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# CRIMINAL DEFENSE FOCUS<sup>®</sup>

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## 10 Factors to Consider when Choosing Your Attorney

Finding the right attorney could be the most important decision you make about your case. Outcome can vary from attorney to attorney. "The best defense is a good lawyer". The following are important factors to consider in choosing your attorney:

### 1. Choose CRIMINAL Law Specialist

Criminal law is highly specialized and very different from other areas of law. You need to select an attorney who is a *criminal defense specialist*, i.e., an attorney who's primary –if not exclusive practice- is dedicated to defending criminal cases. Don't hire a family or real estate lawyer. A knowledgeable civil attorney will refer you to a criminal lawyer. Hire an attorney who is knowledgeable and experienced in the law and practice of criminal defense..

### 2. Choose a lawyer you TRUST and can work with

You want to find an attorney that you can completely trust will fearlessly work as hard as possible to represent your best interests. Your attorney is going to be your champion. S/he is going to be your advocate and your voice to speak for you. Choose an attorney that you are comfortable communicating with because preparing a good defense requires an excellent attorney-client relationship and the attorney understanding your needs. It is important that you and your attorney communicate and work well together; Trust is fundamental to that.

### 3. Choose a HARD WORKING attorney

There are many ways that an attorney can try a case. Often, to get the best result, an attorney needs to be tenacious and determined. You need to completely trust that your attorney will be dedicated to you and your case to work as hard as necessary to get you the best result.

### 4. Choose an EXPERIENCED attorney

You want to find a skillful attorney, experienced in investigation, trial, negotiations and motions in defending your type of case.

### 5. Choose an attorney with a respected REPUTATION

Choose an attorney who works in the Courts and is familiar with and highly respected by the local judges and prosecutors with whom s/he will be defending you / negotiating your sentence.

### 6. Choose an attorney not with REASONABLE CASELOAD

Ask your attorney how many active cases s/he is currently working on. Even the best attorney cannot do a great job if s/he is spread too thin dividing their attention between too many cases. Hire an attorney who will give your case their maximum personal attention and priority.

### 7. Choose an attorney who can START IMMEDIATELY

Do not delay. Time is not on your side. Actions need to be taken immediately to improve your odds at trial and sentencing. The sooner you get an attorney working on your case; the better off you will be, regardless of whether you are guilty or completely innocent. Don't hire an attorney who cannot work on your case until later; choose an attorney who can start immediately.

### 8. Choose an attorney who is CREATIVE and "thinks outside the box"

Criminal defense is as much an art as it is a science. For standardization, prosecutors and courts often try to make charges and sentences consistent and the same for all situations. However, because of the complex nature of criminal matters, no two cases are exactly alike and often there are *defenses* and *sentencing alternatives* that are better for you that a creative defense attorney can devise and, with enough persistence, get the prosecutor and court to accept. Some clients want to avoid fines, others want to keep their driver's license, others want to avoid jail, and others who are not citizens just want to remain in the U.S. If your attorney fully understands your needs and goals, s/he can often craft a solution that reflects your most important concerns.

### 9. Choose an attorney you can AFFORD - How much will it COST?

Price is the last consideration on your list. Your defense is too important to skimp on the price. The outcome of your criminal case can affect your whole life and future (and finances). Having a criminal record can be very limiting and close important opportunities in your life. It can also mean high fines and serious time in jail or prison. How much is it worth to you to save spending time in jail, or keep a felony or misdemeanor off your criminal record?

Criminal attorneys are highly skilled, specialized attorneys who work very hard for their clients, fighting for your rights and freedom, and are worth the expense. If you don't have enough money, it is worth borrowing the money from family, friends, credit cards or banks.

Pay your attorney in full; you do not want your attorney concerned about whether they will get paid for their efforts; you want your attorney thinking about nothing but defending you, well. Nevertheless, money is a real concern to all of us; **no one budgets to buy a criminal defense.**

This is a most unexpected emergency expense. Be upfront with your attorney about how much the representation will cost. Unlike most attorneys who charge *hourly*, criminal lawyers usually charge **flat fees**. This is so because criminal attorneys have done such cases so many times, they are relatively certain how much work is involved in defending such a case. The **flat fee** is generally preferable to clients because clients know that they are *locked in* at a certain total cost and do not need to fear a future unexpectedly high lawyer's bill. However, a flat fee may not include *costs* and *expenses*. Ask your attorney what "costs" are included and which *costs* are extra (photocopies, faxes, phone charges, travel time, hiring experts and investigators, etc).

### 10. SAVE MONEY! Choose an attorney with LOW OVERHEAD

The one way that you can save significant money without sacrificing quality of your attorney is by choosing a good attorney who has **low overhead**. If your lawyer has a big, prestigious office with marble floors, fancy furniture, plenty of staff, be aware that his clients –you- are paying for it! An attorney who undertakes high overhead costs need to charge higher fees to cover those costs (and then still earn a profit). The best criminal defense lawyer in the world may work out of small, modest office, but still be the most skilled and experienced attorney dedicated to you and defending your case (but does not need to charge you a higher fee to cover overhead).

### CONCLUSION

Ask an attorney questions about all of the above factors before making your decision to hire. Don't worry about offending the attorney. This is all about you – it's your defense and your life. You are the one who will have to live with the verdict and the consequences. You are about to pay a large amount of money for an advocate who is going to protect your rights and your freedoms. You deserve the best. Choose wisely.

