

**RESPONSE TO
2014-2015 GRAND JURY REPORT
RIVERSIDE COUNTY OFFICE OF COUNTY COUNSEL**

This report is long on conclusions but short on facts. It is incomplete, misleading and fails to address three critical components underlying the dispute: (1) the County Counsel's ethical and statutory duties to its client; (2) the County Counsel's objections to the grand jury's practice of manipulating the witness interview process to deny counsel to witnesses appearing before the grand jury; and (3) the grand jury's unsuccessful attempts to obtain a court order to disqualify the County Counsel from representing his client and the court's determination that the County Counsel may discharge its duties to its client by representing county witnesses before the grand jury.

In January of 2015, the County Counsel notified the grand jury's legal advisor, District Attorney Michael Hestrin, and issued an objection to the grand jury's practice of manipulating the witness interview process to deny counsel to witnesses as provided in Penal Code section 939.22. County Counsel expressed his concern about the civil grand jury's consistent practice of seeking to compel unsworn testimony from witnesses so that the witness's legal counsel may not be present in the grand jury room. He explained that the grand jury requests the presence of county employees and does not advise them whether or not their testimony will be taken under oath. They do so with the hope and expectation that they appear without counsel. If they appear without counsel, they then take the testimony under oath. If however, they appear with counsel, they then decide to take unsworn testimony. The County Counsel expressed his belief that the practice is inappropriate, unethical and constitutes an abuse of the civil grand jury process. The practice ceased after the County Counsel met with the District Attorney and the Presiding Judge. The County Counsel also advised the District Attorney and Presiding Judge that this practice was not limited to County witnesses but was a widespread practice used in investigations of other public agencies

Following is the response of the Riverside County Office of the County Counsel to the specific findings and recommendations in the above referenced Grand Jury Report.

FINDING NO. 1:

Conflict of Interest and Secrecy

AB 266 became law in January 2012. The law added Section 939.22(a) to the California Penal Code. County Counsel has interpreted this law, and applied the new law to him to represent the officials and employees of the County as to County civil matters brought before the Grand Jury, and to be present at all interviews of County employees that are to be interviewed under oath. County Counsel has attempted to attend one interview and directed, on three occasions, a Deputy County Counsel to represent County employees who have been called to give testimony in Grand Jury interviews. This presents a conflict of interest due to the incompatibility of the professional duties of the County Counsel to represent the County and the Grand Jury in the same manner.

This is a direct violation of California Penal Code §934(a). Conflict arises when County Counsel acts in a dual representative role.

The County Counsel's primary duty is to the BOS, not the employees. This conflict places an onerous and improper burden on the witness because such witness is not at liberty to speak openly and candidly while giving testimony. The witness faces retaliation or discipline by his/her department supervisor or manager due to the County counsel's presence (referenced in *McClatchy Newspapers v. Superior Court of Fresno County* 751 P 2d. 1329 (Cal. 1988)). It makes County Counsel cognizant of the nature of the Grand Jury's inquiry and the areas being reviewed, as well as, exactly what testimony was given by the witness. A witness could believe that such information may be relayed to the employee's department or managers. Even though County Counsel is admonished not to reveal the nature of the Grand Jury interview, the secrecy and integrity of the proceedings has already been compromised by County Counsel's mere presence, which taints the integrity of the interview.

The Office of the Attorney General, State of California, in an Opinion issued June 6, 2003, (02-1108) stated, in part:

... We believe that the Legislature's policy of preserving the secrecy of the grand jury proceedings is not only applicable when a grand jury is performing its criminal indictment function, but also when it is performing its civil watchdog function. In *McClatchy Newspapers v. Superior Court*, supra, 44 Cal.3d 1162, the Supreme Court observed:

The importance of secrecy is well established in the context of the grand jury's criminal indictment function. By the same token, when the grand jury conducts a watchdog investigation of local government operations as in the instant case, secrecy appears equally vital. Compared with the indictment proceedings, the efficacy and credibility of watchdog investigations no less required that witnesses testify without fear of reproach by their peers or their superiors. Through the watchdog investigation and report serve a difference social purpose than the criminal indictment, eliciting candid testimony is obviously critical to both functions of the grand jury.

Significantly, the separated and distinct functions of watchdog and indictment grand juries are sometimes intermingled, in the sense that watchdog inquiries into alleged corruption may involve the weighing of possible criminal indictments against county officials and other being investigated... Whether or not a watchdog grand jury actually undertakes the weighing of indictments, secrecy 'provides the proper atmosphere in which to generate uninhibited testimony from county employees who might otherwise be intimidated by political and employment considerations.'

