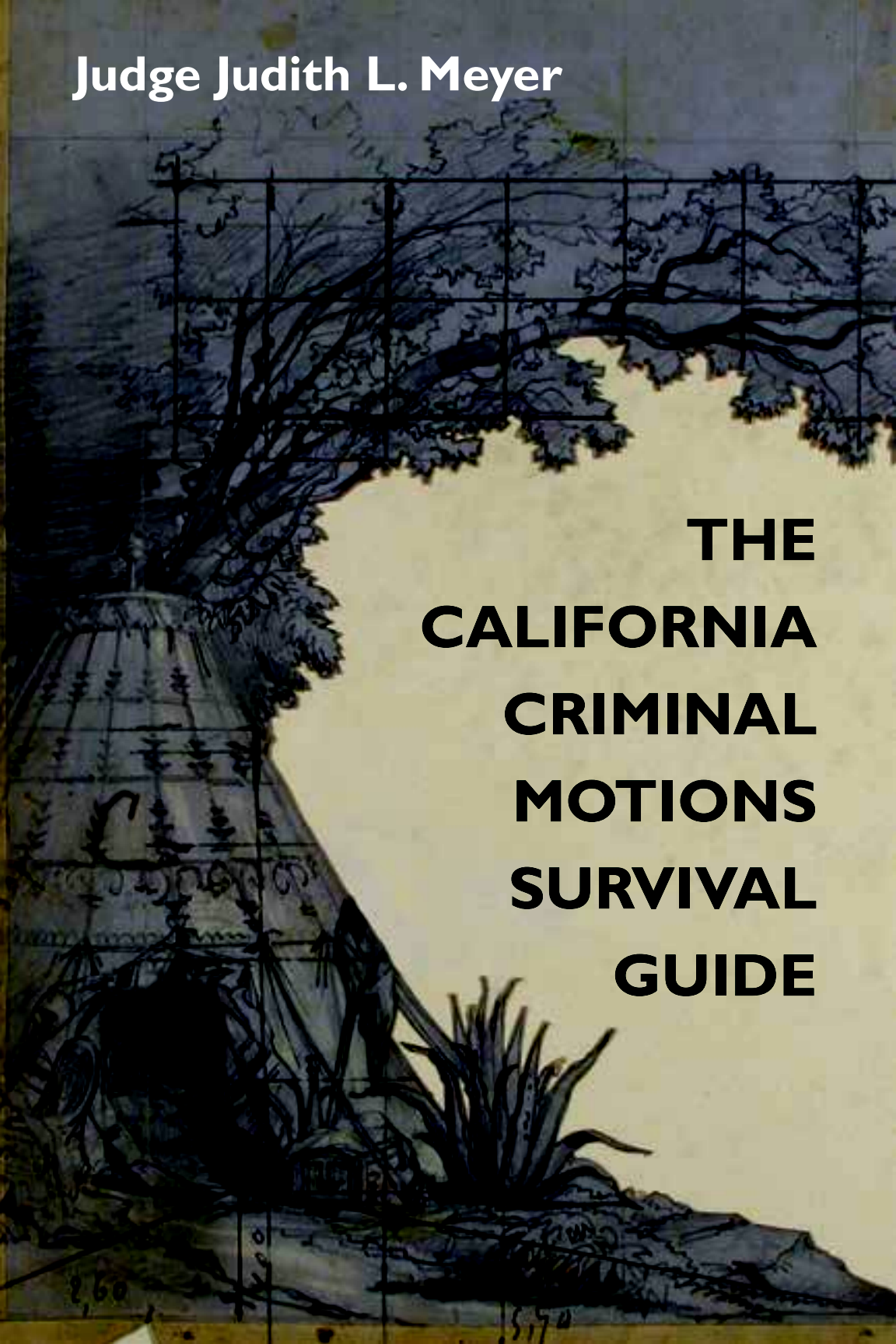


Judge Judith L. Meyer

**THE
CALIFORNIA
CRIMINAL
MOTIONS
SURVIVAL
GUIDE**



The California Criminal Motions Survival Guide

Judge Judith L. Meyer

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The cover of this book features “Design for a Stage Set at the Opéra, Paris: A Tent” by Eugene Ciceri. While primarily remembered for his landscapes, Eugene Ciceri began his career by working on projects similar to his father, Pierre-Luc-Charles Ciceri, who painted stage sets and other large murals for the Paris Opera, and served as the designer of official ceremonies for the King of France. The image is provided courtesy of the Metropolitan Museum of Art under a CC0 1.0 Universal (CC0 1.0) Public Domain Dedication.

