

What a Relief: From Detention to Conviction and Beyond

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Today's Objectives

To provide you with the tools you need to help clients who have suffered either an arrest or a conviction clean up their records and fix related problems.

To provide practice tips that will save you time.

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Today's Materials

- 1. Client records
- 2. Only an arrest
- 3. Dismissals, diversions, and acquittals
- 4. Defective convictions (briefly)
- 5. Standard convictions
- 6. Collateral consequences

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What We Will Not Cover

- Defective convictions (in detail)
- Appeals
- Writs
- Very unusual circumstances (i.e. DNA exoneration)

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Topics

- **1. Client records**
- 2. Only an arrest
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- 4. Defective convictions
- 5. Standard convictions
- 6. Collateral consequences

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1. Client Records

- Available
 - Client's records
 - Online case portal (some jurisdictions)
 - Physical file (destroyed per GC 68152, archived)
- Unavailable/missing
 - Obtain a RAP sheet

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1. Client Records

- Local RAP sheets (contact local law enforcement)
- DOJ RAP sheets
 - Attorney request – PC 11105
 - Client's request

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1. Client Records

Attorney's Request

- Faster turnaround
 - Certified: 3-4 weeks
 - Non-cert.: 1-2 days
- Free
- Certified records are supposed to be corrected

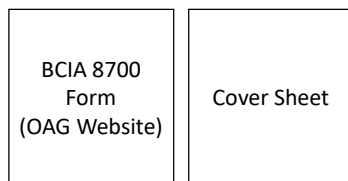
Client's Request

- Slower turnaround
 - 1-2 months
- Live Scan fee
- **Allows clients to challenge errors**

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1. Client Records

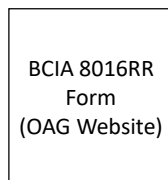
- How an attorney request records:
 - Full instructions on the OAG's website
 - Email the OAG:



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1. Client Records

- How a client request records:
 - Full instructions on the OAG's website
 - Fill out and bring the following to a Live Scan site:



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1. Client Records

- Defective records
 - Client must first request records to get the necessary form (BCIA 8706)
 - Instructions are on the OAG's website
 - Fill out the BCIA 8706 form
 - Provide certified copies

BCIA 8706
Form
(Included with
Client's RAP
sheet)

Certified
copies of
supporting
forms

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Topics

- 1. Client records
- **2. Only an arrest**
- 3. Dismissals, diversions, and acquittals
- 4. Defective convictions
- 5. "Proper" convictions
- 6. Collateral consequences

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2. Only an Arrest

- Only an arrest (no charges)
 - Police refuse the case
 - Own decision (PC 849(b)(1))
 - Intoxication only (PC 849(b)(2)-(3))
 - Mental health only (PC 849(b)(5))
 - Prosecutor has refused the case
 - Statute of limitations has expired

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2. Only an Arrest

- Certificates of Detention (PC 849.5)
- Motions to Seal Arrest and Related Records (PC 851.91)
- Motions for Factual Findings of Innocence (PC 851.8)

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2. Only an Arrest

- Certificates of Detention (PC 849.5)
 - In any case in which a person is arrested and released and no accusatory pleading is filed charging him with an offense, any record of arrest of the person shall include a record of release. Thereafter, the arrest shall not be deemed an arrest, but a detention only.

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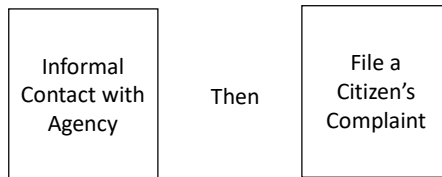
2. Only an Arrest

- Certificates of Detention (PC 849.5)
 - Reduce arrests to detentions
 - Detentions do not need to be disclosed
 - Great for avoiding collateral consequences
- Often automatically given if police refuse the case

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2. Only an Arrest

- If a certificates of detention are not given:
 - Contact the arresting law enforcement agency informally
 - File a citizen's complaint (check agency's website)
 - *Schmidt v. Cal. Highway Patrol* (2016) 1 Cal.App.5th 1287, 623
 - Awarded attorney fees
 - Practice Tip: Copy county counsel/city attorney