## 7 Questions you need to ask your Attorney defending you

After retaining a lawyer, you're not done! To succeed in your case you must take an active role in your defense in order to assist your attorney defend you. In order to do so, you must be informed to ensure that your lawyer is providing you with an effective defense. You deserve to be advised and certain that thorough discovery, investigation and defense are being conducted, and you are getting the best defense.

Ask your lawyer the following important questions:

### 1. DISCOVERY – EVIDENCE – INVESTIGATION

Has your lawyer obtained and reviewed all "Discovery", including: police reports, witness statements, video and audio tapes, photographs and other material provided through "discovery" by the D.A.'s office? Has the attorney made copies of all of it and reviewed it with you? What is your attorney's evaluation of the evidence? What is the "worst evidence" against you? Has your attorney considered not only what evidence is there, but **what evidence is not there (missing)**? What physical or testimony evidence does the prosecution rely on open to challenge? Or what evidence does the DA not have that could mean dismissal of your case? Are there eyewitnesses that should be interviewed? What sort of defense investigation should be conducted to find that evidence to disprove your guilt?

### 2. CLIENT ACTIONS

Sometimes there are steps you can (and should) take which will dramatically lessen your sentence. What should **you** be doing to improve the outcome of your case? Are there records or other information you can get to provide your lawyer or bring to court? Should you enroll in any classes, counseling, or a drug rehabilitation program that will lessen your sentence? What role will you play at trial as a potential testifying witness or observer?

### 3. STRATEGY

What is your lawyer's preliminary evaluation of the case against you? What **defenses** are available to you? What is the best defense strategy? What are the risks and benefits of strategy? Can your attorney mount a successful defense at trial or is it in your best interests to plea bargain?

### 4. COSTS

How much defense investigation needs to be done, and what will it cost? Do you need to hire **Expert Witnesses** to testify for you at trial? How much will they cost? Is their testimony worth it? What is the time table preparing for trial; how long will the trial last and what will it cost?

### 5. PLEA BARGAINS

The vast majorities of criminal cases do not go to trial, but are settled through negotiation. Determining a fair plea bargain is both an art and a science. This is where your Attorney's knowledge and experience are essential. The first factor includes a careful evaluation of the strength of your case and evaluation of the odds of winning or losing at trial. Then, given your odds at trial, you and your attorney need to balance your uncertain sentence, (if convicted at trial) with the certain sentence of the *deal* / offer if you plea and "cut your losses".

What sort of offer does your attorney believe the prosecution will make? What can your attorney do to improve the prosecution's offer? What counter-offer are you prepared to make? What can reasonably be expected? What is the standard range in similar cases? Can you do better? Consider your "maximum sentence *exposure*" if you go to trial and lose compared to taking a plea bargain.

### 6. SENTENCING ALTERNATIVES

Are there any *Sentencing Alternatives* to standard Jail that you may be eligible for, such as electronic home detention, Sheriff's Work Program, Work Furlough, or community service? Are there any standard or creative *Probationary Terms* that are preferable to you which will satisfy the prosecution and court's concerns and allow you to receive a lesser sentence, easier to accept? Some clients want to avoid fines, others want to keep their driver's license, others want to avoid jail, and others who are not citizens, just want to remain in the U.S. If your attorney fully understands your needs and goals, s/he can craft an alternative sentence that protects your most important concerns and hurts you the least.

### 7. MOTIONS – Legal Defenses (Due Process and your constitutional rights)

Is your attorney ensuring that you are being given *Due Process* and that your constitutional rights are not being violated? Sometimes you can win a case on a **legal** point. Considerations include:

1. Did the police conduct a search where evidence was seized from your home, car or person? If so, can the legality of the search be challenged by a **Motion to Suppress**? (i.e. - Is the evidence against you inadmissible – and thus can your case be dismissed?)
2. Did the Police **detain** you or **arrest** you? Did the Police question you and, if so did you make a **statement** to the police? Were you properly "**Mirandized**"? If not, is this statement (and any evidence it lead to) admissible at trial or can it be suppressed? How damaging is it to your case? How will your defense strategy change based on the admissibility of the evidence or statements?
3. Are there any legal issues with the charges filed? Can you **demur** to the complaint? Are the charges based on events that happened more than 1 year ago? More than 3 years ago? Can you bring a **Motion to Dismiss** for a violation of your **right to a speedy trial** or some other constitutional right?

### CONCLUSION

This case is not just any case; it's **your** case! You deserve the best defense from an attorney who considers all of these questions. The answers to these questions should provide you with the knowledge you need to confidently proceed with your case, knowing that you are receiving effective representation and defense, whether by negotiated plea, or trial.

### The Lowenstein Law Office

If you are being criminally charged in San Francisco Bay Area call ANTHONY LOWENSTEIN at the **Lowenstein Law Office at 415-492-2888** for a CONSULTATION and the best legal services and **Aggressive Defense at an Affordable Low Cost**, including defending your criminal record and protecting your constitutional rights, and taking care of all aspects of your case, including: Pre-Filing Defense, Private Investigation, and all Court Appearances. Even if I am not the right lawyer for you or your case, I maintain a broad network of attorneys and can help you find the right lawyer for you.

