

A  
Defendant's Guide  
to the  
Criminal Court

BY

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**FOR THOSE IN TROUBLE IN SAN FRANCISCO  
EXPECT TO SEE ATTORNEY  
JAMES FARRAGHER CAMPBELL  
BESIDE THEM IN COURT**

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He has delivered numerous lectures throughout the country and has authored over thirty published articles on criminal defense practice.

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## Foreword

I see my career in criminal defense before my eyes on a daily basis. I have mementos of everything significant either hanging on the walls or set about throughout the office. And, as I look around my office, I am visually reminded that I have seen the best of times and the worst of times in criminal defense.

I have represented truly falsely-accused individuals; and, I have represented people who have clearly violated the law. Some of those were found guilty, some were spared a much worse sentence than they might have otherwise received, and some walked away from a conviction. When people find themselves charged with a criminal act I am usually the lawyer they hope to retain.

One reason I have written this small book is to properly inform you of what you may expect if you've been arrested for a criminal charge and what you can do before retaining a lawyer.

You may be asking yourself, "Why would you provide so much valuable information for almost nothing?" The answer is actually quite simple: Trust.

Since 1975 I have attempted to develop and maintain an excellent reputation as a criminal defense lawyer who does everything legally possible to win your case, I want to be a lawyer you can be trust both ethically and professionally. I believe this book is a good start to building that trust.

Some law firms or lawyers do not want you to know too much about what they actually do or can do in your defense. By providing this uncensored information now, I believe you will be better-educated about your case and about the lawyers who handle criminal cases. I know that if I give you sound information on what to look for in an attorney as well as how to evaluate your case, you will be in a better position to select the best lawyer for yourself.

## INTRODUCTION

If you have been arrested for the first time, then this book is intended for you.

In truth, nothing can really prepare you for what you are about to experience because no matter how many times I've gone to criminal court it is never the same twice. There are, however, some constants which can guide you. Armed with this knowledge, you may be better-prepared to cope with potential difficulties and you will also be in a better position to assist the lawyer you retain in defending your case.

Please remember that this is not intended as a legal text on criminal law, criminal procedure, or a mini-primer on defending a criminal case. It will not explain all the procedures that may occur in your case. It is intended as a guide for you to understand the basic operations and procedures that you are likely to encounter in the court system. Also, keep in mind that most good lawyers are good because they will be as flexible and creative as possible within the bounds of the law. Therefore, no hard and fast principles that can be explained in detail will be found applicable in all criminal cases.

As you probably already know, there is a lot of information available to you on the Internet. In fact, that is probably how you came to order this book. Anyone arrested can obtain a wealth of information to assist them in understanding their case and in selecting defense counsel. Indeed, the average person today can make a much more informed decision on their case and on the lawyer they want to retain due to the information available on the Internet.

One major *caveat* should be noted: Information is not knowledge! While a great deal of information is available on the Internet, keep in mind that the "information highway" is, like any other highway, an expedient way of getting to a destination but never the destination itself.

Similarly, while this book endeavors to alert you to the legal basics of a criminal defense case, **it is not a substitute for the legal advice of competent counsel**. It is my hope that this book will help you understand the nature of a criminal charge and the options available to you as you exercise your Constitutional rights to a competent attorney and a fair trial. After over thirty three years of practice in the criminal courts, it is my observation that your Constitutional rights don't mean much if you don't have a good lawyer.

# CHAPTER 1

## YOUR ARREST and THE CHARGES

It can happen at any time and at any place - you have been arrested - the nightmare begins. All of a sudden you are no longer in your world, the cops are now in charge, and it's scary.

If you have been arrested for the first time, I am sure you will admit it was a devastating experience. You were probably treated as a "common criminal". While you certainly don't think of yourself as such, this is the viewpoint of most police officers. It is also likely to be the viewpoint of most prospective jurors. Remember, the police see criminal conduct on a daily basis and, after a while, they become somewhat blasé about the personal experience you have undergone.

Your lawyer will definitely need to know any statements you made to the police as they will, in all likelihood, be used against you in court to prove the necessary elements of the charges. All of this information is valuable. You should do your best to recall in exact detail everything that took place and try to recall all police contact leading to, during and following your arrest.

When the police officer decides to make an arrest, he or she is actually saying: "In my opinion, I think this person was involved in a crime." What will be on trial is the prosecutor's evidence that will support the officer's opinion.

All of the evidence which will be used against you in court will be either circumstantial evidence (evidence that points to a conclusion) or direct evidence (evidence that is itself proof); and it will be geared to support the officer's opinion that you are guilty.

From a legal standpoint, your lawyer will analyze your detention and the arrest to determine whether there was legal probable cause to support either. This is one of the very first legal issues that will be explored by criminal defense counsel. Your

contact with the police is of great importance to your lawyer in structuring your defense.

Certain legal rules govern the arrest process and your lawyer will analyze the controlling law to determine if a valid legal arrest has taken place and what remedies exist if you were not legally arrested. The details of the arrest are important for many different legal reasons; and, your lawyer will be looking to legal defenses which may flow from the arrest process itself, either substantively or procedurally, that will block the prosecution.

An arrest can be made in several ways: 1) an on-view arrest; 2) on probable cause; or by a warrant for your arrest.

