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Report of the Grand Jury Committee, San Diego County Bar Association*

Preface

The Grand Jury Committee of the San Diego County Bar Association was formed at the request of Charles W. Froehlich, Jr., President of the Bar Association, in January, 1971, to make a comprehensive study of the Grand Jury process in San Diego County, and of the criminal indictment procedure in particular.

The Committee met regularly twice monthly. It met with various judges of the Superior Court, the Jury Commissioner, past Grand Jurors, and Michael Lustig, assistant professor of sociology at California State Polytechnic College at Pomona, California, who, as a doctoral candidate at University of California, San Diego, completed a sociological study of San Diego County Grand Jurors and Grand Jury nominees for the period 1962 through 1971.

With a view toward measuring the opinions of knowledgeable persons across the state, the Committee conducted two questionnaire surveys. The first was a general questionnaire sent out to superior

* The Committee consisted of: *Norbert Ehrenfreund*, Chairman, Chief Trial Attorney, Defenders Inc.; J.D. Stanford University, 1959; M.A., Columbia University, 1950. *Edwin L. Miller, Jr.*, District Attorney of San Diego County; J.D., U.C.L.A., 1951. *Sol Price*, Businessman; J.D., University of Southern California, 1938. *David M. Gill*, Partner, Harrington, Waddell, Gill & Briggs, San Diego, California; J.D., Stanford University, 1959; LL.M. Georgetown, 1962. *James M. Gathey*, Partner, Gregorcich, Gathey & Hunt, San Diego, California; J.D., University of California at Berkeley, 1964.

The Committee wishes to thank Michael A. Ferrara, Jr. and Louis J. Bizzarri, students at the University of San Diego Law School, for their valuable assistance in connection with research, statistical compilation, and editorial review as regards this report.

court judges, municipal court judges, deputy district attorneys, public defenders, attorneys, law professors and former Grand Jurors.

The second survey was conducted by a special questionnaire sent to other district attorneys of California by Mr. Miller with regard to the use of the Grand Jury process in their counties. The results of these two questionnaire surveys are published in our report.

Our student assistants also researched and reported on the use of the Grand Jury system in other states.

In addition to these studies already mentioned, the Committee collected and used the following records as a foundation for its report:

1. Records of San Diego County Grand Jurors and Grand Jury nominees for the ten-year period 1962-1971 with information on occupation, age, sex, area of residence and retired status.
2. Records of testimony of twenty-eight judges of our Superior Court regarding procedures used for nominating persons to the Grand Jury given before Judge Gilbert Harelson.
3. Annual reports of our Grand Juries.
4. Records of our District Attorney as to the nature of cases presented for indictment to the Grand Jury in 1970 and the disposition of such cases to date.
5. Public statements made by past Grand Jurors and citizens at a Board of Supervisors meeting on May 6, 1971.

At the outset the Committee decided to direct the major thrust of its study toward the role of the Grand Jury involving the criminal indictment process rather than its function of watching over the operation of county government. It was felt that the fair treatment of persons accused of crimes deserved priority. The Committee divided its study into the following four major questions:

1. *Should there be a Grand Jury?*

This area involved such questions as whether the Grand Jury should be abolished altogether or whether it should be retained in its present form; whether it should be divided into two bodies (one criminal and one investigatory); whether it should be limited to either its criminal indictment role or to its civil investigation role.

2. *How should the Grand Jury be selected?*

This question faced the serious criticism that the present method of selection of Grand Jurors might not result in a fair representation of a cross-section of the county's population, particularly as to race, socio-economic status, age and sex.

3. *What types of cases should be presented before the Grand Jury?*

Here the Committee considered whether the Grand Jury criminal process was being over-used and abused, and whether there should be some check or limitation placed on the District Attorney's unlimited discretion to present cases by way of Grand Jury indictment, rather than by way of complaint, preliminary hearing and information.

4. *How should the Grand Jury proceedings be conducted?*

This area attempted to respond to another critical challenge, *i.e.*, that the Grand Jury's secrecy aspect deprives an accused person of the right to counsel, confrontation of witnesses, discovery, presentation of evidence, and judicial determination of the admissibility of evidence.

SECTION I

NATURE OF THE GRAND JURY PROCESS
IN SAN DIEGO COUNTY

Chapter I: *Historical Background.*

Every year nineteen citizens of San Diego County are selected to serve for one year as the Grand Jury. This group has two basic functions: (1) to hear and deliberate upon criminal matters presented by the District Attorney, and to return an indictment if appropriate; and (2) to serve as the "watchdog" of county government, investigating county records and the conduct of county officials.

The Grand Jury system was created in England around the twelfth century to protect the common man from the tyranny of the state. The original thirteen American states adopted the Grand Jury as part of the English common law, and the California constitution required that "a grand jury shall be drawn and summoned at least once a year in each county." The Grand Jury has been under attack in both the United States and England for more than a hundred years. It has been variously criticized as archaic, inefficient, cumbersome, irresponsible and costly. England, the place of its birth, abolished it in 1933. Today it lives on in a variety of forms in our country and our state, amid many demands for change.

Chapter II: *Method of Selection.*

Nominees to the San Diego County Grand Jury are selected by the judges of the Superior Court. At the end of each year each judge is asked to nominate a given number of persons for next year's Grand Jury. For the 1971 Grand Jury, for example, each judge was asked to nominate two persons. In prior years the number of nominees to which each judge was entitled has ranged from two to five. Other than the instruction that the Grand Jurors should come from the various supervisorial districts in the county, and the qualifications set out in the state statutes, the judges have never received any written or oral instructions as to how nominees are to be selected. They have never been required nor advised to select a Grand Jury from a cross-section of the county as to race, socio-economic groups, age or sex; nor to try to select a Grand Jury which would be fairly representative of the county as a whole.

The legislature has prescribed certain qualifications for Grand Jury service. No person may serve on the Grand Jury unless he is a citizen, over the age of twenty-one, and a resident of the county for a year.¹ Grand Jurors must be people "who are in the possession of their natural faculties, and not infirm or decrepit, of fair character and approved integrity, and of sound judgment."²

Expressly disqualified from Grand Jury service are persons serving as trial jurors anywhere in the state, or who have been discharged as Grand Jurors in any county within one year, or who have been convicted of malfeasance in office or any felony or other high crime.³ Others may claim exemption from Grand Jury service, including attorneys, doctors, dentists, school teachers, ministers, officers of the state or of the United States, employees of state prisons, railroads and telegraph or telephone companies, anyone holding a city or county office of profit, and anyone who has been summoned or served as a trial juror in any court of the state within the year.⁴ Finally the codes provide that a person otherwise liable for Grand Jury service may be excused only when material injury or destruction of his property is threatened or his own health or that of his family makes it necessary that he be excused. He shall not be excused "for slight or trivial causes, or for hardship, or for inconvenience to said juror's business."⁵ In practice, judges do not nominate persons who are unwilling to serve.

1. CAL. CODE CIV. PRO. § 198 (West 1954).
2. CAL. PENAL CODE § 897 (West 1970).
3. CAL. PENAL CODE § 893 (West 1970).
4. CAL. CODE CIV. PRO. § 200 (West Supp. 1971).
5. CAL. CODE CIV. PRO. § 201 (West 1970); CAL. PENAL CODE § 894 (West 1970).

It seems fair to say the judges in San Diego County are given wide latitude in determining who to nominate. A judge who was appointed to the bench in 1970 testified that he received no written or oral instructions other than to submit two names.

San Diego County has a jury commissioner, Lawrence Adams, who was appointed pursuant to law.⁶ The Penal Code provides that: "Pursuant to written rules or instructions adopted by a majority of the judges of the superior court of the county, the jury commissioner shall furnish the judges of the court annually a list of persons qualified to serve as grand jurors during the ensuing year, or until a new list of jurors is required. . . ."⁷ However, the judges are not required to select any names from the jury commissioner's list, but may, "if in their judgment the due administration of justice requires, make all or any selections from among the body of persons in the county suitable and competent to serve as grand jurors, regardless of the list returned by the jury commissioner."⁸ In San Diego County these statutes pertaining to the jury commissioner's list have apparently never been applied. The judges have not adopted any written rules or instructions pursuant to Penal Code § 903.1, and therefore the jury commissioner has never furnished them with any list of persons qualified to serve as Grand Jurors. The judges agree that as a body they have never considered the application of the statutes pertaining to the jury commissioner's list. Except for the statutory requirement in 1969 that the grand jury nominees be selected from the different supervisorial districts in proportion to the number of inhabitants in each, there has been no change in the local nominating procedure for at least fifteen years.

Many judges believe the Grand Jury should fairly represent a cross-section of the community, but none use any representative list as a source from which they choose nominees.

Most of the judges nominate persons they know, generally personal friends. The others nominate persons recommended by someone they know. It is safe to say that in order to be nominated to the Grand Jury in San Diego County a citizen has either to know a

6. CAL. PENAL CODE § 903 (West 1970); see also, CAL. CODE CIV. PRO. § 204(a) (West Supp. 1971).

7. CAL. PENAL CODE § 903.1 (West 1970).

8. CAL. PENAL CODE § 903.4 (West 1970).

Superior Court judge, or know someone who knows a Superior Court judge. This cuts out a substantial number of taxpaying citizens from consideration.

Certain characteristics of the judges are significant as bearing upon the kind of people they are likely to know and therefore nominate. The twenty-eight judges who selected nominees in 1970 and 1971 averaged fifty-five years of age; each had a minimum annual income of \$33,390; twenty-six owned their own homes; and over half lived in the First Supervisorial District, including Point Loma and La Jolla, which comprise our wealthier neighborhoods.

In making their nominations, several judges added their own qualifications to the statutory requirements for nominees on the grounds that the duties of examining county government operations require special competence, such as business and accounting experience. One of the main criteria for nomination was having time to serve. Most judges said they did not nominate working people, that is, blue-collar workers or daily or hourly wage-earners, because they believed such persons could not afford to take the time off to serve. Some judges made affirmative efforts to nominate members of minority races, young persons, blue-collar workers, and women.

