

CERTIFICATE OF ATTENDANCE FOR CALIFORNIA MCLE

Top portion of form to be completed by the Provider

It is preferred that the form is pre-printed with the attendees name and bar number.

Provider Name: Ventura County District Attorney's Office

Provider Number: 1130

Title of Activity: Criminal Prodecure

Date(s) of Activity: October 9, 2018

Time of Activity: 8:30 a.m. to 12:00 p.m.

Location of Activity (City/State): Ventura, CA

This Activity qualifies for: Participatory ☒ Self-Study ☐

Total California MCLE Credit Hours for the above activity: 3.50, including the following sub-field credits:

- Legal Ethics: _____
- Recognition and Elimination of Bias: _____
- Competence Issues: _____

Bottom portion of form to be completed by the Attorney after participation in the above-referenced activity

By signing below, I certify that I participated in all, or some*, of the activity described above and am therefore entitled to claim the following California MCLE credit hours:

Total California MCLE Credit Hours: _____, including the following sub-field credits:

- Legal Ethics: _____
- Recognition and Elimination of Bias: _____
- Competence Issues: _____

(You may not claim credit for the subfields above unless the provider is granting credit in those areas above.)

Print Your Name (clearly): _____

Your California State Bar Number: _____

Signature: _____

* partial participation hours must be pro-rated

ACTIVITY EVALUATION FORM FOR CALIFORNIA MCLE

Please complete and return to Provider (Please Print)

Provider Name: Ventura County District Attorney's Office Provider Number: 1130

Title of Activity: Criminal Procedure

Date(s) of Activity: October 9, 2018

Time of Activity: 8:30 a.m. to 12:00 p.m.

Location of Activity: District Attorney's Office, Bradbury Conf. Room, Ventura, CA

Please indicate your evaluation of this course by completing the table below

Question	Yes	No	Comments
Did this program meet your educational objectives?	☐	☐	
Were you provided with substantive written materials?	☐	☐	
Did the course update or keep you informed of your legal responsibilities?	☐	☐	
Did the activity contain significant professional content?	☐	☐	
Was the environment suitable for learning (e.g., temperature, noise, lighting, etc.)?	☐	☐	

Please rate the instructor(s) of the course below

Instructor's Name and Subject Taught	On a scale of 1 to 5, with 1 being Poor and 5 being Excellent, please rate the items below	Rate 1 – 5
Michael D. Schwartz / Criminal Procedure	Overall Teaching Effectiveness	—
	Knowledge of Subject Matter	—

Instructor's Name and Subject Taught	On a scale of 1 to 5, with 1 being Poor and 5 being Excellent, please rate the items below	Rate 1 – 5
	Overall Teaching Effectiveness	—
	Knowledge of Subject Matter	—

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	Overall Teaching Effectiveness	—
	Knowledge of Subject Matter	—

**OFFICE OF THE DISTRICT ATTORNEY
COUNTY OF VENTURA**

**MCLE AGENDA
BASICS OF CRIMINAL PROCEDURE**

October 9, 2018

8:30 AM – 12:00 PM

Executive Conference Room

Instructor: Michael D. Schwartz, Chief Assistant District Attorney

MCLE Credit: 3.hours

- 8:30 – 8:45 Criminal pleadings and proceedings flow chart
- 8:45 – 9:00 Felony, misdemeanor and infraction punishments
- 9:00 – 9:30 Right to counsel
Arrest warrants and subpoenas
Bail
Arraignment
Pleadings, joinder and severance
Preliminary hearings
Grand jury
- 9:30 – 9:45 Break
- 9:45 – 10:45 Discovery
Public records
Motion to set aside information or indictment (995 motion)
Search and seizure motions
Motion to disclose informant's identity
Selected pretrial motions
Speedy trial
Continuances
Disqualification of judge
Line-ups
Confessions and admissions
- 10:45 – 11:00 Break
- 11:00 – 12:00 Prior convictions, uncharged misconduct
Discharge, dismissal, mistrial
Pleas and case settlement
Deferred entry of judgment, diversion, preplea probation reports
Trial by court or jury
Jury selection
Trial preparation
Selected trial motions
Jury instructions
Prejudgment motions
Writs and appeals
Mental competence