Secrecy also serves to protect the reputations of those who may be unjustly accused during the course of a watchdog investigation. 'Grand jury secrecy... is "as important for the protection of the innocent as for the pursuit of the guilty." [Citation Omitted.] [Citation.]' (Id.at.pp. 1175-1176)

Response: County Counsel wholly disagrees with the finding.

The grand jury's attempt to define the County Counsel's clients is inaccurate. County Counsel has a legal and ethical duty to serve as legal advisor to the County Board of Supervisors, its officers and employees. (See CA Government Code §§ 26526, 26529 & 27642) Also the California Rules of Professional Conduct require County Counsel to act in the County's best interest by providing fair and competent legal advice

The Government Code, Rules of Professional Conduct and interpreting case law define the obligations and scope of the representation of County Counsel's clients. The mere fact that the grand jury disfavors the County Counsel fully and faithfully discharging his duties, as required by the Government Code and the Business and Professions Code is insufficient to require a change in the practices and representation of County Counsel's clients.

RECOMMENDATION NO. 1:

Conflict of Interest and Secrecy

To maintain secrecy, County Counsel, or its Deputy County Counsel, shall not represent an employee of the County when testifying before the Grand Jury, pursuant to California Penal Code §934(a). Rather than protecting county agencies from the Grand Jury's scrutiny, County Counsel shall be receptive to such inquiries.

Response: This recommendation will not be implemented because it is not warranted and not reasonable and because the County Counsel has not made inaccurate, incomplete, and misleading statements.

Respondent disagrees with the Grand Jury's statement that the Office of County Counsel's (County Counsel) shall not represent County employees in matters before the Grand Jury. Respondent takes particular issue with the Grand Jury's legally unsupportable position that the County Counsel should ignore his statutory and ethical duties by not representing county employees as his clients and by not "protecting County agencies from Grand Jury scrutiny..." The Grand Jury clearly does not fully understand the role of County Counsel, nor does it understand the limits of grand jury action.

To suggest that the County Counsel abdicate this role is without reason or legal support. To follow this recommendation would subject the County Counsel and the subordinate lawyers to discipline from the State Bar for a failure to protect the client's interests and for failing to competently act as a lawyer.

Further, the Grand Jury's concern on the issue of secrecy was addressed by the Legislature in adopting Penal Code Section 939.22. That section states in pertinent part that:

(a) Any witness who is called to give testimony under oath before a civil grand jury may have counsel present on his or her behalf while he or she is testifying. Any counsel present before the grand jury pursuant to this subdivision shall comply with all of the following:

(1) Counsel shall not object to any questions asked of the witness or otherwise speak to the grand jury, but may advise the witness during the course of the examination.

(2) Counsel shall not disclose or use anything heard in the grand jury room other than in the representation of the witness he or she represents.

(b) A violation of this section by counsel shall be a violation of the Rules of Professional Conduct and may be reported to the State Bar of California.

There is no evidence of, nor has there been an allegation of a violation of Penal Code Section 939.22. This strong admonition is sufficient to protect the secrecy concerns of the grand jury, thereby rendering their findings and recommendations speculative.

FINDING NO. 2:

Transparency and Accountability

County Counsel has advised department heads, on or about January 21, 2015, to delay release of information to the Grand Jury, which is a violation of the California Public Records Act (Gov. Code §§6250-6276.48)(PRA). County Counsel's actions obscure the transparency and accountability throughout the County.

As the Court in *Monroe v. Garrett* (1971) 17 Cal.App.3d 280, 284 [94Cal.Rprt.531] observed:

In our system of government, a grand jury is the only agency free from possible political or official bias that has an opportunity to see the picture of crime and the operation of government relating thereto on any broad basis. It performs a valuable public purpose in presenting its conclusions drawn from that overview. The public may, of course, ultimately conclude that the jury's fears were exaggerated or that its proposed solutions are unwise. But the debate which reports, such as the one before us, would provoke could lead only to a better understanding of public governmental problems. They should be encouraged and not prohibited.

Response: County Counsel wholly disagrees with the finding.

Respondent disagrees with the Grand Jury's statement that "County Counsel's actions obscure the transparency and accountability throughout the County." The Grand Jury finding makes this bold assertion with no facts or examples where the Grand Jury was denied any document to which they were lawfully entitled.

