Handling a Criminal Case

A Practical Guide for the California Paralegal or Legal Secretary

This guide provides California paralegals and legal secretaries with the tools necessary to assist a defense attorney in defending an adult criminal case from arrest to appeal, and all the steps in between.

by
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About This Guide

I wrote this guide to furnish California paralegals and legal secretaries with the tools necessary to assist a defense attorney in defending an *adult* criminal case from arrest to appeal and all the steps between. The guide presupposes that the reader is a paralegal or legal secretary and has a working knowledge of the legal system. This guide does not apply to juvenile cases.

About the Author

I earned a paralegal certificate at Sonoma State University (Rohnert Park, California) in 2006 and an AA/AS degree from Santa Rosa Junior College in 2004. I have worked as a paralegal at law firms handling personal injury, criminal defense, family law, and general civil litigation cases.

Since 2007, I have been working as a freelance paralegal. I work primarily with criminal defense attorneys throughout California, drafting motions, briefs and performing legal research. Before I was a paralegal, I worked as a correctional officer for the Sonoma County Sheriff's Office in Santa Rosa, California. I live in Santa Rosa, California.

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Introduction

Arguably, the United States Constitution alludes to only two professions: journalists in the First Amendment and criminal defense attorneys in the Sixth Amendment. The United States Supreme Court decisions are replete with statements about how crucial it is to have a defense attorney representing the accused. In some respects, the most meaningful were the words of in the Scottsboro Boys case — *Powell v. Alabama* (1932) 287 U.S.

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

The Role of the Prosecutor and Law Enforcement: Prosecutors and law enforcement officers have an obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for ascertaining the facts surrounding the commission of the crime.

The prosecutor "is the representative not of an ordinary party to a controversy." The prosecutor represents the state, whose "interest, in a criminal prosecution is not that it shall win a case, but that justice shall be done." The prosecutor has a duty "to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (*Berger* v. *United States,* 295 U. S. 78, 88.)

The Role of the Criminal Defense Attorney: But criminal defense counsel must vigorously defend the guilty, even if that means withholding incriminating evidence and attacking incriminating evidence counsel knows to be true. This idea has never been more expressed than by the late Supreme Court Justice Byron White in *United States v. Wade* (1967) 388 U.S. 218.

> "But defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty. The State has the obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the

> prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth. Undoubtedly there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth."

The spirit of *United States v. Wade* is embodied in the rule that criminal defense counsel is exempt from the prohibition against frivolously asserting or controverting issues: "It is the duty of an attorney to… do all of the following: To counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense." (Bus. & Prof. Code, § 6068(c); see also American Bar Association's Model Rules of Professional Conduct, Rule 3.1.)

Criminal defense paralegals play a crucial role in protecting overreaching by the state and enforcing constitutional and statutory protections to benefit the individual client and society.

Chapter 1: The Right to Counsel; The Attorney-Client Relationship

A criminal defendant is entitled to the assistance of counsel at every critical stage of the proceedings. (U.S. Const amend VI; Cal Const art I, § 15; see also Pen. Code, §§ 686, 859, 987; *Gideon v. Wainwright* (1963) 372 U.S. 335; see further reading, below.)

Although indigent defendants have a right to appointed counsel, that right does not extend to the unrestricted selection of counsel. (*Harris v. Superior Court* (1977) 19 Cal.3d 786.) The guarantee of appointed counsel also encompasses publicly funded ancillary defense services. (*Corenevsky v. Superior* Court (1984) 36 Cal.3d 307, 319; see Pen. Code, § 987.9.)

A defendant may waive representation and appear in propria persona if the waiver is timely, knowing, and intelligent. (*Faretta v California* (1975) 422 U.S. 806.)

Representation by certified law students under appropriate supervision does not infringe upon the right to counsel. (*People v. Perez* (1979) 24 Cal.3d 133, 139.)

The attorney-client relationship typically begins with an initial client interview, during which counsel gathers the pertinent facts, clarifies the scope of representation, outlines the legal process, and sets the fee.

Further Reading

Gideon's Trumpet is a 1964 book by Anthony Lewis describing the story behind the 1963 landmark court case *Gideon v. Wainwright*, in which the U.S. Supreme Court ruled that criminal defendants have the right to an attorney even if they cannot afford one. In 1965, the book won an Edgar Award from the Mystery Writers of America for Best Fact Crime book.

On Video

Gideon's Trumpet (1980) https://www.youtube.com/watch?v=20JiDaH-2A4
Henry Fonda plays Clarence Earl Gideon, whose fight for the right to have publicly funded legal counsel for the needy resulted in a landmark U.S. Supreme Court decision.

YouTube: "A Day in the Life of a Criminal Defense Attorney" (Funny)
https://youtu.be/FgH_h3JKldo?si=PwcSqJ59SvqsXHNU

Chapter 2: Arrests and Pre-Trial Release Procedures

A. Arrests

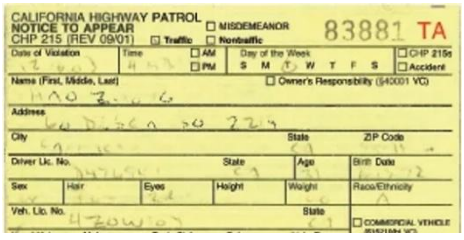
A police officer may come to make an arrest in several ways. Often, arrests occur following the issuance of an arrest warrant. Officers may also make warrantless arrests when observing someone commit a crime, or when they have probable cause to believe a suspect has committed a felony, regardless of whether it occurred in their presence. Additionally, arrests may result from investigative activities—such as surveillance, informant tips, or follow-up on reported crimes—which provide sufficient probable cause. Finally, officers may execute bench warrants issued by a judge to compel a defendant or witness who failed to appear in court.

Once a person is arrested, they must be brought before a magistrate "without unnecessary delay, and, in any event, within 48 hours after … arrest, excluding Sundays and holidays," unless the 48-hour period expires when court is not in session. (Pen. Code, § 825.)

In felony cases, the prosecutor may request a summons instead of an arrest warrant when filing a complaint. (Pen. Code, § 813.) A summons allows the defendant to appear in court for arraignment without being taken into custody. Note ► In some counties, the district attorney may issue a "notify letter" to inform the accused that a complaint has been filed and to direct them to appear in court on a specified date. If the defendant fails to appear, a bench warrant may be issued. However, absent proof that the summons was received, the failure to appear cannot be held against the defendant in future proceedings. (Pen. Code, § 813(c).)

B. Citation Release (Notice to Appear)

A common way for a person to become a criminal defendant is to have a police officer issue the person a citation (also known as a Notice to Appear), a written directive instructing a defendant to appear before a judge or magistrate at a specified date and time. Upon receiving a citation, the defendant must sign a written promise to appear and provide either satisfactory identification or a fingerprint. After complying, the defendant is released with a copy of the citation (Pen. Code, § 853.6(d)). Standard Judicial Council forms are used for notices to appear.


CALIFORNIA HIGHWAY PATROL
NOTICE TO APPEAR
CHP 215 (REV 09/01)
☐ MISDEMEANOR
☐ Traffic ☐ Nontraffic
83881 TA
Date of Violation
Time ☐ AM ☐ PM
Day of the Week S M T W T F S
☐ CHP 215s ☐ Accident
Name (First, Middle, Last)
☐ Owner's Responsibility (§40001 VC)
Address
City
State
ZIP Code
Driver Lic. No.
State
Age
Birth Date
Sex
Hair
Eyes
Height
Weight
Race/Ethnicity
Veh. Lic. No.
State
☐ COMMERCIAL VEHICLE

Individuals arrested for infractions or misdemeanors, outside the Vehicle Code, typically must be cited and released upon signing the Notice to Appear unless they request immediate appearance before a magistrate (Pen. Code, § 853.6(a)(1)). There are specific exceptions to this general rule:

- Offenses listed in Pen. Code, § 1270.1 are excluded.
- Misdemeanor violations involving domestic violence protective orders (Pen. Code, §§ 13700, 13701) require the defendant to be taken before a magistrate unless the arresting officer

determines there is no immediate danger or likelihood the offense will resume. Counties must establish protocols to guide officers in these determinations (Pen. Code, § 853.6(a)(2).)

- Officers retain discretion not to release individuals arrested for misdemeanors under certain circumstances outlined in Pen. Code, § 853.6(i).

C. Release on Own Recognizance

For defendants who remain in custody until arraignment, counsel can request release on the defendant's "own recognizance" (OR). Judges have broad discretion to grant OR release (Cal Const art I, § 12; Pen. Code, § 1270(a)). Defense counsel commonly argues mitigating circumstances for OR and alternatively seeks bail reduction (Pen. Code, §§ 1271, 1275, 1289). **Note**: Defendants released on OR must remain law-abiding. If a defendant is arrested for a new felony while awaiting resolution of an existing felony case, the prosecution can file a Penal Code §12022.1 enhancement, significantly impacting bail considerations and potential sentencing outcomes.

D. Bail and Surety Bonds

Bail allows defendants release from actual custody into "constructive custody" secured by a surety bond. Bail amounts must be specified by court order or arrest warrant (Pen. Code, §§ 815a, 1268, 1269a).

A bail bondsman (or bail agent) posts a surety bond with the court on the defendant's behalf. In exchange, the defendant (or their family) pays the bondsman a non-refundable premium, typically 10% of the bail amount. The bondsman becomes financially responsible for the full bail if the defendant fails to appear.

Bail agents do not personally have the capital to guarantee large bonds. They operate as appointed agents of large insurance companies (called surety insurers). The insurance company is the actual guarantor of the bond. The bondsman is essentially a retail agent who sells the insurer's product.

<u>Recent Developments in the California Bail System</u>

The Covid Pandemic's Impact on Bail: In April 2020, the Judicial Council of California responded to the COVID-19 pandemic by implementing an emergency bail order (Judicial Council Emergency Rule 4, effective April 13 to June 19, 2020), sometimes called "zero bail," to reduce viral transmission in courts and jails. The policy kept cash bail in place for more severe offenses but set bail at zero dollars for most misdemeanors and non-violent felonies.

Although the statewide mandate lasted for roughly two months, many county courts temporarily adopted similar policies, and until July 2022, most Californians lived in a county with an emergency bail order in place. California's emergency bail orders dramatically altered the pretrial process and drew concerns that those released would commit additional crimes. Studies found that initial

implementation increased rearrests modestly for nonviolent felonies but stabilized over time. Lifting these orders did not significantly alter rearrest rates.

Legal Limitations: *In re Humphrey* (2021) 11 Cal.5th 135: The California Supreme Court ruled in *In re Humphrey* that detaining defendants solely because they cannot afford bail violates due process and equal protection. Courts must consider ability to pay and flight/safety risks in setting bail amounts.

Post-Pandemic Legislative Reform Efforts: In response to the emergency bail experience, lawmakers introduced legislation aiming to codify $0 bail for misdemeanors and low-level felonies, refund bail payments if conditions are met, and establish a statewide standard bail schedule—modeled after the emergency approach. As of mid-2025, these bills have cleared initial legislative committees but have not yet been enacted statewide. The statewide zero-bail emergency policy is no longer in effect; cash bail remains a baseline in most counties. A handful of counties have adopted zero-dollar protocols within pre-arraignment programs, but there is not a uniform state policy.

Chapter 3: Client Intake Process

The criminal defense paralegal's involvement in a criminal case typically begins after the arrest and filing of charges against the client. Your first point of contact with the case may be when your supervising attorney returns from court where he or she has appeared with the client for arraignment. Besides opening a case file according to your office's protocols, a good paralegal can and should do a few things.

The Police Report: Police reports are the first link in the chain that leads to criminal prosecution. How does a person become a "defendant" in a criminal court case? Generally, the defendant commits some crime. A police agency investigates illegal conduct, writes a report, and presents it to a prosecutors' office.

A prosecutor will base a decision on whether to file criminal charges against someone based in no small measure on the police report's content.

Defense attorneys read police reports to determine whether the elements of the crimes alleged are, to prepare their cases, determine if officers acted appropriately, and ensure the suspect's rights.

For a police report to be of use in the judicial process, the report must be well organized, include facts needed to establish a crime occurred, and all actions taken by officers were appropriate.

Whether labeled as a police report, arrest report, incident report, or something else, the first thing the criminal defense paralegal should do is read the report. The more you know about the case, the easier it is to complete assigned tasks related to the case. As you read, ask yourself (1) Who was involved? (2) What did they do? (3) Where did they do it? (4) When did they do it? (5) Why did they do it? (6) How did they do it?

> **PARALEGAL POINTER ►** Highlight the names of witnesses, victims, and police officers in police reports with a consistent color scheme. E.g., witness, victim, police officer. This will come in handy when the attorney is in court for a hearing and questioning a witness, i.e., the attorney can quickly find the parts of reports where a particular witness said or did something and question them about it,

Types of Accusatory Pleadings in Criminal Cases: If a crime is an infraction, misdemeanor, or felony, the first accusatory pleading document is commonly known as a complaint (Pen. Code, § 949, and Pen. Code, § 859.)

In many counties, the citation serves as the complaint. (See Pen. Code, § 853.9, subd. (a)(1) and 853.9, subd. (b).)

During the pendency of a misdemeanor case, the charging document's title never changes; it is always the complaint.

In a felony case, following a preliminary hearing where the court holds the defendant to answer, the charging document is called the information.

If a prosecuting agency pursues a felony, but the jurisdiction does not conduct preliminary hearings, or the prosecution avoids the preliminary hearing process, the case must go to a grand jury. If the grand jury finds there is enough evidence, it will issue an indictment.

Review the Accusatory Pleading for Pen. Code, § 950 Compliance: The accusatory pleading must contain: (1) the title of the action, specifying the name of the court to which the same is presented, and the names of the parties, and (2) a statement of the public offense or offenses charged therein. (Pen. Code, § 950.)

The accusatory pleading may be written "in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused." (Pen. Code, § 950.)

Look over the pleading to make sure it complies with Penal Code section 950. Read the police report and note evidence to support or refute the accusatory pleading's accusations.

Statute of Limitations Check: Look up the statute of limitations for each charge in the accusatory pleading. You can find California's criminal statutes of limitations of actions in Pen. Code, §§799-805. Then compare the offense date as alleged in the accusatory pleading with the pleading filing date. Alert your supervising attorney to any possible discrepancies.

Generally, the time to commence an action for most felonies is six (6) years. (Pen. Code, § 800.)

Generally, the time to commence an action for most misdemeanors is three (3) years. (Pen. Code, § 801.)

There is no limitations period on any offense punishable by death or by imprisonment in the state prison for life or life without the possibility of parole, for the embezzlement of public money, or sex offenses specified in Penal Code section 799(b)(1).