*To my friend and colleague, Judge Amy Carter.
You are my guardian angel and my source of
inspiration to achieve greater things in my life.*

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Chapter I

Arraignment Stage

A defendant is entitled to have a court inform him or her of the charges, his or her rights, and to enter a plea of guilty or not guilty.

Charging Document: Complaint, Information, or Indictment

How does a person become a “defendant” in a criminal court case? Generally, the defendant commits some sort of crime. A police agency investigates the criminal conduct and presents it to a prosecutors’ office. Depending on the severity of the criminal conduct, a prosecutor files a “charging document” (a civil equivalent is called the “pleadings”) that spells out the date, type, and level of the crime. This charging document can be called a “complaint,” “information,” or “indictment.” The name of the charging document can give some indication whether the filed crime is an infraction, misdemeanor, or felony.

If a crime is an infraction, misdemeanor, or felony, the pleading document is known as a **complaint**. Cal. Penal Code §§859, 949. (Note, for juvenile crimes, the document is known as a “petition.”) An infraction and misdemeanor may be initiated by the police directly filing a citation in a

court. Cal. Penal Code §853.6. During the pendency of an infraction or misdemeanor case, the title to this charging document never changes. However, for a felony crime, after the court has conducted a preliminary hearing, the charging document changes to an **information**. If a prosecuting agency chooses to pursue a felony but the jurisdiction does not conduct preliminary hearings, or the prosecution chooses to avoid the preliminary hearing process, the case must go to a grand jury. If the grand jury finds there is enough evidence, it will issue an **indictment**.

Any charging document must state the following information:

- the defendant's name (plus any co-defendants) and date of birth;
- the date of the alleged offense(s);
- the crime(s) charged and whether an infraction, misdemeanor, or felony;
- any enhancements that attach to the crime(s);
- the location of the offense(s) (generally, the county where the offense occurred);
- any prior convictions that can be used to enhance punishment; and
- any special allegations that can be used to enhance punishment.

The Arraignment

Under the U.S. Constitution, the purpose of the arraignment proceeding is to inform the accused of the nature of the criminal charges pending against that person, inform the defendant of other legal rights, and have the defendant enter a plea of guilty or not guilty. Cal. Penal Code §988. If the defendant is not represented by counsel at the arraignment

and the charge is a misdemeanor or felony, the defendant has a right to have counsel present. The defendant can hire a private attorney, have an attorney appointed by the court, or go by way of self-representation.

During the arraignment, a defendant has a right to have a copy of the accusatory pleading and to have the court read the accusatory pleading to the defendant. In addition, the court will advise the defendant of his or her rights: the right to an attorney (if not already present), the right to a jury trial, the right to cross-examine and confront witness, the right to present a defense to the charge(s), the right to remain silent, and the right to be heard on bail. Finally, the court will ask the defendant whether he or she wishes to plead guilty or not guilty. As you can imagine, in a busy calendar courtroom, this process can be fairly lengthy if the accusatory pleading includes many charges.

Most courts proceed with an abbreviated version of an arraignment. Most arraignment judges confirm the name on the accusatory pleading with the defendant (or attorney). After ascertaining a true name and date of birth, the court turns to the attorney and states: “Counsel, do you waive formal reading of the complaint, advisement of rights, and enter a plea of not guilty (and deny all special allegations) for your client?”

If the case is a misdemeanor, an attorney can appear on behalf of the client for arraignment. The defendant need not be present. Cal. Penal Code §977(a)(1). (There are some exceptions to this rule if the crime involves domestic violence or driving under the influence.) Often, the attorney will state the following: “Your Honor, I’m appearing 977a on behalf of my client. We have received a copy of the charging document, and we are ready to proceed.” These “code words” signal to the judge that the attorney’s client is not present in court.

If the case is a felony, a defendant must appear in person before the judge. There is an exception if the defendant executes a written waiver of appearance in open court and the court accepts that written waiver. Cal. Penal Code §977(b)(1), §977(c)(2)(A).

Some jurisdictions may conduct the initial court appearance through two-way electronic audio-video communication. Cal. Penal Code §977(c).

The time for arraignment depends on whether the defendant is in or out of custody. If a defendant is held in custody, the arraignment must take place no more than “48 hours after arrest, excluding Sundays and holidays.” Cal. Penal Code §825. If a defendant is not in custody, an arraignment must take place without unnecessary delay. If arraignment is delayed too long, it could lead to a motion to dismiss.

991 Motion

At a misdemeanor arraignment, if a defendant is in custody, and has pleaded not guilty, the defendant may request a probable cause determination. Cal. Penal Code §991(a). In a probable cause determination, the judge will look at facts known, and determine if those facts would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that the person arrested was guilty of a crime. This process is intended to safeguard against the hardship of remaining in custody if there is no probable cause to think the defendant committed a crime.

