

CALIFORNIA JUDGES BENCHGUIDES

Benchguide 55

**BAIL AND OWN-RECOGNIZANCE
RELEASE**

[REVISED 2013]



ADMINISTRATIVE OFFICE
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BAIL AND OWN-RECOGNIZANCE RELEASE

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I. [§55.1] SCOPE OF BENCHGUIDE

This benchguide provides an overview of the procedure for handling bail and own-recognizance motions. It includes procedural checklists, a brief summary of the law, and spoken forms. A discussion of release by citation or written notice to appear is beyond the scope of this benchguide.

II. PROCEDURE

A. [§55.2] Checklist: Hearing Motion for Release on Bail (Felony Case)

- (1) *Determine if defendant is entitled to release on bail.*
 - *Consider the evidence presented by defense counsel and prosecutor on the issue of defendant's eligibility for release.*

Note: If the defendant has been arrested for a serious or violent felony or other designated offenses, and does not have counsel, the court must appoint counsel to represent the defendant at the hearing. Pen C §1270.1(b).

- *Capital case: Determine if there is substantial evidence of guilt. If so, deny defendant's motion for release. For discussion, see §55.11*
- *Violent felony or felony sexual assault case: Determine if there is substantial evidence of guilt and a substantial likelihood that defendant's release will result in great bodily harm to others. If so, deny the motion for release. For discussion, see §55.10.*
- *Case involving any felony when persons have been threatened: Determine if there is substantial evidence of guilt, evidence that defendant has threatened another person with great bodily harm, and a substantial likelihood that defendant will carry out the threat*

if released. If so, deny the motion for release. For discussion, see §55.10.

- *If a “hold” has been placed on defendant, deny the motion for release.* For discussion, see §55.12.

(2) *If motion for release on bail is granted, set amount of bail. Review the following factors when setting the amount* (Pen C §1275(a); Cal Const art I, §§12, 28 (b)(3), (f)(3)):

- *Protection of the public,*
- *Safety of the victim,*
- *Safety of the victim’s family,*
- *Seriousness of the offense(s) charged,*
- *Defendant’s criminal record, and*
- *Probability of defendant’s returning to court.*

For discussion, see §§55.13–55.14.

(3) *If the defendant has been arrested for a violent felony, serious felony, or other designated offense, review these additional factors when setting the amount* (Pen C §1270.1(c)):

- *Evidence of the defendant’s past court appearances, and*
- *The maximum potential sentence that could be imposed.*

For discussion, see §55.16.

(4) *If the court sets bail in an amount that is either more or less than the amount in the bail schedule, and the defendant has been arrested for a violent felony, serious felony, or other designated offense, the court must state on the record the reasons for that decision.* The court’s statement must address the issue of any threats made against the victim or witnesses. Pen C §1270.1(d). For discussion, see §55.16.

(5) *Specify any conditions to be placed on defendant’s release.* For discussion, including mandatory conditions in stalking cases, see §55.53.

(6) *If defendant is unable to post bail, schedule a hearing to review the order fixing bail within five days, unless the hearing is waived by defendant.* Pen C §1270.2. For discussion, see §55.20.

B. [§55.3] Checklist: Hearing Motion for Release on Bail Pending Appeal (Felony Case)

(1) *Consider the evidence presented by defense counsel and prosecutor on the issue of defendant’s eligibility for release pending appeal.*

(2) *Review the following factors:*

- *Likelihood of defendant's flight if released,*
- *Potential danger to society posed by defendant's release, and*
- *Frivolousness of the appeal or lack of diligence in defendant's prosecution of the appeal.* For discussion, see §55.22.

(3) *Grant or deny motion for release.*

Note: Grant of motion is required if defendant (a) provides clear and convincing evidence that he or she does not pose a danger to the public and that flight is unlikely, and (b) demonstrates that the appeal raises a substantial legal question and has not been filed for the purpose of delay. Pen C §1272.1. For discussion, see §55.22.

(4) *Specify any conditions to be placed on the defendant's release.* For discussion, see §55.53.

(5) *State reasons in support of decision to grant or deny motion for release.* Pen C §1272.1(c). For discussion, see §55.23.

C. [§55.4] Checklist: Hearing Motion for Own-Recognizance Release

(1) *Consider the evidence presented by the defense counsel indicating that there is a high probability that defendant will return to court if released, including evidence of defendant's ties to the community.*

Note: If the defendant has been arrested for a serious or violent felony or other designated offenses, and does not have counsel, the court must appoint counsel to represent the defendant at the hearing. Pen C §1270.1(b). For discussion, see §§55.48–55.49.

(2) *Consider the evidence presented by the prosecutor indicating that defendant is not likely to return to court if released, including defendant's past record of court appearances, and the severity of the possible sentence defendant faces if convicted.* For discussion, see §55.48.

(3) *If the court employs an own-recognizance (OR) investigative staff, review the staff recommendation for or against the release of defendant.* Pen C §1318.1.

(4) *Review the following factors:*

- *For all cases, safety of the victim and the victim's family* (Cal Const art I, §28(b)(3), (f)(3)).
- *For cases involving misdemeanors* (Pen C §1270):
 - Defendant's likelihood of appearing in court, and
 - Public safety. For discussion, see §55.48.

- *For cases involving violent felonies, serious felonies, or other designated offenses (Pen C §§1270.1(c), 1319(b)):*
 - The potential danger to other persons, including any threats that have been made by the defendant and any past acts of violence,
 - Defendant’s likelihood of appearing in court, including any evidence offered by the defendant regarding his or her ties to the community and ability to post bond,
 - Existence of any outstanding felony warrants on defendant,
 - Information contained in any written report of the OR investigative staff, and
 - Any other information presented by the prosecutor.

For discussion, see §55.49.

(5) *Grant or deny OR release.*

Note: Denial is mandatory if defendant is arrested for a violent felony and has previously failed to appear in a felony case. Pen C §1319(b). For discussion, see §55.49.

(6) *If granting OR release:*

- *Violent felony case: State reasons for the decision to grant release.* Pen C §1319(c). For discussion, see §55.51.
- *Specify any conditions to be placed on OR release.* For discussion, see §55.53.
- *Direct defendant to file a signed release agreement with the court clerk.* Pen C §1318. For discussion, see §55.52.

(7) *If denying OR release:*

- *Misdemeanor or nonviolent felony case: Make finding on the record that release will compromise public safety or will not reasonably ensure defendant’s appearance in court.* Pen C §1270(a).
- *Violent felony case: State reasons for the decision to deny release.* Pen C §1319(c). For discussion, see §55.51.

D. [§55.5] Checklist: Exonerating Bail on Surrender of Defendant by Surety (Pen C §1300)

(1) *Advise defendant of his or her right to move for withdrawal of any previous time waiver.* Pen C §1300(a)(3).

(2) *Grant a motion for withdrawal of time waiver on request of defendant, and set next hearing date accordingly.*

(3) *Advise defendant of the court's authority to order the return of all or a portion of any bail premium paid by the defendant or other person if court determines that good cause does not exist for defendant's surrender.* Pen C §1300(a)(3), (b). For discussion, see §55.31.

(4) *Consider evidence presented by counsel and the surety on the issue of whether there is good cause for defendant's surrender.*

(5) *Determine whether "good cause" exists.*

- *If there is good cause, order bail exonerated.* Pen C §1300(a).
- *If there is no good cause, order bail exonerated and order surety to return all or a portion of any bail premium to defendant or other person who paid the premium.* Pen C §1300(b). For discussion, see §55.31.

E. [§55.6] Checklist: Declaring Forfeiture of Bail; Granting Continuance (Pen C §1305.1)

(1) *Call the case.* If defendant is not present, ask defense counsel to explain defendant's absence.

(2) *Determine if there is "sufficient excuse" for defendant's absence.* Pen C §1305(a). For discussion, see §§55.33–55.34.

(3) *If no sufficient excuse:*

- *Declare bail forfeited in open court.* Pen C §1305(a). Although not required, it is recommended that the court state that the defendant's nonappearance was "without sufficient cause."
- *Consider issuance of a bench warrant for defendant's arrest.* Pen C §978.5. *If a bench warrant is issued, the judge should set bail on the bench warrant.* Pen C §982. Order the warrant entered into the national warrant system (National Crime Information Center (NCIC)) if the warrant is issued on a private surety-bonded felony case. Pen C §§980(b), 1196(b).

(4) *If sufficient excuse:*

- *Continue the case for a reasonable period to enable defendant to appear.* Pen C §1305.1. For discussion, see §55.34.
- *State for the record the reasons for concluding that defendant's absence is with sufficient excuse.* For discussion, see §55.34.

F. [§55.7] Checklist: Hearing Motion To Vacate Forfeiture or Toll Time (Pen C §1305)

(1) *Determine whether the motion is actually a Pen C §1305 motion.* Many sureties, depositors, and attorneys confuse the concepts of tolling time under Pen C §1305 and extending time under Pen C §1305.4. Often

the moving party asks to toll time, when it actually wants an extension. See Pen C §1305.4; checklist in §55.8.

(2) *Determine whether the motion has been timely filed.* The motion must be filed within 180 days of the mailing of notice of the forfeiture (plus an additional five days to allow for mailing) or within 180 days of the date of forfeiture if no notice is required. Pen C §1305(b), (c). If the last day falls on a weekend or holiday, the motion may be filed on the next court day. CCP §12a. For discussion, see §55.36.

(3) *Determine whether the motion is being timely heard.* The motion must be heard within 30 days of the expiration of the 180-day period. The court may extend the 30-day period on a showing of good cause. Pen C §1305(j). For discussion, see §55.36.

(4) *Determine whether the surety or depositor has met the notice requirements.* The surety or depositor must give the prosecutor written notice at least 10 court days before a hearing on the motion under Pen C §1305(f) or (g) (defendant beyond jurisdiction of the court or state). Pen C §1305(k). For discussion, see §55.36.

(5) *Determine whether there are grounds to vacate the forfeiture and exonerate bail.* Pen C §1305(c), (d), (f), (g). If the court sets aside the forfeiture, it must impose any costs of returning the defendant to custody, unless the court determines that it is in the best interest of justice not to require payment. For discussion, see §§55.38, 55.44.

(6) *Determine whether there are grounds to toll the 180-day period of relief.* Time may be tolled for a reasonable period to allow the return of the defendant to custody. Pen C §1305(e). For discussion, see §55.42.

G. [§55.8] Checklist: Hearing Motion To Extend Period for Relief From Bail Forfeiture (Pen C §1305.4)

(1) *Determine whether the motion to extend the period has been timely filed by the surety or depositor.* The motion must be filed within the initial 180-day period provided in Pen C §1305. Pen C §§1305.4, 1305(j). If the last day falls on a weekend or holiday, the motion may be filed on the next court day. CCP §12a.

(2) *Determine whether the motion is being timely heard.* The motion must be heard within 30 days of the expiration of the 180-day period, unless there is good cause to extend beyond 30 days. Pen C §§1305.4, 1305(j).

(3) *Determine whether the surety or depositor has met the notice requirements.* The surety or depositor must give the prosecutor written notice at least 10 court days before a hearing on the motion. Pen C §§1305.4, 1305(k).

(4) *If the motion was not properly served, consider whether to ask the prosecutor to waive the defect.*

☛ **JUDICIAL TIP:** If the prosecutor waives the defect, ask the moving party to agree that the bond and the insurer are estopped from later contending that the court had no jurisdiction to act because of the defect. See *People v Ranger Ins. Co.* (1994) 31 CA4th 13, 22, 36 CR2d 807 (equitable principles applicable to bail proceedings).

(5) *Determine whether the declaration or affidavit to the motion establishes good cause to extend the time for relief.* Pen C §1305.4.

(6) *If the motion is granted, extend the time for relief not exceeding 180 days.* Pen C §1305.4. For discussion, see §55.37.

III. APPLICABLE LAW

A. [§55.9] Bail Defined

Bail allows a defendant to be released from actual custody on the posting of a bond, cash deposit, or other security deemed necessary to guarantee the defendant's appearance in court. The word "bail" as used in the statutes has several different meanings. It may refer to the security posted for the defendant's appearance (see, e.g., Pen C §§1269c, 1275), to the surety or bondsperson who posts the security (see, e.g., Pen C §§1269, 1279), or to the process of releasing the defendant (see, e.g., Pen C §§1268, 1458). The first meaning is the most common and will be used in this benchguide. When bail is in the form of an undertaking, it is usually referred to as a bail or surety bond. When it is in the form of a deposit of money, the term "cash bail" is used.