The on-view arrest is how many arrests are made. This occurs when a police officer sees you commit a crime in his or her presence and immediately apprehends you for that offense. Generally this is how almost all misdemeanor arrests are made. There are rules that must be followed in these cases that your lawyer will check to see if the arrest was properly made. If appropriate certain motions are available to dismiss the case if the proper procedure was not followed.

The second manner of arrest is if the police have developed evidence that leads him or her to believe you have committed a felony, even though they did not actually see you commit the crime in their presence, and then come and arrest you. Sometimes these types of arrests are also accompanied by the execution of a search warrant. Such is very common in drug cases.

Lastly, an actual arrest warrant may be issued ordering your arrest. This can be from a court when you fail to appear for a court date, it could be from a court following a presentation of evidence to a magistrate. Or it also can originate from a Grand Jury Indictment which in turn orders your arrest.

## **WHAT IS THE CHARGE?**

The absolute first thing your lawyer will want to know is what are you charged with? Is it a felony or a misdemeanor? The exact criminal charge will carry the exposure to a certain sentencing range and that will determine to what extent your legal exposure is to custody time.

All crimes and public offenses in California are divided into felonies; misdemeanors and infractions.

A felony is defined as a crime which is punishable with death or by imprisonment in the state prison. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions.

Every felony offense in California carries a specific sentence that is set forth in the Penal Code with a sentencing range of three terms: a lower term, a middle term and an upper term. As an example, the crime of rape, a violation of Penal Code Section 261, carries the punishment of state prison for a term of three years (the lower term), six years (the middle term) or eight years (the upper term). Any felony where a specific term is not stated in the Penal Code or where it simply states the punishment to be "state prison" means a term of 16 month, 2 years or 3 years.

A Complaint will be filed by the district attorney's office and the Complaint will state in legal language the exact charges you face in court. The Complaint is the name given to the paper setting out the alleged violations of law. The Complaint is the legal document that brings you to court and starts the legal process against you. The Complaint will be the legal documents that will start off the case against you in court, whether you are charged with a felony or a misdemeanor. The only exception to this would be if you were indicted by a Grand Jury. This process of Grand Jury Indictment is rarely used for the most part and usually come into play modernly in political sensitive cases only. If you are charged with a federal felony then there is usually a grand jury indictment seeking your arrest.

A Complaint could also contain what are known as enhancements. These enhancements are also likely if you have prior convictions, prior prison terms; if your case involves great bodily injury and other types of aggravating criminal conduct. Such enhancements will have to be alleged by the prosecutor and answered by the defendant.

## CHAPTER 2

### MAKING THE RIGHT DECISION

O.K. you have been arrested. Now it is time to get it together and figure out the best thing to do. The first thing you should definitely do is set up a consultation with a criminal defense attorney. If you woke up with severe chest pains you would see a doctor! Well this is much the same – see a lawyer. But by all means, see a criminal defense lawyer! If you had chest pains would you see a podiatrist?

The big surprise is that if you went to see a doctor to determine what might be wrong with you, you would pay. To see the best criminal defense lawyers in the country will not cost you a dime. All you are spending is your time. Don't be a fool, talk to a criminal defense lawyer.

When you do arrange for a consultation, be sure that you are going to interview with the actual lawyer who you are considering for representation. As I said, you usually can speak with some of the top criminal defense lawyers in the country without having to pay a consultation fee. So, why not start at the top. Go see the best. My advice, of course, is to speak with a criminal defense lawyer and not a lawyer who occasionally handles criminal cases.

When I first started practice as a criminal defense lawyer in 1975, a lot of criminal cases were handled by general practitioners because, for the most part, the cases could easily be negotiated. With the advent of no plea bargaining positions, new statutory crimes and advancements in chemical and scientific testing, old avenues of defense and areas of settlement have been blocked. Now criminal defense has become a “specialty.” Today criminal defense is one of the most difficult areas of law. Public sentiment has moved the courts and the legislature to impose much stricter laws and penalties criminal trials have become much more difficult due to the public's initial emotional mind set against those accused of crime.

Any lawyer who undertakes the defense of a criminal case today does not have an easy task. We all hope that our courts apply the law even-handedly to all citizens accused of a crime in all types of criminal cases; but, in reality there are many judicial and legislative exceptions that apply to virtually all phases of substantive

and procedural law in criminal cases which does not make the defender's job easy. Make no mistake, the general public perception, stiffer penalties, relaxed constitutional safeguards and an attitude adjustment in both the legislature and the courts has caused the criminal trial to evolve into an area suited only to those well-versed and well-trained in the complexities of criminal law.

The task of criminal defense today requires a lawyer not only with extensive legal skills, but also with a solid understanding and knowledge of the scientific and technical aspects which will be encountered in even the most routine case. Any lawyer today who views criminal defense as easy is either ill-prepared, naïve, or both. No longer is it assumed that a first time offender will get a grant of probation. A conviction today may very well result in mandatory incarceration, a substantial fine, a lengthy period of community service, a criminal record and a whole litany of collateral consequences that impact employment and travel.

