

Here's How and When to Do It

ACTION GUIDE

November 2004

Defending Your Client in a Misdemeanor Case (Including a DUI)

Ron Albers

***JUDGE'S
PERSPECTIVE*** | The Honorable Fumiko Hachiya Wasserman
Los Angeles County Superior Court



CONTINUING EDUCATION OF THE BAR ■ CALIFORNIA
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Scope of Guide

This Action Guide provides guidance for an attorney whose client has been arrested for a misdemeanor. It takes you step-by-step from that first telephone call, through negotiating a disposition, to what to do after the client is sentenced. Steps for special procedures include, e.g., DUI, immigration, and mental health issues.

Revision Highlights

- Includes new step on Proposition 36 probation in drug possession cases.
- Includes revised steps on misdemeanor diversion and deferred entry of judgment in drug cases.
- Includes statutory amendments, e.g., new Vehicle Code provisions relating to DUI's, restrictions on duces tecum subpoenas in criminal cases.
- Includes latest cases, e.g., on *Pitchess* motions, reciprocal discovery, scope of Proposition 36.
- Includes reorganized steps on discovery, and on restitution and restitution fines.

Abbreviations

Appeals & Writs	Appeals and Writs in Criminal Cases (2d ed Cal CEB 2000)
Crim Defense Prac	Millman, Michael, et al., California Criminal Defense Practice (Matthew Bender 1981)
Crim Law	California Criminal Law Procedure and Practice (7th ed Cal CEB 2004)
Crim Law Forms Man	California Criminal Law Forms Manual (Cal CEB 1995)
Direct & Cross	Effective Direct & Cross-Examination (Cal CEB 1986)
Effective Intro of Evidence	Effective Introduction of Evidence in California (2d ed Cal CEB 2000)
Evidence Benchbook	Jefferson's California Evidence Benchbook (3d ed CJA-CEB 1997)
Evidentiary Foundations	Imwinkelried, Wydick & Hogan, California Evidentiary Foundations (3d ed Lexis 2000)
Laying a Foundation	Laying a Foundation To Introduce Evidence (Preparing and Using Evidence at Trial) (Cal CEB Action Guide Winter 2000)

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Please recycle previous Action Guide.

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When Client Is Arrested or Arrest Imminent

STEP 1. OFFER IMMEDIATE ADVICE TO CLIENT DURING INITIAL TELEPHONE CONVERSATION

WHEN CLIENT WILL TELEPHONE

Client will phone you when he or she:

- a. Has just been arrested; or
- b. Fears imminent arrest, *e.g.*, client hears that an arrest warrant has been issued, but client has not yet been arrested.

ADVISE CLIENT

Remain Silent

To avoid waiving constitutional right to remain silent ([US Const amend V](#)), tell client *not* to discuss the case, *unless you are present*, with:

- a. Law enforcement officials; OR
- b. Other inmates; OR
- c. Relatives; OR
- d. *Anybody*.

NOTE

Also advise client not to volunteer or admit to noncitizen status when speaking with anyone.

O.R. Release Procedures

If client is in custody, tell client:

- a. That he or she may need to discuss personal facts with the person who handles applications for release on “own recognizance” (O.R.) (*e.g.*, facts about employment, residence, family circumstances; see [step 8](#), below); but
- b. *Not* to discuss facts of case with O.R. person, or anyone at the jail.

Further Research: For suggested instructions to give client, see [California Criminal Law Procedure and Practice §30.5 \(7th ed Cal CEB 2004\)](#), referred to throughout this Action Guide as Crim Law.

STEP 2. OBTAIN INITIAL INFORMATION FROM CLIENT DURING INITIAL TELEPHONE CONVERSATION

OBJECTIVE

In initial telephone conversation, obtain enough information to:

- a. Evaluate your client's ability to pay your fees (see [step 4](#), below);
- b. Evaluate whether you wish to defend client (see [step 4](#), below) based on:
 - (1) Your experience;
 - (2) Time available;
 - (3) Particular issues in the case; and
 - (4) Whether you have a conflict of interest. See [step 4](#), below.
- c. Assist in client's release from custody (see [step 6](#), below);
- d. Collect and preserve evidence (see [step 10](#), below); and
- e. Conduct preliminary negotiations with prosecutor or law enforcement agency. See [step 11](#), below.