"Admission to bail" is the order of a competent court or magistrate that the defendant be discharged from custody on the posting of bail. Pen C §1268. The acceptance of bail by the court or magistrate is called the "taking of bail." Pen C §1269.

B. Bail Before Conviction

1. Right to Bail

a. [§55.10] Noncapital Offenses

A defendant who is charged with a noncapital offense may be admitted to bail before conviction as a matter of right. Pen C §1271. However, Cal Const art I, §12 curtails this right under the following circumstances:

- If the defendant is charged with a violent felony or a felony sexual assault offense when the facts are evident or the presumption great and the court finds, based on clear and convincing evidence, that there is a substantial likelihood the person's release would result in great bodily harm to others (Cal Const art I, §12(b)); or

- If the defendant is charged with any felony when the facts are evident or the presumption great and the court finds, based on clear and convincing evidence, that the person has threatened another with great bodily injury and that there is a substantial likelihood that the defendant will carry out the threat if released (Cal Const art I, §12(c)).

The phrase “when the facts are evident or the presumption great” has been defined as follows: “It is not necessary that the evidence should be so convincing as to justify a verdict against the accused, but it is sufficient if it points to him and induces the belief that he may have committed the offense charged.” *In re Page* (1927) 82 CA 576, 578, 255 P 887. In determining whether there is a “substantial likelihood” that the defendant will cause great bodily injury to another if released, the magistrate or judge must review the specific circumstances on a case-by-case basis. *In re Nordin* (1983) 143 CA3d 538, 543, 192 CR 38.

Penal Code §292 designates certain sex offenses as felony offenses involving acts of violence and great bodily harm for the purpose of determining defendant’s right to release on bail under Cal Const art I, §12. These offenses are Pen C §§261(a)(2) and (a)(6) (forcible rape), 262(a)(1) and (a)(4) (forcible spousal rape), 264.1 (rape in concert), 286(c) and (d) (forcible sodomy or sodomy in concert), 288(b) (forcible lewd act on child), 288a(c) and (d) (forcible oral copulation or oral copulation in concert), and 289(a) (forcible anal or genital penetration by foreign or unknown object).

b. [§55.11] Capital Offenses

A defendant who is charged with a capital offense may not be admitted to bail if proof of guilt is evident or the presumption of guilt is great. Pen C §1270.5; Cal Const art I, §§12(a), 28(f)(3) (no right to bail “when the facts are evident or the presumption great”). The finding of an indictment does not add to the strength of the proof or the presumptions to be drawn from it. Pen C §1270.5. A crime is a capital offense if the statute makes it punishable by death, even when the prosecutor has promised not to seek the death penalty. *In re Bright* (1993) 13 CA4th 1664, 1671, 17 CR2d 105 (nature of the charged offense, and not the punishment actually faced, determines availability of bail); *Maniscalco v Superior Court* (1993) 19 CA4th 60, 23 CR2d 322 (purpose of exception to the right to bail for capital defendants is to protect public from those who commit intensely serious crimes). See also *People v Superior Court (Kim)* (1993) 20 CA4th 936, 941, 25 CR2d 38 (juvenile being tried as an adult for a capital crime not entitled to bail, even though death penalty may not be imposed against defendant under 18 years; gravity of the offense, and not the characteristics of the specific defendant, is determining factor).

c. [§55.12] Defendant Subject to Hold

A defendant is not entitled to release on bail if a “parole hold” is placed on the defendant, even though the criminal charge triggering the hold is a bailable offense. *In re Law* (1973) 10 C3d 21, 26, 109 CR 573. A defendant who is not a United States citizen may be subject to an immigration hold by federal immigration authorities. In addition, a defendant arrested on an extradition warrant is not eligible for release on bail. Pen C §1550.1; *People v Superior Court* (Ruiz) (1986) 187 CA3d 686, 692, 234 CR 214.

2. [§55.13] Bail Hearing; Setting Bail Amount

When a defendant appears in court on the charged offense, the bail amount must be set by the judge. Pen C §1269b(b). If the defendant has not yet appeared in court and an arrest warrant has been issued, bail is set in the amount endorsed on the warrant. Pen C §§815(a), 1269b(b). If no arrest warrant has been issued, the bail amount is set in accordance with the uniform county-wide schedule of bail, unless a magistrate has granted a request for a deviation from the bail schedule. Pen C §§1269b(b), 1269c; see discussion in §55.15.

Requests for the setting of bail or the reduction or increase of bail are commonly made at arraignment on the complaint, at the conclusion of the preliminary hearing, on the filing of an information or indictment, at arraignment on the information or indictment, and at the conclusion of hearings on motions. Bail motions may be made orally or in writing. A written motion may contain a memorandum of points and authorities and a declaration of supporting facts. The court may read and consider police reports and other information reflecting the arrest or conviction record of a defendant when reviewing requests for the setting or changing of bail. Pen C §1204.5(a).

Hearings on bail motions are generally informal. Many judges decide bail motions on the basis of the defendant’s criminal record and oral representations from both the prosecutor and defense counsel. Some courts, however, may require actual testimony, affidavits, or declarations. Local court rules frequently delineate procedures for bail hearings.

If a defendant is charged with a serious felony, as defined in Pen C §1192.7(c), the victim must be given notice and reasonable opportunity to be heard at the bail hearing. Cal Const art I, §28(f)(3). For more discussion of the victim’s right to notice, see §55.16.

A defendant charged with a capital offense, a violent felony, or a felony sexual assault offense who makes an application for bail is entitled to a hearing to determine if the criteria of Cal Const art I, §12 are satisfied. *Clark v Superior Court* (1992) 11 CA4th 455, 458, 14 CR2d 49. The court may not deny a motion for bail in a capital offense case unless it finds that

the proof of the defendant's guilt is evident or the presumption of guilt great. When a defendant is charged with a violent felony or a felony sexual assault offense, the court may deny bail if it finds, in addition to substantial evidence of guilt, a substantial likelihood that the defendant's release will result in great bodily injury to another person. The court may deny bail to a defendant charged with any felony if it finds substantial evidence of guilt and clear and convincing evidence that the defendant has made threats of great bodily injury to another person that he or she is likely to carry out. Cal Const art I, §12; see §§55.10–55.11. If the defendant is arrested for a violent felony, as defined in Pen C §667.5(c), a serious felony, as defined in Pen C §1192.7(c), or other designated offenses, the court may not set bail that deviates from the bail schedule without a noticed hearing. See §55.16.

If the court decides to set bail in excess of the bail schedule, it should articulate the specific grounds in support of the decision. *In re Christie* (2001) 92 CA4th 1105, 1109–1110, 112 CR2d 495.

3. [§55.14] Factors To Consider When Setting Bail Amount

The court has broad discretion in setting the amount of bail, and absent a manifest abuse of discretion, the court's order fixing bail will not be disturbed. *People v Norman* (1967) 252 CA2d 381, 411, 60 CR 609, disapproved on other grounds in 6 C3d 693, 697. However, there are constraints to the court's power. First, the court must not set bail with the intent of punishing the defendant. *People v Gilliam* (1974) 41 CA3d 181, 191, 116 CR 317. Second, the court must not set "excessive" bail. Cal Const art I, §§12, 28(f)(3). Bail is excessive when it is "unreasonably great, and clearly disproportionate to the offense involved, or the peculiar circumstances appearing must show it to be so in the particular case." *Ex parte Ryan* (1872) 44 C 555, 558. Bail is not considered excessive merely because the defendant cannot post it. *In re Burnette* (1939) 35 CA2d 358, 360, 95 P2d 684.

In setting, reducing, or denying bail, the court must consider the following factors:

- *Safety of public and victim.* The protection of the public and the safety of the victim are the primary considerations in determining the proper amount of bail. Cal Const art I, §28(b)(3), (f)(3); Pen C §1275(a).
- *Safety of the victim's family.* Cal Const art I, §28(b)(3).
- *Seriousness of the charged offense.* Cal Const art I, §§12, 28(f)(3); Pen C §1275(a). In weighing the seriousness of the offense, the court must consider the alleged injury to the victim, the alleged threats to the victim or witness to the offense, the alleged use of a firearm or other deadly weapon in the commission of the offense,

and the alleged use or possession of controlled substances by the defendant. Pen C §1275(b). If the defendant is charged with a narcotics offense (Health & S C §§11350–11392), the court must consider the alleged amount of the controlled substances involved in the commission of the offense and whether the defendant is currently released on bail for another narcotics violation. Pen C §1275(b).

- *Previous criminal record of the defendant.* Cal Const art I, §§12, 28(f)(3); Pen C §1275(a).
- *Probability of the defendant's appearing at the trial or hearing of the case.* Cal Const art I, §§12, 28(f)(3); Pen C §1275(a).

➤ **JUDICIAL TIP:** In weighing the probability of the defendant's appearing at subsequent proceedings, the court should consider the same factors that are reviewed in determining whether to release a defendant on his or her own recognizance, including the defendant's ties to the community, such as the defendant's record of employment, length of residence, and family status. In addition, the court may want to consider the defendant's record of appearance at past court hearings and the potential severity of the sentence the defendant may receive. See §55.48.

Other factors that the court may consider in determining the amount of bail include the defendant's wealth (*Ex parte Ruef* (1908) 7 CA 750, 753, 96 P 24), the amount of the defendant's gain from the crime (*In re Williams* (1889) 82 C 183, 23 P 118), the number of separate offenses charged (*People v Surety Ins. Co.* (1978) 77 CA3d 533, 537, 143 CR 661), and the defendant's status as a fugitive (*In re Grimes* (1929) 99 CA 10, 12, 277 P 1052).

The fact that the defendant has or has not asked for a jury trial may not be considered in fixing the amount of bail. Cal Rules of Ct 4.101.

4. Increasing or Decreasing Bail Amount

a. [§55.15] Before Arraignment

A defendant who is arrested without a warrant for aailable felony offense (other than as described in §55.16) or for the misdemeanor offense of violating a domestic violence restraining order may, before arraignment and any other judicial determination of bail, apply for release on bail lower than that indicated in the schedule of bail or release on own recognizance. The application may be made by the defendant or the defendant's attorney, friend, or family member. Pen C §1269c.

A peace officer may request the local magistrate or commissioner to set bail at an amount higher than that indicated in the bail schedule if the officer has reasonable cause to believe that the amount of bail set forth in

the bail schedule is insufficient to ensure the defendant's appearance or to ensure the protection of a victim, or family member of a victim, of domestic violence. Pen C §1269c. The peace officer must file with the magistrate or commissioner a declaration under penalty of perjury setting forth the facts and circumstances in support of his belief. Pen C §1269c.

The magistrate or commissioner who receives a request for a bail increase or reduction may set bail in an amount that he or she deems sufficient to ensure the defendant's appearance or to ensure the protection of a victim, or family member of a victim, of domestic violence, and on such terms and conditions as he or she deems appropriate, or authorize the defendant's release on own-recognition. Pen C §1269c. The defendant may be held without bail for up to eight hours after booking while a bail increase is being sought. If no order increasing bail is made within the eight-hour period, the defendant is entitled to be released on posting the amount of bail set forth in the bail schedule. Pen C §1269c. If the magistrate or commissioner decides to set bail in excess of the bail schedule, he or she should articulate the specific grounds in support of the decision. *In re Christie* (2001) 92 CA4th 1105, 1109–1110, 112 CR2d 495.

Bail deviation procedures under Pen C §1269c do not apply to defendants arrested on warrants. However, a judge or magistrate can change the bail amount endorsed on an arrest warrant by writing the revised amount on the face of the warrant. See Pen C §1269a.

b. [§55.16] Hearing When Defendant Arrested for Violent or Serious Felonies, or Designated Offenses

A noticed hearing must be held in open court before a defendant is released on bail in an amount that is either more or less than the amount indicated in the bail schedule if the defendant is arrested for any of the following crimes (Pen C §1270.1(a); Cal Const art I, §28(f)(3)):

- A violent felony, as defined in Pen C §667.5(c), but not including residential burglary under Pen C §460(a);
- A serious felony, as defined in Pen C §1192.7(c);
- Pen C §136.1 punishable under Pen C §136.1(c)—intimidation of witness or victim;
- Pen C §243(e)(1)—battery of former spouse, cohabitant, or fiancé;
- Pen C §262—spousal rape;
- Pen C §273.5—corporal injury of spouse or cohabitant;
- Violation of protective order under Pen C §273.6 where the defendant made threats to kill or harm, has engaged in violence against, or has gone to the residence or workplace of, the protected party;

- Felony violation of Pen C §422—criminal threats; and
- Pen C §646.9—stalking.