County Counsel has a legal and ethical duty to serve as legal advisor to the County Board of Supervisors, its officers and employees. (See Government Code §§ 26526, 26529 & 27642) Further, the California Rules of Professional Conduct require County Counsel to act in the County's best interest by providing fair and competent legal advice.

The Grand Jury is only entitled to any public record to which any member of the public is entitled. (Penal Code §921). The Grand Jury has no superior right to public records beyond that of any other citizen. Despite the Grand Jury's protestations, they are simply not entitled to access to "all" records; they are only able to access public records.

One of the various duties and obligations of County Counsel in representing its client, the County of Riverside, is to protect against inadvertent disclosure of attorney-client and attorney work-product privileged documents, as well as documents protected by Constitutional, statutory or common law privileges. The law is clear - - the grand jury is not entitled to such information. The Grand Jury's assertion that County Counsel should not be allowed to provide legal advice to its client on document requests from the Grand Jury is misguided and contrary to the County Counsel's ethical and statutory duties to its client. Expecting its client to fend for itself and not avail itself of counsel with regard to requests made by the Grand Jury is a dereliction of County Counsel's responsibilities. The County Counsel, by discharging its lawful duties and responsibilities by advising its client, in no way inhibits the Grand Jury from completing its work. Rather, the County Counsel's advice to its client on these matters merely insures that the Grand Jury is receiving all public records to which it is entitled under the law. No more and no less.

Each year, the County receives dozens of inquiries from the grand jury pertaining to its operations, programs and services. The grand jury often submits its requests in writing for information to the various county departments. There are dozens of site visits and release of information on County programs and services that never involve the County Counsel's Office.

This "Finding" is indicative of the Grand Jury's misunderstanding of the role of County Counsel to represent its client, the County of Riverside and its constituent entities. Throughout the 2014-2015 term, the County Counsel properly discharged his ethical and statutory duties pursuant to Rules 3-110, 3-310, and 3-600 of the California Rules of Professional Conduct relative to dealings with the Grand Jury.

RECOMMENDATION NO. 2:

Transparency and Accountability

County Counsel shall advise department heads to allow access to all documents requested by the Grand Jury. The department shall provide assistance by helping identify records and information relevant to the request, which is part of the PRA, and suggesting ways to overcome any practical basis for denying access to PRA documents (see PRA §6253.1). Any denial of a request by the Grand Jury must be justified in writing, by demonstrating that the record is exempt or that the public interest in confidentiality outweighs the public interest in disclosure.

Response: This recommendation will not be implemented because it is not warranted and not reasonable.

The Respondent disagrees with this recommendation to the extent that it implies that the Grand Jury is entitled to "all documents". It is clear that the Grand Jury is entitled to all public

documents that would be accessible by any other member of the public. The Grand Jury will continue to have access to the public records and information to which it is entitled pursuant to Penal Code Section 921 and interpreting case law.

FINDING NO. 3:

Inaccurate, Incomplete and Misleading Statements

The 2012-2013 Riverside County Grand Jury Report, which reflected the time period when the present County Counsel was then City Attorney for the City of Riverside, indicated the reason he revealed confidential information, was “to make them aware of what the Grand Jury was doing.” On May 20, 2013, he was admonished in writing by County Counsel. (See Attachment #1)

In a letter or reply dated May 21, 2013, from Riverside City Attorney, to the County of Riverside County Counsel (see Attachment #3), he excused his actions with the following statement, in part:

...The reference to the nature of the pending Grand Jury Investigation was made in order to assist the District Attorney, County Counsel, and the presiding judge in their evaluation as to the appropriateness and legality of the Grand Jury’s conduct.

In a letter to the Presiding Judge of the Riverside County Superior Court dated July 10, 2013, the then City Attorney responded to a 2012-2013 Grand Jury Report by inaccurately stating, in part:

...As the court is aware, the Grand Jury is not a wholly independent body. Rather, it is under the control of the Superior Court and its Presiding Judge...

The Grand Jury is an investigative arm of the superior court and has judicial, as well as, investigatory and inquisitional responsibilities and powers as defined in California Penal Code Sections 888 through 945. Once the Grand Jury is duly impaneled and sworn, its functions are conducted as a separate and independent body, acting apart from the jurisdiction of the court, beholding to no one body, entity or court.

A letter from the current County Counsel to the Grand Jury dated January 8, 2015, misstates the Penal Code by omitting words, “at all times,” intrinsic to the Penal Code §934(a).

