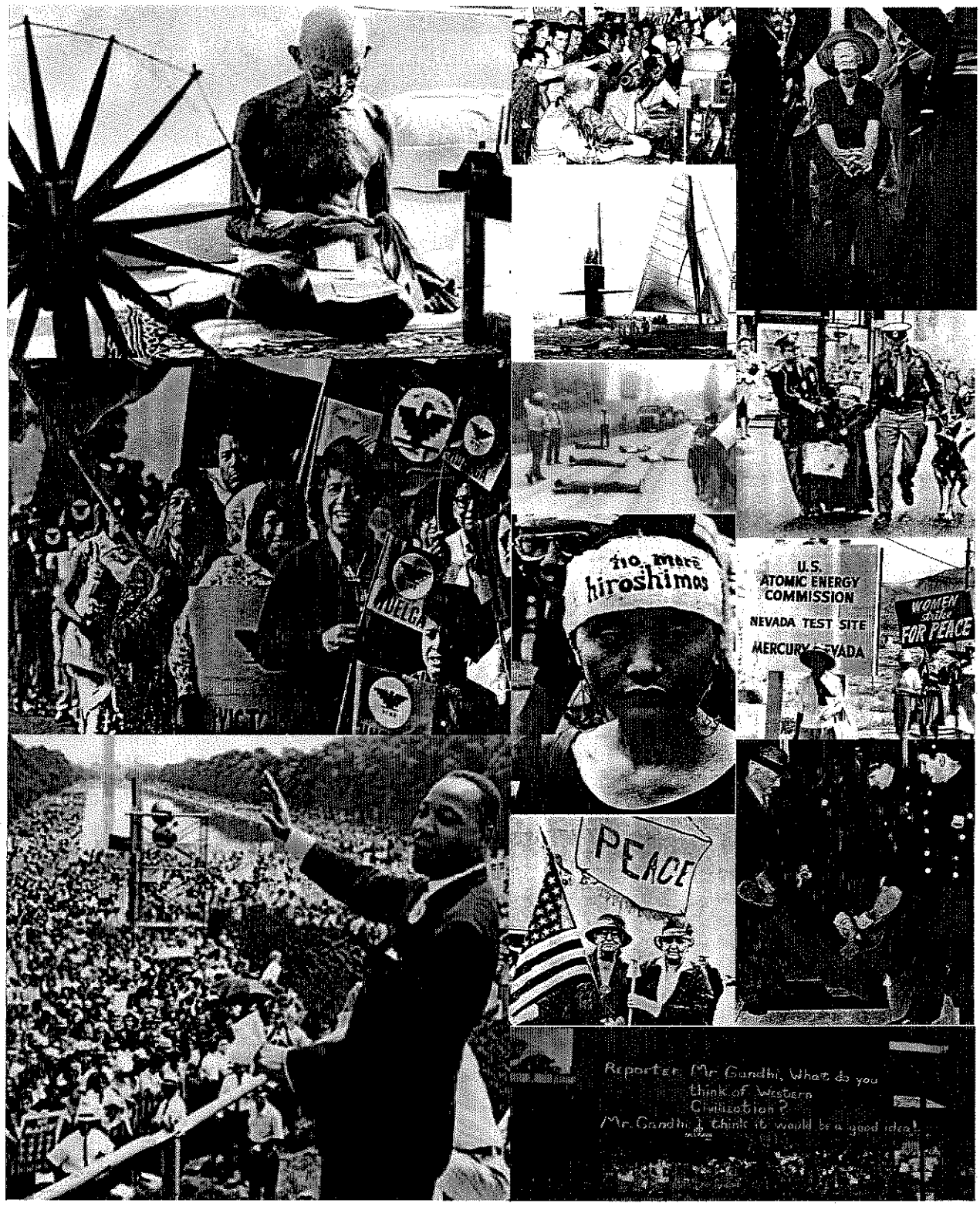

REPRESENTING DEMONSTRATORS

August 9, 2000

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RELEASE PROCEDURES

RICHARD G. HIRSCH
VICKI I. PODBERESKY

RICHARD G. HIRSCH, A.B., 1961, University of California (Los Angeles); J.D., 1965, University of California (Berkeley). Mr. Hirsch is a partner in the law firm of Nasatir, Hirsch & Podberesky, Santa Monica, and a certified specialist in criminal law. He is a Fellow of the American Board of Criminal Lawyers, and Past President of California Attorneys for Criminal Justice, and the Criminal Courts Bar Association. He is listed in The Best Lawyers in America, Who's Who in California, Who's Who in American Law, The World's Leading White Collar Criminal Lawyers, and the International Who's Who of Professionals. He co-authored this chapter in the first and second editions, and updated it with Ms. Podberesky for the third and fourth editions.

VICKI I. PODBERESKY, A.B., 1982, University of California (Berkeley); J.D., 1985, University of Southern California Law Center. Ms. Podberesky is a partner in the law firm of Nasatir, Hirsch & Podberesky, in Santa Monica, where she specializes in both state and federal criminal defense. She co-authored this chapter in the second edition, and updated it with Mr. Hirsch for the third and fourth editions.

CEB also wishes to thank CURT LIVESAY, Los Angeles, CA., who co-authored this chapter in the first and second editions.

◇ §4.1 I. OVERVIEW

The in-custody client's first impression of defense counsel is usually based on counsel's ability to secure the defendant's release from custody. Counsel can help the client post the bail listed on the bail schedule at the police station; specific bail amounts are set for each of the various crimes. See §4.19 on bail schedules. In some counties, a judge or bail commissioner is on duty at all times to determine whether an own recognizance (O.R.) release is appropri-

ate or whether the bail figure set in the bail schedule should be lowered. (The police also use the bail magistrate to raise bail.) See the list of phone numbers for these "duty" judges and bail magistrates in the larger counties in §4.2. When this service exists, counsel should phone as soon as he or she has enough information to support an O.R. or lowered bail request. In counties without a 24-hour bail magistrate or duty judge, counsel may call a judge at home if counsel knows him or her well enough, or may want to wait until the defendant makes the first court appearance to make an O.R. or bail motion.

In addition to release through a judge or magistrate, in some larger jurisdictions sheriffs or custodians release prisoners on a citation to appear ("cite" them out) on what otherwise would be a bail matter in order to keep the jail population within the confines of federal court orders regarding overcrowding. O.R. project persons will generally tell counsel how the procedures work in a particular county.

If a large amount of money was seized when the defendant was arrested, and the police believe it was the fruit of illegal activity, various agencies such as the Internal Revenue Service may file a notice of tax lien on the money. 18 USC §§1963–1968 (RICO [Racketeer Influenced and Corrupt Organizations] sections); 26 USC §§6321–6322 (IRS liens); Health & S C §§11470–11494. Once a tax lien has been filed, forfeiture proceedings take place. If no tax lien has been filed, defense counsel may make a motion to return seized currency. See chap 56 on forfeiture.

Deposits of cash for bail by the defendant (and under some circumstances by third parties on his or her behalf) are subject to forfeiture and seizure under expanded forfeiture statutes. The practice of obtaining an assignment of cash on deposit for bail to cover fees is imperiled by these forfeiture procedures. It is now common in federal and state proceedings for the prosecutor to make inquiries about the amount posted and the source of the deposit. In addition, Pen C §1275 provides that, when a bail bond is involved, the magistrate must be convinced that no portion of the pledge, surety, consideration, deposit, or indemnification has been feloniously obtained by *anyone.*

The type of release obtained by a defendant, or the amount of bail, is important to the prosecutor, particularly if there is a risk that the defendant will flee, is dangerous, or has threatened a victim. Prosecutors who obtain information concerning a defendant's conduct if released, but who will not be in court when the defendant appears, should put a note in the file sufficient to give the deputy who will appear enough information to make the necessary representations to the court.

§4.2 II. CHART: PHONE NUMBERS OF O.R. PROJECTS, DUTY JUDGES, AND BAIL MAGISTRATES IN SELECTED COUNTIES

County	*Contact Person/Hours*	*Phone Number*
Alameda	• Berkeley O.R. Project (M-F, 9 a.m.-4 p.m.; Sun, 8 a.m.-11 a.m.) (Berkeley only)	(510) 548–2438
Fresno	• Honor release program; contact honor release officer (M-F, 8 a.m.-12 noon, 1–5 p.m.)	(559) 488–3420
Kern	• Call clerk's office, criminal division, superior court (M-F, 8 a.m.-12 noon, 1–4 p.m.)	(661) 861–2621
Los Angeles	• O.R. program (M-F, 7 a.m.-4:30 p.m.)	(213) 974–5821
	• Separate "bail deviation program" (7 days a week, 6:30 a.m.-12:00 midnight; intake open until 11 p.m. for information)	(213) 351–5151 through 5162 (800) 351–5151
Orange	• Main Office (6 a.m.-3 p.m.)	(714) 834–4793
	• After 3 p.m.	(714) 647–4581
Riverside	• Pretrial services (M-F, 7 a.m.-4 p.m.)	(909) 955–4506
Sacramento	• Pretrial release program (7 days a week, 24 hours a day; however, a judge or commissioner will not be called between midnight and 6 a.m. unless emergency)	(916) 874–7356
San Diego	• Pretrial Services San Diego County Municipal Courts (M-F 8 a.m.-5 p.m.)	(619) 531–3497
San Francisco	• O.R. Project (7 days a week, 24 hours a day)	(415) 552–1496 (8 a.m.-5 p.m.) (415) 552–8505 (24 hrs.)
Santa Barbara	• Pretrial services (7 days a week, 8 a.m.-5:00 p.m.; O.R. officer available after business hours, beeped by answering service)	(805) 681–5645
	• Other hours: Jail Control Room; ask for shift commander	(805) 681–4242

County	Contact Person/Hours	Phone Number
	• Booking officer (to reach person)	(805) 681–4242
	• Records Department (for paperwork)	(805) 681–4260, 681–4261
Santa Clara	• O.R. desk at main jail (7 days a week, 24 hours a day)	(408) 299–4082
	• O.R. Office of Pretrial Services (M-F, 8 a.m.-5 p.m.)	(408) 299–4091
Ventura	• Bail Review Officer at Court Services Department	(805) 654–2854
	• After hours and weekends: call jail; contact classification and security person who does O.R. and can contact on-call judge	(805) 654–3309, 654–3311

▶ **Note:** The California Association of Pretrial Services, P.O. Box 1852, Sacramento, CA 95812–1852, is a good resource for information on pretrial service programs statewide.

§4.3 III. CHART: DEADLINES

Action	Deadline	Authority
Filing of formal complaint when misdemeanor citation filed with prosecutor.	Within 25 calendar days of time of arrest.	Pen C §853.6(e).
Fixing amount of bail after filing notice with magistrate or filing of formal complaint.	On filing of notice or complaint, magistrate may fix amount of bail.	Pen C §853.6(e).
Bail on old offense applied to new offense when recommitted following successful Pen C §995 motion.	If new charge is filed within 15 calendar days of dismissal, old bail must be applied to new offense.	Pen C §1303.
Release from bail forfeiture and reinstatement of bond when defendant can show satisfactory excuse for failure to appear.	Surety, or surety and defendant, must appear before court within 180 calendar days after notice of bail forfeiture; that period may be extended by court if defendant was ill, insane, or in custody.	Pen C §1305(a).

IV. CITATION (NOTICE TO APPEAR)

§4.4 A. Citation Described

A citation is a written notice to appear issued by a peace officer, directing the defendant to appear at a time and place before a judge, magistrate, or other officer authorized by the court to accept bail. Pen C §853.6; Veh C §40500. The Judicial Council prescribes the form of notices to appear. Sample forms are in the Judicial Council Forms pamphlet, available from the Judicial Council. The defendant must sign the promise to appear, be provided a copy of it, and then be released. Pen C §853.6(d).

§4.5 B. Who May Be Released

Infraction and misdemeanor arrests: non-Vehicle Code. Generally, people arrested for committing an infraction or misdemeanor who do not ask to be taken before a magistrate must be released on signing a written notice to appear. There are a number of exceptions. An arresting officer may decide not to release a person based on one of the following reasons (Pen C §853.6(i)):

(1) The person arrested was so intoxicated that he or she could have been a danger to himself or herself or to others.

(2) The person arrested required medical examination or medical care or was otherwise unable to care for his or her own safety.

(3) The person was arrested under one or more of the circumstances listed in Sections 40302 and 40303 of the Vehicle Code.

(4) There were one or more outstanding arrest warrants for the person.

(5) The person could not provide satisfactory evidence of personal identification.

(6) The prosecution of the offense or offenses for which the person was arrested, or the prosecution of any other offense or offenses, would be jeopardized by immediate release of the person arrested.

(7) There was a reasonable likelihood that the offense or offenses would continue or resume, or that the safety of persons or property would be imminently endangered by release of the person arrested.

(8) The person arrested demanded to be taken before a magistrate or refused to sign the notice to appear.

(9) There is reason to believe that the person would not appear at the time and place specified in the notice. The basis for this determination shall be specifically stated.

If a person in the above circumstances is not released, the arresting officer must indicate the reason for not doing so on a form provided by the law enforcement agency. Pen C §853.6(i).

Infraction and misdemeanor arrests: Vehicle Code. If the offense is a misdemeanor or infraction Vehicle Code violation, or an ordinance violation relating to a traffic offense, the defendant must be released unless he or she asks to be taken before a magistrate (Veh C §§40302–40304, 40500, 40504), or unless one of the following situations exists (Veh C §40302):

- No driver's license or other satisfactory evidence of identity.
- Person arrested refuses to give his or her written promise to appear in court.
- Person arrested is charged with violating Veh C §23152.

Wobbler. A peace officer is not to release on a citation a defendant arrested without a warrant for a violation that could be charged as either a felony or a misdemeanor (called a "wobbler"). 58 Ops Cal Atty Gen 886 (1975).

Domestic violence. A person arrested for violating a protective order involving domestic violence (Pen C §13700(b)) must be taken before a magistrate unless there is no reasonable likelihood that the offense will continue, and if persons and property are not in imminent danger. Pen C §853.6(a).

§4.6 C. Prosecutor's and Magistrate's Duties

The arresting officer files a duplicate copy of the notice to appear with the prosecuting attorney, unless the prosecutor has directed a filing with the magistrate. Pen C §853.6(e)(2)–(3). If the matter involves an infraction, the officer must file the notice to appear with a magistrate. Pen C §853.6(e)(1).

When a notice to appear is filed with the prosecutor, a formal complaint from that office must be filed with the magistrate within 25 calendar days from the time of arrest. Pen C §853.6(e). Thereafter, the magistrate has the duty of fixing bail.

Failure to file a complaint within 25 calendar days does not bar the prosecutor from charging the case. Pen C §853.6(e).

§4.7 D. Defendant's Compliance With Notice To Appear

The defendant complies with a notice to appear by (see Pen C §§853.6(e)–(f), 977(a); Veh C §40507):

- Appearing personally at the time and place specified;
- Depositing the amount of bail set by schedule or by the magistrate; or
- Appearing by counsel.

§4.8 E. Optional Bail Forfeiture in Infraction Cases

When a defendant who has deposited bail fails to appear when the case is called for arraignment, the general practice is for the magistrate to declare the bail forfeited and order that no further proceedings occur. A forfeiture of bail on a citation is equivalent to a conviction for purposes of infraction violations of the Vehicle Code and for administrative sanctions of the Department of Motor Vehicles. Veh C §§1803, 13103. The *Boykin-Tahl* requirements for a valid plea of guilty to a misdemeanor or felony charge have no application to optional bail forfeitures in infraction cases. *Mills v Municipal Court* (1973) 10 C3d 288, 302 n11, 110 CR 329, 339 n11.

§4.9 F. Effect of Failure To Appear in Misdemeanor Cases

After a defendant has been released on a promise to appear, an arrest warrant can issue on the charge if the defendant (Pen C §§853.6(f), 853.8, 1320; Veh C §40514):

- Fails to appear;
- Fails to deposit bail; or

• Fails to comply with the terms of the judgment.

If the defendant fails to appear for trial in a misdemeanor case, the court may:

• Proceed with the trial in the defendant's absence if the court finds that the defendant has authorized counsel to proceed in his or her absence under Pen C §977(a), or has absented himself or herself voluntarily with full knowledge that the trial is to be held or is being held (Pen C §1043(e));

• Continue the case (Pen C §§853.6(e), 1043(e)(1));

• Order bail forfeited or revoke the defendant's O.R. (Pen C §§853.6(e), 1043(e)(2));

• Issue a bench warrant (Pen C §§978.5, 1043(e)(3)).

Willful violation of a promise to appear is a misdemeanor, regardless of the disposition of the original charge. Pen C §853.7. A similar misdemeanor provision appears in Veh C §40508(a). See also Pen C §1320 (crime of failure to appear after O.R. release).

For further discussion of appearance by counsel only, see §§6.17–6.18.

V. OWN RECOGNIZANCE (O.R.) RELEASE

§4.10 A. Guidelines

In 1982, California voters approved two ballot measures dealing with the criminal justice system, Propositions 4 and 8. Each contained language concerning bail and O.R. release. Proposition 8 received fewer votes, and, under Cal Const art II, §10(b) and art XVIII, §4, "[i]f provisions of 2 or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail." Proposition 4, therefore, now controls. See *Brosnahan v Brown* (1982) 32 C3d 236, 255, 186 CR 30, 41. Proposition 4 is now codified in Cal Const art I, §12, and provides that "[a] person may be released on his or her own recognizance in the court's discretion."

Own recognizance release is available in the trial court and on appeal. See *In re Robinson* (1971) 16 CA3d 539, 94 CR 148.

There are statutory guidelines for release on O.R. A defendant who has not been charged with an offense punishable by death may be released on his or her own recognizance. Pen C §1270(a). See also Cal Const art I, §12. This includes a defendant arrested on an out-of-county warrant as long as the case arises out of misdemeanor offenses. Pen C §1270(a).

When specified offenses are charged, the factors in Pen C §1275 must be applied to determine whether O.R. release is appropriate. Pen C §1270. A defendant in custody for misdemeanor offenses and a defendant who appears before a court or magistrate on an out-of-county warrant arising out of a case involving only misdemeanors are entitled to an O.R. release unless own recognizance release will compromise public safety or will not reasonably assure the defendant's appearance in court. Pen C §1270(a). The court is not constitutionally required to give a written statement of the reasons for denying an O.R. release. *Van Atta v Scott* (1980) 27 C3d 424, 166 CR 149.

▶ **Note:** The court should not consider the general failure of persons accused

of similar crimes to appear for trial: *People v Arnold* (1976) 58 CA3d Supp 1, 132 CR 922 ("low-grade" misdemeanors).

There are additional restrictions on O.R. release of persons accused of committing a violent felony as described in Pen C §667.5(c). Pen C §1319(a). O.R. release of a defendant accused of committing a violent felony who willfully and without excuse failed to appear on an earlier felony is prohibited. Pen C §1319(b). In all other cases in which a violent felony described in Pen C §667.5(c) is charged, a hearing must be held at which the judge must consider the following factors (Pen C §1319(b)):

- The existence of any outstanding felony warrants for the defendant;
- The information in the report prepared to conform with Pen C §1318.1 (*e.g.*, criminal record and residence); and
- Any information presented by the prosecutor.

§4.11 B. Own Recognizance (O.R.) Hearing: When Required, Conduct of Hearing, and Conditions of Release

In cases other than the violent felonies listed in Pen C §667.5(c), no hearing is required before O.R. release is granted. See Pen C §1319(a) (only requires hearing when Pen C §667.5(c) felony is charged). It is common for persons arrested on misdemeanors to be O.R.'d at arraignment based on representations by defense counsel, or based on a report submitted by an O.R. project. The court usually asks the prosecutor for any information he or she has concerning the defendant, and for the prosecutor's position on whether the defendant should be O.R.'d. The prosecutor, however, need not be given any notice or opportunity to participate in a decision to grant an O.R. release in non-Pen C §667.5(c) cases. See Pen C §1319(a); *Williams v County of San Joaquin* (1990) 225 CA3d 1326, 275 CR 302.

When a violent felony listed in Pen C §667.5(c) is charged, a court hearing is required, with notice and a reasonable opportunity to be heard given to the prosecutor. Pen C §1319(a). The court must state the reasons for its decision on the record. Pen C §1319(c).

O.R. conditions are meant only to ensure that the defendant will make future court appearances. *People v Barbarick* (1985) 168 CA3d 731, 735, 214 CR 322, 324. The court may condition an O.R. release on the needs of the individual defendant as they relate to making subsequent court appearances. For example, if a defendant who uses drugs plans to enter a custodial drug rehabilitation facility, an O.R. release may be granted with this condition (*People v Sylvestry* (1980) 112 CA3d Supp 1, 7, 169 CR 575, 579), or to submitting to random drug testing and warrantless search and seizures (*In re York* (1995) 9 C4th 1133, 40 CR2d 308). If the condition, however, does not relate to making future court appearances, it is invalid. *People v Barbarick* (1985) 168 CA3d 731, 214 CR 322 (court cannot condition O.R. release on submission to search and seizure); *McIntosh v Municipal Court* (1981) 124 CA3d 1083, 177 CR 683 (court erred in conditioning O.R. release on demonstrators' agreement not to return to site of demonstration). In addition, the condition must be based on the specific facts of the defendant's case. *In re York, supra.*

§4.12 C. Los Angeles County O.R. Program

The Los Angeles County O.R. program offers all Los Angeles County criminal courts handling felony cases the investigative services of its personnel. See Pen C §1318.1 (a court may, with the concurrence of the board of supervisors, employ an investigative staff for the purpose of recommending whether a defendant should be released on his or her own recognizance). The program is located at: Pretrial Services Division of Superior Court, 433 Bauchet St., Room 100, Los Angeles, CA 90012; telephone: (213) 974-5821.

The report submitted to the court must include the factors listed in Pen C §1318.1: written verification of outstanding warrants, any prior failure to appear, criminal record, and residence for the previous year; and a recommendation on whether to O.R. the defendant.

§4.13 D. Defendant's O.R. Agreement

To be released on his or her own recognizance, the defendant must file with the clerk of the court, or other person authorized by the court to accept bail, a signed release agreement that includes (Pen C §1318):

- Defendant's promise to appear at all times and places as ordered;
- Defendant's promise to obey all reasonable conditions imposed by the court;
- Defendant's promise not to leave the state without the court's permission;
- Defendant's agreement to waive extradition, should it become necessary; and
- Defendant's acknowledgment that he or she has been informed of the consequences of violating the conditions of release.

E. Revoking O.R. Release Order

§4.14 1. Requiring Defendant To Post Bail

Former Pen C §1318.6 allowed the court to revoke O.R. and require bail under certain circumstances. *In re Noland* (1978) 78 CA3d 161, 144 CR 111, overruled on other grounds in *People v Romero* (1994) 8 C4th 728, 35 CR2d 270. That statute was repealed in 1985 and has not been reenacted. Judges may therefore lack the authority to require bail after a defendant has been released on his or her own recognizance. In practical terms, most circumstances that would give a court reason to want to set bail involve circumstances that allow the court to set bail, *e.g.*, a new crime, or a failure to appear (Pen C §§1320–1320.5).

§4.15 2. Placing Defendant in Custody

The trial court has the authority to issue a bench warrant for a defendant who fails to appear, under Pen C §978.5. See also Pen C §853.8. In addition, a person on O.R. release who willfully fails to attend a scheduled court appearance is guilty of a misdemeanor if charged with a misdemeanor (Pen C §1320), or guilty of a felony if charged with a felony (Pen C §1320.5). There is a presumption that a person who willfully fails to appear within 14 days of his or her scheduled appearance date intended to evade the process of the

court. Pen C §§1320–1320.5. Willful failure to attend a scheduled court appearance is also a misdemeanor under Pen C §853.7.

▶ **Note:** A defendant who fails to appear after signing an agreement under Pen C §1320 that does not satisfy all of the statutory requirements cannot be guilty of the offense of failure to appear. *People v Jenkins* (1983) 146 CA3d 22, 193 CR 854.

VI. RELEASE ON BAIL

§4.16 A. Bail Defined

Bail permits a defendant to be released from actual custody into the constructive custody of a surety on a bond given to procure the defendant's release. "The purpose of bail is to assure the defendant's attendance in court. . . ." See *In re Samano* (1995) 31 CA4th 984, 992, 37 CR2d 491, quoting *In re Underwood* (1973) 9 C3d 345, 348, 107 CR 401. The amount of bail must be specified in a court order or on the arrest warrant. Pen C §§1268, 1269a, 815a.

The term "bail" has acquired several different meanings by usage. It may mean (see Pen C §§1269, 1300(a)(2), 1492):

- Security posted for the appearance of the defendant;
- The bondsperson who acts as surety; or
- The process of releasing the defendant.

The methods of posting bail are described in §§4.27–4.29.

§4.17 B. When Defendant Is Entitled to Bail

Before conviction, bail is a matter of right unless the offense is punishable by death, or a public safety exception is established. Cal Const art I, §12. The "public safety exception," allowing preventive detention, applies only to certain classes of felonies and to offenses listed in Pen C §292. See discussion in §4.21.

Before the defendant goes to court, bail may be posted according to the amount on the bail schedule. See §4.19 for discussion of bail schedules. Once the defendant appears in court, the judge or magistrate has the discretion to admit defendant to bail. See Pen C §1268; *Johnston v Marsh* (3d Cir 1955) 227 F2d 528, 531.

After conviction, a defendant in a misdemeanor case has the right to have a bail amount fixed that will cover the period between conviction and the pronouncement of judgment. Pen C §1272(1)–(2). Bail is discretionary after conviction in felony cases. Pen C §1272(3).

The discretionary bail allowed after conviction of a felony and before sentence (Pen C §1272(3)) is governed by Pen C §1272.1. If the application for bail on appeal is made at sentencing, "reasonable" notice to the prosecutor is required. Pen C §1274. If the application is made after sentencing, a five-court-day notice to the prosecutor is required. Pen C §1272(3).

There is no provision of law, either constitutional or statutory, that permits release on bail when a "parole hold" has been placed on the defendant. *In re Law* (1973) 10 C3d 21, 23, 109 CR 573, 574. See discussion in §57.4.

§4.18 C. Duration of Bail

Bail, once posted, stands until forfeited or exonerated to ensure the defendant's appearance at all stages of the proceedings on the original charge. Pen C §§1273, 1278, 1458–1459. If bail was posted through a bail bond agency, the agent and the defendant (or a person acting on his or her behalf) sign a bail agreement that usually fixes the term of the bail bond as one year. The defendant must pay a renewal premium for any additional period.

D. Fixing Amount of Bail

§4.19 1. Bail Schedules

Superior, municipal, and justice court judges are responsible for adopting a countywide schedule of bail for all bailable felony offenses and for all misdemeanor and infraction offenses. Pen C §1269b(c). The schedules typically list the offense by code section and description, then indicate the recommended amount of bail. The bail schedule usually specifies additional amounts for cases in which sentence enhancing allegations or other extraordinary facts are present. The jails have a copy of the bail schedules. Pen C §1269b(e). They are also available from the court clerk. See Pen C §1269b(e). Defendants may post the amount of bail listed in the bail schedule to effect their release before appearing in court.

Once in court, either the district attorney or the defense may argue for a departure from the bail schedule. Additional amounts of bail may be requested for aggravating or enhancing factors. Similarly, defense counsel can argue for a downward departure from the bail schedule based on the existence of mitigating facts.

§4.20 2. Discretionary Authority; Bail Hearing

Magistrates are authorized to set bail in an amount they deem sufficient to ensure the defendant's appearance. Pen C §§1268, 1269c, 1275, 1289. Judges usually adhere to the amount set in the county's bail schedule unless conditions concerning the case point towards a higher or lower amount. See discussion of bail schedules in §4.19. Counsel can request a higher or lower bail figure from any municipal or superior court judge. See Pen C §§1269c, 1270.2, 1289. In addition, a peace officer may file a declaration stating that he or she does not believe that the amount of bail set in the schedule is sufficient to assure the defendant's appearance. Pen C §1269c.

A bail hearing is required within five calendar days from the time when the original order fixing bail was made if the defendant is still in custody. The defendant may waive this review. Pen C §1270.2.

If the defendant is charged with a serious felony or a crime of domestic violence, a hearing is required before he or she may be released on a different bail from that on the bail schedule, or released O.R. The provisions of Pen C §825 govern over the provisions of Pen C §1270.1 with regard to the time limit for that hearing. Two days' written notice are required to be given. *Dant v Superior Court* (1998) 61 CA4th 380, 71 CR2d 548.

