

**COMMENTS OF THE CALIFORNIA
GRAND JURORS' ASSOCIATION¹ ON
PROFESSORS VITIELLO AND KELSO'S
*TENTATIVE RECOMMENDATION
REFORM OF CALIFORNIA GRAND JURY
STATUTES***

In Volume 35, January 2002, the *Loyola of Los Angeles Law Review* published an article by Professors Vitiello and Kelso entitled "Reform of California's Grand Jury System" which concluded "In the end, the authors believe that California will be best served by well-trained grand juries that reflect our diverse population." The California Grand Jurors' Association (CGJA) wholeheartedly agrees with that conclusion. Professors Vitiello and Kelso have also, however, released for public comment a series of specific proposed statutory changes intended, presumably, to implement their thoughts on reform (http://www.mcgeorge.edu/government_law_and_policy/publications/ccglp_pubs_grand_jury_tentative_recommendations.pdf).

Although it agrees wholeheartedly with the authors' ultimate conclusion quoted above, CGJA disagrees with many of their specific statutory proposals. The comments which follow are addressed specifically to those proposals and not to the Professor's January article.

I. EXECUTIVE SUMMARY

The overarching concern that the CGJA has with the wide-ranging reform proposals Professors Vitiello and Kelso released for public comment is that they should not be introduced as legislation in

1. The California Grand Jurors' Association is a California nonprofit, public benefit corporation staffed and funded by its volunteer membership. It is composed of past and present California regular grand jurors. It has no staff and no external funding.

their present form. Further, no significant revisions to the statutes related to the California grand jury system should be proposed without a consensus of all affected constituents. Those constituents include: grand jurors, judges, district attorneys, county counsels, court executive officers, the California State Association of Counties, the League of California Cities, the California Special Districts Association, California Statewide Communities Development Authority, California Society of Municipal Finance Officers, California Municipal Treasurers' Association, members of the CGJA, members of independent associations of former grand jurors, representatives of law enforcement, grand juror trainers, the media, taxpayers' associations, and the general public.² The CGJA believes that the California Judicial Council should create a task force, open to all affected constituents, for the purpose of studying the possible need for changes to the grand jury system, and if the need is found to exist, building a broad and strong consensus on how best to address it.

Our concern in that regard is prompted by two primary considerations. First, we think the proposals are not well researched or fully thought out, and if they were to be adopted in present form, would cause far more harm than good. Second, and every bit as important, CGJA recognizes that any comprehensive legislation, such as these proposals, that does not come to the legislature with a strong supporting consensus from all, or nearly all, affected interest groups is subject to being distorted and manipulated through amendment, often at the last minute and before the true consequences of such action can be considered. Given how few, in or out of the legislature, understand the grand jury system, it is quite possible, indeed in our view even likely, that a reform package that lacks a compelling consensus will be attacked piecemeal. Such a

2. This list is by no means exhaustive. There are, of course, many associations and other organizations that represent those with an interest in grand juries as well as numerous officials and agencies that are the subject of grand jury oversight, and their organizations. Although some have provided us with copies of their comments on the Vitiello/Kelso proposals, there may be many of which we are unaware. *See infra* note 11. The CGJA notes that the California Law Revision Commission currently has pending an inquiry relating to the possible amendment of certain Penal Code sections affecting grand juries, including section 933, and may be presumed to have some interest in coordinating amendment proposals.

reform package would be subject to attack even by the well intentioned, who are addressing specific concerns advanced by different interests without consideration of the entire matrix or any understanding of how an “adjustment” in one section of the code can affect others. Changes to the grand jury statutes have practical, financial, legal, and possibly constitutional issues that must be surfaced, analyzed, and resolved before any effort to legislate change is initiated. Although the CGJA is focused on the civil function of grand juries and professes no expertise with respect to the criminal indictment function, we believe that any changes in the criminal function must take into account how they might impact the more common, and we believe more critical, civil function.³

At the outset, the fundamental relationship between grand juries, the courts, and the counties needs analysis. Two recent events, one legislative and one judicial, have created uncertainty and confusion regarding the funding of grand juries and their continued relationship with the courts. Any analysis of grand jury reform must start with an understanding of the implications of the Brown-Presley Trial Court Funding Act⁴ and the California Supreme Court decision in *Daily Journal Corp. v. Superior Court*.⁵ Together, these two events seem to end the traditional role of the grand jury as an “arm of the court”⁶ and may eliminate much of the ability of courts to supervise grand juries in ways other than those expressly provided for by legislation. Inasmuch as grand jury supervision has historically been viewed as an inherent authority of the courts, limitations on that authority would significantly change the day-to-day relationship between courts and “their” grand juries. This concern is discussed in Section III and throughout these comments.

3. Indictments appear to be infrequently used in any event. See *Bradley v. Lacy*, 53 Cal. App. 4th 883, 893 n.4, 61 Cal. Rptr. 2d 919, 925 n.4 (1997) (stating that “[i]n California, relatively few prosecutions are commenced by indictment. The great majority are initiated by information.”); see also *infra* note 7 (providing CGJA survey results).

4. CAL. GOV’T CODE §§ 77000-77400 (West 1993 & Supp. 2002) [hereinafter Trial Court Funding Act]; see also CAL. R. CT. 810 (West 1996) (regarding costs associated with court operations).

5. 20 Cal. 4th 1117, 979 P.2d 982, 86 Cal. Rptr. 2d 623 (1999).

6. See, e.g., *McClatchy Newspapers v. Superior Ct.*, 44 Cal. 3d 1162, 1171, 751 P.2d 1329, 1333, 245 Cal. Rptr. 774, 778 (1988) (stating that “the grand jury is fundamentally a judicial entity, ‘an instrumentality of the courts of this state’”).

One aspect of California's grand jury system that has understandably not received much attention is the tremendous diversity in the practices followed by the fifty-eight counties with respect to their grand juries. So far as we are aware, the reason this diversity has gone largely unremarked is because no one has ever comprehensively surveyed the field. For that reason, the CGJA recently did so. We sent an eight page written survey to the current and immediate prior forepersons of all fifty-eight counties' regular grand juries. We sought detailed information in five areas: (1) grand jury types and selection processes, (2) orientation and training, (3) resources, (4) advisors and guidance, and (5) specific grand jury practices, such as witness admonishment, accusations and final reports. We have received to date responses from forty-four counties (seventy-six percent).⁷ The resulting 352 pages of raw data have been compiled in summary form and are discussed in section IV of these comments. As part of our specific statutory comments discussed below, we make frequent use of the survey results in analyzing the practical effects of specific code sections as they are varyingly applied around the state.

Although we firmly believe that it is premature to contemplate specific legislation before the consequences of the Trial Court Funding Act and *Daily Journal* are understood—and in any event oppose wholesale, wide-sweeping reform in the absence of substantial consensus—we do offer numerous detailed suggestions with regard to existing legislation. The statutes governing grand juries are concededly incomplete, inconsistent and confusing. In some measure, they have been tolerable because the courts have been able to work with them using their inherent authority. If that authority is lost, there will be a need for much work on the statutes. Based on the experiences of our members (all of whom have been grand jurors), information we learned at our Annual Conferences and during our annual training programs, and the results of our recent grand jury survey, we have commented on the numerous ways in which existing statutes cause confusion or are inappropriate to the civil function of today's regular grand juries. We detail those comments on a statute-by-statute basis in Section V.

7. See CAL. GRAND JURORS' ASS'N, 2001 CALIFORNIA GRAND JURY PRACTICES SURVEY (Nov. 2001) at <http://www.nvo.com/cgja/nss-folder/onlinepublications2/survey.pdf>. [hereinafter SURVEY].

In the discussion in Section V, we note the existence of many proposals that would nominally affect only the criminal function of grand juries and express our concern that they should not be permitted to weaken or interfere with the civil functions of the regular grand jury. We specifically object to the proposed bifurcation of grand jury powers and the mandate that every county have a standing representative criminal grand jury which might supplant the regular grand jury.

As the Vitiello/Kelso proposals acknowledge, the CGJA trains new grand jurors around the state in regional training programs. Our trainers, all of whom have been grand jurors, have been training new grand jurors for up to thirteen years, and we feel we understand the training needs of grand jurors better than anyone else. We discuss our views on training in Section VI. Although the Vitiello/Kelso training proposal has no detail sufficient to permit specific comment, we do question some of its assumptions. We also wonder how the proposal to create “objective testing procedures” to determine whether jurors trained in the proposed pilot program “performed more effectively” than those without training could possibly work. There is implicit in that notion a view that grand juries, grand jurors, the situations they investigate, and the expert and legal advice they receive is much more standardized from county to county than is actually the case. In any event, although we unequivocally support the best training for grand jurors, we urge that this aspect of the Vitiello/Kelso reform package be given far more thought and analysis than the proposal currently reflects.

With the caveat that we *do not* advocate any grand jury reform being proposed to the legislature which has not resulted from a broad, deep and strong consensus of all constituents, in Section VII we suggest five areas which, if legislation were to be proposed, we believe should be addressed. Regular grand juries should be provided better access to independent counsel. They should be provided with access to technology on par with the technology available to those they oversee. Careful reconsideration of the confidentiality rules as they apply to the civil function of the grand jury is called for. Minimum training standards should be developed, and we offer our view that doing so is an apt function for the Administrative Office of the Courts. Consideration should be given to requiring each county to have an “Implementation Review

Committee” to review whether or not grand jury recommendations, the implementation of which has been agreed to by the affected agency or official, have in fact been implemented.

Finally, we conclude by urging the California Judicial Council to convene a task force on grand jury reform so that the broad, deep, and strong consensus we believe is so important in this area can be forged.

II. INTRODUCTION

The burden of our comments is that it is folly at best, and dangerous devilment at worst, to propose a sweeping reform of the California grand jury system without first:

- understanding the legal penumbra under which the grand jury system operates, which is, at best, unclear at the present time;
- understanding how the fifty-eight grand juries actually function in their respective counties—information that, to the best of our knowledge, has not previously been systematically compiled by anyone at any time, and;
- involving, at the earliest stage of consideration, all interested parties under the guidance and direction of an informed, neutral agency capable of receiving and digesting the input of many different constituents.

We discuss the legal penumbra and its uncertain state first, in the hope and expectation that anyone seriously advocating grand jury reform will devote the resources and expertise necessary to clarify those uncertainties before, or at least as part of, any effort at reform.

We then discuss the absence of any institutionalized understanding of how grand juries actually function and what they actually accomplish. We describe the results of a recent CGJA study, which we believe to be the only one of its kind,⁸ that demonstrates wide diversity among grand jury practices and the need for a comprehensive, authoritative study by an appropriate government agency to generate credible data sufficient to show how

8. The Vitiello/Kelso proposals reference an unidentified 1996 study without specifically addressing what the study covers. CGJA requested a copy of, or citation to, that study from Professors Vitiello and Kelso, but has received no response. We cannot know therefore what the nature of the study was.

grand juries actually operate.⁹ So far as we are aware, no one, at any time, has done a meaningful study of what the costs and financial benefits of the California grand jury are. Costs are reasonably estimable, but benefits are not. We suggest that if any comprehensive reform package gets to the California Legislature, the legislature is sure to ask the question: What does the grand jury cost and what benefit does it provide? It would, in our view, be irresponsible to bring the proposed sweeping reform to the legislature without having an answer to that question. We suggest that developing an answer will be a difficult and time consuming job, perhaps best conducted as a funded study by a grantor interested in better government.¹⁰ We suggest that this is something that the Administrative Office of the Courts, the administrative arm of the California Judicial Council, is uniquely well positioned to administer.

Assuming that a serious discussion and consideration of possible reform will ensue, we note below the most apparent deficiencies in the existing statutes pertaining to grand juries and suggest corrections that we believe are necessary before those statutes are incorporated in a reform package. In the course of that discussion, we note our concerns about the sweep of the separate “criminal” grand jury and the “right to counsel” proposals which are part of the reform package. For historic, constitutional and operational reasons,

9. It should go without saying, but under the circumstances we feel compelled to say, that it borders on the irresponsible to justify a grand jury “reform” effort on the basis of press coverage of two, and only two, instances of alleged grand jury error, one of which was, if error at all, error by the district attorney and not by the grand jury, and the other of which at most demonstrates how vulnerable a grand jury can be to error if it is not guided by independent, competent legal advisors. Each year California’s fifty-eight regular grand juries return dozens of indictments and issue hundreds of reports critical of various aspects of local government. That Professors Vitiello and Kelso could find but two instances of alleged error speaks volumes for the integrity and efficacy of the grand jury.