## **SLECTING A LAWYER**

When you think about selecting a criminal defense lawyer, be careful. There are some law firms that claim to provide representation all over the state. Do you really think one lawyer is going to be all over the State of California handling cases? In these situations, it is likely that you will be assigned to another lawyer who has an office in the area where your case is located. The referring lawyer will then probably take some kind of a referral fee to turn your case over. There are a few firms that spend a great deal of money on advertising and have a standing relationship with local lawyers who, in turn, are assigned your case. You can easily spot these lawyers and firms in that they each advertise separately and jointly. In other words, lawyer X is listed as a member of law firm Y, but you see lawyer X's advertisements for his own office standing separate and apart from law firm Y. You are probably paying more for the referral from law firm Y to lawyer X, than if you hired lawyer X directly.

When you have your interview, the interviewing lawyer should be able to give you a case evaluation and intelligently explain how he or she would go about defending your case. Any lawyer who spends time telling you how good they are is not telling you how they would go about trying to win your case. Get information on what the lawyer perceives to be the issues in your case and what chances you have in either winning the case or getting a favorable settlement.

Also, if you are interviewing a prominent criminal defense lawyer, ask what his or her actual legal involvement in your defense case will be? Is he or she just overseeing the case? Is he or she available to you for ongoing case consultations during the litigation? And, the big question, will he or she actually go to court on your case and personally be available for trial? What is the benefit of a “big name” if that individual is not there at your side? What is the benefit of an excellently-skilled lawyer if he or she is going to have an associate try your case?

You should also be sure to ask about the firm’s procedure on how you will be kept informed about the status of the case. Will you be receiving letters and copies of all motions filed in your defense, copies of all police reports and all lab reports? You want to be sure that you will be kept well-informed on the progress and developments in your case at all times. These are difficult cases and, as the case proceeds, decisions will have to be made. You cannot make an informed decision if you are not properly informed.

**THIS IS IMPORTANT.** You simply must set aside some time to undertake this task. The lawyer you hire will have a large part to play in determining the outcome of your case. The outcome of your case can and will impact you for many years to come.

Traditionally, you might ask friends, relatives, business associates and or other lawyers you might know for the name of a good criminal defense lawyer. This, however, also reveals to others that you have been arrested and many people do not want this known. This is certainly not unusual, but it is more important to get good representation than to worry about your embarrassment. However, you do have a great research tool available to you – the Internet!

Remember, anyone can put up an Internet web site. It can say almost anything and the lawyer certainly wants you to think that they are great. Look to the lawyer’s reputation and standing in the criminal defense bar. That is what should be on the web site, not a lot of self promotion and TV appearances. There is absolutely no substitute for experience and reputation. A lawyer’s knowledge and reputation is really all that they have to sell. Naturally, those lawyers with the best track record, experience and reputation will end up costing the most, but not always. Think about the value you are getting versus the costs.

## Legal Fees And Costs

Again, no surprise, you will usually get what you pay for just like any other service. The biggest names in the business will charge the most. But be careful; be sure those lawyers will actually be the lawyers working on your case. Unfortunately, there are a few-well known lawyers that attract clients but then have other associates do the actual legal work. Be sure you speak with the lawyer you want and make sure that lawyer will be available to you for trial. There are some well-known lawyers who never even interview a prospective client. They have a law clerk, an investigator, or a paralegal do it. That's like a nurse interviewing you for open heart surgery. Why would you settle for that?

### A Word of Caution on Low-Fee Lawyers

There are lawyers who can quote you a low fee, a very low fee in some cases. But you should know what you are getting for the fee. Are you going to get the quality and time commitments that are needed to be taken in your defense? They may be doing that because they have no intention of spending the proper amount of time defending your case in court. Such an attorney may have a strong financial incentive to avoid a number of court appearances and/or conduct the proper case preparation. These types of attorneys rarely, if ever, go to trial.

Favorable pretrial settlements come about through a strong advocate. A strong advocate is one that knows how to successfully prepare a case for trial and has successfully tried a great number of criminal cases. This is the lawyer's great strength – his or her professional standing and reputation.

Again, be careful. A large fee does not necessarily guarantee a good lawyer. Always check the lawyer's standing in Martindale-Hubbe. It is the oldest directory of lawyer's standing and reputations in the legal community. It is voted upon by other lawyers. So you have, in essence, lawyers ranking other lawyers. Some cities also have magazines, such as "San Francisco Magazine", "Los Angeles Magazine", etc. which from time to time, publish a "Super Lawyers" section. Here, again, this is a survey of lawyers judging or recommending other lawyers that they would choose for a particular legal problem.

Search the listing of legal organizations, such as the American Board of Criminal Lawyers, [www.Abcl.us](http://www.Abcl.us). This is an excellent resource for criminal lawyers because

this is the most prestigious group of criminal lawyers in the country. But you should be careful of pure commercial sites that simply list lawyers. These lawyers usually pay a fee to be listed and it really does not provide any guide to their abilities except that this is an area of law in which they want to get cases. The commercial lists are the equivalent to a yellow page ad in the phone book; it gives you a starting point.

## Chapter 3

# YOUR CASE IN COURT



The citation you signed when you were released from jail, or your bail bond notice, requires that you appear in court for your arraignment. At the arraignment, the judge advises you of the charges that have been filed against you by the prosecution and informs you of your rights.

### Your Rights In a Criminal Case

Your rights in a criminal case in both state and federal courts are as follows:

#### **RIGHT TO AN ATTORNEY**

You have the right to be represented by an attorney at all stages of the criminal proceedings. If you cannot afford an attorney, the court will appoint one for you; usually this will be a public or a federal defender.