Response: County Counsel wholly disagrees with this finding. The statements made by County Counsel are accurate reflections of the law.

RECOMMENDATION NO. 3:

Inaccurate, Incomplete, and Misleading Statements

County Counsel shall refrain from making inaccurate, incomplete, and misleading statements.

Response: This recommendation will not be implemented because it is not warranted and not reasonable and because the County Counsel has not made inaccurate, incomplete, and misleading statements.

Merely because the grand jury may disagree with statements made by the county counsel does not render those statements "inaccurate, incomplete, and misleading". Unfortunately, this erroneous perception by the grand jury is driven in large part by their lack of understanding of the County Counsel's role in County government and a lack of understanding of their own duties and powers enumerated in the Penal Code.

FINDING NO. 4:

Obstruction of the Grand Jury

The Grand Jury has a twelve-month period to complete its work. Delay can effectively foreclose Grand Jury scrutiny, and a strategy of delay is apparent in the conflict of interest with County Counsel who is a legal representative of both Grand Jury and the agencies it seeks to examine. County Counsel has made numerous attempts to thwart the Grand Jury's investigations of departments of the County. This obstruction included attempts to block access to information, delaying the Grand Jury's hearings, by requiring subpoenas, making access to witnesses and records difficult and invoking attorney-client privilege to protect the 18,000 plus County employees when such privilege may not exist rather than the legitimate interests of the 2.2 million County residents.

County Counsel has devised a plan, as evidenced by an email dated December 4, 2014, (see Attachment #2), to hamper the process of the Grand Jury's pursuance of its legal and authorized duties granted them under California Penal Code §925(a). County Counsel's scheme of orchestrating this plan is accomplished by advising department heads, in staff meetings, by email, and by PowerPoint presentations. This PowerPoint presentation contains significant references pertaining to Criminal Grand Juries, which does not apply to Civil Grand Juries.

His plan of action has the effect of disrupting the Grand Jury's mission by weakening and delaying the normal process of the Grand Jury's legal authority as outlined in California Penal Code §888 through §945. County Counsel's actions not only attempt to gain unauthorized information and insight into the areas being reviewed, but also in effect, to usurp the legal process for which the Grand Jury exists.

County Counsel's efforts to circumvent the Grand Jury's legal domain over its legal duties and jurisdiction constitute an obstruction of the operations of the Grand Jury.

County Counsel's response to Grand Jury inquiries are designed to obstruct transparency, protect the BOS, County agencies, and the Office of County Counsel from scrutiny, rather than to cooperate with the legitimate intergovernmental fact-finding and investigative functions of the Grand Jury. This finding discusses a few specific instances which are typical of the resistance the Grand Jury is encountering.

Evaluative techniques lead the Grand Jury to conclude the County Counsel and Executive Officer, using the email of December 4, 2014, that stated: "We will then coordinate with the affected County Department and Executive Office on the appropriate response in order to properly protect the interests of the County, its officials and employees," expressed plans to protect the BOS from another controversial Grand Jury Report, such as the 2013-2014 Grand Jury Report on Political Reform concerning CID funds. County Counsel has either been directed to, or on his own as evidenced by his current actions, chosen to ignore California Penal Code §934(a), which states, in part:

...Unless advice is requested, the judge of the court, or county counsel as to civil matters, shall not be present during the sessions of the grand jury.

A voicemail received by the Grand Jury foreperson on March 19, 2015, at 1:15 p.m., from County Counsel's Administrative Assistant, stated, "we don't represent the Grand Jury anymore," is also a violation of California Penal Code §934(a), which states, in part:

The grand jury may, at all times, request the advice of the court, or the judge thereof, the district attorney, the county counsel, or the Attorney General...

Response: County Counsel wholly disagrees with the finding.

The County Counsel's duties and obligations have been set forth above and are incorporated herein. Again, the grand jury misunderstands effective representation of clients as obstruction. This is simply not the case. County Counsel, in requiring compliance with the applicable procedural guidelines set forth in the Penal Code do not constitute "interference or obstruction". Rather, it represents appropriate representation of the County and its employees.

With regard penal code section 934 (a) which states in pertinent part that the grand jury "may, at all times, request the advice of the court, or judge thereof, the district attorney, the county counsel or the Attorney General..." , the key phrase, ignored by the grand jury, is "may, at all times, request". The plain language of the section does not create a mandatory duty on behalf of the county counsel to represent the grand jury as the grand jury so indicates. Rather, the legislature provided a range of four options for the grand jury to request legal advice. Further, the legislature does not require any of those entities to provide the requested advice, only that such advice may be requested. The grand jury's reliance on this language to create a mandatory duty on the county counsel to provide representation is misguided.