Bail motions are commonly made at arraignment in municipal court, at the conclusion of the preliminary hearing, at arraignment in superior court, and at the conclusion of hearings and motions.

▶ **Ethics:** It is unethical for counsel to request a change in bail without telling the judge of previous bail motions in the case. *Di Sabatino v State Bar* (1980) 27 C3d 159, 162 CR 458 (attorney disciplined).

When admission to bail is discretionary, reasonable notice must be given to the prosecutor of a request for bail. Pen C §1274. A bail hearing is conducted by a judge or magistrate. It may be set at the request of the defendant or the prosecutor. The purpose of the hearing is for the magistrate to fix or change the amount of bail. Traditionally, the bail hearing is informal and devised to discover salient information relating to permissible guidelines for setting bail. Either side may produce evidence through testimony, declarations, or representations. See *Van Atta v Scott* (1980) 27 C3d 424, 437, 166 CR 149, 155. Usually the magistrate considers the defendant's record and oral representations from both sides without requiring a formal oath or declaration. However, the magistrate may require actual testimony, affidavits, or declarations. See 27 C3d at 441, 166 CR at 157. Local court rules frequently establish procedures for the hearing. Both parties should be prepared to present evidence acceptable to the magistrate.

3. Permissible Guidelines for Setting Bail

§4.21 a. California Constitution Article I, §12

California Constitution article I, §12 enumerates the standards governing the setting of bail. This section was substantially amended by the passage of Proposition 4 in 1982 (see §4.10). The effect of Proposition 4 has been to modify or to overrule the former provisions of Cal Const art I, §12 and *In re Underwood* (1973) 9 C3d 345, 107 CR 401, which forbade the consideration of public safety or the dangerousness of the suspect in setting or denying bail. In other words, art I, §12 now allows preventive detention. Proposition 4 also amended Cal Const art I, §12 to provide specifically for the denial of bail in noncapital cases in certain circumstances. In felony cases in which the facts are evident or the presumption great, the court can deny bail if (Cal Const art I, §12):

- The defendant inflicted "acts of violence" on another person, and the court finds, based on clear and convincing evidence, that there is a substantial likelihood that the person's release would result in great bodily harm to others;
- The court finds, based on clear and convincing evidence, that the person has threatened another with great bodily harm and there is substantial likelihood that the person would carry out the threat if released; or
- It is a capital crime. See *People v Superior Court* (Kim) (1993) 20 CA4th 936, 25 CR2d 38 (holding that it was error for trial court to grant bail to a minor charged with a capital crime notwithstanding fact that death penalty cannot be imposed against a minor.)

▶ **Note:** Penal Code §292 includes specific sex offenses within Cal Const art I, §12's preventive detention scope. (These sex offenses are *not* mentioned by name in art I, §12.)

The phrase "when the facts are evident or the presumption great" was defined in *In re Page* (1927) 82 CA 576, 578, 255 P 887, 888, to mean:

> [I]t is not necessary that the evidence should be so convincing as to justify a verdict against the accused, but it is sufficient if it points to him and induces the belief that he may have committed the offense charged.

The standard of clear and convincing evidence has been defined as: requiring a finding of high probability, based on evidence so clear as to leave no substantial doubt, and sufficiently strong to command the unhesitating assent of every reasonable mind. *In re Nordin* (1983) 143 CA3d 538, 543, 192 CR 38, 40.

Article I, §12 was found to be constitutional in *In re Nordin, supra.*

When bail is available, art I, §12 lists the following factors as ones to consider in fixing the amount of bail:

- Seriousness of the offense;
- Defendant's previous criminal record;
- Probability that the defendant will make future court appearances.

§4.22 b. Additional Guidelines for Setting Bail

Bail during pending case. Penal Code §1275 lists a number of factors that the court must consider in setting, reducing, or denying bail:

- Public safety is the primary consideration;
- Seriousness of the offense charged, including
  - Alleged injury to victim,
  - Alleged threats to victim or witness to crime charged,
  - Alleged use of firearm or other deadly weapon in commission of the crime charged, and
  - Alleged use or possession of controlled substances by defendant.

A number of additional factors are routinely considered by courts in determining whether the defendant is likely to make future court appearances. Some of the more common areas of inquiry follow:

- Does defendant have ties to the community;
- Does defendant live in the community;
- Does defendant's family live in the area;
- Is defendant employed locally (give length of employment);
- Does defendant own property in the community;
- What is the value of the bond to defendant (defendant's relative wealth as it affects value to him or her of bond);
- Are there express indications by defendant that he or she will not appear at future court hearings; and
- Is there any prior record of failure to appear.

There are special rules in Pen C §1275 when specified drug offenses are charged against the defendant.

If a defendant is found to have willfully misled the court regarding the source of bail, bail may be increased. Pen C §1275(d).

When a serious felony as defined in Pen C §1192.7, or a violent felony,

as defined in Pen C §667.5(c), is charged (but not including residential burglary), or violation of Pen C §243(e)(1), §262, §273.5, or §646.9, the defendant cannot be released on bail in an amount different (either higher or lower) than the countywide bail schedule unless a hearing is held in open court on two days' written notice to the prosecutor and the defense attorney. Pen C §1270.1. If the magistrate deviates from the countywide bail schedule, the reasons for that decision must be stated on the record. If any threats were made against the victim or a witness, the court must address those issues on the record in relation to any bail set. Pen C §1270.1(d). Guidelines the court must consider at the hearing are in Pen C §1270.1(c).

If the court reduces bail below the amount established by the bail schedule approved for the county for a person charged with a serious felony, the court must make a finding, on the record, of unusual circumstances. Pen C §1275(e).

Bail pending probation or appeal. The criteria the trial court must consider in deciding whether to set bail pending probation or appeal are in Pen C §1272.1. Pen C §1272. There are differing standards for granting bail in misdemeanor and felony cases, according to Pen C §1272; those differences do not violate equal protection of the law. *In re Podesto* (1976) 15 C3d 921, 127 CR 97.

§4.23 4. Increasing or Reducing Bail

By the time defense counsel enters a case, police agencies may have already applied for and received a deviation of bail to a higher amount than that called for in the bail schedule (see Pen C §1269c). If this has occurred, the bail commissioner, magistrate, or judge who granted the deviation should be contacted and an attempt made to return the bail to its original figure or a lower amount. See Pen C §1269c.

If the police have not requested a bail figure higher than that in the bail schedule, defense counsel may wish to seek a lower bail figure.

▶ **Warning:** Keep in mind that a request for deviation will involve the arresting agency and facts may be elicited that work to the client's detriment, such as his or her parole status.

A municipal or justice court judge can increase (or reduce) a previously set bail in a misdemeanor case during the course of the proceedings, using the power conferred in Pen C §1289, made applicable to misdemeanor cases by Pen C §1458.

After holding the defendant to answer in a felony case, the magistrate can admit the defendant to bail. Pen C §1277. It can be reasoned that, because a magistrate has the power to set bail in the first instance, inherent power exists to modify the order if new facts are brought to the court's attention. This provides the basis for the raising or lowering of bail after the preliminary hearing. See *Frankfort v Superior Court* (1925) 71 CA 357, 235 P 60.

§4.24 5. Hearing To Determine if Bail Deposit Feloniously Obtained

Once the court has set the amount of bail, the source of the bail funds becomes important. The court cannot accept a bail bond unless the judge

is convinced that no portion of the consideration, pledge, security, deposit, or indemnification paid, given, made, or promised for its execution was feloniously obtained by the defendant. Pen C §1275(a). To make this determination, the court is allowed to inquire into the legitimacy of the source of any bail, either proffered or accepted. Pen C §1275. This suggests an evidentiary hearing procedure. The inquiry is called a "*Nebbia* hearing" in federal court, after *U.S. v Nebbia* (2d Cir 1966) 357 F2d 303.

▶ **Note:** In *U.S. v $250,000 in U.S. Currency* (1st Cir 1987) 808 F2d 895, 898, the defendant's bail postings came back to haunt him due to facts developed in a *Nebbia* hearing.

Handling of fee money must be carefully considered in view of the criminal penalties enacted in the past few years. See §18.18 for discussion of forfeiture and criminal penalties.

If the court concludes that the source of the bail bond is a product of criminal activity, the bail must not be accepted or, if already accepted, must be returned. The reason for not allowing bail to be posted that is the product of criminal activity is that the primary purpose of bail is to provide a financial incentive for the defendant to appear in court. The strength of this incentive depends on the defendant's commitment to assets pledged as bail. If the assets are illegally obtained, or represent the "business expense" of a larger criminal enterprise, there may be minimal incentive for the defendant to appear at court hearings. *U.S. v Ellis DeMarchena* (SD Cal 1971) 330 F Supp 1223, 1226.

§4.25 6. Excessive Bail Prohibited

"Excessive bail may not be required." Cal Const art I, §12(c). On the other hand, bail is not "excessive" merely because the defendant is unable to post the amount fixed. *In re Burnette* (1939) 35 CA2d 358, 360, 95 P2d 684, 685.

§4.26 E. Conditions of Bail

Magistrates have the authority to set bail on conditions that they consider appropriate. Pen C §1269c. The nature of the conditions is limited only by the imagination of the prosecutor and the judge, as long as they serve the purpose of bail. See Pen C §1269c. For example, a magistrate may require a defendant to surrender his or her passport, driver's license, or other form of documentation with a rational nexus to mobility; may require the defendant to appear at a designated location or agency at appointed times; or may condition bail on the defendant's not traveling outside of a designated geographic area. The same limitations that apply to conditions of O.R. release probably apply to release on bail. They are discussed in §4.11.

Penal Code §136.2 allows the court to order a defendant not to intimidate, dissuade, or contact victims and witnesses.

Defense counsel can also employ imaginative thinking when making a motion for bail. Defense counsel should explore the possibility of alternatives to bail such as inpatient rehabilitative programs and private counseling. Alternatives such as these in combination with a modest bail or release on O.R. may persuade

the court that it can assure the defendant's appearance in court while also addressing the defendant's long-term problems.

Counsel faced with difficult release situations may want to consider requesting a curfew condition, or electronic monitoring (referred to commonly as "house arrest" or "home detention"). A client with sufficient funds can rent the service. No county or federal court in California presently has funds budgeted for pretrial electronic monitoring. (See §46.32 for discussion of home detention *sentencing* options.) Several federal district judges have used "at home" electronic monitoring for release.

One other portion of the Penal Code covers release: Pen C §§701–714 ("Security To Keep the Peace"). This procedure is commonly called a "peace bond." Section 714 provides: "Security to keep the peace, or be of good behavior, cannot be required except as prescribed in this Chapter."

To the extent that Pen C §1269c seeks to restrict a defendant's conduct while on bail (as opposed to enforcing his or her duty to appear), Pen C §714 and the amended bail sections seem to be in conflict.

F. Methods of Posting Bail

1. Deposit

§4.27 a. Cash, Check, Money Order, Traveler's Check

The defendant, or any person on his or her behalf, may deposit with the court clerk or with the law enforcement agency having custody of the defendant the sum set by the applicable bail schedule or mentioned in the order admitting the defendant to bail. A personal check, bank cashier's check, money order, or traveler's check are usually accepted in payment of a bail deposit for a nonfelony offense on certain conditions, including satisfactory identification. However, some courts and law enforcement agencies do not accept all of these alternatives to cash, particularly when the amount is large or when a check is from a defendant in custody. See *Williams v City of Oakland* (1972) 25 CA3d 346, 101 CR 137. The courts are not allowed to accept a general assistance check for this deposit. Pen C §1295. When counsel is not using a bail bond agency, he or she should call first to inquire about what is acceptable.

State criminal court clerks are required to send an "information return" to the Internal Revenue Service reporting receipt of *more than* $10,000 in cash as bail when the charges involve controlled substances, racketeering, or money laundering. 26 USC §6050I(g). A return is required only if *cash* is posted. "Structuring" a cash bail deposit is a federal felony. 31 USC §5324. It appears that at least some criminal court clerks are not yet aware of this requirement.

▶ **Note:** The defendant must receive credit on a new charge for any sums deposited as bail for an original charge based on the same acts. Pen C §1295. See §4.37.

Defense counsel may wish to discuss with the defendant the possibility of having a third party post bail instead of using the defendant's assets. An *innocent* third party's assets used for bail are not subject to use by the court after the judgment to satisfy a fine or judgment, nor are they subject to seizure by a government agency. At the same time, one should keep in mind that

any third party depositor makes public his or her interest in the defendant, and the existence of his or her assets. Forfeiture is discussed in chap 56; inquiry into the source of bail money is discussed in §4.24.

§4.28 b. Government Bonds; Equity in Real Property

Instead of a deposit of money, the defendant, or any other person on his or her behalf, may deposit state or United States government bonds with the court, or may give as security an equity in real property. The defendant may not be charged for the transaction. Pen C §1298.

▶ **Note:** The jail does not have to accept bonds (*Williams v City of Oakland* (1972) 25 CA3d 346, 101 CR 137) or equity in real property (see Pen C §1298, which requires a court hearing on equity interest in real property used for bail).

Case law has interpreted the value of state bonds to be that of present market value. The rationale is that "[t]he deposit of bonds of a market value less than the amount of the cash deposit required has the effect of reducing the amount of the bail which the court had deemed adequate and sufficient for the purposes of bail." *Newton v Superior Court* (1971) 16 CA3d 499, 505, 94 CR 120, 124.

With respect to real estate equity, a hearing must be held in which the magistrate determines the value of the equity. Real estate equity is allowed as bail only when its value is equal to twice the amount of any required cash deposit. Pen C §1298. At the hearing, defense counsel files a bail undertaking, an appraisal of the property prepared by a licensed real estate broker or property appraiser, and a preliminary title report from a title company.

▶ **Note:** It is a good idea for defense counsel to coordinate with county counsel on the adequacy of the posting papers before the hearing; the district attorney usually seeks county counsel's advice on requirements for these papers. Ideally, defense counsel can then take an approved package to the district attorney and court.

A careful prosecutor may insist on proof of prior recordation in the county of the property's location and then ask for submission, as a condition subsequent to release, of a title company report or policy after recordation. This ensures that no liens other than those represented to exist at the time of initial recordation and up to release have been recorded against the property.

The prosecutor may wish to inquire into the sources underlying the purchase of the property, based on Pen C §1275(a). Defense counsel should consider this possibility before attempting to use real property as bond.

If the judge determines that the property qualifies, counsel prepares a deed of trust and a demand promissory note. The deed of trust is filed with the county clerk and conformed copies provided to the judge and to the owner of the property. The judge is given the original promissory note. For further discussion, including forms, see Roberts, *Posting Real Property as Bail*, 12 CACJ Forum 36 (Sept.-Oct. 1985).

§4.29 2. Undertaking of Bail (Bail Bond)

A bail bond is a document, executed by a surety, which is a promise to pay the face amount of the bond equivalent to the sum set as bail, unless the defendant fulfills the conditions of the bond. Pen C §1269. Typically, the defendant agrees to "appear and answer any charge in an accusatory pleading . . . in whatever court it may be prosecuted, and . . . at all times hold himself or herself amenable to the orders and process of the court . . . and if convicted, will appear for pronouncement of judgment or grant of probation. . . ." Pen C §1278. A bond or undertaking of bail executed by a licensed bail agent must be accepted unless the judge or magistrate is convinced that part or all of the consideration to be posted for bail was feloniously obtained. Pen C §§1275(a), 1276(a). A qualified bail bond agent may both execute and issue a bail bond or undertaking of bail. Pen C §1276(b). All or part of the money paid to obtain the bond is designated as a nonreturnable fee.

The officer in charge of a jail, the clerk of an inferior court of the judicial district with jurisdiction over the offense, or the clerk of the superior court may accept bail in the amount fixed by the complaint, warrant, or bail schedule under specified conditions. Pen C §1269b(a). All money and bond deposits accepted by a jailer are to be transmitted immediately to the judge or clerk of the court that fixed bail. Pen C §1269b(f).

G. When Judge Can Place Defendant Who Is on Bail in Custody

§4.30 1. After Appearance for Trial

When a defendant who has posted bail appears for trial, the court in its discretion may order him or her committed to custody. Pen C §1129. The public safety provision of Cal Const art I, §12, probably has rejuvenated this concept. See §4.21. See also discussion of Pen C §1275 in §4.24.

§4.31 2. After Adverse Verdict

If a verdict is rendered against a defendant, Pen C §1166 says that the defendant must be remanded to custody to await judgment of the court on the verdict. However, after considering the protection of the public, the seriousness of the offenses charged and proven, the defendant's previous criminal record, the probability of the defendant's appearing before the court to hear judgment on the verdict, and the public safety, the court may allow the defendant to remain out on bail if the court concludes the evidence supports this decision. Pen C §1166.

In a misdemeanor case, the defendant has the right to have bail fixed after conviction, and that bail is discretionary after conviction in felony cases. Pen C §1272. In practice, judges follow Pen C §1272.

If the defendant fails to appear for judgment after conviction, the judge must issue a bench warrant for his or her arrest. Pen C §1313.

§4.32 3. On Appeal

Requests for bail on appeal are made to the trial court. See Pen C §1272. A reviewing court can fix bail on proper application showing an erroneous denial by the trial court. Cal Rules of Ct 32(b). Review of the trial court's bail ruling is usually sought through a petition for writ of habeas corpus. See §§40.22–40.34.

In cases charging misdemeanors, or in misdemeanor or felony cases in which only a fine is imposed, bail is a matter of right. This is true even when the appeal is from a modification or reinstatement of probation that imposes imprisonment, if the defendant was originally granted probation without imprisonment. *In re O'Driscoll* (1987) 191 CA3d 1356, 236 CR 882 (120 days in county jail). In all other cases it is discretionary with the judge. Pen C §1272; *In re Pipinos* (1982) 33 C3d 189, 187 CR 730. The alternative to bail is custody.

Defendants who wish bail on felony appeal must demonstrate, by clear and convincing evidence, that they are not likely to flee, that they do not pose a danger to the safety of any other person or to the community, and that the appeal is not for the purpose of delay and raises a substantial legal question. Pen C §1272.1.

Bail application on felony appeal requires reasonable notice to the prosecutor. See Pen C §1274; Cal Rules of Prof Cond 5–300(B). Although there is no statutory requirement that the prosecution be given an opportunity to be heard in open court, it would be unusual for a court to deny a request to be heard. If the bail application is made after sentencing, a five-court-day notice to the prosecutor is required. Pen C §1272(3).

When bail is discretionary, the court must release the defendant on bail pending appeal if the defendant demonstrates all of the following (Pen C §1272.1):

- That, by clear and convincing evidence, the defendant is unlikely to flee, determined under these criteria:
  - Ties to the community;
  - Record of court appearances in previous cases;
  - Severity of possible sentence.
- That, by clear and convincing evidence, the defendant does not pose a danger to another or to the community. The court must consider whether crime is a violent felony described in Pen C §667.5(c).
- That appeal is not for delay, but raises a substantial legal question that is likely to result in reversal if decided in the defendant's favor.

The court must state its reasons for granting or denying bail on appeal.

§4.33 4. After Appeal

When a case is returned to the trial court following completion of the appellate process, the court usually sets a sentencing date and notifies the attorneys. If the defendant is out of custody and fails to appear, the court can direct that he or she be arrested. See (Pen C §1310).

The court has discretion to fix bail on the order of recommitment. Pen C §§1314–1315.

§4.34 5. Other Reasons for Placing Defendant in Custody

Even though a defendant has been admitted to bail, the trial court may order him or her placed in custody when:

- The defendant has failed to appear and the court has forfeited his or her bail (Pen C §1310(a));
- The court determines that the surety is dead or has left the state (Pen C §1310(b)); or
- The defendant fails to meet an increased amount of bail set by the court under Pen C §985 (Pen C §1310(c)).

§4.35 H. Bail Forfeiture; Bench Warrant; Defendant Appearing Through Counsel

If a defendant fails to appear as ordered by the court and does not have sufficient excuse, the court must declare the bail forfeited. Pen C §1305. In addition, the court may issue a bench warrant for the defendant's arrest. Pen C §979. When the court concludes, however, that the defendant may have a sufficient excuse for not appearing, the court may issue a bench warrant but hold service of it and continue the case for a reasonable period of time without ordering a forfeiture to enable the defendant to appear. Pen C §§1305(b), 1306. See *People v Ranger Ins. Co.* (1994) 31 CA4th 13, 36 CR2d 807. This avoids returning the bail bond agent to court when it is not necessary. Defense counsel should present verification of the defendant's excuse when possible, *e.g.*, a letter from the defendant's doctor stating that the defendant was too ill to come to court, or from a towing service that towed the defendant's car at the time of the court appearance.

▶ **Note:** A defendant's failure to appear is not cause for forfeiting bail if, within 15 court days of the scheduled arraignment, no complaint issues, or the charges are dismissed. Pen C §1305(a).

A misdemeanor defendant is not required to be personally present in court if counsel appears on his or her behalf. Pen C §977. In such a case, bail cannot be forfeited unless the court has specifically ordered the defendant to appear. See Pen C §1043(e) (court can order defendant to be personally present at trial for purposes of identification unless counsel stipulate to identity). Similarly, when the court has granted the defendant in a felony case the right to appear through counsel at certain proceedings, the court cannot forfeit bail when the defendant does not appear in compliance with the Pen C §977(b) form. See Pen C §§977(b), 1043(a)–(d).

▶ **Note:** Defendants are required to be present at trial readiness (sometimes called status) conferences, even without the court's order. Cal Rules of Ct 227.6; *People v American Bankers Ins. Co.* (1990) 225 CA3d 1378, 276 CR 210.

§4.36 I. Relief Against Bail Forfeiture

The surety or the surety and the defendant must appear before the court within 180 calendar days after notice of forfeiture to establish a satisfactory

excuse for the defendant's neglect. Pen C §1305(a). The court may extend that period if it finds that the defendant was temporarily disabled by illness, insanity, or detention by other authorities. Pen C §1305(a).

The surety is entitled to be released from the forfeiture on "such terms as may be just," including (Pen C §1305(a)):

- The court's failure to meet the requirement of mailing notice;
- Appearance of the defendant and his or her surety with a satisfactory excuse for the defendant's absence;
- Surrender of the defendant to the court or to custody;
- Death of the defendant or permanent inability to appear due to illness, insanity, or detention by other authorities, all without connivance of the surety.

A surety was excused from payment when the defendant was barred from reentry into the United States because of a prior conviction. *People v American Surety Ins. Co.* (2000) 77 CA4th 1063, 92 CR2d 216.

To obtain relief against bail forfeiture, the surety must strictly adhere to the technical procedural aspects of Pen C §1305(a).

§4.37 J. Exoneration of Bail; Forfeiture of Bail

Exoneration. Termination of the obligation of bail has become known as exoneration. When bail has served its purpose, the depositor or the surety is relieved of the obligation and is entitled to return of the deposit. If the defendant is the depositor and the judgment includes a fine, the bail may be applied toward payment of the fine. Pen C §1297.

Exoneration occurs under the following conditions:

- Demurrer is sustained (Pen C §1008);
- Motion in arrest of judgment is granted (Pen C §1188);
- Case is dismissed following suppression of evidence (Pen C §1538.5(k)–(*l*));
- Case is dismissed under Pen C §1385 (Pen C §§1188, 1384);
- Court orders the defendant into a diversion program for drug abuse (Pen C §1000.2), or mental retardation (Pen C §1001.27);
- Defendant is recommitted to custody after an adverse verdict (Pen C §1166);
- Defendant is found mentally incompetent to stand trial under Pen C §§1368, 1370, 1370.01, or 1371;
- Case is dismissed under Pen C §995 (Pen C §997).

Forfeiture. Forfeiture of defendant's bail as a result of the defendant's failure to appear is only proper when the defendant failed to appear on the charges for which the bail was posted. *People v King Bail Bond Agency* (1990) 224 CA3d 1120, 274 CR 335 (bail posted on Pen C §278.5 charge; defendant acquitted but held in contempt during trial; bail posted on §278.5 charge cannot be forfeited for failure to appear on contempt).

Before forfeiture, the surety or other person who deposited assets may surrender the defendant into custody to obtain exoneration of the bail money. Pen C §1300(a).

▶ **Note:** When the defendant is surrendered to the court by the bail bond agent and the court determines that good cause does not exist for the surrender

because the defendant has not failed to appear and has not violated any court order, the judge may order the bail returned to the depositor and the premium or any part of it returned to the person who paid it. Pen C §1300(b).

When bail is exonerated following a Pen C §995 dismissal and the prosecutor recharges the defendant, bail on the original offense must be applied to the new charge if it is filed within 15 calendar days of the dismissal. Pen C §1303. This procedure permits the defendant to avoid the costs of depositing a second sum or of paying the premium on a second bond.

A deposit of bail received for an infraction in the Vehicle Code (or any local ordinance adopted under the Vehicle Code) must be refunded within 30 calendar days of cancellation, dismissal, or finding of not guilty of the charges. Multiple deposits in payment of a parking ticket must be identified and returned within 30 calendar days. After 60 calendar days, unreturned amounts accrue interest as set by CC §3289. Veh C §42201.6. Other bail money does not earn interest for the depositor. Govt C §53647.5; Pen C §1463.1.

§4.38 K. Habeas Corpus

A writ of habeas corpus is an appropriate vehicle to gain review of a bail issue. See *In re Bright* (1993) 13 CA4th 1664, 17 CR2d 105. It may be used to challenge detention without bail and to examine the amount and conditions of bail. Pen C §§1490–1491. The writ is frequently used to litigate issues of detention allegedly in violation of US Const amends V and VIII. See *Carlson v Landon* (1952) 342 US 524, 96 L Ed 547, 72 S Ct 525. See §§40.22–40.34 on writs of habeas corpus.

VII. DEFENSE ATTORNEY PROCEDURES

§4.39 A. Client Interview; Obtaining Prosecution Information

The defense attorney's initial contact in a criminal case may come from a suspect in custody, a member of his or her family, or a friend. To effectuate a release, it is essential to determine:

- The true name of the person in custody, and, if different, the name under which he or she was booked;
- Where the person is being held;
- Who the caller is and how he or she was referred;
- A physical description of the suspect and date of birth, if possible (often several persons with the same name are held in jail facilities);
- The charges on which the person was arrested;
- Which police agency made the arrest and what officer is handling the case;
- Whether the suspect is on parole or probation and the facts concerning such cases, including whether there are parole or probation holds;
- How financial arrangements are to be made for bail and legal fees;
- Whether there is a hold by any foreign jurisdiction; and
- Whether there is an immigration hold.

It is advisable to contact the investigating officer or obtain a copy of the police report to find out the police point of view concerning the case. Often the facts in the police report differ from those related by the suspect or his or her friends.

Defense counsel should bring to the attention of the police investigator facts that will bear on the amount of bail to be set, or on whether the officer will agree to release the suspect on his or her own recognizance or by citation. In rare cases, information may be revealed that suggests the suspect's noninvolvement and that results in his or her release pending further investigation. Of course, the attorney must weigh the risks of revealing evidence at this point that may be damaging to the client at a later time, against the possibility of reduced bail, O.R., a citation release or release without further proceedings under Pen C §849(b).

Counsel should advise the defendant that commission of a felony while on bail or O.R. for a felony will increase the sentence on the original charge. Pen C §12022.1.

Counsel should remain cognizant of the statutes governing attorney fee contracts, forfeiture potentials, including a "relation back" forfeiture of attorney fees, and the crimes that apply to attorneys who accept "tainted" money. See discussion in §18.18. See Fee Agreement Forms Manual (Cal CEB 1989) concerning fee agreements.

For further discussion of interviewing the defendant, see §§1.1 (client interview form), 1.2, 5.13.

B. Determining Best Release Procedure Before Arraignment

§4.40 1. Release on Citation

In many misdemeanor arrests, it is possible to convince police agencies to release suspects on a citation or written promise to appear. See §§4.4–4.5. Even if the suspect is not released on a citation by the arresting officer, it may be possible to convince a superior officer at the station to do so.

In driving under the influence of alcohol cases, the police usually detain the person arrested until he or she is sober, then release him or her on a citation. Of course, the option of an earlier release should be presented to the client and bail posted if an immediate release is desired. Because of the time required for a bond to be processed, release on citation may prove to be the most expedient means.

§4.41 2. O.R. Release

Own recognizance release is available only from the court. In some jurisdictions there is an on-call judge or bail commissioner. That person may be called by phone at any time of the day or night, and has the authority to release a defendant on his or her own recognizance or to change the amount of bail. See the chart in §4.2, listing bail and O.R. telephone numbers for some of the larger jurisdictions.