10. It would appear that the Vitiello/Kelso proposals agree with this view. At page eleven of the grand jury Background Study, the authors note the absence of any meaningful study of the costs and benefits of the civil oversight function of the regular grand jury and note: “Such a study is beyond resources available to the author(s) of this report.” Michael Vitiello & Clark Kelso, *Grand Jury Background Study* (Apr. 18, 2001), available at http://www.mcgeorge.edu/government_law_and_policy/institute_legislative_practice/grand_jury_reform_project.htm.

we oppose a standing “criminal” grand jury. The expertise and interest of the CGJA is in the civil oversight role of the regular grand jury. As such, we have no position on the question of whether a target of a criminal investigation by a grand jury, led by a district attorney in consideration of a possible indictment, is wise or unwise. We do have serious concerns that the language of any such provision be carefully drawn so that the right to have counsel present does not impact the civil setting, including the accusation function and investigations of noncriminal targets.¹¹

As the primary independent training agency for grand jurors in the state, we also comment generally on the training proposal advanced by Professors Vitiello and Kelso, and express our reservations regarding the efficacy of attempting to utilize state-sponsored career training techniques to train short-term volunteers whose value lies in their independence from the state.

As proponents of AB 607, which amended Penal Code section 904.6 in 1991 to authorize any county to impanel, on an as-needed basis, an additional, demographically representative, grand jury to handle only criminal matters, we explain why the Vitiello/Kelso proposal that every county *must* have such a grand jury, perhaps to the exclusion of its regular grand jury, is unwise, potentially unconstitutional and financially unsound.

Finally we advance suggested areas for affirmative additions to the existing statutory scheme that we believe should be made if *any* reform legislation is introduced.

III. THE GRAND JURY’S PRESENT UNCERTAIN ROLE IN THE GOVERNMENTAL SCHEME

No proposal to reform the California grand jury will be useful unless it initially takes into account the limbo into which the grand jury has recently been thrust, however unintentionally. Conversely, any proposal to reform the grand jury system which does not take the current ambiguous situation of the grand juries into account will be ill-advised and potentially dangerous to the grand jury system.

11. Others knowledgeable about and interested in the grand jury system in California have already provided comments to Professors Vitiello and Kelso, and they tend to oppose many features of the proposals, including the right to counsel feature.

This is so because for almost 150 years¹² the grand jury, both criminal and civil, has functioned as an arm of the court and judicial supervision and oversight have provided the putty and paint which covered the many gaps and distortions that would otherwise be apparent from the inadequate, often inconsistent, legislation addressed to grand juries.

One can, but need not at the present time, have a significant debate over the extent to which the legislature, or the courts for that matter, can alter certain time-honored characteristics of the grand jury—characteristics the continuation of which arguably were endorsed and adopted by the people when they adopted California's Constitution and thereby mandated the yearly existence of grand juries in all counties.¹³

What does need to be addressed at the outset of any discussion about reform, however, is who has what authority to reform the grand jury. CGJA does not have the resources to provide a properly researched and analyzed answer to that question, but it can confidently advance the proposition that whoever wishes to reform the grand jury must undertake that research and analysis to be effective, indeed, to avoid being dangerous.

The problem, in a nutshell, is that in the relatively recent past the grand jury's historical underpinnings have been, perhaps unintentionally, weakened by both the legislature and the California Supreme Court. Until fairly recently, grand juries were consistently

12. See Michael Vitiello & J. Clark Kelso, *Reform of California's Grand Jury System*, 35 LOY. L.A. L. REV. 513, 515 (2001).

13. See, e.g., *Fitts v. Superior Ct.*, 6 Cal. 2d 230, 240-41 (1936) ("The Constitution of 1879 did not attempt to change the historic character of the grand jury and the system [the Constitutional Convention's] members had in mind was evidently the same system that had come down to them from the common law. It is in no sense a statutory grand jury distinguished from the common-law grand jury as claimed by the respondent. . . . We must conclude, therefore, that the Constitution of 1879 when it refers to the grand jury refers to it as it had always been known and understood prior thereto."). Long before the California Constitution mandated the presence in each county of a "grand jury," those words were known to describe a body that functioned as a civic watchdog: overseeing government, criticizing officials, publicizing concerns and compelling public officials to make corrections, suggesting new legislation and representing the people of the community. See Stephanie A. Doria, Comment, *Adding Bite to the Watchdog's Bark: Reforming the California Grand Jury System*, 28 PAC. L.J. 1115, 1120 (1997), and authorities cited therein.

viewed to be “arms of the court” and the superior courts, which impaneled and “supervised” the grand juries, used their inherent authority to fill in the gaps created by the minimal, and often confusing, legislative guidance provided by the grand jury statutes. Just as the courts themselves, as independent constitutionally created agencies have certain inherent authority, so too did the grand jury as an agency of the court. Similarly, just as the legislature is empowered to enact legislation affecting certain aspects of the court’s operations¹⁴ it has enacted certain statutory guidelines for grand juries as well.¹⁵

The statutes have been incomplete,¹⁶ inconsistent¹⁷ and confusing¹⁸ for decades, but there has been little adverse consequence to the operation of grand juries because the courts, and the grand juries’ other legal advisors, have “made up” the rules as they went along. This has worked acceptably, and it is this system of patchwork statutes, infrequent appellate guidance, and frequent judicial intervention at the local level that has given us the system that many today say “isn’t broken and doesn’t need fixing.” Arguably, the primary disadvantage of this ad hoc system is that it permits, perhaps even encourages, tremendous diversity in the way the fifty-eight grand juries operate. Given the diversity of the counties, their resources, demographics, and needs, CGJA is not persuaded that such diversity is necessarily bad. Certainly anyone advocating reform on the statewide level must address the issue whether it makes sense to have the same operating rules, for

14. *See, e.g.*, CAL. GOV’T CODE §§ 68070-76000 (West 1997) (“The Organization and Government of Courts”).

15. *See, e.g.*, CAL. PENAL CODE §§ 888-939.91 (West 1985 & Supp. 2000) (“Grand Jury Proceedings”).

16. As discussed hereafter, for example, admonitions of confidentiality are provided for interpreters and minors’ support persons but not for the witnesses themselves. *See* CAL. PENAL CODE §§ 939.11, 939.21 (West 1985 & Supp. 2000).

17. As discussed hereafter, for example, the oath given to a regular grand juror requires that the jurist pledge to investigate crimes (which the jurist may, in fact, be told he or she cannot do) but says nothing about government oversight, the primary function the jurist will have. *Compare* CAL. PENAL CODE § 911 *with* § 914.1 (West 1985 & Supp. 2001).

18. As discussed below, for example, there is much confusion among the counties as to what constitutes a “public prison” as that term is used in California Penal Code sections 919 and 921.

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example, for Alpine County with a population of 1,200 people, and Los Angeles County with a population of 9.5 million people and more government than many states and countries have. To form that judgment requires a more informed understanding about what is actually happening than we believe anyone currently possesses. CGJA has begun the process of collecting relevant information, but much more needs to be done and the weight of official agencies must be brought to bear.

But even if those considering reform come to understand what, factually, they are proposing to reform, there remains the question of what the legal status of the grand jury is and what the parameters of permissible reform are. Although, to repeat, CGJA is not in a position to provide—or, with its limited resources even to undertake—a comprehensive legal analysis, we urge that anyone advocating sweeping reform is intellectually obliged to do so, and we suggest the following as a broad outline to guide that analysis.

For over 100 years the California courts regularly pronounced that grand juries were “judicial bodies,” “instrumentalit[ies] of the court,” and “arm[s] of the courts,” all without specific regard to whether the grand jury was performing a criminal or civil function.¹⁹ This recognition that grand juries had a special role vis-a-vis the courts gave rise to a judicial involvement with grand juries that far exceeded anything expressly contemplated by the statutes. One example should suffice to make the point. Although the legislature has specifically provided that grand jurors, interpreters, and minors’ support persons must maintain confidentiality,²⁰ it made no such provision for witnesses. Nonetheless, CGJA’s survey has found that 80% of regular grand juries admonish witnesses to maintain confidentiality, no doubt with the blessing and probable encouragement of their “supervising” courts which, perhaps wisely, have seen a legislative void and have stepped in to fill it. Indeed, the Attorney General as early as 1983 issued an opinion validating this practice and even opining that courts could enforce jury-administered

19. See, e.g., *People v. Superior Ct.*, 13 Cal. 3d 430, 438-39, 531 P.2d 761, 766-67, 119 Cal. Rptr. 193, 198-200 (1975) (and cases cited therein) *Board of Ret. v. Santa Barbara County Grand Jury*, 58 Cal. App. 4th 1185, 1188, 68 Cal. Rptr. 2d 607, 610 (1997).

20. See CAL. PENAL CODE §§ 911, 933.11, 939.21 (West 1985 & Supp. 2001).

admonitions by contempt of court proceedings.²¹ Whether or not the legislature should provide for such admonitions and enforcement is beside the present point. The point is that courts have long felt they had inherent authority to guide and assist “their” grand juries in ways such as this.

All that began to change in 1988 with the legislature’s passage of the Brown-Presley Trial Court Funding Act which, *inter alia*, excluded grand juries from the definition of “trial court operations.” Apparently in response to that Act, in July 1988 the California Judicial Council, which oversees the courts, promulgated California Rule of Court 810.²² That rule, which is binding on the superior courts which used to oversee grand juries, excludes from “court operations” “civil and criminal grand jury expenses and operations (except selection).”²³ Pursuant to Rule 810(c), costs for civil and criminal grand jury expenses and operations (except selection) “are unallowable.”²⁴

With no fanfare, and so far as CGJA has been able to determine, no comment by anyone representing the interests of grand juries, funding for this hitherto arm of the court became “unallowable.”

Then, without even referencing this legislative development, the California Supreme Court issued a unanimous decision in 1999 that, although dealing with a very narrow issue, can be read to support the proposition that, except in special cases to be defined by the supreme court in the future, superior courts do not have inherent authority over “their” grand juries, but rather have only the authority the legislature gives them.²⁵ This is intellectually consistent with a prior

21. *See* 66 Op. Att’y Gen. 85 (1983).

22. CAL. R. CT. § 810 (West 1996).

23. CAL. R. CT. § 810(b)(6) (West 1996).

24. An interesting development that should lead to a complete reanalysis of grand jury funding is the potential that an initiative may appear on the November 2002 ballot which, if passed, would create a “State” grand jury, composed of thirteen regional jury panels of twenty-three jurors paid up to \$100,000 each. Without even considering the cost of training, transportation, lodging, investigations, staff, etc., the cost of that grand jury could be at least \$29,000,000. The initiative in its present form would require that the cost of that grand jury “be paid from funds appropriated in the Budget Act for the support of the judiciary.” In other words, that grand jury, unlike the current grand juries, would be an expense of the courts. *See* Initiative SA2001RF0026 (2002), *available at* <http://caag.state.ca.us/initiatives/activeindex.htm>.

25. *See* Daily Journal Corp. v. Superior. Ct., 20 Cal. 4th 1117, 1133-34, 979

position taken by the California Supreme Court in 1988, and heavily relied upon in the 1999 decision, to the effect that the *grand juries* themselves have no inherent powers, only those granted to them by the legislature.²⁶

Two current examples, selected from many, illustrate the potential confusion and uncertainty surrounding the status of California grand juries today. In 1998, the presiding judge of the Santa Clara Superior Court “dissolved” a seated grand jury on the grounds that it was dysfunctional as a result of a divisive split among the members.²⁷ No doubt the presiding judge felt he had the power to do so as part of his inherent powers. But in light of the supreme court’s *Daily Journal*²⁸ decision, he may have been powerless to discharge the jury. Once, a court had the authority to discharge a grand jury at any time “in the exercise of its jurisdiction.”²⁹ However, more recently the legislature has given courts statutory authority to discharge grand juries only “on the completion of the business before the grand jury” or on the expiration of its term.³⁰ Arguably then, because the legislature has spoken to the issue of jury discharge and has given the court only limited ability to act, under the reasoning of *Daily Journal*³¹ the court lacks the ability to discharge a dysfunctional panel. Obviously any reform must take into account such novel factors as the possibility that a court can no longer discharge a jury, or a juror, or otherwise seek to involve itself with the grand jury absent express legislative authorization to do so.

A different circumstance demonstrates the same uncertainty now surrounding the grand jury’s role. In 2001, the legislature amended

P.2d 982, 992-93, 86 Cal. Rptr. 2d 623, 633-35 (1999).