CALIFORNIA CRIMINAL PROCEEDINGS

MISDEMEANOR

Complaint filed → Arraignment → [Pretrial conference] → Jury trial → Sentencing

FELONY VIA COMPLAINT

Felony complaint filed → Arraignment → [Early disposition conference] → Preliminary examination (in front of magistrate) → Held to answer (magistrate finds probable cause) → [DA “info review” meeting] →

SUPERIOR COURT Information filed → Arraignment → Motion to set aside information (Penal Code section 995, if defendant files one) → [Pretrial conference] → Jury trial → Sentencing

FELONY VIA INDICTMENT

Indictment (by grand jury) → Arraignment → Motion to set aside indictment (Penal Code section 995, if defendant files one) → [Pretrial conference] → Jury trial → Sentencing

[Note: Pretrial conferences and early disposition conferences are not required by the Penal Code but may be scheduled as opportunities to settle cases, to determine if trials need to be continued, etc., without having to unnecessarily subpoena witnesses]

STRAIGHT FELONIES – PRISON

Penal Code sections 211/213(a)(2): second degree robbery

“punishable by in imprisonment in the state prison for two, three, or five years”

straight felony, state prison

STRAIGHT FELONY – COUNTY JAIL – “LOCAL PRISON”

(non/non/non/non) (created in 2011 by realignment legislation, AB 109 etc.)

Health and Safety Code section 11352: sale of controlled substances

“shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for three, four, or five years”

1170(h)(2): straight felony, county jail, unless is serious or violent (it’s not), or has prior serious or violent conviction, or is required to register as sex offender, or is fraud/embezzlement over \$100,000

Penal Code section 134: preparing false documentary evidence

“is guilty of a felony”

Penal Code 18: generic felony: 16 months, 2 years or 3 years, in state prison, unless punishable under 1170(h)

1170(h): county jail

Unless court finds inappropriate in the interest of justice, court shall suspend a portion of the jail term; to be served on mandatory supervision. (Penal Code 1170(h)(5).)

“WOBBLERS”
(17(b), ALTERNATIVE FELONY/MISDEMEANOR)

Penal Code section 273.5(a) spousal battery

“shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not more than one year”

Penal Code section 17(b): misdemeanor/felony “wobbler”

Up to one year in county jail as a misdemeanor, or
2, 3 or 4 years in state prison as a felony

Penal Code 136.1(a): dissuading a witness

“shall be punished by imprisonment in a county jail for not more than one year or in the state prison”

Penal Code section 17(b): misdemeanor/felony “wobbler”

Up to one year in county jail as a misdemeanor, or
16 months, 2 years or 3 years in state prison (Penal Code section 18(a))

Vehicle Code section 10851(a): vehicle taking

“shall be punished by imprisonment in a county jail for not more than one year or pursuant to subdivision (h) of Section 1170 of the Penal Code”

Penal Code section 17(b): misdemeanor/felony “wobbler”

Up to one year in county jail as a misdemeanor, or
16 months, 2 years or 3 years in county jail as a felony

STRAIGHT MISDEMEANORS

Penal Code section 466.3: possession of device to break into vending machine

“is punishable by imprisonment in the county jail for not more than one year”

This is a misdemeanor – see Penal Code section 17(a)

Penal Code 242/243(a): battery

“imprisonment in a county jail not exceeding 6 months”

Penal Code section 148.9: false identity to peace officer

“is guilty of a misdemeanor”

Penal Code section 19: generic misdemeanor: up to 6 months county jail

Health and Safety Code section 11350: possession of controlled substances

“shall be punished by imprisonment in a county jail for not more than one year, except that such person shall instead be punished pursuant to subdivision (h) of Section 1170 of the Penal Code if that person has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 of the Penal Code or for an offense requiring registration pursuant to subdivision (c) of Section 290 of the Penal Code.”