When counsel will have to make a court appearance to request an O.R. release, he or she should immediately request an investigation by the court's

O.R. division. The better procedure is for counsel to assist the client in filling out the O.R. form, work with the O.R. investigator, and present facts to the police investigating officer or prosecuting attorney to show that an O.R. release is appropriate so that the prosecutor will not oppose defense counsel's motion in court. Because this procedure may take some time, the client may prefer posting bail and seeking an O.R. release at a later date.

Certain factors may militate against initiating an O.R. investigation, such as the defendant's desire to prevent family or an employer from learning of the arrest or the possibility that an O.R. investigation may uncover information detrimental to the defendant.

§4.42 3. Effect of Parole, Probation, or Immigration Holds

An immediate release is especially important if the client is already on parole or probation. If the arrest comes to the attention of probation or parole authorities, a "hold" may be placed, in which case release will be blocked even if bail is posted on the new offense. *In re Law* (1973) 10 C3d 21, 23, 109 CR 573, 574. If release is effectuated before the "hold," however, the probation or parole officer may allow the defendant to remain free on bail pending a resolution of the current charge. The client should be aware that, if he or she is arrested by the parole or probation officer after posting bail and no bail is set on the violation, the premium paid for bail will most likely be lost and the defendant will not be able to receive credit for time served on the new case. See §§37.53–37.63 on credit for time served.

If a client is detained by a hold placed by the United States Immigration and Naturalization Service (INS), counsel should consult 8 USC §§1252(a), 1357(a), 8 CFR §§242.2, 287.3, and the regulations thereto. If counsel is inexperienced in immigration matters, counsel should also seek advice from an immigration law specialist. An INS hold request is often initiated by a call to the INS by local authorities, so defense counsel must be sure to tell the client not to answer any questions about alienage posed by local or federal authorities. The INS's ability to "hold" without a warrant is circumscribed. A verbal hold must be followed by an administrative warrant within 24 hours. A detained noncitizen may be released on bond or conditional parole (*i.e.,* without bond). The process involves the discretion of an immigration official and the action of an administrative law judge. Their discretion is rarely interfered with on review, which must be by a writ of habeas corpus to a federal district court. A concise review of the initial hold and bond issues and procedures is contained in Kesselbrenner & Rosenberg, Immigration Law and Crimes, chap 8 (1984) (see §2.22 for information on publisher, The West Group). See chap 48 of this book for general discussion of immigration issues.

It is the writers' experience, and that of a number of counsel consulted on the issue, that it is not futile to seek reasonable local bail and post it even though an INS hold is placed. Because of the overcrowded condition of local detention facilities as well as federal immigration detention facilities, obtaining the defendant's release on bail or O.R. in the local court may be the key either to causing the INS to drop its hold or to obtaining immigration bail. The immigration authorities are more likely to drop a hold or set a reason-

able bail when confronted with having to pick up a detainee from the local sheriff. A detention hold placed by the INS on a defendant who has *not* been released from the local jail does not require the federal authorities to find space to hold the defendant. There is thus no incentive for them to deal with the matter. If the defendant is ordered unconditionally released from local custody, however, the federal agency must face using its resources to house the defendant.

After release on an immigration bail, counsel should assure that subsequent immigration procedures are legal and that, in the case of a continuing criminal case, procedures are used that allow the noncitizen to remain in the United States until completion of the criminal process. For further discussion, see chap 48.

§4.43 4. Cash Bail

By posting cash bail, the defendant avoids paying a ten-percent or more premium to a bail bond agent and tying up property as collateral. In certain types of cases, however, posting cash bail creates other problems. For example, in a narcotics case the deposit of a high cash bail may be of interest to the Internal Revenue Service or the Franchise Tax Board. See also the discussion of court clerk reporting requirements concerning cash bail in §4.27. Furthermore, a large amount of ready cash will be noted by the police, DA, investigating officer, or prosecuting attorney and may be used against the defendant. There is also the possibility of a hearing under Pen C §1275 (see §4.24) to determine the source of the cash. It may be advisable, therefore, for defendants in narcotic cases to work through a bail bond agent and maintain a low profile. However, even this avenue may have problems; the subpoenaing of bail bond records and inquiry at bail hearings into the source of bail bond funds now occurs with regularity.

§4.44 5. Pros and Cons of Delaying Release

Counsel should advise the defendant of the benefits and detriments of delaying release. The defendant must then make the final decision; some individuals would prefer to pay any amount to avoid the degradation of incarceration.

Some of the advantages of delay are that charges may not be filed, misdemeanor charges may be filed with a lower bail schedule, or counsel may be successful in convincing the court at the time of arraignment to set lower bail than that called for by the schedule, or to release the defendant on his or her own recognizance. For discussion of the deadlines for arraigning the defendant, see §§6.7–6.8.

Some of the disadvantages of delay include the possibility that the amount of bail will be increased because a misdemeanor arrest becomes a felony with the passage of time, *e.g.*, if a victim is found to have injuries not apparent at first, priors are discovered, or parole or probation holds are placed; and of course, if the victim dies, bail might not be set at all.

§4.45 C. Contacting Bail Bond Representative

Much of the leg work in obtaining a client's release can be accomplished by a reliable and competent bail bond agent. This individual can visit the

client at the jail and make all the contacts and arrangements for the collateral necessary to secure a bond, including appraisals. A bail bond agent may also be able to locate an arrestee whose location in custody is unknown.

It is important for any attorney with criminal cases to establish a relationship with a good bail bond agent. The efficiency of this person will reflect on the attorney. Conversely, a poor impression may result in the client's retaining other counsel.

As a general rule, counsel should never "guarantee" bail unless the client is personally known to the attorney and is of particularly good repute. The expediency of obtaining the client's release may be very costly to the attorney if the client fails to appear and the attorney is liable for the forfeited bond.

§4.46 D. Contacting Prosecutor

Defense counsel should contact the prosecutor whether or not counsel is successful in securing the client's release. If the arrest takes place in a jurisdiction in which different agencies prosecute misdemeanor and felony cases, and if there is a possibility of either being filed, counsel should contact both offices. Counsel should also communicate with the investigating police officer because he or she will probably make the initial decision concerning charging and bail or other release.

In some jurisdictions, if defense counsel believes that the case against the client is weak, counsel can call the prosecutor's office and ask the charging deputy to contact defense counsel before filing the case to hear from counsel why the case should not be filed.

The purpose of discussions with the prosecutor varies. Counsel can attempt to prevent a criminal filing, convince the prosecutor to file misdemeanor rather than felony charges, attempt to limit counts, arrange for an office hearing if these are available (see §10.41), arrange for a voluntary surrender and, if the suspect is in custody, negotiate bail. This may be the time to make a tactical decision to reveal defense evidence not in the possession of the prosecutor. Of course, counsel must know the prosecutor with whom he or she is dealing and weigh the consequences of such a step.

If the client is seeking immunity from prosecution or wishes to cooperate with authorities, and if counsel is willing to represent a person so inclined, this is the time to make such overtures. See chap 25 on immunity for testimony.

Counsel should always continue to review the potential for lowering an agreed and reasonable bail to an even lower sum or to securing O.R. release throughout the proceedings. As the case moves along, the prosecutor may be agreeable to further lowering bail, which can result in release of collateral surety posted with the bail bond agent to secure appearance, release of a cash sum posted with the court, or release of parcels of posted real property. In addition, the psychological effect of having a lower bail at the end of a given proceeding or if other charges are filed is helpful.

Counsel is required to notify the prosecutor when counsel will move to reduce bail after an information or indictment has been filed, when an O.R. is sought following arrest for a specified violent felony, and when bail is a matter of discretion rather than a matter of right. 71 Ops Cal Atty Gen 64 (1988).

§4.47 E. Surrendering Defendant

If a defendant is not in custody and counsel is aware of pending criminal charges, every effort should be made to surrender the defendant before he or she is arrested. If negotiations have been ongoing with the prosecuting agency, arrangements to surrender should include the setting of reasonable bail or release on defendant's own recognizance. Defense counsel may secure the prosecutor's agreement to a lower bail figure if the defendant agrees to conditions such as surrendering his or her passport, agreeing to check in daily with the prosecutor's office or the police department, or waiving extradition. These conditions also may be suggested in any bail argument.

Investigators often ask defense counsel to have the defendant surrender at the police station for booking (*i.e.*, photographing and fingerprinting; Pen C §7(21)). Counsel should be sure that there is an agreement to transport the defendant to court immediately thereafter. Alternatively, counsel can arrange to surrender the client in court when the case is filed. If this is done, counsel can ask the court to release the client from court without first being booked with the order that the defendant arrange to be booked while out of custody.

Once the defendant is before the court, the arrest warrant will be recalled and counsel may argue for reasonable bail in light of the defendant's voluntary surrender. Unless an O.R. release has been agreed on, it is always best to have a bail bond agent present in court to obtain the defendant's immediate release.

Counsel may wish to have family members and friends present in court when the client surrenders. In the right case, a strong showing by friends and family can be influential in persuading the court that the defendant is not a flight risk or a danger to the community. It may even be appropriate to have the individuals who are putting up the bail or posting real property on behalf of the defendant address the court and express their opinion on the honesty, integrity, and trustworthiness of the defendant.

VIII. PROSECUTION PROCEDURES

§4.48 A. Who Makes Release Recommendation

Usually, the prosecutor who prepares the complaint recommends an amount for bail. The sum typically is that indicated on the bail schedule. The recommendation is placed on the face of the complaint and on any related arrest warrant. Alternatively, the prosecutor's original release recommendation is made by a deputy assigned to after-hours duty. Typically, such a deputy is contacted by an arresting or booking officer who desires a higher bail than that reflected on the countywide bail schedule. The deputy gleans the facts of the case, the reasons for a higher bail, and assists the officer (in person or by phone) in drafting a bail deviation declaration. See Pen C §1269c. The deputy may contact a magistrate to advise that the officer will be visiting the magistrate to request that bail be fixed at a higher amount than that given in the bail schedule.

As the case advances procedurally, the prosecutor appearing in court at any stage may recommend a different sum as additional factors are discovered.

See Pen C §§1269c, 1275, 1310. See also Pen C §§1129, 1166. There are sample motions to increase bail and to examine the source of bail in California Criminal Law Forms Manual §§4.1–4.3 (Cal CEB 1995).

A prosecutor's decision to recommend no bail in a noncapital case based on a public safety exception (Cal Const art I, §12) usually must be approved by a supervising deputy with substantial experience.

§4.49 B. Factors Affecting Release Recommendation

The usual sum recommended is that indicated on the countywide bail schedule. Any variation should be based on articulable factors.

The prosecutor should fully discuss the evidence in the case with the investigating officer. Sometimes it may be necessary to contact the victim to determine the details of what occurred, the severity of injuries, the relationship of the parties, and the existence of any threats. It is essential that all available police reports be read carefully.

In addition, the prosecutor should be amenable to requests from the defense attorney or bail bond agent to discuss factors relevant to bail. Explanations for the defendant's conduct on previous occasions can be quite informative. The prosecutor should not hesitate to discuss the matter with any person who has relevant information.

▶ **Note:** If the defendant is represented by counsel, defense counsel's permission must be obtained before talking to the defendant about the subject matter of that representation. Cal Rules of Prof Cond 2–100.

§4.50 C. Preparing for Bail Hearing

Preparation for a bail hearing is the same as that for any contested adversarial setting. The prosecutor should be prepared to present evidence and oral argument to prove the case for the bail recommended. If allowed by local practice or court rules, declarations should be drafted and ready for filing. Any witnesses who would tend to establish a public safety exception or reveal the defendant's propensity to flee should be in court. In addition, the original court files or certified copies of documents showing the defendant's previous failures to appear should be secured for submission into evidence. See *Van Atta v Scott* (1980) 27 C3d 424, 441, 166 CR 149, 157. Proof of previous failures to appear is usually conclusive. See Cal Const art I, §12.

With authority to make inquiry to satisfy the criteria in Pen C §1270 and the inquiry now allowed by Pen C §1275(a), prosecutors should prepare to ask questions about the source of assets proposed for bail or placed with a bond agent and not neglect detailed inquiry into the sureties or assets behind the bail. Alleged narcotic offenders may be discomfited when they realize that inquiry into available assets is contemplated.

For further discussion, see §§4.20 (bail hearing), 4.24 (hearing to determine if bail deposit feloniously obtained). A sample motion to examine the source of bail is in California Criminal Law Forms Manual §4.2 (Cal CEB 1995).

6
ARRAIGNMENT

HERBERT N. F. GEE

HERBERT N.F. GEE, B.A., 1970, California State University (Los Angeles); J.D., 1974, University of California (Berkeley). Mr. Gee is in private practice in Berkeley, specializing in general civil and criminal litigation. He co-authored this chapter in the second edition and updated it for the third, fourth, and fifth editions.

CEB wishes to thank the HON. JUDITH D. FORD, Oakland-Emeryville Municipal Court, who contributed to previous editions of this book.

◇ §6.1 I. OVERVIEW

▶ **Note:** The 1998 amendment to the state constitution by Proposition 220 allows the unification of municipal and superior courts into a unified superior court by majority vote of superior and municipal court judges. Cal Const art VI, §5(e). As of the date of publication, all counties in California have approved unification. Penal Code §1462 confers municipal court jurisdiction on superior courts where the courts are unified.

Defense counsel. Defense counsel takes a seat with other counsel on the side of the bar nearest the judge, or in whatever waiting area is used by counsel in that particular court, and waits until his or her client's case is called. At that time, the out-of-custody defendant comes forward and stands next to defense counsel. The in-custody defendant is brought into court by the bailiff. In some courts, counsel may speak with the prosecutor before a case is called, *e.g.,* to arrange diversion. In some courts, in misdemeanor cases, attorneys obtain their dates from the clerk and do not appear before a judge.

Time and place of first appearance. Persons accused of an infraction, misdemeanor or a felony charged by complaint make their first court appearance in the municipal court. See Pen C §§740, 806, 1462.2. Those accused on the basis of an accusation or indictment make their first court appearance in the superior court. Pen C §§949, 976. Where there is no municipal court due to unification, the superior court has jurisdiction. Pen C §1462(d). People charged only with infractions can be arrested (taken into custody), *e.g.,* for failure to identify themselves (Pen C §853.5). These people are also charged by complaint,

and make their first court appearance before a magistrate. In each case, the arrested person is to be brought before a magistrate or judge without unnecessary delay, and in no case later than 48 hours after the arrest; the 48 hours is tolled during the weekend, holidays, and when the courts are not in session. Pen C §825. See also Cal Const art I, §14 (in felony cases, defendants to be taken before magistrate "without unnecessary delay").

Probable cause determination. Following a warrantless arrest, a probable cause determination must be conducted by a magistrate as soon as reasonably feasible, but no later than 48 hours after arrest; weekends and holidays may *not* be excluded from the 48 hours. *County of Riverside v McLaughlin* (1991) 500 US 44, 114 L Ed 2d 49, 63, 111 S Ct 1661, 1674. This probable cause determination may be combined with another proceeding, such as arraignment, as long as it is timely. *County of Riverside v McLaughlin, supra.*

Advice of rights. Many courts recite a mass advisement of rights at the beginning of each formal court session, for example, at 9:00 a.m., and again at 2:00 p.m. See *Mills v Municipal Court* (1973) 10 C3d 288, 307, 110 CR 329, 342. Thereafter, as individual cases are heard, the court asks individual defendants when their case is called if they were present during the advisement and if they heard and understood it. If the defendant is not represented, the court informs him or her of the charges, including any prior convictions (Pen C §§858–859, 1025), and of his or her right to counsel (Cal Const art I, §15; Pen C §§858, 859, 987(a)) and to a speedy trial (Cal Const art I, §15; Pen C §1382(a)(3)). There is no requirement that the court advise represented defendants of their rights at arraignment unless they wish to plead guilty. *People v Emigh* (1959) 174 CA2d 392, 344 P2d 851. In misdemeanor cases, the judge has the clerk give the defendant a copy of the complaint, if one is requested. In felony cases, the defendant must be given a copy of the charging document. Pen C §988. If the defendant is unrepresented, the judge then asks if he or she will hire an attorney or wishes appointed counsel. Although not required, it is common and better practice for the judge to delay asking a defendant to enter a plea until after he or she appears with an attorney.

Bail and own recognizance release. The court then considers the defendant's custody status. If bail has not already been set, and if the offense is bailable, the court must set bail at defendant's first court appearance. Cal Const art I, §12; Pen C §1271. See *Van Atta v Scott* (1980) 27 C3d 424, 166 CR 149. Many counties have some sort of bail or own recognizance (O.R.) program that interviews prisoners before their first or second court appearance, makes follow-up phone calls to verify the information given by the prisoner, and makes such information available to the court and counsel. This information assists the court in deciding whether to release the prisoner on his or her own recognizance, or, if O.R. release is rejected, the amount of bail to set. Pen C §§1318–1318.8.

Appointment or retention of counsel. If counsel has not been retained or appointed to represent the defendant, the case may be continued to allow the defendant to retain counsel of his or her choosing, or to contact the local public defender or other court appointed attorney agency. When more than one defendant is charged in a single case, the court must appoint independent counsel for each codefendant. Appointed counsel may then recommend joint

representation if that is appropriate. *People v Mroczko* (1983) 35 C3d 86, 115, 197 CR 52, 70.

Arraignment in misdemeanor cases. Although most defendants attend the arraignment, their presence is not required. In misdemeanor cases, counsel may appear for the defendant at all stages. Pen C §977(a); *Simmons v Superior Court* (1988) 203 CA3d 71, 249 CR 721; *People v American Bankers Ins. Co.* (1987) 191 CA3d 742, 236 CR 501.

Depending on local practice, before a case is called at arraignment, defense counsel may wish to discuss with the prosecutor the defendant's release on his or her own recognizance (O.R.), reduction of bail already set, or disposition of the case. If it appears that more time is needed for discussion, and with the prosecutor's concurrence, defense counsel may ask the court to continue the matter to a later time during the court session (*i.e.*, "pass the matter"). In most cases no discussions take place at arraignment.

When a misdemeanor case is called, defense counsel may do any of the following:

- Waive arraignment;
- Request a probable cause hearing if the defendant is in custody (Pen C §991; see §6.26);
- Ask the court to release the defendant on his or her own recognizance or set or reduce bail if the defendant is in custody;
- Enter a plea on the client's behalf (usually a not guilty plea; see §10.1 for a list of available pleas);
- Ask the court to continue the case before entering a plea so counsel can file a demurrer; see §7.27);
- Set the case for motions (see the checklist in §24.3);
- Ask the court to continue the matter for further pretrial nonevidentiary hearings, *e.g.*, pretrial settlement or disposition, or discovery compliance; or
- Request that the case be set for trial.

In some courts, counsel obtain their dates from the clerk and do not formally appear before the judge.

Counsel who needs a continuance before having a client enter a plea, *e.g.*, to prepare a demurrer to the complaint, may request one of no longer than seven calendar days. Pen C §990.

If the defendant is in custody and does not waive the right to a speedy trial, the trial must be set within 30 calendar days of arraignment or plea, whichever occurs later. If defendant is out of custody and does not waive the right to a speedy trial, he or she must be tried within 45 calendar days of arraignment or plea, whichever occurs later. Pen C §1382.

Because defense counsel usually has not had enough time to obtain discovery and conduct an investigation of the case in order to adequately advise the client of the wisdom of a guilty plea, great caution should be exercised before advising a defendant to plead guilty at arraignment.

Arraignment in felony cases. In felony cases, the prosecution may proceed by either of two charging documents: complaint or indictment. Charging is usually by complaint. When proceeding by complaint, the prosecution files a complaint before the magistrate, and the defendant must personally appear

there for arraignment. Pen C §977(b). The court sets the case for a preliminary hearing within ten court days of the date the defendant is arraigned or pleads not guilty, whichever occurs later, unless both the defense and the People (another term for the prosecution) waive their respective rights to a "no-time-waiver" hearing. Pen C §859b. Counsel may schedule motions to be heard at the same time as the preliminary hearing.

Defense counsel may wish to aggressively pursue a plea bargain before the preliminary hearing is conducted, especially in cases that cannot be plea bargained after a holding order is issued. See discussion of this issue in §22.6.

If there is insufficient evidence at the preliminary hearing to make the defendant stand trial on the charges, the case is dismissed, and the defendant, if in custody, is discharged from custody. Pen C §871. If the defendant is held to answer (*i.e.*, required to stand trial), the magistrate orders the defendant to appear for rearraignment within 15 calendar days after the magistrate issues a holding order. Pen C §1382(a)(1). If the defendant and prosecutor waive a preliminary hearing, the prosecutor must file an information within 15 calendar days of the waiver. Pen C §860.

When a prosecutor proceeds by grand jury indictment or accusation, the defendant's first appearance is in the superior court, where he or she is arraigned on the indictment. See Pen C §949. *Hawkins v Superior Court* (1978) 22 C3d 584, 150 CR 435.

At the arraignment on either an information or indictment, counsel and the defendant must be present. Pen C §977(b). If counsel wishes to waive the defendant's personal presence at hearings on motions, counsel may have the defendant execute in open court a waiver of personal appearance form, with counsel's approval indicated, and obtain the court's approval, and must file the waiver with the judge's clerk. The waiver form must be substantially in the language provided in the statute. Pen C §977(b). See §§6.17–6.18. Local court forms should be used if available. At arraignment, counsel may make a bail or O.R. release motion, enter a plea of not guilty, file a formal discovery motion, and set the case for motions (see §24.3) and for trial. Other available pleas are discussed in chap 10. The same motions that are available in misdemeanor cases are also available in felony cases. In felony cases counsel should have checked the requirements of the particular motion before setting the preliminary hearing because some motions may be brought at the preliminary hearing and others may not. See §§22.31–22.35. In addition, in felony cases the defendant may make a motion under Pen C §995 to set aside one or more counts in an information or indictment because of lack of probable cause, because the defendant was not legally committed by a magistrate, or because an indictment was not found, endorsed, and presented as prescribed.

Mentally ill and developmentally disabled defendants. Counsel or the judge may wish to have a defendant examined because of apparent mental incompetence. See Pen C §§1368, 4011.6. These procedures are discussed in §§54.3–54.22.

➪ §6.2 II. CHART: DEADLINES

Procedure	*Deadline*	*Authority*
In-custody defendant arraigned on complaint (either misdemeanor or felony).	Without unnecessary delay; at latest, within 48 hours after arrest, excluding Sundays and holidays.	Cal Const art I; Pen C §§825, 849; *People v Lee* (1970) 3 CA3d 514, 83 CR 715.
In-custody defendant arraigned on complaint (either misdemeanor or felony).	Without undue delay; at latest, within 2 calendar days after arrest, excluding Sundays and holidays. If court not in session, time extended to include next regular judicial day.	Cal Const art I; Pen C §§825, 849; *People v Lee* (1970) 3 CA3d 514, 83 CR 715.
Continuance to obtain counsel.	No more than 7 days in misdemeanor cases; no less than 1 day in felony cases.	Pen C §990.
Out-of-custody defendant arraigned on misdemeanor citation.	Must be at least 10 calendar days after arrest unless defendant waives that right. Prosecutor must file complaint within 25 calendar days of arrest.	Pen C §853.6; Veh C §40303.
Out-of-custody defendant arraigned on misdemeanor complaint.	Without unnecessary delay.	While Pen C §825 appears to apply to defendants both in and out of custody, it has been interpreted to apply only to those in custody. See *People v Sylvia* (1960) 54 C2d 115, 122, 4 CR 509.
Out-of-custody defendant arraigned on felony complaint.	Without unnecessary delay (same as in-custody defendant for all practical purposes).	See Pen C §§825, 859.
Following warrantless arrest, probable cause determination must be conducted by magistrate.	As soon as reasonably possible, but no later than 48 hours after arrest; weekends and holidays may *not* be excluded from 48 hours.	*County of Riverside v McLaughlin* (1991) 500 US 44, 114 L Ed 2d 49, 63, 111 S Ct 1661.
Defendant arraigned on information, whether in or out of custody.	No time specified because information must be filed by then.	Pen C §§859, 1382.
Defendant arraigned on indictment.	Once arrested on bench warrant, same deadlines as defendants arrested on complaint.	Pen C §§945, 978.5; see Pen C §§825, 849; *People v Redinger* (1880) 55 C 290, 298.

☑ §6.3 III. CHECKLIST: ARRAIGNMENT

MISDEMEANOR CASES

Defense Counsel

- ❒ Motion for defendant's release from custody
  - ❒ Bail motion
  - ❒ Own recognizance release motion
- ❒ File waiver of defendant's appearance
- ❒ Probable cause (*Walters*) hearing (Pen C §991)
- ❒ Serve on prosecutor and file informal discovery request
- ❒ File demurrer (before plea)
- ❒ Request continuance before entering plea
- ❒ Enter plea:
- ❒ Not guilty
- ❒ Guilty
- ❒ Nolo contendere
- ❒ Once in jeopardy
- ❒ Former judgment of acquittal or conviction
- ❒ Not guilty by reason of insanity (seldom used in misdemeanor cases)
- ❒ Set pretrial motions (see checklist in §24.3)
- ❒ Set trial date

Prosecutor

- ❒ Request higher bail or no bail if appropriate
- ❒ Bring discovery for defense counsel (usually a police report)
- ❒ Provide complaint to defense on request
- ❒ Serve on defense and file informal discovery request
- ❒ Make motions:
  - ❒ Handwriting exemplars
  - ❒ Fingerprints
  - ❒ Lineup
  - ❒ Severance
  - ❒ Joinder
  - ❒ Amend complaint

FELONY CASES CHARGED BY COMPLAINT

Defense Counsel

- ❒ Motion for defendant's release from custody
  - ❒ Bail
  - ❒ Own recognizance
- ❒ Probable cause (*County of Riverside*) hearing
- ❒ File waiver of defendant's appearance
- ❒ File demurrer (before plea)
- ❒ Serve on prosecutor and file informal discovery request
- ❒ Request continuance before entering plea
- ❒ Enter plea:
  - ❒ Not guilty
  - ❒ Guilty
  - ❒ Nolo contendere
  - ❒ Once in jeopardy
  - ❒ Former judgment of acquittal or conviction
  - ❒ Not guilty by reason of insanity (usually entered in superior court)
- ❒ Set date for preliminary hearing, including motions to be heard as part of preliminary hearing
  - ❒ Former judgment of acquittal or conviction
  - ❒ Not guilty by reason of insanity (seldom used in misdemeanor cases)
  - ❒ Amend complaint

Prosecutor

- ❒ Request higher bail or no bail, if appropriate
- ❒ Bring discovery for defense counsel (usually police reports)
- ❒ Provide complaint to defense on request
- ❒ Serve on defense and file with court informal discovery request
- ❒ Make motions for:
  - ❒ Handwriting exemplars
  - ❒ Fingerprints
  - ❒ Lineup
  - ❒ Severance
  - ❒ Joinder
  - ❒ Amend complaint

FELONY CASES CHARGED BY INDICTMENT OR INFORMATION

Defense Counsel

- ☐ Motion for defendant's release from custody
  - ☐ Bail motion
  - ☐ Own recognizance release motion
- ☐ File waiver of defendant's appearance
- ☐ File demurrer (before plea)
- ☐ File formal discovery motion if needed
- ☐ Request continuance before entering plea
- ☐ Enter plea
  - ☐ Not guilty
  - ☐ Guilty
  - ☐ Nolo contendere
  - ☐ Once in jeopardy
  - ☐ Former judgment of acquittal or conviction
  - ☐ Not guilty by reason of insanity
- ☐ Set date for pretrial motions (see checklist in §24.3)
- ☐ Set motion to dismiss under Pen C §995
- ☐ Set trial date

Prosecutor

- ☐ Request higher bail or no bail, if appropriate
- ☐ File formal discovery motion if needed
- ☐ Set hearing on motion for search and seizure hearing (Pen C §1538.5(i), (j))
- ☐ Set hearing on motion to reinstate complaint (Pen C §871.5)
- ☐ Severance motion
- ☐ Joinder motion
- ☐ Amend information

IV. ACCUSATORY PLEADING

§6.4 A. Misdemeanor Cases

A defendant charged with a misdemeanor (*i.e.*, a change that may result in a maximum penalty of a county jail commitment; see Pen C §§16–17, 19) may be arraigned either on a complaint (Pen C §740) or on a citation (Pen C §§853.6, 853.9; Veh C §40513). A complaint is a formal written document under oath accusing the defendant of a public offense. Pen C §806. A citation is a written notice to appear in court, issued on release from custody or instead of taking a person into custody for a public offense. Pen C §§853.5, 853.6. If a citation is on an approved Judicial Council form but is unverified, the defendant may request that a verified complaint be filed at the time of arraignment. Pen C §853.9(b); Veh C §40513(b). The prosecutor must then file a verified complaint and seek the issuance of a warrant. Pen C §853.9(a). A warrant for failure to appear on a complaint based on a written promise to appear does not have to be verified. Pen C §853.8; see *People v Superior Court* (Copeland) (1968) 262 CA2d 283, 68 CR 629.