ASK APPROPRIATE QUESTIONS

Ask client:

Arrest

- a. Crimes client has been charged with; and
- b. Whether client talked with any law enforcement person about the facts of the case, and if so, person's:
 - (1) Name; and
 - (2) Phone number.

Possible "Holds"

Whether there are any "holds" on client's release, *i.e.*, client will not be released because, *e.g.*:

- a. Client is on probation ([Pen C §1203.3](#));
- b. Client is on parole ([Pen C §3056](#));
- c. There are outstanding warrants for client's arrest, *e.g.*, failure to pay any traffic tickets, failure to pay child support; and/or
- d. Client may have possible immigration problems, *e.g.*, if client is not a United States citizen, alien status could be revoked. See [step 17](#), below.

Financial Information

- a. Bail amount:
 - (1) Obtain from client, if client knows;
 - (2) If client does not know, you may be able to determine bail amount from (for bail information see [step 9](#), below):
 - (a) Reviewing schedule adopted by the courts; or
 - (b) Examining the arrest warrant.
- b. How client will obtain money for bail and fees, including:
 - (1) Names and phone numbers of client's family or friends with money for bail;
 - (2) Whether client can pay immediately:

- (a) For services you have already provided; and
- (b) Your retainer; and
- (3) How client will pay for your services during remainder of case if services not covered by retainer.

Witnesses or Evidence Find out whether any witnesses or physical evidence must be immediately preserved. If so, do *not* discuss details on the phone, but arrange to talk to client in person.

If Client in Jail If client is in jail, ask:

- a. Specific location and jail phone number;
- b. How client's name is listed on the booking records;
- c. Client's booking number (if client knows).

AVOID INAPPROPRIATE QUESTIONS WHILE ON PHONE Be aware that law enforcement personnel or other inmates may overhear this initial telephone conversation; do *not* ask the client:

- a. About the actual *facts* of the offense; or
- b. *Names* of witnesses.

Further Research: *Crim Law*, chaps 1 (client interview) and 5 (right to counsel).

STEP 3. DETERMINE WHETHER CLIENT IS CHARGED WITH MISDEMEANOR

CLASSES OF CRIME DEFINED

REVIEW CLASSES OF CRIME All crimes are classified as ([Pen C §17\(a\)](#)):

- a. Felonies (see definition, below);
- b. Misdemeanors (see definition, below); OR
- c. Infractions. See definition, below.

Felony Defined Felony is crime that is punishable with ([Pen C §17\(a\)](#)):

- a. Death; or
- b. Imprisonment in the state prison.

Misdemeanor Defined Misdemeanor is crime that is:

- a. Not a felony (see definition, above);
- b. Not an infraction (see definition, below); and
- c. Punishable with maximum confinement of 1 year in a county detention facility. [Pen C §§17\(b\), 19.2](#).

Infraction Defined

Infraction is crime that is ([Pen C §19.6](#)):

- a. Not punishable by imprisonment; and
- b. Classified as an infraction in statute defining the crime.

DETERMINE CLASS OF CRIME**REVIEW COMPLAINT**

Review the complaint filed against the defendant, because it:

- a. Will give you the section of the Penal Code or other statute (*e.g.*, Vehicle Code, Health and Safety Code) under which defendant is being charged; and
- b. May state the classification of the crime with which defendant is being charged.

REVIEW STATUTE

If complaint does not state the class of crime being charged, review the statute that prescribes the punishment for the crime to determine its classification.

NOTE 

Typically in California, the code section that defines a crime is followed by one or more sections that prescribe the punishment. See, *e.g.*, [Pen C §§242](#) (definition of battery) and [243](#) (punishment for battery).

**Felony/Misdemeanor
“Wobbler”**

Crime can be either a felony or misdemeanor (*i.e.*, a “wobbler”) if the punishment statute specifies that it may be punished by:

- a. Imprisonment in the state prison; or
- b. Imposition of a fine; or
- c. Imprisonment in the county jail.