26. See *McClatchy Newspapers v. Superior Ct.*, 44 Cal. 3d 1162, 751 P.2d 1329, 245 Cal. Rptr. 774 (1988). The *McClatchy* view is, however, at odds with the concept of a “common-law” grand jury articulated by the supreme court in *Fitts*. See *Fitts v. Superior Ct.*, 6 Cal. 2d 230, 231, 57 P.2d 509, 510 (The supreme court has never expressly disavowed the *Fitts* articulation of the common law status of grand juries as envisioned by the citizenry when the 1879 Constitution was adopted).

27. See Sandra Gonzalez, *Judge Dissolves Grand Jury Unprecedented: Dissidents Are Blamed For Split in Civil Panel*, SAN JOSE MERCURY NEWS, Dec. 30, 1998, at A1.

28. 20 Cal. 4th. 1117.

29. *In re Gannon*, 69 Cal. 541, 547, 11 P. 240, 242 (1886).

30. CAL. PENAL CODE § 915 (West 1985 & Supp. 2001).

31. See 20 Cal. 4th at 1123.

Penal Code section 890 to increase pay and mileage for grand jurors.³² However, the section, as amended, continues to provide for payment to grand jurors of mileage “for each mile actually traveled in attending court as a grand juror.”³³ Proposed Government Code section 77811 in the Vitiello/Kelso proposal uses the same “attending court as a grand juror” language.³⁴ Both the legislature, at least in this instance, and Vitiello/Kelso seem to continue to view the grand jury as an arm of the court.³⁵ As noted above, it may well no longer enjoy that status and, suffice to say, most grand jurors do not “attend court” in their capacities as jurors. Indeed, according to CGJA’s survey, 54% of grand juries meet in nonjudicial facilities, which is consistent with the import of the Trial Court Funding Act’s exclusion of grand juries from court operations.³⁶ There can be no doubt, however, that the legislature and Vitiello/Kelso intended mileage to be paid for travel to grand jury meetings whether or not held in court. The problem we seek to highlight is that each made their recommendations in apparent ignorance of the changing footing of the grand jury. We hope adequate research and analysis will avoid similar mistakes should any reform proposal be presented to the legislature.

In short, no discussion of grand jury reform is likely to be meaningful until the proponents come to grips with the uncertainties created by the dichotomy between long standing notions of the role of the grand jury in our Constitutional system and the new, possibly unintended, orphaned status of the grand jury. In our opinion, when, and only when, such an analysis is completed will it be opportune to even initiate any discussion about the wisdom of undertaking wholesale reform of the grand jury system. We believe it is also essential to that analysis that it include a careful and detailed look at how the fifty-eight regular grand juries are actually funded. To assist

32. See CAL. PENAL CODE § 890 (West 1985 & Supp. 2002).

33. *Id.*

34. Michael Vitiello & J. Clark Kelso, *Tentative Recommendation—Reform of California Grand Jury Statutes* (April 18, 2001) available at http://mcgeorge.edu/government_law_and_policy/publications/ccglp_pubs_grand_jury_tentative_recommendations.pdf [hereinafter *Tentative Recommendation*].

35. *Id.*

36. SURVEY, *supra* note 7.

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in starting that analysis we discuss below the results of our recently conducted survey of regular grand juries.

IV. RESULTS OF CGJA'S SURVEY OF GRAND JURY PRACTICES³⁷

In June 2001, the CGJA surveyed the current and immediately prior forepersons of California's fifty-eight county grand juries relative to approximately 100 grand jury practices.³⁸ To date, forty-four of California's counties (76%) have responded to our survey.³⁹ Our survey represents the first comprehensive look at California's grand juries in recent times. Some 352 pages of raw data have now been compiled into a twenty-page statistical report of current grand jury practices.⁴⁰

A. Grand Jury Types and Selection Processes

An optional additional grand jury dedicated to hearing criminal matters supplements the regular grand jury in 48% of California's counties. Criminal grand juries are used frequently in four heavily populated counties, while rural counties may use a criminal grand jury one or two times a year.⁴¹ Indictment activity by regular grand juries is rare, with only five counties reporting indictments in the last two years.⁴²

Volunteers are the only source of candidates for the regular grand jury in 55% of the counties; while 18% of the counties use petit jury rolls; and 9% use nominees of court, government, or community leaders as their source of candidates. Remaining counties use split sources of candidates. Also, six counties reported difficulty in finding sufficient candidates to impanel their grand jury and in each case additional volunteers resolved the problem.⁴³

37. This section relates and interprets some of the critical findings of CGJA's 2001 California Grand Jury Practices Survey. *See id.* At times, the language may be taken directly from the Survey.

38. *See id.*

39. All percentage references resulting from the survey are based on the forty-four counties responding to the survey.

40. SURVEY, *supra* note 7.

41. *See* SURVEY, *supra* note 7.

42. *See id.*

43. *See id.*

Juror carryovers from one jury to the next are very common and were found in 86% of the counties. The number of carryovers ranged from one to eight.⁴⁴

B. Grand Jury Orientation and Training

Orientation and/or training for a new grand jury are almost universal and found in 98% of the counties reporting. The one county reporting no training does allow the foreperson to attend CGJA training. Training is conducted during the first eight weeks of a new jury term in 52% of the counties, while 16% conduct training immediately prior to the jury's term. Remaining counties report a combination of training times.⁴⁵

Former grand jurors, in the form of CGJA, local juror associations, and as individuals, are involved in 90% of the training conducted. County counsel is involved in 59%, the district attorney in 50%, and outside professional paid trainers are reported in 30% of the county programs.⁴⁶

Our survey questioned respondents on twelve training components. Common components used in 55% of the counties were grand jury Authority & Law, Juror Conduct, Investigations, and Interviewing. Another 16% used at least three of the common components identified by our survey results. Hours spent on individual training components varied from thirty minutes to six hours, with investigations and interviewing typically receiving higher amounts of time. Foreperson training was significantly lacking, with less than 10% reporting any training of their forepersons.⁴⁷

All but one county reported issuance of a jury handbook annually, with most updates done by the sitting grand jury.⁴⁸

C. Grand Jury Resources

Annual grand jury Budgets varied widely from \$5,200 in a rural county to \$1,233,000 in California's largest county with a median of \$55,328 for the 36 counties submitting budget information. In less populated rural counties, 33%, reported budgets of less than \$35,000;

44. *See id.*

45. *See id.*

46. *See id.*

47. *See id.*

48. *See id.*

while in California's more populated counties, 33%, reported budgets in the range of \$100,000 to \$432,592; excluding the Los Angeles County budget.⁴⁹

Sixty-six percent of the counties have dedicated and secure grand jury rooms, usually within court or county buildings. Grand juries without dedicated rooms meet in a wide variety of locations such as public libraries, spare court jury rooms, hospitals, city council chambers, and agricultural offices. The size of meeting rooms varied from 128 square feet to a complex of meeting rooms and offices covering 4,000 square feet.⁵⁰

Fifty-seven percent of the grand juries receive some form of staff support from either court or county personnel.⁵¹ The amount of support usually has a direct relationship to the county's population and ranges from thirty minutes a week to a full-time administrator or secretary.⁵²

Equipment resources for grand juries vary widely with 64% having at least a computer, telephone, and copier. Unfortunately, seven counties, or 15%, report not even having a telephone, while a large number report no computer or copier available.⁵³

Grand jury use of outside personnel resources was very limited with 11% using independent counsel, 18% using auditors, and 27% using outside experts.⁵⁴

D. Grand Jury Advisors and Guidance

Our survey asked respondents to identify, by ranking, their primary legal advisors.⁵⁵ Approximately one-half, 51% ranked their judge as primary, 42% ranked county counsel as primary, and 7% listed their district attorney as primary advisor to the grand jury.⁵⁶ A third (32%) of the counties reported having a legal advisor recused

49. *See id.*

50. *See id.*

51. Although not on the survey, we are aware anecdotally that where courts provide services they usually charge the counties for the cost due to the Trial Court Funding Act and Rule 810.

52. *See SURVEY, supra note 7.*

53. *See id.*

54. *See id.*

55. *See id.*

56. *See id.*

for a conflict of interest. Only 23% reported their court having a policy on recusals.⁵⁷

Court instructions to the grand jury varied significantly with 68% receiving instruction that jury deliberations are restricted only to grand jurors; 43% receiving instruction, mainly in the form of a juror's handbook, on how to handle accusations; 36% receiving instruction on use of independent counsel; and 27% receiving instruction on how to handle responses to a final report.⁵⁸

Legal advisor response time to grand jury requests varied from immediate to a disheartening ninety days. Sixty-four percent of those responding reported response time of one week or less and 25% reported immediate response.⁵⁹

Our survey contained seven questions on legal advisor involvement in grand jury activities.⁶⁰ Most responses revealed limited involvement, except county counsel previewing final reports in approximately 50% of the counties, and a few isolated practices of court personnel opening mail without authority or suggesting topics for investigations.⁶¹

E. Specific Grand Jury Practices

“Issuance of accusations was rare with only five counties reporting accusations in recent years. One accusation was reported as sustained.”⁶²

“Admonishment of witnesses was common and reported by 80% of the counties but no one reported any Court action for a witness violating an admonishment.”⁶³

Most (64%) of the grand juries issued multiple final reports⁶⁴ during the course of their terms.⁶⁵

57. *See id.*

58. *See id.*

59. *See id.*

60. *See id.*

61. *See id.*

62. *Id.*

63. *Id.*

64. These are often, and unfortunately misleadingly, referred to as “interim reports” with the consequence that some respondents purport to be uncertain whether they are “final reports” as to which the time to respond has started to elapse.

65. *See SURVEY, supra note 7.*

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Grand Jury final report actions revealed [that] 82% issue [Penal Code section] 933 instructions and 91% use a transmittal letter sent, usually, by the Foreperson. Named respondents are directed to send their responses to the Court in 77% of the counties while Grand Juries are left to determine legality of a response in 52% of the counties. In 48% of the counties, the Court issues a letter or order when a respondent fails to respond to a Grand Jury's final report.⁶⁶

Final reports are published on the Internet by 64% of the grand juries and 39% also publish the responses to final reports.⁶⁷

Clearly there is a great deal of variation among the regular grand juries, even with respect to matters nominally covered, and therefore presumably standardized, by the governing statutes. Those statutes are discussed below.

V. INDIVIDUAL STATUTES

CGJA does not support broad reform of the type currently proposed. Certainly CGJA opposes the legislative introduction of any such reform package not preceded by substantial additional thought and significant and varied constituent input. Against the possibility that such a reform package is introduced, however, we comment on the specifics of some of the statutes that would be affected by the proposed reform. First, we are concerned that, in the course of their legislative transposition, they may be changed in well-intentioned, but harmful, ways. Second, those that are not changed may unintentionally create a misapprehension as to the legislature's intent. Specifically, for many of the statutes, the only reform presently suggested is that they be moved to the Government Code. However, many of these statutes are flawed in ways that grand juries have learned to work around. As stated previously, many of the statutes are incomplete, inconsistent, and confusing and do not comport with the effects of the Trial Court Funding Act or the *Daily Journal* decision. To simply readopt them now as part of a relocation to the Government Code would imply that such a state of affairs is desirable. This is so because such readoption would likely be viewed as constituting legislative ratification of their flaws because courts presume that the legislature knows what it is doing.

66. *Id.*

67. *See id.*

Consequently, we make the comments below in the hope that if the legislature is asked to act, it will in fact know what the consequences of its actions will be.

We identify the statutes on which we have comments by their present section numbers in the codes and, if they are the subjects of new citations proposed by Professors Vitiello and Kelso, follow with that citation. Statutes not mentioned are omitted intentionally. At the outset, however, we wish unequivocally to state that we oppose transferring any current Penal Code provisions relating to grand juries to the Government Code. Grand juries are not agencies *of government*; they are the means by which citizens have expressly retained unto themselves the right to oversee government. The power to investigate and initiate prosecution for crimes (indictment) has always been an integral component of the regular grand jury's function. Even if the ill-conceived suggestion of a mandatory criminal grand jury proposed by section 77853 is deleted,⁶⁸ relocating grand jury functions from the Penal Code to the Government Code is sure to cast doubt on the continued efficacy of the regular grand jury's criminal functions and lead to confusion and litigation in an area where matters are, and long have been, settled.