§6.5 B. Felony Cases

Felonies (cases that may result in a state prison commitment or sentence of death (Pen C §17(a))) are tried in superior court based on either an indictment or an information. Pen C §737. Before an information can be filed, however, a complaint must be filed before a magistrate and a preliminary hearing conducted or waived. Pen C §§738, 860. An information may allege any charge proved by the evidence presented at the preliminary hearing, whether or not charged in the magistrate's holding order. Pen C §§738–739. An indictment is the charging document returned by a grand jury based on its investigation and deliberation. Pen C §§939.9, 949. For further discussion, see §§7.3–7.5 (description of complaints, informations, indictments) and chap 22 (preliminary hearings).

§6.6 C. Unrelated Traffic Offenses

A person arrested on a misdemeanor or felony warrant who has outstanding traffic citations may consent to be arraigned on the traffic matters at the same time he or she is arraigned on the warrant. It is irrelevant whether the appearance date on the citations has arrived or not. Veh C §40311.

A person imprisoned in state prison may secure a dismissal of most Vehicle Code violations. Veh C §41500. See §52.39.

V. DEFINITION, PURPOSE, AND TIMING OF ARRAIGNMENT

§6.7 A. Definition and Purpose

Definition. Arraignment occurs when a judge, clerk, or prosecutor acting at the court's direction reads the accusatory pleading to the defendant, delivers a copy to him or her, asks whether the defendant wishes to enter a plea, and perhaps includes entry of a plea.

▶ **Note:** When a complaint charges only misdemeanor violations, a copy need not be delivered to the defendant unless he or she requests one. Pen C §988.

It is unclear whether arraignment includes defendant's entry of a plea because Pen C §988 makes no reference to actual entry of a plea. In *Chartuck v Municipal Court* (1975) 50 CA3d 931, 123 CR 816, the court concluded that arraignment occurs whether or not defendant enters a plea. However, in *Simpson v Municipal Court* (1975) 45 CA3d 112, 119 CR 184, the court held that entry of a plea is an integral part of arraignment—at least for purposes of bringing a defendant to trial within the time requirements of Pen C §1382. *Valdes v Municipal Court* (1977) 69 CA3d 434, 438 n3, 138 CR 50, 52 n3, held that arraignment has occurred, at the very latest, at the time a plea is entered.

▶ **Note:** When representing a defendant who appeared initially without counsel, and there is no evidence that the defendant waived time, the attorney may wish to argue that the time to bring the case to trial began to run from the defendant's first appearance and not from the subsequent entry of a plea.

Purpose. The purpose of arraignment is to inform the accused of the charges

against him or her and to give the accused a fair opportunity to plead to them. *People v Turner* (1994) 8 C4th 137, 32 CR2d 762.

§6.8 B. Where Arraignment Takes Place

A defendant must be arraigned before the court in which the accusatory pleading is filed unless the action is transferred to another court for trial. Pen C §976. In non-unified courts, defendants are arraigned in municipal court on a complaint and in superior court on an information or indictment. In unified courts, the superior court has jurisdiction over all criminal cases. See §§7.3–7.5 for description of complaints, informations, and indictments.

When a defendant is unable or unwilling to appear in court, arraignment may be held where the defendant is located, *e.g.*, a hospital room or cell.

Until January 1, 2001, a defendant accused in Sierra County who is in custody in Nevada County may be arraigned in Nevada County. Pen C §976.5. See discussion in §6.32 on out-of-county arraignment, and in §6.14 on televised arraignments.

§6.9 C. By Whom Arraigned; When Rearraignment Required

An arraignment must be conducted by the court, or by the clerk or the prosecuting attorney at the court's direction. Pen C §988. Better practice, however, is for the court to conduct the arraignment and to advise defendants of their rights. *Mills v Municipal Court* (1973) 10 C3d 288, 307 n17, 110 CR 329, 343 n17.

Although an accused must be arraigned to apprise him or her of the charges filed, the accused need not be rearraigned on *existing* charges when a new accusatory pleading is filed, after appeal, or when an amended accusatory pleading is filed. However, the accused must be arraigned on any *new* charges that are added to the newly filed or amended pleading. *People v Turner* (1994) 8 C4th 137, 32 CR2d 762.

▶ **Note:** In felony cases, the court is required to obtain the defendant's right thumbprint following arraignment on an information or indictment. Pen C §992.

§6.10 VI. RECORDING ARRAIGNMENT

A court clerk must prepare and maintain a docket that reflects the title of each criminal action and all orders and proceedings in those actions. A docket entry is considered legally sufficient for all purposes. Pen C §1428.

To make a complete docket entry, a court may order a court reporter to transcribe all oral proceedings or to electronically record them. CCP §274c; Govt C §72194.5; Cal Rules of Ct 980.5. California Rules of Court 980.5(f)–(g) describes the preparation and use of transcripts from recordings.

§6.11 VII. WHEN ARRAIGNMENT MUST TAKE PLACE

A defendant charged with a misdemeanor or a felony and held in custody must be brought before a magistrate without unnecessary delay following the

arrest. Pen C §849. "Unnecessary delay" means, in any event, "within 48 hours after [defendant's] arrest, excluding Sundays and holidays." Pen C §825; CCP §§134–135; Govt C §§6700, 6706, 71345. This language has been interpreted to exclude weekends and court holidays. *People v Lee* (1970) 3 CA3d 514, 521, 83 CR 715, 719. See also *People v Pickens* (1981) 124 CA3d 800, 177 CR 555. Code of Civil Procedure §134, authorizing local courts to conduct arraignments on judicial holidays, does not convert those into a nonholiday for purposes of computing time. If the court is not in session, the time is extended to the next regular judicial day. Pen C §825. If the 48-hour period expires while the magistrate is still in session, the arraignment may take place at any time during that session. Defendants arrested on Wednesday must be arraigned on Friday, no matter what time the arrest occurred, unless the Friday is a court holiday. Pen C §825(a)(2).

The 48-hour limitation applies to people arrested with and without a warrant for infractions, misdemeanors, and felonies. Even if no complaint has issued, the defendant must be taken before the magistrate within these time limits to be released from custody. Pen C §825.

A defendant must be taken before a magistrate as early as possible within the 48-hour limit, even though no complaint has issued. See Pen C §825. Forty-eight hours is only a limit; a delay of less than 48 hours may be unreasonable under Pen C §825 or Cal Const art I, §14. See *People v Powell* (1967) 67 C2d 32, 59, 59 CR 817, 833; *Dragna v White* (1955) 45 C2d 469, 289 P2d 428.

Defendants are usually arraigned on an information in superior court 15 calendar days after the defendant is held to answer, although that is not required, because the information must be filed by then (Pen C §1382).

Failure to comply with requirements for timely filing of the charging document and arraignment in court does not necessarily require dismissal (*In re Walters* (1975) 15 C3d 738, 753, 126 CR 239, 250), although it may affect the legality of a confession made during the time arraignment was delayed (see *People v Thompson* (1980) 27 C3d 303, 329, 165 CR 289, 303, discussed below), and may serve as grounds for a civil action against the offending police officer (*Dragna v White* (1955) 45 C2d 469, 289 P2d 428). An officer's willful delay in bringing a defendant before a magistrate is a misdemeanor. Pen C §145.

To warrant dismissal, the delay between arrest and arraignment must be unreasonable and deprive the defendant of a fair trial or otherwise be prejudicial to the defendant. See *People v Valenzuela* (1978) 86 CA3d 427, 150 CR 314 (defendant claimed prejudice because he was unable to secure chemical test after being arrested for being under influence of narcotic (Health & S C §11550); court reversed trial court's dismissal because record did not support conclusion that delay in arraignment was reason for defendant's inability to secure test); *People v Combes* (1961) 56 C2d 135, 142, 14 CR 4, 7 (defendant arraigned less than two days after arrest; no unnecessary delay). Dismissals are rare because of the heavy burden of prejudice. *People v Turner* (1994) 8 C4th 137, 32 CR2d 762 (delay did not result in involuntary statements); *People v Thompson* (1980) 27 C3d 303, 329, 165 CR 289, 303 (one-day delay in arraigning defendant accused of homicide so that arresting officer could get some sleep was not sufficient reason for delaying arraignment; however, there was no showing that illegal detention produced defendant's confession, nor that there was essential

connection between illegal detention and confession); *People v Pettingill* (1978) 21 C3d 231, 145 CR 861 (police read defendant his *Miranda* rights on three separate occasions over 61-hour period during which defendant was not arraigned; defendant refused to talk first two times, but confessed third time; judgment reversed); *In re Walker* (1974) 10 C3d 764, 779, 112 CR 177, 186 (delay is but one factor in determining whether statement is voluntary, and confession made during illegal delay is not automatically inadmissible); *People v King* (1969) 270 CA2d 817, 76 CR 145 (purpose of delay was not to elicit damaging statements, and delay was within statutory limits).

Defense counsel may seek a defendant's release from custody when the defendant is held beyond the Pen C §825 limits by filing a petition for writ of habeas corpus. *People v Wilson* (1963) 60 C2d 139, 152, 32 CR 44, 53. For further discussion of these writs, see §§40.22–40.34.

For discussion of the related topic of probable cause hearings, see §6.26.

§6.12 VIII. ASCERTAINING DEFENDANT'S TRUE NAME

Defendants may be tried under their true names or the names they provided at arrest. At arraignment, defendants must be given the opportunity to provide their true names to the court. If a defendant provides a different true name from the one on the complaint, the court must direct that the correction be entered in the court minutes. Pen C §989.

When the true name will incriminate the defendant, defense counsel should direct the client to remain silent. Penal Code §989 does not require a defendant to provide his or her true name.

IX. ADVICE OF RIGHTS

§6.13 A. Collective or Individual Advice

Misdemeanor cases. The court in misdemeanor cases may collectively *advise* defendants of their rights (*Mills v Municipal Court* (1973) 10 C3d 288, 307, 110 CR 329, 342, cited with approval in *Sundance v Municipal Court* (1986) 42 C3d 1101, 1129, 232 CR 814, 831); however, individual inquiry and waiver is required for a valid *waiver* of a right (*In re Smiley* (1967) 66 C2d 606, 58 CR 579 (waiver of counsel and speedy trial); *James v Municipal Court* (1975) 45 CA3d 557, 119 CR 606 (mass arraignment sufficient when coupled with individual inquiry regarding defendant's wish to waive counsel and plead guilty)). Counsel usually may obtain a sample of the mass arraignment form from the clerk of the court in order to review what advice was given.

Felony cases. Advisement of rights in felony cases is done individually. *In re Tahl* (1969) 1 C3d 122, 132, 81 CR 577, 584.

§6.14 B. Use of Televised Advisement and Arraignment; Videotaped Advisements

If the defendant is in custody, the initial court appearance may, with the consent of the defendant, be conducted by two-way electronic audio/video communication. Pen C §977(c).

Videotaped mass advisements of constitutional rights in court are not constitutionally objectionable. *People v Shannon* (1981) 121 CA3d Supp 1, 175 CR 331.

Penal Code §977.2 allows for arraignment of currently incarcerated defendants charged with a misdemeanor or felony to be conducted by two-way electronic audio-video communication without the physical presence of the defendant in the courtroom.

C. Advice Concerning Counsel; Counsel's First Appearance

§6.15 1. Court's Duty To Advise Unrepresented Defendant of Right to Counsel

The court is required to inform unrepresented defendants of their right to counsel (Cal Const art I, §15; Pen C §§858–859, 987(a)). (This is to be distinguished from the rights that must be given and waived when a defendant pleads guilty or no contest. See discussion in §§10.7–10.22) There is no requirement that the judge be the one to advise defendants of their rights; the prosecutor or clerk may do it as well. However, better practice is for the judge to advise defendants. *Mills v Municipal Court* (1973) 10 C3d 288, 307 n17, 110 CR 329, 343 n17.

Unrepresented defendants must be informed that they are entitled to the aid of retained counsel of their choice at every stage of the proceedings (Cal Const art I, §15; Pen C §§686(2), 858; *People v Crayton* (1999) 77 CA4th 307, 91 CR2d 488 (failure to readvise defendant of right to counsel at arraignment after being so advised at preliminary hearing was error, but harmless), and if they are financially unable to employ counsel, that they are entitled to court-appointed counsel (Pen C §§858–859, 987(a), 987.2; *In re Smiley* (1967) 66 C2d 606, 615, 58 CR 579, 585; *Bogart v Superior Court* (1963) 60 C2d 436, 34 CR 850 (defendant was an attorney)). If they wish, they can represent themselves. *Faretta v California* (1975) 422 US 806, 45 L Ed 2d 562, 95 S Ct 2525. For further discussion of the right to counsel, see chap 5.

The court must inform defendants *before* appointing counsel that they may be ordered to reimburse the county for the cost of court-appointed legal services. Pen C §987.8(f). When the court appoints counsel, it may hold a hearing to determine whether the defendant has any assets, particularly real property, that can be attached by the county to reimburse it for legal assistance to the defendant. Pen C §987.8(a).

Defendants have the right to a reasonable continuance in order to obtain counsel. Pen C §859; *In re Johnson* (1965) 62 C2d 325, 329, 42 CR 228, 231.

When indigent codefendants appear without counsel, the court must initially select separate and independent counsel for each defendant to determine whether the interests of justice "will best be served by joint representation." *People v Mroczko* (1983) 35 C3d 86, 115, 197 CR 52, 70. After attorneys have interviewed codefendants and returned to court, or when retained or appointed counsel for codefendants states that he or she faces a conflict of interest and requests appointment of separate counsel, the court should accept the attorney's statement as an officer of the court that a conflict of interest exists and should grant the request. Although the judge may explore the adequacy of a claim of conflict,

he or she may not require an attorney to make a detailed presentation of the basis of the conflict because it might risk violating the duty of lawyer-client confidentiality. *Leversen v Superior Court* (1983) 34 C3d 530, 539, 194 CR 448, 453.

Codefendants may be jointly represented only after each has made a knowing and intelligent waiver of the right to separate counsel. *People v Mroczko* (1983) 35 C3d 86, 109, 197 CR 52, 66.

For further discussion of conflicts in joint representation, see §§18.8–18.16.

§6.16 2. When Public Defender Represents Defendant at First Court Appearance; Counsel Subsequently Retained

Whether appointed counsel will be present with the defendant at the first court appearance depends on the policy of the local public defender or other indigent counsel program. In some counties, defendants are routinely interviewed by a public defender before their first court appearance and represented at that appearance. This procedure has several advantages for the defense. First, defense counsel is able to advise the defendant of his or her right to remain silent; police officers may seek to continue or begin questioning on the crime for which defendant was arrested, or an unrelated crime, after arrest and before the first court appearance. Second, defense counsel is prepared to make a bail or own recognizance (O.R.) release recommendation at the first appearance. Third, defense counsel or an investigator can conduct any investigation that must be done right away, *e.g.*, photographing bruises and other injuries on the defendant. In other counties, the public defender waits until the first court appearance to be appointed by the court and then interviews the defendant. The advantage of this approach is that some or many defendants bail out before a public defender goes to the jail to interview them, and are more likely to secure private counsel or will come to the public defender's office, where they can be interviewed more conveniently.

Private counsel retained after a public defender has been appointed may give the public defender's office a substitution-of-counsel form signed by the defendant and request a copy of any discovery they have received or investigation they have conducted. See Evid C §§953–954 (lawyer-client privilege). See Cal Rules of Prof Cond 3–700(D)(1) (client papers and property). A sample substitution of counsel form is in California Criminal Law Forms Manual §5.3 (Cal CEB 1995). In practice, many courts will accept an oral substitution of counsel when done in open court with the defendant's express consent.

3. Appearance by Counsel and Defendant

§6.17 a. In Misdemeanor Cases

The court can require a defendant to be present in the courtroom during arraignment. Pen C §977(b). In particular, in domestic violence cases as defined by CCP §942, and in cases involving a misdemeanor violation of Pen C §273.6, the court may order the defendant to be personally present for the purpose of service of a restraining order under Pen C §136.2. Pen C §977(a)(2). Otherwise, a misdemeanor defendant may appear at the arraignment through counsel. Pen

C §977(a). See also Veh C §40507 (appearance by counsel complies with written promise to appear). It is preferable for defense counsel to have the defendant sign a form giving his or her consent to this procedure. See the sample form for felony cases in California Criminal Law Forms Manual §5.4 (Cal CEB 1995), which also may be used in misdemeanor cases with some modification.

A defendant charged with a misdemeanor appearing through counsel is not required to be personally present when the case is set for trial. *Castaneda v Municipal Court* (1972) 25 CA3d 588, 594, 102 CR 230, 234. The court may set a trial date in the absence of both the defendant and defense counsel, and notify counsel by mail of the future court date. *Cody v Justice Court* (1965) 238 CA2d 275, 288, 47 CR 716, 725. See also Veh C 40519(b) (defendant who enters plea by mail may be notified of trial date by mail); Cal Rules of Ct 830 (when trial and arraignment are set for same date at request of defendant who is out of custody, clerk must notify defendant of time and date). However, trial usually is set in counsel's absence only in Vehicle Code infraction cases.

If the court sets a case for trial in the defendant's absence, it must be set for trial by jury unless the defendant previously waived the right to a jury trial. Cal Const art I, §16; *In re Tahl* (1969) 1 C3d 122, 81 CR 577; *People v Martin* (1980) 111 CA3d 973, 169 CR 52.

A corporation may appear through counsel. When a corporation is charged with misdemeanor or infraction violations arising from the operation of a motor vehicle, the corporation may appear through the president, vice president, secretary, or managing agent to enter a plea of guilty. If a representative of the corporation does not appear, the court must enter a plea of not guilty and proceed as in any other case. Pen C §1396.

§6.18 b. In Felony Cases

A defendant charged with a felony must be personally present at the arraignment, the time of plea, the preliminary hearing, when evidence is taken during trial, and when sentence is imposed. Pen C §977(b). A defendant accused of a felony may waive his or her presence for most other proceedings, but only with the court's permission and defense counsel's approval and after completing a waiver of appearance form. Pen C §977(b). A sample form is in California Criminal Law Forms Manual §5.4 (Cal CEB 1995). The defendant must execute the written waiver in open court, and counsel must sign it, secure the court's consent, and file the waiver with the court clerk. Pen C §977(b).

§6.19 4. Notice Regarding Payment of Cost of Counsel

Before appointing counsel for an indigent defendant, the court must notify him or her that he or she may be liable for payment of all or part of the cost of appointed counsel if the court, at the conclusion of the criminal proceedings, determines that the defendant has the present ability to pay. Pen C §987.8. The court clerk must note on the docket that this admonition was given at the time the court appointed counsel. See *People v Amor* (1974) 12 C3d 20, 29, 114 CR 765, 770 (due process requires notice).

See Pen C §987.8 generally for a detailed description of the hearing requirements for redetermination of indigency.

§6.20 D. Informing Defendant of Charges; Copy of Complaint

When a defendant is brought before a magistrate (defined in §3.4), the magistrate must immediately inform him or her of the charge, including any prior convictions that have been pleaded. Pen C §§858–859, 1025; see *In re Johnson* (1965) 62 C2d 325, 329 n2, 42 CR 228, 231 n2 (Pen C §859 applies to all courts). Defendants are entitled to a copy of the charging document and automatically given one in felony cases. Defendants need only request the charging document if charged with a misdemeanor. Pen C §988.

Failure to inform a defendant of the charges is usually legally relevant only if the defendant then entered a plea of guilty without counsel. See §35.30.

X. ENTERING PLEA

§6.21 A. Requesting Defendant's Plea

After the complaint is read and the court determines that the defendant either is represented by counsel or has effectively waived counsel, the court asks the defendant to enter a plea. Pen C §988. If the defendant refuses to answer, a plea of not guilty is entered by the court. Pen C §1024.

§6.22 B. Choice of Plea; Time To Answer

When a defendant appears without counsel and wishes to be represented by counsel, the better practice is for the court to delay asking the defendant to enter a plea until after he or she appears with an attorney. Defendants are entitled to a reasonable time to answer and a reasonable continuance to enter a plea. In the case of a felony, the continuance must be for at least one day; if a misdemeanor, it may not exceed seven days. Pen C §990. These statutorily mandated continuances do not require a waiver of the right to speedy trial, or of statutory time limits. See Pen C §990 (no language requiring such waivers).

Defendants who wish to represent themselves must be asked if they wish to enter a plea. The choices of plea are set out in §10.1. If a defendant refuses to enter a plea, he or she is deemed to have entered a plea of not guilty. Pen C §1024.

If a defendant has been arrested for a Vehicle Code misdemeanor or infraction, he or she is entitled to a continuance of at least five days to plead and prepare for trial. However, the defendant may waive the five-day continuance either in writing or in open court. Veh C §40306(b).

§6.23 C. Postponement for Mental Evaluation

Proceedings may be postponed to determine if a defendant is mentally competent to stand trial. See discussion in §§54.3–54.22.

§6.24 D. Inquiry Concerning Priors

When a prior conviction is alleged, the court must ask the defendant whether the allegation is true. Pen C §1025. If the defendant intends to admit the prior

conviction, the court must advise the defendant of the constitutional rights discussed in §§35.30–35.39. The defendant's answer must be entered in the minutes and is considered conclusive in all subsequent proceedings unless withdrawn with the court's consent. If the defendant denies suffering the prior or refuses to answer ("stands mute on the prior"), the denial is entered in the minutes, and the prior conviction must be tried by a jury, or by the court if a jury is waived. A defendant's refusal to answer is the equivalent of a denial of the prior. Pen C §1025.

For further discussion of prior convictions, including grounds for attacking priors and procedure, see chap 35.

§6.25 E. Entering Plea of Guilty or No Contest

The defendant can enter a plea of guilty or no contest through counsel in misdemeanor cases, but must appear in court to do so in felony cases. See Pen C §977(a); *Simmons v Superior Court* (1988) 203 CA3d 71, 249 CR 721. It is unusual for counsel to have a client enter a plea of guilty or no contest at arraignment because there usually has not been sufficient time to investigate the case and discuss a plea bargain with the prosecutor.

▶ **Note:** In some cases, when counsel does have the facts, an early plea may be strategically advisable to bar prosecution for more serious uncharged offenses. See *People v Bas* (1987) 194 CA3d 878, 241 CR 299.

For further discussion, see chaps 10 (plea bargaining and requirements when defendant enters a plea of guilty) and 38 (pronouncing judgment).

§6.26 XI. HEARINGS CONCERNING PROBABLE CAUSE (*COUNTY OF RIVERSIDE, WALTERS,* AND PRELIMINARY HEARINGS)

Warrantless arrests (*County of Riverside*). A probable cause hearing must be held promptly after arrest for persons arrested without a warrant. *Gerstein v Pugh* (1975) 420 US 103, 125, 43 L Ed 2d 54, 71, 95 S Ct 854, 868. At the latest, it must be held within 48 hours of arrest. Weekends and holidays are *not* excluded from the 48 hours. *County of Riverside v McLaughlin* (1991) 500 US 44, 114 L Ed 2d 49, 63, 111 S Ct 1661, 1670. The 48-hour rule, however, is only a guideline. While a county's routine practice of holding probable cause hearings within 48 hours would make the jurisdiction immune from system challenges, an individual may challenge the timing of his or her probable cause determination as unreasonable even though it came within 48 hours of arrest. See *People v Bonillas* (1989) 48 C3d 757, 787, 257 CR 895, 912. When the probable cause determination is not made within 48 hours of the defendant's arrest, the burden shifts to the prosecution to demonstrate the existence of a bona fide emergency or other unusual circumstance justifying the delay. *County of Riverside v McLaughlin, supra*. For further discussion, see §6.26.

The hearing does not have to be adversarial; attorneys do not have to be present, and the magistrate may base his or her decision solely on documents. *Gerstein v Pugh* (1975) 420 US 103, 120, 43 L Ed 2d 54, 69, 95 S Ct 854,

866. In many jurisdictions, as a matter of regular practice, prosecutors attach supporting declarations to support probable cause to the complaint at the time of filing it. The hearing may be combined with the arraignment or some other proceeding if held within the 48-hour time limit. *County of Riverside v McLaughlin* (1991) 500 US 44, 114 L Ed 2d 49, 64, 111 S Ct 1661, 1671.

A prompt probable cause hearing is required in juvenile proceedings, but it does not have to be held within 48 hours. *Alfredo A. v Superior Court* (1994) 6 C4th 1212, 26 CR2d 623.

Probable cause hearing when misdemeanor defendant in custody (*Walters*). Lack of probable cause in misdemeanor cases may be attacked at a Pen C §991 hearing (a *Walters* hearing), if the defendant is in custody when arraigned and pleads not guilty. Pen C §991(a). Misdemeanor defendants in custody and entering a plea of not guilty must be given notice of the right to a hearing to determine whether there is probable cause to believe that a public offense has been committed and that the defendant is the person responsible. Pen C §991; *In re Walters* (1975) 15 C3d 738, 126 CR 239. This notice can be given en masse. *Mills v Municipal Court* (1973) 10 C3d 288, 303, 110 CR 329, 339; *Sundance v Municipal Court* (1986) 42 C3d 1101, 1129, 232 CR 814, 830. The procedures in Pen C §991 are based on the constitutional requirement that there be a judicial determination of probable cause on request when a misdemeanor defendant is in custody. *In re Walters* (1975) 15 C3d 738, 126 CR 239. The court may rule on the legality of any detention or arrest as part of the probable cause determination. *People v Ward* (1986) 188 CA3d Supp 11, 235 CR 287.

No notice concerning a Pen C §991 hearing is required, and the motion may be made orally. The court may grant a continuance for good cause not to exceed three court days before holding a hearing. Pen C §991(b). At the §991 hearing, the court can consider the arrest warrant and its supporting affidavits or declarations, and any other documents of similar reliability that are incorporated by reference. Pen C §991(c). If the court determines that there is probable cause to believe the defendant committed the offense charged, the court must set the case for trial. If the court finds that no probable cause exists, it must dismiss the complaint. Pen C §991(d). This dismissal is not a bar to another prosecution for the same offense if the prosecutor refiles within 15 calendar days of the dismissal. However, a second dismissal under Pen C §991 is a bar to further prosecution for that offense. Pen C §991(e). For further discussion, see §6.26.

Preliminary hearing in felony cases charged by complaint. The existence of probable cause in felony cases charged by complaint must be proven at the preliminary hearing whether the defendant is in or out of custody. If there is insufficient probable cause, the case must be dismissed. See Pen C §§858–883. See also chap 22 (preliminary hearings).

§6.27 XII. SETTING BAIL; OWN RECOGNIZANCE (O.R.) RELEASE

The court must set bail at defendant's first court appearance if the offense is bailable. Cal Const art I, §12; Pen C §1271. A court cannot set bail on a parole hold. *In re Law* (1973) 10 C3d 21, 26, 109 CR 573, 576.

The court may release on his or her own recognizance, *i.e.*, without having to post bail, anyone for whom the court could set bail. Pen C §1270(a).

A person who is arrested on a charge from another county has the right to be brought to court in the county of arrest to have bail set, if no bail has been set by the warrant itself. Pen C §§821 (felonies), 822 (misdemeanors). See also §6.15.

For further discussion of bail and O.R. release, see chap 4.

§6.28 XIII. DIVERSION AND DEFERRED ENTRY OF JUDGMENT

Counsel may request deferred entry of judgment, or diversion, depending on what program is available, at the first court appearance. They are available in certain drug cases, child abuse and neglect cases, and cases involving developmentally disabled defendants. In addition, individual counties may have their own programs for particular classes of cases. Pen C §§1000–1001.75. On successful completion of the program, the charge is dismissed. Pen C §§1001.1, 1001.7. In the case of child abuse and neglect cases, when there is a referral for counseling under Pen C §§1000.12–1000.13 before the filing of a complaint, a complaint will not be filed if diversion is successfully completed. Pen C §1000.12(c).

For further discussion of diversion and deferred entry of judgment, see chap 9.

