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County Counsel Dual Representation

Summary:

Penal Code §925 and §933(a) require a final report to be written by the Grand Jury. The Grand Jury scheduled and subsequently conducted an interview with management of the Yuba County Airport on September 24, 2014. The Grand Jury invited subject management. The Chief Deputy County Counsel appeared with the Airport management. The Chief Deputy County Counsel did not make the Grand Jury aware of his intended appearance. The Chief Deputy County Counsel was not invited by the Grand Jury to attend the interview. The County Counsel's office created an apparent conflict of interest to the Grand Jury by offering unsolicited comments during its interview of the Yuba County Airport management.

The Grand Jury is required to investigate whether the County is in compliance with the Consent Decree dated November, 1978. The Consent Decree requires the Grand Jury to do an annual analysis of whether the Yuba County Jail is in compliance with the provisions of the Consent Decree and include the results in its yearly report. The Grand Jury shall receive its copy of the Consent Decree from Yuba County on an annual basis. The Chief County Counsel did not notify the Grand Jury of its 2013 motion to terminate the Consent Decree of November, 1978.

The Office of the County Counsel appears to be in violation of §934 of the California Penal Code.

The Grand Jury expects to operate with a sense of confidence when dealing with the County Counsel's office. However, the Grand Jury finds difficulty utilizing the office of the County Counsel for legal advice and for confidential legal sufficiency of reports prior to release. The Grand Jury is lacking confidence with the office of the County Counsel.

County Counsel should be directed by the Yuba County Board of Supervisors to budget from the existing County Counsel budget a retained attorney to be available to the Grand Jury and to any department of the County when a possible conflict of interest is created.

Introduction and Background:

The County Counsel is appointed by the Board of Supervisors. The Office of the County Counsel renders legal advice and affords legal representation to the County Board of Supervisors, County departments, and many special districts. County Counsel attorneys do not provide legal advice to the public.

The Chief Deputy County Counsel is subordinate to the County Counsel. The Chief Deputy County Counsel uses considerable independent judgment and discretion in department administration and management.

The Chief Deputy County Counsel meets with and advises the Board of Supervisors, County Administrator, and other County boards and commissions, and boards of directors of special districts with respect to both legal advice and representation.

The role of the Grand Jury in California is unique due to statutes passed in 1880. The Grand Jury is fundamentally a group of citizens who have volunteered their time to act as watchdogs on local government as a service to their fellow citizens. The duties include investigation of county government.

The Grand Jury is part of the judicial system. The Grand Jury Judge, the District Attorney, the County Counsel, and the State Attorney General act as its advisors.

Methodology and Approach:

The Grand Jury has conducted a number of interviews in its investigations as per The Yuba County Grand Jury Handbook, The California Grand Jury Association and The California Penal Code with reliance upon §914 through §940.

Documents:

- Opinion Letter by The California Grand Jurors Association
- Current Rules of the State Bar of California; Rule 3-310 - Avoiding the Representation of Adverse Interests
- Consent Decree of November, 1978
- Opinion of University of California, Davis Civil Rights Clinic
- Appeal of Denial to Terminate Consent Decree (DARRIL Hedrick, ET AL.; *Plaintiffs-Appellees* v. JAMES GRANT, ET AL.; *Defendants-Appellants*)
- The California Rules of Professional Conduct (www.calbar.ca.gov)

Interviews:

- County Counsel
- Former Forepersons of the Yuba County Grand Jury

Discussion and Narrative:

The Grand Jury scheduled and subsequently conducted an interview with management of the Yuba County Airport on September 24, 2014. The Grand Jury invited subject management. The Chief Deputy County Counsel appeared with the Airport management.

The Chief Deputy County Counsel did not make the Grand Jury aware of his intended appearance. The Chief Deputy County Counsel was not invited by the Grand Jury to attend the interview.

The Grand Jury queried the reason for the appearance of the Chief Deputy County Counsel. The Grand Jury was informed by the Chief Deputy County Counsel the purpose of his attendance was to resolve any misunderstandings between the Grand Jury and the Yuba County Airport; that the County Counsel represents both the Airport and the Grand Jury. When the Chief Deputy County Counsel began to answer a question directed to the Airport management, the Grand Jury requested the Chief Deputy County Counsel to leave per §934 of the California Penal Code. The Chief Deputy County Counsel complied.