PENAL CODE SECTION 889; PROPOSED GOVERNMENT CODE SECTION 77804—INDICTMENT:⁶⁹ Although the Vitiello/Kelso report states that this section has no derivation,⁷⁰ it is in fact taken verbatim from Penal Code section 889. The use of the word "accusation" in the definition of an indictment causes unnecessary confusion. As long ago as 1904, the California Supreme Court made it clear that an "accusation is not an indictment, and is not to be treated as such."⁷¹ We suggest that the term "accusation" be replaced with "a statement of the public offense or offenses charged therein."⁷²

68. *See Tentative Recommendation, supra* note 34, at 19.

69. *See id.* at 10.

70. *See id.*

71. *In re Burleigh*, 145 Cal. 35, 36, 78 P. 242, 242 (1904) (noting that the accusation was apparently intended to be similar to articles of impeachment); *see also* *Edson v. Superior Ct.*, 98 Cal. App. 367, 372, 277 P. 194, 196 (1929) (stating that an accusation to remove a public officer for misconduct need not be drawn with particularity of indictment).

72. CAL. PENAL CODE § 950 (West 1985).

PENAL CODE SECTION 890; PROPOSED GOVERNMENT CODE SECTION 77811—FEES:⁷³ Our concern regarding the implications of the “attending court” language and the “arm of court” historical basis for the term is discussed *supra*.⁷⁴ We believe mileage rates should be materially higher than \$0.29 per mile, one way, and that there is need for greater clarity as to what trips, where, and for what purpose, create a mileage entitlement. In many counties, particularly those that are very large, or in smaller, but mountainous, counties with poor road coverage, mileage may be far more important than per diems, and mileage rates may well limit diversity. The recent passage of Assembly Bill 1161, which increases the minimums for grand juror pay and mileage may, in any event, have rendered this proposed revision moot.⁷⁵

PENAL CODE SECTION 890.1; PROPOSED GOVERNMENT CODE SECTION 77812—PAYMENT OF FEES:⁷⁶ As discussed previously, we believe the Trial Court Funding Act⁷⁷ itself, and its practical implications, must be reconsidered as part of any meaningful analysis of grand jury reform. This would include a careful reconsideration of which “jurors” are a court expense, which are a county expense, and whether it makes sense to shift all grand juror costs to the counties.

PENAL CODE SECTION 893; PROPOSED GOVERNMENT CODE SECTION 77830—COMPETENCY:⁷⁸ Penal Code section 893(a)(2) is a good example of a statute⁷⁹ that, although flawed, has not been a problem but which, if readopted by transposing it to a different code, might become problematic. At present, grand jurors are “discharged” at the end of their term and courts have no express authority to “discharge” one or more jurors other than on the completion of their business or term.⁸⁰ Section 893(2)/77830(2) would therefore prohibit “carry-over” grand jurors.

We are aware anecdotally that many courts “screen” their prospective grand jurors against criteria over and above those set

73. See *Tentative Recommendation*, *supra* note 34, at 10-11.

74. See *supra* Section III.

75. See AB 1161, 2001 Leg., Reg. Sess. (Cal. 2001).

76. See *Tentative Recommendation*, *supra* note 34, at 11.

77. See Trial Court Funding Act, *supra* note 4.

78. See *Tentative Recommendation*, *supra* note 34, at 14.

79. See CAL. PENAL CODE § 893(a)(2) (West 1985 & Supp. 2001).

80. See CAL. PENAL CODE § 915 (West 1985 & Supp. 2001).

forth in this section and section 903.2. If, as a result of the Trial Court Funding Act and *Daily Journal*,⁸¹ courts do not have inherent authority over grand juries, we question the legitimacy of engaging in such unauthorized screening. The practice should be either expressly permitted or expressly prohibited.

PENAL CODE SECTION 896—SELECTION: See comments to section 893.

PENAL CODE SECTION 901(a); PROPOSED GOVERNMENT CODE SECTION 77845—SERVICE:⁸² There is occasional confusion whether a grand jury's term ends at the end of twelve months or only when a new jury is impaneled. Case law provides that it continues until a new jury is impaneled.⁸³ The statute should clearly so state.

PENAL CODE SECTION 903.2; PROPOSED GOVERNMENT CODE SECTION 77842—POTENTIAL JURORS: See comments to section 893.

PENAL CODE SECTION 903.3; PROPOSED GOVERNMENT CODE SECTION 77843—SELECTION OF JURORS: See comments to section 893.

PENAL CODE SECTION 903.4; PROPOSED GOVERNMENT CODE SECTION 77844—DISREGARD LIST: See comments to section 893.

PENAL CODE SECTION 904.4 AND 904.6; PROPOSED GOVERNMENT CODE SECTIONS 77822, 77823, 77850, 77851, 77853, 77854 AND 77940—ADDITIONAL GRAND JURY:⁸⁴ We see no need for such a body. Furthermore, we have serious concerns about the constitutionality of requiring that, if a county wishes to have only one grand jury it must be the “representative” criminal grand jury, which would then also exercise civil oversight functions. Although others are obviously better positioned than we are to do a comprehensive study of this issue, our analysis indicates that the 1974 amendment to Article 1, section 23 of the California Constitution was not intended to change the character of the basic, regular grand jury in any way, but only to permit the creation of limited jurisdiction, “representative” criminal grand juries in *addition to*, and not in lieu of, regular grand juries.

81. See AB 233, 1997 Leg., Reg. Sess. (Cal. 1997); *Daily Journal Corp. v. Superior Ct.*, 20 Cal. 4th 1117, 979 P.2d 982, 86 Cal. Rptr. 2d 623 (1999).

82. See *Tentative Recommendation*, *supra* note 34, at 17.

83. See *People v. Bonelli*, 50 Cal. 2d 190, 324 P.2d 1 (1958); *Halsey v. Superior Ct.*, 152 Cal. 71, 91 P. 987 (1907).

84. See *Tentative Recommendation*, *supra* note 34, at 12-39.

Specifically, Proposition 7, adopted in 1974, amended the Constitution to provide, as it now does, for “[o]ne or more” grand juries.⁸⁵ Previously, the Constitution had required that each county have “[a] grand jury.” The grand jury referred to was, of course, the dual purpose common law grand jury recognized by the supreme court in *Fitts v. Superior Court*.⁸⁶ The voters’ pamphlet that accompanied Proposition 7 makes no mention of a possible change in grand juror makeup from the existing “select” membership to a “representative” one.⁸⁷ Indeed, the only reference to the grand jury in the entire pamphlet says: “Presently the Constitution requires each county to summon a grand jury once each year. *Without changing that requirement*, this proposition allows the Legislature to provide for summoning more than one grand jury each year.”⁸⁸

Proposition 7 itself resulted from constitutional amendments recommended in 1970 by the California Constitution Revision Commission,⁸⁹ specifically including the language that is now Article 1, section 23.⁹⁰ A review of the minutes of the commission’s meetings in 1969 and 1970 reveals that various proposals to require *any* grand juries to be “representative” were defeated.⁹¹ The recommendations of the commission, transmitted to the Joint Committee on Rules in January 1971, include commentary on the language which is now Article 1, section 23.⁹² That commentary makes clear that there was no intent to change the regular grand jury’s composition to a “representative” one: “The criminal indictment function suggests that the grand jury be composed of a broad cross-section of the community. The governmental investigation function, on the other hand, is best discharged by persons having a more sophisticated knowledge of accounting and

85. California Voter’s Pamphlet, Proposition 7 (1974).

86. 6 Cal. 2d 230, 240-41, 57 P.2d 510, 514-15 (1996).

87. See California Voter’s Pamphlet, *supra* note 85.

88. *Id.* (emphasis added).

89. See CALIFORNIA CONSTITUTION REVISION COMMISSION, PROPOSED REVISION OF ARTICLE, ARTICLE XX, AND ARTICLE XXII OF THE CALIFORNIA CONSTITUTION (1971).

90. See CAL. CONST. art. I, § 23.

91. See MINUTES OF THE MEETING OF THE CONSTITUTION REVISION COMMISSION (1970).

92. See CAL. CONST. art. I, § 23.

administration.”⁹³ We conclude that it is likely that moving the “governmental investigation function” from the regular grand jury to a “representative” grand jury would be unconstitutional.

Whether unconstitutional or not, there is simply no need for the mandatory criminal grand jury being proposed. The optional criminal grand jury, currently provided for by Penal Code section 904.6, is adequate to meet any need prosecutors may have to obtain indictments and to avoid interfering with a regular grand jury’s civil oversight function,⁹⁴ at minimal expense to the counties.⁹⁵ We suggest that Penal Code sections 904.4 and 904.6 be melded so that, for example, the section 904.4 grand jury, like the 904.6 grand jury, would have to be composed of a “reasonably representative” cross section of the relevant population. We also strongly recommend that language be added to make clear that a regular grand jury may refuse to hear a criminal matter if an additional grand jury *may* be appointed to do so. We note here that this is but a minor statutory adjustment and in no way affects our broad views on the propriety of creating parallel, or even exclusive, criminal grand juries in all counties, for all criminal matters, and depriving regular grand juries of their ancillary criminal powers. Nor does it affect our view, discussed below, that the right to have counsel present in criminal investigations, whatever it may prove to be, be very clearly and carefully distinguished from civil investigations, including accusations, where no right to counsel presently exists.

93. CALIFORNIA CONSTITUTION REVISION COMMISSION, *supra* note 89, at 22.

94. See SURVEY, *supra* note 7; *supra* section IV. According to our survey, regular grand juries handle very few indictments, which leaves them free to pursue their civil oversight function, and indicates a lack of need for a mandatory standing criminal grand jury. See *supra* Section IV; California Grand Jurors’ Association, *2001 California Grand Jury Practices Survey* (2001), available at <http://www.nvo.com/cgja/nss-folder/onlinepublications2/survey.pdf> (last visited Feb. 9, 2002).

95. We note that our opposition to a separate standing criminal grand jury is consistent with the determination of the Los Angeles County Citizens’ Economy and Efficiency Commission. In its July 2001 publication “Review of the Effectiveness of the Los Angeles County Grand Jury,” this commission concluded an analysis of Los Angeles’ ongoing experiment with two grand juries, one criminal and one regular, by recommending a prompt return to a single, regular grand jury. Counties which wanted to use a representative grand jury for criminal purposes would of course have the ability to do so pursuant to Penal Code section 904.6.

CGJA also questions what benefit would be served by so distorting the historic grand jury function and character. In a speech at CGJA's 2000 Annual Conference, Judge Quentin Kopp, who indicated that he himself had given some thought to revising some aspects of grand jury functions, most notably the secrecy requirement, stated that he had been informed by the California District Attorney's Association that only 2% of criminal actions were initiated by indictment.⁹⁶ As noted, CGJA's survey reveals that indictments are very infrequently sought in all but four counties.⁹⁷ On the face of such paucity of demand for grand jury indictments, can it make sense to rip so deeply into the bowels of the organism in the untested hope of successfully performing a radical operation of so little benefit? Here, more than anywhere else in the proposed scheme, we find ourselves echoing and endorsing our brethren who so frequently responded to these proposals by saying: "It ain't broke; don't fix it!"

PENAL CODE (NONE); PROPOSED GOVERNMENT CODE SECTION 77853—INDICTMENTS/REPRESENTATIVE GRAND JURY REQUIRED.⁹⁸ This would appear to be a matter involving the criminal role of a grand jury and, to that extent, we have no comment on the wisdom of using an *optional* "representative" grand jury to "issue indictments." We would urge great clarity, however, to avoid unintended implications. First, we see no need to attempt to strip the regular grand jury of its constitutional right to indict. That such an indictment *might* be flawed by reason of the jury's makeup is a factor for the prosecutor and jury to consider in the exercise of discretion. We are aware of no reason a regular grand jury could not validly indict if it was in fact representative, regardless of the procedures used to impanel it. So too, we are unaware of any reason why a district attorney, having an indictment in hand, could not elect to proceed by way of preliminary hearing so as to avoid any potential taint from the composition of the indicting grand jury. We do not oppose the use of a section 904.6 grand jury where needed to avoid interfering with a regular grand jury's civil oversight work. We do however, strenuously oppose stripping the regular grand jury of its indictment power, a power which it may wish to use from time to

96. See CGJA NINETEENTH ANNUAL CONFERENCE PROCEEDINGS 4 (2000).

97. See SURVEY, *supra* note 7.

98. See *Tentative Recommendation*, *supra* note 34, at 19.

time and which, even if infrequently used, may prove valuable for its *in terrorem* effect.

