columbia Circuit.

The court has also developed an expertise in the

area of election law. In 1913, a piece of Progressive Era legislation designated the Third District justices to serve on a “board of title commissioners” to review ballot titles for accuracy. In 1938 the California Supreme Court invalidated the legislation as a violation of the separation of powers, and the justices returned to their traditional role as arbiters of pre-election disputes. Because election cases usually involve extreme time pressures, given the often narrow window between the time a challenge can be made and the deadline for printing ballots, the Third District’s experience in this area has proven particularly valuable.

PARTISAN POLITICS AND THE COURT

As a check on overt partisanship, the organic legislation creating the California Court of Appeal forbade the Governor from filling more than six of the nine new seats with members of his own party. And with most of the original appointees having served as Supreme Court Commissioners, thereby proving their probity and worth, fears of cronyism were allayed.

Reflecting California’s early divided views on the subject of slavery, in 1905 Governor George Pardee appointed two wounded Union veterans to the Third District (Chipman and Abraham Buckles), and one Confederate veteran (George Smith) to the Second District in Los Angeles. General Chipman had prosecuted a notorious Confederate prison commandant just after the Civil War, but the social and political wounds of that conflict proved so deep that, as late as 1911, he felt obliged to refute charges that it was he who had been the war criminal for railroading the defendant.

Political partisanship has nonetheless played a recurring role in the history of all California courts, including the Courts of Appeal. After the initial round of appointments, sitting appellate justices were required to face overtly partisan, and possibly contested, elections. This arrangement had the unfortunate potential to tempt the skewing of decisions to curry electoral favor.

Although there had been only a handful of contested Court of Appeal elections since the court’s creation, it was a heated Third District election in 1932 that spurred demand for statewide reform. When Presiding Justice William Finch died in office, Governor “Sunny Jim” Rolph appointed Hugh Preston of Ukiah (Mendocino County) in May, 1931, to fill the vacancy. Preston was the brother of California Supreme Court Justice John Preston. Even by then the Third District was viewed largely as a “Sacramento” court, which led a local trial judge, John Pullen, to mount an unusually vigorous campaign to unseat Preston the following year.

Adopting the theme “One Preston is Enough,”



Courtroom in the Library and Courts Building

Pullen boldly claimed that it was Hugh Preston’s family connections, and not any real ability, that had led to his appointment. Preston responded with tough-on-crime stump speeches, calling for legislation to allow less than unanimous guilty verdicts in homicide cases. This maverick idea attracted many voters, but Hugh Preston lost the election, 112,181 to 93,618. The larger Sacramento vote, which went 30,401 to 8,123 for Pullen, overwhelmed Preston’s strong support on the North Coast. (This defeat did not end John Preston’s influence; he later played a critical role in Annette Abbott Adams’ appointment to the Third District.) The unseemly nature of this contest turned the tide and in 1934 the present retention system was adopted, whereby justices do not face challengers, only their own records.

“THE HIGHLANDS OF THE MIND”

The justices and staff of the Third District work across the street from the State Capitol, in surroundings steeped with history and beauty. Originally the court shared the first floor of an apse in the Capitol with the State Library, but that space was eliminated when an addition was tacked on to the back of the building. Before then, however, the Third District had found a new home.

Etched into the granite pediment, the aphorism “Into the Highlands of the Mind Let Me Go” welcomes visitors to the newly renamed Stanley Mosk Library and Courts Building, which since 1929 has housed the State Library (including what is now the Bernard E. Witkin State Law Library) and the Third District Court of Appeal. The building and its twin, the Jesse Unruh Building, separated by a spectacular fountain, were designed in 1918 by the architectural firm Weeks & Day, which also designed several San Francisco landmarks. These neoclassical structures represented the pinnacle of California state government offices when they opened a decade later and today reflect the spaciousness and

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style of another era. Apart from a seismic retrofit and the closure of five-story-tall natural light shafts, the Library and Courts Building, named to the National Register of Historic Places in 1984, has changed little from its original design. Images of the building, and the stunning artwork on display throughout, can be viewed at the California State Library Foundation's website at www.csfdn.org/exhibits.html.

The Memorial Vestibule, lined by sixteen towering black columns topped by urns, is a tribute to veterans of the First World War and features murals by Frank Van Sloun, comprising his *War Through the Ages*. Through the foyer is the courtroom used by the Third District for oral arguments, generally during the third week of each month; by the California Supreme Court twice a year for a few days; and occasionally for other proceedings, such as confirmation hearings by the Commission on Judicial Appointments and trials conducted by the Commission on Judicial Performance. The two-story courtroom has been called the most beautiful in the state and is a popular destination for school and tour groups.