Most **991 motions** are made at the arraignment. However, the court may grant a three-day continuance for good cause. The court may consider the arrest warrant and any supporting documents and affidavits (i.e., arrest warrant, sworn complaint, police report, and any other documents relied on for the case and/or arrest). If the court denies the

991 motion, the case proceeds normally. If the court grants the 991 motion, the prosecution has fifteen calendar days to refile, or is barred from prosecution of the case.

O.R. Motion

Any person who has been arrested for, or charged with, an offense other than a capital offense may be released on his or her **own recognizance (O.R.)** pending the outcome of the case (Cal. Penal Code §1270(a)). The defendant need not post bail under this form of release. Although a defendant is granted liberty under this form of release, a court may still specify specific conditions to an O.R. release. Such conditions must be meant to ensure public safety and ensure defendant's future appearance. Examples of potential conditions include wearing an ankle location monitor, attendance at Alcoholics Anonymous or Narcotics Anonymous meetings, submitting to drug testing, and/or compliance with a protective order.

Most misdemeanor offenses are entitled to O.R. release unless the defendant is a threat to public safety or is not likely to return to court. For specified felony offenses (serious or violent felonies, domestic violence, or violation of a protective order), the prosecution is entitled to notice to a hearing, and the court must conduct a hearing before a judge may grant O.R. release.

Bail Motion

Money can buy freedom, at least temporarily. Bail permits a defendant to be released from "actual" custody into "constructive" custody on a surety bond given to procure the defendant's release. Cal. Penal Code §1286 et seq. Essentially, the defendant gives a specified amount of money

to the court for the court to hold until the conclusion of the case. The theory of bail is that this money will be an incentive for the defendant to appear in court and obey all laws during the pendency of the case. Bail is established when a defendant is arrested and/or when a case is filed in the court system.

Bail bond agents have made a living out of charging a fee to loan a defendant money to post bail. For example, most bond agents charge 10 percent of the bail. So, if bail is \$50,000, the bond agent charges a defendant an up-front fee of \$5,000. The bond agent then “posts” a bond with the court for \$50,000. Upon receipt of this bond, the jail releases the defendant from custody. At the conclusion of the case, the court releases the \$50,000 back to the bond agent. However, the bond agent does not return the \$5,000 to the defendant. That money is the cost of doing business and posting the bond. If the defendant does not return to court, the bond agent loses \$50,000.

Once posted, bail stays in place until “forfeited” or “exonerated.” The term “forfeited” means the defendant did not show up for court, and the court retains the bail money. The term “exonerated” means the bail goes back to whomever originally posted the money.

A defendant is entitled to bail before conviction, as a matter of right, unless the offense punishable by death or a public safety exception is established. After conviction but before sentencing bail is a discretionary decision for the judge in a felony case, but mandatory in a misdemeanor case.

Prosecutors suggest and courts set bail amounts based on county-created “bail schedules.” This schedule suggests certain bail amounts for specific crimes. Both the prosecution and defense can request a bail hearing to make the bail amount either higher or lower than the suggested scheduled amount.

Courts often look to “1275 Factors.” These come from Cal. Penal Code §1275. The court looks to the following four factors for a bail amount: (1) public safety, (2) the seriousness of offense charged, (3) the defendant’s prior record, and (4) the probability of court appearance and ties to the community. In addition, in California, if the charge is a “serious” or “violent” felony (as defined under the California Three Strikes Law), a court cannot reduce bail unless the court finds “unusual circumstances.” The court cannot deviate unless there are unusual circumstances. And, there is no bail for capital offenses.

What happens when a drug dealer tries to post bail with the proceeds of ill-gotten gains? A prosecutor can make a 1275.1 motion. Cal. Penal Code §1275.1. A court conducts a hearing to determine the source of the bail money. (In federal court, this is known as a *Nebbia* hearing. *United States v. Nebbia* (2d Cir. 1966) 357 F.2d 303.) If the court is satisfied the money comes from clean sources, the court will instruct the jail to accept the bond and release the defendant.

As with O.R. release, a court can impose conditions on the acceptance of bail. Cal. Penal Code §1269(c). Such conditions are within the discretion of the court. Examples include wearing an ankle location monitor, surrendering passport, a ban on out-of-state travel, imposition of a protective order, and participation in counseling or rehabilitation.

Upon a plea or verdict of guilty by a jury, a court must decide if an O.R. or bailed-out defendant should remain out pending sentencing. Cal. Penal Code §1166 gives discretion to the court. In a misdemeanor case, the court must set bail pending sentencing. In a felony case, a court has discretion to set bail or remand a defendant with no bail set. The court may consider factors for setting bail and allow defendant to remain out of custody on the existing bond pending sentencing.