In practice, only a few counties in the state use the jury commissioner's list as specified in the statutes. Lassen County is one exception. There, prospective Grand Jurors are selected at random from the same lists used to draw petit jurors. In Sacramento County, for example, criticism of the "select your friends" system resulted in a change in 1967, and now most of the judges use a jury commissioner's list of names taken from the voter registration rolls in addition to their own nominations.

Once the nominations are made, the jury commissioner distributes a complete list of all nominees, with addresses and occupations, if any, to all the judges. This gives the judges an awareness of who the other nominees are. The judges hold an annual meeting in which the nominations are discussed, and any objections to a nominee are then made. As a result of such objection a nominee's name may be withdrawn. The nominees are narrowed by lot in a first drawing to a list of thirty, and then at a second drawing narrowed again to the final nineteen.

The comprehensive studies made of judges' nomination lists, questionnaires filled out by the nominees themselves covering the past ten years, and the recent testimony of the judges—all of which is a matter of record available for inspection—have provided our Com-

mittee with much insight and data on the results of the selection process in San Diego County and the composition of our Grand Juries.

The most significant finding is the almost total exclusion of the blue-collar worker or daily wage-earner from our Grand Jury process.

There exists in San Diego County, as in every American community, a substantial portion of the people who work for a daily or hourly wage—the so-called blue-collar worker. This is the socio-economic class which is distinguished primarily by the fact its members work at manual or physical labor, are paid an hourly or daily wage, receive orders as opposed to giving orders, generally receive less pay than white-collar workers, generally have less education than white-collar workers, and generally have less discretion as to hours of work. They are the carpenters, the plumbers, electricians, mechanics, day-laborers, the cooks, the fishermen, the welders, and hundreds of other occupational categories. We are informed that in our county this socio-economic group comprises about 40 to 50% (or over 125,000) of all those who are engaged at some occupation. Under California law such persons may be fully competent as Grand Jurors. There is nothing in the law which limits service in the Grand Jury to persons otherwise occupied. At least in determining whether there is sufficient evidence to warrant an indictment, the manual worker may be fully as competent as the business executive.

Here are the facts:

Of all the Grand Jurors in San Diego County for the ten-year period from 1962 through 1971 (191 persons), there was not a single person who was a blue-collar worker at the time of his selection. Many of the judges believed the time required for Grand Jury service, and the pay (\$10.00 per day), tended to exclude this large economic class.

Let us go a step farther. Of all the *nominees* to the Grand Jury for the ten-year period from 1962 through 1971 for which we have records (784), there were only two blue-collar workers, and one of these is questionable as to whether he belongs in this category. The two were a moving-picture projector operator nominated in 1970, and the chief bartender of Lubach's Restaurant, nominated in 1971 (the questionable one).

On the other side of the coin, about fifty per cent of the active work force in San Diego County is white-collar workers. But their high over-representation among Grand Jurors and Grand Jury nominees is illustrated by the following facts:

- a. Of all the Grand Jurors from 1962 through 1971 in the active work force, 100% were white-collar workers;
- b. Of all the 1970 nominees (eighty-one) in the active work force, 97.4% were white-collar workers;
- c. Of all the 1971 nominees (fifty-three) in the active work force, 94% were white-collar workers.

We use the term "active work force" to mean all those active in some work. The term excludes retired persons and housewives.

There has been particular over-representation of managers, officials and business proprietors, as illustrated by these facts:

- a. In San Diego County, managers, officials and business proprietors make up about 25% of the active work force;
- b. Of all the Grand Jurors from 1962 through 1971 who were in the active work force, 72.22% were managers, officials and proprietors;
- c. Of all the 1970 nominees in the active work force, 64.1% were managers, officials and proprietors;
- d. Of all the 1971 nominees in the active work force, 68.75% were managers, officials and proprietors.

Now for a consideration of the facts regarding retired persons:

- a. Of all the 191 persons who served as Grand Jurors from 1962 through 1971, fifty-five were retired. Of those who were retired, only one had been a blue-collar worker immediately prior to retiring, to-wit, a retired maintenance painter who served on the Grand Jury in 1971. 96% were in the white-collar class immediately prior to retiring.
- b. Of eighty-one nominees in 1970, twenty-seven were retired. Only one had been in the blue-collar class just prior to retiring—the same retired painter mentioned above. 88% were retired from the white-collar class. We had no record of the remaining 8%.
- c. Of fifty-three nominees in 1971, seventeen were retired. Only one had been in the blue-collar class immediately prior to retirement—again the same painter heretofore mentioned. 88% were retired from the white-collar class.

In past years critics of the Grand Jury selection process have most often directed their attacks to the area of racial discrimination. However, the Committee found little evidence to support such a criticism in San Diego County today. Five blacks served on the 1971 Grand Jury. A Mexican-American served on the 1970 Grand Jury. At least one Mexican-American was nominated for 1971, but none was drawn in the final selection. If members of such minority groups have been excluded from consideration, it is because of

their socio-economic status rather than their ethnic or racial background. And, indeed, they are excluded from consideration, as are many others, if they neither know a Superior Court judge nor have contact with someone who does. In this connection, it seems relevant to point out there is neither a black nor a Mexican-American on our Superior Court bench. Nor has there ever been, to our knowledge.

The next most striking finding in our study was the exclusion, however unintentional, of young persons from the Grand Jury process. In 1970 about 30% of San Diego County's adult population—twenty-one years and older—was under thirty years of age. But for the past ten years, on the basis of reliable information, it appears no person under thirty has ever served on the Grand Jury. Of all Grand Jury nominees, 1968 through 1971, for whom age information was available (144), none was under thirty.

In 1970, 54.8% of the adult population of the County was under forty-five. The median age was forty-two. But of all 1968 through 1971 Grand Jurors, only 14.86% were under forty-five, and 85.14% were between forty-five and eighty.

One encouraging sign for youth: The median age of Grand Jurors is decreasing. In 1968, the median age was sixty-one; in 1969, it was fifty-five; in 1970, it was fifty-three; and in 1971, it was forty-eight.

In 1970, the ratio of males to females in San Diego County among persons twenty-one years old and over was just about one to one, with females outnumbering males by a small margin. Males have always outnumbered females on the Grand Jury, but this ratio too is decreasing in favor of females. Thus the ratio of males to females for all 1962 through 1971 Grand Jurors was four males to each female; the male to female ratio for all nominees in 1970 was four to one; but the male to female ratio for all nominees in 1971 was down to two to one. A few judges said they expressly tried to select women in order to give them greater representation on the Grand Jury.

Our studies show Grand Jurors tend to come from the wealthier income brackets and reside in the few wealthier neighborhoods. This is not surprising since the judges seek people who can afford to serve. The only facts available on actual income levels come

from special questionnaires submitted to the 1970 Grand Jury. They showed the 1970 Grand Jury had a median gross income level of \$14,000 annually, which means 50% earned over \$14,000. This is considerably higher than the percentage of the total adult population of the county who earned over \$14,000.

Still another measure of the economic status of Grand Jurors, while not as direct, is found in the study of census tracts in which the Grand Jurors and Grand Jury nominees reside.

A census tract is a small geographical area into which San Diego County has been divided by the United States Census Bureau for the purpose of reporting statistical information. Census tracts are designed to be relatively homogeneous in economic status and living conditions. The average tract contains about 4,000 persons.

Of the 241 census tracts in San Diego in 1960, the last year for which we had information, we had data for 226 as to the median family income in those tracts. There were nine census tracts which had the highest median family incomes, that is, median family incomes of \$10,000 or more. These nine tracts contained 3.47% of the total population. Five of these nine tracts were in the First Supervisorial District, which includes Point Loma and La Jolla.

Although those nine census tracts contained only 3.47% of the total population of San Diego County, the percentage of all the San Diego Grand Jurors over the years 1962 through 1971 who lived in those tracts was 30.53%.

The percentage of all the 1970 nominees who lived in those nine tracts was 21.52%; and the percentage of all 1971 nominees who lived there was 26.42%.

The study of census tracts also revealed the residences of Grand Jurors and Grand Jury nominees tended to be concentrated in a small number of tracts.

Thus, of all the Grand Jurors for the years 1962 through 1971, 19.47% came from just three census tracts which contained only 1.34% of the population of San Diego County.

Of all the 1971 nominees, 54.53% came from thirteen census tracts which contained but 6.29% of the population. None of the 1971 nominees came from 204 census tracts which contained 82.71% of the population.

We mentioned previously that under law Grand Jurors are to be nominated from the various supervisorial districts in proportion to the number of inhabitants therein. Thus, the number of nominees for the 1971 Grand Jury from the First Supervisorial District

should have been ten. However, there were fourteen nominees from this district, which, as previously mentioned, contains most of the richest neighborhoods in the county, including Point Loma and La Jolla.

A surprising number of persons were nominated more than once. Although there were a total of 834 Grand Jury nominations for the period 1962 through 1971, only 558 actual persons were nominated. This is because 172 persons were nominated more than once, as follows: 112 persons were nominated twice; thirty-four persons were nominated three times; fourteen persons were nominated four times; eight persons were nominated five times; three persons were nominated six times, and one man was nominated eight times.⁹

Chapter III: *Preparation of Grand Jurors for Their Task.*

At the outset of each term, the Grand Jury receives instructions as to their task from the Presiding Judge of the Superior Court and the District Attorney. In addition, each Grand Juror receives a booklet entitled "The San Diego County Grand Jury Guide", which is compiled and edited by a Superior Court Judge.

However, the Committee's discussions with various past Grand Jurors indicate there is often confusion and misunderstanding with regard to the role of the Grand Jury and the standards to be used in determining whether an indictment should be returned. There is no uniform statewide guide for use by Grand Juries in each county. Grand Juries in different counties, as well as our own Grand Juries, from year to year seem to have different views.

The language in Penal Code §§ 939.6, 939.7 and 939.8 with regard to the admissibility of evidence, the right of the Grand Jury to order other evidence to explain away the charge, and the amount of evidence sufficient to warrant an indictment present many questions which often are not cleared up among the Grand Jurors.¹⁰ There also appears to be disagreement among Grand Jurors as to

9. Much credit is due to Assistant Professor Lustig and to his law student assistant Roy Selin of the University of San Diego for the depth of this analysis of our selection process, as well as to Jury Commissioner Adams and Grand Jury secretary Louise Ruth for making the raw data available. We have here touched only on the highlights of this study. There are numerous additional facts, graphs and charts available.