**ANTHONY LOWENSTEIN**

CRIMINAL DEFENSE FOCUS 415-492-2888

# What is a Pre-Filing / Pre-Court Defense?

## The Criminal Justice Process

### Are you criminally charged, but not yet been Court?

**Are you not yet charged, but fear you might be?** What do you do when you the Police are investigating you and you fear potential criminal charges? Is there anything a criminal defense lawyer can do to help you at this stage, even before criminal charges are filed against you? **YES!** In fact, your actions before you are charged in Court can be the most important part of your defense, based on the **Criminal Justice Process - Law and Order** - The justice process has two groups: the Police who investigate the crimes, and the District Attorneys who prosecute the offenders. These are their stories. **How a "Suspect" becomes a "Defendant"** - When the Police suspect you have committed a crime, but have not yet charged you, you are a "**Suspect**". Once the Police arrest or cite you, and send their Report to the District Attorney (D.A.), the D.A. decides whether to charge you. If the D.A. files criminal charges against you, so you have to come to court, you now become a "**Defendant**".

**The Process works like this:** First, the Police who are the *detectives* in the case investigate the facts and prepare *Witness Statements, Evidence, and Reports* to submit to the District Attorney (D.A.). The problem is that, unlike detectives, Police often do not conduct a full investigation, uncovering the whole truth. Rather Police simply seek sufficient incriminating evidence to charge the "suspect(s)". It's their job (and slant) to find evidence of guilt, not to look hard for evidence of innocence. Thus, many Police Reports only tell half of the story –the incriminating side of the story pointing towards guilt. In the Report, the Police indicate the booking or citation charges, with which the Police **believe or suggest** the suspect should be charged, and once their investigation is complete, they pass on their Reports to the District Attorney's Office for legal action. Then, the *Filing D.A.* reviews the Reports and makes a *filing decision*. The D.A. is not bound by the Police's citation / booking or suggestion of the appropriate charges. The D.A. can file the same, less, or even more charges than the Police suggested. The D.A. decides on the charges to file after reviewing the facts, the applicable law, and considering the evidence and deciding which charges are justified and most accurately appropriate, and provable (beyond a reasonable doubt). D.A.'s generally seek to err on the side of caution by over-charging. They do this for two reasons: first, they can always amend or dismiss the charges later if the law or evidence requires such and second, D.A.'s often file "trumped up" charges as a bargaining chip for future plea negotiations. So, later it appears like they are offering a good deal to dismiss some charges (which should have never been filed anyway) in exchange for a plea to other charges.

**How can you and your Defense Attorney influence the process?** - The D.A.'s office often appreciates defense counsel's input, because the D.A. has limited time, scant information and often a skewed perspective of the facts, it is so imperative that Defense counsel provide them with whatever missing necessary facts can help [positively] influence the D.A.'s filing decision.

A proven philosophy of human nature is that: **It is a lot easier to help someone make up their mind than it is to change their mind once they have already made it up.**

It is better to help D.A. make up their mind to not file charges, or file lower charge, rather than to blindly let them assume the worst, charge the case, and then only after try to disprove the case and change their minds once they already have a mindset as to what happened and who's guilty. Of course, you attorney must use careful discretion about what s/he says and "**Do no harm**" - your attorney should preserve your confidentiality and attorney-client privilege and not volunteer any [negative] facts that would worsen your situation giving the D.A. facts that would make them file higher charges.

The facts that help a D.A. make up their mind about the filing decision include the following:

- 1) **The suspect's personal background information** - influenced positively or negatively simply by the defendant's background. Positive, helpful facts about the defendant include whether s/he has any prior criminal record, has a full time job, has a supportive family, has undergone some unusual hardship that explains or even justifies their unusual behavior, and generally whether s/he is an upstanding citizen. To prove this, the D.A. often will take the Defense Attorney's word, but supporting letters and documentation always help.
- 2) **Factual evidence demonstrating the suspect's innocence** - Sometimes, it is possible (and necessary) to find concrete evidence proving innocence, that the Police Report omits, - and bring that to the D.A.'s attention. This can be done by the attorney or with the help of a Private Investigator. Recall that Police often seek just enough incriminating evidence to justify charging a suspect. Thus sometimes Defense counsel needs to conduct a separate *Private Investigation* to find exculpatory evidence (proving your innocence) and then provide it to the D.A. / Court.
- 3) **Research of the relevant law that helps your case** - The D.A. does occasionally get the law wrong - and Defense counsel can research the law and find statutory or case law authority showing that the provable facts don't support the proposed charges, or alternatively that the available evidence is likely not sufficient to render a guilty verdict at trial.

This work not only helps at the start, but it may also help later by setting the stage for the entire case in a beneficial way to you. But it must be given to the D.A. A.S.A.P. When the defense attorney completes their investigation of the case and research of the law, s/he then provides the D.A. with all of this information to "assist" them in their *filing decision* and based on what is provided, the defense attorney can request that the D.A.:(1) **Not file any charges;** (2) **Reduce the charges** - i.e. file less charges, or file charges as less serious - *Misdemeanor* and not *Felony*.

(Some offenses known as "wobblers" allow the D.A. to choose whether to file the offense as a Misdemeanor or as a Felony. It is far better to be charged with a *Misdemeanor*, considered a less serious offense, with less stigma, a simpler process and lower penalty than to be charged with a *Felony*, considered the most serious of crimes, with the most complex process).