Second, even if one wishes to strip the regular grand jury of its power to indict, it must be made expressly clear in doing so that the regular grand jury continues to have the power to diligently “inquire into . . . all public offenses”⁹⁹ There is no precedent for removing the power to investigate crimes from a regular grand jury. Penal Code sections 904.4 and 904.6 merely require the regular grand jury to defer indicting, not to defer investigating. Whether a regular grand jury which has conducted an investigation into what turns out to be criminal conduct wishes to turn the results of its investigation over to a district attorney for a proceeding by information, or to a section 904.6 grand jury for proceeding by indictment, there is no reason to prevent the regular grand jury from conducting the investigation. Indeed, there is serious reason not to create such a limit. Many investigations may begin as mere oversight inquiries and turn into criminal investigations. It could be seriously disruptive, and certainly unnecessary, to give defendants the right to seek to set aside convictions on the grounds that the process started with an initial civil investigation, which they now label as a “criminal investigation” undertaken by a grand jury prohibited from doing so.

Third, it should be made expressly clear that the act of “issuing an indictment” is not, nor is it analogous to, the act of presenting an accusation, and that the latter does not require a representative grand jury.

PENAL CODE SECTION 908.1; PROPOSED GOVERNMENT CODE SECTION 77861—VACANCIES:¹⁰⁰ We suggest the third sentence be modified to read: “No person selected . . . to fill a vacancy . . . shall vote . . . on any *criminal* matter upon which evidence was taken . . . prior to the time of his or her selection.” (Emphasis added.) The hearsay rule does not apply in civil investigations and it is frequently the case that jurors do not hear a full presentation of “evidence” prior to the full panel discussion preceding a vote to further an investigation or issue a report. This is also inconsistent with the

99. CAL. PENAL CODE § 911 (West 1985 & Supp. 2001).

100. See *Tentative Recommendation*, *supra* note 34, at 22.

intent of the staggered term provisions envisioned by Penal Code sections 908.2 and 77846.

PENAL CODE SECTION 908.2; PROPOSED GOVERNMENT CODE SECTION 77846—STAGGERED TERMS:¹⁰¹ We oppose this provision, which is carried forward without substantive change from the existing Penal Code, and urge that it be deleted. A good regular grand jury is an organism, not unlike an orchestra or sports team. Its members must, and if the grand jury is successful do, learn to work closely together, understanding and accommodating the views, predilections, and prejudices of one another, and creating a milieu in which disparate strangers from all walks of life can achieve consensus on difficult issues. It makes no sense to require that that organism be disrupted constantly so that no functioning unit can evolve. It is, indeed, an idea one would expect to be advanced by those opposed to effective grand jury oversight of government. Although staggered terms are currently provided for on an optional basis, anecdotal evidence indicates that judges, in their wisdom, rarely use this potentially disruptive device.

PENAL CODE SECTION 909; PROPOSED GOVERNMENT CODE SECTION 77857—QUALIFICATIONS:¹⁰² See comments to Penal Code section 893.

PENAL CODE SECTION 911; PROPOSED GOVERNMENT CODE SECTION 77859—OATH:¹⁰³ Obviously, we have objections to the creation of the two grand juries that would necessitate the use of two oaths. That aside, however, and assuming that the regular grand jury will continue in its present form, with its present powers, the oath needs serious work. This is another example of the courts and the grand juries having “muddled along” despite the legislative inadequacies.

The current oath administered to almost every regular grand juror in the state will be violated almost instantly by many, if not most, of those jurors. Further, it does not even address that which they are in fact pledging to do.

101. *See id.* at 17.

102. *See id.* at 21.

103. *See id.*

The current oath states:

I do solemnly swear (affirm) that I will support the Constitution of the United States and of the State of California, and all laws made pursuant to and in conformity therewith, will diligently inquire into, and true presentment make, of all public offenses against the people of this state, committed or triable within this county, of which the grand jury shall have or can obtain legal evidence. Further, I will not disclose any evidence brought before the grand jury, nor anything which I or any other grand juror may say, nor the manner in which I or any other grand juror may have voted on any matter before the grand jury. I will keep the charge that will be given to me by the court.¹⁰⁴

Based upon the survey conducted by the CGJA¹⁰⁵ (and anecdotal evidence received over the years in training programs and otherwise) virtually all of the grand jurors in the state take that oath but approximately one-half are told that they are *not* to investigate crimes but are solely to function as civil oversight bodies. In other words, they are specifically told that they must violate their oath and shall not “diligently inquire into . . . all public offenses . . . of which the grand jury . . . can obtain legal evidence.”¹⁰⁶ This absurdity is further heightened when it is recognized that every regular grand jury impaneled has government oversight responsibilities and is “inform[ed] and charge[d]” by the court of such “powers, duties, and responsibilities”¹⁰⁷ but takes no oath to do anything about them.

PENAL CODE SECTION 912; PROPOSED GOVERNMENT CODE SECTION 77860—FOREPERSON:¹⁰⁸ We are aware, anecdotally, that some courts initially appoint forepersons who are then subject to a

104. CAL. PENAL CODE § 911 (West 1985 & Supp. 2001).

105. See SURVEY, *supra* note 7; Part IV.

106. CAL. PENAL CODE § 911 (West 1985 & Supp. 2001); see *supra* Part V. Of course, this oath does reflect and support the proposition that grand jurors were intended to, and do, have independent power to investigate crimes and return indictments whether or not a district attorney asks them to do so. The practicality is that criminal procedure is so fraught with special rules and technicalities that few grand juries will be able to effectively investigate crimes and return indictments without the aid of their district attorney. This demonstrates the weakness in the level of legal advice available to grand juries, however, not that those who wrote the oath intended it to be a nullity.

107. CAL. PENAL CODE § 914.1 (West 1985 & Supp. 2002).

108. See *Tentative Recommendation*, *supra* note 34, at 22.

confirming vote by the grand jury after the jurors have gotten to know one another; others appoint only an interim foreperson and the jurors elect, or advise the court of their preference regarding, a permanent foreperson after an appropriate orientation period. Both practices make sense, but neither is expressly permitted as required by *Daily Journal*.¹⁰⁹

PENAL CODE SECTION 914; PROPOSED GOVERNMENT CODE SECTIONS 77881, 77811.5—TRAINING:¹¹⁰ See Section VI, *infra*, for a discussion of CGJA's views regarding the Vitiello/Kelso training proposal. Section 914(c) needs to be clarified to expressly provide, consistent with our suggested reconsideration of the Trial Court Funding Act, who pays for juror training: the courts or the counties. Given that it is the court, not the county, that "shall ensure" the training of grand jurors, we think it is appropriate for the courts to develop minimum training standards for grand jurors,¹¹¹ most appropriately as part of the Standards of Judicial Administration.

PENAL CODE SECTION 914.5; PROPOSED GOVERNMENT CODE SECTION 77882—EXPENSES:¹¹² Although we approve of giving the court express statutory authority to direct payment of grand jury expenses by the county to avoid any *Daily Journal* problems, we question the source of this authority and, as noted elsewhere, suggest that the implications of the Trial Court Funding Act and *Daily Journal* be fully considered as part of any proposed reform. We presume that the language "[t]he grand jury shall not spend money or incur obligations in excess of the amount budgeted for its investigative activities" excludes expenses for training for example.¹¹³ If that is not the intent, we suggest the language be clarified, and if it is the intent, we suggest the statutory purpose needs rethinking.

PENAL CODE SECTION 915; PROPOSED GOVERNMENT CODE SECTION 77883—COMMENCEMENT:¹¹⁴ We have no objection to the proposed statutory text. The comment, however, assumes that

109. See 20 Cal. 4th 1117, 979 P.2d 982 (1999).

110. See *Tentative Recommendation*, *supra* note 34, at 10, 23.

111. CAL. PENAL CODE § 914(b) (West 1985 & Supp. 2002).

112. See *Tentative Recommendation*, *supra* note 34, at 24.

113. CAL. PENAL CODE § 914.5 (West 1985 & Supp. 2002).

114. See *Tentative Recommendation*, *supra* note 34, at 24.

“proceedings are confidential . . .”¹¹⁵ which is an overstatement given that witnesses are under no obligation of confidentiality.

PENAL CODE SECTIONS 916, 916.1; PROPOSED GOVERNMENT CODE SECTION 77884—RULES, FOREPERSON:¹¹⁶ We would amend the first sentence to read: “Each grand jury shall choose its officers, consistent in the case of the foreperson with Government Code section 77860 (Penal Code section 912)¹¹⁷ topics for inquiry, and shall determine its rules of proceeding.” We question the retention of a reference to the Penal Code in the second sentence.

PENAL CODE SECTION 917, 918; PROPOSED GOVERNMENT CODE SECTIONS 77945, 77946—PUBLIC OFFENSES:¹¹⁸ We have no comment on the language of these provisions, but believe they must, unequivocally, remain part of the responsibility and authority of the regular grand jury.

PENAL CODE SECTIONS 919, 920; PROPOSED GOVERNMENT CODE SECTIONS 77892, 77893—PUBLIC PRISON, MALFEASANCE:¹¹⁹ We recognize that the reforms propose only to carry forward the existing language of sections 919(a)-(c) without change. However, that language is the source of much confusion and should be clarified if these proposals go to the legislature.

A significant source of confusion lies in the use of the two distinct terms “jail” and “prison” in subsections (a) and (b).¹²⁰ We are aware anecdotally that in some counties “jail” in subsection (a) is interpreted to mean county or city jail, and consequently no mandatory duty to investigate them as “prisons” attaches pursuant to subsection (b). In other counties, they are treated as prisons, thus mandating that they be “inquired into”¹²¹ (but not reported upon) pursuant to subsection (b).

In some counties, especially where “jails” are treated as “prisons,” it may be that state prisons are viewed as “off-limits” because they are state, not county agencies. In other counties state prisons are treated as “prisons.” Lastly, there is confusion whether

115. *Id.*

116. *See id.* at 24-25.

117. Obviously, as modified per our suggestion in the discussion of those provisions.

118. *See Tentative Recommendation, supra* note 34, at 40-41.

119. *See id.* at 27-28.

120. CAL. PENAL CODE § 919 (a)-(b) (West 1985).

121. *Id.*

juvenile halls and/or California Youth Authority (“CYA”) facilities are either “jails” or “prisons” or neither. Of course, in the case of county and city jails and juvenile halls (but not CYA facilities) the issue is only whether the grand jury *must* “inquire into” them¹²² or *may* “investigate and report on” them.¹²³ In the case of CYA facilities the issue is whether, if they are not prisons pursuant to section 919(b), there is any authority for the grand jury to investigate or report on them at all.¹²⁴

A second potential confusion looms on the horizon. Pursuant to section 919(b), whatever “prison” means, the statute at least means a “public” prison. We are unaware what the status of private prisons was when the forerunner of section 919(b) was enacted, but we note that there is a trend towards privatizing prisons. We suggest that whether such prisons are to be treated within the meaning of “public prison” needs clarification.¹²⁵ Penal Code section 921 and 77890 use the same term “public prisons” and should also be clarified.

Section 919(c) invites confusion and debate at best, and gridlock or violation at worst, in that it *requires* grand juries to investigate what could be the subject of numerous, albeit frivolous, complaints with no indication of the level of information available to the grand jury sufficient to trigger the requirement.¹²⁶ Surely it makes no sense to impose the obligation of section 919(c) on the grand jury where willful misconduct or corruption has already been lawfully determined to have occurred; that would simply be a wasteful duplication of effort. Conversely, it seems equally wasteful to require that the grand jury must investigate every complaint, however scanty, of willful misconduct or corruption that comes to its attention. In practice, grand juries must be free to determine if they

122. CAL. PENAL CODE § 919(b) (West 1985).

123. CAL. PENAL CODE § 925 (West 1985 & Supp. 2001).

124. For example, in a recent unreported decision, the San Luis Obispo Superior Court held that a CYA facility in that county was a proper subject for the grand jury to investigate. *See In re Grand Jury Subpoena of Medical Records*, No. MC 00060 (Cal. Super. Ct., Aug. 14, 2000).

125. One commentator recently said, referring to private prisons in general, “Private prisons are under no obligation to ensure access to information about their inmates or how they are classified.” Jeffrey A. Lowe, *Justice Shouldn't Be for Sale, Yet Private Prisons Market It*, S. F. DAILY J., Nov. 12, 2001, at 4. Although the statement is undocumented and most probably does not refer to a grand jury investigation, it highlights a potential future problem.

126. *See* CAL. PENAL CODE § 919(c) (West 1985).

have adequate cause to spend their energies investigating willful misconduct or corruption. The term “shall” should be changed to “may” to permit this discretion and eliminate what is otherwise the need to set forth the level of information necessary to trigger the mandatory obligation.