There are *multiple exceptions* and unique situations that extend the limitations period for felonies and misdemeanors beyond those specified above, particularly for sex offenses committed when the victim was under age 18. (Pen. Code, §§ 801.1- 805.)

Pull the Jury Instructions: Retrieve the CALCRIM jury instructions for every charge. CALCRIM instructions are available for free download on the California Judicial Branch website. Print or download the instructions. The jury instructions are useful in research because they detail all the elements the prosecutor must prove to convict; they summarize the law on the issues covered. They contain notes summarizing the leading case law.

Research Potential Penalties: Use sentence calculation software, like Crime Time, to calculate the sentencing consequences of each charge. Entering all the data into the software is a task the paralegal or legal secretary can complete during the initial case set up process.

Compliance with Marsy's Law: Marsy's Law is the name for the California Victims' Bill of Rights Act of 2008, enacted by voters as Proposition 9 through the initiative process in the November 2008 general election. The law gets its name from Marsy Nicholas, a woman who was stalked and murdered by her ex-boyfriend, Kerry Michael Conley, in 1983.

Marsy's Law provides that victims in California have a constitutional right to be "treated with fairness and respect for his or her privacy and dignity, and to be free from intimidation, harassment, and abuse, throughout the criminal or juvenile justice process." (Cal. Const. Art. 1, sec 28(a).)

The defense team shall not disclose the address or telephone number of a victim or witness to a defendant or their family. (Pen. Code, § 1054.2(a)(1).) Willful violation of this subdivision is a misdemeanor. (Pen. Code, § 1054.2(a)(3).)

Redaction of the Police Report: Redact the names and telephone numbers of victims and witnesses in paper or copies of police reports furnished to your firm's clients. You can redact pdf documents using the redaction feature of the pdf software you are using. You can cleanse a paper copy of a report by blacking out the information with a black marker, like a Sharpie. However, DO NOT give the blacked-out document to the client. You can see the data under the black marks by holding the paper up to the light. Instead, make a photocopy of the blacked-out document and give the copy to the client.

PARALEGAL POINTER ► When you give the client an appropriately redacted copy of the police report, ask him or her to mark it up with comments. For example, have the client note any inaccuracies or omissions in the report. These may not be material inaccuracies or omissions, but sometimes this exercise can alert you to something important. Make sure to tell the client that just because something is incorrect in the police report does not mean they have earned a "get out of jail free" card.

The Intake Questionnaire: Most law offices will ask new clients to fill out an intake questionnaire. Frequently it is the paralegal who will hand the new client this questionnaire. Paralegals should have considerable input in creating the questionnaire. Think about updating the questionnaire template as you think of new pieces of information you want to capture at the start of a case.

The intake questionnaire should cover the information that any law office would gather from a new client and information unique to criminal cases, such as the following.

- Arrest date, time, and place
- Arresting agency and officer's name, if known
- The names and contact information of anyone else arrested with the client.
- Did the client make any statements to law enforcement? If so, what were they?

- Have you discussed the crime with anyone else?
- Describe the order of events leading to the arrest
- List any witnesses to the alleged crime if known
- List any alibi witnesses
- List prior arrests/charges, date, and final dispositions
- Whether the client is on probation, parole, or pre-trial supervised release (name of parole or probation officer)
- End the questionnaire with a section asking the client to note any comments or information that may be of value.

As the case progresses, you may need to research contact information for subpoenaing witnesses and records or conduct social media and internet research regarding potential jurors.

Near the end of the case, such as when your office is preparing a statement in mitigation or sentencing brief, you may need to research the client's:

- Family history
- Work history
- Educational background
- Medical history
- Military history
- Obtain documentation of the client's attendance at court-mandated treatment/counseling or completion of educational programs while in custody

Paper and Electronic Case File Retention: Generally, the attorney must provide the case file's entire contents, minus the attorney work product, to the client or successor counsel at the client's request. (Cal. State Bar Formal Opn. 1992-127; see also Rules Prof. Conduct, rule 3-700(D)(1).) Even if the client has a copy of the file, the attorney must turn over the original file. (See *Friedman v. State Bar* (1990) 50 Cal. 3d 235, 244.)

Some attorneys believe they only need to provide the client with the original file. However, in 2007 the Committee on Professional Responsibility and Conduct issued Formal Opinion 2007-174, which states in part: "3-700(D) expressly extends its coverage to 'all the client papers and property.' It does not draw any distinction based on the form of any item, whether electronic or non-electronic." The opinion states that it would be unreasonable to distinguish paper versus electronic material. The opinion argues that "client papers and property" is not a static concept and is evolving.

Bar associations have uniformly recommended that criminal attorneys retain the file for the life of the former client, unless the client expressly authorizes the file's destruction. As the LACBA explained, files "relating to criminal matters may well have future vitality even after the judgment, sentence and statutory appeals have been concluded." (L.A. Cnty. Bar Ass'n Formal Op. No. 420 (1983).)

"Considerations pertaining to the criminal defendant's liberty interest in the proceedings and to the possibility of review of criminal convictions by appeal or writ (even many years after conviction) warrant especially cautious treatment of criminal case files." (L.A. Cnty. Bar Ass'n Formal Op. No. 475.)

For example, a criminal client's file could be relevant to future habeas petitions, actual innocence claims, and malpractice or ineffective assistance of counsel claims. Because a criminal defense "attorney cannot foresee the future utility of information contained in the file" after the representation ends, the attorney "should not undertake the destruction of the client files" absent "specific written instruction from the client authorizing the destruction of the file." (L.A. Cnty. Bar Ass'n Formal Op. No. 420.)

The State Bar of California has quoted LACB's Opinion No. 420 with approval, adding that California's subsequent adoption of the "Three Strikes" law (Penal Code section 1170.12) "could make a client file in a matter resulting in a prior conviction more important than ever." Cal. State Bar Formal Op. No. 2001-157. Thus, the State Bar concluded that "client files in criminal matters should not be destroyed without the former client's express consent while the client is alive." (Id.) https://www.ocbar.org/All-News/News-View/ArticleId/1240/April-2014-Retaining-the-Client-File-After-the-Representation-Ends

Metadata Removal: Metadata is information about computer files and related records.

For example, a Microsoft Word document on your computer may contain the following metadata:

- The date and time the file was created
- Comments, revisions, versions
- Hidden text and invisible content
- Document properties and personal information
- The time spent editing the file
- The word document's count
- The directory/folder where the file is located
- The date and time the file was last modified
- The author of the file

If you send opposing counsel a document, for example a motion, that has not had the metadata scrubbed, he or she may be able to see all the stuff you took out; how your arguments evolved, and other information that could reveal strategic information. Imagine you have prepared a demand letter in a personal injury case, and you failed to remove the metadata from it before sending an electronic copy to opposing counsel. The metadata could alert the other side that you were willing to settle the case for less than the letter states. That would be an embarrassing and costly blunder.

To remove metadata from a Microsoft Word file, go to File →Info →Check for Issues →Inspect Document.

The same kind of metadata removal process should be performed on .pdf documents.

"Upon client's request, Attorney must release to the client the electronic versions of all papers and property in question, at Attorney's expense, after first stripping each document of any and all metadata that contains confidential information belonging to other clients." (Committee on

Professional Responsibility and Conduct issued Formal Opinion 2007-174, p.3, citing Bus. & Prof. Code, §6068, subd. (e)(1).)

Word processing software attached metadata by default. Metadata includes comments, revisions, versions, annotations, document properties, and hidden text. One bar association opinion said metadata need not be disclosed to the client because it is considered attorney work product equivalent that in paper files. (Orange County Bar Formal Opn. 2005-01.)

According to Microsoft, "[W]hen you share an electronic copy of certain Office documents with clients or colleagues, it is a good idea to review the document for hidden data or personal information. You can remove this hidden information before you share the document with other people. The Document Inspector feature in Word, Excel, PowerPoint, or Visio can help you find and remove hidden data and personal information in documents that you plan to share." ("Remove hidden data and personal information by inspecting documents, presentations, or workbooks" (January 8, 2019.)

Redactions Required by Law: You must redact certain information before releasing to the client case file:

- Jurors' names (Code Civ. Proc., § 237.)
- Victims' and witnesses' addresses and phone numbers received by trial counsel in discovery (Pen. Code, § 1054.1(a).)
- Name and address of a victim of a sex offense upon his/her request (Pen. Code, § 293; Gov. Code, § 6254(f)(2).)

Further Reading

The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion Interim No. 19-0004
https://www.calbar.ca.gov/Portals/0/documents/publicComment/2022/19-0004-Client-File-Release-Retention.pdf

Because court, law enforcement, and prosecutors' records (particularly reporter's transcripts) are not kept indefinitely, the contents of counsel's files may be the only source of exculpatory or otherwise useful information related to a prior conviction.

Case and Calendar Management: The attorney's office staff must have a current copy of the attorney's calendar to locate the attorney. Unlike other practice types, it is not uncommon for a criminal lawyer to be called to court with little notice. For example, if a client is arrested on a bench warrant or a new case, the court may receive a call in the morning requesting that counsel appear in court with the client that afternoon.

If the attorney uses an online calendar, access must be provided to the office staff so accurate, up-to-date schedules can be maintained and calendaring conflicts can be avoided. There are several legal case management software or cloud-based programs that include features for maintaining calendars. The author endorses no vendor, but here are some examples: Practice Panther, My Case, Clio.

Chapter 4: Discovery

What Is Discovery, and What Is Its Purpose?: Discovery is most often thought of as "the formal exchange of evidentiary information and materials between parties to a pending action." (*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 20.)

Discovery is designed to ascertain the truth. (*Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 375-377.)

Historical Background: Initially, under common law, the accused in a criminal action could not compel the production of documents or other evidence possessed by the prosecution.

> "Production was denied before trial on the ground that to compel the prosecution to reveal its evidence beforehand would enable the defendant to secure perjured testimony and fabricated evidence to meet the state's case. It was felt, furthermore, that to allow the defendant to compel production when the prosecution could not in its turn compel production from the defendant because of the privilege against self incrimination would unduly shift to the defendant's side a balance of advantages already heavily weighted in his favor. [Citations.]" (*Powell v. Superior Court* (1957) 48 Cal.2d 704, 706.)

It was not until the mid-1950s that California courts rethought the notion that a criminal defendant could discover the prosecution's evidence. One case around that time held that the defendant in a criminal case could compel production when it became apparent *during a trial* that the prosecution has in its possession relevant and material evidence that is not confidential because "the state has no interest in denying the accused access to all evidence that can throw light on issues in the case." (*People v. Riser* (1956) 47 Cal.2d 566, 585.) Later, the California Supreme Court said it was appropriate for the courts to "develop the rules governing discovery in the absence of express legislation authorizing such discovery." (*Jones v. Superior Court* (1962) 58 Cal. 2d 56, 59.)

California's Modern Discovery Statutory Scheme: Before 1990, criminal discovery was governed primarily by case authority. (*Schaffer v. Superior Court* (2010) 185 Cal.App.4th 1235, 1242.) However, in 1990, the voters of California adopted Proposition 115, the "Crime Victims Justice Reform Act." Proposition 115 added constitutional and statutory language authorizing reciprocal discovery in criminal cases and a new chapter in the Penal Code on the subject. (Cal Const art I, § 30 and (Penal Code, §§ 1054 to 1054.10.) Because of Proposition 115, discovery in criminal cases is now governed primarily by statutory law. (*In re Littlefield* (1993) 5 Cal.4th 122, 129-130.)

The discovery scheme codified in Penal Code sections 1054–1054.10 is intended to promote the ascertainment of truth, save court time, and protect victims and witnesses from danger, harassment, and undue delay (see Pen. Code, § 1054); and to prevent trial by ambush. (*People v. Bell* (1998) 61 Cal. App. 4th 282, 291.) These objectives are consistent with the real purpose of a criminal trial:

ascertainment of the facts. (*In re Littlefield* (1993) 5 Cal.4th 122, 131.)

Under the reciprocal discovery provisions of Cal Const art I, §30, and Penal Code, §§ 1054 to 1054.10, both the prosecution and the defense are entitled to discovery. (See *Izazaga v Superior Court* (1991) 54 Cal.3d 356 [reciprocal discovery is constitutional].) 1054–1054.10 apply to both misdemeanor and felony cases. (*Hobbs v Municipal Court* (1991) 233 Cal.App.3d 670, disapproved on other grounds in *People v Tillis* (1998) 18 Cal.4th 284, 295.)

No discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the United States Constitution. (Pen. Code, § 1054(e).)

Discovery and the Constitution: Both the United States and California Supreme Courts have held that a criminal defendant does not possess a general constitutional right to discovery. (See *Weatherford v. Bursey* (1977) 429 U.S. 545, 559 and *Schaffer v. Superior Court* (2010) 185 Cal.App.4th 1235, 1243.) Instead, the Fourteenth Amendment compels "disclosure" of material evidence favorable to the defendant with no request by the defense. (*Brady v. Maryland* (1963) 373 U.S. 83, 87.)

Criminal Discovery v. Civil Discovery: There are no interrogatories, depositions, or requests for admissions in criminal discovery. There is a lot less of the "hiding the ball" game that sometimes plagues civil litigation.

The closest thing to a deposition in a criminal case is the conditional examination. Prosecutors can request a conditional examination under Penal Code sections 1335–1345 to take the testimony of a witness who they know will leave the jurisdiction, whose life is in danger, who is so sick he or she probably will not be able to testify at trial, or who, in a human trafficking or domestic violence case, has been dissuaded from testifying or cooperating with the prosecution by the defendant through threats or intimidation.

The Prosecution's Discovery Duties: Penal Code section 1054.1 requires the prosecuting attorney to disclose to the defense:

> (a) The names and addresses of persons the prosecutor intends to call as witnesses at trial.
> (b) Statements of all defendants.
> (c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged.
> (d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial.
> (e) Any exculpatory evidence.
> (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial.

The prosecution's duty to disclose includes the items in its possession and those items it knows to be in

the possession of the investigating agencies. (Pen. Code, § 1054.1)

"The individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." (*People v. Masters* (2016) 62 Cal.4th 1019, 1067.) "The scope of the prosecutorial duty to disclose encompasses not just exculpatory evidence in the prosecutor's possession but such evidence possessed by investigative agencies to which the prosecutor has reasonable access." (*IAR Systems Software, Inc. v. Superior Court* (2017)12 Cal.App.5th 503, 514.) The People comply with this obligation by allowing a defendant to examine, inspect, or copy discoverable items. (*Schaffer v. Superior Court* (2010) 185 Cal.App.4th 1235, 1244-1245.)

The Defendant's Discovery Duties: Penal Code section 1054.3 states the defendant and his or her attorney shall disclose to the prosecuting attorney:

> (1) The names and addresses of persons, other than the defendant, he or she intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons, or reports of the statements of those persons, including any reports or statements of experts made in connection with the case, and including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial.
>
> (2) Any real evidence which the defendant intends to offer in evidence at the trial.