Originally, it was planned that the Supreme Court would move its headquarters from San Francisco to Sacramento and occupy this building along with the Third District. But these plans also included locating the courtroom on the fifth floor. Chief Justice William Waste refused to move the Court into an "attic," and, given Sacramento summers in the days before modern air conditioning, he may have been justified. The architects hastily added a near-duplicate first-floor courtroom (the current courtroom) to the building plans to try to satisfy the Chief Justice, without success. The fifth-floor courtroom, outfitted nearly identically to the one on the first floor, was built nonetheless and today is used as a public meeting room.

Across from the fifth-floor room is a solarium, at one point "remuddled" into a dingy display room for the State Library's Special Collections. Recently, it was transformed into the bright and elegant Robert K. Puglia Library, used by the justices, staff, and law student externs of the Third District.

Near the door to the RKP Library is an intriguing Civil War painting by Emanuel Leutze, best known for his 1851 masterpiece *Washington Crossing the Delaware*, on display at the Metropolitan Museum of Art in New York, and his later work commonly known as *Westward Ho*, commissioned for the U.S. Capitol. In *Fort Sumter After the Bombardment*, Leutze depicts the aftermath of a failed 1863 effort to recapture the fort, which Leutze witnessed from a Union ship.

The real significance of the painting is in its provenance: After Justice Chipman left it to the state in a testamentary letter, the painting was loaned to South Carolina in the 1950s and then forgotten. Justice Puglia happened to see the painting at the Charleston Museum while on vacation in 1987 and quizzed a flustered curator about it. Not satisfied with her answer – he later told the *Sacramento Bee* that "she was in an utter snit" – Puglia began a long campaign to recapture the artwork, which resulted in another unconditional surrender by the South.

The third floor features the Witkin Law Library, open to the public, and the Circulation and Reading Rooms of the State Library, including a massive Maynard Dixon mural dedicated to California's progress, not to be missed even on a short visit. Huge windows fronted by roomy Arts & Crafts library tables overlook either the fountain or the State Capitol Park, making both libraries ideal places for spreading out one's work and taking pen in hand. The second floor, too, features a stunning work by Dixon, his *Anoakia* murals, which depict striking, though fanciful, Native American scenes.

The Library and Courts Building is connected to the Capitol and the Jesse Unruh Building by historic tunnels, no longer in common use. These passages mirror, but do not connect to, the network of tunnels which underlies much of downtown Sacramento. (Those tunnels were formed from the original street level and first floors of buildings, before the entire area was raised for flood protection. Many downtown restaurants and shops have basement access to this network and occasional tours are conducted.) A separate passage connects the historic courthouse to an annex building, blandly named "Library & Courts II," that houses the court's clerk staff and records and is also shared by the State Library.

In 2002, the main building was renamed the Stanley Mosk Library and Courts Building in honor of the late Supreme Court Justice Mosk's service to the law. A life-sized bronze statue of Mosk, holding a lawbook, stands outside the entrance, with the words "Guardian of the Law and Defender of Civil Rights and Civil Liberties" etched on the pedestal below. An account of the dedication ceremony, with an image of the statue, may found at www.cschs.org/02_history/02_f07.html.

Across from the Mosk statue is a tribute to the fallen peace officers of California, from statehood to the present. Each year the Governor, Attorney General, judicial and legislative leaders, and other officials lead a somber procession of the families and colleagues of the newly-fallen, accompanied by officers from virtually every police and sheriff's department in the state. Justice Puglia led the effort to locate this law enforce-

ment memorial here, to recognize the contribution of the fallen line officers to the administration of justice. Images of the memorial may be found at www.camemorial.org.

A BYGONE ERA

The Third District's sense of the past is reflected not only in its physical surroundings, but also in its unique preservation of a fascinating slice of California legal history. While today would-be attorneys in the Golden State must pass a three-day written bar examination, initially admittance to the bar was gained via oral examination by local judges. With the creation of the Courts of Appeal, the administration of bar exams, still oral, was centralized in each district.

So far as is known, only the Third District has preserved its records of this historic practice. The archives show the ad hoc nature of these exams, and how the character of the applicant and the person moving the application for admission often played a significant role – perhaps even a greater role – than the quality of the answers supplied by the applicant.

