

**SHOULD CIVIL INVESTIGATIONS
BE PERFORMED BY THE GRAND JURY IN CALIFORNIA**

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EXECUTIVE SUMMARY

The grand jury is a fascinating subject for research. The institution has been in existence nearly a thousand years, with some evidence indicating it may date back to biblical times. William Shakespeare made this reference in Act III of Twelfth Night, “And they have been grand-jurymen since before Noah was a sailor.” The Magna Carta guaranteed a person’s right to a pretrial review by the grand jury as a procedural safeguard. Colonists brought the institution to the New World, and it became a vital force in protesting British authority. Also referred to as the “People’s Panel”, grand juries became instrumental in furthering the concept of self-government.

Grand juries have survived the test of time and remain a part of the federal and state systems in this country. Each of the 50 states maintains the institution, though its scope of activities varies dramatically, and no two states have identical designs. It is in the comparison among states that California is set apart from the others. While the vast majority of states have kept the criminal grand jury intact, or at least the discretion to use it if necessary, only California and Nevada continue to use civil grand juries to comprehensively investigate local government agencies.

California courts have undergone tremendous change in the last two decades. People knowledgeable in the system twenty years ago would not recognize it today. No one is more painstakingly aware of the changes than those within the system who have strived to chart the course and the rest who have weathered it. A state constitutional amendment was passed in 1998

permitting local judicial discretion to unify courts in each county. As of this writing, all 58 court systems have unified, thereby abolishing the Municipal Court. An entire layer of trial courts has been eliminated. As of 1997, complete funding responsibility was transferred from the counties to the state. As a result, the trial courts have become separated from county government and are now viewed as a separate entity. The third branch of government is now visibly apparent, though it was long shrouded in the county government structure. In January of 2001 approximately 20,000 people moved from county employment to that of the superior courts, statewide, resulting in an entirely separate personnel system. During these tremendous transitions, the allowable use of trial court funds was defined in California Rule of Court 810. These reforms did not touch the grand jury system, however. Grand jury costs were not included within the definition of court operations. They remain charges on the counties. The legal relationship between the grand jury and the court and county remain ambiguous.

Given the sweeping reform of the court system in California, it is time to investigate the role of the grand jury, not in its criminal function, but in its charge to conduct annual civil investigations of local government agencies.

The purpose of this paper is to identify and address problems surrounding the civil grand jury and to recommend reforms which will ensure that the public is well served.

ABSTRACT

This paper will examine the civil grand jury process in the State of California for purposes of determining if civil investigations, particularly those of local government, should continue under the current structure, or if statutory reform is needed. Nevada is the only state other than California that maintains comprehensive civil investigatory functions by a grand jury. The remaining states have either abolished the use of the grand jury for this purpose or utilize other methods to ensure governmental accountability.

The Superior Court in each of the 58 counties in California is required to impanel a grand jury and perform assorted administrative services for its support every year. The manner in which the grand jury functions has a direct impact on the court in terms of the degree of judicial interaction and the level of administrative assistance required. Although the grand jury is frequently referred to as an arm of the court, it is a part of the county government structure. The grand jury has its own budget unit under the county and is completely funded with county money. The Superior Court is funded by the state and its revenue and expenditures are entirely separate from the county. Clarification of statutes governing funding of the trial courts in California in recent years defined grand jury operations as a non-allowable use of court funds, thereby eliminating any confusion that may have existed.

The grand jury system is flawed in a number of ways. There are 58 different grand juries in California each year, comprised of approximately 1100 citizens. Impanelment is problematic

in that some jurisdictions have difficulty motivating citizens to apply. The time commitment is substantial, so that most working people are not able to serve. Consequently, the makeup of the grand jury is often weighted with older, retired persons. Those with personal agendas are attracted to grand jury service as it is perceived by some to be a powerful political institution. Once grand jurors are selected, no standardized, statewide training is provided. The length of service is unrealistic in terms of mandated duties. The duration of a term is 12 months, during which grand jurors, in discharging the civil investigation responsibility, must become familiar with local government operations, conduct investigations as they deem appropriate and prepare written recommendations for improvement. During this time they are essentially unsupervised, since much of what they do is secret, as provided by law. Governmental agencies investigated by the grand jury must file responses to the written recommendations; however the deadline for submission of responses is after the grand jury has been discharged from further duties. At the time of discharge, a new grand jury is impaneled and the cycle begins again.

Research was undertaken to determine if grand jury problems are prevalent throughout the state, and, if so, whether reform could improve the process. Consideration was also given to whether grand jury civil investigations of local government should continue at all.

Three governmental agencies in each county were surveyed for their opinions concerning the functioning of the civil grand jury. Surveys were sent to County Administrative Officers, Offices of County Counsel and Court Executive Officers to determine satisfaction levels and to measure the level of consistency that exists between counties. The three groups selected were

those having the closest affiliation with the grand jury and, therefore, the most knowledge with the current process. Data was not sought from current grand jurors, nor those having previously served.

Responses were received from approximately one-half of the counties surveyed. The conclusion drawn from the data received is that there is considerable variation in many aspects of grand jury operations between counties, with the largest discrepancy existing in budget size compared to county population. While grand juries in some counties function with relatively few problems, other jurisdictions indicate the institution is in need of reform.

Although grand jurors are essentially considered volunteers, the statewide cost is in the millions of dollars annually. That having been said, grand jury budgets do not contain sufficient funds for the provision of training, equipment and other resources in order for jurors to perform their duties well. Increases to local budgets in order to correct substandard conditions could require double or triple the current level of funding. Such an increase would require a commitment from citizens and political leaders that there is a desire and a priority placed on correcting the many problems surrounding the grand jury today. Statutory revision and stable, adequate funding are paramount in lending efficiency and credibility to the process. Without either, serious consideration should be given to transferring the civil investigatory functions to a state agency or commission if those functions are to be performed on an annual basis. An office of citizen complaints at the local level, similar to that which exists in some locations for complaints against police officers, with statewide oversight, might also provide a more

consistent service in California than that which is currently provided by the civil grand jury.

I. INTRODUCTION

The civil grand jury process in California has been the subject of controversy for many years. Among county and court officials, there are proponents of the system as it currently exists, those that support sweeping reform and some that are in favor of abolition.

In the author's court, grand jury performance varies dramatically from year to year. Some of the most notable problems having developed over recent years are summarized below:

- ◆ **Interest:** Citizens willing to serve has been on the decline for several years.
- ◆ **Time Commitment:** Frequently, the grand jury is confronted with numerous problems during their brief term of service. Soon after impanelment, it is common for several members to resign because of the time commitment required. Two years ago, the grand jury concluded the year with less than the required number of jurors because the list of alternate jurors had been exhausted. It is not uncommon to hear jurors say they are anxious for the term to end as service is not what they envisioned.
- ◆ **Management and Support:** Already strained judicial resources must find time to be responsive to the grand jury's needs. Problem jurors can create tensions and dissatisfaction among the rest of the panel and the court is forced to intervene.
- ◆ **Training:** The budget allocated by the county does not allow for training or

attendance at statewide seminars for all members of the grand jury. Frequently, only the foreperson is able to attend conferences offering training.

◆ **Facilities:** The grand jury does not have it's own meeting room, office space, equipment or support staff. A conference room shared by county agencies is used for grand jury meetings, based on availability. Committee meetings take place at members homes, restaurants or other locations. No county or court office space, furniture or equipment is available for their use.

All too often, there are only a few talented and dedicated individuals who serve on the grand jury. In a group of 19 people, it is these few that do the work of many. Frequently jurors lack the skills and knowledge necessary to carry out their duties and the balance of the panel is left to carry the load. In some years there is congeniality among the members, and in others there is not. Individuals who have volunteered only because they have "agendas" or are intent on investigating pet peeves in government can make it through the selection process, only to make the jobs of others more difficult.

Others citizens, applying in a noble attempt to volunteer their time to government, leave with a sense of frustration and disappointment that their service was not meaningful or they simply were not appreciated. For this, not only is county government to blame, but all of government, for perpetuating an institution that is in dire need of reform. The needs of grand jurors have been ignored for decades.