All of this work described above can be done **Pre-Filing**, (before charges are filed) - or if you are charged, **Pre-Court**, before your first Court appearance, your *Arraignment*. & often works very well.

The effort is warranted when it prevents the D.A. from ever filing charges, or convinces the D.A. to dismiss charges. Then not only do you not get a criminal record, you never have to go through the aggravation of the criminal process. The effort is still warranted when charges are reduced. In fact, sometimes a good Pre-Filing Defense that reduces the charges can have a more beneficial impact for the defendant **right from the start**, than the best defense for a case that begins with much higher charges. Even if the D.A. still files full charges, a **Pre-Filing / Pre-Court** defense helps to immediately put your best foot forward by providing helpful information to the D.A. and the Court about yourself and the facts to provide a balanced account of the case. Moreover, it ensures your attorney has adequately "worked up" the case at an early stage and is already fully prepared to defend you should the case go forward in Court. **Do not delay!** Time is not on your side. Certain actions need to be taken immediately to improve your odds at trial and/or to lessen your sentence. The sooner you get an attorney involved in your case; the better off you will be, regardless of whether you are guilty or innocent. **Hire an attorney who can work on your case immediately and prepare a compelling Pre-filing defense to get your case off to the right start that will hopefully quickly bring your case to the right end!**

## What should you say to the Police?

### **NOTHING!** - Don't say anything to the Police, ever!

Whether you are innocent or guilty, you should remain silent. When the Police tell you that "anything you say can and will be used against you in a court of law", they mean business. Anything you say can **never** help you and can **only hurt you**. So don't say anything? **More people talk their way into jail than talk their way out of jail.** Remember this key fact: It doesn't matter what you did.

**All that matters now is what the authorities think you did and what they can prove you did.** So, don't help the Police prove anything. Don't provide a *confession* or any statement.

Despite anything they say, the Police are not trying to *help* you; they are trying to convict you. The Police will try every trick in the book to get you to talk. The Police will tell you that they are helping you and that telling what you have done will "make you feel better". Don't do it, unless incriminating yourself and being convicted makes you "feel better".

**If you are the suspect of a crime and the Police Question you,** just say that you mean no disrespect but wish to exercise your right to remain silent. Tell them "I don't want to be questioned"; and

**Say the magic words: "I want to speak to an Attorney"** - As soon as you say that you want a lawyer, the Police **must cease all questioning**.

There are 3 types of Police encounters with citizens:

- 1) **Consensual Encounters** - This is when the Police, without any stated suspicion of you, simply say hello to you or ask you questions. It is a consensual encounter because **you** consent to talk to them. Unless you are legally detained or arrested, you are entitled to ignore the Police or tell them you don't wish to talk.
- 2) **Detentions** - when the Police *stop* and detain you for investigation, and, for a time, you would be reasonable to infer that **you are not free to leave**.
- 3) **Arrests (Custody)** - when the Police take you into their custody, usually accompanied by telling you that you are under arrest, hand-cuffing you, and/or physically confining you to their Patrol Car or a Jail cell.

The nature of your encounter with the Police may later determine whether your statements to the Police can be used against you in court. Generally, Police only need to *Mirandize* you (read you your rights) when arresting you and can only use your statements against you if the *Detention* or *Arrest* was legal (i.e. did not violate your constitutional rights). Police can always use your statements made during consensual encounters against you in court. The Police do not have to read you your rights in non-custodial interrogations (ie. when you are free to leave). The point of the above is that there are complex criminal and constitutional laws governing when and how your statements can be used against you in court. However, you always retain one option - the right to remain silent! If you don't talk to the police, the nature of your police encounter is irrelevant; your attorney will only have to litigate the nature of the police encounter if the prosecution wants to use your incriminating statements (or the evidence they lead to) against you. **CONCLUSION** - In any Police encounter, since, your statements to the Police can only hurt you, **Don't talk to the Police. Remain Silent! Ask for a Lawyer.**

## BAIL - (Getting out of Jail)

Most people want nothing more than to stay out of Jail. Once arrested, if incarcerated, the law requires that the prosecution file charges and bring you to court within 72 hours of your arrest.

So, you have two options. You can immediately bail out, or wait until your arraignment in court when your lawyer can ask the court to release you on your **own recognizance (O.R.)** release) or to reduce the original amount of bail to a lesser amount. Some people, want to get out immediately at any cost; others wait until their arraignment to see if they can either get an OR release or lower bail they can afford.

In determining whether or not to grant a person **OR release** or to set bail, Penal Code §1275 requires the judge to assume that all the charges are **true**. In deciding Bail, the law requires the judge to consider:

- 1) **Protection of Public - Whether the defendant poses a threat to a particular person or society in general** - To determine this, the Court considers: the seriousness of offense charged, whether it involved violence, an Injury, Firearm, or alleged threats, whether the defendant is on trial for another action, and the defendant's Prior Criminal Record.
- 2) **Probability of the defendant appearing (Flight Risk)** - To determine whether the defendant poses a *flight risk* of attending future court appearances if released on bail, the Judge looks for the defendant's ties to the community. Factors include: whether the defendant is a (long term) resident of the community, the defendant's employment status and history, family ties and other factors that show either a strong or weak connection to the local community. The court may also evaluate the potential severity of the sentence which might induce a defendant to flee.