**When Wobbler
Considered Misdemeanor**

Wobbler will be considered a misdemeanor when it does not result in imprisonment in the state prison, *e.g.*, when:

- a. Judge imposes a fine or imprisonment in the county jail;
- b. Judge commits defendant to the Youth Authority and declares the crime to be a misdemeanor;
- c. Judge grants probation without imposition of a sentence and declares the crime to be a misdemeanor;
- d. Prosecutor files complaint specifying that the offense is a misdemeanor and defendant does not object to that classification; or
- e. Magistrate determines at or before the preliminary examination that the offense is a misdemeanor.

Example: Grand theft may be either a felony or a misdemeanor. See [Pen C §489](#).

Misdemeanor

Crime is a misdemeanor if the statute defining the crime:

- a. States that it is a misdemeanor, without including a penalty, in which case it is punishable by ([Pen C §19](#)):

- (1) Imprisonment of 6 months or less in the county jail; or
- (2) Fine not exceeding \$1000; or
- (3) Both;
- b. Provides that it is punishable by 1 year or less in the county jail ([Pen C §19.2](#)); or
- c. States that it is a public offense and does not provide any penalty ([Pen C §19.4](#); see a., above, for penalty).

Infraction

Crime is an infraction if:

- a. The statute defining the crime states that it is an infraction;
- b. The crime is not punishable by imprisonment ([Pen C §19.6](#)); or
- c. The offense is a misdemeanor listed in [Pen C §19.8](#) and the prosecutor or the court, with the defendant's consent, elects to treat it as an infraction ([Pen C §17\(d\)](#); see *In re Kevin G.* (1985) 40 C3d 644, 221 CR 146 (minor's consent to have misdemeanor traffic offense treated as infraction was not effective, because he did not intelligently waive his right to counsel)).

NOTE 

At least one offense that is ordinarily a misdemeanor, petty theft of property valued at \$50 or less, may be charged as an infraction at the prosecutor's discretion. See [Pen C §§488, 490.1](#). For discussion, see [Crim Law §§6.32, 36.16](#).

CONSIDER EFFECT OF CLASSIFICATION**If Felony**

The procedural requirements for prosecuting and defending a felony are more strenuous, and usually require more expertise. See [1 Witkin & Epstein, California Criminal Law §79](#).

If Wobbler

- a. If crime is a wobbler, you may be able to bargain with the prosecution or judge to charge the offense as a misdemeanor; BUT
- b. You must follow felony procedural requirements until the classification is resolved.

If Infraction

If crime is an infraction:

- a. Defendant has no right to a jury trial ([Pen C §19.6](#)); and
- b. Defendant has no right to court-appointed counsel unless defendant remains in custody. [Pen C §19.6](#).

Further Research: On the right to counsel, see [Crim Law §§5.2–5.12](#).

STEP 4. DECIDE WHETHER YOU WANT TO TAKE THE CASE

ASSESS COMPLEXITY OF CASE	Analyze complexity of the issues, <i>e.g.</i> :
Custody	If client is in custody, will you have to fight to get client released?
Other Defendants	If there are codefendants involved: <ol style="list-style-type: none"> a. Has more than one defendant requested your services? See “Evaluate Possible Conflicts of Interest” below. b. Should defendants be tried at the same trial? See Crim Law §7.39. c. Has a codefendant made a statement against your client?
Conflicts	Have you or your firm represented: <ol style="list-style-type: none"> a. A co-defendant (see Crim Law §18.8)? b. The victim or any witnesses?
Prior Record	Does client have a record of prior arrests or convictions? If so: <ol style="list-style-type: none"> a. Recognize that prior record might make negotiating a disposition more difficult (see step 32, below); and b. Prior record might affect the sentence that client receives.
Numerous Witnesses	Are there numerous witnesses? If so, you will spend more time preparing for and conducting trial.
DMV	Will client face DMV administrative hearing? See step 16 , below.
Immigration	Will client’s immigration status raise issues? See step 17 , below.
DETERMINE WHETHER YOU HAVE TIME TO HANDLE CASE	Based on your evaluation of the complexity of issues in the case, estimate the number of hours you will need to: <ol style="list-style-type: none"> a. Research and prepare pretrial motions (see steps 13 and 36, below); b. Make court appearances (pretrial motions, if necessary, may entail numerous appearances); c. Investigate and prepare facts for trial (see steps 20–30, below); d. Research and prepare for evidentiary issues at trial (see steps 42 and 46); e. Prepare for trial (see steps 50–51); f. Research sentencing issues and prepare for sentencing hearing. See steps 53–70.
EVALUATE YOUR EXPERTISE	If you are not familiar with the legal issues in the case:

Acquire Expertise

Determine whether you will have time to acquire sufficient learning and skill by (see [Cal Rules of Prof Cond 3–110](#)):

- a. Associating or consulting another attorney; or
- b. Researching, studying, and practicing in the legal area covered in client’s case.