straight misdemeanor unless priors, then 1170(h)(1) (generic felony: 16 months, 2 years or 3 years in county jail)

Vehicle Code section 12500(a): driving without a valid license

VC 40000.11(b): 12500(a) is a misdemeanor

VC 42002: generic misdemeanor: up to 6 months jail

Look in List of Violations in back of paperback Vehicle Code

WOBBLERETTES

Penal Code sections 17(d), 19.8: alternative misdemeanor/infraction

Includes PC 415 (disturbing the peace), 485 (retention of found property), 853.7 (failure to appear), certain trespasses, certain BPC alcohol offenses, VC 23109 (racing/exhibition of speed), 12500 (driving w/o valid license), 14601.1 (suspended license), 40508 (failure to appear), a few others.

Penal Code 490.1 – petty theft \$50 or less, at discretion of DA only (court cannot reduce over DA objection)

STRAIGHT INFRACTIONS

Fine only – no jail – court trial only (no jury trial) – no appointed counsel

See Vehicle Code sections 40000.1, 42001 – infraction punishment for Vehicle Code violations where no other penalty prescribed

EXAMPLE

Vehicle Code section 2800.2: (a) If a person flees or attempts to elude a pursuing peace officer in violation of Section 2800.1 and the pursued vehicle is driven in a willful or wanton disregard for the safety of persons or property, the person driving the vehicle, upon conviction, shall be punished by imprisonment in the state prison, or by confinement in the county jail for not less than six months nor more than one year. The court may also impose a fine of not less than one thousand dollars (\$1,000) nor more than ten thousand dollars (\$10,000), or may impose both that imprisonment or confinement and fine.

PROBATION

For some offenses, probation is prohibited, or can only be granted if the court finds it is an unusual case in the interest of justice. But for most offenses, the court has the option of suspending the imposition of sentence and placing the defendant on probation. Probation terms can include time in county jail. A defendant serving jail time as a condition of probation has not technically been “sentenced.” Instead, imposition of sentence has been stayed.

See Vehicle Code 23536 (minimum sentence for first time DUI) vs. 23538 (minimum probation terms for first time DUI).

mds 9/19/17

**OFFICE OF THE DISTRICT ATTORNEY
COUNTY OF VENTURA**

BASICS OF CRIMINAL PROCEDURE

**A non-comprehensive summary derived primarily from
C.E.B., CALIFORNIA CRIMINAL LAW PROCEDURE AND PRACTICE
(2016 edition)**

Revised 9/6/16, minor changes 9/19/17, minor changes 10/5/18

Chapter 3 - Right to counsel

DA generally does not have standing on issue of whether defendant will be represented, or by whom, unless it results in unreasonable request for continuance.

Marsden Motion (irreconcilable conflict in relationship with appointed counsel so that ineffective representation is likely to result). (*People v. Marsden* (1970) 2 Cal.3d 118.) Closed hearing, DA is excluded.

Defendant has federal constitutional right to represent himself without counsel. (*Faretta v. California* (1975) 422 U.S. 806, 836.)

Untimely *Faretta* motion, not made a reasonable time prior to the commencement of trial, is within discretion of the trial court. (*People v. White* (1992) 9 Cal.App.4th 1062, 1071.)

Defendant not permitted to misuse *Faretta* to unjustifiably delay a scheduled trial or to obstruct the orderly administration of justice. But motion even on the day of trial is not untimely per se...depends on availability of witnesses, prior opportunities to make the motion, etc. (*People v. White, supra.*)

If *Faretta* motion is granted, the defendant is entitled to a reasonable continuance to enable him to prepare for trial. (*People v. Hill* (1983) 148 Cal.App.3d 744, 756 (describing the “*Faretta* game.”))

Continuance beyond 60 day period of PC 1382 at request of counsel to prepare for trial proper over defendant’s objection, presuming effective counsel acting for best interest of the client. (*People v. Noriega* (1997) 59 Cal.App.4th 311, 321.)