Until 1915, many applicants paid the ten dollar fee in gold, and records show a recurring court expense for the summer examinations: "Kane & Trainer Co., ice, \$1.60." No doubt this amenity eased the process in the Sacramento heat, but perhaps the heat also served to shorten the exam. Roy Whitfield Blair, an August 1915 applicant, recounted that he was asked only one question: "Recite the Rule in Shelley's case." He did, perfectly, and was told to sit down. He passed!

Lilburn Gibson (1892-1979), later a Mendocino County Superior Court judge, took the examination some months afterwards and faced a more rigorous grilling. According to Gibson, two groups of fifteen applicants were questioned:

We were seated in a semi-circle before the three members of the court: Justices Chipman, Hart, and Burnett. The grapevine (not too reliable) had told us the practice of the court was to examine the class on the second book of Blackstone (Rights of Property) and if one could pass that, he was in. So I had boned up on that book and had it down pretty pat. Imagine my surprise when Mr. Justice Chipman opened up on the first book of Blackstone (Rights of Persons). I was the first one in the semi-circle, and when I saw what was up, I was about to throw up my hands, thinking it was the end. But the first question asked was easy and I had no trouble with it. Then he really went to town on me for about fifteen minutes. . . . Everyone did well, and I felt we had all passed. . . . However, to my consternation, . . .

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Applications for August 1915			
Aug 20	George L. Lerose	38	G. Note 10.00
Aug 20	Raymond J. Coughlin	39	Gold 10.00
" 20	Edw. A. Shaffer	40	P.O. 10.00
" 20	C. R. Ogg	41	G. Note 10.00
Applications for February 1916			
Oct 25	Maxwell F. Buffum	1	10
Jan 8	Carroll Seale	2	10
Sept 1-1915	C. L. De Young	3	Filed #
Jan 8 1916	Ben C. Jones	3	10
" 26	Emil Stumpert	5	10
Feb 23	J. E. Light	6	10
" 27	De P. Carey	7	10
Feb 1	R. E. Bunch	8	10
" 14	Lilburn Gibson	9	10
" 14	E. H. Furman	10	10
" 14	G. W. Bedson	11	10
Feb 7	R. J. Irving	12	10
" 16	J. H. Langenauer	13	10
" 16	Frederick H. Busby	14	10
" 17	Ernest M. Kullback	15	10
" 17	Bushfield	16	10
" 19	William H. Abrams	17	10
" 20	Timothy J. Sheeran	18	Filed #
" 21	Thomas P. Hale	19	10
" 22	Albert R. Capodini	20	10
" 22	Robert L. Johnson	21	10
" 22	Harold M. Ball	22	10
" 23	Henry Pearl Tomler	23	Filed #
" 24	B. W. Hughes	24	10
" 26	H. L. McAllister	25	10

A page from the bar application ledger, 1915–1916. Note the fee paid in gold and the high passage rate for Gibson's group.

[t]he justices had a whispered conference and I heard Mr. Justice Hart say, "This is really a good class. I wonder what they know about the codes?" Then he went through us[!] . . . As we were leaving the room, to my great surprise, the Clerk of the Court came over to me and said, "I want to congratulate you. You answered the court's questions clearly and showed you knew what you were talking about, and this gave confidence to the whole class.

By the end of this era, either the exam became more difficult or the quality of the applicant pool declined: Only fifteen of thirty-seven passed the Third District's 1927 test. That year, the State Bar of California was created and this agency assumed responsibility for administering the bar examination.

NOTABLE JUSTICES

The Third District's many able jurists have comprised a diverse and talented group, including a former

California Secretary of State (Paul Peek); four later California Supreme Court justices (Peek, Frank Richardson, Cruz Reynoso, and Janice Rogers Brown); two later federal appeals court judges (Brown and Connie Callahan); a number of legislators (Elijah Hart, Andrew Schottky, Peek, Ed Regan, and Fred Marler); and many veterans from the Civil War through Vietnam, including a Congressional Medal of Honor recipient (Abraham Buckles) and two brigadier generals (Chipman and Fred K. Morrison).