XIV. SETTING NEXT COURT APPEARANCE

§6.29 A. Misdemeanor Cases

After arraignment, counsel can ask the court to schedule appropriate pretrial motions for hearing, pretrial hearings for plea negotiations, and trial dates. Some counties require written notice of the grounds for search and seizure motions. Counsel should check local court rules before setting motions.

Pretrial motions are discussed in chaps 11 (discovery), 14 (speedy trial motion), 16 (change of venue), 19 (lineup and identification), 20 (motion to return or suppress evidence), 21 (motion to disclose informant), and 24 (selected pretrial motions). See chap 54 on procedures for mentally ill and developmentally disabled defendants.

A misdemeanor defendant who has been released on his or her written promise to appear may authorize a court clerk to set the case for arraignment and trial on the same date without first making a court appearance. Cal Rules of Ct 830.

▶ **Note:** In some courts, dates are obtained from the court clerk.

§6.30 B. Felony Cases

Initiated by complaint. In felony cases initiated by the filing of a complaint defense counsel may obtain some discovery at arraignment, depending on local practice. However, it is important for defense counsel to obtain full discovery before the preliminary hearing. Therefore, defense counsel should make an

informal discovery request at the arraignment unless a standing discovery order covers the items desired by the defense. Prosecutors also should make an informal discovery request at arraignment. For further discussion, see chap 11.

If counsel wishes to have a motion heard at the preliminary hearing, he or she should check and follow the notice requirements for that particular motion as well as any local rules of court. See §§22.31–22.34 for discussion of motions that may be brought at the preliminary hearing. See chap 54 on procedures for mentally ill and developmentally disabled defendants.

Initiated by information or indictment. At arraignment on a felony information or indictment, defense counsel should notice discovery and other appropriate motions for hearing. Defense pretrial motions available in superior court are discussed in chaps 11 (discovery), 14 (speedy trial motion), 16 (change of venue), 19 (lineup and identification), 20 (motion to return or suppress evidence), 21 (motion to disclose informant), 23 (motion to dismiss the information or indictment under Pen C §995), and 24 (selected pretrial motions). See chap 54 on procedures for mentally ill or developmentally disabled defendants. The prosecution also has the right to hearings on discovery requests made to the defense under Pen C §§1054–1054.7. See chap 11.

Prosecutors may notice a special hearing to challenge a ruling at the preliminary hearing favorable to the defense under Pen C §1538.5(j) (see §20.31), a motion to reinstate charges (see §§20.27, 20.31, 23.32–23.38), a discovery motion (see chap 11), and any other relevant motion (see checklist in §24.3).

§6.31 XV. SELECTING TRIAL DATE

A defendant is entitled to at least five days to prepare for trial after entering a plea. Pen C §1049.

Misdemeanor cases. In misdemeanor cases, a trial must be set no more than 30 calendar days after the defendant is arraigned when he or she is in custody, or 45 calendar days after arraignment when not in custody unless the defendant waives time or good cause is shown for a continuance. Pen C §1382(a)(3). A defendant unrepresented by counsel cannot waive these time limits or consent to a trial date beyond the statutory period unless the court has explained to him or her (1) the right to be tried within the statutory period (unless there is good cause for delay) or to have the case dismissed, and (2) the effect of consent to a postponement. Pen C §1382; *Hill v Municipal Court* (1962) 206 CA2d 257, 24 CR 34. See discussion of what constitutes "arraignment" in §6.7.

Felony cases. Felony trials must be set no more than 60 calendar days after the filing of the information or finding of the indictment absent a time waiver or good cause. Pen C §1382(a)(2). Another statute, Pen C §1049.5, passed as part of Proposition 115, requires felony trials to be set within 60 calendar days of the superior court arraignment unless good cause is shown under Pen C §1050 for a later date. If the trial in a felony case does not take place within these guidelines, and there has been no time waiver, the defendant is entitled as a matter of right to have the case dismissed. Pen C §1382.

▶ **Note:** Penal Code §1049.5 has not been amended to reflect court unification, and only refers to "defendant's arraignment in superior court."

Preferential setting. Trials in the following types of cases are to be set before other trials, and in any event must be set for trial within 30 calendar days of arraignment (Pen C §1048):

- When a minor is detained as a material witness in the case (see §51.24), or is the victim of the alleged offense, or when any person is the victim of a sex crime charged under Pen C §§261, 264.1, 286, 288, 288a, or 289 committed by force, violence or threat of violence;
- When a witness or a victim was a person who was 70 years of age or older at the time of the alleged offense or was a dependent adult;
- When a violation of Pen C §§261, 264.1, 273a, 273d, 285, 286, 288, 288a, or 289, committed by the use of force, violence, or the threat of violence, is charged.

▶ **Note:** Nothing in Pen C §1048 provides for a statutory right to trial within 30 calendar days. Pen C §1048(c).

When the alleged sexual assault offenses described in Pen C §11165.1(a) or (b) or child abuse under Pen C §11165.6 are charged, the superior court, in scheduling a trial date, must make "reasonable efforts" to avoid setting the trial on the same day that the prosecuting attorney assigned to that case has another trial set. Pen C §1048.1.

For further discussion of speedy trial requirements, see chap 14.

§6.32 XVI. FIRST APPEARANCE OUT OF JUDICIAL DISTRICT (MISDEMEANORS) OR OUT OF COUNTY (FELONIES OR MISDEMEANORS)

Misdemeanors. If a misdemeanor prosecution is begun in a judicial district other than where the alleged offense was committed, the judge must inform the defendant at the time of arraignment of his or her right to be tried in the district where the offense was committed. Pen C §1462.2. Penal Code §1462.2 does not apply to felonies. *People v Clark* (1971) 17 CA3d 890, 95 CR 411.

Out-of-county arrests. When a defendant arrested in a county other than the one in which the alleged crime occurred cannot make bail, the judge must tell him or her of the right to be taken to the county where the crime is charged within five calendar days of when the law enforcement agency with custody of the defendant notifies the other county of the defendant's location. If the law enforcement agency requesting the arrest is more than 400 miles from the county in which the defendant is in custody, and the offense charged is a felony, the agency has five *court* days within which to take the defendant to the county in which the warrant was issued. The arresting officer must notify the out-of-county arresting agency that the defendant is in custody. The court must set a date certain for defendant's appearance in the other county not more than 25 calendar days after bail is set on the arrest warrant. Pen C §§821 (felonies), 822 (misdemeanors).

When the court fails to tell a defendant of these rights or to set bail, or the law enforcement agency with custody of the defendant does not take defendant to the other county, defendant's remedy is to petition for a writ of habeas corpus. See §§40.22–40.34 on habeas corpus procedure.

A defendant arrested for felony violations of the Vehicle Code is treated like any other felony defendant. Veh C §40301. In the case of Vehicle Code violations that are not felonies, the defendant must be taken before a magistrate in the county in which the offense is alleged to have been committed or, depending on the offense, be given a notice to appear before that magistrate. Veh C §§40302–40303. See *Kramer v Superior Court* (1966) 239 CA2d 500, 48 CR 897; *People v Superior Court* (Simon) (1972) 7 C3d 186, 101 CR 837.

When a defendant is in custody and undergoing prosecution in one county and has cases pending in other counties, Pen C §§821–822 do not entitle the defendant to compel arraignment in another county on separate charges until the pending prosecution in the first county is completed. *Ng v Superior Court* (1992) 4 C4th 29, 13 CR2d 856.

For discussion of venue and jurisdiction, see §16.3.

§6.33 XVII. RIGHTS IN INFRACTION CASES

An infraction is an offense not punishable by incarceration. Pen C §19.6. Unless otherwise provided by law, all legal rights provided to persons accused of misdemeanors also apply to those accused of infractions. Pen C §19.7. Defendants charged with infractions are not entitled to a jury trial, cannot be imprisoned, are not entitled to appointed counsel, and are subject to multiple prosecutions. *People v Sava* (1987) 190 CA3d 935, 939, 235 CR 694, 696; *People v Battle* (1975) 50 CA3d Supp 1, 6, 123 CR 636, 639. See Pen C §19.6.

▶ **Note:** In dicta in *People v Anderson* (1987) 191 CA3d 207, 220 n7, 236 CR 329, 338 n7, the court opined that an individual defendant charged with an offense calling for a penalty of $1000 or more should be entitled to a jury trial.

A defendant charged only with an infraction, and therefore not subject to incarceration, and not detained pending trial, need not be advised of the right to counsel because the right to appointed counsel does not extend to infractions. *People v Prince* (1976) 55 CA3d Supp 19, 127 CR 296. However, if the defendant is not released from custody, he or she is entitled to appointed counsel. Pen C §19.6.

If an offense punishable only by a fine, and therefore normally classified as an infraction, is designated a misdemeanor by the legislature, it is a misdemeanor for purposes of trial, and defendants are entitled to the same rights as defendants in other misdemeanor cases. *Tracy v Municipal Court* (1978) 22 C3d 760, 150 CR 785 (violation of Health & S C §11357(b), at that time possession of one ounce or less of marijuana).

A defendant charged with a traffic infraction who has suffered three prior infraction convictions within the preceding 12 months can convert the infraction into a misdemeanor (see Veh C §40000.28) by admitting the prior convictions even though the priors are not charged or have been stricken in the interests of justice. *People v Shults* (1978) 87 CA3d 101, 150 CR 747. This procedure makes available those rights in misdemeanor prosecutions not otherwise available in an infraction case.

When a defendant is charged with a misdemeanor, the prosecution and

the court cannot, without the defendant's consent, reduce the charge to an infraction to deny the defendant's right to a jury trial, when the charge is based on the same facts. *People v Bowden* (1978) 86 CA3d Supp 1, 150 CR 633.

▶ **Note:** *People v Shults* and *People v Bowden* were disapproved by the court in *Mitchell v Superior Court* (1989) 49 C3d 1230, 1251, 265 CR 144, 157, to the extent that they provide support for the argument that, when a prosecutor has the alternative of prosecuting a single act under two statutes, one requiring a jury trial and the other not, he or she must prosecute under the one affording the right to a jury trial.

While there is no requirement that a district attorney be present to represent the People in the trial of an infraction, the judge cannot take the prosecutor's place. *People v Daggett* (1988) 206 CA3d Supp 1, 253 CR 195.

▶ **Note:** Penal Code §§19.8 and 490.1 contain a growing list of misdemeanors that can be charged alternatively as infractions. Counsel should consult this list frequently. New misdemeanors as of January 1, 1992, are driving without a license, driving with a license suspended for certain reasons, exhibition of speed (Veh C §§12500, 14601.1, and 23109(c)), and petty theft under certain circumstances (see Pen C §490.1). Among many other already existing alternative misdemeanor-infractions are such crimes as disturbing the peace and certain types of vehicular trespass (Pen C §§415 and 602(m)).

Counsel may appear for defendants charged with misdemeanors or infractions; defendant's presence is not required. Pen C §977(a); *Simmons v Superior Court* (1988) 203 CA3d 71, 249 CR 721; *People v Kriss* (1979) 96 CA3d 913, 917, 158 CR 420, 422. A defendant ordered to appear on a traffic infraction may, before the date of his or her required appearance, plead not guilty in writing. Veh C §40519(b).

§6.34 XVIII. PROCEDURE ON FAILURE TO APPEAR

When a defendant's personal appearance is necessary in court, such as for arraignment, and the defendant is in custody, the court may direct that the officer having custody bring the defendant before the court. Pen C §978.

If a defendant is released on bail or on his or her own recognizance and fails to appear at arraignment when his or her personal presence is required, the court may order forfeiture of bail (Pen C §§979, 1269b(g), 1305–1306) and order a bench warrant to issue for defendant's arrest (Pen C §§978.5, 979). Failure to appear on a written promise to appear on a felony violation is a felony. Pen C §1320. Failure to appear on a written promise to appear on a misdemeanor violation or an infraction is a misdemeanor. Pen C §§19.7, 853.7, 1320.

Protecting Defendants from Immigration Consequences

by Katherine Brady and Norton Tooby

This updated article is intended as an introduction, for California criminal defenders, concerning how to protect criminal defendants from adverse immigration consequences of convictions and sentences. Since one-fifth to one-sixth of the California population is foreign born, many of our clients face sometimes disastrous immigration consequences from relatively minor convictions. As criminal defense attorneys, we have a responsibility not merely to advise them about, but to **defend them against**, these consequences. Failure to do this constitutes ineffective assistance of counsel.[1]

Our clients will not thank us if we succeed in obtaining a minor sentence, only to discover the conviction **requires** the immigration court to strip away their green cards and deport them away from their homes of 30 years, U.S.-citizen spouses and children, friends, and employment. While counsel may do an excellent job in terms of traditional criminal defense work, neglecting the immigration consequences of various defense options puts the client at serious risk.

It is useful to think of immigration consequences as analogous to a search motion: we must investigate the facts, and research the law bearing on the possible illegal search, and then not merely advise the client, but bring a search motion if warranted. Similarly, since immigration consequences frequently have effects even more devastating to the client than the sentence for the criminal conviction, we have an obligation to investigate the immigration facts, research the law (or call an expert), advise the client, and defend the case so as to minimize the adverse immigration consequences if the client chooses to do so.

We can achieve amazing results for some of our clients. For example, in some cases if we obtain a sentence of 364 days, as opposed to 365, we can save the clients from becoming "aggravated felons" and give them at least some chance to stay in the country. In other cases, a plea to one offense instead of another fairly similar crime with the same sentence imposed may avoid deportation for the client. The great satisfaction of reaching a result that allows the client and family to continue to live together in the United States can be exhilarating.

In any defense of a non-citizen, counsel must:

Obtain from the Client the Information Necessary to Formulate a Strategy to Avoid Unnecessary Immigration Consequences

The client can provide initial information concerning immigration status that you or immigration counsel will need in order to figure out what immigration effect various possible convictions and sentences will have. The first step is to obtain this information from the client. A suggested "Basic Immigration Status Questionnaire" is provided on p. 61. You will also need (a) the client's rap sheet, and (b) information on the current charges, likely plea-bargains and sentences.

Call an Immigration Expert or Research the Exact Immigration Consequences of Any Proposed Plea or Option Yourself

Calling an expert is the easiest way to obtain up-to-date information on the immigration consequences of the various possible alternative dispositions and sentences. **Unless you have yourself researched the specific immigration questions facing your individual client, using up-to-date resource material, expert immigration advice is absolutely necessary.**

The immigration consequences may be eliminated or ameliorated through a variety of techniques, often without sacrificing traditional criminal defense goals. Ample resources exist to assist us in obtaining answers to the immigration questions that arise during the course of representing our clients.

The National Immigration Project of the National Lawyers Guild (14 Beacon Street, Suite 506, Boston, MA 02108, [617] 227-9727) is a valuable resource. Headed by Dan Kesselbrenner, coauthor of *Immigration Law and Crimes*, it is a clearinghouse on recent developments and litigation in immigration law and criminal issues.

Community agencies often offer assistance to persons with immigration problems. These agencies may or may not have a staff attorney. For a national directory of such agencies write the National Center for Immigrants' Rights, 1636 W. 8th Street, Suite 215, Los Angeles, CA 90017 (*Directory of Non-Profit Immigration Agencies*, $5). While such agencies might not have the resources or expertise to offer advice about immigration consequences of crimes, they may be able to represent a client before the INS after the criminal case has been resolved.

Many individual immigration counsel are willing to consult by telephone (if the call does not take too long) concerning immigration effects of proposed criminal dispositions. Local Bar Associations often have lists of immigration attorneys, and a local chapter of the National Lawyers Guild or American Immigration Lawyers Association (AILA) will often be able to help. The Washington, D.C., AILA office (1400 Eye Street, N.W., Suite 1200, Washington, D.C. 20005, [202] 371-9377) will provide the name of a local AILA representative or, for a fee, the AILA membership directory.

In California, the Immigrant Legal Re-

[1] *People v. Soriano* (1987) 194 Cal.App.3d 1470; *People v. Barocio* (1989) 216 Cal.App.3d 99; *In re Resendiz* (1999) 71 Cal.App.4th 145. In *Soriano*, defense counsel was found ineffective not solely for a failure to advise, but for a failure to seek a sentence of 364 days, rather than 365.

source Center [ILRC], 1663 Mission St., Suite 602, San Francisco, CA 94103, (415) 255-9499, is a non-profit organization that provides advice, training and materials to non-profit community agencies and immigrants' organizations. The ILRC maintains a contract service and, for a modest fee, ILRC lawyers will provide criminal defense counsel with expert telephone consultation about immigration consequences of a criminal conviction. A reduced fee is available to staff of public defenders' offices and to court-appointed counsel.

It is advisable for criminal defense counsel to establish an ongoing relationship with an office such as the ILRC or a specific immigration attorney in order to receive consistent advice in this area as needed.

To research this area yourself, the best secondary sources are: K. Brady, N. Tooby, et al., *California Criminal Law and Immigration* [focusing on California offenses and practice],[2] and D. Kesselbrenner & L. Rosenberg, *Immigration Law and Crimes* [focusing on federal offenses and the laws of several states].[3]

Explain the Specific Immigration Consequences to the Client in an Understandable Manner

Some defense counsel advise the client that a disposition "might lead to deportation, exclusion or denial of naturalization." Essentially, counsel are restating the warning that judges must give to all defendants under Penal Code § 1016.5. While this general warning is sufficient for the judge, it in no way discharges counsel's duty to fully advise the client.[4] Counsel must find out the specific consequences — e.g., disqualification from political asylum, naturalization, loss of lawful permanent resident status, deportation, permanent ineligibility for lawful status, disqualification from waivers — and clearly explain them to the client. The client has a right to know what is at stake.

Find Out How High a Priority the Immigration Consequences Are

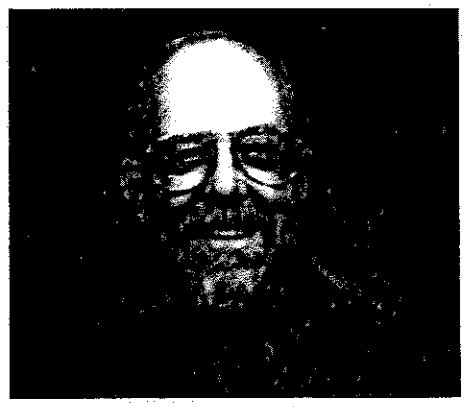
Once the client understands what the immigration consequences are, s/he may or may not make them a defense priority. Some clients are not willing to risk more time in jail in an effort to safeguard their immigration status. Others place the right to remain with their families in the U.S. as their highest priority and would sacrifice almost any other consideration. They may be willing to plead to additional counts, or serve an extra six months in custody, for example, in order to alter the conviction to one that will not trigger deportation. These difficult choices must be made by the client, once s/he is fully informed.

If Immigration Is a High Priority, Conduct the Defense with This in Mind

This may cause a drastic change in defense strategy. First, counsel must determine precisely what disposition will minimize or eliminate immigration consequences. This requires a good knowledge of the immigration law or expert advice. Some ideas for safe disposition are discussed in this article. They can include bargaining for diversion without a guilty plea,[5] dismissal, acquittal, delay of conviction, "deferred verdict,"[6] a carefully-framed sentencing disposition or a plea to some other "safe" offense, even one only tenuously connected to the offense charged or not connected at all.

Aggressive criminal defense work — including strategies not normally used in defense of a minor charge — may be required. For example, the client may choose to take a minor case to trial, even if there is only a slim possibility of ac-

Katherine Brady is a staff attorney at the Immigrant Legal Resource Center in San Francisco and has been an adjunct professor at Santa Clara University Law School. She is the principal author of California Criminal Law and Immigration *and coauthor of "Representing the Noncitizen Criminal Defendant," Chap. 48, in C.E.B.,* California Criminal Law: Procedure And Practice *(4th ed. 1998).*



Norton Tooby of Oakland specializes in criminal defense of immigrants, both before and after conviction. He has written Chapter 8, "Post Conviction Relief," and coauthored Chapter 9, "Aggravated Felonies," in K. Brady, N. Tooby, et al., California Criminal Law and Immigration *(Immigrant Legal Resource Center 1995), written "Criminal Defense of Noncitizens," 22 N.L.G. National Immigration Project* Immigration Newsletter, *Nos. 3-4 (February & June, 1995), and served as Update Editor during 1998-1999 for D. Kesselbrenner & L. Rosenberg,* Immigration Law and Crimes *(West Group 1999).*

[2]Order from the ILRC, 1663 Mission St., Suite 602, San Francisco CA 94103, Fax (415) 255-9499. $90 per copy (1999 revised edition).

[3]West Group, COP, 610 Opperman Drive, Eagan, MN 55123 ($175). (800) 334-5009; fax (800) 213-2323.

[4]*People v. Soriano, supra* [Penal Code § 1016.5 warning given; conviction reversed for ineffective assistance of counsel in failing to research, advise and **defend client against** immigration consequences]; *In re Resendiz, supra* [same].

[5]Drug diversion under Penal Code § 1000 constitutes a **conviction** under immigration law even after dismissal, if, as is required by January 1, 1997, amendments, a guilty plea is entered.

[6]"Deferred verdict" is a nonstatutory agreement under which the defendant and prosecution waive jury, submit the case to the court for decision on the police reports or the like, and the case is continued for a year, for example, for verdict on the agreement that the defendant will perform community service, complete a program of some sort, pay restitution or the like as conditions of OR release, and that the prosecution will dismiss the charges before verdict if the defendant successfully completes the requirements. This avoids a "conviction" for immigration purposes.

quittal, if the alternative is certain deportation or in order to delay the finality of the conviction by appeal and thus spend more time with his or her family.

Overview of Immigration Consequences

In the last seven years, Congress has rewritten immigration laws a number of times to increase both the kinds of criminal behavior that incur immigration penalties and the severity of those penalties, including two major pieces of legislation in 1996.[7] The balance of this article will give an overview of current law governing the immigration consequences of crimes, and suggest possible defense strategies.

Definition of Conviction: Juvenile Proceedings, Appeal, Diversion, DEJ and Accessory After the Fact

Only certain dispositions are considered to be "convictions" for immigration purposes. Diversion (if no plea of guilty has been entered),[8] dispositions in juvenile proceedings, and a conviction that is still on appeal are not "convictions."

Note that in some cases, a person's behavior causes adverse immigration consequences even without a conviction. For example, it is a basis for deportability and/or inadmissibility if the INS determines that a person ever trafficked in illegal drugs, has "engaged" in prostitution, has made a false claim to U.S. citizenship (on or after September 30, 1996), lied or used false documents for immigration benefits, illegally smuggled people across the border or encouraged them to cross, is or has been a drug addict or abuser or has been found in civil court to have violated a domestic violence TRO (on or after September 30, 1996).[9]

Juvenile Proceedings

Immigration authorities recognize that juvenile proceedings result in civil findings of delinquency that do not constitute criminal convictions. A person in juvenile proceedings can be found guilty of theft or simple possession of drugs, for example, and the INS will not consider that to be a "conviction" of a crime involving moral turpitude or a narcotics offense.[10] If the juvenile is bound over for treatment in adult criminal court, however, the conviction will count as a conviction for immigration purposes. Because some acts have bad immigration consequences even without a conviction (e.g., an alien is inadmissible if there is evidence of drug trafficking), the **conduct** underlying some juvenile findings may trigger adverse immigration consequences. See discussion in above paragraph.

Diversion

Completing a pre-trial diversion program and obtaining dismissal of the charges does not constitute a "conviction" under immigration law **so long as there has been no plea of guilty or no contest entered at any time.**[11] Criminal cases dismissed after successful completion of a traditional diversion provision with no guilty plea requirement, such as the former version of drug diversion under Penal Code § 1000, do not constitute convictions for immigration purposes.

Penal Code § 1000, however, was amended effective January 1, 1997, to require entry of a plea of guilty and to provide for deferred entry of judgment ["DEJ"], with dismissal for successful completion. Congress specifically declared that deferred entry of judgment, such as the new diversion statute, **does** constitute a conviction for immigration purposes.[12] Under the new DEJ legislation, county authorities can agree to create a "drug court" which would operate as a true pre-plea diversion program that does not require a guilty plea and, therefore, would not result in a conviction for immigration purposes.

Diversion dismissals under prior law, however, continue to be non-convictions, since no guilty plea was entered. The **ex post facto** provisions of the federal constitution require use of the former diversion statute for offenses committed prior to January 1, 1997.[13]

Moreover, some diversion courts have continued to use the former diversion procedures (without a guilty plea) even after the turning of the year. A diversion

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[7]The most recent legislation consists of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (hereinafter AEDPA), effective April 24, 1996; and Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of the Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104-208, 110 Stat. 3009 (hereinafter IIRAIRA), effective September 30, 1996.

[8]But see Penal Code § 1000 as amended effective January 1, 1997, requiring a guilty plea. This disposition constitutes a conviction for immigration purposes even after dismissal, with a possible exception for the first time a person receives diversion. *Matter of Punu*, Int. Dec. 3364 (BIA 1998)(en banc).

[9]See generally INA §§ 212(a)(1), (2), 237(a)(2), 8 U.S.C. 1182(a)(1), (2), 1227(a)(2).

[10]*Matter of C-M-*, 5 I&N 327 (BIA 1953); *Matter of Ramirez-Rivero*, 18 I&N 135 (BIA 1981). The one exception is that a juvenile found to have committed an offense that would be a violent felony under 18 U.S.C. § 16 if committed by an adult is barred from Family Unity, a program that gives employment authorization and lawful status to relatives of aliens who gained permanent residency during the amnesty program.

[11]*Matter of Ozkok*, Int. Dec. 3022 (BIA 1988). This has not changed under IIRAIRA § 322, which amends INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A) to create a statutory definition of conviction that is more encompassing than the definition set out by the BIA in *Matter of Ozkok, supra*.

[12]Congress recently redefined "conviction" for immigration purposes to mean "a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where — (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty or restraint on the alien's liberty to be imposed." IIRAIRA § 322, amending INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(a).

[13]A statute violates the *ex post facto* clause of the federal or state constitution if it either (a) punishes as a crime an act previously committed that was innocent when done, (b) increases the punishment for a crime after its commission, or (c) deprives an accused of any defense available under the law at the time the act was committed. *Collins v. Youngblood* (1990) 497 U.S. 37, 111 L.Ed.2d 30.

with no guilty plea, even if unauthorized, does not constitute a conviction for immigration purposes.

Finally, there are other diversion statutes, such as general misdemeanor diversion or diversion for persons with mental retardation, which continue as before to operate **without** guilty pleas, and the results of such programs do not constitute convictions for immigration purposes.

Expungements under Penal Code § 1203.4 formerly were effective to eliminate immigration consequences of convictions for "crimes of moral turpitude," firearms convictions and, under some circumstances, convictions of first-offense simple possession of drugs. The Board of Immigration Appeals, however, eliminated this rule and expungements are now completely ineffective in removing the immigration consequences of these convictions.[14] Because this rule may change, it is still worthwhile to obtain expungements, but they do nothing under current law to protect immigrants.

Accessory after the Fact

Conviction under statutes similar to accessory after the fact under Penal Code § 32 has been held not to be a drug offense for immigration purposes even when the principal offense involved drugs.[15] Accessory after the fact is a better alternative than any drug offense.

While it is not as well-established in case law, a plea to accessory probably will avoid immigration penalties for conviction of most other offenses, such as an aggravated felony (unless a sentence of a year is imposed), firearms or domestic violence offense, by pleading to accessory after the fact. The exception is moral turpitude and, while immigration authorities in the past held that accessory after the fact involves moral turpitude, it is possible that this ruling will change.[16]

How Do Convictions and Sentences Affect Noncitizens?

The Immigration and Naturalization Act of 1952 (INA), as amended, is the federal immigration statute.[17] It creates several categories for criminal offenses. The category that the crime falls in, combined in some cases with the person's immigration status or equities, determines how much damage a conviction will do. The four main categories of adverse immigration consequences are: (1) "aggravated felonies," which trigger deportation and other terrible immigration consequences; (2) other grounds of deportation (now called "removal"); (3) criminal grounds of inadmissibility; and, (4) criminal grounds that bar eligibility to establish good moral character (an immigration concept important in obtaining immigration benefits such as naturalized citizenship).

An Aggravated Felony Conviction Absolutely Triggers Removal

This is the death knell, the fatal blow, for the hopes of almost any noncitizen to stay in the United States. Even a long-term permanent resident who is convicted of an aggravated felony will almost certainly be quickly deported and permanently banished. Tragically, in the last ten years Congress has tossed dozens of serious and even minor offenses (including even some minor state misdemeanors) into the aggravated felony category.[18] For example, conviction of a misdemeanor crime of violence with a one-year sentence (even if execution is suspended) is considered to be an aggravated felony.