#### **RIGHT TO A TRIAL**

You have the right to a trial on the charge against you. This also includes the right to trial on any alleged prior conviction or other enhancements that may be charged against you as well. The right to a trial is the right to a trial by a jury of twelve people from your community, all of whom must agree to a verdict before you may be found guilty.

#### **RIGHT TO OBTAIN EVIDENCE**

You have the right to subpoena into Court evidence and witnesses on your behalf. You also have the right to testify on your own behalf if you want to do so.

#### **RIGHT TO CONFRONTATION**

You have the right to cross-examine and challenge any witnesses against you.

#### **RIGHT AGAINST SELF-INCRIMINATION**

You have the right against self-incrimination, which means the right to remain silent and the right not to testify against yourself. The prosecutor cannot call you to testify against yourself in court.

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Be aware that these rights can be little more than platitudes unless you have a dedicated and resolved advocate at your side to properly guide you in their skillful use and exercise. They are there for your protection as well as for the protection of the collective members of our society.

Many times, if you are charged with a misdemeanor, an attorney will waive your personal appearance at the arraignment under Penal Code Section 977. This allows you to appear before the court through your lawyer only, saving you the time and trouble of having to come to court. The case is then set down for further proceeding, usually a pre-trial conference date for several weeks later. If you are charged with a felony then you must personally appear in court at the arraignment. A waiver under 977 may be granted, but that will be up to the judge.

Once the court process begins, you will be before the court, which means your case will be in front of a judge. The judge is of critical importance to your case. The power that the judge has over your case is considerable. In the federal court that power is almost absolute.

The judge's role in the case is to decide questions of law and to apply the law as fairly as possible to your case.

At the arraignment, the judge will take a plea, either from you or through your lawyer, of "not guilty." If you do not have a lawyer at the arraignment, the judge more than likely will not ask you for a plea until you have had an opportunity to consult with and retain counsel.

The only things the judge can do at the arraignment are accept your plea, set bail and continue the case for further proceedings. The judge will not entertain any discussions as to the merits of your defense to the charges; those issues will be taken up at a later date in the litigation.

Later in the course of the case, the judge will hear all pretrial motions that will be filed by your lawyer. The lawyer will conduct legal research and determine what are the appropriate motions to file that best serve your defense. These may include motions to limit or exclude certain evidence and to discover the evidence that the prosecutor intends to offer against you at trial. If there are such motions, and usually there are, these will be later argued by counsel and ruled upon by the judge.

The success or failure of these various motions will, in large part, determine the legal strength or weakness of your case. The judge will then be in a position later, at the pre-trial conference, to attempt to settle the case by discussion with both the prosecutor and your lawyer. This is when plea bargaining and/or sentencing bargaining usually starts to take place. The judge presides over the trial ruling on legal questions, while leaving questions of fact to be determined by the jury.

Plea-bargaining is a compromise between the parties, the prosecution and the defense, on what plea you agree to enter in exchange for charges being dismissed. A plea bargain also usually involves a sentence bargain as well. Sentence bargaining is an indication from the judge as to the sentence which would be imposed if you agreed to plead guilty to a certain charge. Even if you agree to a "deal" with the prosecutor, the plea and/or sentence will still have to be approved by the judge. The judge has the final word on sentencing unless the prosecutor is going to dismiss the case in its entirety.

If your case is not settled or dismissed, then you will probably be going to jury trial. The judge presides over the trial by ruling on legal questions, while leaving questions of fact to be determined by the jury. This is perhaps the area where the judge has the most power over your case. By the time the trial begins, the judge has determined how the trial will be conducted and what evidence will be received based on pretrial rulings.

The trial judge may be the same judge you appeared before for the pretrial proceedings, or it may be a different judge who has never participated in the case before. In some courts, the judge handles the case all the way through from start to finish; while in other counties, the court has set up specialized departments, with each having a part of the case's procedure to handle. In those courts, certain judges are assigned to preside over the trial of the case with different judges conducting the pretrial proceedings.

As electrifying and exciting as a jury trial may be, a good criminal defense lawyer wants to keep his or her client out of court as much as possible. But, sometimes a criminal case will have to go to trial simply because there is no other way to win except trial. If a trial is requested by you, then you will, of course, have to personally attend. The length of a criminal trial will of course depend upon the type of case you have. Most misdemeanors usually can be tried with two to four days, depending again on the charges you face. A felony trial may take between five to ten days, again depending upon the type of case; and, some cases may take weeks and even months to try. All is dependent upon the type of case and the number of witnesses call. The longest trial I have ever tried was a triple murder case that took nine months.

## PRETRIAL PROCEEDINGS

The next subject I want to cover is “pretrial proceedings”; in other words, all the court proceedings that take place prior to the actual trial of your case.

Pretrial procedures most often relate to the filing of motions that can dispose of the case without the necessity of a trial. However, there are other pretrial motions used for purposes of preparing the defense that do not go directly to a dismissal of the case. An example of this is the motion for pretrial discovery. Here, the lawyer seeks to ensure that you are in possession of all of the evidence that exists in the case which the prosecution has in its possession. If a discovery order is violated, some sanction may be imposed by the court but, in all probability, it will not result in a dismissal of the case. However, a violation of discovery rules may place the prosecution in a tactically-poor position which sometimes can lead to a favorable settlement.