The civil investigation charge to the grand jury is a wonderful concept. The presence of a watchful eye on local government is positive for Californians. Thus, no public servant should fear such a group reviewing his or her work. But the work must be performed well to be valuable. Therein lies the problem. From the method of selection to the filing of the final reports, the civil grand jury process is in need of correction.

Grand jury operations are inconsistent throughout the state, in part because oversight on a statewide basis does not exist. For every criticism, flaw or weakness that is cited in the grand jury system in this paper and other written works, there is an opposing view. There are many safeguards in the system that can also be construed as significant faults. This research will assess all components of the institution in order to evaluate if the grand jury's civil investigations should continue to be performed.

II. REVIEW OF RELEVANT LITERATURE

Literature on the civil grand jury is very limited. An initial review eliminates most books and publications because the majority focus on the federal system and its application to criminal proceedings. Narrowing the field to the California system and only the civil investigatory functions reduces the material to a very short list.

The most comprehensive book on the subject is Grand Juries, A Study in Citizenship in California by Bruce T. Olson.¹ Mr. Olson's study of the grand jury spans decades and his knowledge on the subject is unparalleled in this state. He is the Executive Director of the American Grand Jury Foundation located in Modesto, California and as such, conducts training seminars for new grand jurors. The book seems to have been written in answer to a question he was asked at the conclusion of one of his seminars. The question posed to him was: "In an era of experts, professional administrators, and increasingly complex government, is there a need for the civil grand jury, and what is its future?" The book does not provide any "yes" or "no" answers, but it implies that the grand jury, good or bad, is only what grand jurors make of it. Freedom-loving citizens must be involved and support the ideal of self-government.

¹Bruce T. Olson, Grand Juries, A Study in Citizenship in California, (Modesto, California/American Grand Jury Foundation, 2000)

The civil investigatory, or “watchdog,” functions of the civil grand jury are discussed in several California law review articles, which provided additional perspectives on this rather unique institution. “Adding Bite to the Watchdog’s Bark: Reforming the California Civil Grand Jury System” by Stephanie A. Doria provides an in-depth examination of the grand jury, from its origins to a conclusion that the system should be retained and strengthened as a mechanism for citizens to monitor their local government.²

A 1999 McGeorge Law Review article titled, “The California Civil Grand Jury: From Watchdogs to Watched Dogs” by John M. Feser, Jr. details a segment of grand jury reform brought about by the Grand Jury Reform Task Force established in 1996.³ The task force, created by the California State Association of Counties and staffed by county officials throughout the state, has sponsored legislation pertaining to the functions of the civil grand jury in California. It was born out of substantial criticism levied on the grand jury that it is inefficient, wasteful and ignored. The article examines Penal Code Section 929 which gives the presiding judge of the superior court authority to make available to the public evidentiary material, findings and other information relied upon by the grand jury for its final report in a civil investigation. This statute was significant in that it was a departure from the secrecy

²Stephanie A. Doria, *Adding Bite to the Watchdog’s Bark: Reforming the California Civil Grand Jury System*, 28 Pacific Law Journal (1997)

³John M. Feser, Jr., *The California Civil Grand Jury: From Watchdogs to Watched Dogs*, McGeorge Law Review, University of the Pacific (1999)

protections afforded to the grand jury prior to its enactment.

Much of the information obtained on the historical background of the grand jury in England and colonial America was found in two books. The first was The Grand Jury: The Use and Abuse of Political Power by Leroy D. Clark.⁴ The second was The Grand Jury, An Institution on Trial by Marvin E. Frankel and Gary P. Naftalis.⁵ They provided detailed descriptions of events in English history that help to explain the grand jury's evolution from an institution feared by the people to one that protected them from abuses.

Numerous newspaper articles from the Los Angeles Times and San Diego Union-Tribune were helpful in terms of journalists' descriptions of the system and quotes from former grand jurors on their feelings about grand jury service. Although this information was limited in the amount of material available, it was valuable in that it originated from sources actually participating in the grand jury process.

⁴Leroy D. Clark, The Grand Jury: The Use and Abuse of Political Power (New York: Quadrangle/New York Times Book Co., 1975)

⁵Marvin E. Frankel and Gary P. Naftalis, The Grand Jury, An Institution on Trial (New York: Hill and Wang, 1977)

Last, but not least, is the “Grand Jury Background Study” prepared by Professors Michael Vitiello and J. Clark Kelso from the Capital Center for Government Law and Policy, University of the Pacific, McGeorge School of Law.⁶ Equally informative was their “Roundtable Discussion on Grand Jury Reform” transcript of proceedings of June 1 and 2, 2000.⁷ This study was not limited to the civil functions of the grand jury in California, but explored certain aspects of the criminal function also. The material was particularly relevant to this research because it focused on the problems unique to California and recognized the need for reform. Tentative recommendations have been released suggesting that grand jury statutes be revised and moved from the Penal Code to the Government Code. Modifications to correct ambiguities in the current code sections would clarify the funding responsibilities of the county and the court, where confusion has existed. The recommendations also establish the first pilot program in the state to develop curriculum and provide grand jury training funded by the Legislature. Many of the points recognized in the background study and roundtable discussion were similar to those identified in this paper.

⁶Michael Vitiello and J. Clark Kelso, *Grand Jury Background Study*, Capital Center for Government Law and Policy, University of the Pacific, McGeorge School of Law (2001)

⁷Michael Vitiello and J. Clark Kelso, *Roundtable Discussion on Grand Jury Reform*, University of the Pacific, McGeorge School of Law (2000)

III. METHODOLOGY

In order to determine if grand jury reform or modification is needed, it was decided to approach the question from the perspective of local government officials. Although input from persons having served as grand jurors was considered valuable as well, the scope of the project did not allow collection of data from all available sources. Local governmental officials having the closest affiliation with the grand jury were identified as the superior court, county counsel and the county administrator, and were therefore selected for the study.

An assumption was made that problems with the grand jury process experienced locally are also experienced in other locations throughout the state. Because the grand jury in each of the 58 counties operates independently from the others, a data collection instrument was necessary to document the experiences and practices in each of the counties. Key questions were developed in the following five major areas: 1) Funding, 2) Resources, 3) Selection, 4) Legal Guidance and 5) Training, in order to ascertain similarities and differences from county to county. Surveys tailored to each of the three court or county agencies were prepared and some questions were duplicated across surveys. For example, county administrators and county counsel from every county were both asked if the county was generally in favor of the grand jury continuing to investigate local government. Other duplicate questions were asked in order to gather different perspectives on the same issue. The surveys are attached and incorporated as a part of this research as Appendixes A, B and C. An informal pretest of the surveys was

conducted and no changes were made as a result.

A total of 171 surveys were mailed in September, 2001, to the groups described above. Respondents were asked to complete the survey and mail or fax back to the author of this paper. Within approximately 45 days, 117 completed surveys had been returned. County Counsel responses were received from 58.6% of the counties; Court Executive Officers responded from 81% of the counties and County Administrative Officers answered in 50% of the counties. Data was extracted and grouped into ten tables according to subject matter, which are attached and incorporated as Appendixes E through N. Counties are referred to by number instead of name on all of the tables because many respondents requested anonymity. References to survey data contained within this paper use percentages based on the total number of responses received.

IV. HISTORY OF THE GRAND JURY

The grand jury has a rich history. Originating in 12th Century England, it served to disclose the names of those persons deemed guilty of criminal offenses. King Henry II created the grand jury to regain jurisdiction over criminal charges from the baronial and ecclesiastical courts. Soon after taking the throne, Henry II discovered his predecessors had relinquished substantial judicial jurisdiction, so that even the most serious criminal offenders could claim “benefit of clergy” and be tried before an ecclesiastical court where the penalty could be as light as expulsion from a Church position.⁸ Even more compelling was the King’s desire to regain substantial revenue resulting from fines imposed by the courts.