10. CAL. PENAL CODE § 939.6, § 939.7 and § 939.8 (West 1970).

whether voting on multiple counts should be done all at once or on each count separately.

Chapter IV: *How the Grand Jury Operates (Indictment Function).*

Once the final nineteen Grand Jurors are impaneled, the Presiding Judge appoints the foreman, the foreman appoints the officers, committees are created, and committee chairmen appointed.

The Grand Jurors decide among themselves when to meet. The Grand Jury meets on the seventh floor of the County Courthouse, across the hall from the offices of the District Attorney. Grand Jurors have complained they are unable to hear witnesses clearly under the present sound system. For the past several years they have heard criminal cases on Wednesday and held business and committee meetings on one to two other days of the week. In 1970, when the District Attorney presented a total of 389 criminal cases, it was often necessary to meet on both Wednesdays and Thursdays for this aspect of the work. District Attorney Miller has informed the Committee that this year the Grand Jury is generally able to handle the criminal cases on one day—Tuesday. It appears that under the present Grand Jury system, with its dual role, each Grand Juror must spend two to three days per week to fulfill his or her duties.

Unless otherwise provided by law, the Grand Jurors are paid ten dollars per day of service, plus ten cents per mile transportation expenses.¹¹ The term of service is generally one year.

There are no statutory rules of procedure except that at least twelve Grand Jurors must concur to return an indictment.¹² Otherwise Grand Jurors are free to set up their own procedural rules.

We have previously mentioned the two principal functions of the Grand Jury: criminal indictment and county government investigation. Now we wish to examine the indictment phase more specifically.

The law provides "the grand jury may inquire into all public offenses committed or triable within the county and present them to the court by indictment."¹³ In San Diego County, however, Grand Juries have seldom inquired into a public offense on their own. Almost all offenses considered by the Grand Jury are brought to its attention by the District Attorney.

11. CAL. PENAL CODE § 890 (West 1970).

12. CAL. PENAL CODE § 916 and § 940.

13. CAL. PENAL CODE § 917.

The District Attorney has unlimited discretion as to whether to prosecute a criminal case by indictment or by complaint, preliminary hearing and information. There is nothing in the California Constitution nor the Penal Code to provide any standard as to which course he should choose.¹⁴

Defense attorneys claim there is an unfairness in such discretion on the ground the accused who is indicted by the Grand Jury does not receive the same rights of confrontation of witnesses, right to counsel, presentation of evidence and judicial rulings on the admissibility of evidence which are available to another accused charged with a similar crime who is afforded a preliminary hearing.

However, our state courts have held there is nothing unconstitutional in this practice.¹⁵ While conceding the indictment procedure denies a defendant certain constitutional rights guaranteed available at preliminary hearings, such as those just mentioned, the courts have consistently approved the use of the Grand Jury indictment procedure to hold a defendant to answer. One reason for this distinction is that, historically, the Grand Jury procedure antedates the information and preliminary hearing method.

A defendant's constitutional rights are held not violated where a criminal prosecution is initiated by either indictment or information. A defendant who believes the Grand Jury had no grounds upon which to indict him may seek relief in the Superior Court under Penal Code § 995,¹⁶ and, if denied relief, may petition for a writ of prohibition in the appellate court under Penal Code § 999 (a).¹⁷

In the past the District Attorney has presented some cases to the Grand Jury after the magistrate of the Municipal Court, having heard the evidence at the preliminary hearing, has refused to bind the matter over for trial on the ground of insufficient evidence. In past instances many such cases were presented without the Grand Jury's having been informed that the Municipal Court had dismissed the case. To date, however, in 1971, only one case dismissed at the preliminary hearing was presented to the Grand Jury, and in that instance the Grand Jury was informed of the prior dismissal.

14. CAL. CONST., Art. I, § 8; CAL. PENAL CODE § 682 and § 737.

15. *People v. Rojas*, 2 Cal. App. 3rd 767, 82 Cal. Rptr. 862 (1969).

16. CAL. PENAL CODE § 995 (West 1970).

17. CAL. PENAL CODE § 999(a) (West 1970).

There has also existed in the past the practice of presenting cases to the Grand Jury for which complaints had already been filed. In such cases there has already been a pre-arrest investigation; the accused has already been arrested, subjected to the jurisdiction of the court, and a date has been set for a preliminary hearing. Again, the Grand Jury is generally not informed prior to the presentation of the evidence that a complaint has already been filed. Lacking such knowledge, the Grand Jury has no reason to inquire of the District Attorney (which it might otherwise do) why he is seeking an indictment when a complaint, arrest and arraignment in Municipal Court have already set the court's processes in motion. The accused is rarely notified that evidence is to be presented against him before the Grand Jury; nor is his counsel, if he has any. There have been a few instances where the accused has been invited to testify if he wished, but these have been very rare.

Criminal cases have usually been presented to the San Diego County Grand Jury in this manner:

When the Grand Jury is ready to proceed, the Deputy District Attorney in charge of presenting the case is invited to enter the Grand Jury room. When he enters at first there is no court reporter present. It is a completely secret session. Only he and the Grand Jurors are present. He brings with him the indictment or charge he is seeking with the names of the prospective witnesses typed on the back. He states the nature of the charge, outlines the testimony expected from the witnesses, and may answer questions put to him by the Grand Jurors. None of this is recorded. The defendant and his counsel have no way of finding out what was said in this opening statement. If the Deputy District Attorney overstates his case, if he happens to make a prejudicial remark or innuendo about the defendant, however unintentional, no one else will know.

According to a few 1970 Grand Jurors, such opening statements could be damaging to the accused person in those cases where the evidence stated in the opening statement was not produced. It has been pointed out that too much reliance is often placed on the preliminary statements as opposed to evidence.

When the court reporter is called in, the foreman states for the record the nature of the case, the name of the defendant and the names of the District Attorney's witnesses; he directs any Grand Juror who has a state of mind which would prevent him from acting impartially and without prejudice to the substantial rights of either party to retire.¹⁸ If there are at least twelve Grand Jurors remain-

18. CAL. PENAL CODE § 939.5 (West 1970).

ing, the Deputy District Attorney then proceeds with his witnesses on the record. They are called in one by one to testify. They answer the District Attorney's questions only. There is no cross-examination. Neither the accused nor his counsel is permitted to be present. No judge is present to rule on the legality, admissibility, or relevancy of the evidence.¹⁹ However, in the event an indictment is returned, the defendant may subsequently attack the validity of the indictment in Superior Court by reference to the transcript of record. The law permits the Grand Jury to seek the advice of the Presiding Judge of the Superior Court at any time on points of law.²⁰ But this right has seldom been exercised, and unless such advice is asked, the judge is not present in the Grand Jury room.

Although the Grand Jurors themselves may ask questions of the witnesses if they wish, this is rarely done. The local practice is for the Grand Jurors to submit their proposed questions, in writing, to the Deputy District Attorney, who decides whether they are proper or not. Sometimes after a witness is excused, there is a discussion between the Deputy District Attorney and the Grand Jurors as to any questions they may have about the testimony. This discussion, likewise, is off the record. When a witness is excused, he is instructed by the foreman to keep his testimony secret. When all the District Attorney's witnesses have finished testifying, the court reporter is usually excused, again leaving the Deputy District Attorney and the Grand Jurors alone to discuss any questions the Grand Jurors may have off the record. District Attorney Miller has issued explicit instructions to his deputies to refrain from any possibly prejudicial remarks during all such discussions; and as yet there is no indication his instructions have been violated.

What about defense witnesses? Are they called to testify? If so, by whom?

The Grand Jury is not required to hear evidence for the defendant, but it is supposed to weigh all the evidence submitted to it, and when it has reason to believe that other evidence is available which will explain away the charge, the law says it shall order the evidence to be produced and for that purpose may require the District Attorney to subpoena the witnesses.²¹

19. CAL. PENAL CODE § 939 (West 1970).

20. CAL. PENAL CODE § 934 (West 1970).

21. CAL. PENAL CODE § 939.7 (West 1970).

When deliberations on the voting begin, no one, not even the District Attorney, is permitted to be present.²² However, the Committee has received some insight into this phase of the proceedings from several past Grand Jurors, who stated that the large number of cases, especially narcotics cases, often left the Grand Jury tired at the end of the day and that sometimes there was a tendency to rush through cases presented in the late afternoon.

Chapter V: *Is the Grand Jury Over-Used for Indictments?*

In 1970, the District Attorney presented 389 criminal cases for indictment consideration. A total of 383 indictments were returned. There were 34 classes of crimes in those cases, and in all but four classes, *i.e.*, murder, narcotics-related, sex and child cruelty, the Grand Jury returned indictments in every instance. Of forty-one murder cases, thirty-nine indictments were returned; of 245 narcotics-related cases, 244 indictments were returned; of forty-eight sex cases, forty-six indictments were returned; and of four child-abuse cases, three were returned.

The total of 389 cases presented is more than four times the number presented in 1966.

For the year 1970, the disposition of these cases was as follows:

GRAND JURY STATISTICS 1970

Persons Convicted (Trial or Plea)	426
Persons Acquitted	25
Indictments Dismissed in Furtherance of Justice	44
Indictments Dismissed under Penal Code §1538.5	10
Indictments Dismissed for Insufficient Evidence	25
Indictments Dismissed by court for other reasons	4
Persons certified to Juvenile Court	28
Trials Pending	12
Trials Pending (Defendants presently insane)	3
Defendants not Apprehended	35
Dismissals Due to Death of Defendant	2
Total	<u>614</u>

For the period January 6, 1971 through October 19, 1971, the San Diego County Grand Jury returned 180 indictments. This figure represents prosecutions against 240 people, including ninety-six people indicted in six narcotic buy programs. District Attorney Miller states the number of indictment proceedings will be much lower in 1971 because the Grand Jury is being used more sparingly.