The defendant's list of discovery duties is noticeably shorter than the prosecutors because the prosecutor's ability to obtain discovery is limited by the defendant's Fifth Amendment rights, specifically the defendant's constitutional protection against self-incrimination.

How Criminal Discovery Works in Practice: Criminal discovery is generally conducted informally between the parties by unwritten request. Most courts have a standing discovery order requiring the parties to turn over standard items (e.g., police reports, names, and addresses of anticipated witnesses, expert's reports, rap sheets) on the other party's request. Filing a formal discovery motion is usually necessary only when counsel seeks something not on the standing disclosure list or when one party has not complied with an informal discovery request.

An informal discovery request is required before formal court enforcement of discovery can be requested. (See Pen. Code, § 1054(b). Informal discovery requests and responses should be backed up by adequate record-keeping to avoid subsequent confusion about what was requested and produced, provide a basis for sanctions and protect defense counsel from claims of ineffective assistance of counsel. (See *People v. Wright* (1990) 52 Cal.3d 367, 413, overruled on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459.)

The first piece of informal discovery the defense receives is often the police report. Depending on local practice, the prosecutor will provide the defense attorney with a paper copy of the police report at arraignment or in electronic format (usually a .pdf) via email. After that, unless the case is a serious felony, it is generally "crickets" unless the case goes to trial.

In some counties, at the outset, the prosecutor will give the defense attorney a boilerplate discovery request that lists verbatim the items spelled out in (Pen. Code, § 1054.3). There is rarely a need for the defense to act or respond to this pro forma request unless the case goes to trial.

Some defense attorneys serve the prosecutor with boilerplate discovery requests at the beginning of the case as a "cover-your-bases" tactic. Such a request is a good idea, and you can always seek additional discovery if needed later.

Discovery Beyond the Police Report
Depending on the case, here are examples of items the defense may need to obtain in the early stages of the case:

- Audio recordings of 911 call to police
- Audio/video of police interrogation of the client
- Copy of the client's criminal record ("rap sheet")
- Maintenance and calibration records for breath testing equipment (DUI cases)
- The **AGE 21 AND OLDER OFFICER'S STATEMENT** (DS 367) (*The DS 367 form is completed by the police in a DUI case and then forwarded to the Department of Motor Vehicles (DMV) so it can begin the driver's license suspension process. Most DUI attorneys also handle the DMV hearing side of a DUI case, and this form is needed for that hearing. The prosecutor has virtually no role in the DMV license suspension process. As a result, he or she may not have access to this form. You may need to get it from the DMV.*)
- Copies of photos and documents not included in the police report
- Video recordings from police dashboard cameras and body-worn cameras.
- The law enforcement agency's written policies and procedures for body-worn cameras

PARALEGAL POINTER ► Some police reports will indicate — using a checkbox (☑) or a written statement in the report's narrative — whether there is any video footage of the police interaction with the client. Be on the lookout for this. Ask for video even if there is no indication
in the report.

The prosecutor may provide video evidence to the defense on a DVD or by furnishing a link to the video on a cloud storage system like Axon Enterprise Inc., the police technology company best known for its Taser stun guns. Some police agencies will send you a unique link to view video stored on Axon's website, evidence.com. The video will play within your web browser. You also may download the video.

Getting Discovery from Law Enforcement Agencies: The arresting law enforcement agency has most items listed above in "Discovery beyond the police report." Depending on how they do things in your county, the level of cooperation you receive from these agencies may vary. In some counties, the district attorney's office will provide the defense with a discovery authorization letter for each case. This letter confirms that the defense attorney is authorized to receive discovery from the law enforcement agency. The defense includes a copy of this authorization letter in discovery requests it

serves on law enforcement agencies.

Paying for Reproducible Discovery: Although Penal Code section 1054.1 is silent on the question of who is responsible for costs to produce discovery, if a nonindigent defendant preparing for trial requests that the prosecution provide him or her with copies of pretrial discovery, such as documents and digital media, the People may charge the defendant a reasonable duplication fee. (*Schaffer v. Superior Court* (2010) 185 Cal.App.4th 1235, 1245.) (The *Schaffer* case involved a dispute between a criminal defendant and the Ventura County District Attorney's Office's policy of charging privately retained defense counsel a duplication fee of 15 cents per page.)

Third-Party Criminal Discovery: Third-party criminal discovery refers to the prosecution and defense's acquisition of evidence from individuals or entities who are not parties to the criminal litigation. Third-party discovery is governed by different rules than discovery between the parties.

Subpoenaing Witnesses and the Production of Documents from Third Parties: The criminal discovery procedures in Penal Code sections 1054–1054.10 do not regulate the discovery of information in possession of uninvolved third parties (i.e., not the prosecutor or police), (*Teal v. Superior Court* (2004) 117 Cal.App.4th 488, 491.) Therefore, a subpoena duces tecum (Pen. Code, §§ 1326–1328) should compel the production of relevant materials in the possession of a third party.

In a criminal case, the defense can compel the attendance of a witness in court, or the production of documents from third parties, via a subpoena signed by the defendant's attorney of record. Criminal law (adult and juvenile) has its own Judicial Council subpoena form - CR-125/JV-525 (*Order To Attend Court Or Provide Documents: Subpoena/Subpoena Duces Tecum*). Note that the subpoena directs the custodian of records to deliver the records to the court, not sent to the defense attorney directly.

Consumer Records: Consumer records are records sought from telephone companies, banks, insurance, and financial services providers, health care providers, schools, attorneys, or accountants. (Code Civ. Proc., § 1985.3(a)(1).)

There are special procedures for discovering consumer records in civil cases. (See Code Civ. Proc., § 1985.3.) However, these procedures only apply in civil cases and do not limit criminal discovery. (Code Civ. Proc., § 1985.3(a)(3).)

You need not serve a *Notice to Consumer or Employee and Objection* (SUBP-025) on the employee or consumer. If you have worked in civil litigation, you are likely familiar with the *Notice to Consumer or Employee and Objection*, the purpose of which is to notify the consumer or employee whose records are sought that he or she may object to their production. In criminal proceedings, you get to bypass that entire process. In certain circumstances, the consumer or employee may challenge the subpoena in court.

PARALEGAL POINTER ► Not everyone knows of this exception for criminal cases. Sometimes, the holder of the records refuses to comply with your subpoena and insists that you prove you have served the *Notice to Consumer or Employee and Objection* form. To smooth over this potential snag, I used to

include a homemade notice explaining that the Notice to Consumer or Employee and Objection form is not required in criminal cases.

PARALEGAL POINTER ► When subpoenaing cellular telephone records, the question that inevitably arises is on whom do you serve the subpoena? Prison Legal News has compiled a Cellular Telephone Subpoena Guide. The guide contains the subpoena compliance centers' contact information for various cell phone companies and social media networks.

Unlike the rule in civil cases*, you need not get the consumer's written consent to subpoena their phone records in criminal law. (*See Pub. Util. Code, § 2891, and Code Civ. Proc., § 1985.3.)

When issuing subpoenas to cell phone carriers, here is a list of things to ask for:

- All inbound and outbound numbers used
- All inbound and outbound SMS and text messages
- All elapsed times and usage durations for calls and texts
- Connection date and time
- Seizure time
- Originating phone number and IMEI or MEID (phone serial number)
- Originating IMSI (SIM Serial Number)
- The tower ID and GPS location during each indicated transmission
- The plan code (M2M- Mobile to Mobile)
- General date connection information is also useful to experts, and this includes
- Connection date and time
- Elapsed time or data transmission
- Bytes up and down
- Type of data accessed (visual voice mail or mobile data)
- Cell tower number and GPS location for all cell towers

Due to space limitations on line 2 c. ("Provide a copy of these items to the court") of the subpoena form, you may need to paste the list above into an Attachment to Judicial Council Form (MC-025) and attach it to the subpoena (CR-125/JV525).

Special Procedures for Obtaining Certain Records

With certain categories of information, such as protected health information, student records, records held by state agencies, and financial records from financial institutions, the prosecution or defense may obtain discovery from a third party only if they serve a subpoena and take additional steps. For an in-depth discussion of these issues, it is best to consult a publication such as *California Criminal Discovery* (5th ed.) by Justice Brian M. Hoffstadt (LexisNexis). Amazon has a Kindle edition.

Getting the Subpoenaed Records from the Court

Subpoenaed materials are delivered to the court. (Evid. Code, § 1560(b).) The way you get possession of these materials from the court depends on local court practice. A calendared appearance and a hearing may be necessary, or you may pick them up from the clerk.

When the defense has issued a subpoena duces tecum to a nonparty, the court may order an in-camera hearing to decide whether the defense may receive the documents. However, the court may not condition the documents' disclosure to the defense on the prosecution's receiving a copy of the documents. Disclosure of such documents to the prosecution is required when the defense uses the documents at trial. (Pen. Code, § 1054; *Teal v. Superior Court* (2004) 117 Cal.App.4th 488, 492.) Often, the data sought through a subpoena duces tecum are arguably privileged. In that situation, the court becomes involved. An in-camera hearing is required. (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 60; see Pen. Code, § 1326(c). Subpoenas and subpoenas duces tecum may be challenged by a motion to quash.

The prosecution may not participate in any third party-discovery efforts of the defense but may participate if the court so desires. (*People v. Superior Court* (*Humberto S*.) (2008) 43 Cal.4th 737, 750.)

Discovery of Peace Officer Personnel Records – The *Pitchess* Motion

Peter J. Pitchess (left) was Sheriff of Los Angeles County, California, from 1958 to 1981. In 1972, amidst Pitchess' tenure as county sheriff, Cesar Echeveria was charged with battery of four of Pitchess' deputies. Echeveria claimed that he acted in self-defense in response to excessive force by the deputies. As part of his defense, Echeveria sought records of several investigations conducted by the administrative services bureau, a sheriff's office internal unit that investigates citizen complaints of official misconduct. The investigations involved accusations by various members of the public that the deputies had themselves used excessive force on previous occasions. The trial court granted the motion and ordered the prosecution to secure the records from the sheriff. However, the commander of the administrative services bureau refused to cooperate, at which point the defendant obtained a subpoena duces tecum directing Sheriff Pitchess to produce the information. The sheriff declined to do so, and unsuccessfully moved to quash the subpoena. In a unanimous 7-0 decision (*Pitchess v Superior Court* (1974) 11 Cal.3d 531), the California Supreme Court permitted Echeveria to obtain the investigations over Sheriff Pitchess' objections.

The *Pitchess* decision shook California law-enforcement agencies to their cores triggering record-setting shredding of police investigation records and myriad discovery abuses. (See *San Francisco Police Officers' Assn. v. Sup. Ct*. (*City & Cty. of San Francisco*) (1988) 202 Cal.App.3d 183, 189.) To curtail these practices, the Legislature enacted changes to the statutory scheme to balance the right to privacy of the peace officer and the employing agency with the interest of justice. (See *City of Azusa v. Sup. Ct*. (*Madrigal*) (1987) 191 Cal.App.3d 693, 696-697.) In 1978, the legislature amended Penal Code section 832.5, and added Penal Code sections 832.7, 832.8 and Evidence Code section 1043. With these amendments, the Legislature attempted to protect a party's right to a fair trial and the officer's privacy interest. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1227.)

Separately, the Legislature has enacted procedures to implement *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 that allow criminal defendants to seek discovery from the court of potentially exculpatory information in confidential peace officer personnel records. (See Evidence Code sections 1043, 1045 and Penal Code sections 832.7, 832.8.) If a party bringing what is commonly called a *Pitchess* motion makes a threshold showing of good cause (Evid. Code, § 1043(b)(3)), the court must review the records in camera and disclose to that party any information they contain that is material. (See Evidence Code

sections 1043, 1045, and Penal Code sections 832.7, 832.8.)

Thus, Peter J. Pitchess' name lives on in the "*Pitchess* motion." His name also graces one of Los Angeles County's satellite jails, the Peter J. Pitchess Detention Center (left), off Interstate 5 in the unincorporated community of Castaic.

Alternative to *Pitchess* Discovery

In 2018, the Legislature enacted Senate Bill 1421. The bill amended Penal Code sections 832.7 and 832.8. Particular peace officer or custodial officer personnel records and records relating to specified incidents, complaints, and investigations involving peace officers and custodial officers must be provided for public inspection under the California Public Records Act (Gov. Code, §§ 6250 - 6276.48.)

Chapter 5: Pretrial Diversion

1. What is pretrial diversion?
Pretrial diversion refers broadly to programs that steer people away from the criminal legal system and toward services that address their needs—offering meaningful alternatives to arrest, prosecution, and incarceration.

2. The purpose of diversion
While incarceration was once assumed to enhance public safety, a growing body of research shows that it does little, if anything, to reduce crime. Diversion programs take a different approach: they focus on the underlying issues that contributed to the criminalized behavior in the first place.

By tackling root causes of community instability—such as food and housing insecurity, unemployment, limited educational opportunities, and unmet mental health needs—diversion initiatives not only reduce long-term crime and strengthen community safety, they also do so in a cost-effective way.

3. California Diversion Programs
California has several diversion programs:

- Misdemeanor diversion (Pen. Code, § 1001.50 through P.C. 1001.55)
- Cognitive disability diversion (Pen. Code, § 1001.20 through Pen. Code, § 1001.34)
- Mental health diversion (Pen. Code, § 1001.35 through 1001.36)
- Bad check diversion (Pen. Code, § 1001.60 through Pen. Code, § 1001.67)
- Parental diversion (Pen. Code, § 1001.70 through Pen. Code, § 1001.75)
- Military diversion (Pen. Code, § 1001.80)
- Theft diversion (Pen. Code, § 1001.81)
- Primary caregiver diversion (Pen. Code, § 1001.83)
- Court-initiated (misdemeanor) diversion (Pen. Code, § 1001.95 through 1001.97)

To date, the Judicial Council has not adopted any state-wide diversion motion or application forms, although some counties have their own forms. Most attorneys have a self-created template that they use.

In the author's experience, the most popular forms of diversion are in order of popularity, Court-Initiated Misdemeanor Diversion (Pen. Code, § 1001.95), and Mental Health (Pen. Code, § 1001.36), Military/Veterans (Pen. Code, § 1001.80).

Diversion, particularly the three most popular varieties, tend to require a great deal of documentary evidence in the form of exhibits, such as mental health evaluations, letters of support, school and employment records, etc. Paralegals will be key players in the collection and organization of these documents.

Chapter 6: Selected Pre-trial Motions

1. Motion to Set or Reduce Bail

In both felony and misdemeanor cases, the court has the authority to modify a bail order during the proceedings if new facts are brought to the court's attention. (Pen. Code, §§ 1289, 1458.)