The prosecutor and defense attorney must receive a two-court-day notice of a motion for bail increase or reduction and must be allowed to contest the motion. Pen C §1270.1(b). If the defendant does not have counsel, the court must appoint counsel to represent the defendant at the hearing. Pen C §1270.1(b). This hearing must take place within the time that the defendant is to be brought before a magistrate to answer the charges. Pen C §§825, 1270.1(b). If a motion to reduce bail is made at the hearing required under Pen C §825, the court must exercise its discretion to grant or deny the motion even in the absence of the two-court-day written notice. *Dant v Superior Court* (1998) 61 CA4th 380, 390, 71 CR2d 546.

If a defendant is charged with a serious felony, as defined in Pen C §1192.7(c), the victim must be given notice and reasonable opportunity to be heard at the bail hearing. Cal Const art I, §28(f)(3). This new constitutional provision fails to set forth who must give the required notice. Because the prosecutor has contact with the victim, it seems logical that the district attorney's office or other appropriate agency (*e.g.*, pretrial services office) take responsibility for providing notice to the victim.

- **JUDICIAL TIP:** The victim's right to notice is not dependent on a victim's prior request. Therefore it is incumbent on the court to determine if proper notice of the hearing has been given to the victim when the crime involves a serious felony.

At the hearing, the court must consider evidence of the defendant's past court appearances, the maximum potential sentence that could be imposed, and the danger that may be posed to other persons if the defendant is released. Pen C §1270.1(c).

If the defendant is arrested for stalking under Pen C §646.9, the victim(s) of the crime may be present at the Pen C §1270.1 bail hearing and must be permitted to address the court on the issue of bail. Pen C §646.93(b). In addition, the court must impose specific conditions of release on bail unless good cause is shown. See §55.53.

If the judge or magistrate sets bail in an amount other than that contained in the bail schedule, he or she must state in the record the reasons for that decision and address the issue of any threats made against the victim or witness. Pen C §1270.1(d).

A court's decision to reduce the bail of a defendant who is charged with a serious felony, as defined in Pen C §1192.7(c), or a violent felony, as defined in Pen C §667.5(c), below the bail schedule amount must be accompanied by a finding of unusual circumstances set forth on the record. Pen C §1275(c). The fact that the defendant has made all prior

court appearances or has not committed any new offenses does not constitute unusual circumstances. Pen C §1275(c).

c. [§55.17] Increasing Bail in Cases Involving Violation of Domestic Violation Orders

Notwithstanding Pen C §1270.1(a) (see §55.16), a judge or magistrate, pursuant to Pen C §1269c, may, with respect to a bailable felony offense or a misdemeanor offense of violating a domestic violence order, increase bail to an amount exceeding that set forth in the bail schedule without a hearing, provided an oral or written declaration of facts justifying the increase is presented under penalty of perjury by a sworn peace officer. Pen C §1270.1(e).

d. [§55.18] After Filing of Information or Indictment

When an information or indictment for a felony is filed and the defendant, before the filing, has posted bail for the appearance to answer the charge, the court may order an increase in the bail amount. If the defendant fails to post the increased amount, the court may order the defendant committed to custody. Pen C §§985, 1273. The court is not required to show “good cause” for the increase. *People v Norman* (1967) 252 CA2d 381, 398, 60 CR 609, disapproved on other grounds in 6 C3d 693, 697.

After the defendant has been admitted to bail on the indictment or information, the court may increase or decrease the amount of bail only on a showing of “good cause.” Pen C §1289; *In re Aydelotte* (1929) 97 CA 163, 165, 275 P 510 (defendant’s failure to appear at trial due solely to serious illness not “good cause”). “Good cause” may be established by a change in circumstances since the time of the original order releasing the defendant or additional facts not shown at the time of the original order. 97 CA at 165. See *In re Alberto* (2002) 102 CA4th 421, 430, 125 CR2d 526 (second judge erred in increasing bail amount on belief that first judge had not complied with bail statute; good cause must be founded on changed circumstances relating to the defendant or the proceedings, not on the conclusion that another judge committed legal error).

If the defendant moves for a bail reduction, defense counsel must serve notice of the motion to the prosecutor. Pen C §1289. If the court increases the amount of bail, it may order the defendant to be committed to actual custody, unless the defendant posts bail in the increased amount. Pen C §1289. The defendant is not entitled to notice of an application by the prosecutor for an increase in the amount of bail. *Frankfort v Superior Court* (1925) 71 CA 357, 360, 235 P 60.

5. [§55.19] Hearing To Examine Source of Bail

Penal Code §1275.1(a) states that no bail bond may be accepted unless the judge or magistrate is convinced that no portion of the consideration, pledge, security, deposit, or indemnification paid, given, made, or promised for its execution was feloniously obtained.

A hold on the release of a defendant must be ordered by a magistrate or judge if either a peace officer or prosecutor files a declaration setting forth probable cause to believe, or the magistrate or judge has probable cause to believe that the source of any consideration, pledge, security, deposit, or indemnification paid, given, made, or promised for its execution was feloniously obtained. Pen C §1275.1(b).

The defendant and his or her counsel must be provided with a copy of the declaration of probable cause within the time that the defendant is to be brought before a magistrate to answer the charges. Pen C §§825, 1275.1(d). If the declaration is not acted on within 24 hours, the defendant must be released from custody on the posting of the amount of bail set. Pen C §1275.1(g).

Once the magistrate or judge has determined that probable cause exists, the defendant bears the burden of proving by a preponderance of the evidence that the source of any consideration, pledge, security, deposit, or indemnification paid, given, made, or promised for its execution was not feloniously obtained. Pen C §1275.1(c). If the defendant meets this burden, he or she must be released from the hold and released under the authorized amount of bail. Pen C §1275.1(c).

Any person providing any portion of the consideration, pledge, security, deposit, or indemnification paid, given, made, or promised for its execution may request the magistrate or judge to close the evidentiary hearing to the general public in order to prevent disclosure of the person's financial affairs. Pen C §1275.1(f).

If the defendant is found to have willfully misled the court regarding the source of bail, the court may increase the amount of bail as a result of the misrepresentation. Pen C §1275.1(i). The misrepresentation may be a factor to be considered by the court in any subsequent bail hearing. Pen C §1275.1(i).

A trial court's noncompliance with Pen C §1275.1 does not operate to exonerate a surety's liability and is not a defense to forfeiture of the bail bond. *People v Indiana Lumbermens Mut. Ins. Co.* (2011) 192 CA4th 929, 120 CR3d 734 (sheriff released defendant, notwithstanding hold imposed by the trial court, before the Pen C §1275.1 was held; trial court's order denying surety's motion to set aside a summary judgment on forfeited bail bond affirmed).

6. [§55.20] Review of Order Fixing Bail

A defendant who is detained in custody before conviction because he or she cannot post bail in the amount fixed by the court is entitled to an automatic review of the order fixing bail by the judge or magistrate having jurisdiction of the offense. Pen C §1270.2. This review must be held no later than five days from the time of the original order fixing the amount of bail on the accusatory pleading. Pen C §1270.2. The defendant may waive this review. Pen C §1270.2.

C. Bail Pending Appeal or Application for Probation

1. [§55.21] Bail as Matter of Right

A defendant who has been convicted of an offense not punishable by death may request the court for a release on bail pending the defendant's application for probation or appeal. Bail is a matter of right under the following circumstances:

- Before judgment is pronounced, pending an application for probation in misdemeanor cases. Pen C §1272(1).
- When an appeal is from a judgment imposing a fine only, whether for a misdemeanor or a felony. Pen C §1272(1).
- When an appeal is from a judgment imposing imprisonment in misdemeanor cases. Pen C §1272(2).

A misdemeanant whose probation is revoked and reinstated to include a jail term is entitled to release on bail pending appeal. *In re O'Driscoll* (1987) 191 CA3d 1356, 1359, 236 CR 882. The Courts of Appeal are split as to whether a defendant convicted of a felony and committed to the county jail as a condition of probation is entitled to release on bail pending an appeal. See *In re McCaughan* (1956) 142 CA2d 690, 692, 299 P2d 725, and *In re Torres* (1947) 80 CA2d 579, 581, 182 P2d 573 (court may not deny bail on appeal when defendant is sentenced to county jail term as condition of felony probation). But see *People v McNiff* (1976) 57 CA3d 201, 205, 127 CR 604 (neither *Torres* nor *McCaughan* establishes an absolute rule to be applied mechanically in every case).

- ➡ **JUDICIAL TIP:** The court should confirm that the defendant has filed a notice of appeal before fixing bail. When the defendant has been convicted of multiple offenses, the court may release the defendant on bail only if a notice of appeal has been filed for each judgment. *People v Walters* (1954) 123 CA2d 184, 185, 266 P2d 563.

The right to release on bail under Pen C §1272 is a prescribed remedy for an appealing defendant and does not apply to an appeal by the

prosecution. Pen C §1272; *In re Weiner* (1995) 32 CA4th 441, 445, 38 CR2d 172.

2. [§55.22] Discretionary Bail

Defendants convicted of noncapital felonies may be admitted to bail pending an appeal at the discretion of the court. Pen C §1272(3). In exercising discretion under Pen C §1272(3), the court may consider the following factors:

- The likelihood of the defendant's flight,
- The potential danger to society posed by the defendant's flight, and
- The frivolousness of the appeal or lack of diligence in the defendant's prosecution of the appeal. *In re Podesto* (1976) 15 C3d 921, 933, 127 CR 97.

Penal Code §1272.1 codifies the above factors and requires the court to release a defendant on bail pending appeal when the defendant demonstrates each of the following:

- *By clear and convincing evidence, the defendant is not likely to flee.* Pen C §1272.1(a). In determining whether the defendant is or is not likely to flee, the court must consider the defendant's ties to the community, including his or her employment; the duration of the defendant's residence; the defendant's family attachments and property holdings; the defendant's record of appearance at past court hearings or of flight to avoid prosecution; and the severity of the sentence the defendant faces. Pen C §1272.1(a).
- *By clear and convincing evidence, the defendant does not pose a danger to the safety of any other person or to the community.* Pen C §1272.1(b). In determining whether the defendant poses a danger to the community, the court must consider whether the crime for which the defendant was convicted is a violent felony, as defined in Pen C §667.5(c). Pen C §1272.1(b). However, bail may be denied if the crime is not a violent felony when other circumstances of the case indicate that the defendant's release may pose a danger to the community. *In re Hernandez* (1991) 231 CA3d 1260, 1263, 282 CR 709 (bail denied to defendant convicted of possession for sale of narcotics when there was likelihood that defendant would continue to sell narcotics on release).
- *The appeal is not for the purpose of delay and, based on the case record, raises a substantial legal question which, if decided in favor of the defendant, is likely to result in reversal.* Pen C §1272.1(c). A "substantial legal question" is defined as a close question, one of more substance than would be necessary to a

finding that it was not frivolous. In assessing whether a substantial legal question has been raised on appeal, the court is not required to determine whether it committed error. Pen C §1272.1(c).

The prosecutor must be given reasonable notice of an application for bail by a defendant convicted of a noncapital felony. Pen C §1274. If a bail application is made after a sentencing hearing, the prosecutor must receive notice of the hearing on the bail application at least five court days in advance of that hearing. Pen C §1272(3).

3. [§55.23] Statement of Reasons

In making its decision to grant or deny release on bail under Pen C §1272(3), the court must include a brief statement of reasons in support of its order granting or denying a motion for bail on appeal. Pen C §1272.1(c). The statement must include the basis for the order with sufficient specificity to permit meaningful review. Pen C §1272.1(c); see *In re Pipinos* (1982) 33 C3d 189, 193, 187 CR 730 (statements of reasons should contain more than mere findings of ultimate fact or a recitation of the relevant criteria for release).

D. Methods of Posting Bail

1. [§55.24] Undertaking or Bond

Bail may be posted by the filing of a written undertaking or bond executed by sureties. Pen C §§1269, 1278. The bond ensures the payment of the bail amount if the defendant fails to appear in court as required. Generally, the bond states that the defendant will appear and answer any charge in the accusatory pleading, hold himself or herself amenable to the orders and process of the court, and, if convicted, appear for pronouncement of judgment or grant of probation. Pen C §§1278(a), 1287(a).