**YOU ARE WELCOME TO READ BOTH SECTIONS ON MISDEMEANORS AS WELL AS FELONY CHARGES WHICH FOLLOW; BUT YOU WILL PROBABLY ONLY BE INTERESTED IN THE CHARGE WHICH YOU ARE PRESENTLY FACING.**

**IF YOU ARE CHARGED WITH A FEDERAL OFFENSE, READ EITHER THE MISDEMEANOR OR THE FELONY SECTION FOR FEDERAL CASES THAT FOLLOW.**

## MISDEMEANOR

After you were arrested, the police booked you into custody. Typically, you were released on a citation release, without having to post bail. A citation release is just like you posting bail. Your signature on the citation operates as a promise for you to appear on the date indicated on the citation. If you fail to appear as promised, this, in and of itself, is a separate offense apart from the criminal charge for which you were originally arrested.

The other way you could have been released is through a bail bondsman or by you yourself posting bail. If you make all your required court appearances, the bail bond will be exonerated, e.g., set aside, at the end of the case.

If you posted your own bail directly with the clerk of the court, or did so through a friend or relative, then at the end of the case, and assuming you have not failed to appear, you will receive the entire amount of the bail back. If you posted a bond using a bondsman, then you will not receive any refund because the premium you paid was for the cost of the bond.

Your first appearance before the court will be the arraignment. As stated earlier, the arraignment is when the judge informs you of what offenses you are specifically charged with, and you inform the judge how you are going to plead. The court will not hear any defenses to the case at this time. If you already have a lawyer, then a plea of “not guilty” will probably be entered. If you do not have a lawyer by the time of the arraignment, you can ask the judge for a continuance to obtain the services of an attorney. The judge will generally not ask you to enter a plea at this time without counsel and will generally give you reasonable time to secure the services of an attorney.

If you cannot afford to hire a private attorney, then you can request that a public defender be appointed to represent you.

Arraignment procedures can vary from county to county. For example, in some counties, the court will set the matter for a pretrial conference as well as a jury trial date right at the arraignment. Other courts may set a date for a pretrial conference to explore the possibility of disposition and settlement before setting a jury trial date. Whatever the local court practice, the matter is going to be continued for the possibility of a disposition short of trial. Generally, the courts hearing misdemeanor cases are the busiest of all the trial courts in the county, so both the judge and prosecutor will want to see if a settlement can be reached in your case.

After the arraignment, the attorney will be pursuing discovery. The discovery process is available for you to determine what evidence the prosecutor has to prove the charges. Your lawyer will want to see if the prosecutor can prove all of the elements of the crimes you are charged with committing. Information turned over by the prosecution on discovery enables your attorney to explore any and all legal claims, which may prevent evidence from being used at the trial.

Sometimes the evidence may have been obtained in violation of your right to privacy; your rights to be free from unreasonable search and/or seizure. Statements may have been obtained against your right against self-incrimination, or you're right to counsel. There are many other areas of protection that your defense lawyer will want to litigate and determine before you are asked to stand trial. The determination of these issues may affect the outcome of the case and possibly lead to a more favorable settlement. If this is the case, then these points will be the subject of certain motions to exclude or limit evidence at trial. These motions, in turn, will then be the motions which will comprise your pretrial motions. These will then almost always be heard prior to trial and, sometimes, even prior to a pretrial conference. In some situations, defense counsel may want to have the pretrial conference heard first to discuss these motions with the prosecutor and the court in hopes of reaching a settlement offer. Local rules of court may dictate when such motions can be made and this will factor into counsel's decision of which motions to file.

Even if the pretrial motions do not totally dispose of the case by a dismissal, the motions can still have a possible favorable impact by limiting certain evidence or strengthening a position which will come up at jury trial. Sometimes a motion may "lock-in" certain testimony, which later becomes invaluable at trial.

Once the pretrial motions are heard and ruled upon by the judge, the case should be ready to proceed to trial. Sometimes the court, or your attorney, will want to set a further date for the purpose of one last pretrial conference. This period of time between the hearing on the motions and the setting date can give the parties one last chance to re-evaluate their positions and decide whether or not to run the risk of trial.

This is probably a good place to talk about the prospect of trial and what risks and consequences are attached to a decision to proceed to trial.

Factored into this decision are the following considerations: Will a pretrial disposition involve jail time? Will the disposition result in you having a criminal record? Could the disposition expose you to civil damages? (If you were charged with an offense which was in any way connected to any injuries or property damage, you might escape jail, but end up paying a lot of money for the damages from a civil suit or claim). Also, a major concern to most people is the impact a disposition will have on their record. You should take all of these factors into consideration in deciding whether or not the pretrial offer is a good one.

A plea bargain is an offer extended by the prosecutor to settle the case for a negotiated disposition. The prosecutor may be willing to drop certain charges if you plead guilty to other charges. The prosecutor can recommend a certain sentence if you plead, but the ultimate sentence imposed is always up to the judge.

The judge, of course, must sentence you within the bounds of the law; i.e., the judge cannot give you a greater sentence than allowed under the statute, nor can the judge give you a lesser sentence than the statutory minimum. As an example, certain offenses require that you spend a minimum amount of time in jail. The judge cannot sentence you to less than the amount of time set by statute.