What the California Constitution Says About Bail: Article I, §12, of the California Constitution states that the court shall set bail unless an exception applies. The exceptions in the Constitution are for:

- Capital cases
- Felony offenses involving acts of violence on another person, or felony sexual assault offenses on another person, when the facts are evident or the presumption great and the court finds based on clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others.

  > **Note**: Pretrial detention in violent felony case requires individualized findings on the record supported by clear and convincing evidence. (*Yedinak v Superior Court* (2023) 92 Cal.App.5th 876.) See also *In re Harris* (review granted Mar. 9, 2022, S272632; superseded opinion at 71 Cal.App,5th 1085).

- Felony offenses when the facts are evident or the presumption great and the court finds based on clear and convincing evidence that the person has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released.

  > **Note**: The phrase in subdivision (c) "the facts are evident or the presumption great" means evidence in the record that would be sufficient to sustain a hypothetical verdict of guilt on appeal" (See *In re White* (2020) 9 Cal.5th 455, 463 citing *In re Nordin* (1983) 143 Cal.App.3d 538, 543.

Excessive Bail Prohibited: When the court does set bail, article I, §12 provides that, in fixing the amount of bail, the court may not require bail that is "excessive." The primary consideration in setting bail is public safety. (Pen. Code, § 1275, subd. (a).) The court must take into consideration the seriousness of the offense charged, the defendant's previous criminal record, and the probability of the defendant's appearing at the trial or hearing of the case. (Pen. Code, § 1275, subd. (a).)

Alternatives to Bail: If the court is not permitted to deny bail, equal protection and due process principles (U.S. Const amend XIV; Cal Const art I, §§7, 15) require the court to release the defendant on their own recognizance, unless the court "finds by clear and convincing evidence no less restrictive conditions of release can adequately protect the public or the victim or that the defendant poses an unacceptable flight risk." (*In re Humphrey* (2021) 11 C5th 135. "Other conditions of release—such as electronic monitoring, regular check-ins with a pretrial case manager, community housing or shelter, and drug and alcohol treatment—can in many cases protect public and victim safety as well as assure the arrestee's appearance at trial." (*In re Humphrey, supra*) The reasons for denying bail should be stated on the record. (See *In re Harris* (review granted Mar. 9, 2022, S272632; superseded opinion at

71 Cal.App.5th 1085)

2. Motion to Suppress Evidence (Pen. Code, § 1538.5)

A motion to suppress evidence, also known as a Penal Code section 1538.5 motion, is a proceeding in which a defendant seeks an order that prohibits prosecutors from using certain evidence at trial on grounds that it was obtained by means of an illegal search or seizure under the Fourth Amendment to the U.S. Constitution.

Evidence can be suppressed only if (1) the judge determines that an officer obtained the evidence in violation of the Fourth Amendment, and (2) the costs of suppression outweigh its benefits. For example, suppression may be deemed unwarranted if the evidence was obtained by means of a search warrant that, although it failed to establish probable cause, the existence of probable cause was a close call.

The U.S. Supreme Court first introduced the exclusionary rule in 1914 with *Weeks v. United States* (1914) 232 U.S. 383. For almost half a century, the exclusionary rule only applied to criminal cases in federal court. The high court extended the protections of the exclusionary rule to state criminal prosecutions in the case of *Mapp v. Ohio* (1961) 367 U.S. 643, 643.)

The exclusionary rule exists to deter police misconduct. (*Herring v. U.S.* (2009) 555 U.S. 135, 144.)

3. Motion to Set Aside the Information or Indictment (Pen. Code, § 995)

Before a Penal Code section 995 motion can be brought, felony charges must have been brought against the defendant. In a felony case, all felony charges are brought in one of two ways: (1) through an indictment brought by a grand jury or (2) through an information filed by the district attorney after a preliminary hearing on the underlying criminal complaint.

A "grand jury" differs from the jury (technically known as the "petit jury") that one finds at a California criminal jury trial. Whereas the petit jury at a jury trial decides whether the defendant is guilty or innocent—the grand jury's job is just to determine whether there is probable cause to believe that the defendant may have committed the crime.

Most felony charges are brought through the preliminary hearing/information process in California—not through a grand jury and an indictment. According to an article on the California Grand Jurors' Association Website, district attorneys are more likely to use the grand jury/indictment process if the following are true:

- There is a high public interest in the case
- A preliminary hearing would take more time than a grand jury hearing
- The prosecution plans to call witnesses who are children or who for other reasons would not do well under the cross-examination that would occur at a preliminary hearing
- The case against the defendant seems weak—and the prosecutor wants a chance to "test" it out before the grand jury

- The case involves wrongdoing by a public officeholder and/or
- The witnesses are incarcerated in state prison

It follows then that a Penal Code section 995 motion becomes available after a grand jury has indicted the defendant or the court has held a preliminary examination, and the court held the defendant to answer one or more charges contained in the complaint.

Thus, there are two kinds of 995 motions, one that challenges a grand jury indictment and one that challenges the legal sufficiency of an information following a preliminary examination. The grounds for each are explained below.

- *Grand jury indictment*: The indictment is not found, endorsed, and presented as prescribed in the Penal Code or where the defendant has been indicted without reasonable or probable cause. (Pen. Code, § 995(a)(1) (A)(B).) Note: Penal Code sections 888 to 939.91 set forth the procedures for grand jury proceedings in a felony case.

- *Information*: The defendant had not been legally committed by a magistrate, or the defendant had been committed without reasonable or probable cause at the preliminary examination. (Pen. Code, § 995(a)(2) (A)(B).) Note: Penal Code sections 858 to 883 set forth the procedures for conducting the preliminary examination in a felony case.

The purpose of a preliminary examination is to determine whether there is competent evidence to commit the defendant for trial. (*Priestly v. Superior Court* (1958) 50 Cal.2d 812, 819.) Stated another way, "[T]he purpose of the preliminary hearing is to weed out groundless or unsupported charges of grave offenses, and to relieve the accused of the degradation and the expense of a criminal trial." (*Jaffe v. Stone* (1941) 18 Cal.2d 146, 150.)

Everyday paralegal and legal secretary tasks related to a 995 motion:

- Drafting the statement of facts by reading and citing to the transcript of the preliminary hearing or grand jury transcript
- Drafting the procedural history
- Conducting legal research for the memorandum of points and authorities supporting the motion

See preliminary hearing bench guide at http://www2.courtinfo.ca.gov/protem/pubs/bg92.pdf

Chapter 7: Trial Preparation

As trial approaches, the criminal defense paralegal can play a vital role in creating the trial binder/checklist, motions in limine, and requests for jury instructions.

Trial binder/checklist

Binders and tabs can be purchased from Bloomberg, Bindertek, and Legal Dimensions. Bloomberg has a free e-book on how to put together a trial binder.

Further Reading

The Paralegal's Role in Trial Notebook Preparation and Trial by Susan Boester

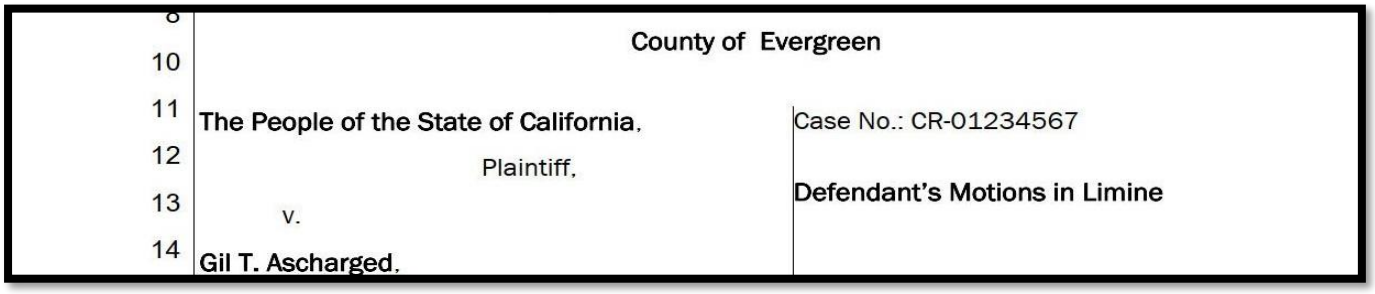
At right is a sample of a criminal trial notebook checklist:

TRIAL NOTEBOOK CHECKLIST: CRIMINAL	
Task	***Responsible Person's Initials***
All police reports (initial and additional reports)	
Property reports	
Photo log	
Photos and/or videotapes	
Crime lab reports	
Search warrant and return	
Vehicle identification sheet/vehicle invoice sheet	
911 tape	
CAD report	
Medical reports (victim and/or defendant)	
Autopsy report	
Defendant's criminal history	
Victim/witness criminal history	
Restitution information from victim or crime victim fund or Department of Social Services	
Polygraph results	
Identification—latent prints reports	
Witness list/order	
Discovery response	
Photo montage	
Exhibit log	
Constitutional rights card	
Search consent card	
Other: _____	

Motions in Limine

A motion in limine is brought at the threshold of trial, outside the presence of the jury, that seeks an advance ruling from the trial judge admitting, excluding, or limiting the introduction of specific evidence.

If you want all the motions in limine in a single document, label the caption page as shown below.



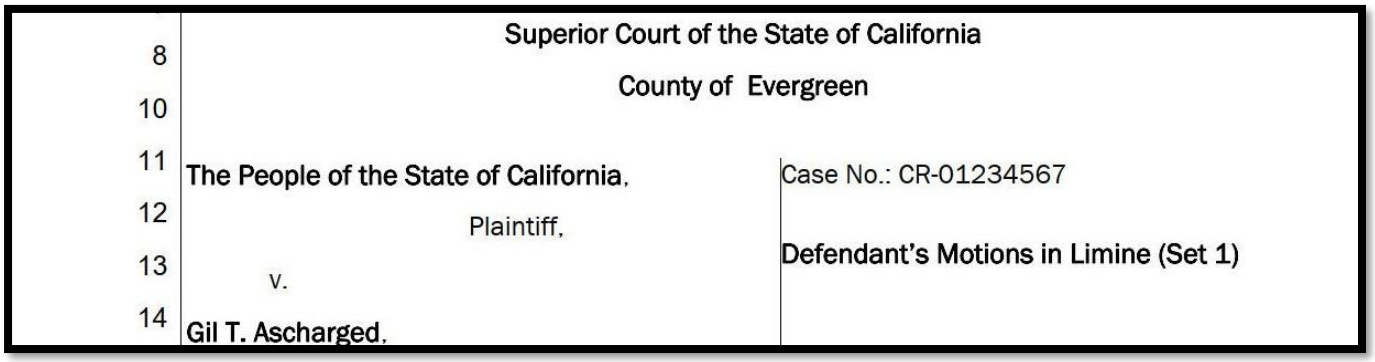
County of Evergreen

The People of the State of California,
Plaintiff,
v.
Gil T. Ascharged,

Case No.: CR-01234567

Defendant's Motions in Limine

If you anticipate having to submit more than one set of motions, label each set as shown below.



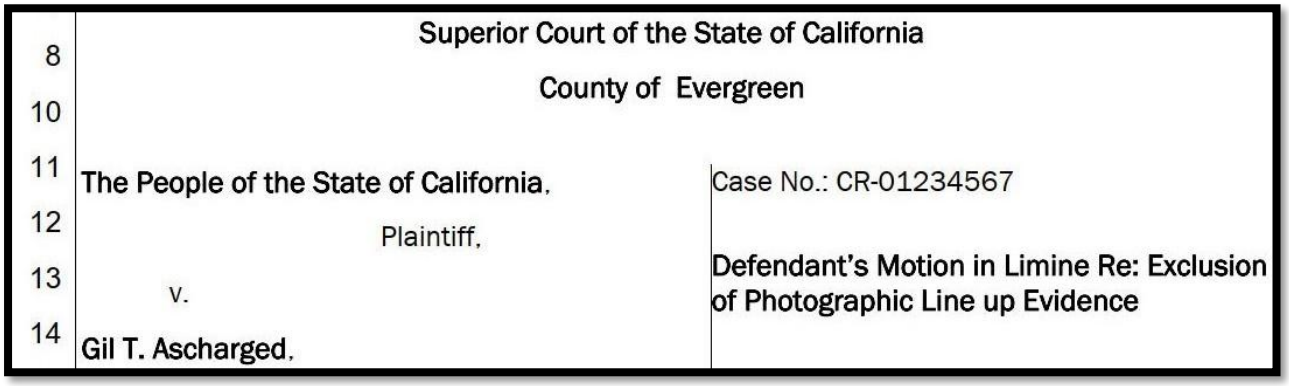
Superior Court of the State of California
County of Evergreen

The People of the State of California,
Plaintiff,
v.
Gil T. Ascharged,

Case No.: CR-01234567

Defendant's Motions in Limine (Set 1)

Or give each motion its own descriptive name as shown below.



Superior Court of the State of California
County of Evergreen

The People of the State of California,
Plaintiff,
v.
Gil T. Ascharged,

Case No.: CR-01234567

Defendant's Motion in Limine Re: Exclusion of Photographic Line up Evidence

Below is an example of what the rest of the first page of your motions in limine could look like.

Superior Court of the State of California

County of Evergreen

The People of the State of California, Plaintiff, v. **Gil T. Ascharged,** DOB: 00-00-0000 Defendant	Case No.: CR-01234567 **Defendant's Motion in Limine Re: Exclusion of Photographic Line up Evidence** Hearing Information Hearing Date: Time: Dept.: Judge:

To: The Court and the District Attorney of Evergreen County

Introduction

The defendant, Gil T. Ascharged, by and through counsel, requests that the court, prior to the start of the trial, grant the motions in limine on the following pages.

General Rules Re: Motions in Limine

Counsel may, through a motion in limine, seek an advance court ruling excluding certain evidence and ruling forbidding any mention of or reference to certain evidence. (*Charbonneau v. Superior Court* (1974) 42 Cal.App.3d 505, 507.) The subject matter of the motion in limine may relate to any matter which the court has the authority to exclude under the California Evidence Code. This motion may also be used to force the opponent to establish foundational facts in advance for admissibility. (*Hyatt v. Sierra Boat Company* (1978) 79 Cal.App.3d 325.)

Start the actual motions in limine on the page following the "General Rules Re: Motions in Limine" section. For each in limine motion, use a format like the one below.

Motion in Limine No. 1

The defendant moves the court for an order prohibiting the prosecution from conferring with witnesses during court breaks.

Authority and Argument

"[W]hen a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying. He has an absolute right to such consultation before he begins to testify, but neither he nor his lawyer has a right to have the testimony interrupted in order to give him the benefit of counsel's advice." (*Perry v. Leeke* (1989) 488 U.S. 272, 281.)