Once the church agreed to the body which ultimately became known as the grand jury, the King sought to regain criminal jurisdiction from feudal barons. Under the Assize of Clarendon, issued in 1166, the King effectively gained more power and control over his subjects by creating a panel of 16 men, who heard evidence and decided if a suspect was to be brought to trial. Originally, all accusations commenced with the grand jury members themselves and in fact, each juror was expected to bring those suspected of crimes before the panel. Although they never lost that power to accuse, outsiders were eventually allowed to make accusations, as well.⁹

⁸ Clark, *supra* note 4, at 8.

⁹Richard D. Younger, The People’s Panel: The Grand Jury in the United States, 1634 - 1941 (Providence, Rhode Island: Brown University Press, 1963) 1. A presentment was an

accusation arising from the jury's own knowledge, as differentiated by an Indictment, which included a charge brought to the grand jury from an outsider.

Once accused by the jury, a suspect was tried by ordeal, which was a harrowing process rarely survived. A trial by ordeal could involve the suspect's arm being submerged in boiling water and after being bandaged for three days, if the wound festered, the accused was guilty. If trial by water was selected, the accused was thrown into a lake and if he sank, he was acquitted. If he swam, he was pronounced guilty. Similar tests using trial by hot iron as well as other objects were equally irrational.¹⁰ Suffice it to say, people were extremely fearful of the grand jury and their extraordinary power.

Likewise, grand jurors themselves were fearful to serve on the panel and suffered penalties if they failed to answer a summons. Heavy fines were imposed to insure there were adequate numbers of men to keep the grand jury process alive. The Crown also imposed penalties when grand jurors failed to indict a person the King believed to be guilty, or if the grand jury failed to make enough accusations, thereby limiting the revenue stream flowing to the royal treasury.¹¹

By the 17th century, the grand jury's role as a puppet of the King changed, and its powers were significantly reduced. The institution which the people had originally feared began to evolve into a shield between royal persecution and the English people. Cases receiving most notoriety were ones in which the grand jury found the evidence lacking and refused to indict,

¹⁰Frankel and Naftalis, *supra* note 5, at 8.

¹¹Clark, *supra* note 4, at 9.

even when the King, for political reasons, urged the indictment. The concept of secrecy began to develop and juries no longer had to reveal the evidence they considered in deciding to indict or not. Trials by petit juries replaced trials by ordeal. Parliament's developing powers to tax diminished the grand jury's obligation to generate revenue for the crown. Although it took five centuries to become independent, England's grand jury was transformed into a vital force in protecting the rights and privileges of its citizens.

Our forefathers established a modified form of the grand jury when settling the American colonies. By 1683, all of the colonies had formed grand juries. They protested abuses and looked after the welfare of their communities.¹² During revolutionary times, grand juries resisted British rule by refusing to indict those charged by the crown's emissaries. Prior to the creation of the first representative assembly in New York, the grand jury began to establish ordinances. In other colonies, they became roving investigators, inspecting jails and bridges and reprimanding local officials for failing to build them properly (the first hint of a civil grand jury). Grand juries sometimes selected petit juries, checked on people failing to attend church and audited county funds.¹³ Grand juries used the power of their written reports to inspire public pressure, forcing officials to take corrective action.

¹²Younger, *supra* note 9, at 2. Colonial grand juries participated in many activities not typically associated with today's grand juries. They acted as the voice of the people in conveying their wishes, suggested legislation and protested abuse by government.

¹³Clark, *supra* note 4, at 14.

Grand jury history continued in the early formation of the United States with its placement in the Fifth Amendment of the Constitution. Bitter debates between the Federalists and Republicans resulted in partisan use of grand juries to indict Republican critics.¹⁴ By the time of the Civil War, grand juries in the South, hoping to continue the practice of slavery, brought indictments against those attempting to abolish it.

Over the years, the continued use of the grand jury has been widely argued. Many prominent Americans have criticized the institution, while others vehemently defend it. It has been described as inefficient and pointless by some, while others maintain it is an important safeguard against oppression and a critical last bastion for the lay citizen's involvement in government.

Despite its significant place in ancient history, grand juries ceased to exist by 1917 in England and were finally abolished in 1933 following years of debate. Critics accused grand jurors of abusing their power, investigating matters for personal and political motives, and filing reports without conducting full investigations. Many of the same sentiments expressed in England nearly 70 years ago are felt today in this country, and most states have followed England by abandoning use of the civil grand jury system.

¹⁴Frankel and Naftalis, *supra* note 5, at 13.

Grand juries exist in all states today, although their roles are primarily in criminal matters. The term of service and scope of duties differ greatly between states. They are best known for their indictment function, whereby they assemble to hear criminal charges against individuals and determine whether such person(s) should be indicted.¹⁵ Fourteen states still require an indictment to commence prosecution of felony cases.¹⁶ Grand jury indictments are required for capital or life imprisonment cases in five other states. The remainder of the states use the indictment process as an available option for the prosecutor.

¹⁵Doria, *supra* note 2, at 1124. An indictment is a written accusation charging a public offense. When considering an indictment, the defendant is not present and cannot cross-examine witnesses.

¹⁶U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, State Court Organization, 1998, 283, 284, 285. States requiring an indictment to commence all felony prosecutions are Alabama, Alaska, District of Columbia, Maine, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, South Carolina, Tennessee, Virginia and West Virginia.

V. AUTHORITY TO DRAW GRAND JURIES, IMPANELMENT AND COST

The authority to draw a grand jury in California can be found in Section 23 of the California Constitution, which states, “One or more grand juries shall be drawn and summoned at least once a year in each county.” No other specific information governing the duties, responsibilities or restrictions over the grand jury can be found in the Constitution.

Unlike most other states and the federal system, California grand juries have the power to conduct civil investigations of local government, which is commonly referred to as civil “watchdog” powers. A total of 35 states assign some civil duties to their grand juries, such as periodic inspections of jails and prisons or public buildings. However, none are as comprehensive as California and Nevada in inspecting local government operations and reporting on public affairs and the welfare and safety of the community.

The grand jury’s role in criminal matters was severely reduced as a result of *Hawkins v. Superior Court*, a 1978 California Supreme Court case, which held that procedural rights afforded to defendants prosecuted by indictment were considerably disparate from those prosecuted by information, and therefore constituting a violation of the equal protection provision of the state constitution.¹⁷ The court recognized significant disparity in the rights of defendants prosecuted by information who were entitled to a preliminary examination, and those

¹⁷*Hawkins v. Superior Court*, 22 Cal. 3d 584, 1978. An information is a written accusation accusing a person of committing a criminal offense. It differs from an indictment only in that it is sworn to by a public officer, usually the District Attorney, instead of a grand

prosecuted by indictment who were not. Those indicted by the grand jury were not allowed to be present in the room when the grand jury heard evidence, nor represented by counsel, and therefore could not cross-examine witnesses or present evidence on their behalf. As a result of the Hawkins case, defendants indicted by a grand jury had a right to a postindictment preliminary hearing, which essentially required the prosecutor to duplicate the presentation of his or her case. During the twelve years Hawkins was in effect, there was a sharp decline in the number of indictments that were returned by grand juries, allowing them to focus on civil “watchdog” functions.

The state constitution was amended in 1990 by the passage of Proposition 115, known as the Victim’s Rights Law, overruling the Hawkins case. Article 1 was added to Section 14.1 of the constitution which eliminated the defendant’s right to a postindictment preliminary hearing, thereby permitting the prosecutor to select criminal cases appropriate for grand jury indictment. Today, prosecutors use discretion in selecting criminal cases for grand jury review. Jurisdictions using a separate criminal grand jury, having been impaneled on a random basis, typically generate more indictments than others using a single grand jury for civil and criminal purposes.

Grand juries seeing their role as primarily civil, complain that involvement in criminal indictment hearings negatively impacts the time available to complete civil investigatory functions. For example, in the final report of the 1991-1992 Butte County grand jury, the following recommendation was set forth:

jury.

“As California statutes now allow, it is the recommendation of this Grand Jury that future criminal matters be taken before a specially selected Grand Jury specifically designated only for each criminal matter. This procedure would allow the members of the original Grand Jury to devote their time and efforts solely to matters regarding government activities and governmental expenditures.”