Unavailability of defense counsel not good cause to continue beyond 60 days if based on failure of state to provide sufficient resources for criminal defense. (*People v. Johnson* (1980) 26 Cal.3d 557.)

Chapter 4– Arrest warrants and subpoenas

Ways we get defendants into court: (1) in custody, (2) released by law enforcement agency on citation, bail or own recognizance, (3) arrest warrants, or (4) appearance letters, with declaration in support of arrest warrant on file.

Subpoenas: Mail service valid if call in with DOB and CDL. (PC 1328d.) Minors served through parent/guardian (plus serve minor if 12 or older). (PC 1328(b).)

Peace officers served through their supervisor. (PC 1328(c)-(f).)

If residence of witness 150 miles or more from courthouse, judge must sign subpoena. (Penal Code § 1330.)

If witness is out of state, must use Uniform Act to Secure the Attendance of Witnesses From Without the State in Criminal Cases (Penal Code §§ 1334 et seq.)

Subpoena duces tecum (SDT): Law unclear if need affidavit (or declaration) showing good cause and materiality. (Compare Code Civ. Proc. §§ 1985(b), 1987.5; *People v. Clinesmith* (1959) 175 Cal.App.2d Supp. 911, 913-914; *People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1318 [affidavit or declaration required]; with *Michael B. v. Superior Court* (2002) 103 Cal.App.4th 1384, 1395-1396 [no affidavit required for grand jury SDT because CCP does not apply to criminal cases].) Records go to court, not to party. (*People v. Hammon* (1997) 15 Cal.4th 1117.) Opposing side has right to notice of nature of records subpoenaed and court may allow opposing side to be heard; court should review records before releasing them to party that requested them. (*Kling v. Superior Court* (2010) 50 Cal.4th 1068.)

SDT for business records: can return records by mail with declaration of custodian. (Evid. Code § 1560.) But declaration may be insufficient to establish elements of business records exception (Evid. Code § 1561.) (*Taggart v. Super Seer Corp.* (1995) 33 Cal.App.4th 1697, 1706.)

Chapter 5 – Bail

Own recognizance: Penal Code § 1270

Bail: Penal Code § 1275 and Marsy's Law (Cal. Const., art. I, § 28 (e)): protection of public, safety of the victim, seriousness of offense, criminal record, probability of appearance. Public safety and safety of victim are the primary considerations.

Cal. Const., art. I, § 12 (Proposition 4): right to bail except (a) "capital crimes when the facts are evident or the presumption great," or (b) felony involving acts of violence on another person, or felony sexual assault on another person, substantial likelihood release would result in great bodily harm to others, or (c) felony, threats of GBH, substantial likelihood would carry out threat if released.

Reluctance of local Court of Appeal to allow bail much in excess of bail schedule.

Senate Bill 10 (Penal Code § 1320 et seq.) – effective 10/1/19 – replaces cash bail with detain/own recognizance decision by Pretrial Assessment Services or judge

Chapter 6– Arraignment

Advice of rights, appoint counsel (or determine if pro per or have appointed counsel), entry of plea. If plead guilty, sentence or set for sentencing. If plead not guilty, set for trial (misdemeanor) or for preliminary examination/early disposition conference (felony). Release on bail/OR or remand to custody. Provide discovery in misdemeanor case.

48 hour rule: must be arraigned within 48 hours after arrest with or without warrant, not counting weekends and holidays. (Penal Code § 825.) No rearrests.

Chapter 7 - Pleadings, joinder and severance

Misdemeanor: Accusatory pleading is the complaint. Citation may serve as complaint if on Judicial Council form (Penal Code § 853.9, Veh. Code § 40513.)

Felony: (a) Indictment (grand jury), or
(b) felony complaint→preliminary examination→held to answer→information

Language rather than code section controls, even if wrong code section cited. (*People v. Thomas* (1987) 43 Cal.3d 818, 831.)