1368 Motion—Declaring a Doubt

Upon meeting your client for the first time, you may realize that your client is not comprehending what you are saying and appears not in his right mind. A person cannot be tried or “adjudged to punishment” while that person is mentally incompetent. In criminal court, mental incompetence means that as a result of a mental disorder the defendant is unable to understand the nature of the proceedings or aid in his or her defense. In such a case, a defense attorney may stand before the court and state, “Your Honor, I am **declaring a doubt** under **1368**.” Cal. Penal Code §1367 et seq.

Jurisdictions handle these situations differently. Some counties have special mental health courtrooms that handle these cases. In other counties, the case remains in the courtroom for all proceedings. Check with your local jurisdiction on proper procedures.

If a defense attorney declares a doubt, the judge will suspend criminal proceedings. This tolls the time for statutory speedy trial rights. The court will then appoint psychiatric experts to evaluate the defendant and report to the court whether the defendant is competent to stand trial. The defendant is entitled to a competency trial. Most often, the attorneys agree the court can rule based on the psychiatric written report(s) without requiring testimony. If the defendant is deemed incompetent, the defendant is often sent to and treated at a state mental health hospital until competency can be restored. Criminal proceedings remain suspended until competency is restored. Once competency is restored, criminal proceedings resume at the stage where they were suspended, and all speedy trial rights resume.

Sometimes competence is never restored. If the defendant was charged with a felony committed under this criminal statute, a state hospital can hold the defendant for the

maximum of two years. For a misdemeanor the court can hold a criminal defendant up to a year. Then the County Public Guardian's office may get involved and seek to commit the defendant under other legal procedures.

Kellett Motion

When more than one offense arises out of same act or course of conduct, *all* offenses must be charged in single proceeding. *Kellett v. Superior Court* (1966) 63 Cal.2d 822. A **Kellett motion** incorporates the principles from the Constitution preventing double jeopardy. The double jeopardy clause prevents a person from being tried twice for the same offense. There are some exceptions to this rule if a court initially prohibits joinder of charges or granted severance of charges. If a prosecutorial agency violates the *Kellett* rule, additional charges not brought in initial proceeding are barred from prosecution.

The following are two examples of situations involving this rule: (1) A defendant convicted of brandishing a gun may not be prosecuted later on a felony charge of possessing a gun; (2) A defendant acquitted of robbery alleging use of a gun may not be prosecuted later on a charge of possessing an unregistered firearm.

McNabb-Mallory Rule

In federal court, any unnecessary delay between an arrest of a defendant and the arraignment can result in suppression of any statements made by the defendant. *McNabb v. United States* (1943) 318 U.S. 332; *Mallory v. United States* (1957) 354 U.S. 449. In federal court, this is known as the **McNabb-Mallory rule**. Federal courts have determined that if a defendant gave a statement to the police within six hours

of arrest, barring any other constitutional voluntariness issues, the statements are admissible. However, if the police solicited statements from a defendant outside of this six-hour window, the court must decide if the delay was unreasonable or unnecessary, and whether to suppress any statements.

California has *not* adopted this specific rule, but judges may factor in any delay under a voluntariness standard to any statements given under *Miranda*.

Adopted from Judith Meyer’s extensive teaching résumé and years of courtroom experience as both a prosecutor and judge, the *California Criminal Motions Survival Guide* is designed to serve as a quick reference for those new to the world of California criminal trials. Meyer’s comprehensive collection of local terms of art and nuanced explanations are not often covered during law school, but are typically learned through experience alone, making this guide an invaluable addition to the bookshelf of new criminal attorneys practicing in California.

“This book is a must have resource for all attorneys looking to navigate the jargon of criminal law. Every chapter is a goldmine of information and perfect for anyone looking to enhance their advocacy skills. Dedicated to criminal law for her entire career, Judge Meyer shares her vast expertise in this subject to create this ‘survival guide.’ It will be a book you will take with you to court every day!”

—Jim Gash, President and CEO, Pepperdine University



About the Author

Judith Levey Meyer is a Superior Court Judge for Los Angeles County presiding over criminal felony trials. Prior to taking the bench, she was a criminal prosecutor for Los Angeles County and Ventura County. She serves as an instructor for her judicial colleagues and as an Adjunct Law Professor at differing law schools teaching a variety of subjects including: Evidence, Criminal Law and Procedure, Trial Advocacy, Criminal Motions, and Negotiation Theory and Practice. Judge Meyer graduated Magna Cum Laude from Pepperdine University School of Law in 1993.