A bail bond or undertaking of an admitted surety insurer must be accepted and approved by the court or magistrate without further acknowledgment if executed by a licensed bail agent of the insurer and issued in the name of the insurer by a person authorized to do so by an unrevoked power of attorney. Pen C §1276(a). The bail agent may both execute and issue the bail bond or undertaking. Pen C §1276(b).

An undertaking may be executed by private sureties. The following requirements must be met before the court will approve a private bond or undertaking:

- The undertaking must be executed by two sureties who are residents, householders, or freeholders within the state. Pen C §§1278(a), 1287(a), 1458, 1279(1). The court may reject any

surety who is not a resident of the county where bail is offered. Pen C §1279(1).

- The undertaking must contain the bail agent license number of the owner of the bail agency issuing the undertaking along with the name, address, and phone number of the agency, regardless of whether the owner is an individual, partnership, or corporation. Pen C §§1278(b), 1287(b). The bail agency name on the undertaking must be a business name approved by the Insurance Commissioner for use by the bail agency owner, and be so reflected in the public records of the commissioner. Pen C §§1278(b), 1287(b).
- Each surety must be worth the amount specified in the undertaking, exclusive of any property exempt from execution. Pen C §1279(2). If a surety is not worth the specified amount, but owns any equity in real property, the court or magistrate must hold an evidentiary hearing to determine the value of the equity. If, at the conclusion of the hearing, the court is satisfied that the equity is worth twice the amount of the bond, the surety is justified. Pen C §1279(2).
- The sureties must justify by affidavit that they possess the necessary qualifications to act as sureties. Pen C §§1280, 1280a.
- The undertaking must be in the form prescribed by statute. Pen C §§1278, 1287, 1458.

2. [§55.25] Cash Deposit; Credit Card Payment

At any time after an order admitting the defendant to bail or after the arrest and booking of a defendant charged with a misdemeanor, the defendant, or any other person acting on his or her behalf, may deposit cash with the court or with the law enforcement agency having custody of the defendant in lieu of obtaining a bail bond. Pen C §§1269b(a), 1295(a). The cash must be in the amount fixed by the bail order or bail schedule. Pen C §1295(a). The court cannot accept a general assistance check for a deposit. Pen C §1295(c). A defendant who has posted a bond may, at any time before the forfeiture of the bond, substitute a cash deposit for the bond. Pen C §1296 (bail exonerated upon deposit).

A personal check, bank cashier's check, or money order may be accepted in payment of a bail deposit for any misdemeanor offense. Govt C §71386(a) (courts must adopt written policy to accept such forms of payment). However, a court is not required to accept a check in excess of three hundred dollars from a defendant in custody for any alleged violation of the Penal Code. Govt C §71386(b).

A court may authorize the use of credit cards for payment of a bail deposit for any misdemeanor offense, subject to the approval of the county board of supervisors. Govt C §6159.

If a judgment is rendered for the payment of a fine, any cash deposited by the defendant may be used to satisfy the judgment and to pay restitution to the victim or the Restitution Fund. Pen C §1297. Any surplus cash must be returned to the defendant. Pen C §1297. The cash deposit of a person other than the defendant must be returned to the depositor after judgment, within ten days after the depositor submits a claim. Pen C §1297. If a claim is not made within ten days of the exoneration of bail, the clerk must notify the depositor of the exoneration. Pen C §1297.

3. [§55.26] Deposit of Government Bonds

Bonds of the United States or of the State of California may be deposited with the court in lieu of a cash deposit. Pen C §1298. The bonds must have a face value of the cash deposit required. Pen C §1298. However, a court is not required to accept government bonds when their actual or market value is less than their face value. *Newton v Superior Court* (1971) 16 CA3d 499, 505, 94 CR 120. Law enforcement agencies are not authorized to accept government bonds as bail. *Williams v City of Oakland* (1972) 25 CA3d 346, 352, 101 CR 137 (Pen C §1269b(a) authorizes jailer to accept only cash or surety bond executed by admitted surety insurer).

4. [§55.27] Equity in Real Property

The defendant, or any other person acting on his or her behalf, may give as security any equity in real property that the defendant owns in lieu of a cash deposit. Pen C §1298. The value of the equity must be determined at a hearing before the magistrate. At this hearing, defense counsel will submit a certified appraisal of the property and a preliminary title report. If the magistrate finds that the value of the equity is equal to twice the amount of the cash deposit required, the equity must be accepted as bail. Pen C §1298. If the equity is accepted, defense counsel must execute a deed of trust in favor of the county and a demand promissory note.

E. [§55.28] Exoneration of Bail

The termination of the obligation of bail is known as exoneration. When bail is exonerated, a surety is relieved of liability and a depositor is entitled to the return of the deposit. Exoneration typically occurs when the criminal proceedings are terminated or on the surrender of the defendant to custody.

1. [§55.29] Termination of Proceedings in Defendant's Favor

Bail is exonerated when a criminal proceeding is terminated in any of the following ways:

- Grant of motion setting aside the indictment or information unless the court directs resubmission of case (Pen C §997);
- Dismissal of action after demurrer is sustained and no amendment is permitted or offered (Pen C §1008);
- Discharge of defendant arrested on a warrant from a wrong county (Pen C §1116);
- Discharge of jury because facts charged do not constitute a punishable offense (Pen C §1117);
- Grant of motion in arrest of judgment (Pen C §§1185–1188);
- Dismissal of action for want of prosecution (Pen C §1384); or
- Acquittal (Pen C §1195; *People v King Bail Bond Agency* (1990) 224 CA3d 1120, 1125, 274 CR 335).

If a criminal proceeding against a defendant who has been admitted to bail is dismissed, the bail must not be exonerated until 15 days after the court directs the action to be dismissed. Pen C §1303. If, within this 15-day period, the defendant is arrested and charged with a public offense arising out of the same act or omission on which the proceeding was based, the bail must be applied to the offense. Pen C §1303. The court clerk must send notice by mail to the surety of the bail application to the new charge. Pen C §1303. If the court fails to notify the surety, the bail is exonerated. *People v Surety Ins. Co.* (1983) 139 CA3d 848, 854, 189 CR 89.

When a dismissal of a complaint, indictment, or information occurs after the default of the defendant, the obligation of the bail bond is not released or otherwise affected. Pen C §1306(d).

2. [§55.30] Conviction and Commitment or Probation

When a general verdict is rendered against an in-custody defendant, or a special verdict is given, the court must order the defendant committed to the custody of the sheriff to await sentencing. Pen C §1166.

If the defendant is on bail, the court must commit the defendant unless the court concludes the evidence supports its decision to allow the defendant to remain on bail after it has weighed the following factors (Pen C §1166):

- Protection of the public;
- Seriousness of the offense charged and proved;
- Previous criminal record of the defendant; and

- Probability of the defendant failing to appear for the judgment of the court on the verdict.

On commitment of the defendant, bail is exonerated. Pen C §1166. However, if the court does not order commitment and allows the defendant to remain at liberty before the date for judgment and sentence, the liability of the surety remains in effect until completion of the pronouncement of judgment or grant of probation. *People v Allied Fid. Ins. Co.* (1978) 82 CA3d 242, 247, 147 CR 245. See *People v American Sur. Ins. Co.* (2001) 88 CA4th 762, 766–768, 106 CR2d 235 (bail not exonerated merely because court indicates a sentence to defendant who is allowed to remain free on bail and instructs defendant that a failure to make a timely appearance for sentencing may result in imposition of a greater term). The form of bond prescribed by Pen C §§1278, 1287, 1458, and 1459 contains a guaranty that the defendant, “if convicted, will appear for pronouncement of judgment or grant of probation.” Once the defendant appears for judgment and judgment is pronounced or probation granted, bail is exonerated. Pen C §1195. The surety is not liable for a defendant’s failure to surrender on the date set for execution of sentence. *People v North Beach Bonding Co.* (1974) 36 CA3d 663, 672, 111 CR 757 (defendant failed to surrender himself at expiration of three-day stay of execution).

When a defendant violates probation, is arrested and incarcerated, and is then released again on bail pending a hearing on the violation, if the court thereafter reinstates the defendant’s probation, the bail is exonerated by operation of law under Pen C §1195. *People v Safety Nat’l Cas. Corp.* (2007) 150 CA4th 11, 14–17, 57 CR3d 659.

If a defendant appears for judgment and is committed to the custody of the sheriff for diagnosis and further evaluation under Pen C §1203.03, bail is exonerated and the surety is not liable for the defendant’s nonappearance at sentencing. *People v Amwest Sur. Ins. Co.* (1986) 180 CA3d 444, 447, 225 CR 592.

By its terms, Pen C §1166 applies only to proceedings after a trial and verdict, and not to proceedings involving a guilty plea. *People v Seneca Ins. Co.* (2003) 29 C4th 954, 957–963, 129 CR2d 842 (court also noted that the organization of the Penal Code and the placement of Pen C §1166 in the part of the code that relates to matters that arise after the start of trial and before judgment clearly indicate that Pen C §1166 refers to proceedings following a contested trial and verdict).

3. [§55.31] Surrender to Custody

At any time before forfeiture, bail may be exonerated through surrender of the defendant to the officer to whose custody the defendant was committed at the time of bail. Pen C §1300. Surrender may be made

by the surety, depositor, or the defendant. Pen C §1300(a). Under Pen C §1300(a), such an exoneration must be made in the following manner:

- A certified copy of the undertaking of bail, a certified copy of the certificate of deposit, or an affidavit given by the bail licensee or surety company listing all the specific information that would be included on a certified copy of an undertaking of bail must be delivered to the officer who takes custody of the defendant. Pen C §1300(a)(1).
- The officer must acknowledge the surrender by a certificate in writing. Pen C §1300(a)(1).
- The surety or depositor must make a reasonable effort to notify the defendant's last attorney of record of the surrender. Pen C §1300(a)(2).
- The officer must bring the defendant before the court in which the defendant's next appearance on the case is scheduled within 48 hours of the surrender. Pen C §1300(a)(3).
- The court must advise the defendant of his or her right to request withdrawal of any previous time waiver. The court must also inform the defendant that it can order the return of all or part of the bail premium paid by the defendant or other person under the circumstances outlined in Pen C §1300(b) (see below). Pen C §1300(a)(3).
- The court may order that the bail or deposit be exonerated on five days' notice to the prosecutor, including a copy of the undertaking of bail or certificate of deposit, and the officer's certificate of acknowledgment. If the defendant is released on own recognizance or on another bond before the order is issued, the court must order exoneration without prejudice to the court's authority under Pen C §1300(b) (see below). Pen C §1300(a)(4).

Notwithstanding exoneration under Pen C §1300(a), if the court finds that good cause does not exist for the surrender of a defendant who has not failed to appear or has not violated any court order, it may order the surety or depositor to return all or part of the bail premium to the defendant or other person who has paid the premium. Pen C §1300(b). Good cause for surrender under Pen C §1300(b) is not limited to a defendant's failure to appear or violation of a court order. Good cause exists when a defendant fails to appear on another charge in another court or fails to keep surety notified of his or her address or phone number. *People v Smith* (1986) 182 CA3d 1212, 228 CR 277.

When a defendant is returned to custody by court action rather than by the surety, the defendant has not been surrendered by the surety for purposes of Pen C §1300(b), and the court is without authority to order the

surety to return the bail premium. *Indiana Lumbermens Mut. Ins. Co. v Alexander* (2008) 167 CA4th 1544, 1547–1548, 85 CR3d 170; *Kiperman v Klenshetyn* (2005) 133 CA4th 934, 938–940, 35 CR3d 178 (defendant was remanded to custody after an amended complaint was filed and bail was raised beyond the posted amount; bond was exonerated by operation of law).

A surety or depositor may arrest a defendant, under the authority of Pen C §1301, for the purpose of effecting the defendant's surrender. If a defendant is arrested within the state, the surety or depositor must, without unnecessary delay, and in any event within 48 hours of arrest, deliver the defendant to the court in which the defendant's next appearance in the case is scheduled or to the custody of the sheriff. Pen C §1301. A defendant apprehended outside California must be delivered to the appropriate court or the sheriff within 48 hours after the defendant is brought into the state. Pen C §1301. The defendant may waive the time requirements of Pen C §1301 by a written signed waiver delivered to the surety or depositor within 48 hours of arrest or entry into the state. However, the defendant may revoke the waiver at any time and in the same manner, whereupon he must be delivered within 48 hours after the revocation. Pen C §1301.