RECOMMENDATION NO. 4:

Obstruction of the Grand Jury

County Counsel shall discontinue interference with the work of the Grand Jury. County Counsel shall be available to the Grand Jury to provide advice, at all times, as to civil matters as stipulated in California Penal Code §934(a).

Response: This recommendation will not be implemented because it is not warranted and not reasonable and because it is based on an erroneous understanding of the law.

As stated above, Penal Code Section 934(a) does not place a mandatory duty on the County Counsel to provide legal advice to the Grand Jury. Rather, the legislature adopted a mechanism by which the Grand Jury could request legal advice from multiple sources including the Court, the District Attorney, the County Counsel and the Attorney General. Of these entities, only the County Counsel has a competing interest in representing parties who could appear before the Grand Jury. The County Counsel, as stated above, provides advice and represents the County, its Boards and employees. This primary representation is in conflict with providing advice to the Grand Jury. Therefore, the Grand Jury is free to seek advice from other sources as provided by the Penal Code. The County Counsel has represented, and will continue to represent, the County in matters before the Grand Jury. Such representation is not “interference” as perceived by the Grand Jury. Rather, it is the ethical representation of the County in compliance with Rule 3-300 of the State Bar Rules of Professional Conduct.

FINDING NO. 5:

Choice of Having Counsel

California Penal Code §939.22(a) permits a witness giving testimony under oath to have counsel present during a Grand Jury interview. It allows the witness to make the determination whether or not to have counsel present. It is not the determination of County Counsel. It is inappropriate for County Counsel or a Deputy County Counsel to represent the witness who is a County employee, when the Grand Jury is investigating a County department because; it violates the secrecy and confidentiality of the Grand Jury sessions.

County Counsel has advised County departments and special districts, if they have been contacted by the Grand Jury for information or to give testimony under oath, to then contact County Counsel for representation. This has given the impression County Counsel must be used by County employees, when in fact, said employees, if they choose to have representation, may bring an independent attorney.

The Grand Jury does not object to the County employee witnesses having counsel represent them, pursuant to California Penal Code §939.22, so long as it is not County Counsel pursuant to California Penal Code §934(a).

California Penal Code §939.22(c) states:

Nothing in this section shall be construed to grant a witness a constitutional right to counsel under the United States or California Constitutions nor grant any right to discovery for the subpoenaed witness.

Response: County Counsel wholly disagrees with this finding.

The County Counsel offers representation for county employees when they are called to appear before the Grand Jury. Such representation is voluntary and the decision to request such representation is left to the employee. The County Counsel has no power to require that an employee have representation from the County Counsel's office. This finding, as with many of the findings herein, is unsupported by any facts.

RECOMMENDATION NO. 5:

Choice of Having Counsel

When a witness, who is a County employee, desires to be represented by counsel, in a matter regarding the performance of his/her duties, or the operations of his/her department, the County shall allow or provide an attorney not affiliated with the County Counsel, to represent the witness assuring his/her rights are not violated.

Response: This recommendation will not be implemented because it is not warranted and not reasonable and because it is unsupported by the facts and the law.

The Grand Jury is mistaken that a witness must select representation from the County Counsel's office when appearing before the Grand Jury. Any witness may elect, at their own expense, to retain their own separate counsel to represent them before the Grand Jury. The County Counsel offers representation, at no cost to County employees, as part of the County Counsel's representation of the County and its employees acting in the course and scope of their employment. Any employee is free to refuse such representation.

FINDING NO. 6:

Violation of Board Policy C-35

The BOS established Policy C-35 and implemented it on September 1, 2009. This policy addresses the Subject: Standards of Ethical Conduct to Address Fraud, Waste, and Abuse. This policy applies to all County employees and officers.

Section 7 of Policy C-35 addresses: Acknowledgement in writing of this policy by all current and future employees as evidence of receipt.

Whereas this policy in Section 4 l, states that county employees have a duty to identify, report, and work to eliminate fraud, waste and abuse.

Section 4 m, highlights the duty of every employee to cooperate in an investigation involving a violation or an alleged violation of this policy.

Section 4 n, addresses the prohibition from attempting to identify or intentionally exposing the identity of any party making an anonymous report or complaint pursuant to this policy.