The Grand Jury is required to investigate whether the County is in compliance with the Consent Decree dated November, 1978. The Consent Decree requires the Grand Jury to do an annual analysis of whether the Yuba County Jail is in compliance with all provisions of the Consent Decree and include the results in its yearly report. The Grand Jury shall receive its copy of the Consent Decree from Yuba County on an annual basis. The 2013 motion to terminate the Consent Decree was denied on April 2, 2014. Subsequently, County Counsel's office filed an appeal on April 29, 2014, and the County Counsel made no comment of this action to the Grand Jury.

The Grand Jury was informed by the County Counsel that the County Counsel represents the Board of Supervisors, 28 county departments, 43 special districts, and the Grand Jury. Current Rules of the State Bar of California; Rule 3-310 - Avoiding the Representation of Adverse Interests states in part:

“A member shall not, without the informed and written consent of each client: (1) Accept representation of more than one client in a manner which the interests of the clients potentially conflict: or (2) Accept or continue representation of more than one client in a manner in which the interests of the clients actually conflict...”

Explained in *Walker v. Berkeley, supra, 951 F.2d 182, 184*, “... (1) that an attorney for a governmental entity usually has only one client, namely, the client itself, which acts through constituent sub-entities and officials....”

Through research of various cases relative to “conflict of interest” (conflict of interest is defined in Encarta Dictionary – a conflict between the public and private interests of somebody in an official position, or conflicts between a number of public resources) the Grand Jury found several cases.

County Counsel Dual Representation

In *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575 (Howitt), the court concluded that county counsel could not undertake dual representation, in which the office was both advocate and adviser to the decision maker in a contested hearing, unless adequate internal safeguards were established to avoid a conflict of interest. The court concluded “*By definition, an advocate is a partisan for a particular client or point of view. The role is inconsistent with true objectivity, a constitutionally necessary characteristic of an adjudicator.*”

In *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App. 4th 81 (Nightlife Partners) the court again concluded that when a public attorney acts as an advocate in a matter, the attorney is generally precluded by due process concerns from advising the decision maker in the same matter.

The 1991-1992, Los Angeles County Grand Jury justified “... *We could find no other jurisdiction that operates the way Los Angeles County does..... Dual representation in its present form does not appear to be the answer.*” (Los Angeles County Dept. of Children etc. Services v. Superior Court (Shawn B.) (1996) 51 Cal.App.4th 1257)

In *Civil Service Com. v. Superior Court* (1983), the court held that county counsel was disqualified from representing the county in litigation against its own Civil Service Commission because the same attorney from that office had provided pre-litigation advice to both the county and the commission. (*City of Santa Barbara v. Superior Court-Stenson-* (2004) 122 App.4th 17)

The Grand Jury verified, via interview, that during the last six months, the County Counsel has physically represented multiple departments.

The County Counsel’s office is customarily used to verify legal sufficiency of the Grand Jury’s Final Reports, as per §934 of the California Penal Code. The Grand Jury has a reasonable expectation of confidentiality when the County Counsel’s office is utilized. Through interviews, it has been revealed that the County Counsel’s office has prematurely released “Final Report” information to the department of investigation. The Grand Jury has verified through the California Grand Jury Association that the County Counsel’s office released confidential opinion information to a third party department of the county.

The Grand Jury expects to operate with a sense of confidence when dealing with the County Counsel’s office. However, the current Grand Jury finds difficulty utilizing the office of the County Counsel for legal advice and for confidential legal sufficiency of reports prior to release. The Grand Jury is lacking confidence with the office of the County Counsel.

Findings:

- F1. During an interview with the Yuba County Airport management, the Chief Deputy County Counsel appeared without an invitation and without any prior notice to the Grand Jury. The Chief Deputy County Counsel did not make the Grand Jury aware of his intended appearance. The Chief Deputy County Counsel was asked to leave the Grand Jury interview of the Yuba County Airport management. The Chief Deputy County Counsel immediately complied.

The Grand Jury verified, via interviews, that during the past several years, the County Counsel has represented multiple departments regarding Grand Jury inquiries and investigations without Grand Jury invitation. The Office of the County Counsel appears to be in violation of §934 of the California Penal Code.

California Penal Code §934(a) states, “Unless advice is requested... the county counsel..., shall not be present during the sessions of the grand jury.”