"The reason for the rule is one that applies to all witnesses — not just defendants. It is a common practice for a judge to instruct a witness not to discuss his or her testimony with third parties until the trial is completed. Such non-discussion orders are a corollary of the broader rule that witnesses may be sequestered to lessen the danger that their testimony will be influenced by hearing what other witnesses have to say, and to increase the likelihood that they will confine themselves to truthful statements based on their own recollections." (*Perry v. Leeke* (1989) 488 U.S. 272, 281-282.)

_____

☐ Granted

☐ Modified

☐ Denied

☐ Denied without prejudice

☐ Granted, but modified as shown below:

Requests for Approved CALCRIM Jury Instructions
First, a bit of history!

California was a pioneer in the pattern jury instruction movement. In 1938, a committee of the Los Angeles Superior Court drafted a set of pattern jury instructions recommended for civil and criminal cases in California courts. Out of these efforts, the committed created CALJIC California Jury Instructions-Criminal) and BAJI (Book of Approved Jury Instructions).

CALJIC and BAJI were standardized (fill-in-the-blank) jury instructions. These pattern instructions saved judges and lawyers a great deal of time and were well-regarded as legally accurate. However, the legal accuracy came at a cost. The instructions, which generally parroted the language of statutes and judicial opinions, were often stilted, used obscure language, and were challenging for jurors to understand. For roughly 60 years, the Los Angeles County Superior Court has controlled a piece of this state's legal business by owning the rights to both CALJIC and BAJI.

However, in the late 1990s, the California Judicial Council appointed a task force to draft more user-friendly instructions as part of a broader reform effort. The eight-year effort begat two new sets of jury instructions: CALCRIM (criminal) in 2006 and CACI (civil) in 2003. CALCRIM and CACI are in the public domain and are available for free. Thomsen Reuters now owns the rights to CALJIC; they will sell you its latest edition for $394.00. (They throw in the free CALCRIM instructions for "free.")

The Judicial Council's goal in drafting the CALCRIM instructions "was to write instructions that are both legally accurate and understandable to the average juror." For criminal trials, "[T]he California Judicial Council withdrew its endorsement of the long-used CALJIC instructions and adopted the new CALCRIM instructions, effective January 1, 2006." (*People v. Thomas* (2007) 150 Cal. App. 4th 461, 465.) The use of CALCRIM instructions is strongly encouraged (Rules of Court, rule 2.1050(e), but not mandatory. (*People v. Thomas* (2007) 150 Cal. App. 4th 461.)

Defense counsel's duty to prepare/request all necessary jury instructions: Defense counsel's duty to request jury instructions has been emphasized in the case law:

- The duty of counsel to a criminal defendant includes careful preparation of, and request for, all instructions that in counsel's judgment are necessary to explain the legal theories upon which his defense rests (*People v. Sedeno* (1974) 10 Cal. 3d 703, overruled on unrelated point in *People v. Breverman* (1998) 19 Cal.4th 142.)

- If defense counsel believes that the instructions to be given by the trial court are incomplete or need elaboration, he or she must request additional or clarifying instructions. Failing to do so waives any appellate remedy about the inadequacy of the instructions (*People v. Dennis* (1998) 17 Cal. 4th 468, 514.)

- Neither the absence nor presence of a pattern jury instruction on a subject excuses defense counsel from the ordinary obligation for submitting proposed instructions to the trial court. Failing to tender an adequate instruction may constitute a waiver on appeal. (*People*

v. Simon (2001) 25 Cal. 4th 1082, 1109.)

- A defendant has a right to have the jury instructed on the defense theory of the case. "A criminal defendant is entitled, on request, to an instruction 'pinpointing' the theory of his defense." (*People v. Wharton* (1991) 53 Cal. 3d 522, 570.) Such an instruction may "direct attention to evidence from … which a reasonable doubt could be engendered." (*People v. Hall* (1980) 28 Cal. 3d 143, 159 [overruled on another point by *People v. Newman* (1999) 21 Cal. 4th 413].)

The Court Also Must Ensure Proper Instruction of the Jury: The court must instruct on defense theories and every material question. A court must give jury instructions relating to defenses if it appears the defendant is relying on the defenses or if there is substantial evidence supportive of the defenses, and they were not inconsistent with the defendant's theory of the case. (People v. Russell (2006) 144 Cal.App.4th 1415, 1431.)

The court must give the requested jury instruction on every material question upon which there is no evidence deserving of any consideration. That the evidence may not be of the character to inspire belief does not authorize an instruction's refusal based thereon. However incredible the defendant's testimony may be, he may have an instruction based upon the hypothesis it is entirely accurate. (*People v. Burns* (1948) 88 Cal.App.2d 867, 871.)

Rules of Court Related to Jury Instructions: Title 4 of the California Rules of Court contains most rules for criminal cases. However, Title 4 does not mention jury instructions. Therefore, we rely on the portion of Title 2, Rules for All Trial Courts, that discuss jury instructions.

- Rule 2.1050. Judicial Council jury instructions
  This rule covers the purpose, accuracy, public access to, updating, and amendments, and using jury instructions drafted by the Judicial Council.

- Rule 2.1055. Proposed jury instructions
  This rule addresses the form and format of "approved jury instructions," meaning jury instructions approved by the Judicial Council of California. The rule also addresses "special jury instructions," meaning instructions from other sources, those specially prepared by the party, or approved instructions substantially modified by the party.

- Rule 2.1058. Use of gender-neutral language in jury instructions
  This rule provides that all instructions submitted to the jury must be written in gender-neutral language.

Preparing the Request for Approved CALCRIM Jury Instructions: Begin the creation of your request for approved jury instructions on pleading paper with the case caption. Give the document a title such as "Defendant's Request for Approved Jury Instructions." The request should be addressed to the trial judge and the prosecuting attorney. Follow this with an introduction, a sample of which appears below:

> Under this court's order re pre-trial filings and Local Rule [insert local rule #], the defendant, Gil T. Ascharged, submits the following set of approved jury instructions for use.

CALCRIM instructions are available at https://www.courts.ca.gov/partners/312.htm. The instructions are organized by volume and series numbers. Below is a breakdown:

Volume 1
SERIES 100 PRETRIAL
SERIES 200 POST-TRIAL: INTRODUCTORY
SERIES 300 EVIDENCE
SERIES 400 AIDING AND ABETTING, INCHOATE, AND ACCESSORIAL CRIMES
SERIES 500 HOMICIDE
SERIES 800 ASSAULTIVE AND BATTERY CRIMES
SERIES 1000 SEX OFFENSES
SERIES 1200 KIDNAPPING
SERIES 1300 CRIMINAL THREATS AND HATE CRIMES
SERIES 1400 CRIMINAL STREET GANGS
SERIES 1500 ARSON
SERIES 1600 ROBBERY AND CARJACKING
SERIES 1700 BURGLARY AND RECEIVING STOLEN PROPERTY
SERIES 1800 THEFT AND EXTORTION

Volume 2
SERIES 1900 CRIMINAL WRITINGS AND FRAUD
SERIES 2100 VEHICLE OFFENSES
SERIES 2300 CONTROLLED SUBSTANCES
SERIES 2500 WEAPONS
SERIES 2600 CRIMES AGAINST GOVERNMENT
SERIES 2800 TAX CRIMES
SERIES 2900 VANDALISM, LOITERING, TRESPASS, AND OTHER MISC. OFFENSES
SERIES 3100 ENHANCEMENTS AND SENTENCING FACTORS
SERIES 3400 DEFENSES AND INSANITY
SERIES 3500 POST-TRIAL: CONCLUDING

A defense request for the approved jury instructions to be given in a case may be formatted as a list, by CALCRIM number and the instruction title. Unless the court requires it, there is no need to include in this request the actual text of each approved jury instruction.

With that in mind, it makes sense to begin your list of requested approved instructions in the order in which the instructions appear in CALCRIM, i.e., starting with Series 100 and counting upward. I prefer to use a table. Below is an excerpt from the first page of my table:

CALCRIM	**Title of Instruction**
100	Trial process
101	Cautionary admonition: jury conduct
102	Note-taking

Remember that not all the instructions in CALCRIM will always apply. For example, series 330 through 337 contain instructions that apply only when certain types of witnesses, such as accomplices, in-custody informants, etc., testify. If there will be no accomplices, in-custody informants testifying at trial, omit those instructions from your request.

Once you have listed all the Series 100, 200, and 300 approved instructions you want to be given, the next section of the list should include the instructions for the specific offenses charged. The instructions for specific offenses are contained in Series 400 to 2900. If applicable, this section should include any Series 3100 instructions (enhancements and sentencing factors).

Finally, if you are proffering a defense to the charges, cap off the list of requested approved instructions with the appropriate series 3400 instructions (defenses and insanity) and the series 3500 post-trial: concluding instructions.

Requesting Special Jury Instructions: Begin the creation of your request for special jury instructions on pleading paper with the case caption. Give the document a title such as "Defendant's Request for Special Jury Instructions."

The request should be addressed to the trial judge and the prosecuting attorney. Follow this with an introduction, a sample of which appears below:

> Under this court's order re pre-trial filings, the defendant, Gil T. Ascharged, submits the following request for a special jury instruction for use at trial. The defendant reserves the right to withdraw, amend, modify and/or add to these instructions before closing argument.

Next, briefly cite the authority that authorizes special just instructions. Here is an example:

> California Rules of Court, rule 2.1055 (a)(1)(B), provides the authority for a party to request special just instructions.
>
> In a criminal case, the duty to request and the authority for special jury instructions is well-established. See, for example *People v. Dennis* (1998) 17 Cal. 4th 468, 514 [If defense counsel believes

that the instructions to be given by the trial court are incomplete or need elaboration, he or she must request additional or clarifying instructions. Failing to do so waives any appellate remedy about the inadequacy of the instructions.

Next comes the text of the requested special jury instruction, the authority for the instruction, and the argument about why you need the instruction. Here is an example:

Special Instruction No. 1
Required Mental State for Assault

Text of proposed special instruction:

"In Count 1, the defendant is charged with assault upon John Doe with a deadly weapon, to wit, the defendant's Dodge Ram Pickup Truck. This accusation is based on evidence that when the defendant stopped his vehicle alongside John Doe's vehicle, the driver's side mirrors of each vehicle touched, causing no damage. Unless you find that the defendant, at the time this act occurred, had actual knowledge of facts sufficient to establish that his act would by its nature probably and directly result in injury to James Earl Lewis, you must find the defendant not guilty of Count 1."

Authority and Argument
Assault is a general intent crime. The mental state for assault is actual knowledge of the facts sufficient to establish that the defendant's act by its nature will probably and directly result in injury to another. (*People v. Williams* (2001) 26 Cal.4th 779, 781.)

Evidence will show that Mr. Ascharged came to a quick stop alongside John Doe's vehicle because Doe had stopped his vehicle in the middle of the road preventing Mr. Ascharged from passing. Mr. Ascharged was in a hurry to get home because he knew that workers with large pieces of equipment would be coming back from the end of the road and would hinder and/or block him from getting by. Their mirrors on both men's vehicles touched, but there was no damage. The men exchanged words; Mr. Doe pulled to the shoulder; Mr. Ascharged drove home without incident.

The jury could reasonably infer from the facts as described above this was a low speed, minor damage collision between the vehicles' sideview mirrors, which was no insignificant that that it would not cause Mr. Ascharged to have actual knowledge sufficient to establish that his act by its nature would probably and directly result in injury to Mr. Doe.

Rule 2.1055 sets forth rather precise rules for formatting jury instructions requests:

(a) Application

(1) This rule applies to proposed jury instructions that a party submits to the court, including:

(A) “Approved jury instructions,” meaning jury instructions approved by the Judicial Council of California; and

(B) “Special jury instructions,” meaning instructions from other sources, those specially prepared by the party, or approved instructions that have been substantially modified by the party.

(2) This rule does not apply to the form or format of the instructions presented to the jury, which is a matter left to the discretion of the court.

(Subd (a) amended effective August 26, 2005; previously amended effective January 1, 2003, and January 1, 2004.)

(b) Form and format of proposed instructions

(1) All proposed instructions must be submitted to the court in the form and format prescribed for papers in the rules in division 2 of this title.

(2) Each set of proposed jury instructions must have a cover page, containing the caption of the case and stating the name of the party proposing the instructions, and an index listing all the proposed instructions.

(3) In the index, approved jury instructions must be identified by their reference numbers and special jury instructions must be numbered consecutively. The index must contain a checklist that the court may use to indicate whether the instruction was:

(A) Given as proposed.

(B) Given as modified.

(C) Refused

(D) Withdrawn

(4) Each set of proposed jury instructions filed on paper must be bound loosely.

(Subd (b) amended effective January 1, 2016; previously amended effective July 1, 1988, January 1, 2003, January 1, 2004, and January 1, 2007.)

(c) Format of each proposed instruction

Each proposed instruction must:

(1) Be on a separate page or pages;

(2) Include the instruction number and title of the instruction at the top of the first page of the instruction; and

(3) Be prepared without any blank lines or unused bracketed portions, so that it can be read directly to the jury.

(Subd (c) amended effective January 1, 2004; previously amended effective July 1, 1988, April 1, 1962, and January 1, 2003.)

(d) Citation of authorities

For each special instruction, a citation of authorities that support the instruction must be included at the bottom of the page. No citation is required for approved instructions.

(Subd (d) adopted effective January 1, 2004.)

(e) Form and format are exclusive

No local court form or rule for the filing or submission of proposed jury instructions may require that the instructions be submitted in any manner other than as prescribed by this rule.

(Subd (e) adopted effective January 1, 2004.)

Rule 2.1055 amended effective January 1, 2016; adopted as rule 229 effective January 1, 1949; previously amended effective April 1, 1962, July 1, 1988, January 1, 2003, January 1, 2004, and August 26, 2005; previously amended and renumbered as rule 2.1055 effective January 1, 2007.

Advisory Committee Comment

This rule does not preclude a judge from requiring the parties in an individual case to transmit the jury instructions to the court electronically.

PARALEGAL POINTER ► In the author's experience, these strict formatting rules are rarely enforced by the trial court. However, if your judge is a stickler, you know where to look.

Chapter 8: Juror and Expert Witness Background Research

Discovery of Juror Information by Defense and Prosecution: Trial judges have the discretion to permit the defense access to jury records and reports of juror investigations prepared by the prosecution. "When courts then deny defendants who cannot afford similar investigations access to the prosecutor's records, the result is that prosecutors in case after case will have substantially more information concerning prospective jurors than do defense counsel." (*People v Murtishaw* (1981) 29 Cal.3d 733, 767; see also *People v Pride* (1992) 3 Cal.4th 195, 227 [no relief because there was an inadequate record of what the prosecution had]).

NOTE: You may obtain information from the registrar of voters on the political parties of prospective jurors.