4. [§55.32] Other Exoneration Situations

Additional circumstances requiring exoneration of bail include:

- Commitment of defendant to a state hospital or other treatment facility on a finding of incompetence to stand trial under Pen C §1370 or §1370.01. Pen C §1371.
- Placement of defendant into a deferred entry of judgment program for drug abuse. Pen C §1000.2
- Placement of defendant into a diversion program for persons with cognitive developmental disabilities (Pen C §1001.27) or contributing to delinquency of a minor (Pen C §1001.73). See also Pen C §§1001.6, 1001.53 (other county diversion programs for misdemeanor offenders).
- Substitution of a cash deposit for the bail bond by defendant at any time before forfeiture of the bond. Pen C §1296.
- Recommitment of defendant to custody by court order at any time after his or her appearance for trial. Pen C §1129.
- Expiration of two-year period from the effective date of the initial bond, provided the court is informed in writing at least 60 days before the expiration date. Pen C §1304. The court may refuse to exonerate bail, in which case the court must inform the surety or depositor of the reasons for refusal. Pen C §1304.

- Other remand to custody. *People v McReynolds* (1894) 102 C 308, 311, 36 P 590. The arrest and return to custody of the defendant in a second unrelated case, however, does not relieve the surety of the obligation on the bail bond. *People v Amwest Sur. Ins. Co.* (2001) 87 CA4th 69, 71, 104 CR2d 282.

A trial court's failure to consider the statutory factors in Pen C §1275 before setting or reducing bail is not a cognizable ground for exoneration nor a defense to the forfeiture of the bail bond. *People v Accredited Sur. & Cas. Co. Inc.* (2004) 125 CA4th 1, 6-8, 22 CR3d 375 (Pen C §1275 procedures have no legal effect on forfeiture of bail when defendant fails to appear for sentencing).

F. Forfeiture of Bail

1. [§55.33] Declaration of Forfeiture

If a defendant, without sufficient excuse, fails to appear for arraignment, trial, judgment, or on any other occasion before the pronouncement of judgment when his or her presence in court is lawfully required, or fails to surrender himself or herself in execution of judgment after appeal, the court must declare a forfeiture of bail or any deposit in lieu of bail. Pen C §§1305(a), 1269b(h), 1195, 1043(e)(2); *People v United Bonding Ins. Co.* (1971) 5 C3d 898, 907, 98 CR 57 (failure to declare forfeiture in absence of sufficient excuse divests court of jurisdiction to declare forfeiture at later date); *People v Amwest Sur. Ins. Co.* (2004) 125 CA4th 547, 550, 22 CR3d 810. The court may not declare a forfeiture, however, if a complaint is not filed or the charges are dismissed within 15 days of defendant's arraignment date. Pen C §1305(a). The 15-day provision means that if no criminal complaint has been filed by the date set by the jailer for the first court appearance, bail can be neither exonerated nor forfeited on that date. It cannot be exonerated yet because the prosecutor is given 15 days to file the complaint. And it cannot be forfeited because if no complaint is filed within 15 days and the court does not continue the case or otherwise order the defendant to return on a later date, the court has no jurisdiction to declare a forfeiture on the bond. *County of Los Angeles v Fairmont Specialty Group* (2008) 164 CA4th 1018, 1024-1025, 79 CR3d 421 (trial court did not err in failing to declare a forfeiture on arraignment date originally set by jailor; complaint had not yet been filed, and the 15-day period for its filing had not expired); *People v Ranger Ins. Co.* (2006) 145 CA4th 23, 27-30, 51 CR3d 326 (trial court lost jurisdiction to declare a forfeiture when the prosecutor failed to file complaint within 15 days of defendant's original arraignment date). The 15-day period refers to 15 days from the arraignment date originally set by the jailor, and not 15 days from a later date to which the arraignment was postponed by the

prosecuting agency. *People v Ranger Ins. Co.*, *supra*. See also *People v Indiana Lumbermens Mut. Ins. Co.* (2010) 190 CA4th 823, 118 CR3d 555 (15-day rule strictly construed even if trial court finds good cause to continue arraignment to permit prosecutor to file complaint).

The declaration of forfeiture must be made in open court. Pen C §1305(a); see *People v Bankers Ins. Co.* (2009) 171 CA4th 1529, 1533–1535, 90 CR3d 117 (court’s statement “[W]e’ll keep the bail bond and issue a warrant” did not clearly convey declaration of forfeiture); *People v National Auto. & Cas. Ins. Co.* (2002) 98 CA4th 277, 282–287, 119 CR2d 746 (court’s declaration that bail was “revoked” did not effect a forfeiture; bail revocation and bail forfeiture are distinct legal concepts). There is no requirement that the reporter’s transcript or the court’s minutes reflect that the declaration occurred in open court. *People v Allegheny Cas. Co.* (2007) 41 C4th 704, 61 CR3d 689 (failure to declare forfeiture in open court may not be presumed on a silent record). However, the California Supreme Court stated that it is “better practice” that the court’s minutes reflect that the declaration was made orally in open court. 41 C4th at 706. In those cases involving a silent record, it is up to the party seeking to set aside the forfeiture and exonerate bail to establish that the trial court failed to declare the forfeiture in open court. 41 C4th at 706–707. Following the forfeiture, the court may issue a bench warrant for defendant’s arrest. Pen C §§978.5, 979, 1043(e)(3), 1195 (issuance of warrant for defendant who fails to appear for judgment mandatory on application of the prosecutor).

When a reporter’s transcript and court minutes are in conflict on the issue of whether a declaration of forfeiture was made in open court, the court must examine the circumstances of the case to determine which should prevail. *People v Bankers Ins. Co.* (2010) 182 CA4th 582, 586, 105 CR3d 844. In *Bankers Ins. Co.*, the complete court transcript did not reflect that the trial court declared a forfeiture of bail in open court, and the clerk’s minutes had the bail forfeiture box checked. The court found that the reporter’s transcript was entitled to greater weight because the transcript was certified as a full, true, and correct transcription, and with the exception of the bail forfeiture, the clerk’s minutes and the reporter’s transcript reflected the same information. In addition, there was nothing in that record that suggested any of the proceedings in open court were held outside of the court reporter’s presence or not reported for any reason. 182 CA4th 586–588.

If defense counsel appears on behalf of a defendant charged with only a misdemeanor or on behalf of a felony defendant who has executed in open court a written waiver of his or her right to be personally present during the criminal proceedings, bail may not be declared forfeited unless the court specifically ordered the defendant to personally appear. Pen C §§977(a)–(b), 1043(e), 1193; *People v American Bankers Ins. Co.* (1987) 191 CA3d 742, 747, 236 CR 501. See also *People v National Auto. & Cas.*

Ins. Co. (2004) 121 CA4th 1441, 1449–1450, 18 CR3d 357 (defendant not required to attend hearing on a demurrer and a Pen C §995 motion to strike absent court order to personally appear).

2. [§55.34] Granting Continuance

When the court has reason to believe that sufficient excuse exists for the defendant's failure to appear, the court may continue the case for a reasonable time to enable the defendant to appear without ordering a forfeiture or issuing a bench warrant. Pen C §1305.1. There must be some basis in fact for the conclusion that a sufficient excuse may exist. *People v Amwest Sur. Ins. Co.* (1997) 56 CA4th 915, 923, 66 CR2d 29. Representations by defense counsel that there is good reason that the defendant cannot be present will support an implied finding that sufficient excuse exists. *People v Amwest Sur. Ins. Co.*, *supra*, 56 CA4th at 925 (counsel told court that defendant may have been at an emergency and would be available the following day); *People v Surety Ins. Co.* (1976) 55 CA3d 197, 201, 127 CR 451 (counsel informed court that defendant was out of town for medical treatment); *People v Wilshire Ins. Co.* (1975) 53 CA3d 256, 261, 125 CR 529 (representation by counsel that defendant was in custody in another county). These representations may be based on information obtained other than from the defendant personally. *County of Orange v Ranger Ins. Co.* (2005) 135 CA4th 820, 823–824, 37 CR3d 575 (counsel's representations that defendant misunderstood the need to appear at pretrial conference were based on statements of defendant's sister). However, the court may not grant a continuance based on promises from defense counsel that the defendant will soon be surrendered to the court. *People v Surety Ins. Co.* (1984) 160 CA3d 963, 969, 206 CR 836.

Penal Code §1305.1 does not require a defendant to have actual knowledge of a continued date as a prerequisite to the declaration of a forfeiture on a subsequent nonappearance. *People v Ranger Ins. Co.* (2003) 108 CA4th 945, 953–955, 134 CR2d 199 (trial court continued a hearing for one day; defendant again failed to appear, and the court declared bail forfeited).

Any information relied on by the court in its determination that there is sufficient excuse for the defendant's absence must be reflected in the court record. *People v American Bankers Ins. Co.* (1989) 215 CA3d 1363, 1370, 264 CR 152 (excused nonappearance cannot be implied from silent record). The reporter's transcript, as well as the minutes, can supply a sufficient record of the excuse. *People v Amwest Sur. Ins. Co.*, *supra*, 56 CA4th at 922.

3. [§55.35] Notice Requirement

If the amount of forfeiture exceeds \$400, the court clerk must, within 30 days of the forfeiture, mail notice of forfeiture to the surety or depositor, mail a copy of the forfeiture notice to the bail agent whose name appears on the bond, and execute a certificate of the mailing and place it in the court file. Pen C §1305(b). When the surety is an authorized corporate surety insurer, notice of forfeiture must be mailed to the insurance company and the bail agent who posted the bond. Pen C §1305(b). The 180-day period for seeking relief from forfeiture (see §55.36) must be extended by a period of five days to allow for the mailing of notice. Pen C §1305(b).

Notice to a depositor must inform the party of the procedures for relief from the forfeiture and the applicable time limitations. *Minor v Municipal Court* (1990) 219 CA3d 1541, 1552, 268 CR 919 (notice merely referring to Pen C §1305 sufficient to inform a professional surety but not a private cash depositor). If the clerk fails to mail the required notice within 30 days of the forfeiture, the surety or depositor is released from its obligation under the bond. Pen C §1305(b). If, however, the surety receives actual notice despite a technical mistake by the court clerk, the forfeiture will stand if neither the surety nor bail agent produces the defendant. *County of Orange v Lexington Nat'l Ins. Co.* (2006) 140 CA4th 1488, 1491–1496, 45 CR3d 543 (clerk failed to send notice of initial forfeiture and surety never otherwise received actual notice; trial court lost jurisdiction to declare a later forfeiture and enter a summary judgment against the surety); *People v Ranger Ins. Co.* (1996) 51 CA4th 1379, 1386, 59 CR2d 777 (notice of first forfeiture effective when former bail agent forwarded it to surety, but exoneration required because clerk, who knew of surety's new address, nevertheless sent notice of second forfeiture to same former agent, and it was not forwarded).

4. [§55.36] Relief From Bail Forfeiture

Surety's Motion To Vacate: The surety or depositor may make a motion to vacate a forfeiture and be exonerated from liability at any time within 180 days of the mailing of notice of the forfeiture (plus an additional five days to allow for mailing) or within 180 days of the date of forfeiture if no notice is required. Pen C §1305(b)–(c). See *People v American Bankers Ins. Co.* (1991) 227 CA3d 1289, 1298 n4, 278 CR 314 (actual notice triggers 180-day period if notice mistakenly mailed to wrong address); *People v International Fid. Ins. Co.* (2001) 92 CA4th 470, 474–475, 112 CR2d 1, disapproved on other grounds in 33 C4th 653, 663 n7 (when period to file motion expires on a weekend or holiday, surety may file on next business day; CCP §12a applies to statutes governing bail forfeiture). The surety or depositor must give the

prosecutor written notice at least 10 court days before a hearing on the motion under Pen C §1305(f) or (g) (defendant beyond jurisdiction of the court or state). Pen C §1305(k). The motion may be heard within 30 days of the expiration of the 180-day period, the court may extend the 30-day period on a showing of good cause, and the surety may appear either in person or by counsel at the hearing. Pen C §1305(j). The 30-day period within which the motion may be heard applies to the expiration of a 180-day period extended under Pen C §1305.4 (see §55.37). *County of Los Angeles v Nobel Ins. Co.* (2000) 84 CA4th 939, 943, 101 CR2d 320.