Example: Roberto has been a permanent resident (had a green card) for 20 years. He is married to a U.S. citizen, has three young U.S. citizen children, owns his own business that employs U.S. citizen workers and has no criminal record. After a bad fight in a bar, he is charged with assault with force likely to cause great bodily injury. The District Attorney offers two years. Since conviction of a "crime of violence" with a sentence of a year or more is defined as an aggravated felony, this plea would make Roberto an aggravated felon. If he accepts the plea, Roberto will be permanently deported from the United States. If, after deportation, he returns without permission and is caught in the U.S., he faces a maximum 20-year federal prison sentence for illegal re-entry.[19] (The only possible defense against deportation in immigration court would be if he can make an extremely strong showing that he will be persecuted for political reasons or tortured if he is deported.)

Theft, receiving stolen property, burglary, perjury or a "crime of violence" (threatening violence to person or property)[20] with a one-year sentence imposed, or sale of $10 of marijuana or sexual abuse of a minor without regard to sentence, are just a few examples of the dozens of offenses listed as aggravated felonies. The list is discussed later in more detail.

Several Other Categories of Offenses Trigger Deportation, but Do Not Totally Disqualify the Immigrant from Some Sort of Relief in Immigration Court[21]

[14]*Matter of Roldan*, Int. Dec. 3377 (BIA 1999)(en banc).

[15]See, e.g., *Matter of Batista-Hernandez*, Int. Dec. 3321 (BIA 1997) (federal accessory after the fact); *Castaneda de Esper v. INS*, 557 F.2d 79 (6th Cir. 1977); *Matter of Velasco*, 16 I&N 281 (BIA 1977) (federal misprision of felony not a drug offense even where principal felony is drug offense); *Matter of Espinoza-Gonzalez*, Int. Dec. 3402 (BIA 1999)(en banc) (same).

[16]See K. Brady, et al., *California Criminal Law and Immigration*, §§ 4.11, 9.4.

[17]The act appears in Title 8 of the United States Code. To make things interesting, the same statute has a different section number in the INA from that in Title 8. For example, the aggravated felony definition appears in INA § 101(a)(43) and in 8 U.S.C. § 1101(a)(43).

[18]See 8 U.S.C. § 1101(a)(43), and discussion below, for definition of aggravated felony offenses.

[19]See 8 U.S.C. § 1326(b)(2), penalizing illegal re-entry by a deported aggravated felon.

[20]Do not confuse the extremely broad immigration definition of "crime of violence" with the far narrower California "strike" list of violent felonies. For the federal immigration definition, see 18 U.S.C. § 16, 8 U.S.C. § 1101(a)(43)(F).

[21]The grounds of deportation appear at 8 U.S.C. § 1227(a), INA § 237(a).

A person who is deportable for some reason other than conviction of an aggravated felony is also in a dangerous situation. Even a long-term lawful permanent resident can, and often will, be deported. The difference is that, depending upon the type of conviction and the person's immigration status and history, the person **might** be eligible to apply in immigration court for some discretionary waiver of deportation.

> **Example:** In the above example, if Roberto pleads to two counts of assault with force likely to cause great bodily injury, each with a consecutive 364-day sentence, he will not have an aggravated felony conviction (because he will not have any one conviction of a crime of violence in which a one-year sentence was imposed). Roberto still may be deportable, under the ground for crimes involving moral turpitude. Because he is not deportable for an aggravated felony, however, he will be able to apply for a discretionary waiver of deportation for long-term permanent residents.[22] If the immigration judge grants the waiver, Roberto can remain in the U.S. as a permanent resident despite the convictions.

Examples of deportable offenses that are not aggravated felonies include first conviction of simple possession of drugs, many crimes involving moral turpitude, firearms offenses, domestic violence offenses (broadly defined), etc., as discussed later. The discussion of the various waivers available is beyond the scope of this article, but criminal defense counsel must research and identify what waivers might be available in each defendant's situation (or consult an immigration attorney), in order to try to fashion a plea bargain that would avoid disqualifying that individual from receiving the particular waiver.

Criminal Grounds of Inadmissibility Prevent Immigrants from Obtaining Lawful Status, Lawfully Entering the Country Once They Have Left the United States, or Obtaining Naturalized Citizenship[23]

A noncitizen who comes within one of the grounds of inadmissibility often will be blocked from obtaining a green card or some other form of immigration benefit. For example, if the person is undocumented but could get a green card through a family member, being inadmissible may prevent this. An inadmissible permanent resident who wants to travel outside the U.S. may be stopped at the border and not permitted to return.

> **Example:** Li arrived in the U.S. as a tourist three years ago and has remained here illegally. He is now married to a U.S. citizen who is filing a petition to make Li a permanent resident. If Li becomes inadmissible, his application may be denied. He is charged with misdemeanor grand theft. He needs to fashion a plea bargain that will not make him inadmissible. (In this case, if it is his first offense, he needs to obtain a sentence of less than six months. See "petty offense exception," discussed later.)

A person who is inadmissible based on criminal problems usually will be held not to have "good moral character," which is a requirement for naturalization and some other forms of relief.

The Effect of Sentence

As the above examples show, in some, but not all, cases, obtaining a certain sentence may be sufficient to avoid adverse immigration results for the client. It is important to identify whether or not sentence is important, and, if so, exactly what the sentence requirements are. Sentences can be especially important in avoiding aggravated felony status for a given conviction (by avoiding a sentence imposed of one year or more), and in avoiding some of the immigration consequences of convictions for crimes involving moral turpitude. Again, the effect of sentence will vary depending upon the individual's circumstance; each case must be independently researched.

Besides the grounds of inadmissibility, a person can be blocked from establishing good moral character if s/he has actually spent 180 days in jail as a result of one or more convictions during the time period for which good moral character must be shown. This 180 days for good moral character is the one section in immigration law that depends upon time actually spent in jail, as opposed to the term of imprisonment formally ordered by the judge.

For immigration purposes, a period of confinement ordered by a judge for an offense, "regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part," will be counted as the term of the sentence.[24] This changed the former rule, which was that if a court suspended imposition of sentence and ordered jail time as a condition of probation, the time would equal zero sentence for immigration purposes. Under current law, if the client received IOSS and no custody time as a condition of probation, that counts as zero sentence imposed. If the person received six months custody time as a condition of probation and was released from custody in four months because of conduct credits, that counts as six-month sentence for immigration purposes. If the client receives a five-year sentence, execution of which is suspended and the client is placed on probation with no custody time, that counts as a five-year sentence. Concurrent sentences are evaluated as the length of the longest sentence, and consecutive sentences are added together.[25]

[22]See "Cancellation of Removal for Permanent Residents" under INA § 240A(a), 8 U.S.C. § 1229b(a). This is the successor to "212(c) relief" that existed for decades and was eliminated for immigration proceedings initiated on or after April 1, 1997.

[23]See 8 U.S.C. § 1182(a), INA § 212(a) (grounds of inadmissibility); 8 U.S.C. § 1101(f), INA § 101(f) (bars to establishing good moral character).

[24]8 U.S.C. § 1101(a)(48)(B), as amended by IIRAIRA § 322(a)(1).

[25]*Matter of Fernandez*, 14 I&N 24 (BIA 1972).

The Effect of Post-Conviction Relief

Defense counsel can perform a great service for the client by vacating prior convictions to eliminate their immigration consequences. In addition, expungements under Penal Code § 1203.4 may be helpful in the future, although under current law they do not eliminate the immigration effects of criminal convictions.

Vacating the Conviction

Vacating the conviction in its entirety, by direct appeal, habeas corpus, coram nobis, motion to withdraw the plea or vacate the conviction, or the like, will eliminate any adverse immigration consequences (along with all other consequences) flowing from the conviction.[26] When a judgment is vacated, the conviction is eliminated *ab initio*, as having been illegal from the time it was imposed.[27]

Vacating the judgment will also eliminate the effect of any sentence or imprisonment resulting from the conviction. Moreover, a petition for extraordinary writ may be brought simply for purposes of vacating the original sentencing, and obtaining a fresh sentencing hearing. A new sentence imposed by the judge will be the one considered by the immigration authorities, even if the defendant has already completed serving the original sentence.[28]

In order to obtain an order vacating the conviction that the INS will respect, it is necessary that the conviction or sentence be vacated on grounds it is legally invalid for some reason. Constitutional invalidity is the best, but invalidity on any legal grounds, such as for violation of Penal Code § 1016.5, is sufficient. The order vacating the conviction or sentence should specify that the conviction or sentence is legally invalid. Orders based solely on humanitarian grounds (such as the desire to avoid the drastic consequences of deportation) will likely not be respected by the INS. Moreover, orders vacating convictions based solely on "state rehabilitative statutes," such as Penal Code §§ 1000 or 1203.4, will likewise not be honored by the INS.[29]

When a conviction is vacated for immigration purposes, it is important (a) to obtain a certified copy of the order vacating the conviction, since the immigration courts often require certified copies, and (b) to correct the state and federal criminal history records so the client's rap sheets reflect the new information that the conviction has been vacated.[30]

Expunging the Conviction Is No Longer Effective

Expunging the conviction under Penal Code § 1203.4 (probation felonies and misdemeanors) or § 1203.4a (nonprobation misdemeanors) no longer has the effect of eliminating convictions of firearms offenses, crimes of moral turpitude or first-offense drug possession for immigration purposes.[31] It is possible this may change in the future. It is therefore wise to obtain these expungements wherever possible, but not to count on them at this time as eliminating any convictions for immigration purposes.

New Diversion = Deferred Entry of Judgment

Congress specifically provided that "deferred adjudication" or "deferred entry of judgment" programs, such as the new "diversion" under Penal Code § 1000 as of January 1, 1997, which requires entry of a plea of guilty, nonetheless constitute "convictions" for immigration purposes even after charges are ultimately dismissed for successful completion of the program.[32] Still, it is possible that the law will change and recognize the effectiveness of deferred entry of judgment as avoiding a conviction for immigration purposes of a person's very first drug offense, if it is only simple possession.

Aggravated Felonies

The INA designates several dozen state, federal and foreign offenses as "aggravated felonies,"[33] ranging arbitrarily from murder, to the most minor drug sale, to conviction of misdemeanor theft with a one-year suspended sentence imposed to failure to appear for certain felony trials. **There is no substitute for checking the list, each time you are defending a noncitizen, to see if every potential plea-bargain offense is on the list.**

Conviction of an aggravated felony brings drastic penalties under immigration laws and is almost a guarantee of deportation and permanent banishment.

> **Warning:** The defendant should be warned that if s/he is convicted of an aggravated felony

[26] See, e.g., *Wiedersperg v. INS*, 896 F.2d 1179 (9th Cir. 1990) (post-conviction writ vacating criminal conviction entitled alien to reopen deportation proceeding even after he had been deported); *Mendez v. INS*, 563 F.2d 956, 958 (9th Cir. 1977) (illegal to deport alien whose conviction had been vacated); *Estrada-Rosales v. INS*, 645 F.2d 819, 821 (9th Cir. 1981) (deportation of alien based on invalid conviction could not be considered "lawfully executed"); *United States v. ex rel. Freislinger on Behalf of Kappel v. Smith*, 41 F.2d 707 (7th Cir. 1930).

[27] "Once a court grants a motion to withdraw a plea of guilty or a motion in the nature of coram nobis, however, the court's action will eliminate the conviction for most immigration purposes." D. Kesselbrenner & L. Rosenberg, *Immigration Law and Crimes* (1995), § 4.2(a), p. 4-4, citing *Matter of Sirhan*, 12 I & N 592 (BIA 1970); *Matter of Kaneda*, 16 I & N 677 (BIA 1979).

[28] *Matter of Martin*, 18 I&N 226 (BIA 1982) (correction of illegal sentence); *Matter of H*, 9 I&N 380 (BIA 1961) (new trial and sentence); *Matter of J*, 6 I&N 562 (AG 1956) (commutation). See K. Brady, *supra*, Chapter 5 for discussion of the immigration consequences of sentences and confinement.

[29] *Matter of Roldan*, Int. Dec. 3377 (BIA 1999)(en banc)(orders under "state rehabilitative statutes do not eliminate convictions or sentences for immigration purposes); *Matter of Punu*, Int. Dec. 3364 (BIA 1998) (en banc) (deferred entry of judgment creates a conviction for federal immigration purposes, regardless of state law).

[30] See K. Brady, *supra*, § 8.10.

[31] *Matter of Roldan*, Int. Dec. 3377 (BIA 1999)(en banc).

[32] INA § 101(a)(48)(A); *Matter of Punu*, Int. Dec. 3364 (BIA 1998) (en banc) (deferred entry of judgment creates a conviction for federal immigration purposes, regardless of state law).

[33] See INA § 101(a)(43), 8 U.S.C. § 1101(a)(43).

and deported and then returns to the U.S. illegally, s/he is subject to a potential 20-year federal prison term just for the illegal re-entry.[34] U.S. Attorneys are increasingly prioritizing these cases. Federal public defenders in California report that these illegal re-entry cases now comprise as much as 20% of their caseload.

In many cases, informed and aggressive defense work can prevent conviction of an aggravated felony. For example, many common offenses — such as theft, burglary or a crime of violence — are aggravated felonies **only** if one year or more in custody is ordered by the court (either as part of a state prison or county jail sentence, even if execution is suspended, or as a condition of probation). If defendant's counsel can fashion a sentence bargain of imposition suspended and no more than 364 days jail as a condition of probation, even to several counts made to run consecutively, counsel can avoid conviction of one aggravated felony and the client's immigration problem might be successfully resolved. Once the true stakes are known, defense counsel may prevent an aggravated felony conviction simply by launching a full scale defense to a charge that otherwise would have been pleaded out.

The following is a general summary of the offenses listed in 8 U.S.C. § 1101(a)(43) as aggravated felonies. These offenses are aggravated felonies for most immigration purposes regardless of the date the conviction was entered.[35] For more information see *California Criminal Law and Immigration*, Chapter 9.

In general, an aggravated felony includes two categories of offenses. The first category is composed of convictions that are aggravated felonies only if a certain sentence is imposed. The second category constitutes aggravated felonies regardless of the sentence imposed.

Aggravated Felonies Only If One Year Is Imposed

The following offenses are aggravated felonies **only if custody of one year or more was ordered by the sentencing court:**

◆ a "crime of violence" as defined in 18 U.S.C. § 16. (The definition of a "crime of violence" is quite broad.[36] In some contexts, possession of a firearm has been held not to be a crime of violence,[37] but possession of a sawed off shotgun is.)[38] This category even includes felony driving under the influence.[39]

◆ a theft offense (including receipt of stolen property);

◆ burglary;

◆ offenses relating to commercial bribery, counterfeiting, forgery or trafficking in vehicles the identification numbers of which have been altered;

◆ an offense relating to obstruction of justice (held to include accessory after the fact), perjury or subornation of perjury, or bribery of a witness; and

◆ using fraudulent documents to obtain an immigration benefit (except for a first offense to help an immediate family member).[40]

Strategy

For these offenses only, a sentence of 364 days or less will prevent the offense from becoming an aggravated felony. Conviction of three counts of theft, with imposition of sentence suspended and no more than 364 days as a condition of probation for each to run consecutively, for example, would not result in any aggravated felony conviction.

Aggravated Felonies Regardless of Sentence

The following offenses constitute aggravated felonies regardless of the sentence imposed:

◆ Any drug trafficking offense[41] (e.g., possession for sale or sale of $10 of marijuana).

◆ For a non-citizen who wishes, above, all to stay in the United States, a minor drug sale is like a

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[34]See 8 U.S.C. § 1326(b)(2).

[35]Before the passage of IIRAIRA in 1996, certain older convictions were not aggravated felonies depending upon the effective date of the statute that included the offense in the list of aggravated felonies. IIRAIRA § 321(c) removes all previous statutory effective dates and makes every offense listed in INA § 101(a)(43) an aggravated felony for at least some purposes, regardless of the date of conviction, in all "actions taken" after September 30, 1996. An exception is for federal prosecution of illegal re-entry after conviction of an aggravated felony and deportation. There the offense had ... to have been classed as an aggravated felony as of the date that the person made the illegal re-entry. See IIRAIRA § 321(d) discussing INA § 276(a), (b), 8 U.S.C. § 1326(a), (b).

[36]18 U.S.C. § 16 defines a "crime of violence" for this purpose to include any offense that: (a) requires as an essential element "the use, attempted use, or threatened use of physical force against the person or property of another ...", or (b) "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." This determination is made on the basis of the elements **in the abstract**, without consideration of the actual conduct of the accused, which is held to be not relevant to the decision. (*United States v. Gonzalez-Lopez*, 911 F.2d 542 (11th Cir. 1990); *Matter of Alcantar*, Int. Dec. No. 3022 (BIA 1994).)

[37]See *United States v. Garcia-Cruz*, 40 F.3d 986 (9th Cir. 1994) [possession of firearm not crime of violence for purposes of determining whether defendant is a career offender under U.S.S.G. § 4B1.2 (November 1, 1989 version)]; *United States v. Sakahian*, 965 F.2d 740 (9th Cir. 1992) [same for Career Offender Sentencing Guideline]. See also App. C (amendment 433) to U.S.S.G. § 4B1.2 ["The term crime of violence does not include the offense of unlawful possession of a firearm by a felon" was added to Application Note 1].

[38]*Matter of Granados*, 16 I&N 726 (BIA 1979)[possession of sawed-off shotgun deportable]; but this offense is deportable independently as a firearms conviction. (8 U.S.C. § 1227(a)(2)(C).)

[39]*In re Magallanes-Garcia*, Int. Dec. 3341 (BIA 1998).

[40]See INA § 101(a)(43), 8 U.S.C. § 101(a)(43)(F), (G), (J), (R), (S).

[41]8 U.S.C. § 1101(a)(43)(B).

capital offense. In addition, any drug offense listed in specified federal controlled substance statutes, or in exact state analogues to the federal offenses, is an aggravated felony.[42] The Ninth Circuit recently held that a **second conviction of simple possession** of marijuana is an aggravated felony because a second conviction of simple possession of marijuana would be a felony under one of the named federal statutes.[43]

See Strategy suggestions at "Drug Offenses and Drug Abuse" section, later.

◆ Trafficking in firearms or destructive devices (bombs, grenades).[44]

◆ Murder, rape or sexual abuse of a minor.[45] Statutory rape probably will be held to constitute sexual abuse of a minor.

◆ The following offenses, but only if the loss suffered by the victim or the government was $10,000 or more: money laundering, transactions involving proceeds from specified unlawful activity, and offenses involving fraud, deceit or tax evasion.[46]

◆ Several offenses relating to operating a business of prostitution, slavery, peonage.[47]

◆ Offenses relating to revealing the identity of domestic or international undercover agents.[48]

◆ Failure to appear by a defendant for service of sentence if the underlying offense is punishable by a term of five years or more;

[42] 8 U.S.C. § 1101(a)(43)(B).
[43] *United States v. Garcia-Olmedo*, 112 F.3d 399 (9th Cir. 1997).
[44] 8 U.S.C. § 1101(a)(43)(C).
[45] 8 U.S.C. § 1101(a)(43)(A).
[46] 8 U.S.C. § 1101(a)(43)(D), (M).
[47] 8 U.S.C. § 1101(a)(43)(K). This includes an offense that "relates to the owning, controlling, managing, or supervising of a prostitution business" or that is described in 18 U.S.C. §§ 2421-2423 and 1581-1585, 1588.
[48] 8 U.S.C. § 1101(a)(43)(L).

Basic Immigration Status Questionnaire

Purpose: To obtain the facts necessary for an immigration lawyer to determine immigration consequences of a criminal conviction.
Documents: Make copies of any immigration documents or passport.
Criminal History: Rap sheet and possible current plea-bargain offenses needed before calling.

_____ _____ Yes ☐ No ☐
Client's Name Date of Interview- Imm. Hold?

_____ ( )_____ _____
Client's Immigration Lawyer Telephone # Def's DOB

1. **Entry:** Date first entered U.S. _____ Visa Type_____
Significant departures — Date _____ Length _____ Purpose _____
Date last entered U.S. _____ Visa Type _____

2. **Immigration Status:** Lawful permanent resident Yes ☐ No ☐
If so, date client obtained green card _____
Other special immigration status: ☐ refugee ☐ asylee ☐ temp. resident
☐ work permit ☐ TPS ☐ Family Unity ☐ ABC
☐ undocumented ☐ visa — type _____ Date obtained? _____
Did anyone ever file a visa petition for you? Yes ☐ No ☐
Name and number _____ Date _____
Type of visa petition _____ Was it granted? Yes ☐ No ☐

3. **Prior Deportations**
Ever been deported or gone before an immigration judge? Yes ☐ No ☐
Date _____
Reason _____
Do you have an immigration court date pending? Yes ☐ No ☐
Reason _____ Date _____

4. **Prior Immigration Relief:** Ever before received a waiver of deportability [§ 212(c) relief or cancellation of removal] or suspension of deportation?
Yes ☐ No ☐ Which _____ Date _____

5. **Relatives with Status:**
Do you have a U.S. citizen ☐ parent ☐ spouse
☐ child — DOB(s) _____ ☐ brother or ☐ sister
Do you have a lawful permanent resident ☐ spouse or ☐ parent

6. **Employment:** Would your employer help you immigrate? Yes ☐ No ☐
Occupation _____
Employer's name and number _____

7. **Possible Unknown Citizenship:** Were your or your spouse's parent or grandparent born in the U.S. or granted U.S. citizenship? Yes ☐ No ☐
Were you or your spouse a permanent resident under the age of 18 when a parent naturalized to U.S. citizenship? Yes ☐ No ☐

8. Have you been abused by your spouse or parents? Yes ☐ No ☐

9. In what country were you born? _____
Would you have any fear about returning? Yes ☐ No ☐
Why? _____

or failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of two years' imprisonment or more may be imposed.[49] As always, a conviction of the offense is required for it to be an aggravated felony; merely failing to appear, without being convicted of the criminal offense of failure to appear, does not have immigration consequences.

◆ Alien smuggling, except for a first conviction in which the person smuggled was an immediate family member.[50]

◆ RICO offenses in which a sentence of one year could have been imposed.[51]

Drug Offenses and Drug Abuse

Most drug convictions will constitute aggravated felonies and trigger deportation. One clear exception is that first conviction of simple possession is not an aggravated felony. This conviction, however, is still very dangerous in that, in most cases, it is a basis for deportation (except for first offense simple possession of 30 grams or less of marijuana for personal use).[52] Expungement under Penal Code § 1203.4 was formerly available to eliminate a single conviction for first offense simple possession of any drug,[53] but this benefit has been abolished by the Board of Immigration Appeals.[54] It may still be worthwhile to obtain § 1203.4 expungements in these cases, in case the law changes again.

A person can be found inadmissible — even if s/he has no conviction — if the INS has "reason to believe" the person has ever been a drug trafficker or conspired or assisted in trafficking.[55]

A person is also inadmissible if s/he admits committing any drug offense, whether or not there has been a conviction.[56] This might occur, for example, if the person made a formal and knowing admission of a drug offense in court.

Significantly, drug addiction and drug abuse are a basis for exclusion and deportation.[57] The definition of abuse is in dispute. Currently, some U.S. consulates are ruling that any drug use beyond mere "experimentation" (for example, one instance of use) within the last three years demonstrates drug abuse.[58]

Strategy

The best resolution is to plead to an offense not related to controlled substances.

The next-best resolution is to plead to accessory after the fact under Penal Code § 32, even if the principal offense involved drugs, because this has been held not to be a drug offense for immigration purposes. (Note, however, that if a one year sentence is imposed, accessory after the fact will become an aggravated felony under a separate section.)[59] There is a strong argument that solicitation to commit a drug offense also is neither a drug offense nor an aggravated felony.[60]

Attempt or conspiracy to commit a drug trafficking offense or any other aggravated felony is an aggravated felony.[61]

If a state drug offense does not involve trafficking in the generally understood sense (e.g., sale, possession for sale), it will only be an aggravated felony if it is precisely analogous to a federal drug offense. If the state definition is broader than or does not appear in the federal statute, the state offense might not be an aggravated felony. Therefore, offenses such as being under the influence (Health & Safety Code § 11550), possession of paraphernalia (Health & Safety Code § 11364) or driving under the influence of drugs should not constitute aggravated felonies since (a) they do not inherently involve drug trafficking, and (b) there is no federal analogue. They still will be bases for deportation and exclusion. (In addition, driving under the influence is an aggravated felony as a crime of violence if a one year sentence is imposed.)

Likewise, there is some chance that manufacture and transportation for personal use of a drug would be held not analogous to a federal drug offense.[62]

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[49] 8 U.S.C. § 1101(a)(43)(Q), (T).

[50] 8 U.S.C. § 1101(a)(43)(N).

[51] 8 U.S.C. § 1101(a)(43)(J).

[52] 8 U.S.C. § 1227(a)(2)(B)(i). This offense also triggers inadmissibility. See 8 U.S.C. §§ 1182(a)(2)(A)(I)(II)(ground of inadmissibility). A hardship waiver may be available under INA § 212(h), 8 U.S.C. § 1182(f) to excuse inadmissibility for simple possession of 30 grams or less of marijuana.

[53] The Ninth Circuit has held as a matter of equal protection that a person who would have been eligible for an "expungement" honored by the INS had she been in federal criminal proceedings (under 18 U.S.C. § 3607 relief for first-time conviction of simple possession) must receive the same treatment from INS if s/he obtains an expungement in state court, even if the state's expungement statute is not an ... exact allegory to the federal statute. *Garberding v. INS*, 30 F.3d 1137 (9th Cir. 1994). The Board of Immigration Appeals held in accord. *In re Manrique*, Int. Dec. 3250 (BIA 1995).

[54] *Matter of Roldan*, Int. Dec. 3377 (BIA 1999)(en banc).

[55] 8 U.S.C. § 1182(a)(2)(C).

[56] 8 U.S.C. § 1182(a)(2)(A)(I)(II).

[57] 8 U.S.C. § 1182(a)(1)(A)(iii)(inadmissible if currently a drug abuser or addict); 8 U.S.C. § 1227(a)(2)(B)(ii)(deportable if addict or abuser since entering the United States).

[58] See *California Criminal Law and Immigration*, § 3.4.

[59] *Matter of Batista-Hernandez*, Int. Dec. 3321 (BIA 1997). See *California Criminal Law and Immigration*, §§ 3.1, 9.4.

[60] *Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir. 1997) (solicitation under an Arizona statute is not a basis for deportation, because the deportation ground lists conspiracy and attempt but not solicitation).

[61] 8 USC § 1101(a)(43)(U), INA § 101(a)(43)(U).

[62] Manufacturing might be held not to be analogous to a federal offense because a California court held that it does not require guilty knowledge. *People v. Telfer*, 223 Cal.App.3d 1194 (1991). However, another California appeals court recently held that it does require guilty knowledge. *People v. Coria*, 66 Cal.App.4th 1385, 78 Cal.Rptr. 2d 620. Transportation for personal use would appear not to be an aggravated felony, but the Ninth Circuit has held that it is in the context of a federal sentence enhancement. *U.S. v. Lomas*, 30 F.3d 1191 (9th Cir. 1994). Because there is an argument that a different holding should apply in "straight" immigration proceedings, there is some possibility that a future reviewing court will hold this not to be an aggravated ...

These are not safe or dessirable pleas; they are drug offenses and may well be aggravated felonies, as well as having enhanced criminal penalties. But, if there is no other alternative, they are preferable to straight sale for immigration purposes.

As discussed above, three dispositions are not considered convictions: diversion (without a guilty plea), treatment in juvenile proceedings and a conviction which is not yet final because it is still on appeal (although the latter is a temporary solution only, in most cases). It has not been established whether these resolutions will prevent a finding that the person was a drug abuser.

A person deportable under this ground might still be able to apply for discretionary relief in immigration court, as long as the offense is not an aggravated felony.[63]

Crimes Involving Moral Turpitude — Inadmissibility

Definition

A person who has been convicted of just one offense involving moral turpitude is inadmissible,[64] meaning the person can be kept out of the United States or barred from obtaining a green card or other lawful status. Many minor and serious offenses can be classified as crimes involving moral turpitude. The fact that a state offense has been held under state law to involve or not to involve moral turpitude does not mean that federal immigration authorities will reach the same conclusion. One should consult an immigration text, such as *California Criminal Law and Immigration* (discussing over 70 California offenses) or *Immigration Law and Crimes* (similar discussion for federal and various state offenses). Generally, if an offense, as defined by statute involves fraud, theft, intent to commit serious bodily harm or, in some cases, lewdness, malice or recklessness, the offense will be held to involve moral turpitude.