Any plea bargain that the prosecutor extends ultimately will have to be accepted or approved by the judge. In most cases the prosecutor is familiar with the particular judge and knows what he or she will usually impose as a misdemeanor sentence. Almost routinely, the judge will approve such a misdemeanor disposition unless he or she feels it is very much out of line with the facts surrounding the offense.

The concept of plea-bargaining comes in two forms. The first, as discussed above, is that you will accept a plea to a charge, and in return, other charges will be dismissed. For example, in exchange for a plea to “trespass”, the “shop-lifting” charges would be dismissed. You could thereby avoid the consequences attached to the shop-lifting charges.

There is another aspect to plea bargaining: Sentence bargaining. Only the judge has control over the exact sentence imposed. The prosecutor cannot control the sentence, only the charge to which you agree to plead. Occasionally, the judge will impose a sentence different from what the prosecutor seeks. If this situation occurs,

you will, of course, consult with your lawyer as to your options. It may be that such action by the judge will alter your decision about pleading guilty.

The dynamics of plea-bargaining, in both forms of a plea and a sentence, take place throughout the case. Usually, offers to settle are freely discussed as the case proceeds through litigation.

Once the best offer is made and approved by the judge, then you will have to make a decision as to the benefits and disadvantages to the offer to settle the case. This is, by definition, a compromise. In a compromise, both parties get something that they want and lose something they want. The question always is, what are you gaining or losing in the process?

While it is common for a client to ask us what our opinion is on the settlement, it is neither our role nor our proper place to tell you what to do. Whether you accept the deal or not is your decision and your decision alone to make. If you turn down the deal and go to trial and lose, it is you and not the lawyer that will pay the price of that decision. If you take the deal, thereby giving up your right to a trial, it is you, and not your lawyer, who will be wondering whether or not you did the right thing and might have won at trial.

After you have made the decision to go to trial, the pretrial proceedings in a strict legal sense have come to an end. There will still be some motions, referred to as motions *in limine*, which will be heard before trial, but these are motions which can only be heard by the actual judge who presides over the trial. These motions seek to limit or exclude certain evidence before the jury.

Your Attorney will continue with the factual and legal trial preparation of the case as the trial date draws near.

## FELONY

A crime under California law which carries a minimum sentence of at least one year in the state prison is defined as a felony. Some crimes are defined in the Penal

Code as “wobblers.” This means the prosecutor could charge them as misdemeanors or felonies.

There is little in your life, save a major health problem, that can even come close to destroying your life like a felony charge. Little can prepare you for the anxiety and pressures that you will find yourself under while facing this type of charge. Why? Because, if you are convicted, you can be sentenced to state prison. Whether or not you actually serve a prison sentence will be discussed, but the pure pressures of the process is horrific.

After you have been arrested, the police will book you into custody. If you are arrested on a felony, there are several ways in which you can be released. First, you can be released through a bail bondsman or by you posting bail. A bail bondsman usually charges you a premium for posting the bail-bond, and that is generally 10% of the actual amount of the bond. For example if your bail is \$10,000.00 then the bondsman would charge you \$1,000.00 as their fee for posting the \$10,000.00 surety bail bond with the clerk of the court. The bondsman will usually also require some collateral against the remaining amount in case you fail to appear, making the bond subject to forfeiture.

If you make all your required court appearances, the bail bond will be set-aside at the end of the case. You will receive no return of the fee that you paid the bondsman because that is the money the bondsman earned in taking out the surety bond, similar to an insurance policy, on you.

If you post your own bail, or a friend or relative does so, the entire amount must be deposited directly with the clerk of the court. The full amount will be returned to you at the conclusion of the case provided, of course, you have made all court appearances.

You could also be released through your promise to the court that you will return on a given date and time. This is called a court “OR” (a release on your own recognizance). This can be undertaken directly from the court when you first appear in court for arraignment, or from an “OR” project that interviews individuals after arrest that have been unable to make bail. They then complete an “OR” report that will go to the court which can either be approved or rejected by the judge.

In most felony arrests, “OR” is not easy to obtain, but if you are a first offender, have strong family ties to the community, have employment and no prior failures to

appear for court, then there is a chance you could get an “OR” release. The type of charge you are facing, as well as the circumstances involved in the case, will be determinative of the judge’s decision to grant or deny an “OR” request.

All felony offenses are first brought before the court for arraignment, pre-preliminary examination motions and preliminary hearing. All felony charges have two levels of proceeding in California. They start in Superior Court where the judge sits as a magistrate to determine whether or not probable cause exists for you to be tried. If the judge finds that probable cause exists, then you are “held to answer” and arraigned again for trial.

Your first appearance before the court will be the arraignment. The arraignment is the judge informing you of what you are charged with and taking your plea. The court will not hear any defenses to the case at this time.

Once your lawyer appears and the plea of not guilty is entered, the court will then set the matter down for a pre-preliminary examination conference. This procedure, at the arraignment, can vary from county to county. For example, in some counties, the court will set the matter for a pre-preliminary conference as well as a preliminary hearing date right at the arraignment. Other judges will set the date for what is called a superior court review to see if there is a chance of a disposition, and then only later set a future preliminary hearing date if the case cannot be settled.