Grand juror sentiments with respect to focusing on civil matters alone, are not shared universally. Depending on the make up of a panel, some grand jurors look forward to their role in criminal matters, seeing it as a rare opportunity to become involved in noteworthy cases.

A grand jury is impaneled annually in every one of the 58 California Counties. The required number of jurors is dependent on population. Twenty-three are required in a county having a population exceeding 4,000,000, eleven in a county having a population of 20,000 or less, and nineteen in all other counties.¹⁸ Counties apply discretion to increase the size of the grand jury by local ordinance.¹⁹ The reasoning for the number of required jurors may go back to ancient times and it's application today is difficult to reason. Under the current structure, a grand jury may establish its own internal operating procedures and rules. Most grand juries form

¹⁸California Penal Code, Section 888.2

¹⁹Butte county, having a population of 201,600 impanels 23 grand jurors instead of 19. Trinity county having a population of 13,000 impanels 19 grand jurors instead of 11. Both examples illustrate counties that have chosen to use a larger grand jury than that which is required.

several different committees for purposes of distributing the civil investigations workload.²⁰

Once a decision has been made that a civil investigation will commence, it is usually assigned to a specific committee for action. In reality, a jury of this size presents a number of problems.

Budgets must be considerably larger for panels of 19 persons, as opposed to the minimum number of 11. Counties experiencing difficulty obtaining enough qualified applicants would be better served by reducing the number required and thereby raising the standards which are applied to the selection process.

²⁰Citizen complaints and suggestions for investigations from a previous grand jury may be voted on by the entire group for purposes of deciding which investigations are to be undertaken.

One additional grand jury may be impaneled at the direction presiding judge of the superior court in each county.²¹ The California Attorney General opined that the additional grand jury authorized by Penal Code section 904.6 is restricted to criminal matters only, and may not perform civil oversight functions.²² The second grand jury is selected at random from a source or sources reasonably representative of a cross section of the population, which in many instances differs dramatically from the selection method used to impanel the regular grand jury. This additional grand jury may withstand challenges that it is a representative cross section of the population where the regular grand jury likely will not. A survey of county officials indicates about half of the respondents believe the regular grand jury is not representative of the population in their jurisdictions.²³

California statutes define the grand jury as a body of the required number of persons sworn to inquire of public offenses committed or triable within the county. One grand jury in each county shall be charged and sworn to investigate matters of civil concern.²⁴ Qualifications to serve are minimal. Persons must be at least 18 years old, a citizen of the United States, a resident of the state and county for one year, having sufficient knowledge of the English

²¹California Penal Code, Section 904.6

²²76 Opinions of the Attorney General, 181

²³See Table 1, Appendix E

²⁴California Penal Code, Section 888 makes the distinction if more than one grand jury is impaneled pursuant to Penal Code Sections 904.5 to 904.9, inclusive, only one grand jury shall have civil investigatory duties. Investigation or inquiry into matters of civil concern are described as the needs of county officers, including the abolition or creation of offices for, the purchase, lease, or sale of equipment for, or changes in the method or system of, performing the duties of the agencies subject to investigation.

language and be in possession of his or her natural faculties, of ordinary intelligence, of sound judgment and of fair character.²⁵ Persons are not eligible if they are serving as a trial juror, have been discharged as a grand juror within one year, been convicted of malfeasance in office or any felony, or currently serving as an elected public officer.

Although grand jurors are essentially considered volunteers, they do receive nominal compensation. Per diem in the amount of \$10 per grand jury meeting plus mileage is provided

²⁵California Penal Code, Section 893

by law, however a higher fee or rate of mileage may otherwise be provided by county or city ordinance.²⁶ The grand jury per diem rate matched that of trial jurors until July 1, 2000 when legislation became effective raising trial jurors' pay to \$15 per day, commencing with the second day of service.²⁷ Effective July 1, 2002, grand jurors' per diem will be increased to \$15 per meeting. A survey of 30 California counties revealed that only 11 counties pay grand jurors the per diem rate set forth in the Government Code. Two Counties do not pay jurors for meeting attendance at all, and several southern California counties pay much more than that which is required by law.²⁸ Most counties pay grand jurors the mileage rate set by the Internal Revenue Service of \$.345 per mile (2001), however 2/3 of the counties responding to a survey on this subject indicate they pay round trip, instead of one-way as required by the Government Code. Legislative efforts in 2000 to raise grand juror per diem statewide resulted in the Governor vetoing the bill, describing grand jury service as a privilege for which citizens voluntarily apply and interview. The Governor also indicated in his veto message that he did not believe that "jurors who are summoned, and thus, commanded to serve should be paid less compensation

²⁶California Penal Code, Section 890

²⁷No compensation is provided to trial jurors for the first day of service.

²⁸See Table 1, Appendix E. Los Angeles, Riverside and Santa Barbara counties pay 2-1/2 times the rate set in the Government Code. Ventura county pays twice the rate and Orange

than a grand juror.” In some instances, individual grand jurors may waive payment of any compensation. Both per diem and mileage expenses are paid out of the county general fund.²⁹

VI. CIVIL GRAND JURY STATUTORY POWERS

county pays five times the rate required by the code.

²⁹California Penal Code, Section 890.1. This section was amended effective 1/1/02 to increase grand juror pay from \$10 to \$15 per meeting, effective 7/1/02.

The California civil grand jury's powers are contained within a variety of statutes. Their investigative powers are so broad that there seems very little they cannot choose to examine, as long as it is within their county boundary. By law, they are required to investigate and report on the operations, accounts and records of officers, departments or functions of county government, including special districts, and they may select which agencies are to be investigated.³⁰ They may probe any city or joint powers agency located in the county, examine their books and records and issue a report making any recommendations they deem proper.³¹ The need for an increase or decrease in the salaries of elected county officials may also be investigated and reported upon, as well as the needs of county officers, including the abolition or creation of offices. They are given unlimited access to all public records and complete independence while conducting investigations.

Investigations arising out of public complaint are performed at the discretion of the grand jury usually without input from any government source. Grand jurors reviewing citizen complaints have complete discretion to accept or ignore what is brought to their attention and they are under no obligation to explain their reasoning. Direction in local handbooks may suggest that an abbreviated reason be given; however, there is no statutory requirement to do so. This concept of being able to pick and choose is offensive to those critical of the institution in that it is yet another area where individual feelings, bias or political motives can be abused.

³⁰California Penal Code, Section 925

³¹California Penal Code, Section 925a

Jurors may file complaints themselves or may be referred matters from a previous grand jury; however, in both instances they are not compelled to take action. The decision of whether to commence an investigation may be left strictly to the foreperson without the concurrence of other members, depending on the procedural arrangement that is instituted by a particular grand jury. For example, a suggested practice is that complaints are referred to a particular committee for review and recommendation, following which a vote may be taken by the entire grand jury authorizing an investigation if at least 12 members concur.

The grand jury may employ experts or assistants to aid it in carrying out investigations, at an agreed compensation approved by the superior court. Expenditures for this purpose may not exceed \$30,000 annually, unless approved by the county board of supervisors. Although this option is available in situations where it is warranted, it is seldom used. A survey of county officials indicates funding was provided for experts in only 27% of the counties.³²

³²See Table 2, Appendix F

VII. FUNDING

Adequate funding is critical for any organization. The grand jury is certainly no exception. Although the grand jury is commonly referred to as an arm of the court, it is actually a part of county government and its funding flows from such. The statewide cost for the grand jury was not available from the California Department of Finance. The total figure for counties responding to a survey making up approximately half of those in California is just under \$4,000,000. The board of supervisors in each of the 58 counties in California allocates a fiscal year budget for annual expenditures, which may include payment of per diem and mileage costs, office expense and training. Data collected from County Administrators throughout California indicates only one out of 30 counties considers their local grand jury budgets inadequate.³³

³³*Id.*

Statutory provisions exist that permit the grand jury to investigate and report upon the operations of incorporated cities, joint powers agencies and special districts located in the county.³⁴ Each may have its own taxes and revenues, separate and apart from county government. While grand jury powers clearly cross county/city boundaries within a county, the funding does not. Administrators in 70% of those counties responding indicated cities should contribute to the grand jury's budget.³⁵ An additional 10% either had a combined county/city governance structure or had no incorporated cities within their counties.