A study of the number of criminal cases presented to Grand Juries of large counties of the state prior to 1971 shows that San Diego

22. CAL. PENAL CODE § 939 (West 1970).

County has generally used the Grand Jury to obtain indictments in more cases than any other county, including Los Angeles.

Some members of the 1969 and 1970 Grand Juries felt that too many cases were presented in those years to afford each case the full and complete hearing it merited and that the body was being over-used for criminal cases.

Chapter VI: *How the Grand Jury Operates (Civil Investigation Function).*

Although the Committee's study was directed primarily to the indictment function of the Grand Jury, we found it necessary to examine its civil or "watchdog" functions, and in particular the scope of the Grand Jury's investigatory powers, to help us answer the question: Should there be a Grand Jury?

We have alluded, generally, to the so-called government "watchdog" aspect of the Grand Jury.²³ From its earliest days the Grand Jury has been recognized as the medium for exposing political corruption. Specifically, the Grand Jury is required by statute to investigate county government offices and officers, and report on the results of that investigation. No law imposes a duty for investigation of city governments by the Grand Jury. As a result, our San Diego County Grand Jury has traditionally steered away from investigation of city government, even though the Penal Code does provide the Grand Jury with the power to remove district, county and city officers for wilful misconduct or corruption.²⁴ The 1970 indictments of San Diego city councilmen, for example, stemmed from the presentation of evidence in criminal cases, and were not a product of the Grand Jury's performance of its civil investigatory function.

The Grand Jury is also required by statute to "annually make a careful and complete examination of the books, accounts and records, especially those pertaining to revenue, of all the officers of the county . . . and report as to the facts it has found, with such recommendations as it may deem proper and fit."²⁵ Once again, the stat-

23. CAL. PENAL CODE § 914.1 (West 1970).

24. CAL. PENAL CODE § 922 (West 1970).

25. CAL. PENAL CODE § 925 (West 1970).

ute only requires examination of the books of county officers, leaving open the question of whether investigation of the books of city officers is precluded.

In addition to the powers already mentioned, the Grand Jury is entitled by statute to free access to the public prisons or jails and the right to examine all public records within the county.²⁶

It may at any time examine the books and records of any special-purpose assessing or taxing district located wholly or partly in the county, and may report upon the manner in which such districts perform these duties.²⁷

Every Grand Jury impaneled in even-numbered years is required to investigate and report upon the needs for increase or decrease in the salaries of the District Attorney and the Auditor. As often as may be required, the Grand Jury shall investigate and report upon the need for increase in the salaries of the members of the Board of Supervisors.²⁸

Finally, every Grand Jury must investigate and report on the need of all county officers including the abolition or creation of offices, the need for equipment by the offices and the manner in which the various offices perform their duties.²⁹

To meet these various statutory duties, the San Diego County Grand Jury in recent years has at the outset divided itself into standing committees as follows: (1) Audit, Government Efficiency and Economy; (2) Complaints; (3) Education; (4) Health and Welfare; (5) Juvenile Delinquency; (6) Legislative; (7) Narcotics; (8) Public Safety and Law Enforcement; and (9) Public Works. These committees visit county agencies, interview county personnel, and attend public meetings.

If the Grand Jury wishes a special investigator or special counsel to assist in any investigation, it may request the Attorney General to employ and supply such assistance.³⁰

At the end of its yearly term, the Grand Jury issues a final report, with its findings and recommendations, and the Board of Supervisors must comment on such findings and recommendations. There is, however, no one from the Grand Jury with the duty or power to see if such recommendations are being implemented in any way.

26. CAL. PENAL CODE § 921 (West 1970).

27. CAL. PENAL CODE § 933.5 (West 1970).

28. CAL. PENAL CODE § 927 (West Supp. 1971).

29. CAL. PENAL CODE § 928 (West 1970).

30. CAL. PENAL CODE § 936 (West 1970).

SECTION II
ANALYSIS OF QUESTIONNAIRES*Introduction*

The Grand Jury Committee attempted to measure the opinions of those involved with Grand Juries in California on the questions being considered in the study. Two questionnaire surveys were made. The first was a comprehensive questionnaire sent out to Superior Court judges, Municipal Court judges, Deputy District Attorneys, Public Defenders, attorneys, law school professors and former Grand Jurors (within the past five years). These persons lived in eight major counties of the state; Alameda, Los Angeles, Orange, Sacramento, San Bernardino, San Francisco, Santa Clara and San Diego.

About 725 questionnaires were sent out, and about 275 were returned. Unfortunately, judges (seventy-seven) and former Grand Jurors (137) were over-represented in the responses received, and Deputy District Attorneys (nine), Public Defenders (three) and law professors (two) were under-represented. This questionnaire is a part of this report as Appendix A.

The second questionnaire survey was a special inquiry of District Attorneys conducted for the Committee by San Diego County District Attorney Edwin Miller. Mr. Miller made up and then sent out questionnaires to other District Attorneys in the eight largest counties in California regarding their use of the Grand Jury. These counties were Los Angeles, San Francisco, San Diego, Santa Clara, Orange, Alameda, San Bernardino and Sacramento. This questionnaire is a part of this report as Appendix B.

The following two chapters present an analysis of these two questionnaire surveys.

Chapter I: *Analysis of Responses to General Questionnaire.*

These are the major findings or highlights resulting from the general questionnaire. Appendix A includes a complete statistical summary of responses.

1. *Should There be a Grand Jury?*

An overwhelming majority of those who responded (75%)

are in favor of a two-Grand-Jury system, one investigatory and one criminal. Only 8% of 142 responses favored abolishing the Grand Jury entirely.

2. *How Should the Grand Jury be Selected?*

The responses to this question are closely divided. Of 179 responses, 85% are in favor of a selection that is broadly representative of the community at large. Closely following is a 76% preference for selection from nominees of Superior Court judges out of a total of 198 responses.

Other responses show 62% in favor of staggering the terms of Grand Jurors to provide continuity, but only 20% in favor of reducing the term of service. Out of a large response of 239 votes, 40% were favorable to setting a maximum age limit for eligibility. Those who signified exactly what age limit should be set were closely divided between ages 65 and 70.

3. *What types of Cases should be Presented to the Grand Jury?*

The types of cases which are always or almost always presented to the Grand Jury, according to the survey, include sex cases, narcotics, murder, and those involving public officials, in that order. There is also a similar response to which cases *should* be presented: cases involving public officials and narcotics are again listed, with the addition of cases involving child molestation.

There are 63% of 208 respondents who believe that the prosecutor should be permitted to seek an indictment in a case which a magistrate has refused to bind over following a preliminary hearing. Only 37% of 241 responses believed the prosecutor should be precluded from resubmitting a case to the Grand Jury where an indictment had previously been refused. A large response of 248 does show 89% in favor of informing the Grand Jury of the fact that a case was previously the subject of a preliminary hearing at which bind-over was refused.

4. *How Should the Grand Jury Proceedings be Conducted?*

Nearly one half of those who replied (41%) agreed that some elements of an adversary proceeding should be present in matters presented before the Grand Jury.

The majority of respondents were in favor of furnishing the Grand Jury with counsel, other than the prosecutor, to advise them concerning the admissibility of evidence (60%), the elements of the

crime in question and the amount of proof required to bring an indictment (57%).

A 70% response indicates a desire that the Grand Jury be precluded from considering any evidence which would be inadmissible, over proper objection, at a preliminary hearing.

On an often-debated topic, 70% of the respondents expressed the opinion that the prosecutor should not be allowed to present evidence, "argument" or "instruction" without a court reporter present.

There are also several responses worth noting concerning the rights of individuals whose acts are the subject of a Grand Jury investigation.

An overwhelming majority (92%) did not favor permitting such individuals to appear during such investigations in the capacity of observers. On the other hand, it was a close vote (48% in favor) as to whether such individuals should be given the right to appear with counsel before the Grand Jury, even absent a request by the Jury.

Out of 216 responses, 73% indicated that such individuals should not be given the opportunity to have evidence against them suppressed before the case was presented to the Grand Jury.

There were strong responses (82% and 67% respectively) against requiring the Grand Jurors to complete a basic course in criminal law and against their being furnished with books on law to assist them in their duties.

Finally, it is notable that 80% of 246 responses agreed that the prosecutor has an obligation to disclose evidence favorable to the defendant, particularly since a majority of the replies received overall came from judges and past Grand Jurors.

In order to further elucidate the results of the study, it is important to note the total responses from each occupational group, since they vary greatly:

Superior Court judges _____	51
Municipal Court judges _____	27
Attorneys _____	34
Former Grand Jurors _____	137
Deputy District Attorneys _____	9
Public Defenders _____	3
Law Professors _____	2

Chapter II: *Analysis of Responses to District Attorney's Questionnaire.*

The questions to the District Attorneys were divided into three categories: (1) the final disposition of cases initiated by way of indictment; (2) procedures employed prior to the presentation of evidence before the Grand Jury; and (3) procedures employed for the presentation of evidence before the Grand Jury.

A summary of the specific questions and answers follows:

Question 1: What has been the ultimate disposition of cases initiated by indictment?

Answer: Four counties did not have statistics on the dispositions of Grand Jury cases. A fifth county responded that cases involving 132 defendants had been disposed of; and of these, 126 defendants were convicted, by plea or trial, and six were acquitted or their cases were dismissed. A sixth county did not specify how many defendants were indicted; in each case of those where it could be ascertained how many individual defendants were prosecuted, there were twenty convictions and twelve dismissals or acquittals. A seventh county indicated that of cases disposed of involving fifty-eight defendants, forty-eight were convicted and ten were acquitted or dismissed. The last county polled indicated that of cases disposed of involving fourteen defendants, twelve defendants were convicted and two were acquitted. It should be noted that of those counties reporting statistics, the large majority of cases were still pending.

Question 2: What is the policy with respect to selection of cases for presentation to the Grand Jury?

Answer: While the answers from the eight counties varied in length from a sentence to a detailed analysis, the following patterns emerge: Five counties used the Grand Jury to keep confidential the identity of informants. Five counties used the Grand Jury for homicide cases and cases of unusual complexity. Four counties used the Grand Jury for presentation of cases involving sex offenses. Four counties used the Grand Jury where there was a danger that the statute of limitations would run. Three counties used the Grand Jury for presenting cases involving alleged misconduct by public officials. At least one or more counties mentioned

the following criteria for selection of the Grand Jury as the method of initiating a criminal prosecution:

Cases of multiple defendants where some have been arrested and others have not;

Cases involving organized crime;

Cases involving potential widespread publicity.