In each case, the court will evaluate both flight risk and dangerousness in determining whether or not to give a defendant an OR (own recognizance) release or a reduction in bail. The defendant's lawyer can help tremendously by contacting family, friends and employers to obtain employment and residential letters confirming the defendant as peaceful man with a good reputation in his community. Family and friends also may wish to attend the defendant's arraignment and bail review hearings to speak directly to the judge on behalf of the defendant. A good attorney can often suggest **No Bail Alternatives**, such as Supervised OR release (subject to certain conditions, such as drug testing, reporting etc.) This is a key stage as it is important to get out of Jail and back to your life and working on your case.

**POSTING BAIL** - There are 3 way to Post Bail: - (1) Post the full **Cash Bond** directly with the Court. (Your money is returned to you once your case is over and the bail bond is "*exonerated*")

(2) Pay a **Bail Bondsman** to post bail for you. The bondsman charges you 10% of the total amount of Bail as **his fee** (you don't get it back).

(3) Post a **Property Bond** - The Court allows you to place a lien on your house as a Bond, as long as the asset is appraised at twice the Bond's value. (arranged through a Bail Bondsman).

Which method is most economical depends on the amount of Bail. A good criminal attorney works with a Bail Bondsman to take care of this matter for you quickly and easily, so you stay out of Jail!

# PROBATION

## After you plead or are found Guilty

### What is Probation?

If you plead guilty, or are convicted at trial, the court can sentence you to prison or jail according to the legal guidelines, or instead, can grant you *Probation*. Thus the Judge must determine whether or not to grant you *Probation*. If the judge grants you probation, you will not be sentenced to *state prison*, but it does not necessarily mean that you will not be sentenced to serve time in county jail. The court does not have to grant you probation – it is a privilege the court gives you and can take away from you). In exchange for getting this privilege, you must agree to and comply with the court imposed *terms of probation*. So unfortunately, *Probation is not free!* If granted probation, the judge will require you to accept probation on certain terms and conditions including: pay a fine, do community service, join a drug or alcohol rehabilitation program, have no contact with another person, submit to search and seizure of your place or person at any time, not carry a firearm and many others. However, the most dreaded condition of probation is serving time in the county jail system.

### **SENTENCING ALTERNATIVES (terms of Probation)**

**JAIL** - In most cases, defendants are ordered to serve some amount of time in county jail up to a maximum of one year. When people are sentenced to serve *straight time* in county jail, they and their families suffer many consequences more serious than the jail sentence itself. Thus most defendants wish any alternative to spending time in Jail.

#### **Sheriff's Work Program (SWAP)**

If sentenced to 60 days or less, most defendants can work on a Sheriff's Work Program (SWAP) instead of Jail. The Sheriff's work program usually has you perform token unskilled work like picking up garbage, cleaning trains or raking leaves from 9-5. Then you can go home and each day counts as one day in Jail. Often SWAP can be done on weekends, so you don't miss work, family, or other obligations. Thus most people prefer SWAP if eligible to do so.

#### **Work Furlough – (allows you to keep your job!)**

Often, the Court can sentence you to a work furlough facility that you sleep at nights and weekends, but which allows you to go to your job during working hours.

**Home Arrest** – If you are ill, or are caring for others, or in various other circumstances, you can be sentenced to stay at home, with allowances to leave for work or medical reasons.

#### **Residential Treatment Program (RTP)**

If your case is primarily caused by drug or alcohol related addictions, the court will often be sympathetic and recognize that you need *treatment*. Attending a Residential Treatment Program (RTP) can be a highly preferable alternative to Jail. This way, you get the treatment that you need anyways, and you avoid Jail. But wait, it gets better! It's never too soon to start. If you get into an RTP while your case is pending, if your attorney has the judge "*order you to enter and remain in the RTP*", then you will be credited jail time for the time you spend in the program, while your case is pending. Another good thing about RTP's is that some have "*working man programs*" where you stay over at the Program on nights at weekends, but may leave to work from 6a.m. to 6p.m. – allowing you to continue working while receiving treatment. RTP's are often expensive and have long waiting lists, so if you have a drug or alcohol case, don't delay, **Enroll in a good Program and avoid Jail!**

### **After you plead or are found guilty - Getting the Lowest Sentence**

## **PROBATION Recommendations**

After you plead guilty or are convicted, the court has a sentencing hearing to determine what sentence to impose upon you. To decide what sentence to impose, the court first asks for a recommendation from the Probation Department. Thus before you are sentenced, you must complete an interview with your Probation Officer (P.O.) who has access to your prior record ("trap sheet"), all the court's evidence in your case – and then information from his or her interview with you. Your P.O. prepares a Pre-Sentencing Probation Report or Recommendation of what sentence is most appropriate for you, whether you should be granted probation and, if so, on what terms. The Judge essentially follows the Probation Recommendation unless the defense or the prosecution shows convincing evidence why the Judge should deviate from it. Thus, your sentence (and future) are in the hands of your P.O., so your efforts need to be focused on how to make a good impression on your P.O. so that s/he makes a favorable sentencing recommendation to the court.

#### **The Probation Application**

When you sign up for your Probation Interview, you will be given a Probation Application to complete for the P.O. to review before meeting with you for your Probation Interview. Most of the form is basic background information, however there is the one "**Key Question**" that asks you about the Present Offense, which asks you to tell your story of the facts and circumstances involved; what actually happened; what led to your arrest, the reasons why you committed this act; and to tell how you feel about it.