Following the arraignment, the discovery process is available for you to determine what evidence the prosecution has on you to prove the charges at the preliminary hearing and later at the trial. The defense wants to see if the prosecution can prove all of the elements of the charge against you. If so, then you have to explore any and all legal claims which may prevent the evidence from being used at the preliminary hearing and/or the trial.

Sometimes, the evidence may have been obtained in violation of your rights to privacy; your rights to be free from unreasonable search and/or seizure; statements may have been obtained against your right against self-incrimination, or your right to counsel. There may be many other areas of protection that your defense lawyer feels should be litigated and determined by the court before you are asked to stand trial. If this is the case, then these points will be the subject of certain motions to exclude or limit this evidence at the preliminary hearing and/or the trial. These

motions, in turn, will then be the pretrial motions which your lawyer will want to be heard prior to the preliminary hearing. In some situations, he or she may want to have the preliminary hearing first, and then take these motions up for review to the Superior Court. The motions can also be calendared for hearing following the preliminary hearing in the Superior Court. There may be certain tactical decisions which dictate that these motions not be brought at the preliminary hearing. For example, in a motion to suppress evidence, the defendant is usually only allowed to have one evidentiary hearing; in other words, you can only call the searching police officer at one hearing to give testimony on the facts of the search. Your attorney may elect to hold off on this motion until after the preliminary hearing. On other occasions, the motion may be made and heard at the preliminary hearing.

Sometimes, your defense counsel may want to use the motions as a bargaining tool with the prosecutor to see if a more favorable disposition can be reached. Other times, these motions are used to improve the defense's position at trial. This is often the situation in accident cases.

In a felony case, you have the right to a review of the magistrate's ruling holding you to answer under Section 995 of the California Penal Code. Under this section, you have the right to have the magistrate's ruling, as well as other proceedings which took place prior to the holding order, re-examined to determine whether or not the holding order might have been illegal.

Once the pretrial motions are heard and ruled upon by the judge, your case should be ready to proceed to preliminary hearing. In some courts, the judge will want to set a further date for purpose of setting the actual preliminary hearing date. Often, this period of time between the hearing on the motions and the setting date will give the parties a chance to re-evaluate their respective positions and decide whether or not they should run the risks of proceeding further.

From your perspective, you will want to know if any pretrial disposition will involve county jail time or a commitment to state prison. Secondly, will the disposition result in you having a criminal record? What future consequences would the felony conviction have on your life? Will you lose your civil rights, i.e., will you still be able to vote, hold public office, possess a firearm, and keep any state licenses that you may have? Could the disposition expose you to civil damages? If you were charged with an offense which was in any way connected to an accident, or people were injured, you might end up exposing yourself to

damages from a civil suit. You should take all of these factors into consideration when deciding whether or not the offer to plead is a good one for you.

A plea bargain is an offer extended by the prosecutor to settle the case for a negotiated disposition. The prosecutor may be willing to drop certain charges if you agree to plead guilty to certain charges. The prosecutor can recommend a certain sentence if you plead, but the ultimate sentence which will be imposed upon you is within the sole discretion of the judge. The judge, of course, is bound to sentence you within the bounds of the law; i.e., the judge cannot give you a greater sentence than that allowed under the statute you agree you violated, nor can the judge give you a less severe sentence if required by the law.

Felony sentencing is governed in California under the Determinate Sentencing Act. The sentencing laws call for a predetermined set level of a sentencing range for every felony as defined in the California Penal Code. For example, if you were to plead guilty or be found guilty of rape (Penal Code Section 261) you would face a sentencing range of 3 years, 6 years, or 8 years in state prison. Assuming certain rules of mitigation would apply to your case, the judge could then sentence you to a mitigated term of 3 years. If, on the other hand, the judge found that aggravating circumstance applied to you, then you could be sentenced to the aggravated term of 8 years. Otherwise, the court will always impose the middle term of 6 years.

If you are eligible for probation, the court will still sentence you to the determinate prison term, as set out in the above example, but the court can stay the execution of the sentence and place you on probation. Sometimes, as a condition of probation, the court will impose a county jail commitment, which must be less than 1 year.

Remember, a felony is defined by law as a crime punishable by prison. Prison is an institution where you are kept for more than 1 year; county jail, on the other hand, is a custodial facility where you are kept for 1 year or less.

If applicable, the prosecutor can also allege an “enhancement.”

A sentencing enhancement may mean that more prison time could be added to the final sentence; it could also mean you would not be eligible for probation, even if you are a first offender; it could also mean that your sentence can be doubled in some situations. Sentence enhancements must be stated in the charging document. Your lawyer will advise you whether or not they apply to your case. Enhancements

are covered by law and specifically defined in the Penal Code. Your lawyer will discuss these with you if it appears they apply to your case.

The preliminary hearing, sometimes called a preliminary examination, is nothing more than a judge sitting as a magistrate to determine two legal questions: (1.) is there some reasonable evidence to show that a felony has been committed? (2.) Is there some reasonable evidence that connects you to that crime? If the magistrate finds a “yes” answer to the two questions above, then you will be held to answer on the felony charge for trial.

At the preliminary hearing, the prosecutor must produce the evidence needed to obtain the "holding"; in other words, just some reasonable evidence to connect you to the crime.

Most prosecutors will not put on a complete case at the “PX”; they will just want to show the bare minimum of the elements of the crime.