Discovery of Juror Information Using the Internet: Many prospective and seated jurors use social media and may post content publicly on the Internet. There is a split of opinion on whether a trial attorney or a member of their team may ethically investigate prospective jurors using Internet search engines such as Google during voir dire. Those who favor such research point out that a web-based review of publicly available information, e.g., the prospective juror's public Facebook page and blog postings, can help counsel decide whether to exercise a peremptory challenge or challenge for cause.

There is no California case, statute, or Rule of Professional Conduct directly addressing web-based searches for juror information during jury selection. California Rule of Professional Conduct 3.5(h) states that lawyer shall not directly or indirectly conduct an out of court investigation of a person who is a member of the venire or a juror *in a manner likely to influence the state of mind of such person in connection with present or future jury service*.

Thus, while it is well established that a juror cannot be contacted once sworn, simple web-based research of public information conducted in court about a prospective juror does not appear to violate the rule. The ABA Criminal Justice Standards that address the pretrial investigation of prospective jurors likewise appear to permit the use of an Internet search engine during voir dire. (See ABA Criminal Justice Standards for the Defense Function 4–7.3(c).

Further reading
Friend Request: Ethically and Legally Investigating Jurors' Social Media
https://www2.stetson.edu/advocacy-journal/friend-request-ethically-and-legally-investigating-jurors-social-media/

Attorneys, paralegals, etc., should never contact jurors or prospective jurors on social media. Contact includes but is not limited to things like becoming "friends" with a juror or prospective juror on Facebook, following someone on X, formerly Twitter, or responding to or commenting on something a juror or prospective juror posts on social media.

Jurors willing to speak at the post-trial stage with the trial attorney or members of the attorney's team, such as an investigator, can provide their contact information. This can cause face-to-face interviews with jurors in which the possibility of juror misconduct can be explored. A search on Facebook or other

social media of what jurors publicly posted about their deliberations can provide robust corroborating evidence of such misconduct. The investigation may lead to a motion for a new trial.

Further reading
"Using the Internet and Social Media in Jury Selection" (Plaintiff Magazine, February 2012) https://www.plaintiffmagazine.com/recent-issues/item/using-the-internet-and-social-media-in-jury-selection

Expert Witness Opposition Research: Research into the defendant's and prosecutor's experts' background should be done early and continue to be updated as the case progresses. Items found in outside research on experts can have a significant effect on the outcome of your case. Here are some research areas to consider:

Criminal History: Imagine the sinking feeling of showing up at a deposition (or worse, at trial) to learn that your expert-witness accountant had a felony tax fraud conviction, or the trucking expert had three recent DUIs. It is essential to make these discoveries early. Consider running the expert's name through PACER and any state court databases. Also, conduct an internet search for news reports of any noteworthy incidents with the law. It is also valuable to check any professional licensing organizations in the expert's field for disciplinary records. You will undoubtedly want to know if the expert property appraiser was disciplined for performing unsupported appraisals.

Prior engagements: Subscription services such as Westlaw or Lexis allow parties to learn of an expert witness's prior engagements. While full reports may not be available online, these searches can provide enough information to identify the lawyers who appeared in the prior case and whether you should reach out to them to ask for any non-confidential prior materials.

Prior Publications: Research papers and academic articles – free or at a reasonable cost — written by expert witnesses can be found by searching JSTOR, Hein Online, Jurn, and Google Scholar (the articles section, not the case law section). Such research may uncover information to discredit the opposing party's expert. JSTOR can show whether the expert's academic works are regularly cited by other academics and can lead to other publications disproving the expert's theory.

Prior Motion/Appellate History: Motions related to scientific evidence's admissibility and the experts who testify about that evidence are common. Sometimes these motions, usually in limine in nature, can be located with subscription-based legal research databases. PACER is a good source for motions filed in federal court. The motions may show whether and under what circumstances your expert or the prosecution's expert has qualified to testify as an expert witness. Services such as LexMachina or WestlawEdge allow parties to search by expert name and quickly discover how often an expert has been allowed to testify compared to how often that person was excluded. These services can even show whether the judge has ever ruled on the expert or whether the judge generally refuses to allow expert testimony on a particular topic.

Curriculum Vitae Verification: Most experts will disclose their curriculum vitae or "CV" through discovery. Paralegals may attempt to verify items on the CV, such as university degrees and prior

employment. Any inaccuracies can be used to question the witness's credibility.

General Internet Searches: Never underestimate the power of a Google search on the expert. You may discover positive things that your expert was too humble to share with you. You may also discover that the local newspaper regularly runs articles bashing the expert as untrustworthy. Free and straightforward internet searches can cause discoveries that change the dynamics of a case.

Misdemeanor Sentencing: Sentencing hearings in misdemeanor cases are generally brief. It is common for the prosecutor and defense counsel to address the court, after which the court pronounces judgment. The sentencing choice is within the discretion of the judge, acting within prescribed statutory limits.

In California, the penalty for a misdemeanor offense can be up to 364 days in county jail and a fine of up to $1000.00. (Pen. Code, § 18.5.) Prior to 2015, the maximum misdemeanor sentence was the same as the minimum felony sentence – one year (365 days). (SB 1310 (2014). *Velasquez-Rios v. Wilkinson* (9th Cir., 2021), 988 F.3d 1081: *People v. Shropshire* (2021) 70 Cal. App. 5th 938.)

The purpose of Penal Code section 18.5 is to distinguish misdemeanor sentences from felony sentences to help immigrants avoid deportation. Prior to the addition of section 18.5, the federal government defined a misdemeanor as a crime punishable by up to 364 days; California defined it as one punishable by up to 365 days. This one-day difference often proved disastrous for immigrants with convictions, however, because the federal government considers a crime punished by 365 days a felony and felony convictions often subject immigrants to deportation or exclusion.

The court does not have to apply the aggravating and mitigating factors in the California Rules of Court for felonies, but it may look to them for guidance. (*People v Faber* (2017) 15 Cal.App.5th Supp 41.)

Unlike in felony cases (see below), when a defendant is convicted of a misdemeanor, the trial court does not have to obtain a probation report before sentencing. (Pen. Code, § 1203(d).) However, when the defendant is convicted of a sex offense for which registration is required under the Sex Offender Registration Act (Pen. Code, §§ 290–290.024), or if the probation officer recommends that the court at sentencing order the offender to register as a sex offender under Penal Code section 290.006(a), the court must refer the defendant to the probation department for an assessment of the risk the defendant poses to the community. (Pen. Code, § 1203(d).) This assessment is to be performed using the State-Authorized Risk Assessment Tool for Sex Offenders (SARATSO). (Pen. Code, §1203(d).) The trial court must consider this report in sentencing. (Pen. Code, § 1203(d).) Each county probation department is required to assess every eligible person whether a report is prepared under Pen. Code, §1203. (Pen. Code, § 290.06(a)(6).)

In misdemeanor cases, defense counsel may file a written report with the court, furnishing information about the defendant's background and personality and suggesting a rehabilitation program. The prosecution and the probation officer must be permitted to reply or to evaluate the program recommended. (Pen. Code, § 1204.)

Felony Sentencing: The Criminal Justice Realignment Act of 2011 (2011, ch 15 (AB 109)) made significant changes to the sentencing and supervision of convicted felons. The CJRA transferred the supervision and jurisdiction of nonviolent, nonsexual, and nonserious felons to the counties. These low-level felony offenders who are sentenced to incarceration must now serve their felony sentence in county jail.

The Determinate Sentencing Law (Pen. Code, § 1170): Most felonies are punished under the Determinate Sentencing Law (DSL). (Pen. Code § 1170.)

Under the old DSL, the sentencing judge could select a sentence from one of three terms of imprisonment. These terms of imprisonment were referred to as the lower term, the middle term, and the upper term. For example, 16 mos. (lower), 2 yrs. (middle), or 3 yrs. (upper). The judge was supposed to select the middle term (called the presumptive term) unless he or she found that certain aggravating factors set forth in Title Four of the Rules of Court outweighed certain mitigating factors. In such a case, the judge would impose the upper term. On the other hand, if the mitigating factors outweighed the aggravating factors, the judge would impose the lower term.

However, in *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*), the U.S. Supreme Court held that California's DSL was unconstitutional under the Sixth (right to jury trial) and Fourteenth Amendments (due process/equal protection) because it permitted judges to impose the upper term sentence based on facts (aggravating factors) found to be true by the judge by a preponderance of the evidence, rather than on facts found by the jury beyond a reasonable doubt.

Following *Cunningham*, the California legislature amended the former Pen. Code, § 1170(b), and the Judicial Council amended the California Rules of Court. The amendments removed most references to "upper," "middle," and "lower" terms and allowed the sentencing court to use its "discretion" to select one of the "three authorized terms." (Cal Rules of Ct 4.420; Pen. Code, § 1170(b).)

> Then, beginning January 1, 2022, Pen. Code, § 1170(b) was modified so that sentencing courts may impose a sentence exceeding the middle term only:
>
> - When there are circumstances in aggravation of the crime that justify the imposition of a term of imprisonment exceeding the middle term; and
>
> - The facts underlying those circumstances have been stipulated to by the defendant; or have been found true beyond a reasonable doubt at trial by the jury or by the judge in a court trial in a bifurcated proceeding; or
>
> - The factors are exclusively based on the defendant's prior convictions as established by a certified record of conviction.

Enhancements: There are two kinds of enhancements: those related to the crime (conduct enhancements, which are attached to specific counts) (see, e.g., Pen. Code, §§ 12022.5, 12022.7) and those related to recidivism (enhancements for priors, which are attached to the accusatory pleading as a whole) (see, e.g., Pen. Code, §§ 667(b), 667.5(b)). The court must impose all enhancements that have been pleaded and proved unless it has the authority to strike an enhancement in furtherance of justice under Pen. Code, §1385.)

Effective January 1, 2022, the court's authority to strike enhancements has been expanded under SB 81. See Pen. Code, § 1385(c).

Some enhancements carry only a single term. Others permit the trial court to select one of three terms, but for these enhancements, the court may no longer impose the upper term unless the trier of fact finds the aggravating circumstances true beyond a reasonable doubt in a separate trial or the defendant stipulates to the facts comprising the aggravating factor(s), and the court determines the aggravating circumstances justify exceeding the midterm of the enhancement. (See Pen. Code, §1170.1.)

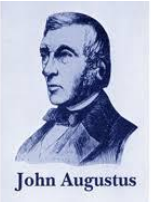
Alternative Sentencing Schemes (3 Strikes and 1 strike laws). The Three Strikes Law is an alternative sentencing scheme applicable when one or more prior serious or violent felony convictions are alleged as "strikes." (See Pen. Code, §§ 667(b)–(i), 1170.12.) Prior convictions for serious or violent felonies also may be alleged as enhancements under the DSL. (See Pen. Code, § 667(a). The One Strike Law, a sentencing scheme for sex offenders who meet certain criteria.

The Presentence Investigation and Report

When a defendant is convicted of a felony, the court must refer the case to the probation officer for a presentence investigation and report if either of these conditions is true: (1) the defendant is statutorily eligible for probation or a term of imprisonment in county jail or, (2) the defendant is not eligible for probation, but a report is needed to assist the court with other sentencing issues, including the determination of the proper restitution fine. (Rule 4.411(a).) The parties may stipulate to the waiver of the probation officer's investigation and report in writing or in open court and entered in the minutes, and with the consent of the court. (Rule 4.411(b).)

The probation officer will interview the defendant and the victim or victims as part of the report preparation process. Defense counsel should always prepare the defendant for the interview with the probation officer, provide the officer all the information counsel thinks will benefit the defendant, and communicate anything unusual about the case personally with the officer. Sometimes, defense counsel will want to be present for the probation interview.

The History of the Pre-Sentence Investigation Report: The origins of the modern presentence investigation began in the 1840s with Boston shoemaker John Augustus' crusading efforts. Considered the father of modern probation, Augustus believed that the "object of the law is to reform criminals and to prevent crime, and not to punish maliciously or from a spirit of revenge." In his efforts to redeem selected offenders, Augustus gathered background information about the offender's life and criminal history. If he determined that the person was worthy, Augustus provided bail money out of his own pocket. If he won the person's release, he helped them find employment and housing. Later he appeared at the sentencing hearing and provided the judge with a detailed report of the person's performance. Augustus would then recommend that the judge suspend the sentence and release the person to his custody. Augustus' leadership led the Massachusetts legislature to establish the nation's first probation law in 1878.


John Augustus

By the time that the National Probation Act was passed in 1925, creating a federal probation service, most states had probation statutes.

The presentence investigation report has been the central source of information to sentencing judges since the 1920s. Its original purpose provided information to the court on the defendant's personal history and criminal conduct to promote individualized sentencing. With more punitive sentencing policies in recent years, the report has become more offense focused and less individualized.

The probation officers' reports are used by judges in determining the appropriate length of a prison sentence and relied upon by the California Department of Corrections and Rehabilitation in deciding on the facility and program in which to place a defendant and are also used in deciding whether probation is appropriate.

The Statement in Mitigation/Sentencing Brief: Once the completed probation report is filed with the court and copies are provided to the prosecutor's office, and defense counsel, the defense's real work begins – preparing the statement in mitigation or sentencing brief.

A statement in mitigation (also known as a sentencing brief) is a document prepared by the defense to persuade the court to impose the lightest possible penalty — such as an alternative to jail or prison — based on the case's circumstances and the characteristics of the defendant.

Penal Code, § 1170(b) provides that defense counsel may submit a statement in mitigation to be considered by the court in imposing a sentence. This statement may "dispute facts in the record or the probation officer's report, or present additional facts." (Pen. Code, § 1170(b).) The purpose of the statement is to help the court determine whether to send a defendant to state prison or grant probation. Counsel for the defendant should present the court with a statement in mitigation to adequately represent his or her client at the time of sentencing. See (*People v. Cropper* (1979) 89 Cal. App. 3d 716, 720.)

The probation report applies the court rules regarding sentencing, with an emphasis on the:

Criteria affecting probation (Rule 4.414)
Circumstances in aggravation (Rule 4.421)
Circumstances in mitigation (Rule 4.423)

Thus, the statement in mitigation will try to persuade the court that the defendant meets the criteria for probation outlined in rule 4.414, that the factors in aggravation spelled out in rule 4.421, relating to the crime and the defendant, do not apply to the defendant, or that the aggravating factors are outweighed by factors in mitigation spelled out in rule 4.434.

What Must Be Included in the Statement of Mitigation: The statement in mitigation must include a summary of the facts on which the defense relies to justify probation. (Rule 4.437(c).) The same rule allows the prosecution to file a statement in aggravation for the defense and prosecution to file a joint statement.

Assertions of fact in the statement in mitigation must be supported by competent evidence. (Rule 437(d).) Counsel may rely on information in the probation report or other reports filed in the case or may produce independent evidence.