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2. Only an Arrest

- Motions to Seal Arrest and Related Records (PC 851.91)
 - A person who has suffered an arrest that did not result in a conviction may petition the court to have his or her arrest and related records sealed (PC 851.91)
 - The statute of limitations must have run (PC 851.91(a)(1)(A)) or
 - The prosecutor has filed a complaint, but no conviction occurred (PC 851.91(a)(1)(B))

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2. Only an Arrest

- Motions to Seal Arrest and Related Records (PC 851.91)
 - Matter of law, unless
 - Pattern of domestic violence, child abuse, or elder abuse
 - Pattern = 2 or more convictions or 5 or more arrests within three years from one other arrest
 - Interests of justice

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2. Only an Arrest

- Motions to Seal Arrest and Related Records (PC 851.91)
 - Effects: Seals arrests and related records
 - Arrest may be pleaded and proven in later prosecution
 - Still must be disclosed if applying to be a police officer, to run for public office, for licensure, or to contract with the California State Lottery Commission.

CR-409

CR-410

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2. Only an Arrest

- Certificates of Detention vs. Sealing
 - Certificates of detention are better for avoiding collateral consequences
 - Police officer applications
 - CCW issues
- Practice Tip: Seek a certificate of detention if the DA refuses a case

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2. Only an Arrest

- Motions for Factual Findings of Innocence (PC 851.8(a))
 - Seals records for three years, followed by destruction
 - Must show factual innocence
- Great, but very difficult
- Generally, must show that no reasonable cause exists to believe that the petitioner committed the offense.
 - E.g. Practicing without a license, when petitioner had a license

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Topics

- 1. Obtaining records
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- **3. Dismissals, diversions, and acquittals**
- 4. Defective convictions
- 5. “Proper” convictions
- 6. Collateral consequences

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3. Dismissals, diversions, acquittals

- Dismissals
 - Motions to Seal (PC 851.91)
 - Motions for Factual Findings of Innocence (PC 851.8)

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3. Dismissals, diversions, acquittals

- Diversion
 - Motions to seal (PC 851.91)
 - Special statutes (PC 851.87)

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3. Dismissals, diversions, acquittals

- Acquittals
 - Motions to Seal (PC 851.91)
 - Motions for Factual Findings of Innocence (PC 851.8)

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Topics

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4. Defective Convictions

- Complex post trial motions
- Appeals
- Writs

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4. Defective Convictions

- Examples of post-trial motions
 - Motion for a New Trial
 - Severe defect with the trial
 - Motion to Modify Verdict
 - Verdict contrary to law/evidence
 - Motion in Arrest of Judgment
 - No judgment rendered b/c of demurrer grounds
 - Motion to Vacate Judgment
 - New evidence/clerical mistakes

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Topics

- 1. Obtaining records
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- **5. Standard convictions**
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5. Standard Convictions

- Expungements (PC 1203.4 series)
- Early termination of probation (PC 1203.3)
- Nunc pro tunc motions
- Reductions from felonies to misdemeanors (PC 17(b))
- Certificates of rehabilitation (PC 4852.01)
- Governor's pardons (Cal. Const. Art. V, § 8)
- Cannabis convictions (HS 11361.8)
- Prop 47 convictions
- New senate bills

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5. Standard Convictions

- Expungements (PC 1203.4 series)
 - Withdraw guilty/no contest plea and dismiss the action
- Benefits
 - Easier to get a job
 - Easier to obtain a license
 - Can help with immigration consequences
- Limitations
 - Only applicable to certain convictions (many felonies are ineligible)
 - Can be used as prior offenses
 - Does not restore many rights, including firearm rights

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5. Standard Convictions

- Expungements (PC 1203.4 series)
 - Requirements:
 - Must have completed probation
 - Not currently facing new charges/punishment for an offense
- Practice Tip
 - Certain offenses, such as DUIs, require an explanation as to why it is in the interests of justice to grant expungement.

CR-180

MC-031
(if DUI/
special)

CR-181

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5. Standard Convictions

- Expungements (PC 1203.4 series)
 - PC 1203.425
 - In many cases, arrests, non-convictions and convictions occurring on or after January 1, 2021, will be automatically given post-conviction relief.
 - Starts July 1, 2022.