## **FEDERAL CHARGES**

### **Misdemeanor**

If you have been charged with a federal offense, and it is a misdemeanor, then you will be notified by the United States Attorney's Office that a complaint will be filed against you. It may also happen that you may be taken right away following your arrest before a United States Magistrate. A Magistrate functions in a misdemeanor case like a judge. You have the right to have your case tried before the United States District Court before a U.S. District judge, but this is rarely done in most misdemeanor cases. Usually, your case will remain in the Magistrate's Court for all proceedings.

The procedure for a federal misdemeanor is rather straightforward. You will be arraigned, at which time you will be informed of the rights you have before the court as well as the charges which you are accused of committing. The court will ask for a plea, if counsel represents you, or the court will continue the case for a short period of time in order for you to obtain counsel for your defense.

Once a plea is entered, which usually is "not guilty" then the case is continued for a pretrial conference or for a future setting date, at which time the court will be informed by the parties, that is the defense and the prosecution, whether or not there is a settlement or disposition in the case. If this happens, then the case is resolved at that juncture and in accordance with the terms agreed to by the parties and approved by the court.

If, on the other hand, the case is not settled, then you will continue with the litigation. Usually, pretrial motions will be set along the lines of what has been discussed in the preceding misdemeanor section regarding pretrial motions. It is not unusual for some pretrial motions to be brought and heard before substantial settlement talks can take place. If the case still is not resolved, then it will be set for trial.

In a federal misdemeanor, you have the right to a jury trial if your punishment could exceed six months in jail. Otherwise, you only have the right to a court trial; that is, a trial presided over by the federal magistrate who will decide whether or not you are guilty.

## Felony

If you have been charged with a federal crime which is defined as a felony, which is the most likely type of federal crime that is prosecuted, then you will be either charged by Complaint, filed in court by the United States Attorney's Office, alleging the crimes they believe you committed or you will be indicted by the Federal grand jury.

If you have been indicted, again the most common procedural method, then you will appear before a United States Magistrate and be arraigned. This is the formal advisement of the charges filed against you and your right. The rights are the same as in California state court. You may go back and review those in the previous chapter if you have questions.

After the arraignment the case will be continued to the calendar of the federal judge assigned to your case. The judge will then set future status dates and move the case on his or her calendar for all pretrial proceedings and possible trial.

## CHAPTER 4

### How Can I Help My Defense?

The fact you retained an excellent criminal defense lawyer does not relieve you of your responsibilities in your defense. Remember, a good lawyer will want you to become actively engaged in your case. Now it is time for you to start.

The first thing to remember is that you are not a lawyer. Do not attempt to acquire a legal education overnight or during the course of your case. You will, no doubt, learn a great deal about the criminal justice system before your case is over, but please do not look upon it as your job to become as knowledgeable about the law as your lawyer. That does not help your defense.

What can, and should you, do?

Since you do not have to worry about working on the legal issues (that's what you hired a lawyer for), you can focus upon being a real ally to your lawyer, and hence, your case. Any and all documents relating to the case which are in your possession should be disclosed to your lawyer. You should be candid with your attorney on all the facts which even potentially may impact your case. You should also start to assemble the names and contact information for all witnesses that you think can help. If you need to call character witnesses then these people should also be contacted and asked if they would be willing to testify in court on your behalf.

Always remember to be in court on time. This probably sounds like such a simple thing, but you would be amazed at how many judges get upset when a case is called on the court calendar and the lawyer has to ask that the matter be passed until the client arrives. This may seem to be a minor inconvenience for the court, but some judges will actually issue a bench warrant for your arrest, or the judge can drop you to the end of the calendar call. This means you will not get your case called until close to noon on the morning calendar. Not good.

You should, of course, never miss a court date unless you are informed by your lawyer's office that your appearance is excused.

What should you wear to court? This is a question often asked. The answer is simple. Come to court as you would for any important meeting or event where you want to make a good impression.

Co-operate with your lawyer's office as completely as possible. If you are being kept well-informed by your lawyer, then you know that all that can be done is being done on your behalf.

The psychological impact of being arrested and charged with a crime can easily lead to depression and confusion. Do not permit this to affect your decision of which attorney to hire, the attorney-client relationship and, most importantly, your defense.

It is important to accept the reality of what has happened to you. Rightly or wrongly, justly or unjustly, you have been arrested and charged with a crime. Clear and calm thinking will help you to take whatever steps are necessary for you to put yourself at ease.

Your lawyer will send you a copy of the charging documents, and explain all of the charges against you and what it all means. Anything you do not understand, ask to be explained until you do understand.

The lawyer will also send you copies of all police reports and all other documents that will impact your case. You should read and review all of these documents carefully.

Most good criminal defense lawyers will also have a good support staff trained in criminal court procedures. They can be a great resource to you for daily information and updates on your case; don't be afraid to ask them questions. They are there to assist the attorney in providing you the most efficient defense.

Your willingness to purchase and read this book demonstrates your commitment to your defense. You have already taken the first productive step at ensuring successful representation.

Keeping the information that you received in this book in mind; balanced with the totality of circumstances surrounding your case; you should now have a good starting point to select defense counsel. And once you have selected a good criminal defense attorney, you can rely upon their skill and knowledge in raising

and litigating all the favorable legal issues in your defense. You are now ready to understand and assist in your defense.

We wish you all the best with your legal trial!