It is important to be truthful and straightforward, humble and remorseful. Your story will be made part of the report to the court. Remember that the Probation Officer is **not** trying to determine your guilt or innocence. Rather the Probation Officer is only trying to determine: (1) that you take responsibility for your actions – and thus do not need to be punished (harshly); (2) that you are very remorseful;

(3) that it is unlikely that you will commit any such acts again; and (4) that you are willing and able to comply with the rules and terms of probation.

It is strongly advised to have your attorney review and help you write your answer to the "Key Question". Your attorney may know the particular P.O., and in any event knows what to say and what not to say! When reviewing and completing your Probation Application, your attorney should be brutally honest and insist that you follow his or her instructions. If you want praise for your work, show your answer to your mother, if you want to receive a lesser sentence, show it to your lawyer.

**The Probation Interview** - For the interview, remember: the rule is: Keep it simple and short. Stick to the relevant facts in as few words as possible. Take responsibility for your actions and show remorse for the effects on others. Just answer the questions - be humble - don't go overboard by volunteering too much extraneous information to the Probation Officer. Your P.O. can sometimes be disagreeable. Never get into an argument with the Probation officer, as you will not win. Follow the same guidelines mentioned above for the Probation Application.

**Life on Probation - There are 2 kinds of probation:** (1) The easier kind is *Court or Informal* Probation. While on court probation, you simply need to follow certain rules and obey all laws (which you should do anyways) – but you don't have to report to anyone and probation will expire automatically at the end of its term.

(2) The other kind of Probation is *Supervised or Formal* Probation where there are stricter rules to follow and you are more closely supervised and monitored by a *Probation Officer*.

**Supervised Probation after you're sentenced** – You and your Probation Officer (P.O.) (Know and obey the rules).

After you're sentenced, the P.O.'s job is supposed to be to carry out the direct orders of the court and to "help" you get on with your life. It sounds wonderful but it's often more difficult. You will likely find your P.O. intrusive, critical, and ready to send you to jail in a heartbeat if you violate your Probation for any reason. **Your Probation Officer is not your friend!** If in your P.O.'s opinion you violate any of your terms of Probation, your P.O. can *violate* you, and then you will have to have a new trial for a *Probation Violation*, which can carry more jail time and even stricter terms of Probation (for the initial offense). If you're not careful, you can really fall into a vicious cycle. Have your attorney keep your P.O. in line by communicating to them that you will be obeying all the rules and that the attorney will assist you in that goal. Interestingly, most probation violations are for drug and traffic violations. So staying clean is the best strategy. Good luck, and put all this behind you!

#### **PROBATION MODIFICATION**

Most judges are reluctant to modify the terms of a defendant's probation; however, a defendant may apply to the court for a modification of sentence when the defendant can demonstrate that unforeseen circumstances, which arose after the date of the sentence, seriously endanger the health and financial survival of the defendant or his remaining family members. If your family's health or financial survival is threatened by illness, loss of job or any other circumstance which occurred after the date of your sentence, you should ask your lawyer to make a motion to modify your sentence to allow you to respond to your family's crisis. If you can clearly demonstrate the crisis with documentation or testimony, your attorney has a good chance of persuading a judge to modify your sentence.

## **EXPUNGEMENT (Clearing your Record)**

### **What is an Expungement?**

An Expungement essentially clears your record, by having your conviction set aside and the case dismissed. An expungement is better than a pardon; it is a complete reversal of a conviction. To use an analogy, an Expungement is to a Conviction as an Annulment is to a Marriage. So whereas a Divorce acknowledges a prior Marriage's existence and dissolves it, an Annulment reverses the Marriage, by declaring that the Marriage never validly occurred. Likewise, **an Expungement reverses a conviction and declares that the conviction never occurred**. The upshot is that **when asked if you have ever been convicted of a crime, you can honestly answer No!** - **Why do you want your record cleared?** The most frequent case is when you are in the process of filling out a job application and eventually come across the dreaded question: "Have you ever been convicted of a crime?" Perhaps a few years back, in your past life, you did something that was against the law during a temporary lapse in better judgment. Whatever the mistake, it resulted in a criminal conviction, a misdemeanor or even worse, a felony. Going back to the dreaded question, you must decide whether to answer that statement truthfully (which you should always do) or not. You are damned if you do and damned if you don't. If you answer truthfully, you may be denied the job. If you lie and the prospective employer discovers the conviction, you definitely will not get the job. Even worse, if the application has language to the effect of "signed under the penalty of perjury", you could face potential criminal perjury charges.

Wouldn't it be nice to answer that same question "NO?" If you have your conviction *expunged*, you can. Most criminal convictions can be expunged. The exceptions are some serious and/or violent felonies. In order to qualify for an *Expungement*, the applicant must have been granted probation and successfully completed the Probation term, including having paid all fines, and completing any community service, or court-ordered counseling, etc. Sometimes, you can even end Probation early. After you have completed one half your term of Probation, you can make an application to the court for an Early Termination of Probation by showing special factors why further Probation is not warranted. If your Probation is terminated, you may immediately apply for an Expungement.

**The primary benefit of having a conviction expunged** is for the job application scenario presented above. However, there are situations where you are still required to disclose even "expunged" convictions. These situations include, applying for a government job at a state, federal or local agency or applications for a state or federal licenses such as a doctor, attorney, accountant, etc. Even though the conviction must still be reported in these circumstances, it still looks much better that the conviction has been expunged, rather than having done nothing. Most people desire an expungement for employment purposes, where it will almost always be of some benefit. When in doubt, go for the expungement of your conviction, and give yourself a clean slate.