Decline Case

Decline case if you do not have time to acquire sufficient expertise.

EVALUATE POSSIBLE CONFLICT OF INTEREST

Evaluate possible conflict of interest, *e.g.*, you represent a codefendant in the case. See [Cal Rules of Prof Cond 3–310](#).

Decline Case

Decline case if you, *e.g.*:

- a. Represent a codefendant, and client will not sign written waiver of right to conflict-free representation (see *People v Mroczko* (1983) 35 C3d 86, 103, 197 CR 52); or
- b. Have represented the victim or any witness. See *People v Pennington* (1991) 228 CA3d 959, 965, 279 CR 85; *People v Bonin* (1989) 47 C3d 808, 835, 254 CR 298.

NOTE

If you have questions regarding conflicts, call the [State Bar Ethics Hotline at 1–800–238–4427](#).

BE SURE THAT YOU ARE WILLING TO GO TO TRIAL

If you are unwilling, afraid, or unable to go to trial, do *not* take the case, because:

- a. Even though most cases do not go to trial, your effectiveness in pretrial negotiations and motion work will be significantly lessened if you are not willing to go to trial; and
- b. The outcome for your client will probably be worse than if it had been handled by someone ready to go to trial. For discussion of necessity of being prepared to go to trial, see [step 40](#).

ESTIMATE FEES AND COSTS

- a. Calculate your fees based on the number of hours you estimate the case will take. See above.
- b. Determine whether you will want to obtain expert assistance, and assess the probable cost for, *e.g.*, consultation, testing, and testimony.

DECLINE IF CLIENT UNABLE TO PAY

- a. Ask client to make arrangements for your fees and costs, *e.g.*, to make a retainer payment.
- b. Decline case if you are not satisfied that client is able to pay fees and costs.

NOTE

If your client is having trouble getting the money for a misdemeanor bail, you will undoubtedly have problems obtaining your legal fees; if necessary, refer client to public defender or County Bar Association for low fee or no-cost services.

Further Research: See [Crim Law](#), chaps 2, 18.

IF YOU DECIDE TO REPRESENT CLIENT

ENTER RETAINER AGREEMENT

- a. If client expenses are reasonably likely to exceed \$1000, you must have a signed written agreement. A signed duplicate of the fee agreement must be given to the client or the contract is voidable. [Bus & P C §6148](#).
- b. If attorney fees will probably exceed \$1000, you *must* have a signed written agreement. [Bus & P C §6148](#).
- c. Regardless of whether *required* by [Bus & P C §§6146–6148](#), protect yourself by having written agreement with *all* clients.
- d. Make sure you and client agree whether or not representation includes related noncriminal proceedings, *e.g.*, DMV hearings. See [step 16](#), below.

Form

For sample agreements, see [California Civil Litigation Forms Manual, chap 1 \(Cal CEB 1980\)](#); see also [Crim Law, chap 5](#).

OBTAIN FEES

To avoid future problems, get your fees at the beginning of your relationship with the client.

NOTE

If your client later is unable to pay your fees, consider asking the court to appoint you as counsel. See [People v Castillo \(1991\) 233 CA3d 36, 55, 284 CR 382](#).

Further Research: See [Crim Law, chap 5](#).

STEP 5. OBTAIN FURTHER INFORMATION

ARRANGE TO GET DOCUMENTS

Get copies of police reports and related information from:

- a. Client; or
- b. Court file.

CONSIDER CONTACTING INVESTIGATING OFFICERS

Decide whether to contact the investigating police officers to get additional information about the case. See [step 11](#), below.

INTERVIEW CLIENT

Conduct an immediate preliminary interview to obtain details of the case from the client:

- a. In your office; or
- b. At the jail. See below.

If Client Is In Custody

Call jail to determine:

- a. When you can conduct interview with client;

NOTE

For security reasons, most jail facilities have certain times when you will not be able to meet with your client.

- b. Location of the facility and client;