If the defendant intends to dispute facts in the probation officer's report or to offer evidence in mitigation at the sentencing hearing, the statement in mitigation must give notice of that intent and must include a summary of any evidence to be introduced, including witnesses' names and the substance of the expected testimony. (Rule 4.437(c)(2).) If counsel fails to provide notice his or her intent to present evidence as required by rule 4.437(c)(2), the court can refuse to hear that evidence.

When possible, a statement in mitigation should include:

- Documentation of any educational and rehabilitation programs the defendant has participated in while in custody before sentencing
- Documentation, such as a letter from an employer confirming that the defendant will have a job if released from custody and placed on probation
- Letters from physicians attesting to the defendant's medical conditions
- Reference letters from prior employers
- A few *well-screened* letters of support from family and friends (preferably not mothers, wives, or girlfriends, who always think the defendant is an angel.)
- Verification that the defendant has been accepted into a residential substance abuse treatment program
- Any other relevant documentation

Filing and Service of the Statement in Mitigation: The statement in mitigation must be served on the prosecution and filed at least 4 days before the date set for sentencing. (Rule 4.437(a).)

Chapter 10. Appeals

Jurisdiction for Misdemeanor Appeals: Appeals in misdemeanor cases heard in the appellate division of the superior court. (Pen. Code, § 1466.)

Rules of Court for Misdemeanor and Infraction Appeals:

- *Misdemeanors*: Rules 8.850 – 8.891
- *Infractions*: Rules 8.900 — 8.929

What May Be Appealed by the Defendant:

- A final judgment of conviction. (Pen. Code, §§ 1466(b)(1).)
- A sentence, an order granting probation. (id.)
- A conviction in a case in which, before final judgment, the defendant is committed for insanity. (id.)
- A conviction in a case in which, before final judgment, the defendant is given an indeterminate commitment as a mentally disordered sex offender. (id.)
- The conviction of a defendant committed for controlled substance addiction. (id.)
- An order denying a motion for a new trial made after final judgment or an order granting probation. (id.)
- From any order made after judgment affecting his or her substantial rights. (Pen. Code, § 1466(b)(2).)
- An order denying a motion for return of property or a motion to suppress evidence. (Pen. Code, §§ 1538.5(j) and 1510.)

Common Judicial Council Forms Used in Misdemeanor and Infraction Appeals

- CR-131 Information on Appeal Procedures for Misdemeanors (*The CR-131 explains the misdemeanor appeal process.*)

- CR-132 The Notice of Appeal (Misdemeanor)

- CR-134 Notice Regarding Record on Appeal (*This form does several things. First, it tells the appellate division whether you want it to consider your appeal with or without access to a record of what was said in the trial court. The author has never seen an appeal done without a record of what was said in the trial court.)*

Second, if you elect to have the appellate division consider your appeal with a record of what was said in the trial court, your next decision is what kind of record you want. The most common record requested is a reporter's transcript from a court reporter in the trial court who made a record of what was said. The other option is for a transcript prepared from an audio recording of the trial court proceedings. With this option, a court reporter listens to the audio recording and creates a transcript.

The third option is a copy of an official recording. No transcript will be created. Instead, the appellate

judges will watch or listen to the recording of what went on in the trial court. This option is only available if the appellate division has a local rule permitting the use of a copy of an official recording and with the written consent of both the defense and the prosecutor.

The final option is for a statement on appeal — a written summary of the trial court proceedings approved by the trial court. If this option is selected, the statement on appeal is usually drafted by the defense attorney. A copy of the proposed statement on appeal is provided to the trial court and to the prosecutor. Both may have input on the content of the statement on appeal. Once the final statement on appeal is approved, that serves as the record of what happened in the trial court.

A form can be used to create the proposed statement on appeal, the CR-135 Proposed Statement on Appeal (Misdemeanor).

CR-136 Notice of Waiver of Oral Argument (Misdemeanor)
I have never seen an attorney file one of these. They do love to argue!

Key Timelines

- After the Notice of Appeal (Misdemeanor) and the Notice Regarding Record on Appeal are filed, the court clerk prepares and sends to the appellate division (and the parties) the clerk's transcript of the official record containing all the documents from the trial court proceeding. This official record includes the court reporter's transcript, if applicable, and the items in Rule of Court 8.861.

- When the record is filed, the appellate division clerk must promptly send a notice to each appellate counsel or unrepresented party, giving the dates the briefs are due. (Rule 8.881.) Briefs are usually due 30 days after the trial court's record has been sent to the appellate division. (Rule 8.882(a)(1).)

- The respondent's brief is due 20 days after the service and filing of the appellant's opening brief. (Rule 8.882(a)(2).)

- The Appellant's reply brief is due 20 days after the respondent's brief has been filed/served. The appellant's reply brief is optional. (Rule 8.882(a)(3).)

- Although the decision on the appeal can be handed down at the oral argument date, the court has 90 days from the oral argument date to issue a decision.

- The deadline to seek a rehearing in the appellate div. is 15 days after the opinion was filed (Rule 8.889(b)(1))

- The deadline to ask for certification to the Court of Appeal is before the judgment on appeal becomes final in that court. (Rule 8.1005(c).)

- Judgment on appeal becomes final 30 days after it is filed. (Rule 8.888(a)(1).)

- Special rules apply to the formatting of briefs in appellate cases. (Rule 8.883.)

Appeals in Felony Cases: Most trial court level criminal defense attorneys do not handle felony appeals in criminal cases. Felony appeals tend to be handled by attorneys who specialize in appellate practice. But it is customary where the defendant is sentenced to state prison for the attorney who handled the case at the trial court level to file a notice of appeal. As a trial court level criminal defense paralegal, you may be asked to assist in preparing the notice of appeal. This filing, which occurs in the trial court, will get the post-conviction appellate process rolling in the Court of Appeal, including the appointment of appellate counsel for the defendant.

For felony cases, you must file a *Notice of Appeal — Felony (Defendant)* (Form CR-120) within 60 days of the judgment or order appealed.

Chapter 11: Clearing a Criminal Record

The Importance of Post-Conviction Relief

A criminal record sometimes acts as a barrier to securing employment. Jobs are essential for exonerees who are trying to rebuild their lives. Finding and keeping work plays a crucial role in successful reentry and reintegration. Employment also provides essential economic security, allowing former prisoners to pay their bills, support their families, obtain housing, and secure medical care. However, while employment is essential to rebuilding a life, individuals with criminal records experience more difficulty obtaining employment than any other disadvantaged group.

Study after study shows how substantial these barriers to employment are. For example, a national survey of 600 businesses showed that employers shy away from hiring ex-convicts out of fear of liability if they commit a new crime. (Joan Petersilia, "When Prisoners Come Home: Parole and Prisoner Reentry" (2003).)

Do Not Call It an "Expungement"

In California, technically the vehicle for obtaining the post-conviction relief process is called a petition for dismissal, not as an "expungement." The word "expungement," can mean different things in different places. In some jurisdictions, including California, "expunged" records do not disappear. Instead, the court updates the case docket with an entry showing the court granted the dismissal petition and the charge was dismissed.

California provides rather generous mechanisms for post-conviction relief. This relief can be especially significant to clients and their prospects for employment and reintegration into public life. After obtaining a dismissal, a person is legally permitted to tell virtually all private and some public employers they have never been convicted of a crime.

The petition process is governed by Penal Code sections 1203.4 and 1203.4a:

- Penal Code section 1203.4 generally provides "expungement" relief to defendants convicted and placed on probation. Most petitioners who qualify for relief under Penal Code section 1203.4 are entitled to a dismissal of their conviction virtually automatically.

- Penal Code section 1203.4a provides relief to "defendant[s] convicted of a misdemeanor and not granted probation" (and those who suffer infraction convictions). Penal Code section 1203.4a requires the petitioner who seeks relief to demonstrate that she "has, since the pronouncement of judgment, lived an honest and upright life and has conformed to and obeyed the laws of the land."

What a Dismissal Will Not Do

A prior conviction dismissed under the "expungement" scheme *will not*:

- Restore the right to own or possess a firearm unless the person could otherwise do so.

- Relieve a person of the duty to register as a sex offender (A different motion is required to be relieved of the sex offender registration requirement).
- Result in the removal of the person's name from the public sex offender website
- Restore a person's eligibility to hold public office.

A prior conviction that was dismissed under the "expungement" scheme *can be counted as a prior*:

- to increase punishment in future criminal cases
- to affect a person's driving privileges (DMV)

Misdemeanor Dismissals

Petitioner's situation	Remedy	Forms
The petitioner was convicted of a misdemeanor and is still on probation.	Request early release from probation and file a petition to have the conviction dismissed.	File a petition under Penal Code section 1203.3 to have probation terminated early, and a petition under Pen. Code, § 1203.4 for dismissal. Petition: Form CR-180 Order: Form CR-181
The petitioner was convicted of a misdemeanor and have completed probation.	Request a dismissal of the conviction.	File a petition under Pen. Code, § 1203.4 for dismissal. Petition: Form CR-180 Order: Form CR-181
The petitioner was convicted of a misdemeanor or infraction and were never given probation.	Request a dismissal of the conviction.	File a petition under Pen. Code, § 1203.4a for dismissal. Petition: Form CR-180 Order: Form CR-181

Felony Dismissals

Petitioner's situation	Remedy	Forms
The petitioner was convicted of a felony wobbler and is still on probation.	Request early release from probation and file a petition to have the conviction reduced to a misdemeanor and dismissed.	File a petition under Pen. Code, § 1203.3 to have probation terminated early. File a petition under Pen. Code, § 17(b) to get a felony reduced, and a petition under Pen. Code, § 1203.4 for dismissal. Petition: Form CR-180 Order: Form CR-181

The petitioner was convicted of a felony wobbler and is done with probation and/or county jail time.	File a petition to have the conviction reduced and dismissed.	File a petition under Pen. Code, § 17(b) to get a felony reduced, and a petition under Pen. Code, § 1203.4 for dismissal. Petition: Form CR-180 Order: Form CR-181
The petitioner was convicted of a felony and sentenced to county jail under Pen. Code, § 1170(h)(5).	File a petition to have the conviction dismissed.	File a petition under Pen. Code, § 1203.41 for dismissal. Petition: Form CR-180 Order: Form CR-181
The petitioner was convicted of a felony and was sentenced to state prison or put under the authority of the Department of Corrections and Rehabilitation.	File a petition for a certificate of rehabilitation and pardon.	See the below

What is a Certificate of Rehabilitation?

A certificate of rehabilitation is a court order declaring that a person has been rehabilitated after a California state criminal conviction. It also recommends that the governor grant a full pardon. (Penal Code section 4852.13(a).) If the court grants the petitioner a certificate of rehabilitation, the court will send a certified copy to the governor. The certificate serves as an application for a pardon by the governor. A governor's pardon by the governor gives a person all the civil and political rights of citizenship, including the right to vote, and, sometimes, the right to own and keep a legal firearm. (Penal Code sections 4852.17, 4853 – 4854.) A certificate of rehabilitation and Governor's pardon is only available to California residents.

Who is Eligible for a Certificate of Rehabilitation?

1. A person convicted of a felony committed to state prison or under the authority of the California Department of Corrections and Rehabilitation; or

2. A person convicted of a felony, or a person convicted of a misdemeanor violation of any sex offense specified in Penal Code section 290, which has been dismissed under Penal Code section 1203.4 as long as the petitioner has not been incarcerated since the dismissal, is not on probation for the commission of any felony, and the petitioner presents satisfactory evidence of five years' residence in California before filing the petition.

To file a petition for a certificate of rehabilitation, the petitioner must reside for five years in California, plus wait additional time depending on your conviction. (Penal Code section 4852.03.) This period of rehabilitation starts upon the petitioner's discharge from custody or petitioner's release from parole, post-release supervision, mandatory supervision, or probation, whichever is sooner.

Who Is Ineligible for a Certificate of Rehabilitation?

A person is not eligible for a certificate of rehabilitation if any of the following applies:

- He/she is on mandatory life parole.
- He/she is a person with a death sentence.
- He/she is in the military.
- He/she is convicted of a violation of Penal Code section 269, 286(c), 288, 288a(c), 288.5, 288.7, or 289(j), except if there are extraordinary circumstances.
- He/she is not a California resident.

How Can a Person Get a Certificate of Rehabilitation?
If the petitioner is eligible, he/she may file a petition with the superior court where he/she resides. This is a lengthy process and may involve a hearing. Petitioners have the right to the assistance of a public defender. If there is no public defender in the petitioner's county, the petitioner may still get help, either from the county's adult probation officer or, if the court thinks the petitioner needs legal representation, from a court-appointed lawyer. (Pen. Code, § 4852.08.)

Direct Governor's Pardon
If the applicant is ineligible to apply for a certificate of rehabilitation, he/she may apply to the governor for a direct pardon. More information is available on the Governor's Clemency – Commutations & Pardons web page at https://www.gov.ca.gov/clemency/

Chapter 12. Legal Ethics

NALA Code of Ethics and Professional Responsibility

First adopted by the NALA membership in May of 1975, the Code of Ethics and Professional Responsibility is the foundation of ethical practices of paralegals in the legal community. The code consists of ten canons:

- **Canon 1** – A paralegal must not: (a) engage in, encourage, or contribute to any act which could constitute the unauthorized practice of law; (b) establish attorney-client relationships, set fees, give legal opinions or advice, or represent a client before a court or agency unless so authorized by that court or agency; and (c) engage in conduct or take any action which would assist or involve the attorney in a violation of professional ethics or give the appearance of professional impropriety.

- **Canon 2** – A paralegal must not perform any of the duties that attorneys only may perform or take any actions that attorneys may not take.

- **Canon 3** – A paralegal may perform any task which is properly delegated and supervised by an attorney, as long as the attorney is ultimately responsible to the client, maintains a direct relationship with the client, and assumes professional responsibility for the work product.

- **Canon 4** – A paralegal must use discretion and professional judgment commensurate with knowledge and experience but must not render independent legal judgment in place of an attorney. The services of an attorney are essential in the public interest whenever such legal judgment is required.

- **Canon 5** – A paralegal must disclose his or her status as a paralegal at the outset of any professional relationship with a client, attorney, a court or administrative agency or personnel thereof, or a member of the general public. A paralegal must act prudently in determining the extent to which a client may be assisted without the presence of an attorney.

- **Canon 6** – A paralegal must strive to maintain integrity and a high degree of competency through education and training with respect to professional responsibility, local rules and practice, and through continuing education in substantive areas of law to better assist the legal profession in fulfilling its duty to provide legal service.

- **Canon 7** – A paralegal must protect the confidences of a client and must not violate any rule or statute now in effect or hereafter enacted controlling the doctrine of privileged communications between a client and an attorney.

- **Canon 8** – A paralegal must disclose to his or her employer or prospective employer any pre-existing client or personal relationship that may conflict with the interests of the employer or prospective employer and/or their clients.