# D.U.I.

## Driving Under the Influence

I just got arrested and charged with “DUI”. What should I do? If you have been arrested for Driving Under the Influence of Alcohol or Drugs, there are many factors to consider. It is important that you receive accurate information from a qualified attorney right away. A DUI defense requires immediate attention. An attorney should fully help you understand and exercise your constitutional rights that are involved with every DUI offense. **There are two separate and distinct battles to fight, one with the Court and one with the DMV.**

## The D.M.V.

**Department of Motor Vehicles (DMV)** - If you have a California driver’s license, the Police snatched your license and gave you a Pink Slip that is your temporary license for 30 days. Ok, so you can drive for 30 more days. However, if you read the fine print on the back, you will read one of the most important government notices about your license: Your license will be suspended in one month, & **YOU HAVE 10 DAYS TO REQUEST A STAY OF SUSPENSION AND AN ADMINISTRATIVE REVIEW OF your DUI.** Thus, you or your attorney needs to properly notify the DMV that you wish to exercise your rights and have a DMV Review of your case within 10 days of the date of your arrest. If you do not ask for this Stay and Review within the 10 days after your arrest, you forfeit your right to the Stay and Review regardless of how meritorious your case. Of course, the Police and DMV don’t advise you of this little tidbit of information. This is one of many reasons you need a good lawyer to protect you.

At the DMV hearing, your attorney may or may not need you to attend. The DMV hearing is presided over by a “DMV Hearing Officer”, who plays the role of Prosecutor and Judge, in that they hear defense arguments, and then make their findings and rule on the evidence. - **The DMV hearing is solely to determine 3 issues:**

- 1) Did the Officer have probably cause to believe that you were driving under the influence?** (i.e.- Did the Police have a valid reason to stop your car?—Speeding, run a red light, etc.) There are constitutional requirements for the stop, detention, search, and/or arrest. Regardless of how drunk you were, if the Police did not have a legally valid reason to stop you, then all the evidence obtained is inadmissible and you win.
- 2) Was your arrest lawful?** (As above, there are constitutional requirements for a valid arrest, which if not met, avert a finding of DUI).
- 3) Were you driving with a blood alcohol concentration greater than 0.08 ?** - This is usually the big question. Because DUI is such a technical crime, the DMV reviews the case with methodical legal precision. Title §17 of the Administrative Code sets stringent standards of evidentiary requirements for DUI measurements. In any event, a chemical test (breath test or blood test) must be conducted within 3 hours of the time you were observed or admitted driving. For a breath or blood test, there are many technicalities where the results are not considered reliable and are thus inadmissible for the DMV hearing. Examples include:
  - (1) For a Breath Test**, if the Intoxilyzer was not calibrated correctly. The machine may be broken, not set right, or the solution may be stale giving statistically unreliable results. Your attorney should check the Intoxilyzer Maintenance and Accuracy Records, provided to all defense attorneys by law by the county crime lab. If the Intoxilyzer was not recalibrated every 10 users or 100 hours, or if the Officer who administered the test was not trained on the machine in the last 5 years, the results are inadmissible. Sometimes the crime lab issues a notice that a certain Intoxilyzer was not functioning properly during a certain period – and all results for all subjects tested are unreliable! Furthermore, the results are not admissible if the Officer cannot confirm that you were breath-tested within 3 hours of the observed driving, and/or if the Officer does not watch you for period of 15 minutes prior to the test to ensure that you do not eat, smoke, chew gum, belch or otherwise taint your breath sample.
  - (2) For a Blood Test**, the toxicologist must follow Title 17 procedure (use a different preservative in the test tube than the normally used by hospitals) otherwise, the results are not admissible.

Often, evidence can be shown and an Expert Toxicologist can testify that given your drinking pattern, your blood-alcohol concentration was likely below 0.08 at the time of driving. Expert Toxicologist study the absorption and oxidation rate of alcohol. After telling your attorney your exact drinking pattern, he can tell you if it raises certain technical defenses to the DUI charge.

### License Suspensions / Restrictions

Once your attorney files your request to the DMV for a Stay of Suspension and Administrative Hearing (within 10 days), you may continue to drive with your Pink Slip until your attorney or the DMV tells you otherwise. The DMV Hearing is usually about 1-2 months after the arrest, and after the DMV Hearing, the DMV Officers renders an opinion usually in 2-4 weeks.

**If the DMV Officer finds in your favor** (for any of above 3 issues), then **you win** and the DMV sets aside the suspension, and sends you back your license and an apology.