The language of subsection (c) appears to apply to willful or corrupt misconduct committed “within the county”¹²⁷ by any “public officer.”¹²⁸ As such, it would appear to reach conduct by state officials. A frequent question that arises for regular grand juries is whether they are required (or permitted) by section 919(c) to investigate judges. Clearly, judges are “public officers” and would seem to be covered by the statutory language.¹²⁹ Notwithstanding the statutory language, we understand anecdotally that many grand juries are advised that they cannot investigate the judiciary because the grand jury is an arm of the court. In consequence, it would be investigating itself and would appear conflicted if it found no wrongdoing.

Given the consequences of the Trial Court Funding Act and *Daily Journal* discussed in section III, *supra*, such arm of the court reasoning is suspect.¹³⁰ We further note that the county in which such conduct by state officials is most likely to arise is Sacramento County. The Sacramento County regular grand jury already has the unique statutory authority to hire a special counsel to “aid the work

127. County grand juries may investigate “lobbying or bribery of state legislators occurring within [the] county.” *Samish v. Superior Ct.*, 28 Cal. App. 2d 685, 687, 83 P.2d 305, 306 (1938). The *Samish* decision relied in part on then Penal Code section 923, the forerunner of present section 919(c), which then provided: “The grand jury must inquire . . . into the willful or corrupt misconduct in office of public officers of every description within the county.” *Id.* at 689, 83 P.2d at 307.

128. A public officer is one who exercises a part of the sovereign power of government. *See* 52 CAL. JUR. 3D, PUBLIC OFFICERS & EMPLOYEES § 2 (2001).

129. At one time grand juries investigated judges pursuant to Penal Code section 925. However, this would appear improper now that judges are state officials. *See* 76 Op. Att’y Gen. 70, 71 (1993). As noted, however, Penal Code section 919(c) appears to reach state officials. *See* CAL. PENAL CODE § 919(c) (West 1985).

130. CGJA does not advocate that regular grand juries affirmatively seek to investigate the judiciary; we merely note that under the circumstances provided for by section 919(c) it would appear to be permissible, indeed—given current language—mandatory, that they do so.

of the grand jury” but not to duplicate any service which by statute is “vested within the powers of the district attorney”¹³¹ Whatever the district attorney exclusion means, it seems clear that it does not extend to investigations pursuant to section 919(c). Consequently, at present, the Sacramento County grand jury would appear to have special statutory authority to hire special counsel to investigate willful or corrupt misconduct of state officials occurring within Sacramento County.¹³² However, we observe that the “note” explaining then statutes 1988, ch. 886, now Penal Code section 936.7, the source of this unique authority, stresses the level of government services delivered by the county and a “multiplicity of special taxing districts” in Sacramento County¹³³ as justification for the special counsel provision. The note, however, fails to mention the likelihood of willful misconduct or corruption in office occurring in that county.

It is unclear to what extent any grand jury can investigate willful or corrupt misconduct by a state official in that jury’s county and whether the Sacramento grand jury can hire special counsel to do so in a situation such as the Quackenbush scandal. Clarification seems to be required.

PENAL CODE SECTION 922; PROPOSED GOVERNMENT CODE SECTION 77891—ACCUSATION:¹³⁴ We agree with the unchanged language of Penal Code section 922. We note, however, that section 77953, which purports to provide new and expanded rights to counsel, would extend those rights to investigations that “may result in an . . . accusation”¹³⁵ We strongly object to the extension of any new right to counsel to such situations inasmuch as the accusation is not a criminal proceeding.¹³⁶ Indeed, we suggest that if

131. CAL. PENAL CODE § 936.7 (West Supp. 2002).

132. It would not, however, seem to have the power to bring an accusation against a state official inasmuch as that power is restricted to actions against “district, county, or city officers.” CAL. PENAL CODE § 922 (West 1985); *see also* CAL. GOV’T CODE § 3060 (West 1985 & Supp. 2002).

133. Oddly, Sacramento County has but 66 independent special districts compared, by way of example, to Tulare’s 111, San Joaquin’s 102 or Fresno or Kern’s 100. *See* LITTLE HOOVER COMMISSION, SPECIAL DISTRICTS: RELICS OF THE PAST OR RESOURCES FOR THE FUTURE? 24 (2000).

134. *See Tentative Recommendation, supra* note 34, at 27.

135. *Id.* at 43.

136. *See supra* note 71 and accompanying text.

reform legislation is to be introduced, it include specific provisions clarifying the accusation's civil status and the procedures for its use. Grand juries currently have no clear guidance in this regard.

PENAL CODE SECTION 923; PROPOSED GOVERNMENT CODE SECTION 77947—ATTORNEY GENERAL'S GRAND JURY:¹³⁷ We have no comment on the continued language, but disagree with the notion that it be exclusively contained in proposed Chapter 5, which purports to create a separate, representative criminal grand jury which we oppose. We do question, however, the usefulness of this procedure. We note that, according to press reports, Attorney General Lockyer is using a grand jury to investigate allegedly illegal electricity pricing practices. We do not know but assume Vitiello and Kelso can readily discover whether that grand jury is the regular grand jury for Sacramento County (which would not be "representative"), a section 904.6 grand jury (which would be "representative"), or a section 923 grand jury (which we assume need not be representative). If the attorney general did not opt for a section 923 grand jury, we question the value of this provision. If he did, but impaneled a nonrepresentative grand jury, we suggest that the decision casts significant doubt on the alleged value of "representative" grand juries, even when investigating potentially indictable offenses.¹³⁸

PENAL CODE SECTION 924; PROPOSED GOVERNMENT CODE SECTION 77941—DISCLOSURE OF INDICTMENT OR INFORMATION:¹³⁹ We have no comment on the continued language, but disagree with the notion that it be exclusively contained in proposed Chapter 5, which purports to create a separate, representative criminal grand jury which we oppose.

PENAL CODE SECTIONS 924.1, 924.2, 924.3; PROPOSED GOVERNMENT CODE SECTIONS 77885, 77886, 77887—SECURITY:¹⁴⁰ We believe current secrecy rules are unduly constraining on the civil function of grand juries and should be modified. Either witnesses

137. See *Tentative Recommendation, supra* note 34, at 47.

138. Although we have not been able to verify this, the Associated Press reported that the California Attorney General was going to use the regular nineteen person Sacramento grand jury, presumably not a "representative" grand jury. See *CONTRA COSTA TIMES*, July 6, 2001, at A10.

139. See *Tentative Recommendation, supra* note 34, at 40-41.

140. See *id.* at 25-26.

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should be bound by the same standards of confidentiality as jurors, or the confidentiality strictures applicable to civil oversight investigations should be carefully relaxed. We agree with Judge Quentin Kopp, who made the following remarks at the CGJA 2000 Annual Conference:

Now there's a fourth factor that gives me pause about grand jury, it's based on an innate limitation and that's the secrecy limitation of a grand jury and a grand jury's work. Now that has to be counter-balanced in some way by the need to convey to people what the grand jury has done and to convey it in a forceful way. I think that is constantly a problem. A problem of encouraging the media and even addressing the attention of the media to the product of the grand jury. And here I assume that it's a good product and that it's worthwhile, but it's very difficult in my estimation based upon my twenty seven years or so and now almost thirty of watching the grand jury process, to draw the attention of the media in a way which translates into public opinion. We know that we have no power, literally. We have the power to formulate findings, we have the power to formulate recommendations, but our ultimate power is in persuasion and persuasion is based upon public opinion and we can't individually do very much so we have to rely on the media but on the other hand we're circumscribed by that rule of secrecy. All of which leads me to believe that there should be a re-examination of some of the finer points, and I emphasize finer points, of the secrecy provisions of the law itself. . . . I believe that we should all concentrate on overcoming those aspects, increasing the visibility of Grand Juries, increasing the ability to deal with the media, and that may mean some tinkering with parts of the statutes that are now in effect, but altogether giving ourselves more prominence in our respective counties.¹⁴¹

We suggest that careful study be made, by a broadly representative constituency, into the overall issue of the role of secrecy in grand jury civil oversight investigations. We note

141. CGJA NINETEENTH ANNUAL CONFERENCE PROCEEDINGS, 6, 8-9 (2000).

elsewhere that, although the jurors operate under strict rules of confidentiality, the officials and agencies they investigate are under no such constraint. Indeed, even if they were, the restraint might well prove to be impractical. Frequently, the grand jury meets in the same facility as those it oversees, where it is readily observable who is going in and out of the grand jury room. Similarly, a simple request for documents is sufficient to alert an entire department that certain aspects of its operations are under review. Finally, as Judge Kopp noted, the grand jury is severely handicapped in its inability to explain its actions to the press, or even to respond to the spin—perhaps outright distortions—of the officials or agencies on which it reports.

PENAL CODE SECTION 924.6; PROPOSED GOVERNMENT CODE SECTION 77924—TESTIMONY DISCLOSURE:¹⁴² We have no comment on the continued language, but disagree with the notion that it be exclusively contained in proposed Chapter 5, which purports to create a separate, representative criminal grand jury which we oppose.

PENAL CODE SECTION 925; PROPOSED GOVERNMENT CODE SECTION 77894—COUNTY INVESTIGATION:¹⁴³ We have no objection to continuing the existing statutory language. However, we note that opinions purportedly interpreting that language have been inconsistent¹⁴⁴ and we recommend that before the language be re-suggested to the legislature, an analysis of those opinions be undertaken to determine whether clarifying the language would eliminate the possibility for such inconsistencies.

PENAL CODE SECTION 926; PROPOSED GOVERNMENT CODE SECTION 77920—EXPERTS AND ASSISTANTS:¹⁴⁵ We have no objection to the general statutory language. It should, however, be

142. See *Tentative Recommendation*, *supra* note 34, at 34.

143. See *id.* at 28.

144. Cf. 67 Op. Att’y Gen. 519 (1984) (providing that a court marshal is subject to grand jury audit); 76 Op. Att’y Gen. 70 (1993) (providing that a grand jury does not have authority to investigate court administrative operations); Bd. of Tr. of Calaveras Unified Sch. Dist. v. Leach, 258 Cal. App. 2d 281, 65 Cal. Rptr. 588, 592 (1986) (stating that a grand jury cannot investigate personnel records of school district officials); 78 Op. Att’y Gen. 290 (1995) (stating that a grand jury may investigate how a school district performs its duties and functions).

145. See *Tentative Recommendation*, *supra* note 34, at 32.

expanded to include reference to Penal Code section 933.6/Government Code section 77898 (nonprofits), which appear to have been unintentionally excluded. In addition, the \$30,000 limitation is unrealistic today. We suggest increasing that 1974 amount to its present value of \$112,500.¹⁴⁶ This section, of course, implicates the Trial Court Funding Act and *Daily Journal*. See the discussion regarding them at Section III, *supra*.

PENAL CODE SECTION 929; PROPOSED GOVERNMENT CODE SECTION 77889—PRIVILEGE AND SECRECY:¹⁴⁷ The language at the outset of this section “[a]s to any matter not subject to privilege . . .”¹⁴⁸ raises a question that needs to be addressed. Presumably, the grand jury is in no position to waive privileges held by others, though how the grand jury would know the underlying information in that instance is problematic. Further, most privileges in California are creations of the Evidence Code and such code is inapplicable to grand juries.¹⁴⁹ Therefore, there would presumably not be many, if any, items “subject to privilege” known to the grand jury as a result of its proceedings. However, the grand jury itself would be the holder of at least the attorney-client privilege with respect to advice it had received. As the holder of that privilege it should be free to waive it. Consequently, we suggest that the quoted language is potentially overbroad and should be revised as follows: “As to any matter not subject to a privilege which applies in grand jury proceedings or, if held by the grand jury, is not waived by it”

There is another issue that arises from time to time, with inconsistent results, regarding the attorney-client privilege held by the grand jury. We think it must be clear that the grand jury which received the privileged advice is free to waive the privilege. However, the question arises whether a successor grand jury can waive the privilege which attached to advice given to its predecessor. By way of analogy, the second grand jury, as the successor in interest

146. According to the Inflation Calculator at <http://www.westegg.com/inflation/>, the number for 2000 was \$112,313.86. At year-end 2001 it will probably be in excess of \$112,500.00.

147. See *Tentative Recommendation*, *supra* note 34, at 26.

148. *Id.*

149. See CAL. EVID. CODE § 300 (West 1995 & Supp. 2002); *El Dorado v. El Dorado County Grand Jury*, No. SC20010006 (Apr. 3, 2001).

to the privilege, should have the unilateral right to waive the privilege. There is a need for statutory clarity in this regard, however.