This divergence in the funding structures as between city and county governments may lend support to overall state funding responsibility.³⁶ Grand jurors themselves question the total burden of their budget being on the county alone. The overall health of grand jury budgets varies dramatically from county to county. One northern California county having a population of approximately 800,000 reported a 2000/2001 grand jury budget of \$23,430, while another southern California county having a population of 773,500 reported a budget of \$198,420 for the same year. Similarly, two Central Valley counties within close proximity of each other and having populations of 400,000 and 415,000, reported budgets of \$98,988 and \$201,200,

³⁴Penal Code Section 925 requires the grand jury to investigate and report on the operations, accounts and records of county officers including any special legislative district or district created pursuant to state law. Section 925a permits the grand jury to examine the books and records of any incorporated city or joint powers agency located in the county and make any recommendations it may deem fit. Authorization to examine the books and records of any special purpose assessing or taxing district or local agency formation commission is contained in Penal Code Section 933.5.

³⁵See Table 2, Appendix F

³⁶Vitiello and Kelso, *supra* note 7, at 55.

respectively.³⁷ This is again illustrated in two small northern California counties having a difference in population of only 127 people, but whose budgets varied by 186%. These data may reflect many problems including that some counties that are in comparatively poor financial health or that possibly a low priority is placed on grand juries by some boards of supervisors. Grand jury complaints about a lack of resources and inadequate training are understandable.

³⁷Figures represent budget allocations and do not reflect actual expenditures.

Increases in funding by local county governments is also inconsistent and demonstrates a varied level of support among counties. Los Angeles County, the largest county in the State of California, reported a grand jury budget for fiscal year 1999/2000 of \$687,000 with an increase to \$1,189,000 for 2000/2001.³⁸ Riverside, the third largest county in the state, had a grand jury budget of \$386,000 for 1999/2000 and a projected decrease to \$385,000 for 2000/2001.³⁹ Reluctance on the part of counties to increase grand jury appropriations is varied. A survey of county grand jury budgets indicates a decrease in funding from fiscal year 1999/2000 to 2000/2001 in 30% of the counties, with 13% reporting no change in funding between fiscal years. The remaining 57% of counties reported budget increases from slight to substantial.

Funding may be directly correlated to community and county sentiments about the grand jury's worth. Counties that do not value the work of the grand jury or have little faith that its final report will be significant in terms of fresh suggestions for improvement, may be inclined to shift funds to other county agencies more highly regarded. Departments experiencing budget shortfalls or those faced with cutting staff and thereby service to the public, stand a better chance of winning approval from the Board of Supervisors when there is not enough money to go around. Grand juries typically do not prepare their county budgets and they may have very little interaction with the person who does. The time line for the process is such that the budget is actually prepared several months before grand jury selection takes place. It is unlikely that a

³⁸See Table 3, Appendix G

³⁹*Id.*

newly sworn foreperson would be familiar enough with this arduous process to take an active role in county budget appeal hearings which take place early in the fiscal year. Lack of leadership continuity in the grand jury from year to year can result in a serious detriment at budget time.

With no statewide standards in place, it is possible for persons who have a political ally who is the subject of a potential grand jury investigation or who may become the subject of a grand jury investigation themselves, to play a role in deciding or impacting grand jury funding levels. This is indicative of a serious flaw in the design of the institution. Persons having final decision making authority can manipulate the grand jury's ability to conduct investigations over officials or county operations for the following year. The grand jury's only recourse may be to ask the court to intervene by using Penal Code Section 931, and thus placing the court in the uncomfortable position of straining its relationship with the county by ordering the Auditor to pay necessary investigative expenses.

The county may also deliberately restrict the grand jury's ability to explore investigations pertaining to cities and special districts. Since boards of supervisors are focused on allocating dollars for county services and receive pressure from a variety of forces, they may be disinclined to provide funds that cross jurisdictional boundaries. Grand jurors have no authority to allocate expenditures from their budget and therefore are completely dependent on the county to provide adequate funding.

The entire budget process residing with the county is also an area that can lead to confusion for the grand jury. They begin to see themselves as quasi county employees and correlate their jurisdiction to that of the county, instead of local jurisdiction, which includes cities and special districts. Grand jurors develop more of a connection and even sometimes a social relationship with county leaders so that they become focused on only a portion of their total scope of civil review.

VIII. SUPPORT RESOURCES

County government's provision of basic resources, such as support staff, office space, equipment and meeting rooms has been problematic for years. In 1997 the legislature successfully added statutory language requiring the superior court to arrange for a suitable meeting room and other support as the court determines necessary for the grand jury.⁴⁰ Unfortunately, there was no allocation of money for this purpose and the statute required costs incurred as a result be absorbed from existing resources. Data collected from 47 counties indicates 19% still do not provide meeting rooms for their grand jury and 6% provide a room, but it is also used for other purposes as well.⁴¹

⁴⁰Penal Code Section 938.4

⁴¹See Table 4, Appendix H

Much needed office machines such as personal computers and typewriters are rarely provided. Grand jurors in many counties are forced to use their own personal equipment for official business. Enterprising members learn early in the term which jurors are computer literate and have a machine at home with which to type drafts of materials. Space used to store library materials and conduct grand jury business is frequently shared with county agencies. In extreme cases, the only space provided may consist of a locked file cabinet kept in a public corridor, and cardboard boxes are hauled in the trunk of someone's car to a meeting place.⁴² Committee meetings may be conducted in someone's home or at a restaurant because courthouse space is not available for use. Survey results indicate 34% of superior courts polled do not provide dedicated office space for the grand jury.⁴³ This may be due to the fact that many courts are out of space and have nothing available for the grand jury's use. Counties report 53% do not provide support staff to the grand jury and 20% have no computers or copy machines.⁴⁴

Enterprising grand jurors have gone so far as to conduct fund raisers in order to raise money to purchase word processing equipment.⁴⁵ This lack of resources serves to further

⁴²Vitiello and Kelso, *supra* note 7, at 18.

⁴³See Table 4, Appendix H

⁴⁴See Table 5, Appendix I

⁴⁵Vitiello and Kelso, *supra* note 7, at 61. Dan Taranto, Director and Past President of the California Grand Jurors Association, indicated during a roundtable discussion that while serving on the Humboldt grand jury he went to the Board of Supervisors to ask for a typewriter because they had none. A typewriter with sticky keys was ultimately produced for the grand jury's use. Because of their dissatisfaction with the sticky typewriter and the Board's denial of the grand jury's request for a word processor, the grand jury conducted a fund raiser and bought its own equipment.

hamper grand jurors' efforts to effectively use their 12 month tenure. An impression is made that counties do not want to help and do not place a priority on the needs of the grand jury.

Funding for experts and assistants is available to the grand jury, if first approved by the court.⁴⁶ Expenditures for such assistance may not exceed \$30,000 per year unless also approved by the Board of Supervisors. Outside auditors and appraisers may be allowed to examine records and documents if the grand jury requires assistance when examining the accounts of the county assessor. Survey results indicate funding for experts has been used in only 26% of counties responding.

In many instances, a reluctance to provide necessary tools and space to the grand jury may be more the result of an absence of a voice. Experienced administrators are very effective in getting what they need by having learned how and when to ask, and what might be exchanged in return such that the desired results are produced. Because most grand juries, other than those from very large counties having designated support staff, do not have a representative knowledgeable in the process; inadequacies in support resources continue to magnify the challenges to grand juries year after year.

⁴⁶California Penal Code, Section 926

IX. SELECTION

Selection of the grand jury is the responsibility of the Superior Court in each of the 58 counties. Little else is consistent in the process of selection among the counties. Courts are not required to draw from any particular source of citizens such as lists of registered voters or licensed drivers. In fact, many counties use a combination of methods of selection in order to develop a list from which the final grand jurors are actually drawn. It is doubtful county residents actually know or understand how this process works where they reside because there is no requirement to advise the public which method is being used.⁴⁷

⁴⁷Olson, *supra* note 1, at 271. Statutes governing grand jury selection allow the superior court considerable discretion. There is nothing to preclude persons employed by local government or even blood relatives of public officials.