Must plead in conjunctive (“and”), may prove in disjunctive (“or”).
(*In re Bushman* (1970) 1 Cal.3d 767.)

All offenses in same course of conduct must be joined.
(*Kellett v. Superior Court* (1966) 63 Cal.2d 822.)

Joinder of charges: 1 defendant: PC 954: offenses connected in their commission or of the same class

Joinder of defendants: PC 1098.

People v. Aranda (1965) 63 Cal.2d 518: extrajudicial statement of one defendant which incriminates another defendant cannot be admitted in joint trial. Must sever, exclude statement, or sanitize to delete references to co-defendant

Amendment of complaint or information without leave of court before plea or sustaining of demurrer; motion required after that. (PC 1009.)

“Wobblers” (alternative felony/misdemeanors): PC 17(b)
Misdemeanor/infracton wobblers: PC 17(d), 19.8

Chapter 8 – Preliminary hearings (preliminary examination)

Probable cause standard

May demand offer of proof that defense witnesses will establish affirmative defense, negate an element, or impeach a prosecution witness. (PC 866(a))

PX may not be used for purposes of discovery (PC 866(b))

Hearsay admissible through qualified officer (Prop. 115/PC 872(b))

Chapter 9 – Grand jury

Functions of grand jury: indictment, civil watchdog, “accusation” against public official

Ventura County uses second grand jury for criminal investigations
(PC 904.6)

Chapter 11 – Discovery

Criminal discovery statute: Penal Code § 1054 et seq.

Pitchess v. Superior Court (1974) 11 Cal.3d 531 – motion by either side for records from peace officer's personnel file

Largely mooted by 2018 amendment to PC 832.7 (SB 1421) – public access to records re discharge of firearm, use of force resulting in death or great bodily injury, sexual assault, or sustained finding of dishonesty re crime or misconduct

Brady v. Maryland (1963) 373 U.S. 83 – prosecution's duty to provide defense with material evidence favorable to the accused

Chapter 12 - Public records

Public Records Act (Gov. Code §§ 6250-6268) (see back of Vehicle Code).
Legal Policies Manual: Must refer to Chief Deputy

Sealing of court records: California Rules of Court, rules 2.550, 2.552: specific procedures to file records under seal. Must file motion conditionally under seal, establish "overriding interest that overcomes the right of public access", etc. N/A discovery motions. (Based on *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178.)

Chapter 13 – Motion to set aside information or indictment (PC 995)

Information is not supported by probable cause shown at preliminary examination

Other procedural errors

Based on record of the preliminary hearing

Judge can remand for correction of "minor errors" (PC § 995a)

Motion to reinstate complaint after "not HTA" at PX (PC 871.5)--a "reverse 995 motion." An option to refiling.

Chapter 16 – Search and seizure motions

If stipulate that no warrants, it shifts burden to the prosecution

Argue all applicable exceptions to warrant requirement – can't raise new theories on appeal

Harvey-Madden rule: if officer relied on statement of another witness, need that witness or person who spoke to that witness

Importance of developing factual record. E.g., what facts supported conclusion that officer safety required a pat down? How long was the detention? When did officer learn that defendant was on probation (and you should provide court documents showing he was in fact on probation).

Chapter 17 - Motion to disclose informant's identity

Identity of informant must be material to guilt or innocence, not just to probable cause. (Evid. Code 1042 (c).)

Defendant must make showing that informant would provide material exculpatory evidence. (*Franks v. Delaware* (1978) 438 U.S. 154.)

Only then is defendant entitled to in camera hearing. Officer (not informant) appears at in camera hearing.

Chapter 18 - Selected pretrial motions

A. Criminal law motion time limits

Time limits for motions: serve and file motion w/ points and authorities at least 10 calendar days before hearing, opposition 5 calendar days, reply 2 court days. (Cal. Rules of Court, rule 4.111.)

Later discovered authority: file supplemental brief or provide court and counsel with cites ASAP (Ventura County Superior Court rule 11.03.)