Regardless of the treatment of the privilege issue, we object to the overbreadth of this section. We are aware of at least one instance where a grand jury has determined that, because of this section, it must write its reports in such a way as to avoid actually naming sources of information who may well be public officials about whom the public has a right to be informed or who are perfectly willing to be identified. Protection of whistle-blowers and those who seek anonymity should be provided for, but not at the expense of rendering grand jury reports sterile and internally indefensible.

PENAL CODE SECTION 931; NO PROPOSED REFORM SECTION—PAYMENT OF EXPENSES: See comments to Penal Code section 890.1.

PENAL CODE SECTION 932; PROPOSED GOVERNMENT CODES SECTION 77930—RECOVER MONEY DUE:¹⁵⁰ We suggest that the term “district attorney” be replaced with the term “county counsel” both times “district attorney” appears. Recovery of monies owed is a civil litigation function better suited to the skills of county counsel. If there are any counties left that do not have county counsel we suggest that the term “district attorney” be replaced with the term “county counsel or, if there is no county counsel, the district attorney.”

PENAL CODE SECTION 933; PROPOSED GOVERNMENT CODE SECTION 77932—FINAL REPORT:¹⁵¹ This statute has some imprecise language that needs to be made more precise. The first sentence of subsection (a) implies that *all* grand juries issue “final reports” and that there is only one final report.¹⁵² First, section 904.6 grand juries do not (and, if the ill-conceived section 77940 grand jury is established, it may not) issue final reports. Second, as the second sentence recognizes, there may be multiple final reports issued during a grand jury’s term and, indeed, the release of multiple final reports throughout the course of a grand jury’s term is becoming the norm.¹⁵³ The first sentence should be revised to read: “Each regular

150. See *Tentative Recommendation*, *supra* note 34, at 36.

151. See *id.*

152. *Id.*

153. See SURVEY, *supra*, note 7.

grand jury shall submit to the presiding judge of the superior court one or more final reports”

Subsection (a) also leaves unclear that it is the grand jury’s determination whether and when to submit a final report for comment before its public release. A new fourth sentence should be inserted to read: “The grand jury, in its discretion, shall determine when, after the presiding judge has determined that it is in compliance with this title, a final report shall be publicly released, and whether and when to submit such a report for comment prior to public release.”

Many grand juries would like to discuss the recommendations in their final reports with officials and agencies in advance of release, but are deterred from doing so by the fact that the jurors, *but not the officials or agencies*, are required to keep the contents of the unreleased report confidential. Therefore, a new fourth sentence, consistent with the last sentence of Penal Code 933.05 (see 77932(c) below), should be added to read:

No officer, agency, department, or governing body of a public agency or employee or agent thereof shall disclose or comment upon the contents of the report prior to the public release of the final report. Disclosure in violation of this section shall constitute ‘willful misconduct in office’ pursuant to Penal Code section 919(c).

Subsection (b) needs to be clarified, consistent with the above, to avoid public filing of an unreleased report or the unnecessary delay in filing responses, which need not be “found in compliance” at all. The first sentence should be modified to read: “One copy of each final report, found to be in compliance with this title and publicly released by the grand jury, and the responses thereto, shall be placed on file”

Subsection (c) needs clarification as to who has responsibility for assuring timely and proper responses are received. The section provides that responses, in the form of “comments,” are to be made “to the presiding judge.”¹⁵⁴ It is unclear, however, what the presiding judge is to do about them. Indeed, consistent with *Daily Journal* it is unclear if he/she has authority to do *anything* about

154. *Id.* at 37.

them.¹⁵⁵ According to the CGJA survey, in 48% of the counties, the presiding judge follows up in at least those situations where no timely response is submitted.¹⁵⁶ We believe many presiding judges view themselves as having no role with regard to responses, and many others do not get the responses that are received for statutory compliance. Subsection (c) also needs the addition of a new last sentence as follows: “No officer, agency, department, or governing body of a public agency or employee or agent thereof shall disclose or comment upon the contents of the report prior to the public release of the final report. Disclosure in violation of this section shall constitute ‘willful misconduct in office’ pursuant to Penal Code section 919(c).”

Lastly, subsection (d) needs clarification of the language “elected county officer or agency head.”¹⁵⁷ Specifically, it is unclear whether “elected” modifies only “county officer” or “agency head” as well.¹⁵⁸

PENAL CODE SECTION 933.05(e); PROPOSED GOVERNMENT CODE SECTION 77914(b)—RESPONSES TO FINDINGS:¹⁵⁹ The requirement that, during an investigation, the grand jury meet with “the subject” of the investigation needs clarification. Often the subject may be a body, such as a board of supervisors, or an agency, such as the Public Works Department. With whom is the grand jury to meet in those circumstances?

PENAL CODE SECTION 933.5; PROPOSED GOVERNMENT CODE SECTION 77897—SPECIAL DISTRICTS:¹⁶⁰ We can find no definition for the term “special-purpose assessing or taxing district”¹⁶¹ and believe it needs to be defined. Based upon anecdotal information, we believe most independent special districts and grand juries believe the term includes all independent special districts, whether enterprise or nonenterprise. It is less clear whether there is consensus if dependent special districts, of any type, are included. We also note that there are some special districts in the state which

155. See *Daily Journal Corp. v. Superior Ct.*, 20 Cal. 4th 1117, 979 P.2d 982, 86 Cal. Rptr. 2d 623 (1999).

156. See SURVEY, *supra* note 7, at 2.

157. See *Tentative Recommendation*, *supra* note 34, at 37.

158. See *id.*

159. See *id.* at 32.

160. See *id.* at 29.

161. *Id.*

have no apparent function.¹⁶² We suggest that language similar to that of sections 925(a) and 928 be included as the last sentence of section 933.5 as follows: “The grand jury may investigate and report upon the needs of all special districts wholly or partly within the county, including the abolition or creation of special districts, and the equipment for, or the method or system of performing the duties of, the several special districts.”

PENAL CODE SECTIONS 934, 935; PROPOSED GOVERNMENT CODE SECTIONS 77921, 77922—RIGHT TO SEEK ADVICE:¹⁶³ These two sections should be clarified so that it is clear that unless the district attorney is presenting evidence in a criminal proceeding for the purpose of seeking an indictment, the district attorney may be present during sessions of the regular grand jury only when his/her advice is requested by the regular grand jury.

PENAL CODE SECTION 936.5; NO PROPOSED REFORM SECTION—EMPLOYMENT OF SPECIAL COUNSEL AND INVESTIGATORS: This section has a number of problems. First, according to the statutory language, special counsel cannot be appointed unless the court determines, after an evidentiary hearing, that all of the district attorneys, the county counsel, and the *attorney general* have conflicts that prevent them from acting.¹⁶⁴ As a practical matter, the attorney general has no interest in, or expertise with respect to, grand jury civil oversight matters and cannot reasonably be expected to be a viable alternate source of counsel, even if wholly free of any possible conflict. Second, the requirement of an evidentiary hearing, the possibility of appeal, and the fact that the order appointing independent counsel is stayed pending such an appeal makes this an unworkable prospect for a regular grand jury limited by its one-year term. Third, the provision that no special counsel can be appointed absent a certification that the county has the funds to pay such counsel, *unless the board of supervisors or a member is under investigation*,¹⁶⁵ invites treatment of the board of supervisors or a member as a subject of investigation who might otherwise not be.

162. See LITTLE HOOVER COMMISSION, SPECIAL DISTRICTS: RELICS OF THE PAST OR RESOURCES FOR THE FUTURE? at i.

163. See *Tentative Recommendation*, *supra* note 34, at 33.

164. See CAL. PENAL CODE § 936.5(b) (West 1985).

165. See CAL. PENAL CODE § 936.5(c) (West 1985).

Anecdotally, we understand that, despite the strictures of section 936.5, in counties where it appears to the court that the county counsel and district attorney have conflicts, the court will authorize retention of independent counsel by the grand jury, subject to court supervision of fees.

Here again there exists a situation where, when the system works, it works in contravention of the limitations of *Daily Journal*.¹⁶⁶ The entire subject of independent counsel for grand juries needs to be re-thought. Grand juries may need independent counsel in two, quite different, circumstances.

First, for many grand juries, county counsel is their primary legal advisor.¹⁶⁷ County counsel of course represents many, perhaps most, of the officials and agencies the grand jury wishes to investigate. Some counsel proceed, despite the conflict, to the obvious potential detriment of the grand jury. Others are quite willing to recuse themselves, but that often leaves the grand jury to seek advice from a district attorney who has no skills in agency law and a full plate of other matters for which he/she is statutorily responsible. Supervising judges are often willing to serve as advisors, but they have their own trial calendars and may not be the most accessible advisors. The attorney general is simply not in the business of providing advice to grand juries conducting the civil oversight function. There needs to be a simple procedure, not unlike that currently followed by sympathetic judges—but unauthorized by the legislature and therefore suspect under *Daily Journal*¹⁶⁸—which permits a grand jury, on short notice, to request, and the supervising judge to authorize, retention of outside, independent legal counsel to assist in civil matters where cause is shown.

Second, occasionally a grand jury's conduct is the subject of litigation—litigation which frequently gives rise to interpretations and rules which affect all California grand juries. It is possible for such litigation to occur without the participation of the affected grand jury. It is virtually certain that it will occur without the participation

166. See *Daily Journal Corp. v. Superior Ct.*, 20 Cal.4th at 1117, 979 P.2d 982, 86 Cal. Rptr. 2d 623 (1999).

167. According to the CGJA survey this is the case for 42% of California grand juries. See *supra*, Section IV.E.

168. See *Daily Journal Corp. v. Superior Ct.*, 20 Cal.4th at 1117, 979 P.2d 982, 86 Cal. Rptr. 2d 623 (1999).

of anyone representing the interests of grand juries in general. One consequence is the development of impractical, unrealistic court decisions of the type that may necessitate legislative reform from time to time.

If a consequence of the Trial Court Funding Act and *Daily Journal* is that the courts must treat grand juries as “unallowed” and shall have no inherent authority with respect to them, the grand juries will be in desperate need of independent legal advice. Otherwise they will be forced always to seek support from the very bodies they are charged to investigate. The unfortunate outcome of that circumstance is predictable. Presently, grand juries are still getting covert help from the courts, but such help cannot be predicted to continue. We suggest that the subject of making independent advice available to grand juries is one worthy of a study and analysis by the many constituents who will be affected by the outcome.

PENAL CODE SECTION 938.4; PROPOSED GOVERNMENT CODE SECTION 77814—MEETING ROOM AND OTHER SUPPORT.¹⁶⁹ This is another example of the problems caused by the Trial Court Funding Act and *Daily Journal*. Current law is unclear as to who is to pay for a “suitable meeting room and other support as the court determines is necessary for the grand jury.”¹⁷⁰ If grand juries are no longer part of court operations, it is difficult to see how the court will pay for them. But, if the court is not paying, why should it decide what is “suitable”? The concept that the court be authorized to direct the county to pay at least gives the court statutory authority to become involved, thus avoiding the *Daily Journal* problem, but we wonder how counties will like such a suggestion.

GOVERNMENT CODE SECTIONS 77940 THROUGH AND INCLUDING 77973; PENAL CODE SECTIONS 904.6, 917, 917.8, 923, 924, 924.6, 938, 938.1, 938.2, 938.3, 939, 939.2, 939.21, 939.3, 939.5, 939.6, 939.7, 939.71, 939.8, 939.91, 940, 943, 944, 945, AND AB 527. Generally, matters of criminal authority and procedure are not within the purview or expertise of the CGJA. We therefore make no specific comments on these statutes except, as noted elsewhere, where they may implicate civil functions. We, along with other commentators, do of course strongly object to the attempted

169. See *Tentative Recommendation*, *supra* note 34, at 12.

170. CAL. PENAL CODE § 938.4 (West 2002).

bifurcation of grand jury powers between civil and criminal, and we discuss those broad objections in our discussion of Penal Code sections 904.4 and 904.6, above.

VI. TRAINING FOR GRAND JURORS

One of the prime purposes of the CGJA is to promote comprehensive training and orientation of all new jurors throughout the state. Indeed, some CGJA members have been actively conducting training as individuals, as well as for the organization, for more than the past decade.¹⁷¹ Previously, when the legislature was considering changes to the Penal Code, representatives of CGJA testified before legislative committees regarding the need for training of county grand jurors. We were pleased to see the advances made by the passage of Penal Code section 914(b) and welcome efforts to improve the quality of training and to provide the funding to make it available to all grand jurors statewide.

Our analysis of the Vitiello/Kelso reform proposals regarding grand juror training produced agreement in some areas, but also raised some concerns and many unanswered questions in the areas of cost, scope, and the proposed pilot project.