Divisible Statute and the Record of Conviction

Some statutes punish offenses that involve moral turpitude and offenses that do not. For example, Calif. Vehicle Code 10851 defines "vehicle taking" as a taking with intent to deprive the owner of possession "permanently" (turpitudinous) or temporarily (not turpitudinous). If it is not clear that the section violated involved moral turpitude, the reviewing authorities will look to the record of conviction to resolve the question. The record of convcition includes only the indictment or information, the plea or verdict, and the sentence. Therefore, if counsel can keep the record of conviction clear of evidence that the defendant violated a part of the statute that involved moral turpitude, immigration authorities will rule that the conviction does not involve moral turpitude. Counsel may have to bargain for a substitute indictment to accomplish this.

Petty Offense Exception

Since so many offenses can be classified as involving moral turpitude, many noncitizens risk being excluded for even a minor conviction. Coming within the "petty offense exception" is one way to avoid this exclusion. Under the exception, an alien is automatically not inadmissible if:

- ◆ s/he has committed only one crime involving moral turpitude;
- ◆ s/he "was not sentenced to a term of imprisonment in excess of six months (regardless of the extent to which the sentence was ultimately executed)"; and,
- ◆ the offense carries a maximum possible sentence of one year or less.[65]

Thus, a person convicted of a misdemeanor first offense CMT with a sentence of six months or less is not inadmissible under the moral turpitude ground. Note, however, that the definition of "sentenced to imprisonment in excess of six months" is technical. For immigration purposes, if imposition of sentence has been suspended there is zero sentence, but a new change in the law means that court-ordered custody as a condition of probation now **counts** as incarceration for this purpose. For example, if imposition of sentence is suspended and the person is ordered to spend a year in jail, the year in custody counts as a sentence for purposes of computing the six months.[66] Similarly, if a term of imprisonment is imposed, suspended execution of sentence does not prevent the entire sentence from being counted as a sentence.[67]

Strategy: Qualifying for the Petty Offense Exception

Note that this exception excuses inadmissibility, but not removability.

Check the defendant's entire criminal record to make sure that s/he has **committed** only one crime involving moral turpitude. Commission of a previous moral turpitude offense, even if the conviction was expunged or charges were dismissed and there was no conviction at all, will disqualify the defendant from taking advantage of the petty offense exception for a later CMT which results in conviction. On the other hand, previous non-turpitudinous convictions (e.g., driving under the influence, simple assault) will not disqualify the defendant from the petty offense exception.

Obtain a sentence of six months or less, or suspended imposition of sentence

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felony. See discussion in *California Criminal Law and Immigration*, § 9.8 (Part C).

[63]The new INA § 240A(a) cancellation of removal for long-term permanent residents can now — in deportation proceedings filed after April 1, 1997 — waive removal for any criminal conviction that is not an aggravated felony. It requires (a) continuous lawful presence in the United States for seven years before commission of the deportable offense, (b) possession of lawful permanent resident status for five years, and (c) a showing that deportation would cause extreme hardship to an immediate family member who is a U.S. citizen of lawful permanent resident, and is then discretionary. 8 U.S.C. § 1229b.

[64]8 U.S.C. § 1182(a)(2)(A)(I).

[65]See INA § 212(a)(2)(A)(ii), 8 U.S.C. § 1182(a)(2)(A)(ii).

[66]INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A).

[67]See, e.g., *Matter of M.*, 6 I&N 346 (BIA 1954); *Matter of Castro*, Int. Dec. 3073 (BIA 1988).

with six months or less jail time as a condition of probation.

Try to negotiate a misdemeanor rather than a felony disposition. If the felony is a wobbler, try to obtain reduction from a felony to a misdemeanor under Penal Code § 17, if possible before the person comes before immigration authorities, so the maximum sentence is one year or less.[68] Failing this, if the plea bargain has a one year top, immigration counsel could argue that the petty offense exception applies because the instant offense has a de facto one year top, even if the potential maximum was state prison.

Of course, try to avoid conviction of a crime involving moral turpitude in the first place. Consult an immigration text for charts of holdings on moral turpitude. As discussed above, in the case of a divisible statute keep the record of conviction clear of information that indicates that the conviction was for a turpitudinous offense.

The Moral Turpitude Ground of Deportability

The defendant can become deportable for a conviction of a CMT in one of two ways:

Conviction of One Crime Involving Moral Turpitude

A person is deportable who was convicted of a crime involving moral turpitude that was **committed within five years of his or her last admission** to the United States, and that carries a **potential** sentence of one year or more.

Strategy

Conviction of a misdemeanor moral turpitude offense can make a defendant deportable if s/he committed the offense within five years of last admission to the U.S., as long as the misdemeanor has a potential one year sentence. (In a change from pre-1996 law, the **potential** sentence, and not sentence **imposed**, is now relevant for this ground.) The defendant should attempt to plead to a misdemeanor such as petty theft that has a maximum six month sentence, since expungements under Penal Code § 1203.4 no longer eliminate these convictions for immigration purposes.

"Admission" to the United States is a term of art and may not include every entry into the U.S. made by a permanent resident.[69] Consult with an immigration attorney or research the law to determine if the defendant's last admission was within five years of committing the offense.

Conviction of Two Crimes Involving Moral Turpitude

Conviction of two crimes involving moral turpitude is a basis for deportation unless the offenses represent a "single scheme of criminal misconduct." There is no time requirement, and all CMTs trigger this result, regardless of the potential or imposed sentence. A 1971 and a 1997 conviction for misdemeanor petty theft, for example, will combine to make the defendant deportable.

Strategy

If the offenses are connected together in their commission, it may help to get some indication on the record that they were both committed pursuant to a single scheme of criminal misconduct, although the immigration court will determine under its own standard whether the two offenses were committed pursuant to a "single scheme" of criminal misconduct.

A person deportable under this ground might still be able to apply for discretionary relief in immigration court, as long as the offense is not an aggravated felony.[70]

Attempt to plead to an offense that does not involve moral turpitude, or to a "divisible statute," with the record of conviction clear of evidence that the offense involved moral turpitude. See discussion of these terms in the Petty Offense discussion, above.

Deportability for Any Offense Related to Firearms or Destructive Devices

Conviction of **trafficking** in firearms or destructive devices or explosive materials is an aggravated felony and, therefore, a ground for deportation. An example of a destructive device is a bomb or grenade (see 18 U.S.C. § 921(c)). So is conviction of any of several federal firearms offenses listed in the definition of aggravated felony, including felon in possession of a firearm.[71]

A noncitizen is also independently deportable for any offense relating to firearms or destructive devices.[72]

The strategies below can help in avoiding a firearms conviction. In using these strategies, it is crucial to keep in mind, however, that **the defendant must avoid a conviction of a "crime of violence" with a one-year sentence**, because this is independently an aggravated felony. Being convicted of an aggravated felony is worse than being deportable under the firearms ground.

Strategy

A firearms sentencing enhancement under California law is not considered a firearms "conviction" for immigration purposes.[73] Plead to an offense that does not involve firearms, even if you must admit a firearms enhancement. Be careful to avoid conviction of a crime of violence with a sentence imposed of a year or more.

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[68]This will fulfill the third requirement for the petty offense exception, that the maximum sentence must be one year or less. *LaFarga v. INS*, __ F.3d __ 1999 U.S. App. LEXIS 4843 (9th Cir. 1999).

[69]Admission is defined at 8 U.S.C. §1101(a)(13), INA § 101(a)(13).

[70]The new INA § 240A(a) cancellation of removal for long-term permanent residents can now — in deportation proceedings filed after April 1, 1997 — waive removal for any criminal conviction that is not an aggravated felony. It requires (a) continuous lawful presence in the United States for seven years before commission of the deportable offense, (b) possession of lawful permanent resident status for five years, and (c) a showing that deportation would cause extreme hardship to an ... immediate family member who is a U.S. citizen of lawful permanent resident, and is then discretionary. 8 U.S.C. § 1229b.

[71]8 U.S.C. § 1101(a)(43)(C), (E).

[72]Conviction under any law of "purchasing, selling, offering for sale, exchanging, using, owning, possession or carrying in violation of any law, any weapon, part, or accessory which is a firearm or destructive device," or of conspiracy or attempt to do this, is a basis for deportation.

[73]See *Matter of Rodriguez-Cortez*, Int. Dec. 3189 (BIA 1992).

Conviction of an offense that does not include use of a weapon as an element is not a firearms conviction, even if the record of conviction states that the defendant used a firearm.[74]

Some statutes encompass both acts that necessarily involve firearms and acts that do not. A common example is the offense of possession of a weapon under Penal Code § 12020, where the statute includes knives as well as firearms. If the statute is divisible or ambiguous, immigration authorities will not look beyond the "record of conviction" (charge, plea, judgment or verdict, and sentence) to determine whether the person was convicted of an offense relating to firearms.[75] If counsel can keep the record of conviction clear of this information, the person will not be deportable under the firearms ground of deportability. Be careful to avoid a one-year sentence if the conviction is of a "crime of violence," so as not to make the offense an aggravated felony. Crime of violence for immigration purposes is broadly defined to include acts which threaten harm to persons or property.[76]

[74]*Matter of Perez-Contreras*, Int. Dec. 3194 (BIA 1992).

[75]This is the same "divisible statute" rule used in analyzing crimes involving moral turpitude. See *In re Madrigal-Calvo*, Int. Dec. 3274 (BIA 1996)(the transcript of the respondent's plea and sentence hearing, during which the respondent admitted possession of a firearm; was held to be part of the record of conviction and thus sufficient to establish that the respondent was convicted of a firearms offense); *In re Texeira*, Int. Dec. 3273 (BIA 1996) (a police report is not part of a "record of conviction," nor does it fit any of the descriptions of documents admissible as evidence to prove a conviction before an immigration judge under 8 CAR § 3.41 (1995); therefore while it can be considered as a factor in an application for discretionary relief, it is not proof of conviction to establish deportability); *In Re Pichardo* Int. Dec. 3275 (BIA 1996) (where the record of conviction failed to identify the subdivision under which the alien was convicted or the weapon he was convicted of possessing, deportability is not proved even where the alien testified in immigration proceedings that the weapon he possessed was a gun).

[76]See 18 U.S.C. § 16 and discussion in text, *supra*.

A person deportable under the firearms ground might still be able to apply for some discretionary relief in immigration court, as long as the offense is not an aggravated felony.[77]

Domestic Violence, Child Neglect or Abuse

In 1996, Congress created a new, very broad ground of deportation based on a conviction of a state or federal crime of domestic violence, spousal abuse or child abuse.[78] The person must be convicted of a crime of domestic violence, stalking, child abuse, child neglect or child abandonment. A person also is deportable whom a civil or criminal court has found to have violated a domestic violence protective order, even without a criminal conviction.

Conviction of a "crime of domestic violence" is a broad category of offenses defined as "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."[79]

The defendant must be a current or ex-spouse, the parent of a victim's child, a person who co-habited as a spouse or someone similarly situated under state domestic or family violence laws, or any other individual against whom such laws provide protection.[80] Thus, offenses such as vandalism or simple assault, which do not involve moral turpitude, might be held to be a basis for deportability if committed against a live-in girlfriend or boyfriend.

[77]A person married to a U.S. citizen, for example, might be able to immigrate or "re-immigrate" through the spouse. *Matter of Rainford*, Int. Dec. 3191 (BIA 1992). The new INA § 240A(a) cancellation of removal for long-term permanent residents can now — in deportation proceedings filed after April 1, 1997 — waive a firearms conviction.

[78]See INA § 1227(a)(2)(E).

[79]18 U.S.C. § 16.

[80]8 U.S.C. § 1227(a)(2)(E)(i).

Strategy for Criminal Charge

Seek a plea to an unlisted offense. For example, witness intimidation under Penal Code 136.1(b) proscribes attempting to prevent or dissuade a crime victim or witness from making a report or complaint. This offense might describe the aftermath of a domestic violence incident, but it can be committed without use or threat of violence and, thus, would not be a "crime of violence" or domestic violence offense. It might be held to be obstruction of justice, in which case it would be an aggravated felony if a one-year sentence was imposed.

Attempt to avoid any reference in the record of conviction (charging paper, plea, judgment, transcripts) to the existence of a listed relationship between the defendant and the complaining witness.

A person deportable under this ground might still be able to apply for discretionary relief in immigration court, as long as the offense is not an aggravated felony.[81]

"Cancellation of Removal"

The Waiver for Lawful Permanent Residents of Seven Years

Until recently, longtime lawful permanent residents who were convicted of certain crimes could apply for a waiver of deportation known as "section 212(c) relief" (so called because it was then located in INA § 212(c)). In cases brought to immigration court on or after April 1,

[81]Cancellation of removal for long-term permanent residents can waive removal for any criminal conviction that is not an aggravated felony. It requires (a) continuous lawful presence in the United States for seven years before commission of the removable offense, (b) possession of lawful permanent resident status for five years, and (c) a showing that deportation would cause extreme hardship to an immediate family member who is a U.S. citizen of lawful permanent resident, and is then discretionary. 8 U.S.C. § 1229b(a), INA § 240A(a). Some aspects of the relief are technically complex. For example, deportability under the firearms ground may not "stop the clock" on the seven years. See discussion in § 11.10, *California Criminal Law and Immigration*.

1997, section 212(c) has been eliminated and, in its place, permanent residents must apply for **"cancellation of removal."** If cancellation is granted the person will not be "removed" (i.e., deported or excluded). To qualify, the applicant must:

> a) have been a permanent resident for at least five years;
> b) have continuously resided in the U.S. for at least seven years after having been lawfully "admitted in any status";[82]
> c) not have been convicted of an aggravated felony; and,
> d) not previously have received § 212(c) relief, suspension of deportation or cancellation of removal.[83]

Strategy

Avoid conviction of an aggravated felony.

Attempt by negotiation to choose a later offense or post-date the date of commission of the offense in the record of conviction so as to enable marginal candidates to accrue the necessary seven years between lawful admission and the date of the commission of the offense as reflected in the record of conviction.

Getting the Client Out — Dealing with Immigration Holds and Detainers[84]

If your client has an immigration hold, do not assume it is hopeless to attempt to obtain his or her release, although, since October, 1998, the new mandatory detention laws require the immigration courts to hold without bond nearly all noncitizens in removal proceedings as a result of criminal convictions.[85] Check the case out individually to see whether it is possible to secure the client's liberty. The basic strategy is to bail the client out of criminal custody **and** INS custody separately. If you can secure your client's release from criminal custody **before** an immigration hold is placed, the client may never face the problem of an INS hold.

If an "immigration hold" is placed, obtain a copy of the paper. It may not be an immigration "request to detain" at all, but merely a notice that the non-citizen is under investigation by the INS, which does **not** legally justify detaining the client.

If it was lodged by telephone, but not followed up within 24 hours by the proper written form, it is no longer effective as an immigration hold, and the client should be released from custody when s/he bails on the criminal charges.

If the client bails on the criminal charges, but is under an INS hold, s/he will usually be picked up from jail by the INS within 48 hours, and can then attempt to bond out of immigration custody. If the INS does not pick up the client within 48 hours after the client would otherwise have been released from state custody, the client should be released immediately or the custodian can face a suit for false imprisonment. Habeas corpus can be used to secure his or her release.

If the proper detainer has been issued by the INS, immigration counsel can secure the client's release on an immigration bond if the client is eligible for bond in immigration court. The INS will accept full cash bond with no fee required. A bond agency usually requires real property collateral or full cash deposit (plus 10% annually to the bondsperson).

Almost all noncitizens who are deportable or inadmissible under criminal grounds are ineligible for release from INS custody on bond.[86] It is important to consult carefully with an immigration lawyer to determine whether it will be possible to bond the client out of immigration custody before deciding whether it is worthwhile to attempt to secure release from criminal custody.

Once released from state custody into INS custody, the bond is set and the client's immigration lawyer can obtain a bond redetermination hearing in immigration court within a few days, by telephone if the client has been moved to a distant INS holding facility.

If the client cannot bond out of INS custody, it may be unwise to bail the client on the criminal charges since the INS can take the client to El Centro or some other inconvenient location, making it far more difficult to defend the criminal case. ▲

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[82]The "admission" could be as a tourist, a lawful permanent resident, with a border crossing card, or other status. The time necessary for this relief stops accruing at the time of service on the noncitizen of a Notice to Appear in immigration court or **commission** of a criminal act rendering the respondent inadmissible or deportable. INA § 240A(d)(1), 8 U.S.C. § 1229b(d)(1).

[83]IIRAIRA § 304(a)(3) creating INA § 240A(c), 8 U.S.C. § 1229b(c).

[84]See Michael K. Mehr, "State Enforcement of Immigration Law, Immigration Holds and Detainers, Detention of Aggravated Felons and Juvenile Aliens," in K. Brady, *supra*, Chapter 12, §§ 12.5-12.6; see also *Immigration Law and Crimes*, § 8.3.

[85]8 U.S.C. § 1226(c). The major exceptions are noncitizens removable only for one CMT or for a domestic violence conviction.

[86]This includes: (a) any alien inadmissible on criminal grounds (see INA § 212(a)(2)(A)-(E), 8 U.S.C. § 1182(a)(2)(A)-(E)); (b) any alien deportable for having "committed" two or more crimes involving moral turpitude, an aggravated felony, a controlled substance violation, a firearms offense, or miscellaneous crimes relating to espionage, selective service, and alien smuggling; or for being a drug abuser or addict (see INA § 242(a)(2)(A)(ii), (A)(iii), (B), (C) and (D), 8 U.S.C. § 1226(a)(2)(A)(ii), (A)(iii), (B), (C) and (D)); and (c) any alien deportable for having been convicted of a single crime of moral turpitude, if the alien was sentenced to a term of imprisonment of at least one year. (See INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i).) Aliens deportable under the domestic violence ground are in the second highest, not highest, priority for detention.

RESISTING EXECUTIVE OFFICER

PENAL CODE SECTION 69

Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty, is punishable by a fine not exceeding ten thousand dollars ($10,000), or by imprisonment in the state prison, or in a county jail not exceeding one year, or by both such fine and imprisonment.

CALJIC 7.50
OBSTRUCTING/RESISTING EXECUTIVE OFFICERS

[Defendant is accused [in Count[s] _____] of having violated section 69 of the Penal Code, a crime.]

Every person who willfully [and unlawfully] attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon that officer by law, or who knowingly resists, by the use of force or violence, an executive officer in the performance of his or her duty, is guilty of a violation of section 69 of the Penal Code, a crime.

The term "executive officer" includes a [police officer] [deputy sheriff] [_____].

In order to prove this crime, each of the following elements must be proved:

[1. A person willfully [and unlawfully] attempted to deter or prevent an executive officer from performing any duty imposed upon that officer by law; and

2. The attempt was accomplished by means of any threat or violence.]

[1. A person knowingly [and unlawfully] resisted an executive officer in the performance of his or her duty; and

2. The resistance was accomplished by means of force or violence.]

RESISTING ARREST

PENAL CODE SECTION 148

(a) (1) Every person who willfully resists, delays, or obstructs any public officer, peace officer, or an emergency medical technician, as defined in Division 2.5 (commencing with Section 1797) of the Health and Safety Code, in the discharge or attempt to discharge any duty of his or her office or employment, when no other punishment is prescribed, shall be punished by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment.

CALJIC 16.102
RESISTING ARREST

[Defendant is accused [in Count[s] _____] of having violated Penal Code section 148, subdivision (a), a misdemeanor.]

Every person who willfully resists, delays, or obstructs any [peace officer] [public officer] [_____ (other)] in the discharge or attempt to discharge any duty of [his] [her] office or employment, and who knows or reasonably should know that the other person is a [peace officer] [public officer] [_____ (other)] engaged in the performance of [his] [her] duties, is guilty of a violation of Penal Code section 148, subdivision (a), a misdemeanor.

In order to prove this crime, each of the following elements must be proved:

1. A person willfully resisted, delayed, or obstructed a [peace officer] [public officer] [_____ (other)];

2. At the time the [peace officer] [public officer] [_____ (other)] was engaged in the performance of [his] [her] duties; and

3. The person who willfully resisted, delayed, or obstructed knew or reasonably should have known that:

(a) the other person was a [peace officer] [public officer] [_____ (other)];

(b) and was engaged in the performance of [his] [her] duties.

FALSELY REPRESENTING SELF AS ANOTHER PERSON TO PEACE OFFICER

PENAL CODE SECTION 148.9

(a) Any person who falsely represents or identifies himself or herself as another person or as a fictitious person to any peace officer listed in Section 830.1 or 830.2, or subdivision (a) of Section 830.33, upon a lawful detention or arrest of the person, either to evade the process of the court, or to evade the proper identification of the person by the investigating officer is guilty of a misdemeanor.

(b) Any person who falsely represents or identifies himself or herself as another person or as a fictitious person to any other peace officer defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, upon lawful detention or arrest of the person, either to evade the process of the court, or to evade the proper identification of the person by the arresting officer is guilty of a misdemeanor if (1) the false information is given while the peace officer is engaged in the performance of his or her duties as a peace officer and (2) the person providing the false information knows or should have known that the person receiving the information is a peace officer.

ASSAULT

PENAL CODE SECTION 240

An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.

CALJIC 9.00
ASSAULT——DEFINED

[Defendant is accused [in Count[s] _____] of having violated section 240 of the Penal Code, a crime.]

[Every person who commits an assault upon another person is guilty of a violation of Penal Code section 240, a [misdemeanor] [crime].]

In order to prove an assault, each of the following elements must be proved:

1. A person willfully [and unlawfully] committed an act which by its nature would probably and directly result in the application of physical force on another person; and

2. At the time the act was committed, the person intended to use physical force upon another person or to do an act that was substantially certain to result in the application of physical force upon another person; and.

3. At the time the act was committed, the person had the present ability to apply physical force to the person of another.

"Willfully" means that the person committing the act did so intentionally.

To constitute an assault, it is not necessary that any actual injury be inflicted. However, if an injury is inflicted it may be considered in connection with other evidence in determining whether an assault was committed [and, if so, the nature of the assault].

[A willful application of physical force upon the person of another is not unlawful when done in lawful [self-defense] [or] [defense of others]. The People have the burden to prove that the application of physical force was not in lawful [self-defense] [defense of others]. If you have a reasonable doubt that the application of physical force was unlawful, you must find the defendant not guilty.]

BATTERY

PENAL CODE SECTION 242

A battery is any willful and unlawful use of force or violence upon the person of another.

CALJIC 16.140
BATTERY

[Defendant is accused [in Count[s] _____] of having committed the crime of battery in violation of section 242 of the Penal Code, a misdemeanor.]

Every person who willfully [and unlawfully] uses any force or violence upon the person of another is guilty of the crime of battery in violation of Penal Code section 242.

In order to prove this crime, each of the following elements must be proved:

1. A person used force or violence upon the person of another; and

2. The use was willful [and unlawful].

[The use of force or violence is not unlawful when done in lawful [self-defense] [or] [defense of others]. The burden is on the People to prove that the use of force or violence was not in lawful [self-defense] [or] [defense of others]. If you have a reasonable doubt that the use of force or violence was unlawful, you must find the defendant not guilty.]

DISTURBANCE OF PUBLIC MEETING

PENAL CODE SECTION 403

Every person who, without authority of law, willfully disturbs or breaks up any assembly or meeting that is not unlawful in its character, other than an assembly or meeting referred to in Section 302 of the Penal Code or Section 18340 of the Elections Code, is guilty of a misdemeanor.

CALJIC 16.225
DISTURBANCE OF PUBLIC ASSEMBLY OR MEETING

[Defendant is accused [in Count[s] _____] of having violated section 403 of the Penal Code, a misdemeanor.]

Every person who, without authority of law, willfully disturbs or breaks up any public assembly or public meeting, not unlawful in its character, is guilty of a violation of Penal Code section 403, a misdemeanor.

In order to prove this crime, each of the following elements must be proved:

1. The defendant substantially impaired the conduct of a public assembly or public meeting by committing acts in violation of implicit customs or usages applicable to the type of meeting being held, or in violation of explicit rules for the conduct of that meeting;

2. The defendant knew, or as a reasonable person should have known, of these customs, usages or rules;

3. The defendant's acts were intentionally committed; and

4. The defendant's activity itself, and not the content of the activity's expression, substantially impaired the effective conduct of the meeting.

PENAL CODE SECTION 404

(a) Any use of force or violence, disturbing the public peace, or any threat to use force or violence, if accompanied by immediate power of execution, by two or more persons acting together, and without authority of law, is a riot.

PENAL CODE SECTION 404.6

(a) Every person who with the intent to cause a riot does an act or engages in conduct that urges a riot, or urges others to commit acts of force or violence, or the burning or destroying of property, and at a time and place and under circumstances that produce a clear and present and immediate danger of acts of force or violence or the burning or destroying of property, is guilty of incitement to riot.

CALJIC 16.231
INCITEMENT TO RIOT——"RIOT"——DEFINED

A "riot" is any use of force or violence which disturbs the public peace, or any threat to use force or violence, if accompanied by the immediate power of execution, by two or more persons acting together without authority of law.

CALJIC 16.235
RIOT

[Defendant is accused [in Count[s] _____] of having violated sections 404, subdivision (a) of the Penal Code, a misdemeanor.

Every person who participates in any riot is guilty of a violation of Penal Code sections 404, subdivision (a), a misdemeanor.

In order to prove this crime, each of the following elements must be proved:

1. A riot occurred; and

2. The defendant willfully participated in the riot.

CALJIC 16.230
INCITEMENT TO RIOT

[Defendant is accused [in Count[s] _____] of having violated section 404.6, subdivision (a) of the Penal Code, a misdemeanor.]

Every person who with the specific intent to cause a riot does an act or engages in conduct which urges a riot, or urges others to commit acts of force, or violence or the burning or destroying of property, at a time and place and under circumstances which produce a clear and present and immediate danger of acts of force or violence or the burning or destroying of property, is guilty of a violation of Penal Code section 404.6, subdivision (a), a misdemeanor.

In order to prove this crime, each of the following elements must be proved:

1. The defendant specifically intended to cause a riot;

2. With that intent [he] [she] committed an act or engaged in conduct which urged a riot, or with that intent [he] [she] urged others [to commit violent acts] [or] [to burn or destroy property]; and

3. This conduct took place under circumstances which produced a clear and present and immediate danger that [force or violence] [, or] [the burning or destruction of property] would take place.

To constitute the crime charged, no actual force need be used or violence occur, nor need there be any actual burning or destruction of property.

UNLAWFULLY ASSEMBLY

PENAL CODE SECTION 407

Whenever two or more persons assemble together to do an unlawful act, or do a lawful act in a violent, boisterous, or tumultuous manner, such assembly is an unlawful assembly.

PENAL CODE SECTION 408

Every person who participates in any rout or unlawful assembly is guilty of a misdemeanor.

CALJIC 16.240
UNLAWFUL ASSEMBLY

It is an unlawful assembly:

[Whenever two or more persons assemble together for the purpose of doing an unlawful act[.]] [, or]

[Whenever two or more persons who are assembled together do a lawful act in a violent, boisterous, or tumultuous manner, that is, where such act or acts are themselves violent or tend to incite others to violence.]

[An assembly of two or more persons assembled together to do a lawful act is not unlawful unless the assembly is or becomes violent or gives rise to a clear and present danger of immediate violence.]

FAILURE TO DISPERSE

PENAL CODE SECTION 409

Every person remaining present at the place of any riot, rout, or unlawful assembly, after the same has been lawfully warned to disperse, except public officers and persons assisting them in attempting to disperse the same, is guilty of a misdemeanor.

CALJIC 16.250
REFUSAL TO DISPERSE WHEN ORDERED

[Defendant is accused [in Count[s] _____] of having violated section 409 of the Penal Code, a misdemeanor.]

Every person who remains present at the place of any [riot] [or] [rout] [or] [unlawful assembly], after the same has been lawfully warned to disperse, except public officers and persons assisting them in attempting to disperse the same, is guilty of a violation of Penal Code section 409, a misdemeanor.

[A commission of this offense may be established by proof of failure to disperse after a lawful warning to disperse, even though the accused person had not participated in any riot, rout or unlawful assembly.]