Employees have expressed concerns to the Grand Jury that the investigative process, intrinsic to the Speak-Out Program, has not always maintained the anonymity required to protect the employee from retaliation by supervisors or managers. Secrecy is the paramount reason they come to the Grand Jury.

The result of this practice by the County Counsel curtails whistle blowing and transparency within the County. Employees have the right and protection of Policy C-35 to speak up. This precludes any retaliation for doing so.

This Grand Jury has discovered County Counsel is actively issuing directives to all departments of the County to notify his office in advance, if ever requested to appear as a witness to any Grand Jury investigation or interview. These directives have the effect of not only violating the secrecy of the Grand Jury; it also violates the provisions of anonymity as stated in multiple sections of County Policy C-35. County Counsel is actively disrupting the Grand Jury's investigations by screening documents the Grand Jury has sought. This is an unwarranted impediment of the Grand Jury's legal duties, as well as, a violation of the California Public Records Act. County Counsel should be aware of this because he was one of the authors of "The Peoples Business: A Guide to the California Public Records Act."

County Counsel's claim that every employee of the County is entitled to his representation during investigative sessions of the Grand Jury would violate California Government Code §995.2(a)(c). As an example, any employee of the County alleged to be engaged in fraud, waste, or abuse could not rely on the County Counsel for his/her defense.

The Grand Jury has been asked by a County agency to provide questions in writing before an employee is interviewed pursuant to the advice of County Counsel. Providing questions in advance by the Grand Jury is prohibited by California Penal Code §924.1. It is improper for County Counsel to advise a County agency to make this request.

Response: County Counsel wholly disagrees with this finding.

The County Counsel has not violated Board Policy C-35. Any employee is free to speak to the Grand Jury without representation at any time. However, it is appropriate for the County Counsel to advise his clients of his ability to provide advice and representation should they be contacted by the Grand Jury.

County Counsel never advised clients to ask the Grand Jury to place questions in writing in lieu of live testimony. County Counsel has, in certain circumstances, advised clients to ask the Grand Jury to place requests for documents in writing. This is to confirm that the requests made by the Grand Jury seek documents to which they are legally entitled and not otherwise privileged or exempt from disclosure. This request is also to confirm that all responsive public documents are provided to the Grand Jury and so there is no confusion over what is sought by the Grand Jury. Moreover, it is important for the County's attorney to educate County officials and employees on the law and their duties and obligations in response to an inquiry or investigation by the grand jury to ensure compliance.

RECOMMENDATION NO. 6:

Violation of Board Policy C-35

In order to maintain the provisions of anonymity of Policy C-35, County Counsel shall not ask, or direct, County employees to notify him of their contact with the Grand Jury.

County Counsel shall complete appropriate training courses relevant to California Penal Codes and Government Codes governing the California Grand Juries. (This continuing education may assist County Counsel in understanding that the Civil Grand Jury is an independent and autonomous body beholden to no one.)

Response: This recommendation will not be implemented as it is not warranted and not reasonable.

As stated throughout this response, the Grand Jury attempts to invade and control the manner of representation by the County Counsel of its clients. The County Counsel will appropriately advise its clients as required by all applicable laws and rules. Such advice, when appropriate, will include advice on responding to Grand Jury requests.

With regard to training, the County Counsel, as mandated by Penal Code Section 914, has provided training to the 2015-16 Grand Jury on the County Counsel's role in County Government. Hopefully, this information was helpful to the 15-16 Grand Jury and will serve to avoid the misunderstanding of the County Counsel's role by the 2014-15 Grand Jury.

FINDING NO. 7:

Riverside County Executive Office

In an email dated December 4, 2014, County Counsel, at the direction of the Executive Office, issued a directive requesting departments of the County to advise the County Counsel regarding inquiries made by the Grand Jury. County Counsel has been directed "to establish a consistent and coordinated approach to handle these inquiries, and respond to requests for information." This is a concerted effort to breach the confidentiality of Grand Jury proceedings. (See Attachment #2)

Response: County Counsel wholly disagrees with this finding.

The Grand Jury again misunderstands the role of the County Counsel to represent its clients. To suggest, as the Grand Jury does, that clients are precluded to discuss any request from the Grand Jury with their attorney is inaccurate and without any support in the law. Rather, such coordination allows the County to confirm appropriate responses to all legitimate Grand Jury requests for information. The grand jury simply cannot direct how and in what manner the County Counsel represents its clients.