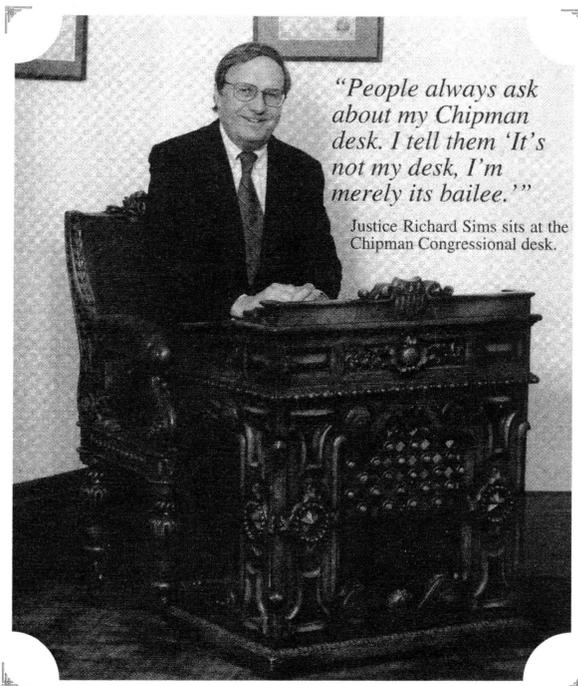
Two former justices merit special mention here, General Norton Parker Chipman, the first Presiding Justice, and Presiding Justice Annette Abbott Adams, the first woman to serve as an appellate justice in California. An account of the late Presiding Justice Puglia's influence and contributions to California law and the judiciary must await another day. (An introduction to his life will be published in McGeorge School of Law's journal, 36 *McGeorge Law Review*, (no. 4) (forthcoming, 2006), and a sketch can be found at www.courtinfo.ca.gov/courts/courtssofarpeal/3rdDistrict/justices.)

A fuller account of General Chipman's life will be found in a forthcoming book by Jeff Hogge, a chambers attorney for Third District Court of Appeal Justice George Nicholson. (See Hogge's website at www.nortonparkerchipman.com.) For now it is enough to sketch his achievements. Chipman served on President Abraham Lincoln's staff and accompanied Lincoln when he delivered the Gettysburg Address. He prosecuted Henry Wirtz, the Confederate commander of the Andersonville Prison, where about thirteen thousand Union prisoners died from disease and ill treatment. This trial was portrayed in a film featuring William Shatner as Chipman, and the prison site is now a national park, an official tribute to all American prisoners of war.

After the war, Chipman became the first congressional representative for the District of Columbia, fought to ensure completion of the Washington Monument, was a founder of the Grand Army of the Republic, and authored the order creating Decoration Day, now celebrated as Memorial Day.

In 1876, Chipman moved to California, and in 1897 he was appointed Commissioner of the Supreme Court, a position he held until he became the first presiding justice of the Third District in 1905, at age seventy. Chipman was nearly defeated when he stood for election as required the next year. Winning only a plurality of votes, he was reelected when his Democratic and Socialist challengers split the majority. He held the position of Presiding Justice for sixteen years until he retired in 1921. He died three years later at age eighty-nine.

Presiding Justice Annette Abbott Adams was a



"People always ask about my Chipman desk. I tell them 'It's not my desk, I'm merely its bailee.'"

Justice Richard Sims sits at the Chipman Congressional desk.

woman of many firsts. She was one of the first two women to receive a law degree from Boalt Hall, the first woman to serve as a U.S. Attorney, the first woman appointed Assistant U.S. Attorney General, and the first woman to serve as an appellate court justice in California.

After a brief stint in private practice, where she caught the attention of then U.S. Attorney and later California Supreme Court Justice John Preston, Adams became an Assistant U.S. Attorney in 1914 and succeeded Preston as U.S. Attorney for the Northern District of California in 1918. She tried her hand at politics soon after ratification of the Nineteenth Amendment, receiving a token vote as a Vice Presidential nominee at the Democratic National Convention in San Francisco in 1920 and running an unsuccessful campaign for County Supervisor three years later.

Adams returned to private practice in 1921 and joined up with Preston, now retired from the bench, in 1935. In March, 1942, she became California's first female appellate justice when Governor Culbert Olson appointed her Presiding Justice of the Third District. In 1950, as part of the state's Centennial celebration, Adams sat on one case as a pro tem justice of the California Supreme Court. She retired from the Court of Appeal in 1952 and died four years later.

WATER LAW AND THE THIRD DISTRICT

Many of California's legal and political debates revolve around one commodity: water. The Third District has been at the forefront of resolving environmental and other issues arising from the state's relationship with

this precious resource.