Court's Motion To Vacate: Penal Code §1305(c)(1) and (c)(2) require the court to vacate a forfeiture and exonerate bail on its own motion when the defendant is arrested or surrendered to custody under specified conditions within the 180-day period. If the court fails to act on its own motion, the obligations under the bond must be immediately vacated and the bond exonerated. See §55.38.

a. [§55.37] Motion To Extend Period for Relief

The surety or depositor may file a motion, based on a showing of good cause, for an order extending the 180-day period. The motion must be filed within the 180-day period and heard within 30 days of the expiration of the 180-day period, unless there is good cause to extend beyond 30 days. Pen C §§1305.4, 1305(j). See *People v International Fid. Ins. Co.* (2001) 92 CA4th 470, 474–475, 112 CR2d 1, disapproved on other grounds in 33 C4th 653, 663 n7 (when period to file extension motion expires on a weekend or holiday, surety may file on next business day; CCP §12a applies to statutes governing bail forfeiture). The motion must include a declaration or affidavit stating the reasons showing good cause to extend the period. Pen C §1305.4.

To establish “good cause” for extending the 180-day forfeiture period within the meaning of Pen C §1305.4, the surety must show due diligence in attempting to locate the defendant and secure his or her presence during the initial 180 days, a reasonable likelihood of success of capturing the defendant if an additional 180 days is provided, and any other relevant circumstances. *County of Los Angeles v Fairmont Specialty Group* (2008) 164 CA4th 1018, 1027–1029, 79 CR3d 421; *People v Accredited Sur. & Cas. Co., Inc.* (2006) 137 CA4th 1349, 1354–1358, 40 CR3d 892. See also *People v Ranger Ins. Co.* (2007) 150 CA4th 638, 642–646, 59 CR3d 128 (trial court did not abuse discretion by denying motion to extend when surety received information that the defendant had fled to Mexico five months before the exoneration period expired but failed to send an investigator to Mexico or make any other effort to confirm the information until after the expiration period); *People v Alistar Ins. Co.* (2003) 115 CA4th 122, 127, 9 CR3d 497 (insurance company established good cause by providing relatively detailed declaration of its investigator’s

unsuccessful efforts to locate defendant who was reportedly in Mexico before the 180-day period expired); *People v Ranger Ins. Co.* (2000) 81 CA4th 676, 681, 96 CR2d 892 (trial court did not abuse discretion by denying motion to extend when surety simply stated that defendant might be at a certain address in Mexico without any assurance that defendant might be placed in custody and extradited to the United States).

The surety or depositor must give the prosecutor written notice at least 10 court days before a hearing on the motion. Pen C §1305.4. If good cause is shown at the hearing, the court may order the period to be extended up to an additional 180 days from the order of forfeiture. Pen C §1305.4. See *People v Taylor Billingslea Bail Bonds* (1999) 74 CA4th 1193, 1198, 88 CR2d 713 (trial court may grant only one extension of time).

b. Surrender of Defendant

(1) [§55.38] In General

The court must, *on its own motion*, vacate a forfeiture and exonerate the bail or deposit if, within the 180-day period:

- The defendant appears in court either voluntarily or in custody after surrender or arrest. Pen C §1305(c)(1); see *People v Ranger Ins. Co.* (2005) 133 CA4th 1000, 1002–1003, 35 CR3d 253 (defendant’s appearance at the office of the clerk of the court is not equivalent to an appearance in court for purposes of Pen C §1305(c)(1)); or
- The defendant is surrendered to custody by the surety or depositor or is arrested in an underlying case in the county where the case is located, and the defendant is released from custody before an appearance in court. Pen C §1305(c)(2).

The court, in its discretion, may vacate a forfeiture and exonerate the bond if the defendant appears in court after the 180-day period ends if the person was arrested on the same case within the county where the case is located during the 180-day period and has been in continuous custody from the time of arrest until his or her appearance in court. Pen C §1305.6(a). The surety or depositor must give the prosecutor written notice at least 10 court days before a hearing on the motion. Pen C §1305.6(c).

Under the forfeiture provisions of Pen C §1305, an arrest includes a hold placed on the defendant in the underlying case while he or she is in custody on other charges. Pen C §1305(i). A defendant is under arrest or on hold within the meaning of Pen C §1305(i) when he or she is arrested on an unrelated offense and the outstanding bench warrant is discovered by the arresting authorities, but the defendant is released at the behest of

law enforcement officials in whose jurisdiction the original crime occurred. *People v Fairmont Specialty Group* (2009) 173 CA4th 146, 152–155, 92 CR3d 516.

If a bench warrant for the arrest of a defendant is not entered into the national warrant system (NCIC), as required under Pen C §§980(b) and 1196(b), and the court finds that this failure prevented the surety or bond agent from surrendering the defendant into custody, prevented the defendant from being arrested or taken into custody, or resulted in the defendant's subsequent release from custody, the court must, on petition, set aside the forfeiture and exonerate the bail or deposit. Pen C §§980(b), 1196(b). A motion for relief from the forfeiture of a bail bond based on an agency's failure to enter the bench warrant into the NCIC must be filed by the surety within the 180-day period set forth in Pen C §1305. *County of Los Angeles v Bankers Ins. Co.* (2011) 199 CA4th 407, 411–413, 130 CR3d 852.

(2) [§55.39] Surrender in Another County

If outside the county where the case is located, the defendant is surrendered to custody by the surety or depositor or is arrested in the underlying case within the 180-day period, the court must vacate the forfeiture and exonerate bail. Pen C §1305(c)(3).

Penal Code §1305(c)(3) does not require or imply that the court vacate a forfeiture on its own motion or automatically exonerate the bail. It is incumbent on the surety to bring a Pen C §1305(c)(3) motion for relief before the expiration of the 180-day period. *People v Indiana Lumbermens Mut. Ins. Co.* (2010) 49 C4th 301, 306–313, 110 CR3d 4. However, if good cause is shown, a Pen C §1305(c)(3) motion may be filed within 20 days of the mailing of the notice of entry of judgment under Pen C §1306. Pen C §1305.6(b). The surety or depositor must give the prosecutor written notice at least 10 court days before a hearing on the motion. Pen C §1305.6(c).

Penal Code §1305(c)(3) does not extend to defendants arrested in another state or in a foreign country. In such cases, Pen C §1305(f) and (g) apply (see below). *People v Accredited Sur. & Cas. Co.* (2004) 132 CA4th 1134, 1142–1145, 34 CR3d 199; *People v Ranger Ins. Co.* (1998) 61 CA4th 812, 818, 71 CR2d 806.

(3) [§55.40] Defendant Beyond Court's Jurisdiction

The court must vacate a forfeiture and exonerate the bail when the defendant is in custody beyond the jurisdiction of the court that ordered the bail forfeited, and the district attorney elects not to seek extradition after being informed of the defendant's location. Pen C §1305(f); *People v Ranger Ins. Co.* (1998) 61 CA4th 812, 818, 71 CR2d 806 (motion to

vacate forfeiture denied when district attorney attempted to extradite and failed).

The court must also vacate a forfeiture and exonerate the bail when the defendant is beyond the jurisdiction of the state and is temporarily detained by the bail agent in the presence of a local law enforcement officer who positively identifies the defendant as the wanted defendant in a signed affidavit, and the district attorney elects not to seek extradition after being informed of the defendant's location (Pen C §1305(g); *County of Orange v Ranger Ins. Co.* (1998) 61 CA4th 795, 800, 71 CR2d 811 (Pen C §1305(g) applicable when defendant detained by bail agents in a foreign country)). See *County of Los Angeles v American Contractors Indem. Co.* (2007) 152 CA4th 661, 666-669, 61 CR3d 367 (affidavit need not be sworn before a local judge or taken before or authenticated by a United States foreign officer; affidavit is not used for hearsay purposes and therefore CCP §2014 and Evid C §1454 are inapplicable); *People v Frontier Pac. Ins. Co.* (1999) 69 CA4th 1093, 81 CR2d 921 (declaration of notary public/attorney identifying defendant insufficient to satisfy requirements of Pen C §1305(g); declarant's primary duty must be law enforcement).

The surety or depositor must give the prosecutor written notice at least 10 court days before a hearing on a Pen C §1305(f) or Pen C §1305(g) motion. Pen C §1305(k).

In cases arising under Pen C §1305(g), if the bail agent and the district attorney agree that additional time is needed to return the defendant to the jurisdiction of the court, and the district attorney agrees to the tolling of the 180-day period, the court may, on the basis of the agreement, toll the 180-day period within which to vacate the forfeiture. The court may order tolling for up to the length of time agreed upon by the parties. Pen C §1305(h).

The court may not vacate a forfeiture when it is not feasible for the district attorney to seek extradition of a defendant. Extradition is deemed infeasible when the host country, as a matter of policy and practice, refuses to grant extradition requests in the type of case at hand. *County of Los Angeles v Fairmont Specialty Group* (2009) 173 CA4th 538, 543-545, 92 CR3d 767 (not feasible to extradite Honduran citizen from Honduras for routine drug offense); *County of Orange v Ranger Ins. Co.*, *supra*, 61 CA4th at 803 (Mexico routinely refused to extradite Mexican nationals for nonheinous crimes).

A bail bond is not exonerated simply because the district attorney has not completed (or even initiated) extradition of the defendant before the end of the bond exoneration period. In the case of an out-of-custody criminal defendant who flees to a foreign jurisdiction and is identified by the bail agent in compliance with Pen C §1305(g), the bond is exonerated if the criminal defendant is returned to the court within the bond

exoneration period or the prosecutor elects not to extradite. *People v Seneca Ins. Co.* (2010) 189 CA4th 1075, 1080–1083, 117 CR3d 217.

(4) [§55.41] Permanent Disability

The court may direct that the order of forfeiture be vacated and that bail be exonerated in the case of a permanent disability of the defendant, if within 180 days of the date of forfeiture or within 180 days of the mailing of the notice, it appears to the court's satisfaction that the following conditions are met (Pen C §1305(d)):

- The defendant is deceased or otherwise permanently unable to appear in court because of illness, insanity, or detention by civil or military authorities. See *People v American Sur. Ins. Co.* (2000) 77 CA4th 1063, 92 CR2d 216 (trial court erred in denying motion to vacate forfeiture when defendant deported to Mexico and barred by federal law from reentering the United States); and
- The defendant's absence is without the connivance of the surety.

Penal Code §1305(d) does not require or imply that the court vacate a forfeiture on its own motion or automatically exonerate the bail. The surety must bring a Pen C §1305(d) motion for relief before the expiration of the 180-day period. See *People v Accredited Sur. & Cas. Co. Inc.* (2012) 203 CA4th 1490, 1496, 138 CR3d 370.

(5) [§55.42] Temporary Disability

If the defendant's nonappearance is due to a temporary disability, the court must toll the running of the 180 days for the remainder of the period during which the disability continues if it appears to the court's satisfaction that the following conditions are met (Pen C §1305(e)):

- The defendant is temporarily disabled because of illness, insanity, or detention by military or civil authorities (see, e.g., *People v Lexington Nat'l Ins. Co.* (2010) 181 CA4th 1485, 1490–1492, 105 CR3d 469 (if defendant is in custody in another state, that detention constitutes a temporary disability because the defendant will be available for transfer to California after the conclusion of proceedings in the other state));
- Because of the temporary disability, the defendant is unable to appear in court during the remainder of the 180-day period; and
- The defendant's absence is without the connivance of the surety.

In addition, the court may toll the 180-day period for a reasonable time to allow the surety to return the defendant to the court once the defendant's disability has terminated. Pen C §1305(e).

Penal Code §1305(e) does not require or imply that the court toll the exoneration period if the defendant is temporarily disabled on its own motion. The surety must bring a Pen C §1305(e) motion to toll before the expiration of the 180-day period. *People v Accredited Sur. & Cas. Co. Inc* (2012) 203 CA4th 1490, 1500–1502, 138 CR3d 370.

c. [§55.43] Reinstatement of Bail

When a defendant returns to court by means other than surrender by the surety, the court may reinstate bail and order the defendant released again on the same bond. Pen C §1305(c)(4). Notice must be provided to the surety or the bail agent acting on behalf of the surety before the court may order reinstatement. Pen C §1305(c)(4); *People v Ranger Ins. Co.* (2003) 110 CA4th 729, 733–735, 1 CR3d 875 (the term “the bail,” as used in notice provisions of Pen C §1305, refers to the surety, and unless service is required to be given the surety in addition to the bail agent, service on the bail agent is service on the surety). Notice of forfeiture required under Pen C §1305(b) does not suffice as notice of the possibility of reinstatement of bail. *County of Madera v Ranger Ins. Co.* (1991) 230 CA3d 271, 275, 281 CR 230. Although Pen C §1305(c)(4) does not address whether notice to a cash depositor is required before reinstatement of a money deposit, it may be argued that due process considerations require such notice. See *People v Swink* (1984) 150 CA3d 1076, 198 CR 290 (discussion of due process rights of cash depositor). The court is not required to obtain the consent of the surety or depositor before bail is reinstated. *People v Wilshire Ins. Co.* (1976) 61 CA3d 51, 59, 132 CR 19 (decision to reinstate bail lies within sound discretion of the court).