B. Discriminatory prosecution

(*Murgia v. Municipal Court* (1975) 15 Cal.3d 286)

Laxity in enforcement of laws not a defense, but discrimination against racial groups, union members, first amendment, etc., can be a defense. E.g. *People v. Serna* (1977) 71 Cal.App.3d 229 (prosecution of only those who exercised First Amendment right of complaining about school system.)

Defendant must show that he would not have been prosecuted but for his membership in a constitutionally protected, or suspect, class, or his exercise of a statutory or constitutional right. (*People v. Owens* (1997) 59 Cal.App.4th 798 (no discrimination where felony prosecution of peace officer for endless chain

scheme, misdemeanor prosecution of civilians).) Must show plausible justification for discovery.

C. Recusal of prosecutor (PC § 1424)

- 10 days written notice to DA and AG
- conflict of interest renders it unlikely defendant would receive a fair trial
- PC 1424 was enacted in 1980 to change the standard of *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255. Under section 1424, an actual conflict must be shown; the mere *potential* for bias or the *appearance* of a conflict does not justify recusal.
- conflicting “personal” interest, or “personal or emotional involvement,” or “emotional stake” in the case (*People v. Superior Court (Martin)* (1979) 98 Cal.App.3d 515)
- institutional financial conflicts (*People v. Eubanks* (1996) 14 Cal.4th 580 (victim paid investigative costs))
- zealous advocacy OK; don’t need same kind of disinterest of judge or jury. (*People v. Parmar* (2001) 86 Cal.App.4th 781, 797)
- disqualification of particular prosecutor usually enough; whole office must be recused if conflict of top management (*Younger v. Superior Court* (1978) 77 Cal.App.3d 892 (Johnnie Cochran); *Deukmejian v. Superior Court* (1980) 110 Cal.App.3d 427, 434; *People v. Merritt* (1993) 19 Cal.App.4th 1573, 1581)

D. Retaliatory/vindictive prosecution

“raise the ante” after trial (seek increased punishment after exercise of right to trial or right to appeal).

Chapter 19 – Speedy trial

Statute of limitations:

PC 799-805.5

Generally 1 year for misdemeanors (PC 802)

3 years for most felonies and wobblers (PC 801, 805(a))

Statutory trial deadlines:

Preliminary hearing within 10 court days of arraignment (PC 859b)

Information filed within 15 days of holding order (PC 1382(a)(1))

Felony trial within 60 days of arraignment (PC 1382(a)(2))

Misdemeanor trial within 45 days of arraignment (30 days if in custody)
(PC 1382(a)(3))

If last day falls on Saturday, Sunday or court holiday, deadline extended
until next court day

Continuance *beyond the statutory period* by request or consent: trial must
begin on new day or within 10 days thereafter

Preaccusation delays, post accusation delays: there is a body of case law based
upon due process (14th amendment), speedy trial (6th amendment), and California
Constitution, all with different standards

Chapter 20 – Continuances

Good cause must be shown, 2 days notice required unless good cause for non-
compliance (PC 1050; see PC 1050.1, 1050.5, 1051.)

Good cause not required for prosecution to obtain continuance within time.
(*People v. Rubaum* (1980) 110 Cal.App.3d 930.)

Chapter 21 – Disqualification of judge

Need approval of supervisor per Legal Policies Manual to disqualify (“paper”) a
judge

CCP 170.6 (peremptory challenge): 1 per side. Must be before contested issue of
fact decided. Deadlines.

CCP 170.1, 170.5 (challenge for cause): Judge has personal knowledge, judge
served as a lawyer for one of the parties, financial interest, judge or family
member is a party, or “a person aware of the facts might reasonably entertain a

doubt that the judge would be able to be impartial,” including bias or prejudice against a lawyer in the proceeding.

Chapter 22 – Line-ups

Defense counsel is an observer

Best to comply with reasonable, practical suggests of defense even if not required.

Jury is likely to think you should have, will give you credit if you do, hold it against you if you don't.