- **Canon 9** – A paralegal must do all other things incidental, necessary, or expedient for the attainment of the ethics and responsibilities as defined by statute or rule of court.

- **Canon 10** – A paralegal's conduct is guided by bar associations' codes of professional responsibility and rules of professional conduct.

Link to NALA Code of Ethics
https://nala.org/certification/certification_old/nala-code-ethics-and-professional-responsibility/

Applicability of Lawyers' Ethics Rules to Paralegals
ABA Model Rule 5.3(a) requires that a law firm's partner "shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the [non-lawyer's] conduct is compatible with the professional obligations of the lawyer" (emphasis added).

ABA Model Rule 5.3(b) similarly requires that a lawyer "having direct supervisory authority over a non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer."

Avoid Conflicts of Interest
Canon 8 of the National Federation of Paralegal Associations' Model Code of Ethics and Professional Responsibility and Guidelines for Enforcement states:

> "A paralegal must disclose to his or her employer or prospective employer any pre-existing client or personal relationship that may conflict with the interests of the employer or prospective employer and/or their clients."

Conflict of Interest Defined

> A conflict of interest, in the legal sense, involves information about a client held by a member of the legal team...an attorney, paralegal or legal secretary. That information need not be attorney/client privileged information, nor does it have to include actual documented facts about a client's legal matter. It only needs to be information about the client that, were it revealed to other members of the legal team, may cause some harm, injury or prejudice to the client. -National Federation of Paralegal Associations website

How Does a Paralegal Know When a Conflict of Interest Exists?
The paralegal's supervising attorney must determine whether there is a conflict of interest between the paralegal and the client or a legal matter. There are three common examples of when a paralegal may have a conflict of interest in a legal matter:

- If a paralegal works at one law firm handling a legal matter on behalf of a client, then goes to work for another law firm handling the same legal matter on behalf of the adversary
- If a paralegal is related to or close friends with a party, a client, or someone involved in the legal matter

- If a paralegal is involved either within a legal professional organization or in another business entity

How to Identify a Possible Conflict of Interest

- On your first day of employment (if it has not been done during the interview process), ask the supervising attorney or another person for a list of legal cases or matters that the firm or employer is handling. Review that list to identify clients' names, parties in litigation, acquaintances, friends, or family members you recognize.

- Compare your list of all legal cases or matters you have worked on against the new employer's list. If you work in litigation, also review the names of attorneys representing the parties.

- Advise the employer of any matters in which you suspect you may have a conflict of interest. Provide only enough information about the matter for the employer (or a firm or corporation conflicts committee) to determine the existence of a conflict of interest. Usually, the name of the client or the matter is sufficient to assess this.

- As new clients and legal matters come into the office, or if new parties are added to cases already underway, check their names against your list as described above.

- Despite your best efforts, a matter or client in which you have a possible conflict of interest may slip through. If this happens, bring it to the attorney's attention when you learn of it.

- Maintain your list of matters on which you work throughout your paralegal career.

What Is an Ethical Wall?: An ethical wall is an imaginary boundary placed around an individual or individuals with whom a conflict of interest is discovered. This imaginary boundary is supposed to bar any communication, written or verbal, between the legal team members handling a matter and the person with whom the conflict of interest exists. The ethical wall used to be known as a "Chinese wall" after the Great Wall of China. This term is now considered archaic and should be avoided.

Purpose of the Ethical Wall: Primarily erecting an ethical wall protects the client's confidences and secrets. Sometimes an ethical wall is erected not because the person with whom the conflict exists would reveal the client's privileged information but simply to "avoid giving any appearance of impropriety." The ethical wall is erected to ensure there is absolutely no opportunity for the client's confidences and secrets to be revealed to anyone other than those handling the client's legal matter.

A secondary purpose for erecting ethical walls is to avoid limiting legal professionals' job mobility. If it were impossible to erect an ethical wall, members of the legal profession might encounter serious hurdles when changing jobs. If they have a conflict of interest involving too many clients, no employer will want to hire them because the law firm or other employer would be disqualified from handling those cases. They may be precluded from finding work because of the vast number of legal matters they were exposed to.

How to Create an Ethical Wall: Once it is established that a conflict of interest exists, the client's consent for continued representation in the matter must be obtained. If the paralegal is working in a traditional setting, the attorney will obtain that consent. And if the matter is adversarial (i.e., in litigation), the attorney must obtain the adversary's consent.

- Send a memorandum alerting all firm or corporation employees to the conflict of interest. The memo should advise employees they may not communicate any information about the file with, or in front of, the person with whom the conflict of interest exists.

- Maintain in the file a hard copy establishing the ethical wall (a) to remind people about the wall and (b) if an adversary or other individual makes a challenge to the wall.

- Place on the file folder a red tag or some other notation that reminds everyone handling the matter that a wall has been erected.

- Sometimes, it may be appropriate to physically move the files to another location away from the person with whom the conflict of interest exists.

- Above all, respect the ethical wall once it is erected. Do not talk about, listen to, or read anything about that legal matter once the ethical wall has been erected.

Attorney's Duty to Supervise Paralegal: Attorneys must supervise the work of subordinate attorneys and non-attorney employees (e.g., paralegals) or agents. (Cal. Rule of Prof. Conduct, rule 3-110; see also, e.g., *Palomo v. State Bar* (1984) 36 Cal.3d 785, 796 [attorney failed to supervise or instruct office manager on trust account requirements and procedures, and *never* examined either her records or the bank statements for any of the office account].)

Rules Re: Communication/Contact: An attorney of paralegal connected with a case:

- May not communicate with judges, law clerks, research attorneys, or other court personnel who participate in the decision-making process, absent opposing counsel, except with opposing counsel's consent. (Rules of Prof. Conduct, rule 5-300(B).) Exception: matters where the law permits ex-parte communication

- May not communicate, directly or indirectly, with jurors, potential jurors, or their family members while a case is pending except in official proceedings before the judge and with opposing counsel present. (Rules of Prof. Conduct, rule 5-320.)

- May not attempt to influence a juror (Pen. Code, § 95 [it is a felony]) in any of the following ways:

    - Oral or written communication with him or her except in the regular course of proceedings.
    - Book, paper, or instrument exhibited, otherwise than in the regular course of

proceedings.
    - Threat, intimidation, persuasion, or entreaty.
    - Promise, or assurance of any pecuniary or other advantage.

- Should tell the defendant's family/friends to have no contact with jurors. (Rules of Prof. Conduct, rule 5-320(G).)
- May not have improper contact with a represented party (Rules of Prof. Conduct, rule 2-100) (contrast with interviewing victim/witness in a criminal case)

Do Not Enter into an Attorney-Client Relationship: A paralegal works within the constraints of the attorney-client relationship but cannot be the one to initiate that relationship. This can be challenging since paralegals are often the first point of contact that potential clients may have with a firm—they interview and gather information. Naturally, the prospective client will consider the consultation the first step in retaining an attorney.

Do Not Negotiate Fees with a Client: Negotiating fees gets to the heart of the attorney-client relationship since it establishes the conditions of that relationship. The agreement to pay for legal services – even before payment is made – is considered the client's part of the contract. This means it can only be negotiated between the attorney and the client directly.

Clients cannot always be expected to understand this constraint, and they may raise the matter of cost innocently. However, paralegals must be prepared to deflect these discussions and direct clients to the attorney instead.

Do Not Give Legal Advice: This rule can be challenging to comply with because the definition of legal advice can be very hazy. Almost every aspect of a paralegal's job revolves around devising and communicating proper legal strategy.

What constitutes legal advice? Is something as simple as saying, "This case looks like a slam dunk," a violation? Many authorities believe so.

Most bar associations interpret legal advice as being whatever the client *perceives* as being legal advice. This can be as simple as a throwaway observation about how difficult or easy a case may be. It is best to stay in your lane and hold any comments you might have, even if it is just to be friendly or avoid an awkward silence. Better to feel a little uncomfortable and tight-lipped than to be in hot water for playing it too loose.

However, you are safe if you stick to providing basic factual and procedural information about the case or the courts. This does not extend to predicting outcomes or discussing the merits of strategies, but it can include essential elements like filing deadlines, the law, and trying a case.

FURTHER READING: "Paralegals Must Take More Ethics MCLEs Than Attorneys, But Why?"

https://www.sfbar.org/blog/paralegals-must-take-more-ethics-mcles-than-attorneys-but-why/

Chapter 13. DMV Administrative Per Se (APS) Proceedings

In 1989, the California Legislature enacted a scheme directing and enabling seizure and virtually automatic administrative suspension of the driver's license of any person arrested for operating a vehicle with a blood-alcohol level in excess of .10 percent; in 1990 the legislation was amended to lower the blood-alcohol level to .08 percent.

A person arrested for DUI has ten days to request a hearing from the DMV to contest the automatic suspension. (Veh. Code, § 13558(b).) The 10-day deadline to request the hearing is the single most critical factor in protecting driving privileges.

Most criminal defense attorneys, in addition to representing the DUI arrestee in criminal court, will also represent the client in the DMV hearing process, which is a separate administrative proceeding, governed by its own rules, including a low standard of proof.

Representing oneself at a DMV APS hearing is a foolhardy endeavor. The law and rules governing these hearings are complicated. This is because a DMV APS hearing is a fast-moving, high-stakes administrative process that can suspend a driver's license long before any court case. In fact, to give you an idea how complicated the process is, *California Drunk Driving Law*, the preeminent treatise on DUI law, devotes 143 pages to APS hearings

> "[a] license issued...to operate a motor vehicle...may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees...and such licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment."
>
> *Bell v. Burson* (1971) 402 U.S. 535, 539

Issues Decided at the Hearing

Generally, the hearing focuses on narrow, technical questions:

- Did the officer have reasonable cause for the stop?
- Was the arrest lawful?
- Was the driver 0.08% BAC or higher?
- Was the chemical test properly administered?

Paralegal Tasks Related to the DMV APS Hearing Process:

- Scheduling the hearing
- Obtaining and providing discovery from and to the DMV
- Assisting with the preparation of a hearing brief

Legal Challenges to the DMV APS Hearing Process

The DMV's APS hearing structure has been challenged on constitutional grounds because, as the

argument goes, it violates both California and federal due process protections. Specifically, the APS system infringes upon drivers' rights by consolidating prosecutorial and adjudicatory roles within a single DMV employee. (*California DUI Lawyers Association v. Department of Motor Vehicles* (2022) 77 Cal.App.5th 517, 532-533.) Essentially, the DMV hearing officer acts as the "prosecutor" and the judge.

In response to *California DUI Lawyers Association v. Department of Motor Vehicles*, the DMV proposed modifications to the APS hearing process, introducing a bifurcated system in which one DMV employee would serve as an "Advocate" while another would act as a "Trier of Fact." However, these new procedures have not been consistently or meaningfully implemented. The majority of DMV Driver Safety Offices continue to operate under the longstanding model wherein a single employee assumes both roles.

The Vehicle Code does not allow the purported "Advocate" and "Trier of Fact" structure for APS hearings. (Veh. Code, Division 6, Chapter 3, Article 3; Cal. Veh. Code, §§ 14100 - 14112.) To date, no proposed regulations governing the APS hearing process have been submitted to the Office of Administrative Law. Consequently, there is no statutory or regulatory basis for implementing any new procedures.

Two years after the decision in *California DUI Lawyers Association v. Department of Motor Vehicles*, the Court of Appeal, in *Knudsen v. Department of Motor Vehicles* (2024) 101 Cal.App.5th 186, held that a driver's due process rights are violated when the administrative record and revocation decision indicate that the hearing officer acted as both adjudicator and advocate, or as an adjudicator who also collected and developed evidence. If the record shows a public hearing officer engaged in advocacy, the driver's right to an impartial adjudicator is compromised, thus entitling the driver to a new APS hearing before a neutral decision-maker.

The *Knudsen* court identified seven distinct aspects of the hearing in that case that showed the hearing officer was improperly engaged in advocacy and concluded the denial of due process constituted structural error mandating a new hearing before a constitutionally impartial adjudicator.

According to *Knudsen*, a hearing officer improperly engages in advocacy, and creates a structural error that results in a denial of due process, in the following circumstances:

1. The hearing officer asks questions that do not legitimately develop witness testimony but instead seek to undermine and cast doubt on that testimony. (*Knudsen* at pp. 210-211.)

2. The hearing officer asks questions that attempt to change or mischaracterize the witness' previously clear and unequivocal testimony. (*Knudsen* at p. 211.)

3. The hearing officer's decision highlights things the expert did not do, such as conducting a personalized study or evaluation, and faults the expert for not basing their opinion on other information sources, as a basis to diminish the expert's overall testimony when identifying that omission serves no legitimate purpose, nor does it provide a meaningful ground to discredit the expert's opinions, and the manner in which it was introduced suggests an advocacy role rather than

neutral fact finding. (*Knudsen* at pp. 210-211.)

4. The decision mischaracterizes expert testimony. In Knudsen this occurred when the hearing officer recast the expert's unequivocal testimony as a statement of mere likelihood and minimized the expert's stated level of certainty. (*Knudsen* at p. 211.)

5. The hearing officer's decision erroneously characterizes (1) a witness' accurate descriptions of the documents admitted by the hearing officer, (2) the witness' description of scientific principles, and (3) an expert's opinion, as inadmissible "hearsay." In Knudsen this error was compounded by the fact that the hearing officer raised the hearsay issue for the first time in the suspension notice/findings, thereby depriving Knudsen an opportunity to address the issue. (*Knudsen* at p. 212.)

6. The hearing officer relies on evidentiary claims that were unsupported by the record. In Knudsen, this error manifest itself when the hearing officer stated that the expert relied on Knudsen's "driving pattern" as a basis for his opinions when in fact, the expert did not discuss Knudsen's "driving pattern" in any way. He simply stated that police did not seize Knudsen based on observations of his driving. (Knudsen at p. 212.)

7. The hearing officer erroneously claims that the Respondent had failed to rebut an evidentiary presumption, when in fact, the Respondent had rebutted that presumption. In *Knudsen* this happened when the hearing officer claimed that the three-hour presumption had not been rebutted and the decision clearly relied on the three-hour presumption to show that Knudsen had been driving with a BAC of 0.08 percent or greater. Therefore, the public hearing officer committed a clear error of law that significantly benefited the DMV. (*Knudsen* at p. 212.)

The *Knudsen* court concluded that the record reflected inaccurate characterizations of important testimony, questions that were inconsistent with developing testimony, and an error of law that significantly benefited the DMV. These considerations collectively demonstrate that the public hearing officer acted as an advocate for the DMV. Because the hearing officer acted as an advocate and adjudicator, Knudsen's due process right to an impartial adjudicator was violated. (*Knudsen* at pp. 21-2132.)