One county left the selection of cases for presentation to the Grand Jury to the individual deputy presenting the evidence.

Question 3: Is an off-the-record statement made by the Deputy District Attorney prior to the presentation of the case? Is it considered necessary to make the statement off the record?

Answer: In all counties, an off-the-record statement is made in at least some of the cases presented. In six counties an off-the-record statement is made indicating either the general facts of the case to be presented or the elements of the crime involved. Four counties specifically mentioned the names of the witnesses who were to testify. Responses from the remaining counties do not specify what type of opening statement is made off the record. Two counties expressed the opinion that the statements should be off the record, while two other counties indicated that though statements were made off the record, the respondents saw no reason why they should be made off the record.

Question 4: Does the statement include instruction on the law and on the elements required for the offense charged? Does the statement include a discussion of the facts?

Answer: While the responses largely overlapped those given for Question 3, six counties, at least in some cases, include in the off-the-record statement some mention of the elements of the crime and the law involved.

Question 5: In the event the case was dismissed at the preliminary hearing, is the Grand Jury informed of that fact?

Answer: Three counties indicated that it is rare to take a case to the Grand Jury where the case was dismissed by a

magistrate, but that in such cases the Grand Jurors are informed of the prior dismissal. Three other counties indicated that the Grand Jurors are informed of a prior dismissal. The remaining counties indicated that in some, but not all, cases the Grand Jurors are informed of the prior dismissal.

Question 6: As a matter of policy, are cases dismissed at the preliminary hearing taken to the Grand Jury?

Answer: All counties polled indicated that there was no set policy as to whether cases dismissed at the preliminary hearing are taken to the Grand Jury. Each county, however, indicated that it had taken cases previously dismissed to the Grand Jury, but as indicated in Question 5, three counties indicated that such an occurrence was rare.

Question 7: Does the Grand Jury have a legal advisor acting separately from those deputies who present cases? If so, how is the advisor selected?

Answer: All counties indicated that there was a legal advisor to the Grand Jury in addition to the deputies who presented cases to the Grand Jury. In each case, the legal advisor was a representative of the District Attorney's office.

Question 8: How are questions by Grand Jurors handled?

Answer: Seven counties responded that questions by individual Grand Jurors were permitted, but that such questions had to be submitted in writing to the deputy presenting the case for screening. One county indicated the Grand Jurors can ask questions of witnesses directly, but that the deputy presenting the case advised the witness whether to answer the question or not.

Question 9: Is the prospective defendant ever invited to make a statement? If so, under what circumstances?

Answer: All counties indicated that there was no general policy prohibiting prospective defendants from making a statement to the Grand Jury. Five counties indicated that such a procedure was rare. One county indicated that the prospective defendant was invited if, in the opinion of the deputy presenting the case, it was felt the defendant would wish to make a statement. Another county indicated that all persons holding public

office, as well as professional people whose livelihood is dependent upon their reputation and the good will of the general public, are invited to appear before the Grand Jury.

Question 10: Is evidence favorable to the prospective defendant ever disclosed to the Grand Jury? If so, under what circumstances?

Answer: All counties indicated that in at least certain circumstances evidence favorable to the defendant was presented. While there was no discernible pattern in the responses as to the circumstances dictating presentation of evidence favorable to the prospective defendant, at least three counties indicated that where advisability of an indictment was questionable, all evidence favorable to the prospective defendant would be presented to the Grand Jurors.

SECTION III

FINDINGS AND RECOMMENDATIONS

The Committee makes the following findings and recommendations with regard to the questions presented:

1. *Should There be a Grand Jury?*

The Committee believes there should be a Grand Jury, but not in its present form, and not with its present name. We find defects do exist under the present Grand Jury system, and we believe certain changes should be effected in order to prevent abuse or the appearance of abuse by the Grand Jury.

On the civil side, the Grand Jury has particular value as a vehicle through which the public can examine the actions of its officials and agencies and make constructive recommendations for change.

On the criminal side, the Grand Jury procedure has special value in shielding a possible suspect or victim from premature harmful publicity, particularly where no indictment is returned, and in a few cases protection of witnesses from intimidation or physical harm.

RECOMMENDATION 1: TWO UNITS

The Committee recommends that the Grand Jury be divided into two units, of nineteen persons each, as follows:

- (a) A criminal-indictment unit to devote its attention exclusively to hearing evidence presented for consideration of whether an indictment should be returned; i.e., whether the suspect should stand trial; and
- (b) A government-investigation unit to devote its attention exclusively to the civil aspects of the Grand Jury's role.

Such a division will greatly reduce the time required of indictment jurors, and make possible a more representative selection from the community.

RECOMMENDATION 2: CHANGE OF NAME

The Committee further finds that in many cases the public and, more importantly, Superior Court jurors tend to give more credence to an indictment because it is returned by the "Grand Jury" than they give to the filing of a complaint and an information resulting from a preliminary hearing. For this reason, we recommend the Grand Jury be renamed so as to more accurately reflect its function, which is not that of a jury, as that term is commonly used, but rather an accusatory body, responsible only for determining whether probable cause exists to charge a person with the commission of a criminal offense.

The Committee welcomes suggestions for appropriate names; but until other ideas are received, it is suggested the criminal-indictment unit be known as the "Indictment Panel" and the civil investigatory unit be known as the "Government Investigative Panel".

2. *How Should the Two Panels be Selected?*

The Committee believes all possible defendants considered by the Grand Jury should have the right to a Grand Jury selected at random from a fair cross-section of the county. We also believe that all citizens of San Diego County eligible to vote should have an equal opportunity to be considered for service on such Grand Juries, and should have an obligation to serve when summoned for that purpose.

The Committee finds there has been no intentional or purposeful discrimination against any class in the selection of Grand Jurors.

However, the Committee also finds that the method by which our Grand Jurors have been selected does not operate to encompass a cross-section of the community, and practically excludes, however

unintentionally, blue-collar workers, poor persons and young persons. This situation tends to create resentment, particularly in the working man who pays heavily in taxes but is seldom represented.

The Committee does not believe defendants have a right to proportional representation of their race or class on the Grand Jury. It does believe, however, it is in the American tradition that all eligible persons have the right to be considered for Grand Jury service.

RECOMMENDATION 3: SELECTION ON SAME BASIS AS TRIAL JURORS

The committee therefore recommends nominees for the Indictment Panel be selected in the same manner and from the same source petit or trial jurors are selected; that the final nineteen members of the Indictment Panel be selected by lot from a larger panel of thirty nominees; that prior to such final selection the group of thirty nominees shall be examined by the Presiding Superior Court judge to insure they meet the qualifications set forth in Penal Code §§ 893 894 and 897; that the names of all prospective nominees be selected from the voter registration lists as well as some other source if necessary to foster the policy of selection at random from a fair cross-section of the community.

**RECOMMENDATION 4: NO CHANGE IN SELECTION OF
INVESTIGATIVE PANEL**

The Committee recommends no change in the present system of selection as to nominees for the Government Investigative Panel because of the special nature of the duties there involved. However, the selection of individuals trained in subjects such as economics, finance, engineering and accounting would provide a beneficial diversity to the Government Investigative Panel.

The Committee finds the low compensation of \$10.00 per day, the length of term of service of one year, and the meeting day (Tuesday or Wednesday) have also operated to prevent blue-collar workers, poor persons and young persons from serving on the Grand Jury.

RECOMMENDATION 5: COMPENSATION OF \$30 PER DAY

The Committee recommends each member of both panels be compensated for each day's service at the rate of \$30.00 per day, plus authorized expenses.

RECOMMENDATION 6: SIX-MONTH TERM

The Committee recommends the length of the term of service of the Indictment Panel be reduced to not more than six months.

RECOMMENDATION 7: MEET ON SATURDAYS

The Committee recommends the Indictment Panel shall have the option of meeting on Saturdays, thereby giving greater opportunity for service to persons with regular jobs. District Attorney Miller states his staff is ready to cooperate with such a schedule, if such is the desire of the Indictment Panel.

3. *What Types of Cases Should be Presented before the Indictment Panel?*

The Committee is concerned about the possible over-use of the indictment process as expressed earlier in this report. The members of the Committee wish to make it clear we have the fullest confidence and respect for our present District Attorney and his staff, and we have no doubt he will guard against the possibility of such over-use to the best of his ability. But we are here attempting to set down guidelines for the District Attorneys to follow, and we believe there is a need to place some check against the possibility of over-use in the future.

The Committee believes the District Attorney should not, in the absence of new or additional evidence or obvious error in application of law, present cases to the Indictment Panel in order to override a Municipal Court magistrate's conclusion that the evidence is insufficient to hold the accused for trial; nor that he should present cases to the Indictment Panel in order to override a Superior Court judge's decision to dismiss the information or indictment for insufficient evidence by seeking an indictment based upon the same evidence.

RECOMMENDATION 8: OPPOSES OVERRIDING MAGISTRATE

Therefore, the Committee recommends the District Attorney be precluded from presenting a case for indictment where a complaint has been dismissed following a preliminary hearing based upon the same evidence, and in which the same individual was the defendant, unless a full and complete explanation is stated on the record as to why an exception should be made, and the Indictment Panel votes to determine whether an exception should be granted.

RECOMMENDATION 9: OPPOSES OVERRIDING SUPERIOR COURT JUDGE

The Committee recommends the District Attorney be precluded from presenting a case for indictment where an information or indictment has already been set aside for insufficiency of the evidence by a Superior Court judge based upon the same facts and in which the same individual was the defendant, unless a full and complete explanation is stated on the record as to why an exception should be made, and the Indictment Panel votes to determine whether an exception should be granted.

We are concerned, too, about the practice of returning indictments in those cases where criminal complaints have already been filed based on the completion of a pre-arrest investigation, the defendant arraigned at a public hearing in Municipal Court, and where his preliminary hearing date has been set. Where such a case is presented to the Grand Jury prior to the preliminary hearing, and an indictment returned, the preliminary hearing never takes place. This practice can result in misleading defense counsel.