- **JUDICIAL TIP:** Courts frequently request defendants seeking reinstatement of bail to bring to court a letter from their surety indicating the surety’s agreement to the reinstatement. Sureties are more than happy to provide such letters because it spares them the inconvenience of coming to court to request relief from a forfeiture.

The court may not reinstate bail of a defendant who appears in court after arrest on a bench warrant. Once the defendant is remanded into custody, the liability of the surety ceases and bail is exonerated. *People v McReynolds* (1894) 102 C 308, 311, 36 P 590.

d. [§55.44] Assessment of Costs

When a court grants relief from a bail forfeiture, it must impose, as a condition of relief, a payment of the costs of returning the defendant to custody, unless the court determines that the interests of justice are best served by not imposing payment. Pen C §1306(b); see *People v Ranger*

Ins. Co. (1992) 9 CA4th 1302, 1308, 12 CR2d 343 (assessment of cost of housing and care of defendant while in custody exceeded court's jurisdiction under Pen C §1306(b)); see *People v Sue Sarkis Bail Bonds* (1986) 182 CA3d 650, 655, 227 CR 506 (assessment of \$50 to cover cost of issuing bench warrant for defendant's arrest is valid condition of relief).

If the defendant posted cash bail, the costs must be imposed directly on the defendant. If a surety posted a bond, the costs may be imposed on the surety who may then pass the costs on to the defendant or recover them from the collateral held by the surety. *People v V. C. Van Pool Bail Bonds* (1988) 200 CA3d 303, 305, 246 CR 79. The court may enter a summary judgment for failure to make payment against the amount of the costs owing at the time the summary judgment is entered, plus any administrative costs and interest. Pen C §1306(b). Judgment may not be entered against the amount of the bond. Pen C §1306(b).

If an assessment is made a condition of an order to set aside the forfeiture of bail or a deposit, the clerk must mail notice to the surety or depositor and to the bail agent whose name appears on the bond within 30 days and execute a certificate of mailing and place it in the case file. The surety or depositor must be given a minimum of 30 days after the mailing of the notice to make payment. Pen C §1305.2. If the assessment has not been paid by the specified date and a certificate of mailing not executed, another notice must be mailed to the surety, depositor, or bail agent, allowing an additional 30 days for payment. Pen C §1305.2. If the notice requirements of Pen C §1305.2 are not strictly followed, the court will lose jurisdiction to enter summary judgment under Pen C §1306, and the bail will be exonerated. *People v Ranger Ins. Co.*, *supra*, 9 CA4th at 1307 (mailing of conditional exoneration order that provided no time limit for payment is jurisdictional defect).

- **JUDICIAL TIP:** To avoid the problems and complexities of Pen C §1305.2, some courts order the forfeiture to be set aside without condition, and in a separate order direct any assessment to be paid to the clerk's office within 30 days or some other reasonable time.

5. [§55.45] Entry of Summary Judgment

When bail is forfeited and the period for setting aside the forfeiture has lapsed, the court that declared the forfeiture must enter a summary judgment against the surety for the amount of the bond plus costs. Pen C §1306(a). Summary judgment must be entered within 90 days after the date on which it may be first entered. If it is not timely entered, the bail must be exonerated. Pen C §1306(c). If notice of forfeiture was mailed to the surety, the 90-day period begins to run on the 186th day following notice. *People v Ranger Ins. Co.* (2000) 77 CA4th 813, 91 CR2d 907. An appeal from a denial of a motion to vacate a forfeiture of bail does not toll

the 90-day period. *County of Sacramento v Insurance Co. of the West* (1983) 139 CA3d 561, 565, 188 CR 736. Notice of the entry of summary judgment must be served on the surety within five days of the entry of judgment. Pen C §1308(b).

When the surety timely files a motion to vacate the forfeiture or a Pen C §1305.4 motion to extend the appearance period before the exoneration period expires, and the motion is decided after that period expires, the trial court's power to enter summary judgment begins on the day following the denial of the motion and expires 90 days later. *People v Aegis Sec. Ins. Co.* (2005) 130 CA4th 1071, 1074–1076, 30 CR3d 686; *People v Granite State Ins. Co.* (2003) 114 CA4th 758, 764–770, 7 CR3d 887.

A trial court's error of incorrectly listing the date of the actual order of bail forfeiture on the notice of forfeiture does not deprive the court of jurisdiction to enter judgment, and a judgment based on such error may be amended nunc pro tunc to state the correct date of forfeiture. *People v Aegis Sec. Ins. Co.* (2005) 127 CA4th 569, 573–574, 25 CR3d 623 (such a discrepancy amounts to clerical error that may be corrected on court's own motion or at request of a party).

A summary judgment entered prematurely is merely voidable. *People v American Contractors Indem. Co.* (2004) 33 C4th 653, 663–664, 16 CR3d 76 (summary judgment entered on last day of appearance period or one day prematurely was voidable, not void). Although a summary judgment is subject to correction by appeal or timely motion to vacate the judgment, there is no basis to set it aside by collateral attack once it is final. Although Pen C §§1305, 1306 expressly provide that if a court or court clerk fails to perform in a specific manner, the surety is released of all obligations or the bond is exonerated, there is no statutory provision that provides that a surety is released from its obligation if judgment is entered prematurely. 33 C4th at 661–662.

After summary judgment is entered and becomes final, the prosecutor must demand payment of the judgment within 30 days. Pen C §1306(e)(1). If the judgment is not paid within 20 days of the demand, the judgment must be enforced as a money judgment. Pen C §1306(e)(2). Enforcement must occur within two years of the entry of judgment. Pen C §1306(f). Neither the filing of an appeal from a summary judgment nor the filing of an appeal from an order denying a motion to set aside a summary judgment tolls the two-year period unless an appeal bond is posted under CCP §917.1(a). *People v American Contractors Indem. Co.* (2006) 136 CA4th 245, 249–250, 38 CR3d 603; *County of Orange v Classified Ins. Corp.* (1990) 218 CA3d 553, 556, 267 CR 73. An appeal bond must be posted by a surety other than the one filing the appeal. Pen C §1306(e)(2).

A court may not accept any person or corporation as a surety on bail if a summary judgment entered against that person or corporation remains unpaid 30 days after the service of notice of judgment, unless a proceeding

challenging the validity of the order of forfeiture or summary judgment has been initiated and, if an appeal is taken, an appeal bond posted within the 30 days. Pen C §1308(a).

G. [§55.46] Recommitment of Defendant

The court may, by an order entered on its minutes, direct the defendant's arrest and recommitment to custody despite the defendant's prior posting of bail under the following circumstances:

- When the defendant has failed to appear and bail has been forfeited. Pen C §1310(a).
- When it satisfactorily appears to the court that one or both of the private sureties of a bond have died or left the state. Pen C §1310(b).
- When it satisfactorily appears to the court that the defendant's bail is insufficient. Pen C §1310(b); *In re Eiseman* (1925) 72 CA 622, 238 P 124.
- After an indictment or information charging a felony has been filed. Pen C §1310(c).
- After the defendant's appearance for trial. Pen C §1129.
- When a verdict is rendered against the defendant. Pen C §1166.

An order of recommitment under Pen C §1310 must state the facts on which it is founded, and direct that the defendant be arrested and committed to custody. Pen C §1311. If the ground for recommitment is the defendant's failure to appear for judgment on conviction, the defendant must be committed according to the requirements of the order. Pen C §1313. But see *People v National Auto. & Cas. Ins. Co.* (1966) 244 CA2d 491, 494, 53 CR 297 (court has discretion to admit defendant to bail after recommitment for failure to appear for sentencing). If the order is made on any other ground and the offense charged is bailable, the court may direct that the defendant be admitted to bail in the amount specified in the recommitment order. Pen C §1314.

H. [§55.47] Own-Recognizance Release

A defendant may request the court for a release from custody in exchange for a written promise to appear, otherwise known as an own-recognizance (OR) release. A motion for OR release may be made at the times appropriate for a bail motion. Some courts give defendants release application forms during their initial court appearance. In counties where there are pretrial release programs, investigators review defendants' eligibility for OR release and report their findings and recommendations to the court.

The California Constitution grants courts the discretionary power to release a defendant on his or her own recognizance. Cal Const art I, §12, §28(f)(3). However, statute prohibits a court from granting an OR release to defendants charged with capital offenses and to certain defendants charged with violent felonies. Pen C §§1270(a), 1319(b); see §55.49.

The court must consider the safety of the victim and the victim's family in making its determination whether to release the defendant on his or her own recognizance. Cal Const art I, §28(b)(3), (f)(3).

1. [§55.48] Misdemeanor or Nonviolent Felony Offenses

A defendant who is in custody and is arraigned on a complaint alleging a misdemeanor offense, or who appears before a court or magistrate on an out-of-county warrant arising from a case involving misdemeanors, must be released on his or her own recognizance unless the court makes a finding on the record that this release will compromise public safety or will not reasonably ensure that the defendant will appear on the next court date. Pen C §1270(a). Public safety must be the court's primary consideration. Pen C §1270(a).

A defendant who is arrested for or charged with a nonviolent felony offense may be released on his or her own recognizance at the court's discretion. Cal Const art I, §§12, 28(f)(3). Although there are no statutory guidelines as to what factors the court must consider in its decision to grant or deny an OR release to a defendant charged with a nonviolent felony, many courts apply the factors contained in Pen C §1275(a). The state Constitution requires that the court consider the safety of the victim and the victim's family. Cal Const art I, §28(b)(3), (f)(3).

In determining the probability that the defendant will return to court if released on his or her own recognizance, the court must consider the defendant's ties to the community, the defendant's record of appearance at past hearings or of flight to avoid prosecution, and the severity of the possible sentence the defendant faces. *Van Atta v Scott* (1980) 27 C3d 424, 438, 166 CR 149. The defendant bears the burden of producing evidence of community ties, including employment or other sources of income, and the duration and location of the defendant's residence, property holdings, and family attachments. The prosecution bears the burden of producing evidence of the defendant's record of appearance at prior court hearings and the severity of the possible sentence. 27 C3d at 438. The prosecution also bears the burden of proof concerning the defendant's likelihood of appearing at future court hearings. 27 C3d at 444.

Notice to the prosecutor is not required when a defendant charged with a misdemeanor or nonviolent felony requests release on his or her own recognizance. *Williams v County of San Joaquin* (1990) 225 CA3d 1326, 1333, 275 CR 302. Notice is required, however, when the defendant is charged with a violent felony. Pen C §1319(a); see §55.49.

An OR hearing must be held in open court before the magistrate or judge before OR release may be granted to a defendant who is arrested for a new offense and who is currently on felony probation or felony parole. Pen C §1319.5. A hearing also is required if a defendant has failed to appear in court three or more times within the last three years, resulting in a warrant being issued each time (except for Vehicle Code infractions), and he or she is arrested for any felony offense or other specified offenses. Pen C §1319.5.

2. [§55.49] Violent Felony Offenses

A noticed hearing must be held in open court before a defendant is released on OR if the defendant is arrested for any of the following crimes (Pen C §§1270.1(a), 1319(a)):

- A violent felony, as defined in Pen C §667.5(c), but not including residential burglary under Pen C §460(a);
- A serious felony, as defined in Pen C §1192.7(c);
- Pen C §136.1 punishable under Pen C §136.1(c)—intimidation of witness or victim;
- Pen C §243(e)(1)—battery of former spouse, cohabitant, or fiancé;
- Pen C §262—spousal rape;
- Pen C §273.5—corporal injury of spouse or cohabitant;
- Violation of protective order under Pen C §273.6 where the defendant made threats to kill or harm, has engaged in violence against, or has gone to the residence or workplace of, the protected party;
- Felony violation of Pen C §422—criminal threats; and
- Pen C §646.9—stalking.