In 1913, William Mulholland famously said, "There it is. Take it," as he opened the taps designed to deliver Owens Valley water to Los Angeles. This act ultimately triggered the water wars of the 1920s, fictionalized in the popular movie *Chinatown*. Still thirsty, the Los Angeles County Department of Water and Power sought to undertake additional works that could have drained Mono Lake. These diversions were contested in a suit that resulted in Presiding Justice Frank Richardson issuing a writ of mandate giving the Third District original jurisdiction over the case. (See *County of Inyo v. Yorty*, 32 Cal.App.3d 795 (1973).) It took twenty-five years and numerous reported decisions before the competing stakeholders settled their differences in 1997 and the court discharged the writ.

More recently, the Third District dealt with a case that took on added importance in the aftermath of the New Orleans levee failures caused by Hurricane Katrina. *Paterno v. State of California*, 113 Cal.App.4th. 998 (2003), held that the state was liable for incorporating defective levees into its flood control system. The decision has led the Governor, the state legislature, and Congress to rethink the plan for ensuring adequate flood-control measures for California.

A LOYAL AND ACCOMPLISHED STAFF

The early practice of the court was to have new law graduates assist justices with their work. The older term "law secretary" gave way to "research attorney" or "legal research aid" in the 1940s. A number of these law clerks went on to their own successful careers on the bench, including the late U.S. District Court Judge Milton Schwartz (who worked under Justice Adams in 1948), Court of Appeal Justices Hugh A. Evans and Joseph DeCristoforo, Sacramento Superior Court Judge Lawrence Marvin, and Orange County Superior Court Commissioner Barry Michaelson. One law clerk, Peggy Flynn, became Clerk of the Court and later Sacramento's first female Municipal Court Judge. Another former research attorney, Tom Gede, currently serves as Executive Director of the Conference of Western Attorneys General. Increasingly since the 1960s, legal research has become a permanent career choice for attorneys working for the justices.

Other support staff, too, have demonstrated longevity of commitment. The current most senior employee, Judicial Assistant Claire Cooper, was hired in 1972 by Presiding Justice Frank Richardson. She recalls receiving advice from Gladys Morgan, who began her career with the court as a stenographer over fifty years earlier and later assumed secretarial and personnel responsibilities, retiring in 1975. Presiding Justice Arthur Scotland routinely hands out ten-, fif-

teen-, and twenty-year service recognition pins, reflecting the overall stability of the workforce.

CONCLUSION

As one of the original Courts of Appeal, located at the seat of state government, the Third District has a rich heritage and traditions that have served to carry it through the first one hundred years in exemplary form. Now expanded to eleven justices, who hold appointments from five governors, the court faces the next hundred years well-equipped to ensure justice for all the people within its vast borders.

The prime source for early California legal history is Oscar Shuck's Bench and Bar of California. Although published prior to the creation of the Court of Appeal, nonetheless it contains useful biographies of some of the early court figures. It was followed by a derivative but useful work by J.C. Bates, History of the Bench and Bar of California, in 1912. The California Blue Books provide much data about California's changing court systems and judicial and political personalities.

The Secretary of State's Office maintains the government archives, including records of the court system, although the collection is incomplete and often categorized poorly. The staff is eager to help researchers navigate around the quirks in the collection. Many documents that could be in the Archives are in private hands (so-called astray documents) and can be found at book and ephemera shows. (Some of the author's collection of legal ephemera is on permanent display at the Orange County Superior Court.)

The California State Library has many valuable resources, including old newspaper archives (such as the Sacramento Bee and Union), and extensive collections of photographs, legal books, and other material. Gary Kurutz, head of the Special Collections Branch, is always of invaluable assistance.

The author has relied on personal communication with judges and staff members, including Stanley Mosk, Robert K. Puglia, Frances Newell Carr, Milton L. Schwartz, Hugh Evans, Hugh Preston, Jr., and many others, regarding specific issues mentioned in this article and more general legal and judicial points.

The Third District's own records include the above-described Bar records (1905-1926). Linda Wallihan, the Third District librarian, maintains files on the building and its renovations and displays interesting documents and photographs in the Robert K. Puglia Library. Her help to the author over the years on researching court history and other topics has been vital.

Levin has worked for the Third District for over eighteen years and is Lead Chambers Attorney for Justice Fred K. Morrison. Many people helped with this article but all errors and omissions are his alone.