We agree the teaching method of hands-on exercises utilizing simulation could be effective. The main drawback is that it takes much more time, which equates to much higher costs.

Projected costs of the proposed training program are projected at \$1,000 per juror, which is unrealistic.¹⁷² Assuming the recommendation contemplates centralized training, it would be at least \$1,500 to \$2,000 per juror when the costs for lodging, meals, and travel expenses are added. Multiplied by 1100 grand jurors statewide this comes to \$2,200,000 each year. The Vitiello/Kelso report states, “[i]t is unlikely that very many counties could afford the expense of this type of program.”¹⁷³ We agree that they cannot.

The reform proposal “suggests the possibility of state funding for grand juror training.”¹⁷⁴ It is a possibility, but is it realistic that the state (especially with projected budget shortfalls) would take that

171. The three primary authors of this section have been training grand jurors for 13, 11 and 10 years, respectively.

172. See *Tentative Recommendation*, *supra* note 34, at 7.

173. *Id.*

174. *Id.*

on? Exactly how would funding be provided? Would it be mandated and automatically provided every year or would it be discretionary funding that may be available some years but not other years? How can it be assured that state funding will not come with “strings attached” that may be detrimental to grand jury operations or independence?

The scope of the training program, as stated on page 7, “would train grand jurors to conduct interviews, examine witnesses and write reports,”¹⁷⁵ which differs from the Penal Code section 914 wording of “training that addresses, at a minimum, report writing, interviews, and the scope of the grand jury’s responsibility and statutory authority.”¹⁷⁶ Grand jury responsibility and statutory authority must be included. We also wonder why the training proposal does not include the topic of how to plan and conduct a grand jury investigation. Why is just interviewing included when it is only one of several methods used by grand juries in conducting investigations?

The proposed scope of instruction seems incomplete and very limited. In addition to report writing, interviews, investigations, and the scope of the grand jury’s responsibility and statutory authority, there are many other topics that are essential to a comprehensive training program. These topics include: organization and internal operating practices of a grand jury; juror conduct, obligations, and ethics; how to research and verify information as factual; continuity and follow-up to final reports; interrelationships with legal advisors and outside experts; understanding the authority, organization, and functions of various local government agencies, as well as the role of public officials and governing boards; laws common to all public agencies such as the Brown Act,¹⁷⁷ California Public Records Act,¹⁷⁸ Political Reform Act of 1974,¹⁷⁹ and conflict of interest law; and how to handle citizen complaints.

The proposed pilot project for grand juror training would encompass developing a civil grand jury curriculum, offering one-time, free training to a limited number of grand jurors based on this

175. *Id.*

176. CAL. PENAL CODE § 914 (b) (West Supp. 2002).

177. CAL. GOV’T CODE §§ 54950-54962 (West 1997).

178. CAL. GOV’T CODE §§ 6250-6268 (West 1995).

179. CAL. GOV’T CODE §§ 81000-81016 (West 1993).

curriculum, and then evaluating the curriculum and training program at an estimated cost of \$300,000.¹⁸⁰ Our questions are:

1. Developing a civil grand jury curriculum. We believe that the subject matter of the curriculum is just as important as the teaching methodology used and wonder:
 - a. Does the Department of Justice, Vitiello, Kelso, or any of California's law schools have a thorough understanding of the functions and operations of regular grand juries? Would they seek input from experienced grand jurors and if so, how?
 - b. If funding is made available, will other organizations of professional training providers be considered?
 - c. We note that no law school curriculum lists any course work regarding the California regular grand jury. Might it not be appropriate for judges, district attorneys, county counsels, court executive officers, and former grand jurors to develop some training for law schools themselves, so their graduates will be able to assist grand juries in conducting their essential civil oversight role?
2. One-time, free training will be offered to no more than 250 new grand jurors between January 1, 2003 and December 31, 2003, followed by an evaluation and a written report to the legislature by July 1, 2004.¹⁸¹
 - a. Most one-week programs provide training to employees who have a financial and professional stake in attending. Often the training is mandated by their employers. Most grand jurors are basically volunteers who serve only for one year. They may not have the incentive to spend a week in concentrated training.
 - b. Many grand jurors are employed and their juries meet in the evening. Some employed jurors have a problem attending even CGJA's two-day seminars. How could they attend a five-day

180. See *Tentative Recommendation*, *supra* note 34, at 7.

181. See *id.*

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program? How can the program be evaluated properly if it excludes such grand jurors, who will in any event be part of the population that serves on grand juries?

3. Evaluation of the efficacy of providing substantial training.
 - a. How do you determine “effectiveness” in a grand jury? If you are planning to compare seemingly identical counties, one of which gets this training and one does not, you need to establish how to measure effectiveness. The issues any grand jury has to deal with are largely situational—what is currently happening in a county. Many highly effective reports depended on a particular situation that came to the attention of the grand jury. Regardless of how similar two counties may be, that they might have similar and simultaneous happenings is unlikely. Of course, this also presupposes two other things: that it is possible to match county grand juries adequately and that each of these counties would be able to recruit similar jurors.
 - b. Who is to perform the evaluation? Will they be independent from those that design and implement the program so there would be no vested interest in what the results are? How can one ensure that the results of the proposed pilot program are “evaluated” with reference to meaningful standards?
 - c. For evaluation purposes, how will a “comparable” county that did *not* receive training be found? CGJA’s 2001 Grand Jury Practices Survey shows that 98% of the responding counties receive training.¹⁸² Would those counties selected for the “comparable” group have to forego their normal training that year? Would this be a violation of

182. See SURVEY, *supra* note 7.

Penal Code section 914(b) that mandates grand jurors receive training?¹⁸³

4. There is no mention of any plan as to how the pilot project could be turned into a statewide training program. Should there not be at least a tentative plan for continuation and expansion? If this is likely to be only a one-time training effort, we think grand juries would be better served to use the \$300,000 for durable, ongoing teaching materials such as training videos available to all juries.

The issue of training is so critical to the success of any jury that we feel it is necessary to have an additional study by a variety of former jurors of varying types of expertise, as well as other professionals such as presiding judges, district attorneys, and county counsels—practitioners rather than academics. We believe that only someone who has actually served on a jury can grasp the range of subject matter essential to carry on investigations, form consensus, write good reports, and make proper recommendations. Many former jurors are attorneys, teachers, university professors, police and professional investigators, accountants, management auditors, and others who have professional skills that can be used to establish training essentials and methods. Indeed, people with these skills are used by CGJA in its training programs as part of the training team and as presenters at seminars. We think their views should be included in any consideration of grand juror training. We also note that the Administrative Office of the Courts has professional trainers on its staff and we believe their views should be included as well.

VII. SUGGESTIONS FOR STATUTORY ADDITIONS

Hopefully it is abundantly clear by now that CGJA does not support the introduction of broad reform legislation of the type proposed by Vitiello/Kelso, or indeed, given the vagaries of the legislative process, of any type of reform except the most narrow and specific proposals which have broad understanding and support. If, however, a broad reform package is to be introduced, we urge that it include statutory proposals designed to address the following areas which we know to be of recurrent concern to grand juries:

183. See CAL. PENAL CODE § 914(b) (West 2002).

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- a. Better access to independent counsel, both to advise grand juries during the course of their terms and to represent them in judicial proceedings where the interests of a grand jury, or all grand juries, are at stake. Current access to independent counsel is overly restrictive and forces grand juries to rely for their advice on counsel with conflicts of interest or no concern for the grand jury and its interests.¹⁸⁴ Occasionally, grand juries must go to court and there is no current provision designed to permit them to retain litigation counsel. A recent ruling from the Superior Court, not appealed, granting the grand jury access to material that the county was improperly withholding, was possible only because a member of the grand jury panel was a skilled litigation practitioner and represented the grand jury pro bono.¹⁸⁵ In addition, it is possible for issues of importance to grand juries to be litigated without any grand jury, or spokesperson for the rights and interests of grand juries in general, being a party to the litigation.¹⁸⁶ Legislation should provide for the retention of independent counsel, either by the directly affected grand jury or by the court as *amici*,¹⁸⁷ if grand jury interests are to be adjudicated in the absence of any party representing those interests.
- b. Legislation should ensure that grand juries have access to current technology. As our survey reveals, grand jury access to even everyday technology varies widely.¹⁸⁸ We recognize that the ability of counties to provide technology will vary

184. See discussion of Penal Code section 936.5, *supra* notes 164-68 and accompanying text.

185. See *El Dorado v. El Dorado County Grand Jury*, No. SC20010006 (Apr. 3, 2001).

186. Thus, for example, in the seminal *Fitts* case, 4 Cal. 2d 514, 51 P.2d 66 (1935), the fundamental attributes of the grand jury were debated, and issues of alleged grand jury impropriety and the use of the accusation procedure were resolved. However, the grand jury was not a party to the action, nor were grand jury interests represented by any amici. This is a case that made it to the California Supreme Court. It seems likely that in many unreported cases resolved at the trial court level, grand jury interests are similarly unrepresented.

187. See, e.g., *McClatchy Newspapers v. Superior Ct.*, 44 Cal. 3d 1162, 751 P.2d 1329, 245 Cal. Rptr. 2d 774 (1988) (where the Fresno County grand jury was represented by amici).

188. See SURVEY, *supra* note 7.

considerably, so we suggest that legislation simply require that the grand jury be provided with whatever technology is made available to county employees.

- c. Consistent with our discussion of the confidentiality provisions of the Penal Code and Judge Kopp's remarks quoted above, we think existing confidentiality statutes need rethinking and replacement with a new, more coherent confidentiality policy with regard to the civil oversight function of the grand jury. We currently take no position as to which is better, but we think a choice needs to be made between complete confidentiality, including witnesses and government personnel on the one hand, or relaxed confidentiality as it applies to grand jurors on the other. The current situation where jurors are pledged to the utmost secrecy while witnesses and government personnel are free to talk among themselves, to potential witnesses, and to the media is simply wrong.¹⁸⁹
- d. Consistent with our discussion of training in Section VI, we believe that minimum training standards should be developed to assist courts in meeting their responsibility under Penal Code section 914 to ensure grand juror training. This, it seems to us, is ideally a function for the Administrative Office of the Courts, as it clearly is an inappropriate role for the legislature.
- e. There is need for a comprehensive analysis of the role "Implementation Review Committees" can play in ensuring proper follow-up on responses to reports where the agency or official has agreed to implement suggested changes. We understand that such bodies exist, in somewhat different forms, in Orange and San Diego Counties and that their function in each is to inquire into the status of promised implementation and to report their findings to the Boards of

189. By way of example only, see Chuck Finnie & Julian Guthrie, *Grand Investigating S.F. Schools*, S.F. CHRON., Sept. 23, 2001, at A21, which reported on the commencement of a *federal* grand jury investigation of the city's schools. We wonder if simple publicity of that sort does not bring out the complaints and the whistle-blowers and make the grand jury's job much easier. Currently, that type of public notification and outreach is prohibited to California grand juries.

Supervisors for such follow up action as the Boards may desire to take. We believe the function of Implementation Review Committees, and their possible desirability for all counties, cities and special districts is a fit subject for analysis by the Administrative Office of the Courts.

VIII. CONCLUSION

The dual function regular grand jury has been a part of California's system of governance since the state's inception. It has a long, honorable and valuable history. It has functioned remarkably well over the decades, allowing generations of citizens to exercise their retained rights to oversee their governments. It has functioned credibly with little legislative attention and remarkably simple, if imprecise, statutory guidelines. It has been able to do so largely because it has been an arm of the court, able to operate wholly independent of the courts, yet able as well to seek their guidance and protection from hostile officials. The Trial Court Funding Act and *Daily Journal* decision have put all of that at risk. Whether legislative changes will be required as a result, and what they may be, remains to be determined. What is clear at the moment is that no legislation should be introduced until all affected persons and entities have had ample time to consider, analyze, debate, and form consensus as to what such legislation, if any, should be. For starters the CGJA believes that there should be consideration of undoing the potentially harmful effects of the Trial Court Funding Act and *Daily Journal*. Only when it is known whether the regular grand jury will return to its status as an arm of the court does it make sense to even contemplate legislation relating to how it operates. There are a large number of vitally affected interests which must be heard before any legislative risk is run by the introduction of one or more bills. We urge that the Judicial Council is the agency best equipped to host and oversee the effort to bring the different interests together and assist them in reaching consensus. The CGJA stands ready to offer its expertise and services in that regard so that the institution to which we are dedicated is wisely preserved.