Chapter 23 – Confessions and admissions

This is a huge area of law that warrants a separate lecture.

If Miranda violation, can use for impeachment.

If statement involuntary, cannot be used for any purpose.

Listen to tape to make sure summary in report is accurate.

Mechanics of Miranda hearing: go through the card, statement by statement.

Officer not make any promises or threats.

Officer give opinion that waiver was free and voluntary.

Griffin error: *Griffin v. Calif.* (1965) 380 US 609: cannot comment on defendant's failure to take the stand.

Doyle v. Ohio (1976) 426 US 610: cannot comment on defendant's failure to make statement to police.

Corpus delicti rule: Statements of defendant insufficient by themselves to prove guilt; need some other evidence to establish every element of the crime. Identity of defendant is not an element of the crime.

Chapter 24 – Prior convictions, uncharged misconduct

Alleged priors for sentence enhancement

Generally are bifurcated from main trial

Judge hears challenge to constitutional validity

Jury determines identity, whether suffered conviction

Uncharged priors for credibility of testifying defendant or any witness

Felony convictions (Evid. Code § 788)

Moral turpitude misdemeanors: conduct, not conviction is admissible.
(*People v. Wheeler* (1992) 4 Cal.4th 284.)

Court may “sanitize” priors of defendant if too similar to current offense

Court’s discretion under Evidence Code § 352

Priors to prove conduct

Evid. Code § 1101(a): priors inadmissible to prove disposition to commit crime

Evid. Code § 1101(b): admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident

Evid. Code § 1108: prior sexual offense admissible

Evid. Code § 1109: prior domestic violence

Proceed with caution regarding priors on issues of credibility or to prove conduct.
Get a ruling from the court first.

Chapter 25- Discharge, dismissal, mistrial

PC 1385: dismissal on motion of DA or on court’s own motion.

Grounds: cannot be proven beyond a reasonable doubt, or furtherance of justice.
Includes right to strike priors, except serious felonies (PC 667)

“Discharge,” not “dismissal” if no charges have been filed.

One dismissal for misdemeanors. (PC 1387)

Two dismissals for felonies. (PC 1387)

Three dismissals for violent felonies if excusable neglect. (PC 1387.1)

Chapter 26 – Pleas and case settlement

PC 1016: Guilty, not guilty, nolo contendere (no contest), former conviction or acquittal, once in jeopardy, not guilty by reason of insanity.

Waiver of rights for guilty or no contest plea: nature of charges, direct consequences (including minimum and maximum punishment), right to jury trial, confront and cross-examine witnesses, privilege against self-incrimination. (*In re Tahl* (1969) 1 Cal.3d 122; *Boykin v. Alabama* (1969) 395 US 238.) Factual basis for felony.

No contest plea same as guilty plea for a felony. (PC 1016(3).)

Conviction of Vehicle Code offense not collateral estoppel or res judicata in a civil case. (Veh. Code § 40834)

Ventura County no plea bargaining policy

Chapter 27 – Deferred entry of judgment, diversion, preplea probation reports

Various diversion statutory schemes – starting at PC 1000

Ventura County judges never order preplea probation reports

Chapter 28 – Trial by court or jury

Court trial requires waiver of jury by the People, by the defendant personally, and by defense counsel. (Cal. Const., art. I, § 16.)

Per Legal Policies Manual, need supervisor approval to waive jury for (1) special interest case, or (2) felony.

If have good case and good judge with practical ability to evaluate evidence, normally should be willing to waive. Ask other DDAs about judge.

Advantages of court trial: faster, easier (more stipulations, shorter cross, etc.), certain verdict (no hung jury), easier on witnesses, substantially less chance of reversal. Disadvantages of court trial: case may have more appeal to a jury.