RECOMMENDATION 10: OBLIGATION OF DISTRICT ATTORNEY TO
INFORM DEFENSE COUNSEL

The Committee therefore recommends the District Attorney be obliged to inform the accused or his counsel as soon as practicable of his intention to present the case to the Indictment Panel. The District Attorney should make a good faith attempt to state his intentions at the time the defendant is arraigned in Municipal Court.

RECOMMENDATION 11: TEN-DAY LIMITATION

The Committee recommends that if the District Attorney intends to present the matter to the Indictment Panel where a defendant has been arraigned on a complaint and is in custody, the District Attorney be required to present the matter to the panel within ten days of the defendant's arraignment on the complaint. Such requirement would not preclude presentation of the case to the Indictment Panel subsequent to a defendant's release from custody.

RECOMMENDATION 12: INFORM PANEL IF COMPLAINT FILED

The Committee recommends that in all cases where a complaint

has been filed, the accused arraigned, and preliminary hearing date set, the Indictment Panel be informed of such facts prior to the presentation of evidence.

RECOMMENDATION 13: RIGHT TO REFUSE TO HEAR EVIDENCE

The Committee recommends members of the Indictment Panel be fully informed of their right to refuse to hear evidence in any case if they feel the case should proceed to a preliminary hearing; and that wherever such question is raised by any member of the Indictment Panel the District Attorney shall explain fully his reasons for proceeding by way of indictment.

4. *How Should the Proceedings be Conducted?*
(a). *Orientation and Instruction.*

The Committee finds the orientation and instruction of Grand Jurors for their task has been inadequate.

RECOMMENDATION 14: UNIFORM GUIDE BOOK

The Committee recommends the state publish a uniform guide book for use by all counties in the state, outlining in detail Grand Jury powers and duties, and fully explaining all laws pertaining to the process.

RECOMMENDATION 15: MEETINGS WITH PRESIDING JUDGES

The Committee recommends that in order to facilitate the use of such a guide book the Presiding Judge of the Superior Court, or his designated representative, in addition to his charge to the Grand Jury, be encouraged to meet informally with the panels to discuss and answer questions relating to matters contained in the book; and that all panel members be fully informed of their right to request such meetings.

(b) *Procedures.*

RECOMMENDATION 16: ALL STATEMENTS RECORDED

The Committee recommends all proceedings before the Indictment Panel be recorded, including all statements by the prosecutor, except that the voting deliberations of the panel members in the absence of all other personnel shall not be recorded and shall remain secret.

The Committee finds that in the past, when individual Grand Jurors wished to ask questions of witnesses in criminal cases, they were required to submit those questions in writing to the Deputy District Attorney, who would then determine whether the question was a proper one in his judgment; and if so, he, the Deputy District Attorney, would ask it. The Committee finds nothing improper in this practice, and takes note of the fact that this practice is followed throughout the state.

RECOMMENDATION 17: WRITTEN QUESTIONS MADE AVAILABLE

The Committee recommends, however, that a record be kept of all written questions submitted by Grand Jurors which shall be made available to defense counsel upon request.

RECOMMENDATION 18: POWER TO ADVISE WITNESS NOT TO ANSWER

The Committee further recommends that whenever Grand Jurors ask questions directly of the witness, the Deputy District Attorney be given authority to instruct the witness not to answer on the ground the question is improper.

Numerous suggestions have been made to the Committee that certain elements of an adversary proceeding should be added to the indictment procedure. The Committee finds the indictment process does serve a legitimate function in criminal law, and that much of that function might be destroyed by requiring its proceedings to be adversary in character. Therefore, we oppose turning the indictment process into an adversary proceeding. The Committee does believe, however, that some policy changes by the District Attorney should be encouraged.

RECOMMENDATION 19: INVITATION TO ACCUSED TO TESTIFY

The Committee recommends in those instances where either the District Attorney has valid, exculpatory information in his possession negating the guilt of the accused or where the District Attorney has reasonable cause to believe there is valid information negating the guilt of the accused in the possession of the accused, the District Attorney invites the accused to testify absent any compelling reason to the contrary. Refusal by the accused to accept such invitation should neither be disclosed to nor discussed by the Indictment Panel.

RECOMMENDATION 20: PROSECUTOR'S RIGHT TO OUTLINE
LAW AND FACTS

The Committee recommends prosecutors be advised they have the right to make an opening or closing statement to the Indictment Panel with regard to the facts presented and the law relating to such facts, so long as a record is made of such statements.

RECOMMENDATION 21: ARGUMENTS TO GRAND JURY INADVISABLE

The Committee recommends prosecutors be further advised they should not make statements or arguments in an effort to influence Grand Jury action relating to an indictment.

RECOMMENDATION 22: USE OF JUDGE OR REPRESENTATIVE

The Committee recommends members of the Indictment Panel be encouraged to utilize the counsel of the Presiding Judge of the Superior Court, or his designated representative, to resolve legal questions and instructions on the possible applicable law.

RECOMMENDATION 23: DISCLOSURE OF DEFENSE EVIDENCE

The Committee recommends all members of the Indictment Panel be fully informed of their right to request presentation of evidence for the accused whenever they have reason to believe that other evidence might explain away the charge.

RECOMMENDATION 24: INDEPENDENT STATUS

The Committee recommends each panel hereafter be advised, prior to beginning service, in clear specific terms, of its status as an independent body, and that it shall at no time serve as an arm or "rubber-stamp" of the District Attorney, nor of any other government agency.

RECOMMENDATION 25: DISCLOSURE OF EVIDENCE NEGATING GUILT

The Committee recommends the prosecutor be obligated to disclose to the Indictment Panel any evidence which he knows to a reasonable certainty will tend to negate guilt.

RECOMMENDATION 26: PRIOR CONVICTIONS NOT TO BE DISCLOSED

The Committee recommends any prior conviction of an accused, unless part of the offense for which an indictment is sought, not be disclosed to the Indictment Panel.

On the civil side, the Committee believes the investigatory power relating to city governments needs to be clarified.

A recent study by the Los Angeles District Attorney's office confirms the Committee's view that the Grand Jury has the power to investigate city government.

RECOMMENDATION 27: POWER TO INVESTIGATE CITY OFFICIALS

Therefore, the Committee recommends the present law be amended to make clear the investigative panel's power to examine the functions of city government officials and city government offices in the same manner as county and special district governmental operations.

Appendix A

GRAND JURY QUESTIONNAIRE

PLEASE CHECK ONE:

<p>A. Your County</p> <p>Alameda _____</p> <p>Los Angeles _____</p> <p>Orange _____</p> <p>Sacramento _____</p> <p>San Bernardino _____</p> <p>San Francisco _____</p> <p>Santa Clara _____</p> <p>San Diego _____</p> <p>Other _____</p>	<p>Your Occupation</p> <p>Superior Court Judge _____</p> <p>Municipal Court Judge _____</p> <p>Deputy District Attorney _____</p> <p>Public Defender _____</p> <p>Attorney _____</p> <p>Law School Professor _____</p> <p>Former Grand Juror _____</p> <p>Other _____</p>
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	Total Responses
I. SHOULD THERE BE A GRAND JURY?	
1. Should it be:	
A. Kept as presently selected and operated in California.	YES <u>52%</u> NO <u>48%</u> 185
B. A two grand jury system—one investigatory and one criminal.	YES <u>75%</u> NO <u>25%</u> 229
C. Abolished entirely.	YES <u>8%</u> NO <u>92%</u> 142
D. Limited to investigatory ("watch-dog") functions.	YES <u>25%</u> NO <u>75%</u> 139
E. Limited to Criminal functions.	YES <u>8%</u> NO <u>92%</u> 124
F. Other: (1) Use two grand jury system only in larger counties	7
(2) Limited criminal grand jury to presentments.	1
II. HOW SHOULD THE GRAND JURY BE SELECTED?	
1. Should it be:	
A. Broadly representative of the community at large.	YES <u>85%</u> NO <u>15%</u> 179
B. "Blue Ribbon" in character.	YES <u>39%</u> NO <u>61%</u> 163
C. Selected from nominees of Superior Court Judges.	YES <u>76%</u> NO <u>24%</u> 198
D. Selected from the same source as petit jurors.	YES <u>35%</u> NO <u>65%</u> 162
E. Purposely controlled so that its makeup reflects that of the county, that is, have a "seat" for particular minority groups, e.g., racial, age, income or employment classifications.	YES <u>31%</u> NO <u>69%</u> 163
F. Other: (1) Use Superior Court Judge nominees only in investigatory grand jury.	15
(2) Only investigatory grand jury should be "Blue Ribbon".	13
(3) Only criminal grand jury should be selected from same source as petit jurors	24

- (4) Only criminal grand jury should be broadly representative. 10
- 2. Should the term of members be staggered to provide for continuity? YES 62% NO 38% 253
- 3. Should the term of members be shortened? YES 20% NO 80% 238
 - A. Only Criminal Grand Jury should be shortened 11
 - B. Shorten to 6 month term 6
 - C. Shorten to 3 month term 1
- 4. Should a maximum age limit be set for eligibility to serve on the grand jury? What age? YES 40% NO 60% 239
 - Age 65 (36) Age 70 (33) Age 60 (12) Age 75 (5)

III. WHAT TYPES OF CASES SHOULD BE PRESENTED BEFORE THE GRAND JURY?

1. What types of cases are *always* or *almost always* presented?

- (1) Sex —118 (2) Narcotics — 92 (3) Public Officials— 60
- (4) Murder — 91 (5) Fraud — 32 (6) All Felonies — 14

A. If any, what are the features of these cases that require or favor presentation to the grand jury rather than the complaint-preliminary hearing procedure?

- (1) Protect Children 44
- (2) Secrecy 43
- (3) Faster to use grand jury 39
- (4) Avoid publicity 24
- (5) Protect informers 22
- (6) Complexity 12
- (7) Save money 9

B. If you are aware of any written guidelines or policies regarding the types of cases to be presented to the grand jury, please briefly state them.