- F2. The County Counsel did not notify the 2013-2014 and current Grand Juries of its motion to terminate the Consent Decree of November, 1978. Such motion to terminate was filed by the County Counsel’s office in 2013. The Consent Decree requires the Grand Jury to do an annual analysis of whether the jail is in compliance with the provisions of the Consent Decree and include the results in its yearly report. The 2013 motion to terminate the Consent Decree was denied April 2, 2014, by the 9th District Court of Appeals. The County Counsel filed a Notice of Appeal April 29, 2014. The current Grand Jury was not made aware of this Notice of Appeal.
- F3. The County Counsel’s office created an apparent conflict of interest to the Grand Jury by offering unsolicited comments during its interview of the Yuba County Airport management. The Chief Deputy County Counsel volunteered comment to a Grand Jury question asked of the Yuba County Airport management, a department of the county. The question was directed to the manager of the airport. It became clear to the Grand Jury that the Chief Deputy County Counsel voluntarily appeared in the interview to represent the interests of the Yuba County Airport; even though the Grand Jury was informed his presence was to solely clear up any misunderstandings between the Yuba County Airport and the Grand Jury; that the County Counsel represents both the Airport and the Grand Jury.

- F4. The Grand Jury was informed by the County Counsel that the County Counsel represents the Board of Supervisors, 28 county departments, 43 special districts, and the Grand Jury. The office of the County Counsel appears to be in violation of the State Bar of California; Rule 3-310.

Current Rules of the State Bar of California; Rule 3-310 - Avoiding the Representation of Adverse Interests. Rule 3-310(C) provides, in part: “A member shall not, without the informed and written consent of each client: (1) Accept representation of more than one client in a manner which the interests of the clients potentially conflict: or (2) Accept or continue representation of more than one client in a manner in which the interests of the clients actually conflict...”

Explained in: *Walker v. Berkeley, supra, 951 F.2d 182, 184*, “... (1) that an attorney for a governmental entity usually has only one client, namely, the client itself, which acts through constituent sub-entities and officials....”

Recommendations:

- R1. The Grand Jury recommends County Counsel follow California Penal Code §934 (a) and Rule 3-310. County Counsel should be directed by the Yuba County Board of Supervisors to budget from the existing County Counsel budget a retained attorney to be available to the Grand Jury and to any department of the County when a possible conflict of interest is created by following California Penal Code §936. (See F1, F3)

California Penal Code §936. Special counsel and investigators states: “When requested to do so by the grand jury of any county, the Attorney General may employ special counsel and special investigators, whose duty it shall be to investigate and present the evidence in such investigation to such grand jury. The services of such special counsel and special investigators shall be a county charge of such county.”

- R2. In accordance with the Consent Decree of 1978, the County Counsel, as well as the Yuba County Sheriff, shall ensure that all current Grand Juries are made aware of the yearly requirement for the Grand Jury to perform an annual assessment of the jail’s compliance with all provisions of the Consent Decree of November, 1978. (See F2)

- R3. The County Counsel should seek an ethics opinion from the State Bar as to potential conflicts of interests in simultaneously representing the County of Yuba, the Yuba County Sheriff, the Yuba County Jail, and the Yuba County Grand Jury. (See F3)
- R4. The County Counsel should abstain from representing the Grand Jury and other County departments if there is a potential conflict of interest. (See F4)

Current Rules of the State Bar of California; Rule 3-310 – Avoiding the Representation of Adverse Interests. Rule 3-310(C) provides, in part: “A member shall not, without the informed and written consent of each client: (1) Accept representation of more than one client in a manner which the interests of the clients potentially conflict: or (2) Accept or continue representation of more than one client in a manner in which the interests of the clients actually conflict...”

Explained in: *Walker v. Berkeley, supra, 951 F.2d 182, 184, “ ... (1) that an attorney for a governmental entity usually has only one client, namely, the client itself, which acts through constituent sub-entities and officials....”*

Request for Responses:

Pursuant to California Penal Code §933.05, the Grand Jury requests responses as follows from the following individuals:

- Yuba County Counsel (F1, F2, F3, F4, R1, R2, R3, R4)
- Chairman of the Board of the Yuba County Board of Supervisors (F1, F2, F3, F4, R1, R2, R3, R4)

The governing bodies indicated above should be aware that the comment or response of the governing body must be conducted in accordance with Penal Code §933(c) and subject to the notice, agenda and open meeting requirements of the Brown Act.