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5. Standard Convictions

- Motion to Terminate Probation (PC 1203.3)
 - Client is performing well on probation and close to the termination
 - Some jurisdictions may be willing to grant expungement at the same time, so consider filing both

Written
Motion or
Local Form

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5. Standard Convictions

- Nunc Pro Tunc Relief
 - Removes a conviction nunc pro tunc upon completion of terms
 - Generally requires a preexisting plea agreement

Written
Motion

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5. Standard Convictions

- Reduction from Felony to Misdemeanor (PC 17(b))
 - Formally reduces a felony to a misdemeanor
 - Benefits
 - Client was never convicted of a felony
 - Easier to obtain licenses
 - Restores gun/jury rights

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5. Standard Convictions

- Reduction from Felony to Misdemeanor (PC 17(b))
 - Eligible
 - Convicted of a wobbler
 - Sentenced to (and completed probation)
 - Prior expungement does not bar 17(b) relief
 - *Meyer v. Superior Court In and For Sacramento County* (1966) 247 Cal.App.2d 133, 140.)

CR-180

MC-031
(always
include)

CR-181

or

Written
Motion

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5. Standard Convictions

- Certificates of Rehabilitation (PC 4852.01)
 - Benefits:
 - General proof of rehabilitation
 - A state licensing agency cannot deny a license solely based upon a rehabilitated conviction
 - Can remove 290 registration requirements for less serious 290 requirements

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5. Standard Convictions

- Certificates of Rehabilitation (PC 4852.01)
 - Eligibility (a lot of technical rules):
 - Generally, one of the following:
 - Convicted felon and sentenced to prison
 - Convicted felon and sentenced to probation and conviction has been expunged
 - Convicted of a misdemeanor sex offense and the conviction has been expunged
 - Period of rehabilitation (PC 4852.03)
 - 5 years of residence in California, plus additional time depending upon the conviction (often an extra 5, 4, or 2 years).
 - No subsequent incarceration

Local Form

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5. Standard Convictions

- Governor's Pardons
 - Benefits
 - Restoration of firearm rights (unless DV or dangerous weapon)
 - Restoration of most rights
 - Relief from 290 registration
 - Immigration relief
 - Practice tip:
 - Combine with a motion to seal arrest and related records for more complete relief

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5. Standard Convictions

- Governor's Pardons
 - To apply:
 - Certificates of detention are automatically submitted
 - Direct pardon (usually only done for those ineligible for a certificate of rehabilitation)

Local form
for COR

or

Application
from
Governor's
website

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5. Standard Convictions

- Cannabis Convictions
 - November 9, 2016, many cannabis offenses became legal/lesser offenses/or wobblers
 - Possession (HS 11357)
 - Cultivation (HS 11358)
 - Possession for Sale (HS 11359)
 - Unlawful Transport (HS 11360)
 - Practice tip: In rare circumstances, this can render certain individuals who were previously ineligible for 17(b) relief eligible.

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5. Standard Convictions

- Cannabis Convictions
 - Many courts are automatically cleaning up cannabis-related arrests and convictions
 - If relief has not been granted you will need to file in the court of original jurisdiction (even if probation has been transferred)

CR-400

CR-401

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5. Standard Convictions

- Prop 47 Convictions
 - Certain felonies may be recalled and redesignated as misdemeanors:
 - Simple drug possession
 - Petty theft under \$950
 - Shoplifting under \$950
 - Forging or writing a bad check under \$950
 - Receipt of stolen property under \$950
 - **Deadline: November 4, 2022**

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5. Standard Convictions

- Prop 47 Convictions
 - Practice Tip: *People v. Grant* (2020) 57 Cal.App.5th 323
 - MSRP price does not equal fair market value when items are constantly on sale

Local forms

or

Written
motion

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5. Standard Convictions

- New senate bills:
 - SB 136/483 – One-year priors in most cases
 - SB 1393 – Five-year prior strike (non-final cases only)
 - SB 620 – Firearm use enhancements (non-final cases only)
 - SB 81 – Dismissal of enhancements (sentencing must occur after January 1, 2022)