The prosecutor and defense counsel must receive a two-court-day written notice of a motion for OR release and a reasonable opportunity to be heard on the matter. Pen C §§1270.1 (b), 1319(a). If the defendant does not have counsel, the court must appoint counsel to represent the defendant at the hearing. Pen C §1270.1(b). The hearing must take place within the time that the defendant is to be brought before a magistrate to answer the charges. Pen C §§825, 1270.1(b), 1319(a). If a motion for OR release is made at the hearing required under Pen C §825, the court must exercise its discretion to grant or deny the motion even in the absence of the two-court-day written notice. *Dant v Superior Court* (1998) 61 CA4th 380, 390, 71 CR2d 546.

In making its determination whether to release the defendant on OR, the court must consider the potential danger to other persons, including any threats that have been made by the defendant and any past acts of

violence. Pen C §1270.1(c). The court must also consider any evidence offered by the defendant regarding his or her community ties, his or her ability to post bond, and the safety of the victim and the victim's family. Pen C §1270.1(c); Cal Const art I, §28(b)(3), (f)(3).

A defendant arrested for a violent felony may not be released if it appears, by clear and convincing evidence, that the defendant failed to appear in court on a previous felony charge. Pen C §1319(b). In all other cases, the court must consider the following in its decision to grant or deny release: (1) the existence of any outstanding felony warrants on the defendant, (2) any information contained in an investigative report prepared under Pen C §1318.1 (see §55.50), and (3) any other information presented by the prosecutor. Pen C §1319(b).

3. [§55.50] Investigative Report

If the court employs an investigative staff to recommend whether a defendant should be released on his or her own recognizance, that staff must prepare a report when the defendant is charged with a violent felony, as defined in Pen C §667.5(c), or a felony violation of Veh C §23153(a) (DUI causing injury to another). Pen C §1318.1(b). The report must contain a recommendation for or against OR release and written verification of (1) any outstanding warrants against the defendant, (2) any prior incidents where the defendant has failed to make a court appearance, (3) the defendant's criminal record, and (4) the defendant's residence during the past year. Pen C §1318.1(b).

The report must be submitted to the court for review before the Pen C §1319 hearing and placed in the court file. Pen C §§1318.1(b), 1319(c). If the court has not received the report at the time of the hearing, however, the court is not precluded from granting the defendant an OR release. Pen C §1319(b)(2).

4. [§55.51] Statement of Reasons

The court is not required to issue a written statement of reasons when it denies a defendant charged with a misdemeanor or nonviolent felony an OR release. *Van Atta v Scott* (1980) 27 C3d 424, 446, 166 CR 149. However, a decision by the court to refuse OR release must be accompanied by a finding on the record that release will compromise public safety or will not reasonably ensure the appearance of the defendant on future court dates. Pen C §1270(a). In cases involving violent felonies, the court must state the reasons for granting or denying an OR release, and the statement must be included in the court's minutes. Pen C §1319(c).

5. [§55.52] Written Agreement To Appear

A defendant may not be released on his or her own recognizance unless the defendant files with the clerk of the court or other person authorized to accept bail a signed release agreement. Pen C §1318. Under Pen C §1318, the agreement must contain the following:

- The defendant's promise to appear at all times and places, as ordered by the court;
- The defendant's promise to obey all reasonable conditions imposed by the court;
- The defendant's promise not to leave the state without permission of the court;
- The defendant's agreement to waive extradition if he or she fails to appear as required and is apprehended outside the state; and
- The defendant's acknowledgment that he or she has been advised of the consequences and penalties for violation of the conditions of release.

I. [§55.53] Placing Conditions on Bail and Own-Recognizance Release

Penal Code §1318(a)(2) authorizes imposition of "reasonable conditions" on a defendant's own-recognizance release. The California Supreme Court has interpreted Pen C §1318(a)(2) to permit a trial court to impose conditions that are related to the furtherance of public safety, including, but not limited to, conditions that relate to ensuring subsequent court appearances. *In re York* (1995) 9 C4th 1133, 40 CR2d 308. In *In re York*, the Supreme Court held that a trial court can require a defendant charged with a felony drug offense to submit to random drug testing and warrantless search and seizure as conditions of release. Although the conditions do not relate directly to the likelihood that the defendant will attend future court hearings, they clearly relate to the prevention and detection of further crime and therefore to the safety of the public. 9 C4th at 1145. The court did not address whether such release conditions could be imposed in misdemeanor cases. 9 C4th 1138 n2.

In *People v Barbarick* (1985) 168 CA3d 731, 735, 214 CR 322, imposition of a random drug search condition to a defendant charged with a misdemeanor possession offense was held invalid because it did not reasonably relate to ensuring future court hearings. Similarly, in *McIntosh v Municipal Court* (1981) 124 CA3d 1083, 1085, 177 CR 683, the requirement that a protester sign an agreement stipulating that he or she would not trespass or blockade a nuclear plant as a condition of OR release was found to have no relationship to ensuring the defendant's future court appearances, and was struck down. However, in light of *In re*

York, supra, and the subsequent amendment to Pen C §1270(a) that requires public safety to be the primary consideration in determining whether to grant OR release in misdemeanor cases, the continuing validity of *Barbarick* and *McIntosh* is questionable. See *In re McSherry* (2003) 112 CA4th 856, 861, 5 CR3d 497 (*Barbarick* discredited).

Participation in a residential drug rehabilitation program has been upheld as a valid condition of release. *People v Sylvestry* (1980) 112 CA3d Supp 1, 7, 169 CR 575.

In domestic violence cases, OR release of the defendant is frequently accompanied by Pen C §136.2 stay-away orders to ensure the protection of the victim and witnesses. See *In re York, supra*, 9 C4th at 1145 (victim protection and prevention against witness intimidation appropriate purposes of OR conditions).

Magistrates may set bail on conditions that they consider appropriate. Pen C §1269c. Conditions imposed on bail must be reasonable and related to public safety. *In re McSherry, supra*, 112 CA4th at 860–863 (trial court had authority to place restrictions on defendant’s bail pending appeal of his conviction of multiple counts of misdemeanor school loitering; restriction requiring defendant to stay at least 200 yards from places where children congregate was reasonable and related to public safety given defendant’s prior criminal history of child sexual abuse). However, the imposition of a bail condition may not violate the defendant’s procedural due process rights. *Gray v Superior Court* (2005) 125 CA4th 629, 636–643, 23 CR3d 50 (bail condition prohibiting defendant from practicing medicine violated defendant’s procedural due process rights; trial court (1) significantly impaired the defendant’s freedom to pursue a private occupation without giving him notice, (2) did not give defendant an effective opportunity to confront the charges or witnesses against him, or (3) did not give defendant a full hearing).

Stalking cases. Before releasing on bail a defendant charged with stalking under Pen C §646.9, the judge must impose the following conditions of release unless good cause is shown (Pen C §646.93(c)):

- The defendant must not initiate contact in person, by telephone, or by any other means with the alleged victim(s);
- The defendant must not knowingly go within 100 yards of the alleged victim(s), their residence, or place of employment;
- The defendant must not possess any firearms or other deadly or dangerous weapons;
- The defendant, on request at the time of his or her court appearance, must provide the court with his or her home and business addresses and phone numbers; and
- The defendant must obey all laws.

J. [§55.54] Criminal Sanctions for Failure To Appear

A defendant charged with or convicted of a felony who, in order to evade the process of court, willfully fails to appear in court after release on bail or on his or her own recognizance is guilty of a felony. Pen C §§1320(b), 1320.5. A defendant charged with or convicted of a misdemeanor who is released on his or her own recognizance and who willfully fails to appear at a scheduled court appearance is guilty of a misdemeanor. Pen C §1320(a). Failure to appear under Pen C §1320 or §1320.5 is a specific intent crime; the prosecution must prove that the defendant willfully failed to appear and did so with the intent to evade the process of court. *People v Wesley* (1988) 198 CA3d 519, 522, 243 CR 785.

Penal Code §§1320 and 1320.5 provide that when a defendant does not appear within 14 days of his or her court appearance, the court may presume that the defendant intended to evade the process of court. However, the court in *People v Forrester* (1994) 30 CA4th 1697, 37 CR2d 19, held that this presumption violates due process because it relieves the prosecution from proving that defendant harbored the specific intent to evade the process of the court. The court stated in dicta that in a prosecution for failure to appear, when the prosecution has produced proof of defendant's willful failure to appear within 14 days of the assigned appearance date, the trial court should instruct the jury that it is permitted, but not required, to infer that the defendant intended to evade the process of court. 30 CA4th at 1703.

A defendant who is not advised of the consequences and penalties of violating the conditions of release and who fails to appear in court cannot be found to have "willfully" failed to do so. *People v Jenkins* (1983) 146 CA3d 22, 27, 193 CR 854 (defendant did not sign written acknowledgment that he had been informed of consequences and penalties).

A prosecution for failure to appear while out on own-recognizance (Pen C §1320) requires evidence of the signed release agreement specified under Pen C §1318. *People v Mohammed* (2008) 162 CA4th 920, 76 CR3d 372 (release of a defendant from custody without a signed release agreement is not a release under an own recognizance; doctrine of substantial compliance does not apply to agreement).

A court order is not necessary to require a defendant's presence under Pen C §1320.5. *People v Jimenez* (1995) 38 CA4th 795, 798, 45 CR2d 466 (prosecutor calendared hearing, notified defense counsel to have defendant present, and warned that bench warrant would issue if defendant did not appear).

IV. SCRIPTS

A. [§55.55] Declaring Forfeiture of Bail (Pen C §1305(a))

[Judge calls case. Defense counsel appears without defendant and fails to offer “sufficient excuse” for defendant’s absence.]

The defendant not appearing and there being no sufficient, legal, or justifiable excuse to warrant defendant’s absence, the court declares bail forfeited.

[Alternative 1:]

A bench warrant is issued for the defendant’s apprehension.

[Alternative 2:]

A bench warrant is issued for the defendant’s apprehension, but the clerk is to hold the warrant until *[date]*.

[Alternative 3:]

I will give *[name of defense counsel]* until *[date]*, to appear with the defendant in this court. If the defendant is not brought before this court by that date, I will issue a bench warrant for the defendant’s apprehension.

[If the court issues a bench warrant, add:]

Bail on the bench warrant is set in the sum of \$ ____.

[Or:]

There is no bail on the bench warrant.

[If the court issues a bench warrant on a private surety-bonded felony case, add:]

The bench warrant is ordered entered into the NCIC, the national warrant system.

B. [§55.56] Granting Continuance Without Bail Forfeiture (Pen C §1305.1)

[Defense counsel offers “sufficient excuse” for defendant’s absence.]

The court has reason to believe that sufficient excuse may exist for the defendant’s neglect to appear. This belief is based on the representations of counsel that the defendant’s absence is due to *[state reasons]*. Under authority of Penal Code section 1305.1, the case will be

continued until [date], at _____ [a.m./p.m.], to enable the defendant to appear. Bail will not be forfeited at this time.

C. [§55.57] Exonerating Bail on Surrender of Defendant (Pen C §1300)

[Judge calls case and determines that all parties are present.]

[Mr./Ms.] [name of defendant], you have a right to request the court to order the withdrawal of any time waiver you may have previously consented to.

[Defense counsel moves the court to order withdrawal of time waiver.]

Motion is granted. The time waiver previously consented to by the defendant is now withdrawn. The case is currently set for trial on [date]. The trial is rescheduled for [date], which is within the statutory time.

[Mr./Ms.] [name of defendant], if the court determines that good cause does not exist for your surrender, the court may order the surety to return all or part of the bail premium to you, if you paid the premium, or to the person who made payment on your behalf.

Does the prosecuting attorney, defense counsel, or a representative of the surety wish to be heard on the issue of whether the surety should be ordered to return to the defendant part or all of the bail premium?

[Counsel and surety respond.]

[If court finds good cause exists for surrender:]

The court determines that good cause exists for the surrender of the defendant. It is ordered that the bond be exonerated. The defendant is not entitled to the return of any portion of the bail premium.

[If court does not find good cause exists for surrender:]

The court determines that good cause does not exist for the surrender of the defendant. It is ordered that the bond be exonerated. It is further ordered that the surety return to [name of defendant/name of other person who paid all or part of the premium] the sum of \$_____, which represents [___ percent/all] of the premium paid for the bond.

V. [§55.58] ADDITIONAL REFERENCES

California Criminal Law Procedure and Practice, chap 5 (Cal CEB 2012)
4 Witkin and Epstein, California Criminal Law, *Pretrial Proceedings*,
§§87-139 (4th ed 2012)

6 Witkin and Epstein, California Criminal Law, *Criminal Appeal*, §§111-121 (4th ed 2012)

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