The process of selection begins by the court making an order designating the estimated number of jurors that will be required for the grand jury to carry out its duties. This order is made in the month prior to the beginning of the fiscal year.⁴⁸ If the county has a jury commissioner or someone who performs the duties of a jury commissioner, a list is furnished to the judges from which the jury commissioner recommends individuals for grand jury service. The jury commissioner compiles the list pursuant to written rules or instructions adopted by the judges. Ironically, the court is not required to use any of the names on this list. In fact, the judges may create a pool of prospective jurors which may include any person in the county they feel suitable and competent.⁴⁹ This provision allows total discretion on the court's part to decide who shall become a prospective juror. One may conclude such authority is appropriate to ensure the grand jury is selected only from those individuals the court deems uniquely qualified to do the job.

The law provides for all prospective jurors to be nominated by judges or in some cases, by members of boards of supervisors or other local government officials, which is a method of selection once referred to as, "a means guaranteed to produce partiality."⁵⁰ While this possibility may exist in order to impanel those people who possess the skills and abilities deemed desirable for grand jury work, it also smacks of century old criticisms when persons

⁴⁸County government operates on the fiscal year commencing July 1 and ending June 30 of the following year.

⁴⁹California Penal Code, Section 903.4 permits judges to name any person they see fit to the group of those from which final selection will occur.

⁵⁰Frankel and Naftalis, *supra* note 5, at 34.

were hand picked by the King, or as late as the 1960's when the key-man system was used in this country. The key man system involved the clerk of the court contacting men having extensive connections and asking that they recommend grand jurors.⁵¹

The nomination method can also place the court in the untenable position of nominating a friend or business acquaintance who discovers the grand jury may not be the prestigious, elite group it once was. Judges in smaller counties may experience difficulty in nominating the required number of uniquely qualified individuals every twelve months, thereby creating the possibility of the same people serving over and over.

⁵¹*Id.*

So much authority is conferred on the court in the selection process, that no one may challenge it. Neither the panel nor an individual grand juror may be challenged, except by the court for want of qualification.⁵²

For the above reasons and others, counties who once selected grand juries by personal nomination alone have changed to supplement the pool with citizen volunteers and a combination of registered voters and those licensed to drive. Of 47 courts responding to questions about their selection method, 6 indicated they still strictly use the nomination system.⁵³ Once the required number of prospective jurors is reached, all counties complete final selection by lottery. This process entails placing the names of prospective jurors on ballots and drawing one by one until the correct number of individuals have been seated.

Lack of randomness and the ability to select friends, associates or political allies is extremely perplexing for those familiar with the petit jury process. There is nothing to preclude selection of persons that are related to or supporters of local government officials or those with whom they share compatible political ideas to sit on the grand jury. In smaller, rural counties, judges involved in the selection process may interview all prospective jurors they do not personally know. Therefore, those finally chosen may ultimately all be personal acquaintances of that judge. Ironically, potential abuse exists in the selection process that, if duplicated in local

⁵²Penal Code Section 910

⁵³See Table 6, Appendix J

government, might compel an investigation by the grand jury. This is not to assert that judges would abuse the process, but to point out a weakness in the method that exists for selecting grand jurors.

The provision in existing law that requires the court to select grand jurors by personal interview in order to ascertain whether they possess the minimum qualifications is yet another hurdle. While it may lead some to believe jurors are being hand picked, it has resulted in eliminating individuals that may appear acceptable on paper, but reveal their true motivations upon in-person examination. The question is whether this is a prudent use of already strained judicial resources. Most counties search for no fewer than 30 people from which to draw their final number of grand jurors. If a conservative estimate of 50 individuals were scheduled for 30 minute interviews, it is conceivable almost a week of the court's time could be spent each year fulfilling this requirement. This is a serious problem in light of a recent statewide assessment of judicial needs having revealed that California is currently in need of 365.3 new judgeships, or an increase of 19.2% statewide.⁵⁴ Because of insufficient staffing, it is conceivable that not all courts comply with Penal Code Section 896.

⁵⁴Report of Results of Statewide Assessment of Judicial Needs Including List of Recommended New Judgeships to the Judicial Council, October 26, 2001

The composition of the grand jury has been attacked as lacking diversity in many ways. Many citizens who experience difficulty serving two or three days on a petit jury, may consider grand jury service an impossibility. With its term of 12 months and frequent evening and daytime meetings, interviews or tours, most working people with families making up a significant part of the population, are eliminated from service. Data collected from 47 courts indicates 59.5% experience difficulty in obtaining enough interested people to serve each year.⁵⁵ Despite community outreach, the time commitment alone establishes a system where retired, more affluent people having the financial ability to volunteer their time make up a large percentage of those willing to serve.

Though the grand jury is criticized for its older membership, this could be considered an advantage. Highly experienced, retired professionals may be more suited to grasp the complexities of local government and conduct the investigations required of them. These same people may be more familiar with the community and could apply life experiences to grand jury duties.

⁵⁵See Table 7, Appendix K

Challenges that grand jurors do not accurately represent a cross-section of the community and therefore do not stand the test for criminal matters, have resulted in the increasing number of separate grand juries, one for criminal, one for civil.⁵⁶ The amount of time a grand jury spends on criminal matters is solely at the discretion of the District Attorney. In counties where the grand jury spends substantial time considering indictments, there is little time available for civil functions. For this reason, approximately 19% of California counties use multiple grand juries.⁵⁷ Selection of the criminal grand jury is done randomly, using the same pool as that used for petit juries, allowing the court to use previously described methods of selection for the civil grand jury. One urban county selects as many as four grand juries per year, with those designated for criminal purposes selected and dismissed every three months, thereby making it easier for the average citizen pressed into service.

One of the biggest obstacles to overcome in implementing separate grand juries is that of funding. While it may be advantageous to separate the functions, with a second criminal grand jury specifically authorized by California Penal Code Section 901.6, it can only be accomplished where there is adequate county funding to absorb the additional costs. Because California Rule of Court 810 does not permit grand jury expenditures to be made from California court funds, counties are responsible for a potentially significant increase in costs.

⁵⁶The grand jury responsible for civil duties is commonly referred to as the “regular” grand jury.

⁵⁷See Table 7, Appendix K

X. LEGAL GUIDANCE

The issue of legal guidance for the grand jury is particularly troublesome, not only for the court and county government, but for the grand jurors themselves. Proponents of the system describe the grand jury as a body of lay citizens gathered together to act as watchdogs over local government by interviewing public officials and inspecting public records. Put simply, it keeps government honest. The question is, who watches the grand jury? Their powers are very broad, and they are not required to have a complaint to commence an investigation. They may do so on their own initiative, which provides possibilities for abuse and personal agendas. They may go looking for problems which may or may not exist, having been intrigued by complainants.⁵⁸ A former Los Angeles County grand juror in 1984-85 said, “Forget the civil side completely. It’s sort of ridiculous...We’re just like babes in fairyland when we go down there (to the grand jury room), we don’t know what the hell we’re doing.”⁵⁹

⁵⁸Spoken by a member of the 1997-98 San Diego County Grand Jury, “Too often, grand juries simply get it wrong. They are easily seduced by the complainants who come to them with tales of alleged civic wrong that only they, the noble grand jury, can unearth and expose.” Marjorie Van Nuis, *Grand Juries Are A Joke, But No One Laughs*, SAN DIEGO UNION-TRIBUNE, June 25, 1999

⁵⁹Robert W. Stewart, *Experts Question Role, State Grand Juries Failing Civil “Watchdog” Function*, LOS ANGELES TIMES, August 5, 1986