RECOMMENDATION NO. 7:

Riverside County Executive Office

The County Executive Office shall cease from issuing these directives pertaining to Grand Jury requests. County Executive Office shall direct County Counsel to cease making presentations, forcing or advising County departments and special districts, and agencies, on how to coordinate their responses to the Grand Jury.

Response: This recommendation will not be implemented because it is not warranted and not reasonable.

The Grand Jury cannot invade the relationship between the County Executive Officer and his subordinate employees, nor can they invade the attorney-client relationship between the County Counsel and his clients. The County Executive has the great responsibility of managing all County employees. To suggest that he is prohibited from overseeing requests from the Grand Jury is without legal basis. Further, the Grand Jury is incapable of invading the attorney-client privilege in any way. To suggest that they have the power to dictate the manner in which the County Counsel carries out his ethical obligations to his client is without merit. The County Counsel has and will continue to carry out his statutory and ethical duties to his clients as required of a government attorney.

FINDING NO. 8:

Violation of Code of Ethics

County Counsel has a history of bias and contempt against the Grand Jury, as evidenced in a 2012-2013 Grand Jury Report, City of Riverside, Office of the City Attorney. The report detailed issues with the Office of the City of Riverside City Attorney, the position he occupied at the time. Hence, County Counsel has continuously interfered with the legal duties of the Grand Jury, and has violated the provisions of the Business and Professions Code pertaining to lawyers, Section 6068. This report has precipitated County Counsel to disrespectfully neutralize the Grand Jury from performing its legal and authorized duties.

Business and Professions Code Section 6068 states lawyers shall observe rules of law, including the California Rules of Professional Conduct and the State Bar Act.

Business and Professions Code §6068 states, in part:

It is the duty of an attorney to do all of the following:

- (a) To support the Constitution and laws of the United States and of this state...
- (d) To employ, for the purpose of maintaining the causes confided to him or her means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.
- (e)(1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client...
- (g) Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest...

Response: County Counsel wholly disagrees with this finding.

The Grand Jury again, as stated earlier and repeatedly in this response, misunderstands the role of the County Counsel and its own powers and duties. These comments, stated more fully above, are incorporated herein. The County Counsel rejects the assertion that there has been any violation of Business and Professions Code Section 6068. Rather, the Grand Jury misinterprets effective representation of the County as “bias and contempt”. The allegation made by the Grand Jury that this section has been violated is without a factual basis as is evident by the conclusory allegations made above.

The County Counsel will continue to represent his clients with the highest standards of professionalism and ethics in accordance with Business and Professions Code 6068 and all other applicable rules and laws governing the representation of clients. That the Grand Jury misinterprets this obligation as “bias and contempt” is unfortunate and erroneous. Again, fully and faithfully discharging statutory and ethical responsibilities in effectively representing your clients cannot legitimately be considered bias, contempt or interference.

RECOMMENDATION NO. 8:

Violation of Code of Ethics

County Counsel shall adhere to the tenets of the Business and Professions Code §6068.

Response: The recommendation will not be implemented because it is not warranted and not reasonable and is erroneous and unsupported by facts to the extent that it implies that there has been any past violation of Business and Professions Code section 6068.

As indicated above, the County Counsel will continue to represent its clients with this highest standard of professionalism and ethics in accordance with Business and Professions Code 6068 and all other applicable rules and laws governing the representation of clients.

FINDING NO. 9:

Failure to Provide Upjohn Warning

The scope of attorney-client privilege in a corporate context was defined by the United States Supreme Court in *Upjohn Co. v. United States*, 101 S. Ct. 677, 449 U.S. 383 (1981). Since *Upjohn*, courts and commentators have discussed an Upjohn or Corporate Miranda warning. The need for such warnings stems from the fact that Corporate Counsel's client is the corporation and not the employees, officers, or directors of the corporation. If an Upjohn warning has not been given, an employee may believe that he or she is represented by Corporate Counsel.

Thus the attorney representing a governmental agency is best served to provide an Upjohn warning to the person consulting him/her to make the representation clear. This warning is generally given to an employee, officer or director before an interview begins.

An Upjohn warning generally consists of the following requirements:

- (1) that the attorney represents the County, City or other unit of government and does not represent the individual personally;
- (2) that the communications between the attorney and the individual are privileged;
- (3) that the privilege belongs solely to the County, City, or other unit of government which may in its discretion choose to waive the privilege and disclose the communication to third parties; and
- (4) that so long as the privilege attaches, the employee may not disclose the communication to third parties.