In order to prove this crime, each of the following elements must be proved:

1. A [riot] [rout] [unlawful assembly] occurred;

2. Defendant was present at the place of the _____ (riot, etc.);

3. Defendant was lawfully warned to disperse;

4. Defendant was not a public officer or a person assisting a public officer in attempting to disperse the _____ (riot, etc.); and

5. Defendant willfully remained notwithstanding the warning.

DISTURBING THE PEACE

PENAL CODE SECTION 415

Any of the following persons shall be punished by imprisonment in the county jail for a period of not more than 90 days, a fine of not more than four hundred dollars ($400), or both such imprisonment and fine: (1) Any person who unlawfully fights in a public place or challenges another person in a public place to fight. (2) Any person who maliciously and willfully disturbs another person by loud and unreasonable noise. (3) Any person who uses offensive words in a public place which are inherently likely to provoke an immediate violent reaction.

CALJIC 16.260
BREACH OF PEACE

[Defendant is accused [in Count[s] _____] of having violated section 415, subdivision [(1)][(2)][(3)] of the Penal Code, a misdemeanor.]

Every person who:

[(1) Unlawfully [fights] [challenges another person to fight] in a public place] [or]

[(2) Willfully and maliciously disturbs another person by loud and unreasonable noise] [or]

[(3) In a public place directs at one or more persons offensive words which are inherently likely to provoke an immediate violent reaction]

is guilty of a violation of section 415, subdivision [(1)][(2)][(3)] of the Penal Code, a misdemeanor.

In order to prove this crime, each of the following elements must be proved:

[1. A person willfully [and unlawfully] fought another person, or challenged another person to fight; and

2. The fight, or the challenge, occurred in a public place[.]] [; or]

[1. A person willfully and maliciously caused loud and unreasonable noise; and

2. The loud and unreasonable noise caused another person to be disturbed[.]] [; or]

[1. A person used offensive words which were inherently likely to provoke an immediate violent reaction; and

2. Those words were [directed at one or more other persons and] uttered in a public place.]

DAMAGE TO PROPERTY

PENAL CODE SECTION 594

(a) Every person who maliciously commits any of the following acts with respect to any real or personal property not his or her own, in cases other than those specified by state law, is guilty of vandalism:

(1) Defaces with graffiti or other inscribed material.

(2) Damages.

(3) Destroys.

Whenever a person violates this subdivision with respect to real property, vehicles, signs, fixtures, furnishings, or property belonging to any public entity, as defined by Section 811.2 of the Government Code, or the federal government, it shall be a permissive inference that the person neither owned the property nor had the permission of the owner to deface, damage, or destroy the property.

(b) (1) If the amount of defacement, damage, or destruction is four hundred dollars ($400) or more, vandalism is punishable by imprisonment in the state prison or in a county jail not exceeding one year, or by a fine of not more than ten thousand dollars ($10,000), or if the amount of defacement, damage, or destruction is ten thousand dollars ($10,000) or more, by a fine of not more than fifty thousand dollars ($50,000), or by both that fine and imprisonment.

(2) (A) If the amount of defacement, damage, or destruction is less than four hundred dollars ($400), vandalism is punishable by imprisonment in a county jail not exceeding one year, or by a fine of not more than one thousand dollars ($1,000), or by both that fine and imprisonment.

(B) If the amount of defacement, damage, or destruction is less than four hundred dollars ($400), and the defendant has been previously convicted of vandalism or affixing graffiti or other inscribed material under Section 594, 594.3, 594.4, 640.5, 640.6, or 640.7, vandalism is punishable by imprisonment in a county jail for not more than one year, or by a fine of not more than five thousand dollars ($5,000), or by both that fine and imprisonment.

(c) (1) Upon conviction of any person under this section for acts of vandalism consisting of defacing property with graffiti or other inscribed materials, the court may, in addition to any punishment imposed under subdivision (b), order the defendant to clean up, repair, or replace the damaged property himself or herself, or, if the jurisdiction has adopted a graffiti abatement program, order the defendant, and his or her parents or guardians if the defendant is a minor, to keep the damaged property or another specified property in the community free of graffiti for up to one year. Participation of a parent or guardian is not required under this subdivision if the court deems this participation to be detrimental to the defendant, or if the parent or guardian is a single parent who must care for young children.

(2) Any city, county, or city and county may enact an ordinance that provides for all of the following:

(A) That upon conviction of any person pursuant to this section for acts of vandalism, the court may, in addition to any punishment imposed under subdivision (b), provided that the court determines that the defendant has the ability to pay any law enforcement costs not exceeding two hundred fifty dollars ($250), order the defendant to pay all or part of the costs not to exceed two

hundred fifty dollars ($250) incurred by a law enforcement agency in identifying and apprehending the defendant. The law enforcement agency shall provide evidence of, and bear the burden of establishing, the reasonable costs that it incurred in identifying and apprehending the defendant.

(B) The law enforcement costs authorized to be paid pursuant to this subdivision are in addition to any other costs incurred or recovered by the law enforcement agency, and payment of these costs does not in any way limit, preclude, or restrict any other right, remedy, or action otherwise available to the law enforcement agency.

(d) If a minor is personally unable to pay a fine levied for acts prohibited by this section, the parent of that minor shall be liable for payment of the fine. A court may waive payment of the fine, or any part thereof, by the parent upon a finding of good cause.

(e) As used in this section, the term "graffiti or other inscribed material" includes any unauthorized inscription, word, figure, mark, or design, that is written, marked, etched, scratched, drawn, or painted on real or personal property.

(f) As used in this section, "graffiti abatement program" means a program adopted by a city, county, or city and county by resolution or ordinance that provides for the administration and financing of graffiti removal, community education on the prevention of graffiti, and enforcement of graffiti laws.

(g) The court may order any person ordered to perform community service or graffiti removal pursuant to paragraph (1) of subdivision (c) to undergo counseling.

(h) No amount paid by a defendant in satisfaction of a criminal matter shall be applied in satisfaction of the law enforcement costs that may be imposed pursuant to this section until all outstanding base fines, state and local penalty assessments, restitution orders, and restitution fines have been paid.

(i) This section shall remain in effect until January 1, 2002, and as of that date is repealed, unless a later enacted statute that is enacted before January 1, 2002, deletes or extends that date.

CALJIC 16.320
VANDALISM

Every person who maliciously [defaces with graffiti or other inscribed material] [damages] [or] [destroys] any [real] [or] [personal] property not [his] [her] own [, the amount of damage being over $400,] is guilty of vandalism in violation of Penal Code section 594, subdivision[s] (a) and [(b)(3)] [(b)(4)], a misdemeanor.

["Graffiti or other inscribed material" includes any unauthorized inscription, word, figure, mark, or design that is written, marked, etched, scratched, drawn or painted on real or personal property.]

In order to prove this crime, each of the following elements must be proved:

1. A person [defaced with graffiti or other inscribed material] [,] [damaged] [or] [destroyed] any [real] [or] [personal] property belonging to another person; [and]

2. The person acted maliciously in doing so [; and]

[3. The amount of the [defacement] [damage] [destruction] to the property exceeded $400.00].

TRESPASS

PENAL CODE SECTION 602

Except as provided in Section 602.8, every person who willfully commits a trespass by any of the following acts is guilty of a misdemeanor:

. . .

(f) Maliciously tearing down, damaging, mutilating, or destroying any sign, signboard, or notice placed upon, or affixed to, any property belonging to the state, or to any city, county, city and county, town or village, or upon any property of any person, by the state or by an automobile association, which sign, signboard or notice is intended to indicate or designate a road, or a highway, or is intended to direct travelers from one point to another, or relates to fires, fire control, or any other matter involving the protection of the property, or putting up, affixing, fastening, printing, or painting upon any property belonging to the state, or to any city, county, town, or village, or dedicated to the public, or upon any property of any person, without license from the owner, any notice, advertisement, or designation of, or any name for any commodity, whether for sale or otherwise, or any picture, sign, or device intended to call attention to it.

. . .

(h) Willfully opening, tearing down, or otherwise destroying any fence on the enclosed land of another, or opening any gate, bar, or fence of another and willfully leaving it open without the written permission of the owner, or maliciously tearing down, mutilating, or destroying any sign, signboard, or other notice forbidding shooting on private property.

. . .

(j) Entering any lands, whether unenclosed or enclosed by fence, for the purpose of injuring any property or property rights or with the intention of interfering with, obstructing, or injuring any lawful business or occupation carried on by the owner of the land, the owner's agent or by the person in lawful possession.

. . .

(l) Entering and occupying real property or structures of any kind without the consent of the owner, the owner's agent, or the person in lawful possession.

. . .

(n) Refusing or failing to leave land, real property, or structures belonging to or lawfully occupied by another and not open to the general public, upon being requested to leave by (1) a peace officer at the request of the owner, the owner's agent, or the person in lawful possession, and upon being informed by the peace officer that he or she is acting at the request of the owner, the owner's agent, or the person in lawful possession, or (2) the owner, the owner's agent, or the person in lawful possession. The owner, the owner's agent, or the person in lawful possession shall make a separate request to the peace officer on each occasion when the peace officer's assistance in dealing with a trespass is requested. However, a single request for a peace officer's assistance may be made to cover a limited period of time not to exceed 30 days and identified by specific dates, during which there is a fire hazard or the owner, owner's agent or person in lawful possession is absent from the premises or property. In addition, a

single request for a peace officer's assistance may be made for a period not to exceed six months when the premises or property is closed to the public and posted as being closed. However, this subdivision shall not be applicable to persons engaged in lawful labor union activities which are permitted to be carried out on the property by the California Agricultural Labor Relations Act, Part 3.5 (commencing with Section 1140) of Division 2 of the Labor Code, or by the National Labor Relations Act. For purposes of this section, land, real property, or structures owned or operated by any housing authority for tenants as defined under Section 34213.5 of the Health and Safety Code constitutes property not open to the general public; however, this subdivision shall not apply to persons on the premises who are engaging in activities protected by the California or United States Constitution, or to persons who are on the premises at the request of a resident or management and who are not loitering or otherwise suspected of violating or actually violating any law or ordinance.

. . .

(p) Refusing or failing to leave a public building of a public agency during those hours of the day or night when the building is regularly closed to the public upon being requested to do so by a regularly employed guard, watchman, or custodian of the public agency owning or maintaining the building or property, if the surrounding circumstances are such as to indicate to a reasonable person that the person has no apparent lawful business to pursue.

. . .

(s) Entering upon private property, including contiguous land, real property, or structures thereon belonging to the same owner, whether or not generally open to the public, after having been informed by a peace officer at the request of the owner, the owner's agent, or the person in lawful possession, and upon being informed by the peace officer that he or she is acting at the request of the owner, the owner's agent, or the person in lawful possession, that the property is not open to the particular person; or refusing or failing to leave the property upon being asked to leave the property in the manner provided in this subdivision.

This subdivision shall apply only to a person who has been convicted of a violent felony, as specified in subdivision (c) of Section 667.5, committed upon the particular private property. A single notification or request to the person as set forth above shall be valid and enforceable under this subdivision unless and until rescinded by the owner, the owner's agent, or the person in lawful possession of the property.

(t)(1) Knowingly entering, by an unauthorized person, upon any airport operations area if the area has been posted with notices restricting access to authorized personnel only and the postings occur not greater than every 150 feet along the exterior boundary.

(2) Any person convicted of a violation of paragraph (1) shall be punished as follows:

(A) By a fine not exceeding one hundred dollars ($100).

(B) By imprisonment in the county jail not exceeding six months, or by a fine not exceeding one thousand dollars ($1,000), or both, if the person refuses to leave the airport operations area after being requested to leave by a peace officer.

(C) By imprisonment in the county jail not exceeding six months, or by a fine not exceeding one thousand dollars ($1,000), or both, for a second or subsequent offense.

(3) As used in this subdivision the following definitions shall control:

(A) "Airport operations area" means that part of the airport used by aircraft for landing, taking off, surface maneuvering, loading and unloading, refueling, parking, or maintenance, where aircraft support vehicles and facilities exist, and which is not for public use or public vehicular traffic.

(B) "Authorized personnel" means any person who has a valid airport identification card issued by the airport operator or has a valid airline identification card recognized by the airport operator, or any person not in possession of an airport or airline identification card who is being escorted for legitimate purposes by a person with an airport or airline identification card.

(C) "Airport" means any facility whose function is to support commercial aviation.

. . .

CALJIC 16.330
ENTERING LAND TO INTERFERE WITH BUSINESS

Every person who willfully enters upon any land, fenced or unfenced, [with the specific intent to injure any property or property rights thereon] [or] [with the specific intent to interfere with, obstruct, or injure any lawful business or occupation being carried on [by the owner of the land or [his] [her] agent] [by the person in lawful possession of the land]] and who does interfere with, obstruct, or injure the [property] [property rights] [business] [or] [occupation] is guilty of a violation of Penal Code section 602, subdivision (j), a misdemeanor.

["Land" includes improved or unimproved real property.]

In order to prove this crime, each of the following elements must be proved:

1. A person willfully entered land of another, fenced or unfenced;

2. A person did so with the specific intent [to injure any property or property rights thereon] [or] [to interfere with, obstruct, or injure any lawful business or occupation being carried on by the [owner of the land or [his] [her] agent] [or] [person in lawful possession of land]]; and

3. That person interfered with, obstructed, or injured the [property] [property rights] [business] [or] [occupation].

CALJIC 16.340
ENTERING AND OCCUPYING REAL PROPERTY

Every person who willfully enters upon land or into buildings of any kind without the consent of [its owner, or [his] [her] agent] [the person in lawful possession thereof] and who occupies some portion or all thereof continuously or until ousted therefrom and with the specific intent to dispossess those lawfully entitled to possession of the property from that portion of the property occupied is guilty of a violation of Penal Code section 602, subdivision (l), a misdemeanor.

In order to prove this crime, each of the following elements must be proved:

1. A person willfully entered upon the land [or into buildings of any kind] of another person;

2. The person did so without the consent of the _____ (owner, etc.);

3. That person occupied some portion, or all thereof, continuously or until ousted therefrom; and

4. That person entered and occupied the property with the specific intent to dispossess those lawfully entitled to possession from that portion of the property actually occupied.

OBSTRUCTING STREETS OR SIDEWALKS

PENAL CODE SECTION 647c

Every person who willfully and maliciously obstructs the free movement of any person on any street, sidewalk, or other public place or on or in any place open to the public is guilty of a misdemeanor. Nothing in this section affects the power of a county or a city to regulate conduct upon a street, sidewalk, or other public place or on or in a place open to the public.

INJURY TO PUBLIC PROPERTY

LOS ANGELES MUNICIPAL CODE SECTION 41.14

No person shall cut, break, destroy, remove, deface, tamper with, mar,injure, disfigure, interfere with, damage, tear, remove, change or alter any:

(a) part of any building belonging to this City;

(b) drinking fountain situated on any public street or sidewalk or any appliance used in or about such foundation;

(c) (1) electric lamp erected or suspended on or over any street, sidewalk or park and used in the lighting thereof, or any wire or other apparatus immediately attached to such lamp;

(2) any lamp standard or lamp pole, nor attach thereto any banner, pennant, streamer, flag, sign, picture, wire, rope or other attachment of any kind for any purpose without first obtaining a permit to do so, as required by Sec. 62.132 of this Code;

(d) parts or appurtenances of the fire alarm, telegraph system or police signal system, lamp post, street sign post, fire alarm box, police signal box, post, standard, or pole or any fixture or apparatus used about or in connection with any such post, box, standard or pole;

(e) life buoy, life preserver, life boat, rope, gang or other materials, property or apparatus owned by this City and used or intended to be used for the purpose of saving life except when necessary for that purpose;

(f) public bridge or any portion thereof;

(g) water main, pipe, conduit, hydrant, reservoir or ditch, or to tap the same without permission of the Board of Water and Power Commissioners;

(h) water meter or any box containing any pipe, stop-cock or cut-off valve of the Department of Water and Power of this City or cover the same with earth, brick, stone, mortar, debris, or building material;

(i) tree, shrub, tree stake or guard in any public street, or affix or attach in any manner any other thing whatsoever, including any guy wire or rope, to any tree, shrub, tree stake or guard except for the purpose of protecting it or unless otherwise authorized by this Code;

(j) property owned by any public utility located on any street or sidewalk;

(k) other property owned or leased by this City, the County of Los Angeles, the State of California or the United States government or any political subdivision or department thereof, and not specifically enumerated in this section;

(l) public document, notice or advertisement or any private or legal document required to be posted or exhibited in the manner and place provided by law, or any copy of any ordinance posted in any public building or place, or on private property when such public notice or ordinance is required by law to be placed or posted thereon.

LOITERING ON SIDEWALKS

LOS ANGELES MUNICIPAL CODE SECTION 41.18

(a) No person shall stand in or upon any street, sidewalk or other public way open for pedestrian travel or otherwise occupy any portion thereof in such a manner as to annoy or molest any pedestrian thereon or so as to obstruct or unreasonably interfere with the free passage of pedestrians.

(b) No person shall loiter in any tunnel, pedestrian subway, or on any bridge overpass, or at or near the entrance thereto or exit therefrom, or at or near any abutment or retaining wall adjacent to such entrance or exit, or any retaining wall or abutment adjacent to any freeway, street or highway open and used for vehicular traffic, or adjacent to that portion thereof used for vehicular traffic, or on any public property in the proximity of such bridge, overpass, or retaining wall or abutment.

(c) No person in or about any pedestrian subway, shall annoy or molest another or make any remark to or concerning another to the annoyance of such other person, and no person shall commit any nuisance in or about such subway.

(d) No person shall sit, lie or sleep in or upon any street, sidewalk or other public way. The provisions of this subsection shall not apply to persons sitting on the curb portion of any sidewalk or street while attending or viewing any parade permitted under the provisions of Section 103.111 of Article 2, Chapter X of this Code; nor shall the provisions of this subsection supply to persons sitting upon benches or other seating facilities provided for such purpose by municipal authority by this Code.

OBSTRUCTING ENTRANCE TO PUBLIC ASSEMBLAGE

LOS ANGELES MUNICIPAL CODE SECTION 41.19

No person shall sit or stand on or at the entrance of any church, hall, theatre or other place of public assemblage in any manner so as to obstruct such entrance.

TRESPASS ON PRIVATE PROPERTY

LOS ANGELES MUNICIPAL CODE SECTION 41.24

(a) No person shall enter or be present upon any private property or portion of private property not open to the general public without the consent of the owner, the owner's agent, or the person in lawful possession, where signs forbidding entry are displayed as provided in Subsection (f).

(b) No person shall enter upon any private property or portion of private property, not open to the general public, who within the immediately preceding six months was advised as follows: to leave and not return, and that if he or she returns to the property within six months of the advisement he or she will be subject to arrest. This advisement must be made by the owner, the owner's agent, the person in lawful possession or a peace officer at the request of the owner, owner's agent or person in lawful possession. The advisement shall be documented in writing by the individual making it and shall include the name of the person advised, the date, approximate time, address and type of property involved. Such documentation shall be retained for a minimum period of one year. This subsection is not violated if a person so advised enters the property within the designated six month period, if he or she has been expressly authorized to do so by the owner, the owner's agent or a person in lawful possession.

(c) Entry requiring Express Consent of Owner.

1. No person shall enter or be present upon private property not open to the general public without the express consent of the owner or the owner's agent when that person:

A. has been convicted of any violation of the law involving narcotics, prostitution, vandalism, weapons, disturbance of the peace, loitering, threat to commit a violent act, or a violent act, on that same private property not open to the general public, whether or not such property is posted in accordance with Subsection (f); and

B. has, subsequent to the conviction been told to leave and not return to that same property, by the owner, the owner's agent or a peace officer at the request of the owner or the owner's agent.

2. The request to leave must be made within six months of the date of the conviction and shall be documented in writing by the individual making the request. The documentation of the request shall include the name of the person being requested to leave, the date, the approximate time, the address and the type of property involved.

3. This subsection applies even if the person has the consent of a person in lawful possession but does not apply to persons who have a right of lawful possession to the subject property. An individual who has the consent of the person in lawful possession may not be refused entry by the owner or the owner's agent for a period exceeding twelve months, computed from the date of the request.

(d) No person shall enter or be present upon any private property or portion of private property open to the general public who within the immediately preceding 24 hours was advised to leave and not return, and that if he or she returns to the property within 24 hours of the advisement, he or she will be subject to arrest. This advisement must be made by the owner, the owner's agent, the person in lawful possession or a peace officer at the request of the owner, owner's agent or the person in lawful possession. A request to leave may be made only if it is rationally related to the services performed or the facilities provided.

(e) The term "private property" shall mean any real property, including but not limited to, buildings, structures, yards, open spaces, walkways, courtyards, driveways, carports, parking areas and vacant lots, except land which is used exclusively for agricultural purposes, owned by any person or legal entity other than property owned or lawfully possessed by any governmental entity or agency.

(f) For purposes of Subsection (a), one sign must be printed or posted in a conspicuous manner at every walkway and driveway entering any enclosed property or portion thereof and at a minimum of every fifty feet along the boundary of any unenclosed lot. This requirement is met if at least one sign is conspicuously printed or posted on the outside of every structure on such property, so as to be readable from each walkway and driveway entering such property. The sign shall state as follows:

THIS PROPERTY CLOSED TO THE PUBLIC
No Entry Without Permission
L.A.M.C. SEC. 41.24

The language **"THIS PROPERTY CLOSED TO THE PUBLIC No Entry Without Permission"** on said sign shall be at least two inches high.

(g) When a peace officer's assistance in dealing with a trespass is requested, the owner, owner's agent, or the person in lawful possession shall make a separate request to the peace officer on each occasion. However, a single request for a peace officer's assistance may be made to cover a limited period of time not to exceed twelve months when such request is made in writing and provides the specific dates of the authorization period.

(h) This section shall not apply in any of the following instances:

(1) when its application results in, or is coupled with, any act prohibited by the Unruh Civil Rights Act, or any other provision of law relating to prohibited discrimination against any person;

(2) when its application results in, or is coupled with, an act prohibited by Section 365 of the California Penal Code, or any other provision of law relating to the duties of innkeepers;

(3) when public officers or employees are acting within the course and scope of their employment or in the performance of their official duties; or

(4) when persons are engaging in activities protected by the United States Constitution or the California Constitution or when persons are engaging in acts which are expressly required or permitted by any provision of law.

(i) Violation of any of the provisions of this section shall be a misdemeanor or an infraction.

(j) If any part or provision of this section, or the application thereof to any person or circumstance, is held invalid, the remainder of the section, including the application of that part or provision to other persons or circumstances, shall not be affected thereby and shall continue in full force and effect. To this end, the provisions of this section are severable.

LOUD AND RAUCOUS NOISE

LOS ANGELES MUNICIPAL CODE SECTION 41.57

(a) It is unlawful for any person to cause, allow or permit the emission or transmission of any loud or raucous noise from any sound making or sound amplifying device in his possession or under his control.

(1) upon any private property, or

(2) upon any public street alley, sidewalk or thoroughfare, or

(3) in or upon any public park or other public place or property.

(b) The words "loud and raucous noise" as used herein shall mean any sound or any recording thereof when amplified or increased by any electrical, mechanical, or other device to such volume, intensity or carrying power as to unreasonably interfere with the peace and quiet of other persons within or upon any one or more of such places or areas, or as to unreasonably annoy, disturb, impair or endanger the comfort, repose, health, or safety of other persons within or upon any one or more of such places or areas. The word "unreasonably" as used herein shall include but not be limited to, consideration of the hour, place, nature, and circumstances of the emission or transmission of any such loud and raucous noise.

DEMONSTRATION EQUIPMENT PROHIBITED

LOS ANGELES MUNICIPAL CODE SECTION 55.07

(a) No person shall carry or possess while participating in any demonstration, rally, picket line or public assembly, any length of lumber, wood, or wood lath unless that object is one-fourth inch or less in thickness and two inches or less in width, or if not generally rectangular in shape, such object shall not exceed three-quarters inch in its thickest dimension.

RESIDENTIAL PICKETING

MUNICIPAL CODE SECTION 56.45

(e) Prohibition Against Targeted Demonstrations Focused Upon and At or About a Private Residence.

Any person, acting alone or in concert with others, who pickets, parades or patrols in a manner that is both (1) focused upon the private residence or dwelling of any individual residing within the City of Los Angeles, and (2) takes place within one hundred (100) feet of such private residence shall be guilty of a misdemeanor.

Except as specified herein, nothing in this subsection shall prohibit generally the peaceful picketing or distributing pamphlets, going door-to-door, alone or in groups, in residential neighborhoods.

OBEDIENCE TO OFFICERS

LOS ANGELES MUNICIPAL CODE SECTION 80.02

No person shall willfully fail or refuse to comply with any lawful order, direction or signal of a Police Officer or Traffic Officer.

Notwithstanding any other provision of this Code, violation of this section is an infraction.

AMPLIFIED SOUND

LOS ANGELES MUNICIPAL CODE SECTION 115.02

It shall be unlawful for any person, other than personnel of law enforcement or governmental agencies, or permittees duly authorized to use the same pursuant to Sec. 103.111 of this Code, to install, use, or operate within the City a loudspeaker or sound amplifying equipment in a fixed or movable position or mounted upon any sound truck for the purposes of giving instructions, directions, talks, addresses, lectures, or transmitting music to any persons or assemblages of persons in or upon any public street, alley, sidewalk, park or place, or other public property except when installed, used or operated in compliance with the following provisions:

(a) In all residential zones and within 500 feet thereof, no sound amplifying equipment shall be installed, operated or used for commercial purposes at any time.

(b) The operation or use of sound amplifying equipment for noncommercial purposes in all residential zones and within 500 feet thereof, except when used for regularly scheduled operative functions by any school or for the usual and customary purposes of any church, is prohibited between the hours of 4:30 p.m. and 9:00 a.m. of the following day.

(c) In all other zones, except such portions thereof as may be included within 500 feet of any residential zone, the operation or use of sound amplifying equipment for commercial purposes is prohibited between the hours of 9:00 p.m. and 8:00 a.m. of the following day.

(d) In all other zones, except such portions thereof as may be included within 500 feet of any residential zone, the operation or use of sound amplifying equipment for noncommercial purposes is prohibited between the hours of 10:00 p.m. and 7:00 a.m. of the following day.

(e) The only sounds permitted shall be either music, human speech, or both.

(f) Sound emanating from sound amplifying equipment shall be limited in volume, tone and intensity as follows:

1. The sound shall not be audible at a distance in excess of 200 feet from the sound equipment.

2. In no event shall the sound be loud and raucous or unreasonably jarring, disturbing, annoying or a nuisance to reasonable persons of normal sensitiveness within the area of audibility.

(g) Except as provided in (b) above, no sound amplifying equipment shall be operated upon any property adjacent to and within 200 feet of any hospital grounds or any school or church building while in use.

(h) The operation or use of any sound amplifying equipment installed, mounted, attached or carried in or by any sound truck is further prohibited:

1. Within the Central Traffic district at any time;

2. Upon Hollywood Boulevard between Vermont Avenue and La Brea at any time;

3. Upon Wilshire Boulevard at any time;

4. Upon Sunset Boulevard at any time;

5. Upon Vine Street at any time;

6. Upon any street between the hours of 4:30 p.m. and 9:00 a.m. of the following day;

7. Upon any street on any Sunday.

CASE INFORMATION

Name:	
Nickname:	
Address:	
City, State, Zip:	
Date of Birth:	
Home Telephone:	
Business Telephone:	
FAX:	
PAGER:	
E-MAIL:	
AFFINITY GROUP:	
AFFINITY GROUP CONTACT:	Name: Telephone: ( )
IMMIGRATION:	U.S. Citizen ❒ If not checked, more detailed immigration inquiry required
PRIOR CONVICTIONS:	Misdemeanor Convictions ❒ Felony Convictions ❒

Court:		Case No.		
Event	**Date**	**Div/Dept**	**Judge**	**Prosecutor**
Arrest Date:				
Release by Citation:				
Complaint Filed:				
Arraignment:				
Pre-Trial:				
Trial:				

WAIVER OF DEFENDANT'S PERSONAL APPEARANCE

The undersigned defendant, having been advised of his or her right to be present at all stages of the proceedings, including, but not limited to, presentation of and arguments on questions of fact and law, and to be confronted by and cross-examine all witnesses, hereby waives the right to be present at the hearing of any motion or other proceeding in this cause. The undersigned defendant hereby requests the court to proceed during every absence of the defendant that the court may permit pursuant to this waiver, and hereby agrees that his or her interest is represented at all times by the presence of his or her attorney the same as if defendant were personally present in court, and further agrees that notice to his or her attorney that his or her presence in court on a particular day at a particular time is required is notice to the defendant of the requirement of his or her appearance at that time and place.

The undersigned further authorizes and consents to his or her attorney entering a plea of not guilty on his or her behalf at the time of arraignment.

Dated:

Signature:_____

Print Name:_____