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5. Standard Convictions

- SB 136/483 – One-year priors in most cases
 - Exception: sexually violent offense
 - Government must identify individuals who qualify by:
 - March 1, 2022 – Those who served their base term and are serving a sentence based on the enhancement
 - July 1, 2022 – All other individuals
 - Relief must be granted by:
 - October 1, 2022 – For individuals who have completed their base term and are serving a sentence based upon this enhancement
 - December 31, 2023, all other individuals

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6. Collateral Consequences

- Firearms
- Sex offender registry
- Licensing
- CCW permits (PC 26150)
- TWIC cards
- Civil restraining orders
- Return of Property
 - General
 - Firearms

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6. Collateral Consequences

- Firearms
 - Identify method lost
 - Check for federal DV firearm ban (18 U.S.C. § 922(g)(9))
 - Check if a dangerous weapon was involved
 - If for single felony
 - Consider a 17(b) or
 - Governor's Pardon

17(b) Packet

Governor's
pardon

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6. Collateral Consequences

- Sex offender registry (SB 384; PC 290.5)
 - Tier system*
 - Tier 1: 10 years of actual registration
 - Tier 2: 20 years of actual registration
 - Tier 2*: 10 years of actual registration (under 21 and close in age)
 - Tier 3: life
 - Practice tip: try to avoid the multiple victim enhancement (PC 667.61) which confers life

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6. Collateral Consequences

- To file:
 - Register for the minimum period
 - The registration period may be extended due to new alleged offenses
 - File on or after client's next birthday after July 1, 2021
 - Provide proof of current registration
- Note: Individuals on the registry are supposed to receive their tier designations



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6. Collateral Consequences

- Licensing
 - Best to avoid a conviction altogether (through diversion etc.)]
 - General rule: conviction is substantially related to the job details the applicant will perform
 - Limitation: AB 2138 – a licensing board may not take away/deny a license if:
 - The conviction is seven years or older; and
 - The conviction is not substantially related to the job details the applicant will perform

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6. Collateral Consequences

- Licensing
 - Only somewhat helpful:
 - Expungements
 - 17(b)s
 - 851.91s
 - Consider:
 - Factual findings of innocence
 - Certificates of detention

Certificate of
detention

Factual
finding of
innocence

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6. Collateral Consequences

- CCW Permits (PC 26150)
 - Local law enforcement has almost complete discretion
 - Only somewhat helpful:
 - Expungements
 - 17(b)s
 - 851.91s
 - Factual findings of innocence
 - Certificates of detention

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6. Collateral Consequences

- TWIC Cards (Transportation Worker Identification Credential card)
 - Access to maritime facilities and vessels
 - Often automatically deny an application due to a conviction without looking into it (often a wobbler will be considered a felony).
 - Generally advisable to appeal and respond.

TWIC forms
and
response

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6. Collateral Consequences

- Civil restraining orders:
 - Domestic violence restraining orders
 - Standard: Preponderance of the evidence
 - Civil harassment restraining orders
 - Standard: Clear and convincing evidence

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6. Collateral Consequences

- Civil restraining orders:
 - Domestic violence restraining orders
 - Standard: Preponderance of the evidence
 - Civil harassment restraining orders
 - Standard: Clear and convincing evidence

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6. Collateral Consequences

- Consider continuing indefinitely under *Pacers*
 - *Pacers, Inc. v. Superior Court* (1984) 162 Cal.App.3d 686
 - Persuasive authority to stay civil actions until a criminal matter has been resolved
- If denied, consider filing a request to modify/terminate the order

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6. Collateral Consequences

- Practice tips:
 - The Benchguides for CHROs and DVROs are excellent.
 - Respondents are entitled by law to continue the first hearing if they have not filed a response.
 - The rules of evidence are different (per *Kaiser Found. Hosps. v. Wilson* (2011) 201 Cal.App.4th, 550, all relevant evidence, including hearsay evidence, must come in at CHRO hearings)
 - If a TRO is granted, in most cases, a client must immediately surrender their firearms

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6. Collateral Consequences

- Return of Property
 - Varies by jurisdiction and agency
 - Good idea to get a stip/order soon after the case has been resolved
 - Extra requirement for firearms – a law enforcement release
 - Effective Dec. 1, 2021, must be done online at the OAG's website
 - Approval is only good for 30 days from the date on the letter

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