**If you lose your DMV Hearing**, or (don’t ask for one within 10 days), then your license will be *suspended* for 1 month, where you may not drive at all. After this 1 month “hard” *suspension*, you have a choice. Either you can wait another 3 months of not driving at all (for a total of 4 months) and then get your license back, or you can immediately apply for a Restricted License. This Restricted License allows you to drive to and from and in the course of your employment and to an Alcohol First Offender Program (FOP) (described below). This is preferable for most people who need to drive to make a living, or otherwise transport themselves or others. As a side note, if you drive on a Restricted License, as long as you have a remotely realistic claim that your driving has something to do with work, you can pretty much drive wherever you want. Just don’t be caught at the beach with a surfboard in your backseat (unless you’re a professional surfer and surfing is part of your job). After 5 months, you can go the DMV and have the restriction removed so you have your full license back. **In order to get your license, either full or restricted, you must bring 3 things to the DMV:**

- (1) Proof of Insurance (SR-22 form);**
- (2) Proof of Enrollment / Completion of an Alcohol First Offender Program (FOP);** and
- (3) \$150.00 reissue fee.**

## THE COURT

In addition to the D.M.V. consequences of DUI, in California, DUI is considered a misdemeanor crime and is thus prosecuted like any other misdemeanor crime (like petty theft etc.). Thus DUI goes through the same criminal procedure as any other case. There is an Arraignment where you must plead Not Guilty and a Pre-trial conference where your attorney meets with the District Attorney and Judge and attempts to negotiate a plea bargain, and if one is not reached, then you are entitled to a trial by jury.

**For DUI, why are there two (2) charges?** - When suspected of DUI, the court charges you with a violation of:

- 1) Vehicle Code §23152(A)** – This is the “Driving Under the Influence Charge”. Regardless of your proven Blood-Alcohol content (BAC), the court can find you guilty of DUI, if convinced that you were impaired while driving. This can be proved by the presence of some alcohol and the Police Officer’s observations of your driving and your [poor] performance on the *Field Sobriety Tests* (FSTs). Your lawyer can defend this charge by showing that your BAC was low (if it was) and that your driving was good and consistent with normal driving and that you performed well on your FSTs.
- 2) Vehicle Code §23152(B)** – This is the Blood-Alcohol Content (BAC) charge. Here the court is specifically charging that you were driving a vehicle while your BAC was  $\geq 0.08$ . The proof for this is very technical and can be defended in similar ways to defending a DMV Hearing, as described above.

**What if I plead guilty or am convicted of DUI?** - If convicted of DUI, the court imposes the following penalties:

- 1) 2-10 Days County Jail** - Note that this time does not necessarily have to be spent behind bars. Most defendants can work on a Sheriff’s Work Program (SWAP) instead of Jail. The Sheriff’s work program usually has you perform token unskilled work like picking up garbage or raking leaves from 9-5. Then you can go home and each day counts as one day in Jail. Often SWAP can be done on weekends, so you don’t miss work, family, or other obligations. Thus most people prefer SWAP if eligible.
- 2) Fines up to \$2500.**
- 3) 3 Years Court / Informal Probation**. This does not mean that you have to meet with a Probation Officer. It just means that for 3 years, you must obey all laws (which you need to do anyway) and also not drive with any measurable amount of alcohol in your blood. That is zero tolerance for 3 years. If you drink, don’t drive; and if you drive, don’t drink.
- 4) Attend an Alcohol Education First Offender Program (FOP)**. This is a 3 month program where you attend a 2 hour class once a week. No you can’t do it over one weekend. You must take it over 3 weeks. It’s actually not so bad. Most people while inconvenienced that they must take this class, once there, find it helpful to learn about DUI, and re-evaluate their relationship with alcohol in their lives. But either way, the FOP is necessary because the DMV will not give you back your license (ever) until you take the FOP. Thus you really must Enroll in the FOP!
- 5) Driver’s License Suspension or Restriction** - preferably concurrent with the DMV suspension/restriction. This restriction allows you to only drive to and from and in the course of your employment and to the FOP, above. The key is to get any Court imposed *restriction* to overlap with any DMV suspension/restriction, so to minimize the time you are prohibited from driving..

### SUMMARY

DUI charges can be very traumatic and financially burdensome. Each case is unique and requires a thorough investigation and aggressive representation for a successful defense in all DUI cases. There are steps that can be taken so charges are dismissed, reduced, or plead to on adequate terms. The results of a DUI action depend on the facts of each individual case and your strategy in reaching a conclusion. **A good attorney can assist you in each of the critical stages involved in a DUI matter and give you the information necessary for you to make informed decisions about your case.**

**If your license, your record and your time are important to you, it’s well worth it to hire an attorney to take care of your case for you.**

### Driving Under the Influence of DRUGS

Note that DUI is usually for driving under the influence of *alcohol*. DUI actions for driving under the influence of drugs are rare. Driving under the influence of *marijuana*, for example, is seldom prosecuted because the active chemical THC stays in blood for so long, it is hard for toxicologists to determine whether the subject was high while driving (or high two weeks ago before driving). Moreover a Police study intending to show drivers on *marijuana* were dangerous actually showed that drivers on marijuana drove significantly better. Of course, this study was not widely published. Therefore most drivers suspected of driving while high are not convicted of D.U.I. However, being high or in possession of hard drugs while in a vehicle carries severe consequences of its own. You could be charged with possession of narcotics (in a vehicle), being under the influence of narcotics, or possession of drug paraphernalia. Additionally, you may lose your license for up to one year. Enough said: “Just say No”

If you are charged with DUI in the San Francisco Bay Area call the **Lowenstein Law Office** at **415-492-2888** for a CONSULTATION.

Having defended numerous DUIs, I have gained extensive experience that can work for you, providing the best legal services and **Aggressive Defense at an Affordable LOW COST:** including defending your criminal record, protecting your constitutional rights, and taking care of all aspects of your case, including the DMV Hearing and all Court Appearances