In addition to the need for sound legal counsel so that grand juries can reach accurate conclusions once investigations are completed, legal counsel is also essential to prevent exposure to civil liability on the part of grand jurors because comments in a report about persons or officials not indicted by the grand jury are not privileged.⁶⁰ In a 1978 case before the First District Court of Appeal, an engineering, land surveying and architectural firm was defamed by statements contained in a Lake County grand jury report that the firm had been negligent, incompetent and wrong in the performance of its duties. The court held that the grand jury members were not immune from being sued.⁶¹ The Supreme Court in 1988 also recognized the importance in balancing grand jury power. The court held that a grand jury exceeded its legal limits when it announced intention to disclose raw evidentiary materials gathered during a secret watchdog investigation.⁶²

Grand jurors themselves recognize the need for legal counsel. In the letter to the court, dated December 31, 1992, accompanying the Colusa County grand jury's final report, the foreman said the following:

⁶⁰California Penal Code Section 930

⁶¹*Gillett-Harris-Duranceau & Associates, Inc. v. Robert C. Kemple*, 83 Cal. App 3d

⁶²*McClatchy Newspapers v. Superior Court of Fresno County*, 44 Cal. 3d 1162

“To assist the Grand Jury in its functions, we also recommend that an attorney from the county always be included as a member of the Jury. The complexity of laws, regulations, statutes, etc., governing the functioning of the Jury and governmental bodies within its purview are so complex and open to interpretation (that) the common layman appointed to the Jury is overwhelmed and intimidated. The efficient functioning of the Jury was often hampered by lack of immediate access to counsel.”

Who is to provide legal guidance to this group of lay citizens in order to avoid the threat of abuse or defamation suits? Just as it may not be an effective use of overburdened judicial resources to interview prospective grand jurors, neither is it in the public’s best interest to utilize a judge to supervise citizens having no legal training. Most Superior Court judges are far too busy carrying calendar assignments or trying cases to spend time overseeing every move the grand jury makes.

Most counties in California report that the grand jury is referred to County Counsel for matters requiring legal direction in connection with civil investigations.⁶³ There seems, however to be an inherent conflict of interest in county attorneys providing advice to a grand jury investigating a county agency, that agency also being represented by County Counsel. Grand jurors become frustrated when neither the presiding judge nor county counsel can assist

⁶³Each county maintains the services of a County Counsel, who acts as the county’s legal advisor and representative. If this person is not an employee of the county, he/she may provide services under a contractual agreement.

them.⁶⁴ Others voice complaints that information from legal counsel is inconsistent and typically there is no expert available to them. There is no statewide centralized advice point that grand jurors may contact, despite efforts by the California Grand Jurors Association to create a pro bono hotline with law school students.⁶⁵ Grand jurors feel left out in the cold when legal advice is not immediately available to them and the perception is that no one really wants to help.

A survey of 32 County Counsel Offices throughout the state revealed 31% do not provide legal guidance on grand jury investigations.⁶⁶ Of those that do provide assistance, over half indicated the grand jury is referred to the District Attorney if County Counsel declares a conflict. Conflicts can occur in the instance where county counsel represents the interests of a county department that is being investigated by the grand jury and both sides are seeking legal counsel from the same office. The Court is used for conflict advice approximately 19% of the time. Data indicates independent, outside counsel is appointed in less than 10% of the counties responding.

⁶⁴Vitiello and Kelso, *supra* note 7, at 56.

⁶⁵Vitiello and Kelso, *supra* note 7, at 69.

⁶⁶See Table 9, Appendix M

Review of grand jury reports is an important safeguard to ensure libelous statements are eliminated prior to publication. In 41% of the county counsel offices responding, legal staff do not provide assistance in reviewing or editing written reports generated by the grand jury.⁶⁷ Because grand jurors are liable for remarks against individuals not indicted, it is surprising that so many counties do not play a more active role on behalf of grand juries. Pursuant to an Attorney General opinion, the county must provide indemnification and defense to grand jurors who, acting within the scope of their lawful duties, are sued for statements made in a final report.⁶⁸ The potential for exposure to liability on the part of the county, as well as grand jurors, would seem to dictate careful review of any materials generated by the grand jury prior to the issuance of reports.

⁶⁷*Id.*

⁶⁸Attorney General Opinion No. 97-1210, June 2, 1998, Volume 81, page 199

XI. TRAINING

Training may be the single-most critical element in assuring success in the grand jury process. By virtue of its definition, the grand jury is a group of citizens who may or may not have had any formal education, training or experience in areas such as conducting investigations, interviewing officials and writing reports. They may have little or no knowledge in dealing with governmental entities and are unaware of the local government structure of agencies and departments. The process, whether reasonable or not, requires them to become experts in these areas and more, and to complete all of their duties within a twelve-month period of time.

Grand jurors are informed of their many duties after impanelment and swearing has taken place, which may be considered the first installment of their training. This process is known as reading the charge, which is similar to the court's instruction to a petit jury prior to the commencement of deliberations. It is usually spoken by the court to the grand jurors and a written copy may be provided for their benefit, as well. The court is required by law to give them information on their duties and as to any charges for public offenses returned to the court or likely to come before the grand jury.⁶⁹ The charge may be lengthy or short, based on the court's opinion of how much information is necessary. A sample of a court's charge is attached to this paper and

⁶⁹Penal Code Section 914 specifies that a charge shall be given. This section also sets forth the training that is to be provided to assist the grand jurors in the performance of their duties regarding civil matters.

incorporated as Appendix D.

Most responsive to the training predicament are those persons who have experienced it themselves. Founded in 1982, The California Grand Jurors Association, (CGJA) states as its mission, “We promote government accountability by improving the training and resources available to California’s 58 regular grand juries and educating the public about the substantial local government oversight and reporting powers those grand juries have.” They are, without a doubt, a group of very talented and dedicated individuals who volunteer to perpetuate, enhance and improve the functions of the “regular” grand jury system in California.⁷⁰ They indicate one of their primary purposes is to promote comprehensive training for new jurors in California. The CGJA is the only statewide organization of its kind, although local associations also exist in several counties.

⁷⁰Unknown author, “Why the CGJA Avoids the Term “Civil” Grand Jury.” CGJA avoids the term “civil grand jury” and encourages grand jurors to do the same. The belief is that the term does not accurately describe the dual civil and criminal functions and thereby diminishes its powers.

CGJA conducts regional and statewide training seminars in California. It offers instruction covering broad subject areas taught by former grand jurors who lend their experiences and expertise. CGJA believes someone who has actually served is the most competent to teach, a concept that makes sense. Although the training is intended to supplement and complement the training received by grand jurors locally, it is often the only training provided in many jurisdictions. CGJA's training team utilizes skills learned from former jurors, who include attorneys, teachers, university professors, police and professional investigators, accountants, management auditors and others. These seminars average two days in length. The registration cost is affordable and the training includes a binder of reference materials.⁷¹ However, the associated travel costs including hotel, meals and transportation may be beyond county budgets. Consequently, because of a lack of funding, many new grand jurors do not receive this instruction.

In addition to the training offered by CGJA, counties report they use a combination of other sources to help educate new grand jurors. Among those are local grand juror associations, former grand jurors, professional trainers, the district attorney and county counsel. Members of the court's staff and some county government officials also have some level of participation in local orientation and training sessions.

Legislation which placed an emphasis on training for grand jurors was passed in 1997 with the Grand Jury Training, Communication and Efficiency Act. It amended the language of the statute to specify that civil grand jurors should receive training that addresses, at a minimum, report

⁷¹Registration cost for the seminar held in 2001 was \$75 per person.

writing, interviews, and the scope of the grand jury's responsibility and statutory authority.⁷² The Act was significant in that it created a state-mandated program of training in order to assist the grand jury in the performance of its duties with respect to civil matters. It identified key areas of concern and placed the burden on local officials to ensure that such education is provided. Those local officials were identified as the court, in consultation with the district attorney, the county counsel and at least one former grand juror.

Although the legislation formally recognized a need for grand jury training in civil matters, it did not create a uniform program for use statewide. The responsibility to carry out the intent of the legislation was placed on local officials, and costs for doing so were to be absorbed by the court or the county from existing resources. In many instances, this need for specific training was not a new concept for counties, as they had been well aware grand jury training was lacking or even non-existent in some jurisdictions.