“Slow plea” (submission of case on transcript or police report): tantamount to a guilty plea, must waive constitutional rights. (*Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 605.) We have a form for this. (S/WPC/Brief Bank/Waiver of Constitutional Rights for Submission on Transcript)

Chapter 29 – Jury selection

A. Challenges for cause (actual bias, implied bias): CCP 228, 229.

B. Peremptory challenges (Code Civ. Proc. § 231.)

Punishable by death or life: 20 per side

Other felonies: 10 peremptory challenges per side, plus 5 on each side for each additional defendant.

All misdemeanors: 6 per side, plus 2 for each additional defendant

Alternate jurors: 1 per defendant/side (Code Civ. Proc. § 234.)

C. Voir dire

Indicate to jurors that they can give information confidentially, out of presence of other jurors, public, news media

Jury trial reports on computer

Wheeler considerations

Chapter 30 – Trial preparation

Review reports

Interview and prepare witnesses

Visit scene, have officer visit scene

Anticipate evidentiary issues

Prepare argument, instructions

Motion in limine?

Trial brief?

Chapter 31 – Selected trial motions

Judgment of acquittal

1118 PC - court trial - People not prove beyond a reasonable doubt

1118.1 PC - jury trial - not sufficient to uphold on appeal - substantial evidence of each element

Granting of 1118, 1118.1 motion not appealable (double jeopardy; PC 1118.2)

Chapter 32 - Jury instructions

Cal. Rules of Court, rule 2.1050 (e): Use of CALCRIM is “strongly encouraged” and “recommended” unless “a different instruction would more accurately state the law and be understood by jurors.” “Whenever the latest edition of the Judicial Council jury instructions does not contain an instruction on a subject on which the trial judge determines that the jury should be instructed, or when a Judicial Council instruction cannot be modified to submit the issue properly, the instruction given on that subject should be accurate, brief, understandable, impartial, and free from argument.”

Example of innocuous special instruction

Chapter 34 - Prejudgment motions

Motion for new trial (PC 1179-1182)

Before judgment or probation order entered

Judge as “13th juror” (determine if there is sufficient credible evidence to sustain the verdict) (*People v. Robarge* (1953) 41 Cal.2d 628, 634.)

Appellate court will uphold grant of new trial if any conflict in the evidence (*People v. Espinola* (1940) 38 Cal.App.2d 482, 485.)

Jury misconduct

Chapters 42-45- Writs and appeals

Appellate Dept. of Superior Court is now Appellate Division (misdemeanors)

California Court of Appeal, Second Appellate District, Division 6 (Justices Gilbert, Yegan, Perren, Tangeman)

Published opinions of California Supreme Court and all districts of the Court of Appeal are binding on superior court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455)

State courts are not bound by decisions of lower federal courts, even on constitutional issues. (*People v. Tremayne* (1971) 20 Cal.App.3d 1006, 1014.)

People's appeals: grounds

Felony: PC 1238 (60 days)

Misdemeanor: PC 1477 (30 days)

Dismissal before jeopardy, sentencing error, errors after judgment

Defense appeals

Felony: AG handles

Misdemeanor: DA handles

People's writ of mandate/prohibition

Setting aside portion of information/indictment (PC 1118)

Discovery orders

Evidentiary rulings are not generally reviewable by either side

Grant of motion to suppress evidence (PC 1538.5 (i) & (o)).

Preserving the record for appeal/writ:

Object on the record. Document chambers discussions.

Raise relevant grounds on the record.

Get relevant facts and evidence on the record.

Filing of writ does not automatically stay trial court proceedings.

Chapter 48 – Mental competence

PC 1368—suspend criminal proceedings, institute civil proceedings to determine if competent to stand trial

Chapter 49 – Immunity

Felonies: court can order **use immunity** or **transactional immunity**, even over objection of witness (PC 1324)

Misdemeanors: transactional immunity, only if witness agrees (PC 1324.1)

Per Legal Policies Manual, requires memo and supervisor approval

If have immunized, voir dire on this

Draft letter making it clear no immunity for perjury

If expect witness to take the 5th and plan to give immunity, get necessary approval, have forms ready

Advice: Stay on the well-trodden path