The Upjohn warning may be verbal, but the warning should be documented by a signed acknowledgement as a contemporaneous memorandum of the interview.

The Grand Jury has found no evidence County Counsel informed County employees with an Upjohn Warning that clearly states to the employee that County Counsel represents the government agency and not the employee, pursuant to (*Upjohn Co. v. United States*, 101 S. Ct. 677, 449 U.S. 383 (1981)).

Conversely, County Counsel has expressed to County employees that County Counsel is the legal representative of all 18,000 plus Riverside County employees and that an attorney-client relationship exists between County Counsel and all employees in the County.

The result of County Counsel's/Executive Officer's directive, as outlined in the email of December 4, 2014, initiated a sequence that is designed to breach the secrecy provisions of the Grand Jury. All County employees are directed by County Counsel, to ask if the interview will be sworn or unsworn. He then informs the employee if the nature of the investigation is of a sensitive nature and the Grand Jury determines that sworn testimony will be necessary, then the County Counsel instructs the employee that County Counsel will be present at the interview. This act is a clear violation of California Penal Code §934(a), which states, in part:

...Unless advice is requested, the judge of the court, or county counsel as to civil matters, shall not be present during the sessions of the grand jury.

Employees are also directed to ask the Grand Jury to put in writing, what questions will be asked and or documents to be presented prior to the interview which is a violation. This would be a breach of the Grand Jury's sworn oath of secrecy pursuant to California Penal Codes §924.1.

Response: County Counsel wholly disagrees with this finding.

The Grand Jury again, as stated earlier and repeatedly in this response, misunderstands the role of the County Counsel and its own powers and duties. These comments, stated more fully above, are incorporated herein. County Counsel will appropriately advise all clients of conflicts when and where they exist in compliance with the law.

With regard to requesting questions from the Grand Jury in writing, the County Counsel has not provided such advice to its clients. The Grand Jury may be confusing requests for documents to be placed in writing. This is to ensure that the Grand Jury is provided public records to which it is entitled. It is also to avoid confusion as to what documents are being sought and to confirm that all responsive public documents are provided to the Grand Jury.

RECOMMENDATION NO. 9:

Failure to Provide Upjohn Warning

County Counsel shall refrain from misleading County employees into believing they may have protections when they may not. County Counsel shall inform all employees of the Upjohn Warning and shall have employees sign an acknowledgement form as proof they are aware of the Upjohn Ruling and circumstances. This policy shall be incorporated into County Counsel's policy and procedures manual.

Response: The recommendation will not be implemented because it is not warranted and not reasonable.

If and when a conflict was to arise between clients, the County Counsel will handle the situation properly, according to all applicable laws and rules governing the practice of law.

-FINDING NO. 10:

Superior Court Case

In Riverside Superior Court Case #RICMISC20151 the 2014-2015, Riverside County Grand Jury raised the issue of a potential conflict between County Counsel and County employees they may be representing. The Riverside Superior Court Judge stated:

To the extent that that [sic] conflict exists, and there may be one, County Counsel, as with any other attorney, is obligated to properly advise its clients, employees about a potential conflict, and to obtain waivers appropriate or separate counsel if a waiver can't be obtained, but that's between the attorney and its client.

County employees may have an attorney of their choice including but not limited to a private attorney, union attorney, etc., there is no mandate that the attorney has to be County Counsel.

The Grand Jury found no evidence that County Counsel has or had properly advised any County employee of a potential conflict and obtained any waivers.

Response: County Counsel wholly disagrees with this finding.

Any discussion between an attorney and client are confidential and privileged. The law is well-settled that the grand jury has no right to such information based on the absolute privilege of that communication.

This matter was heard by the Honorable John Vineyard on May 22, 2015. After consideration of the issue, Judge Vineyard held that there was no basis to disqualify the County Counsel from representing County employees before the grand jury. Further, Judge Vineyard held that the County Counsel may represent County employees during testimony before the grand jury as provided in Penal Code section 939.22.

RECOMMENDATION NO. 10:

Superior Court Case

County Counsel shall properly advise County employees of potential conflict, and to obtain waivers appropriate or separate counsel if a waiver can't be obtained. A County employee shall be advised that representation by an attorney is at his/her request and is not mandated that it be County Counsel.

Response: The recommendation will not be implemented because it is not warranted and not reasonable.

If and when a conflict was to arise between clients, the County Counsel will handle the situation properly, according to all applicable laws and rules governing the practice of law.