⁷²Penal Code Section 914

In reviewing survey results, grand jury budgets in 41% of the counties responding either decreased or remained the same between fiscal years 1997/98 and 1998/99, which may indicate that no additional funds were allocated for the training required by Penal Code Section 914.73. When asked if boards of supervisors would support increasing grand jury budgets to support additional training, 27% of the county officials responded that they would not.

Despite the efforts of the legislature, government officials and associations of former grand jurors, training is still viewed overall as deficient. No formal training program exists for use statewide, and what is offered differs from county to county. There are no standards or requirements for elements of training, the absence of which can produce results which might subject the county and the grand juror, individually, to civil liability. Mandatory training provided to government employees in order to reduce the employer's liability is non-existent for the grand jury.

A recent experience with sexual harassment issues highlighted the need for all types of training for grand jurors carrying out their duties under the auspices of the county. A member of a grand jury requesting records from a city office for purposes of conducting an investigation was accused of engaging in inappropriate behavior with a female employee. Although the grand juror stated he meant no offense, he had no training on the sensitivity of sexual harassment issues and subjected himself and city and county departments to liability. Other training such as disability accommodation issues, either mandatory or optional, offered to governmental employees could also prove important for grand jurors.

⁷³See Table 3, Appendix G

County Counsel offices throughout the state were asked if they viewed the current training for grand jurors as adequate. Twenty-six percent of those responding answered in the negative. That survey also revealed 29% of County Counsel offices provide no training to the grand jury. Some of the commentary provided revealed that in one county the grand jury refused to allow County Counsel to perform training and that materials provided for their use were refused by grand jurors.⁷⁴ Yet another County Counsel responds the grand jury would benefit from better training in investigations and report writing and although the current training was adequate for what it is, more comprehensive training is still needed.

Virtually every county supplies a handbook for its grand jurors, and in most instances, it is the grand jury itself or the court that revises or updates the handbook for the next grand jury. County Counsel prepares the handbook in roughly one-third of the counties responding to a survey on this topic.

The skills grand jurors bring to their position must be considered in addressing training needs. Investigations requiring interviewing techniques, fact-finding and analysis skills are critical for every member of the grand jury to perform effectively. The ability to question a public official with courtesy and respect, while also obtaining the necessary information needed to verify or corroborate facts is essential. Because of the number of investigations that are condensed within a 12 month period, and the reports that must be written, the majority of the group must possess basic

⁷⁴Survey responses from California County Counsel Offices were received confidentially and thus, individual identity is not revealed.

skills in order to share the workload. Persons who are limited or ineffective will only make the others' jobs more difficult.

California County Counsel Offices were surveyed on grand juror skills and knowledge of local government. In 71% of the counties polled, it is County Counsel who is the primary provider of guidance on investigations undertaken by the grand jury.⁷⁵ Because they work closely with grand jurors, County Counsels may be the most insightful on their skills and abilities. Of those county counsels responding, 56% felt grand jurors possessed the interviewing and report writing skills necessary to carry out their duties, while 35% indicated they did not. The remaining 9% had no opinion or said the skills vary.⁷⁶

Today's world of local government is complex and confusing. To further complicate matters, the grand jury's jurisdiction is not clearly defined by the same lines of demarcation as that of local government. Fifty percent of counties responding felt grand jurors possess the familiarity with local county government needed to carry out their duties. Forty-one percent indicated they do

⁷⁵See Table 9, Appendix M

⁷⁶*Id.*

not. The remainder had no opinion or felt it varied from year to year.⁷⁷

⁷⁷*Id.*

XII. PROBLEMS FOR COURTS

The court's actual involvement with the grand jury conflicts with the state of the law. Referred to by many as an "arm of the court", the degree of interaction and assistance between the court and the grand jury has been subject to interpretation for several years. With the advent of the Lockyer-Isenberg Trial Court Funding Act of 1997, California Rule of Court 810 was promulgated which defined "court operations" and thus specifically stated what was an allowable expenditure from trial court trust funds. Section (b) of that same rule excluded "civil and criminal grand jury expenses and operations (except for selection)". While funding for trial courts became a state responsibility, grand jury expenses remained under the county's authority. Statutory law requires considerable interaction between the court and the grand jury on matters such as resources and training, which is complicated by Rule 810. Court officials are placed in the position of using "court operations" resources for other than their specified purposes or abandoning the grand jury to fend for itself.

The court's role in seating a grand jury does not end when the impaneling is completed. Once newly sworn grand jurors get a better idea of what their service entails, some resign early in their term. Reports indicate that they find the experience frustrating because the intellectual makeup of the group varies such that goals developed in the beginning of the term cannot be attained. The grand jury's work becomes limited and people no longer wish to commit the time and

effort required.⁷⁸ Other jurors resign due to illness. A 12 month term for older citizens often results in resignations because of health issues. Resignations require court action to appoint replacement jurors.

⁷⁸David Hasemyer and Anne Krueger, *The Grand Jury: Behind Closed Doors*, SAN DIEGO UNION-TRIBUNE, June 12, 1986. Members of the San Diego grand jury found the experience frustrating and a waste of money. One person who resigned early indicated she should not be replaced because she hadn't accomplished anything. She stated the cases were boring and felt her time was wasted, along with the county's money.

Possibly one of the most unpleasant duties the court faces is removing a problem juror. Inappropriate behavior of a single person can be so corrosive to the group effort that if the offender is not removed, resignations of others will follow. In one such instance, jurors reported a member who repeatedly arrived late for meetings and then proceeded to ask an endless number of unnecessary questions causing delay and aggravation. The same juror was accused of hinting or asking favors of public entities, so that others were embarrassed by the impropriety of actually receiving gratuities. Abuse of power, absenteeism and lack of participation or willingness to contribute are issues that if not successfully dealt with internally by the foreperson, or other members of the grand jury, ultimately become the court's problem. In a survey of California courts, 40% of those responding indicated court officials were aware of complaints made against grand jurors that resulted in a juror's removal. Forty-two percent of the incidents were concluded by the offender resigning from the grand jury.⁷⁹ In an extreme case concerning the 1998-99 Santa Clara County grand jury, a judge dismissed five jurors in mid-term for violating their oath. The damage was so intense the remainder of the grand jury was discharged because internal conflict caused the group to become dysfunctional. Secrecy provisions prevented the release of exact details of the controversy, but the judge's decision was reviewed and upheld by the Court of Appeals. When the court becomes involved in an internal problem impacting the grand jury, the expenditure of time and energy in developing an effective solution can be considerable.

In cases of resignation or removal, courts keep several alternate jurors on a waiting list in order to replace those who do not complete their terms. In some cases, the list is exhausted and a grand jury must conclude the year with less than the required number. Replacing jurors part way

⁷⁹See Table 6, Appendix J

through the term slows the process and may further hinder the grand jury from completing its work within the time allowed.

To further complicate the court's role, it is usually the presiding judge of each court that has the duty of overseeing the grand jury.⁸⁰ The presiding judge in each county typically handles the administrative matters of the court. Pursuant to Penal Code Section 933(a) the grand jury shall submit a final report of its findings and recommendations that pertain to county government matters to the presiding judge. If a finding is made by the judge, the final report may be submitted for comment to the responsible county department or responsible officer. All comments by the governing body of a public agency which is the subject of a grand jury report, must also be submitted to the presiding judge. This process of reviewing and approving final reports for publication can be problematic for the court, depending on the quality of the grand jury's product. For example, in 1975, in a case in which a grand jury proposed to issue a report that the court decided exceeded the grand jury's jurisdiction, the court refused to file the report and the decision was appealed. The appellate court found the that judge's action was proper.⁸¹

The quality of grand jury reports is inconsistent throughout the state of California. Survey results indicate most Court Executive Officers rated the quality of reports as good. The same question posed to County Counsel resulted in 9% ranked excellent, 58% good, 6% fair and 18% poor.⁸²

⁸⁰In some instances, the presiding judge may delegate the responsibility of overseeing the grand jury to another judge of the same court.

⁸¹Bruce T. Olson, *supra* note 1, at 55

⁸²See Table 10, Appendix N