- (1) No response

C. (If Applicable). As a prosecutor, what general factors do you or did you consider in determining whether to take a particular case to the grand jury?

- (1) Avoid cross-examination 4
- (2) Protect witnesses 4
- (3) Save time 3

2. Should the:

A. Prosecutor be permitted to seek an indictment in a case which a magistrate has refused to bind-over following preliminary hearing?

YES 63% NO 37% 208

B. Grand Jury be informed if a case presented to it was previously the subject of a preliminary hearing at which bind-over was refused?

YES 89% NO 11% 248

C. District Attorney be precluded from resubmitting a case to the grand jury where an indictment has previously been refused?	YES <u>37%</u>	NO <u>63%</u>	241
D. If so, are there any circumstances under which he should be permitted to resubmit the case to the grand jury?			
(1) New evidence			98
(2) At District Attorney's discretion			4
3. What types of cases SHOULD be presented?			
(1) As is now done	— 28	(2) Public Officials	— 27
(3) Narcotics	— 20	(4) Child molestation	— 17
(5) Sex	— 15	(6) Fraud-complex case	— 10

IV. HOW SHOULD THE GRAND JURY PROCEEDINGS BE CONDUCTED:

1. Should any elements of an adversary proceeding be present in matters presented to the grand jury?	YES <u>41%</u>	NO <u>59%</u>	202
A. If so, which elements should be present?			
(1) Defendant and his attorney allowed to be present			21
(2) Right to cross-examine witnesses			11
(3) Right to testify			8
(4) All elements			8
2. Should the grand jury:			
A. Be furnished counsel, other than the prosecutor, for advising the jury regarding evidence it should properly consider?	YES <u>60%</u>	NO <u>40%</u>	246
B. Be furnished counsel, other than the prosecutor, for advising the jury regarding elements of the crime and amount of proof required to be met before indictment might issue?	YES <u>57%</u>	NO <u>43%</u>	244
C. Be furnished counsel, other than the prosecutor, for examination of witnesses on behalf of the jury?	YES <u>48%</u>	NO <u>52%</u>	189
D. Be precluded from considering any evidence which would be inadmissible, over proper objection, at a preliminary hearing?	YES <u>70%</u>	NO <u>30%</u>	188
E. Be furnished a Superior Court judge during proceedings to rule on admissibility of evidence?	YES <u>35%</u>	NO <u>65%</u>	184
F. Receive from the District Attorney any information, evidence, "argument", or "instruction" without a court reporter?	YES <u>30%</u>	NO <u>70%</u>	227

G. Be encouraged to question the witnesses independently rather than through the District Attorney?	YES <u>51%</u>	NO <u>49%</u>	203
H. Be given the right to request the presence of an individual whose acts are the subject of investigation together with his attorney?	YES <u>76%</u>	NO <u>24%</u>	214
3. Should all individuals whose acts are the subject of an investigation or action by the grand jury be:			
A. Given the right to appear before the grand jury with counsel, whether or not requested to appear by the jury?	YES <u>48%</u>	NO <u>52%</u>	243
B. Permitted to appear during such investigations only in the capacity of observers?	YES <u>8%</u>	NO <u>92%</u>	210
C. Permitted to appear before the jury, with counsel, whether or not requested to appear by the jury?	YES <u>44%</u>	NO <u>56%</u>	220
D. Given notice of the fact?	YES <u>53%</u>	NO <u>47%</u>	199
E. Given the opportunity, whether a complaint has been formally filed or not, to have evidence against them suppressed which is in the possession of the prosecuting officials?	YES <u>27%</u>	NO <u>73%</u>	216
4. If the opportunity to suppress is granted, should such suppression proceedings be conducted before presentation of the case to the grand jury?	YES <u>45%</u>	NO <u>55%</u>	175
5. Should grand jurors be required before service to complete a basic course in criminal law and procedure during which they would be instructed concerning the elements of major crimes, etc.?	YES <u>18%</u>	NO <u>82%</u>	256
6. Should grand jurors be furnished with and have available for their use any books on law to assist them?	YES <u>33%</u>	NO <u>67%</u>	250
7. Does the prosecutor have an obligation to disclose evidence to the grand jury favorable to the defendant?	YES <u>80%</u>	NO <u>20%</u>	246
8. If so, under what circumstances?			
(1) All circumstances			34
(2) In mitigation			15
(3) Where he knows of material evidence			14

Question Number

Additional Remarks

Appendix B

RESULTS OF DISTRICT ATTORNEYS' QUESTIONNAIRES

I. BREAKDOWN OF THE DISPOSITION OF GRAND JURY CASES FILED IN EACH COUNTY DURING 1970

(1) *What has been the ultimate disposition of cases initiated by indictment?*

County #1—We do not have a breakdown of the cases presented to grand jury in 1970. However, our educated guess is that over 90% concern narcotics violations. Further, we do not have a separate tabulation of the disposition of the indictments.

County #2—Number of Indictments returned	130
Number of defendants indicted	241
Number of defendants convicted	126
Number of defendants acquitted	00
Number of defendants dismissed	6
(1 dec'd, 1 by court, 4 by D.A.)	
Other: (Incompetent)	4
	136

Number of defendants disposed of 136
(Remaining cases were still pending as of this report.)

County #3—We don't have a breakdown of the disposition of cases taken to the grand jury during 1970. We took 179 cases to the grand jury during that period.

County #4—No response to this question

County #5—Cases Indicted	129
Narcotic Violations	105
Homicideand Manslaughter	6
Major Fraud and Theft, including checks	9
Vice (Bookmaking and Prostitution)	2
Sex Crimes	1
Crimes Against Persons (Assault) Kidnapping, Robbery)	5
Arson	1
Amended Indictments	11
Persons Indicted	261
Disposed of	93
Pending in Court	145
Never Arraigned on Indictment	23

County #7—Confidential response

II. PROCEDURE PRIOR TO PRESENTATION OF CASE:

(1) *What is the policy with respect to selection of cases for presentation to the grand jury?*

County #1—All narcotic cases involving an undercover agent who has been active over a period of time in securing evidence against numerous violators; sex offenses where the victims are under fourteen years of age or unusual brutality or indignities are suffered by the victim; homicide and fraud cases where factual situation indicates a lengthy preliminary hearing is very likely.

County #2—Cases are selected for presentation to the grand jury if they are thought to be of general interest to the jurors in their examination of conditions throughout [COUNTY]. In general, cases where the facts are clear and the evidence is reliable are presented, and in most cases the accused is already under

arrest. The majority of cases presented are homicides, robberies, burglaries, and narcotics cases where undercover police officers are involved.

County #3—Generally, we go to the grand jury to avoid the preliminary examination; statute just about run out; protect special employees; get statements of adverse witnesses; seeking early trial, etc.

County #4—Selection of cases for presentation to the grand jury is primarily left to the individual deputy, who must obtain permission of the chief deputy upon convincing him that it is suitable in light of the policy manual.

County #5—Cases that indicate an undue consumption of time for preliminary hearing, due to number of defendants, number of attorneys, or number of witnesses; cases in which the preliminary hearing has been postponed and delayed for an unreasonable length of time; cases dismissed at preliminary hearing for legal reasons rather than factual problems, and in which further review is desirable; cases where witnesses are out of state and we wish to assure a firm date for their testimony; cases involving public employees or officials; cases where it is desirable to avoid potential publicity and fanfare attending a preliminary hearing.

County #6—Initially, the deputy district attorney will obtain permission from his immediate superior as well as from certain designated members of the executive staff of the office. The types of cases traditionally which we present to the grand jury are those cases where (a) the Statute of Limitations is in danger of running, (b) sexual cases of a delicate nature where a witness-victim is of tender years, (c) cases of alleged official misconduct by public officials, (d) some cases involving organized crime where the safety of a witness can be more readily guaranteed, (e) controversial cases wherein a distinct public interest has been expressed, (f) cases where secrecy is most important to insure arrests and to insure the possibility that continuing investigations can be completed, (g) cases where there are multiple defendants but not all are in custody or available for concurrent arrests and thus one preliminary hearing.

County #7—Confidential response

- (2) *Is an off-the-record statement made by the Deputy District Attorney prior to presentation of the case? Is it considered necessary to make the statement off the record?*

County #1—Yes, we limit the statement to the identification of the witnesses to testify and a brief resume of their testimony and the nature of the indictment we are presenting for their consideration. We remind the jury their function is not to determine guilt but is limited to a determination of whether there are reasonable grounds to believe the crime was committed and that defendant committed same. We believe it advisable to make the statement off the record.

County #2—Prior to presenting evidence, a very brief statement is made by the District Attorney sufficient to acquaint the jurors with the names of witnesses, location of events, and the type of case to be presented. This is done so that the required admonition by the jury foreman (Penal Code Section 939.5) will have some meaning to the jurors.

County #3—An opening statement is made in complicated cases. This isn't on the record as my best recollection is that the code speaks of "testimony". We wouldn't oppose such being on the record as we restrict our statements to what would be proper in such cases.

County #4—Yes, a statement of the case and the applicable law is made to the grand jury. Traditionally, this has been off the record, but I have no reason to consider it necessary to make the statement off the record.

County #5—When an opening statement is made, an effort is made to restrict it to a discussion of the elements of the crimes for which indictments are being sought.

County #6—Prior to the entire grand jury hearing the formal presentation of the case, our deputy initially presents the case verbally to the Criminal Complaints Committee composed of nine members of the jury wherein he outlines the nature of the case, number of witnesses expected to testify, the alleged violations of law, etc., thus, an informal, secret meeting made to the Committee members off the record. Just prior to the formal presentation of the case to the entire jury, an off-the-record statement is made by the deputy outlining the theory of the case together with the violations of the law which he expects to prove together with the comment as to the names and number of witnesses that will testify. Inasmuch as statements by counsel are not evidence, it would appear that the better policy would be for the deputy district attorney to make all informal statements pertaining to the case off the record.

County #7—Confidential response

(3) *Does the statement include instructions on the law and on the elements required for the offense charged? Does the statement include a discussion of the facts?*

County #1—We do not instruct on law unless requested by grand jury and then only to the extent of reviewing code sections involved. They are informed of the elements of crime as set forth in indictment. Facts are discussed only to the extent set forth in response to question number (2) above.

County #2—A brief statement relative to the legally required elements of each crime is given whenever it is required.

County #3—Depends on experience of grand jury and how complicated the case might be. We find it usually makes more sense to apply law to facts at end of presentation.

County #4—Yes, it is more in the nature of an open statement to the jury so that the jury can sensibly follow the evidence as it is presented.

County #5—See response to question (2) above.

County #6—Generally, the statement by the deputy just prior to the taking of formal evidence does not include legal instructions and/or the elements required for the offense charged. However, this basically is an optional procedure. It should be noted that each and every grand juror has access to a "program" of the case wherein there is listed fundamental concepts of law pertaining to the cases as well as tentative witnesses and exhibit lists together with an outline of the alleged specific violations of law.

As hereinabove indicated, the opening statement will to some degree touch upon the facts in the course of briefly outlining the case to the grand jury. However, a specific discussion of detailed facts should not be undertaken because of the inherent danger of a deputy inadvertently commenting on said facts which could conceivably be prejudicial to the suspect's rights.

County #7—Confidential response

(4) *In the event the case was dismissed at the preliminary hearing, is the grand jury informed on that fact?*

County #1—Not necessarily, although quite frequently we do so.

County #2—Cases which have been dismissed at preliminary hearings are seldom presented to the grand jury. In a like manner, cases where an indictment is refused by a grand jury are seldom, if ever, presented to the grand jury after dismissal by a municipal court judge, this fact would be made clear to the grand jury prior to presentation of evidence.

County #3—Yes, after they have voted.

County #4—Yes, although it is a rare instance where we take cases to the grand jury which were dismissed by the committing magistrate.

County #5—The grand jury is always informed if the case was dismissed at the preliminary hearing. They are also told if a complaint is then pending before a magistrate and our reason for bypassing the preliminary hearing and presenting the case to the grand jury.

County #6—Yes

County #7—Confidential response

(5) *As a matter of policy, are cases dismissed at the preliminary hearing taken to the grand jury?*

County #1—No. A deputy is required to make a report of such dismissal, the reason, if any, given by the court for the dismissal, and his evaluation of the case from a prosecution standpoint. This is reviewed by a senior deputy, who makes his recommendation to the Assistant District Attorney or District Attorney, who in turn makes the decision as to whether to present the case to grand jury, usually after reading transcript of preliminary hearing.

County #2—See response to question number (4) above.

County #3—Depends on case.

County #4—I would say that there is no policy in regard to taking cases to the grand jury that have been dismissed at preliminary hearings. We have, in fact, done the reverse in one case where the grand jury refused to indict, we took through preliminary and successfully prosecuted the defendant.

County #5—We present cases to the grand jury that have been dismissed at the preliminary hearing only when we feel there has been an incorrect interpretation of the law by a magistrate, and we would like further review of the legal issues by the Superior Court or Appellate Courts.

County #6—No.

County #7—Confidential response

(6) *Does the grand jury have a legal adviser acting separately from those deputies who present cases? If so, how is the adviser selected?*

County #1—We have a deputy who is primarily assigned to act as legal adviser to the grand jury, who is selected by the District Attorney. He presents most of the narcotic cases, primarily because of volume submitted at a given session. Nearly all other cases are presented by a senior deputy who will have the responsibility of prosecuting the case in the event an indictment is returned.

- County #2—It has been the practice in [COUNTY] that the chief assistant district attorney be the advisor to the grand jury. He also presents the majority of cases which they hear.
- County #3—Yes. District Attorney himself or one of the assistants.
- County #4—In addition to deputies who present cases, the chief deputy and/or the district attorney constitutes the legal advisor for the grand jury.
- County #5—The grand jury does have a legal advisor acting separately from those deputies who present cases. The District Attorney assigns a senior member of the special operations section as advisor. The advisor approves cases to be presented and determines who will present them.
- County #6—Yes. He is appointed by the District Attorney.
- County #7—Confidential response

III. PROCEDURES FOLLOWED DURING THE PRESENTATION OF CASES:

(1) *How are questions by grand jurors handled?*

- County #1—The juror is asked to make a note of the question and to withhold it until after witness leaves the room.
- County #2—All questions by individual grand jurors are reduced to writing and handed to the District Attorney. The District Attorney then asks the questions in the proper form. If the question is an improper one (i.e., questions about prior criminality or unrelated crimes, etc.), the District Attorney does not ask the question. After the case has been submitted to the jury and voted upon, the reason for not asking the question is explained to all the jurors.
- County #3—Don't ask question of witness. Ask District Attorney and he will ask, if proper.
- County #4—We allow questions by the grand jurors of witnesses; however, if they touch on inadmissible evidence, we advise the witness not to answer.
- County #5—The grand jurors are requested to submit any questions in writing to the deputy district attorney presenting the case. He then screens the questions, answering only those he feels are pertinent.
- County #6—If a grand juror has a question to ask of a witness, he is requested to submit said question in writing to the deputy district attorney presenting the case who will then exercise discretion as to whether he shall or shall not ask that question of the witness. His guidelines for this determination are dictated by rules of evidence, the possible prejudicial effect on the case with respect to the suspect's rights, and last, but by no means least, good common sense.
- County #7—Confidential response

(2) *Are questions required to be submitted in writing and thereafter screened by the deputy?*

- County #1—The questions are not required to be in writing. The questions are "screened" only to the extent that the deputy puts them in the proper form. The witness is then recalled and the deputy propounds the question. We do counsel against the asking of completely irrelevant questions, but if it is the consensus of the grand jury that a question should be asked, the deputy does so.
- County #2—See response to question number (1) above.
- County #3—No.
- County #4—We have found that questions submitted in writing constitute such a cumbersome procedure that it is totally unsatisfactory not only to the jurors but to the deputy as well.

County #5—See response to question number (1) above.

County #6—See response to question number (1) above.

County #7—Confidential response

(3) *Is the prospective defendant ever invited to make a statement? If so, under what circumstances?*

County #1—Yes. All persons holding public office whether elected or appointed. Also, professional people whose livelihood is particularly dependent upon their reputation and the goodwill of the general public.

County #2—Prospective defendants are normally not subpoenaed to the grand jury hearing, but there have been investigations where a prospective defendant was invited by letter to attend and testify if he desired.

County #3—In any case if we believe he'd do so.

County #4—In investigative matters a prospective defendant may be invited to make a statement. Ordinarily defendants against whom a case is clear are not invited to testify.

County #5—The prospective defendant is seldom invited to make a statement.

County #6—There are no set departmental guidelines in the area. However, traditionally suspects who are in custody on alleged violent crimes have not been invited to testify. Further, and in keeping with tradition, those persons holding public office in the county whose cases are before the grand jury are invited to come in and testify in their own behalf. It should be noted that it is entirely permissible for these people to have their attorney present in an adjoining room so that if a suspect, while under oath desires to consult his lawyer prior to answering a specific question put to him, he may ask for a recess so that he may do just that. Further, it is generally up to the sound discretion of the individual deputy presenting the case as to whether he shall send a letter of invitation to testify to a prospective defendant. Sometimes, our decision in this regard is simplified to a great extent by virtue of the fact that the grand jury itself may ask that the suspect be invited to come in and make a statement.

County #7—Confidential response

(4) *Is evidence favorable to the prospective defendant ever disclosed to the grand jury? If so, under what circumstances?*

County #1—Yes. There are two types of cases presented. One is where the evidence of guilt is overwhelming and in our opinion the favorable evidence is insufficient to create a reasonable doubt. The second type is where there is sufficient evidence for a prosecution case, but certain favorable evidence might indicate that a prosecution is not advisable or that successful prosecution is problematical. In the first type of case, we do not present the favorable evidence; in the second type we do so.

County #2—All evidence which is necessary to support an indictment is presented to the grand jury in the same manner it would be presented to a magistrate. In many instances, this includes evidence which could be helpful to a defendant (i.e., use of drugs or alcohol, exculpatory statements to police, etc.)

County #3—If questionable case, yes. For example, police officer shooting. We invite relatives, etc. of deceased who are all "shook up" and ask them to tell what they know about the case. Hard to keep out hearsay, etc. but they did have a chance.

- County #4—Such evidence is disclosed to the grand jury, and this generally arises in close cases where a jury may decide to go either way. As you can appreciate, generally there is no particular evidence favorable to a prospective defendant available to the prosecution in a run-of-the-mill criminal case.
- County #5—There are cases in which evidence favorable to the prospective defendant is disclosed to the grand jury. This is done where there are mitigating factors or there is a serious conflict in the evidence and it is desirable to have the grand jury weigh all of the factors pertaining to the case.
- County #6—Pursuant to Section 939.7 of the Penal Code, it is our policy that when a deputy district attorney is in possession of or has access to evidence favorable to a suspect's position that he should come forward with said evidence and present it to the grand jury notwithstanding the fact that it may tend to explain away the charge.
- County #7—Confidential response

Appendix C

September 27, 1971

TO: GRAND JURY COMMITTEE
FROM: SOL PRICE

I have read the first draft of the report of the Grand Jury Committee, and I am in agreement with the findings and recommendations, except as to the necessity for a Grand Jury at all.

It is my opinion, and I wish it filed as a minority report, that the use of a Grand Jury in criminal matters is expensive, unfair and unnecessary. It is also my opinion that the use of the preliminary hearing is unnecessary and that all felonies should be handled on the basis of the District Attorney filing a complaint in the Superior Court. However, if there must be a Grand Jury, I am in favor of the findings and recommendations contained in the first draft.

It is my feeling that the findings and recommendations should be more carefully drawn with regard to the elimination of redundancy. I also would not object to an amendment on recommendation 8 which would permit the District Attorney to present a case to the Grand Jury after dismissal at a preliminary hearing, provided he informed the Grand Jury of these facts.

I am sorry I must be out of town for this meeting. I want to commend all of you for the sincere and conscientious effort you gave this matter—especially the two young men, Lou and Mike, and I think Norbert has been an outstanding chairman and has kept us moving along on a very difficult and complex subject.

It has been a pleasure serving with you.

/s/ Sol Price